Hungary

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Introductory remarks

TheTreaty of Lisbonhad significant implicationsfor the EU external relations, which has not been manifested only in the attempt to bring the whole Union's action under one 'umbrella' of values, objectives and principles, but the Treaty amendmenthas also modifiedthe institutional balance to some extent, as it slightly strengthened the position of the European Parliament in the related decision making procedures. Considering also the massive changes in the competence structure – e.g. the extension of the scope of the Common Commercial Policy –, it is obvious, that today the Member States have to act and promote their interests in a profoundly reshaped landscape. In addition to the challenges arising from this new institutional setting, the topics covered by the report requires careful analysis and evaluation, inasmuch as the underlying questions – specifically the topics concerning the policies on border controls, asylum and immigration – are implying sensitive issues at the core of interests of the Member States.

This factor had also effects on the methodology and instruments we could apply for the elaboration of the questionnaire. First, there were difficulties encountered in involving Government officials, public servants and other professionals, and the interviews mostly resulted only in expressing general information, personal views etc. Second, there was also a restricted availability of coherent and practical source of information onstrategicand policy objectives of Hungary, which could have been beneficial for shed light on the official position of Hungary in several topics raised by the report.[1]With the aim of overcoming these difficulties and delivering a balanced assessment, the analysis predominantly relies upon the views and positions of the academia, the scholarly literature, the relevant EU and domestic law as well as case law, other publicly available information, and our personal view.

[1] For instance, the last coherent foreign policy strategy of Hungary has been published in 2011 with prioritizing the Euro-Atlantic relations of Hungary, see: Hungary's Foreign Policy after the Hungarian Presidency of the Council of the European Union, Ministry of Foreign Affairs, 2011, available at: https://eu.kormany.hu/admin/download/f/1b/30000/foreign_policy_20111219.pdf) After the 2014 parliamentary election, the policy and strategic goals have been markedly changed and shifted with the objectives of the 'Eastern Opening ', which might be regarded as certain type of realism in trade and economic relations, however coherent strategy has not been published. Today only statements of the Government, concrete policy decisions, press releases etc. might help to describe a strategy the Government follows.

Chapter 1 Division of competences between the European Union and the Member States

Question 1

Following the extension of areas subject to internal EU legislation, the AETR effect has been perceived in new areas recently. The following recent examples for EU exclusive competence under the AETR doctrine can be mentioned here: 1) The exclusive competence of the EU encompasses the acceptance of the accession of a third State to the Convention on the civil aspects of international child abduction concluded in The Hague on 25 October 1980.[2] 2) The content of the Convention of the Council of Europe on the protection of neighbouring rights of broadcasting organisations, also falls the exclusive competence of the European Union.[3] 3) Having regard to the existence of Directive 2001/77 on the promotion of electricity produced from renewable energy sources in the internal electricity market[4] the EU enjoys exclusive external competence to conclude international agreement regulating the import of green energy, because the AETR affect precludes a provision of national law, which provides for the grant of exemption from the obligation to acquire green certificates owing to the introduction, onto the national consumer market, of electricity imported from a third State, by means of the prior conclusion, between the Member State and the third State concerned, of an agreement under which the electricity thus imported is guaranteed to be green.

We have no information on problems raised at the national level in this regard.

Question 2

The case-law of the CJEU confirmed that the question as to whether the options for EU exclusive competence set out in Article 3(2) TFEU are met must be examined in the light of the Court's AETR judgment, as well as the subsequent case-law interpreting AETR conditions. The Court, set out a few typical examples in which exclusive EU competence should be recognized:[5]

–where the conclusion of an agreement by the Member States would be incompatible with the unity of the common market (internal market) and the uniform application of EU law,

– where, the existing internal EU legislative measures contain clauses relating to the treatment of nationals of non-member countries or to the complete harmonisation of a particular issue

[2] Opinion 1/13 of the CJEU (Convention on the civil aspects of international child abduction), ECLI:EU:C:2014:2303

[3] Judgment in the case C-114/12 *Commission v Council*, ECLI:EU:C:2014:2151

[4] OJ 2001 L 283, p. 33

[5] See judgment in the case C-467/98, EU:C:2002:625 *Commission* v *Denmark* and the following opinions of the CJEU: *Opinion 1/94* (Competence of the Community to conclude international agreements concerning services and the protection of intellectual property), ECLI:EU:C:1994:384; *Opinion 1/03* (Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), ECLI:EU:C:2006:81

– the Court did not find that the EU had exclusive competence where, both the Community provisions and those of an international convention laid down (only) minimum standards, because, in such cases, there was nothing to prevent the full application of EU law by the Member States

– the Court did not recognise the need for exclusive EU competence where there was a chance that bilateral agreements would lead to distortions in the flow of services in the internal market,

As regards the scope of the second opition for implied exclusive competence under Article 3(2) TFEU, the case-law of the CJEU confirmed that the conclusion of the international agreement being thus necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules.[6]

In its decisions interpreting AETR conditions the CJEU already examined the question what if the third option provided by Article 3(2) TFEU is not exercised internally. The leading decision is Opinion 2/91 here where the Court established that the scope of EU rules may be affected or altered by international commitments where such commitments are concerned with an area which is already covered *to a large extent* (i. e. not completely) by such rules.[7] However, after the entry into force of the Lisbon Treaty, it was not clear whether the interpretation given by the Court in Opinion 2/91 is still applicable when understanding the scope of the third opition for implied exclusive competence according to Article 3(2) TFEU. The majority of Member States represent the view that that this interpretation is irrelevant since it was not included in Article 3(2) TFEU, so an exclusive external competence cannot arise merely because the area in which an international agreement applies is covered to a large extent by equivalent internal rules of EU law.[8] Contrary to that opinion of the Member States, the Court confirmed in its recent case-law that the interpretation given by Opinion 2/91 (and subsequent case-law interpreting Opinion 2/91) remained relevant, in the context of Article 3(2) TFEU, for the purpose of ascertaining whether the condition pertaining to the risk of EU common rules being affected, or of their scope being altered, is met.[9] That means that such a risk does not presuppose that the areas covered by the international commitments and those covered by the EU rules coincide fully.[10] Where the test of 'an area which is already covered to a large extent by [EU internal] rules' is to be applied, the assessment must be based not only on the scope of the rules in question but also on their

[6] C-467/98, EU:C:2002:625 *Commission* v *Denmark*, paragraph 57

[7] Opinion 2/91, EU:C:1993:106, paragraphs 25 and 26

[8] This was the view, for instance, of the Belgian, Czech, German and Estonian Governments, Ireland, the Greek, Spanish, French, Cypriot, Latvian, Lithuanian, Austrian, Polish, Portuguese, Romanian, Slovak, Finnish, Swedish and United Kingdom Governments concerning the exclusive external competence of the European Union to accept (by way of an international act) the accession of a non-Union country to the Convention on the civil aspects of international child abduction concluded in the Hague on 25 October 1980. (See Opinion 1/13, paragraph 63).

[9] See judgment in *Commission* v *Council*, EU:C:2014:2151, paragraphs 70, 72 and 73; Opinion 1/13, paragraph 73.

[10] *Commission* v *Council*, EU:C:2014:2151, paragraph 69; Opinion 1/13, paragraph 72.

nature and content. It is also necessary to take into account not only the current state of EU law in the area in question but also its future development, insofar as that is foreseeable at the time of the analysis. Furthermore, the existence in an agreement of a so-called 'disconnection clause' providing that the agreement does not affect the application by the Member States of the relevant provisions of EU law does not constitute a guarantee that the EU internal rules are not affected by the provisions of the agreement because their respective scopes are properly defined but, on the contrary, may provide an indication that those rules are affected.[11]

Question 3

For the scope of the provision according to the case-law of the CJEU, see answer given to Question 4.

No information can be obtained on the understanding of the Member States regarding this provision.

Question 4

There is definitely a link between Article 216 TFEU and Article 3 (2) TFEU. In this respect, the role of the former provision in EU external relations law seems to be quite similar to that of the latter. In case C-81/13, Opinion AG Kokott establishes that the ERTA doctrine has essentially been codified in Article 216(1) TFEU since the entry into force of the Treaty of Lisbon, noting that Article 3(2) TFEU has a similar effect.

Apart from the basically similar function of these provisions, their scope is not exactly the same. Article 216 draws no distinction according to whether the European Union's external competence is shared or exclusive: that provision covers both the shared external competence and the exclusive external competence of the European Union.[12] Article 216(1) TFEU determines the *existence* of EU external competence but not its exclusive nature — the latter is determined by Article 3(2) TFEU.[13] In other words, Article 216(1) TFEU sets out the

[11] Opinion 1/03, paragraphs 126 and 130.

[12] ECLI:EU:C:2017:645. Opinion of Advocate General Saugmandsgaard Øe delivered on 7 September 2017 in Case C-687/15 Commission v Council, paragraph 37. Most of the legal literature supports that approach. See, for example, Piet Eeckhout: *EU External Relations Law*, 2nd ed., Oxford University Press, Oxford, 2012, p. 112; Trevor Hartley: *The foundations of European Union law*, 8th ed., Oxford University Press, Oxford, 2014, p. 186; Rudolf Geiger: Article 216 TFEU, point 3, in Rudolf Geiger, R., Daniel-Erasmus Khan and Marcus Kotzur: *European Union Treaties*, Hart, Oxford, 2015; and Rudolf Mögele: Artikel 216 AEUV, point 29, in Rudolf Streinz (ed.): *EUV/AEUV (Kommentar)*, 2nd ed., C. H. Beck, Munich, 2012.

[13] Opinion of Advocate General Sharpston in Opinion 2/15 (*EU-Singapore Free Trade Agreement*, EU:C:2016:992, paragraph 64); Opinion of Advocate General Szpunar in *Germany* v *Council*) C-600/14, EU:C:2017:296, paragraph 80); Opinion 2/15 (*EU-Singapore Free Trade Agreement*) of 16 May 2017 (EU:C:2017:376, paragraphs 171 and 172); Opinion 1/13 (*Accession of third States to the Hague Convention*) of 14 October 2014 (EU:C:2014:2303, paragraphs 67 to 74).

conditions for the existence, while Article 3(2) sets out the conditions for the exclusivity of EU implied external competences under the ERTA doctrine.

This is the reason why the conditions determined in these provisions are not exactly the same. The second option ('necessary in order to achieve, within the framework of the [European Union's] policies, one of the objectives referred to in the Treaties') mentioned in Article 216(1) TFEU reaches beyond the scope of the ERTA doctrine. This option for granting implied external competence for the EU originates in Opinion 1/76 of the CJEU where the Court established that, in such cases, the EU acquired (implied) external (but not necessarily exclusive!) competence.

Chapter 2 Questions regarding the negotiation and the conclusion of international agreements (Article 218 TFEU)

Question 5

No practical information could be obtained, which might explain profoundly the perception of Hungary (as well as the Government of Hungary) to the functioning of the '218 (4)' special committee, or to the positions of the institutions. The overall attitude to the special committee, which has been noted and observed, is that the committee are regarded as a certain 'focal point' of the member states' domestic policy concerns, and can be easily used to channel the national interest into the negotiations. Moreover, attention has been drawn to the recent CJEU case law regarding the scope of Article 218 (4) and the extent or detail, to which the Council is empowered to set down rules on the negotiations as well as regarding the role of the special committee. In *C-425/13 Commission v Council* the Commission[14] argued that the special committee plays merely consultative role, however the Council – alongside with several Member States intervened in the procedure[15] – represented a view that the Council is empowered to lay down binding rules regarding the negotiations *vis-à-vis*the Commission. However the Court refused the latter position and annulled certain parts of the negotiation mandate, which enacted detailed provisions regarding the negotiations as it infringed the principle of institutional balance. As a result, the special committee can lay down neither binding nor detailed provisions about the negotiating positions. The Court maintained and repeated this argument in its later case law as well.[16]

[14] Judgement of 16 July 2015, Commission v Council, C-425/13, ECLI:EU:C:2015:483.

[15] Czech Republic, Denmark, Germany, France, Netherlands, Poland, Sweden, and UK. Hungary did not join the case.

[16] See Judgement of 24 June 2014, European Parliament v Council, C-658/11, ECLI:EU:C:2014:2025. For detailed analysis, see Ildikó Bartha: The External Side of Parliamentary Democracy – Comment on the Case C-658/11 European Parliament v. Council of the European Union, Hungarian Yearbook of International Law and European Law, 2016; Ricardo Passos: The External Powers of the European Parliament, In The European Union's External Action in Times of Crisis (Eds.: Piet Eeckhout, Manuel Lopez-Escudero), Hart, 2016, pp. 109–112.

Question 6

The ratification of the Comprehensive Economic and Trade Agreement (CETA) gave rise to debate on the provisional application of the agreement in Hungary. Previously, the Hungarian Parliament (*Országgyűlés*) adopted a decision on the requirements relating to the trade and investment agreements concluded by the EU.[17]The decision 'urged' the Government that the CETA, the TTIP and the TiSA are mixed agreements, requiring the ratification of all member states, therefore "[the agreements] should not enter into force provisionally until all member states of the European Union ratify these agreements." Leaving the inaccuracy of this provision out of consideration,[18]it is important that the Hungarian Parliament expressed concerned about the ongoing negotiations and has sent a strong message to the Government.

Before the signature of CETA, the *Országgyűlés* put again the agreement to be concluded with Canada down in agenda and adopted another decision.[19] The decision emphasized the Hungarian Parliament's view on the exclusion of provisional application of CETA, highlighting that the "[…] Parliament considers the objectives [laid down in the decision] in the ratification procedure under the condition that the Parliament does not give authorization for the provisional application of the Agreement [falling into the competence of the Member States]".[20]

Consequently, a slight shift in the position of the *Országgyűlés* could be observed as the Parliament has excluded only the provisional application of provisions relating to the competence of the member states, and not to the full agreement. Even though this second decision has been more permissive, the position of the Hungarian Parliament has been more restrictive than the standard practice of conclusions and ratification of mixed agreements, when the provisional application is limited not only to matters of EU exclusive competence, but consent has been given regularly for matter in which the European Union has been authorised to exerciseshared competence.[21]

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[17] 11/2016. (VI. 17.) OGY határozat az Európai Unió harmadik országokkal kötött kereskedelmi és beruházási megállapodásaival kapcsolatos követelményekről [Decision 11/2016. (VI. 17.) of the Parliament on the requirements relating to the trade and investment agreements concluded by the European Union with third countries]

[18] I.e. using the imprecise term of 'provisional entering into force' instead of 'provisional application' and it is logically nonsense to require the whole ratification process to be done for the provisional application, as the full ratification leads to the 'standard' application of the agreements.

[19] 22/2016. (X. 14.) OGY határozat az egyrészről az Európai Unió és tagállamai, másrészről Kanada között az Átfogó Gazdasági és Kereskedelmi Megállapodás (Comprehensive Economic and Trade Agreement - CETA) aláírásával kapcsolatos álláspontról [Decision 22/2016. (X. 14.) of the Parliament on its viewpoint on the signature of the Comprehensive Economic and Trade Agreement (CETA) to be concluded between the European Union and its Member States, on the one part, and Canada, on the other part].

[20]Decision 22/2016. (X. 14.) of the Parliament, para. 1.

[21] And not to mention here several exceptions, in which the agreement could be applied even in matters, in which member States can exercise competence, see the Association Agreements concluded, e.g. with Georgia or Ukraine.

Question 7

When approving the proposal to sign the mixed agreement, the Council can also decide to provisionally apply the agreement according to Article 218(5) TFEU). Although the Treaties give the right to decide to the Council, politically important trade agreements are usually not applied provisionally before the European Parliament has given its consent. In case of mixed agreements, only those parts of the agreements can be provisionally applied which fall under the EU's exclusive competence.[22]

It follows from the fundamental constitutional principles of EU law (especially fom those relating to the devision of powers between the EU and the Member States[23]) that a renegotiated mixed agreement can only be concluded alone by the European Union with the third State if, as a result of the renegotiation procedure, the renegotiated text contains only provisions covering areas falling under the exclusive external competence of the EU.

On the other hand, the requirement of sincere cooperation between the EU and the Member States (Art. 4(3) TEU) also has a relevance here. The Member States are obliged to complete their national ratification procedure in due time and avoid blocking the conclusion of the mixed agreement by delays in their internal processes.[24] As an instrument for controlling Member State action, the Council often sets as a recommendation a deadline for the Member States to complete the ratification process. However, it is not possible for the EU to create a legally binding obligation for the Member States in this regard.[25]

Question 8

Given that most agreement involving a cooperation procedure establish some sort of institutional framework, the distinguishing feature of the 'agreements establishing a specific institutional framework by organising cooperation procedures' within the meaning of Article 218 (6) (a) (iii) TFEU proved to be difficult to define in the practice. In any case, agreements on the accession to an International Organisation often qualify as agreements of that kind.[26] The CJEU already have the chance to examine the issue in case Parliament v Council C-566/08. In that case, the European Parliament sought the annulment of Council Decision 2008/780/EC of 29 September 2008 on the conclusion, on behalf of the European Community, of the Southern Indian Ocean Fisheries Agreement. However, the Parliament

[22] http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/586597/EPRS_ATA(2016)586597_EN.pdf

[23] See Article 5 TEU, Articles 3-6 ZFEU.

[24] Jenő Czuczai: Mixity in Practice: Some Problems and Their (Real or Possible) Solution, in Cristophe Hillion and Panos Koutrakos (eds.): *Mixed Agreements Revisited – The EU and its Member States in the World*, Oxford, Hart Publishing, 2010, pp. 233-4.

[25] Joint Guideline 1/2005 of the Minister of Foreign Affairs and the Minister of Justice [Hungary] on the application of Act L of 2005 in the procedure for international treaty-making, point 169

[26] See for instance the accession of the EU to the Hague Conference on International Private Law (Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law, L 297, 26.10.2006, pp.1-2). The legal basis of the accession procedure was - among other provisions - Article 300 (3) of the EC Treaty which is the former version of the current Article 218 (6) (a) (iii) TFEU.

withdrew the case after the entry into force of the Treaty of Lisbon, presumably because of its significantly enlarged powers under other provisions of Article 218 TFEU with regard to the conclusion of international agreements.[27]

Question 9

Any assessment of or view on the suspension of application of international agreements has not been expressly nor officially formulated, however some concerns has been raised relating to the emerging position of the European Parliament in the suspension cases. According to these views, the suspension of agreements on the grounds e.g. of human rights violations are regarded first and foremost as foreign policy tools, therefore these cases are touching upon politically sensitive issues not only at EU but also at national level. For this reason, the interest of the member states would be to fully maintain their control over the suspension procedures and reject any attempts made by the European Parliament in order to be involved in these cases. This argument is based purely on the grounds of the national interest, however, our assessment differs to some extent from the latter approach. First, one of the most important aims of the Lisbon Treaty was the democratization of the EU external relations, specifically the objective to strengthen the position of the European Parliament, therefore involvement of the Parliament (e.g. in form of non-binding resolutions)[28] could fully comply with this goal. Second, as the Parliament can exercise definite rights in the procedure of conclusion of international agreements, it is reasonable that the Parliament wants to have insight into the suspension of those agreements. For that reason, even if the TFEU excludes completely any strong legal function of the Parliament in the suspensions of agreements,[29] it is well understandable that the Parliament is striving after setting, at least, the political scene of the debates in the suspension cases.

Question 10

In 2011, the Commission launched infringement procedures against the 20 EU states having found that certain resolutions adopted in the framework of the OIV (Organisation of Vine and Wine (OIV)[30] affected, in the sense of the '*ERTA* doctrine', the EU *acquis*, especially the rules of Regulation 1234/2007/EC.[31] It argued that the OIV resolutions had failed to observe

[27] Pieter Jan Kuijper, Jan Wouters, Frank Hoffmeister, Geert de Baere, Thomas Ramopoulos:The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor. Oxford University Press, 2013

[28] E.g. the European Parliament adopted a non-binding resolution with the aim at proposing the suspension of the EU-US Swift Agreement on data privacy, see European Parliament resolution of 23 October 2013 on the suspension of the TFTP agreement as a result of US National Security Agency surveillance (2013/2831(RSP))

[29] See Article 218 (9) TFEU.

[30] The OIV is an intergovernmental scientific and technical organization with 44 contracting states among which 20 are EU Member States (Hungary among them). The EU is not a member of the OIV.

[31] Regulation 1234/2007/EC establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products, OJ L 299/1.

both the EU's exclusive competences in the area and the principle of loyal cooperation under Article 4(3) TEU.[32] Finally, at least according to our information, the Commission did not refer the matter to the CJEU.[33]

Question 11

The Government of Hungary is on the opinion that, in case of review of legality of legislative acts of EU external relations, the obligation (of the Council) to immediately and fully inform the European Parliament at all stages of the (legislative or treaty-making) procedure. is a matter which the CJEU must take into account of its own motion (i. e. irrespective of the fact whether is it a ground for review in the action for annulment submitted before the Court). Hungary represented this view before the Court in case C-399/12 Germany v Council (OIV case).

According to our information, national parliaments may have only an indirect role in this matter in Hungary: they take part in the procedure of adoption of the negotiation position of the Government within the Council of the EU (in case their legislative competence is concerned).

Chapter 3 Legal effects of international agreements

Question 12

No information can be obtained on national cases on the application and/or interpretation of international agreements concluded solely by the European Union or of mixed agreements, or on cases concerning the challenge of such agreements which were not source of references for a preliminary ruling.

Question 13

Specific discussions regarding the CJEU case law on direct effect of international agreements has not taken place in Hungary, however, the scholarship focused on the most important developments in this area. Articles reflected on the Court'sjurisprudence even before the

[32] Commission staff working document – Accompanying the document Report from the Commission 29th annual report on monitoring the application of EU law (2011) /* SWD/2012/0400 final.

[33] It should be noted, however, that, parallel to the infringement procedures, the Commission submitted a proposal for a Council decision concerning the position to be adopted on behalf of the European Union with regard to certain resolutions proposed in the OIV framework. This decision was adopted on 18 June 2012 under Article 218(9) TFEU. Germany then brought an action for annulment against the decision before the CJEU which resulted in the judgment in the case C-399/12 Germany v Council, ECLI:EU:C:2014:2258.

accession of Hungary to the EU,[34] and later, the case law (Ikea wholesale; F.T.S. International, FIAMM-Fedon) has been examined in the Hungarian scholarly literature.[35]

Question 14

The actions for failure to fulfil obligations brought by the Commission against Hungary to the Court did not concern directly international commitments binding on the European Union.[36]Similarly, no infringement procedures initiated by the Commission against Hungaryare known that are implying directly such international obligations,however, certain cases (but not Court cases) involved indirectly international commitments. In 2015, the Commission commenced infringement procedure against Hungary in connection with the directive on certain issues concerning the ILO Maritime Labour Convention.[37] The formal notice has been sent to Hungary, however in 2016, the infringement procedurehas been closed without publishing any details on the dispute.[38] The recent case regarding the implementation of EU asylum and migration acquis might imply indirectly international obligations.[39] The formal notice has been issued on 17 May 2017, setting out concerns raised by the amendments to the Hungarian asylum law. The Commission considered that three of the five issues identified in the letter of formal notice from 2015 remained to be addressed, in particular in the area of asylum procedures. In addition, the letter outlined new

[34] Viktor Luszcz: A WTO és az EU jogának kapcsolatrendszere [The relationship of the WTO and EU law], Jogtudományi közlöny, 2003/3. pp. 131–144.

[35] Attila Vincze: A WTO és az EU jog viszonyának újabb felvonása a dömpingellenes jog díszletei között. [The recent act of the relationship of the WTO and EU law in the scene of the anti-dumping la], Európai Jog, 2007/6. p. 20; Balázs Horváthy: A GATT-WTO-normák helye az uniós jogrendszerben, [The position of the GATT-WTO-law in the Union's legal order], Állam- és Jogtudomány, 2008/3, pp. 355–392; Bartha Ildikó: Nemzetközi szerződések mozgásban [International agreements in action], Dialóg Campus, Budapest, 2015, pp. 86–88.; Blutman László: Az Európai Unió joga a gyakorlatban [The Law of the European Union in practice] (e-book), HVG-Orac, Budapest, 2014, pp. 218–220.

[36] The 18 cases referred by the Commission to the Court affected mostly compliance with the internal market regulations. The list of the cases are available here: http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&r_dossier=&noncom=0&decision_date_from=&decision_date_to=&active_only=0&EM=HU&title=&d_type=5&submit=Search

[37] Formal notice issued in infringement no.: 20150194 (28/05/2015) Directive 2013/54/EU of the European Parliament and of the Council concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention, 2006.

[38] Case closed in infringement no. 20150194 (25/02/2016) Directive 2013/54/EU of the European Parliament and of the Council concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention, 2006. In addition to this case, the Commission initiated another infringement procedure relating to the Maritime Labour Convention concerned by an agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF), however, also this procedure has been closed without any further action in 2017. See infringement no. 20140511 (27/04/2017) Directive 2009/13/CE du Conseil du 16 février 2009 portant mise en œuvre de l'accord conclu par les Associations des armateurs de la Communauté européenne (ECSA) et la Fédération européenne des travailleurs des transports (ETF) concernant la convention du travail maritime, 2006, et modifiant la directive 1999/63/CE.

[39] Infringement no. 20152201 (17/05/2017), Incorrect implementation of EU asylum and migration acquis.

incompatibilities of the Hungarian asylum law, as recently modified by the amendments of 2017.[40] The incompatibilities focused mainly on three areas: asylum procedures, rules on return and reception conditions.[41]

Question 15

No relevant information on specific tools, instruments or practices could be obtained relating to control measures taken by Hungary in order to ensure compliance with international agreements binding on the European Union. Therefore the question can be answered only hypothetically, referring to the standard and implicit mechanisms and principles for fulfilling obligations arising from EU law (legislation, role of the Hungarian Parliament, Government's instruments, control mechanisms over the public administration as well as municipal law making and administration, role of domestic courts in this regard, etc.).[42]

Chapter 4 Trade and protection of investments

Question 16

Official position of Hungary could not been obtained regarding the scope of the common commercial policy and the extent of its exclusive character. However, the Hungarian scholarly literature examined the related issuesand defined the 'foreign direct investment' as a wide concept,[43] which has been inspired by the international economic law (e.g. comparing its scope with the concept of the TRIMs,[44] definitions of the OECD and IMF[45] etc.), and the

[40] Commission follows up on infringement procedure against Hungary concerning its asylum law (European Commission - Press release, Brussels, 17 May 2017).

[41] The EU legal acts concerned are particularly the Directive 2013/32/EU on Asylum Procedures, Directive 2008/115/EC on Return, Directive 2013/33/EU on Reception Conditions, which can be indirectly contextualized within the international law framework.

[42] See for a general commitment in this regard in the Hungarian law, Act L of 2005 on procedures relating to international agreements, § 4 (3): "From the preparation of an international agreement it has to be constantly observed, whether the agreement is in accordance with the Fundamental Law, laws; as well as obligations arising from the European Union law and international law. The conformity should be established by modification of the content of the agreement, modification or enacting of laws, or - if feasible – by modification or termination of obligations arising from the European Union law and international law."

[43] See Attila Vincze: EUMSZ 207. cikk [Article 207 TFEU] in András Osztovits (ed.): Az Európai Unióról és az Európai Unió működéséről szóló szerződések magyarázata [Commentary on the Treaty on the European Union and Treaty on the Functioning of the European Union], vol 2 , Complex, Budapest, 2011.; Péter Balázs – Pál Sonnevend: Közös kereskedelempolitika [Common Commercial Policy] in Tamás Kende: Bevezetés az Európai Unió politikáiba [Introduction to Policies of the European Union], Complex, Budapest, 2015.; Balázs Horváthy: A közös kereskedelempolitika jogi feltételrendszere a Lisszaboni Szerződést követően [The provisions concerning the Common Commercial Policy after the Lisbon Treaty] in Imre Vörös – Balázs Horváthy (Eds.): Az európai uniós jogfejlődés irányai a Lisszaboni Szerződés után [The trends of the European Union's legal development after the Lisbon Treaty], MTA TK JTI, Budapest, 2012. pp. 157–188.

[44] The scope of the TRIMs ('Trade-Related Investment Measures') is narrower that the notion of the Treaty ('Foreign Direct Investments'). It was argued, that the competence for the issues covered by the TRIMs existed

Court's case law.[46] In spite of the wide extent of the concept, the portfolio investments have been excluded from the scope of CCP in terms of this interpretation, arguing that the investors of portfolio investmentsgenerally does not intend to have control directly over the assets that underlie the financial claims, consisting mostly of holdings of corporate equities and corporate, government bonds etc. On the other hand, direct investment gives the investor a long-term controlling interest in an undertaking, therefore the direct investments are less volatile than the speculative, portfolio investment.

The exclusion of the portfolio investments from the scope of CCP has been recently confirmed by the CJEU in Opinion 2/15. The Court held that "[t]he acquisition of company securities with the intention of making a financial investment without any intention to influence the management and control of the undertaking ('portfolio' investments) […] constitute[s] movements of capital for the purposes of Article 63 TFEU […]" and this form of investment has been defined as 'non-direct investment'.[47] However, uncertainty remained, how to qualify a concrete transaction, whether it is an 'investment without influence'. The Court refers to the 'intention' of the investor ("[…] without any intention[…]"), however this component alone is not able to determine the status of an investment beyond reasonable doubt, but it is plausible, that not the investors' intention alone, but a real control – or an 'effective voice' of the investors – could be qualify objectively the nature of an investment (otherwise, the investor would be alone to qualify the transaction depending on the fact, whether he or she has or not intention to control. In other terms, the investors' intention could subjectively determine the scope of the EU competence). This method is fully complying with the previous CJEU case law, which held that the effective control is depending not only on the share of the investor, but the on investor's participation in the administration, decision-making of the company, or specific provisions regarding the assets.[48]

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even before the Treaty of Lisbon entered into force. See Eberhard Grabitz – Meinhard Hilf – Martin Nettesheim: Das Recht der Europäischen Union [Law of the European Union], C.H. Beck, München, 2011, Article 207, para. 44.; Markus Krajewski: External Trade Law and the Constitutional Treaty, CMLRev 2005. 91. p. 114

[45] See OECD Benchmark Definition of Foreign Direct Investment, 4th ed., 2008. Available at: https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf

[46] See for instance: Judgment of 12/12/2006, C-446/04, Test Claimants in the FII Group Litigation, ECLI:EU:C:2006:774, para. 181; Judgment of 24/05/2007, C-157/05, Holböck, ECLI:EU:C:2007:297, para. 34; Judgment of 23/10/2007, C-112/05, Commission v Germany, ECLI:EU:C:2007:623, para. 18; Judgment of 18/12/2007, C-101/05, A, ECLI:EU:C:2007:804, para. 46; Judgment 20/05/2008, C-194/06, Orange European Smallcap Fund, ECLI:EU:C:2008:289, para 100; Judgment of 14/02/2008, C-274/06, Commission v Spain, ECLI:EU:C:2008:86, para 18; Judgment of 26/03/2009, C-326/07, Commission v Italy, ECLI:EU:C:2009:193 para. 35.

[47] Opinion of the Court of 16 May 2017, Opinion 2/15, Request for an opinion pursuant to Article 218(11) TFEU, ECLI:EU:C:2017:376

[48] Judgement of 12/12/2006, C-446/04, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue , ECLI:EU:C:2006:774 para 182.

Moreover, it is worth mentioning that the IMF and OECD terminology applies a threshold in determining and qualifying an investment. The interest of control is formally deemed to exist when a direct investor owns 10% of the ordinary shares or voting shares of a foreign company, conversely, it is presumed that an investment below the 10% threshold doesn't give the investor a controlling interest.[49]

Question 17

Hungary's BITs were also influenced by the modifications of the Treaty of Lisbon which in Article 207(1) TFEU provides for the exclusive competence of the EU on foreign direct investment. The changes affecting the more than 1000 BITs of the Member States with third countries were indicated in a regulation (the so called BIT regulation) adopted on 12 December 2012 by the Parliament and the Council establishing the terms, conditions and the procedure under which Member States are authorized to maintain in force, amend or conclude bilateral agreements with third countries relating to investment.[50]

The BIT regulation permits Member States to maintain in force BITs with third countries signed before 1 December 2009 or before the date of their accession which have been notified in accordance with the regulation. Member State autonomy in this domain is allowed as long as the EU does not exercise its powers under Article 207 TFEU to conclude a bilateral investment agreement with the third state concerned. According to the Commission's first publication of the list of the BITs affected, Hungary wished to maintain 37 agreements[51] covering all its agreements concluded with third states but not those with other EU Member States.[52]

Question 18

Even if Hungary has been supportive towards the negotiations on the recent EU trade and investment agreements according to the official statements,[53]arguing that a balanced deal

[49] However, that definition is flexible, as there are instances where effective controlling interest in a firm can be established with less than 10% of the company's voting shares. See Balance of Payment Manual. 5th ed., IMF, Washington, 1993. p. 87, available at: http://www.imf.org/external/np/sta/bop/bopman.pdf

[50] Regulation 1219/2012/EU establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L351/40.

[51] List of the bilateral investment agreements referred to in Article 4(1) of Regulation 1219/2012/EU establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ C131/2.

[52] Before the entry into force of the BIT regulation, the new Article 207 TFEU had no real influence on the legality of Hungary's agreements.

[53] See for instance: The signing of the free trade agreement between the European Union and Canada is in Hungary's interests, published by Ministry of Foreign Affairs and Trade, based on press release of the Hungarian Press Agency (MTI) (October 25, 2016), available at: http://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/the-signing-of-the-free-trade-agreement-between-the-european-union-and-canada-is-in-hungary-s-interests ; and The lack of agreement on CETA is frustrating for Hungary, published by Ministry of Foreign Affairs and Trade, based on press release of the Hungarian Press Agency (MTI) (October 25, 2016),

might benefit the Hungarian economy significantly,[54]the Government provides this support cautiously.A realistic approach is represented and it is always emphasized that only compromise is acceptable that is fully kept in line with the 'national interest' of Hungary. In this respect, distinctive attention has been paid for the dispute settlement mechanism of CETA. In 2015, it was expressed that the Government might not support the CETA because the investor-state dispute settlement system, and a 'political consensus' was reported for refusing the ISDS mechanism in the Parliament.[55]Moreover, the impact assessment report on the TTIP commissioned by the National Council for Sustainable Development has given rise to criticism over the draft chapter on dispute settlement provisions.[56] This 'resistance', however, has been stimulated also by the harsh debates triggered in Europe on the model and necessity of investor-state dispute settlement in 2014-2015 that led to a public consultation announced by the European Commission on this issue and elaboration of a new approach to the dispute settlement mechanism. After the Commission announced the proposal on international arbitration court[57] and the provisions of the new model has been integrated into the text of CETA in 2016, the debates on the ISDS have been slightly calmed down also in Hungary.

Question 19

No relevant information about the position of Hungary regarding the liability of the Union and the member states could be obtained. The political discourse went into only the question of the competence allocation between the EU and member states.[58] The Hungarian scholarly

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http://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/the-lack-of-agreement-on-ceta-is-frustrating-for-hungary

[54] "It is primarily IT companies that are in favour of the proposed Transatlantic Trade and Investment Partnership (TTIP) agreement between the EU and the United States; environmental protection groups and human rights activists are against the treaty." See: It is primarily IT companies that are in favour of the TTIP, Press Release, Ministry of Foreign Affairs and Trade (May 20, 2016), available at: http://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/it-is-primarily-it-companies-that-are-in-favour-of-the-ttip. It was also predicted, that the Hungarian automobile, pharmaceutical and food industries could gain significant ground on the Canadian market after the CETA enters into force. The signing of the free trade agreement… op. cit.

[55] See the statements made by István Mikola, secretary of states in the Ministry of Foreign Affairs and Trade: Magyarország nem kér a választott bíróságokból [Hungary do not want to take the arbitration courts], Bruxinfo.hu (8.05.2015).

[56] Gábor Baranyai – Erik Szarvas – Zsófia Wagner: A Transzatlanti Kereskedelmi és Beruházási Partnerségről szóló Megállapodás lehetséges hatásai a Fenntartható fejlődésre Magyarországon [The potential impacts of the Transatlantic Trade and Investment Partnership on the sustainable development in Hungary], ELDH Consulting Kft., Budapest, 2015. Available at: http://www.nfft.hu/documents/1238941/1240165/NFFT_mt_24_TTIP_jogi_elemzes_2015_kezirat.pdf/48b94e87-7691-4ff3-9eba-0a577307b9c1

[57] CETA: EU and Canada agree on new approach on investment in trade agreement, Press release, European Commission, (Brussels, 29 February 2016), available at: http://europa.eu/rapid/press-release_IP-16-399_en.htm

[58] But only superficially, see the above cited parliamentary decisions, Decision 11/2016. (VI. 17.) and Decision 22/2016. (X. 14.) of the Parliament (*Országgyűlés*).

literature examines issues concerning the responsibility only on general level, but neither the liability regarding the trade and investment treaties, nor specific questions (e.g. financial responsibility directive)[59]has been at the centre of attention of the academia.

Question 20

As a result of the Lisbon Treaty that established a general framework for values, principles and objectives, requiring that the Union shall pursue these concepts in the whole range of the EU external relations, the Common Commercial Policy has become an integral part of the European Union's external action. Therefore, the functioning of the CCP is based on a two-level structure of values, principles and objectives, which encompasses not only the proper, trade-related goals, such as progressive liberalization, but includes several non-trade concerns, like protection of human rights, or promotion of sustainable development as well. Even though no relevant evidence could be obtained regarding the role of these concepts in the common commercial policy, the Hungarian legal scholarship partly addressed the mainquestions posed by the report.[60]

At first glance, the changes introduced by the Lisbon Treaty seem to be unimportant, knowing that the European Union has been committed to implementing an inclusive, 'values-driven' trade policy for many decades. The reform is indeed significant, because the Treaty succeeded in merging the diverging areas of the EU external action first time, however, the apparently more coherent construction does not firmly answer the question how the values, the general objectives, the principles might relate to the specific concerns of the CCP, and what role these concepts are playing in the operation of the trade policy. Earlier, the possible conflict between the trade-related objectives and general objectives of the Community could be resolved by the specificity of the trade policy, i.e. the goals of the CCP, as *lex specialis*, was deemed to prevail over the general objectives of the Community.

The Treaty of Lisbon added the consistency requirement to the unified structure of external objectives and principles, ensuring the consistency of general and specific, trade-related principles and objectives. The consistency requirement might be interpretedas institutional cooperation as well, as the Council and the Commission, assisted by the High Representative for Foreign Affairs and Security Policy are obliged to cooperate in order to ensure this consistency.[61] The consistency requirement is still handled more clearly on the level of the CCP, because the provisions of Article 21 TEU on consistency is repeated in Article 205

[59] Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party

[60] Ildikó Bartha: Nemzetközi szerződések… [International agreements…] op. cit., pp. 41–44; Balázs Horváthy: A közös kereskedelempolitika alapelvei és célkitűzései az integrált uniós külkapcsolatrendszer tükrében [The principles and the objectives of common commercial policy in the light of the integrated external relations of the Union], Iustum Aequm Salutare, X., 2014/1, pp. 51–69; Péter Balázs – Pál Sonnevend op. cit.

[61] Article 21 (3) TEU

TFEU.In addition, the reference to the principles and objectives of Union's external action is stressed – unnecessarily again – in Article 207 TFEU. According to the grammatical and systematic interpretation of these provisions it is plausible that the inherent principles and objectives of CCP governed by free trade ideas are not strictly subordinate to the general principles of external relations, but the EU trade policy should be 'guided' by the principles and objectives of general level. In other terms, the EU, at least, has to take into account these concepts, which encompasses a sort of non-economic and non-trade factors.

However, if several principles and objectives are incorporated in a systematic order, the question concerning the potential conflicts between the different areas, principles and objectives might always arise.It is crucial concerning the CCP, as Article 21 TEU contains several principles and objectives which could be hardly reconciled with the logic of the trade policy and principally with the objective of liberalization. Therefore, conflicts or tensions can be expected in the relation of trade and non-trade concerns, e.g. in issues of trade and human rights, trade and environment, trade and labour rights and social policy concerns, etc. Since the EU has been always a dominant promoter of the inclusion of social policy concerns into the external trade policy, the aforementioned conflict potential is less concentrated at the level of the European Union's decisions making mechanism,[62] than relating to international dimension, i.e. in trade negotiations, or in implementation of the international economic law. This tendency and the potential conflicts are palpable in the EU new generation of free trade agreements, which go already beyond the 'classic' free trade agreements, including also rule of law and human rights clauses, environmental objectives, and sustainable development. In a similar way, some EU autonomous trade preference schemes involve the labour rights, environmental consideration, and promotion of fair trade specifically.[63]

Even the recent trade and investment partnership agreements aim at integrating several non-trade concerns into the body of the agreements. Despite of the normative nature, the formulation of the principles – including also the principle of uniformity – seems to be relatively abstract and restrictive, therefore the principles do not establish strict obligations within the Common Commercial Policy. Due to the soft formulations in the Treaty – "shall be guided", "promote" etc. – it can be concluded, that the principles are not able to give obvious signal of what concrete trade policy decision the EU institutions should adopt. The Treaty objectives were seen more than mere declaration, but according to the Treaty

[62] However, conflicts are neither at the Union's level conceptually excluded, e.g. institutional conflicts can be presumed, as the European Parliament has made clear that the Union has to involve non-economic, socio-political approaches closely in its external action for a long time. From this perspective, it seems to be significant, that the Treaty of Lisbon has considerably strengthened the position of the European Parliament in the field of the Common Commercial Policy (see e.g. the consent requirement of the European Parliament for the conclusion of international agreements in Article 207 (2) TFEU.

[63] However, these preferential agreements can be seen as not fully compatible with the WTO law, se e.g. European Communities – Conditions For The Granting Of Tariff Preferences To Developing Countries, WT/DS246/AB/R (7 April 2004). http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm

formulations, and in light of the Court's interpretation, the objectives are expressing only an orientation, or direction of the Union's action. Consequently, both the principles and the objectives in this context have legal quality, but might imply only an orientative, guiding function in the decision-making procedures. However the EU institutions may overlook neither the principles, nor the objectives. The institution has to take into account these concepts; but it enjoys a wide margin of discretion.[64]

Question 21

Observations on particular aspects of conclusion of agreements have not been highlighted and no remarks has been expressed regarding the procedural exceptions listed in Article 207 (4) TFEU. However, if considering the overall stance of the Hungarian Government to the EU external trade policy, namely the fact that the Government lays stress upon the 'national interest' of Hungary frequently, the exceptions listed in Article 207 (4) TFEU might pertain to the core of the national interest, therefore Hungary presumably would think these issues over (e.g. cultural, social health services, etc.) before coming to a decision.

Chapter 5 Area of freedom, security and justice (policies on border controls, asylum and immigration)

Question 22:

Although the Lisbon Treaty has taken significant steps to clarify the competence allocation between the EU and the Member States, the competence debate – specifically regarding the external competences in the field of the area of freedom, security and justice – has not been resolved. Moreover, the Protocol No 23 on the external relations of the Member States with regard to the crossing of external borders has beeninterpreted uniformly neither by the scholarship nor by the Member States. The legal scholarship approaches the Protocol No 23 from different angles.After the "Communitarization" of the third pillar, the major part of the scholarly literature accepted the argument that the EC acquired implicitly exclusive powers in terms of the AETR doctrine.[65] However, later the arguments became more complex and

[64] Additionally, it is also important, how this 'values-driven' trade policy of the EU is related to the international trade law, specifically to the WTO law. Even though the WTO has becoming more open to the non-trade concerns in the last two decades, in light of the current legal framework of the WTO, all trade measures, which are underpinned by the social policy considerations, as the human rights, environmental protection, cultural aspects, or other social policy objectives, can be regarded as potential trade restrictions, conflicting with the WTO's main concern on free trade and liberalization. Therefore, the main question is how the potential measures of the EU underpinning the values, principles and objectives can comply with the WTO law (e.g. with the exceptions of the Article XX GATT, Article XIV GATS etc.), and how these conflicts can be resolved at the level of the World Trade Organization. Taking into consideration that the EU is an important *demandeur* of integration of these concerns, conflict cannot be excluded between the levels of the WTO and the European Union.

[65] Steve Peers: EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law, OUP, Oxford, 2015, p. 51; Steve Peers – Nicola Rogers: EU Immigration and Asylum Law: Text and Commentary, Martinus Nijhoff Publishers, Leiden, 2006. pp. 887-889.

offered alternative conclusions to the relationship of ERTA doctrine to the scope and objective of the Protocol.The politically sensitive character of the migration policy has been highlighted,[66] which might explain why the distribution of powers between the EU and the Member States are difficult and why the Member States are reluctant to confer powers explicitly on the European Union in this field.[67]However, it is also argued that the external relations Protocol itself implies the inapplicability of the AETR doctrine.[68]

The Hungarian doctrine does not address substantially the meaning and scope of the Protocol, nor the practice of Hungary is showing any unique characteristics that might be considerably different from approaches applied in other Member States. Hungary has been maintained as well as concluded certain types of agreements containing provisions on external relations with regard to the crossing of external borders after its accession to the European Union, however these provisions might presumably fall outside the scope of Article 77 (2) (b) TFEU. Such provisions are coveredby agreements on border control cooperation concluded with neighbouring countries,[69]agreements addressing issues relating the local border traffic.[70] Moreover also specific agreements have been concluded, regarding e.g.,visa requirements for their nationals holding diplomatic passports;or agreements governing the cross-border transport with the neighbouring countries.[71]

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[66] Georgia Papagianni: Institutional and Policy Dynamics of Eu Migration Law, Brill, 2006, p. 79

[67]Bernd Martenczuk: Migration policy and EU external relations, In Loïc Azoulai – Karin de Vries (eds.): EU Migration Law. Legal Complexities and Political Rationales, OUP, 2014. pp. 84–85.

[68] Kay Heilbronner: Immigration and asylum policy of the European Union, Kluwer Law International, The Hague 2000. pp. 65-66, cited by

[69] See e.g. Act CIV of 2005 on promulgation of Agreement concluded between the Hungarian Republic and Romania (Bucharest, 27 April 2004) on cross-border road and railway traffic control ; Act XXXV of 2006 on promulgation of Agreement concluded between the Hungarian Republic and Romania (Bucharest, 20 October 2005) on the order of the Hungarian-Romanian state border, cooperation and mutual assistance; Act IV of 2012 on promulgation of Agreement concluded by the Government of Hungary and the Government of Republic of Serbia on road, railway and waterway border traffic control; Act LXVIII of 2012 on Agreement concluded by the Government of Hungary and the Ministerial Cabinet of Ukraine on the control of road and railway cross-border traffic at crossing points; Act LVII of 2014 on promulgation of Agreement between the Government of Hungary and the Government of Federal Republic of Austria on border crossing points at the common state border, as well as on cooperation in control of cross-border road and waterway traffic; Act LVIII on promulgation of Agreement between the Government of Hungary and the Government of Republic of Serbia on road passenger and goods transport.

[70] E.g. Act CLIII of 2007 on promulgation of Agreement between the Government of the Republic of Hungary and the Cabinet of Ministers of Ukraine on the rules of local border traffic.However, concerning these agreements there is a specific authorization on behalf the EU by theRegulation (EC) No 1931/2006 of the European Parliament and of the Council; for detailed analysis, see Ildikó Bartha: Hungary's international agreements…, op. cit. p. 351.

[71] Act XI of 2009 on promulgation of Agreement between the Government of the Republic of Hungary and the Government of the Arab Republic of Egypt on the abolition of visa requirements for their respective nationals holding diplomatic passport; Act IX of 2013 on the promulgation of Agreement between the Government of Hungary and the Government of the Republic of Indonesia on the exemption of visa requirements for their respective nationals holding diplomatic and service passport; Act XXVIII of 2014 on promulgation of Agreement

Question 23:

Until 2012, the concept of safe third country has been shaped bythe interpretation and application of the Hungarian authorities and courts on case-to-case basis. The Hungarian Asylum Act[72] laid down only framework provisions regarding the concept,[73] therefore the courts had to establish the criteria, whether the relevant countryhas to be assessed as safe third country.[74]In 2012 the 'jurisprudence-analyzing working group,' a specialized body of the Curia of Hungary (*Kúria*)[75] adopted an interim report on the concept of safe third country and found substantial contradictions in the previous case law of the Hungarian Courts.[76] Based on these findings and the proposals elaborated by the working group, the Curia adopted an opinion for establishing consistency in the case law regarding the assessment at the end of 2012.[77]The opinion highlighted the following major assumptions regarding the assessment method:

- the Hungarian courts are obliged to consider all accurate and authenticinformation on the third country in question, which are available when the judgment is entered;
- the relevant country reports of the office of the United Nations High Commissioner for Refugees (UNHCR) have to be assessed in any case;

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between the Government of Hungary and the Government of the State of Kuwait on the exemption of visa requirements for holders of diplomatic, service and special passports; Act of XIV of 2016 on promulgation of Agreement between The Government of Hungary and The Government of Mongolia on the exemption of visa requirements for holders of diplomatic and service/official passports; Act LXXII of 2016 on promulgation of Agreement between the Government of Hungary and the Government of the Republic of Ghana on the mutual visa exemption for holders of diplomatic and service passports.

[72] Act LXXX of 2007 on Asylum.

[73] See § 2 i) of Act LXXX of 2007: Safe third country is „[a] country in connection to which the refugee authority has ascertained that the applicant is treated in line with the following principles: ia) his/her life and liberty are not jeopardised for racial or religious reasons or on account of his/her ethnicity/nationality, membership of a social group or political conviction and the applicant is not exposed to the risk of serious harm; ib) the principle of non-refoulement is observed in accordance with the Geneva Convention; ic) the rule of international law, according to which the applicant may not be expelled to the territory of a country where s/he would be exposed to treatment/behaviour stipulated by Article XIV(2) of the Fundamental Law, and id) the option to apply for recognition as a refugee is ensured, and in the event of recognition as a refugee, protection in conformity with the Geneva Convention is guaranteed."

[74] However, it is important that the concept may only be applied as an inadmissibility ground where the applicant stayed or travelled there and had the opportunity to request effective protection; has relatives there and may enter the territory of the country; or has been requested for extradition by a safe third country. In the practice of the Hungarian authorities and Courts, transit or stay is a sufficient connection, even in cases where a person was smuggled through the country. See § 51(3) of Act LXXX of 2007.

[75]I.e. the Supreme court in Hungary.

[76] 2012.El.II.F. 1/9/4-28-1 *A menekültügyi és idegenrendészeti joggyakorlat elemző csoport együttes részjelentése: a biztonságos harmadik ország megítélése a menekültügyi nemperes eljárásokban* [Joint interim report of the jurisprudence-analyzing working groups in asylum and immigration: the assessment of country as safe third country in the out-of-court proceedings], p. 3.

[77] 2/2012 (XII.10) opinion of Administrative-Labour Department of Curia on certain questions relating to the assessment of a country as a safe third country.

- if there is doubt about the assessment, the court can turn to the Hungarian Immigration and Asylum Officeand require information in order to clarify the conditions concerning the third country in question;[78]
- the opinion of the Curia has explicitly declared, that an overloaded administrative asylum system of a third country might impede the enforcement of the rights of asylum seekers, therefore, in such case, the country *should not*qualify as safe third country;[79]
- ifthe asylum seeker has not applied for asylum in the third country concerned previously, this fact cannot be considered in a way that the country in questionshould be assessed necessarily as a safe third country.[80]

The inconsistent case law of the Hungarian courts has also drawncriticism fromthe civil society and non-governmental organizations. The Hungarian Helsinki Committee argued even before the adoption of the Curia's opinion that the application of safe third country standards can hinder the asylum seekers from being able to apply for effective protection.[81] The striking example has been Serbia, a non-EU member that lays on the Balkan 'migration route' and shared its border partly with Hungary.A large part of asylum seekers arrived through Serbia, consequently it was decisive, whether Serbia can be assessed as safe or not safe third country. The lack of access to effective procedures, an effective remedy, legal aid and information has been well documented,[82]even in the 2012 UNHCR report,[83]moreover, it might have been also an indication that between 2008 and 2012, there has not been any asylum seeker, who received refugee status by the Serbian authorities.[84]Despite these concerns, the Hungarian Immigration and Asylum Office qualified Serbia permanently as safe third country and later this position was supported by several court judgements.For this

[78] 2/2012 (XII.10) opinion of Administrative-Labour Department of Curia, Part I.
[79] 2/2012 (XII.10) opinion of Administrative-Labour Department of Curia, Part II.
[80] 2/2012 (XII.10) opinion of Administrative-Labour Department of Curia, Part III.
[81]*Megjelent a Kúria iránymutatása a biztonságos harmadik ország koncepciójáról* [The Curia's opinion on the concept of the safe third country has been released], Hungarian Helsinki Committee, 19 December 2012. Available: http://www.helsinki.hu/megjelent-a-kuria-iranymutatasa-a-biztonsagos-harmadik-orszag-koncepciojarol/
[82] Ibid. See also Serbia as a safe third country: a wrong presumption, Hungarian Helsinki Committee, September 2011. Available at: http://helsinki.hu/wp-content/uploads/Serbia_as_a_safe_third_country_A_wrong_presumption_HHC.pdf; Celebrating 30 years of the ELENA Network: 1985-2015, European Council of Refugees and Exiles, 26 October 2015, p. 2. Available at: https://www.ecre.org/wp-content/uploads/2016/05/ELENA-Celebration.26.10.2015.final_.pdf; Case law fact sheet: Prevention of Dublin transfers to Hungary, European Council of Refugees and Exiles, January 2016, pp. 5–6. Available at http://statewatch.org/news/2016/jan/eu-ecre-factsheet-dublin-transfers-to-hungary-1-16.pdf
[83] Serbia as a country of asylum: Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia, UNHCR, August 2012. Available at: http://www.refworld.org/docid/50471f7e2.html
[84]*Megjelent a Kúria iránymutatása…*, Hungarian Helsinki Committee, 19 December 2012.

reason, the Hungarian Helsinki Committee has welcomed the opinion adopted by the Curia.[85]

In 2015, the concept of the 'safe third country'has been at the forefront of discussions again, when the Hungarian Parliament has enabled the Government to lay down decree on list of safe third countries.[86]Under this mandate, the Government adopted the list[87] and considered as safe third countryamong others[88] Serbia, Bosnia-Herzegovina, Kosovo, Turkey,[89]or interestingly, also the EU Member States are referred in the text as 'safe third country'.[90]It was also criticized that the Decree restricted itself only to establish the list of countries, but has not given any explanation or justification as to how the Government arrived to the conclusion that each country listed qualifies as safe.[91]

The status of the countries covered by the list can be regarded as a presumption, because the Decree enables the applicants to prove that there was no opportunity to apply for effectiveprotection in the third country concerned. Therefore the presumption is rebuttable, however, it is important to note that the applicant itself is required to prove those concerns. In other terms, the standard of proof is relatively high, if consideringthat in most of the cases the asylum seeker is smuggled through thethird countrywithout any real connection, which could establish evidence to prove the above requirement. Moreover, it is also questionable, whether the assessment of a third country can really rely upon on the asylum seeker's individual and personal factors at all, or it is rather resulted by structuraland functional deficiencies of the asylum system of the third country.

As the Decree was in contradictionwith the Curia's aforementioned opinion of 2012, and in 2016, the Curia has withdrawn its former opinionon the ground that legislation has since changed and its application based on current asylum and migration laws is no longer possible.[92]However, the inconsistency in the courts' case law has not be dissolved and the

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[85] Ibid.

[86] Act CVI of 2015 on the amendment Act LXXX of 2007 on Asylum.

[87] Government Decree 191/2015 on national designation of safe countries of origin and safe third countries.

[88] The list includes all member and candidate countries of the EU, members of the European Economic Area, the US States not applying death penalty, Switzerland, Bosnia-Herzegovina, Kosovo, Canada, Australia and New Zealand. See §2 of Act CVI of 2015.

[89] In the original version of the Decree Turkey was exempted from the list, however, after the deal between the EU and Turkey on asylum matters has been concluded, Turkey's position was changed. Today Turkey, as a candidate country of the EU is defined as 'safe third country' by the Decree. See Boldizsár Nagy: Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation, 17 German L.J. 1033 (2016), p. 1045.

[90] Ibid p. 1045–1046: "Nobody in the government noted that 'safe third countries' may not refer to an EU member state, only to a State outside the EU. Nor did they note that by failing to designate Japan and many other countries as safe countries of origin, those left out may feel insulted."

[91] Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016. UNHCR, May 2016, p. 15. Available at: http://www.refworld.org/docid/57319d514.html

[92] 1/2016 (III.21.) opinion of Administrative-Labour Department of Curia on revision of department opinion. Se also: Safe third country – Hungary. Hungarian Helsinki Committee, Asylum Information Database. Available at:

inadmissibility decisions based on Serbia being a safe third country has been varying. For instance, the Szeged Regional Court (*SzegediTörvényszék*) commenced to reject almost all appeals after the revision of the Curia's opinion, but its practice reversed again towards the end of 2016.By contrast, the practice of the Budapest Regional Court (*Fővárosi Törvényszék*) has been inconsistent throughout 2016.[93]

After the adoption of the Government Decree in 2015, the Debrecen Administrative and Labour Court (*Debreceni Közigazgatási és Munkaügyi Bíróság*) initiated preliminary ruling procedure in order to clarify the consistency between the concept of safe third country after the adoption of the Decree and the EU law.[94]The case concerned a Pakistani citizen, who entered Hungary from Serbia in 2015 and submitted an application for international protection, then left the country to the Czech Republic. The applicant was delivered to the Hungarian authorities in the framework of Dublin Regulation, but his application was rejected later and as a consequence, the applicant has been expelled to Serbia, as the authority considered it to be a 'safe third country.'The asylum seeker lodged an appeal against the decisions before the Debrecen Administrative and Labour Court. The Court requested a preliminary ruling in December 2015 asking, in brief words, whether a Member State, after having applied the framework of the Dublin System, is able toassess the fact, whether the applicanthas arrived from a safe third country or not.[95]The CJEU stated in *C-695/15 PPUMirza*that the fact that a responsible Member State in terms of the Dublin Regulations receives an applicant from another Member State, does not preclude that the applicant thereafter will be sent to a safe third country according to the Dublin III Regulation. The Hungarian Government interpreted the decision in a way, that the "Hungarian reasoning was approved" by the CJEU and consequently, the Government Decree 191/2015 is fully compatible with the EU law.[96]

Question 24:

The Global Approach to Migration and Mobility (GAMM) has been established even before the refugee crisis deepened the strains between the Member States of the European Union. Until 2013-2014 also Hungary expressed concerned about the cooperation within GAMM and has participated intensively in the dialogues.Specifically, the idea of 'Budapest Process' has been backed up by Hungary in order to involve third countries alongside the 'Silk Road'.

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http://www.asylumineurope.org/reports/country/hungary/asylum-procedure/safe-country-concepts/safe-third-country

[93] Ibid.

[94] Judgement of 17 March 2016, *Mirza*, C-695/15 PPU, ECLI:EU:C:2016:188.

[95] For the exact questions, see: Application, C-695/15 PPU, OJ 2016 c 90, p. 10. Available at: http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2016.090.01.0010.01.ENG

[96] The Hungarian reasoning was approved by the Court of Justice of the European Union, Press release, Immigration and Asylum Office, 17/03/2016. Available at: http://www.bmbah.hu/index.php?option=com_k2&view=item&id=841:the-hungarian-reasoning-was-approved-by-the-court-of-justice-of-the-european-union&lang=en

In 2013, Hungary as co-chair of the presidency of the 'Budapest Process' took part in the elaboration of the priorities and main objectives of the Partnership. The Ministerial Declaration,[97] which launched the Partnership, has covered priority goals such as improvement of conditions for legal migration, support for the integration of migrants and counteracting phenomena of discrimination, racism and xenophobia; or strengthening the positive impact of migration on development, both in countries of origin and ofdestination. Hungary explicitly reinforced its commitment to cooperate within the Partnership and wanted to "[…] play active role in the coordination of practical projects carried out within the Declaration […]".[98] In addition to the Silk Routes Partnership for Migration, Hungary has also supported the 'Rabat Process' on the Africa-EU Partnership on Migration, Mobility and Employment,[99] which also aims at organizing the legal migration.[100]

However, as the refugee crisis in Europe worsened significantly in 2015, Hungary has changed its stance to the migration and asylum policy, which also triggered a shift in the political landscape. The former cooperative attitude to the priorities of the emigration policy represented within the GAMM turned into an anti-immigrant rhetoric.[101] As reflection on the largest migration wave European Union has ever faced, the Hungarian Government responded by building a fence along its borders with Serbia and Croatia.[102]Hungary has opposed the regulation on provisional mechanism for the mandatory relocation of asylum seekers discussed and adopted by the Council in 2015, and later brought action against the quota mechanism before the CJEU.[103] In consequence of the current circumstances described above, at this moment, the future prospects of the Global Approach to Migration and Mobility cannot be assessed from the perspective of Hungary. In other words, without any significant change at policy level, neither strong commitments, nor proactive engagement can be awaited from Hungary. For similar reasons, at this time no relevant examples can be

[97] The Istanbul Ministerial Declaration on A Silk Routes Partnership for Migration, 19 April 2013, para. (1). Available at: https://www.budapestprocess.org/silk-routes-partnership/istanbul-ministerial-declaration

[98] Selyemút Migrációs Partnerség [*Silk Routes Migration Partnership*], Press release, Ministry of Interior, 19. April 2013. Available at: http://2010-2014.kormany.hu/hu/belugyminiszterium/hirek/selyemut-migracios-partnerseg

[99] Afrikai migráció hatékony kezelése [*Effective control of the African migration*], Press release, 1 December 2014. Available at: http://www.kormany.hu/hu/kulgazdasagi-es-kulugyminiszterium/biztonsagpolitikai-es-nemzetkozi-egyuttmukodesert-felelos-allamtitkar/hirek/afrikai-migracio-hatekony-kezelese

[100] The Rome Programme For 2015-2017 (annex to the Rome Declaration), 27 november 2014, part I. Available at: https://www.rabat-process.org/images/RabatProcess/Documents/declaration-programme-rome-ministerial-conference-rome-2014-rabat-process.pdf

[101] Top 10 of 2015 – Issue #6: Refugee Crisis Deepens Political Polarization in the West, Migration Policy Institute, 11 December 2015. Available at: https://www.migrationpolicy.org/article/top-10-2015-%E2%80%93-issue-6-refugee-crisis-deepens-political-polarization-west

[102] Hungary's Orban urges EU migration debate, sees threat to democracy, Reuters, 22 October 2015. Available at: http://www.reuters.com/article/us-europe-migrants-hungary-pm-idUSKCN0SG0M320151022

[103] The CJEU dismissed the action in September 2017, see Judgement of 6 September 2017, *Slovakia and Hungary v Council* , Joined Cases C-643/15 and C-647/15, ECLI:EU:C:2017:631.

highlighted from the bilateral relations of Hungary with African countries which could serve as an example for the launch of the pacts between the EU and the priority African countries.

Question 25:

Since 1995, Hungary has concluded 28 agreements (including the bilateral implementing protocols to EU agreements), which contains provisions regarding the readmission. Most of the treaties entered into force even before Hungary joined the European Union (19), more than half of the agreements have set down relations with the EU member states (16),[104]and there are 7 bilateral implementing protocols that are linked to a readmission agreement concluded by the EU with third country.[105]

Apart from the bilateral protocols, the Hungary-Kazakhstan agreement is the only bilateral readmission agreement, which has been concluded after the accession of Hungary to the EU. The ratification of the agreement triggered harsh debate in the Parliament, refuting the necessity of an agreement, which would govern the readmission to a country facingcomplicated human rights challenges.[106]Also the question of compatibility of the agreement with the EU and international law obligations was raised, however, the Government clearly expressedits convictionthat the agreement is fully compatible with the relevant sources of law.[107] Regarding the human rights concerns, it was pointed out that the agreement did not jeopardized the rights of the refugees, because the requirement of the non-refoulment principle should apply and it would hinder the readmission of refugees into an 'unsafe third country'.[108]Consequently the legality of the bilateral readmission agreements is not disaffirmed by Hungary, and it is argued that Member States has wide competences to conclude agreements with third countries. Following this line of arguments, the readmission agreements concluded with third countries by the Member States might be correct underArticle 79 (3) and Article 3 (2) TFEU.

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[104] Hungary has agreements with Austria, Belgium, Croatia, Estonia, France, Germany, Italy, Latvia, Luxembourg, The Netherlands, Poland, Portugal, Czech Republic, Romania, Slovakia, Slovenia. The remaining agreements and bilateral protocols have been concluded with Western Balkan and Eastern European Countries (Albania, Bosnia Herzegovina, Georgia, Kazakhstan, Kosovo, FYROM Macedonia, Moldova, Montenegro, Serbia, Russia, Ukraine).

[105] Albania, Bosnia Herzegovina, Georgia, Moldova, Montenegro, Serbia, and Russia.

[106] See Letter of L. Trócsányi, minister of justice to MP Cs. Molnár on written reply to MP' s question 'On the basis of which human rights concerns has the agreement been concluded? (27. June 2014.). Available at: http://www.parlament.hu/irom40/00256/00256-0001.pdf

[107] Letter of L. Trócsányi… p. 2.

[108] Letter of L. Trócsányi…