The Unfulfilled Potential of Stabilisation and Association Agreements Before SEE Courts

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1 Introduction

Stabilisation and association agreements have been a vital part of the EU's enlargement policy toward SEE countries. Building on and to a large extent replicating the provisions of the so-called 'Europe agreements' concluded with the CEE states that joined the EU in 2004,[1] SAAs have so far been signed with Macedonia and Croatia (2001), Albania (2006), Montenegro (2007), Serbia and Bosnia and Herzegovina (2008), and negotiations on an SAA with Kosovo opened in 2013.[2] Of those that have been signed, the Macedonian (2004), Croatian (2005), Albanian (2009),

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[1] Blockmans and Lazowski (2006), p. 3.

[2] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part [2005] OJ L26; Council of the European Union, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part (6.6.2008) 8226/08; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ L107; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part [2010] OJ L108; Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part [2013] OJ L278.

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Montenegrin (2010) and Serbian (2013) SAAs have entered into force. The SAA for BiH has been ratified by Bosnia and Herzegovina as well as by all the EU Member States, but not by the EU itself.

Within the EU's enlargement policy, SAAs are seen as a way of imposing conditionality on potential candidates, based on the idea that the '*tangible* prospect of EU membership is the key instrument for transformation of the Western Balkans'.[3] They have been used to encourage reforms in a wide range of areas, including regional cooperation and human rights protection, by giving association countries access to the EU market and, even more importantly, by giving a concrete shape to their EU membership aspirations.

There is a wealth of literature on these systemic aspects of the SAAs.[4] This chapter will look at a different issue, however: the use of SAAs by courts in legal disputes. There has been a certain amount of EU case law on the effects of similar instruments in the legal orders of the EU Member States.[5] In addition, we know that the Europe agreements in particular were read by the high courts of some of the Member States that joined in 2004 as imposing wide-ranging interpretative duties, in effect creating a 'back door' for the application of EU law even before accession.[6] What we do not know, at least not in a systematic fashion, is whether the same has been true in the SEE countries, i.e. with respect to the SAAs. Looking at their content, the SAAs should provide at least as much material for judicial application as the Europe agreements. At least some of their provisions are capable of having direct effect under EU standards. Besides, like the Europe agreements, they contain provisions on the approximation of laws that could be read as imposing a duty on SEE courts to interpret national law in the light of EU law even before accession.

This chapter will argue that, despite these similarities, the evidence seems to show the SAAs have, by and large, not been relied upon to impose broad interpretative duties in the SEE states, such as the duty to interpret national law in the light of EU law. In addition, they have rarely been relied upon directly before national courts in order to disapply national law. They have, however, had a more practical

[3] Blockmans (2006), p. 315.

[4] See e.g. Blockmans (2007); Elbasani (2008); Kellermann et al. (2001); Kellermann et al. (2006); Noutcheva (2009), p. 1065; Phinnemore (2003), p. 77; Renner and Trauner (2009), p. 449.

[5] See, among others, Case 270/80 *Polydor Ltd. and RSO Records Inc v. Harlequin Record Shops Ltd. and Simons Records Ltd 2* [1982] ECR 329; Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A* [1982] ECR 3641; Case C-192/89 *S.Z. Sevince v. Staatssecretaris van Justitie* [1990] ECR 3461; Case C-63/99 *The Queen v. Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk* [2001] ECR I-6369; Case C-268/99 *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie* [2001] ECR I-08615; Case C-438/00 *Deutscher Handballbund eV v. Maros Kolpak* [2003] ECR I-4135; Case C-265/03 *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol* [2005] ECR I-02579; and Case C-101/10 *Gentcho Pavlov and Gregor Famira v Ausschuss der Rechtsanwaltskammer Wien* [2011] ECR I-5951.

[6] See Sect. 3.2 below, as well as the national reports on the Member States with Europe agreements in Kellermann et al. (2006).

effect in areas where the SAA makes a specific reference to the EU *acquis*—notably in competition law.

This chapter attempts to cover all the association countries that are signatories to the SAAs. Slovenia, as one of the 2004 Member States and party to a 'Europe agreement' rather than an SAA, is covered only in passing. For Croatia, the judgments mentioned in the text were collected by way of a search of various case-law databases. For the other SEE states, the chapter relies on information given either in the national reports or by their authors.

2 The Basic Elements of the SAAs

The SAAs, based on today's Article 217 TFEU,[7] are examples of so-called mixed agreements that impact areas of exclusive Member State competence and therefore require ratification by all of the Member States as well as the EU and the association country. While based on the Europe agreements concluded with the CEE countries, they have been adapted in several respects for the states of the Western Balkans. Thus, for example, unlike the Europe agreements, the preambles of the SAAs do not mention accession, but only the EU's 'readiness to integrate' the association countries 'to the fullest possible extent' and their status as 'potential candidates' for EU membership. In addition, the objectives of the SAAs—and thus also the kind of 'conditionality' that these instruments promote[8]—are somewhat broader, referring to respect for democratic principles, human rights, international law and the rule of law[9] as well as to intra-regional cooperation.[10] The 'operative' provisions of the SAAs, however, are largely similar to those of the Europe agreements. This is certainly true of the provisions that are most likely to be applied by a court, such as those on free movement of goods or competition.

In broad terms, all of the SAAs share the following features.

Firstly, all of them require the association countries to gradually approximate their legislation to the EU *acquis* by the expiry of a transitional period, the duration of which differs (5 years after the SAA's entry into force for Montenegro, six for BiH, Croatia and Serbia, and ten for Albania and Macedonia). They also require the approximation to initially focus on certain areas, mostly those that are relevant for the internal market. The precise priorities differ to some extent (e.g. in the case of Serbia and Montenegro, justice, freedom and security is also mentioned as a priority

[7] The Article states: 'The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.'

[8] Rodin (2006), p. 357.

[9] See Art 2 of all the SAAs.

[10] Art 11 SAA Croatia and SAA Macedonia; Art 12 SAA Albania; and Art 14 SAA Serbia, SAA Montenegro and SAA BiH.

area, while SAA Albania contains a more detailed list of substantive policy priorities[11]). There are also more specific harmonisation clauses requiring the association states to gradually implement the EU *acquis* in areas such as intellectual property, standardisation and consumer protection.[12]

Secondly, they contain trade liberalisation provisions modelled on the TFEU free movement and competition rules. The provisions on customs duties are asymmetrical, giving preferential access to EU markets to the association countries immediately while allowing them to temporarily maintain protectionist measures.[13] Some provisions, notably those on the free movement of goods and competition, can be described as 'mirror provisions' whose content is almost identical to equivalent Treaty rules, while others, such as those on workers or services, do not go as far. The SAAs contain, among other things:

- standstill clauses (prohibitions of new or higher tariffs);
- prohibitions of quantitative restrictions on imports and measures of equivalent effect;
- prohibitions of fiscal discrimination;
- rules on non-discrimination of workers and the access of their spouses and children to the labour market;
- rules on the freedom of establishment;
- rules on the 'supply' of services;
- rules on current payments and the movement of capital;
- provisions on public-policy justification of restrictive measures;
- provisions on competition (agreements, abuses of dominant position, state aids[14]);
- specific rules on public contracts, intellectual property protection, standardisation and consumer protection.

These rules had already largely been taken over by the so-called interim agreements, the purpose of which was to implement the SAA trade liberalisation provisions even before the entry into force of the SAAs.[15]

[11] Art 70 SAA Albania and BiH; Art 69 SAA Croatia; Art 68 SAA Macedonia; Art 72 SAA Montenegro and SAA Serbia.

[12] See, for example, Arts 71, 73 and 74 SAA Croatia.

[13] Arts 17–20 SAA Albania; Arts 19–21 SAA BiH, Montenegro, Serbia; Arts 16–18 SAA Croatia; Arts 16–19 SAA Macedonia.

[14] In this respect, all of the SAAs except SAA Macedonia go farther than the Europe agreements in that they require the association states to not only establish an independent competition agency, but to empower it to order the recovery of unlawfully granted aid (para 4 of the relevant SAA competition provision).

[15] See, for example, the Interim Agreement on trade and trade-related matters between the European Community, of the one part, and Bosnia and Herzegovina, of the other part (2008) OJ L169, which is currently in force.

Thirdly, the SAAs contain provisions on justice and home affairs and on cooperation in various policy areas.[16] While important, these elements of the SAAs seem to be less amenable to judicial application. Indeed, the judgments reported below deal only with the provisions of trade liberalisation and approximation of laws.

Fourthly, they contain financial and institutional provisions. Most importantly, they create Stabilisation and Association Councils that supervise the application of the agreements and have the power to adopt various decisions or delegate them to a Stabilisation and Association Committee.[17]

Finally, the SAAs allow rather ill-defined sanctions for non-compliance with various provisions. Most importantly, they allow the EU as well as the association countries to 'take appropriate measures' in the case of a breach of the agreement.[18]

3 Applying the SAAs in Legal Disputes

The SAAs could be applied by SEE courts in two main ways. Firstly, courts can apply the SAA itself, either directly or indirectly. In practical terms, the consequence of applying the SAA directly would usually be to disapply or annul (where this is possible) a conflicting national measure. Courts could also apply the SAA as such indirectly, by interpreting national law in the light of its provisions.

Secondly, the SAA could trigger the consistent interpretation of national rules with the EU *acquis*, beyond the provisions of the SAA itself. The most interesting aspect of this second option is its ability to introduce the rules of EU law through a 'back door' of sorts: arguably, at least in some cases, the SAAs require national courts to apply national rules in accordance with the requirements of EU law, including CJEU case law. It seems that the SEE legal orders examined in this book recognise this to some extent. Not even within particular states, however, is there agreement on how far this obligation can go.

The second option is different from the first in that the courts apply EU law (legislation, case law or even soft law) that is not contained in the SAA itself, and perhaps not even directly referred to in the SAA. This distinction may not be as significant as it seems. We can take the example of a court that is applying—whether directly, by refusing to apply a conflicting provision of national law, or indirectly, by interpreting national law in the light of the SAA—an SAA provision on restrictions on imports of goods. Let us imagine, quite realistically, that the court would wish to inform its interpretation of the SAA provision by looking at the

[16] See, for example, Titles VII and VIII of SAA Croatia.

[17] The role of these bodies varies in different states. The Croatian implementing legislation, for example, made the decisions of the Stabilisation and Association Committee subject to parliamentary approval, thus stripping this provision of much practical value.

[18] See e.g. Art 120/2 SAA Croatia.

CJEU case law on the equivalent provisions of the founding Treaties, perhaps even citing it in the judgment. What is the 'legal source' or legal authority in this case: the SAA as such, or EU law beyond the SAA? The answer is not perfectly clear, but it is probably not important either, as long as we accept the possibility that courts may support their chosen interpretation of law by something other than formally binding, *ex ante* identifiable 'sources of law' (more on this below). There is a problem, however, if one believes that a legal provision, even one as open-ended as a prohibition of 'measures having equivalent effect to quantitative restrictions on imports', can or should be applied by only looking at the text of the provision itself. From that point of view, to inform the interpretation of the provision by anything other than its text would be to *apply* another source of law, which could be described as illegitimate.

The second option may not, therefore, be as different from the first option as it seems. Within the second option, however, there is a practically important distinction between two forms of consistent interpretation. The first and more obvious form is to rely on the provisions of the SAAs that explicitly require or allow the use of various EU law interpretative mechanisms, such as case law or Commission decisions. This is the case with the SAA provisions on competition law. While there is some controversy in using this sort of consistent interpretation, it has nevertheless by and large been accepted in the SEE states.

The second form of consistent interpretation, however, has so far found little fertile ground. This is the possibility of invoking general clauses that require the SEE countries to approximate their legal rules to EU law. According to some authors, since the harmonisation clauses are addressed to the State as a whole, they should also be relevant for courts. The way courts should implement this duty is to interpret national rules, in areas where this is relevant, with the requirements of EU legislation and case law.

In the following sections, I will look at whether and how these options (the direct application of SAA provisions, the application of EU law through general harmonisation clauses and through explicit SAA references in competition law) have been used by the SEE courts.

3.1 Direct Application of SAA Provisions

The most important prerequisite for applying SAA provisions before national courts is that the constitution allows for the direct effect of international treaties. In order to deal with conflicts with domestic rules, the constitution should also specify that treaties are hierarchically superior.

These prerequisites are to a large extent fulfilled in all the analysed SEE States. International agreements have both direct effect and supremacy over national law in Albania, Croatia, Macedonia, Montenegro, Serbia and Slovenia. Bosnia and Herzegovina seems to be a more complex case: a clear constitutional provision on the direct effect of international agreements and their relationship with

conflicting national laws only exists in relation to treaties explicitly listed in the Constitution, which does not include the SAA. The national report, however, concludes that the SAA should, upon its entry into force, also be recognised as having direct effect and as being superior to domestic laws.[19] Similarly to Bosnia and Herzegovina, the constitutional approach to the application of international law in Kosovo is also rather complex, granting priority to the rather unclear category of 'legally binding norms of international law' and a set of human rights conventions, including the ECHR. As for a future SAA for Kosovo, it seems that it would fall under a constitutional provision that pronounces ratified international agreements to be 'part of the internal legal system ... directly applied except for cases when they are not self-applicable and the application requires the promulgation of a law'.[20]

The national reports reveal only a small number of cases where the SAAs were directly applied against a provision of national law or a measure adopted by national authorities. Thus, the Albanian Constitutional Court invoked the SAA standstill clause, prohibiting the introduction of new or more restrictive quantitative restrictions on imports and measures having equivalent effect, against a decision of the Albanian Council of Ministers. The decision treated domestically produced diesel oils more favourably than imports and imposed a ban on importing a particular type of diesel oil. The Constitutional Court concluded that the decision violated the SAA standstill clause, as well as its provision on measures that 'constitute a means of arbitrary discrimination or a disguised restriction on trade'.[21]

In *Makpetrol v. Ministry of Finance Customs Office*, the First Skopje Basic Court similarly disapplied two by-laws imposing customs duties in violation of the Macedonian SAA and interim agreement. This judgment is the only example found for the purposes of this book of an ordinary court disapplying a provision of national law on the basis of the SAA. The court even made a declaratory finding that the provisions were 'no longer in force' because they conflicted with the SAA and the interim agreement.[22]

On the other hand, there seem to be no examples of indirect application of an SAA (re-interpreting a provision of national law in the light of an SAA provision). Similarly, neither has the direct application of an SAA provision led to more extensive reliance on EU law beyond the SAA itself. When SEE courts directly apply a substantive provision of an SAA (i.e. not in cases when they rely on SAA

[19] See the chapter by Zlatan Meškić and Darko Samardžić, Application of International and EU Law in Bosnia and Herzegovina.

[20] On these issues, see Art 122 of the Albanian Constitution; Art II of the Constitution of Bosnia and Herzegovina; Art 141 of the Croatian Constitution; Art 19.1 of the Constitution of Kosovo; Art 118 of the Macedonian Constitution; Art 9 of the Montenegrin Constitution; Arts 16 and 94 of the Serbian Constitution; Art 8 of the Slovenian Constitution. For more details, see the respective national reports.

[21] See the chapter by Gentian Zyberi and Semir Sali, The Place and Application of International Law in the Albanian Legal System.

[22] See the chapter by Marija Risteska and Kristina Miševa, Application of International Law in Macedonia.

provisions on the approximation of laws, which raise their own consistent interpretation issues which will be discussed below), it might seem quite likely that they would also take into account EU law outside the confines of the SAA itself, such as CJEU case law. Indeed, at least with the so-called 'mirror provisions' which are almost identical in content and similar in aims to the provisions of EU Treaties, common sense dictates that the SAA cannot be adequately understood without considering EU case law or other parts of the *acquis*. This does not mean that SEE courts would be bound by CJEU case law, in the sense that they should achieve the same outcome. The CJEU has, for its part, found that the interpretation of mirror provisions can be different from the interpretation of equivalent Treaty provisions due to the less ambitious nature of the legal documents in which they are contained. As a consequence, the level of protection of SAA rights can in some cases be lower than in equivalent intra-EU cases.[23]

It is questionable whether SEE courts would openly follow such an approach. This may be explained by a general reluctance to openly discuss interpretative choices.[24] Most of the cases analysed in this chapter seem to follow an all-or-nothing logic: EU law is either followed to the letter, or not at all. Adapting the interpretation of a similarly worded legal instrument, depending on the context, could prove to be an unnatural exercise for SEE courts, which seem to be accustomed to viewing legal texts either as binding 'sources of law' or as largely irrelevant. For most SEE courts, the use of foreign law, international law, scholarly writings or other sources in support of a particular argument, much less as so-called 'persuasive authority',[25] is uncommon. There are exceptions to this, in particular constitutional courts, which do frequently refer to international or transnational law, but this is almost exclusively limited to the ECHR and the decisions of the European Court of Human Rights.[26]

The conclusion is that an SEE court disinclined to apply an SAA provision would be more likely to find it wholly inapplicable or not to have direct effect rather than to contrast it with CJEU case law and show why the SAA contextually warrants a lower level of protection, because the latter strategy would require a shift in the usual mode of argumentation applied by those courts.

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[23] See, in particular, *Polydor* (paras 14–21) and the other judgments cited in n 5.

[24] For a similar conclusion regarding the CEE states, see Kühn (2005a), p. 563; Kühn (2005b), pp. 55, 63. In the Croatian context, see Ćapeta (2005), p. 23 and Rodin (2005), p. 1. As Bobek points out, of course, this may not be an issue for SEE or CEE judges alone, and one should not be overly optimistic about either the desirability or the capacity of ordinary courts in general to adopt broad principle-based legal interpretations. See Bobek (2006), p. 265.

[25] On the difference between 'binding' and 'persuasive' authority, as well as on the oft-noted contradiction of describing an authority as 'persuasive', see Schauer (2008), p. 1931.

[26] In the case of Croatia, extensive citation of ECtHR case law by the Constitutional Court has become commonplace, while at the same time it remains very rare in the decisions of any other courts, even the Supreme Court. Cf. Ćapeta (2005), p. 37. In Montenegro, the ECHR is also the most frequently cited source of international law, most notably in the decisions of the Supreme and Constitutional courts (see the chapter by Dušan S. Rakitić, Judicial Application of International Law in Montenegro).

There are judgments that lend support to this conclusion. The Croatian Constitutional Court, for example, rejected a complaint related to a customs procedure during which imported goods were reclassified under a higher tariff heading. The applicant claimed that the decision of the customs authority violated the 'general principles' of the SAA, including the 'duty of the Republic of Croatia to ensure the application of legal rules aligned [with EU law] in administrative and judicial practice'. This rather abstract argument seemed to be based on Article 73 of the Croatian SAA, requiring Croatia to 'take the necessary measures in order to gradually achieve conformity with Community technical regulations' and 'start at an early stage' to 'promote the use of Community technical regulations and European standards, tests and conformity assessment procedures.'

The Constitutional Court rejected this argument out of hand, finding that the provision 'does not give rise to any rights for individuals' and therefore 'cannot be the basis for the provision of constitutional protection to the applicant'.[27]

Looking at the facts of the case, the decision not to rely on the SAA may have been unsurprising. Indeed, it is unclear from the judgment how customs reclassification procedures would be affected by European technical regulations and standards or why the decision to reclassify was contrary to them. What is remarkable, however, is the broad rejection of the use of SAA harmonisation provisions as a basis for the protection of individual rights. This particular issue will be examined in more detail in the following section.

3.2 Mandatory or Optional Application of EU Law Through Harmonisation Clauses

In the CEE states that acceded in 2004, there were a number of examples of using the harmonisation clauses contained in their 'Europe agreements' as a basis for interpreting national law in conformity with EU law. Thus, in 1997 the Polish Constitutional Tribunal found that the agreement's general harmonisation clause creates a duty for Polish courts to interpret existing legislation so as to ensure conformity with EU law as much as possible.[28] The Czech Constitutional Court found in 2001 that primary EU law is 'not foreign law' and that it should be applied by courts, especially when it comes to 'general principles of law'.[29] The Slovenian case also seems to prove the point; in her report, Hojnik points out that it was generally accepted that Slovenian courts should, on the basis of the SAA, '*mutatis mutandis* apply the case law of the Court of Justice of the European Union in cases concerning mirror provisions of the Treaty establishing the European

[27] U-III/4961/2005 (NN 47/08), judgment of 2 April 2008, para 9.

[28] Case K. 15/97 (OTK 19/1997). For more details and other related judgments, see Kühn (2005b), pp. 61–63.

[29] The Milk Quota case (410/2001 Sb.). See Kühn (2005b), p. 66.

Community'.[30] Even the Hungarian Constitutional Court, in its 'Europe agreement' judgment which is otherwise not at all 'friendly' towards the pre-accession reliance on EU competition rules, found that national law can in principle be interpreted in the light of the SAA obligations on a non-mandatory basis.[31]

As already outlined, the SAAs contain clauses similar to the clauses of Europe agreements that led CEE courts to read interpretative duties (or, at least, interpretative possibilities) into national law. Article 69 SAA Croatia, just to give one example, provides that 'Croatia shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*', starting on the date of signature of the SAA and gradually extending 'to all the elements of the Community *acquis* referred to in this Agreement' within 6 years after its entry into force—i.e. by 1 February 2011. In addition, there are similar, more specific harmonisation clauses for areas such as intellectual property (Art 71), technical regulations, standardisation and normisation (Art 73, as referenced above), statistical cooperation (Art 83), cross-border broadcasting (Art 97), electronic communications (Art 98) and energy (Art 101).

Given the experience of the CEE states, it might be expected that these SAA provisions would have a similar impact on courts. This was also advocated in the local legal literature.[32] Under this view, for example, a party could indirectly invoke CJEU case law on electronic communications or a directive on energy markets liberalisation as an argument in favour of a particular 'EU-friendly' reading of national law, on the basis of the SAA harmonisation clause, even before accession. The reasoning behind this is that courts are also charged with the duty of (gradual) alignment with EU law, especially if one takes into account the rather obvious point that alignment with the *acquis* is not and cannot be simply a formal process of legislative adoption. Alignment has to relate to the actual implementation of the *acquis*, and that question is clearly one for the courts.[33]

Thus, courts should at least have the option to take EU law into account when deciding how national law should be interpreted. Ćapeta has gone even further and argued that Article 69 of the Croatian SAA not only allows, but requires, such a consistent interpretation—at least when applying legislation that is specifically intended to harmonise Croatian law with the *acquis*.[34]

Practice, however, has by and large not followed this approach. While SEE courts have at times dealt with various sources of EU law, there has been no consensus in any of the analysed states (apart from Slovenia, apparently) that there is a general duty to interpret national law consistently with EU law pre-accession. Some judgments that went in that direction were rebuked by subsequent

[30] See the chapter by Janja Hojnik, Judicial Application of International and EU Law in Slovenia.

[31] 'Europe Agreement Judgment', judgment No. 30 of 25 June 1998, VI.3. See also Volkai (1999), p. 25, as well as Harmathy (2001), p. 315.

[32] Ćapeta (2006), p. 1443.

[33] Ibid, pp. 1475–1479.

[34] Ibid, pp. 1482–1483.

practice, and there have been no straightforward decisions of a high court, such as a constitutional or supreme court, imposing that duty, unlike the Polish and other examples above. In fact, if we disregard the special case of competition law (see below), even the non-mandatory use of EU materials in adjudication has been considered problematic at times.

This is not to say that international or EU law is never cited by SEE courts. Curiously, national courts have on occasion made use of EU law in a completely amorphous way—without clarifying why it is pertinent or what its effect is. One example of this is the Albanian Constitutional Court's judgment in *Instituti i Ekspertëve Kontabël të Autorizuar*. The Court invoked Directive 2006/43 on statutory audits of annual accounts and consolidated accounts[35] as support in order to reject a claim that the national law on auditing was unconstitutional. It found, for example, that State supervision of auditors did not violate the independence of the profession, *inter alia* because such supervision is required by the Directive. Thus, hypothetical conformity with EU law was used as an argument for the actual conformity of the law with the Albanian constitution, though without clarifying the precise basis on which EU law was taken into account.[36]

The Serbian Supreme Court of Cassation similarly supported its findings in a family law dispute by referring, in general terms, to the provisions on the right to family life and children's rights of the EU Charter of Fundamental Rights—again, without explaining why the Charter was a relevant legal source.[37] In Croatia, Zagreb County Court dealt with a collective claim raised by a group of NGOs against the discriminatory statements of a football official about homosexuals. The plaintiffs invoked the ECJ judgment *Firma Feryn*,[38] in which an executive's general statements against hiring immigrants were considered discriminatory. The County Court distinguished between the two cases because they dealt with different discriminatory grounds—a distinction which seems rather irrelevant. The key point, however, is that EU law was taken into account and discussed almost as if it was binding on Croatian courts—without explaining why or on what basis.[39]

These cases could, of course, be just random examples that show no general trend. On the other hand, they do suggest that, on occasion, invoking EU law in a general, non-specified manner can be a helpful strategy for litigants. As will be discussed, however, when the argument is based more closely on the SAA or

[35] 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 [2006] OJ L157/87.

[36] See the chapter by Gentian Zyberi and Semir Sali, The Place and Application of International Law in the Albanian Legal System.

[37] Judgment of the Appellate Court in Belgrade, Rev. 2401/2010 of 28 April 2010. See the chapter by Mirjana Drenovak Ivanović and Maja Lukić, Judicial Application of International Law in Serbia.

[38] Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* [2008] ECR I-5187.

[39] Zagreb County Court, judgment 15 Pnz-6/10-27 of 6 April 2011.

framed in terms of a legal obligation, courts seem to take a more conservative approach—often saying that unless an EU act or decision is formally recognised as a source of law, it cannot be used. If this suggestion is true, a paradox seems to be at play: the more a plaintiff invests in explaining why 'foreign' sources should be used, the less likely he or she is to succeed. The paradox could be explained, however, by the frequent all-or-nothing attitude of SEE courts to using legal materials: if something is presented (explicitly or even tacitly, as was perhaps the case in the three judgments just cited) as a 'source of law', it must be applied and followed, and if it is presented as something less than that, it must be rejected. Another, simpler, explanation could lie in the fact that these three cases dealt with EU legislation. Even though EU legislation is no more binding prior to accession than, for example, CJEU decisions, it could be the case that courts accustomed to using only legislation as a legal source are more likely to accept references to non-binding legislation than to non-binding case law or soft law.

In any event, there are a number of examples of SEE courts refusing to interpret domestic law in the light of EU sources. One of them is the Serbian Constitutional Court judgment in *ERC Commerce Computers*, a customs classification case. While the judgment did not turn on SAA obligations, it had to do with an even more persuasive 'back door' for the application of EU law: a provision of the Customs Tariff Act requiring the mandatory application of customs classification decisions published in the Official Journal of the EU. The applicants, having lost their case before the customs authorities and the Administrative Court, attempted to invoke *Kamino International Logistics*,[40] a judgment in which the CJEU dealt with the classification of products similar to those at stake in the Serbian case.

Regardless of the merits of the case, it seems quite clear that, in order to properly apply EU legal acts, one should interpret them in the way that they are interpreted in the EU, and this means having a look at ECJ case law. The applicant's plea asking the Constitutional Court to do so was, however, rejected 'because the... Customs Tariff Act provides that only decisions on the classification published in the Official Journal of the European Union are legally binding'.[41]

Some Croatian courts also seem to follow this approach. The High Commercial Court, in a 2007 ruling, rejected a party's attempt to use the SAA as a basis for relying on the Treaty 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 Court's view was that reliance on EU law beyond the confines of the SAA is not permitted, the sole exception to this being the SAA provision on competition law which explicitly refers to 'criteria arising from the application of

[40] C-376/07 *Staatssecretaris van Financiën v. Kamino International Logistics BV* [2009] ECR I-1167.

[41] Decision of the Constitutional Court of the Republic of Serbia, Už-4787/2011 of 24 November 2011. See, similarly, the Constitutional Court's decision on the Judges Act, where arguments based on various non-binding international documents were rejected as these are not 'formal sources of law' under the Constitution. See further the chapter by Mirjana Drenovak Ivanović and Maja Lukić, Judicial Application of International Law in Serbia.

the competition rules applicable in the Community'. The SAA rules on IP, the Court reasoned, only require Croatia to achieve 'a level of protection of intellectual, industrial and commercial property rights similar to that existing in the Community', which means 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'.[42]

This was a kind of pigeon-holing: because Croatia is not an EU Member State, this case is not about quantitative restrictions, but only about the exercise of trademark rights. Therefore, the Court looked only at the SAA provision dealing with IP, and not the one prohibiting quantitative restrictions—which would have been much more on point. The case could have been simply distinguished on the facts (the allegedly infringing goods were imported from Turkey, and not from the EU), or perhaps dealt with in a more nuanced way, acknowledging the application of EU law through the SAA 'back door' but reading it in a more flexible way than required under Article 34 TFEU (see above). Instead, the High Commercial Court suggested that EU law was irrelevant to such cases as a matter of principle.

Similarly, the Croatian Administrative Court in 2010 overturned a Competition Agency state aids decision partly because of its reliance on the Community guidelines on state aid for rescuing and restructuring firms in difficulty, a non-binding Commission document. 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 in any other Croatian law or legal rule, cannot be a source of law.[43]

Interestingly, this ruling was adopted in spite of the well-established case law of the Constitutional Court that allows the interpretative use of EU law in competition cases (see below).

There are also some opposite examples. In three related judgments on trademarks from 2006, the Croatian High Commercial Court seemed quite open to reading the SAA as imposing a duty to interpret national rules consistently with EU law. Thus, it drew support from the Trade Marks Directive 89/104 to prevent a

[42] Judgment of the High Commercial Court of the Republic of Croatia Pž 5155/07-3 of 11 December 2007.

[43] Judgment of the Administrative Court of the Republic of Croatia Us-5362/2007-10 of 3 November 2010. Curiously, the Croatian Supreme Court—the highest Croatian court if we disregard the special case of the Constitutional Court, and in charge of harmonising the case law of all courts below—has largely been absent from the debate. To my knowledge, it has referred to the SAA in only two judgments. Neither of those cases had much of a connection to the SAA (they were deposit payment disputes), it was not clear why the plaintiffs were invoking it, and the Supreme Court's only finding was that the SAA could not be applied given that it had not yet entered into force at the material time (judgment 1301/2007-2 of 21 February 2008 and judgment 796/2007-2 of 7 October 2008).

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. In the first judgment, the Court reasoned that the Directive can be used 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*'.[44] In the second and third judgments, the Court was even more detailed, finding explicitly 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*'.[45] While these statements seem to go quite far, their value is rather limited. The first reason for this is that the 2007 judgment by the same chamber of the same court, as described above, goes in an entirely opposite direction.[46] Secondly, as in the cases where EU law was referred to without a clear legal basis, the openness of the court to consistent interpretation in these cases could be explained by the fact that a legislative text—a Directive—was at stake. Whether this would hold, for example, if an important CJEU judgment on trademarks was invoked, is questionable. The final reason is the fact that there was never clear support for this view in the case law of either the Croatian Constitutional Court or the Supreme Court (whose task is to ensure conform interpretation in the judicial branch).

As an interim conclusion, while it is still early days for many of the SAAs, the overall picture shows very little evidence of the pre-accession use of EU law on the basis of an interpretative duty imposed by the SAAs. To some extent, however, an exception can be made in the area of competition law, the subject of the next section.

3.3 Privileged Areas: Competition Law

Competition law, including the rules on state aids, is a more promising avenue for pre-accession reliance on EU law. This is because of explicit SAA provisions requiring national courts and competition agencies to assess restrictive agreements,

[44] Judgments of the High Commercial Court of the Republic of Croatia Pž 639/06-3 of 23 February 2006 and Pž 8064/04-3 of 17 May 2006.

[45] Judgment Pž 2330/05-3 of 13 June 2006. Curiously, the Court also added that, as a consequence of the SAA's 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 SAA's 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.

[46] It could perhaps also be added that the composition of the chamber deciding all four of the judgments was identical, except for the first 2006 case in which one of the members of that chamber was deciding as an individual judge.

abuses of a dominant position and state aids[47] 'on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles [101, 102, 106 and 107 TFEU] and interpretative instruments adopted by the Community institutions'.[48] These 'criteria' and 'interpretative instruments' include legislation, various soft law measures such as Commission Guidelines and Notices, the case law of the Court of Justice and the General Court of the EU, as well as Commission decisions in competition cases.

On the face of it, this duty only relates to anticompetitive behaviour that 'may affect trade' between the SEE state involved and the EU. This excludes behaviour that does not affect cross-border trade and would therefore, in the EU context, only fall under national competition law. Nevertheless, national legislation and practice do not always take the borderline between the two very seriously. Thus, the Croatian Competition Act provides, rather loosely, that Croatian authorities will 'in accordance with [Art 70 of the SAA], particularly in the case of legal voids and uncertainties relating to the interpretation of competition rules, accordingly apply the criteria arising from the application of the competition rules applicable in the European Community'.[49] This can be read as imposing an interpretative duty even in cases that do not affect trade with the EU, and it seems that this is what happens in practice. The Croatian Competition Agency has relied on EU materials whenever they seemed pertinent in terms of subject matter. From the EU's point of view, this reliance on EU competition law solutions even in areas where those rules cannot apply is not problematic: indeed, the Court of Justice has recently accepted jurisdiction in a preliminary reference where the national court explicitly said that there was no effect on trade, but claimed that national competition law nevertheless requires courts to take EU law into account.[50]

The interesting question for the purposes of this chapter is whether courts accept this wide-ranging use of EU law in pre-accession competition cases, and how that compares with the pre-accession use of EU law in other areas. The general answer—based, it should be said, on a relatively limited body of judgments—is that competition law cases are indeed different. SEE appellate courts have been more open to the use of EU law in these cases than elsewhere, albeit not without controversy.

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[47] The SAAs do not refer to concentrations, but national competition laws may extend this duty to follow EU law to that area as well (as was the case in Croatia, for example).

[48] Art 70 SAA Croatia.

[49] Zakon o zaštiti tržišnog natjecanja (NN 79/09, 80/13), Art 74. A translation of the 2009 version of the act can be found at http://www.aztn.hr/uploads/documents/eng/documents/COMPETITION_ACT_2009.pdf. The State Aid Act of 2005, as amended in 2011 (NN 140/2005, 49/2011), contained a similar provision (Art 6/4), requiring the Croatian Competition Agency to apply these 'criteria' accordingly, in line with Art 70 SAA. The 2013 State Aid Act (NN 72/2013, 141/2013) removes this provision, as part of an overall simplification required by EU accession and the shift of authority to the Commission in state aid decisions.

[50] Case C-32/11 *Allianz Hungária Biztosító Zrt. and Others v. Gazdasági Versenyhivatal* (14 March 2013, nyr).

So far, apart from Croatia, there is only one such case in the national reports: the *ASA Auto*[51] judgment of the Court of Bosnia and Herzegovina. Even though the SAA of BiH had not, and still has not, entered into force, the Competition Act—adopted even before the ratification of the SAA—contains a provision enabling the Competition Authority to 'take into account the practice of the ECJ and the decisions of the European Commission' when deciding a case. In *ASA Auto*, the Court found an abuse of a dominant position following the legal test laid down by the ECJ in its *IMS Health*[52] judgment. While the judgment itself was not cited, the Court of BiH referred both to the provision of the Competition Act allowing for the use of EU law and, in general terms, to the case law of the ECJ. It seems that this reliance on EU law raises no constitutional issues in BiH.[53]

In Croatia, a fairly extensive body of case law has developed on these issues. The debate was launched by the Administrative Court,[54] charged with reviewing Competition Agency decisions. In three judgments from 2006, it took different positions on whether EU law can be used by the Agency. In October 2006, it held that:

> the [SAA and the Interim Agreement] could have 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 in any other Croatian law or legal rule, cannot be a source of law.[55]

Only a month later, however, a different chamber of the same court found in two related judgments that the Agency was wholly justified in relying on EU legal sources as well as soft law, not just because that is required by the provisions of the SAA, the Interm Agreement and the Competition Act, but also because it helps improve the predictability and clarity of the legal standards that the Agency will apply. In addition, the judgments found that EU law can be relied upon in this way even in the case of anticompetitive agreements concluded before the entry into force of the interim agreement, given that the purpose of the interim agreement and the SAA is to eliminate existing restrictions of competition.[56]

Deciding on a constitutional complaint against one of the latter judgments, the Constitutional Court broadly agreed. In response to the argument that 'criteria,

[51] Court of BiH, decision No. S1 3 U 005412 10 Uvl of 15.3.2012, M.R.M. Ljubuški/ASA Auto d.o.o. Sarajevo (*ASA Auto*). See the chapter by Zlatan Meškić and Darko Samardžić, Application of International and EU Law in Bosnia and Herzegovina.

[52] Case C-418/01 *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG* [2004] ECR I-5039.

[53] See the chapter by Zlatan Meškić and Darko Samardžić, Application of International and EU Law in Bosnia and Herzegovina.

[54] At the time, this was the only administrative court in Croatia. Today, there are four administrative courts and a High Administrative Court.

[55] Judgment of the Administrative Court of the Republic of Croatia Us-5438/2003-7 of 26 October 2006.

[56] Judgment Us-555/2003-4 of 9 November 2006 and judgment Us-4832/2003-6 of 9 November 2006.

standards and interpretative instruments' of EU law cannot be applied unless they are taken over and published as Croatian law, the Court considered that these materials are not 'primary sources of law' but only an 'auxiliary interpretative tool'. In a sense, the Court played down the role of EU law as one of merely 'filling in legal voids' in a way that 'conforms to the spirit of national law'.[57]

This distinction between 'primary' and 'interpretative' sources of law can be challenged as a matter of principle.[58] More to the point, it is highly questionable whether what the SAA requires falls into the latter category. After all, the SAA does not merely allow Croatian authorities to refer to EU materials, but it requires them to apply national competition law in line with them. To give one example, following the SAA, in a case that affects trade between the EU and Croatia, the Competition Agency would almost certainly not be at liberty to depart from the interpretation provided by CJEU case law. The SAA therefore intends precisely for EU law to bind national authorities and to be used in a way that affects the outcome. The fact that the various legal materials referred to by Article 70 of the SAA are not formal sources of law, for instance in the sense of independently giving rise to a cause of action, seems irrelevant given that they fundamentally affect the actual content of the legal rules as applied by the authorities. The Constitutional Court's talk of 'auxiliary interpretative tools' was therefore rather misleading, since it could lead to the conclusion that Croatian institutions are free to follow the EU competition law *acquis* or not, even though the SAA as well as national competition law clearly require them to do so.[59]

In a subsequent judgment, the Constitutional Court repeated the 2008 ruling on this point. Interestingly, however, it completed the citation by stating: 'Croatian competition bodies are authorised and obliged to apply the criteria' arising from EU law.[60] Adding the word 'obliged' would seem to go against the notion that EU law is not used as a 'primary source of law', but only as a gap-filling mechanism that does not contradict Croatian law.

Regardless of these quibbles, the Constitutional Court judgments were a win for the Competition Agency, legitimising its reliance on EU law. An interesting question, however, is whether they go farther than that. Specifically, in the 2008 judgment the Court supported its findings by adding that the competition law harmonisation clause (Art 70 SAA) should be viewed in the context of Croatia's duty to align itself with the *acquis*. This meant 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'.

[57] For an extensive commentary of this decision, see Stanić (2008), p. 247.

[58] See e.g. Schauer (2008), p. 1931.

[59] In that sense, the Europe Agreement judgment of the Hungarian Constitutional Court, declaring a decree on the implementation of the Europe agreement to be unconstitutional because it required the application of EU competition law criteria, was more honest. See n 32.

[60] Judgment U-III/4082/2010 (NN 28/11) of 17 February 2011 para 7.1.

This statement is so general that it could be read as applying not only to Article 70 SAA and the competition rules, but also to all other areas where alignment with EU law took place, i.e. wherever the general SAA harmonisation clause is relevant. Whether the Constitutional Court actually meant to go that far is an open question, and so far we do not know if this has been (or will be, in the limited subset of cases in which the Croatian SAA may still be relevant) taken up by other courts. The cases referred to in Sects. 3.1 and 3.2, where courts have not always been friendly to reliance on EU law, mostly predate the judgment of the Constitutional Court. There is, however, no subsequent case law showing more openness to consistent interpretation. If anything, the 2010 Administrative Court judgment, rejecting the use of EU law even in a clear-cut competition case (see Sect. 3.2), shows that the message has not come across.

4 Conclusion

This chapter has covered the judgments in which either the SAAs, or EU law in general, were invoked or applied prior to EU accession in the states covered in this book. Admittedly, the sample is limited to what could be found in various case law databases (the case of Croatia) and to what was reported by the authors of the other national reports. It is possible that some relevant cases were missed.

With that *caveat*, several tentative conclusions can be made.

Firstly, the SAAs and EU law in general can be applied in a number of ways. Some of these seem to have been followed more frequently than others. The following table lists them, along with some examples (Table 1).

Overall, the SAAs seem to have had rather limited effect. None of the SEE states have been particularly open to applying the SAAs or to imposing extensive pre-accession interpretative duties. For example, unlike the case in some of the Member States that joined the EU in 2004, there have been no conclusive judgments of the high courts of the SEE states that make it clear that the SAAs impose a general duty to interpret national law in line with EU law. Some judgments found that such a duty exists, but they were contradicted by later judgments of the same court or other courts.

Table 1 Overview of different ways of applying the SAAs or EU law pre-accession

Ways of applying SAAs/EU law	Legal basis for applying SAAs/EU law
Application of the SAA itself	Direct application (e.g. *Makpetrol*)
	Indirect application (no examples found)
Application of the EU *acquis* on the basis of the SAA	General harmonisation clauses (the Croatian High Commercial Court judgments of 2006)
	Specific interpretative duties or references to EU law, such as in competition law (e.g. *ASA Auto*; the Croatian Constitutional Court judgments of 2008 and 2010)
Amorphous citation of EU/-international law	Unclear (e.g. the Croatian NGOs case)

In addition, there are very few cases where the SAAs were applied directly or where a conflicting provision of national law was disapplied. In Croatia, for example, it seems there were no such cases in the eight years in which the SAA was in force prior to accession. In addition, there seem to have been no cases anywhere in which national law was (re-)interpreted in light of the provisions of the SAA itself, or where a court conducted a *Polydor*-like analysis of 'mirror provisions', comparing the interpretation that should be given to an SAA provision to that given to an equivalent Treaty provision by the CJEU.

The only exception to this rather limited role of EU law prior to accession has been competition law, where the SAAs make an explicit reference to the 'criteria' and 'interpretative instruments' of EU law. This 'back door' for the application of EU law has been grudgingly accepted, despite some controversy (see, for example, the 2006 case law of the Croatian Administrative Court, as well as the 2010 judgment of that court that again refuses the application of EU law, in contrast to the Constitutional Court).

Finally, in some cases international or EU law has been used in a non-specified way, without clarifying its relevance or the basis for citing it. Paradoxically, SEE courts seem to be willing to rely on EU law, especially EU legislation, as long as no one raises the question of *why* they should do so. If that question is raised, however, they are more likely to take a conservative stance and refuse to take EU law into account, given that it is not a binding 'source of law'. This response is given not only when EU law is claimed to be binding authority (meaning that national law *has* to be interpreted in the light of EU law), but even in some cases where it is invoked as persuasive authority or merely as a supporting argument (i.e. an interpretative choice that the court *can*, but need not, make).

I have suggested that the reasons for this paradox are similar to those that explain the general reluctance to rely on EU or international law. SEE courts seem to build their decisions by either fully relying on something as a 'source of law' or by simply refusing to apply it (finding, for example, that a provision has no direct effect or that it is irrelevant to the case at hand). Adapting the interpretation of a legal source in the light of other legal or non-legal material, including EU law, is not a part of the toolbox with which judges usually approach cases. Thus, EU law can be applied if it is somehow recognised *ex ante*—not necessarily on the basis of an explicit discussion—as a 'source of law'. If, however, it is invoked in the context of a general duty to re-interpret another source of law, it may encounter resistance. This is also why explicit legislative or Treaty references to EU law, as in the case of the SAA provisions on the EU competition *acquis*, make it much more likely (but not certain) to have an impact.

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