# ENFORCING INTERNATIONAL FREE TRADE THROUGH ADJUSTMENT OF DOMESTIC LAW

## STRATEGIC THINKING ON THE LONG ROAD TO LEGAL INSTITUTIONALISATION


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**Abstract:** This paper draws upon legal analysis to assess the outcomes of enforcing international free-trade through adjustment of domestic law. The free-trade agreements have facilitated free movement of goods, services, capital and persons on the basis of adjustment of legislation, by a single objective of harmonization on the supranational basis. The efforts of free-trade aims to institutionalize countries with new policy competencies through legal adjustment. Each free-trade agreement has the potential to shed light upon how the economies benefit from each other. A difficult task in a politically and legally diverse background of prospective countries from the Western Balkan requires new approach towards adjustment in the field of the competition area. This paper addresses the simple question, why some free-trade agreements succeed and why the others fail in order to achieve the objectives in the countries of the Western Balkan

**Title:** Enforcing international free trade through adjustment of domestic law - Strategic thinking on the long road to legal institutionalization.

**Keywords**: Free Trade Agreement (FTA), Stabilization and Association Agreements (SAA), Western Balkan Countries, Competition clauses, International free trade.

***Resumen:*** *Este artículo recurre al análisis legal para evaluar los resultados de la aplicación del libre comercio mediante la reforma del Derecho interno. Los acuerdos de libre comercio han facilitado la libre circulación de bienes, servicios, capitales y personas basándose en la reforma de la legislación, con el único objetivo de la armonización a nivel supranacional. Por ello, la aplicación del libre comercio pretende dotar a los países de nuevas políticas competenciales a través de la reforma de su normativa interna. Cada acuerdo de libre comercio tiene el potencial de esclarecer cómo las economías de los países pueden beneficiarse mutuamente. Una labor difícil en el contexto política y legalmente diverso de países como los Balcanes occidentales exige un nuevo enfoque encaminado a la reforma del Derecho de la competencia. Este artículo analiza por qué algunos acuerdos de libre comercio tienen éxito y por qué otros fracasan en la consecución de sus objetivos en los países de los Balcanes occidentales.*

***Título:*** *La aplicación del libre comercio internacional a través de la reforma de la legislación nacional: Pensamiento estratégico en el largo camino hacia la institucionalización legal.*

***Palabras clave****: Acuerdo de Libre Comercio, Acuerdos de Estabilización y Asociación, Balcanes occidentales, Cláusulas de competencia, Libre comercio internacional.*

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## I. Introduction

This paper draws upon theoretical research method from comparative legal analysis to assess the outcomes of enforcing free trade through adjustment of domestic law. The free trade agreements (FTAs) have facilitated free movement of goods, services, capital, and persons. The EU and countries of Western Balkan countries during the past decade have signed the FTAs, known as Stabilization and Association Agreements. The adjustment of legislation in these countries, which fosters, even more, the free trade amongst countries is still lacking and ambiguous. One important part of FTAs contains the provisions on the competition law. However, there are some uncertainties among different countries in the Western Balkan are still being felt today in terms of institutionalizing new policy competencies in the field of competition law. Each FTA has the potential to shed light upon how the economies of these countries benefit from each other in the meaning of market economy with free competition. A difficult task in a politically and socially diverse background of six prospective Member States from the Western Balkan requires new approach towards adjustment of competition law. This paper addresses the simple question, why some FTA provisions succeed and why the other fails in order to achieve the objectives towards adjustment of competition law.

As a supranational rule with supremacy over the national laws of twenty-seven countries and more than five-hundred million citizens, the EU law holds a magnetic attraction to the prospective countries. Membership presents unparalleled opportunities for legal change. Due to the path of political processes, the Western Balkan countries have crossed at positive curves when signed the FTAs (namely SAAs) with the EU. The expansion of EU policy through the SAA with the WB countries has long intrigued legal scholars and legal processes. Some critical theoretical and empirical spots remain, particularly regarding the factors that contribute to the success or failure to change state behavior and policy outcomes in specific issue of free trade such as enforcement of competition law. To date, this area of law has been advanced on the conditions under constant pressure by the EU in establishing legal change through adjustment of national legislation. Given the remarkable contribution of the EU to the development of the European legal system within WB countries, a focus on enforcement is mandatory. That the EU has historically issued legal rulings on expanding its authority and economic transformation, is an thriving fact. Over time, the EU managed to weave for an economic model that went far beyond what its founders have anticipated. Indeed, scholars have paid little attention to the extent at which the WB countries ought to engage in adjusting in a given policy area or its

development. In the WB countries there remains a deficiency of theoretical and empirical research into the reasons why one effort to institutionalize competition policy fails. This paper seeks to redress that proportion with respect to two very specific policy areas.

## I. The gravity of the free trade

The basic philosophy of the FTA between every country has to be based on the concept of common development market. Free trade agreements (FTAs), which are set up by member countries, create job opportunities, provide good working conditions for workers and companies and could transfer of skills and technology. These benefits provide good economic effects on the national and local level of the parties. However, without the practical application of the FTA, there would be no economic effect on the society at the whole. If one party adopts the FTAs policies to pursue only political gains without serious consideration on practical application, then these political activities will result in downsizing or lower their aspiration for EU internal market. This will cause downsizing of integration that would inevitably result in the loss of aspiration and willingness to become part of the EU. These situations could be related as bringing damage to the principles of free market rules, which are one of the important rules of the European Union (EU).

The concept of free market rules constitutes part of TFEU (Articles 4(2)(a), 26, 27, 114 and 115 of the Treaty on the Functioning of the European Union (TFEU).[1] Competition law protects the free market rules, company law and other related legislation. Taking an example from the SAAs in WB countries, the EU since 1999 has applied to these the free trade agreements towards potential membership after fulfilment of all membership criteria.[2] Around two decades ago at Selanik Summit to justify its argument regarding future enlargement, the EU supported the process and ultimately decided that WB countries are part of the European integration process upon positive implement reform agenda within a period of ten (10) years after signing the SAA. This is an example which shows that the gravity at an EU internal market is transferred gradually to WB countries by free trade agreements.

[1] Consolidated version of the Treaty on European Union, *OJ C 202, 7.6.2016, p. 13–388 (EN)*. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT [Accessed on 25.03.2017]

[2] Communication from the Commission to the Council and the European Parliament on the stabilisation and association process for countries of South-Eastern Europe - Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, former Yugoslav Republic of Macedonia and Albania. /* COM/99/0235 final */ Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51999DC0235&from=EN (Accessed on 26.03.2017)

The first act of the EU which intended to integrate mainly WBs countries through better economic reform was promulgated in 2000 in Zagreb while providing integration into the EU's common market. Then, the first perspective was put into practice for Croatia. These agreements were proposed to Macedonia in 2004, Albania in 2006, Montenegro 2010, Serbia in 2013, Bosnia and Hercegovina in 2015, and Kosovo in 2015. The main contents of these agreements are a set of provisions which promise to provide the same benefits under the SAA to promote stability and economic development in the Western Balkans and the prospect of EU integration.

## II. Types of The trade agreements already in place

The EU negotiates trade agreements to strengthen the economy and create jobs within respective countries. These agreements enable European businesses to compete more effectively and export more to countries and regions outside the EU and vice versa. Also, FTAs provide better access to markets and consumers from around the world into the EU. This increases trade, grows the economy of countries and gives consumers a wider choice of products at competitive prices. EU trade agreements also require partner governments to protect human rights, labor rights and the environment and rule of law in general. The commitment to enforcing these issues in practice is of particular value.[3]

Main types of agreement already in place are:

1. *Customs Unions which eliminate customs duties in bilateral trade and establish a joint tariff for foreign importers,*
2. *Association Agreements, stabilization agreements, and economic partnership which remove or reduce customs tariff in bilateral trade,*
3. *Partnership and cooperation agreements, which provide a framework for bilateral economic relations.*

In every free trade agreements, the EU has provided competition clauses, or the statement concerning free market rules or free market economy. It says that the Parties recognize that it is inappropriate to encourage trade activities by infringing competition rules, safety or environmental measures or lowering domestic market standards, derogate from such measures and standards as an encouragement for the establishment, abuse of dominant position or distorted practices of the market in its area of application. This competition policy does refer to the EU declaration of the free market rules and WTO policies.

[3] European Commission, Free Trade Agreements. Available at: http://ec.europa.eu/trade/policy/countries-and-regions/agreements/ (Accessed on 26.03.2017)

The EU trade policy is one of the hubs of its relations with the rest of the world (Article 207 of the TFEU), as well as an exclusive EU competence (Article 3 of the TFEU).[4] On behalf of all EU countries, the European Commission handles trade issues, such as negotiating trade agreements with non-EU countries. The EU is active in the World Trade Organization (WTO). It supports the abolition of trade and customs barriers. To defend its market, it uses such as antidumping and anti-subsidy measures, the trade regulation, and safeguards measures.

The trade policy is managed through rules for international trade, namely the basic rules and disciplines of WTO law. The institutions referring to negotiations of the FTAs are composed of different structures. On behalf of the EU, the European Commission negotiates with the trading partner. During this process, the Commission works closely with the Member States, Council, and the European Parliament. The Commission must request an authorization from the Council to negotiate a trade agreement with a trading partner. This authorization sets out the general objectives to be achieved in the negotiation process. During this process, the Commission reports regularly to Council and the European Parliament about the outcomes of negotiations. After the negotiations are completed the Commission presents the draft agreement to the Council and the European Parliament. Procedurally, the trade agreement enters into force once it is fully ratified.

As a rule, agreements between the Union and third countries or international organizations are negotiated according to the procedure stipulated by the TFEU. These agreements should be negotiated and concluded in accordance with this procedure. The procedure involves an authorization for the opening of negotiations, negotiating directives, signing and conclusion of agreements. Article 218 of the TFEU sets out the following provisions:

> *Article 218*
>
> *(ex Article 300 TEC)*
>
> *1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.*
>
> *2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.*
>
> *3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision*

[4] Consolidated version of the Treaty on European Union, *OJ C 202, 7.6.2016, p. 13–388 (EN)*. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT [Accessed on 27.03.2017]

*authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.*

*4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.*

*5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.*

*6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.*

*Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:*

*(a) after obtaining the consent of the European Parliament in the following cases:*

*(i) association agreements;*

*(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;*

*(iii) agreements establishing a specific institutional framework by organising cooperation procedures;*

*(iv) agreements with important budgetary implications for the Union;*

*(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.*

*The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.*

*(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.*

*7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.*

*8. The Council shall act by a qualified majority throughout the procedure.*

*However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.*

> *9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.*
>
> *10. The European Parliament shall be immediately and fully informed at all stages of the procedure.*
>
> *11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.*[5]

This Article sets out the Council and the Parliament's role in the EU trade policy are crucial. Especially, the European Parliament should be immediately and fully informed at all stages of the procedure of free trade agreements.[6] As provided in this Article, there are some circumstances where a Member State, the European Parliament, the Council, or the Commission may obtain the opinion of the Court of Justice to clarify whether an agreement envisaged is compatible with the Treaties into force in the EU. If the Court's opinion is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised accordingly.

To ensure the effective exercise of the rights of the Union under international trade rules, the EU adopted an Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization.[7] According to Article 1, this regulation "provides for Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization ('WTO') which, subject to compliance with existing international obligations and procedures."[8] The

[5] Consolidated version of the Treaty on European Union, *OJ C 202, 7.6.2016, p. 13–388 (EN)*. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT [Accessed on 28.03.2017]

[6] See: DG Trade. (2013). *Trade negotiations step by step*. European Commission. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT [Accessed on 28.03.2017]

[7] Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification). *OJ L 272, 16.10.2015, p. 1–13*.

[8] Article 1, Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the

international trade rules are part of the World Trade Organization ('WTO') and laid down in the Annexes to the WTO Agreement. Also, they include rules laid down in any other agreement to which the European Union is a party and which are applicable to trade between the Union and third countries. The international trade rules are based on a legal mechanism of law which is transparent and ensures that the decision under international trade rules is taken on the basis of accurate factual information and legal analysis.

As discussed above, economic free trade policy aims to be of benefit to all humankind. The EU uses the existence of international rules for international trade and the basic rules and disciplines of WTO law to make many FTAs of benefits of all humankind. Despite the greatest security challenges and financial crises facing the world today is the need to use an international system of FTAs to maximize global economic growth and also achieves a greater equity. Such a system that currently both integrates post-communist countries, namely the WB countries, and assists currently in their efforts to participate in the economic integration are the SAAs. The SAAs between the EU and WB countries are the most important means available to secure peace and prosperity into the future memberships to the EU.

## III. The association agreements with the Western Balkans

The SAA has broad sense, which is an international agreement signed between two or plural countries, the objects of which are to decrease or abolish tariffs on goods and barriers on services, and in some cases, to protect labor standards and environments.[9] The SAA constitutes an important part of an economic partnership agreement between EU and aspirant countries from the WB, the objectives of which are the deregulation of law and government regulations, the cooperation and harmonization of national and international economic activities, and in some cases as well the protection of labor standards and environments.[10]

Several authors of the EU law have summarized various arguments, all of which are intrinsically interrelated to the enlargement. Including the WB countries in the array of accession countries by meeting the requirements of full membership remains an evident approach. The agreements negotiated and concluded by the European Union

exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification). *OJ L 272, 16.10.2015, p. 1–13*.

[9] World Bank. (2009). *The Road to Stability and prosperity in South Eastern Europe – A regional Strategy Paper*. pp. 21-22.

[10] Sedelmeier, Ulrich. (2015). *Constituent Policy and Tool for External Governance*. In: Wallace, Hellen. Pollack, Mark A., Young, Alasdair R., eds., *Policy-Making in the European Union*, 7th ed. Oxford University Press. p. 413-417.

with groups of countries and international organizations are a dynamic process on the basis of which the recent enlargement was designed for the WB countries (Koutrakos 2006).[11] Also, one straightforward approach of the EU regarding countries of the WB to include in the enlargement process is considered through SAA. This policy aimed to push the new democracies of the WB in a serious process. This process led to a decision to embark on the enlargement process with the potential hope of future membership (Zielonka 2006).[12] Since 2000 onwards the EU agreed to enter serious negotiations with the WB countries and at the same time evaluate its status through formal reports annually that assesses the level of conformity of these countries to chapters of EU legislation which they are required to enforce in practice (Neal 2007).[13] Overall, the EU's approaches through SAAs are mainly economic and political, namely membership into the EU.

In legal terms, underpinning of the WB countries through SAA is seen as construing the nature of the EU obligations laid down in the EU Treaty rules. Thus, the SAA is the European Union's policy towards the WB countries with the aim of eventual EU membership. It involves a progressive partnership with a view to stabilizing the region and establishing a free-trade area. Also, sets out common political and economic goals, and contain elements of the accession process. Basically, the SAAs rest on contractual relationships, trade relations, financial assistance, regional cooperation and good neighborly relations.

Figure 1, State of play as of March 27, 2017, based on Rodin, 2012, p.155.[14]

| Country | Status | State of play |
|---|---|---|
| Albania | Candidate country | Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, OJ L 107, 28.4.2009, p. 165–502 |
| Bosnia and Hercegovina | Potential candidate | Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, OJ L 164, 30.6.2015, p. 2–547 |

[11] Koutrakos, Panos. 2006. EU International Relations Law. Hart Publishing. p.359.

[12] Zielonka, Jan. (2006). Europe as Empire The Nature of the Enlarged European Union. Oxford University Press . p.112-113.

[13] Neal, Larry. (2007). *The Economics of Europe and the European Union*. Cambridge University Press. p.401.

[14] This table is updated as of March 2017 to reflect the state of play of the EU and WB countries concerning the SAAs. See: Rodin, Sinisa. (2012). *The European Union and the Western Balkans*. In: Bindi, Frederiga. Angelescu, Irina. eds., *The Foreign Policy of the European Union Assessing Europe's Role in the World*, 2nd ed. Brookings Institution Press. p.153-163.

| | | |
|---|---|---|
| Croatia | EU Member State | Decision of the Council of the European Union of 5 December 2011 on the admission of the Republic of Croatia to the European Union, OJ L 112, 24.4.2012, p. 6–110. Treaty concerning the accession of the Republic of Croatia to the European Union, OJ L 112, 24.4.2012, p. 10–110 |
| FYR Macedonia | Candidate country | Stabilization 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, OJ L 84, 20.3.2004, p. 13–197 |
| Kosovo | Potential candidate | Stabilization and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, OJ L 71, 16.3.2016, p. 3–321 |
| Montenegro | Candidate country | Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, OJ L 108, 29.4.2010, p. 1–354 |
| Serbia | Candidate country | Stabilization and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, OJ L 278, 18.10.2013, p. 14–471 |

The rationale for the common free-market principles and competition rules are a crucial part of the SAAs. They are introduced as a means for free movement of workers, freedom of establishment, free movement of payments and capital as a central element of European internal market. All these four freedoms are integrated into the SAA. After the entry into force, the SAA requires a number of the national documents (e.g. National strategies, sectoral strategies, action plans, as well as primary and secondary legislation for implementation and enforcement. Especially, in the early stages, in important national documents, should be included regulating activities of competition and state aid from the viewpoint of general EU competition law. These documents should be amended every year because of the obligations of States parties regarding the adjustment of legislation with the EU acquis.

The SAA consists of an international legally binding instrument to regulate domestic law of the WB countries. The EU approach refers to the three principles of the Copenhagen obligations such are political, economic, legal and administrative. This concept of a legally binding agreement, namely SAA, requires that WB countries meet their obligation the duties provided under the FTA. Chadee at al. (2015) emphasized that “a free trade agreement (FTA) is a legally binding agreement between two or more countries to liberalize trade and investment and bring about closer economic

integration."[15] This approach is currently attracting the adjustment of national markets to become a competitive power market in the future within the EU internal market. Overall, this summary shows that the EU integration policy in the WB countries is based on the economic integration. The integration in the EU market in the future shall be based on the competition rules and as the basis of the free market principle. All this integration is required to be fulfilled by adjusting of national law with the EU acquis.

## IV. Competition rules under SAA

Competition law is a pillar of the EU internal market. The development of competition law date back in the United States legislation of the Sherman Act of 1890 and the Clayton Act of 1914.[16] Then, competition law has gone through phases of renewed legislative updates around the world. The development of competition law in the EU is reflected in the foundational Treaties of the EU and is strengthened since then. The EU law expresses crucial provisions regarding competition law. The relevance of EU competition law for emerging economies is crucial. Specific aspects of EU competition law and the implications of the changes required by the Stabilization and Association Agreement (SAA) requires normative support regarding fulfilment of EU competition rules. Developing theoretical approaches and conceptual tools that can enable the implementation of the SAA's provisions is important for the future economies of the Western Balkan countries.

The competition rules that were set up under SAA are integral part of the TFEU.[17] Companies, mergers, state aid rules, and concerted practices, have the following principles and philosophies. They are guaranteed under TFEU at national and supranational level. These rights are based on Article 101 until 109. Articles 101 contain the basic rules of competition. Article 103-106 prescribe the implementation and administration of these rules. Articles 107-109 concern aid granted by undertakings by EU Member States.[18]

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[15] Chadee, Doren. Roxas, Banjo. Rogmans, Tim. (2015). *Prospects and Challenges of Free Trade Agreements: Markets*. Palgrave Macmillan. p.45.

[16] See: The Sherman Act, 1890, outlaws "*every contract, combination, or conspiracy in restraint of trade*," and any "*monopolization, attempted monopolization, or conspiracy or combination to monopolize*." The Federal Trade Commission Act and the Clayton Act, 1914, antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today. Available at: https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [Accessed 02.04.2017]

[17] Consolidated version of the Treaty on European Union, *OJ C 202, 7.6.2016, p. 13–388 (EN)*. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT (Accessed on 22.04.2017)

[18] Moens, Gabriel. Trone, John. (2012). *Commercial Law of the European Union.* Springer. p.185.

Figure 2, Provisions of competition within SAAs articles for the potential candidate and candidate country of the Western Balkan.

| Country | Status | State of play | Article on competition law |
|---|---|---|---|
| Albania | Candidate country | Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, OJ L 107, 28.4.2009, p. 165–502 | Articles 70 and 71 |
| Bosnia and Hercegovina | Potential candidate | Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, OJ L 164, 30.6.2015, p. 2–547 | Articles 70 and 71 |
| Croatia | EU Member State | Decision of the Council of the European Union of 5 December 2011 on the admission of the Republic of Croatia to the European Union, OJ L 112, 24.4.2012, p. 6–110. Treaty concerning the accession of the Republic of Croatia to the European Union, OJ L 112, 24.4.2012, p. 10–110 | Articles 101 until 109 of TFEU |
| FYR Macedonia | Candidate country | Stabilization 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, OJ L 84, 20.3.2004, p. 13–197 | Articles 68 and 69 |
| Kosovo | Potential candidate | Stabilization and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, OJ L 71, 16.3.2016, p. 3–321 | Articles 74 and 75 |
| Montenegro | Candidate country | Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, OJ L 108, 29.4.2010, p. 1–354 | Articles 72 and 73 |
| Serbia | Candidate country | Stabilization and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, OJ L 278, 18.10.2013, p. 14–471 | Articles 72 and 73 |

The provisions of these articles require alignment of legislation concerning the behavior and acts of enterprises and companies in goods and services within the EU internal market. However, the activities which are controlled and restricted for the protection of competition, which are stipulated in laws such as competition law and state aid law, must have the fair level of enforcement in practice, which is included in the concept of the rule of law within national legal systems of the Western Balkan countries. The rule of law is one of the founding principles stemming from the

common constitutional traditions of all EU Member States, and is one of the fundamental values upon which the European Union is based. Respect for the rule of law is a prerequisite for the protection of all four freedoms listed in the EU treaties. However, in recent years the Western Balkan countries are confronted with crisis of competition law and economic standards due to the lack of the rule of law. The rule of law concept into the EU domain is the predominant concept for the internal market.

Summarily, the process of concluding the SAAs with the West Balkans is of crucial importance for the economic standards and competition law of the respective countries. Currently, as illustrated above some of the countries, except Croatia that is the member country of the EU, other countries are potential countries and candidate countries for membership. Such agreements concluded with the Western Balkan are supervised under strict rules of implementation and enforcement by the EU. In relation to the fulfilment of these SAAs, the EU developed an instrument of the assessment by the European Commission, known as yearly country reports, that considerable evaluate progress which has been made in a number of specific areas of every country.

## V. Competition clauses under domestic constitutional law

The number of free trade agreements ratified around the world is rising continually. Besides free trade provisions, these agreements contain also provisions concerning distortion of competition rules. At the domestic constitutional level, there are seven types of constitutions providing competition clauses that intend to protect free market rules in accordance with EU law. These clauses include several provisions listing relevance of the open economy and free market and also taking into account the protection of competition from abuse of dominant position.

The first type is one of the components of Croatia.[19] Free enterprise, free market rules, the economic system, equal legal status on the market, the prohibition of abuse of monopolies are the main concepts which defined by the constitution of Croatia. Main provisions regarding free market rules and competition law are stipulates in Article 49. These provisions provide:

*Article 49*

[19] The consolidated text of the Constitution of the Republic of Croatia encompasses the Constitution of the Republic of Croatia (as published in the official journal of the Republic of Croatia, *Narodne novine*, no. 56/90, 135/97, 8/98 – consolidated text, 113/2000, 124/2000 – consolidated text, 28/2001, 41/2001 – consolidated text, 55/2001 – correction) and the Amendments to the Constitution of the Republic of Croatia published in *Narodne novine*, no. 76/2010, in which the date of their entry into force is indicated.

*Free enterprise and free markets shall form the foundation of the economic system of the Republic of Croatia.*

*The state shall ensure all entrepreneurs equal legal status on the market. The abuse of monopolies, as defined by law, shall be forbidden.*[20]

*These provisions encourage the economic progress and the economic development of Croatia. Also, another important article referring to the competition law in conjunction with the EU internal market is stipulated in Article 145 which implies directly applicable rules of EU in the Croatian domestic legislation. This Article provides that:*

*Article 145*

*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. [sic.][21]

This article embodies the rights and obligations to apply the EU law and thus ensuring equal rights to the exercise economic freedom under the EU rules. This article requires that all the legal acts in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union law.

The second type is one of Bosnia and Herzegovina. As a federation of three republics, such constitution provides provisions on competition law. The constitution of BiH provides a chain of provisions embodies in several articles. The first provisions that

[20] Ibid, Article 49, The consolidated text of the Constitution of the Republic of Croatia encompasses the Constitution of the Republic of Croatia (as published in the official journal of the Republic of Croatia, *Narodne novine*, no. 56/90, 135/97, 8/98 – consolidated text, 113/2000, 124/2000 – consolidated text, 28/2001, 41/2001 – consolidated text, 55/2001 – correction) and the Amendments to the Constitution of the Republic of Croatia published in *Narodne novine*, no. 76/2010, in which the date of their entry into force is indicated.

[21] Ibid, Article 145, The consolidated text of the Constitution of the Republic of Croatia encompasses the Constitution of the Republic of Croatia (as published in the official journal of the Republic of Croatia, *Narodne novine*, no. 56/90, 135/97, 8/98 – consolidated text, 113/2000, 124/2000 – consolidated text, 28/2001, 41/2001 – consolidated text, 55/2001 – correction) and the Amendments to the Constitution of the Republic of Croatia published in *Narodne novine*, no. 76/2010, in which the date of their entry into force is indicated.

manifest constitutional commitment towards open market economy appear in the preamble. Within preamble it is stipulated that "...to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy..."[22] Also, according to the Constitution four freedoms such as persons, goods, services, and capital is guaranteed. In addition, the entities which compose the federation of BiH are not allowed to impede full freedom of movements throughout Bosnia and Herzegovina and neither establish controls at the boundary between the entities. Article 1 paragraph 4 of the Constitution stipulates that:

> Article 1 para. 4.
>
> There shall be freedom of movement throughout Bosnia and Herzegovina. Bosnia and Herzegovina and the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. Neither Entity shall establish controls at the boundary between the Entities.[23]

The third type is embodied in several articles of the Constitution of Serbia, such as provisions concerning competitive marketplaces. Basic principles of the competitive marketplace in the economic system of Serbia are based on market economy, open and free market, freedom of entrepreneurship, independence of business entities, and equality of private and other types of assets. Article 82 on the economic system stipulates that:

> Article 82
>
> Economic system in the Republic of Serbia shall be based on market economy, open and free market, freedom of entrepreneurship, independence of business entities and equality of private and other types of assets.
>
> The Republic of Serbia shall represent a unique economic area with a single commodity, labor, capital and services market.

The impact of the market economy on social and economic status of the employed shall be adjusted through social dialogue between trade unions and employers.[24]

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[22] Bosnia and Herzegovina's Constitution of 1995 with Amendments through 2009. Available at: https://www.constituteproject.org/constitution/Bosnia_Herzegovina_2009.pdf?lang=en [Accessed on 04.04.2017]

[23] Ibid Article 1 paragraph 4. Bosnia and Herzegovina's Constitution of 1995 with Amendments through 2009. Available at: https://www.constituteproject.org/constitution/Bosnia_Herzegovina_2009.pdf?lang=en [Accessed on 05.04.2017]

[24] Constitution of Serbia. Available at: https://www.constituteproject.org/constitution/Serbia_2006.pdf?lang=en [Accessed on 05.04.2017]

Also, restriction of free competition by creating or abusing monopolistic or dominant status is strictly prohibited, and foreign persons shall be equaled on the market with domestic persons.

> Article 84: Status on the market
>
> Everyone shall have equal legal status on the market.
>
> Acts, which are contrary to the Law and restrict free competition by creating or abusing monopolistic or dominant status, shall be strictly prohibited.
>
> Rights gained through capital investments, in accordance with the Law, may not be curtailed by the Law.
>
> Foreign persons shall be equaled on the market with domestic persons.[25]

The fourth type is referred to provisions of the Constitution of Montenegro. The constitution of Montenegro recognizes principles of an economic system based on a free and open market, freedom of entrepreneurship and competition.

> Article 139
>
> Economic system shall be based on a free and open market, freedom of entrepreneurship and competition, independence of the economic entities and their responsibility for the obligations accepted in the legal undertakings, protection and equality of all forms of property.

The constitution of Montenegro recognizes principles of an economic system based on a free and open market, freedom of entrepreneurship and competition.[26]

Additionally, Article 140 of economic area and equality provides unique provisions in the economic area that encourage economic development. In addition, it secures free competition and prohibits the obstruction monopolistic or dominant position in the market. This article provides that:

> Article 140
>
> The territory of Montenegro shall represent a unique (unified) economic area. The State shall encourage even economic development of all its areas.
>
> It shall be prohibited to obstruct and limit free competition and to encourage unequal, monopolistic or dominant position in the market.[27]

[25] Ibid, Article 84, Constitution of Serbia. Available at: https://www.constituteproject.org/constitution/Serbia_2006.pdf?lang=en [Accessed on 05.04.2017]

[26] Article 139, Constitution of Montenegro. Available at: https://www.constituteproject.org/constitution/Montenegro_2007.pdf?lang=en [Accessed on 05.04.2017]

The fifth type of provisions is embodied in several constitutional provisions of the Constitution of Kosovo. These provisions provide a free market economy with free competition, a favorable legal environment for a market economy, and freedom of economic activity. Provisions of Article 7 sets out that the constitutional order is based on the principles of a market economy and ensures equal participation in the economic area.

> Article 7
>
> 1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.
>
> 2. The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life.[28]

Furthermore, Article 10 stipulates "a market economy with free competition is the basis of the economic order of the Republic of Kosovo." Furthermore, some other general principles that ensure a favorable legal environment for a market economy are sets out in Article 119 that stipulates:

> Article 119
>
> 1. The Republic of Kosovo shall ensure a favorable legal environment for a market economy, freedom of economic activity and safeguards for private and public property.
>
> 2. The Republic of Kosovo shall ensure equal legal rights for all domestic and foreign investors and enterprises.
>
> 3. Actions limiting free competition through the establishment or abuse of a dominant position or practices restricting competition are prohibited, unless explicitly allowed by law.[29]

The sixth type of provisions is embodied in the Constitution of Albania. The constitutional provisions set out that the economic system of Albania that is based on a market economy and on freedom of economic activity. Article 11 of the Constitution sets out that:

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[27] Ibid, Article 40. Constitution of Montenegro. Available at: https://www.constituteproject.org/constitution/Montenegro_2007.pdf?lang=en [Accessed on 06.04.2017]

[28] Article 7, Constitution of Kosovo. Available at: http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf [Accessed on 06.04.2017]

[29] Ibid, Article 119, Constitution of Kosovo. Available at: http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf [Accessed on 06.04.2017]

> Article 11
>
> 1. The economic system of the Republic of Albania is based on private and public property, as well as on a market economy and on freedom of economic activity.
>
> 2. Private and public property are equally protected by law.
>
> 3. Limitations on the freedom of economic activity may be established only by law and for important public reasons.[30]

The seventh type is referred to provisions of the Constitution of Macedonia. The constitutional provisions are embodied in several articles. The fundamental values of the constitutional order of Macedonia are stipulated in Article 8. This article stipulates some sets of provisions about various freedoms. Among these freedoms numerous it is stipulated "the freedom of the market and entrepreneurship."[31] Foundations for economic relations within the constitution of Macedonia are stipulated in Article 55. This article provides that:

> Article 55
>
> The freedom of the market and entrepreneurship is guaranteed.
>
> The Republic ensures an equal legal position for all parties in the market.
>
> The Republic takes measures against monopolistic positions and monopolistic conduct of the market.
>
> The freedom of the market and entrepreneurship can be restricted by law only for reasons of the defence of the Republic, protection of nature and environment, or public health.[32]

As seen from the constitutional perspective, all constitutions set out provisions regarding the free market rules and free market economy. At semantic system point of view they differ but in the content, the whole meaning is the same aiming at providing open market rules. The contents of competition rules in the constitutional law of the Western Balkan countries, in other words, provide competencies for free market rules and fair competition.

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[30] ibid, Article 11, Constitution of Albania. Available at: https://www.constituteproject.org/constitution/Albania_2012.pdf?lang=en [Accessed on 09.04.2017]

[31] Article 8, Constitution of Macedonia. Available at: http://eudo-citizenship.eu/NationalDB/docs/MAC%20Constitution%20(amended%20by%20XXX)%20eng.pdf [Accessed on 10.04.2017]

[32] ibid, Article 55, Constitution of Macedonia. Available at: http://eudo-citizenship.eu/NationalDB/docs/MAC%20Constitution%20(amended%20by%20XXX)%20eng.pdf [Accessed on 10.04.2017]

## VII. Evaluation of competition clauses in practice

The national legislation of WB countries (except Croatia which is already EU member) includes some slight provisions of the protection of competition, state aid rules, mergers, concerted practices, and other economic protection. It is interesting to point out that, after the adoption of legislation should follow the process of alignment with EU law, which according to the SAAs is mandatory, and legally binding into practice. There is the trend among the WB countries to include competition clauses as parts of the national domestic law. This means that the chapters on competition, state aid, mergers, concerted practices, abuse of dominant position clauses are inserted as independent chapters among other chapters concerning trade and services.

In evaluation of adjustment in domestic law to the SAA it is important to note that what kind of provisions misses within national law referring to the elimination of discrimination of employment in respect of employment and occupation, which includes non-discrimination of women workers, the reason for excluding this equal treatment clause is unknown. The legal provisions of the SAAs are stipulated the same and require enforcement in practice. This system of derives the TFEU articles that sets out:

> Article 101
>
> 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
>
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
>
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> - any agreement or category of agreements between undertakings,
>
> - any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[33]

The SAAs does provide the concept of abuse of dominant provisions. In addition, the abuse of dominant position derives from the TFEU provisions. Article 102 sets out:

Article 102

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[34]

Consequently, the Western Balkan countries are required to adjust national law within a timeframe of ten (10) years to fully harmonize with EU law. This adjustment under SAA can be evaluated every year through country report mechanism issued by the European Commission. One of the challenges in terms of enforcement is lack of capacity to introduce rules and regulations necessary for implementation of the SAA provisions. There are some slight competition clauses enacted under SAA. However,

[33] Consolidated version of the Treaty on the Functioning of the European Union - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE VII: COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS - Chapter 1: Rules on competition - Section 1: Rules applying to undertakings - Article 101 (ex Article 81 TEC)

[34] Consolidated version of the Treaty on the Functioning of the European Union - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE VII: COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS - Chapter 1: Rules on competition - Section 1: Rules applying to undertakings - Article 102 (ex Article 82 TEC)

the effective enforcement is still limited. From some countries, the competition rules are reported as broadly in line, some of them are not and some other face huge challenges in enforcement at all.[35] The integration of Western Balkan countries within the EU internal market is based on deregulation policy based on neoliberalism by which the new government would pursue to strengthen international competiveness of domestic industries by establishing competition business section within domestic law. This policy intends to enact special provisions enforce the application of competition rules to these countries. Mostly the legal infrastructure complies with EU law. However, the governments should successfully pursue the adjustment of legislation to insert the new standards of competition law. This revision of the legal framework should be realized gradually towards full implementation of EU competition law. The existing provisions should be moving into the newly promulgated rules by adopting the expressions found in the SAA and TFEU in the future.

The rationale for a common market, free market principles, and competition rules are introduced within these SAAs with aiming at establishing an area for free movements of goods, services, capital, and persons. These are crucial elements of European internal market. This rationale is also based on the spirit of free market rules. The same wordings regarding market rules are inserted in every SAAs which laid the foundation of the European integration for the Western Balkan countries.

The concept of a legally binding agreement suggests that the Western Balkan countries are required to meet their obligation the duties provided under the FTA. These SAAs are mainly trade agreements (FTAs) and legally binding agreements between the EU and respective country in the Western Balkan to liberalize trade and closer economic integration. As a summary, this brief legal history explores that the EU integration policy in the WB countries is based on the economic philosophy through adjustment of national law with the EU acquis. This is because economic development between countries is based on the competition rules as the basis of the free market principle of every country.

## VIII. Conclusion

To put emphasis on the prohibition of unfair practices, equal treatment in market, and the protection of consumer rights within the WB countries, the EU adopted and enshrined within SAA the competition principles and state aid rules, in other words the core free market standards. These SAA have its own legal effects under international

[35] See: Country Report of Serbia 2016, Country Report of Albania 2016, Country Report of Montenegro 2016, Country Report of Kosovo 2016, Country Report of Albania 2016, Country Report of Macedonia 2016. Available at: https://ec.europa.eu/neighbourhood-enlargement/countries/package_en [Accessed on 10.04.2017]

law over those countries. The important point is that these SAAs (namely FTA) should be applied to any affiliated countries regardless of any integration status. However, the SAA has legal binding power because it writes that the provision simply invites governments of SAA Members to respect principles embodied therein. Following the adoption of SAA, core competition standards of the EU are adopted through adjustment called “alignment of national law with the EU acquis” which includes stipulations on the protection of free market principles, state aid rules, concerted practices in the course of company activities.

The lack of legal methodology to handle analysis in competition law cases is a core problem of legal system in the WB countries. As mentioned, competition rules are a diverse legal group with mixed requirements. The legal framework currently into force is slow to yield to such fluidity and is largely incapable to mirroring itself to the EU internal market. Some advocacy scholars have permeated with positive aspects the alignment process. However, the overwhelming majority of literature discusses enforcement in contrast (and negatively) at the crossroads of ideals of enforcement (as required by the EU practice). This is especially well reflected in the above cases of WB countries seeking adjustment, as a benchmark of enforcement and in order to become part to the EU internal market.

The principles laid down in SAAs offer normative guidelines in such areas as competition, state aid rules, abuse of dominant position, concerted practices. The enforcement of these normative guidelines requires harmonization of domestic law with EU law. In the view from long-term perspectives, the idea of the harmonization is referred to the quantity and the quality of domestic markets in the long road to legal institutionalization. Transitioning from old economic background to new free market principles requires amendment of the legal framework in order to align with the EU law best practices. In this context, the SAAs brought positive signaling within the principles of free market. The landmark of the SAAs (namely, tree-trade agreements) invokes the weight and prominence of normative, political and economic evidence, that the WB countries have a range of opportunities to make progress towards EU integration.

A prevailing principle among EU association agreements leading approaches is the concept of enforcement responsibility of the free-trade agreements. This concept includes responsibility to impose legal adjustment on national domestic law, especially in the framework of competition law. Thus, by providing opportunities for constructive improvement in the Western Balkan the EU fosters strategic path on the long road to legal institutionalization between parties, such the EU in one hand, and the Western Balkan countries in another. Thus, the philosophy of free trade agreements stems initially from the path towards economic cooperation and later accession into the EU.

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