European Union Law Application by the National Courts of the EU-Membership Aspirant Countries from South-East Europe

Contact:
South East European Law School Network (SEELS)
Centre for SEELS
Faculty of Law "Justiniuanus Primus"
Build. Gazi Dekchev 6b
1000, Skopje, Macedonia

www.seeelawschool.org
centre@seeelawschool.org

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Editors in chief:
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Dr. Veronika Efremova, GIZ Open Regional Fund for South East Europe-Legal Reform (Macedonia)

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ANALYTICAL FRAMEWORK FOR REGULAR MONITORING OF THE CAPACITY OF SEE COURTS FOR EU LAW APPLICATION......................................................... 193
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Application of the European Union law in the EU accession countries in South East Europe is one of the key challenges within their European integration process. Considering the continuous process of approximation of national legal systems of these countries to the *acquis communautaire* until the day they become full EU member countries, there is a need of comparable adequate application and enforcement of already harmonised laws by the national courts in the SEE countries.

According to the requirements set by the European Union, SEE countries are expected not only to align their national legislation with the *acquis*, but also to guarantee and secure efficient application of the relevant EU law by national courts. In this respect it is necessary to ensure adequate monitoring of the capacity of the national courts to apply respective EU law in practice. Yet, theoretical works and empirical research in this area are currently lacking in SEE countries.

Aiming to contribute to analysing and preparing the comparative overview on the status and capacity of SEE countries’ national courts for applying EU law during the pre and post-accession period, Faculties of Law of Skopje, Belgrade, Podgorica, Split, Zagreb and Zenica within the South East European Law School Network (SEELS) initiated a project on „European Union Law Application by the National Courts of the EU-Membership Aspirant Countries from South-East Europe”. The project started in November 2013 with a duration of 10 months and is supported by the project “Open Regional Fund for South East Europe - Legal Reform” implemented by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) on behalf of the German Federal Ministry of Economic Cooperation and Development (BMZ).

The main objective of the project is to offer a theoretical model for studying the SEE courts’ capacity to apply EU law and an initial study of the existent SEE courts’ practice on country-specifics as well as a comparative regional basis. According to that model, in the frame of the project a theoretical and practical framework will be developed for monitoring the capacity of the SEE aspirant countries’ courts for applying EU law during the pre-accession (and post-accession) stages, that would contribute to setting up a regular periodical monitoring system of such national courts’ capacity and practice in the selective SEE countries.

The project will provide a valuable comprehensive theoretically and empirically backed study on the present national courts’ practice in each of SEE countries and would offer practical recommendations for improving that courts’ capacity, to be of use *inter alia* by both competent authorities and national courts and judges (including national judiciary training academies), as well as by universities and research institutions.
Fifteen professors and young researchers from the Faculties of Law of Tirana, Zenica, Mostar, Zagreb, Split, Skopje, Podgorica, Belgrade, Kragujevac and Niš carried out the regional research and compiled the comparative analysis whose theoretical and empirical findings and outcomes are synthesised into this publication. We would like to express our gratitude for their valuable work and results produced. We hope this publication will serve in the future for further deepening of the research in this respective field and for enhanced cooperation between the concerned institutions to further strengthen capacities of national courts for a more efficient application of EU Law.

Skopje, September 2014.

Prof. Dr. Goran Koevski
Manager
Centre for the South East European Law School Network (SEELS)

Dr. Veronika Efremova
SEELS Sub-Project Manager
Open Regional Fund for SEE - Legal Reform Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)

Dr. Christian Athenstaedt
Fund Manager
Open Regional Fund for SEE - Legal Reform Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)
CHAPTER ONE

INTRODUCTION
PART 1

JUDICIAL HARMONIZATION: A MAJOR CHALLENGE FOR THE SOUTH EAST EUROPEAN NATIONAL COURTS

Sašo GEORGIEVSKI*

For the last decade, at least, SEE countries have been intensively engaged with preparing themselves for future membership in the European Union in pursuance of their shared strategic goal of becoming part of the European integration structures. At present, only Croatia has fully achieved that goal, becoming a full-fledged member of the Union on July the 1st, 2013, whereas the other SEE countries find themselves at different stages in the EU pre-accession process. Nevertheless, despite their different status regarding the EU, and albeit varying intensity and dynamics of their respective Euro-integration course, all SEE countries have been (and still are) intensively submitted to the requirements for Europeanization of their internal institutional structures, including their internal legal orders. On their Euro-integration route *inter alia* their legal orders are constantly subjected to the demands for harmonization with the Union’s *acquis*, causing large number of EU rules to penetrate their domestic legal systems as transposed into domestic legislation.

The process of European integration and especially that of ‘legal harmonization’ of domestic legislation with the law of the Union entails tremendous pressures on the SEE state institutions to make the necessary adjustments domestically in giving effect to the EU harmonizing rules, including on the SEE national courts. As put by Anelli Albi in the pre-accession context of the CEE countries, a major challenge facing EU candidate states and their national courts is whether ‘legislative harmonization’ going on in these countries should be accompanied by ‘judicial harmonization’ as well. ‘Judicial harmonization’ implies that “… national courts should apply the interpretation of the European Court of Justice and take account of EU legislation when applying provisions of domestic laws or the provisions of the [Stabilisation and Association] Agreements.”

* Sašo Georgievski, PhD, Full Professor at the at the Faculty of Law “Iustinianus Primus”, University Ss. “Cyril and Methodius” Skopje, e-mail: sgeorgievski@yahoo.com, icvd@pf.ukim.edu.mk

1 Montenegro, and Serbia, have already started accession negotiations with the Union in June 2012 and January 2014 respectively, and Macedonia, being a candidate state as of 2005, still awaits the beginning of such negotiations, and is currently engaged in a ‘High Level Accession Dialogue’ with the EU’s institutions aimed to abridge the delay in its accession progress caused by the unsettled ‘difference over the name’ with Greece. Albania, and Bosnia and Herzegovina, are potential-candidates, with Albania having a Stabilisation and Association Agreement in force as of 1 April 2009, and Bosnia and Herzegovina still awaiting its SAA to become effective, though it has ratified it on its part. Source: the European Commission, at http://ec.europa.eu/enlargement/countries/check-current-status/index_en.htm.


4 Albi, “EU Enlargement”, p. 52.
The pre-accession experience of particular CEE countries, especially that of Poland, the Czech Republic and some other CEE countries, demonstrate that, in principle, their courts (particularly higher and Constitutional courts) had generally responded to that challenge by adopting a ‘Euro-friendly’ approach when interpreting and applying domestic legislation. Although there was relatively little case law on direct application of the Europe Agreements’ provisions in the CEE countries at the time of pre-accession, in principle, the Europe Agreements’ provisions were generally capable of being directly applied in most of the CEE countries’ constitutional systems. Under the respective provisions of their constitutions, the national courts of certain CEE countries, most notably, the Polish courts had proceeded with directly applying relevant Europe Agreement’s provisions in a number of cases, though often in order ‘to support the argument’ than using it as a main basis for deciding cases.

Yet, generally, certain CEE national courts, especially, Constitutional and higher courts were more often prone to resorting to indirect application of EU (EC) primary and secondary law when interpreting domestic harmonized legislation (although not without reservations), mainly relying on the standard ‘harmonization provisions’ of the respective Europe Agreements, but also on wider teleological basis. In an earlier decision, in the Gender Equality in the Civil Service Case, the Constitutional Tribunal of Poland directed the other Polish courts that, notwithstanding that the law of the Union was not binding in Poland pre-accession, under the harmonization Articles 68 and 69 of the Polish Europe Agreement, Poland was obliged “to use ‘its best endeavours’ to ensure that future

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5 The term ‘Euro-friendly’ application of law has been employed *inter alia* by Kühn as implying a “… [use of] EU law as argumentative tool to interpret domestic law,” as opposed to the restrictive – ‘limited law’ approach of domestic law application, or as using EU law sources as ‘persuasive sources.’ Kühn, Zdeniek, “The Application of EU Law in the New Member States: Several Early Predictions,” 6 *German Law Journal* no.3 (2005), 563, at pp. 567-68; and “European Law in the Empires of Mechanical Jurisprudence: The Judicial Application of European Law in Central European Candidate Countries,” 1 *Croatian Yearbook of European Law and Policy* no.1 (2005), 55, p. 63. The later approach has been equally described in certain CEE countries as a ‘pro-European interpretation of laws,’ or as ‘soft adaptation of law to EU standards,’ equivalent to the doctrine of indirect effect in EC law. See Lazzowski, A., “Adaptation of the Polish Legal System to European Union Law: Selected Aspects,” Sussex European Institute Working Paper No. 45, Brighton, 2001, p. 21, referred to by Albi, “EU Enlargement,” p. 53. In this book, we will use interchangeably the terms ‘Euro-friendly’ and ‘EU-consistent’ and ‘EU-conformed’ and ‘EU-harmonious’ interpretation/application of domestic law for denoting the later approach of interpretation and application of domestic legislation in view of the applicable EU law.

6 I.e. in the constitutional systems of Lithuania, Bulgaria, Poland, Estonia, Slovenia; and in those of the Czech Republic, Slovakia and Romania, following their 2001 and 2003 constitutional amendments, respectively (previously, the last three had been dualist countries as regards treaties, except for human rights treaties enjoying a privileged monist regime). In Latvia, a system of reference with respect to treaties has been applied, and Hungary has maintained a dualist approach. Albi, “EU Enlargement,” p. 41-42, and Chapter 3. Also See Chapter 5 of this book.


legislation [would be] compatible with Community legislation."9 Although, the later obligation had been primarily falling upon the Polish parliament and government, it had also resulted in “the obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility” with the Community legislation.10 That approach was generally followed by other Polish courts.11

Similarly, in the Czech Republic, affirming the similar approach taken by the High Court in the Skoda Auto case12 the Constitutional Court emphasized the quality of the Treaty of Rome and TEU of deriving from the same values and principles as the Czech constitutional law. It suggested the valuable use of the interpretations of the European antitrust law offered by the European bodies for the interpretation of the corresponding Czech law.13 In another decision inter alia the Czech Constitutional Court resorted to an even wider teleological reasoning for the purpose of allowing indirect application of EU law, stating that “[p]rimary Community law “… penetrates into the Court’s decision making – … in the form of general principles of European law.”14

Certain other CEE countries’ national courts had developed a comparable pre-accession Euro-friendly jurisprudence of indirect application of EU law sources as the Polish and the Czech

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10 Ibid. The Polish Constitutional Tribunal has inter alia later confirmed the indirect applicability of the law of the Union in the internal order in its 2003 Decision dealing with the constitutionality of the Polish Law on the national referendum regarding EU accession, in Decision K 11/03 (available at: http://www.trybunal.gov.pl/eng/summaries/K_11_03_GB.pdf).

11 See for instance the Polish Supreme Court’s decisions in Case SN I CKN 1217/98 2001.05.29 wyrok SN I CKN 1217 OSNAP 2002/1/13 (the ‘Polish Bar’Case); the Antimonopoly Court’s decision in Case XVII Amr 65/96 1997.01.08 wyrok s. antym. XVII Amr. 65/96 Wokanda 1998/1/60; etc. Reported by Albi, “EU Enlargement,” p. 53, referring to Kellerman A., “Constitutional Aspects for Bulgaria," p. 12 et seq.


courts, although instances where the later had not occurred were not infrequent in the pre-accession practice of all of these countries’ courts.

The adoption of the ‘Euro-friendly’ approach, allowing for pre-accession application of certain sources of the law of the Union by national courts and for harmonious interpretation of domestic legislation in view of relevant EU law, should be welcomed in the SEE countries as well. It might contribute avoiding on time the possible shocks that may be experienced by their national courts immediately after EU accession, when SEE national judges would have to apply the law of the Union in full according to its principles, acting as (both) ‘European judges’ (already occurring in Croatia, as an EU member state). If, according to Zdeniek Kühn, “… all judges of the [EU aspirant] countries acted as if they already were European judges, the first day after EU enlargement would not mean a legal revolution annihilating entirely the philosophy of the old system; on the contrary, this would mean a mere continuation of the process already started by the association treaties.” Should EU law be considered by the national courts of EU aspirant countries wherever their domestic harmonized law is to be applied, it could ensure that “… not the texts but rather the laws are being harmonised.” Even before acceding to the Union, while performing their adjudicative function SEE national courts are expected to directly apply certain internally directly effective rules of the law of the Union, most notably, of the respective provisions of the SAAs and other binding treaties concluded with the Union, and in particular to consult indirectly various relevant EU law sources (including the ECJ’s jurisprudence), as part of the Euro-friendly application of the SAA and relevant national law. Since, like their counterparts from the CEE region in the pre-accession period (adding Croatia), the SEE countries currently lack specific ‘European clauses’ on the applicability of EU law in their respective constitutions, the scope of possible direct and indirect application of the relevant EU law sources domestically has to be primarily established under their respective constitutional provisions governing the applicability and status of treaties and international law, especially, as regards the Stabilisation and Association Agreements. The later agreements, as noted above, have the potential of entailing effective rights in the internal orders of EU aspirant states, and lay out particular legal grounds for indirect EU law application in the pre-accession period in particular under their standard harmonization clauses.


But, granting appropriate effect to the SAAs and other EU law sources internally by national courts is a rather challenging task. It requires particular wisdom and willingness demonstrated by national judges when interpreting the applicable constitutional and SAA’s provisions in a way favorable to EU law and the respective SEE country’s Euro-integration goals, particularly on the part of the judges at the leading national court institutions, including Constitutional Courts. In the Polish example, for instance, the adoption of the ‘Euro-friendly’ pre-accession approach by the highest courts of the country appeared as “a logical outcome of their friendly approach to the application of international law and their high aspiration in performing judicial review”, and was due to the fact that these courts “…staffed with many prominent Polish lawyers and academics, have seemed willing to fulfill the mission of Europeanization.”

Yet, there are major challenges on that road facing the SEE national courts (like their CEE counterparts) attached to the interrelated phenomena of what have been described by some authors as a ‘dualist inertia’ in the practice of national judges as regards European and international law application,21 and as a ‘mechanical jurisprudence’,22 still present in the SEE (and the CEE) national courts’ practice as rather resilient remnants from the ex-socialist past. Equally depicted as a ‘limited law’ application, or a ‘dogmatic textual-positivism’ in law application etc.,23 the later phenomenon has been attached to the “obvious problems” of the CEE ordinary courts of “…excessive reliance on a literalist (or textualist) reading of law, their ignorance of the underlying purpose of the law and their inability to apply abstract legal principles.”24 But, that appears to be a chronic habit of judges still prevailing in the SEE courts’ practice as well.25 A recent article devoted to the analysis of the human rights jurisprudence of the Croatian Constitutional Court26 seems to confirm the continuous presence of that habit even among the courts of Croatia, a recent EU member state. In that article, published after more than a decade from his initial warnings about the ‘dualist inertia’ of the Croatian judges when it comes to the international and European law application (mutatis mutandis) applica-

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23 According to Kühn, ‘limited law’ application of domestic harmonized legislation would occur where the courts consider only “… ‘limited law’ of the texts of harmonizing legislation, not taking into account community law in its full meaning … [including] the texts of European directives, which had to be transposed into domestic law, their reasoning and rationale, which would explain why a particular policy was regulated on the European level, ECJ jurisprudence, and ideally also case law of the EU Member States.” Similarly, ‘dogmatic textual positivism’ implies an approach which have been practiced by (the CEE) national lawyers and judges different than that imminent to the Union’s legal order, which itself is a “non-dogmatic approach towards legal argumentation,” but “… rather pragmatic and instrumental.” Kühn, “The Application of European Law in the New Member States,” espec. at p. 565 and 580. Also See Kühn, “European Law in the Empires of Mechanical Jurisprudence,” espec. at pp. 62-3.
25 Writing at the time of the Croatian pre-accession in 2005, Tamara Ćapeta drew a conclusion (mutatis mutandis pertinent for all SEE judges) that the Croatian judges had perceived themselves “only as appliers of the written law … so that every dispute may be resolved using pure deductive logic,” and that they “…view[ed] the legal rules as an end in themselves, rather than as a means of achieving certain social objectives and policy choices.” She had also warned that the needed change for making the Croatian judges to be “… ready for European Constitutionalism is … not one that [would] happen overnight.” Ćapeta, Tamara, “Courts, Legal Culture and EU,” vol. I Croatian Yearbook of European Law and Policy (2005), p. 20-21, available at http://www.encyclo.com/index.php/encyclo/article/view/2/2. In fact, that situation regarding the Croatian judges has not changed dramatically after Croatia joined the EU, as demonstrated further in the text.
ble for the rest of the SEE judges), Siniša Rodin, though praising the Constitutional Court for evolving into “a sophisticated interpreter of fundamental rights,” again found “… that the human rights jurisprudence of the Constitutional Court [of Croatia] is formalistic and not genuinely motivated by the protection of fundamental rights,” and that the practical recourse to fundamental rights by this Court appears as “mainly instrumental.” The call for a “new ideological description of the judicial function” that was raised in the CEE context seems to be equally pertinent for the SEE countries, requiring appropriate national policies that would lead towards building a genuine ‘European legal culture’ among the SEE national judges.

Based on the above premise, this book addresses the issue of the application of the European Union law in the SEE countries under their current law and national courts’ practice. It is a final outcome of a research undertaken during 2013-14 by designated researchers and their research teams from the Faculties of Law at the respective state Universities of Tirana, Zenica, Mostar, Zagreb, Split, Skopje, Podgorica, Belgrade, Kragujevac and Nis, members of the South East European Law School Network (SEELS). The research was part of the Project entitled “Application of the European Union Law by the National Courts of the EU-Membership Aspirant Countries from South-East Europe” supported by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), Open Regional Fund for South East Europe-Legal Reform. The aim of that Project was twofold: a) to present a comprehensive study of the applicable legal basis and courts’ practice of the SEE countries of applying EU law in the pre-accession period on country-specific and comparative regional basis, and b) to develop an analytical framework for research and monitoring of the capacity of the SEE countries’ courts for applying EU law during the pre-accession and post-accession stages, which could contribute setting up a system for regular periodical monitoring of the national courts’ capacity for EU law application in the particular SEE countries and in the SEE region as a whole. The Project did not comprehend analysis of the legislative harmonization process going on in the SEE countries, or of the constitutional changes that would be required in these countries for allowing their prospective membership in the Union, although occasional referrals to the later constitutional aspects would seem inevitable, especially, regarding research on the pre- and post- EU accession law and practice of those SEE countries that have already become members of the Union (i.e. Croatia).

The current book follows the above main research objectives and is organized accordingly in two separate Parts. It starts from the basic theoretical premise that pre-accession application of EU law is possible and that is already taking place in the practice of the SEE national courts, under the respective countries’ constitutional systems. In Croatia, EU law application in full is a prerogative in the legal order of Croatia, in view of the obligations stemming from its already acquired membership in the Union and the corresponding amendments to its Constitution it had adopted immediately before accessioning to the EU.


30 See Rodin, Siniša, “Functions of Judicial Opinions and the New Member States,” in The Legitimacy of Highest Courts’ Rulings, Judicial Deliberations, and Beyond, edited by Nick Hulls, Maurice Adams, and Jacco Bomhoff, Asser Press, 2009,” 369; and “Discourse and Authority in European and Post-Communist Legal Culture,” vol. 1 Croatian Yearbook of European Law and Policy (2005), available at http://www.cyelp.com/index.php/cyelp/article/view/1/1. Tamara Ćapeta suggests that the proper place for changing the current legal culture of the Croatian (SEE) judges are the law schools, in that “[l]egal education needs to be adapted so that it can prepare future ‘thinking’ judges.” She also stresses that the effective EU membership “… may speed up the process of transformation of society’s legal culture, including its judiciary. Ćapeta, “Courts, Legal Culture and EU,” p. 21.
The Chapter Two of the book contains valuable contributions by 13 authors and coauthors coming from respective SEE Law Faculties in which they present comprehensive analysis of the current constitutional and statutory framework for the application of the law of the Union in each of the respective SEE countries, and identify major trends of EU law application in their particular national courts’ jurisprudence. Embraced by these analyses are the law and practice of Albania, Bosnia and Herzegovina, Macedonia, Montenegro, and Serbia, all referred to as ‘EU-membership aspirant countries’ because of their different status regarding the EU. Croatia, of course, is not an ‘aspirant’ country, as it has recently become an EU member state, but is added in the research because it could offer the other SEE countries valuable experience with EU law application both before and immediately after EU accession, especially, given the shared historic roots of their respective legal systems.

In their articles, authors address in detail a similar set of predetermined aspects regarding EU law application in their particular countries before EU accession, including the scope and meaning of their country’s constitutional and statutory provisions governing the applicability and status of treaties, especially, of the relevant SAAs, of binding not-ratified international agreements, decisions of international bodies established under binding agreements (i.e. the SA Council’s decisions), and of general international law or ‘general principles of international law,’ in search for the extent to which these provisions lay down particular grounds for the application of EU law sources before accession. The later constitutional provisions are analyzed in view of the current practice of national courts, in particular, of that of the Constitutional courts and the highest national courts. In addition, special attention is paid to the applicability of particular SEE country’s SAA’s provisions, including its standard harmonization clauses laying grounds for ‘Euro-friendly’ application of harmonized law, as to the way these have been conceived and actually applied by relevant national courts.

In their articles, authors particularly seek to identify established patterns of EU law application under the applicable legal framework by consulting relevant national courts’ jurisprudence, and to discover whether the desired EU-friendly application of domestic legislation has found firm roots in the current practice of their country’s national courts. Related to that, they consult leading cases in which EU law sources have been directly or indirectly applied, in an effort to discern the methodological approach taken by national courts in their actual application.

Authors equally refer to some particular aspects related to the capacity of the SEE national courts to apply properly the law of the Union, including the current level of professional training of judges in EU law offered at the respective countries’ training institutions, the accessibility of relevant national and international (particularly the ECJ’s) jurisprudence for judges, and the available modes for ensuring a uniform application of (both) EU law within the judicial system of each SEE country.

While addressing the above issues, references to international law application in the particular SEE countries’ legal orders and courts’ practice have seemed inevitable, because of the necessary convergence between EU law and international law internally at the EU pre-accession stage in view of the applicable national constitutional and statutory rules pertaining primarily to the later law, and of the particular relevance that the national courts’ jurisprudence of applying international law may have as an indirect indicator for the courts’ capacity for properly applying (both) EU law, given that both these legal systems appear as ‘external’ to domestic law.

Chapter Two ends with a Concluding Chapter providing a comparative summary of the main findings presented in the previous chapters devoted to individual SEE countries regarding EU law application in SEE, including appropriate recommendations for improvements in that respect.

Expectedly, the country-specific analysis provided in the articles under Chapter Two reveal remarkable similarities among the different national regimes and established courts’ patterns related to EU law application in all SEE countries. In particular, these analyses underlie the already present (albeit
still modest and scattered) practice of the SEE courts of directly and (especially) indirectly invoking EU law sources as part of an Euro-friendly application of domestic law, that also relates to international law sources. But, they equally emphasize the lack of an appropriate ‘European legal culture’ developed among the SEE national judges manifested by the still prevalent mode of textual-positivist application of (both) EU and international law. Certain specificities for each SEE country, however, have been also pointed out.

Whereas, Chapter Two of the book provides diagnosis of the current national law and jurisprudence regarding EU law application in the particular SEE countries, Chapter Three is more forward looking and offers an Analytical framework for continuous research and monitoring of the capacity of the SEE national courts for applying the law of the Union during the pre-accession (and post-accession) stages. Though, that Analytical framework could be equally used for any individual research, its primary aim is to serve as a theoretical platform for exercising systematic research and monitoring of the SEE courts potential for EU law application, implying future establishment of a comprehensive mechanism for regular monitoring of that courts’ potential on national and regional basis. The later mechanism assumes that an institutionalized network of national monitoring units would be set up in the SEE countries, tasked with exercising periodical (annual or biannual) monitoring and issuing regular progress reports on country-specific and regional basis, by using the Analytical framework.

The Analytical framework for monitoring the capacity of the SEE courts for applying EU law offered herein is based on one dependent and six independent research variables. The constitutional and legal arrangements that govern the applicability of EU (and international) law sources in each of the particular SEE countries, for which an initial outline is already offered in Chapter Two of this book, are meant to serve as an independent research variable. The six dependant research variables, presented in detail in Chapter Three, include separate measurement of: a) the awareness of judges for the possibilities and limitations for EU (and international) law application in the respective SEE country’s legal order; b) the actual practice of courts in applying EU (and international) law – quantitative measurement; c) the actual practice of courts in applying EU (and international) law – qualitative measurement; d) the professional training of judges for EU law application; e) the organizational capacity of courts for EU law application; and f) the judges’ perceptions on the wider socio-political EU-integration-related context potentially linked to their judicial practice of EU-law application.

The combined or individual use of desk research, surveys, focus groups and interviews as appropriate research methods is specifically suggested for the research related to each of the above six dependent variables.

The last portion of the text of Chapter Three offers suggestions for an appropriate adjustment of the Analytical framework for the monitoring of the SEE national courts’ capacity for applying EU law after the respective SEE countries’ accession to the Union, currently applicable to Croatia, reflecting the specific requirements entailed by EU membership under the applicable principles of EU law.

We hope that the reader of this book would find some useful insights on the topic of EU law application by national courts before EU accession, added to those already offered by many other valuable works devoted to the same topic in the SEE and other EU Enlargement contexts. But, above all, we wish that this book would find usefulness and excite particular interest on the matter among the responsible policy-makers and courts from the SEE region to which it has been primarily addressed, in an aim to contribute achieving the desired goal of Europeanization of the judiciaries of the SEE countries within their overall strive for being part of the European integration stream.

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CHAPTER TWO
COUNTRY REPORTS ON APPLICATION OF EU LAW BY NATIONAL COURTS
THE APPLICATION OF THE INTERNATIONAL AND EUROPEAN UNION LAW BY THE NATIONAL COURTS IN ALBANIA

Fjoralba CAKA

Abstract

This paper aims to analyze and describe the relationship between international and national law in the Republic of Albania. It will provide a panorama of the constitutional and legal framework in Albania with regard to the status of the international law in the Albanian domestic system. Special focus will be given to the case law of the highest courts, the Constitutional Court and the High Court in Albania, and how they apply in practice international law in their daily practice. As the integration process of Albania in EU is of focal importance for the country, a part of this study concentrates on whether the highest courts acknowledge any special status to the Stabilization and Association Agreement with European Union and whether there is any indirect application of the EU acquis in the pre-accession stage.

Key words: international law, domestic law, European Union law, domestic courts

Fjoralba Caka was graduated summa cum laude at the Faculty of Law, University of Tirana. She has a Master of Second Level in European Union Business Law from Faculty of Law, University of Tirana and a LLM in International Business and Corporate Law, from University of San Diego School of Law, USA. She is a PhD. candidate and works as lecturer of European Union Law and Internal Market, nearby Faculty of Law, University of Tirana. She has participated in regional and international conferences and is the author of different national and international articles on European Union Law issues, with special focus on the European integration process of Albania in the European Union.

* Fjoralba Caka, LLM, Lecturer at the Faculty of Law, University of Tirana, e-mail: fioricaka@gmail.com
A. The Status of International Law in the Albanian Domestic Legal Order

In 1992 Albania overruled the totalitarian communist system and established a democratic system of governance based on rule of law and guarantees for human rights. Upon change, the newly democratic country established relations with other democratic countries and entered into international agreements with different international organizations. Eager to show perseverance for duties and responsibilities of the international level, as a sign of abrupt divorce with its isolated communist past in the area of the international relations, but also due to the influence of international experts in the drafting of the new constitutional, Albania provided for a special status of the international agreements in the domestic legal order. In fact, this opened and inviting approach to international norms in the domestic legal system, has been a general trend in the Constitutions of other Eastern Europe countries as well after the fall of the communist era. The Estonian constitution (Art.3/1), the Hungarian Constitution (Art. 7/1), the Lithuanian Constitution (Art.138), the Polish Constitution (Art.87/1), the Rumanian Constitution (Art 11), the Czech Constitution (Art.10) et al. has opted for a monist system of international law, by incorporating international immediately in their domestic system.

The Constitution of Albania in force, ratified in 1998, has a very friendly approach towards the international law and its application in the Albanian domestic order. The international law instruments have been regulated in a number of provisions in the Albanian Constitution, such as Article 5, 17, 116, 121, 122, 123, 131 (a)(b), 117(3), showing the importance the legislator has paved to international law. Albania as well has opted for a monist system of international law. Different international law instruments such as international agreements, acts of international organization where Albania is a member, or general principles of international law are, by the constitutional provisions, made part of the domestic legal system. Thus, Article 5 of the Albanian Constitution provides that Albania applies international law that is binding upon it, while Article 116(b) of the Constitution enumerates the international agreements ratified by law as normative acts effective all over the territory of Albania. All these legal provisions leave no equivoques on that Albania has opted for a monist system of international law.

However, eventhough Art.5 of the Constitution provides that Albania applies the international law that is binding upon it, there are no provisions in the Constitution that define what is binding international law. In fact, the Albanian Constitution regulates expressively only the status of (i) the international agreements that are ratified by the Parliament, as well as those that do not required ratification by Parliament (Article 116, 121, 122); (ii) the norms adopted by international organization enacted by organization where Albania is a contracting party (Art. 122(3)), 123) and, (iii) the special status of the European Convention on Human Right and Fundamental Freedoms (Art.17). In this section will be shortly analyzed the status of different instruments of international law in the Albanian domestic system.

1. The Status of Ratified International Agreements in the Albanian Domestic Order

According to paragraph 1 of article 122(1) of the Albanian Constitution:

"Any international agreement that has been ratified is part of the domestic legal system, after it is published in the Official Journal of the Republic of Albania".

3 See respectively: Article 122(1), 122(2) and 5 of the Albanian Constitution.
Thus, for an international agreement to be part of the Albanian domestic order, two conditions should be met: first, the international agreement should be ratified by law and secondly, it should be published in the Official Journal of the Republic of Albania.

The main body vested with the power to ratify international agreement and treaties in Albania is the Parliament. Article 121(1) of the Albanian Constitution provides a list of agreements that can be ratified and denounced only and exclusively by a law from the Parliament. These are international agreements that involve territory, peace, alliances, political and military issues, human rights and freedoms, and obligations of citizens as provided in the Constitution, the membership of the Republic of Albania in international organizations, the assumption of financial obligations by the Republic of Albania, the approval, amendment or repeal of laws. If one of these listed agreements, is not ratified by a law of the Parliament, than the procedure of ratification shall be unconstitutional and, the Parliament has the right to denounce this agreement. Moreover, the Parliament has the discretion to ratify other agreements that are not listed in Article 121(1) of the Albanian Constitution, but to do this the majority of all of its members has to agree.

Regarding the publication of international agreements there are no special procedures envisaged. Art. 117(3) of the Constitution, fist sentence, provides that "International agreements that are ratified by law are promulgated and published according to the procedures that are provided for laws." Read together with Article 117(1) and Art. 84(3) of the Constitution, it leads to the conclusion that an international agreement enters into force at the moment it enters in force the law that ratifies it, i.e. with the passage of not less 15 days after the publication of the ratifying law into the Official Journal. The publishing process in the Official Journal is accompanied with the Albanian translated version of the agreement. The publishing of the international agreement in Albanian language stems from the prerequisite that these international agreements are part of the domestic system and may be directly applied.

After these formal requirements are fulfilled, the ratified international agreement becomes part of the Albanian domestic system and it is binding all over the territory. This is reinforced by Article 116 (1)(b) of the Constitution, which lists the ratified international agreements among the normative acts that are effective in the entire territory of the Republic of Albania. That shows again that Albania opted for the monist system of international law.

Moreover, the ratified international agreements are not only part of the Albanian domestic legal system, but they have a special status therein. The Constitution acknowledges to these agreements both supremacy and direct applicability.

1.1. Supremacy of the Ratified International Agreements

The supremacy clause of the ratified international agreements can be read in different articles of the Constitution. Article 122(2) provides that "An international agreement that has been ratified by law has superiority over laws of the country that are not compatible with it." On the other hand, the supremacy clause is reinforced by Article 116(1) (b) of the Albanian Constitution, known as the "hierarchy of legal acts" provision. This Article, lists the normative acts with normative power in all the territory of Albania, and places the international agreements above the laws enacted by the Alba-
nian Parliament and other normative acts issued by the Council of Ministers. This positional hierarchy of international agreements in Article 116 (1)(b) makes the laws of the Parliament and the normative acts of the Council of Ministers succumbed to ratified international agreements. Moreover, according to article 131(a) the Constitutional Court has exclusive competence to declare void a law that is not compatible with an international agreement. This means that domestic laws should be in compliance with ratified international agreements, otherwise the Constitutional Court will declare them void and expel them from the domestic legal order. However, it is not only the constitutional judge that has the power to "guard" the supremacy clause of the ratified international agreement over conflicting national law. Every judge in the domestic judicial system should acknowledge the supremacy of the ratified international agreement provision over conflicting domestic provision and this is explicitly stated, as well be seen infra, even by the case law of the courts.

Another issue regarding the supremacy of international agreements is their status vis-à-vis the Constitution. Article 116(1)(b) on the hierarchy of normative acts in the Republic of Albania, makes it clear that the Constitution is the supreme law of the land and the international agreements are succumbed to the Constitution. The supremacy of the Constitution over the international agreement can be inferred as well by Art. 131(b) of the Constitution, regarding the a priori constitutional review of the international acts.\(^8\) The fact that the Constitutional Court reviews the constitutionality of an international agreement before the ratification shows that the Constitution is a superior act and that international agreements should be in compliance with that.

### 1.2. Direct Applicability of Ratified International Agreement

Direct applicability of the ratified international agreement is another characteristic provided in the Constitution. Article 122(1) guarantees that ratified international agreements are directly applicable, except when the agreement is not self-executing and its application requires the adoption of a law.\(^9\) The Constitution is silent with regard to the definition of an international agreement that is self-executing or directly applicable. However, some pre-requisites may be drawn from the wording of Article 122(1). First, we can say that, as for supremacy effect, even for direct applicability, two pre-requisite conditions are to be met: (i) the international agreement should be ratified by the Parliament and (ii) it should be published in the Official Journal. If these two conditions are not met, then that international agreement is not part of the domestic legal system and it is not binding. Second, if read a contrario, it could be deduced that a self-executing agreement is an international agreement which does not require the states to intervene for its application, by enacting laws. However, as neither the law nor the legal practice has set any condition for the direct applicability of international treaties, or the characteristics of a (non) self-executing agreement, in practice it will be for the courts to decide, case by case, whether an international agreement is directly applicable or not.

Regarding the issue of direct application of a ratified international agreement, the power of discretion rests with the judge ruling the case. It is the role of the ordinary judge in a trial to choose which from the laws before him is relevant for the determination of the case at issue. The judge can use avoidance techniques by classifying the agreement as non-self executing and not applying that directly, or make a harmonious (consistent) interpretation of the national law with the international agreement. This is an issue falling within the judicial interpretation of the ordinary courts and it is

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\(^8\) Article 131(b): [the Constitutional Court] decides on: the compatibility of international agreements with the Constitution, prior to their ratification.

\(^9\) Article 122(1) reads: "Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law. The amendment, supplementing and repeal of laws approved by the majority of all members of the Assembly, for the effect of ratifying an international agreement, is done with the same majority."
not object of judicial review from the Constitutional Court. Only in one situation the ordinary judge is obliged to suspend the case and bring it before the Constitutional Court. This is when the directly applicable international agreement is the European Convention of Human Rights (ECHR). The ordinary judge according to Article 145 of the Constitution will suspend the case and bring the law before the Constitutional Court as being contrary to the ECHR and the Constitution. This broad reading of Art. 145 of the Constitution is due to the fact that the ECHR- as will be seen infra- has the same status as the Constitution, when the case concerns with restrictions or limitations of human rights. 12

1.3. The Special Status of the European Convention of Human Rights in the Albanian Domestic Legal Order

From all the ratified international agreements, the Constitution reserves a special status to the European Convention of Human Rights. The Constitution in Art. 17(2) calls the ECHR as the minimum legal standard for the protection of human rights. The limitations of the human rights made by law of the Parliament, cannot exceed the limitations provided in the ECHR. Therefore, since most of the human rights in the Albanian Constitution are mirror provisions of the human rights guaranteed in the ECHR, the judges in case of limitation of human rights, may refer in both documents, and then follow the interpretations of the European Court of Human Rights (ECtHR). As a matter of practice this has been the path the Albanian courts of different instances have followed. They have more and more significantly in these recent years referred to the ECHR and the ECtHR. This is because the ECHR is considered as a living instruments, therefore the guarantees and the level of protections of the ECtHR is always evolving, taking into consideration the evolution of the needs and interests of citizens in a democratic society. The Albanian judge therefore should update to the recent case law of the ECtHR to find the relevant guarantees for the human right restricted.

It is been argued between scholars whether the Constitution gives to the ECHR the constitutional status only with regards to the limitation and restriction of rights, or in all its substance. Some authors make a textual reading of Art.17(2) of the Constitution and say that the ECHR is directly applicable and has the same status as the Constitution, only with respect to the limitation of human rights. Other scholars argue that although the provisions of the Convention make reference to the Convention only with regard to the restrictions of the human rights, the substance of the Convention should be considered as having a constitutional status given the symmetry in the formulation of the guarantees of human rights provided in the Constitution and Convention. Zyberi & Sali bring a new approach of Article 17(2), which is also seconded by the author of this paper. Although Art.17(2) does not incorporate part of the ECHR in the Constitution, but merely refer to it, but for certain rights as "torture, slavery, punishment without law, or arbitrary deprivation of life…the ECHR is made an integral part of our Constitution".17
On the other hand, there are human rights in the Albanian Constitution that are not enshrined directly in the ECHR. We can mention for example Art. 55 of the Albanian Constitution, which guarantees the right of every individual to health insurance\(^\text{18}\), or Art. 58 of the Constitution, which protects the freedom of artistic creation and scientific research\(^\text{19}\), etc. Since there is no provision for these rights in the ECHR, shall this mean that in case of restriction of these rights the ECHR will lose the special constitutional status? There is no practice found before the Constitutional Court about this hypo. However, we can draw three possible lines of interpretation. The first option, is that the judge makes an original interpretation of the right envisaged in the Constitution and does not refer at all to the ECHR or to the ECtHR, or not even to any other international agreement. The second option, the judge can still scrutinize in the ECtHR practice, where he can find elements, which afford protection to the concerned right in the ambit of the ECtHR practice; for example the freedom of artistic creation provided in Art. 58 of the Constitution may be protected in the light of freedom of artistic expression, and the freedom of artistic expression is protected by Art. 10 of the ECtHR as a freedom of speech. The third option could be that the judge construes the national constitutional provision in the light of another international agreement that is ratified by Albania, from which he can draw principles or understand better the content of the national provision.

2. The Status of Norms Produced by International/Supranational Organization

The Albanian Constitution moreover regulates the status of the norms issued by the organizations where Albania is a member state. Article 122(3) reads.

“The norms enacted by an international organization have supremacy, in case of conflict, over the law of the land, when the agreement ratified by the Republic of Albania for its participation in this organization, expressly envisages their direct applicability.”

Thus, Albanian Constitution acknowledges to the norms issued by international organization both the **supremacy** and the **direct applicability** in the domestic legal order. However, it sets two conditions for that. First, the agreement for the participation of the Republic of Albania in the international organization must be ratified by the Parliament, and second, the ratified agreement must provide explicitly for the direct applicability of the norms adopted within the organization.

One important remark is made regarding the supremacy of the norms issued by supranational organization: the supremacy of the norms issued by international organization in Article 122(3), is different from the supremacy of ratified international agreements provided in Article 122(1) of the Albanian Constitution. The supremacy of the ratified international agreements in Art, 122(1) is extended over the “domestic legal system”, while the norms of international organization in Article 122(3) have supremacy over the “law of the land”. The terminology “law of the land” in the Albanian language is broad and it might comprises even the Constitution itself\(^\text{20}\). However, some authors still deem that, since there is not any interpretation by the Constitutional Court, it is not clear what “law of the land” really means\(^\text{21}\). Kellermann finds that the status of the EU primary and secondary law in the Albanian domestic system is not defined and he suggests that a special clause on the relationship of EU law with the domestic legal order, should be incorporated in the Albanian Con-

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\(^\text{18}\) Article 55 (2) reads: Everyone has the right to health insurance pursuant to the procedure provided by law.

\(^\text{19}\) Article 58(1): Freedom of artistic creation and scientific research, placing in use, as well as profit from their results are guaranteed for all.


stitution upon its integration in EU.\textsuperscript{22} In fact, although article 122(3) is considered by scholars as the “clause of integration” and it seems to make it easier for EU law supremacy and direct applicability to be acknowledged at a constitutional level, this might not be the case. By acceding the EU, Albania will sign and ratify the EU Treaties, and this way the EU primary law will be part of the domestic legal system as ratified international agreement and will have supremacy. However, supremacy and direct applicability of the ratified international agreements as provided in the Constitution is not the same as the principle of supremacy and direct effect elaborated by the Court of Justice of the European Union. This will be shortly discussed below at section C.3.3.

3. The Status of Non-Ratified International Agreements in the Domestic Legal Order

3.1. Governmental International Agreement

A second category of international agreements as provided by article 122 of the Albanian Constitution, are agreements that do not need ratification by the Parliament. Article 122(3) foresees that the Prime Minister informs the Parliament each time the Council of Ministers signs an international agreement that is not ratified by law. The notification of the Parliament should be interpreted as a guarantee for the principle of check and balance. On the other hand, it is also interpreted as a guarantee for the parties of the agreement that the agreement will not be affected upon the change of the government’s composition\textsuperscript{23}. Regarding the legal force of these agreements in the hierarchy of legal norms although the Constitution is silent with regard to them, they must be considered as any other normative act adopted by the Council of Ministers. However, there are scholars who attribute them a special status within the domain of legal acts enacted by Council of Ministers, arguing that the requirement that the Parliament is notified about these agreements should be considered as an element to distinguish them from the ordinary normative acts of the Council of Ministers regulating the internal issues.\textsuperscript{24}

3.2. International Agreements of Local Government

Article 109(4) of the Constitution provides that local government units have the right to form unions and joint institutions with one another for the representation of their interests, to cooperate with local units of other countries, and to be represented in international organizations of local governments. Furthermore, article 3 of the Law on the Conclusion of Treaties and International Agreements\textsuperscript{25} foresees that local authorities have the power to conclude agreements, of a scientific, technical, educative etc., nature, within the framework of their area of activities or jurisdiction. However, prior consultation with the Ministry of Foreign Affairs is requested. Moreover local authorities must follow up the implementation of the international agreements adopted in their area of activities and inform periodically the Council of Ministers and the Minister of Foreign Affairs with regard to their implementation. Also in the Law on the Local Government, it is rephrased the constitutional provision on the right of the local government units to “cooperate with the units of local govern-

\textsuperscript{22} Kellermann Alfred, “Impakti i Anëtarësimit në BE në rendin e brendshëm ligjor të Republikës së Shqipërisë. E Drejta Parlamentare dhe Politikat Ligiore. No.35, 200, p.9.

\textsuperscript{23} Omari, Luan. & Aurela Anastasi,. E Drejta Kushtetuese. Ibid., p.58.

\textsuperscript{24} Omari, Luan, & Aurela Anastasi, E Drejta Kushtetuese. Ibid.

\textsuperscript{25} Law on the Conclusion of Treaties and International Agreements, No.8371, date 21.07.1998, Official Journal No.18. Eventhough this law was enacted before the entry into force of the current Constitution, it is used by the courts as a source of interpretation (eg. CONSTITUTIONAL COURT Decision 15, date 15.04.2010), which means it is still good law for the parts that are not repealed by any new legal provisions.
ment of other countries, and be represented in international organizations of local government, according to legislation in force”.

B. The Ex Ante Review of International Agreements by the Constitutional Court

The Constitutional Court makes an integral *ex ante* review of the constitutionality of the international agreement. Article 131(b) and Art. 52(1) of the Law on the Organization and Functioning of the Constitutional Court provides that the “Constitutional Court considers the compatibility of the International Agreement with the Constitution before they are rectified”. We can understand from the wording of this provision that the constitutional review is made only for those international agreements that are object of ratification. The subjects that can invest the Constitutional Court for this review are: the President of the Republic; the Prime Minister; not less than one-fifth of the deputies; the head of High State Control. On the other hand, the People’s Advocate; the organs of local government; or the organs of religious communities, political parties and other organizations can invest the Constitutional Court only for cases concerning their interests. During the review process, the ratification procedure of the agreement is suspended, until the Constitutional Court decides on its constitutionality. If the Constitutional Court finds the international act incompatible with the Constitution or some of its provision, the Parliament cannot ratify the agreement. Academics believe that the ex ante constitutional control is more suitable for the position of the state in the international arena. If there is any incompatibility with the national constitution the state shall not ratify the agreement and the agreement shall not enter into force, therefore there is no breach of the principle *pacta sunt servanda*. The decision of the Constitutional Court No 15/2010 is a good case to illustrate this, as well as the constitutional review of international agreement by the Constitutional Court.

The case concerned the compatibility of an international agreement signed between Albania and Greece “*On the delimitation of continental shelf and other maritime zones*” The petitioner claimed that the negotiation and signing process of the agreement, was contrary to the Constitution. More specifically, the claim was that the Albanian negotiating party lacked the competence and power to enter the negotiation. They alleged that the negotiation and signing of this agreement was contrary to Article 7 of the Albanian Constitution on the division of powers, article 92 that defines the competences of the President, and Art.4 of the Constitution that sanctions the rule of law principles. On the other hand, the interested party claimed that if this agreement would be declared void, then Albania would not have kept the obligations it committed to undertake at the international level, therefore would not respect the principle *pacta sunt servanda*, sanctioned in the Treaty of Vienna, which is ratified by Albania. The Constitutional Court said:

“International law is neutral concerning the issue which body acts on behalf or on account of the state, as how the internal political will it is formed and expressed, or even more how does a state behave in relation to domestic law or with respect to norms of international law, as long as it fulfills the rights and obligations it has undertaken...”

28 Article 52(3). Law, No.8577, date10.2.2000, “On the Organization and the functioning of the Constitutional Court of the Republic of Albania.”The proceeding shall end within one month from the date of the submission of the case. Article 53(2) ibid.
draw from the obligations assumed, for this serves to the international stability and the enforcement of the principle *pacta sunt servanta* (...)”

Then the Constitutional Court interpreted its own constitutional process of judicial review of international agreements. The Constitutional Court said:

"The review of international agreements is one of the most special powers given to the Constitutional Court, due to the fact that it is deemed to assess the observance of constitutional norms and principles in the field of foreign relations. The assessment of the interests and needs to stipulate an international agreement is a political act. The issue of whether this political act is in accordance with the domestic normative framework (meaning: constitutional) and with the national interests as a whole, is of legal character. It is here that it is focused the constitutional review made by the constitutional court.

(...)When the Constitutional Court interprets the contents of an agreement and reaches a conclusion with regards to its compliance with the national constitution, it relies only on the verification of respect for fundamental constitutional principles in the text of the agreement. The Constitutional Court, in this case, takes into account the principle that political organs of the state are based on constitutional principles to enter into an agreement and have the will to achieve a result in accordance with these principles. So constitutionality, trust and goodwill is presumed, in relation to the agreement, as long as the constitutional control does not reach to a different outcome (...)”

After a thorough analysis, the Constitutional Court declared the Agreement incompatible with the Constitution, first because of lack of full powers by the delegation who negotiated the agreement, second because of serious problems with the content of the agreement, and third because of infringement of principles of international law on the delimitation of maritime boundaries between two countries, as provided in the UN Law of See Convention (Montego Bay Convention). As a result, the Parliament of Albania did not ratify the agreement. However it ruled that in this case there was no infringement of Article 46 of the Vienna Convention, since the agreement was not yet ratified by the Albanian Parliament, and as such it has not produced any effect and it did not yet entered into force.

This shows how the Albanian domestic legal order has found a balance between respecting the rule of law principle on one hand, and the *pacta sunt servanta* principle on the other, when the state enters in foreign relations through international agreements. By the *ex ante* control of international agreements, the Constitutional Court is empowered to enforce the balance among respect of the Constitution and its fundamental principles of its domestic legal order, and *pacta sunt servanta* as a principle of international legal order. Furthermore the Constitutional Court showed the boundaries of its power of scrutiny towards an international agreement. The Constitutional Court made a division between when a “political act” in its regards, is out of its jurisdiction, and when an act of the state is object of its scrutiny. The Constitutional Court made it clear that when it reviews the international agreements stipulated by the state in the international political arena, it does not assess the interests and the needs for this international agreement, but only whether this international

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33 Constitutional Court, Decision 15, date 15.04. 2010, ibid. para. 45.
34 Constitutional Court Decision No. 15, date 15.04.2010, para 56, 59.
35 See also Decision 65/1999 and Decision 186/2002 of the Constitutional Court.
36 CC Decision No.15, date 15.04, 2010, ibid., para. 46.
agreement respects the fundamental principles of the Constitution of Albania, which is a power the Constitution itself gives to this Court.

**C. The Application of International Law by Domestic Courts in Albania**

**1. General Overview**

This part of the paper will deal with how the Albanian courts apply international or even EU law at the pre-accession stage. The study covers the case law of the Constitutional Court and the unifying decisions of the High Court in Albania for the time period from 1999-2013. The study is based on the jurisprudence of these two courts, for two main reasons. Firstly, because of the relevance of their case law in the domestic jurisprudence and lower courts. The High, when selects specific judicial issues for examination in the joint college, does it in order to make a unification or change of judicial practice. Therefore the unifying decisions of the High Court are a good indicator how the practice of lower court should develop or is developing on a specific issue. On the other hand the decisions of the Constitutional Court have general binding force and are final, they apply *erga omnes* and its practice is obligatory for all the courts. Secondly, there is another practical reason why the study is based only in the jurisprudence of the higher courts and this is because of the limitation of the research engine or lack of publications of other courts’ decisions on the web. Not every court in Albania publishes its decision in the webpage of the court. Even in cases the decisions are published, there are not developed engines to find the relevant decisions by key words or indexes of cases, and this is true even for the Constitutional Court and the High Court.

Eventhough this section is titled the application of the international law from the domestic courts, the application of the European Convention of Human Rights (ECHR) is not subject of the research. The ECHR is comprehensively applied by the Albanian courts and been object of study by different scholars. Therefore, this paper aim to monitor and scrutinize how domestic courts apply other international instruments with a specific attention to how they apply European Union law instruments in the stage of pre-accession (the latter will be analyzed in PART D).

From the screening of the case law, we can say that in most of times the posture of engagement of Albanian domestic courts with international law is the posture of full alignment. The tendency of the Albanian domestic courts is to harmonize domestic law with international regulation, or to interpret the national legislation in a certain way in order not to override international obligations. Sometimes the domestic courts use the international law provisions to draw from there general principles of law, such as the principle of the independence of the judiciary, or the principle of the independence of the Bar Associations and lawyers, or the *ne bis in idem* principle, the

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37 Due to the difficulties encountered in finding the decisions referring to international law, the list of decision mentioned in this paper is not exhaustive.

38 Albanian Constitution, Art.141(2).

39 Albanian Constitution Article 132(1).


41 Constitutional Court Decision No.11, Date 02.04.2008; Constitutional Court Decision No.11, Date 06.04.2010 The European Charter on the Statute for Judges, Council of Europe.

42 Constitutional Court Decision No.7, Date 12.03.2010.

43 Constitutional Court Decision No.47, Date 7.11.2011 citing to Article 4, Protokol VII ECHR; Art. 14, § 7 of the International Covenant for Civil and Political Rights; Article 50 of The European Union Charter of Human Rights.
principle of an impartial and fair process\textsuperscript{44}, the principle of non discrimination\textsuperscript{45}, the principle of local autonomy,\textsuperscript{46} or the principle "les mitior retro agit"\textsuperscript{47}. In this regards, it is interesting to note that both courts refer even to the soft law instruments of the Council of Europe, as to the Resolutions of the Council of Ministers, or Recommendations of the Parliamentary Assembly, in order to interpret the national domestic law.\textsuperscript{48} Other times the courts use the international law, not just merely to construe the domestic law in compliance with international obligation, in order not to be in breach of the international legal order, but in order to "understand the world" and to apply the domestic law properly.\textsuperscript{49} For example, in Decision no.3 date 24.01.2011, the High Court said:

"The term ‘trafficking’ is known and used extensively in instruments of international law and in the legislation of different states. It is generally accepted in the legal field, that trafficking means the illegal activity or trading, at a national or international level, of goods and services".\textsuperscript{50}

Thus the courts will refer to instruments of international law or will make a comparative study of different legislation to understand better a domestic regulation.\textsuperscript{51} In this regards it is interesting to point out that the courts are also opened to judicial decisions given by the courts of other countries. In a series of decisions for example the Albanian Constitutional Court referred to decisions of the German Federal Constitutional Court\textsuperscript{52}, or to the Constitutional Courts of other Eastern post communist countries.\textsuperscript{53} On the other hand, what we can see in the jurisprudence of the courts, is that sometimes they refer to instruments of international law, by merely citing to the articles of the international instrument, not going through any process of analysis, or how does that instrument they cite relate to the case, or go to the content of the international provision, thus ‘hesitating’ to do any

\textsuperscript{44} Constitutional Court Decision No. 1, Date 25.01.2010 citing to International Covenant on Civil and Political Rights, and Art.6 ECHR.

\textsuperscript{45} Constitutional Court Decision No.33, Date 12.09.2007 citing to Article 12 of the ECHR.

\textsuperscript{46} Constitutional Court Decision No. 29, Date 21.12.2006.

\textsuperscript{47} Constitutional Court Decision No. 35, Date 20.12.2005 citing to Art. 15/1 International Covenant on Civil and Political Rights.

\textsuperscript{48} Constitutional Court Decision No.52 Date 01.12.2011 Referring to Resolution No. 1335 (2003) of the Parlamenary Assembly of the Council of Europe; Recommendation No. 1735 Of The Parlamentary Assambly of the Council of Europe, January 2006; Constitutional Court Decision 32, Date 21.06.2010 referring to the Code of Good Practice In Electoral Matters – Guidelines and Explanatory Report, CdI-Ad (2002) 23, adopted by the Venice Commission at its 52th session (Venice, 18-19 October 2002); Constitutional Court Decision No. 45, Date 10.10.2011, referring to the Resolution 75(11) of the Committee Of Ministers of the Council of Europe; High Court Decision No.4/3, Date 17.01.2011, Recommendations of the Council Of Ministers Of The Council Of Europe, adopted on 09.09.2003; High Court Decision No. 5/4, Date 19.06.2013, Resolution(75)11 of the Council of Ministers of the Council of Europe.

\textsuperscript{49} ILA Preliminary Report, Principles on the engagement of domestic courts with international law, ibid., p. 9.

\textsuperscript{50} High Court Decision No.3, date 24.01.2011, para. 19.

\textsuperscript{51} See also High Court Decision, No.2, dated 27.03.2012, Official Journal, No.106, where the High Court referred to the Basle Convention of Council of Europe and to a Regulation of the Euratom Treaty, to understand better the calculation of time limits.

\textsuperscript{52} Constitutional Court Decision No. 9, date 23.03.2010 on the compatibility of the Law on Lustration with the Albanian Constitution, regarding the restrictions of access to a profession/work the CONSTITUTIONAL COURT referred to Decision of the German Federal Constitutional Court, 11 July 2006; Decision 32, date 21.06.2010 on the propotional system of elections, the Constitutional Court referred to Decision of the Constitutional German Court 1956, on the electoral code of Baden-Württenberg: Entscheidungen des Bundesverfassungsgerichts. Vol. 4; Constitutional Court Decision 15, date 15.04.2010; Constitutional Court referred to Decision of the German Federal Constitutional Court, on the agreement between France and Germany, dt.4.5.1955.

interpretation of the relevant international law. Other times the courts have cited to international law instruments, along with mirror national provisions, stressing that they regulate the same way a certain domain. However, in most of these cases, the judges did not interpret the international law provision, but just cited to those acts and continued to interpret the national provisions. For example, in the High Court Decision No.4, date 24.06.2009 stated:

"Article 8 of the Universal Declaration of Human Rights and Article 13 of the European Convention on Human Rights, provide for an effective right of appeal against the courts’ decision. Moreover, in Article 2 of the International Covenant on Civil and Political Rights, member states are obliged to ensure, through competent judicial, administrative, or legislative authorities, the right of the individual to appeal, and create opportunities for his trial. The same approach is also held by the Albanian Constitution, which in its Article 43 provides that: “Everyone has the right to appeal against a court decision in a higher court, unless otherwise provided in the Constitution.”

Then the Joint Colleges of the High Court in this decision, continued to analyze the domestic provisions of the Code of Criminal Procedure, or article 43 of the Constitution, but without making any further connection to the international instruments mentioned, although in this case they were both international documents ratified by law and were integral part of the Albanian legal order.

There are very few cases in the Albanian domestic courts where the judges directly apply the international law provisions. In most of the cases they interpret domestic law in the light of international instruments, doing a consistent interpretation. Consistent interpretation is the principle that construes a rule of national law in the light of international law. On the other hand direct effect is the principle by which national courts apply a rule of international law as an independent rule of decision in the national legal order, when the rule is not transposed or not adequately so in the domestic order. With this regard, the domestic courts in Albania opt more for consistent interpretation than direct application; For example, the High Court in a Unifying Decision was summoned to make the legal interpretation of Article 3 (3) of the Criminal Code. The High Court ruled:

This conclusion was reached by the Unifying Colleges, through the interpretation of the meaning of the content of Article 3 provision of the Criminal Code and, in particular of its third paragraph… in relation to the constitutional imperative, the [principle of] retroactivity of a more favorable law, stemming from the content of paragraph 3 of Article 29 of the Constitution of the Republic of Albania and the general spirit and the meaning of Article 7 of the European Convention on Human Rights. [Emphasis added]

54 See: The Constitutional Court Decision no. 12, date 15.04.2011 citing to articles 3, 9/3 dhe 10/2 of the Convention on the Rights of Children, regardint the highest interest of the child; Constitutional Court Decision No 14, date 17.04.2007, citing to article 15/1 of the UN International Covenant on the Civil and Political Rights; Constitutional Court Decision No.16, date 11.11.2004 citing to article 19 of the Universal Declaration of Human Rights, aproved by the UN General Assambly with the 217 A (III), date 10.12.2948; Constitutional COURT Decision No.25, date 05.12.2008, the Explanatory Memorandum on the European Charter on the Statute for judges and the European Charter on the Statute for judges of the Council of Europe; High Court Decision No.5, date 12.12. 2013 citing to point 1.4. of the European Charter on the Status for Judges; High Court Decision No. 3 date 29.03.2012, citing to Art.6 of the European Convention of Human Rights.

55 High court decision No.5, date 15.09.2009 citing to Art. Article 8 of the Universal Declaration of Human Rights and Article 13 of the European Convention on Human Rights, provide for an effective right of appeal against the court decisions. Moreover, in Article 2 of the International Covenant on Civil and Political Rights; High Court Decision No.1, date 16.04.2004, citing to Article 6 of the European Convention of Human Rights; High Court Decision No. 3 date 29.03.2012, citing to Art.6 of the European Convention of Human Rights.


57 Betlem, Gerrit, ibid., op.cit.note 60.

58 High Court Decision No.4, 27.03.2003, p.3.
Recently, in the practice of the higher courts we see the tendency to make consistent interpretation of the national laws with the respective EU instrument that is transposed. This might sound a bit premature from our courts. However, even in this pre-accession stage there is stemming from Article 70 of the SAA an obligation for the courts to make a consistent interpretation with EU law of the laws that are enacted in the legislative framework of approximation. The harmonization process does not mean only law approximation, but also that these laws enacted with respect to the approximation agenda, are enforced and implemented properly. Therefore, it is the duty of the courts to interpret laws that are introduced through the implementation of a EU instrument in Albania, in the spirit of this instrument. (see further in PART D).

This part of the paper aims to bring the higher courts perspective on the application of different international law instruments, such as general principles of international law (C.2), ratified international agreements (C.3), non-ratified international agreement (C.4), the status of domestic laws that apply international agreements (C.5) and the status of the SAA (C.6). As it will be noticed by the court decisions brought in this section, the posture of domestic courts with all the international law is full alignment.

2. The Application of General Principles of International Law by Domestic Courts

Article 5, is part of the section “General Principles” of the Constitution. It stipulates that the Republic of Albania applies international law that is binding upon it. There is a split among the Albanian academics on this provision. Some authors say that Article 5 is not a stand-alone provision, and as such, should always be read in conjunction with other provisions of the Albanian Constitution related to the status of international law, such as 121, 122 and 123 (the narrow approach). Others, oppose this standing, saying that Article 5 is not merely declarative, but a legally binding provision that should be interpreted broadly.59 These second group of authors believe, that “binding international law” in this provision, is a reference not only to ratified international agreement stipulated in Art. 122 of the Constitution, but also includes other sources of international law such as customary law, generally recognized norms and principles of international law (the wider approach). According to Zaganjori despite the fact that international treaties are the most important international legal source, and although the most important international customary law is today mostly sanctioned in international treaties or other international instruments, there are some international customary principles that are not found in any international treaty.60 Norms of *ius cogens*, or other principles of customary international law i.e. prohibition of aggression, genocide, slavery, racial discrimination, etc., are considered to have a superior status compared to other provisions of international law.61 Consequently, Zaganjori supports the argument that constitutional and ordinary courts should consider the application of Article 5 independently from other articles of the Constitution related to international agreements. In fact, the second wider approach of Article 5 is affirmed by most of the scholars as the proper one.62 And the same wide approach is supported even by the higher courts judicial practice. In both cases no. 186/2002 on the International Criminal Court Statute63 and case 65/199964 on the abrogation of death penalty in the Albanian Criminal Code, the court seem to go

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59 See: Anastasi, Aurela "Internacionalizimi i se drejtes Kushtetuese: Klauzolat e Integritit të Shqipërisë; Zaganjori, Xhezair, "Vendi i së drejtës ndërkombëtare në Kushtetutën e Republikës së Shqipërisë", botuar në "Jeta Juridike", nr.2, shkurt 2004.
60 Zaganjori, Xhezair. Vendi i së drejtës ndërkombëtare…","ibid., p. 31.
61 Zaganjori, Xhezair Vend i së drejtës ndërkombëtare…","ibid.
62 Omari, Luan and Aurela Anastasi, E Drejta Kushtetuese, op.cit., pg. 56; Zyperi, Gentian and Semir Sali, 'The Place and Application of International Law in the Albanian Legal System', op.citi.ibid. pp. 1, 3.
63 Constitutional Court Decision No.186, date, 23.09.2002.
against the narrow approach, although did not mention article 5 explicitly. In decision no. 186/2002 the Constitutional Court said:

“In this case, the Constitutional Court considers it necessary to express that, while under the Constitution the generally accepted rules of international law are part of domestic law, then the lack of immunity in international criminal proceedings for certain crimes of high risk becomes part of the Albanian legal system.”

Also in decision No.65/99 the Constitutional Court said:

“According to the principles of international law, which are fully reflected in the new Constitution, states as subjects of this right are obliged to fulfill all the commitments that they have undertaken to achieve. Otherwise, in case of failure to fulfill these obligations and international commitments, the respective states will not be able to evade responsibility (…)”

In fact, in both decisions the Constitutional Court, did not cite explicitly to Article 5 of the Constitution, but it is clear that the reference is to this Article.

However, in Grori case both the High Court and even the Constitutional Court not only opted for the broad approach of Article 5, but also applied directly principles of international law in the given case. The reasoning and display of the status of the international law general principles in the Albanian domestic system in these court decisions are very particular.

The applicant, A. Grori requested the Albanian court not to validate and enforce a foreign court decision against him, because there was no bilateral agreement between Albania and Italy for the validation of foreign criminal decisions. Moreover, he claimed that Italy was not a party to the European Convention on the International Validity of Criminal Judgments.

The High Court ruled that in situations where no ruling could be given on a specific issue, because the relevant provisions were inadequate, a legal basis could be provided by general principles of international law, namely the principle of good will and reciprocity, or treaties. Since in the case at issue, the requirement laid down in Article 514, point (e), of the Criminal Code of Procedure was inadequate, the High Court considered that the European Convention on the International Validity of Criminal Judgments and the European Convention on the Transfer of Sentenced Persons provided a sufficient basis for the validation and enforcement in Albania of the foreign court judgement.

Moreover, the SC said:

“….During the examination of the case, the appellant’s counsel stated that there is no bilateral agreement between Albania and Italy as regards the validity and enforcement of criminal judgments. They maintained that such an act would impinge upon the sovereignty of the Albanian state, which is exercised by the Parliament through the ratification of an international or bilateral agreement. This claim is unfounded. The Albanian Parliament manifested its sovereign will through the enactment of the Criminal Code of Procedure, whose provisions at issue should be applied in accordance with their meaning and the unified interpretation of the High Court as outlined above.

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65 Constitutional Court Decision No. 65, date 10.12.1999, p. 3.
66 Constitutional Court Decision No. 65, date 10.12.1999, p. 3.
67 High Court Decision No.1, date 30.1.2003, p. 8.
68 High Court Decision No.1, date 30.1.2003, p. 9.
It must be emphasize that, in case of absence of legal instruments that are signed and ratified, the recognized principles of international law can be applied, through the spirit of good will and reciprocity...”69[Emphasis added]

The appellant challenged the SC decision before the Constitutional Court, arguing a violation of the constitutional due process of law. The Constitutional Court affirmed the position of the Joint College of SC and again reinforced the direct applicability of recognized principles of international law, with special focus to the reciprocity principle. The Constitutional Court argued the following:

“This Court maintains that the arguments given in the decision of the Joint Colleges of the High Court are not incompatible with the Constitution or the [international] conventions. The reciprocal recognition of judicial decision serves to enhance judicial collaboration between the countries and to achieve objectives related to freedom, security and justice. The principle of reciprocity presumes the application of mutual legal instruments in the relationship between states. In international law, reciprocity means the right for equality and mutual respect between the states. The doctrine and the international practice have confirmed that in the absence of a bilateral treaty the cooperation between states in the criminal law area can be achieved through the principle of reciprocity.

The principle of reciprocity is generally applied via international instruments such as international treaties, where mutual rights and obligations are defined. However, in specific circumstances, in the absence of these agreements, states are not forbidden to directly apply the principle of reciprocity, the recognized principles of international law and the goodwill. Their application serves to strengthen cooperation between states in the fight against organized crime and the criminality in general”70

After this decision from the Constitutional Court the applicant challenged both higher courts decisions before the European Court of Human Rights. Contrary to the decisions of the two higher courts in Albania, the ECtHR did not affirm the application of the reciprocity and good will principle in the given situation. According to the ECtHR, the application of this principles did not meet the "qualitative components of the "lawfulness" requirement, as regards the applicant's detention and the conversion of the sentence imposed by the Italian courts" and therefore was contrary to Art. 5(1) of the ECHR.71

The decision of the ECtHR does not mean that the courts should never apply general principles of international law directly, or that the broad reading of Article 5 of the Albanian Constitution is wrong, but merely that this interpretation should not be contra legem. Article 5 of the European Convention of Human Rights, which is part of our domestic legal system, requires that the detention of a person and the sentence against him should be in accordance with a procedure prescribed by law. In this case, the ECtHR refused to consider "law" the general principles of international law. This is because, in the given circumstances the applicant could not be able to foresee, to a degree that was reasonable, that his detention and the conversion of the sentence imposed by the Italian courts, was in accordance with a procedure prescribed by domestic law.72 Therefore, the courts should not have used the reciprocity and good will principles in this case, to enforce the Italian sentence against the

69  High Court Decision No.1, date 30.01.2003, ibid.
70  Constitutional Court Decision, No.13, date 12.7.2004, p. 4.
applicant. This case was a very good attempt by both courts to apply broadly Art.5 of the Constitution and also give direct effect to principles of international law, however as the final verdict shows, they should be careful not to apply these principles contra legem.

3. **The Supremacy and Direct Applicability of Ratified International Agreements by Domestic Courts**

3.1. **The Supremacy of International Law from the Perspective of Domestic Courts**

Article 122(1) clearly provided that in case of conflict between the domestic law and the ratified international agreement, the provisions of the ratified international agreement should prevail. What will the judge do in case of conflict?

The judge hearing the case should not apply the domestic law, but instead the provisions of the international agreement. This is affirmed by the Decision No.1, date 30.1.2003 of the Joint Colleges of the High Court. The Joint College held that:

"the ratified international agreements have supremacy over the laws of the country and therefore in case of incompatibility, the courts should apply the provisions of the international agreement, and not the provision of the conflicting domestic law."73

Thus, the ordinary judge in accordance with Art. 122(2) shall not apply the domestic provisions conflicting international law. However, the ordinary judge have no competence to declare these domestic provisions void (v.supsra, Part B). It is the Constitutional Court that has the competence to declare void normative acts that are not compatible with an international agreement, the ordinary judge should just not apply conflicting domestic law.

3.2. **The Direct Applicability of Ratified International Agreements from the Perspective of Domestic Courts**

Most of the cases of direct applicability of ratified international agreements before the Albanian courts are those concerning the application of the European Convention of Human Rights. There are not many other occasions where the courts have applied directly a provision of international law as an independent legal basis to resolve a dispute. However, an interesting case to mention in this regard is the SC Decision No.6 date 01.06.2011.

The case concerned an application for the recognition of a foreign arbitral award in Albania. The Court of Appeals rejected the recognition of this award and the case was appealed before the High Court. The SC delivered the case to the Joint Colleges who had to decide on some important legal issues regarding the recognition of decisions given by foreign arbitral tribunals. The Court recognized as the relevant applicable law of the case, the provisions of the Civil Code of Procedure, and article 2-5 of the *New York Convention for the Recognition of Foreign Tribunal Awards*. The SC after citing to Article 4 and 5 of the NY Convention and other relevant provision of the Civil Code of Procedure, held that Art. 4.1. (b) (of the NY Convention contains another requirement for the application on the recognition of a foreign arbitral award. According art 4(b)(1) in the application before the court where it is asked the recognition of the award, the applicant must attach an “original written agreement between the parties that defines which court shall have jurisdiction in case of conflict... or a copy of it duly certified” The SC said:

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“In the Civil Code of Procedure there is no such requirement for the admissibility of the application before the court. However, the provision contained in the international agreement, namely art. 4(1)(b) of the New York Convention, according to Art. 122 of the Constitution, prevails and has direct application."  

The SC held that this requirement is very important, because it is on the basis of the agreement between parties that it’s defined which court will have the jurisdiction to judge the case. If the parties did not agree to give jurisdiction to a foreign arbitral tribunal, than it is the domestic court that has jurisdiction to judge the case. The SC remanded the case for retrial to the court of appeal ordering the court to examine whether there is an agreement between the parties, basically whether the condition of article 4(1)(b) was fulfilled.

Another case where the SC applied international law provisions aside to national provisions to settle a case, was the Chemonics case. Here, one of the main issues was a clause in an employment contract between Chemonics and its employees that gave jurisdiction to the Albanian courts to judge conflicts arising from the employment relationship. Chemonics, an American company established in Delaware, which had won a contract with USAID, a US government agency, regarding the implementation of a certain project, challenged the jurisdiction of the Tirana District Court, claiming that on the basis of an international agreement between the US and Albanian Governments, it enjoyed immunity from civil liability before Albanian courts. The legal issue was whether the clause in the employment contract, which gave jurisdiction to the Albanian courts, would be considered as a waiver of immunity or not. The High Court acknowledged that in order to judge about the waiver of immunity of Chemonics in a an employment dispute, it should asses the regulation of both Article 39(a) of the Civil Code of Procedure and Article 32(2) of the Vienna Convention on Diplomatic Relations. The High Court assessed that the stipulation in Article 39(a) of the Civil Code of Procedure and 28 and 32 of the Vienna Convention on Diplomatic Relations, sanction the same principles. Then the High Court said:

Despite the fact that none of the agreements/laws above formally defines the act of a waiver, all [the provisions] converge in the same point, that only where the will of the subject to waive immunity is clearly expressed, the issue will fall under the jurisdiction of the courts in Albania.

The court did not make any specific interpretation to Art.32(2) of the VCDP, however it is clear that the court, to reach the above conclusion, used both the text of the international agreement and national law. Thus the above cited paragraph is a merge of the conditions set in the international and national provision: Article 32(2) of the VCDR says that: "a waiver must always be express". Article 39(a) of the Civil Code of Procedure says that "Members of diplomatic representations located in the Republic of Albania are not subject to the jurisdiction of the Albanian courts, except when: a) accept voluntary". However, although the court used both the national and international provision to solve the issue, the latter seems to "leave the scene" when the court gave its final verdict on the case. The High Court ruled:

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74  High Court Decision No.6 date 01.06.2011, para 36.2.
76  G.Zyberi and S.Sali, op.cit., p.11.
77  High Court Decision No8, date 10.06.2011, para.18. The Vienna Convention of Diplomatic Relations is part of the Albanian legal system since it is ratified by law no.7164 date 10 October 1987.
78  High Court Decision No8, date 10.06.2011, para.20.
79  High Court Decision No8, date 10.06.2011, 21.
“For all said above, the United Chambers of the High Court concludes that, when in an employment contract between the above parties… it is determined that to resolve the disputes arising from an employment relationship, the parties can bring the case before the Albanian courts, such a thing would be considered as a voluntary acceptance of the jurisdiction of the Albanian courts, in the sense of Article 39/a of the Code of Civil Procedure. Said that, referring to the concrete case, the United Chambers of the High Court orders that the Decision of Tirana District Court, Act nr.4088, date 12.04.2010 be upheld.”

Thus the court basically decided that the special clause in the employment contract to transfer the case under the jurisdiction of the Albanian courts, is an expressed waiver (Art.32(2) VCDR), that shows that parties accepted voluntarily the jurisdiction of the Albanian Courts (Art.39(a) CCP). Even though, it did not mention explicitly Art. 32(2) VCDP at the final verdict, it is clear that it applied the international instrument to construe the content of the national provision in order to solve the case.

Regarding the direct applicability of international law, a question it is posed both in theory and practice: what if the ordinary national judge do not apply the ratified international law, or apply it wrongfully? Does the Constitutional Court have the right to review the case on this basis?

The Constitutional Court made has it clear it does not review how the ordinary judges apply the law, whether the ordinary judge applies or not an international agreement in a specific case at a trial, because it is within the ordinary judge prerogatives and discretionary powers to choose which law to apply to solve a case on its merits. However, the Constitutional Court will review the application of the (international) law by the ordinary judge, when there is a claim that its application infringes citizens’ right for a due process of law. The Constitutional Court in its decision No. 35, date 25.07.2011 reaffirms its set case law on this regard. In the case at issue the applicant claimed that the court did not apply the European Convention on Children’s Rights, which is ratified by the Republic of Albania. As such the applicant alleged infringement of the principle of rule of law before the Constitutional Court. The Constitutional Court replied that:

“The Court finds that the claim of the applicant, on the bad application of the European Convention “On Children’s right”, is related to aspects of the application of the material law by the ordinary courts… In this regard, the Court recalls its consolidated practice, where the claims on the application of the material law are deemed within the judicial review of the ordinary courts that resolve the case on its merits, except when the Court finds infringements of the constitutional standards for a due process of law.”

3.3. A Short Remark

The supremacy and direct applicability of the ratified international agreement may sound very familiar with the principles of supremacy and direct effect of EU law. However, we should note that there are big differences of these concepts as they stand in EU law, compared with the articles 122(1) or 122(3) of the Albanian Constitution.

It is true that the obiter dictum in decision no No.1, dated 30.1.2003 (v.supra 3.1), that a judge should not apply domestic law that conflicts with international law, is very similar with what the Court of Justice of EU has ruled in Simmenthal case. In Simmenthal, the CJEU ruled that when a national provision conflicts with a EU law provision, the national court must set aside the provision.

of national law, irrelevant from the fact if the national law was enacted prior or after the EU law.\footnote{C-106/77, Amministrazione delle Finanze dello Stato v. Simmenthal Spa [1978], ECR 585, para. 14, 16, 21, &24.} However, we should keep in mind that in EU law, supremacy does not mean only supremacy of the primary legislation (EU treaties) that are ratified by law, but also supremacy of the secondary legislation such as directive, regulation or decisions enacted by the legislative bodies of the EU. On the other hand the Albanian constitution extends the supremacy only over the ratified international treaties, or to the secondary legislation of international organizations, only when the accession Treaty directly foresees their direct applicability\footnote{In the European Union the supremacy and direct effect of EU law are not sanctioned at a Treaty level. Although with the Lisbon Treaty a step forward was made in this regards, by Declaration No.17 which expressly acknowledges that the 'treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the case law.(see: Declaration No. 17 concerning primacy. Retrieved from: http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/C2007306EN.01025602.htm. \textsuperscript{82})}. Although the Albanian Constitution with these paragraphs is very bend to respect international law supremacy, including EU law in the future- such as are called by some authors “the clauses of integration”\footnote{Omari, Luan, & Anastasi, Aurela, E Drejta Kushtetuese. Ibid.} - that is not enough to guarantee the respect of supremacy as known and developed by the Court of Justice of European Union (CJEU).

In this regard it is worth to make a distinction even between “direct applicability” of the international law and “direct effect” in EU law. First, the direct applicability derives from a specific constitutional provision, while direct effect is an independent characteristic of EU law, as ‘a new legal order of international law’. Direct applicability in Albania is provided in the constitution and is linked to a special characteristic of the international agreement, as the self-executing nature of the international agreement Art.122(1) of the Constitution (or a special provision in the international agreement for accession in an international organization which says that the agreement is directly applicable (Art.122(3)of the Constitution). On the other hand, in EU law, direct effect doctrine is a principle that is elaborated by the Court of Justice of EU; direct effect is a principle by which the courts apply an EU provision as an independent rule of decision in the national legal order, when the EU legal instrument is not transposed or not adequately so in the domestic order. A special provision of an EU instrument has direct effect, when the provision is clear, precise and does not ask for the intervention of the state. Thus, the direct effect is not related to characteristic of the act/agreement, but rather to the characteristics that a special provision manifests. Therefore, Article 122(1) and 122(2) are not enough to guarantee the respect of supremacy and direct effect of EU law as introduced by the CJEU.

4. The Application of Other International Agreements not Ratified by Law from the Perspective of Domestic Courts

Article 122(1) of the Constitution says that international agreements are made part of the domestic legal order upon ratification by law and publication in the Official Journal. Although non-ratified international agreements are not part of the Albanian domestic order and it is not binding, sometimes the domestic judges have referred to these agreements as sources of interpretation. Thus, the High Court, in interpreting Articles 512-518 of the Albanian Criminal Code of Procedure, said:

“The Council of Europe Convention ‘On the international validity of criminal judgments’ is signed by the state of Albania, but it is not yet ratified by the Parliament. As such this Convention cannot be considered part of the domestic legal system and cannot be directly applicable. However, the fact that this Convention is signed, as well as the provision that engages the Albanian government to acknowledge and respect the recognized principles and norms of international law, will be employed to understand, interpret and properly apply the provisions of the Criminal Code of

\footnote{C-106/77, Amministrazione delle Finanze dello Stato v. Simmenthal Spa [1978], ECR 585, para. 14, 16, 21, &24.}
Procedures, related to the case in issue. These provisions cannot be interpreted differently, but only within the meaning and the content of the recognized principles and norms of international law and international conventions.”

Not only the international agreements that are signed, but not yet ratified, are used to interpret the domestic legal norms, but even those international agreement that are neither signed, not ratified can be used to construe the content of a domestic provision. Thus, in its Decision No. No. 2, date 27.03.2012, the High Court had to interpret the calculation of time limits of an application before a domestic court, mainly art. 148(1), 433, 444/1 and 444/2 of the Albanian Civil Code of Procedure. The High Court, in order to interpret the principle of *dias a quo* and *dies ad quem*, referred to the “European Convention on the calculation of Time-limits”, of the Council of Europe. The High Court said:

 [...] Even in this Convention (which is not ratified from our country) there are set time limits rules... Article 2 of the Convention provides that the term *dies a quo* means a day form which the time – limits starts, while *dies ad quem* term means the day on which the deadline expires.

According to Article 3 of the Convention, time-limits expressed in days, weeks, months or years will start from midnight *dies a quo* and will expire *dies ad quem*, at midnight. As described in the accompanying report of the Convention this paragraph follows the rule, which is accepted in most member states, the day on which the time-limits begins (*dies a quo*) should not be taken into account in the calculations, while the day in which it ends (*dies ad quem*) should be taken into consideration. The term midnight means the 24th hour; So the Convention provides that a time period expressed in days or in another partition of time, starts from the 24th hour of the *dies a quo*.”

As it is clear from the above-cited paragraphs, the High Court went through the provisions of the international instruments and explained their content, in order to give a proper interpretation of the national provision. Moreover, in this case the Joint Colleges of the High Court used an international agreement of the Council of Europe, which is neither signed, not ratified, and cited even to the accompanying report in order to interpret rules of the Civil Code of Procedure.

This is a very clear example of consistent interpretation, which shows again that the Albanian domestic courts have opted for a posture of alignment with regards to international law.

5. **The Status of the Domestic Law that Implements International Agreements from the Perspective of Domestic Court**

The odyssey of Kadi case (known in the Albanian jurisprudence the a as the Al Qadi case) is worth bringing as an example in this regard. This case shows at one hand that Albania is eager to respect and implement the obligations stemming from the integration and accession in an international organization, but on the other hand, the implementation of these obligations should not infringe fundamental principles of the Constitution, such as human rights. Respect for rule of law and fundamental principles form a ground that should not be threaten, even when the achievement of international obligations seem urgent, necessary or imperative.

As part of the United Nations, Albania ratified in 2002 the “International Convention on the Suppression of the financing of terrorism” of 10 January 2000. In order to implement the obligations
under the UN Convention to fight terrorism, in 2004 the Albanian Parliament enacted Law No. 9258, dated on 15.7.2004, “On the measures counter the financing of terrorism” 87 And Law No. 10192 “On the Prevention and Suppression of Organized Crime and Trafficking through Preventive Measures against Property” 88 In December 2004, the Minister of Finance issued an order for the sequestering of the assets belonging to Yassin Al Qadi. 89 The legal basis for this order was the “Law Against the financing of terrorism”; the law “On the ratification of the International Convention of the Suppression of financing terrorism” as well as the Council of Minister’s Decision No.718, dated on 29.10.2004 “On the list of the persons declared as financer of terrorism". The Order required the immediate sequestering of all the investments, bank accounts and assets, immovables belonging to, or that are in behalf of Yasin Al-Qadi, the ban of all the financial transactions, funds, assets. Furthermore, the Order required the sequestering of the assets and immovable belonging to legal persons related to Yassin Al-Qaid such as, “KARAVAN Ltd, “Alintid Beton”, “Camel”, “Albanian International Investment Development” etc.90

In 2005 this Order was impugned before the Court of First Instance of Tirana. The plaintiff, “Albanian International Investment and Development” (hereinafter referred to as AIID), alleged before the Court of First Instance the partial annulment of the Minister’s Order by arguing that there is no connection between the company and Yassin Qadi.91 The Court of First Instance declared it had no competence in judging the case and decided the case to be judged by the High Court. The Civil College of the High Court,92 first held that article 17 of the Law On the measures counter the financing of terrorism, could not be used by the plaintiff since it covers only the situations concerning the temporary freezing of assets and not their sequestering, such as the case at issue. Secondly, according to article 19 of the Law On the measures counter the financing of terrorism, a person can challenge the Council of Ministers’ Decision before the Court of First Instance, only when he/she alleges that he is wrongly identified as the person declared as terrorist or financing terrorism, and this was not the matter of the case at issue. Furthermore, as ruled by the High Court, it was not the competence of this Court to decide, based on Article 324 of the Civil Procedure Code, on the legitimacy and the compliance of the Minister’s orders with the normative acts in power. Based on these arguments the High Court ruled the case out of its jurisdiction.

AIID impugned the High Court Civil College’s decision before the Constitutional Court in 200793. The applicant alleged that the High Court decision, by putting the case out of its jurisdiction, infringed their constitutional right for a fair process, guaranteed by article 42 of the Albanian Constitution and Article 6 of the European Convention for the Protection of Human Rights. The Constitutional Court accepted the applicant’s arguments. The Constitutional Court said that The Civil College decision, by bringing the case out of its jurisdiction, infringed constitutional provisions as well as

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87 The aim of this law is the prevention and fight against terrorism and to block those that support and finance terrorism. The law is in compliance with the resolutions of the United Nations Security Council. For the implementation of Law “On the measures counter the financing of terrorism”, the Council of Ministers enacted decision No. 140, dated 13.2.2008 “On the administration of the immovable sequestered in the ambit of fight against the financing of terrorism”. According to this Council of Ministers Decision, the administration of the immovable sequestered, belonging to persons declared as financier of terrorism, is done by the Agency for the Administration of the Confiscated and Sequestrated Properties. The real estate inventory is made by a commission, created by an order of the Minister of Finance, composed by an administrator appointed by the ACSP, a representative of the Ministry of Finance and a representative of the group that made the sequestering.


90 Order, No.2, date.03.12.2004, ibid.

91 High Court Decision (Civil College) No.1036, Dated On 23.06.2005.

92 High Court Decision (Civil College).No.1036, date 23.06.2005.

93 Constitutional Court Decision, No.10, date 04.04.2007, Official Journal No, p. 1175.
other legal provisions. It ruled that the decision of the Civil College of the High Court infringed the constitutional standards for a fair process of law, in the aspect of denying to the applicant the right of access to court. In 8.05.2007 the High Court re-examined the case in the light of the Constitutional Court and acknowledged that the Court of First instance had erroneously applied the law (Civil Procedural law) and brought back the case to the Court of First Instance for re-trial.

Thus, we may see at first the domestic courts in the Al-Qadi case being “hesitant” to review the legality of acts that were enacted to implement the UN Resolution to fight terrorism. Both the court of First Instance and the High Court used an avoidance technique, such as bringing the case out of their jurisdiction, in order not to judge upon the Order No.2 on the Financing of Terrorism. The Constitutional Court assessed that the High Court erroneously brought the case out of its jurisdiction and this attitude of the courts was a denial of the applicant’s right for a due process of law. This is an assurance that the fundamental principles of human rights are the highest values in the pyramid of legal norms and should always be respected, despite of the international obligations Albania undertakes in the international arena.

6. The Stabilization and Association Agreement before Domestic Courts

The Stabilization and Association Agreement between the EU and Albania was signed in 2006 and entered into force in 2009. This agreement was ratified by law as provided by article 122(1) of the Constitution and published in the Official Journal. As such, it is part of the internal legal order and it has supremacy over incompatible domestic law. A request for review of the compatibility of the SAA with the Albanian Constitution prior to its ratification has not been presented to the Constitutional Court. Therefore, it must be presumed that the SAA is an international agreement compatible with the Albanian Constitution.

With regard to the direct applicability of the SAA, only several months after its entry into force, the Albanian Constitutional Court was asked to apply the provisions of the SAA directly in a case of a conflict between the SAA and an internal normative act. The Council of Ministers issued Decision nr.1110, date 30.07.2008 “On the quality of diesel fuel, produced from the refining of domestic crude oil”, which granted D1 fuel, produced from refining crude oil traded within the territory of Albania, more favorable conditions than imported oil. The Albanian Competition Authority, recommended to the Council of Minister to declare void Decision No.1110, because it distorts competition between undertakings operating in the market. After the recommendation, the Council of Ministers issued Decision No. 52, date 14.01.2009 “On the quality of diesel produced from the refining of domestic crude oil, traded for road vehicles and generators”. With this Decision, the Council of Ministers repealed Decision No. 1110, date 30.07.2008, but some of the provisions of the repealed decision, were incorporated in Article 6 and 7 of Decision no. 52. The applicant challenged Decision No. 52 of the Council of Ministers before the Constitutional Court and alleged that it was incompatible with the Constitution and with the Stabilization and Association Agreement.

94 The Constitutional Court, No.10, date 04.04.2007, pg.: “Namely, it infringes articles 324 and 325 of the Civil Procedural Code, which provides that the lawsuit for the annulment or the amended of an administrative act is within the competence of the administrative sections of the Court of First Instances. The decision infringed also article 22 of the Law no. 9258, dated on 15.07.2004 “On the measures against financing of terrorism”, where it is provided expressis verbis the right of appeal in the Court of First Instance for the interested persons or the parties being in good faith...The Civil College of the High Court, ruled that the plaintiff did not alleged to be a person in good faith as provided by law, meanwhile, by the administration of the judicial materials, clearly results that this was stated by the plaintiff in the lawsuit before the Court of First instance, as well as in the recur before the High Court”.
95 High Court Decision (Civil College), No. 610, dated on 08.05.2007.
97 Constitutional Court Decision No. no. 24, date 24.7.2009.
The Court ruled that the provisions of the decision of the Council of Ministers were not compatible with the Stabilization and Association Agreement, namely Article 3398 therefore must be abrogated. The Constitutional Court argued that the normative decision of the Council of Ministers established a privileged position for the domestic products while imposing new rules for the import of diesel D2 and D1 and restricted its trading. The new rules would have a direct influence on the products imported from the member countries of the European Community, restricting thus the trade between Albanian and the European Community.

Regarding the Council of Ministers allegation that this restriction was allowed by Article 42 of the SAA99, the Court said:

“The Court reached the conclusion that the challenged Decision is not within the derogations provided by Article 42 of the SAA, because the interested subject did not prove that the decision in issue is taken for any of the justified reasons provided in the first part of the Article, and also they did not argue that this decision is not an arbitrary discrimination on trade between the European Community and Albania. Said that, Decision no. 52, date 14.01.2009 of the Council of Ministers is not compatible with the Stabilization and Association agreement, namely Article 33 and 42...” 100

This is the first time in the domestic practice that the SAA is object of a dispute before the Constitutional Court. However, Constitutional Court did not grant in this decision any special status to the SAA within the Albanian domestic order. Moreover, the court did not elaborate the notion of quantitative restrictions or measures having equivalent effect with quantitative restrictions, or the objective justifications. Neither did the court refer to the interpretation of the corresponding Article 34 TFEU and 36 TFEU, which are “consubstantial norms”, to make a consistent interpretation of these categories. However, this is a pivotal decision since it is for the first time the Constitutional Court applied directly SAA provision to resolve the case at issue.

D. The Application of EU Legislation by the Domestic Courts in the Pre-accession Stage

Lately there is a tendency, mainly from the higher Courts, to interpret the laws that are enacted in the legislative framework of approximation, with the respective EU instruments (directive, regulations) with which that harmonization is done. Thus, courts have used EU law to construe a specific domestic provision101 or to define its content102. This might sound pretty advanced from our courts to make a harmonious interpretation of the domestic law with the EU law, having in mind that Albania is not a EU member state yet. In the European Union, it was the Court of Justice of EU (CJEU) that articulated this principle for the first time in 1983, in Von Colson case. Here the CJEU ruled that:

“[…] in applying the national law and in particular provisions of a national law specifically introduced in order to implement Directive No. 76/207, national courts are

98 Article 33(2) SAA “From the date of entry into force of this Agreement no new quantitative restriction on imports or exports or measure having equivalent effect shall be introduced, nor shall those existing be made more restrictive, in trade between the Community and Albania”.

99 Article 42 Restrictions authorized: “This Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property, or rules relating to gold and silver. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties.


101 High Court Decision No.2, dated 27.03.2012, Official Journal, No.106, where Regulation (EEC, Euroatom) no. 1182/71 of the Council, was used to interpret some provisions of the Civil Code of Procedure.

102 Constitutional Court Decision No. 48, date 15.11.2013, where Directive 2000/78 was used to construe terms such as “excessive burden” and “reasonable accommodation” in the Albanian Law Against Discrimination.
required to interpret their national law in the light of the wording and purpose of the Directive…

…It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law” 103

Moreover, with *Marleasing* the CJEU made it clear that “in applying international law, whether the provisions in questions were adopted before or after the directive, the national courts called upon to interpret it is required to do so as far as possible, in the light of the wording and the purpose of the directive in order to achieve the results pursued by the latter…” 104

However, Albania is not a member state yet. Where does the courts draw the “inspiration” or the legal basis for doing a consistent interpretation with EU law in this stage of pre-accession? We can read the duty for a harmonious interpretation in the SAA between EC and Albania. Firstly, there is set an obligation in the general harmonization clause, Article 70(1) of the SAA. This Article says:

“[…]Albania shall endeavor to ensure that its existing laws and future legislation shall be gradually made compatible with the Community acquis. Albania shall ensure that existing and future legislation shall be properly implemented and enforced”

This paragraph makes it clear that the harmonization process does not mean only legislative approximation, but also proper implementation and enforcement of the harmonized laws. This means that both the public administration which implement laws and the judiciary which enforces them, shall do it in the spirit of EU instruments, with which the law are harmonized. Making a harmonious interpretation before acceding to the EU, especially for those laws that are harmonized with a specific EU instrument, serves to the principle of legal security; the courts will have a consistent and coherent interpretation of a certain provision before and after the accession, and this will meet the legitimate expectations of the citizens towards how a certain provision is applied. However, yet judges should also pay attention to the limitations of the principle of consistent interpretation. Domestic courts cannot make a consistent interpretation of the domestic law with the EU law, if this interpretation is *contra legem*, or infringes the principles of legal certainty and non-retroactivity. 105 Secondly, there is a specific harmonization clause in the SAA which calls for the direct application of the EU law, and recognition of the practice of CJEU, even before accession. Article 71(2) of the SAA provides that that in the sphere of competition and state aid any practice must be assessed on the basis of the criteria arising from “the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions.” This means that with regards to the practices against unfair competition, or state aid that distorts competition, the respective authorities in Albania (courts included) should refer not only to the relevant articles in the TFEU, but also to the practice of the CJEU, since the Court has the exclusive authority to interpret the Treaties, or any notice or opinion of the Commission on the application of these articles. And to conclude, I will bring the « cherry on the cake »: Article 126 of the SAA. This article establishes the principle of mutual and sincere cooperation between EU and Albania. It says that ‘the Parties shall take any general or specific measures required to fulfill their obligations under this Agreement. They shall see to it that the objectives set out in this Agreement are attained.’ This once again bring in our

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attention that the fulfillment of the objectives under the SAA, does not rest only in the shoulders of the legislative, but all the branches of the government, even the public administration (central/local) and the judiciary.

In some latest decisions of the higher courts it is easy to define the tendency to make consistent interpretation with secondary law of the EU, mainly Directives or Regulations. However, going through the lines of these decisions, you cannot obviously notice, that the reference to EU acquis, derives from the SAA obligation for harmonious and consistent interpretation with EU law. As the results of the research will show, the courts in Albania did only implicitly articulate that there is a duty for the courts to use EU acquis to interpret the respective transposed EU instruments; we can see courts in certain cases tacitly doing a harmonious interpretation of domestic law with the respective EU instrument which was transposed, or mentioning that there is a need to refer to EU law which was transposed, or mentioning Article 70 of the SAA in an obiter dictum. However, Article 70 et al of the SAA are not yet made subject of a proper interpretation from the higher courts.

The High Court and the Constitutional Court in this stage of pre-accession has made different attempt to refer to related EU acquis, as a source of interpretation. This legal attitude seems to follow the obligations provided in Article 70106 of the SAA. According to this Article, “starting by the date of signing this Agreement, existing laws and future legislation in Albania shall be gradually made compatible with the Community acquis. Albania has the obligation moreover to ensure that existing and future legislation shall be properly implemented and enforced.” Mostly in these three recent years, we can track this task being accomplished even from the judiciary.

1. The High Court Perspective

At least in two cases found so far, the High Court has used an EU regulation in order to interpret domestic law. Interesting in first case107, is that the law which was subject of interpretation was not one enacted in the framework of legislative harmonization with EU, instead it was the Civil Code of Procedure108, enacted years before the entering into force of the SAA. In fact, when you read the decision, it is clear that the High Court refer to EU Regulation, just as another international agreement, not giving any special status to the EU acquis for an harmonious interpretation. The High Court in order to interpret the principle of dies a quo and dies ad quem, used two international agreements that are not part of the Albanian legal order: first to the “European Convention on the Calculation of time-limits”, a convention of the Council of Europe and second, to the “Regulation (EEC, Euratom) No 106  Article 70 of the SAA:

1. The Parties recognize the importance of the approximation of Albania’s existing legislation to that of the Community and of its effective implementation. Albania shall endeavor to ensure that its existing laws and future legislation shall be gradually made compatible with the Community acquis. Albania shall ensure that existing and future legislation shall be properly implemented and enforced.

2. This approximation shall start on the date of signing of this Agreement, and shall gradually extend to all the elements of the Community acquis referred to in this Agreement by the end of the transitional period as defined in Article 6.

3. During the first stage as defined in Article 6, approximation shall focus on fundamental elements of the Internal Market acquis as well as on other important areas such as competition, intellectual, industrial and commercial property rights, public procurement, standards and certification, financial services, land and maritime transport – with special emphasis on safety and environmental standards as well as social aspects – company law, accounting, consumer protection, data protection, health and safety at work and equal opportunities. During the second stage, Albania shall focus on the remaining parts of the acquis. Approximation will be carried out on the basis of a program to be agreed between the Commission of the European Communities and Albania.

4. Albania shall also define, in agreement with the Commission of the European Communities, the modalities for the monitoring of the implementation of approximation of legislation and law enforcement actions to be taken.

107 High Court Decision, No.2, dated 27.03.2012, Official Journal, No.106.

1182/71 of the Council of 3 June 1971 “Determining The Rules Applicable To Periods, Dates And Time Limits”. The Court said that:

“The Joint Colleges of the High Court, regarding case at issue, finds it proper to refer to the international acts that regulate the calculation of time limits. One of these instruments is the “European Convention on the calculation of Time-limits”, Basle, 16.5.1972, CETS No. 076), which aims to harmonize the laws of different member states of the Council of Europe on this matter...

(...)The same regulation is stipulated in “Regulation (EEC, Euroatom) No. 1182/71 of the Council, date 03.06. 1971, Determining The Rules Applicable To Periods, Dates And Time Limits”, which is applicable for acts of the Council or the Commission, that implement the Treaty for the Establishment of EEC and the European Community of Atomic Energy.

(...)The Joint College of the High Court notices that it is a general accepted rule that dias a quo principle, is not calculated in the time limit within which an event has happened or an act accomplished...

Thus the High Court used both these two legal instruments of international law in order to support its interpretation of Article 148, 433 and 444/1 of the Civil Code of Procedure. In this case the High Court used a Convention of the Council of Europe, where Albania is a member state, but which is neither signed, nor ratified by Albania, as well as a legal instruments from EU, in which Albania is not a member state yet. With this regards, we see the High Court in a full alignment position with international law, since in order to construe the domestic law, it refers not only to obligatory international instruments, but even to those that are not part of the domestic legal order.

The second case is not a unifying decision as the one above, but rather a case from the Civil College of the High Court.110 Here the court had to rule on the issue whether it is under the Albanian courts’ jurisdiction, to review an application for interim injunction, when the parties have an agreement, in which the jurisdiction to review the conflict arising between them rests in another jurisdiction. In this case, the court referred to a regulation of the EU, as well in the practice of other EU member states or non-EU member states.111 The Civil College said:

“In European Union member states courts are authorized to take interim relief, including protective measures for matters that will be judged by the court of another Member State. The above is provided in Article 31 of Council Regulation (EC) No.44/2001, dated 22.12.2000 (...) Despite the fact that our country is not yet a member with full rights into the European Union, directives (regulations) adopted by them are guiding for our legal practice”112 [Emphasis added]

We can infer from that the reason for this interpretation is related to the accession process; in other words, the EU acquis serves a guide for courts practice, because once Albania is a member state with full powers in the EU, the EU regulation shall be binding for the courts, thus the courts should make a consistent interpretation starting from the pre-accession stage. However, being this a dictum of a Civil College of the Supreme Court, it is not a unified path where courts are called to walk.

109 High Court Decision, No.2, dated 27.03.2012, Official Journal, No.106.
110 High Court, (Civil College) Decision No.22, date 11.01.2011, p. 125.
111 The Civil College do not mention specifically where it referred, but said “…if we refer to the private international law practice, we will find that in the EU member states, as well as in other countries which are non EU member states, it is allowed that the court, where the debtor has his own property and assets, take interim reliefs, including here protective measure such as the one at issue, an interim injunction” see High Court Decision No.22, date 11.01.2011, p. 125, para.1.
112 High Court (Civil College) Decision No.22, date 11.01.2011, p. 125.
Moreover, the interim relief are not part of the first harmonization agenda, so the courts do not have any obligation stemming from the reference of Art. 70 of the SAA. Six days after this decision, the High Court in a unifying decision released an obiter dictum that reflect the obligation of the courts in this pre-accession stage, expressed through the language of the Art. 70 of SAA Agreement. The High Court in decision No.1, date 17.01.2011 said:

"Today is of focal importance the process of approximation of existing Albanian legislation with the acquis communautaire. Albania shall ensure that the existing and future legislation be applied and imposed properly (Article 70 of the Law 9590, date 27. 07. 2006 "On the ratification of the Stabilization and Association Agreement between the Republic of Albania and the European Communities and its member states")  

Interesting is to notice that there is no specific reference in this decision to any EU law- the Court referred just to the ECHR and the ECtHR jurisprudence- but this dictum was a good light for other decisions in the future, where laws enacted in the framework of EU approximation process, were to be used by the courts as sources of interpretation. Unfortunately, this obiter dictum was not repeated any more so far, or made part of any ruling of the High Court decision, so we do not have yet any reading of these SAA provisions from this court.

2. The Constitutional Court Perspective

In Decision 3/2010, a Professional Organization of the Economists challenged before the Constitutional Court the compatibility of Law nr.10091, date. 05.03.2009, “On the statutory audits and the organization of registered accounting experts and chartered accountant” with the Albanian Constitution. The applicant claimed that the establishment of the Institute of the Registered Accounting Experts, as the only organization that gathers registered accounting experts, infringes the constitutional right to assemble, as well as the right to endorse economic activity, since only the registered accounting experts that are members of the Institute can exercise this profession. Among others, the applicant claimed that the Law does not fulfill the EU requirements of independence because the Institute is dependent from the Ministry of Economy and Justice. The interested party claimed on the other hand that the Law is enacted to implement the recommendations and directives of EU and is in compliance with the Eighth Directive of EU.

The Constitutional Court affirmed the arguments given by the interested party. The Constitutional Court acknowledged that the organization of the registered accounting experts, as provided in the Law, was similar with the regulations in most of the EU countries, as well in the other countries that aspire to become EU member states. Further the Constitutional Court analyzed the organization of the Institute in the light of the Eighth Directive. The Court said:

Article 3, second paragraph of the second point of the EU Eighth Directive provides that the professional organizations may be established by member countries, as the competent authority for the regulation and supervision of a profession. In this regard the role of the Institute, as a competent authority is just to regulate certain aspects of the profession because, as foreseen in the Law, the registration, license and its removal or the discipline is not under its competence, but in the competence of other independent institutions, where the Board of Supervision, plays the most

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113 High Court Decision No.1, date 17.01.2011.
114 Constitutional Court Decision No.3, dated 05.02.2010, Official Journal No.17.
115 Representative from the Parliament, Council of Ministers and the Institute of the Registered accounting experts.
116 Constitutional Court Decision No. 3, date 05.02.2010, p. 11.
important role. All these different authorities, make possible that the professionals give service of quality in the interest of the public.

Then the Constitutional Court addressed the issue of independence and again referred to the EU acquis on the statutory audits.\footnote{Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, Art.32.} The Court cited the content of Art. 32(1),(2) and (3) of Directive 2006/43/EC\footnote{1. Member States shall organize an effective system of public oversight for statutory auditors and audit firms based on the principles set out in paragraphs 2 to 7. 2. All statutory auditors and audit firms shall be subject to public oversight. 3. The system of public oversight shall be governed by non-practitioners who are knowledgeable in the areas relevant to statutory audit. Member States may, however, allow a minority of practitioners to be involved in the governance of the public oversight system. Persons involved in the governance of the public oversight system shall be selected in accordance with an independent and transparent nomination procedure.} and found ‘\textit{that the wording of Art. 4 of the Law challenged is compatible with the EU provisions.}’\footnote{Constitutional Court Decision No. 3, date 05.02.2010, p. 12.} This decision was a good opportunity of for the CC to express on the gradual harmonization of law in the pre-accession stage and make a reading for Article 70 of the SAA, since accounting is part of the first stage of approximation agenda.\footnote{Article 70(3) of the SAA reads: 3. During the first stage as defined in Article 6, approximation shall focus on fundamental elements of the Internal Market acquis as well as on other important areas such as competition, intellectual, industrial and commercial property rights, public procurement, standards and certification, financial services, land and maritime transport – with special emphasis on safety and environmental standards as well as social aspects – company law, accounting, consumer protection, data protection, health and safety at work and equal opportunities. During the second stage, Albania shall focus on the remaining parts of the acquis.}

Another good opportunity for the Constitutional Court to read Article 70 of the SAA provision was Decision No.8/2013.\footnote{Constitutional Court Decision No.8. date 08.03.2013.} The case concerned an application of the Central Commission for Elections, on the constitutionality of a referendum for the repeal of Article 22, paragraph 3, and Article 49 of Law “On the integrated waste management”\footnote{Law no. 10463, dated 22.09.2011.} The interested party, the Parliament said that the content of Article 22 is in compliance with the requirements of the environmental legal frameworks and specific objectives the Republic of Albania has for the implementation of Article 108 of the Association and Stabilization Agreement (SAA), and that the law has fully transposed Directive 2008/98/EC for wastes and partially other EU Directives.\footnote{Constitutional Decision No.8, date 08.03.2013 para. 6.3.} Also, the Council of Ministers as an interested party in the process, assessed that the law fully transposes Directive 2008/98/EC and partially Regulation 1013/2005 on the transferring of waste, drafted in compliance with Art. 108 of the Stabilization and Association Agreement.\footnote{Constitutional Decision No.8, ibid. para. 7.1.} The parties said that the repeal of the Articles as required by the referendum would substantially infringe the Constitution, namely article 59, point “d” and “dh”, as well as the international obligations that stem from article 6 of the SAA on the harmonization of legislation with the acquis.\footnote{Constitution Decision No.8.ibid. para 7.4.} These arguments seem to put pressure on the Constitutional Court to acknowledge in this stage of accession the special status of the SAA and the special obligations Albania has regarding law harmonization.

However, the Constitutional Court avoided to take a stance on this issue, saying that the actual object of the application is not the compatibility of the referendum with the Albanian Constitution and with international agreements, but merely whether the constitutional requirements for a referendum are fulfilled.\footnote{Constitutional Court Decision No.8 ibid, para. 27.} The Constitutional Court than ruled that there are no constitutional
obstacles for this referendum, without any further reference to the obligation of consistent interpretation and law harmonization.

One of the main important decisions of the Constitutional Court regarding consistent interpretation with EU law is Decision No. 48 date 15.11.2013. Here, the applicant challenged before the Constitution Court some provisions stipulated by Law No. 10221, date 04.02.2010 “On the protection against discrimination”. One of the claims was that the using in the law of terms like “excessive burden” or “reasonable accommodation” are discriminatory. The CC in order to interpret these terms referred to the law on ratification of the UN Convention on the Rights of Persons with Disabilities\(^\text{127}\) and EU Directive 2000/78. Interesting to note is that the UN Convention was ratified two years after the entering into force of the Albanian Law On The Protection Against Discrimination. Thus, the CC was judging in this case on the compatibility of an international agreement with laws that were in force before this agreements was ratified. We can infer from the CC in this decision, that the supremacy of ratified international agreement, does mean that not only the national legislation enacted after its ratification shall be compatible with it, but all the domestic legislation, including even those legal acts that where in force before the ratification of the agreement. On the other hand the Constitutional Court used EU directives in order to give an interpretation on “reasonable accommodation”. The Constitutional Court said:

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\text{Even Directive 2000/78 ... [in] Article 5 stipulates that to ensure the principle of equality in relation to persons with disabilities, “reasonable accommodation” must be provided. With this terminology, this Directive dictates that every employer shall take appropriate measures so that persons with disabilities be provided access, get involved, participate at work, unless such measures would constitute a disproportionate burden for him (the employer).\(^\text{128}\)}
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Even in this case the Constitutional Court did not refer to Article 70 of the SAA that encourages an harmonious interpretation, moreover when ‘equal opportunities’ is an item included in the first part of the approximation agenda. However, we can infer that the reason why the Constitutional Court used this Directive as a source of interpretation here, is because the Law On the Protection Against Discrimination has been harmonized with Directive 2000/78. The Constitutional Court said:

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\text{In this regard, Article 9/2 of Directive 2000/78 EC “On the establishment of the regulatory framework for equal treatment in employment relations”, with which the law is harmonized, stipulates that member States shall ensure that associations, organizations or other legal entities… may engage, either on behalf or in support of a complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive”\(^\text{129}\)[Emphasis added]}
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Although the Constitutional Court did not mention explicitly where and why this need for harmonious interpretation come from this decision should be congratulated for setting a pattern of interpretation, that when a domestic law is enacted in the framework of the EU law approximation, the domestic law should be interpreted in the spirit of the EU law with which it was harmonized.


\(^{128}\) Constitutional Court Decision No. 48, date 15.11.2013, para. 22.

\(^{129}\) Constitutional Court Decision No.48, date 15.11.2013, para.34.
E. Concluding Remarks

The Constitution of Albania opts for a monist system of international law. International law is binding for its domestic legal order and internally applicable. This Constitution moreover grants special status to international law, both supremacy over the domestic legal order and direct applicability, upon certain conditions being met. This opened and inviting approach to international norms in the Albania domestic legal system, may be seen as an attempt of this country to erase the isolated communist prints of the past, by establishing new features as a good partner and collaborator in respecting and protecting international law. In this pyramidal system of legal norms, the Albanian Constitution gives a special status to the European Convention of Human Rights (ECHR). Article 17 of the Albanian Constitution grants to the ECHR the same status of the Constitution, when restrictions of fundamental rights of individuals are at issue. This is the reason why the courts in Albania largely refer to the ECHR, when they judge upon domestic measures that may infringe the human rights. The Albanian courts moreover have acknowledged a special status even to the case-law of the European Court of Human Rights. Regarding the principle of engagement of domestic courts with international law, Albanian domestic courts are found in the full alignment position. There are different decisions where both the Constitutional and High Court refer to international law in order to draw some principles, or to interpret the content of a domestic provision. The higher courts in Albania refer not only to international law that is made integral part of the domestic system by ratification, but even to the soft law of the European Council, or to court decisions of other member states, in order to interpret national provisions. Lastly, we can mention the efforts made recently by the Albanian courts to make a harmonious interpretation of domestic legislation with the EU acquis in this stage of pre-accession. The harmonious and consistent interpretation derives from the Stabilization and Association Agreement between EU and Albania. Eventhough, SAA has not any special status in the Albanian legal order, the Constitutional has set an important precedent by directly applying the SAA provisions in a specific case. On the other hand, both in the practice of the High Court and Constitutional courts these recent years, there are some sporadic attempts to make a consistent interpretation with the EU acquis. However, we bring into attention that even where the higher courts used EU laws to interpret a domestic provision, neither did they distinguished EU law from other international law, nor did they acknowledge any duty over the courts to make a consistent interpretation as deriving from the Article 70 of the SAA. The integration process into the EU is a multi-dimensional process, that weights not only the legislator, but to the three branches of the government, where the courts of course have a major role to play.
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European Court of Human Rights:
PART 2
BOSNIA AND HERZEGOVINA

THE APPLICATION OF EU LAW IN BOSNIA AND HERZEGOVINA

Zlatan MEŠKIĆ*
Darko SAMARDŽIĆ**

Abstract

The complex state structure of Bosnia and Herzegovina makes it difficult to provide a comprehensive overview of the application of international legal sources in B&H. The application of international and EU law is a question of particular interest for B&H, as the Constitution itself is part of an international agreement. However, the Constitution does not give clear answers regarding the direct effect of international legal sources, their position in the hierarchy of laws in B&H or the specific position of EU law. Although the Stabilisation and Association Agreement did not enter into force, because B&H failed to implement the Sejdić and Finci judgment of the ECtHR, the Constitutional Court, the Court of B&H as well as regular courts have been inspired to apply EU law in a direct or indirect manner. Thereby they interpreted the market freedoms and the Competition Act in the light of the practice of the CJEU.

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Zlatan Meškić earned his degree Magister Juris at the Faculty of Law, University of Vienna in 2006. In Vienna he completed his doctoral studies in the field of European and Private International Law in 2008. He defended his dissertation on the topic “Europäisches Verbraucherrecht unter besonderer Berücksichtigung des Grünbuchs 2007”. Dr. Zlatan Meškić is professor of European Union law, European Private law and Private International law at the Departments for Civil law and State and International law at the University of Zenica, Bosnia and Herzegovina. He is a vice dean for scientific research and the chief editor of the Journal „Annals of the Law Faculty University of Zenica“. He is a member of the editorial board of the journal „Nova pravna revija“ (Sarajevo), „Evropsko pravo“ (Skopje) and the SEE Law Journal (Skopje). He is a scholarship holder from the Max-Planck Institute for Comparative and Private International Law. He is author of two books and several articles.

Darko Samardžić earned his Ph.D. in 2009 in Hamburg, Germany in the field of Constitutional and European Law. He is a professor of European Union Law at the Department for State and International Law at the University of Zenica (Bosnia and Herzegovina). In the years 1999 through 2005 he worked as an assistant officer at the Houses of Parliament of Hamburg, Germany. From 2005 to 2007 he worked as Assistant to the professor of Public Law/Eastern European Law, University of Hamburg and was a lecturer for European and International Law at the “Repetitorium Jura Intensiv“ (Hamburg, Germany). Since 2007 he has been working as a company lawyer and auditor at Continental AG (an international automotive supplier) with a focus on Mergers & Acquisitions and compliance. Dr. Darko Samardžić is an editor in the “European Law Review” (Kragujevac, Serbia). His publications embrace current issues of European and Constitutional law accompanied by international conferences in Germany, Serbia, Montenegro, Bosnia and Herzegovina.

* Zlatan Meškić, PhD, Professor at the Faculty of Law, University of Zenica, e-mail: zmeskic@hotmail.com
** Darko Samardžić, PhD, Assistant Professor at the Faculty of Law, University of Zenica, e-mail: darko.samardzic@conti.de
1. Introduction

The goal of Bosnia and Herzegovina (B&H) to become a member of the EU has raised the question of the application of supranational law (EU law) in B&H, both in terms of preparing for membership and the country’s status after entering the EU.¹ For B&H, this was evident even before the signing of the Stabilisation and Association Agreement (SAA), clarified by the jurisprudence and requested in literature oriented towards EU law. B&H signed the SAA with the EU and its member states on 2008, June 16th². However, it is still to enter into force, as B&H did not implement the Sejdić and Finci judgment of the ECtHR.³ The conclusion of this judgment is that the provisions of the Constitution of B&H violate Article 14 ECHR together with Article 3 Protocol No. 1, as well as Article 1 Protocol No. 12, because of the ineligibility of the applicants to stand for election to the House of Peoples and the Presidency of B&H due to their Roma and Jewish origins. The compliance of electoral rights with this decision is a condition sine qua non required by the EU for the SAA with B&H to enter into full force and effect. This condition requires amendments to the Constitution which are difficult to achieve in legislation. At the same time it is evident that the application of international and EU law is a question of highest priority for B&H. The application of international law is of particular interest for B&H, as the Constitution itself is part of an international agreement: Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina (The Dayton Peace Agreement or DPA).⁴ The Constitution entered into force in December 1995 with the signing of the DPA, which was never ratified by the Parliament of B&H. The Constitution was written in English without an official translation into the official languages of B&H (Bosnian, Croatian and Serbian).

Therefore, only unofficial translations are in use, which leads to different understanding of certain provisions or terms.⁵ B&H is characterised by a complex state structure, as defined in the Constitution, with two entities (the Federation of B&H and Republika Srpska) and the District of Brčko. Republika Srpska is more centralised while the Federation of B&H is more decentralised with its 10 cantons. Hence, altogether 13 constitutions exist within B&H: one for each entity and each canton in addition to the constitution at the state level. Due to this complex state structure, it is not an easy task to provide a comprehensive overview of the application of international legal sources in B&H.

2. Direct Applicability of EU Law in the Legal System of B&H

The incorporation of international law in national law is characterised by the two classical theories of monism and dualism.⁶ The practical impact of these theories is not of crucial importance as far as the moderate dualistic and monistic approaches give rise to the same results.⁷ From both perspectives, the decisive point is to clarify effect within the national legal system. The Constitution of B&H does not explicitly provide for a monistic or dualistic approach towards international law. The

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² SAA signed on 16.6.2008; OJ of Bosnia and Herzegovina No. 5/08, international agreements.
⁴ The General Framework Agreement for Peace in Bosnia and Herzegovina was signed between the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia on 14 December 1995.
The Constitution of B&H explicitly qualifies the incorporation of international legal sources within the national legal system in Article III/3 (b) with regard to general principles: “general legal principles are an integral part of the legal system of Bosnia and Herzegovina and its entities”. Besides general principles, the Constitution explicitly mentions international agreements only with reference to human rights. The status of other international agreements needs to be interpreted. According to Article II/2 of the Constitution of B&H, the rights and freedoms foreseen in the ECHR and its protocols have to be applied directly. Pursuant to Article II/4 of the Constitution of B&H, the rights and freedoms foreseen in the international agreements in Annex I of the Constitution are guaranteed to all people in B&H without discrimination. The title of Annex I is: ‘Additional Human Rights Agreements to be applied in Bosnia and Herzegovina.’ Articles II and III seem to follow a monistic approach of a unified legal system consisting of international and national law which apply directly within the national legal system.

The question is whether the Constitution of B&H allows a general decision in favour of the monistic theory or if argumentum e contrario it is reasonable that the legislator has limited this understanding to the legal sources explicitly named. Thus, all other provisions are dedicated to the dualistic theory. An analogous application to all other legal sources could be explained by Article VI/3 (c) of the Constitution of B&H. This provision enables the CC of B&H to judge if a ‘law which is the basis for a decision is in line with the constitution, the ECHR and its protocols or with the laws of Bosnia and Herzegovina or with a general rule of public international law crucial for the decision of the court’. The dualistic system is dealt with in Article IV/4 (d) of the Constitution of B&H, which requires ratification by the Parliamentary Assembly, whereupon the Presidency of Bosnia and Herzegovina, upon obtaining the formal consent of the B&H Parliamentary Assembly, decides on the ratification of an international treaty (Article V/3 (d)). Once a decision is made, it is signed by the Presidency of B&H and published in the Official Gazette of B&H (the section on international treaties). This understanding is supported by Article 17 of the Procedure for the Conclusion and Execution of International Treaties Act. According to this, the Presidency needs the ratification of the Parliamentary Assembly before acting. Pursuant to Article 22 of the aforementioned law, an agreement comes into full force and effect if it complies with the provisions of the agreement, the law and the ratification.

Jointly and severally, the Constitution of B&H is based on a combination of monistic and dualistic approaches. The monistic approach relates to legal sources of international law with direct effect specified in the Constitution, while other legal sources of international law are covered by a moderate dualistic understanding.

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11 The decision on the giving of consent by the Parliamentary Assembly for the signing of the SAA is published in OG B&H, No. 11/08, international agreements supplement.
3. EU Law in the Hierarchy of Laws in B&H

The Constitution of B&H explicitly gives direct effect to the ECHR and its protocols. Article VI/3 (c) enables the CC to examine if a law is in line with the general rules of international law, which indicates the primacy of the general rules of international law over national law. This leads to the conclusion of the precedence of international law, given the Constitution declares the direct effect of international law. According to Article II/2 of the Constitution of B&H ‘The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina ... and have priority over all other law.’ International conventions listed in Annex I to the Constitution of B&H that provide protection to human rights are considered to be at constitutional level due to their formal inclusion in the Constitution. However, the wording of Article II/2, ‘whereby the rights and freedoms set forth in the ECHR shall have priority over all other law’, does not clarify if the ECHR has priority over the Constitution itself. Some authors argue in favour of the supremacy of the ECHR over the Constitution. This question was the issue in Case No. U 5/04 before the CC of B&H. The Court had to decide if it was competent to judge on the compatibility of the Constitution with the ECHR. According to Article II/2 of the Constitution of B&H, the ECHR is directly applicable. However, the Court restricted its competence to the interpretation of the Constitution and not an examination of the ECHR itself. In an obiter dictum, it concluded that the ECHR cannot have priority over the Constitution of B&H, because it entered into force by means of the Constitution itself.

For other sources of international law in the legal system of B&H, there is no explicit provision regulating the hierarchy of laws. Since the Constitution of B&H is contained in an international agreement (the DPA), the question has arisen whether other Annexes of the DPA are at the same legal level as the Constitution itself. In decisions U 7/97, U 7/98 and U 40/00, the CC decided the Annexes of the DPA supplement each other and cannot be examined in terms of their inconsistency with the Constitution, confirming the other Annexes of the DPA and general legal principles of international law to be at a constitutional level. This opinion is supported by the Constitution in Article III/3 (b), acknowledging general principles of international law to be an integral part of the law of B&H and its entities. For other international agreements, besides those listed in Annex I of the Constitution of B&H, the CC decided (Decision U 5/09) that ‘there is no constitutional provision regulating the introduction of international treaties in domestic law as condition for their applicability; in particular, the constitution does not prescribe to ‘transform’ international rules in domestic law through a law. If consequently international treaties on human rights have a quasi-constitutional rank, there is no indication of a simply ordinary legislative rank for the other treaties in the constitution.’ Thereby the CC excluded the argumentum a contrario that international treaties on human rights explicitly enjoy constitutional rank and therefore all other treaties are at the level of regular laws. It seems that the court presumes international agreements to be below constitutional rank but above regular laws, although there is no certain argumentation or legislative basis provided to support this view.

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18 CC, U 40/00, of 2.2.2001.
The SAA for B&H does not give rise to essential doubt as to its direct application. The Parliament approved this agreement in accordance with the internal provisions of B&H. Hence, it can immediately enter into full force and effect. Individual provisions of this agreement as well as the Interim Agreement have already entered into force and effect with the signing of the SAA.21 The EU usually ratifies ‘mixed agreements’ directly after the Member States have done so, so that there is no partial application of the agreement on the territory of the EU.22 France was the last Member State to ratify the SAA with B&H on 2011 February 10th.23 However, the EU will not ratify the SAA until B&H implements the ECtHR Sejdic-Finci decision, because without its implementation B&H violates Article 1 of the Interim Agreement.

The position of the SAA within the hierarchy of laws is not regulated. Thus, it has to be determined by interpretation. The first indicator is the direct effect of the SAA as acknowledged by the Parliament. Secondly, Article 28 of the Procedure for the Conclusion and Execution of International Treaties Act provides that ‘international agreements which establish direct obligations for Bosnia and Herzegovina are executed by the competent institutions of the state administration whose competence covers areas regulated by those agreements’. According to the subsequent Article: ‘International agreements which are concluded by Bosnia and Herzegovina, and which establish obligations for domestic legal persons, are directly executed by those legal persons’. It is clear that the legal system of B&H recognises the direct effect of international agreements outside of the system of protection of human rights and general principles of international law that establish obligations which nationals of B&H may directly refer to domestic institutions. However, neither the Constitution nor other provisions in the legal system of B&H explicitly solve the problem of which law is applicable in the case of a conflict between national law and the provisions of international treaties which do not regulate human rights. However, a conflicting national law cannot eliminate the application of international agreements. This argument may be supported by Article 32 of the Procedure for the Conclusion and Execution of International Treaties Act, according to which an ‘international treaty will temporarily or permanently cease in its application in accordance with its provisions or the general rules of the international law of treaties’. Finally, the Constitution of B&H consistently gives the provisions of international agreements which are directly applicable the power of supremacy over national laws. Therefore, there is no reason for international agreements which gain direct effect through the internal procedure of ratification to have the same legal power as regular laws, as then they could be derogated by the latter.

Secondary association law, according to the jurisprudence of the CJEU established in Sevice,24 is an integral part of EU law and can have direct effect under the same conditions as the provisions of the SAA. The CJEU has explained that the decisions of the Association Council (in the case of B&H, the Stabilisation and Association Council) are based on the Agreement, as the Association Council is an authority established by it with the responsibility for its implementation.25 The decisions of the institutions established by the SAA fulfil the goal of the Agreement,26 and consequently

21 The Interim Agreement was published in the OG B&H international agreements supplement, No. 5/08 and entered into force on 30 June 2008.
25 Ibid.
do not require any implementing act in order to have effect.\textsuperscript{27} In addition, the direct effect of secondary association law cannot be denied either because the provisions of the SAA do not have direct effect\textsuperscript{28} or because the decision of the Association Council was not published.

In legal science, such a view of the CJEU is justified by the fact that the decisions of the institutions which adopted secondary association law are part of the international agreement by their nature, and therefore they have the same direct effect as primary association law.\textsuperscript{30} Consequently, secondary association law in the hierarchy of law within EU law is below primary association law, but at the same level as the SAA in relation to the national law of B&H.

4. Interpretation of Market Freedoms in the Light of CJEU Jurisprudence Before the Constitutional Court of B&H

The direct and horizontal effects of international and EU law on national law are increasing. In B&H, this is especially evident in private law relations, bearing in mind that the state needs to ensure constitutional rights, but is not competent for the adoption of private law. The Constitution of B&H in Article III/1 lists exclusive competences and in Article III/5 provides certain additional competences of the authorities. All state competences not expressly assigned to the state level are the responsibility of the entities in accordance with Article III/3 (a). Thus, B&H has four Labour Acts (three established by the entities and the District of Brčko, and one at the state level)\textsuperscript{31} and also three company acts (one for each entity).\textsuperscript{32} In addition, private law acts assumed in the basis of succession from Yugoslavia are considered to be entity acts, such as the acts on obligations.\textsuperscript{33}

The division of competences between the state and entity levels in Article III is not clear and is subject to political and legal debate.\textsuperscript{34} Interpretation is also needed for competences established outside of Article III. A further question is which level is responsible for the enforcement of international obligations established by the Constitution at the state level. The focus here is on the guarantee of human rights and fundamental freedoms in accordance with Article II, as well as market freedoms in accordance with Article I/4.

According to Article I/4, neither the state nor the entities shall impede the full freedom of the movement of persons, goods, services, and capital throughout B&H. This provision on the one hand

\textsuperscript{27} CJEU, 14.11.1989, 30/88, Greece/Commission, 1989, I-3711, 16.


\textsuperscript{31} OG B&H, Nos. 26/04, 7/05, 48/05 and 60/10; OG FB&H, Nos. 43/99, 32/00 and 29/03; OG RS, Nos. 38/00, 40/00, 47/02, 38/03, 66/03, 66/03 and 20/07; OG DB, Nos. 19/06, 19/07 and 25/08.

\textsuperscript{32} OG FB&H, Nos. 23/99, 45/00, 2/02, 6/02, 29/03, 68/05, 91/07, 84/08, 88/08, 7/09 i 63/10; OG RS, Nos. 127/08, 58/09, 100/11; OG DB, Nos. 11/01, 10/02, 14/02, 1/03, 8/03, 4/04, 19/07, 34/07.

\textsuperscript{33} Since the break-up of Yugoslavia, this Act (Official Journal of the Socialist Federal Republic of Yugoslavia, Nos. 29/78, 39/85, 46/85, 45/89, 57/89) by virtue of succession has remained applicable in two slightly different versions in each entity of Bosnia and Herzegovina: the Obligations Act of Republika Srpska (OJ of Republika Srpska, Nos. 17/93, 57/98, 39/03, 74/04) and the Obligations Act of the Federation of Bosnia and Herzegovina (OJ of the Republic of Bosnia and Herzegovina, Nos. 2/29, 13/93, 13/94 and Official Journal of the Federation of Bosnia and Herzegovina, No. 29/03).

requires the creation of a ‘free area’ in the territory of B&H (negative integration), and on the other hand the adoption of all necessary measures in order to establish market freedoms throughout B&H (positive integration). The CC has not specified the requirements of Article I/4. Thus, it considers that an interpretation in line with EU law and jurisprudence is needed. To handle constitutional competences, the CC uses the theory of ‘implied powers’. The implied powers theory does not allow intervention in the existing division of powers, but supplements the execution of explicitly listed competences. Following the wording of the CC: ‘Bosnia and Herzegovina, functioning as a democratic state, was authorised to establish, in the areas under its responsibility, other mechanisms, besides those provided in the constitution of Bosnia and Herzegovina, and additional institutions that were necessary for the exercise of its responsibilities’.

The CC points out in decision U 68/02 that the general clause on the internal market in B&H needs to be interpreted in line with EU law and the CJEU. Here, the Court relies on the CJEU Schul judgment, stating that the substantive notion of a “single market” implies that the internal market of Bosnia and Herzegovina should be created by repealing all technical, administrative and other measures. By means of a grammatical interpretation of Article I/4, the Court firstly concludes: ‘entities are obliged not to prevent the accomplishment of this principle (second sentence, Article I/4), and that this does not prevent the State from acting positively so as to fulfil its goal (first sentence, Article I/4), and thus confirms the principles of negative and positive integration with regards to Article I/4’. Secondly, in the same decision, the Court established a connection between Articles I/4 and II/4 on the prohibition of discrimination. The notion of prohibition of discrimination includes not only technical measures but also positive legislation and a positive obligation of the state to guarantee the institutional protection of prohibition of discrimination. With regard to the single market, the state is obliged to institutionally guarantee the prohibition of discrimination on the grounds of residence or entity citizenship. Thirdly, the Court deems it possible to ensure the principles of the common market although the competences are split: ‘Although the constitutional distribution of competences under Article III of the Constitution of Bosnia and Herzegovina allocated certain competences to the Entities that may influence the creation of a single market as the State’s obligation, the autonomous status of the Entities is conditioned by the hierarchically superior competences of the State, which includes protection of the Constitution of Bosnia and Herzegovina and its principles ... In this regard, the supremacy of the State over the Entities and the District of Brčko, which follows from Article III (3) (b) of the Constitution, allows it to take appropriate measures to secure the enjoyment of constitutional rights to all persons’. It is noticeable that the lack of state competence in adopting private law has shifted the question of positive integration under Article I/4 into the focus of the CC. By interpreting the state obligation to guarantee rights under Articles I/4 and II in a non-discriminatory way, the Court has the tendency to give competences to the state to adopt private law where it finds it ‘necessary’, but it does not expressly state in which form this is to be conducted. This is clearly

35 CC B&H, 25.06.2004, U 68/02, para. 41.
36 The theory of “implied powers” seeks to make the restrictive interpretation of listed competences more flexible. For the EU, this theory means that institutions have the necessary powers to execute the powers listed in the Treaties; CJEU, 9 July 1987, joint cases 281,283,285 and 287/85 - Germany/Commission, [1987], I-3203.
39 CC B&H, 25.06.2004, U 68/02, para. 41.
41 CC B&H, 5.10.2002, U 18/00 No. 30/02.
42 CC B&H, 28.5.2010, U 12/09, para. 30.
expressed in Decision U 5/98-II:43 ‘The different legal systems of the Entities, with different types of property or regulations of property law, may indeed form an obstacle to the freedom of movement of goods and capital as provided for in Article I/4 of the Constitution of B&H. Moreover, the constitutionally guaranteed right to privately owned property, as an institutional safeguard throughout Bosnia and Herzegovina, requires framework legislation by the State of Bosnia and Herzegovina in order to specify the standards necessary to fulfil the positive obligations of the Constitution elaborated above. Hence, such framework legislation should determine, at least, the various forms of property, the holders of these rights, and the general principles for the exercise of property rights in property law that usually constitute an element of civil law codes in democratic societies.’

Negative integration in the spirit of Article I/4 has not been the subject of private law cases before the CC. However, bearing in mind the practice of the Court, Article I/4 should be interpreted in the light of the CJEU demanding the consideration of horizontal effect (Drittwirkung)44 as a link between public and private law. An example is Case U 12/09,45 where the CC analysed the maternity pay of public servants at state institutions. Since issues connected with the principle of the welfare state fall within the competence of the entities, the challenged provision of Article 35 of the Salaries and Remunerations in the Institutions of B&H Act46 with regard to the calculation and payment of maternity leave benefits only referred to ‘the regulations governing this field according to the place of payment of the contributions per each employee’. In practice, this provision had the effect that employees resident in Republika Srpska are guaranteed to receive their whole salary, while in the Federation of B&H this issue is ruled by the Federation authorities as well as by the cantons or even the municipalities, which results in important differences, with some cantons not paying any benefits at all. The CC firstly stated that female employees in state institutions had been treated differently in comparable situations. As a justification for such discrimination, the division of competences between the state and the entities was taken into consideration. The Court pointed out that in this area responsibilities are granted by the Constitution to the state. These responsibilities are partly of an international and partly of a national character, and arise with regard to the creation of working conditions without discrimination under Article II/4 of the Constitution of B&H together with Article 1 Protocol No. 12 ECHR, and under Article I/4 on the establishment of the single market in B&H. The Court emphasised its previous practice, according to which Article I/4 needs to be interpreted in the light of CJEU jurisprudence, which is why ‘social benefits like maternity leave for employees of state institutions should not depend on the residence of the person in question, given that the idea of a single market implies that the state makes an employment opportunity equally attractive to all citizens of B&H, notwithstanding entity boundaries, entity citizenship, or place of residence’. The Court pointed out that EU Regulation No. 1408/71 on the application of social security schemes to employed persons and to members of their families moving within the Community47 needs to be respected, as well as further international conventions.48 Finally, the Court concluded: ‘the competence of the entities to regulate social policy is not appropriate to the aim sought to be achieved with regard to social protection and equal remuneration,’ and ‘thus, the state and the entities have

45 CC B&H, 28.5.2010, U 12/09, para. 30.
46 OG No. 50/08 and 35/09.
the joint obligation not only to ensure the highest level of protection of human rights but also to guarantee an equal implementation of these rights'.

Nor the CC, or any other court in B&H ever explicitly relied on the 'harmonisation clause' in Article 70 of the SAA, which obliges B&H to 'ensure that its existing laws and future legislation will be gradually made compatible with the Community acquis. Bosnia and Herzegovina shall ensure that existing and future legislation will be properly implemented and enforced'. From the aspect of the previously addressed problem of the division of competences, the obligation specified in the harmonisation clause of Article 70 SAA demand harmonisation at two levels for B&H:

1. harmonisation of entity provisions in order to create the preconditions for the full freedom of movement of goods, persons, services and capital according to Article I/4 of the Constitution of B&H;
2. harmonisation of entity legislation with EU law with the goal of entry into the new market.49

When speaking about the acquis, it is clear that it also includes provisions at the EU level which are adopted after the ratification of the SAA, as in the contrary case, B&H would by the time it became a full member of the EU (which could take several years) have the legal status it had in 2008.

5. Application of CJEU Jurisprudence before the Court of B&H

Another example is the Competition Act of B&H.50 Pursuant to Article 71 (2) SAA, any practice shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from (ex) Articles 81, 82, 86 and 87 of the EC Treaty and interpretative instruments adopted by Community institutions. Although the Competition Act was adopted three years before the ratification of the SAA, Article 43 states that the Competition Council, as the competent institution for the protection of fair competition in the first instance, 'may for the purpose of the examination of a concrete case, take into account the judicial practice of the CJEU and the decisions of the European Commission'. In a recent judgment, the Court established that the exclusive importer of Volkswagen cars for B&H, ASA Auto, violated the Competition Act, because it abused its dominant position on the market by discriminating against a contracting party.51 ASA Auto signed a letter of intent with MRM., a potential distributor of Volkswagen cars, but the terms of the letter of intent were less favourable than those signed with previous traders. When MRM. violated the less favourable clauses of the letter of intent, ASA Auto decided not to conclude the licence agreement.

In general, every party, even those with a dominant market position, is free to choose its contracting partners.52 However, the Court clarified that ASA Auto, by means of the letter of intent had already established a business relationship with MRM. Namely, it is easier to establish the abuse of the dominant market position when an already existing relationship is cancelled, since it changes the present situation on the market, than in the case of denial of entry into a new contractual relationship.53 The cancellation of an existing business relationship by a party in a dominant market

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50 OG B&H, No. 48/05, 76/07 and 80/09.
position represents an abuse if it is not justified and does not fulfil the requirements of proportionality.\textsuperscript{54} ASA Auto used the violation of the clauses of the letter of intent as justification. The Court took into consideration that the violated clauses were not included in the letters of intent signed with other traders, and therefore declared the justification discriminatory and the cancellation of the business relationship unjustified. The Court concluded all licensed traders are treated unequally and discriminatorily by the application of different conditions for the same business with different parties/distributors.

Additionally, the Court examined the obligation of ASA Auto to conclude a contract with MRM. It based its argumentation on the abovementioned Article 43 of the Competition Act and relied on the practice of the CJEU. The Court listed four requirements for the obligation to conclude a contract:

1. a licence is necessary for the other party in order to access and stay on the relevant market;
2. the risk of exclusion of efficient competition if the licence is not given;
3. a future negative influence on technical developments in the field to the detriment of consumers;
4. there is no objective justification for the denial of a licence.

The Court did not expressly refer to a particular decision of the CJEU, but the conditions named may be found in the IMS Health decision.\textsuperscript{55}

6. Conclusion

Bosnia and Herzegovina still did not implement the 2009 ECtHR decision Sejdić-Finci. This lack is an objection towards full membership of the EU. It violates Article 1 of the Interim Agreement, which gives a negative example of direct applicability of EU law in B&H. However, the Constitutional Court as well as the Court of B&H interpreted national law in the light of EU law or directly apply some standards from EU law, even if they never explicitly relied on the harmonisation clause in Art. 70 of the Stabilisation and Association Agreement. The contributions of prof. Povlakić and prof. Čolaković show that already regular courts have been inspired to apply EU law in a direct or indirect manner. The lack of systematic approach before the national courts seems understandable, having in mind that the obligations under the harmonisation clause are still not made clear to the practice, or even to legal science in B&H which is with this regard only at the beginning. The integrational role of the Constitutional Court, the Court of B&H and the Supreme Courts of the entities of B&H are a positive trend of harmonisation of national law with EU law in practise. To respect legal decisions and opinions in legal science means to respect the constitution and general legal principles such as the rule of law, the separation and balance of powers. National law must comply with constitutional and general principles as well as with supranational laws and general principles which by the way in many respects constitute the same requirements for legislative and executive powers. An overall supremacy of political discretion over legal analysis does not exist.


EUROPEAN LAW APPLICATION BY THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA AND THE SUPREME COURT OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

Maja ČOLAKOVIĆ*

Abstract

The research includes the practice of the Constitutional Court of Bosnia and Herzegovina, the Supreme Court of the Federation of Bosnia and Herzegovina, the cantonal courts in Federation of Bosnia and Herzegovina as well as the practice of lawyers when they address the courts. The general conclusion which comes out of the analysis of the Constitutional Court’s judgments is that CC does not refer to the EU law in the field of private law but it regularly and consistently refers to the practice of the European Commission of Human Rights and the European Court of Human Rights. In the available practice of the Supreme Court of the Federation of Bosnia and Herzegovina it is possible to find several decisions relating to law of torts in which this court refers to the sources of EU law. In answering the question on state liability for damage caused to individuals for irregular and unlawful actions of the court/judge, the SC summed up the jurisprudence of the EJC in this field and emphasized the obligation of the national courts to interpret national law in the light of EU law and to follow the legal standards of the EU. Even in the practice of the cantonal courts and the practice of lawyers it is possible to find examples when the ECHR decisions are referred to.

Key words: constitutional court, Supreme Court, defamation, state liability, damage, EU law

Dr. sc. Maja Čolaković is an Assistant professor at Civil Law Department at the Faculty of Law of the „Džemal Bijedić” University of Mostar. She obtained a master degree at the Faculty of Law of the University of Sarajevo in 2004 by defending the thesis on „The Legal Status of Minors in Civil Law”. The title of her PhD thesis defended in 2010 is “The Right to Physical Integrity as a Personal Right with the main focus on the person’s right to dispose with his own body parts”. The major field of her research interests are the Civil Law, Medical Law and Personal Rights. She is the author and co-author of considerable amount of scientific and professional papers. She has taken part in study visits programmes of several universities in different European countries.

* Maja Čolaković, PhD, Assistant Professor at the Faculty of Law, University of „Džemal Bijedić” in Mostar, e-mail: Maja.Colakovic@unmo.ba
CHAPTER TWO • COUNTRY REPORTS ON APPLICATION OF EU LAW BY NATIONAL COURTS

Introduction

The research has been focused on the practice of the Constitutional Court of Bosnia and Herzegovina and the Supreme Court of the Federation of Bosnia and Herzegovina.

This report also includes the remarks regarding the practice of the cantonal courts in Federation of Bosnia and Herzegovina and the practice of lawyers when they address the courts.

1. The Constitutional Court of Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina (CC) was established under Art. IV of the Constitution of Bosnia and Herzegovina (Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina, which entered into force on 14 December 19951).

In general, the jurisdiction of the Constitutional Court is defined under Article VI.3 and Article IV.3 of the Constitution. It consists of five types of jurisdiction: Disputes arising under conflict of jurisdiction and an abstract review of constitutionality; Appellate Jurisdiction; Referral of an issue by other courts; Unblocking of the Parliamentary Assembly.

The Appellate Jurisdiction implies that the Constitutional Court is the highest judicial body in the state in comparison to ordinary courts. This confirms its role as being a special institutional safe-guard for the protection of the rights and freedoms enshrined in the Constitution.2

The subject of this research are the appeals to the Constitutional Court against the decisions of the ordinary courts in disputes concerning the violation of: Intellectual Property Rights (trademark rights and copyrights); the Right to privacy; the Right to property; the Right to a fair trial; the Right to freedom of expression; the Right to freedom of thought; the prohibition of discrimination.

The general conclusion which comes out of the analysis of the CC’s judgments is that the CC rarely refers to the EU law (for example: Case U 68/02 – the review of constitutionality of the Law on Excise and Sales Tax of Republika Srpska3; Case U 12/09 - the review of constitutionality of the Law on Salaries and Allowances in the institutions of Bosnia and Herzegovina4). The decisions of primary concern here relate to disputes in the field of public law e.g. the cases that only indirectly touched on private law. Regarding private law, the analysis shows that the CC does not refer to the EU law sources (primary, secondary or soft law as well as the judgments of the Court of Justice of the EU - ECJ), but it regularly and consistently refers to the practice of the institutions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR): European Commission of Human Rights (ECmHR) and the European Court of Human Rights (ECtHR) relating to articles 6, 8, 9, 10 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the Protocol No. 1 to the Convention.

The ECHR is an integral part of the Constitution of Bosnia and Herzegovina and is directly applicable in the B&H legal system.5 For that reason the CC’s referall to the ECHR is completely justified and even necessary.

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2 See in more details about the CC’s jurisdiction: Pobrić, Nurko, Ustavno pravo, Mostar, 2000, p. 476-481.
1.1. Appeals against the Judgments in Disputes Involving the Violation of Intellectual Property Rights

1.1.1. In the jurisprudence of the CC there are several decisions regarding disputes over the infringement of trademark, which were previously discussed before the courts in the Federation of Bosnia and Herzegovina and the Brčko District. In these proceedings there was a violation of the Right to a fair trial and the Right to property. On that basis the appellants address to the CC.

In its decisions the CC particularly brings forward a few judgments of the ECmHR and ECtHR (G. v. the Federal Republic of Germany, application no. E 10431/83; Thomas v. the United Kingdom, application no. 19354/02; Van der Hurk v. Netherlands, application no. 16034/90; Mikulić v. Croatia, application no. 53176/99; Borgese v. Italy, application no. 12870/87).

Explaning its positions in regard to the evaluation of whether the certain actions of ordinary courts are considered as the violation of the Right to a fair trial, the CC frequently quotes the EctHR interpretation on Article 6. ECHR (Cases no.: AP 242/03 „Bobita d.o.o.“; AP 1080/08 Humanitarna organizacija «Merhamet» Muslimanskog dobrotvornog društva Sarajevo, AP 3424/08 Mustafa Sulejmanagić).

1.1.2. In the appeals concerning the procedures in regard to the disputes for infringement of copyright, driven before the courts in Federation of Bosnia and Herzegovina and Republika Srpska, the appellants appeal about the violations of the Right to a fair trial and the Right to property.

In the explanation of its decisions, the CC refers to the specific EctHR’s judgments (Thomas v. the United Kingdom, application no. 19354/02; Van der Hurk v. Netherlands, application no. 16034/90; Peter Gratzinger and Eva Gratzingerova v. Czech Republic, application no. 39794/98; Bramelid AND Malmström V. Sweden, application no. 8588/79 and 8589/79; Smith Kline and French Laboratories v. Netherlands, application no. 12633/87; Van der Mussele v. Belgium, application no. 8919/80; Pine Valley Developments Ltd and others v. Ireland, application no. 12742/87).

In addition, the CC brings forward some EctHR’s positions. For example, the CC cites the EctHR's interpretation of the term ‘property’ e.g. „possession” of Article 1 Protocol No. 1 to the ECHR. The CC emphasizes that its own jurisprudence concerning the interpretation of the term ‘property’ is consistent and identical to the jurisprudence of the EctHR (Cases no.: AP 476/10 „SB Softa”, predjeca za proizvodnju računara i računarskih programa d.o.o. Beograd; AP 1223/06 Todor Mikić).

Besides, the CC also refers to to the jurisprudence of the EctHR following the disputes regarding the infringement of copyright in the cases no.: AP 266/03 B.K.; AP 430/09 Gordana Zucić; AP 519/04 M.H.; AP 2483/10 Miroslav Arapović; AP 2614/08 Radio-televizija Bosne i Hercegovine; AP 2850/10 „THE FRIENDS” d.o.o. Banja Luka.

1.2. Appeals against the judgments of the courts in disputes for damages for defamation (violation of the Right to privacy, the Right to freedom of expression and the Right to freedom of thought)

1.2.1. The referrals of the CC to the ECHR and jurisprudence of the EctHR is also evident in the decisions relating to claims for damages for defamation. Moreover, in these cases such a practice is a regular and consistent occurrence. The appellants allege violations of the Right to a fair trial, the Right to freedom of expression, the Right to privacy and the Right to non-discrimination, resulting in proceedings before courts in both B&H entities.

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6 The EctHR points out that “possessions” within the meaning of Article 1 of Protocol No. 1 can be either “existing possessions” or assets, including claims, in respect of which an applicant can argue that he has at least a “legitimate expectation” that they will be realised (Peter Gratzinger and Eva Gratzingerova v. the Czech Republic, application no. 39794/98, § 62.).
In the reasoning, CC refers to the specific EctHR’s judgments (Pronina v. Russia, application no. 65167/01; Doorson v. Netherlands, application no. 20524/92; Thomas v. the United Kingdom, application no. 19354/02; Selisto v. Finland, application no. 56767/00; Castells v. Spain, application no. 11798/85; Chauvy i dr. v. France, application no. 64915/01; Hrico v. Slovakia, application no. 49418/99; Lingens v. Austria, application no. 9815/82; Tolstoy Miloslavski v. the United Kingdom, application no. 18139/91; Handyside v. the United Kingdom, application no. 5493/72; Niemitz v. Germany, application no. 13710/88; Belgian Linguistic case (No 2) (1968) 1 EHRR 252; Ireland v. the United Kingdom, application no. 5310/71; Thorgeir Thorgeison v. Iceland, application no. 13788/88; Observer and Guardian v. the United Kingdom, application no. 13585/8; Dalban v. Romania, application no. 28114/95).

Apart from that, the CC also quotes the EctHR’s position on what falls under the object of protection defined in Article 10 ECHR ("information and ideas that are positive and are considered harmless or no attitude towards them, but also information that offend, shock and disturbed by the notion, because that is what requires tolerance and pluralism, without which there is no democratic society"). CC points out that this position of the EctHR is included in the defamation acts in B&H, and that those acts in some respects even provide a higher level of protection of the freedom of expression than the minimum predicted in ECHR (Cases no.: AP 312/08 NIGD „Dnevne nezavisne novine“ Banja Luka; AP 1676/08 „Distribucija“ d.o.o. Laktaši i Radmilo Šipovac; AP 2272/06 Velimir Marić; AP 7/09 „MM Company“ Sarajevo; AP 95/06 Mirnes Ajanović; AP 149/06, Radio-televizija Federacije Bosne i Hercegovine i Bakir Hadžiomerović; AP 399/06 „Slobodna Dalmacija“ d.d. Split; AP 179/10 Branko Dokić; AP 532/06 Fatmir Alispahić; AP 1064/05 „Press-sing“ d.o.o. i Senad Avdić; AP 1145/04 „Press-sing“ d.o.o. i drugi; AP 1972/10 Mirjana Kusmuk; AP 1881/05 Radio-televizija Bosne i Hercegovine, Bakir Hadžiomerović i Amarildo Gutić).

1.2.2. It is also very interesting and important to notice that in one of the defamation cases, the CC refers not only to the ECHR and EctHR’s jurisprudence but also to the jurisprudence of other countries’ courts. Specifically, in the explanation of its own position that the appelant’s (journalist’s) right to freedom of expression has been violated in the specific case, the CC quoted the practice of the Supreme Court of the United States (Case: New York Times v. Sullivan, 1964)7 concerning the press freedom and the liability of journalists for defamation. The CC also gives a comment on the provisions of the Declaration on freedom of political debate in the media8. It emphasizes that although the Declaration is not of a mandatory nature, Bosnia and Herzegovina as a member of the Council of Europe can not ignore the recommendations regarding the freedom of media, which were adopted by the Council of Europe (Case no. AP 787/04 Senad Avdić i dr.).

2. The Supreme Court of the Federation of Bosnia and Herzegovina

The Supreme Court of the Federation of Bosnia and Herzegovina (SC) is the highest appellate court in the Federation of Bosnia and Herzegovina. In the available practice of the SC we find two decisions in which this court refers to the sources of EU law. Those decisions relate to law of torts (state liability for damages caused to individuals).

2.1. In the first case (Rješenje Vrhovnog suda Federacije Bosne i Hercegovine broj: 65 0 Ps 077856 11 Rev od 25.12.2012. godine), the SC decided on a claim for damages by a judge

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who issued a “wrong” decision (due to misapplication of substantive law or inadequate evaluation of evidence).

The civil liability of legal entity for damage caused by its authority in the law of Bosnia and Herzegovina/ Federation of Bosnia and Herzegovina is regulated in Art. 172 of the Law on Obligations.

The SC considered the question of whether to apply the principle of subjective liability or objective liability of the state/its authorities for irregular and unlawful actions. The Court pointed out that irregular and unlawful actions should be seen as behaviour contrary to the requirement achieved in the public interest by performing services in usual manner. It also includes the activities which significantly deviate from the usual procedure, whereby the existence of “the will or consent to cause a damage to third parties” is not required. The SC considers that “the present concept of the subjective liability of the state, entity or canton for irregular and unlawful actions of the court is opposite to the principle of the rule of law and public interest. On the other hand, establishing the objective liability of the state for every damage caused to individuals by its authorities is another form of extremity. It is also unsustainable and too rigid from the political and practical point of view.”

In answering the question which type of liability to apply the SC followed the provision of comparative law and EU law. The SC stated that “the national courts are obliged to interpret national law in the light of EU law and solve the case under national law applied in accordance with the legal standards of the European Union”. The SC relied on the principle of state liability for damage caused to individuals by national authorities (legislative, judicial, executive) relating to breaches of EU law by Member States. The SC summed up the jurisprudence of the ECJ in this area, starting from Frankovich ruling (Joined Cases 6 i 9/90 Frankovich and Bonifaci), Brasserie du Pechuer and Factortame III (Joined Cases C-46/93 i C-48/93), Gerhard Köbler/Austria (Case C-224/0), to the case Fallimento Traghetti del Mediterraneo SpA contro Republica Italiana (2005.).

Bringing forward the criteria of liability for irregular and unlawful actions of the state/state authorities, which were defined by the ECJ in Frankovich and later in Brasserie du Pechuer and Factortame III ruling, and bringing forward its interpretation of certain legal standards, the SC took the view that the application of this instrument in B&H law should follow the established practice of the EJC. The SC also emphasized that the EJC has not completely determined the content of certain legal standards, such as “sufficiently serious breach”. For that reason „domestic courts can extend and complement those standards by their creative interpretation”.

2.2. The SC discussed the claim for damages by a judge who has misapplicated of substantive law in one more case (Presuda Vrhovnog suda Federacije Bosne i Hercegovine broj 45 0 P 013093 10 Rev od 26.04.2012. godine). The SC ascertained that in the above case there is no irregular and unlawful action of the court to be considered a basis for the liability of the legal entity.
by virtue of the Art. 172 Law on Obligations. The SC explained its attitude by quoting EJC’s positions concerning the conditions of liability for damage caused by state/its authorities relating to breach of EU law.\textsuperscript{14}

3. **Practice of the Cantonal Courts in Federation of Bosnia and Herzegovina**

Even in the practice of the cantonal courts, when acting as courts of higher instances, it is possible to find examples when the ECHR decisions are referred to. Thus, the Cantonal Court of Mostar (\textit{Presuda broj 58 0 Ps 902182 08 Pž od 8. aprila 2008. godine}), explaining its decision on the claim for the realization of the rights from pension insurance (pension payments), refers to the decision of the ECHR in the case \textit{Karanović v. Bosnia and Herzegovina} (application no. 39462/03) and draws parallels with that decision.\textsuperscript{15}

4. **The Practice of Lawyers**

In the cases before lower courts in Bosnia and Herzegovina, we often find that lawyers refer to the ECHR and the jurisprudence of the ECtHR in statements of claim and statements of defense.

4.1. **Basic court of Banja Luka case no. 71 0 P 17333813 P**

Statements of claim: referring to the ECHR – misuse of the right of free expression in art. 10.

Statement of defense: referring to cases \textit{Selisto v. Finland} (Application no. 56767/00) and \textit{Lingens v. Austria} (Application no. 9815/82).

4.2. **Basic court of Trebinje case no: 95 0 P 002037 08 P**

Statement of defense: \textit{Observer and Guardian v. United Kingdom} (Application no. 13585/8).

4.3. **Basic court of Sarajevo, case no: 65 0 P 076120 09 P**


\textsuperscript{14} Excerpt from the judgment, Bulletin of the Supreme Court of the Federation of Bosnia and Herzegovina, January - December 2012, pp. 51-52.

\textsuperscript{15} According to the statements from the decision of the Constitutional Court of B&H, case no.: AP 2549/09, Fond za penzijsko i invalidsko osiguranje Republike Srpske, Bijeljina.
PART 3
CROATIA

ON THE NEW BEGINNING SCENARIO FOR JUDICIAL GOVERNANCE IN CROATIA

Arsen BAČIĆ*

Abstract

The essence of the standard doctrine of the relationship between the EU and national law is the idea of ‘two coordinated but different legal systems’. The doctrine of ‘two orders’ means that after entering national territory EU agreements and EU law directly affect the territory of a Member State and the supremacy of domestic law. As the majority of European constitutions place international agreements at a supra-legal level, the main practical consequence of this doctrine derives from the provision of direct effect. However, what authorizes their ratification or their incorporation into national law is the supremacy clause. Croatia after accession to the EU (1.07.2013) has crossed the bridge. But the supremacy doctrine of EU law and the direct effect principle is not yet living constitution in Croatia. More precisely most of it will be determined by the willingness of the judiciary to accept new reality.

Key words: Croatia, constitution, constitutional law, international law, EU law, national courts


* Arsen Bačić, PhD, Professor at the Faculty of Law, University of Split, e-mail: basic@pravst.hr
1. Introduction

In a number of countries that at the turn of the century discussed the possibilities and modes of entry into the EU, European discourse was parallel with the process of constitutional choice regarding “the institutional models to replace or create new structures.” The result was a clear division between the formal and living constitution which was primarily influenced by the concept of “conditionality.” Although the concept was linked to the need to strengthen the stability of democratic institutions, the rule of law, independence of the judiciary, the adoption of anti-corruption measures, and strengthen the protection of human rights and minorities, in general “conditionality” nevertheless implied relationship building amongst partners among whom were those who had to, on the one hand, agree to established measures, and, on the other to international organizations that proposed the conditions. Literature on the transition process indicated that, in any particular environment at the time before and after EU accession, answers were volens-nolens coloured with intensive feelings about the threat to the safety of national sovereignty and anxiety related to the future. This should be taken into account in any study on the application of the sources of international and EU law or “applicable to the legal foundations and practice of the courts” in the post-Yugoslav countries affected by the EU integration process. The following article highlights some of the issues which Croatia have opened and resolved partially by the judiciary in the period before and after accession to the EU.

2. New Constitutional Grounds for Application of the EU Law are in Service

On 16 June 2010, the Croatian Parliament adopted the amendments to the Constitution of the Republic of Croatia (CRC). Constitutional changes from 2010, in particular the new provision on the sources of law has finally introduced all international and EU law in the Croatian legal system. Constitutional changes from 2010, among other things, regulate the status of EU law in the national legal order. In accordance with art. 152 of the CRC, the changes contained in the new Title VIII (“European Union”) entered into force on the day of Croatian EU accession (1 July 2013). Changes brought about by Title VIII regulating the legal basis of EU membership and the transfer of constitutional powers to its institutions (art. 143), the participation of Croatian citizens and institutions in the EU institutions (art. 144), the relationship between national and European law (art. 145), and the rights of EU citizens (art. 146). These constitutional provisions are designed and adopted to ensure the constitutional and legal basis for EU law with compliant Croatian participation in this international organization. The art. 145 of the CRC opens constitutional order for the application of EU law in domestic courts and public bodies. In particular, paragraph 1 refers to the principle of equivalence and effective legal protection, paragraph 2 on the principle of supremacy, paragraph 3 on the principle of direct effect, and paragraph 4 of the administrative direct effect. These principles were originally formulated in the practice of the European Court of Justice and represent the foundation of the legal order of the European Union. It obliges all member states and is a requirement for membership in the European Union. Therefore it can be said that Art. 145 of the CRC represents a special national

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2 RC Constitution, Article 5: “(1) In the Republic of Croatia, laws shall comply with the Constitution. Other regulations shall comply with the Constitution and law. (2) All persons shall be obliged to abide by the Constitution and law and respect the legal order of the Republic of Croatia.”
expression of these European principles binding irrespective of whether they are contained in the constitutional text or not.3

3. Legal Foundations of Judicial Branch in the Republic of Croatia

Judicial power in the Republic of Croatia is regulated today in the provisions of articles 118 to 126 of the Constitution of the Republic of Croatia. Judicial power is implemented by courts which independently perform this duty. Courts adjudicate on the basis of the Constitution, law, international treaties and other current sources of law. The institution of the state attorney, defined in art. 126 of the Constitution of the Republic of Croatia as an independent body, was included within judicial branch. This body is authorised and obliged to act against perpetrators of criminal and other punishable offences, undertake legal means to protect the constitution and the law. The State Attorney enacts powers on the basis of the Constitution, the law, international treaties and other regulations of the Republic of Croatia.4

The order and area of judicial power, and other judicial bodies (state attorney) in the Republic of Croatia is regulated according to the following laws: (i) Judicial Act (2013) regulates the order, area, and authority of courts, the internal order of courts, conditions for appointing and dismissing judges, lay magistrates and court presidents, their rights and obligations, protection of judicial bodies’ persons and property, the conditions and procedures for appointing court interpreters, expert witnesses and adjustors, conditions for employing government officials and employees, keeping official secrets and ensuring funds for court functioning. Certain provisions determine the order, area and authority of the High Court of RH.5 (ii) State Judicial Council Act (2013) determines the conditions for the election of members and the president of the State Attorney Council and the cessation of their duties, the procedure for appointing and dismissing judges and the procedures for determining their disciplinary responsibilities and other issues related to the functioning of the State Judicial Council.6 (iii) State Attorney Act (2013) determines the organisation and authority of the State Attorney, the conditions and procedure for appointing and dismissing state attorneys and their deputies, their powers, rights and duties and their disciplinary responsibility, performing duties of the judicial administration and of the state attorney’s office in state attorneys, conditions for employing public servants and officials keeping official secrets and ensuring funds for the functioning of the State Attorney Council. This law also regulates the organisation and functioning of the State Attorney’s Council.7


In the context of the contribution to the stabilisation process among South Eastern European Countries, the European Commission in May 1999 proposed the creation of the Stabilisation and Association Process (SAP) for Albania, Bosnia and Herzegovina, Croatia, Macedonia and the Federal Republic of Yugoslavia, now Serbia and Montenegro. This improved the then existing regional approach to these countries’ association with the European Union. In the circumstances then, the new EU strategy’s primary aim was to stabilise the region, while its long term aim was to emphasise as-

4 Ustav Republike Hrvatske, Narodne novine, br. 85/2010.
5 Zakon o sudovima, Narodne novine, br. 28/2013.
6 Zakon o Državnom sudbenom vijeću, NN 116/10, 57/11, 130/11, 13/13, 28/13.
7 Zakon o Državnom odvjetništvu, NN 76/09, 153/09, 116/10, 145/10, 57/11, 130/11, 72/13, 148/13.
association with the EU. EU policy through SAP, as key in approaching the EU provided for concluding the Stabilisation and Association Agreement (SAA) by which states obtained the status of associate members of the EU. With the possibility of advancing to EU membership, this new type of contractual relations with the EU had the aim of stabilising Western Balkan countries by: (i) their accession to European integration, (ii) developing existing economic and trade relations with the EU and among countries in the region, (iii) increased help for democratisation, development of civil society, education and development of institutions, (iv) possibilities for cooperation in various areas, including judicial and domestic affairs, and (v) developing political dialogue, including political dialogue at a regional level. This stabilisation process and accession from the very beginning existed in order to help countries in the region to develop and sustain stable democratic institutions, ensure the rule of law and to create sustainable, open and advanced economies. SAP is a bilateral and regional process, which establishes ties between each individual state and the EU, and encourages regional cooperation among SAP countries, as well as cooperation with neighbouring countries.

Stabilisation and Association Agreements (SAA) belonged to a new generation of European treaties which EU, in the process of stabilisation and association, offered to South European countries within the SAP immediately after the rejection of socialism. These agreements ensured the formal mechanisms and agreed levels of reference which opened up the possibility of working from a distance to continue to approach EU standards. The agreements determined general principles, political dialogue, regional cooperation, free movement of goods, and movement of workers, creating legal entities, offering goods and capital, harmonisation of laws, implementation of laws and market principles, judicial and domestic relations, political and financial cooperation. The Agreements’ aims were to: develop political dialogue between the EU and those countries that had signed the agreement, beginning to gradually harmonise national legislations of signatory countries with the EU’s acquis communautaire improving economic relations between the two sides, gradually developing the free trade zone between the two sides, and encouraging regional cooperation within SAP. This agreement gave signatory countries the status of candidate countries for potential EU membership.

Croatia was the second country to sign the SAA with the EU on 29 October 2001. That agreement was enacted 1 February 2005. SAP was an inevitable part of the stabilisation and association with the EU process on the part of the Western Balkan countries. From January 2002 till enactment of SAP, the temporary Trade-related Measures Treaty was applied. SAA was the first accepted all inclusive treaty between community and member states on the one hand and Croatia on the other. Similarly to “European Treaties” with former candidate countries, SAA also offered a contractual framework for relations between the EU and Croatia until Croatia’s accession to the European Union. It included areas such as: (i) political dialogue; (ii) regional cooperation; (iii) four freedoms, and creating a free trade zone until 2007 for industrial products and most agricultural produce; (iv) harmonising Croatia’s legislation with the acquis including precise rules in areas such as market competition, intellectual property rights and public procurement and (v) a high level of cooperation in all areas of EU policy, including the judiciary, freedom and security.

Complete implementation of SAP was supposed to assist Croatia in its preparations for membership to the EU. Advancement in integration also depended on Croatia fulfilling its obligations within SAP. A range of common bodies at a ministerial level were founded (Council for Stabilisation and Association) at an official level, (Committee for Stabilisation and Association) at a technical level (sub-committees). Also, the Common Parliamentary Committee was created. The first Council for Stabilisation and Association meeting was held in Luxembourg on 26 April 2005 and the first

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Committee for Stabilisation and Association was held in Brussels 14 July 2005. The first Common Parliament Association was held in Zagreb 3 and 4 March 2004.

On 16 February 2005 the SAA between the Republic of Croatia on the one hand and the European Community and its members on the other (SAA) was enacted. This agreement established general principles which make up key elements in SAA and four freedoms were established which Croatia and all its bodies and organs were obliged to protect. These freedoms were the protection of the free movement of goods, workers, capital and the freedom to provide services were established. Courts of the Republic of Croatia were obliged to apply the agreement in the spirit of how these four freedoms were protected before the courts in Community member states. Assessment of the Republic of Croatia’s level of success in adapting to European standards depended on the application of the Agreement provisions. In the pre-accession phase, court practice of the European Court of Justice (ECJ) was not a formal source of law for courts in the Republic of Croatia and Croatian courts did not have the authority to approach that court for interpretation of the law as could other national courts of Union member countries. Despite this however, Croatian courts were obliged to protect the four freedoms stipulated by the Agreement and to take note of decades of the creation of court practice by the ECJ. That is why it was necessary to train judicial officials to apply the Agreement in the spirit that established content was applied by ESP national courts of EU member states. In the aim of achieving the interpretation and application of the Agreement and the provisions brought in on the basis of the Agreement, it was necessary to undertake certain measures. The following was planned:

• to choose, in cooperation with the chair for European law at the Faculty of law in Zagreb and the Ministry of Foreign Affairs and European Integration, key court judgments reached with the application of SAP and related provisions in disputes before the ECJ related to the protection of the four freedoms, and to have these valid judgments translated and published in full on the High Court’s web pages,

• to simulate, within professional development for judges at the Judicial Academy, cases where the Agreement has been breached and practice reaching decisions while comparatively analysing the interpretation of European Law from appropriate European Court decisions in similar situations,

• to place SAP and chosen European Court judgments (translations of at least ten court decisions) from 1 January 2006 within the programme for the State Judiciary (Bar) Examination. Croatian judges were supposed to apply these measures in the pre-accession phase of entering the EU by interpreting regulations in a new way in the spirit of European standards, taking note of the common European legal culture and traditions while promoting those principles which were proclaimed in the fundamental treaties of the creation of the European Community. The most important step forward in entering the EU which the court practice had to take was learn the teleological interpretation of legal norms. Legal gaps and obscurities in legal solutions had to be complemented by reasonable court judgements protecting the fundamental rights and freedoms while avoiding abuse of power. Measures were also supposed to raise awareness of the obligation to strictly follow the SAA not only by courts, but by other bodies of power and thereby avoid punishments and compensation claims which, in the case that the Treaty is breached, burden the budget of the Republic of Croatia which ultimately is borne by taxpayers. By publishing domestic courts judgments in cases occurring from the obliged application of this Treaty and the publishing of rele-

vant recent practice of European Courts, an educational effect would be achieved for future parties in court proceedings.

5. Some Features of the Working Culture of Judges in Croatia before and after EU Accession

The jurisdiction of Croatian courts in matters with an international element before accession were regulated by the Conflict of Laws Act (NN 53/91, 88/01). In practice however the application of foreign law was related to several topics: with materia legalis of public order, rules of immediate application, determining foreign law and private International Law. (i) Public policy not only concerns the protection of the domestic law in the application of foreign substantive law, but also the protection of foreign law rules which may be incompatible with domestic law. Justification for the protection of domestic public order depends, among other things, on whether the subject being handled has a close relationship with the country and the law, i.e. the lex fori. Such a connection exists when the application of foreign law has long term effects. (ii) Rules of immediate application. Sometimes situations with an international element are governed according to specific rules legis fori, which is usually called the rules of immediate application. Such provisions are, for example, the Maritime Code (articles 972 and 974), art. 4 of the Consumer Protection Act and art. 32. para. 2. of ZRS. (iii) Determining foreign law. The court or other competent authority shall ex officio determine the content of foreign law, according to article 13, paragraph 1 of ZRS (NN 53/91, 88/01). According to art. 13. al. 2-3. (iv) Private International Law. Situations with an international element, under certain assumptions, require the application of foreign law which prescribes the rules on applicable law, or conflict of rules.

a. On the Comparative Reasoning in Croatian Courts

Under the authority of Stabilization and Association Agreement (SAA) courts in Croatia after 2005 have started to cite very modestly international and EU law. Comparative law argument primarily was in the operation of the Constitutional Court (CC). In the same time the so-called soft law was the basis for guidance and understanding legal documents, but was not legally binding at that time. But the court could use it to interpret the legally binding sources of law. It was the rule that when candidate countries harmonize legislation with the EU acquis emphasis was primarily supposed to be on the primary law (treaties), international treaties and secondary law, while the court rulings and so called “soft law” were important to the extent to which they allowed interpretation of the first three categories of the acquis. National courts were still obliged to consider a certain norm of the EU, legally binding or not. Such judicial behavior is not necessarily dependent on the force (i.e., the threat of sanctions), but it is, or should be, an integral part of the legal culture.

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10 E.g. decisions of the Constitutional Court (CC) contain quotations from the European Convention on Human Rights and the EU Charter of Fundamental Rights: “... the Constitutional Court points out that the Charter of Fundamental Rights of the European Union is not yet in force in the Republic of Croatia and the proponent of it can not be invoked in the present proceedings ...” (CC Decision UI-5600/2012,OG 58). Or. (...) The Constitutional Court took into consideration the opinion of the European Court of Human Rights. ... (U-III-2501/2008 Zagreb, October 16, 2008)

11 “... So, the provision of SAA Art. 70, Paragraph 2 is essentially determined that the assessment of whether an undertaking in treatment according with the competition rules is relevant not only to Croatian law, but should take into account the entire law of the European Communities relating to the competition.” CC decision: U-III/1410/2007.

12 CC decision U-II-1118/2013.

The Croatian SAA contained the provision: “Croatia will endeavor to ensure gradual harmonization of existing laws and future legislation with the acquis.” Taking into account the political and social context in which SAA existed (October 29, 2001 - February 1, 2005 – July 1, 2013) it can be concluded that under the SAA there was no obligation for courts to interpret the law internally in line with EU. Several features of legal interpretations before the Constitutional Court (CC) should be taken into account. The first is that the CC authoritatively interprets the Constitution timely. Authoritative interpretation does not mean that the CC has a monopoly on interpreting the Constitution, because the legislator (in its making of the regulations) and the courts (who making judgments ‘on the basis of the Constitution, laws, treaties, and other relevant sources of law’, Const. Art. 118. 3) interpret the Constitution too. But in the process of the interpretation of the Constitution, only CC having constitutional right to examine constitutionality of laws and other regulations and giving effect of excluding law from the legal order.

For the interpretation of the sources of law are valid following types of interpretation technique: linguistic, logical, historical (genetic) and systematic method of interpretation. Teleological interpretation as consequentialist method is considered as the most important in the field of interpretation of constitutional law. The teleological method has particular importance in the case of conflict between different methods of interpretation. Supreme Court’s (SC) decision dated Sept. 24, 2008 (Revt-126/08-2) provoked a strong reaction of the CC which revoked decision of the SC. The CC accepting the constitutional complaint annulled the decision of the Supreme Court from February 2007 calling it “unjust, formalistic, wrong and unconstitutional.”

b. On the Role of International Law and EU Law Sources in Croatia?

The internal sources of law for the Constitutional Court and other courts in the Republic of Croatia (the Supreme Court, county, municipal, administrative and commercial courts) are: (a) Title V of the Constitution (NN 56/90, 135/97, 113/00, 28/01, 55/01 - correction, 76/10, 85/10); (b) The Constitutional Law on the Constitutional Court of the Republic of Croatia (Official Gazette 99/99, 29/02, NN 49/02; (c) By rules of the Constitutional Court, (Official Gazette 181/03) with subsequent amendments (16/06, 30/08, 123/09, 63/10, 121/10 and 19/13; (d) practice of the CC is an important source of constitutional rights monitoring, although the CC haven’t applied the precedent doctrine. However, the CC in the interests of legal certainty, predictability and equality before the law followed its earlier decision in the similar cases. They will depart from it only for important reasons and it will explain it in its decision. Thus the CC adopted the legal opinion of the ECtHR, which also does not follow the doctrine of precedent, but follows its earlier decisions; (e) main internal sources of other courts in the Republic of Croatia (Supreme Court, county, municipal, administrative and commercial court) are: Constitution and relevant laws (Law on Courts, 2013).

The main external source of law respective to Constitutional Court and other courts in the Republic of Croatia (the Supreme Court, county, municipal, administrative and commercial courts) are: (a) the Convention for the Protection of Human Rights and Fundamental Freedoms (hence the ECtHR or the Convention, 1950. with protocol no. 1, 4, 6, 7, 11, 12, 13 and 14; ratified along with a protocol no. 1, 4, 6 and 11 (OG 18/97)); consolidated text of the Convention with a Protocols no. 1, 4, 6 and 14.

14 SAA, Art. 69. “The Parties recognise the importance of the approximation of Croatia’s existing legislation to that of the Community. Croatia shall endeavour to ensure that its existing laws future legislation will be gradually made compatible with the Community (acquis).” http://narodne-novine.nn.hr/clanci/medunarodni/328068.html.
16 “… Formalistic approach of the Croatian Supreme Court, given the circumstances of this case, is not admissible…” (CC decision No. U-III-745/2009).
7 was published in OG 6/99 (correction: OG 8/99); Protocols no. 24:13 confirmed by the law of 11 XI. 2002 (OG 14/02), and the Protocol 14 Law of 30 I. 2006. (OG 1/06. ECtHR as well as other international treaties that are in force and which are signed, ratified and duly published in Croatia, are part of the internal legal order (monistic system) and enforce the above laws (Art. 134 Constitution). Bearing in mind their directly applicable character (self-executing norms) Croatian courts are obliged to enforce justice under the terms of art. 118, para. 3. of the Constitution. Jurisprudence of the ECtHR represents in part Convention Law. ECtHR decisions under art. 46 Convention oblige each State Party and it is obliged to perform.

After 2010 constitutional change art. 5 para. 2 of the Constitution stipulates that “everyone must abide by the Constitution and the law”. Precisely the “law” from art. 5 Para 2. means EU law (primary and secondary) as well.

6. International and EU Law in Legal Education for Judges

The training and continued education of judges in international and EU law is essential if it is to become a meaningful reality at the domestic level. Without such training, implementation of EU and international law will remain illusory. The international, EU and national law institutions has on several occasions emphasized the importance of providing training in international and EU law for judges, other legal professions and law enforcement officers 18. Even though, according to the leading authority in EU law in Croatia, the dominant state of affairs is still characterized by the following: Croatian members of the legal profession show cognitive insufficiency of EU law values because EU law was marginalized in professional education. Also, examining knowledge of internal EU Market Law in the Bar Examination is also lacking 19

In 2009, the Croatian Parliament adopted the Judicial Academy Act that introduced a significant reform in the system of entering the professions of judges and state attorneys by setting the obligation to complete a two-year training period at the State School for Judicial Officials organized within the Judicial Academy. Although the Judicial Academy has been successfully conducting training for judicial advisors for several years now, it is still lacking a specialized professional training programme for judicial advisors tailored according to the specific legal areas that they deal with in their work. In December 2012 Croatian Parliament adopted the Strategy for the Development of Justice for the 2013-2018 period which defines the core values of the Croatian judicial system that must be preserved through the whole process of its further development, and are in compliance with all the commitments undertaken in the accession negotiations on Croatian membership of the European Union. 20

Making accessibility of the foreign sources of law and national court’s judgments to the public was also one of the good parts of the new beginning scenario. The overall practice of the ECtHR (Strasbourg) and the ECJ (Luxemburg) is available through the database HUDOC on the official website of the Constitutional Court, Supreme Court, High Commercial Court, High Administrative Court, but also on the the sites of the county or municipal courts. Translations of judgments and decisions of the European Court of Human Rights adopted in relation to the Republic of Croatia, in Croatian,

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can be searched via the website of the Office of the Croatian representative before the European Court of Human Rights. Translations of judgments and decisions of the European Court on Human Rights adopted in relation to the Republic of Croatia, in Croatian, are available on the website of the Ministry of Justice. Summaries of selected decisions of the ECJ in the Croatian language can be browsed through the Judges Network website. The Constitutional Court judgments (from 2006 onwards) and the Supreme Court cases (from 1993) have been reported. A selection of High Administrative Court decisions, and a selection of High Commerce Court decisions that are of particular legal or public interest have also been published.21

7. **On Application of International and EU Law**

The issue of uniform interpretation and application of law is one of the most important legal issues. It is the consistent interpretation of the same provision of law, regulation or other enactment, followed by the equal application of the law, on which the uniqueness of jurisprudence typically depends. As case law undoubtedly is one of the sources of law, it has a very important role in decision making of the courts. Therefore, this source of law should be consistent and a barrier to the adoption of various decisions in resolving cases based on an identical facts and legal issues. The creation of state practice through national court decisions can be seen as a way for national courts to play a role in transnational judicial dialogue. Judges, who generally lack the expertise, language skills, and time to conduct surveys of state practice, may have great difficulty in understanding foreign decisions. These logistical difficulties may be ameliorated through greater training of judges and greater accessibility of foreign court decisions.22 The CC has repeatedly stressed that it was not responsible for the harmonization of jurisprudence. This was emphasized in its decision in the following way:

“... Article 118 Paragraph 1 of the Constitution provides that the Supreme Court, as the highest court ensure uniform application of the law. Accordingly, the Court has no jurisdiction in the harmonization of jurisprudence...”

The Civil Procedure Act provided in article 382 special audit to the party who may request that the Supreme Court reaches a decision in the case of non-conforming practices of appellate courts. After the ordinary courts take on their share of responsibility for the implementation of Union law, the CC will still have the final say in matters of ratification of the Treaties, the fundamental relationship issues of national and European law and will be able to focus on the development of legal arguments that will contribute to the strength of its persuasiveness in European constitutional discourse.23

Under EU law, national courts have to: establish the legitimate aim of regulation taking into account Community interest, if necessary, by interpreting national law in the light of EU law. In doing so, they establish whether a fair balance is present as between national regulatory measure and market freedom guaranteed by EU law balance where individual interest is concerned, against the general interest by application of the proportionality test. These obligations of national courts under EU law are obtained along with and irrespective of the constitutional reform of the Union en-

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21 “Although the field of publishing court rulings made substantially progress, there is still room for further improvement. Decisions of the lower courts or non-final decisions are not published. Publicized decisions mainly of Supreme Court and county courts judgments are very difficult to search due to limited software solutions. Furthermore, judgments are still needlessly anonymous although the European practice is just the opposite. There is no systematic publishing of all decision, but only selected ones. This situation significantly impairs judgment transparency and limits the possibility of criticism S. Rodin, “Hrvatsko i europsko pravo 13 mjeseci prije članstva u Evropskoj uniji”, May 28, 2012, last modified 13.02.2014., http://pravo-eu.blogspot.com/2012/05/hrvatsko-i-europsko-pravo-13-.


visaged by the Lisbon Treaty. However, without proper understanding of the Union’s constitutional framework, national courts will have difficulties to fulfil their European mandate. Under Croatian law, the obstacles for meeting the mandate described above are still living. In particular with the relation with: understanding of public (State) interest as absolute; with judicial deference to the legislature and to the Supreme Court; with understanding of the Constitution as a political rather than a legal instrument and reluctance of ordinary courts to apply it; and with rudimentary proportionality analysis that is, by and large, restrained to the Constitutional court.²⁴

8. Highest Courts as Transnational Law Messengers

The Constitutional Court in its application and interpretation of the constitutional human rights provisions is open in using the rights doctrine of the European Court of Human Rights. In this way, the CC strongly contributes to better individual rights protection in Croatia. It helps to preserve its reputation in the international community and to avoid financial sanctions too. The CC jurisdiction makes it easier to open the door to the way of widening Croatian constitutional law in terms of its convergence with the right of European Integration Law. But there are still some impediments (including institutional ones) as a relics from the pre-accession application of the EU law? First. The language expertise is one of the major obstacles to the decisions of judges to take into account the interpretative effects of EU law. In fact, so far only a small part of the legislation and jurisprudence of the EU has been translated into Croatian. In addition, many of the judges in Croatia have no formal EU law education. However, this topic has been included in the mandatory program of Law Faculties since the 2005/2006 academic year, although some faculties had offered such topics as elective subjects in the past. Therefore, only the youngest judges have possibly acquired some knowledge of EU law. For judges who have not had the opportunity to learn about EU law, programs for educating lawyers on EU law have been organized either within the Judicial Academy or through bilateral projects funded by the EU member states and the European Commission. However, the process of educating judges has only included a small number of the total number of judges in Croatia. The barriers that existed in the pre-accession period still exist. In particular there is a legal formality state of doing things, the refusal of judges to consider political reasons, and so called circular reasoning. Second, during fifty years of socialist rule, original formalist assumptions, such as the objectivity, coherence and systemic nature of law degenerated into a vulgar, textual formalism. Eliminating of this reasoning type is process which is still going on.²⁵


9. Conclusion in Brevis

On July 1, 2013 Croatia became the 28th EU member state. The courts of EU Member States including Croatian courts are obliged under the law of the EU on harmonized way to interpret their national law with EU law. National law in its entirety is under such an obligation. But apart from the existence of interpretative commitments, the EU and its Member States, has developed an interpretative legal culture. This legal culture in nutshell accepts the interpretative obligation that results in the courts interpretation and adapting legal norms. Current understanding of the law as it currently prevails in the EU courts is considered as one of the important actors in the creative law process. Accepting the indirect effect principle in the Croatian legal system therefore will mean a lot more than mere acceptance of one of the principles of European law. It will also mean – according to S. Rodin’s optimism – “a change in legal culture, i.e. understanding of the purpose and thus the functioning and importance of rights”\(^{26}\). Mission impossible? Let’s wait and we shall see clearly what is waiting for us beyond the horizont of the promising new age\(^{27}\).

\(^{26}\) Ibidem

\(^{27}\) “… judges are poor revolutionaries. They are conservative and, in a way, even the reactionary element in any national legal system. They may be eventually convinced that adopting a new approach to X reinterpreting Y should be carried out. But this will not happen without a fair degree of argument and persuasion from the legal scholarship, other legal professions, and/or the parties in particular case”, see M. Bobek, “Comparative reasoning in European Supreme Courts”, Oxford University Press, 2013, pp. 286-287.
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13) Zakon o Državnom odvjetništvu, NN 76/09, 153/09, 116/10, 145/10, 57/11, 130/11, 72/13, 148/13

14) Zakon o Državnom sudbenom vijeću, NN 116/10, 57/11, 130/11, 13/13, 28/13.


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APPLICATION OF EU LAW BY CROATIAN COURTS AND RELEVANT
CONSTITUTIONAL PROVISIONS

Iris GOLDNER LANG*
Mislav MATAJA**

Abstract

The Croatian Constitution contains a separate Chapter whose purpose is to provide the legal
grounds for Croatian membership in the EU and regulate the status of EU law in the national legal order.
Croatia is a monist state and under its Constitutional provisions international treaties which have been
concluded, ratified, published and which have entered into force have primacy over domestic law. Cro-
atian courts have only slowly begun to grapple with the application of EU law. As was the case for the
application of the Stabilisation and Association Agreement before accession, courts have sporadically
applied EU law without elaborating any ambitious doctrines governing the relationship between EU and
national law. Similarly, international law is rarely relied upon by Croatian courts, the only notable ex-
ception being the Constitutional Court’s frequent use of the precedents of the European Court of Human
Rights.

Key words: Constitution, monism, stabilisation and association agreements, international
law, consistent interpretation, harmonisation of laws

Iris Goldner Lang, Jean Monnet Professor of EU law, Ph.D. University of Zagreb 2005, LL.M.
London School of Economics and Political Science (LSE). Visiting researcher, LSE and Institute for
European Law, Johannes Kepler University of Linz. Worked as a trainee at the European Commission.
Jean Monnet Module leader of EU Migration Law and Policy and EU internal Market Law. Specialized
in EU internal market law and EU migration and asylum law.

Mislav Mataija, PhD., is a Senior Assistant at the Jean Monnet Department of European
Public Law at the University of Zagreb Faculty of Law. He graduated at the Law Faculty in Zagreb and
obtained his LLM at the Columbia Law School in New York, where he was a Fulbright Scholar and
James Kent Scholar, and obtained his PhD at the European University Institute in Florence. His areas
of scholarly interest include EU internal market and competition law and international trade law.

* Iris Goldner Lang, PhD, Professor at the Faculty of Law, University of Zagreb, e-mail: igoldner@pravo.hr
** Mislav Mataija, PhD, Senior Assistant at the Faculty of Law, University of Zagreb, e-mail: mislav.mataija@gmail.com
1. Introduction: The New Legal Reality Following Croatian Accession to the EU

The Croatian Constitution contains a separate Chapter VII entitled “European Union” whose purpose is to provide the legal grounds for Croatian membership in the EU and regulate the status of EU law in the national legal order. The Constitutional amendment which inserted Chapter VII into Croatian Constitution was adopted on 16 June 2010. The amendment came into effect on 1 July 2013, the date of Croatian accession to the EU. The provisions of Chapter VII regulate the legal grounds for membership and transfer of constitutional powers (Art. 143); representation of Croatian citizens and institutions in the EU institutions and the decision-making process (Art. 144); relationship of national and European Union law (Art. 145) and; they reiterate the rights of EU citizens (Art. 146).

Art. 145 of the Constitution, entitled “European Union law”, is the most important Constitutional provision in terms of application of EU law in the national legal order. It opens the Croatian legal order to EU law. It provides:

1) The exercise of the rights ensuing from the European Union acquis communautaire shall be made equal to the exercise of rights under Croatian law.
2) All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union acquis communautaire.
3) Croatian courts shall protect subjective rights based on the European Union acquis communautaire.
4) Governmental agencies, bodies of local and regional self-government and legal persons vested with public authority shall apply European Union law directly.

Paragraph 1 provides for the principle of equivalent legal protection based on EU law and national law. Paragraph 2 lays down the application of the principles of EU law such as supremacy, direct and indirect effect. Paragraph 3 provides for the principle of direct effect of EU law and paragraph 4 enables the so called administrative direct effect, meaning that not only national courts, but also national administrative bodies have to apply EU law. However, all these principles and rules exist based on the interpretations of EU law provided by the Court of Justice of the European Union. It has been established long ago by the case-law of the Court of Justice that EU rules have supremacy over national rules, that national rules have to be interpreted in accordance with EU law and that both national courts and administrative bodies have to, under certain conditions, apply EU law directly in order protect individual rights. For this reason Art. 145 of the Constitution can be understood as being of a declaratory and not of instituting nature.

Regarding the legal status and applicability of international law, Croatia is a monist state, based on Art. 141 of its Constitution quoted below. However, in the context of EU law, all EU Member States are bound and have to apply EU law directly. For this reason, (unlike the relationship between international and national law) the relationship between EU law and national law cannot be a dualist one, as all EU norms are an integral part of national systems of EU Member States automatically, due to their EU status. As the court stated in its landmark judgment in Van Gend en Loos1 and then repeated in Costa2 “The Community constitutes a new legal order of international law (the phrase "of international law" was only mentioned in Van Gend en Loos and no longer repeated in Costa – author’s comment) for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States, but also their nationals”.

Accordingly, Art. 143 of the Croatian provides that:

Pursuant to Articles 140 and 141 of the Constitution, the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership.

2. Applicability and Status of the Stabilization and Association Agreement and of International and EU Law Prior to Croatian Accession to the EU

International treaties can be directly applied by Croatian courts and other authorities. Croatian SAA could have been directly applied by Croatian courts prior to Croatian accession to the EU. Upon Croatian accession, Croatian courts have to apply the SAA only to cases dating before 1 July 2013 as their facts took place before the date of accession. However, in case some of the facts in such cases have taken place post-accession, EU law applicable to EU Member States might apply.

The general provision of the Croatian Constitution dealing with the application of international law is Article 141:

International treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.

Some constitutional provisions make limited references to international law other than treaties. Art 2, for example, provides that “the Republic of Croatia, in accordance with international law, shall exercise sovereign rights and jurisdiction over the maritime zones and seabed of the Adriatic Sea outside its state territory up to the borders of neighbouring countries” and Art 3 refers to human rights as one of the highest values of the Croatian legal order, which might be read as also referring to general principles of law and *ius cogens* related to human rights. Art 31 provides that “no one may be punished for an act which, prior to its commission, was not defined as a punishable offence by domestic or international law” and that the statute of limitations shall not apply to “those not subject to the statute of limitations under international law”. Similarly, Art 33 stipulates:

Foreign citizens and stateless persons may be granted asylum in Croatia, unless they are being prosecuted for non-political crimes and activities contrary to the fundamental principles of international law. No alien legally in the territory of the Republic of Croatia shall be banished or extradited to another state, except in cases of enforcement of decisions made in compliance with an international treaty or law.

More generally, however, the Constitution is otherwise silent on other sources of international law, such as international customary law.

It seems, however, that these sources can be applied before Croatian courts; one example of this is a 2013 judgment of the Zagreb County Court, applying the concept of sovereign immunity as arising from international customary law.\(^3\)

As for EU law, the answer depends on whether we are talking about the pre-accession or the post-accession situation.

Prior to accession, the only relevant constitutional provision was the aforementioned Article 141 of the Constitution. This enabled the application of EU law sources through the ‘back door’ of the SAA provisions on harmonization of laws. As will be discussed below, Croatian courts have been willing to rely on EU law sources, such as Commission decisions or ECJ judgments, on the basis of

\(^3\) Gžn-2152/11-2, judgment of 12 March 2013.
the SAA, but only to a limited extent. There was, however, no clear constitutional authority for the application of EU law prior to accession.

This situation changed with accession. The Constitution contains several provisions dealing with Croatia’s membership in the EU, as well as the application of EU law. There is no provision that expressly requires courts to apply particular legal sources such as ECJ jurisprudence or soft law. However, Art 145 provides:

*The exercise of the rights ensuing from the European Union acquis communautaire shall be made equal to the exercise of rights under Croatian law.*

*All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union acquis communautaire. Croatian courts shall protect subjective rights based on the European Union acquis communautaire. Governmental agencies, bodies of local and regional self-government and legal persons vested with public authority shall apply European Union law directly.*

This provision makes it clear that EU legal acts are to be applied “in accordance with the acquis”, which implies that the basic principles of how EU law has to be applied, such as direct and indirect effect and supremacy, are tacitly introduced into the Constitution as well. It is also clear that rights granted to individuals by EU law are to be protected by courts. Finally, the last paragraph requires the direct application of EU law by State bodies.

3. The Pre-Accession Situation

In principle, the SAA has been directly applicable prior to Croatian accession to the EU. Nevertheless, to our knowledge there have been no cases of direct application of the SAA in Croatia prior to accession, resulting e.g. in disapplication of national legislation that conflicts with the SAA.

The use of EU legal sources by courts on the basis of the SAA harmonization clauses is discussed in the next section of this text. While EU law has been used, it would be difficult to characterize the case law of Croatian courts as allowing direct application of EU law sources.

With accession, naturally, there are many examples of Croatian legislation which refers to EU law, implements EU law etc. Prior to accession, to our knowledge, there have been no major examples of application of EU law by renvoi, but this has occurred in some limited technical fields. For example, the former Ordinance on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks implemented into Croatian law the provisions of a Commission Regulation. The Croatian ordinance contained the full text of the Commission Regulation with its amendments in several annexes, and stipulated (Art 7):

*In the case of interpretative disputes or drawbacks of the provisions of this Ordinance, the text of the Regulations from Annexes I through VII of this Ordinance in English will be used, as published in the Official Journal of the European Union.*

As already mentioned, there have been no cases that we are aware of where the SAA was directly applied by a court in Croatia, e.g. against Croatian legislation. There was never any established doctrine on the interpretation of the mirror provisions of the SAA, even though ECJ case law has at times been relied upon (mostly in the area of competition law).

The application of EU law through ‘mirror provisions’ could have, for example, been an issue in a High Commercial Court’s 2007 case on parallel imports and trade-mark exhaustion rights. The HCC, however, chose not to classify the case as a case on the free movement of goods. Therefore,

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it only examined it from the point of view of the SAA’s provisions on IP, asserting that ECJ case law cannot be relevant in that area before accession (interestingly, the HCC could have dealt with the case much more simply by noticing that the allegedly infringing goods were in fact imported from Turkey, and not from the EU).

The reliance on the SAA’s harmonization clauses by courts has largely been limited to the ones related to competition law. In addition, courts have referred to broader aims and values, such as the need to align with the *acquis*, but the overall value of those statements is questionable in light of the contradictions and a lack of clarity in the case law.

4. EU Friendly—Application of Domestic Law in the Practice of Courts

Prior to Croatian accession to the EU, there have been no clear court judgments establishing a leading principle providing general direction to national courts to interpret applicable national law in light of the relevant EU law, at least not for all fields governed by EU law or even for all fields covered by the SAA.

The Constitutional Court has recognized that EU-friendly interpretation is possible in the area of competition law, which is privileged in that a specific SAA provision (Art 70), as well as the provisions of Croatian legislation on competition law and state aids, require the application of ‘interpretative instruments’ of EU law prior to accession.

In a 2008 judgment, in response to the conflicting case law of the Administrative Court, the Constitutional Court addressed the claim that ‘criteria, standards and interpretative instruments’ of EU law cannot be applied unless they are explicitly incorporated into Croatian law and published. The Court rejected this, finding that these materials are not ‘primary sources of law’ but only an ‘auxiliary interpretative tool’ the role of which consists in ‘filling in legal voids’ in a way that ‘conforms to the spirit of national law’. In a later judgment on the same point, however, the Constitutional Court added that ‘Croatian competition bodies are authorised and obliged to apply the criteria’ arising from EU law; this language seems to suggest that EU-friendly interpretation is a duty and not just an option for Croatian courts in the area of competition law (as can, indeed, be concluded from the letter of the SAA and of Croatian legislation).

It is not clear whether this extends to other areas. In the 2008 judgment, the Constitutional Court stated that the competition law harmonisation clause should be viewed in the context of Croatia’s duty to align itself with the *acquis*, so that ‘when applying legislation that has been aligned in this way, it is the duty of State authorities to do so as it is done in the European Communities, i.e. according to the meaning and spirit of the legal rules on the basis of which the alignment was performed.’ This could be read as imposing a general duty of EU-friendly interpretation, but it could also be limited to the competition law context.

It should be noted that, despite these judgments of the Constitutional Court, other courts do not always comply. In 2010, the Administrative Court found the Croatian Competition Agency’s reliance on Commission state aid guidelines to be illegal. The Court cited the constitutional provision allowing for the direct application of international agreements, concluding that: “the [SAA and the Interim Agreement] could have therefore been applied in this case, while the criteria, standards and interpretative instruments of the European Community relied upon by the defendant institution which are not contained in the text of those agreements, nor are they taken over and published.

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in any other Croatian law or legal rule, cannot be a source of law.”

In addition to the cases already mentioned, prior to accession there has been some limited and divergent case law where EU law was invoked on the basis of the SAA. The Administrative Court has at times accepted and at times refused the application of EU law in the area of competition law. The High Commercial Court, in a series of trade-mark disputes, interpreted Croatian legislation in light of the Trade Marks Directive 89/104 to prevent a trade mark owner from relying on the mark against a third party that had been using it as his own name in the course of trade. According to the HCC, the Directive was relevant due to the entry into force of the SAA, ‘under which the Republic of Croatia and the courts of the Republic of Croatia are bound to interpret existing legal rules in a way that conforms with the acquis.’ In the second and third judgments, the HCC even found that Article 69 of the SAA (the general harmonisation clause) ‘creates a duty not only for the Croatian legislative and executive authorities to harmonise future legal rules with the acquis of European law, but also for courts to interpret existing legal rules in a way that conforms with the acquis.’ On the other hand, a 2007 judgment by the same chamber of the same court goes in an opposite direction by rejecting the reliance on the TFEU rules on free movement of goods and the corresponding ECJ case law in a case on parallel imports and the trade mark exhaustion of rights principle. The HCC’s view was that EU law apart from the SAA can only be applied in the area of competition law. In contrast to its previous case law, the HCC found that in the area of trademarks, ‘Croatia will only be bound to respect the interpretations given by the European Court of Justice when it becomes a full member of the EU.’

After accession, to our knowledge, there have been few cases so far where Croatian law was interpreted in light of EU law, even though – as the constitutional provisions listed supra demonstrate – this should not be a major issue in principle. One notable and politically controversial exception is a recent order of the Supreme Court allowing the execution of a European Arrest Warrant issued against a Croatian national for a crime which would be statute-barred in Croatia. The decision was based, in part, on the _Pupino_ judgment of the CJEU:

... for the achievement of the aims and the respect for the principles expressed by EU law, national courts are obliged to apply national law in light of the letter and spirit of EU provisions. This means that national law must in practice be interpreted as far as possible in light of the wording and purpose of the relevant framework decisions and directives, in order to thus achieve the result sought by those framework decisions and directives [...] (as expressly stated in the judgment of the ECJ in Case 105/03 P of 16 June 2005). By acceding to the EU, the Republic of Croatia has also taken on the duty to act in such a way.

5. Conclusion

Croatian Constitution contains a separate Chapter whose purpose is to provide legal grounds for Croatian membership in the EU and regulate the status of EU law in the national legal order. Croatia is a monist state and under its Constitutional provisions international treaties which have been concluded, ratified, published and which have entered into force have primacy over domestic law. Croatian courts have only slowly begun to grapple with the application of EU law. As was

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9 Judgment Pž 2330/05-3 of 13 June 2006. Curiously, the Court also added that, as a consequence of the SAAs entry into force, ‘where a rule of national law is not in accordance with European law, and European law has greater legal force than national law, we are bound to apply the rule of European law’. It is not clear if this was meant purely as an obiter dicta or if it is simply unfortunate drafting. It is doubtful that the High Commercial Court actually meant to say that the SAAs entry into force immediately requires EU law in general to be applied directly and trump national rules. In any event, this would clearly not have been necessary for the resolution of the trade mark disputes.
the case for the application of the Stabilisation and Association Agreement before accession, courts have sporadically applied EU law without elaborating any ambitious doctrines governing the relationship between EU and national law. Similarly, international law is rarely relied upon by Croatian courts, the only notable exception being the Constitutional Court’s frequent use of the precedents of the European Court of Human Rights.
APPLICATION OF THE LAW OF THE EUROPEAN UNION IN THE REPUBLIC OF MACEDONIA

Sašo GEORGIEVSKI*
Ilina CENEVSKA**
Denis PREŠOVA***

Abstract

This article presents a thorough overview and analysis of the application of EU law in the Republic of Macedonia in the pre-accession period. Bearing in mind that Macedonia is still a candidate country for EU accession we explore upon the constitutional and statutory framework which provides the legal bases for application of EU law in its internal legal order at this stage of EU integration. We also reflect upon the relevant practice of the Constitutional Court of Macedonia and the ordinary courts in order to get an insight into the actual application of EU and international law in the Macedonian legal order, pointing to the shortcomings in the interpretation of the national constitutional and statutory provisions and other ‘external sources of law’ in the courts practice that are caused by the deeply rooted legal formalism and textualism. We argue that EU law in Macedonia, at this stage, is being mainly applied by the courts indirectly, as a secondary or persuasive authority particularly in cases which involve domestic legal provisions transposing EU law into the domestic legal order as part of the obligations taken over through the SAA and other EU-related ratified treaties.

Key words: EU law – Macedonia – application - pre-accession - direct effect - national courts - Stabilisation and Association Agreement (SAA)

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Sašo Georgievski, PhD is a full time professor at the University “Ss. Cyril and Methodius”, Faculty of Law “Justinianus Primus: Skopje, Department for International Law and International Relations, and Jean Monnet Chair as of 2012. During his professional career, he was legal advisor to relevant Ministries of the Government of the Republic of Macedonia in legal disputes of the Republic of Macedonia at the ICJ and ICC. He is a nominated arbiter at the list of arbiters at the Permanent Court of Arbitration. He is author of four books and numerous articles in the fields of International and EU Law, in particular in the areas of foreign investment law, concessions and public-private partnerships, state succession, dispute settlement and international adjudication, and the relationship between International and EU law and national legal orders.
Ilina Cenevska, LLM has been working as a teaching assistant in European Union law since 2007 at the Faculty of Law “Iustinianus Primus”, University “Ss. Cyril and Methodius” in Skopje, Macedonia. She holds a LL.M degree in European Union Law from the College of Europe in Bruges, Belgium and is currently pursuing a doctorate in law at the Ghent University Faculty of Law in Belgium. Her academic interests comprise International and European Environmental and Human Rights law and environmental and human rights litigation.

Denis Prešo, LLM works as teaching and research assistant in the department of constitutional law and political system at the Faculty of Law “Iustinianus Primus” in Skopje. After successfully finishing his undergraduate studies at the Faculty of Law “Iustinianus Primus” in Skopje in 2006, he obtained his Master of European Studies (M.E.S.) degree in 2007 from the University of Bonn, Center for European Integration Studies. In 2010, Preshova received his LL.M. (magna cum laude) degree from University of Pittsburgh, Law School, as a Fulbright fellow. Currently he is a PhD student in comparative constitutional law and EU law at University of Cologne, Germany. He has authored several journal articles and book contributions on constitutional adjudication, constitutional design and EU law. His areas of specialization and interest are: comparative constitutional law, EU constitutional law, judicial review and judicial politics, institutional design, human and minority rights.
1. Introduction

The process of legal approximation of the legal order of the Republic of Macedonia, as a candidate country, taking place in the period prior to the country’s accession to the Union, is an essential precondition for its planned integration into the Union’s legal and political framework as an EU member state. The ongoing process of legal approximation or harmonization lays grounds for the future co-existence between the Union and the domestic legal orders whereby the obligation for harmonization is equally distributed among the legislative, executive and the judicial authorities of the state. Like their counterparts from the SEE region, Macedonian judicial authorities share an immensely important task of giving the EU norms appropriate legal effect in the domestic legal system at the pre-accession stage, either by directly applying these norms (where it is legally possible), or by offering an EU-conformed interpretation and application of the domestic legal rules (‘judicial harmonization’). The latter, which is a much more tenable option in the pre-accession period, presupposes that domestic courts interpret and/or apply national legal rules in a Euro-friendly manner, irrespective of whether the national rule being applied originally finds its source in an EU legal act (directive, regulation etc.) or not.

In this article, we will focus on presenting and explaining the current constitutional and other valid legal grounds for EU law direct and indirect application in the Macedonian legal order in the pre-accession period, and in particular on identifying major trends in its application in the jurisprudence of the Constitutional Court and the ordinary courts of RM. Given the convergence between the EU and international legal systems in view of the constitutional grounds for their application domestically, both of them appearing to national judges as ‘other systems’ when compared to their own (i.e. the Macedonian) legal system, our analyses on the EU law application will be accompanied by appropriate references to the effectiveness and practical application of international law by Macedonian courts.

As will be demonstrated below, there are sufficient legal grounds for a limited pre-accession application of the sources of the law of the Union in the Republic of Macedonia via the monist constitutional and statutory basis on international law and the relevant provisions of the Stabilization and Association Agreement and other relevant treaties concluded with the EU. Under that legal framework, one can identify a growing (albeit still modest) trend of mainly indirect application of the sources of EU law by Macedonian courts, including of the SAA which sets out the legal framework for the Macedonian pre-accession process. However, Macedonian judges still lack sufficiently developed awareness for the legal possibilities and the need for pre-accession application of EU law, and appropriate methodological skills for its appropriate application. Particularly worrisome is the absence of a leading role taken by the Supreme and the higher (Appellate) courts in providing guidance to the lower courts regarding EU law application, especially, by the Macedonian Constitutional Court, particularly reflected by its stiff position of not giving direct force to the SAA (and other ratified treaties) under the applicable ‘monist’ provision of the Constitution of RM.

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1 Albi, Anneli. EU Enlargement and the Constitutions of Central and Eastern Europe. Cambridge: Cambridge University Press, 2005, 52. In this article, we will interchangeably use the terms ‘Euro-friendly’ and ‘Euro-conformed’ and ‘EU-harmonious’ interpretation/application of domestic law for denoting the approach of interpretation and application of domestic legislation in view of the applicable EU law.


In presenting the current legal regime for EU law (and international law) application and the related Macedonian jurisprudence, we will first proceed with revealing the content and meaning of the applicable provisions of the Constitution of RM, of pertinent legislation, and in particular of the particular clauses of the Stabilization and Association Agreement, that lay grounds for pre-accession application of the sources of EU law. The overview of the relevant Macedonian jurisprudence regarding EU law (and international law) application will concentrate solely on consulting selected decisions of the Constitutional Court, the Supreme Court and of other courts (including the Administrative Courts) that have been identified as revealing current patterns regarding EU (an international) law application, rather than on presenting a full range of analyzed jurisprudence. While elaborating on our topic, where appropriate, we will consult relevant analytical data provided by the survey conducted at the Faculty of Law ‘Iustinianus Primus’ Skopje in the period between the end of 2011 and the beginning of 2012 on almost a third of Macedonian ordinary judges at all regular court instances, as part of a national research project devoted to the “European Law Application in the Republic of Macedonia Before Its Accession to the EU”.4

2. Legal Framework for the Application of International Law and European Union Law in the Republic of Macedonia

Understandably, as a non-member of the EU, like the rest of the SEE aspirant countries and their CEE counterparts before joining the EU (excepting Poland),5 the Republic of Macedonia has not yet set out explicit basis in its Constitution for EU law application under a specially inserted ‘Europe clause’. Direct and indirect applicability of the law of the Union before EU accession has to be discerned primarily from the respective constitutional and statutory provisions on the status and effect of international treaties, which determine the applicability of the Stabilisation and Association Agreement (and other EU related agreements), and of general international law. In particular, the respective national constitutional and statutory provisions on the status and effect of international treaties are of particular relevance when assessing the approach taken towards pre-accession EU law application, as the relationship between Macedonia and the EU/EC has been initially established through the Stabilisation and Association Agreement, which is a ratified treaty.

In principle, under that Macedonian constitutional and statutory regime, excepting the directly applicable provisions of the SAA and other EU related agreements, and certain EU law sources applicable under these agreements, various sources of the law of the Union (including ECJ’s caselaw) largely represent indirect sources of law and serve as persuasive authority in the Republic of Macedonia, primarily, on the basis of the particular clauses of the SAA.

2.1. Applicability and Status of Treaties

The applicability and the status of treaties, including the SAA, in the Macedonian legal order are primarily governed by Article 118 of the Constitution.6 This provision stipulates that “[t]he inter-
national agreements ratified in accordance with the Constitution are part of the international legal order and cannot be changed by a law [statute]."

Under Article 118, ratified treaties clearly enjoy direct applicability in the Macedonian legal order without, in principle, any need for prior issuance of implementing legislation. The later principle is also reflected in other constitutional and statutory provisions, including in Article 98 of the Constitution and the corresponding provision of the Law on Courts, providing that, while adjudicating, courts must decide on the basis of the Constitution and laws “… and international agreements ratified in accordance with the Constitution.” 7 Similar provisions mirroring Article 118 of the Constitution are found in other statutes, as well. 8

However, in the specific context of the Macedonian Constitutional Court, Article 110 of the Constitution that governs the CC’s competences falls short of explicitly mentioning the Court’s authority for reviewing conformity of domestic legislation with ratified treaties, and for ex post review of the constitutionality of ratified treaties (ex ante review of constitutionality of treaties by the CC is not possible in the Macedonian legal order). The latter lacuna has unnecessarily caused serious anomalies regarding the proper application of the general monist regime for ratified treaties of Article 118 of the Constitution in the current practice of the Macedonian Constitutional Court. 9

While ensuring direct applicability for ratified treaties, Article 118 of the Constitution does not explicitly differentiate between treaty provisions that are capable of being directly applied and those that do not possess such capacity (i.e. akin the US-tailored distinction between ‘self-executing’ and ‘non-self-executing’ treaty provisions), 10 lest it offers specific solutions reflecting the even more nuanced distinctions as regards direct effectiveness of EU provisions that has been developed within the context of EU law. 11 The former distinction could possibly be discerned from Article 18(4) of the Law on Courts, which directs the courts to apply the provisions of ratified treaties in case of a conflict with domestic legislation only “… on a condition that these could be directly applied.” That Article of the Law on Courts, however, fails to spell out any criteria for identifying direct applicability of treaty provisions, leaving the task of developing appropriate identification criteria to national courts.

In addition to Article 118 of the Constitution and the corresponding general statutory clauses, several provisions of the Law on Courts explicitly envisage direct applicability of specific treaty instruments. 12 Thus, Article 35 of the Law on Courts provides that courts apply the European Convention on Human Rights and its principles - ‘following the jurisprudence of the European Court of Human Rights’ (in the context of the guaranteed remedy for violation of the right to a fair trial in

7 Law on Courts of 11.05.2006, as amended, Official Gazette of the Republic of Macedonia no. 58/06; 35/08; and 150/10; Article 2; (in Macedonian).
8 E.g. see the Law on the Organization and Operation of the Organs of State Administration, as amended, Official Gazette of the Republic of Macedonia no. 58/00; no.44/02, no.82/08, and no.167/10), Article 13.
9 For more on that see infra subsection 3.1.
12 Besides the Law on Courts there also other instances in which statutory provision refer to direct applicability of the ECHR and the case-law of ECHR, for example see Law on Civil Liability for Defamation and Insult, (Official Gazette of the Republic of Macedonia No. 143/12 from 14.11.2012) Article 2(2) and Article 3, Law on Civil Procedure (Official Gazette of the Republic of Macedonia No.7/11 from 20.01.2011) Article 400 (3), Law on Criminal Procedure (Official Gazette of the Republic of Macedonia No.150/10 from 18.11.2010) Article 449.
reasonable time).\(^{13}\) And, its Article 18(5) stipulates that they also ‘apply’ the final and enforceable decisions of the ECtHR, the International Criminal Court and “other international courts whose jurisdiction is recognized by the Republic of Macedonia.”\(^{13}\) Whereas, the later provision has been aimed at ensuring automatic execution of the enforceable international courts’ decisions through Macedonian courts, some authors suggest a wider reading of the text of Article 18(5) in order to enable indirect consultation of the relevant international courts’ jurisprudence by national courts, mainly relying on the phrase employed in that Article envisaging that courts ‘apply’ (instead of merely ‘enforce’) international courts’ decisions.\(^{14}\) Whatever the true meaning of that particular provision of the Law on Courts, there have been a certain practice already developed by ordinary courts of indirect consultation of international court’s jurisprudence in their judicial practice, especially of the Strasbourg Court’s decisions in the context of ECHR’s application.\(^{15}\)

The rather opened monistic regime related to treaties in the Macedonian legal order under Article 118 of the Constitution (and the corresponding statutory provisions) is not left without any uncertainties, which potentially create possibilities for diverging and inconsistent interpretations in the practice of different institutions.

The first set of difficulties is related to the narrow scope of Article 118, restricted only to ‘ratified’ treaties, while leaving the status and applicability of valid binding agreements which are not subject to ratification proceedings (often termed as ‘executive agreements’) largely unregulated in the Macedonian legal order.\(^{16}\) Since the later agreements are clearly excluded from the ambit of Article 118 (and the corresponding constitutional and statutory provisions), it may be fairly assumed that, in principle, not-ratified treaties enjoy ‘dualist’ treatment in RM. Not-ratified treaties would be made applicable only through the technique of their ad hoc transformation or incorporation in the internal legal order by a national legal act (most frequently an act of Government), bearing the force and status of that implementing act in the domestic hierarchy of legal sources.

However, even the above assumption could not be taken as absolute and completely immune from different interpretations. Some valid not-ratified treaties are concluded within the framework of (and owe their existence to) related treaties duly ratified by Parliament (e.g. subsequent protocols etc.), may be published in the Official gazette of RM, and may contain provisions affecting rights and obligations of private persons, so it seems that there should be no ample reasons to exclude them from the benefit of the monist regime envisaged by Article 118 of the Constitution. Perhaps, that was exactly what motivated the Macedonian Supreme Court (following similar decisions of the first and second degree courts) to proceed with direct application of the Interim Agreement between Macedonia and the Communities in the 2004 Makpetrol Case,\(^{17}\) despite the fact that that Agreement had not been ratified by the Macedonian Parliament, and that it had been published in the Official gazette of RM only as incorporated in a Government regulation. In its decision, obviously at pains to establish a direct link between the Interim Agreement and Article 118 of the Constitution, the Court nevertheless directly applied and gave supremacy to the Agreement over a conflicting Government regulation (post-dating the one incorporating it) under Article 118 of the Constitution,

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13 Law on Courts (Official Gazette of the Republic of Macedonia No. 58/06 from 11.05.2006, as amended in Official Gazette no. 35/08 from 14.03.2008 and Official Gazette of the Republic of Macedonia No. 150/10 from 18.11.2010), Article 35(1).
15 See infra subsection 3.5.
16 In some countries the applicability of treaties is linked to their prior publication in the respective country’s official journal. Cassese, Antonio. Oxford: Oxford University Press, 2005, 226. Thus, that may possibly include not-ratified treaties that have been dully published in the journal.
17 Judgment of the Supreme Court of Macedonia of 10 June 2004, Rev. no. 23/04.
by treating it as a ‘ratified’ treaty via the ratification of the SA Agreement to which it was functionally linked.\textsuperscript{18}

While, we are not aware of any jurisprudence subsequent to the Makpetrol decision developed by the Supreme Court and other ordinary courts in which they have adopted a similar position of granting direct applicability and supremacy to not-ratified treaties concluded within the framework of ratified treaties, there is no reason for doubts that such positive courts’ practice would be followed in the future, as well. Yet, that would require particular wisdom and a rather creative approach exercised by judges in interpreting and applying Article 118 of the Constitution in every particular situation where a not-ratified treaty has been relied upon. A principled opinion issued by the Supreme Court to lower courts on the question of the applicability and status of not-ratified treaties in the Macedonian legal order under the current constitutional regime would be obviously helpful for ensuring proper understanding and uniform courts’ practice regarding not-ratified treaties.

The same holds true for binding decisions or regulations issued by various bodies established under ratified treaties, including the binding decisions issued by the Stabilisation and Association Council under the SAA.\textsuperscript{19} Unlike some other Constitutions of SEE countries,\textsuperscript{20} the Constitution of the Republic of Macedonia does not spell out any specific rule on the applicability and the status of binding decisions or regulations adopted by the international organizations or bodies to which it is a member under a ratified treaty, so that these should be established through a creative interpretation of the pertinent constitutional clauses, most notably of Article 118. There are two possibilities in that respect: binding decisions would be granted a monist treatment via the respective ratified treaty under a wider interpretation of Article 118 (similar to that related to not-ratified treaties discussed above), or, there applicability and status would be conditioned by prior issuance of specific implementing regulation (a dualist approach). By analogy, perhaps, according to its reasoning in a 2007 case,\textsuperscript{21} in which it was called upon to pronounce on the status and effects of several international technical standards on the maintenance of aircrafts (JAR-145 and JAA) which application domestically have been provided by reference by EC Regulation 3922/91 annexed to the Multilateral Agreement for the Establishment of the European Common Aviation Area (ratified by the Macedonian Parliament),\textsuperscript{22} the Constitutional Court came close to advancing the monist approach. In answer to the initiators’ argument that the later standards have not been ‘ratified treaties’ for the purpose of the application of Article 118 of the Constitution, the Court concluded that, under Article 118, upon its ratification, the Multilateral Agreement for the Establishment of the European Common Aviation Area had become an integral part of the internal legal order “… together with all its component

\textsuperscript{18} Article 128 SAA provides that the conclusion of the Interim Agreement is used as a means to put into effect certain parts of the SAA, especially those relating to free movement of goods, pending the SAAs entry into force.

\textsuperscript{19} E.g. the UN SC resolutions imposing economic and diplomatic sanctions against particular countries under Chapter VII of the UN Charter, including the Statutes of the ICTY and the ICTR enacted by the SC under Chapter VII, etc. Normally, national constitutions do not contain specific provisions providing direct applicability of decisions of international organizations via automatic incorporations. Exceptions are found in the Constitutions of the Netherlands, Greece and Spain, or in the judicial practice of certain states (i.e. France), where their applicability is conditioned by their prior publishing in the respective state’s official journal. Cassese, \textit{International Law}, 233-4. Also in the Albanian Constitution, See infra note.

\textsuperscript{20} I.e. Article 122(3) of the Albanian Constitution, providing that “[the norms enacted by an international organization have supremacy, in case of a conflict, over the law of the land, when the agreement ratified by the Republic of Albania for its participation in that organization, expressly envisages that direct applicability.” For more see Caka, Fjoralba:“The Application of International Law in the Albanian Domestic Legal Order,” published in this book.

\textsuperscript{21} Decision U.br.103/2007-0-0 of 24.10.2007. In that case, the Constitutional Court was called upon to review the constitutionality of a Rule-book issued by the Macedonian Agency for Civil Aviation that referred to direct application of several international technical standards on the maintenance of aircrafts (JAR-145 and JAA standards), since, according to the initiator, the latter have allegedly “not been part of the internal legal order” in view of Article 118 of the Constitution.

\textsuperscript{22} OJ L 235, 16/10/2006.
parts, including the regulation of JAR-145.” But, this was a case in which the application of that specific international regulation had been explicitly referred to by a ratified treaty (i.e. an EC Regulation referred to by a treaty).

Beyond situations where the application of specific pieces of international regulation has been explicitly envisaged by respective ratified treaties, the autonomous status and direct applicability of international binding regulation more generally in the Macedonian legal order at least remains unclear, although there are ample reasons to support the suggestion that the latter should follow the status and force of the ratified treaty that enabled their adoption by the respective international bodies and hence should enjoy direct applicability under Article 118 of the Constitution. Nevertheless, it seems that, as a matter of general practice, and of certain statutory law, the adoption of specific implementing legislation would be required whenever an international binding regulation has to be given force in the Macedonian legal order, without denying them the status of indirect or persuasive sources of law.

The above discussion is particularly pertinent in the context of the SA Council’s decisions, and those of other bodies created under specific treaties concluded with the EU. Though different than the relevant practice of the ECJ, the pre-accession approach of treating these decisions as not-ratified (executive) agreements hence not directly applicable internally, that was taken by the courts of the CEE countries, and was sanctioned by statutes in some countries from the SEE region, suggests only indirect domestic applicability of the Council’s decisions. In view of that practice, and the uncertainties left by Article 118 of the Macedonian Constitution, it could be expected that the SA Council’s (and other bodies’) binding decisions would be subjected to the similar pattern

23 Thus, on the example of restrictive measures imposed by a binding resolution of the UN Security Council pursuant to Chapter VII of the UN Charter, by ‘legal acts’ of the EU, and by ‘legal acts’ of other international organizations in which Macedonia is a member, the Law on International Restrictive Measures of 23.03.2011 (Official Gazette of the Republic of Macedonia no.36/11), like the previous Law of 2008 (Official Gazette of the Republic of Macedonia no.36/07), envisages that these may be imposed in the Republic of Macedonia under a decision issued by the Government of RM.

24 Article 110 SAA inter alia grants power to the Stabilisation and Association Council to issue decisions as envisaged by the particular clauses of the Agreement that “shall be binding on the Parties”; the Parties being obliged to “take measures to implement these decisions.” In addition, that Article adds a general power to the Council to “decide on possible changes to be brought about as regards the content of the provisions governing the second stage (of the Association).” And, Article 111 SAA gives the Council a competence to settle disputes referred to it by a Party “by means of a binding decision.” In general, Albi identified three groups of the former Europe Agreements decisions, equally applicable to the SA Council’s decisions: decisions which modify the Europe Agreements (the SAAs), decisions of interpretation, and decisions concerning discords between the Parties on the application of the Agreement. Albi, EU Enlargement, 43-44.

25 E.g. the Ministerial Council, the Permanent High Level Group, and the Regulatory Board, created under the Treaty Establishing the Energy Community for South East Europe (OJ L 198, 20/10/2006, p.18), empowered inter alia to issue decisions “... legally binding in its entirety upon those to whom it is addressed.” Article 76 of the Treaty. See also Articles 34-35. And, the Joint Committee created under the Multilateral Agreement on the Establishment of a European Common Aviation Area (OJ L 235, 16/10/2006). See especially Article 3 of the Agreement.

26 In principle, the ECJ has recognized direct effectiveness to the Association (SA) Council’s binding decisions, provided that “... regard being had to their wording and their purpose and nature ... they contain a clear and precise obligation which is not subject, in its implementation and effects, to the adoption of any subsequent measure.” Case C-192/89, Sevince [1990] ECR I-3461, para.2, with respect of a decision of the Turkey-EU Association Council.

27 See Albi, EU Enlargement, pp. 43-44.

28 I.e. in Croatia, where, prior to its EU accession, Article 6 of the Law on Implementation of the Stabilisation and Association Agreement (NN MU 15/01), following a radically dualist approach, had provided that decisions of the SA Council had to be ratified by the Croatian Parliament. That, according to Rodin, was in deviation from the monistic principle laid down in Article 140 of the Constitution, according to which ratified treaties make a part of national law, so that its constitutionality was questionable. Rodin, Siniša, “Croatian Accession to the European Union: The Transformation of The Legal System,” in Croatian Accession to the European Union: Economic and Legal Challenges, ed. Katarina Ott, 1 Books on Croatian Accession to the European Union from Institute of Public Finance (2003), Chapter 10, pp. 223-48, p. 239.
of implementation through specific national legislation, having the force internally of merely indirect or persuasive sources for the purpose of interpreting applicable domestic legislation.

The second potential difficulty related to the Article 118 monist regime has to do with the lack of sufficiently clear positioning of the ratified international treaties in the domestic hierarchy of domestic sources of law. The somewhat imprecise phrase used in that Article, merely stipulating that dully ratified treaties ‘cannot be changed by a law [statute],’ might lead to a conclusion that the Constitution does not clearly place the international treaties within the hierarchy of legal norms in the domestic legal order thus leaving room for different interpretations on their exact status and effect. Nevertheless, in their practice, ordinary courts, including the Supreme Court, have correctly conceived the later phrase as ensuring supremacy for ratified treaties over conflicting domestic legislation, but not over the Macedonian Constitution. Such supremacy of ratified treaties over legislation, as a matter of principle, has been frequently confirmed both by the Constitutional Court, but, paradoxically, this principle has not been followed by it in its own practice.

2.2. Applicability and Status of General International Law

Constitution does not extend the monist regime reserved for treaties under its Article 118 both to general international law, or to the ‘principles of general international law,’ nor it contains a separate clause specifically dealing with the applicability and status of general international law. Its applicability and status in the Macedonian legal order has to be established only indirectly, by way of interpretation of Article 8 of the Constitution setting out the ‘fundamental values of the constitutional order of Republic of Macedonia,’ which, of course, is not an easy and straightforward task.

There are two relevant clauses in Article 8 of the Constitution that touch upon the applicability of general international law: a) one envisaging that “the fundamental freedoms and rights of the individual and citizen, recognized in international law and determined by the Constitution” are among the “fundamental values” on which the constitutional order of the Republic of Macedonia is based (first indent of Article 8); and b) another one providing more generally that the later fundamental values also include “the respect for the generally accepted norms of international law” (indent 8 of Article 8).

In practice, the Macedonian Constitutional Court has not been restraining itself from (explicitly or implicitly) relying upon the above provisions as grounds for consulting indirectly various sources of international law when interpreting relevant constitutional and statutory provisions, including international conventions (especially the ECHR), less often soft-law instruments, and even comparative legislative practice of other states. On certain occasions, in particular, as a matter of principle, the Court confirmed that the Macedonian Constitution should be interpreted in view of the ‘general principles of law’ enshrined in the ECHR, and that the ECHR itself should be interpreted and applied in light of the ECtHR’s jurisprudence, because in view of the Court “… the interpretation of the provisions of the European Human Rights Convention is not made by the state-parties [to the Convention] under their sole discretion, but by the European Court for Human Rights through its
practice and decisions.\textsuperscript{33} Regrettably, the Constitutional Court itself has seldom resorted in its own practice towards consulting the ECtHR’s jurisprudence.\textsuperscript{34}

In view of that Constitutional Court’s practice, it is possible to conclude that, under Article 8 of the Constitution, the various sources of general international law, including its evidentiary sources, like the international courts’ jurisprudence, and international soft law, enjoy a rank of indirect or ‘persuasive’ authority for proper interpretation of directly applicable rules in the Macedonian legal order, particularly, in the area of human rights, but also in the more general context. After all, that is perfectly logical given the paramount status of a ‘fundamental value’ conferred by that Article \textit{inter alia} to international law, placing it above the whole domestic legal order, which entails that positive law be construed and applied in the light of that basic premise upon which it is grounded.

In the context of the pre-accession application of EU law, apart from the applicability of the SAA and other ratified agreements concluded between the Republic of Macedonia and the Union, and that of certain other sources of the law of the Union under particular provisions of these agreements, the likelihood for indirect application of some of the EU law sources (including its secondary sources, soft law, ECJ’s case-law etc.) in the Macedonian legal order may be potentially established also under Article 8 of the Constitution of RM. That would be possible, of course, if the Union is conceived as a specific international organization, and its law as a \textit{sui generis} international legal order, which is generally the case with most of the EU membership aspirant countries,\textsuperscript{35} including from the SEE region. To date, however, we have not identified any decision of a Macedonian court in which that approach of invoking Article 8 of the Constitution for the application of EU law sources has been materialized in the courts’ practice.

2.3. The Stabilization and Association Agreement and Applicability of EU Law Through the SAA’s Provisions

The Stabilisation and Association Agreement between the Republic of Macedonia and the European Communities and their Member States,\textsuperscript{36} that entered into force on April 1\textsuperscript{st}, 2004, sets out the basic legal framework for the relationship between the Republic of Macedonia and the Union and its member states during the pre-accession period entailing \textit{inter alia} various obligations for the Macedonian institutions, including its courts. For our purposes, two interrelated issues regarding the SAA are of particular concern: a) the applicability and the status of the SAA’s provisions in the Macedonian legal order, and in particular the required manner in which these provisions should be applied by courts; and b) the special legal grounds provided by that Agreement for the application of other legal sources of the Union before EU accession, most notably, in the harmonization context. As stated before, the Macedonian SAA was ratified by the Parliament of the Republic of Macedonia in April 2001 and enjoys direct applicability and supremacy over domestic legislation (but not over the Constitution) under the monist clause of Article 118 of the Constitution of RM. Despite the lack of specifically devised criteria for the distinction between its directly applicable and not-directly applicable provisions in the current legislation and courts’ practice, most of the provisions of the former category could nevertheless be easily detected in the SAA, especially, those ‘mirroring’ cor-

\begin{footnotesize}
\begin{enumerate}
\item Decision U. no.104/09 of 22 September 2010. Also see the already discussed Articles 35 and 18(5) of the Law on Courts.
\item See \textit{infra} subsection 3.1., especially note 74.
\item E.g. in the context of CEE and the constitutional adaptations in the CEE countries for EU membership, Albi stresses the ‘international organization’ approach in conceiving the European Union as a prevailing theoretical concept that inspired corresponding constitutional amendments in most of these countries, based on traditional understanding of statehood and sovereignty (and international law). See Albi, \textit{EU Enlargement}, at p. 76, p. 113, and Chapter 6. Also see the discussion in Rodin, “Croatian Accession to the European Union,” at p. 232-40, especially p. 238-9.
\end{enumerate}
\end{footnotesize}
responding directly effective clauses in the EU Treaties. As to the later clauses, on its part, the ECJ has maintained a long-established practice of giving them effect similar to that of the corresponding provisions of the founding treaties, though, in several cases it equally reminded that it would sometimes afford them different interpretation than that accorded to the parallel Treaties’ clauses, in view of the special purpose and nature of the association agreements of creating merely “an association” between the parties, and not a Community between member states. Nevertheless, that ECJ’s practice should be conceived as suggesting that the SAA’s provisions should be afforded comparable treatment and effect in the domestic legal order by Macedonian courts, as that had already practiced to a certain (albeit modest) degree by the courts of some CEE countries before their accession to the Union, including by consulting related EU rules and principles and the ECJ’s jurisprudence when interpreting these.

The above suggestion finds legal backing in Article 118 of the SAA, which entails a general duty on the part of the Republic of Macedonia as a Party to the SAA, that is, of its state institutions, including its courts, “... to take any general or specific measures required to fulfill their obligations under this Agreement,” and to “see to it that the objectives set out in this Agreement are attained.” Largely mirroring the Union’s principle of ’sincere cooperation’ of Article 4(3) TEU, the later clause would have to be conceived inter alia as requiring national courts to grant appropriate legal effectiveness to the SAA’s provisions in the domestic legal order. The decisions of the Supreme Court

37 Nevertheless, the national survey conducted by the Faculty of Law ‘Justiniánus Primus’ Skopje revealed a rather striking statistics regarding the judges’ awareness of the direct applicability of the SAA in the Macedonian legal order under the monist Article 118 of the Constitution. Out of 206 surveyed judges (amounting to almost a third of Macedonian national judges), only 27.2% considered the SAA to be directly applicable, whereas 55.8 thought that its applicability is conditioned upon the issuance of prior implementing legislation (with another 17% abstaining from expressing their view on that issue, or, in total 72.8% with the later judges). National Research project: Georgievski, Saso et al. European Union Law Application in the Republic of Macedonia Before Its Accession to the EU, p. 81-82. On the other hand, directly effective provisions of the Macedonian SAA could potentially include inter alia those on: the free movement of goods, Articles 18(1) and (4), 19, 20, 26(2), 27(3), 28(2), 32(1), 33, 34, 39 (after the 5th year of the SAA); establishment, Articles 48(1)(2)(5)(6), 53; services, Articles 55(2)(5), 57; current payments and free movement of capital, Articles 58, 59(1)(4), general provisions, Article 62, 72(2)(3).

38 The ECJ proceeds from its long ago established formula that the Association Agreements’ provision “... must be regarded as directly applicable when, regarding being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent [implementing] measure:” Case 12/86, Demiré [1987] ECR 3719, para.14, and Case C-262/96, Süral [1999] ECR I-2685, para.60. Following that formula, the Court, for instance, accorded direct effectiveness to the respective Association Agreement’s provisions regarding: equal treatment of self-employed persons (in Case C-63/99 Gloszuk (2001) ECR I-6369 and Case C-268/99 Jary (2001) ECR I-8615); legal treatment of legally employed persons (in Case C-162/00 Pokr泽ptoviz-Meyer (2002) ECR I-1049), free movement of goods etc. In contrast to that, ECJ declined to grant direct effectiveness to the provisions on the supply of services (as being subject to implementing measures to be adopted by the Association Council), on social security (expressly requiring further implementing measures and containing a general - programmatic wording), and on competition (containing an explicit clause for the necessity of further implementing measures by the Association Council). On these and other ECJ’s cases see Albi, EU Enlargement, at 36-41, and authors referred to at that place.


40 For more on that see Albi, EU Enlargement, 41-4.

41 Similar provisions are found in other agreements concluded with the EU, e.g. in the Treaty Establishing the Energy Community for South east Europe, OJ L 198, 20/10/2006, p.18, Article 76; the Multilateral Agreement on the establishment of a European Common Aviation Area, OJ L 285, 16/10/2006, p. 34, Article 4; etc.

and the lower degree courts in the Makpetrol case, in which they directly relied on Article 5(4) of the Interim Agreement between Macedonia and the Communities (banning quantitative restrictions and measures having equivalent effect in the trade between the parties) may be taken as an example for an initial readiness of the Macedonian judiciary to respond positively to the challenge of directly applying SAA’s provisions. On the other hand, the broad coverage of the principle of ‘sincere cooperation’ makes it possible to construe Article 118 SAA as providing both general legal grounds for Macedonian courts to employ a ‘Euro-friendly’ or ‘harmonious’ application of national law in accordance with the SAA’s rules and principle aims, most notably, as regards the ongoing harmonization of the domestic legislation with the Union’s acquis under the legal framework of the SAA. The commitment for ‘taking any general or specific measures required to fulfill the obligations under this Agreement’ and for ‘attaining the objectives set out in the SAA’ under Article 118, equally pertains to national courts, requiring them to apply domestic legislation in view of the SAAs principle aims, including its harmonization aims.

For the purpose of establishing legal grounds for ‘Euro-friendly’ or ‘harmonious’ interpretation of national law by Macedonian courts, however, there are additional more specific basis provided by the harmonization clauses of Title VI of the SAA. Among these, the standard clause of Article 68(1) of the SAA recognizes the importance of the approximation of the existing and future laws of the Republic of Macedonia to those of the Union, and explicitly provides a duty for the Republic of Macedonia (its institutions) to “…endeavor to ensure that its laws will be gradually made compatible with those of the Community”. That particular obligation of Macedonia could not be successfully fulfilled if inter alia its already harmonized legislation were not construed and applied in view of the EU’s harmonizing rules transposed in it, of whatever origin and legal form, including the relevant ECJ’s case-law. Indeed, there is some practice already emerging in which Macedonian courts have (at least implicitly) proceeded with an interpretation of domestic applied legislation in view of the respective harmonizing EU legislation.

In addition, some other SAA harmonization clauses specifically refer to the application of certain EU rules in selected areas subjected to intensive harmonization. In particular, paragraph 2 of Article 69 expressly calls upon the “… criteria arising from the application of the rules of Articles 81, 82 and 87 of the Treaty establishing the European Community” as a basis for the assessment of

43 Judgment of the Supreme Court of Macedonia of 10 June 2004 Rev. no. 23/04.
44 As to their principle aims, Sinisa Rodin, for instance, emphasized the difference between association (SAA) agreements and ordinary treaties in international law in that the objective of the former treaties is “the accession of a state party to the EU,” so that the courts “… would have to take this objective into account in the interpretation of the agreements.” Rodin, “Croatian Accession to the European Union,” at p. 37. That also implies readiness of courts to interpret national law in the light of the laws of the Community.
45 E.g. see the decisions of the Polish Constitutional Tribunal in Gender Equality in the Civil Service Case, in Polish, decision K. 15/97, Orzecznictwo Trybunału Konstytucyjnego [Collection of Decisions of the Constitutional Tribunal], nr. 19/1997, at 380; English translation 5 E.EUR. CASE REP. OF CONST. L 271, at 284 (1998), in which the Constitutional Tribunal of Poland had directed the other Polish courts that, notwithstanding that the law of the Union had not been binding in Poland pre-accession, under the harmonization Articles 68 and 69 of the Polish Europe Agreement, Poland had been obliged ‘to use its best endeavors’ to ensure that future legislation [would be] compatible with Community legislation.” Also see the Decision of the Supreme Administrative Court (SAC) in Warsaw of 13 March 2000 in the Senagpo case, translated in (1999-2000) 24 PYIL 217, 219. K. 15/97, 29.09.1997 wyrok TK U K 15/97 OTK 1997/34/37, and case K.27/99, 2000.03.28 wyrok TK U K 27/99 OTK 2000/2/62. Reported by Kühn, “The Application of EU Law in the New Member States,” at p. 566.
46 For comparative CEE pre-accession practise see id. and the Czech Constitutional Court’s (and previously the High Court’s) ruling in Skoda Auto, Sbirka nalezů a usnesení [Collection of Judgments and Rulings of the Constitutional Court], Vol. 8, p. 149 (in Czech), and in the Milk Quota Case, published as No. 410/2001 Official Gazette (English translation available at http://www.concourt.cz). Reported by Kühn, “The Application of EU Law in the New Member States,” 567-68. Other relevant CEE national courts’ pre-accession practice is reported by Albi, EU Enlargement, pp. 54-56.
47 E.g. see the Decision of the Macedonian Constitutional Court U. no.132009-0-0 of 18 November 2009.
48 See Article 68 (especially paragraphs 2, 4 (second indent), and 5), and Articles 70 and 71(2).
the practices incompatible with the proper functioning of the SAA which may affect trade between the parties enumerated in that Article. In view of the pre-accession practice of the CEE countries with the application of the corresponding standard provisions of the former association agreements, the latter clause should be conceived as assuming at least indirect application of the respective EU competition criteria by competent national authorities and courts, which has already started to occur in the practice of the Macedonian Administrative Court. What has been said above about the meaning and effect of the SAA provisions, and the ensuing duties of courts to grant direct and indirect applicability to these and other EU law sources via the SAA, mutatis mutandis applies to many other agreements concluded between Macedonia and the EU. For the moment, the Republic of Macedonia has concluded around 77 agreements with the Union, many of which containing directly applicable provisions and/or standard ‘sincere cooperation’ or ‘harmonization’ clauses analogous to those of the SAA. Among these inter alia because of their more elaborated regime regarding the applicability of EU law sources, two treaties particularly stand out: the Treaty on the Establishment of the Energy Community (the ‘SEE Energy Community Treaty’), and the Multilateral Agreement on the Establishment of the European Common Aviation Area, of 2006. The SEE Energy Community Treaty, that entered into force on September 1, 2006, provides for the implementation by the Contracting Parties of various EU acts on energy, environment, competition and renewables listed in its annexes, and contains various directly applicable provisions and provisions referring to the application of pertinent EC Treaty principles and rules on competition and public undertakings in a way analogous to the standard harmonization clauses of the SAA. In addition, the SEE Energy Community Treaty grants explicit competences to the bodies established by it to issue specific

49 E.g. see the decision of the Constitutional Court (and previously of the High Court) of the Czech Republic in Škoda Auto, supra note 46, etc. In its much debated ‘Europe Agreement’ decision, for instance, the Hungarian Constitutional Court had found that the direct applicability of the relevant EU regulations and ECJ’s case law regarding competition through the Association Council’s decisions would be contrary to the sovereignty provisions of the Hungarian Constitution (without an authorizing constitutional amendment), but nevertheless it allowed for indirect application of EC law when courts’ and authorities interpret the Hungarian internal law: Decision 30/1998, (VI 25) AB, Magyar Közlöny. Reported by Albi, “EU Enlargement”, p.56-58, referring inter alia to Volkai J., “The Application of the Europe Agreement and European Law in Hungary: The Judgment of an Activist Constitutional Court on Activist Notions,” Jean Monnet Working Paper No.8/99, Harvard, 1999, available at www.law.harvard.edu/programs/JeanMonnet/papers/99/990801.html.


51 A list of 77 agreements between the Republic of Macedonia and the European Union of different form and status is available at the European Action Service – Treaties Office Database, at http://ec.europa.eu/world/agreements/searchByCountryAndContinent.do?countryId=3829&countryName=Former%20Yugoslav%20Republic%20of%20Macedonia.


54 See Annexes I-III, and inter alia Articles 10, 12, 13 (recognizing the importance of the Quoto Protocol), 14, and 20 of the SEE Energy Community Treaty.

55 E.g. the prohibition of customs duties, quantitative restrictions, and measures having equivalent effect on the imports and exports of network energy among the Parties under Article 41 of the SEE Energy Community Treaty.

56 SEE Energy Community Treaty, Article 18(2), referring to the application of the criteria arising from the application of the rules of Articles 81, 82 and 87 of the EC Treaty for the assessment of practices incompatible with the proper functioning of the Treaty which may affect trade of network energy among the parties enumerated in that Article, analogous to Article 69(2) of the SAA; and Article 19, providing that, “[w]ith regard to public undertakings and undertakings to which special or exclusive rights have been granted, each Contracting Party shall ensure that as from 6 months following the date of entry force of this Treaty, the principles of the Treaty establishing the European Community, in particular Article 86 (1) and (2) thereof (attached in Annex III), are upheld.”
measures in certain areas, including decisions “legally binding in its entirety upon those to whom [they are] addressed.”

The Multilateral Agreement on the Establishment of the European Common Aviation Area, in turn, although not yet entered into force, and made subject to various transition arrangements for particular SEE countries, goes even further than that, explicitly envisaging that the binding provisions of various EU law instruments listed in its Annex I, and of the decisions of the Joint Committee established by the Agreement, “… shall be made part of [the Parties’] internal order” via acts corresponding to EU regulations and directives. That clause of the Agreement clearly suggests a direct or (at least) indirect application of the enlisted EU law sources by national courts in a way corresponding to that pertinent for the application of EU regulations and directives according to the well established principles of EU law. The latter suggestion on the internal effectiveness of the EU law sources of Annex I is further amplified by Article 15 of the Agreement, which establishes a duty for the Contracting Parties “… [to] ensure that the rights which devolve from this Agreement and in particular from the Acts specified in Annex I, may be invoked before national courts,” and by Article 16(1) envisaging that the later acts shall be interpreted in conformity with the relevant rulings and decisions of the ECJ and the European Commission related to the corresponding rules of the TEC (TFEU) and EU secondary law.

In view of their particular clauses, the above (and other specific) agreements concluded by the Republic of Macedonia and the Union that have been ratified by the Macedonian Parliament clearly provide additional basis for direct and/or indirect application of different sources of the law

57 SEE Energy Community Treaty, Article 76. Also See Articles 34-36. Under Article 94, “the institutions” are empowered to interpret “… any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities.” Absence that, the Ministerial Council inter alia has the power to provide interpretation of the Treaty, which it may delegate to the High Level Group.

58 Source: European Action Service – Treaties Office Database, available at http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=2661. But, note that, as we have already seen, the Constitutional Court of the Republic of Macedonia has already relied indirectly on the provisions of this Agreement and has confirmed in principle its direct applicability in the Macedonian legal order as a ‘ratified treaty’ pursuant to Article 118 of the Constitution in its Decision U.br.103/2007-0-0 of 24.10.2007. Although legally incorrect, the approach of giving effect to ratified treaties internally even before they have entered into force is not entirely absent in the Macedonian courts’ practice, including in the practice of the Constitutional Court.

59 The transitional arrangements for particular countries are provided in Annex V, Protocols I-IX, of the Multilateral Agreement on the European Common Aviation Area.

60 I.e. through “an act corresponding to an EC regulation,” and “an act corresponding to an EC directive … leav[ing] to the authorities of the Contracting Parties the choice of form and method of implementation.” Multilateral Agreement on the European Common Aviation Area, Article 3.

61 Emphases are added. Articles 16 and 20 of the Multilateral Agreement on the European Common Aviation Area, and the related Annex IV, set out a mechanism for ensuring a homogenous interpretation of the Agreement (and the enlisted EU provisions) and for settlement of disputes arising from different interpretations adopted at the national courts’ and EU levels, including through referrals for preliminary ruling made by the courts of the ECCA countries (Norway and Iceland) to the ECJ (whose decisions would be also notified to the other Contracting Parties), and referrals to the Joint Committee for providing appropriate interpretations, available to the other Contracting Parties, and ensuing immediate consultations between the Parties and eventual seizing of the ECJ to rule on the disputed matter in a procedure analogous to that of Article 273 TFEU (ex Article 239 TEC) procedure.
of the Union by the Macedonian courts. Regarding the not ratified agreements concluded with Union, including those concluded within the framework of other ratified treaties (i.e. subsequent protocols etc.), and the binding decisions of the bodies established under ratified treaties, certain dilemmas as to their direct applicability in the Macedonian legal order under the monist regime of Article 118 of the Constitution, as we have already noted, still remain, although, one cannot easily deny to them at least indirect or persuasive force.

3. EU Law in the Case-Law of the Macedonian Constitutional Court and Ordinary Courts

Whether a country opts for a monistic or dualistic doctrine for the relationship between the national and international legal orders in its constitution is not very telling for the actual attitude of the specific country towards the legal norms of international (and EU) law. Even though there is a sort of intuitive reasoning that monistic countries are supposed to be more opened towards ‘external’ sources of law, like international law, this is not necessarily the case. As a matter of fact there are countries that have adopted a dualistic doctrine that have a better record of respecting international law than some of the monistic countries. Then again, there are voices that are very frequently heard lately in the legal discourse which deny the analytical values of these doctrines - often not being able to clearly categorize specific countries in either of the categories - thus treating them as anachronous and being stuck in the Westphalian paradigm. Therefore, what really counts is the approach taken by national courts and their case law when international law and EU law is concerned. Thus in this section the focus will be put on the practice of the Constitutional court of Republic of Macedonia, and then to the analysis of the jurisprudence of the ordinary courts. First, we will discuss the approach taken by the Constitutional court towards international treaties, particularly in light of the relevant constitutional and statutory provisions explained in the previous section, in order to depict the complexity of the issue. Second, we will discuss to what extent has EU law been present in the case-law of the Court, in which form and capacity.

3.1. The Constitutional Court and the Status of International Law and the Law of the Union in the National Legal Order

Even though a monistic tone of Article 118 of the Constitution might lead to a conclusion of a particular openness of the Macedonian legal system towards international law, the Constitutional Court of the Republic of Macedonia belies this conclusion by manifesting its well entrenched rigid textualism. In this sense there are two tendencies within the case-law of the Constitutional Court that point to another more restrained approach. The first tendency is the restrictive interpretation of its constitutionally regulated powers avoiding basically any say on issues of abstract control involving international treaties thus shedding light also on the treatment and status of the SAA. The

62 Another basis for application of different sources of the law of the Union by the Macedonian courts has been specifically provided by particular domestic statutes. For instance the Law on Aviation (Official Gazette of the Republic of Macedonia no. 14/06, 24/07, 103/08, 67/10, 24/12, 80/12, 155/12 and 68/13 from 13.05.2013) Article 3, envisages direct application of numerous EU/EC directives and regulations referred to in that statute. On the other hand, several specific statutes provide for a suspended application of EU law sources as of the moment of future membership of Macedonia in the Union, e.g. the Law on the Central Bank Official Gazette of the Republic of Macedonia no. 158/10) Articles 127 and 129, referring to the EU treaties and the Statute of the ECB, and Law on Banks. Interestingly, other statutes envisage their own entering into force upon EU membership (the Law on professional qualifications, Official Gazette of the Republic of Macedonia no. 171/10, Article 59), or termination of certain of its provisions following membership in the Union (e.g. Law Amending the Law on Private International Law, Official Gazette of the Republic of Macedonia no. 156/10, Article 7).

63 Bogdandy claims that ‘they [monism and dualism] are intellectual zombies of another time and should be laid to rest, or “deconstructed”’ see in Von Bogdandy, Armin, “Pluralims, Direct Effect, and the Ultimate Say,” International Journal of Constitutional Law 6 (2008), pp. 397-413, 400.

64 For a thorough overview and analyses in Macedonian of the application of EU law in Macedonia see European Union Law Application in the Republic of Macedonia Before Its Accession to the EU supra note 4.
second tendency is that the court refers rather rarely to international law in its reasoning and only as persuasive, secondary, authority, using it solely as an additional instrument of interpretation of constitutional and statutory provisions.

Under the respective constitutional provision regulating the powers and competences of the Constitutional court there is no explicit mentioning of any power of this court to review the constitutionality of the ratified international treaties and to control the conformity of legislative acts or regulations with ratified international treaties. Even though this constitutional provision ends with a general phrase “decides on other issue determined by the Constitution” which would also imply safeguarding the fundamental values of the constitutional order of Macedonia enumerated in Article 8, including the respect of the rule of law, the Constitutional court has not taken this phrase into consideration, adopting a very restrained approach instead. Accordingly, the Constitutional court has declared international treaties not to be directly part of its points of reference in matters of constitutional review. According to the practice of the Constitutional Court, international treaties do not represent a source of law on their own but only through the instrument of ratification, the statute, thus the Court adopted a sort of a dualist doctrine in this regard. In this sense the court has equated ratified international treaties in their legal force in the domestic legal order with national statutes. In several decisions the Court repeated a line of argumentation that is quite settled by now. Refusing any jurisdiction on the control of the conformity between the provisions of an international treaty and a national statute it stated that it is not part of its constitutionally regulated competences to decide upon “the mutual conformity of statutes, as well as the mutual conformity of legal acts from the same rank in the hierarchy of legal acts.” This stance has been continuously reiterated by the Court throughout the years, the last instance being in 2012. Consequently the Court cannot have the power to decide on the conformity of two legal acts with a same legal force. Nevertheless such a status of ratified international treaties should not totally exclude them as a point of reference in review of the compliance of lower legal acts with the provisions of the treaty or, according to the wording of the court, the law/act of ratification. However, even this interpretation of the effect of international treaties has been ruled out by the Court.

The second tendency is closely related to the previous one. The restrained interpretation of the Court’s own constitutional competences in relation to international law has also influenced the applicability of ratified international treaties, including the SAA. Namely on several occasions it has pointed out in its decisions that regardless of the fact that ratified international treaties are integral part of the domestic legal order they cannot represent an independent point of reference on which

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65 The Constitution of the Republic of Macedonia of 17.11.1991, and amendments I-XXXII, (Official Gazette of the Republic of Macedonia no. 52/91; 1/92; 31/98; 91/01; 84/03; 107/05; 3/09 and 49/11) Article 110.

66 U.br. 39/2004 and 59/2004 from 21.04.2004 even though these cases involved the ECHR the wording of the reasoning implies a general a conclusion.

67 Ironically, the Constitutional Court in its national report for the XVIth Congress of the Conference of European Constitutional Courts (2014) are also an integral part of the internal legal order, that is, a source of law... “International treaties as part of the international legal order are automatically incorporated into the internal legal order of the Republic of Macedonia and are directly applicable by the Macedonian courts” p. 5. “Given that under the provision of Article 118 of the Constitution international treaties may not be changed by law, it arises that they are hierarchically higher than the domestic laws, but lower than the Constitution of the Republic of Macedonia,” p. 5.

68 Only on one occasion the Constitutional Court has reasoned differently and departed from its well settled view, placing appropriately ratified international treaties by their legal force in the domestic legal system between the Constitution and the statutes in U.br. 140/2001 from 04.12.2002.


the Court can base its constitutional review. International treaties, according to the Court, can only serve as an additional, secondary, source in the interpretation of the constitutional provisions.

“[T]he Court has established that although the European Convention [ECHR] is integral part of the domestic legal order its legal status is below the Constitution and it cannot represent a direct legal grounds upon which the Court can base its decision. …Namely, the provisions of the Convention, as well as the practice of the European Court of Human Rights can represent only an additional argument in the interpretation of the constitutional norms…. ”\(^72\)

Thus the Court accepts only an indirect application and effect of ratified international treaties. Even though this view has been mainly applied in cases involving the European Convention on Human Rights, one can argue that the same reasoning can easily be applied \textit{per analogiam} to all other ratified international treaties.\(^73\) Additionally, the Court went a step further and, when addressing the Supreme Court of RM and other ordinary courts in one of its decisions,\(^74\) it recognized that the referral to the ECHR necessarily implies the referral to the relevant case-law of the European Court of Human Rights when interpreting the provisions of the Convention. Through this, indirect effect was provided to the case-law of an international court which can be perceived as a very positive development. Ironically however, the Court itself, in the case-law analyzed so far, has only seldom referred to specific judgments of the ECtHR in its own decisions.\(^75\)

This position of the Constitutional Court towards international law has left the door closed for the development of other doctrines related to the application of provisions of international treaties. Most significantly the Court in this manner missed valuable opportunities to develop a general doctrine of consistent interpretation of national law with international law,\(^76\) and more specifically to set rules and principles that would allow distinguishing between self-executing and non-self-executing provisions of international treaties. Unfortunately up to this date such fundamental doctrines have not been devised by this Court.

Lastly, before turning to the use of EU law in the relevant case-law of the Constitutional Court, another (tendency is worth noting and adding to the previous ones. Following the change of the composition of the Court in 2012, it is noticeable that it has become more restrictive in its


\(^74\) U. br. 104/2008 from 20.11.2008.


\(^76\) See for example the Charming Betsey doctrine in the U.S., Murray v. The Charming Betsey – 6 U.S. 64 (1804) or Völkerrechtsfreundlichkeit of the German Federal Constitutional Court.
practice than before, even when simple mentioning of international or EU law in its decisions is concerned. Thus, in the last couple of years, one can easily detect the presence of an increasing conservative view of the Court towards external legal sources i.e. the sources of international and EU law.

3.2. EU Law in the Case-Law of the Constitutional Court

Constitutional court’s general position on international treaties and international law in general has been applied also to the Stabilization and Association Agreement (and other ratified treaties with the EU). Namely it has refused to review the conformity of statutes and regulations with the SAA based on the same arguments that apply for ratified international treaties in general.77

“According to the Court, the Constitutional Court is not competent to appraise the content of international agreements, and thereby the conformity of the bylaw with international agreements for a reason that the appraisal of the conformity of international agreements with the Constitution is made by the Assembly of the Republic of Macedonia in the procedure for ratification of the international agreement, which following its ratification becomes an integral part of the internal legal order, and thereby directly enforceable.”78

Even in some cases where one would expect the Court to directly invoke and apply the relevant provisions of the SAA, such as in the case “Made in Macedonia”, the Constitutional Court refrained from doing that.79 This specific case represented a perfect opportunity for the Court to endorse the direct applicability of certain provisions of the SAA. Namely, in the case at hand the applicant challenged the Rulebook of the Ministry of Finance of RM which inter alia envisaged that every fiscal receipt should have a fiscal logo which would read “BUY MACEDONIAN PRODUCTS”, “FOR OUR OWN GOOD” or “MADE IN MACEDONIA”. Such a rule and practice directly affected Article 18(4) of the SAA which regulated the abolishment of quantitative restrictions for imports of goods originating from the Community or measures having equivalent effect in this regards. However, even though the Court reached a decision that was in conformity with the SAA provisions, nonetheless, it decided to ignore the later provisions in its reasoning. On the other hand the only bright spot in this reasoning, besides its outcome, can be seen in the concurring opinion of the justice Igor Spirovski which challenged, on procedural and substantial grounds, the very basis of the majority’s argumentation. Most significantly, in his opinion Spirovski challenged the settled view of the Court that it is not constitutionally empowered to enter into the control of the conformity between the provisions of a ratified international treaty and a general legal act of the executive bodies thus arguing for a more extensive interpretation of the relevant constitutional provisions. Furthermore it based part of his arguments against the reasoning of the majority on the case-law of the Court of Justice of the European Union, more specifically the “Buy Irish” Case80 of the ECJ which has been the first and only instance of referral to the practice of this court.81

As far as the indirect effect of the SAA is concerned, since direct application has not been embraced, the Court has occasionally endorsed the obligations stemming from Article 68 SAA but only to the extent of a duty of consistent interpretation of national laws with these obligations. In other words, the Court has recognized quite clearly the obligations from Article 68 SAA on gradually achieving compatibility of Macedonian laws with the ones of the Community however it has not provided direct application to any of SAA provisions or any other source of EU law. Besides the

78 U. br. 5/2005 from 16.11.2005. This decision is particularly telling if one takes into consideration that it is made in the context of the SAA.
80 Case C-249/81, Buy Irish [1982] ECR 4005.
indirect effect of the provision of the SAA the Court has granted EU secondary law, directives and regulations, also a supporting, interpretative, authority. It has proceeded that way, for instance, in a Case where it stated:

“Although the directives of the European Union as a supranational law are not part of the legal order, that is are not source of law in the Republic of Macedonia, and as such are not the subject-matter of appraisal before the Constitutional Court, the Court, nevertheless, in support of its legal standing took into consideration Directive 2002/21/EC of the European Parliament and of the Council of Europe of 7 March 2002 regarding a common regulatory framework for electronic communication networks and services (Framework Directive)…”

Furthermore, it can be noticed that the Court has had a very lenient stance towards the laws transposing certain secondary EU law (i.e. directives) in most of the cases analyzed so far. In almost all of the cases where the constitutionality of such statutory provisions was challenged the Court has upheld them and therefore adopted an EU-friendly approach.

The latest case-law of the Constitutional Court confirms this position of the Court. In one of the most recent cases that involved Article 68 SAA and in which the constitutionality of certain provisions of the Public Procurement Act was reviewed by the Court, the conformity of this Act with Directive 2004/18/EC and the obligation of harmonization envisaged in Article 68 SAA were used as one of the main arguments in reaching its decision on the constitutionality of the specific provisions. Thus the SAA and the Directive were used not only as supporting but rather as one of the main arguments in interpreting national law in a manner consistent with secondary EU law when arguing the constitutionality of the statute.

Still, one should be cautious in expressing optimism over such possible developments in the future. The Court has never entered into an analysis of the discretionary margin given to Member States in their implementation. It has restricted itself solely to comparing the relevant statutory provision and the ones of the Directive that has been transposed in the Macedonian legal order. Unconditional openness towards EU law, providing a carte blanche to all laws transposing EU law in Macedonia, as manifested by the Court, might negatively affect and undermine the principle of constitutionality and thus the rule of law in the Republic of Macedonia, which is also a leading value of the EU’s legal order.

85 U.br. 30/2012 from 27.06.2012
While in the case of referral to secondary EU law one could recognize limited positive developments in the jurisprudence of the Constitutional Court, in the case of invoking the case law of the ECJ, such a conclusion cannot be made. Namely, regarding Article 94 of the Treaty on the establishment of the Energy Community for South East Europe,\(^{86}\) regulating the interpretation of the treaty provisions and notions and terms used in them and the related secondary EU law, the Court specifically referred to the respective case law of the ECJ and CFI as a source for interpretation. Regardless of this fact, so far, while referring to that Treaty and the related directives and regulations enlisted for implementation by it in three its decisions,\(^{87}\) the Court has avoided invoking the relevant case law of the two Luxemburg courts. In this manner, in the context of the SEE Energy Community Treaty, it has confirmed the position it had already revealed in its national report for the XVIth Congress of the Conference of European Constitutional Courts that “given that the Republic of Macedonia is still not a member of the European Union … the Constitutional Court does not still refer to the jurisprudence of the European Court of Justice”.\(^{88}\) Therefore one could argue that the Court basically avoids implementing the obligations that Macedonia has already assumed by ratifying this Treaty.

### 3.3. The Case Law of the Ordinary and the Administrative Courts

The analysis of the case law of the Supreme Court, the Administrative Court and the High Administrative Court of the Republic of Macedonia\(^{89}\) has shown that these courts have not been unfamiliar with directly applying sources of law of ‘external’ origin, or at least according to them a certain interpretative value in the domestic legal order. What follows is an overview of representative cases decided by the former three courts pertaining to the interpretation and application interpretation of international and EU legal instruments. The main goal here would be to designate the main tendencies existent at the level of the Macedonian ordinary courts in the application/interpretation of international and EU law sources. The analyzed case law of the former courts has been categorized in function to the type of legal sources applied: international law sources (different from the sources of EU law), the European Convention of Human Rights (ECHR) and lastly, EU law sources. The analysis looks at the judgments in light of whether the courts have applied the particular source of EU law and international law as the sole basis for the judgment, as a subsidiary or complementary source of law, or, have, rather, used it as a tool for the interpretation of domestic legal rules.

### 3.4. Application of Sources of International Law (Not EU Related)

The Macedonian ordinary courts have applied ratified international law instruments in a number of instances. In a judgment from 2007,\(^{90}\) when applying the Law on criminal procedure, the Supreme Court decided to directly apply the legal exception provided in Article 14 of the European Convention on extradition concerning the scope of the request for extradition issued by a contracting party to the Convention. Having referred to the latter provisions as ‘norms of an imperative value’, that Supreme Court’s judgment is an example of filling a legal void existent in the national criminal procedure system by way of directly applying the relevant provisions of the European Convention on extradition.

In another case, the Supreme Court examined the privileges and the immunities foreseen by the Convention on the privileges and immunities of the United Nations and the Cooperation agreement

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\(^{86}\) See supra note 57.


\(^{88}\) Supra note 68.

\(^{89}\) The legal challenges to the decisions of the Administrative court are handled by the High Administrative court which acts as second-instance court in matters of administrative justice in Macedonia.

\(^{90}\) Judgment of the Supreme Court of Macedonia of 14 February 2007. Kvp.no.80/05.
between the Republic Macedonia and the UNICEF\textsuperscript{91} with respect to the requisite criteria for exemption from army duty of the United Nations’ staff. Concluding that the applicant did not meet the criteria set out in the former instruments, the Court decided the case solely on the basis of these two instruments as international law sources applicable in the Macedonian legal order.

Similarly, in two judgments from 2013\textsuperscript{92}, the Administrative Court examined the issue at hand by considering the applicability of the exception contained in the Agreement amending the Central European Free Trade Agreement that the applicant had relied on, and found the exception to be inapplicable to the cases which informed the provisions of Article 15 of Annex IV of the Agreement concerning the reimbursement of customs costs for the export of agricultural products. In addition, there was another instance where the Administrative Court directly applied the International Accounting Standards on the appraisal of the value of an impounded property\textsuperscript{93}.

In a case dating from 2002\textsuperscript{94}, when deciding on the validity of an act of the Macedonian Council for the protection of industrial property the Supreme Court did not only rely on the relevant provisions of the Law on industrial property, but additionally referred to the Paris Convention for the protection of industrial property, as well. It used the Paris Convention as an instrument of interpretation in order to arrive at a proper construction of the applicable law, thus giving it the value of an interpretative source of law.

3.5. Application of the European Convention on Human rights (ECHR)

The ECHR has been amply present in the case law of the ordinary courts, especially regarding claims of alleged breaches of the right of access to an independent and impartial court and the right to a fair trial within a reasonable time as guaranteed under Article 6 of the Convention. The ordinary courts have been consistently favorable to giving full effect to the Convention as a regional multilateral instrument ratified by Macedonia\textsuperscript{95}, either by directly applying the Convention, or by pairing the provisions of the Convention with corresponding national legal provisions thus relying on the ECHR as a subsidiary source of law.

The foregoing has been further confirmed in the Principled Legal Opinion of the Supreme Court dated from 8 March 2004\textsuperscript{96} which examined the right to a fair and public trial within a reasonable time as guaranteed under Art.6(1) of the ECHR. The opinion declares the Convention to be part of the Macedonian legal order and perceives the fundamental human rights and liberties recognized by international law and the Macedonian Constitution (of which the rights foreseen under Art.6 (1) ECHR form part) as fundamental values of the Macedonian constitutional order pursuant to Art.8(1) of the Macedonian Constitution. The Supreme Court noted that the requirements of Art.6(1) of the Convention have been adequately translated in Articles 6 and 7 of the Law on Courts, but nev-

\textsuperscript{91} Judgment of the Supreme Court of Macedonia of 19 June 2002, U.no.1423/01;

\textsuperscript{92} Judgment of the Administrative Court of Macedonia of 14 December 2013, U-6.no.47/2012; Judgment of the Administrative Court of Macedonia of 13 December 2013, U-6. no. 44/2012

\textsuperscript{93} Judgment of the Administrative Court of 13 January 2013, U-5. no.117/2012.

\textsuperscript{94} Judgment of the Supreme Court of Macedonia of 27 February 2002, U. no. 2073/99.

\textsuperscript{95} Note here the obligation of Macedonian courts to consult relevant ECHR jurisprudence when dealing with cases of alleged violation of the right to trial within a reasonable time pursuant to Article 35 of the Macedonian Law on Courts, and to directly apply the final and “enforceable” decisions of the ECHR and other international courts under Article 18(5) of the Law on Courts, discussed supra in subsection 2.1.

\textsuperscript{96} Principled Legal Opinion of the Supreme Court of Macedonia on active legitimization in the protection of public capital (NPMS.1) of 8 March 2004; A similar pronouncement is found in the Principled Legal Opinion of the Supreme Court of Macedonia regarding sales via public calls for acceptance of offers, of 13 June 2000 (no.3); see also on this in Najcevska, Mirjana and Todorovski, Sashko, The Judgments Ought to be Implemented, Foundation Open Society Macedonia, Skopje, 2013, pp. 44-47.
Nevertheless, it found that there was a breach of both the Convention and the corresponding domestic rules reflecting the Convention's requirements.

In a 2013 judgment, the Supreme Court examined the alleged violation of the right of legal defense in the criminal procedure as protected under the Law on Criminal procedure, and found additionally that the right of access to court as guaranteed by Art.6(1) of the ECHR had been breached. Hence, the Court relied both on the domestic statute on criminal procedure and on ECHR thereby reinforcing the applicant's procedural protection under national law by complementing the former with the safeguards provided under the Convention. The Supreme Court applied a similar approach in a 2007 judgment concerning the rights of legal defense, more particularly the right of the accused to be notified in a duly and adequate manner of the grounds of the indictment in a language he understands and in which he would be able to converse (by virtue of Art.6(3) of the ECHR). In this way, again, both the provisions of the Law on criminal procedure and the ECHR served as grounds for the Court's judgment.

Concerning the failure of a first instance court to deliver the judgment to the applicant thus preventing him from exercising his right to a legal defense pursuant to Art.413 (3) of the Law on criminal procedure, the Supreme Court nevertheless also considered the later as impeding the applicant's access to court within the sense of Art.6(1), given that as a result of the first instance court's failure to be deliver the judgment the applicant was prevented from appealing to the second instance court. The Court opined that the right to a fair trial under the Convention inter alia implicitly contains the requirement to enable adequate access to courts for the involved individual. Thus, in order to properly construct and apply the relevant article of the Law on criminal procedure, the Court referred to the provisions of the ECHR as additional legal grounds for reaching the judgment and finding a breach of the national legal statute.

The breach of Art.413(3) of the Law on criminal procedure linked to the breach of Art.6(1) ECHR had also been at issue in a case pertaining to the failure of a second instance court to provide the presence of the accused party at the trial. The Supreme Court, among others, found a breach of Art. 6(1) of the Convention by referring to the case law of European Court of Human Rights (ECtHR) with respect to the principle of equality of arms as one of the essential elements informing the wider concept of fair trial.

Another element of the former concept is the right to a trial within reasonable time with respect to which Article 35(1) of the Law on Courts establishes jurisdiction for the Supreme Court to decide on applications of alleged breaches of that right in accordance with the rules and principles of the ECHR and ECtHR jurisprudence. On a number of occasions where the Supreme Court has been called upon to rule on cases involving alleged violation of the right to a trial within reasonable time, the Court has habitually found a breach of both Article 36 of the Law on Courts and Article of the Convention which is the primordial source for the establishment of such right. A certain pattern can be discerned in the reasoning of the Supreme Court concerning the latter legal defense rights in the criminal procedure which is that the Court almost routinely proceeds in these types of cases by

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97 Judgment of the Supreme Court of Macedonia of 1 December 2013, Kvp. no. 179/2013.
98 Judgment of the Supreme Court of Macedonia of 16 January 2007, Kvp. no. 207/06.
99 Judgment of the Supreme Court of Macedonia of 9 July 2013 Kvp. no. 179/2013.
100 Judgment of the Supreme Court of Macedonia of 27 December 2013, Kvp. no. 253/2013.
101 Judgment of the Supreme Court of Macedonia of 27 October 2008, PSRR no.18/2008. The same conclusion was reached and the same reasoning was offered by the Court in several other cases concerning the right to trial within a reasonable time - Judgment of the Supreme Court of Macedonia of 3 July 2009, PSRR no.136/09; also in Judgment of the Supreme Court of 16 February 2010, PSRRG no.183/2009; Conversely, in another similar case the Court found no breach of Art.6 of the ECHR – Judgment of 24 March 2009 PSRR no.65/09;
basing its judgments both on the provisions of the Convention and on the corresponding national legal provisions.

What appears as a sort of a legal curiosum, the Administrative Court and the High Administrative Court (on appeal) had to deal with a case in which the right of access to documents as guaranteed under Article 10 ECHR had been invoked.102 The NGO which was the applicant in the case claimed breach of the former right as it had not received the requested information from a particular governmental agency. The High Administrative court upheld the Administrative court’s judgment by estimating the alleged breach of the right of access to documents solely in light of the Convention, and by deciding the case solely on the basis of the Convention.

3.6. Application of Sources of EU law

The jurisprudence of Macedonian ordinary courts involving legal sources of EU origin has largely centered on the interpretation and application of the Stabilisation and Association Agreement and the Interim Agreement between Macedonia and the European Community, chiefly in the commercial domain. Again, the manner in which the latter instruments have been applied in the court practice is either directly (i.e. as a direct or subsidiary sources of law), or as a persuasive, interpretative authority serving to properly apply domestic sources of law.103

Looking from a purely EU-integration perspective, one of the boldest judgments of the Supreme Court was delivered in the Makpetrol case104 where the Court decided to transcend the principles of national constitutional law – more specifically the rules applicable to giving effect to ratified international agreements – in order to arrive at a Euro-friendly result. Namely, the case concerned a conflict of norms between two governmental decisions, on the one hand, and the Interim Agreement between Macedonia, the European Communities and the Member States, on the other hand, which, foregoing ratification, entered into force very shortly after the conclusion of the SAA in April 2001. The Interim Agreement contained all the trade-related provisions of the SAA as it was specifically intended to enable that the latter SAA’s provisions be promptly put into effect, pending the ratification process of the SAA.

However, from a purely legal perspective, it was highly problematic that the Supreme Court decided to treat the Interim Agreement as a constituent part of the SAA and therefore to presume it to be a ratified international agreement pursuant to the wording of Article 118 of the Macedonian Constitution, that is, a directly applicable source of law. The Court offered almost no argumentation on why it opted for a broad construction of Article 5(4) of the Interim Agreement, considering the latter Article as directly applicable to the case. The former provision laid down a prohibition on all quantitative restrictions imposed on the imported goods originating from the European Community which the Court (evidently) considered as a vital objective capable of overriding certain national legal measures. Nevertheless, that judgment of the Supreme Court is undoubtedly an EU-friendly


103 However, note that, according to the data revealed by the national survey of judges, out of 206 surveyed judges (amounting to almost a third of Macedonian judges), only 1.9% stated to have directly applied, and 8.2% to have indirectly applied the law of the Union (including the SAA) in their respective practice. That is quite understandable, given the current stage in the accession process of the country, and it largely conforms to the data on the applicability of international law: 14.1% of the polled judges claimed to have directly applied sources of international law, whereas, 27.7 to have indirectly applied international law sources. Georgievski et al., European Union Law Application in the Republic of Macedonia Before Its Accession to the EU, p. 71-7, especially p. 74.

104 Judgment of the Supreme Court of Macedonia of 10 June 2004, Rev. no. 23/04.
one even though it had been poorly grounded, so that one can only presume that the ultimate aim in the mind of the Court when issuing the judgment was Macedonia’s integration in the EU.\textsuperscript{105}

The Administrative Court has ventured on directly applying EU legal rules (other than the provisions of the SAA) in a judgment from 2012\textsuperscript{106} which concerned the compatibility between particular acts adopted by the Macedonian Competition Authority and the Law on Competition. The Court endorsed the possibility to apply, by virtue of Article 69 SAA, the criteria concerning the correct application of EU competition rules in instances of appraising forms of distortion of competition liable to affect the trade between Macedonia and the European Communities. It found that the Competition Authority did not err by relying on the applicable Union criteria in the area of competition for the purpose of correctly applying the provisions of the Macedonian Law on competition.

In another case, where the applicant requested annulment of a decision of the Macedonian Competition Authority,\textsuperscript{107} the Administrative Court found that the Law on Competition was not breached when the Competition Authority was assessing the particular form of abuse of dominant position by taking into account the criteria of European competition law, which are to be relied on in instances where the commercial relations between Macedonia and the EU could be potentially prejudiced. More specifically, the Competition Authority had relied on the communications issued by the European Commission relevant to the application of competition rules in the telecommunications sector. The Administrative court found that the Competition Authority had correctly applied the Law on Competition, and that judgment was later upheld in a judgment of the High Administrative Court on appeal.\textsuperscript{108} The latter Court applied the Law on Competition, more particularly Article 3(3) of that Law, which foresaw that the appraisal of the forms of distortion of competition that may have an effect on the trade between Macedonia and the European Communities, by virtue of Article 69 SAA, can be conducted by relying on the criteria concerning the correct application of EU competition rules. Both judgments apply the domestic rule, nevertheless, seeing it as an expression of an EU rule i.e. an enabling agent for the application of a requirement which exists at the EU level.

Another similar type of reasoning was employed by the Administrative Court in a case concerning the application of the Law ratifying the Cooperation Agreement between the Government of Macedonia and the European Commission regarding the rules applicable to the distribution of the Commission’s financial aid to Macedonia in the frames IPA instrument for pre-accession aid. The Court assessed the actions of the applicant solely in the light of the later Law, considering the Agreement to be directly applicable and finally concluding that the applicant had violated the concerned provisions of the Cooperation Agreement.\textsuperscript{109}

4. Professional Training of Judges, Availability of Courts’ Jurisprudence and Ensuring Uniform Application of Law

In this section, we will briefly turn to three important aspects equally pertinent for the proper application of EU law (and international law) in the Republic of Macedonia in the pre-accession


\textsuperscript{106} Judgment of the Administrative Court of Macedonia of 7 February 2012, U. no. 6218/2009.

\textsuperscript{107} Judgment of the Administrative Court of 6 June 2012, no.6517/2009.

\textsuperscript{108} Judgment of the High Administrative Court of 5 February 2013, UZ. no.68/2013.

\textsuperscript{109} Judgment of the Administrative Court of 29 March 2013, U-3 no.931/2012; Upheld by Judgment of the High Administrative Court of 6 September 2013, UZ no.819/2013. A similar judgment was reached by the Administrative Court on 4 January 2013, U-3. 6p.470/2012; subsequently confirmed by the High Administrative Court on 31 October 2013, UZ no.1061/2013.
period, the level of professional training offered to judges specifically related to the law of the Union, the electronic availability of relevant jurisprudence and the existent mechanisms ensuring uniform application of (both) EU law in the current Macedonian court system.

4.1. Professional Training of Judges in EU Law

The level of professional training in EU law acquired by judges certainly represents one viable indicator for their actual capacity to apply that law in practice. Related to that inter alia the Macedonian Academy for Judges and Public Prosecutors, from its initial inception in 2007 as first such institution in the region, has offered numerous seminars and other forms of training related to EU law within its programs for initial and continuous training of judges. According to the data provided by the Academy, among others, there were a total of 110 special EU law-related seminars organized within the Academy in the period from 2007-2012, and that number has increased in the subsequent years. Yet, despite the considerable number of different forms of trainings offered to judges within the Academy (and elsewhere), a large number of Macedonian judges, in principle, still do not consider themselves sufficiently professionally prepared as to be able to properly apply EU law. According to the national survey referred to above, only 7.8% of judges responded that they possess sufficient knowledge in EU law for to be able to apply it in practice (and additional 19.4% - that they possess ‘some’ but ‘not sufficient’ knowledge), while 61.2% of them felt that they would need additional training for that purpose or have not responded to that question at all (11.6%).

The above data highlights the need for further increase of the scope and intensity of professional training of judges in EU law at the Academy, especially, at the level of its continuous training programs for the currently active judges. In particular, given the importance of the Supreme Court (including the High Administrative Court) and the Appellate Courts in directing the shape of the lower courts practice and securing uniform application of (both) EU law, as indicated below, the intensified continuous training should first embrace the later courts preferably in the form of regular compulsory courses organized annually for their judges on selected particularly acute topics related to domestic application of EU law.

4.2. Availability of Courts’ Jurisprudence

The availability of operational and easily accessible datasets of the different courts’ decisions in electronic form would contribute significantly to the increase of the quality of the judicial practice regarding EU law application and to securing uniform application of that law by national courts.

In Macedonia, the 2010 amendments to the Law on Civil Procedure introduced an obligation for first-instance and appellate courts to publish their decisions on the web-page of the respective court. According to Articles 10 and 11 of the Law on Management of Cases in Courts of 30.12.2010, decisions are published on the web-page by an authorized clerk of the respective court no later than two days after the receipt of the final court decision (exempt from publishing are court decisions delivered in proceedings in which the presence of public had been excluded). In addition, the Informatics Centre at the Supreme Court of the Republic of Macedonia keeps an automated data-base of all final court decisions published in electronic form. Access to the latter database is provided for all judges, public prosecutors, the Judicial Council of RM, the Public Prosecutors Council, and for state authorities. Other institutions and individuals (including scholars), in

110 Georgievski et al., European Union Law Application in the Republic of Macedonia Before Its Accession to the EU, pp. 85-86.
112 See Articles 326(4) and 355(5) the Law of Civil Procedure.
turn, must be able to demonstrate a particular ‘legitimate purpose’ in order to use the later database, and could have access to it only under special authorization by the President of the Supreme Court. The President of the Supreme Court issues by-laws detailing access to court decisions.

In practice, however, the datasets of court decisions provided by different courts under the above legal framework are not easily manageable and currently lack effective search engines.

Regarding availability of international jurisprudence, selected ECtHR’s decisions in cases involving the Republic of Macedonia translated in Macedonian are available at the website of the Ministry for Justice, and translated versions of these and other selected decisions of the Strasbourg Court can be found at the websites of other institutions, as well. Of course, case-law of international courts (including the ECJ) in original can be obtained by judges via internet, though difficulties regarding internet access have been reported at some Macedonian courts, and the chronic phenomena of computer illiteracy and insufficient foreign language proficiency are equally impeding a considerable number of Macedonian judges to consult directly relevant international jurisprudence.

4.3. Uniform Application of EU Law

Unlike some other SEE countries, the Republic of Macedonia has not provided for a special procedure by which lower courts can trigger (ex officio or on party’s motion) the highest court to issue legal standings on disputable legal issues that had appeared in their pending cases, which may include inter alia matters related to the application of EU law. The main instruments for ensuring uniform interpretation and application of law (including EU law) domestically are the ‘principled opinions’ that may be adopted by the Supreme Court on legal issues raising particular difficulties in the judicial practice detected by the Court. The Supreme Court decides on its own motion whether to adopt a principled opinion, although in practice it may be often motivated to proceed with issuing opinions upon information on pending legal issues supplied to it by lower courts. So far, however, we were not been able to detect any general opinion issued by the Supreme Court specifically referring to the application of the SAA and other EU law sources in the Macedonian legal order. In our view, the Court should be more active in assuming a leading role in ensuring proper application of EU law by courts inter alia through the issuance of principled opinions on questions regarding the applicability of EU law sources in RM. In these, it should offer clarifications and appropriate guidance on many important issues to the lower courts, including on the effect and content of particular SAA provisions, the meaning of its specific standard clauses as particular grounds for “Euro-friendly” application of domestic legislation, and the necessity for indirect consultation of the relevant EU instruments and ECJ’s jurisprudence by judges in their decisions. In the Macedonian legal system, in principle, all courts enjoy substantial autonomy in performing their adjudicative function. In practice, however, a particularly prominent role in exciting EU law application by lower courts could be played by the four Appellate Courts. In unofficial interviews with some judges we were informed that judges of the lowest (basic) courts largely follow patterns of practice established by those of the Appellate Courts in order to avoid their decisions being quashed or sent back to them on appeal

115 E.g. at the website of the Academy for Judges and Public Prosecutors, on: http://www.jpacademy.gov.mk/publikacii.
116 E.g. in Serbia, a special procedure has been introduced for ensuring uniform law application through establishing the possibility for first instance courts, whenever a disputable legal issue occurs in multiple cases, to initiate proceedings (ex officio or on a party’s motion) at the Supreme Court of Cassation to decide (take a standing) on that issue. The decisions thus rendered by the Supreme Court are communicated to the referring lower court and are published in the Official Bulletin of the Court (or on its web page). For more see Part 6 of this book.
117 In addition to ‘principled opinions’ (‘načelni mislenja’), the Supreme Court also adopts ‘legal standings’ (‘pravni sfačanja’) aimed at ensuring uniform interpretation and application of law among different panels of its particular departments. Whereas, the ‘principled opinions’ are formally not binding on lower courts, they are actually followed by the later courts in their practice, so that in theory these are regarded as ‘de facto sources of law’.
by the Appellate Courts’ judges. Hence, should the later judges be well trained for the application of the law of the Union and encouraged in developing a proper practice of EU law application, one could expect that it would eventually spill over on the corresponding practice of the - by far most numerous - basic courts. The reverse situation, in turn, could discourage even those basic courts’ judges that are sufficiently skilled and willing to proceed with EU law application in their respective practice.

On the other hand, one could expect that a major responsibility in stimulating the development of a proper and uniform practice of EU law application, especially, through ‘Euro friendly’ or ‘harmonious’ application of domestic law, would be assumed by the Macedonian Constitutional Court. That was the case, for instance, with the Constitutional Courts of some CEE countries before their accession to the Union, most notably, those of Poland, the Czech Republic and Hungary, as most activist and influential among the CEE courts. So far, however, the Macedonian Constitutional Court has not leaved up to that task. It has not come out yet with any leading principle on pertinent aspects of the SAA’s and other EU law sources’ application in the internal legal order in view of the Macedonian Constitution, leaving the other courts short of valuable guidance on EU law application as they should have been supplied by it in view of its special constitutionally established position in the Macedonian legal system.

5. Conclusion

This article has aimed at providing a thorough overview and analysis of the constitutional, statutory and treaty framework setting up the legal bases for application of EU law in Macedonia’s pre-accession period, as well as the related practice of the Macedonian Constitutional Court and ordinary courts. We have tried to shed light on the current situation, bring up the existent shortcomings in the current law and national courts’ jurisprudence, and to provide certain recommendations for surmounting these.

Being a candidate state thus a non-member state of the EU, Macedonia has not provided explicit legal basis for application of EU law as such in its constitutional order, but it rather has put the latter’s application under the banner of international law, particularly through the ratified international treaties such as the Stabilization and Association Agreement. In this regard, it has been argued that the constitutional and statutory framework for EU law and international law application under this banner is characterized by a monistic tone with a possibility for direct application of ratified treaties, including the SAA, but also by the existence of various lacunae that leave ample space for divergent interpretations of its meaning and scope by different institutions. While regulating the status only of ratified treaties, the relevant constitutional provisions have omitted to regulate the status and effect of not-ratified international treaties, binding decisions or regulations issued by various bodies established under ratified treaties, including by those established under the SAA and other EU-related treaties, and of general international law.

Notwithstanding such deficiencies, which could be traced also in some other SEE countries, and CEE countries prior to their accession to the EU, these would have been easily overcome had the Constitutional Court provided an appropriate interpretation of the relevant constitutional and statutory provisions and hence aiding filling the existent legal gaps. However, fitting into the general picture of the Macedonian judiciary as a whole, the justices of the Constitutional Court have shown to be deeply entrenched in a rigid legal textualism, known in almost all SEE (and CEE) countries. The Constitutional Court has unfortunately belied the monistic tone of Article 118 of the Constitution and by restrictively interpreting its constitutional powers it has taken a quasi-dualist approach to-

wards ratified international treaties (including the SAA) thus excluding them as a point of reference in the conduct of constitutional review. Whereas it has obliged the ordinary courts to respect ratified international treaties, such as the ECHR, and to consult the case-law of the ECtHR, the Constitutional Court has declined to accept any such obligation stemming out of the constitutional provisions for the Court itself. In this manner it has created an additional confusion in the Macedonian legal system instead of clarifying the relevant constitutional provisions. Generally, the Constitutional Court has applied ratified treaties and international law only indirectly, as a secondary, persuasive, authority using it solely as an additional instrument of interpretation of constitutional and statutory provisions. The same approach has been applied to the SAA and other EU law sources. The sources of secondary EU law, such as directives and regulations, have been referred to only indirectly, especially, in the harmonization context.

As far as the ordinary courts are concerned, the general conclusion is that Macedonian judges still lack sufficiently developed awareness and skills to tackle direct application of EU law and international law regardless of the existence of a number of representative cases in which they have embraced and directly applied EU-related treaties and international law. It remains customary for Macedonian courts to perceive the Union’s legal order merely as an expression of the international legal order, and the EU norms as foreign norms belonging to the international legal system rather than to a sui generis legal system created under the European Union treaties, different from the international one. Be that as it may, in view of the respective constitutional and statutory provisions, contrary to the Constitutional Court, the ordinary courts of Macedonia, and above all the Supreme Court, have devised a rather favorable standard on the position of ratified international treaties (including the SAA) and their application in their practice, in particular, in the context of the ECHR.

In the practice of both ordinary courts and the Constitutional Court it has been noticed that the Euro-friendly approach in the representative cases so far has taken the form mainly of a carte blanche approval. Namely, whenever a domestic provision transposing EU law has been challenged before the courts, they would confirm its validity relying on relevant sources of the law of the Union without thoroughly analyzing its compatibility with the respective EU law source. Employing legal textualism, as a general trend, national courts would only compare the wording of the specific domestic provision with the relevant EU rule without going further into the status and effect of the secondary EU law.

There is an obvious need for more intensified professional training of judges, especially at the higher (Appellate) and highest levels of ordinary courts, and for continuous monitoring of the courts’ practice, in order to increase the judicial capacity and quality of both ordinary courts and the Constitutional Court for adequate application of EU and international law.
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**Polish Constitutional Tribunal**


**Polish Supreme Administrative Court**


**Czech Constitutional Court**


IMPLEMENTATION OF INTERNATIONAL AND EUROPEAN UNION LAW IN MONTENEGRO

Maja KOSTIĆ-MANDIĆ*

Abstract

The Constitution of Montenegro prescribes that the ratified and promulgated international agreements shall have the supremacy over the national legislation, and shall be directly applicable when they regulate the relations differently from the internal legislation.

Generally, International law is applied in practice of the courts, but mostly in the field of Public International Law. This especially applies to the judgments on the request for damages due to the violation of honor and reputation (primarily perpetrated by the media), where the reference to European Convention on Human Rights and decisions of the ECtHR is common. Another example in the practice of Montenegrin courts are judgments in cases addressing deportation of Bosnian citizens during 90-ies, where reference was made to international humanitarian law.

The Constitution of Montenegro and legislation in general do not explicitly refer to application of EU law. However, the Private International Law Act of Montenegro refers to application of the EU law and taking into account of the case law of the European Court of Justice and national courts of the EU members. There is no record of direct application of EU law before the Montenegrin courts but EU law is being applied by the courts through positive legislation, insofar as it is harmonized with EU law.

Key words: Constitution, PIL Act, ECtHR, case law.

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Maja Kostić-Mandić is a professor of Private International Law and Environmental Law with the University of Montenegro Faculty of Law. She graduated from the same Faculty and obtained a Master Degree and a Doctoral Degree at the Faculty of Law in Belgrade. She is a Van Calker scholar of the Swiss Institute of Comparative Law and a Chevening scholar of the University College London. She obtained Scholarship of Max Planck Institute for Comparative and Private International Law in Hamburg twice.

She used to be a member of the Parliament of Montenegro in one mandate.

She is author of several books published in Montenegro, Netherlands and Germany and was involved in more than 20 international projects mostly addressing harmonization of Montenegrin law with EU law.

She is an arbitrator with the International Commercial Arbitration of Chamber of Commerce of Serbia, Montenegro and Slovenia.

* Maja Kostić-Mandić, PhD, Professor at the Faculty of Law, University of Montenegro, e-mail: majak@t-com.me
CHAPTER TWO • COUNTRY REPORTS ON APPLICATION OF EU LAW BY NATIONAL COURTS

Introduction

Application of the international end EU law before the Montenegrin courts has to be reviewed in a specific historical context which will shed more light on developments in legal framework and judicial practice following the referendum on Montenegrin independence. The Decision on Proclamation of Independence of 3 June 2006 explicitly states that Montenegro will be bound by international conventions and agreements concluded and succeeded by the state union of Serbia and Montenegro, when they relate to Montenegro and do not contravene with its legal order.

In October 2007, two important events occurred: adoption of the new Constitution of Montenegro and signing of the Stabilization and Association Agreement with the European Union (SAA). The Constitution of Montenegro for the first time provides for direct application and supremacy of the ratified international treaties and generally accepted rules of international law over the law of Montenegro (art 9 of Constitution). The Stabilization and Association Agreement, in force since 1 May 2010, introduces the obligation of Montenegro to approximate its existing and future legislation with the acquis, as well as obligations of properly implementation and enforcement of existing legislation (art 72 of SAA).

The new impetus to this process was Montenegro becoming candidate country for accession to the European Union on 17 December 2010 and on 26 June 2012 accession negotiations were opened.

All these important events directly or indirectly influenced the awareness of a Montenegrin legal community in general and legal practitioners in particular on rising importance of implementation of international law.

In the course of conducting the research on implementation of international and EU law in Montenegro the special attention was paid to the main fields of interest of the author of the survey and legal disciplines where generally international and EU law is more likely to be regularly applied by the judiciary presently and in the future: Private International Law and Human Rights.

General Normative Framework

In terms of the hierarchy of the sources of law, the Constitution of Montenegro prescribes that the ratified and promulgated international agreements shall have the supremacy over the national legislation, and shall be directly applicable when they regulate the relations differently from the internal legislation (art 9). The predominant interpretation of the said provision by the scholars and jurisprudence is that the Constitution remains the highest ranking source of law in Montenegro. The Constitution explicitly stipulates supremacy and direct applicability of ratified and promulgated international agreements in cases of conflict of norms with the national legislation. Another possibility of implementation of international law includes generally accepted rules of international law (art 9 of the Constitution). The phrase presumably refers primarily to customary international rules and general principles of law accepted by civilized nations (i.e. to Public International Law sources other than treaty law).1

Previous judgments of courts are not formally recognized as a source of law, and courts are not bound to abide by decided cases. However, the Law on Courts of 2002 in art 27(1) enumerates powers of the Supreme Court of Montenegro one of them being a power to provide abstract judicial interpretations of the laws in the absence of any particular case pending before them in order to bring jurisprudence more closely into line. Although these general legal positions and opinions are

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binding only upon the court that adopted them, judges of lower courts tend to comply with the rulings and opinions of higher courts and even with previous rulings of the courts of the same rank in equivalent cases.

The creative role of the courts is predominantly reserved for the domain of filling gaps in statutory law and the interpretation of general and ambiguous statutory provisions.

Jurisprudence is not officially a source of law in Montenegro since courts are not entitled to cite opinions of legal authors as the basis for their decisions. Occasionally, courts may refer to opinions of established legal scholars when explaining the reasons for which they took a certain general position with respect to a particular issue of law.

**Application of EU Law**

The Constitution of Montenegro and legislation in general do not explicitly refer to application of EU law. However, the new 2014 Private International Law Act of Montenegro is to our knowledge, an exceptional piece of legislation providing for applicability of EU law in two distinctive ways: by incorporating provisions of EU regulations into national law in certain fields and for certain types of relations with only minimum adjustments\(^2\) and by stating that interpretation and application of the provisions relating to contractual/non-contractual obligations shall be carried out in accordance with the Regulation on the law applicable to contractual obligations and Regulation on the law applicable to non-contractual obligations (arts 49 and 67 respectively)\(^3\). Thus, it refers to application of the EU law and takes into account the case law of the European Court of Justice and national courts of the EU members. In addition, EU law is applied indirectly when applying ratified multilateral international agreements which bind both Montenegro and EU.

Stabilization and Association Agreement being widely considered as an international agreement, though of a specific kind\(^4\) in principle can be applied before the Montenegrin courts (under art 9 of Constitution) as ratified and promulgated international agreement, but under condition that its respective provisions are eligible for direct applicability. In addition, there are more than 20 international agreements between EU and Montenegro which are ratified by the Montenegrin Parliament.\(^5\) As SAA is an international ratified treaty (though of a specific kind) secondary acts adopted under this and other international ratified treaties could, in principle, be directly applied by national courts under the same conditions as SAA. However, in practice, the courts do not directly apply Stabilization and Association Agreement and other ratified agreements with EU (according to the interviews with the judges of the Basic and High Court in Podgorica there were no such claims at all. In their opinion SAA can be implemented only after transposition of some of the areas of national legislation into domestic law).\(^6\) By 10 March 2014 it seems that there is no record of direct application of EU law before the Montenegrin courts. However, this conclusion is not final and decisive as it is drawn upon interviewing 20 judges of courts of different jurisdictions from all over Montenegro.

Moreover, for the time being there is no legal standing of the Supreme Court of Montenegro on implementation of EU law (including the ECJ’s jurisprudence, the EU’s soft law etc.) whether they could be referred to as general principles of International Law before the Montenegrin courts. Thus,

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\(^2\) In the field of applicable law for contracts, torts/delicts, maintenance and succession.
\(^3\) This does not apply to the provisions of the PIL Act which refer to application of the Hague Traffic Accident Convention (art 58 PIL Act) and the Hague Product Liability Convention (art 57 PIL Act).
\(^5\) As of 10 March 2014, the list provided by Ministry of Foreign Affairs of Montenegro.
\(^6\) Mr Sinisla Bjeković, an expert in International Law stresses the position of some other agreements, such as those regarding readmission which are being applied in administrative procedures and entitle those persons to seek for judicial protection in some specific cases, but it is not likely.
this issue remains the “grey zone”, open for different interpretation of the scope of art 9 of the Constitution. Constitutional Court, Supreme Court and/or other higher courts so far have not established a leading principle providing general direction to national courts to interpret applicable national law in light of the relevant EU law. However, PIL Act provides for this principle in the field of applicable law to contractual and non-contractual obligations regulated by that codification.

**Practice of Constitutional Court**

The Constitutional court of Montenegro is empowered to review domestic legislation as to its conformity with international treaties (abstract constitutional review), including with the SAA but there is no practice in that respect. The official response to our inquiry states that there is no specific constitutional and legal grounds which bind the Constitutional Court in exercise of their powers to take into account EU law but they follow the practice of the European Court of Justice, as well as accessible and relevant case law of the European Constitutional Courts, mainly the practice of the Federal Constitutional Court of Germany. And, since Montenegrin Constitution contains no provisions on the interpretation of EU law, with which the Constitutional Court would have to comply, after the accession of Montenegro to EU the Constitution should be amended in that respect. On the other hand, appreciation of interpretative effects of EU law by the Constitutional Court represents an instrument for the harmonization of law, given the fact that Montenegro accepted the legal obligation to harmonize its national law in certain fields with clearly defined terms, which means that such provisions should be incorporated in the Constitution before Montenegro joins the EU.

**Practice of Courts of General Jurisdiction**

In the practice of the Basic court in Podgorica EU law is being applied by the court through positive legislation, insofar as it is harmonized with EU law. In several occasions judges in the reasoning of the judgment made reference to EU directives, and as for the “soft” law there are a number of decisions which cite recommendations given by EU. However, they can not directly apply EU law at this stage when EU law in general is not a binding legal source in the formal sense. Indirect application is possible as the Charter of Fundamental Rights of the EU in the explanatory memorandum refer to the practice of the European Convention on Human Rights. In the area of private law, if not transposed into national legislation, it is unlikely that anyone would refer to EU law.

**Application of International Law**

The concept of supremacy of international treaties and generally accepted rules of international law is both constitutional and legislative category in Montenegro. As previously stated, the Constitution of Montenegro prescribes that the ratified and promulgated international agreements and generally accepted rules of international law are parts of internal legal order and shall have the supremacy over the national legislation. Thus, they shall be directly applicable when they regulate the relations differently from the internal legislation (art 9). Also, 2014 Private International Law Act contains two provisions on application of international law. Art 2 provides for supremacy of international treaties (and other legislation) as *lex specialis* over that Act, while art 3 addresses legal gaps stating that “such matter shall be subject to provisions and principles of the present Act, the principles of legal order of Montenegro and the principles of private international law.”

The Constitutional court of Montenegro issued legal position that the European Convention on Human Rights is *per se* direct legal basis for obligation of application of decisions of the ECtHR in all jurisdictions.
International treaties in principle can be directly applied by national courts and that is a common practice regarding treaties containing rules on procedure. In the field of Private International Law this stands especially for bilateral treaties on international cooperation in civil and commercial matters with Serbia (2009) and Bosnia and Herzegovina (2010) and the following multilateral treaties: Hague Civil Procedure Convention (1954), Hague Legalization Convention (1961), Hague Convention on International Access to Justice (1980), Hague Convention on Civil Aspects of International Child Abduction (1980), and European Convention on Information on Foreign Law (1968). Due to a comprehensive codification of PIL and to the adaptation of concrete solutions from certain multilateral conventions, the cases in which other international treaties are directly applicable are relatively rare in practice.

International treaties normally exclude renvoi, while the new PIL Act in art 4 provides for renvoi except for: contracts, torts, maintenance, party autonomy, form and regarding legal persons.

The Constitutional court of Montenegro is empowered to review domestic legislation as to its conformity with international treaties (abstract constitutional review).

The legal status of treaties or agreements which are not subject to ratification by the national parliament is not addressed by the Constitution since the art 9 refers only to ratified and promulgated international treaties. Referring to “soft law” and even to the official reports of some international bodies is a common practice of judges in the reasoning of their judgments.

All obligations under international agreements are themselves legally binding, and the court must apply them (e.g. in cases dealing with deportation of Bosnian citizens in the 90-ies the court referred to the UN Convention relating to the Status of Refugees). However, when it comes to the effect of the agreement in domestic law the practice is scarce, and for some forms of international cooperation there was a practice of adopting special legislation (e.g. cooperation with the Hague Tribunal for ex-Yugoslavia).

The decisions of international courts and other oversight bodies are generally respected and there is a number of examples in cases of the European Court of Human Rights, as the case Hajrizi and others v. Federal Republic of Yugoslavia, which ended with the settlement after the decision of the UN Committee for the protection of torture. In case of trade agreements the protection would be feasible only if Montenegro was sued for possible damages and the like. It is not likely that these agreements can produce direct effect in a dispute between private legal entities.

**Practice of Constitutional Court**

The Constitutional Court of Montenegro refers to European Convention on Human Rights and the case law of the European Court of Human Rights on a daily basis, especially in the proceedings on constitutional complaints. In addition to the European Convention, the Constitutional Court in its decisions refers to other sources of international law (the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Framework Convention for the Protection of National Minorities of the Council of Europe, the Hague Recommendations Regarding the Education Rights of National Minorities (1996) and others).

In current practice, the Constitutional Court applied international treaties, the European Convention and the legal positions of the European Court of Human Rights in two ways: by direct application of the relevant provisions of international agreements and the Convention interpreted in accordance with the case law of ECtHR; and by accepting the interpretation of the content and scope of certain legal principles and institutions in a way that ECtHR interpreted them in applying the Convention.
The Constitutional Court, through a series of decisions in the abstract control of the constitutionality and legality uses constitutional interpretation in accordance with the practice of ECtHR, and within it shapes the practice of application of Convention principles (rule of law, proportionality, non-discrimination, equality, human rights and fundamental freedoms, minority rights etc.). Thus, the obligation to take into accounts the decisions and judgments of the ECtHR is derived from the interpretation of text of the Constitution as a whole. In this regard, the Constitutional Court held that the Convention is itself a direct legal source from which arises the obligation to implement the decisions of the ECtHR.

When deciding on certain contentious issue of constitutional law, the Constitutional Court had regard also of the content of other international instruments, which by their nature are not formal sources of law in terms of provision of Article 9 of the Constitution. In such cases, the Constitutional Court noted the existence of various international instruments (resolutions, recommendations, charters etc.), which were adopted by some authorities of universal or regional organizations important for the protection of human rights.

**Practice of Courts of General Jurisdiction**

For the purpose of this survey some decisions provided for by the judges of the Basic Court in Podgorica were made accessible to the author. Their analysis may point to some trends in application of the international law before courts of general jurisdiction in Montenegro. Out of 22 analyzed decisions, (all final and binding) where the international law was applied, in 18 cases reference was made to the European Convention on Human Rights and in other 4 cases to other public international law instruments: Universal Declaration on Human Rights and UN Convention on the Rights of Persons with Disabilities (judgment no. 107/09); UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 2005, UN Convention relating to the Status of Refugees, Geneva Convention and Protocol I from 1977, International Covenant on Civil and Political Rights (3327/10; 5462/10; 1808/11). In addition, two decisions refer to application of the UN Convention on the Rights of a Child Protection (1773/05; 1043/12).

The great majority of the cases address actions for non-pecuniary damages for violation of honor and reputation of the plaintiff via printed media and article 10(2) (Freedom of expression) of the European Convention on Human Rights is the far most cited provision, while in two cases reference was made to art 2 (Right to life – 2866/07; 2368/08), in one case to art 5(5) (Right to liberty and security – 4532/12) and in two cases to art 8 (Right to respect for private and family life – 5462/10; 5765/10).


The reference to case law of the ECtHR was made both in cases were the claim was approved (partially or totally) or rejected (3615/09; 3327/10).

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7 In all the following cases the references are also made to the numbers of the judgments.
In most of the cases the reasoning list the legal sources which are grounds for the decision (e.g. art 6 of Constitution, art 207 of Law on Obligations, Law on Media etc.) and then reinforce their position in decision-making referring to international law. In some case international law in fact indirectly provides for interpretation of the “purely domestic” sources of law (in one case it is explicitly stated that Law on Media should be interpreted in accordance with the principles of Convention and art 10(2) of the Convention and case law of ECtHR (3136/8)).

Some decisions also refer to (universal) principles of international law (107/9; 1206/8) while in one case reference was also made to principles of: equity, solidarity, and protection of the injured party, as overwhelming principles of the national legal system – (1206/8). Furthermore, there is a position of the Supreme Court of Montenegro that civil proceedings for damages for deportation shall not be suspended until the ending of criminal proceedings, which implement international principle of separate liability of state for unlawful acts and individual responsibility for crimes under international law. In this judgment the judges of the Basic Court in Podgorica made reference to the International Convention on the Status of Refugees, and their Protocols.

In one criminal case (under art 378 of Criminal Code of Montenegro addressing resistance or disobedience to lawful decisions or measures of state authorities) the court in its reasoning also cited art 10 of the Convention as well as case law of ECtHR (33/13) and directly applied international law.

Because of the closeness of the Montenegrin legal system with systems in neighboring countries, they often consult case law of the former Yugoslavia (mostly Serbian and Croatian), although this is not explicitly stated in the explanation of the verdict (they do not cite the exact court and the number of the judgment).

As stated above, judges do not only refer to the provisions of the relevant legislation but also use teleological method in reasoning of their decisions. In addition, the conclusion could be drawn that a uniform and consistent jurisprudence of the ordinary courts in Montenegro, especially in the last three years is improving since now each court has department of jurisprudence, which, especially on the appellate level, takes into account the uniformity of case law. However, the regard should be had that this sample reflects only some chosen decisions of the biggest court in country and that further research should be needed in order to have more reliable and accurate data.

**Access to Information**

The courts on their websites (www.sudovi.me), after anonymisation of court decisions, publish some decisions in its sole discretion. The decisions of the Constitutional court are regularly published on its website (http://www.ustavnisud.me/slike/ustavnisud/praksa.htm). A good example of transparency and positive exception is the Administrative Court of Montenegro which, on its website, regularly publishes all its decisions for several years.

The Supreme Court of Montenegro adopted, on 6 July 2011, the legal position stating that access to judicial records can not be made on the basis of the Law on Free Access to Information but only on the basis of procedural law. In addition, it states that it will not be allowed access to information when is requested certain individual decision. In practice this means that if a decision is not published on the website of the court (and generally a small number of decisions are published on the website of the courts), it is very difficult for interested parties to have insight into the court decisions.

Generally, foreign sources of law are not accessible to judges via internet (e.g. via CELEX, HUDOC etc.). In practice, judges get acquainted with the practice of ECtHR through its bulletins and other publications.
Training of Judges

Judicial training in Montenegro is performed within the Judicial Training Center, as part of the Supreme Court of Montenegro. The education is performed as initial and in-service training. The In-service training, which includes professional education of judges is tailor-made depending on the needs of the judiciary and in accordance with the program of work and judicial reforms. It involves trainings in different legal areas, such as: the application of laws and other regulations, with an emphasis on new legislation, awareness of the most important areas of international law, international standards and recommendations, including the EU law and human rights, professional skills, greater efficiency in resolving disputes, alternative dispute settlement procedures, public relations and access to information, etc.8

Conclusion

The Constitution of Montenegro explicitly stipulates supremacy and direct applicability of ratified and promulgated international agreements in cases of conflict of norms with the national legislation. Another possibility of implementation of international law includes generally accepted rules of international law (art 9 of the Constitution).

In the practice of the Basic court in Podgorica EU law is being applied by the court through positive legislation, insofar as it is harmonized with EU law. In several occasions judges in the reasoning of the judgment made reference to EU directives, and as for the “soft” law there is a number of decisions which cite recommendations given by EU.

In current practice, the Constitutional Court applied international treaties, the European Convention and the legal positions of the European Court of Human Rights in two ways: by direct application of the relevant provisions of international agreements and the Convention interpreted in accordance with the case law of ECtHR; and by accepting the interpretation of the content and scope of certain legal principles and institutions in a way that ECtHR interpreted them in applying the Convention.

Out of 22 analyzed decisions of the Basic Court in Podgorica, (all final and binding) where the international law was applied, in 18 cases reference was made to the European Convention on Human Rights. The great majorities of the cases address actions for non-pecuniary damages for violation of honor and reputation of the plaintiff via printed media and article 10(2) (Freedom of expression).

8 Trainings related to international law and EU law included following topics: Defining the EU as a specific legal entity – goals, underlying fundamental values and legal nature; Structure of the EU legal system – overview of EU legal instruments: primary law, secondary law, case law and other instruments; Main characteristics of the EU law (supremacy, direct effect, indirect effect, state liability) – practical implications for the national judge; Fundamental principles of the European Union (fundamental rights, proportionality, nondiscrimination, etc.); Workshop: Analyzing a judgment of the European Court of Justice; Stabilization and Association Agreement between the EU and Montenegro – Essence and overview of provisions on harmonization of regulations, implementation or regulations and judicial application; Structure, organization and functioning of the EU Court of Justice; Preliminary rulings: guide for national judges; Case studies on preliminary rulings procedure; Coercive measures against member states; Articles 258, 259 and 250 of TFEU proceedings, other violations of procedures, coercive measures before national courts – question of state liability; Actions for review of legality of EU norms: Action for annulment (Article 263 of TFEU), Action for failure to act (Article 265 of TFEU) and Action for compensation of damage and pecuniary compensation; Application of EU law by national judges – benefits and obligations; Legal proceedings before the Court of Justice; Overview of the area of freedom, security and justice, after the Lisbon Treaty; Citizenship of the European Union and Schengen; Free movement of third country citizens and the visa regime issue; Status and integration of third country citizens etc. The Centar created a separate programe of continuing education on Private International Law and international co-operation in civil matters, which will be implemented during 2014 through 6 two-day seminars. The following topics shall be addressed: Constitutional basis for conclusion of international agreements, Relationship of the constitution and laws with international agreements, Legal nature of certain agreements, with an overview of the obligations set in the Stabilisation and Association Agreement, New legislation on Private International Law, General EU framework on Judicial Cooperation in Civil and Commercial Matters, Role of the EU Court of Justice in the development of the EU law on co-operation in civil matters, Experience of the countries from the region with similar legal traditions in the process of adoption of EU standards and implementation of EU law and court practice in civil and commercial matters etc.
Abstract

This paper examines the most important issues related to the application of the EU law in Serbia in the pre-accession period. According to Serbian Constitution, court’s decisions shall be grounded on the Constitution, statutes, ratified international treaties and regulations based on the statutes. The domestic courts in Serbia have not yet taken firm position on the status and application of the EU law in general. However, there are some court decisions in which the Supreme Court of Cassation and the lower courts invoked some of the sources of the EU law in the reasoning of their decisions (EU Charter on Human Rights and directives of the European Community). In legal theory it is generally accepted that Stabilization and Association Agreement should be considered a type of international treaty, regardless its specific features, and that it may be applied by the domestic courts according to the rules applicable to the ratified international treaties. Serbian courts have not yet considered the issue of the direct application of the Stabilization and Association Agreement, or other agreements concluded with the EU. The authors hold that the domestic courts should directly apply provisions of the Stabilization and Association Agreement and other agreements with the EU that meets the requirements for direct effect, according to the rules that apply to international agreements, and recognize their direct effect without the adoption of implementing measures.

Key words: EU law, Serbian courts, Stabilization and Association Agreement, direct application, direct effect.

Radovan Vukadinović, PhD, is full time professor at Faculty of Law University of Kragujevac, President of Serbian Association for European Law, Director of the Center for EU Law and Chief-in-editor of (Serbian) Review for European Law. He teaches EU Law and International Business law. Professor Vukadinović is author more textbooks and studies on EU Law and International Busi-

**Dobrosav Milovanović**, PhD is Associate Professor at Faculty of Law Belgrade University. He teaches Administrative Law. He is member of Executive Board of Association of Lawyers and Association for Public Administration of Serbia. Professor Milovanović was involved in numerous projects and he is (co-)author of series of monographs and articles. Among the most recent are “Study on Improvement of Legislative Process in Republic of Serbia”, GIZ (2012) and “Professional Development of Civil Servants in the Republic of Serbia” (2012).

**Dejan Janićijević**, PhD is Associate Professor at the University of Niš, Faculty of Law where he graduated in 1999. He did his master studies in international transactions and comparative law at the University of San Francisco School of Law. As of October 2002, he teaches at the University of Niš Faculty of Law. On July 4, 2007 he defended his doctoral dissertation „Multi-Party Arbitration – Participation of Multiple Subjects with Party Capacity in Arbitration Procedure” written under the mentorship of prof. Gašo Knežević. In 2013 he was promoted to associate professorship for the Civil Law scientific field. He authored numerous articles published in domestic and international publications and participated in international conferences held in Serbia and abroad, as well as in regional and national projects and trainings. His professional engagements include Foreign Trade Arbitration at the Serbian Chamber of Commerce and Basketball Arbitration at the Serbian Basketball Association.

**Vuk Cucić** graduated and finished his master studies at the Faculty of Law, University of Belgrade, where he is currently employed as an assistant lecturer for Administrative Law. He is on the final year of his PhD studies, preparing the thesis entitled “Administrative Dispute of Full Jurisdiction (Contentieux de pleine juridiction) – Models and Types”. During PhD studies, he was on exchange at the Ghent University, Ghent, Belgium and at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany. He published a dozen of articles in Serbian and foreign journals, in Serbian, English and German. He is a member of the Serbian Association for Public Administration. He was a member of several working groups that drafted different laws, including the Law on General Administrative Proceeding, the Law on Public Administration and the Law on Civil Servants. He was special adviser of the Minister of Justice and Public Administration in charge of public administration.
1. **The State of Place of EU Law and SAA in Domestic Constitutional Order**

1.1. **References to EU Law in Serbian Legislation**

The Constitution of the Republic of Serbia does not contain any special provision providing for the application of the EU law in the domestic legal order. EU law is not mentioned in the Constitution of Serbia. Likewise, no similar provision pertaining to general and direct application of the EU law in the internal legal order can be found in any other legislation. However, in some domestic regulations, as well as in several international treaties, there are some references to this body of law.

Thus, the Act on Foreign Trade stipulates that the foreign trade is being regulated “... in accordance with the EU rules.” Among ratified international treaties, the Treaty establishing the Energy Community for South-East Europe (i.e. Energy Treaty), in several articles mentions the law of the European Communities/Union (e.g. Articles 5.10, 11, 12, 15, 16, 24, 25, 31, 33, 59), and these articles refer to the application of certain parts of the communitarian acquis in the field of energy sector (the acquis communautaire in the energy sector). Article 94 of the Energy Treaty, provides for the general application of the established case-law of the Court of Justice or the Court of First Instance of the European Communities in the interpretation of the “terms or other concepts used in this Treaty that are derived from European Community law…”

According these rules, especially under the existing provisions of the Constitution of the Republic of Serbia governing the use of international law, the EU law can be generally applied directly. The provisions enabling such application are contained in Articles 16, 18 and 194 of the Constitution of Serbia. So, the provisions of Article 16/2 of the Constitution provide that generally accepted rules of international law and ratified international treaties are an integral part of the legal order of the Republic of Serbia and applied directly. The same provision is contained in the Article 194 Paragraph 4 of the Constitution.

On direct application of generally accepted rules of international law and ratified international treaties refer the provisions of Articles 145 Constitution and Article 1 Paragraph 2 of Law on Courts.

According to Article 145/2 of the Constitution, courts’ decisions shall be grounded on the Constitution, statutes, ratified international treaties and regulations based on the statutes. According to the provisions of Article 142/2 of the Constitution and Article 1 par. 2 of the Statute on Courts, the courts are required to conduct proceedings in “accordance with the Constitution, statutes and other legal acts, as required by the law, generally accepted rules of international law and ratified international treaties.” The Constitution makes an inexplicable difference between sources of international law applicable to the procedure on the one hand (generally accepted rules of international law), and international sources applicable to the merits of the dispute (ratified international treaties).

Domestic courts have not taken explicit position on the status and application of the EU law in general. However, there are some court decisions in which the Supreme Court of Cassation and the lower courts invoked some of the sources of the EU law in the reasoning of their decisions (EU Charter on Human Rights and directives of the European Community). In legal theory, it is generally accepted that stabilization and Association Agreement (SAA) is a type of international treaty, regard-

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less its specific features, and that it may be applied by the domestic courts according to the rules applicable to the ratified international treaties.⁴

The Constitution of the Republic of Serbia recognizes ratified international treaties and generally accepted rules of international law as binding legal sources. Their legal status is defined in Articles 16/2, 16/3, 18, 167/1, 167/2, 194/4 and 194/5 of the Constitution.

According to the provision contained in the Article 16/2 of the Constitution, ratified international treaties and general accepted rules of international law are an integral part of internal legal order. The Constitution, however, does not specify the meaning of the phrase "generally accepted rules of international law".

The constitutional terminology relating to international sources of law is inconsistent. Thus, the Constitution uses following terms: generally accepted principles of international law (Art. 16 Para. 1), rules of international law (Art. 16 Para. 1), generally accepted rules of international law (Art. 16 Para. 2). We believe that all these formulations should be understood as general principles of law. Regarding international treaties, the Constitution uses the following terms: ratified international treaties (Art. 16 Para. 2), international agreements (Art. 17 and Art. 75/1), valid international standards on human and minority rights (Art. 18 Para. 3), and practice of international institutions which supervise their implementation (Art. 18 Para. 3). Such linguistic inconsistency may lead to different interpretations of constitutional provisions in practice.

The Constitution defines the hierarchical relationship between the sources of international law and domestic law (Art. 16/3 and 194/4), but does not establish such relations between ratified international treaties and general principles of international law.

According to the Art. 16/3, ratified international treaties shall be in accordance with the Constitution, whereas according to Art. 194/4 of the Constitution, ratified international treaties may not be discordant with the Constitution. Should such different wording be understood as (solely) lingual ambiguity? In any case this provision has been invoked in several cases referring to the review of constitutionality of international treaties.⁵

As to the generally accepted rules of international law, the Constitution does not explicitly require their compliance with the provisions thereof. From the wording of the Article 194/2 of the Constitution, according to which the Constitution is the supreme legal act of the Republic of Serbia, one can only conclude that the generally accepted principles of international law should not have supremacy over the Constitution. Compared to other internal law sources, ratified international treaties and general principles of international law do have a higher rank. In this sense, the Constitution provides (Article 194/5) that statutes and other general legal acts of the Republic of Serbia shall not be discordant with the ratified international treaties and generally accepted rules of the International Law.

The Constitution does not regulate the relationship between the ratified international treaties and generally recognized rules and principles of international law. From the fact that the Constitutional Court has no jurisdiction to review the constitutionality of the generally accepted rules of


international law, it may be concluded that the generally accepted rules of international law are in a “privileged” or “higher” status, compared to ratified international treaties.

Of all other national legal sources, only the Statute on Courts recognizes the ratified international treaties and generally accepted rules of international law as binding sources of international law (Article 1, paragraph 2).

1.2. The Direct Applicability of International Treaties (Especially SAA) by National Authorities

In Serbian legal order, international treaties can be directly applied by national courts and other authorities.

According to the Art. 16/2 of the Constitution of Serbia, only confirmed (by national parliament) international treaties and general accepted rules of international law enjoy direct applicability. The Constitution recognizes direct application of human and minority rights guaranteed by generally accepted rules of international law and ratified international treaties. Domestic courts have recognized the direct application of other ratified international treaties. Thus, the High Commercial Court, in its decision PZ. No. 4012/2004 of June 10, 2004 (published in Paragraph Lex, the case law), referred to the Law on Ratification of the Agreement on Succession Issues and directly applied the relevant provisions of the Agreement on Succession.

The Constitution, however, does not determine what does the “direct application” mean and does not distinguish between direct application and direct effect in a way in which these terms are understood in the EU law. It seems that the concept of “direct application” from Article 16/2 of the Constitution means, in fact, direct effect, i.e. that ratified international treaties and generally accepted rules of international law are recognized not only as an integral part of the internal legal order (direct application), but that they can be directly applied by the domestic courts without implementing measures (direct effect). The need to distinguish between direct application and direct effects of ratified international treaties was evident in some cases before domestic courts, e.g. in the course of interpretation and application of the Agreement on Succession. Likewise, most domestic scholars distinguish between concepts of direct application and direct effect.

If this distinction is accepted, the wording “direct application” from the Article 16/2 of the Constitution should be understood as the acceptance of ratified international treaties and general principles of international law only as an integral part of the internal legal order. But direct application does not mean automatically the recognition of their direct effect, i.e. their invocability before national courts. Direct effect should, therefore, be recognized only to the provisions of ratified international treaties and generally accepted rules of international law, which pertain to the guaranteed human and minority rights. Otherwise, a blank acknowledgment of direct effect to all ratified international treaties and the general principles of international law would have far-reaching consequences. For these reasons, the direct effect should be granted only to the provisions of ratified international treaties and the general principles of international law which fulfill the three-fold test accepted in the EU law: they have to be clearly formulated, to assign a subjective rights or impose an obligation, and their realization is not to be conditioned by the adoption of implementing measures.

Domestic courts did not consider the direct application of the SAA or other agreements concluded with the EU. We believe that the domestic courts should directly apply provisions of the SAA

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and other agreements with the EU that meets the requirements for direct effect, according to the rules that apply to international agreements, and recognize their direct effect without the need to adopt the implementing measures. The legal basis for direct application of the ratified international treaties and generally recognized rules of international law could be found in the Article 142 of the Constitution and Article 1/2 of the Law on Courts. Article 142 states that courts shall be independent in their work and rule on the basis of the Constitution, statutes and other legal acts, as required by law, generally accepted rules of international law and ratified international treaties.

1.3. **The Legal Status of Treaties or Agreements which are not Subject to Ratification by the National Parliament**

According to the provision of the Article 14 of the Statute On The Conclusion And Enforcement Of International Treaties, the Serbian National Assembly ratifies international treaties of the military, political and economic nature, treaties that create financial obligations for the Republic of Serbia, treaties that require the adoption of new or amending of existing laws and agreements that deviate from the existing legislation.

International agreements that do not fall under the aforementioned provision are not subject to the ratification procedure. These treaties Government submit information to the competent committee of the National Assembly. Protocols, records and other international acts that, in order to fulfill international agreements concluded by, or adopted by the authority authorized or established these contracts, which do not take new commitments are not considered, in terms of laws, international treaties.

Since the Constitution does not enumerate non-ratified agreements as binding sources of international law, their direct application is not possible.

However, it remains an open issue whether the formulation “confirmed” international agreements refers only to agreements ratified by the National Assembly, or it includes those confirmed by other authorities and instruments, e.g. the regulations of the Government of the Republic of Serbia. The doctrinal acceptable approach is that the wording “confirmed international agreements” should be understood as encompassing both agreements ratified by the National Assembly, and those confirmed otherwise.

When it comes to the Interim Trade Agreement, this instrument was ratified by the Statute of the National Assembly of Serbia on the same day as the SAA9. By the means of ratification, the Interim Agreement was granted the status of a confirmed international agreement, the application of which in the domestic legal order falls under the already discussed provisions. Specificity in its implementation in Serbia was only in the fact that the Serbian government, by the decision of October 16, 2008, has undertaken the obligation of the unilateral application of the Agreement, as of January 1, 2009, regardless the fact that the Agreement was not in force for the other contracting party, and the fact that the other party has temporary stalled the application thereof. By ratification, the Interim Trade Agreement, with all its protocols, became a part of the internal legal order of Serbia.

2. **The Direct Application of Secondary Acts Adopted under International Ratified Treaties**

The secondary acts adopted under ratified international treaties (e.g. regulations or decisions adopted within international organizations, acts enacted by special bodies created by a treaty ratified etc.) can be directly applied by national courts.

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On the implementation of secondary legislation adopted in accordance with or pursuant to ratified treaties with the EU, refers the Treaty establishing the Energy Community for Southeast Europe and SAA. Treaty establishing the Energy Community refers to the mandatory implementation of certain parts of the energy acqis communautaire.

The general legal grounds for the direct application of acts adopted under the SAA can be found in the Art. 72/1 of the SAA that provides: “Serbia shall ensure that existing and future legislation will be properly implemented and enforced.” The SAA also establishes a general obligation of domestic institutions to respect and accept the acquis communautaire (Art. 72/2) and the criteria set forth in the Agreement, as well as the interpretative instruments adopted by the bodies of the EU. Hence, Art. 73/2 provides that: “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 and interpretative instruments adopted by the Community institutions.”

The Article 121 of the SAA provides that the Stabilization and Association Council shall, for the purpose of attaining the objectives of this Agreement, have the power to take decisions within the scope of this Agreement in the cases provided for therein. The decisions taken shall be binding on the Parties, which shall take the measures necessary to implement the decisions taken. The Stabilization and Association Council may also make appropriate recommendations. It shall draw up its decisions and recommendations by agreement between the Parties. Regardless the fact that the above stated provision of the SAA does not cover the issue of direct application of secondary acts explicitly, we hold that the obligation to take necessary measures may include the obligation of the courts to treat them directly effective.

3. The Position of International Treaties and other Sources of International Law in the Hierarchy of Legal Sources (Judicial Review)

The ratified international treaties, including the SAA, do not enjoy supremacy vis-à-vis Serbian constitution. However, they are prevalent over the domestic statutes, which have to be in conformity with the international legal sources. Constitutional Court of the Republic of Serbia is empowered to review domestic legislation as to its conformity with international treaties (i.e. abstract constitutional review), including that with the SAA.

We are not aware of any practice of the Constitutional Court pertaining to assessment of the compliance of national legislation with the SAA. However, the Constitutional Court has reviewed the conformity of domestic law with the ratified international treaties and protocols. The subject of Constitutional Court’s review was the accordance of the provisions of Article 5 Para. 6 of the Statute on financing political parties10 with the provisions of Articles 18, 20, 58 and 86 of the Constitution and the Article 1 of the First Protocol to the European Convention for the Protection of human Rights and Fundamental freedoms (Case 216 IU / 04).

In some other cases the Constitutional Court has relied on or has cited the regulations that are part of the acquis communautaire.11

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10 Official Gazette, RS, no. 72/03 and no. 75/03

11 See Decision of the CC No IUp-85/2008 of 17 March 2010, on the Ordinance on the registration of motor vehicles and trailers (Official Gazette, RS, no. 130 /07, no. 17/ 08 and no. 72/ 08).

•Decision No IU-279/2006 of 16 Decembar 2010. in the case of assessing the constitutionality of the Law on Ratification of the Agreement between the FRY and BiH on Social Security, on the issue of retention payments and overpayment of benefits and legal effect of the ruling, Decision of the Constitutional Court IUz-778/2010 of 31 March 2011, concerning the Law on Travel Documents (Official Gazette, RS, No. 90/ 07 ), regarding the editing of forms of travel documents.
Other sources of international law different than international treaties (i.e. customary international law, principles of international law, including supplementary sources - international conventions (apart from their status as ratified treaties), international jurisprudence, international legal doctrine, international soft law etc. are not mentioned in Constitution as obligatory sources for domestic courts. However, the legal theory recommends their use.

From other international sources, the Serbian Constitution mentions universally recognized principles of international law (Art. 16 para. 1) rules of international law (Art. 16 para. 1) the generally accepted rules of international law (Art. 16 para. 2). Despite the vagueness of used terms, it is accepted that they include as well the secondary sources of international law.

Taken in a narrow sense, other sources of international law can not be applied directly by the domestic courts, but only indirectly, as models or standards for interpretation. The same is true for other sources of the law (except for SAA and other agreements with the EU).

The EU law sources, including secondary sources, can be applied in Serbian legal order via specific provisions of the SAA.

The provision of the Article 73/2 of the SAA provides that "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 and interpretative instruments adopted by the Community institutions."

On the grounds of this provision, the domestic regulatory body for the Protection of Competition (the Commission for Protection of Competition), in the “Frikom” case, referred to the practice of ECJ and relevant secondary sources of the EU law.

Domestic courts have relied upon secondary sources of the EU law on several occasions. Thus, the EU directives have been recognized as standards for the interpretation of domestic legislation.12

4. The Interpretation and Enforcement of SAA in Domestic Legal Order

4.1. The “Mirror Provisions” of the SAA

Domestic courts have not yet declared their position on the so-called mirror provisions of the SAA. The Serbian legal theory refers to the practice of the ECJ, which, starting with the Polydor case,13 holds that mirror provisions in other agreements concluded by the EU should not be construed in the same way as the identical provisions in the Treaties.

In this respect it should be born in mind that the provision of the Article 13 of the Protocol 7 on disputes settlement, stipulates: „Arbitration panels shall interpret and apply the provisions of this Agreement in accordance with customary rules of interpretation of public international law, including the Vienna Convention on the Law of Treaties. They shall not give an interpretation of the acquis communautaire. The fact that a provision is identical in substance to a provision of the Treaty establishing the European Communities shall not be decisive in the interpretation of that provision."

12 Court of Appeal in Novi Sad, PZ1 4804/2010 case in which the reference was made to the Directive 98/59 EC on the protection of employees in case of collective dismissals and the decision of the Supreme Court of Cassation in the case Rev. 2401/2010, regarding the best interests of a child, invoking the EU Charter of Human Rights)

4.2. *The Interpretation of the Standard General „Sincere Cooperation” Clause*

Serbian courts have not yet taken position regarding the sincere cooperation clause. The principle of sincere cooperation is obligatory to EU Member States and their courts. However, in an indirect way, the national courts applying and interpreting the SAA and other derived sources of EU law are also bound to take into account the principle of sincere cooperation and loyalty.

The legal basis for these obligations can be found in the general obligations of the parties to the SAA to take all general and specific measures necessary to meet the obligations from the SAA (Article 129/1). Likewise, the Republic of Serbia and its institutions shall “Ensure that existing and future legislation will be properly implemented and enforced” (Art. 72/1 of the SAA). The adherence to the principle of sincere cooperation is imposed by the general obligation of all states to comply with the Vienna Convention on the Law of Treaties, and that interpretation and application of international treaties shall be in good faith.

4.3. *Standard Harmonization Clauses in the SAA*

National courts have not declared themselves on this issue. However, in theory, this requirement is conceived as a “soft duty”, “obligation of means not ends” or “endeavour clause.”\(^{14}\) However, despite the fact that it is at first glance formulated as the so-called soft obligation, it is expected from the parties to take all measures needed to achieve the goals agreed upon. The provision of the Article 72 of the SAA provides “that existing and future legislation shall be properly implemented and enforced.” The wording “properly implemented and enforced,” is to be understood as “in conformity with the *acquis*.” In this sense, the phrase “existing laws and future legislation will be gradually made compatible with the *Community acquis*” should be understood not only as the obligation of Serbia to adopt harmonized rules (formal harmonization), but also as the duty to ensure their coherent (proper) application before the domestic courts and administrative bodies (functional or actual harmonization or acception of *acquis communautaire*). Proper application involves the effective implementation of the EU law in both substantive and procedural sense. In other words, the SAA and the derived secondary associated regulations should not only be interpreted in such way that the method of interpretation is the interpretation of the target, but also to provide the effective remedies for the protection and enforcement of the granted individual (subjective) rights.\(^{15}\)

4.4. *The Indirect Application of the EU Law Sources as “Persuasive Sources” (Secondary Sources, Soft-law Sources, ECJ’s Jurisprudence etc.)*

In Serbian court practice there have been cases in which these sources were applied. For example, in the Decision Gž1.6928/2010 of 24 November, 2010, of the Court of Appeal in Belgrade, the Court made a statement on the definition of shift work in accordance with Article 2 of the Directive 23/104 EC of 23 November 1993 and Article 2 of the Instructions on the shift-work. The other such decisions – that of the Appellate Court in Novi Sad have already been discussed.\(^{16}\)

But, national courts, especially Serbian's Constitutional Court, Supreme Court and/or other higher courts did not establish a leading principle providing general direction to national courts to interpret applicable national law in light or in line of the relevant EU law (i.e. to resort to EU - ‘friendly’

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\(^{16}\) For critical comment see M. Stanivuković, Pravo Evropske unije i sudovi u Srbiji, Zbornik radova Pravnog fakulteta u Novom Sadu, 1/2012, pp. 203-221.
or ‘harmonious’ or ‘conformed’ (etc.) application of national law. In spite of this, there is the practice of application of EU law sources: Decision Gž1.6928/2010 of 24 November, 2010. of the Court of Appeal in Belgrade in which the Court made a statement on the definition of shift work in accordance with Article 2 Directive 23/104 EC of 23 November 1993. and Article 2 Instructions on the shift-work. There are, also, decisions from the Appellate Court in Novi Sad (see above). The Court’s reasoning in these cases was grounded mainly on principles of interpretation and application of international law as well as on understanding of human rights sources.

On the other side, case-law of ECtHR has been used in domestic courts practice. An example of such a practice can be found in a judgment of the Appellate Court in Belgrade (Kz.2 Po1 no. 339/12 as of 7 August 2012) stating that a court is allowed, when deciding on a disputed issue, to make a reference to the decisions of ECJ in the explanation of its decision. There are no obstacles for the case-law of the ECJ to be utilized in the same manner.

5. The Application of International Law and EU Law in the Practice of Serbian Courts

The case law of national courts in Serbia applying international law and EU sources is substantive. For example, in following cases the Constitutional Court of Serbia (CC) invoked and applied the EC Regulations as parts of the acquis communautaire. Thus, in the Decision no. IU-279/2006 from March 17, 2010, the CC relied on Council Regulation no 2411/98 of November 3, 1998, on the recognition in intra-Community traffic of the distinguishing sign of the Member State in which motor vehicles and their trailers are registered and the Directive of the European Parliament 2006/126/EC. In the Decision IU-279/2006 of 16 December 2010, in the case of assessing the constitutionality of the Law on Ratification of the Agreement between the FRY and BiH on Social Security, on the issue of retention payments and overpayment of benefits and legal effect of the ruling, the CC relied on Council Regulation (EEC) no. 1408/71 of June 14, 1971. and Regulation no. 883/04.

In the decision Už-2196/2010 of 4 July 2013, in relation to the complainant pointing out the differences between individual and collective dismissals, the CC called for a Council Directive 98/59. In the Decision no. IUz-778/2010 of 31 March 2011, a decision concerning the Law on Travel Documents, regarding the editing of Travel Documents, CC relied on other international soft law sources, including the standards and recommendations related to travel documents - ICAO 9303, the EU Council Recommendation (EC) No. 2252/2004, ISO standards, ISO/IEC 14443 and ICAO NTWG.

The Decision IUo-50/2010 of 17 November 2011, issued in connection with the Regulation on the nomenclature of territorial units for statistics, according to which the criteria for establishing statistical region include the ethnic composition of the population, as well as the level of local and regional development, CC relied on the nomenclature of territorial units for statistical purposes in the EU, which is prescribed by the Regulation No. 1059/2003, etc).

In the field of Competition law, the status of the source of law of the Guidelines issued by the Competition Commission was challenged in front of the Administrative Court and the Supreme Court of Serbia – primarily the Guidelines for the implementation of the Regulation for determining the amount to be paid based on the extent of competition and procedural penalty and the Guidelines for implementation of Article 69 of the Law on Protection of competition and Regulation on the requirements for exemption from payment.

A significant shift in the case law has been made in the judgment of the Supreme Cassation Court in the Frikom case in March 2014. In this decision’s dictum the Guidelines were recognized as secondary source of law.

17 Official Gazette, RS, no. 90/07.
18 Official Gazette, RS, no. 109/09.
6. International Law and EU Law as a Part of Legal Education of Judges

Institution charged with systematic legal training of judges and public prosecutors, as well as candidates for judges and public prosecutors, candidates for judges’ and public prosecutors’ associates and administrative staff in courts and public prosecutors’ offices is the Judicial Academy. Its organization, status, functioning and financing is regulated by a special law – Judicial Academy Act19 (hereinafter: JAA). Judicial Academy is a special public services institution founded by the Republic of Serbia (art. 3 JAA). Members of its Governing Board are appointed by the High Judicial Council, the State Council of Public Prosecutors and the Government (art. 7 JAA). Legality of its work is controlled by the ministry in charge of judiciary (art. 3 JAA). Two of its most important training courses are continuing professional training for present judges and public prosecutors (arts. 41 – 46 JAA) and a two-year initial training for candidates for judges and public prosecutors (arts. 25 - 40 JAA). The Judicial Academy was founded in 2010. From 2002 to 2009, there was the Judicial Center, which provided only continuing training for existing judges.20

The Law prescribes that the initial training explicitly includes international legal standards and scientific and professional articles on international law (in addition to domestic law) (art. 35 JAA). In four generations of candidates for judges and public prosecutors that got initial training, there have been approximately 90 persons.21 One of five parts of the program for initial training is a part on EU law and international standards, containing one chapter on EU law and one on the Council of Europe and European Convention of Human Rights.22 The topics covered within EU law are EU company law, commercial law, family law and European cooperation in civil and criminal matters.23 Additionally, further improvement of knowledge of the case-law of the European Court of Human Rights is recognized as one of strategic goals of judicial reform in Serbia.24 Within continuing professional training of present judges and public prosecutors, the Academy organized a series of one-day and two-day seminars on various subject matters of EU law (EU instruments, Human Rights in the EU, European cooperation in civil and criminal matters) and on European Convention of Human Rights.25

Training of existing judges in the form of seminars, conferences and study trips is also organized by other entities, such as the Supreme Court of Cassation of Serbia (especially annual gathering of judges), the Association of Judges of Serbia and the Association of Jurists of Serbia. In addition to domestic law, trainings and publications often refer to international law, European Convention of Human Rights, practice of the European Court of Human Rights and the Court of Justice of EU, as well as legislative harmonization with the EU acquis and EU law in general.

Training of present and candidate judges and public prosecutors with respect to EU and international law can be assessed as good. Nevertheless, the issue is the coverage of such professional training, i.e. the question remains as to how many judges and public prosecutors are left out of it. Accordingly, measures ensuring wide outreach of professional training, not only regarding EU and international law, should be undertaken, in order to ensure judicial quality and efficiency.

20 Available at http://pars.rs/home.html, accessed on 15 February 2014.
21 Available at http://pars.rs/home.html, accessed on 15 February 2014.
22 Available at http://pars.rs/home/pocetna_obuka.html, accessed on 15 February 2014.
23 Available at http://pars.rs/home/dokumenti/node_128254552.html, accessed on 15 February 2014.
In order to comply with the obligations that Serbia has taken on the international level, particularly in relation to the process of accession to the European Union, there is the idea that the Judicial Academy introduces EU law as a general program for the judges of the ordinary courts (i.e. not just for beginners), the judges of the Administrative Court and the judges of the Commercial Court. After this joint program, they should attend some special programs defined by the type of subject, for example competition law for judges of the Administrative Court, where the training is not organized exclusively for legal but also for the some elements of the economic aspect.

7. The Accessibility of Courts’ Judgments and Foreign Sources of Law

Case-law of national courts is published on the websites of the Supreme Court of Cassation (including its stances and opinions) and other state-level and higher courts (the Administrative Court, the Commercial Appellate Court, appellate courts). The case-law is not published in its entirety. Only the judgments in landmark cases, displaying current judicial practice in certain categories of judicial matters, are published. These judgments are also published in printed bulletins of different national courts. The fact that not all the judgments are published, thus disabling effective control of quality and consistency of judicial work by the general and professional public, has been recognized as an obstacle that has to be removed. Namely, the Action Plan for Implementation of Judicial Reform Strategy envisaged as one of its strategic objectives provision of public access to national case-law through creation of unique, systemized, free and openly available databases of national court practice.26

Foreign sources of law are, in general, accessible to judges via internet. All the judgments of the European Court of Human Rights rendered in cases against Serbia are officially translated and are publicly available free of charge. Moreover, other landmark cases of the European Court of Human Rights are also translated and published online.27 However, when discussing this issue with the representatives of the Ministry of Justice and Public Administration, we were told that certain difficulties in practice do exist. To be precise, there are judges who do not have adequate access to foreign sources of law due to low level of their computer literacy, lack of knowledge of foreign languages and even lack of internet access in some courts. Consequently, one of the strategic goals of the judicial reform strategy is establishment and further development of e-Justice in Serbia, encompassing various measures aimed at elimination of mentioned obstacles.28

8. The Role of the Highest Courts in Creating Awareness about the Applicability of (International and) EU Law

The most significant in this respect is the role of the Supreme Court of Cassation of the Republic of Serbia. This court is legally entitled to provide leadership and create awareness of the international and EU law primarily through the means of interpretative interventions – in the forms of legal opinions and general legal standings – as well as through the proceedings for resolution of disputable legal issues.

Legal opinions are unequivocal positions accepted by all panels of a certain department referring to the interpretation of a legislation, the meaning of a legal standard, the way a certain legal gap should be fulfilled, or to a legal issue which is a subject of discordance between panels or causes derailment from the already accepted position of the department or the legal position taken

by a panel. Legal opinions are being established through the procedure laid down by the Court's Rules. As a source of judicature, legal opinions are mandatory to all panels comprising a certain department of the Supreme Court of Cassation. They can be amended only by the same authority they have been established by, in the course of the same procedure.

General legal standings of the Supreme Court of Cassation refer to the interpretation of a certain legislation, which is being applied differently in the same cases. The purpose of issuing general legal standings is the unification of application of the law, and therefore they represent the sources of courts' practice. General legal standings are issued by the General session of the Supreme Court of Cassation of the Republic of Serbia.

The authority for the authentic interpretation of the law lies on the People's Assembly, which is the sole legislator in Serbian legal system.

According to Serbian law, when in the first instance proceedings in multiple cases emerges a necessity to take a standing as to a disputable legal issue, with the determinative bearings on deciding the subject-matter of the case, the first instance court, acting ex officio or on party's motion, initiates the proceedings in front of the Supreme Court of Cassation, in order for the disputable issue to be resolved. The proceedings for resolution of disputable legal issues are proscribed in the Statute on Civil Procedure (Litigation Procedure), in accordance with the recommendations of the Committee of Ministers of the Council of Europe, and they reflect the similar provisions contained in the acquis communautaire. The rules of this procedure provide for the highest court in the country to take a standing on certain legal issue, which has appeared as disputable in the proceedings before a first instance court, and which is, at the same time, disputable in larger number of cases and has a pre-determinative significance for deciding on the subject-matter of the cases. By taking legal standings with respect to disputable legal issues, the Supreme Court of the Republic of Serbia ensures the legal certainty, equality of parties, as well as resolution of disputes within reasonable time.

The procedure for resolution of disputable legal issue commences with the motion, the content of which is proscribed by the law. The motion should contain short presentation of the determined facts in the specific legal matter, parties' arguments on disputable legal issue, and reasons for the first instance court to address the Supreme Court for resolution of the disputable legal issue. The first instance court may lay down its own interpretation of the disputable legal issue.

The court which has initiated the proceedings for resolution of disputable legal issue, requesting its resolution, should transfer to the Supreme Court the complete files of the case in which the disputable legal issue has emerged. The first instance court halts the proceeding until the finalization of the procedure for resolving disputable legal issue.

The Supreme Court of Cassation should decide on the motion not later than 90 days after the day of reception thereof. The Supreme Court may refuse to take standing on the disputable legal issue if it has no bearing on deciding in multiple cases. If the Supreme Court of Cassation decides to resolve the disputable legal issue, that decision shall be published in the Supreme Court of Cassation Bulletin, on its web-page, or by some other appropriate means. The Supreme Court of Cassation decides on the motion for resolution of disputable legal issue according to the procedural rules applicable to issuing legal opinions.

In the legal standing taken subsequent to filing motion for resolution of disputable legal issues the Supreme Court of Cassation examines the disputable legal issue and states reasons for its decision. The taken legal standing is communicated to the court that has initiated the proceedings, and published in the Supreme Court of Cassation Bulletin, on its web-page. By the means of such publication, on the one hand, it is provided for the unified application of the law, and on the other hand, the unnecessary protraction of the proceedings in multiple cases is being prevented.
If the Supreme Court of Cassation has taken the legal standing on the disputable legal issue, the parties to the proceedings in which the same issue has been raised have no right to seek its resolution in the course of pending litigation, since that would represent the abuse of procedural powers.

These statutory instruments are arguably sufficient for the highest court in Serbia to be the leader and to provide guidance for the application of the EU law. However, since the major problem with Serbian legislation is not its content, but its application, the question remains if the proscribed legal framework would in practice be put to use as to live up to the requirements of the process of accession to the European Union.

9. Conclusion

The Constitution of the Republic of Serbia does not contain any special provision providing for the application of the EU law in the domestic legal order. Likewise, no similar provision pertaining to general and direct application of the EU law in the internal legal order can be found in any other legislation. However, in some domestic regulations, as well as in several international treaties, there are some references to this body of law. As to the Stabilization and Association Agreement, in legal theory it is generally accepted that it should be considered a type of international treaty, regardless its specific features, and that it may be applied by the domestic courts according to the rules applicable to the ratified international treaties. Serbian courts have not yet considered the issue of the direct application of the Stabilization and Association Agreement, or other agreements concluded with the EU. The authors hold that the domestic courts should directly apply provisions of the Stabilization and Association Agreement and other agreements with the EU that meet the requirements for the direct effect, according to the rules that apply to international agreements, and therefore recognize their direct effect without the adoption of implementing measures. The leading role in providing guidance for the implementation of the EU in Serbia should be played by the Countries’ highest courts, for which, the existing statutory instruments are arguably sufficient. However, since the major problem with Serbian legislation is not its content, but its application, the question remains if the proscribed legal framework would in practice be put to use as to live up to the requirements of the process of accession to the European Union.
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Abstract

This article offers a comparative overview of the current situation regarding EU law application by the SEE national courts, based in particular on the findings of the country-specific analyses provided by authors in this book. Whereas, the friendly approach towards international law present in all SEE constitutional systems has opened the door for direct and indirect application of the SAAs and other relevant sources of EU law, understandably, so far, there have been only a handful of instances where SEE courts applied directly the respective SAAs or directly applicable specific EU legislation. The SEE national courts, in turn, seems to have embraced more significantly the opportunity for EU-consistent application of domestic legislation, where an increased, yet, still modest and scattered jurisprudence of indirect consultation of various EU law sources while applying national legislation has already emerged. While doing that, however, SEE courts have demonstrated the presence of the ‘endemic’ syndrome of excessive formalism well-known for the CEE national courts’ pre- (and post-) accession judicial practice.

Key words: South East Europe, national courts, EU law, Stabilization and Association Agreements, application, effect.
1. Introduction

In our analyses in Chapter Two of this book on the current law and the practice of the SEE national courts regarding EU law application, we have started from the basic assumption that the adoption of an 'Euro-friendly' or 'EU-consistent' approach within the overall 'judicial harmonization' prerogative, allowing for pre-accession application of certain sources of the law of the Union by national courts and for consistent interpretation of domestic legislation in view of relevant EU law, should be welcomed in the SEE countries. In particular, that might contribute to acquiring a proper 'European legal culture' by the SEE national judges, and to avoiding on time the possible shocks that may be experienced by SEE national courts immediately after EU accession, when SEE national judges would have to apply the law of the Union in full according to its principles acting as (both) 'European judges' (already occurring in Croatia, as an EU member state). We have equally presumed that pre-accession application of EU law in the SEE countries is possible and that it is already taking place in the practice of the SEE national courts under the respective countries' constitutional systems. In the following text, I will try to summarize the main findings of the country-specific analyses provided in the previous Chapters, in an effort to provide a comparative overview of the current situation regarding EU law application by the SEE national courts.

Being more advanced in the realization of the "new beginning scenario for judicial governance" as part of the European integration agenda than the rest of the SEE countries, the Republic of Croatia, before entering the Union on July 1, 2013, had already adopted a 'Europe-clause' in its Constitution enabling direct effectiveness and supremacy of the law of the Union in its internal order according to the well established principles of EU law. The Croatian national courts are already called upon to accept that "new reality" following the country's EU accession. Nevertheless, the Croatian national courts' pre- and immediately post- accession experience with EU law application has been consulted in our analyses as it offers valuable insights on the challenges currently faced by the national courts of the rest of the SEE countries.

Understandably, for the moment, no SEE country has a 'Europe clause' in its constitution specifically providing for separate standing and application of EU law in its internal legal order before EU accession, that had also included Croatia before the 2010 Amendments to its Constitution became effective on July 1, 2013. Analogous to the situation that had existed in their counterparts from the CEE region (and Croatia) before they joined the Union, the applicability of EU law sources in the SEE municipal legal orders has to be established under the national constitutional and statutory provisions governing the applicability and status of different sources of international law, and under the SAAs' and other relevant treaties' specific provisions. Again, in line with the CEE countries

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1 Albi, Anneli. EU Enlargement and the Constitutions of Central and Eastern Europe. Cambridge: Cambridge University Press, p.52. In this text, we will interchangeably use the terms 'Euro-friendly' and 'EU-consistent' and 'EU-conformed' and 'EU-harmonious' interpretation/application of domestic law for denoting the approach of interpretation and application of domestic legislation in view of the applicable EU law.
2 See Chapter 1 of this book, especially p. 16.
6 Bačić, “On the New Beginning Scenario”, in the abstract to the text.
7 Albi, EU Enlargement. p. 41.
(and Croatia’s) pre-accession experience, the current SEE constitutions (and statutes) are generally ‘friendly’ towards international law, in particular, allowing for direct application of the SAAs’ and other EU-related binding agreements’ provisions, and for indirect application of the later agreements and various other sources of EU law. Under that favorable constitutional and statutory framework, there has been quite a substantial practice of international law application developed by all SEE national courts, especially as regards the European Convention on Human Rights. Yet, in the more specific context of EU law application, instances of direct application of directly effective SAAs’ (and other relevant EU) provisions have been rather scarce, though a promising (albeit scattered and still modest) practice of indirect use of the later provisions as persuasive authority has already started to emerge in the relevant SEE courts’ jurisprudence.

2. Constitutional Framework for the Application of EU Law in the SEE Countries

2.1. Applicability and Status of Ratified Treaties Including the SAAs and Other Binding Agreements Concluded with the EU

In general, all constitutions and relevant statutes of the SEE countries have explicitly adopted a ‘monist’ solution on the applicability and status of ratified and dully promulgated treaties, except for Bosnia and Herzegovina, where due to the lack of ‘specific clear answers’ on the effect and status of treaties (and other international legal sources) in the B&H Constitution, that issue would have to be resolved through an interpretation of various relevant constitutional provisions. With the later exception, ratified treaties are made directly applicable by constitutional and statutory means in all SEE internal legal orders and enjoy supremacy over national legislation, but not over the respective national Constitutions. More importantly, this constitutional ‘monist’ regime also pertains to the Stabilisation and Association Agreements and other ratified binding agreements concluded by particular SEE countries with the EU, which can be directly applied by courts in principle without prior adoption of any implementing legislation, with a superior status to national legislation in the domestic hierarchy of norms.

Given its “complex state structure,” and the lack of explicitly envisaged monist or dualist approach towards international law in the Constitution of B&H (being itself a part of an international agreement), the applicability and status of treaties in Bosnia and Herzegovina remain rather unclear and require creative interpretation of relevant constitutional provisions in the courts’ jurisprudence and legal science. Overall, in their article, Zlatan Meškić and Darko Samardžić conclude that “[j]ointly and severally, the Constitution of B&H is based on a combination of monistic and dualistic approaches.” The monistic approach undoubtedly relates to the ECHR and the ‘Additional Human Rights Agreements’ listed in Annex I to the Constitution, whereas other agreements (and legal sources of international law) are covered “by a moderate dualistic understanding.” Yet, after thorough

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8 See Albi, “EU Enlargement,” p. 41-2 and Chapter 3.
10 See: Articles 122(1) and (2) and 161(1)(b) of the Albanian Constitution; Article 141 of the Croatian Constitution (also applicable before EU accession); Article 118 of the Macedonian Constitution; Article 9 of the Montenegrin Constitution; Articles 16(2) and (3) and 194(4) and (5) of the Serbian Constitution.
11 Lists of various agreements concluded by the EU with particular countries (including the SEE countries) could be found at the Treaties Office Database of the European External Action Service at: http://ec.europa.eu/world/agreements/default.home.do (accessed on 12 June 2014).
legal analyses, relying upon relevant Constitutional Court’s jurisprudence and pertinent legal argumentation, these authors suggest that even those of the later agreements (outside of the ambit of enlisted human rights instruments) “that establish obligations [which] B&H nationals may directly refer to domestic institutions,” have a recognized direct effect in the B&H legal system, and that they are considered to be “below constitutional rank but above regular laws.” The later also applies to the B&H Stabilisation and Association Agreement, which “does not give rise to essential doubt as to its direct application.”

In the Republic of Macedonia, the somewhat imprecise phrase used in the ‘monist’ Article 118 of its Constitution regarding the status of ratified treaties (envisaging that dully ratified treaties ‘cannot be changed by a law [statute]’) might have potentially caused different interpretations on the exact status of these treaties in the domestic hierarchy of legal sources. Nevertheless, the later phrase has been correctly interpreted and applied in the practice of the Macedonian Supreme Court and ordinary courts as granting supremacy for ratified treaties over legislation. Although, such direct applicability and superior status for ratified treaties has been confirmed as a matter of principle also by the Constitutional Court, regrettably, the later Court has not been following that principle in its own practice, as it constantly declines to exercise constitutional review of domestic legislation as to its conformity with ratified treaties.

In the Constitutions of some SEE countries, explicit constitutional or statutory provisions have been enacted reserving direct applicability of ratified treaties under their respective constitutional monist regime only to treaty provisions that are capable of being directly applied, while excluding those that do not have the potential of enjoying direct applicability i.e. akin to the US-tailored distinction between self- and non-self executing treaty provisions, or to the distinction between directly and non-directly effective provisions in EU law. Referring to the text of Article 122(1) of the Albanian Constitution, Fjoralba Caka concludes that ‘self-executing agreements’ in Albania cover at least those international agreements “which [do] not require the state[s] to intervene for its application, by enacting laws,” noting however that “it will be for the courts to decide, case by case, whether an international agreement is directly applicable or not.” The later remark seems to be equally valid for all other SEE countries, including for Macedonia, where a similar distinction between self- and not-self- executing provisions has been specifically provided by a statute, and for other SEE countries. In their discussion on the Serbian Constitution, in turn, where there is no express constitutional provision addressing direct and non-direct applicability of treaty provisions,

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17 See infra p. 163-164.

18 E.g. Article 122(1) of the Albanian Constitution provides that a dully ratified and officially published international agreement “constitutes part of the internal juridical system” and that it is implemented directly, “except for cases when it is not self-executing and its implementation requires issuance of a law.” Reported by Caka, Fjoralba, “The Application of the International and European Union Law by the National Courts in Albania,” Chapter 2 of this book, pp.27-59. In Macedonia, the later distinction between different treaty provisions is envisaged in Article 18(4) of the Law on Courts (as amended, Official Gazette of the Republic of Macedonia no. 58/06; 35/08; and 150/10), which directs the courts to apply the provisions of ratified treaties in case of a conflict with domestic legislation only “… on a condition that these could be directly applied.”


Radovan Vukadinović et al. point to the broader need of distinguishing between the concepts of ‘direct applicability’ and ‘direct effect’ in a way analogous to that adopted in the law of the Union.  

While, warning that “the blank acknowledgement of direct effect to all ratified treaties and the general principles of international law would have far-reaching consequences,” they advocate that in the particular Serbian context direct effect should be granted only to ratified treaties and general principles “which fulfill the three-fold test accepted in EU law.” The later seems to be a rather pertinent suggestion for all SEE courts when devising in their practice criteria for identifying directly applicable/effective provisions in the relevant ratified treaties (including the SAAs), irrespective of whether there is an explicit constitutional or statutory provision to that effect, bearing in mind, in particular, the specifics of the ECJ’s case-law in applying the three-fold threshold for direct effectiveness in the particular context of Association (SA) agreements.

The supremacy of ratified international treaties over national legislation (yet not over the constitution) has been further confirmed by the power of the Constitutional Courts of all SEE countries to exercise constitutional review of national statutes and by-laws as to their conformity with ratified treaties, including the SAAs. That includes B&H, where, among the five different types of jurisdictions exercised by the Court, and amid the complex state institutional structure in which “altogether thirteen constitutions exist,” the B&H Constitutional Court is also empowered to exercise abstract review of constitutionality of national legislation, along with its special competence to exercise an ‘Appellate jurisdiction’ in cases referred to it against ordinary courts’ decisions. In fact, decisions rendered by the SEE national Constitutional Courts under this rubric are a particularly valuable source of relevant jurisprudence regarding EU and international law application in the SEE countries.

The only exception to the above statement is the practice of the Macedonian Constitutional Court. The later Court has constantly maintained a very rigid (and heavily criticized) approach of not entering into constitutional review of domestic legislation as to its conformity with ratified in-
ternational agreements, including the SAA. It has based that approach on a pure textual reading of
the relevant constitutional clause of Article 110 governing its jurisdiction, in which an explicit men-
tion of the competence of the Constitutional Court for constitutional review of domestic legislation
against ratified treaties is lacking, in total ignorance of the possibility to establish the later authority
as “other competence” under Article 110 in view of the purely ‘monist’ constitutional provision of
Article 118 on ratified treaties. In fact, in its practice, the Constitutional Court has adopted a “sort of
a dualist doctrine” under which ratified treaties do not represent a source of their own, but gain force
only through the statute of ratification that is equal to any other ordinary statute, which prevents it
from entering into constitutional review of two domestic acts of similar rank. Overall, in line with
that doctrine, ratified treaties (including the SAA) only serve as an additional, secondary, source of
interpretation of the relevant constitutional (or other) domestic provisions in the Macedonian Con-
stitutional Court’s practice.

Consistent with that restrictive ‘dualist’ understanding of the applicability and status of trea-
ties regarding its own jurisdiction, the Macedonian Constitutional Court does not enter either into
a constitutional review of ratified treaties as to their conformity with the Constitution, but restricts
that review solely to the assessment of the constitutionality of the respective ratifying statute.
In contrast to that Macedonian Constitutional Court’s practice, other SEE countries’ Constitutional
Courts are specifically constitutionally empowered to exercise ex post constitutional review of rati-
fied treaties, and in Albania even to exercise ex ante constitutional review of concluded international
agreements (pending their Parliament ratification), with a consequence that an eventual finding by
the Constitutional Court of unconstitutionality of an agreement would bar its further ratification in
the Albanian Parliament.

2.2. Direct Application of the SAAs in the SEE Courts’ Jurisprudence

Though, the Stabilization and Association Agreements formally enjoy direct applicability
and supremacy over domestic legislation in the respective SEE countries’ constitutional systems, so
far practice of direct application of its directly effective provisions by national courts has been ex-
tremely rare, almost non-existent. That stands perfectly in line with the former pre-accession judicial
practice of the CEE countries, including with that of Croatia, where, as reported by Iris Goldner Lang
and Mislav Mataija in their contribution to this book, “to [their] knowledge there have been no cases
of direct application of the SAA in this country prior to accession, resulting e.g. in the disapplication

28 For sharp criticism to that CC’s position, see especially the Concurring Opinion of Justice Igor Spirkovski to the Constitutional Court’s
Decision U.br. 134/2008 from 17.12.2008 in the ‘Made in Macedonia’ case, in which he criticized the Court for inter alia its refusal to
consider both Article 18(4) SAA banning quantitative restrictions and equivalent measures (along with applicable constitutional
provisions) when assessing the constitutionality of the Rulebook of the Ministry of Finance of RM envisaging that every fiscal receipt
should have a fiscal logo which would read “BUY MACEDONIAN PRODUCTS”; “FOR OUR OWN GOOD” or “MADE IN MACEDONIA”. Rely-
ing himself on Article 18(4) SAA and on the ECJ’s ruling in the Buy Irish Case (Case C-249/81, Buy Irish [1982] ECR 4005) as a source of
interpretation, Justice Spirkovski accused the Court in view of its constant refusal to exercise constitutional review of the conformity
of domestic legislation with the SAA of “… missing another opportunity … to strengthen its role as one of the key factors in the
‘europeanization’ of the legal order of the Republic of Macedonia.”

33 Article 131(2) of the Albanian Constitution, in addition to an ex ante constitutional review competence of Article 131(1). See Caka,
34 See Albi, “EU Enlargement,” p. 42-4, reporting on some relevant CEE national courts’ rulings within a “relatively little case law in CEE
on the direct application of the Europe Agreements’ provisions.”
of national legislation that conflict with the SAA.\textsuperscript{35} The later statement is equally valid for the current practice of the national courts of Montenegro,\textsuperscript{36} and of Serbia,\textsuperscript{37} which SAAs entered into force only recently, respectively in 2010 and 2013. As for the practice of the Montenegrin courts, relying on interviews with judges of the Podgorica Basic and High courts, Maja Kostić Mandić reports that “… in practice, courts do not directly apply the Stabilization and Association Agreement and other ratified agreements with the EU,” as there were no such claims referred to them by litigants, and that, in the opinion of the interviewed judges “[t]he SAA can be implemented only after transposition of some of the areas of national legislation into domestic law.”\textsuperscript{38}

In Albania, which SAA became valid as of 2009, so far, there has been one "important precedent" of its direct application set out by the Albanian Constitutional Court, where the Court ruled that provisions of a decision of the Council of Ministers was incompatible with the SAA, without however granting the SAA "any special status … within the Albanian domestic order."\textsuperscript{39} And, in Macedonia, where the SAA entered into force much earlier, in 2004, there have been several cases of direct reliance on the SAA's (and the Interim Agreement's) provisions by the Supreme Court and the Administrative courts,\textsuperscript{40} though, as we have already noted, no cases of direct application of that agreement could be assigned to the Macedonian Constitutional Court due to its resistance towards exercising constitutional review on the conformity of domestic legislation with ratified treaties.

The case of Bosnia and Herzegovina is rather peculiar in that respect. On the one hand, the B&H Stabilization and Association Agreement has still not entered into force, yet there are instances of certain reliance on the SAA provisions by national courts, while its Interim Agreement with the Union has been effective as of 30 June 2008.\textsuperscript{41} On the other hand, the Constitutional Court, the Court of B&H and other regular courts have been called upon and "inspired to apply" directly (and indirectly) certain "standards from EU law" by virtue of specific constitutional and statutory provisions, most notably, of that of Article I/4 of the Constitution, envisaging that the state or the entities shall not impede the full freedom of movement of persons, goods, services, and capital throughout B&H.\textsuperscript{42} ‘Mirroring’ the corresponding EU market freedoms in the specific context of the complex B&H state and societal structure, the later constitutional provision implicitly invites for its application in a way similar or close to that established by the law of the Union including through consultation of the relevant ECJ’s case law. In fact, the B&H Constitutional Court has already confirmed in some of its decisions that the "general clause on the internal market" of Article I/4 of the Constitution needs to be interpreted in line with EU law and the ECJ, and, by relying on certain ECJ’s jurisprudence, it has established the substantive meaning of the ‘single market’ in the context of B&H. The later notion entails the adoption of both negative and positive integration measures, prohibition of discrimination, and supremacy of the competence of the state over the entities and the District of Brčko for ensuring the market freedoms, including under an ‘implied powers’ doctrine analogous to that of the EU.\textsuperscript{43}

\begin{itemize}
\item \textsuperscript{35} Goldner Lang, and Mislav Mataija, “Application of EU Law by Croatian Courts,” p. 94.
\item \textsuperscript{36} Kostić Mandić, Maja, “Implementation of International and European Law in Montenegro,” Chapter 2 of this book, pp. 131-138, at p. 133-134.
\item \textsuperscript{37} Vukadinović et al., “Application of EU Law by Serbian Courts,” p. 147.
\item \textsuperscript{38} Kostić Mandić, “Implementation of International and European Law in Montenegro,” p. 133.
\item \textsuperscript{40} See Georgievski et al., “Application of the Law of the European Union in the Republic of Macedonia,” pp. 121-122.
\item \textsuperscript{41} Meškić, and Samardžić, “The Application of EU Law in Bosnia and Herzegovina,” p. 65.
\item \textsuperscript{42} Meškić, and Samardžić, “The Application of EU Law in Bosnia and Herzegovina,” p. 66 and 70.
\end{itemize}
The Court has also interpreted Article I/4 in view of the requirement for considering horizontal effect under the relevant ECJ’s jurisprudence “as a link between public and private law.”

Apart from direct application of the SAA, the national courts of all SEE countries have been more prone towards indirect reliance on the SAAs and other EU law sources in their jurisprudence, to which we turn in Section 3 of this article.

2.3. Application of the European Convention on Human Rights and other Ratified Treaties by Courts

In general, the SEE national courts have been much more lenient towards direct and (most notably indirect) application of other ratified treaties in particular of the European Convention for the Protection of Human Rights and Fundamental Freedoms (and its Protocols). The practice of ECHR’s application by national courts is particularly telling for their potential to apply EU law as well, especially, given the special place enjoyed by that Convention in the law of the Union and its member states, serving for decades as a source of ‘inspiration’ for the ECJ’s case law on fundamental rights as confirmed inter alia by the EU Charter of Fundamental Rights. Indeed, in all SEE countries, the ECHR (and the related ECtHR’s case law) has been granted a special status by national constitutions or statutes and/or principles devised by relevant Constitutional courts. Not surprisingly, then, the ECHR has generated by far the largest amount of national courts’ jurisprudence of direct and indirect application of treaties and international law.

In Croatia, for instance, the European Convention on Human Rights, along with the ECtHR’s jurisprudence has been always considered as one of the “main external sources of law.” In B&H, by virtue of its special position in the constitutional system granted by Article II/2 of the Constitution, the status of ECHR (together with the other HR’s conventions listed in Annex I) has been raised at the constitutional level, so that the constitutional Court and other courts “regularly and consistently” refer to the practice of the former European HRs Commission and of the Strasbourg Court. Thus, in the appellate jurisdiction’ jurisprudence of the B&H Constitutional Court, the later Court’s practice relying on the ECHR and relevant ECtHR’s case law has had “a regular and consistent occurrence,” whereas, for instance, examples of ECHR’s and ECtHR’s case law invocation can be also found in the decisions of the Supreme Court and the cantonal courts of the Federation of Bosnia and Herzegovina, including in the statements of claim or defense made by practicing lower courts.

Cases of direct and indirect reliance by national courts on the ECHR’s provisions have been amply present in the case law of the Macedonian ordinary courts as well, where their application

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45 See the fifth paragraph of the Preamble and Articles 5.52(3) and 53 of the Charter for Fundamental Rights of the European Union (Official Journal of the European Communities C 364/3).


49 Inter alia in infringement of trademark and copyrights’ disputes (regarding violations of rights to a fair trial and to property), and in disputes for damages for defamation (violation of the rights to privacy, freedom of expression and to freedom of thought. See Čolaković, “European Union law Application by the National Courts,” pp. 73-74, and the cases reported at that place.

50 See Čolaković, “European Union law Application by the National Courts,” pp. 74-76, and the cases reported at that place.
in view of the relevant ECtHR’s jurisprudence has been directed as a principle by the Constitutional Court and the Supreme Court and by specially enacted legislation, especially, regarding claims of alleged breaches of the right of access to an independent and impartial court and the right to a fair trial within reasonable time guaranteed under Article 6 of the Convention. Such cases can be equally traced in the judicial practice of the national courts of Serbia, and in that of the national courts of Montenegro, where the Montenegrin Constitutional Court has issued a legal position spelling out that “the ECHR is per se direct legal basis for the obligation of application of decisions of the ECtHR in all jurisdictions.” The later Montenegrin Court has been referring to the ECHR and ECtHR’s jurisprudence “on daily bases” when construing directly or indirectly applied provisions of the Convention or domestic law especially in the proceedings on constitutional complaints. Whereas, in turn, by far the greatest part of the international law related jurisprudence that has been developed by the Montenegrin ordinary courts pertains to cases which involve the ECHR.

Again, in Albania, most of the cases of direct (and more often of indirect) application of ratified international agreements before courts, concern the European Convention on Human Rights. ECHR enjoys “a special [constitutional] status” under Article 17(2) of the Albanian Constitution, envisaging that restrictions on human rights and freedoms guaranteed by the Constitution may “… in no case exceed the limitations provided for in the European Convention on Human Rights.” While, the scope of the later provision has been subject to vigorous scholarly debates, in particular, as to whether the later constitutional standard is applicable only to the assessment of permitted HRs restrictions or to the whole HRs substantive field, Fjoralba Caka ascribes herself to those authors that advocate a “new approach” of widening the coverage of that ECHR-based constitutional standard from the ambit of mere HRs “limitations” to “certain rights as ‘torture, slavery, punishment without law, or arbitrary deprivation of life’.”

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51 See, in particular: the Law on Courts (as amended, Official Gazette of the Republic of Macedonia no. 58/06; 35/08; and 150/10), Articles 35 and 85; Constitutional Court’s Decision U.br.31/26 of 1 April 2006 Decision U. no.104/09 of 22 September 2010; and the Supreme Court’s Principled Legal Opinion on active legitimization in the protection of public capital (NPMS.1) of 8 March 2004, and Principled Legal Opinion regarding sales via public calls for acceptance of offers, of 13 June 2000 (no.3).


53 E.g. see the Serbian Constitutional Court’s decision in Case 216 IU/04, regarding constitutional review of certain provisions of the Statute of financing political parties (Official Gazette, RS, no.72/03). Reported by Vukadinović et al., “Application of EU Law by Serbian Courts,” p. 147.


56 See Kostić Mandić, “Implementation of International and European Law in Montenegro,” pp. 134-137, especially pp. 134-135. This author reports that, out of 22 analyzed decisions of the practice of the Montenegrin courts of general jurisdiction, in 18 decisions reference was made to the ECHR, and in other 4 cases to other international instruments. The great majority of the former decisions relate to actions for pecuniary damages for violation of honor and reputation via printed media and Article 10(2) ECHR, whereas in the remaining decisions reference was made to Article 2 (right to life), Article 5 (right to liberty and security) and Article 8 ECHR (right to respect for private and family life).


Similar practice of direct and (more often) indirect reliance on international treaties by the SEE national courts is equally noticeable in other human rights contexts, beyond that of the ECHR. Not surprisingly, again, like with the ECHR, that can be explained by the particular formal pledge to human rights protection seeded in all SEE constitutional systems, like for instance in the Croatian and Macedonian systems, where the human rights protection (under the respective Constitution and international law) has been constitutionally raised to the level of ‘highest’ or ‘fundamental’ values of the constitutional order. Or, like in the B&H system, where, as we have already noted, the enlisted human rights instruments annexed to the Constitution enjoy a rank equal to that of the Constitution.

Finally, the practice of direct and indirect application of treaties by the SEE courts is also present as regards other ratified treaties different than the HRs treaties that may also be taken as an indirect indicator of the SEE national courts’ potential for relying on ‘external sources’ of law, including on the EU law sources.

2.4. Applicability and Status of Decisions of Bodies Created under Ratified Treaties Including under the SAAs and other EU-Related Treaties

The issue of the applicability and status domestically of decisions or regulations of bodies established under ratified treaties is of our particular interest in the context of the binding decisions of the Stabilization and Association Councils created pursuant to the respective SAAs, and of those of bodies established under other pertinent ratified treaties concluded by the SEE countries with the EU. In general, the later decisions have not been expressly regulated in most SEE constitutions, including on the EU law sources.

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64 E.g. the Montenegrin Constitutional Court has been referring in its decisions issued in constitutional complaints proceedings to the ICCPR, the ICESCR, the Framework Convention for the Protection of National Minorities of the Council of Europe, the Hague Recommendations Regarding the Education Rights of National Minorities (1996) and others. Kostić Mandić, “Implementation of International and European Law in Montenegro,” pp. 134-137, especially pp. 134-135. In fact, the practice of referring to these and other international human rights instruments, including soft-law instruments, appears to be common for all CEE countries’ Constitutional and ordinary courts.

60 Article 3 of the Croatian Constitution, and Article 8 of the Macedonian Constitution.

62 E.g. in their article on Macedonia, for instance, Sašo Georgievski et al. report on Supreme Court’s decisions in which it relied on instruments like the European Convention on extradition, the Convention on the privileges and immunities of the United Nations, the cooperation agreement between the Republic Macedonia and the UNICEF, or the Paris Convention for the protection of industrial property, and on the Administrative Court’s decisions relying on the Agreement amending the Central European Free Trade Agreement, and International Accounting Standards on the appraisal of the value of an impounded property, etc. Georgievski et al., “Application of the Law of the European Union in the Republic of Macedonia,” pp. 118-119. In her article, Fjoralba Caka reports of the Supreme Court’s cases in which it had relied on the New York Convention on the Recognition of Foreign Tribunal Awards, the Vienna Convention on Diplomatic Relations, etc. Caka, “The Application of the International and European Law by the National Courts in Albania,” pp. 42-44. The later are only illustrations of the variety of treaties (and other international law sources, including soft-law instruments) that the SEE national courts often apply in practice.

61 The SAAs regularly grant authority to the respective Stabilization and Association Councils to issue decisions as envisaged by the particular clauses of the respective SAA ‘binding on the Parties,’ and for the Parties’ obligation to take measures to implement these decisions. E.g. see Article 110 of the Macedonian SAAA, and its Article, giving the SA Council a competence to settle disputes referred to it by a Party “... by means of a binding decision.” In general, Albi identified three groups of the former Europe Agreements decisions, equally applicable to the SA Councils’ decisions: decisions which modify the Europe Agreements (i.e. the SAAs), decisions of interpretation, and decisions concerning discord between the Parties on the application of the Agreement. Albi, EU Enlargement, 43-44.

63 The SAAs regularly grant authority to the respective Stabilization and Association Councils to issue decisions as envisaged by the particular clauses of the respective SAA ‘binding on the Parties,’ and for the Parties’ obligation to take measures to implement these decisions. E.g. see Article 110 of the Macedonian SAAA, and its Article, giving the SA Council a competence to settle disputes referred to it by a Party “... by means of a binding decision.” In general, Albi identified three groups of the former Europe Agreements decisions, equally applicable to the SA Councils’ decisions: decisions which modify the Europe Agreements (i.e. the SAAs), decisions of interpretation, and decisions concerning discord between the Parties on the application of the Agreement. Albi, EU Enlargement, 43-44.

64 E.g. the Ministerial Council, the Permanent High Level Group, and the Regulatory Board, created under the Treaty Establishing the Energy Community for South East Europe (OJ L 198, 20/10/2006, p.18), empowered inter alia to issue decisions “... legally binding in its entirety upon those to whom it is addressed” Article 76 of the Treaty. See also Articles 34-35, and Article 94, granting “the institutions” power to interpret “any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities;” and, in their absence, a power to the Ministerial Council inter alia to provide interpretation of the Treaty, which it may delegate to the High Level Group. Another example of a binding decisions issuing body with similar powers is the Joint Committee created under the Multilateral Agreement on the Establishment of a European Common Aviation Area (OJ L 235, 16/10/2006). See especially Article 3 of the Agreement. All SEE countries are Contracting Parties to these two international agreements.
and their applicability and status would have to be conceived by reference to broader constitutional provisions, most notably to those on the status and applicability of ratified treaties.

As an exception to the above general statement, Article 122(3) of the Albanian Constitution explicitly provides that “[t]he norms created by an international organization have supremacy, in case of a conflict, over the law of the land, when the agreement ratified by the Republic of Albania for its participation in this organization, expressly envisages their direct applicability.” The later provision has raised a broader issue of whether that constitutional clause, to which some scholars refer to as a “clause of integration,” could be conceived as providing in advance sufficient grounds for direct effectiveness and supremacy of EU law (in general) that would follow upon the future membership of Albania in the EU. That, in the words of Fjoralba Caka, “might not be the case,” as “… supremacy and direct applicability of the ratified international agreements as [currently] provided in the Constitution is not the same as the principle of supremacy and direct effect [of the EU Treaties and EU law stemming from the Treaties] elaborated by the Court of Justice of the European Union.”

In the pre-accession context, perhaps, if one employs particular wisdom and a more expressed teleological reasoning while interpreting Article 122(3), it is worth venturing whether the later article could be conceived as extending the direct applicability and supremacy clearly envisaged by it (both) to the binding decisions of the SA Council, and even to those of other bodies with similar competences created by other EU-related treaties.

That Article of the Albanian Constitution put aside, in principle, in the SEE countries, the applicability and status of the SA Council’s and other bodies’ binding decisions would have to be established through a creative interpretation of the monist constitutional clauses (in case of B&H – through a wider monistic understanding) on the status and effect of the treaties that have created them. At first glance, it seems perfectly legally logical that the later decisions should have the same status and effect domestically as the one granted to the ratified treaty that gave the authority for their adoption by the respective bodies, that is, a monist treatment via the respective SAAs’ and other EU-related treaties. In fact, the monist approach towards Association (SA) Council’s has been long ago affirmed by the ECJ in the particular context of the Union. But, in the SEE context, the later might not necessarily be the case. In the pre-accession practice of the CEE countries, that had

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67 On the one hand, it seems that the two conditions for the direct applicability and supremacy of norms issued by a respective international organization implied in Article 122(3), namely, that the agreement establishing the international organization issuing them be a “ratified” one and that it “expressly envisages” for their direct applicability, are fairly satisfied in the case of the SA Council’s binding decisions, since the express authority granting direct applicability to these decisions could be easily detected from the relevant SAAs’ provisions. Yet, in order to establish direct applicability and supremacy for the later decisions under Article 122(3), the phrase “international organization” employed in that Article should be conceived as to embrace both the ‘Accession partnership’ established by the SAA in view of its wider principled aims, which, of course, would require a use of a particularly bold teleological approach on the part of the interpreter of Article 122(3).

68 Thus, for example, Radovan Vukadinović et. al. conclude that, in the particular Serbian context, “[t]he secondary acts adopted under ratified international agreements … can be directly applied by courts,” which also includes the SA Council’s decisions, especially in view of the particular obligations stemming from the standard Article 72 of the SAA. Vukadinović et al., “Application of EU Law by Serbian Courts,” p. 146-147. Similarly, in the Montenegrin context, Maja Kostić Mandić is of the opinion that “… secondary acts adopted by [the SAA] and other ratified treaties could, in principle be directly applied by national courts under the same conditions as SAA.” Kostić Mandić, “Implementation of International and European Law in Montenegro,” p. 133 And, Zlatan Meškić and Darko Šamardžić, calling upon the relevant ECJ’s jurisprudence, conclude that “… secondary association law in the hierarchy of law within the EU is beyond primary association law, but at the same level as the SAA in relation to the national law of B&H. Meškić, and Šamardžić, “The Application of EU Law in Bosnia and Herzegovina,” p. 66.

69 In principle, the ECJ has long ago recognized direct effectiveness to the Association (i.e. SA) Council’s binding decisions, provided that “… regard being had to their wording and their purpose and nature … they contain a clear and precise obligation which is not subject, in its implementation and effects, to the adoption of any subsequent measure.” Case C-192/89, Sevince (1990) ECR I-3461, para.2, with respect of a decision of the Turkey-EU Association Council.
generally contained clauses friendly towards ratified treaties, the Association Councils’ decisions were granted merely indirect applicability as persuasive authority in their respective legal orders.\textsuperscript{70} Similarly, in Croatia, prior to its EU accession, Article 6 of the specially enacted Law on Implementation of the Stabilisation and Association Agreement had adopted “a radically dualist approach” as regards the respective SA Council’s decisions, implying that, in order to be directly applicable, these decisions should have been previously ratified by the Croatian Parliament.\textsuperscript{71} That, according to Siniša Rodin “… [was] a deviation from the monistic principle laid down in Article 140 [of the Croatian Constitution], according to which ratified treaties do make a part of national law” so that “the constitutionality of this provision [was] questionable.”\textsuperscript{72}

In view of the above CEE countries (and Croatian) pre-accession practice, one could fairly assume that the SA Councils’ and other bodies’ binding decisions would be conferred at last indirect effect in the SEE legal orders. Up to this moment, however, there has been no SEE national court’s judgment from which one could infer any emerging jurisprudence on that particular issue.

\textbf{2.5. Applicability and Status of Not Ratified (Executive) Treaties}

What we have said on the binding decisions of the treaty-created bodies \textit{mutatis mutandis} apply to the applicability and status of international agreements that are not subject to ratification by Parliaments, hereby referred to as ‘not ratified’ or ‘executive’ treaties or agreements. The later issue has been rather important for some SEE countries in the context of the Interim Agreements concluded with the Communities for the purpose of putting into effect certain parts of the SAAs pending their entering into force, but it is equally pertinent for many currently valid agreements concluded by the SEE countries with the Union that do not require Parliament ratification.\textsuperscript{73}

In general, no SEE countries’ constitution specifically address the applicability and status of not ratified (executive) agreements, which may imply that these agreements enjoy a dualist treatment as to their direct applicability, without denying them their quality of persuasive or interpretative sources of law. However, in Serbia, the somewhat broader phrase employed in the monist constitutional clause, envisaging that direct applicability and supremacy pertains to “confirmed” (as opposed to “ratified”) international agreements, has raised the issue of whether the constitutional monist regime is reserved only to agreements ratified by the Serbian Parliament, or it also extends to agreements confirmed by other authorities e.g. by the Government through Government regulation.\textsuperscript{74} On final analyses, “[t]he doctrinal acceptable approach is that the wording ‘confirmed international agreements’ should be understood as encompassing both agreements ratified by the National Assembly, and those confirmed otherwise.”\textsuperscript{75} In Albania, in turn, the executive agreements concluded by the Council of Ministers “must be considered as any other normative act by the Council of Ministers,” although some scholars attribute to them higher status than ordinary government

\textsuperscript{70}See Albi, \textit{EU Enlargement}, 43-4.


\textsuperscript{72}Rodin, “Croatian Accession to the European Union,” p. 239.

\textsuperscript{73}Lists of various agreements in force between particular SEE countries and the Union, many of which being of an executive nature, could be found at the Treaties Office Database of the European External Action Service at: http://ec.europa.eu/world/agreements/default.home.do (accessed on 12 June 2014). The Interim Agreements in some SEE countries have not been subject to ratification in the respective Parliaments, e.g. in Macedonia, whereas in other SEE countries they have been ratified together with the respective SAAs, e.g. in Serbia, etc.

\textsuperscript{74}See Vukadinović et al., “Application of EU Law by Serbian Courts,” p. 146.

\textsuperscript{75}Vukadinović et al., “Application of EU Law by Serbian Courts,” p. 146.
regulation governing internal issues in view of the constitutional obligation of the Council of Ministers to inform the Parliament each time it concludes such an agreement (which is not required for ordinary regulation).\(^76\) In practice, not-ratified agreements have been sometimes referred to by the judges of ordinary courts as a sources of interpretation, and even treaties pending their ratification, and international agreements that have been neither signed or ratified, have been used to construe the content of domestic provisions by Albanian courts.\(^77\)

In Macedonia, where, in absence of an explicit constitutional clause, apparently dualist treatment of not ratified (executive) treaties is a rule, Sašo Georgievski et al. have proposed an exception to that rule whenever the executive agreement is concluded within the framework of a ratified treaty (without altering its content), it is published in the Official Gazette, and it contains provisions affecting rights and obligations of private persons.\(^78\) In that, they relied on a leading 2004 decision of the Macedonian Supreme Court, in which it gave direct effect and supremacy over a conflicting government regulation to the Interim Agreement with the Communities (not ratified itself but incorporated in a prior government regulation) under the monist Article 118 of the Constitution, by treating it as a ‘ratified’ treaty via the ratification of the SA Agreement to which it was functionally linked.\(^79\)

Whether the above proposition would find any fertile ground in the courts’ practice of the Macedonian (and any other SEE) courts regarding executive treaties remains to be seen. In any case, these treaties would be most certainly used at least as a persuasive authority by courts for the purpose of interpreting applicable external or domestic provisions, which has been already occurring in the SEE national courts’ practice.

2.6. General International Law

The constitutional regime provided for general international law, or, ‘general principles of law,’ in the SEE internal legal orders is relevant for our discussion on EU law application by the SEE national courts at least for two interrelated reasons. Firstly, the way international law has been positioned in the respective national constitutions may potentially open the door legally for the application of a variety of ‘external’ sources in the domestic legal orders (in addition to treaties), including customary law, comparatively devised legal principles ‘recognized by civilized nations,’ international evidentiary sources etc., perhaps, even of various EU law sources (including ECJ’s case law). And, secondly, it may potentially stand alone as an additional constitutional basis for pre-accession application of certain EU law sources in addition to those provided by the applicable SAAs and other EU-related treaties via the relevant constitutional clauses on ratified treaties. That, of course, would be possible should the Union be conceived as a specific international organization, and its law as a sui generis international legal order, which is in fact often the case with the constitutional approach-
es that have been taken by most of the EU membership aspirant countries, including from the SEE region, in contrast to the far more sophisticated conceptions on the character of the Union and its law and on the constitutional balances between different legal orders within the Union (and more generally, on the international plane) present in both theory and the constitutional practice of the Union and its member states.

Interestingly, in a number of SEE countries’ constitutions the ‘monist’ solution regarding the status and applicability of ratified treaties has been explicitly extended as to embrace general international law as well. In Serbia, the main clauses of Article 16 of the Constitution provide that the “generally accepted rules of international law” are an “integral part of the legal order of the Republic of Serbia” and that they enjoy supremacy over domestic legislation along with ratified treaties. That monist regime for international law has been also confirmed by other constitutional and statutory provisions, though, inconsistencies in the language used throughout the later provisions, and the lack of definitions of the exact meaning of different phrases used in the Constitution and relevant legislation, makes it somewhat uneasy to identify the true scope and substance of that monist regime.

Article 9 of the Montenegrin Constitution spells out a similar solution on the applicability and status of ‘general principles of international law’, yet, the Constitutional Court of Montenegro has not yet adopted any legal standing on the more specific question whether this constitutional clause allows for the implementation of sources of EU law as general principles, the later issue still remaining as a “gray zone.” According to the B&H Constitution “general legal principles are an integral part of the legal system of Bosnia and Herzegovina and its entities,” and these were confirmed by the Constitutional Court to be at a constitutional level.

In Albania, Article 5 of the Albanian Constitution extends the reach of the monist constitutional tone from ‘general principles’ to the whole area of ‘international law,’ providing that “[t]he Re-

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80 E.g. in the context of CEE and the constitutional adaptations in the CEE countries for EU membership, Albi emphasized the ‘international organization’ approach in conceiving the European Union as a prevailing theoretical concept that inspired corresponding constitutional amendments in most of these countries, based on traditional understanding of statehood and sovereignty (and international law). See Albi, EU Enlargement, p. 76, 113, and Chapter 6. Also see the discussion in Rodin, “Croatian Accession to the European Union,” pp. 232-40, especially pp. 238-9.

81 See Albi, EU Enlargement, Chapters 1, 6 and 10, especially p. 195-205, and the authors referred to and discussed at that place. Armin von Bogdandy, for instance, denies altogether the analytical values of the traditional ‘monist’ and ‘dualist’ doctrines as anarchous and being stuck in the Westphalian paradigm, claiming inter alia that “[m]onism and dualism are intellectual zombies of another time and that they should be laid to rest, or ‘deconstructed’.” Von Bogdandy, Armin, “Pluralisms, Direct Effect, and the Ultimate Say,” International Journal of Constitutional Law 6 (2008), 397, especially p. 400.

82 E.g. in Articles 18, 167, and 194 of the Serbian Constitution, and Article 1 of the Law on Courts (Official gazette, RS, no.116/2008; 101/103). The provision of Article 18(3) of the Constitution is particularly significant as it provides that, in the area of human rights and protection of minorities, the respective provisions would be interpreted “… in accordance with the valid international standards … as well with the practice of international institutions authorized for their implementation.”

83 Vukadinović et al., “Application of EU Law by Serbian Courts,” p.144 and 148. The later authors maintain that “other sources of international law” different than treaties, including customary international law and supplementary sources such as international conventions (apart from their status as ratified treaties), international jurisprudence, international legal doctrine, international soft law etc., in a narrow sense, can be applied by courts “… only indirectly, as models or standards of interpretation.” Maja Stanivuković, for instance, suggests that the “generally accepted rules of international law” in view of Article 16(2) of the Constitution of Serbia consist of “international customs [customary law],” implicitly excluding from that rubric the third – subsidiary source of international law – the general principles recognized by civilized nations i.e. principles discerned via comparative analyses of the legal solutions in the main legal systems usually serving the purpose of filling lacunae or making a particular construction prevail when there are two or more possible interpretations. On the other hand, she allows for indirect reliance by courts on “… rules of international and foreign law that are not applicable in Serbia, that may serve as an inspiration for the adoption of an adequate interpretation of domestic legal provisions or as an additional argument for an already adopted interpretation,” that inter alia includes “… the experiences of legislators and courts of foreign countries while regulating and deciding on similar situations,” etc. Stanivuković “Pravo Evropske unije i sudovi u Srbiji,” p.205, 212 (translation from Serbian is ours).


public of Albania applies international law that is binding upon it." Albanian scholars have split over the question whether that constitutional clause is a "stand-alone" or a "merely declarative" provision that should always be read in conjunction with other constitutional provisions governing the applicability of international law.\(^\text{86}\) According to the former broader view, in particular, Article 5 should be understood as providing for autonomous application of "binding international law", including customary law, generally recognized norms, and principles of international law (especially, of a jus cogens character, superior to all other rules). So far, the Albanian Constitutional Court has taken in its practice both these interpretations with regard to the applicability of binding general international law, leaving this question still open for future settlement in practice.\(^\text{87}\)

In the SEE countries which Constitutions do not specifically address the applicability and status of general international law, the later would have to be discerned by applying appropriate (sometimes very creative) interpretation of various constitutional provisions. Most notably, in Macedonia, its applicability and status have to be established by way of interpretation of two clauses of Article 8 of the Constitution, both proclaimed as “fundamental values” on which the constitutional order of the Republic of Macedonia is based, the one implying that “international law” should be used (together with the Constitution) for construing the meaning of fundamental human rights and freedoms, and the other envisaging "the respect for the generally accepted norms of international law". In practice, the Macedonian Constitutional Court has not been restraining itself from (explicitly or implicitly) relying upon the above provisions as grounds for consulting indirectly various sources of international law when interpreting relevant constitutional and statutory provisions, including international conventions (especially the ECHR), less often soft-law instruments, and occasionally even comparative legislative practice of other states.\(^\text{88}\) While, it is possible to conclude that under that Article 8 of the Constitution various sources of general international law, including its evidentiary sources, enjoy a rank of indirect or persuasive authority for proper interpretation of directly applicable rules in the Macedonian legal order, to date, there have no reference made by a Macedonian court to Article 8 as a ground for allowing indirect application of sources of EU law.\(^\text{89}\)

In general, while there is a substantial amount of judicial practice developed by the SEE national courts of indirectly consulting international law sources, including its evidentiary sources, like international conventions, soft-law instruments, and international courts’ jurisprudence, quite often it is impossible to identify whether, while doing that, national courts have been relying on the respective constitutional provisions on the applicability of international law, and why have they invoked particular international instruments in concrete cases among a myriad of often available international law sources in the relevant area. In fact, random selection of particular international legal instruments that are to be consulted by a respective court while deciding particular cases, and absence of any substantive analyses for establishing the proper meaning of the selected international provisions, clothed with excessive textual formalism, seems to be the prevailing technique that has been utilized by the SEE national courts when applying ‘external’ sources of law, to which we will turn more extensively in Section 4 below.

\(^{86}\) Caka, "The Application of the International and European Law by the National Courts in Albania," p. 39, including the references on that place.

\(^{87}\) See Caka, "The Application of the International and European Law by the National Courts in Albania," p. 39-42, discussing the Grory Case, where the High Court and the Constitutional Court argued for direct applicability of Article 5 in the domestic legal order, invoking “recognized principles of international law” via that Article i.e. the principles of reciprocity and good will. See High Court Decision No1, date 30.1.2003, p. 8-9, and Constitutional Court Decision, No.13, date 12.7.2004, p. 4, reported at that place. Reported cases where the Constitutional Court adopted a narrow reading of Article 5 include decisions in case no.186/2002 and 65/1999.

\(^{88}\) See for instance the Constitutional Court’s Decisions U.br.104/09, U.br.104/08, U.br.141/97 and U.br.146/97, etc.

3. Indirect Application of EU Law: EU-Consistent Application of Domestic Legislation under Relevant Provisions of the SAAs and in the SEE Courts Jurisprudence

Under the current constitutional and treaty regime of the SEE countries, as we have already reported in Section 2.2., the SEE national courts are given the possibility to directly apply certain EU law sources domestically i.e. the directly effective provisions of the SAAs and of other ratified treaties concluded with the EU. But, perhaps, more importantly in the pre-accession context, before (and after) accession of their respective countries to the Union, they are also invited to apply indirectly appropriate sources of the law of the Union when interpreting and construing applicable domestic legislation, in particular, that relating to the ongoing process of legislative harmonization.

In an often cited dictum of the Polish Constitutional Tribunal from the pre-accession times of Poland in the Gender Equality in the Civil Service Case, the Constitutional Tribunal had directed the Polish courts that, notwithstanding that the law of the Union had not been binding in Poland pre-accession, under the harmonization Articles 68 and 69 of the Polish Europe Agreement, there was an “…obligation [of courts] to interpret the existing legislation in such a way as to ensure the greatest possible degree of … compatibility” with the Community legislation. Similarly, among the many CEE pre-accession national courts’ precedents, in the decision of the Constitutional Court of the Czech Republic in the Skoda Auto case, the Czech Constitutional Court had emphasized the quality of the Treaty of Rome and TEU as deriving from the same values and principles as the Czech constitutional law, as in the Milk Quota case, it had resorted to an even wider teleological basis for allowing indirect application of (primary) EU law as penetrating the Courts’ decision-making as “[a] form of general principles of European law.”

The principle of ‘EU-consistent’ or ‘Euro-friendly’ application of national legislation could be established through relevant standard clauses of the SAAs (and other EU-related ratified treaties) and/or by relying on wider teleological basis attached to the harmonization and/or broader Euro-integration objectives.

The authors in book have expressed largely concordant positions as to the way the standard harmonization clauses of the respective SAAs should be perceived in their respective country’s legal context, and identified similar trends in the national courts jurisprudence regarding the ensuing obligation of courts to exhibit EU-consistent application of domestic law. The later clauses, present in all SAAs, include, in particular, those general clauses envisaging harmonization duties for the SEE countries’ state institutions (including courts) especially their duty to “endeavor to ensure” gradual compatibility of domestic laws with EU law, and the specific standard clauses in the competition law and state-aids area that call upon the application of certain criteria arising from the application...
of relevant articles of TFEU (TEC). Apart from the SAAs, similar standard clauses are also found in other treaties concluded by the SEE countries with the Union, so that the ensuing discussion applies mutatis mutandis to those clauses as well.

Speaking about the standard general harmonization provision of Article 69 of the Croatia’s former SAA, Arsen Bačić leads to a conclusion that, given the political and social environment in which the SAA existed before Croatian EU accession “under the SAA there was no obligation for courts to interpret the law internally in line with the EU.” Yet, in the broader context, he stresses that national courts were “still obliged to ‘consider’ a certain norm of the EU, legally binding or not,” not by the force of the later norm, but as “an integral part of the legal culture.” “Comparative law argument” with respect to considering EU law had been primarily exercised by the Croatian Constitutional Court, and there had been “some limited and divergent case law” of indirect reliance on EU law on the basis of the SAA by this and other Croatian courts, without, however, any clear leading principle being established in the judicial practice prior to the Croatian accession to the EU. The practice of reliance on EU-law instruments by courts had been mostly expressed in the competition and state-aid areas, in view of the respective specific harmonization SAA clauses. After EU accession, of course, the obligation of Croatian courts for EU-consistent application of domestic law continued under the applicable principles of the law of the Union, and there is some post-accession court practice already emerging where domestic law has been interpreted in light of EU law, including in the recent politically controversial case on the European Arrest Warrant.

Similarly, when discussing the corresponding general harmonization clause of Article 68(1) of the Macedonian SAA, Sašo Georgievski et al. emphasize that the ensuing obligation for state institutions to “endeavor to ensure” that its laws will be gradually made compatible with those of the Community (EU) “… could not be successfully fulfilled if inter alia its already harmonized legislation were not construed and applied in view of the EU’s harmonizing rules transposed in it, of whatever origin and legal form, including the relevant ECJ’s case-law.” Indeed, there is quite a considerable amount of evidence on instances where the Macedonian Constitutional Court has proceeded with

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94 Articles: 71 of the Albanian SAA; 71 of the B&H SAA; 70 of the (former) Croatian SAA; 69 of the Macedonian SAA; 73 of the Montenegrin SAA; 73 of the Serbian SAA.

95 E.g. see the Treaty Establishing the Energy Community for South east Europe, Articles 18 and 19; and the Multilateral Agreement on the Establishment of a European Common Aviation Area, Articles 15 and 16(1). In addition, both agreements provide implementation duties on (and applicability of) numerous provisions of regulations and directives and of other EU instruments listed in their respective annexes. See Articles 10, 12, 13 and Annexes I-III of the former Treaty; and Article 3 and Annex I, and Articles 16-20 of the later Agreement, setting out inter alia and elaborated mechanism for ensuring ‘homogenous’ interpretation of that agreement and the enlisted EU provisions in Annex I in accordance with the relevant EU law and ECJ’s case law.


100 See the Constitutional Court judgments: U-III/1410/2007; U-III/4082/2010 (NN28/11) of 17 February 2011, especially para.7.1. Also, the High Commercial Court’s judgments: Pž 639/06-3 of 23 February; Pž 80/64/04 of 17 May 2006, in trade-mark disputes; and Pž 2330/05-3 of 13 June 2006, in which the Court relied on the general harmonization clause of Article 69 SAA. But also see the Croatian Administrative Court’s judgment Us-5362/2007-10 of 3 November 2010, in which that Court declined to recognize the status of a source of law to the European commission’s state-aid guidelines which were relied upon by the Croatian Competition Agency; and the High Commercial judgment Pž 2330/05-03 of 13 June 2006, where that Court rejected reliance on the TFEU rules on free movement and the corresponding ECJ case law. Reported and discussed in Goldner Lang, and Mislav Mataija, “Application of EU Law by Croatian Courts,” p. 95-96.


indirect reliance on various sources of the law of the Union, under Article 68(1) SAA or on broader grounds, and especially on EU harmonizing regulations, and (most often) on directives. Such practice could be also ascribed to the ordinary courts, including the Administrative courts particularly in the competition law area in view of the related special harmonization Article 69 SAA. A clear leading principle or court guidance for such courts practice, however, is currently missing.

While, the Serbian courts have not yet declared themselves on the issue of the general harmonization clause of the SAA, in theory, this requirement has been conceived “as a ‘soft duty,’ obligation of means not ends’ or ‘endeavor clause.” The duty arising from the phrase of Article 72 SAA to ensure that “existing laws and future legislation will be gradually made compatible with the Community acquis should be understood “not only as [an] obligation of Serbia to adopt harmonized rules (formal harmonization), but also as [a] duty to ensure their coherent (proper) application before domestic courts and administrative bodies (functional or actual harmonization or acception of acquis communautaire);” entailing both “[a duty for securing] effective remedies for the protection and enforcement of the granted individual (subjective) rights.” Whereas a leading principle established by the Serbian Constitutional Court and the Supreme Court or higher courts providing general direction to the lower courts regarding EU-consistent interpretation of domestic law is cur-


105 See Georgievski et al., “Application of the Law of the European Union in the Republic of Macedonia,” p.121-122., and cases discussed at that place. In its 2012 judgment U.no.6218/2009, for instance, the Administrative court endorsed the possibility for direct application, by virtue of Article 69 SAA, the criteria concerning the correct application of EU competition rules in instances of appraising the forms of distortion of competition liable to affect the trade between Macedonia and the European Communities, and in another judgment no.6517/2009 from the same year (upheld on appeal by the High Administrative Court), it endorsed the Competition Authority’s assessment of the particular form of abuse of dominant position by taking into account the criteria of European competition law (specifically the communications issued by the European Commission relevant to the application of competition rules in the telecommunications sector), by virtue of Article 69 SAA.


rently lacking, there have already been cases in which EU law sources have been applied by courts, including in the competition area. Quite similar to the above, in Montenegro, for the time being, respective EU instruments (mainly directives, regulations), in order to construe or to define their “a tendency, mainly from the higher courts,” to interpret domestic harmonized laws in view of the respective EU instruments (mainly directives, regulations), in order to construe or to define their content. However, the relevant courts’ practice does not make it obvious whether the duty for EU-consistent interpretation of domestic legislation derives from the general and special harmonization clauses of Article 70(1) and (2) SAA, since the Albanian courts have often only “implicitly” or “tacitly” resorted to a harmonious interpretation of relevant legislation, without mentioning the legal grounds for doing that.

The case of Bosnia and Herzegovina is rather special regarding EU-consistent application of domestic law. Whereas, in this country, until today, the B&H Constitutional Court and other courts have never explicitly relied on the harmonization clause of Article 70 SAA (itself not yet being into force), other grounds have been available to the national courts for indirect application of EU law sources. The later grounds include specific legislation envisaging their application in particular areas i.e. the Competition Act, and, in particular, Article I/IV of the B&H Constitution spelling out free movement guarantees within B&H. The Competition Act, that had become effective three years before the SAA was concluded, provides legal relevance to the criteria arising from the application of EU law sources. The later grounds include specific legislation envisaging their application in particular areas i.e. the Competition Act, and, in particular, Article I/IV of the B&H Constitution spelling out free movement guarantees within B&H.


109 Judgment of the Supreme Court of Cassation of March 2014 in the Fricom case, in which the Competition Commission’s Guidelines in this area were recognized as secondary source of law. Reported by Vukadinović et al., “Application of EU Law by Serbian Courts,” p. 150.


112 Caka, “The Application of the International and European Law by the National Courts in Albania,” pp. 49-55, especially p. 51. On that place, the author reports on two relevant decisions of the Albanian High Court: Decision No.2, dated 27.03.2012, Official Journal No.106; and (Civil College) Decision No.22, date 11.01.2011, where that Court indirectly consulted, respectively, the Council’s Regulation (EEC, Euroatom) No.1182/71 of 3 June 1971 and the Council’s Regulation (EC) No.44/2001 of 22.12.2000 and EU members and non-members practice, and to an obiter dictum released by the High Court in Decision No1., dated 17.01.2011, regarding approximation duties of Albania under the SAA. In addition, the author reports to three relevant decisions of the Constitutional Court: Decision No.3, dated 05.02.2010, Official Journal No. 17, consulting EU directives on statutory audits; Decision No.8 date 08.03.2013, in which the Court avoided expressing itself on consulting Directive 2008/98/EC for wastes and parts of other directives in view of Article 108 SAA; and Decision No.48 date 15.11.2013, where the CC iter alia relied on the EU Directive 2007/78 in order to give meaning to the phrase “reasonable accommodation” used in the non-discrimination Law No.10221 of 04.02.2010.

of the competition rules in the Community in a way similar to the corresponding Article 70 SAA on competition, and certain judicial practice of their application has already emerged.\textsuperscript{114}

In addition to the general and specific harmonization clauses considered above, several authors in this book dwelled on the meaning of the more broader standard ‘sincere cooperation’ or ‘loyalty’ clauses regularly provided in the SAAs and other EU-related treaties in their respective frameworks,\textsuperscript{115} in order to establish supplementary legal grounds for establishing the duty for EU-consistent application of domestic legislation.\textsuperscript{116} While, that possibility has been confirmed by authors, cases where national courts have relied on the later SAA clauses have been absent in the current practice of the SEE courts.

The above example with the B&H Competition Act reminds that, apart from the relevant clauses of the SAAs and other EU-related treaties, there may be other legal grounds for establishing the duty of the SEE national courts for indirect (sometimes even direct) application of the sources of EU law provided by special legislation referring to particular instruments of EU law. The case with the Montenegrin Private International Law Act is rather illustrative in that respect. Apart from directly incorporating EU regulations into national law for certain fields and types of relations “with only minimum adjustments,” the new Montenegrin 2014 Private International Law Act explicitly opens the door for interpretation of its provisions on contractual and non contractual relations in accordance with the two related EU Regulations.\textsuperscript{117} Examples of the later kind may be found in other SEE countries’ specific legislation as well.\textsuperscript{118}

4. Method of Direct and Indirect Reliance on the Sources of EU Law (and International Law) Employed by the SEE National Courts

The discussion so far revealed that there have been only a handful of isolated instances of direct application of SAA provisions, and a much more expressed (yet still scattered) practice of indirect reliance on EU law sources, by the SEE national courts. However, the real question would be to identify how, that is, in what particular capacity, and according to what interpretative methodology, have these legal sources been applied by the later courts.

In the context of the pre-accession practice of the CEE national courts of direct application of the former Association Agreements (not abundant itself), Anelli Albi concluded that the CEE (notably the Polish) courts had been resorting to direct application of these agreements “… more in terms of supporting the argument rather than as a main ground for deciding.”\textsuperscript{119} Given the scarcity of developed SEE national courts jurisprudence of direct application of the SEE and other EU related agreements, at this moment it is difficult to draw any firm conclusions as to the manner by which

\textsuperscript{114} Meškić, and Samardžić, “The Application of EU Law in Bosnia and Herzegovina,” pp. 69-70. On that place, the authors discuss at length the Court of B&H judgment in the ASA Auto case, where (decision No. S1 3 U 005412 10 Uvl, 15.3.2012), on the basis of the Competition Act, the Court decided by relying inter alia on decisions of the European Commission and (implicitly) on the relevant ECJ’s case law (i.e. on the ECJ’s IMS Health ruling, C-418/01, IMS Health, 2004, I-5039).

\textsuperscript{115} E.g. Articles: 126 of the Albanian SAA; 118 of the Macedonian SAA; Article 129 of the Montenegrin SAA; 129 of the Serbian SAA; etc.

\textsuperscript{116} See Georgievski et al., “Application of the Law of the European Union in the Republic of Macedonia,” pp. 109-110, Vukadinović et al., “Application of EU Law by Serbian Courts,” p. 149, Caka, “The Application of the International and European Law by the National Courts in Albania,” p. 50-51. These standard clauses provide a duty for that Parties of the respective SAA (and other EU related agreement) “… to take any general or specific measures required to fulfill their obligations under this Agreement,” and to “see to it that the objectives set out in this Agreement are attained.”

\textsuperscript{117} See Kostić Mandić, “Implementation of International and European Law in Montenegro,” p. 133.

\textsuperscript{118} See for instance the Law on Aviation (Official Gazette of the Republic of Macedonia no. 14/06, 24/07, 103/08, 67/10, 24/12, 80/12, 155/12 and 68/13 from 13.05.2013) Article 3, envisaging direct application of numerous EU/EC directives and regulations referred to in that statute, etc. Reported by Georgievski et al., “Application of the Law of the European Union in the Republic of Macedonia,” p. 113, note 62.

\textsuperscript{119} Albi, “EU Enlargement,” p. 42.
these treaties (and certain pertinent EU law sources) have been directly applied by the SEE national courts. But, the SEE court practice of indirect application of EU law sources, and of indirect application of international law sources as a supplementary indicator for the later practice, seems to fit well into the former description.

In Macedonia, the analyses of the several cases of direct application of the SAA and EU-related agreements that have been consulted,\textsuperscript{120} may lead to a conclusion that, while relying directly on the SAA and other relevant EU-related treaties, courts have been contemplating the later treaties (and EU law) as having an independent and controlling position vis-à-vis domestic legislation. Yet, in the context of a much more extensive court practice of direct application of other international agreements (including the ECHR),\textsuperscript{121} by far the most numerous instances are those in which the Macedonian courts have been directly relying on the later agreements as a supportive supplement to the directly applied domestic provision,\textsuperscript{122} as compared with cases where they have been directly invoked by them for filling existent lacunae in applicable legislation,\textsuperscript{123} or as a sole basis for the court’s decision.\textsuperscript{124} In the context of indirect application of EU law (and international law) sources, where a considerable practice of indirect reliance on EU law instruments and international law instruments have been reported for the Macedonian Constitutional Court, decisions where this Court have been using these instruments as main argument during the EU-consistent interpretation exercise have been by far less numerous than those in which they have been given a merely supportive role. Even in the later cases, the Constitutional Court would not provide sufficient explanation of why it has selected the particular consulted EU (or international) instrument, and would often resort to a mere comparison of the texts of the applicable domestic provision and that of the interpretative provision, without dwelling deeper into the substantive meaning of the consulted provision. However, as suggested by Sašo Georgievski et. al., “[u]nconditional openness towards EU [and international] law, providing a carte blanche to all laws transposing EU [and international] law in Macedonia, as manifested by the Court, might negatively affect and undermine the principle of constitutionality and thus the rule of law in the Republic of Macedonia, which is also a leading value of the EU’s legal order.”\textsuperscript{125}

In the case of Albania, where the existence of one “pivotal” judgment where the Constitutional Court directly relied on relevant articles of the SAA when quashing a conflicting Government decision has been reported so far,\textsuperscript{126} one can detect similar trends in the court practice of indirect EU law (and international law) application. As reported by Fjoralba Caka in her analyses on the case law of the Constitutional Court and the Albanian High Court of indirect international law application (outside of the ECHR context not considered in her article), these courts have been amply using international law instruments (including soft-law instruments, and sometimes comparative analyses of other countries’ legislation and court practice) when drawing from there general principles of law

\begin{itemize}
  \item \textsuperscript{120} See the cases discussed in Georgievski et al., “Application of the Law of the European Union in the Republic of Macedonia,” at p. 121-122.
  \item \textsuperscript{121} See Georgievski et al., “Application of the Law of the European Union in the Republic of Macedonia,” p. 118-119 and 121-122., and the cases discussed at that place.
  \item \textsuperscript{122} E.g. Judgment of the Supreme Court of Macedonia of 1 December 2013, Kvp.no.179/2013; Judgment of the Supreme Court of Macedonia of 16 January 2007, Kvp.no.207/06; Judgment of the Supreme Court of Macedonia of 9 July 2013 Kvp.no.179/2013; Judgment of the Supreme Court of Macedonia of 27 October 2008, PSRR no.18/2008; etc.
  \item \textsuperscript{123} E.g. Judgment of the Supreme Court of Macedonia of 14 February 2007, Kvp.no.80/05.
  \item \textsuperscript{124} E.g. Judgment of the Administrative Court of 26 June 2012, U-5 no.1175/2010; Judgment of the High Administrative Court of 8 May 2013, UZ no.540/2013.
  \item \textsuperscript{125} Georgievski et al., “Application of the Law of the European Union in the Republic of Macedonia,” p. 117.
  \item \textsuperscript{126} Caka, “The Application of the International and European Law by the National Courts in Albania,” p. 8-49. See Constitutional Court Decision No.24, date 24.7.2009, discussed at that place.
\end{itemize}
and construing applicable domestic law. Yet, while doing that, these courts have equally expressed a habit of *inter alia* “merely citing the articles” in their decisions without going deeper into their substance, of “hesitating’ to do any interpretation of [the consulted] international law,” etc.

The above practices of EU and international law application exhibited by the Macedonian Constitutional Court and the respective Albanian courts are mere reflections of a wider syndrome deeply rooted in the practice of the courts of all SEE countries, depicted by some authors as *inter alia* ‘limited law’ application, ‘dogmatic textual-positivism,’ or a practice of ‘mechanical jurisprudence.’

The later phenomenon has been attached to the “obvious problems” of courts of “… excessive reliance on a literalist (or textualist) reading of law, their ignorance of the underlying purpose of the law and their inability to apply abstract legal principles.”

In his article in this book, Arsen Bačić wrote that, among the various types of interpretative techniques available to judges (i.e. linguistic, logical, historical (genetic), and systematic methods of interpretation), “[t]eleological interpretation as consequentialist method is considered as the most important in the field of constitutional law,” and that it has “particular importance in the case of conflict between different methods of interpretation.” However, in the particular Croatian context, he noted that, despite the long process of professional education of the Croatian judges, “the barriers that existed in the pre-accession period [of Croatia] still exist” in s form of “… legal formality state of doing things, the refusal of judges to consider political reasons, and so called circular reasoning.”

The presence of the still persistent formalism in the Croatian courts’ jurisprudence has been recently confirmed by Siniša Rodin, probably, the most vocal - long-decade - proponent for eradicating such practice from among the Croatian Judiciary (and elsewhere), in his analyses of Croatian Constitutional Court’s jurisprudence on fundamental rights, despite the fact that throughout the years that Court has evolved into “a sophisticated interpreter of fundamental rights.”

Excessive formalism *inter alia* in the EU (and international) law application by judges is undoubtedly deeply seeded in all SEE national court jurisdictions, posing major challenges to the desired Europeanization of courts and to the adoption of a true ‘European legal culture’ by the SEE judges. There are, at least, three possible ways to tackle this challenge, and these include establishing a quality system of professional training of judges in EU law, ensuring a uniform EU law application within the respective national court systems, and securing effective accessibility for judges of relevant European and domestic jurisprudence.

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5. Professional Training of Judges, Availability of Courts’ Jurisprudence and Ensuring Uniform Application of Law

Writing at the time of the Croatian pre-accession in 2005, Tamara Ćapeta made a suggestion, equally valid for all SEE countries, that the proper place for changing the current legal culture of the Croatian judges are the law schools, in that “[l]egal education needs to be adapted so that it can prepare future ‘thinking’ judges.”133 But, there is an equally pressing need to provide adequate professional training of current judges *inter alia* in EU law.

Virtually all SEE countries have established special bodies for maintaining systematic professional training of judges at both initial level (for future judges), and at continuing training level (for current judges).134 These bodies (Judicial Academies, Training Centers) are now the primary institutions offering various courses for judges for acquiring professional knowledge *inter alia* in EU and international law in a systematic and structured way, upgrading the long ago begun process of professional education of judges.

Although, these professional training bodies have been generally assessed by the authors of this book as playing a positive role in ameliorating the professional quality of the respective judiciaries, there is still place for further improvement. Some authors have implied the need for more enhanced coverage of judges trained at these institutions,135 whereas others emphasized the need for further increase of the scope and intensity of professional training of judges in EU law at the respective Academy, especially, at the level of its continuous training programs for the currently active judges.136 According to one suggestion, the intensified continuous training in EU law, as a priority, should particularly embrace judges from the second degree courts in the domestic courts hierarchy (Appellate courts etc.), given their immediate effective role in directing the shape of the practice of lower courts, and those from the highest courts, preferably in the form of regular compulsory courses organized periodically on selected particularly acute topics related to domestic application of EU law at certain moments of time.137

As the Croatian membership in the Union had become imminent, in turn, as part of the “new beginning scenario,” in Croatia, in December 2012, the Croatian Parliament adopted a *Strategy for the Development of Justice* for 2013-2018 which defines the core values of the Croatian judicial system that must be preserved in its further development following all commitments for the judiciary deriving from the Croatian membership in the Union.138

No less importance for upgrading the quality of courts and judges for EU and international law application is attached to the accessibility of domestic and relevant European jurisprudence. In general, the decisions of all Constitutional Courts in SEE are electronically available at their respective websites. As to the other courts, in Croatia, the Supreme Court Judgments have been reported as of 1993, and only a selection of the High Administrative Court decisions, and a selection of the

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134 The first such institution in the region was established in Macedonia, in 2007, the Academy for Judges and Public Prosecutors. In Croatia, such Academy was created in 2009, and in Serbia, in 2010. In Montenegro, judicial training is performed within the Judicial Training Center, as part of the Supreme Court of Montenegro.


136 Georgievski et al., “Application of the Law of the European Union in the Republic of Macedonia,” pp. 123. Similarly, Vukadinović et al. report that there was an idea in Serbia that the Judicial Academy introduces EU law as a general program the judges of the ordinary courts (i.e. at continuing training level), and not just for the beginners.


High Commercial Court decisions that are of particular legal and public interest, are published.\textsuperscript{139} In Macedonia, all ordinary (and Administrative) courts are bound to publish their decisions (after anonymisation) at the respective court’s website by law,\textsuperscript{140} whereas in Montenegro, ordinary courts publish on their respective websites “some” (anonymised) decisions “on their sole discretion.”\textsuperscript{141} In Albania, “not every court publishes its decisions on the web page of the court.”\textsuperscript{142} And, in Serbia, only judgments on landmark cases of the Supreme Court of Cassation and of other state-level and higher courts (the Administrative Court, the Commercial Appellate Court, appellate courts) are published on the websites of the respective court, which has been already recognized as an obstacle that has to be removed according to the Action Plan for the Implementation of Judicial Reform Strategy as one of its strategic objectives.\textsuperscript{143}

In virtually all SEE countries where national courts decisions are available in electronic form, the datasets of these decisions provided by different courts are reportedly not easily manageable and currently lack effective search engines.

In principle, national judges all over the SEE countries could have access \textit{inter alia} to the relevant ECJ’s (and ECtHR’s) case law on the relevant datasets through the internet. Apart from isolated cases of technical difficulties experienced by particular courts regarding internet access, computer illiteracy, and in particular the lack of sufficient foreign language proficiency among considerable number of the SEE national judges appears to have remained as a major obstacle to the effective use of these datasets by judges. In addition, in many SEE countries, translations of the judgments and decisions of the ECHR adopted in relation to each respective SEE country are also available in electronic form. In some SEE countries, translated summaries of selected ECJ’s judgments in the local language can be browsed through the appropriate judicial network website.

On the other hand, another tool that may be used for bettering the quality of EU law (and international law) application by domestic courts is the establishment of an effective system for ensuring uniform law application in the respective national court jurisdiction. In most of the SEE countries, the uniform application of law, in general, and of EU law and international law, in particular, is ensured by the Constitutional Courts (in fact if not in law) mainly through exhibiting constitutional review of domestic legislation and deciding in constitutional complaints proceedings. Equally important are the national highest courts, most notably the Supreme Courts and the highest specialized courts, but there are significant peculiarities attached to each respective SEE country in that respect.

In Croatia, for instance, the formal authority for ensuring uniform law application rests with the Supreme Courts, and that had been confirmed by the Constitutional Court. Yet, after ordinary courts “take on their share of responsibility” for the application of the law of the Union, the Constitutional Court would “still have the final say” in certain matters, including the fundamental relationship issues between Croatian and EU law, and will be able “to focus in the development of legal arguments that will contribute to the strength of its persuasiveness in European constitutional discourse.”\textsuperscript{144} In the ECHR area, being open to using the ‘rights doctrine’ of the European Court for Human Rights,
the Constitutional Court has already “strongly contribut[ed] to better individual rights protection in Croatia,” and its jurisdiction “makes it easier to open the door to the way of widening Croatian constitutional law in terms of its convergence with the right of European Integration Law.”

In those SEE countries deriving from ex-Yugoslavia, the respective Supreme Courts ensure uniformity in law application primarily through the issuance of 'general legal standings' and 'legal opinions' on legal matters raising particular difficulties in the judicial practice as these may be detected by the respective Court. These instruments are not formally binding yet they are often de facto respected by lower courts. The respective Supreme Court decides on its own motion whether to adopt a principled opinion, although in practice it may be often motivated to proceed with issuing legal standings upon information on pending legal issues supplied to it by lower courts.

The authors in this book, however, have not reported on any general legal standing issued by a SEE Supreme Court specifically addressing EU law application matters. In the specific Macedonian context, Sašo Georgievski et al. suggested that the Macedonian Supreme Court should assume a leading role in ensuring proper application of EU law by courts inter alia through the issuance of general principled opinions (general legal standings) on questions regarding the applicability of EU law sources in RM. The later opinions should offer clarifications and appropriate guidance to the lower courts on many important issues, including, on the effect and content of particular SAA provisions, the meaning of the SAA standard clauses as particular grounds for Euro-friendly application of domestic legislation, and the necessity for indirect consultation of the relevant EU instruments and ECJ's jurisprudence by judges in their decisions.

In Albania, apart from the Constitutional Court, which contributes to the uniform application of law domestically through the respected authority of its decisions, uniform law application is additionally ensured by means of ‘unifying decisions’ adopted in joint college by the Albanian High Court on judicial issues selected for examination in order to make unification or change of current judicial practice.

In Serbia, in turn, special procedures have been introduced for ensuring uniform law application, through establishing the possibility for first instance courts, whenever a disputable legal issue occurs in multiple cases, to initiate proceedings (ex officio or on a party’s motion) at the Supreme Court of Cassation to decide (take a standing) on that issue. The decisions thus rendered by the Supreme Court are communicated to the referring lower court and are published in the Official Bulletin of the Court (or on its web page). It is to be expected that, as Serbia further progresses towards membership in the Union, many such referrals would be made by the first instance courts regarding EU law (and international law) related matters, which could contribute to their uniform and proper application in judicial practice.


146 The terminology for denoting these non-binding SC instruments may vary from one to another SEE country, but their substance remains the same. Thus, for the instrument translated as ‘General Legal Standings’ by Radovan Vukadinović et al. and by Maja Kostić Mandić, Sašo Georgievski et al. use the term ‘Principled Legal Opinions’ as being closer to the Macedonian version of the term (‘načelni mislenja’). In any case both phrases relate to ‘interpretative interventions’ adopted at a plenary session by all Chambers of respective SC where the Court provides interpretation of certain legislation or refers to a legal problem etc., aimed at providing unified application of law. The same applies for the terms ‘Legal Opinions’, used by the former authors, and ‘Legal Standings,’ employed by the later authors, for denoting the same SC instrument adopted by all panels of a single Department of the Court aimed at ensuring uniform interpretation and application of law among different panels of the departments. See Vukadinović et al., “Application of EU Law by Serbian Courts,” p. 152-153; Georgievski et al., “Application of the Law of the European Union in the Republic of Macedonia,” p. 124. Whereas, the later SC instruments are formally not binding on lower courts, they are actually followed by the later courts in their practice, so that in theory these are generally regarded as ‘de facto sources of law’.


In principle, in view of the progressive need for a more decentralized pattern of EU law application which is normally assumed upon membership in the Union, but, especially, in view of the fact that there practice is normally more closely followed by the lower (first degree) courts, a primary responsibility for providing uniform EU-consistent national law application should be assumed by higher (second degree) courts. Hence, should the judges at the second degree courts be well trained for the application of the law of the Union and encouraged in developing a proper practice of EU law application, one could expect that it would eventually spill over on the corresponding practice of the - by far most numerous – first degree courts.150

6. Conclusion

The friendly approach towards international law taken by all SEE national constitutions and relevant statutes has opened the door for direct and indirect application by the SEE national courts of the SAAs and other EU related ratified treaties, with the later treaties enjoying supremacy over respective national legislations. Direct application by courts is even possible for certain concrete pieces of EU secondary instruments under some EU-related treaties and national legislation specifically referring to such instruments. Whereas, direct applicability and status of the binding decisions adopted by the SA Councils and by similar bodies created under certain EU related ratified treaties, and that of the not ratified or executive international agreements concluded by the SEE countries with the EU, remain somewhat unclear under the current SEE constitutional monist regimes, the later decisions and agreements enjoy at least indirect applicability in the respective SEE national legal orders.

More importantly perhaps for the particular SEE pre-accession context, and in line with the pre-accession experience of the CEE countries and Croatia, there is a wide open opportunity (and a duty) for the SEE national courts to exhibit EU-consistent application of domestic legislation, especially as regards their already harmonized legislation with the EU acquis. The possibility for EU-consistent application of domestic law exists irrespective of whether it would be grounded on the particular standard clauses provided by the SAAs and other EU-related agreements, on wider teleological Euro-integration objectives, or (less likely) on constitutional clauses on the applicability and status of general international law, or ‘general principles of international law,’ present in some SEE national constitutions.

So far, SEE national courts seem to have followed similar patterns in their actual practice of direct and indirect application of the relevant EU law sources as their counterparts from the CEE region and Croatia from their pre-accession times. So far, there have been only a handful of instances where SEE courts applied directly the respective SAAs or directly applicable specific EU legislation, though their much more expanded record of direct (and indirect) application of the ECHR in view of the relevant ECtHR’s jurisprudence, and of other ratified treaties, might be taken as sending promising signals that direct application of the relevant EU law sources might increase in their future practice. The SEE national courts, in turn, seems to have embraced more readily the opportunity for EU-consistent application of domestic legislation, where an increased, yet, still modest and scattered jurisprudence of indirect consultation of various EU law sources while applying national legislation has already emerged.

While performing EU-consistent application of domestic law, however, SEE national courts have equally demonstrated the presence of the ‘endemic’ syndrome of excessive formalism well-known for the CEE national courts pre- (and post-) EU accession judicial practice, that seems to have been deeply embedded in all SEE national court jurisdictions, not excluding that of Croatia. The

results of our analyses of the current SEE national jurisprudence of indirect consultation of EU law sources, and that of indirect reliance on international law sources of various kinds (including evidentiary and soft-law sources), reveal that such jurisprudence has been predominantly characterized by random selection of consulted EU and international provisions, mere textual reading of these provisions, and lack of any deeper teleological reasoning when relying on EU and international provisions that is imminent to the EU law application. In other words, the current SEE national jurisprudence of EU law and international law application has exhibited all the known features of ‘mechanical jurisprudence.’

All SEE countries have done much for countering the above challenge, especially, by maintaining institutionalized systems for more structured professional education of current and future judges in EU (and international) law, and by making available to a certain extent national and (much less) European relevant jurisprudence for judges. Mechanisms for ensuring uniform application of *inter alia* EU law domestically are already in place, but there has been no visible leadership on matters specifically related to the proper application of the law of the Union provided by the most responsible institutions for uniform law application (i.e. by the national Constitutional Courts and the higher and highest ordinary courts) as yet.

Obviously, a lot more efforts are needed in order to secure a further intensified and better quality application of EU law in the SEE region. Among various possible policy measures, one can suggest at least few pertinent steps. The first relates to the need for further advancement of the current systems for professional education of judges, that is, special courses on EU law, more enhanced than the existent ones, should be introduced at the continuing level of education of current judges. These courses should be made compulsory and gradually available for all national judges, with priority given to judges from the second degree courts in the domestic hierarchy of courts, given their immediate effective role in directing the shape of the practice of the most numbered lower – first degree courts, and to judges from the highest courts. EU law courses should be particularly focused on areas of law of a more immediate concern for judges regarding their domestic legal context, in particular, on specific fields where legal harmonization is happening more intensively under the respective SAAs and other EU-related agreements (in the case of Croatia, under the respective policies and legal instrument of the Union), and to the directly effective provisions of the later agreements and applicable sources of EU law.

As a second step, SEE national authorities and other relevant institutions (e.g. law schools at universities) should consider setting up an institutionalized system for continuous monitoring of the capacity of national courts of each SEE country for EU law application, that would help raising awareness among judges for EU law application and setting up appropriate national policies for gradual increase of their performance regarding EU law application during EU membership pre- (and post-) accession stages. In support of that proposal, the authors of this book have offered an Analytical Framework for Regular Monitoring of the Capacity of SEE Courts’ for EU Law Application, included as Part II of this book.

Overall, the success of whole effort for Europeanization of the SEE national judiciaries would largely depend on whether a gradual shift in the minds of the SEE national judges would occur from pure legalism and textual-formalism when performing the judicial function towards adopting the true features of a genuine ‘European legal culture.’ For achieving that, as Zdeniek Kühn once pertinently suggested in the CEE context, a “new ideological description of the judicial function” would be urgently needed in the SEE. 151 “Mission impossible?” – as questioned by Arsen Baćić at the end of his article in this book. 152 One cannot allow himself to be left without optimism in answer to that.

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CHAPTER THREE

ANALYTICAL FRAMEWORK FOR REGULAR MONITORING OF THE CAPACITY OF SEE COURTS FOR EU LAW APPLICATION
ANALYTICAL FRAMEWORK FOR REGULAR MONITORING OF THE CAPACITY OF SEE COURTS FOR EU LAW APPLICATION

Sašo GEORGIEVSKI (Coordinator)\(^1\)

Abstract

In this Chapter we offer an analytical framework for continuous research of the capacity of SEE national courts for applying EU law during the EU pre-accession (and post-accession) stages, which could serve as an analytical base for future establishment of a comprehensive regular monitoring and reporting mechanism on the potential of courts for EU law application in the particular SEE countries and in the SEE region as a whole. Research under this framework is organized around one independent and six dependent variables detailed in the text together with appropriate research methodology for data collection and analyses. The continuing monitoring and reporting under this Analytical Framework could serve as a practical tool for offering valuable information to the SEE courts and judges and relevant SEE national authorities that would help setting up adequate policies for a gradual increase of the SEE national potential for EU law application. But, above all, it could aid raising awareness among the SEE judges for the need to adopt the true features of a ‘European legal culture’ when performing the judicial function.

Key words: analytical framework – monitoring - EU law – application – capacity - national courts - South East Europe - pre-accession - EU

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1. Introduction

The **main objective** of this Chapter is to develop an analytical framework for continuous research of the capacity of SEE national courts for applying EU law during the EU pre-accession (and post-accession) stages, which would aid setting up policies for a gradual increase of their potential for EU law application before (and after) accession to the EU. That Framework systematically presents and assesses the legal and social conditions that determine the courts performance regarding EU law application in the SEE court practice.

The Analytical framework provided herein could be used for any individual research, but more importantly, it could be employed for maintaining **systematic** and **regular** monitoring of the SEE national courts’ capacity for EU law application. This Analytical framework in fact have an **implied wider purpose** of serving as an analytical base for future establishment of a comprehensive regular monitoring and reporting mechanism on the capacity of national courts for EU law application in the particular SEE countries and in the SEE region as a whole (this component, however, is not part of this book). The later mechanism would assume setting up an institutionalized network of national monitoring units tasked with exercising periodical (annual or biannual) monitoring and issuing regular progress reports on country-specific and regional basis. In such scheme, the primary task of each national monitoring unit would be to perform regular research and reporting on the capacity for EU law application of the courts of its respective country, by using appropriate research methodology mostly suitable to reflect the national specifics of each particular country from the methodological set offered below. At the same time, each monitoring unit could also aid preparing regular comparative reporting on the courts capacity for EU law application for the whole SEE region, by transmitting portions of the research results obtained by it under a unified methodology to a designated regional unit charged with comparative reporting tasks. The first research and reporting conducted by these units under the analytical framework provided herein would serve as a starting base for the comparative research and progress reporting for each successive monitoring period(s), reflecting developments in the SEE national courts’ capacity for EU law application on progressive and continuous bases.

In qualitative terms, the Analytical Framework and the ensuing regular monitoring of the SEE courts performance under that Framework does not include qualitative research on judicial enforcement vis-à-vis the substantive requirements of various EU law instruments that are being implemented or transposed into national legislation as part of the ongoing formal harmonization process, relating to the wider issue of compliance with the EU harmonizing legislation. Rather, the qualitative evaluation aspects present in this Framework focus on the methodology of EU law (and international law) application employed by the SEE national courts while directly and indirectly applying relevant EU (and international) law, when compared with the methodology of law application which is imminent to the later 'external' systems of law. Similarly, the primary interest of the Analytical Framework does not consist of identifying and appraising the relation between the exhibited volume of national jurisprudence where EU law has been applied by SEE courts at particular moments vis-a-vis the total volume of the respective EU harmonizing instruments and/or of domestic transposing legislation, or its share within the total quantity of the respective national courts jurispru-

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2 Thus, the reach and evaluation under this Analytical Framework do not include as particular variables aspects related to *inter alia* the capacity of litigants for invoking EU law in judicial proceedings, access of private parties to the respective national courts, courts interpretations on relevant EU law, reactions by respective national authorities to national litigation, etc. For a specific research on the judicial enforcement of EU law through national courts (in the particular context of public litigation regarding relevant EU directives in the area of environmental law) for instance see Slepčević, Reinhard, "The Judicial Enforcement of EU Law through National Courts: Possibilities and Limits," 16 Journal of European Public Policy 3 (2009), 378, and the authors referred to in that article. On compliance in the Union in general see Börzel, T.A., "Participation through Law Enforcement: The Case of the European Union," 39 Comparative Political Studies 1, 128; Conant, L. Justice Contained: Law and Politics in the European Union. Ithaca, NY: Cornell University Press, 2002.
dence as such. In fact, the later exercise would not be appropriate at this particular moment given the scarcity of the EU law related SEE national courts jurisprudence that can be expected to last as a trend even for considerable number of years following the respective SEE countries’ EU accession (e.g. currently regarding the relevant Croatian courts jurisprudence). Overall, the primary task of the quantitative and qualitative research under the Analytical Framework and the ensuing regular monitoring exercise merely amounts to discerning and comparing the trends in the SEE national courts jurisprudence on EU law application treated as a continuum i.e. as part of the continuous process of Europeanization of the SEE courts. To enable that, the initial and each following periodic research results are to be used as reference points for successive periodic research of the SEE courts’ EU law application performance.

The Analytical framework starts from the basic premise that EU law application by the SEE national courts at the pre-accession stage is not only legally possible, but highly desirable for the appropriate administration of justice and for timely developing a proper European legal culture and appropriate methodological skills among the SEE judges for EU law application. The later would be most valuable post-accession as well, when EU law would take full direct effect and supremacy in the internal orders of the respective SEE countries, and when SEE national judges would assume the function of being (also) ‘European judges’ (already present in Croatia).

Indeed, in Chapter 2 of Part VII of this book, we have concluded that, in addition to Croatia, where the principles of direct effect and supremacy (and other relevant principles) of EU law are fully operational by virtue of its membership in the Union, the constitutional systems of all other SEE countries allow for direct and especially indirect application of certain sources of the law of the Union at the current pre-accession stage. Quite understandably, until this moment, only a handful of instances have occurred where SEE national courts have used that possibility for direct application of the later sources. The SEE national courts, in turn, seem to have embraced more readily the opportunity for EU-consistent application of domestic legislation in view of the relevant EU law sources, where an increased, yet, still modest and scattered jurisprudence of indirect consultation of various EU law sources while applying national legislation has already emerged. However, while doing that, these courts have equally exhibited established patterns of excessive formalism when consulting indirectly EU (and international) law, depicted as ‘limited law’ application, ‘dogmatic textual-positivism,’ or a practice of ‘mechanical jurisprudence,’ in the former pre-accession CEE context. The later patterns may be largely explained as a legacy of the way the judicial function had been perceived and practiced during the ex-socialist times, but they could be also due to a mix of other interrelated factors of an institutional (and even broader social) nature influencing the ‘way of doing

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things’ by the respective SEE judiciaries, partly reflected in our proposed research model, in particular, under the dependent variable 6 below.

Nevertheless, in this Analytical Framework, we assume that the quantity and the quality of EU law application in practice would gradually increase the more particular SEE countries advance towards acquiring membership in the Union, and after their accession to the EU.

Any research on the capacity of national courts for EU law application could not be complete if it is not coupled with similar analyses on their capacity for application of international law. The later need derives from the relative compatibility and convergence between international and EU law in view of the similar constitutional grounds for their application domestically in the period before EU accession, but also from the fact that both these legal systems appear as ‘external’ to national judges when compared with their municipal legal systems, which they are normally called upon and more inclined to address. In other words, “(t)he likelihood that national judges will correctly and properly apply European law increases if they have had some experience with the application of international law, i.e. a legal system other than their own legal system.”7 Hence, the quantity and quality of international law application in practice by national judges could equally serve as a strong indicator for their capacity for properly applying EU law. Our analytical framework for monitoring the SEE court’s capacity for EU law application would include a parallel research of their capacity for international law application, as an indirect source of information on their potential for applying EU law.

2. Research methods

Data collection under this analytical framework will be executed through a combination of the following research methods (combined, or individually employed, as indicated under each research variable below: a) desk research, b) survey, c) focus groups, and d) interviews.

Desk research is a research method that analyzes and interprets data from secondary sources. Having in mind the specifics of our project, desk research will be mainly focused on content analysis of national court decisions from national electronic datasets in the respective SEE countries. It will entail a two-step process. Classification and categorization of descriptive data, and, once that is completed, further processing of such data in a statistical (numerical) measurement of the frequency of certain court rulings.

In order to produce full effectiveness, which would enable comprehensive overview of the national courts’ judicial practice in the respective monitoring period(s), desk research on the relevant national court practice presupposes the existence of an advanced and easily accessible electronic dataset of national jurisprudence within the court systems or at the competent authorities of individual SEE countries. For the moment, electronic datasets of national courts’ jurisprudence exist in all SEE countries, although in most of these countries electronic publishing of national courts’ decisions on the relevant courts’ web-pages is rather selective. The coverage of the available datasets of national jurisprudence varies per different court levels among particular SEE countries, with some

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countries providing for electronic publishing only of the decisions of the higher and highest courts.\(^8\) On the other hand, even the available datasets have been reportedly difficult to search through appropriate search engines all across SEE national jurisdictions, and/or less accessible for prospective users outside of the respective country’s judiciary.\(^9\)

Given the above situation, and until comprehensive datasets of national jurisprudence are fully established for all national courts and made easily manageable throughout the whole SEE region, data-collection through desk research could be performed differently for each SEE country (depending on the available electronically published national courts’ jurisprudence), including, where appropriate, on a sample of relevant national jurisprudence at selected court levels and/or particular courts. In that case, there should be a clear indication that the later exercise inevitably leads towards more restricted research outcomes, merely reflecting current trends in the national jurisprudence instead of providing fully developed analytical results.

**Surveys**\(^10\) are a quantitative method that provides numerical description of perceptions, attitudes or trends of a certain population (i.e. national judges). These outputs are made operational through generalization of results that are based on a sample of that population. Surveys are implemented through collection of responses from a sample of respondents that are related to a survey questionnaire based on (predominantly) closed-ended questions. The collected data sets are subject to statistical analysis.

The survey design for this analytical framework envisions longitudinal measurements that will provide data collected over specific monitoring period(s). The whole exercise entails a specific population that consists of judges from the SEE national courts dispersed in several instances (substantial and geographic). Thus, the survey will be based on a single stage sampling design. The selection process will be a random sample with project specific stratification focusing on the institutional and geographical positioning of the judges in the national court systems. The survey will be executed through an online survey tool.\(^11\) Surveys could be more easily achieved with certain aid and logistical support of the respective national authorities, including courts and/or other relevant bodies (e.g. national training institutions).

Following the methodology of this Analytical Framework, though much similar in their content, appropriate questionnaire(s) should be developed for each respective SEE country for the conduct of the survey(s) that would reflect the particularities of its constitutional system regarding EU law (and international law) application, which should be regularly reviewed and updated for each SEE country as to reflect any changes which might occur between different monitoring periods.

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\(^8\) In general, the decisions of all Constitutional Courts in SEE are electronically available at their respective websites. As to the other courts, in Croatia, the Supreme Court Judgments have been reported as of 1993, and only a selection of the High Administrative Court decisions, and a selection of the High Commercial Court decisions that are of particular legal and public interest, are published. In Macedonia, all ordinary (and Administrative) courts are bound to publish their decisions (after anonymisation) at the respective court’s website by law, whereas in Montenegro, ordinary courts are free to publish on their respective websites only certain (anonymised) decisions on their own choosing. In Albania, only some (highest) courts publish their decisions on the web page of the court. And, in Serbia, only judgments on landmark cases of the Supreme Court of Cassation and of other state-level and higher courts (the Administrative Court, the Commercial Appellate Court, appellate courts) are published on the websites of the respective court. See Georgievski, “Application of the Law of the Union by the SEE National Courts,” p. 181-182, and the authors referred to at that place.


Focus groups are a qualitative method for data collecting. Fundamentally, they present a style of interview in a small group (in our case – a selected small group of national judges). During the collective interview, conscious and unconscious characteristics, attitudes and patterns of thinking would be examined among the respondents (judges). Sometimes, focus groups can be a substitute for polling, if the targeted population is very specific and the goals of the research allow such a situation. Focus groups usually comprise of one moderator, one assistant (for taking notes and audio-visual recording) and eight to twelve members. Besides the responses of the targeted groups, focus groups aim to measure the interaction between the respondents on various issues. Interaction stimulates the scope and depth of the ideas and responses. Relevant data consist of attitudes, impressions, citations, dialogues and non-verbal communication. On occasions, focus groups could start with a small opinion poll on the researched topic, so that later data could be compared to the attitudes by respondents in order to examine whether the collective discussion has changed individual opinions and impressions.

In-depth interview is a qualitative method of data collecting as well. Unlike focus groups, in-depth interview presents a tete-a-tete technique of interviewing a single respondent (e.g. the president of a particular national court, authoritative judge, representative of particular ministry, etc.) The aim of the interview is to get thoroughly acquainted with the orientations, perceptions and attitudes of a single respondent being interviewed by a specially trained interviewer. On one hand, the interview entails asking questions (and having a more or less structured questionnaire) but it also involves precise recording and documenting of the given responses by the interviewee. In terms of the structure of the interview, the most suitable format for our data collection exercise is a semi-structured interview, meaning that, besides having a questionnaire the interviewer must also allow for spontaneity in discussion and should not insist asking questions in a strict order.

3. Research variables

The Analytical Framework for monitoring the capacity of the SEE courts for applying EU law is made operational through a correlation between one dependent and six independent variables presented below.

The constitutional and legal arrangements that govern the applicability and status of EU (and international) law sources in each of the particular SEE countries are used as an independent research variable. Courts and judges apply the law valid at particular times and they must perform their judicial activity within the limits set out by these arrangements. Thus, the research and evaluation of the current and potential capacity of courts for applying EU law (and international law) should take account the limits set out by the applicable constitutional and treaty framework regulating the applicability of the sources of EU (and international) law sources in each of the particular SEE countries for the particular monitoring period, as they may be amended over time.

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The basic premise is that the content and the interpretation of the applicable constitutional and legal provisions for each SEE country are sufficiently clear and that they are relatively accurately determinable under the authoritative statements provided by the leading national courts’ jurisprudence and national and comparative scholarly writings.

For Croatia, as for any other EU member state, the legal framework for EU law application is predetermined by the principles of the law of the Union on direct effect and supremacy (and other relevant principles) of EU law, and by the constitutional provisions enacted by the 2010 Amendments to its Constitution that became effective on July 1st, 2013.14 For the rest of the SEE countries, the current legal framework for EU law application in the pre-accession period is primary provided by the constitutional provisions governing the applicability and status of international law, in particular, with respect to the applicability and status of the respective SAAs and other relevant ratified treaties concluded by a particular SEE country and the Union. A thorough presentation of the currently valid legal framework for each SEE country and comparatively for the whole SEE region is provided in Chapter 2 of this book. In sum, all constitutional systems of the SEE countries allow for direct application of certain EU law sources, that is, of the directly applicable provisions of the respective SAAs and ratified treaties in force between the respective SEE countries and the Union, and of concrete pieces of EU secondary instruments under a reference made by some of the later treaties and specific national legislation.15 More importantly, perhaps, for the particular SEE pre-accession context, these constitutional systems and relevant clauses of the SAAs and EU related ratified treaties have also kept wide open the opportunity for the SEE national courts to exhibit EU-consistent application of domestic legislation, especially as regards their already harmonized legislation with the EU acquis.

The above legal framework for EU law application is reflected all across the dependent research variables of the Analytical Framework presented below, especially, regarding dependent variables 1-3, and these would have to be adjusted appropriately to any future changes in the existent constitutional and statutory regimes that may occur in particular SEE countries at the beginning of each successive monitoring period. In addition, these variables should equally take into account various specifics of each particular constitutional and statutory system pertaining to EU law (and international law) application. For Bosnia and Herzegovina, for instance, due to its “complex state structure,” dependent variables should be shaped appropriately as to reflect the particular constitutional provisions implying a rather unique approach towards EU (and international) law application, including the provision of Article I/IV of the B&H Constitution, guaranteeing market freedoms across the whole B&H in a way ‘mirroring’ the corresponding EU Internal Market Law guarantees, and/or the provisions of specific B&H legislation.16 Or, for Albania, account should be taken for the “integration clause” of Article 122(3) of the Constitution as potential specific ground for the application certain sources of international law (perhaps even of EU law),17 etc.


16 I.e. the B&H Competition Act which had provided legal relevance to the criteria arising from the application of the competition rules in the Community in a way similar to the corresponding Article 70 SAA on competition three years before the conclusion of the SAA, and the related B&H courts related jurisprudence. See Meškić, Zlatan, and Darko Samardžić, “The Application of EU Law in Bosnia and Herzegovina,” Chapter 2 of this book, pp. 61-70, especially pp. 66-70.

17 I.e. for direct application of the binding decisions and regulations issued by international organization in which Albania is a member, maybe even of binding decisions of bodies created by the Albanian SAA. See Caka, Fjoralba, “The Application of the International and European Law by the National Courts in Albania,” Chapter 2 of this book, pp. 27-59, especially pp. 32-33.
For the purpose of conducting a more sustainable research analyses under dependent variables 1-3 below, while determining the constitutional and legal framework for EU law application for each SEE country as an independent variable, it would be useful to indicate and treat separately legal areas of more immediate concern for judges, where EU law sources are more intensively applicable in the domestic context at a given monitoring period. These areas would include, for instance, parts of domestic legislation which are more intensively subject to legal harmonization according to the respective SAAs provisions (e.g. competition, state aids, public procurement etc.), areas of law which are covered by the directly applicable SAA’s or other agreements’ provisions (e.g. the SAAs free movement provisions, etc.), and/or other fields where full or substantial harmonization of domestic legislation has already occurred. For Croatia, as an EU member state, those legal areas of particular concern for judges would have to be identified and explained with respect to the relevant policies of the Union and related EU instruments. The indication of such particular areas should be followed by more detailed explanatory statements on the applicable EU rules (including ECJ’s decisions), and on the manner the latter rules should be applied and/or consulted while deciding appropriate cases by national judges.

The six **dependent variables** of the analytical framework for monitoring the capacity of the SEE courts for applying EU law are separately treated below.

### 4. Dependent Research Variables

Research and monitoring under this Analytical Framework is based on the following dependent variables:

**Variable 1: Awareness of judges for the possibilities and limitations for EU (and international) law application in the respective SEE country’s legal order:**

This variable enables identifying the current level of awareness of the particular SEE country’s national judges for the constitutional and legal framework setting out possibilities and limitations, separately, for direct and indirect application of different EU law sources domestically, as would be outlined in the description of the independent variable for any given monitoring period. The more national judges’ understanding of these possibilities and limitations conform to the authoritatively established content and meaning of the constitutional and other legal provisions governing the applicability of EU law (per different legal sources), the greater would be the potential capacity of courts for properly applying EU law in practice. Such measurement should separately concentrate on the particular areas of more immediate concern for judges identified in the description of the independent variable for each monitoring period as explained above. It also includes measurement of the awareness of judges for direct and indirect applicability of the sources of international law, as an indirect indicator of the courts’ potential for applying EU law.

The most appropriate method for research under this variable should be a combination of:
- a) quantitative survey on a specific stratified sample of judges across all relevant court instances; and
- b) court-specific focus groups with judges.

**Variable 2: Practice of courts of applying EU (and international) law – quantitative measurement:**

The quantitative research under this variable helps discovering the trends in EU law application by particular SEE national courts on a longer run by comparing the volume of the jurisprudence in which different EU law sources have been applied by these courts with the total quantity of the respective national courts jurisprudence at particular monitoring periods. The later research exercise, however, does not have a purpose of its own, given the scarcity of EU-related jurisprudence that exist at the moment and that could be expected in the foreseeable future. Rather, the results obtained
by that research exercise for the particular monitoring period are to be used as reference points for the similar quantitative measurement of the courts output for each successive monitoring period, which would enable identifying developments in the continuing process of EU law application by the respective SEE national courts. Such research does not include comparative measurement of the exhibited portions of EU-related national jurisprudence as against the quantity of the respective EU harmonizing instruments and/or domestic transposing legislation.

The basic hypothesis is that that the higher percentage of decisions in which sources of EU law have been (directly and indirectly) applied in the courts’ practice within the total number of decisions issued in the particular monitoring period (or within a restricted sample of decisions of selected national courts, depending on the availability of datasets of national jurisprudence; See supra Section 2), would indicate higher capacity of courts for applying EU law.

Again, such measurement also includes identification of the share of decisions in which judges have applied sources of international law (as an indirect indicator). It equally assumes separate identification of the share of decisions invoking EU law and international law as per distinct categories i.e. as per direct or indirect application of these sources, and as per particular EU and international legal sources.

As with the previous variable, the measurement on the above lines would separately include independent quantitative measurement of the courts’ practice of EU law application for the priority areas of more immediate concern for judges identified in the description of the independent variable as explained above, as a particular sub-variable on their capacity for EU law application.

In particular, the following specific indicators should be used:

a) the share of decisions in which judges have directly applied sources of EU law (as applicable, depending on the particular SEE country’s constitutional limitations), and especially as regards:

aa) directly applicable provisions of the Stabilisation and Association Agreements;
ab) directly applicable provisions of other agreements concluded by particular SEE countries with the EU;
ac) binding regulations issued by the respective SA Councils and/or bodies established under the SAAs and other (if applicable; in the case of Croatia, directly effective rules of primary sources of EU law)
ad) directly applicable provisions of secondary sources of EU law (by reference to these sources made by the respective SAAs and/or other agreements with the EU and/or specific national legislation; in the case of Croatia, under the applicable principles of EU law and the Croatian Constitution);
ae) general principles of EU law;

and,

b) the share of decisions in which judges have indirectly consulted sources of EU law (in general, or while interpreting already harmonized domestic legislation, as part of the EU-consistent interpretation of domestic legislation), in particular:

ba) provisions of the SAAs and other agreements’ concluded with the EU (including the SA Council’s and other bodies’ decisions);
bb) provisions of primary sources of EU law;
bc) provisions of secondary sources of EU law;
bd) general principles of EU law; including
be) ECJ’s jurisprudence;
bf) EU law related legislation or jurisprudence of national courts of EU member states; and
bg) non-binding sources of EU law, including EU policy instruments, especially, those relating to the particular SEE country’s EU integration (e.g. conditionality documents, etc.).

Regarding the quantitative measurement of international law application, the following specific indicators should be added as supplementary indicators:

c) the share of decisions in which judges have directly applied sources of international law (as applicable, depending on the particular SEE country’s constitutional limitations), especially as regards:

ca) directly applicable provisions of relevant treaties;

cb) directly applicable customary law;

cc) directly applicable principles of general international law;

cd) directly applicable binding decisions or regulations of international organizations; and,

d) the share of decisions in which judges have indirectly invoked sources of international law (while interpreting applicable domestic legislation), in particular:

da) treaties;

db) general international law (i.e. customary law);

dc) general principles of international law, including principles recognized by civilized nations;

dd) decisions or regulations adopted by bodies of international organizations and/or treaty-based bodies;

de) evidentiary sources, including:

dea) international conventions (i.e. law-making treaties, when used as evidentiary sources);

deb) international jurisprudence;

dec) international law doctrine;

dee) international soft law.

In this segment of measurement of the actual courts’ practice it is equally possible to differentiate and compare the share of national court’s decisions invoking EU and international law sources under the above categories and particular indicators per particular types of courts in the court structure of the respective SEE countries (Constitutional, ordinary and specialized courts (if any), higher and lower courts in the national courts’ hierarchy etc.), and as per geographical courts’ location within the particular SEE country and within the region as a whole.

The preferable method for the reach under this variable should be a combination of: a) desk research on the content and statistical analysis of relevant national jurisprudence for the respective monitoring period; and b) quantitative survey on a specific stratified sample of judges across all relevant court instances, as a supplementary method.\(^\text{18}\)

\^\text{18} As noted in Section 2, for the moment, there are differences in the accessibility and scope of coverage of the existent datasets on national jurisprudence among particular SEE countries, leading towards varying data collection and research results among particular countries through the use of the desk research method. Until such datasets are fully established and made easily manageable throughout the whole SEE region, only the data collected through national surveys should be employed for the purposes of performing comparative regional analyses for SEE, since the later require a use of a unified research method in all countries of SEE at the same time. At the level of national research and reporting, however, surveys would only supplement desk research data-collection, as the later method is more appropriate to reflect the national courts’ potential for EU law application.
Variable 3: Practice of courts of applying EU (and international) law – qualitative measurement:

Research under this variable represents the key component of the whole research exercise under this Analytical Framework. As noted in Section 1, it does not amount to a qualitative research on judicial enforcement vis-à-vis the substantive requirements of various EU law instruments that are being implemented or transposed into national legislation as part of the ongoing formal harmonization process, relating to the wider issue of compliance with the EU harmonizing legislation. Rather than that, it focuses on comparing the method of EU law application employed by the SEE national courts while directly and indirectly applying relevant sources of the law of the Union, with the one that is imminent to the later ‘external’ system of law. The EU law approach of law application is different than the one recognized by some authors as ‘limited law’ application, that have been dominating the SEE (and the CEE) national courts’ jurisprudence, including that of the application of the vast amount of the already harmonized national legislation with the Union's acquis. According to Zdeniek Kühn, ‘limited law’ application of domestic harmonized legislation amounts to an approach where the courts consider only “… ‘limited law’ of the texts of harmonizing legislation, not taking into account [EU] law in its full meaning … [including] the texts of European directives, which had to be transposed into domestic law, their reasoning and rationale, which would explain why a particular policy was regulated on the European level, ECJ jurisprudence, and ideally also case law of the EU Member States.”19 As opposed to that method, the EU law application approach is a “non-dogmatic approach towards legal argumentation,” and “… rather pragmatic and instrumental.”20

In our own analyses of the current SEE national jurisprudence of indirect consultation of EU law sources, in Chapter Two of this book, we have identified the presence of the above described symptoms of ‘limited law’ application when SEE judges have been referring to sources of EU law (and international law). We have concluded that indirect reliance on these sources by the SEE courts have been predominantly characterized by random selection of consulted EU (and international) law provisions, mere textual reading of these provisions without any deeper teleological reasoning, and by granting the later provisions a rather supportive role rather than using them as main argument against conflicting interpretations of applicable domestic rules.21 And, we have joined other authors that have been continuously stressing the need for a gradual shift in the minds of the SEE national judges from pure legalism and textual-formalism when performing the judicial function towards adopting the true features of a genuine ‘European legal culture.’22

Research under this variable starts from the main hypothesis that the more national courts directly and/or indirectly apply EU (and international) law in their decisions by resorting to established interpretations and standard interpretation methods characteristic for EU (and international) law application, the greater would be the capacity of courts for properly applying EU law in the

respective monitoring period. The existence of leading authoritative guidance provided by the Constitutional and/or highest national courts to lower courts as to the required manner of EU (and international) law application domestically under the respective constitutional and legal framework would be one strong indicator in that respect. But, research analyses would also focus on a set of other specific indicators for the quality of EU (and international) law application, including the extent of the use of teleological and comparative interpretation methods by judges while interpreting applicable domestic legislation.

The research on the above lines would also include independent qualitative measurement of the courts’ practice of EU law application for the priority areas of more immediate concern for judges identified under the independent variable explained above, as a particular sub-variable on their capacity for EU law application.

In particular, for each monitoring period, research would use as a set of relevant indicators, the share of decisions in which while interpreting directly applied national law and/or directly applicable sources of EU (and international) law national judges have consulted in their decisions:

a) SAA’s provisions and provisions of other agreements concluded with the EU,

b) decisions adopted by the SA Council and bodies created under other agreements concluded with the EU,

c) EU primary and secondary rules,

d) general principles of EU law,

e) ECJ’s case law;

f) EU soft-law instruments (recommendations, opinions, and other soft-law instruments), and policy instruments, especially, those relating to the particular SEE country’s EU integration (e.g. conditionality documents, etc.);

g) EU member states national legislation and/or national courts’ jurisprudence;

For qualitative measurement of international law application - the share of decisions in which national judges have consulted (as supplementary indicators):

h) treaty provisions,

i) customary rules,

j) general principles of international law, including principles recognized by civilized nations;

k) decisions or regulations adopted by international organizations and/or treaty-based bodies;

l) international courts’ and tribunals’ jurisprudence;

m) international soft-law,

n) scholarly writings on international law, including documents issued by authoritative expert bodies (e.g. the International Law Commission, etc.);

o) legal solutions adopted by other relevant countries related to EU and international law, including other countries’ national courts jurisprudence;

And, in particular, the share of decisions in which national judges have resorted to:

p) teleological reasoning (as opposed to the pure formalistic ‘textual reading’ of the applied rules), including on the policy rationales underlying the particular rules applied in the respective decisions, abstract general principles, wider objectives and needs of their country’s integration process etc.
In addition, the quality of EU (and international) law application by national courts would be assessed by the degree to which national judges attach effective role to EU (and international) law in their decisions. Relevant research would first concentrate on identifying the share of decisions issued in the respective monitoring period in which national judges have been applying directly applicable provisions of the particular SAAs, of other agreements concluded with the EU, and/or of applicable EU instruments (depending on the respective SEE country), as well as directly applicable international rules, when merely supporting applicable domestic rules, as compared with the share of decisions in which judges have applied these provisions and rules instead of conflicting domestic rules. Larger share of the later decisions vis-à-vis the former ones would indicate higher quality of the courts’ practice regarding EU law application in the relevant monitoring period. Of course, such assessment would be directly dependable on the extent to which relevant EU (and international) rules enjoy supremacy over domestic sources under the particular SEE country’s constitutional and other applicable legal provisions.

On the other hand, in the context of indirect application of EU (and international) law, particularly relevant is the data on the amount of decisions in which national judges have been relying on EU (and international) rules as a supportive argument for reinforcing a pre-established interpretation of the applied domestic rules, compared to that of decisions in which judges have relied on these rules as a main argument for dismissing alternative interpretations of the applied domestic rules. Again, a greater share of decisions of the latter category vis-a-vis that of the former decisions would indicate higher quality of the courts’ practice regarding EU law application.

Given the importance of authoritative guidance provided by the Constitutional and/or highest national courts to lower courts as to the required manner in which EU (and international) law should be applied, additional special indication for the quality measurement of the SEE national courts practice in applying these laws could be provided by: a) the existence of statements of principle in the decisions issued by the Constitutional Courts and/or national highest courts and/or higher courts regarding the appropriate approach to be taken towards EU (and international) law application, as well as the b) the number of ‘general legal standings’ related to EU (and international) law issued by the appropriate highest courts (as applicable, depending on the particular SEE legal system); and c) the number of references on EU (and international) law related matters actually submitted by lower courts for authoritative interpretation by the highest courts (where such possibility

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The above interpretative instruments issued by the respective highest courts (Supreme Courts) are possible in the SEE countries that derive from ex SFRY. While the terminology for denoting these non-binding SC instruments may vary from one to another SEE country, their substance remains the same. Thus, in Macedonia, the terms “principled Legal Opinions” is often used as being closer to the Macedonian version of the terms (‘начелни мисленja’), than the term “general Legal Standings” often used in the rest of these countries. In any case both phrases relate to ‘interpretative interventions’ adopted at a plenary session by all Chambers of respective SC where the Court provides interpretation of certain legislation or refers to a legal problem etc., aimed at providing unified application of law. See Vukadinović, Radovan, Milovanović, Dobrosav, Janićjević, Dejan, and Vuk Cucić, “Application of EU Law by Serbian Courts – Pre-Accession Issues,” Chapter 2 of this book, pp. 141-156 at p. 152-153; Georgievski et al., “Application of the Law of the European Union in the Republic of Macedonia,” p. 124. Whereas, the later SC instruments are formally not binding on lower courts, they are actually followed by the later courts in their practice, so that in theory these are generally regarded as ‘de facto sources of law’. In the case of Albania, in turn, a special place in ensuring uniform law application (inter alia od EU and international law) is reserved for the Albanian High Court by means of issuing ‘unifying decisions’ adopted in joint college by the Court on judicial issues selected for examination in order to make unification or change of current judicial practice, which could be also taken as a special indicator for performing a quality evaluation of the national courts’ EU related jurisprudence. See Caka, “The Application of the International and European Law by the National Courts in Albania,” p. 36.
exists), and the number of decisions on these references issued by the respective Constitutional or highest courts, in the particular monitoring period.

Research under this variable should combine: a) desk research on the content and statistical analysis of relevant national jurisprudence for the respective monitoring period; and b) quantitative survey on a specific stratified sample of judges across all relevant court instances.

**Variable 4: Professional training of judges for EU law application:**

Research would equally concentrate on identifying the level of professional training on EU (and international) law acquired by national judges (in general, and in the EU law application related SEE country’s specific legal context). Such research would be conditional on the prior identification of the available training programs offered to judges by the relevant national training institutions and by other bodies in the particular SEE country, including the amount of training courses on EU (and international) law offered to judges, and the content and teaching methods practiced in these training courses compared to standard methods required by the particular disciplines of EU and international law (interactive case-based teaching, promoting teleological reasoning, consulting the ECJ’s and other relevant international courts and tribunals etc.). The larger share of judges that have already acquired specific EU law (and international) law professional education within the total number of judges, especially in the priority areas of more immediate concern for judges identified under the independent variable as explained above, and the greater intensity and scope of specific EU (and international) law training acquired by those judges within the overall legal training system, would indicate higher potential of judges for adequate EU law application.

However, the normative framework and application of professional trainings would not be a sufficiently accurate indicator of the actual achievement in acquiring sufficient skills by judges if it is not coupled with perception measurements of the output of these training activities. Research under this segment would also include perception analyses regarding the quality of EU (and international) law education already acquired by judges. A further indicator for that could be the perception of judges on their need to receive some form of expert assistance on EU (and international) law while deciding cases in which EU (or international) law has been invoked e.g. through the establishment of specialized EU (and international) law sections within the respective courts, receiving general legal standings or other form of guidance by the highest courts, having recourse to the Constitutional or highest courts on EU law related matters, using expert witnessing (amicus curiae) during court proceedings etc. In addition, research analyses should reflect the actual professional language skills of judges regarding foreign language mostly used in the relevant documents and in the literature related to EU (and international) law (e.g. English, French, German).

Research method under this variable should combine: a) desk research of the content and level of implementation of EU (and international) law related trainings for judges; b) survey; and c) focus groups - court-specific.

**Variable 5: Organizational capacity of courts for EU law application:**

This part of the research would refer to some internal organizational aspects of the courts’ institutional structure that could have a more direct bearing on their capacity for EU law application. Specific indicators would include:

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24 E.g. in Serbia, where a special procedure has been introduced for ensuring uniform law application through establishing the possibility for first instance courts, whenever a disputable legal issue occurs in multiple cases, to initiate proceedings (ex officio or on a party’s motion) at the Supreme Court of Cassation to decide (take a standing) on that issue. The decisions thus rendered by the Supreme Court are communicated to the referring lower court and are published in the Official Bulletin of the Court (or on its web page). See Vukadinović et al., “Application of EU Law by Serbian Courts,” pp. 153-154.

25 See supra note 18.
a) the existence of separate sections within national courts’ internal structure specialized for EU law;

b) the existence of the possibility for issuance of general legal standings by the highest courts in the particular SEE country;\(^\text{26}\)

c) the existence of the possibility for lower courts to refer EU (or international) law related matters for authoritative decision to the Constitutional or highest courts;\(^\text{27}\)

d) the accessibility of EU and international sources of law to judges via internet (e.g. via CEL-EX, HUDOC etc.); and

e) the accessibility of national courts’ decisions in a published or electronic form.

Affirmative data on all these parameters would indicate higher potential of courts for EU law application.

Research methods should combine: a) desk research on the institutional set-up of the judiciary; and b) in-depth semi-structured interviews with court and competent authorities’ officials.

**Variable 6: Judges’ perceptions on the wider socio-political EU-integration-related context potentially linked to their judicial practice of EU-law application:**

Judges are not isolated from the rest of society, and they are not completely immune to the wider socio-political concerns surrounding EU integration of their particular countries, that may have more or less indirect bearing on their judicial practice related to EU law application. According to the basic assumption of judicial politics research, courts should be equally considered as political institutions whose decision-making is not derived from an abstract and constant ‘legal truth’.\(^\text{28}\)

Indeed, there are considerable possibilities for more or less strict interpretation of the relevant law by judges – in our case – of the imperative to apply EU law properly according to the established national constitutional and legal framework for EU law application. Judges could have varying attitude regarding the later imperative (depending on their understanding of the wider EU-integration related issues), with different consequences on individual and overall quality of EU law application by national courts.

This sections’ aim is to identify the prevailing perceptions of judges regarding the wider socio-political EU-integration context in the particular monitoring period which may be potentially influential on their actual judicial practice of EU law application. The extent to which judges express more or less favorable attitude towards key general and specific issues underlying their country’s EU-integration process, linking that attitude with their EU-law related judicial practice, would reflect higher or lower overall courts’ potential for EU law application within the limits set out by applicable national law. The following specific indicators would be used for establishing that judges’ attitude:

a) how judges view the current SEE particular country’s EU integration process, and in particular:

aa) are they more or less favorable towards their country’s need to join the EU (in the case of Croatia - towards the country’s current membership in the EU)?;

ab) do they see their current country’s integration process (including the ongoing legislative harmonization process) as democratic enough?;

ac) how would that reflect on their current decision-making when they would be called upon to apply EU law: would their position on the above issues influence their decision

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\(^{26}\) See supra note 23.

\(^{27}\) See supra note 24.

to (directly or indirectly) apply EU law in specific cases, in particular, when there would be sufficient latitude to choose between its application or non-application under the current national constitutional regime?

ad) would the perceived remoteness of their country’s accession to the EU have a bearing on judges’ decision to (directly or indirectly) apply EU law?

b) while deciding a case in which EU law has been invoked, would judges attach more importance to their country’s sovereignty, constitutional identity and/or perceived national interests, or to their country’s euro-integration needs or interests, in case of a conflict between these?

c) while deciding a case in which EU law has been invoked, would judges be influenced by the prevalent public opinion and/or their government’s publically announced positions regarding particular EU-related issue appearing in that case?

Appropriate research methods: quantitative survey on a specific stratified sample of judges across all relevant court instances.

5. Monitoring the SEE Courts’ Capacity for EU Law Application Following the Respective Countries’ Accession to the EU

The analytical framework for monitoring the SEE national courts’ capacity for applying EU law described above is equally applicable for the research and assessment of these courts’ capacity after their respective countries’ accession to the Union. Given the particular requirements assumed by membership in the Union with respect to the application of EU law domestically, certain elements of that analytical framework would have to be accordingly adjusted. For the moment, only Croatia is a full member of the EU, and such adjusted framework would be readily employable for the research and monitoring of its courts’ capacity for applying EU law.

In particular, the following adjustments in the above framework would have to be made:

a) The research independent variable used in the framework, reflecting the constitutional and legal arrangements that govern the applicability of EU sources of law in the respective country’s internal legal order, would have to take into account, apart from (and in correlation with) the national constitutional ones, the specific legal requirements deriving from the operation of the principles of direct effect and supremacy of EU law in the internal orders of EU member states (and other related principles, including EU law procedural guarantees), as these have been developed in the ECJ’s and the comparative member state courts’ jurisprudence. More specifically, it would have to include: aa) the legal conditions for direct effectiveness of particular EU rules and provisions (i.e. the requirements that these should be ‘clear and unconditional’); ab) the legal requirements pertaining to the effect of particular EU sources of law, in particular, of EU directives, including those related to the principles on incidental effect, indirect effect, etc., ac) the national courts’ obligations for ‘harmonious interpretation’ of domestic law and ensuring effet utile to EU law, their obligations regarding ad) the operation of the principle of supremacy of EU law, and those of ae) ensuring the

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procedural guarantees granted by EU law (including on member states’ liability for violation of EU law) etc.;

b) Research under dependant variables 1-3 would equally have to reflect the above specific legal requirements deriving from the full operation of EU law: the indicators for the assessment of the awareness of national judges for the possibilities (and limitations) for EU law application under variable 1 (including data collection through survey and focus group and the related questionnaires) would have to include these legal EU requirements; and the later requirements should be also reflected in the particular categories and specific indicators for the quantitative measurement of the actual SEE courts’ practice in applying EU (and international) law (as indicated correspondingly under Variable 2), and, to an appropriate extent, in those for to the qualitative measurement of that actual courts’ practice (under variable 3);

c) Research on the courts’ organizational capacity for EU law application could add as a specific indicator the number of cases referred to ECJ by national courts under the preliminary ruling procedure in the respective monitoring period(s), with the larger quantity of referrals indicating lower preparedness of national courts’ for autonomous dealing with EU law related cases; and

d) The specific indicators on the assessment of the prevailing perceptions of judges regarding the wider socio-political EU-integration context which may be potentially influential on their judicial practice of EU law application (under Variable 6), would have to suffer minor adaptations as to reflect the particular country’s status as a member of the EU (as indicated above).

As already stated, the adjustments of the analytical framework on the above lines should equally embrace research and data collection through survey and focus group methods and the related questionnaires.

5. Conclusion

Understandably, so far, there has not been an abundant practice of EU law direct and indirect application developed by the SEE national courts, and in the existent quite modest EU law related jurisprudence, these courts have been exhibiting well-known patterns of ‘limited law’ application. As these countries’ walk deeper on their European integration path, such practice would naturally increase, and it is imperative for the SEE national courts to gradually adopt on time the appropriate methodology for EU law application when performing the judicial function, by abandoning pure legalism and excessive textual-formalism that is currently dominating in their EU related jurisprudence.

It is our firm belief that setting up a comprehensive mechanism for regular monitoring of the capacity of national courts for EU law application in the particular SEE countries and in the region could be a useful instrument for achieving the above goal. It could be a practical tool for offering valuable information to the SEE courts and judges and relevant SEE national authorities that would help setting up adequate policies for a gradual increase of the SEE national potential for EU law application before and after EU accession. But, above all, it might aid raising awareness among the SEE judges for the need to adopt the true features of the ‘European legal culture’ when performing the judicial function. With that in mind, we have tried to contribute modestly to the realization of that idea by offering an initial Analytical Framework that may be used within a mechanism for regular monitoring of the capacity of SEE courts for EU Law application, in a hope that such mechanism would be established in the near future.
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Books


Articles


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Contact:
South East European Law School Network (SEEELS)
Centre for SEEELS
Faculty of Law "Iustinianus Primus"
Bul. Gozi Detchev 1/b
1000, Skopje, Macedonia
www.seeelawschool.org
centre@seeelawschool.org

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