Twenty years in the European Union

Membership experiences and visions for enlargement

Centre for European Studies
ces.sze.hu

Twenty years in the European Union:
Membership experiences and visions for enlargement

Twenty years in the European Union: Membership experiences and visions for enlargement

Széchenyi István University
Deák Ferenc Faculty of Law and Political Sciences
Centre for European Studies

2024

The manuscripts have been reviewed by
Balázs Horváthy, László Knapp, László Milassin, László Pardavi.

ISBN 978-615-6443-37-3

The publication of this research was supported by the National Media and Infocommunications Authority (Hungary).

National Media and Infocommunications Authority • Hungary

This book has been published within the research stream of "Jean Monnet Module on EU Business Law" (EUBLAW) funded by the Erasmus+ Programme of European Union.

Győr, 2024

CENTRE FOR EUROPEAN STUDIES

Published by Széchenyi István University –
Deák Ferenc Faculty of Law and Political Sciences –
Centre for European Studies
(H-9026 Győr, Áldozat u. 12.)
Tel.:+36/96/503-478
Fax: +36/96/503-472
Web: ces.sze.hu

Content

Foreword

Walking through the EU institutions in Brussels, an iconic mural has been an eye-catching spectacle for many years. At the heart of the artwork created by Julien Crevaels NovaDead was a simple but powerful message: "*The future is Europe*".

The ten countries that joined the European Union 20 years ago have chosen definitely the path that this message implies. The new Member States from the former 'Eastern Bloc' have managed a slight political transition since the late 1980s and the autocratic political systems as well as the state controlled, centrally planned economic structures were replaced by new regimes based on democracy, rule of law and market economy principles. Parallel to this, they defined the accession to the European integration as one the main goals in their external relations. The accession criteria were defined by the Copenhagen European Council in 1993, which did not merely set economic requirements for the states wishing to join, but also meant political conditions. After the conclusion of the accession negotiations, the 2003 meeting of the European Council, also held in Copenhagen, approved the accession of the Baltic States, the Central and Eastern European countries with Cyprus and Malta. 2004 was only the first step in the enlargement process. In 2007 and 2013 new countries joined and today nine countries are recognized as candidates for membership of the European Union.

Over the past twenty years, the 'new Member States' joined since 2004 successfully integrated into the internal market of the European Union, which has resulted in unprecedented development in their economies. The dismantling of the borders not only improved the productivity indicators of the whole European Union, but as result of their participation in the institutions, the integration as a political community

could also expand. However, the economic and political crises of the past two decades and the responses in several Member States questioned the effective enforcement of the duty of sincere cooperation. There are different motivations and political fault lines behind the Eurosceptic attitudes appearing in these Member States, nevertheless some of them might jeopardise the common Union goals.

In 2017 the Centre for European Studies (CES) of Faculty of Law and Political Sciences of the Széchenyi István University launched the conference series 'EU Business Law Forum' with the aim to establish a regular event, which reflects on topical issues of EU business law and explores the related contemporary challenges in their legal, political, economic and social reality. The 4th edition of this conference was devoted to explore the experiences arising from the 2004 as well as the subsequent enlargements of the European Union in light of the current and future challenges of the EU business law. The conference entitled "Twenty Years in the European Union" also had a clear intention of sharing these experiences with professionals involved in research on the current enlargement of the EU. This book offers an insight into the main focus areas of the conference.

Editors
Győr, December 2024

The process of nation building. Identity as a border in the Western Balkans

Mircea Brie*

Abstract: The process of nation-building has most often been based on identity structures. Identity is conceptually reflected differently among European peoples in general and Balkan peoples in particular. In this process, identity borders have played an important role. Even where they were not very clear, very visible, their importance imposed their construction. Identity as a border in the Western Balkans reflects the identity cleavage in the Western Balkans, which often seems to be very real and repeatedly proven by more or less recent historical realities. Identity, be it that of an individual, of a group or of a community can generate both convergence and divergence in a rapport with the other. The other one, a true dichotomy, becomes the expression of the "one beyond" - beyond what is specific to me, to my identity. A border, be it symbolic or ideological, can thus be identified around such identity constructions.
In the process of the nation building analysis, methodologically, the focus falls primarily on the role of the borders of identity arising from ethno-religious or cultural specificity, but also on the nature of mentalities specific to this area. Theoretically and methodologically we must emphasize the fact that our attention is drawn by the national, regional or local identity. The conceptual perspective confers a clear delineation and establishment of policy analysis, just to make the operationalization of concepts easier and more useful in terms of achieving the overall objective set. Our analysis aims at considering, from a spatial standpoint, to consider the realities of identity recorded in the area of Western Balkans. For the purpose of a conceptual clarification and to respond to the methodological desideratum already announced, this paper makes comparative references to the case of the states of North Macedonia, Bosnia and Herzegovina and Montenegro or to the case of the Albanians in the Balkans.

Keywords: Nation-State building, border, identity, ethnicity, religion, Western Balkans, Albanian community, North Macedonia, Bosnia and Herzegovina, Montenegro

* PhD, Professor, University of Oradea, Department of International Relations and European Studies (Oradea, Romania). PhD supervisor in the field of International Relations and European Studies, Babeş-Bolyai University of Cluj-Napoca (Oradea, Romania). E-mail: mbrie@uoradea.ro

1. Introduction and methodological framework

This topic of identity borders has been a main personal concern in the field of research on the Balkan and Eastern European space over the last two decades. This study is a revised and expanded edition in a new methodological construction ideas and synthetic research contained in others previous paper on identity as a border in the space of Central and Eastern Europe. Our analysis aims to consider the establishment of a conceptual link between the identification of borders/identity cleavages (identity polarization of the domestic society) and the identity realities present in the space of the Western Balkans states[1]. The focus of our analysis lies primarily on the identity borders generated by the specific ethno-religious, linguistic or cultural identity, but also by the nature of the mental specific to the area. Without aiming at analysing the entire identity spectrum in the Western Balkans, throughout this study we want to identify *possible identity cleavages* that take the form of identity borders. The identification is accompanied by a process of conceptual analysis with comparative references.

Our *hypothesis* is built starting from the assertion that in the space of these states there are realities that converge towards the daily expression of some community-identity borders. These borders can be identified both in terms of ethno-national and linguistic identity and in terms of religious identity. In these situations, the political or geopolitical connotations and implications are very important and acquire the valences of some decisive

[1] Mircea Brie, 'Identity as a Border in Western Balkans. Comparative analysis' in Istvan Polgar, Mircea Brie (eds), *From Exclusive Borders to Inclusive Frontiers in the Western Balkans* (Debrecen / Oradea 2024); Mircea Brie, 'Identity as Frontier in Central and Eastern Europe. The Case of the Republic of Moldova' in Mircea Brie, Alina Stoica, Florentina Chirodea (eds), *The European Space Borders and Issues. In Honorem Professor Ioan Horga*, (Editura Universității din Oradea/Debrecen University Press 2016) 359–381. Mircea Brie, 'Linguistic individuality in the Republic of Moldova and North Macedonia: an identity border as a political foundation of national construction' in István-József Polgár, Mircea Brie (eds), *The legitimacy of new regionalism in the European integration process, supliment Analele Universității din Oradea, Seria Relații Internaționale şi Studii Europene* (Debrecen University Press/Editura Universității din Oradea 2023) 281–294; Mircea Brie, Islam Jusufi, Polgár István József, 'North Macedonia's internal and external identity disputes. Role and implication for the civil society' (2023) XX(2*)* Civil Szemle*,* 69–97; Mircea Brie, Islam Jusufi and Polgar Istvan, 'The role of the Albanian Community in the European Inegration Process of North Macedonia' in Laura Herta and Adrian Corpădean (eds), *International Relations and Area Studies: Focus on Western Balkans* (Presa Universitară Clujeană 2021) 65–72.

factors in the identity development.

Methodologically, we specify that throughout this study we do not intend to solve in any way fundamental, existential problems or to clarify possible identity dilemmas older or newer controversies. For the purpose of a conceptual clarification and to respond to the methodological desideratum already announced, this paper makes comparative references to the case of the states of North Macedonia, Bosnia and Herzegovina and Montenegro or to the case of the Albanians in the Balkans. At a comparative level, the reality of identity cleavages, which often takes the shape of borders, is similar in the Balkans. A particular note given by the context is kept, namely the specificity and the geopolitics of the former Yugoslav space.

Our *objectives* are to analyse possible identity realities that can generate, at the societal level, certain cleavages that take the form of identity boundaries. Therefore, our debate is oriented towards the identification of these borders, to discuss them in terms of the possible cleavage they produce. It is necessary to specify that, in our assertion, the existence of an identity border does not necessarily imply a rupture, a discontinuity, but can also be interpreted as a cultural-identity contact area. Such a contact area can generate not only multiculturalism, but also the development of an intercultural society in which cleavages fade.

Throughout this extensive analysis, we propose a *general debate on identity issues*, often of great sensitivity in the space of the Western Balkans. In this sense, the approaches of conceptual analysis in each state are accompanied by comparative references similar or different realities as an expression and result from other Balkan states.

The dissolution of Yugoslavia at the beginning of the 90s created seven new independent states and have amplified the process of national emancipation and the emergence of new cleavages in the Balkans. After the armed conflicts that followed the initial proclamation of independence in several of these countries, a period of consolidation came, along with European integration as well as cooperation and reconciliation efforts. The gradual resolution of these conflicts has relieved the public sphere from excessive ethnic nationalistic discussions, which has been conducive to the emergence of civic identities and, with the further rapprochement to Europe, offering the prospect of European non-ethnic identities[2]. The European Union opted for a regional approach in this part

[2] Brie, Jusufi and Polgar (n 1).

of the continent, in order to achieve greater stability among the conflicted communities/states. In 1996 the European Union made a differentiation between the two terms 'South-East (SE) Europe' and 'Western Balkans'. 'SE Europe' refers to all of the countries from the Gulf of Trieste to the Black Sea, while Western Balkans consists of all of the former Yugoslavian states except Slovenia, plus Albania[3]. Basically, we can say that the relations between the EU and the Western Balkans countries is developing and for that the European Union has adopted a good approach to the region because it has brought progress as well as cooperation between the conflicted countries. The main tool in this process, where we can see also great achievements are the bilateral and multilateral meetings organised by or with the support of the European Union where political leaders of the region gather and take common decisions that are valuable for the whole region[4].

Timeline of the dismantling of Yugoslavia:

- June 25th, 1991: Slovenia and Croatia proclaim their independence =>intervention by the federal army
- September 8th, 1991: Independence of the Republic of Macedonia/ today North Macedonia
- From March to April 1992, an even bloodier war spreads in Bosnia-Herzegovina
- March 1992 - September 1995 The siege of Sarajevo
- The Serb community, militarily backed by Belgrade, fought against Muslims and Croatians, who had previously fought among themselves
- November 1-21, 1995, negotiations and the Dayton Agreement – Treaty signed to Paris (14 December 1995)
- Conflicts in Kosovo and NATO intervention in 1999
- February-August 2001, North Macedonia, the conflict between the government and ethnic Albanians, especially in the north and west of the country
- August 13th, 2001 – Ohrid Agreement

[3] Daniel Trenchov, 'The Future of the Western Balkans Integration within the EU' (2012) 4(2) Analytical Journal, 1–12.

[4] Lucia Vesnic-Alujevic, *European Integration of Western Balkans: From Reconciliation To European Future* (Centre for European Studies 2012) 6–9; Brie, Jusufi and Polgar (n 1).

- June 3rd, 2006, the Montenegrin Parliament declared Montenegro's independence
- February 17th, 2008, Kosovo declared its independence from Serbia

2. Identity as a border and nation-state constructions. Conceptual analysis

Since the nineteenth century, the European space has undergone an extensive process of identity transformation. The European societies are modernizing, and under the impact of modernization there are profound changes both at the domestic level and at the international level. The identity revolution was not only specific to the period of the second half of the nineteenth century, when the effervescence of the new led to the erosion of the old monarchical order of powerful governments. The peoples are developing an increasingly strong national consciousness, culminating in the principle of self-determination of the peoples, so much the scene of the treaties that regulated order after the First World War. Then one of the most visible transformations has in view the national and identity emancipation[5].

Nowadays, the process continues and develops on new levels of identity. At the same time, more and more "border" cleavages are emerging within European societies. These boundaries are most often symbolic and ideological. In the contemporary period we are witnessing an effervescence of the national, despite the progress made at European level in terms of consolidating the European identity. The process of European construction was accompanied by a certain blurring of the national, at least at the level of expression of nationalist-extremist movements. European identity appears as a higher-ranking identity that reduces the forms of expression of national and regional identities. This is at least in theory. On the other hand, in the current context, we are entitled to believe that European identity has taken a form of manifestation in parallel with national or regional levels, without being in very close relationship with them. That is, the reduction or amplification of the forms of manifestation at one level does not lead to a counterweight

[5] Brie, 'Linguistic individuality' (n 1) 283.

at another level[6].

At a *conceptual* level, identity constructions appear, apparently placed on the same level of analysis, they can have different connotations. Identity, regardless of the level of reporting (European, national or regional/local), is found as a form of expression in the public space despite universal trends, globalization or uniformity of values, characteristics or community expressions. The elements of ethno-religious identity are found in the global public space, inclusively in forms multiplied through the channels of global propagation. Therefore, not only the global increase itself, but also the particular, the specific.

The latter, often taking forms of extremism, nationalism, ethno-religious violence, are multiplied by gaining followers thousands of miles away. Then, the national and ethnic state, associated with the national territory, managed not only to survive the pressures of the "global society", but also demonstrated an even greater capacity for affiliation. The *Identity globalization* has proven to be stronger in urban and industrialized societies, and where there are consistent rural areas, a rich heritage and cultural tradition, a resistance to globalization has developed. Thus, the local, national-cultural identity is more strongly preserved in the rural-agricultural environment and in the proximity of cultural sites[7]. We hereby propose three levels of analysis regarding the concept of identity: the European level, the national level and the regional level. The specialty literature captures the dispute over the establishment of the identity of a person or community. The process comprises two dimensions: self-identification and hetero-identification. In both situations, both one's own identification and the identification made by someone else, the debate on identity involves both objective and subjective elements. Theoretical analyses, on the other hand, seize a dispute around the subjective and objective dimension of identity. Unlike the concept of *national origin*, which refers to something given, inherited by birth, *national identity* is, above all, the expression of the consciousness of belonging to a cultural

[6] Mircea Brie, 'Identity Revolution and Minority Emancipation: A Cause of the European Concert's Crash. Contemporary Analogues' în Ioan Horga, Alina Stoica (ed), *Europe a Century after the End of the First World War (1918-2018)* (Editura Academiei Române 2018) 237.

[7] Mircea Brie, 'Comparative Conceptual Perspectives on Identity Borders in the Republic of Moldova' (2021) 15(2) EUROPOLITY, Continuity and Change in European Governance, 5–29.

community that is defined as a political community[8]. Ernest Renan refers to this reality when he characterizes the nation, suggestively, as a "daily plebiscite"[9].

The national identity in this case is related to the concept of nation. The latter one understood as a population that divides a territory (to which it relates through the historical dimension), myths and common historical memories, a mass culture, a common economy and common legal rights and duties for each member (the latter referring to the state political organization). This analysis presupposes the existence of: 1. a segment of the population living in a certain territory; 2. a certain type of relationship that expresses the consciousness of identity and belonging, a "community spirit"[10].

Such a perspective on the nation is in line with the philosophy of the Westphalian state that focuses on the idea of state-nation-territory.

Conceptually, the entire identity building has at least two elements of specificity ever since its construction[11]: 1. national identity born of ethnic belonging; 2. national identity born of civic/citizen affiliation. In the first case, national identity serves a certain *ethnic group* that is often in competition with other ethnic groups (most often present in the same reference space). The perspective gives rise to nationalist-tribal expressions that may involve the exclusion of representatives of other ethnic groups. In the second situation, the *civic dimension* serves the state, leading most often to patriotism (the perspective is rather positive compared to the first situation when we are dealing with a perspective with negative connotations!)[12].

In most Western countries, the national identity has been built mainly around the identity of a citizen, and the territory of the status has consequently become the fundamental term of reference for the "national

[8] Ibid.

[9] Gábor Flóra, 'Identitate şi ideologie naţională: o perspectivă socio-istorică [National identity and ideology: a socio-historical perspective]' in Balogh Brigitta, Bernáth Krisztina, Bujalos István, Adrian Hatos and Murányi István (eds), *Identitate europeană, naţională şi regional. Teorie şi practică [European identity, national and regional. Theory and practice]* (Partium Publishing 2011) 114.

[10] Mircea Brie, Daniela Blaga, 'Identity rematch in the European space' in Alina Stoica, Ioan Horga, Mircea Brie, *Cultural Diplomacy at the Eastern and Western Borders of the European Union* (University of Oradea Publishing House 2015) 255–273.

[11] Brie, 'Identity as Frontier' (n 1) 362–363.

[12] Brie (n 7).

territory" - the *civic dimension of national identity.* Eastern Europe has had a different pattern of development, in which ethnicity*, the ethnic belonging or affiliation has fulfilled a* fundamental role in building the national identity – the *ethnic dimension of national identity*[13]. Thus, the Western model of the nation emphasizes the central position of the national territory or homeland of the nation, while the Eastern model is concerned with ethnic origin and cultural ties.

Map 1. Ethnic distribution in the Western Balkans

Source: United States. Central Intelligence Agency. Cartography Center, Library of Congress, https://www.loc.gov/item/2008620837/, accessed on May 20, 2024

[13] Flóra (n 9) 116.

In the Balkan countries, from the conceptual point of view, we can identify different kind of identity characteristics. There are a lot of cleavages or borders associated with the identity: 1. ethnic identity; 2. religion identity; 3. linguistic identity; 4. alphabet identity; 5. citizen identity / civic identity; 6. cultural identity; 7. geopolitical identity.

This reality has led to the sacralization of the state territory considered *national territory*[14] (the righteous property of a single nation/nationality!), while the cultural-historical philosophy is to delegitimize as much as possible the contribution of other national communities[15]. With regard to the European level of analysis on the concept of identity, the legitimate question is to what extent we are talking about a common European identity or, in antithesis, about the presence of identity borders in the European space. A certain identity cleavage can be observed between Western and Eastern Europe. This reality is given by the historical, cultural, religious and political heritage[16].

3. Discussion and Analysis

The young states born from the disintegration of Yugoslavia had to consolidate and strengthen their national identity by referring to its various associated forms. The *national identity based on citizenship*, respectively on civic identity, was a difficult fact to achieve where the ethnic and religious diversity was very great. The new reality: strong identity cleavages, which culminated in violent inter-ethnic conflicts, have profoundly marked Balkan societies. The new geopolitical context, associated with a process of national-identity emancipation, have led to the redrawing of political maps in the Balkan space. Competition and mutual distrust marked the first two decades after the fall of communism. Proof of this are the complicated realities in Bosnia and Herzegovina, and Serbia's disputes with Kosovo[17]. Strong identities used for political

[14] Flóra (n 9) 118–128.
[15] Brie and Blaga (n 10).
[16] Brie (n 7).
[17] Brie, Jusufi and Polgar (n 1) 185–209; Istvan Polgar and Mircea Brie, 'General trends and evolutions from the past century regarding the perception of the Romanian-Hungarian border in the context of the European territorial cooperation. The case of Bihor and Hajdú-Bihar counties' in Birte Wassenberg (ed.), *Frontières en mouvement*

purposes were justified ethnically, religiously, linguistically or culturally. All this blocked the weak initiatives of the states that resulted in the ex-Yugoslav space to create a national identity given by citizenship.

Thus, in order to benefit the state, in order to defend and protect the state and national territory, the new national political regimes used various forms and characteristics of identity to strengthen national identity. In the absence of a solidarity based on citizen identity, identity borders were highlighted to more obviously separate communities built on other identity criteria. This results in forms of identity borders.

The ethno-national identity border. A strong identity supports and justifies a strong statehood. Logic has often been used by political regimes and vice versa, in order to justify national-state constructions newly appeared on the European map. Thus, the existence and survival of a political-state construction came to depend, among other things, on the need for an identity construction that would give an individuality in relation to neighbouring states and peoples, drawing not only state borders but also identity borders.

Montenegro developed after independence a specific policy aimed at highlighting the unitary relationship of the triangle state, nation, citizenship[18]. The three dimensions must be mutually supportive and mutually reinforcing. If the national dimension is weaker, statehood and citizenship must sustain and justify national existence and consolidation. In Montenegro, statehood and citizenship support the nation in the absence of very clear distinctive landmarks that separate the ethno-religious and linguistic identity of the population of this state from the Serbian nation. From this perspective the identity construction is an ongoing, developing process. This process highlights not only a new ethno-national identity reality, but also an increasingly pronounced linguistic and cultural one (the latter by appealing to the historical heritage that would justify the current identity boundaries). In the opposite, there are many who claim that the language spoken is but the Serbian language, and that they are nothing more than Serbs belonging to the Montenegrin nation built on the basis of citizenship and affiliation to a distinct statal space.

(Frontem): Which Models of Cross-Border Cooperation for the EU? A comparative analysis from a Euro-Atlantic perspective (Peter Lang 2024) 497–528.

[18] See more Chapter 2 additionally: *Transitional Triangle: State, Nation, Citizenship*, Jelena Džankić, *Citizenship in Bosnia and Herzegovina, Macedonia and Montenegro: effects of statehood and identity challenges* (Routledge 2015).

In North Macedonia there is a very interesting relationship between Macedonians and Albanians in terms of ethnic borders. Albanians are the largest ethnic minority in North Macedonia. According to the census held in 2002, Albanians comprised 25 percent of the population of North Macedonia. Unofficial estimates are higher due to large emigrant community[19]. Albanians live mainly in north-western parts of the country. The large majority of Albanians in North Macedonia are Muslims, but there are also some followers of the religions like the Bektashi dervish order, Roman Catholicism and Orthodox Christianity. North Macedonia has proven to be one of the examples of states that have more or less implemented a political system of consociationalism[20]. Since independence of North Macedonia in 1991, the country's politics has been heavily driven by both tensions and political dialogue between the two largest communities of North Macedonia, Albanians and Macedonians. Among other notable crises include the Gostivar flag crisis in 1997 and the Kosovo war in 1999. The inter-ethnic tensions culminated with the ethnic conflict that occurred in 2001, which was the peak of the inter-ethnic struggle in the post-independence North Macedonia. The conflict left deep scars in the country's consciousness[21]. The Conflict ended with the signing in August 2001 the peace agreement, the Ohrid Framework Agreement, named after the city where it was concluded.

The Ohrid Agreement laid down rules for more protection and representation rights for the Albanians[22]. As a result of the Ohrid Framework Agreement, important guarantees were provided for ethnic Albanians, particularly as regards local governance, education, language use and participation in public life, including public-sector employment. The Agreement ceased the hostilities and led to the constitutional and

[19] Gëzim Visoka & Elvin Gjevori, 'Census politics and ethnicity in the Western Balkans' (2013) 29(4) East European Politics, 479–498.

[20] Christopher McCrudden, 'Consociationalism, equality and minorities in the Northern Ireland Bill of Rights debate: the inglorious role of the OSCE high commissioner for national minorities' in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, transition and human rights cultures* (Oxford University Press 2006) 2.

[21] Kristen Ringdal, Albert Simkus & Ola Listhau, 'Disaggregating Public Opinion on the Ethnic Conflict in Macedonia' (2007) 37(3) International Journal of Sociology, 75-95.

[22] István Gergő Székely & István Horváth, 'Diversity recognition and minority representation in Central and Southeast Europe: a comparative analysis' (2014) 42(3) Nationalities Papers, 426–448.

administrative changes in order to meet the grievances of the ethnic Albanian and other minority groups. The Agreement opened a new era in North Macedonia's transition as it brought a major change in the national polity[23].

At the Western Balkans level, the Albanian community is present in an extensive area in the southern part of the ex-Yugoslav space.

Map 2. Distribution of Albanians in neighbouring countries

Source:
<https://www.mapmania.org/map/70331/distribution_of_albanians_in_neighboring_countries>, accessed in 12.11.2024.

In case of the Albanian community in the Balkans identity has produced some nuances in the sense that ethno-linguistically and religiously this community has managed to maintain a status that would ensure the

[23] Cvete Koneska, 'On peace negotiations and institutional design in Macedonia: social learning and lessons learned from Bosnia and Herzegovina' (2017) 5(1) Peacebuilding, 36–50.

preservation of cultural-community specificity. Identity has “migrated” to other associated forms of identity connected with citizenship, the civil one, and in some cases even global – European nature. This phenomenon is obvious in Kosovo where more and more citizens are attached to the citizen identity given by the identity-state value. If in this case the Kosovo national identity is associated with the Albanian one, in North Macedonia, the ethno-Albanian community is subject to a form of national otherness by associating it with the Macedonian citizenship identity of the state. In the latter case, the partnership compromise for the well-being and preservation of statehood can lead to a mixed syncretic identity. The ethno-identity dimension (even linguistic or religious) takes a second role in the process of constructing national identity. The national identity is to acquire an increasingly pronounced civic dimension, the result of political compromise[24].

The balance in inter-ethnic relations in North Macedonia is in the process of strengthening. The Albanian community, supported in its external efforts, has become aware not only of the force to influence the domestic policy of the state, but also of its limits.

Language as a border: individuality and foundation of nation. Language was used as a political tool in the nation-building process. The linguistic solidarity of the distinct identity in relation to others causes the individual to position himself "inside the linguistic borders", together with the linguistic community and in opposition to others. The linguistic individuality of a people has always played an important role in consolidating statehood. A distinct language leads to an additional force to preserve statehood. The close relationship between a state construction, an ethno-national identity, on the one hand, and the linguistic individuality of a population is not specific only to the contemporary period, not even to the modern one. It is deeply rooted in history, and has nothing to do with a specific geographical area. The language of one community has always been a form of individualization in relation to another community. It has always been a form of creating a consciousness of community belonging, of solidarity of individuals with the group. It is no wonder, therefore, that it has been used by certain states or political regimes to create and support identity disputes inside or outside a state, inside or outside communities[25].

[24] Brie, Jusufi and Polgar (n 1).
[25] Brie, ‘Linguistic individuality’ (n 1).

People who speak the same language, distinct from other communities they come in contact with, develop forms of community solidarity of identity origin. They can work together, they can build something great, they can fight together, they can stay together - just because, and only and only if they speak the same language. The others are not trustworthy, they cannot be from within, one has to separate oneself from them and find one's support only next to those who speak the same language with you. This foundation is not only the basis for the establishment of modern nations, but also both justifies and is an argument for the complicated policies that underlie identity revolutions, but also regimes or political movements that support separatist movements or the justice of new state constructions. Among the concerns regarding the consolidation of the statehood of the new Balkan states there was the promotion of the linguistic individuality of the new peoples. Moreover, the movements of national emancipation or identity-national construction, started long before the act of independence, were based on and justified on ethno-national, religious, cultural and linguistic individuality[26].

In Montenegro, the public policies and public discourse have led to the assertion of linguistic individuality in relation to the Serbian language. If the Serbian language was initially accepted as the official language, the 2007 constitution requires the "Montenegro language" as the official language, which has caused dismay on the Serbian side[27].

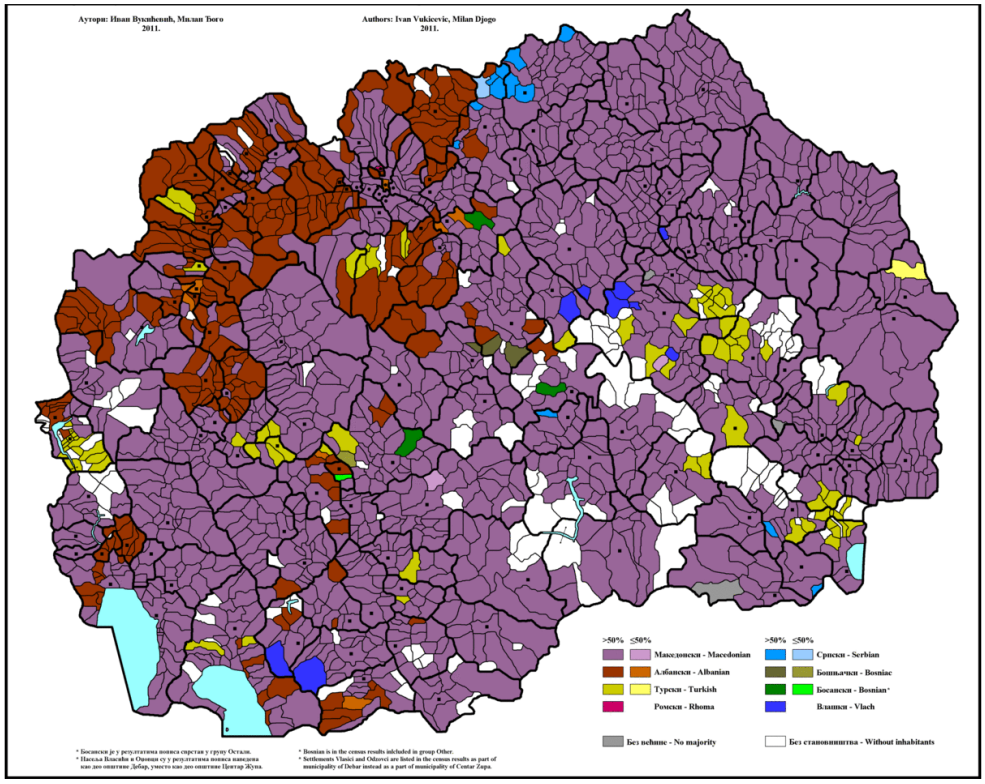
The case of Language dispute between North Macedonia and Bulgaria[28]. North Macedonia has an identity dispute with Bulgaria which focuses on three demands of the Bulgarians: 1. the identity of the Macedonian language and the Bulgarian side demand that their neighbours formally recognize that its language has Bulgarian roots, respectively the official formulation of a "common history", including identity; 2. the recognition and inclusion of the Bulgarian minority in the Constitution of North Macedonia (this claim would mean that the remaining majority is not Bulgarian as the more extreme Bulgarian claims sound - which would put an end to a nationalist dream of the Bulgarian side); and, a much vaguer formulation, 3. that North Macedonia renounces to what is called a "hate speech" against Bulgaria.

[26] Brie (n 7).

[27] Kenneth Morrison, *Nationalism, Identity and Statehood in Post-Yugoslav Montenegro* (Bloomsbury Publishing 2018) 138.

[28] Brie, Jusufi and Polgar (n 1); Brie, 'Linguistic individuality' (n 1).

Map 3. Linguistic map of North Macedonia



Source: apud https://www.deblauwetijger.com/macedonie-sociaaldemocraten-en-albanezen-gaan-regeren/, accessed in 12.11.2024 (Ivan Vukicevic, Milan Djogo, 2011)

We will focus only on the issue of the language dispute, with reach the highest tension by Bulgaria's veto to oppose the start of negotiations of this state with the EU.

Bulgaria refuses to recognize the existence of a separate Macedonian language. It demands that the EU avoids using the term “Macedonian language”, and instead use the term “Official language of Republic of

North Macedonia"[29]. It insists that the Macedonian language is a Bulgarian dialect and ethnic Macedonians are a subgroup of the Bulgarian nation[30]. North Macedonia and Bulgaria share linguistic and cultural similarities but also hold differing views on their history and language, dating back to the 19th century, when Bulgarian nationalists claimed Ottoman-ruled Macedonia as part of Bulgarian territory[31].

Despite a relative progress with the signing in 2017 of the *Treaty on friendship, good neighbourliness and cooperation* at civil society level, there has been no improvement in the perception of the required compromise in the relationship with Bulgaria[32]. Moreover, on the basis of protracted disputes, public opinion has become less and less supportive of this compromise[33].From the data provided by the above-mentioned barometer, it appears that not even the Albanian minority supports a compromise of the historical narrative just for the sake of a compromise towards European integration (34.7% of Albanians and only 12.6% of Macedonians were in favour of a compromise). This despite the fact that among the ethnic Macedonians, the European integration of the country is supported by 63% of the respondents, but a very high number of ethnic Albanians (82%) support North Macedonia's membership in the EU[34].

Public opinion is even less open to compromise regarding the Macedonian language[35].

[29] David L. Phillips, 'Bulgaria, North Macedonia Should Enhance Relations' (*Balkan Insight*, 21 July 2022) <https://balkaninsight.com/2022/07/21/bulgaria-north-macedonia-should-enhance-relations/> accessed 29 November 2024.

[30] Ibid.

[31] Sinisa Jakov Marusic, 'Macedonia, Bulgaria Set to Sign Historic Friendship Treaty' (*Balkan Insight*, 31 July 2017) <https://balkaninsight.com/2017/07/31/macedonia-bulgaria-set-to-sign-historic-friendship-treaty-07-28-2017/> accessed on 23 November 2024.

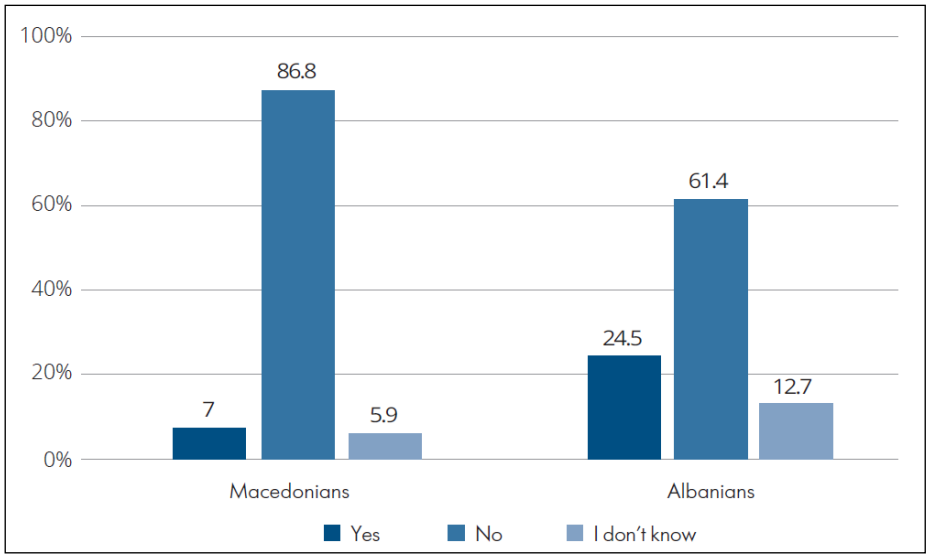
[32] EWG Contributor, 'Macedonia and Bulgaria sign Treaty on friendship, good neighbourliness and cooperation' (*European Western Balkans*, 1 August 2017) <https://europeanwesternbalkans.com/2017/08/01/macedonia-bulgaria-sign-treaty-friendship-good-neighbourliness-cooperation/> accessed 13 November 2024.

[33] Brie, Jusufi and Polgar (n 1).

[34] Ivan Damjanovski, *Analysis of public opinion on North Macedonia`s accession to the European Union (2014-2021)* (Konrad Adenauer Foundation in the Republic of North Macedonia Institute for Democracy "Societas Civilis" 2022) 4.

[35] Brie, Jusufi and Polgar (n 1).

Figure 1. Do you think that North Macedonia should make a concession regarding the language in order to proceed with the EU integration? (%)



Source: Velinovska, Nikolovski and Kirchner (n 36) 11.

The results show a solid and almost undivided opinion among ethnic Macedonians who, by 86.8%, are not willing to make concessions on their language. A concession of this kind is equally unacceptable for a smaller majority of ethnic Albanians (61.4%)[36].

Bulgaria's veto was lifted only after mediation by the French Presidency of the EU Council in July 2022[37].

The Cyrillic alphabet as an identity border. The alphabet is also used as a distinct identity element that can take the form of a cleavage such

[36] Anamarija Velinovska, Ivan Nikolovski and Marie Jelenka Kirchner, *From a poster to a foster child. 2021 public opinion analysis on North Macedonia's EU accession process* (Konrad Adenauer Foundation in the Republic of North Macedonia Institute for Democracy "Societas Civilis" 2022) 11.

[37] Council of the EU, 'Intergovernmental Conference at Ministerial level on the Accession of North Macedonia' (Press release, 19 July 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/07/19/intergovernmental-conference-at-ministerial-level-on-the-accession-of-north-macedonia/> accessed 25 November 2024.

as identity boundaries. If in the case of the Albanians in the former Yugoslavia the use of the Latin alphabet was accompanied by the existence of a clearly distinct language, in the case of other peoples who were part of the former federal state the linguistic individuality was not so clear. For a long time, the linguistic individuality of Croats in relation to Serbs was linked to the use of the Latin alphabet by the former and the use of the Cyrillic one by the Serbians.

This dispute can be identified in the case of Montenegro[38] or the existence of a separate Bosnian language[39]. The alphabet has played every time a very important role in the justice of the decision to draw a linguistic boundary of an identity nature.

The issue of the Cyrillic alphabet in the identity dispute of Bosnian Serbs has come back on the agenda. In this case, in addition to religion, the Cyrillic alphabet plays a very important role as a border of identity.

September 15th 2021, on the occasion of Serbian 'Unity Day', MPs from the two parliaments of Serbia and Republika Srpska passed two laws to encourage the use of the Cyrillic alphabet in a new attempt to strengthen a common national identity[40]. All public institutions and societies, schools and universities, national associations and companies are constrained to use the Cyrillic alphabet[41]. Moreover, private companies are promised tax reductions provided they use this alphabet. The Cyrillic alphabet is part of an increasingly complex means that puts nationalism back in the complicated Balkan republic of Bosnia and Herzegovina.

The Bosnian Serb leader Milorad Dodik, co-president of the state of Bosnia and Herzegovina, rekindled nationalism, sowing the seeds for the resumption of the conflict, with new demands for the separation of Republika Srpska (a region with 1.2 million inhabitants). The other two co-

[38] Morrison (n 27) 130–152.

[39] Džankić (n 18) 48.

[40] Lilia Traci, 'Serbia vrea să consolideze statutul 'alfabetului chirilic' şi identitatea națională' [Serbia wants to strengthen 'Cyrillic alphabet' status and national identity]' (*AGERPRES*, 15 September 2021) <https://www.agerpres.ro/politic-ex/2021/09/15/serbia-vrea-sa-consolideze-statutul-alfabetului-chirilic-si-identitatea-nationala--780150> accessed 29 October 2024.

[41] B92, 'The law to be adopted: Cyrillic Alphabet mandatory' (*B92*, 2021) <https://www.b92.net/o/eng/news/society?yyyy=2021&mm=08&dd=27&nav_id=111549> accessed 15 October 2024.

chairs, Sefik Djaferovic (representative of the Bosnian community) and Jeliko Komsic (representative of the Croatian community), issued a joint statement expressing their support for the preservation of the current borders and their readiness to fight for it[42].

Religion as a border. In the Balkans, religion has always been an element of community individuality in relation to which the boundaries of identity-national communities, and even of states, have been drawn. In the former Yugoslav state, despite numerous efforts made after the Paris Treaties to achieve national cohesion, religion has always been an impediment to this success. Slovenes and Croats are mostly Catholic Christians, Serbs, Montenegrins and Macedonians are mostly Orthodox Christians, Albanians and Bosnians are Muslims. This mosaic picture is very visible, through the role played by religion in drawing identity borders, in Bosnia and Herzegovina. The Serbs are Orthodox, Croats are Catholics, and Bosnians are Muslims. Despite efforts to standardize language, religion (but not only it!) it has kept the ethno-national communities distinct. Moreover, neither is there any longer the same unity within Orthodoxy itself, if we consider the case of the Church in Montenegro. Here an important part of the population reproaches the hierarchical superiority of the Serbian Church and challenges it[43].

4. Conclusion

The states of ex-Yugoslavia, as well as those of the former Soviet bloc, tried to develop a national identity that would serve the formation and consolidation of the national state. The process of national construction was marked by the use of instrumental identity constructions intended to highlight borders.

For this purpose, the ethnic, linguistic, cultural and religious identity cleavages were used with the aim of consolidating the distinct national consciousness in relation to the neighbors. Our research identified a similar behavior in the new Balkan states, but the expression of these

[42] Veronica Andrei 'Liderul sârbo-bosniac Milorad Dodik se joacă cu focul în Balcani. Amenințări la adresa NATO [Bosnian-Serb leader Milorad Dodik is playing with fire in the Balkans. Threats to NATO]' (*Ziare.Com*, 28 October 2021) <https://m.ziare.com/international/bosnia-hertegovina-milorad-dodik-balcani-republica-srpska-1707411> accessed 29 October 2024.

[43] Brie (n 7).

identity borders took into account the demographic reality specific to each state.

If in North Macedonia the language of the Albanian minority in relation to that of the Macedonian majority was a clearly delineated issue and could not be contested, in Montenegro for example the spoken language is still called differently by Montenegrin citizens (some call it Serbian language, others Montenegrin).

Instead, the Macedonians have a linguistic identity dispute with the Bulgarians. Even if the cases are different, in both situations the politicians and leaders from Podgorica or Skopje resorted to messages of self-identification in relation to others through their own distinctive language. The process proved to be useful in the state-national construction process.

As in the case of language, religion was a strong identity element that showed the limits of the Balkan communities. When it was possible, this was instrumented as an additional identity for the purpose of national self-identification. If in North Macedonia or Kosovo, the Albanian Muslims were clearly delimited from the Macedonian or Serbian Orthodox Christians, in Montenegro the Orthodox Church was considered an extension of Belgrade's influence. The religious identity cleavage in relation to the national identity borders is even more evident in Bosnia and Herzegovina. Here, mainly, the Orthodox are mostly Serbs, the Catholics are Croats, and the Muslims are and the Muslims are Bosniaks, and vice versa. In this case, the double identity identification led to the highlighting of much stronger identity borders.

Our hypothesis is confirmed by the fact that realities are highlighted in these countries that converge towards the daily expression of community-identity borders. These cleavages can be identified both from the point of view of ethno-national and linguistic identity, as well as from the point of view of religious identity. In these situations, the political or geopolitical connotations and implications are very important and acquire the value of decisive factors in the development of the identity and construction of the national state.

A fundamental feature of state-type nation-state constructions in Western Balkans is their permanent lack of *legitimacy* or, rather, their incomplete legitimacy. By identifying the state with a single national identity, the other national communities inevitably found themselves outside this process of legitimation, which constituted *a fundamental*

source of inter-ethnic and inter-religious tensions.

References

- Veronica Andrei 'Liderul sârbo-bosniac Milorad Dodik se joacă cu focul în Balcani. Amenințări la adresa NATO [Bosnian-Serb leader Milorad Dodik is playing with fire in the Balkans. Threats to NATO]' (*Ziare.Com*, 28 October 2021) <https://m.ziare.com/international/bosnia-hertegovina-milorad-dodik-balcani-republica-srpska-1707411> accessed 29 October 2024.
- B92, 'The law to be adopted: Cyrillic Alphabet mandatory' (*B92*, 2021) <https://www.b92.net/o/eng/news/society?yyyy=2021&mm=08&dd=27&nav_id=111549> accessed 15 October 2024
- Mircea Brie, 'Identity as Frontier in Central and Eastern Europe. The Case of the Republic of Moldova' in Mircea Brie, Alina Stoica, Florentina Chirodea (eds), *The European Space Borders and Issues. In Honorem Professor Ioan Horga* (Oradea/Debrecen: University of Oradea Publishing House/Debrecen University Press 2016) 359–381.
- Mircea Brie, 'Identity Revolution and Minority Emancipation: A Cause of the European Concert's Crash. Contemporary Analogues' în Ioan Horga, Alina Stoica (eds), *Europe a Century after the End of the First World War (1918-2018)* (Editura Academiei Române 2018) 225–248.
- Mircea Brie, 'Comparative Conceptual Perspectives on Identity Borders in the Republic of Moldova' (2021) 15(2) EUROPOLITY, Continuity and Change in European Governance, 5-29.
- Mircea Brie, 'Linguistic individuality in the Republic of Moldova and North Macedonia: an identity border as a political foundation of national construction' in István-József Polgár, Mircea Brie (eds), *The legitimacy of new regionalism in the European integration process, supliment Analele Universității din Oradea, Seria Relații Internaționale şi Studii Europene* (Debrecen University Press/Editura Universității din Oradea 2023) 281–294.
- Mircea Brie, 'Identity as a Border in Western Balkans. Comparative

analysis' in Istvan Polgar, Mircea Brie (eds), *From Exclusive Borders to Inclusive Frontiers in the Western Balkans* (Debrecen / Oradea 2024).

- Mircea Brie, Daniela Blaga, 'Identity rematch in the European space' in Alina Stoica, Ioan Horga, Mircea Brie, *Cultural Diplomacy at the Eastern and Western Borders of the European Union* (University of Oradea Publishing House 2015) 255–273.
- Mircea Brie, Islam Jusufi and Polgar Istvan, 'The role of the Albanian Community in the European Inegration Process of North Macedonia' in Laura Herta and Adrian Corpădean (eds), *International Relations and Area Studies: Focus on Western Balkans* (Presa Universitară Clujeană 2021) 65–72.
- Mircea Brie, Islam Jusufi and Polgar Istvan, 'Is Inclusivity Necessary for Legitimacy of New Regionalism? Unpacking Open Balkan Initiative Negotiations' (2023) XXIX (Suppl. 2) Transylvanian Review (Regional and Ethnic Communities, Past and Present), 185–209.
- Council of the EU, 'Intergovernmental Conference at Ministerial level on the Accession of North Macedonia' (Press release, 19 July 2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/07/19/intergovernmental-conference-at-ministerial-level-on-the-accession-of-north-macedonia/> accessed 25 November 2024.
- Ivan Damjanovski, *Analysis of public opinion on North Macedonia's accession to the European Union (2014-2021)* (Konrad Adenauer Foundation in the Republic of North Macedonia Institute for Democracy "Societas Civilis" 2022)
- Jelena Džankić, *Citizenship in Bosnia and Herzegovina, Macedonia and Montenegro: effects of statehood and identity challenges* (Routledge 2015).
- EWG Contributor, 'Macedonia and Bulgaria sign Treaty on friendship, good neighbourliness and cooperation' (*European Western Balkans*, 1 August 2017) <https://europeanwesternbalkans.com/2017/08/01/macedonia-bulgaria-sign-treaty-friendship-good-neighbourliness-cooperation/> accessed 13 November 2024.
- Gábor Flóra, 'Identitate şi ideologie națională: o perspectivă socio-istorică [National identity and ideology: a socio-historical

perspective]' in Balogh Brigitta, Bernáth Krisztina, Bujalos István, Adrian Hatos and Murányi István (eds), *Identitate europeană, națională şi regional. Teorie şi practică [European identity, national and regional. Theory and practice]* (Partium Publishing 2011).

- Cvete Koneska, 'On peace negotiations and institutional design in Macedonia: social learning and lessons learned from Bosnia and Herzegovina' (2017) 5(1) Peacebuilding, 36–50.
- Sinisa Jakov Marusic, 'Macedonia, Bulgaria Set to Sign Historic Friendship Treaty' (*Balkan Insight*, 31 July 2017) <https://balkaninsight.com/2017/07/31/macedonia-bulgaria-set-to-sign-historic-friendship-treaty-07-28-2017/> accessed 23 November 2024.
- Christopher McCrudden, 'Consociationalism, equality and minorities in the Northern Ireland Bill of Rights debate: the inglorious role of the OSCE high commissioner for national minorities' in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, transition and human rights cultures* (Oxford University Press 2006).
- Kenneth Morrison, *Nationalism, Identity and Statehood in Post-Yugoslav Montenegro* (Bloomsbury Publishing 2018).
- David L. Phillips, 'Bulgaria, North Macedonia Should Enhance Relations' (*Balkan Insight*, 21 July 2022) <https://balkaninsight.com/2022/07/21/bulgaria-north-macedonia-should-enhance-relations/> accessed 29 November 2024.
- Istvan Polgar and Mircea Brie, 'General trends and evolutions from the past century regarding the perception of the Romanian-Hungarian border in the context of the European territorial cooperation. The case of Bihor and Hajdú-Bihar counties' in Birte Wassenberg (ed.), *Frontières en mouvement (Frontem): Which Models of Cross-Border Cooperation for the EU? A comparative analysis from a Euro-Atlantic perspective* (Peter Lang 2024) 497–528.
- Kristen Ringdal, Albert Simkus & Ola Listhau, 'Disaggregating Public Opinion on the Ethnic Conflict in Macedonia' (2007) 37(3) International Journal of Sociology, 75–95.
- István Gergő Székely & István Horváth, 'Diversity recognition and

minority representation in Central and Southeast Europe: a comparative analysis' (2014) 42(3) Nationalities Papers, 426-448.
- The *Bible*, Genesis, chpt 11.
- Lilia Traci, 'Serbia vrea să consolideze statutul 'alfabetului chirilic' şi identitatea națională [Serbia wants to strengthen 'Cyrillic alphabet' status and national identity]' (*AGERPRES*, 15 September 2021) <https://www.agerpres.ro/politic-ex/2021/09/15/serbia-vrea-sa-consolideze-statutul-alfabetului-chirilic-si-identitatea-nationala--780150> accessed 29 October 2024.
- Treaty of friendship, good-neighbourliness and cooperation between the Republic of Bulgaria and the Republic of Macedonia (Bulgaria–The former Yugoslav Republic of Macedonia) (adopted 1 August 2017, entered into force 14 February 2018) 3234 UNTS 1.
- Daniel Trenchov, 'The Future of the Western Balkans Integration within the EU' (2012) 4(2) Analytical Journal, 1–12.
- Anamarija Velinovska, Ivan Nikolovski and Marie Jelenka Kirchner, *From a poster to a foster child. 2021 public opinion analysis on North Macedonia's EU accession process* (Konrad Adenauer Foundation in the Republic of North Macedonia Institute for Democracy "Societas Civilis" 2022).
- Lucia Vesnic-Alujevic, *European Integration of Western Balkans: From Reconciliation To European Future* (Centre for European Studies 2012).
- Gëzim Visoka & Elvin Gjevori, 'Census politics and ethnicity in the Western Balkans' (2013) 29(4) East European Politics, 479–498.

Short biography of the author

Mircea Brie PhD Professor at the University of Oradea, Department of International Relations and European Studies and PhD supervisor at the Faculty of European Studies of the Babeș-Bolyai University (Romania). Author and co-author of 9 books, editor and coordinator of 21 collective volumes. Over 115 articles in journals, proceedings of international conferences or collective volumes. His research interests are:

international relations and European studies, cross-border cooperation, interethnic and inter-confessional relations, social history, migration, intercultural dialogue, demography, border studies.

Questions relating to the VAT rate reduction on residential property sales

Gábor Butor*

Abstract: A key moment of the VAT reform measures in Hungary was the reduction of the VAT rate on new home sales from 2016. Such a reduction is possible under the applicable rules of EU law if the measure serves social policy objectives. Taxation plays a key role in social policy instruments, and the relationship between taxation and social policy is very close. However, in my view it is questionable whether the reduced tax rate introduced for new homes can be regarded as a social policy step, especially if social policy can be regarded as a step that aims to preserve people's everyday life, living conditions, quality of life and life chances, in short: their well-being. This paper aims to elaborate on these considerations.

Keywords: VAT, VAT rate reduction, immovable property, residential properties, new flats, social policy

1. Introductory thoughts

There is broad agreement that value added tax should not distort market conditions and consumer choices, in particular as a consequence of the principle of tax neutrality, which is the cornerstone of value added tax. This objective is best served by the fact that value added tax is levied by each state on the widest possible range of goods and services consumed.[1] Certain exemptions, which are exceptions to the general rule,

* Attorney-at-law, Becher, Torma and Partners Law Firm (Budapest, Hungary); PhD student, Pázmány Péter Catholic University Faculty of Law and Political Sciences (Budapest, Hungary). Email: gabor.butor@btpartners.hu.
The chapter has been reviewed by László Knapp.

[1] Sijbren Cnossen, 'Improving the VAT treatment of exempt immovable property in the European Union' (2010) Oxford University Centre For Business Taxation WP 10/19.

are of limited application[2] because they infringe the logic and functionality of value added tax.[3]

From the basic assumption set out in the previous paragraph, it might reasonably be assumed that transactions involving immovable property are also subject to value added tax and that the exemptions can only be applied to a limited extent at most (especially considering that expenditure on immovable property transactions is perhaps one of the most significant elements of consumer expenditure).[4] At the same time, the characteristics of real estate, given the specific nature of the properties mentioned above, shade this picture, especially since the taxation of real estate and taxes on real estate transactions are always sensitive areas, and reforms are influenced by a number of social and political circumstances.[5]

The specific role of real estate leads to the fact that the regulations governing real estate transactions are not only specific, but also complex.[6] This is the conclusion of renowned Stanford professor Charles E. McLure, jr,[7] who says that housing is one of the most difficult items to handle under a value added tax.

Real estate plays a special role both in economics and in the system of rules of individual branches of law, or even in the field of legal policy.[8] This is not different in the case of tax law, including value added tax, in respect of which it can be stated that the regulation governing real estate transactions is not only specific, but also one of the most diverse. The complexity of the rules is increased by the fact that value added tax, although it is a harmonized tax at EU level, individual Member States have considerable leeway in determining national rules on a number of points. As a result, although similar in different Member States, we can find

[2] Case C-472/03 *Arthur Andersen* [2005] EU:C:2005:135.

[3] Liam Ebrill, Michael Keen and Victoria J. Perry, *The Modern VAT* (International Monetary Fund 2001).

[4] Satya Poddar, 'Taxation of Housing Under a VAT' (2010) 63(2) *Tax Law Review*.

[5] Hansjörg Blöchliger, 'Reforming the Tax on Immovable Property: Taking Care of the Unloved' (2015) OECD Economics Department Working Papers No. 1205.

[6] Ben Terra, Julie Kajus, *A Guide to the European VAT Directives 2007* (IBFD 2007) vol 1.

[7] Sijbren Cnossen, 'VAT Treatment of Immovable Property' in V. Thuronyi (ed), *Tax Law Design and Drafting* (IMF 1996) ch 7.

[8] Attila Menyhárd, *Dologi jog* (Osiris 2007) 61.

different regulatory solutions regarding its detailed rules. In addition, it should also be emphasized that the system of rules concerning value added tax, as well as the practice of courts and tax authorities, has undergone dynamic development in recent decades, which obviously did not leave transactions involving real estate untouched either. Accordingly, the range of issues related to regulation is also expanding and changing year by year.

The definition of value added tax treatment of real estate – primarily by applying a reduced tax rate to new residential properties – has been a recurring tax policy tool in Hungary in recent years. Recently, a significant part of the papers published concerning value added tax have been questions and interpretations related to the applicability of the 5% tax rate introduced for the sale of new homes. In this context, it should be pointed out that as of 2025 the effectivity of this regulation has been extended until the end of 2026 (or, under certain conditions, until the end of 2030)[9] and that its extension for further years cannot be ruled out, taking into account trends in recent years.

In connection with the above, the question arises to what extent it is fair to determine the reduced tax rate for a sector that plays a prominent role in the economy, such as residential real estate sales, and whether the reduction of the tax rate can serve social policy objectives, as is apparent from the reasoning of the legislation.

2. Fairness of VAT

The principle of justice, according to its modern formal definition, requires that the same be treated differently and the different treated differently according to the degree of difference. If we treat the same differently and the different in the same way, then we are unjust, unlawful, or, as the case may be, unconstitutional or against natural law.[10] Tax justice can be demonstrated in accordance with the principle of solvency with regard to income taxes, but the examination of the requirement of fairness cannot be absent in the case of sales taxes, including VAT. In the

[9] Act LV of 2024 on the amendment of certain tax acts

[10] János Frivaldszky, 'Jog és igazságosság a Caritas in veritate enciklikában' in András Lóránt Orosz, Lóránd Újházi (eds), *Szerzetesi fogadalmak kánonjogi szempontból* (L'Harmattan 2012) 170.

case of personal income tax and value added tax, personal income tax is linked to the supply side of economic output for the same taxpayer, while value added tax is linked to the demand side of the same economic activity.[11] It is always a delicate question whether a particular tax system, or even a specific tax, is fair or equitable.[12]

There is no generally accepted standard for deciding this, and the approach to the question of justice in relation to taxation in particular is open to much debate. In this regard, it is also questionable whether political, social or economic justice should be manifested at all, and to what extent these factors should be taken into account in the design of the tax system, or even what can be called fair in terms of taxation at all.

It can be said that VAT has an impact on taxpayers' behaviour, decisions and consumption habits. Nevertheless, it gives taxpayers considerable freedom, taking into account that it is up to them to decide how much income they decide to spend for consumption purposes. However, freedom of choice is partly free, given that certain goods (such as basic foodstuffs such as meat, dairy products, bakery products) and services (such as utilities) are forced by all citizens to buy or use. On the one hand, this increases horizontal justice, since taxpayers in the same situation pay tax at the same rate and contribute the same amount of tax to public charges in case of consumption of the same amount, quantity or quality. At the same time, there can be no question that vertical justice is violated as a result of the above, given that even the lowest income sections of society are forced to buy certain goods and services for their own consumption, and thus even their minimum subsistence level is not exempt from tax, and even from their lower income they pay the same amount of tax not only as a percentage but, where appropriate, also numerically, at least taking into account basic foodstuffs and services, than those with much higher income levels.[13] In view of this, many authors

[11] Dániel Deák, Hungary: 'Does the Hungarian Local Trade Tax Fall within the substantive scope of DTC?' M. Lang, P. Pistone, J. Schuch, C. Staringer, A. Storck, L. de Boe, P. Essers, E. Kemmeren, F. Vanistendael (eds), *Tax Treaty Case Law Around the Globe* (Linde 2011) 50.

[12] Zsombor Ercsey, *Az Szja- és az Áfa-szabályozás igazságossága a magyar adórendszerben* (Pécs 2012) 152.

[13] Ibid.

regard VAT as a regressive tax[14] [15] or an unfair tax, while some believe that VAT is the fairest tax[16] (since everyone – essentially regardless of the person – is obliged to pay it uniformly).

The cornerstone of the regulation of value added tax are the exemptions[17] and discounts named in the VAT Act (which means transactions subject to a reduced tax rate).[18] With regard to VAT, given that no specific personal assessment is possible at all, or only on the basis of generally defined conditions, exemptions can eliminate the regressive and unfair nature of VAT, which many authors believe, in addition to applying reduced tax rates. Accordingly, some form of exemption for households may make the basic VAT structure more progressive. Based on the principle of fairness, exempting selected goods and services from VAT is not only acceptable, but also very fair, especially in societies where many people live below or around the poverty line.

The need to apply tax benefits has been emphasized several times in the literature. When examining the situation of the housing market and the need for state involvement, Imre Fülöp explicitly emphasized the importance of reducing the value added tax rate, in addition to direct (direct) subsidies and duty reductions.[19] However, sceptical positions are also known. In Cnossen's view, there are strong arguments against VAT acting as a multi-rate tax.[20] Such an argument, in his view, is that it is nearly impossible to distinguish between the products consumed by the rich and the less expensive, conventional products sought by the poor, and that the tasks of traders with multiple tax rates become more difficult. Kálmán Dezséri agrees that although reduced VAT rates may have positive effects, in many cases other economic policy instruments, primarily direct financial support (subsidies), can often be much more

[14] Bálint Ván, Dániel Oláh, 'Szerepel-e az áfacsökkentés az étlapon? A 2016. és 2017. évi magyarországi áfacsökkentések árhatásai' (2018) (3*)* Pénzügyi Szemle.

[15] Sijbren Cnossen: 'A hozzáadottérték-adóra való áttérés társadalmi, gazdasági és politikai vonatkozásai' (1993) (1-2) Szociálpolitikai Értesítő*,* 351.

[16] Állami Számvevőszék [State Audit Office of Hungary], *Az általános forgalmi adó csökkentés hatásai a fenntartható kifehérítés folyamatára* (December 2019) 5.

[17] Sections 85-86 of Act CXXVII of 2007 on Value Added Tax (hereinafter: VAT Act).

[18] Annexes 3 and 3/A of the VAT Act.

[19] György Imre Fülöp, 'Állami szerepvállalás a lakástámogatási rendszer keretében megvalósuló otthonteremtésben' (2018) (9) Studia Iuvenum Iurisperitorum.

[20] Cnossen (n 15) 352.

effective than these. These instruments can be successfully used to achieve environmental, social, cultural goals.[21]

The multi-graduation of tax rates, in my view, with reference also to the introduction of reduced rates, is a rather inefficient and costly means of reducing regressivity. It is no coincidence, according to Cnossen, that some countries that later switched to VAT introduced a single tax rate and adjusted the associated regressive burden distribution at other points in the tax and income transfer system by more efficient means.[22]

3. The question of the social policy objective

Accordingly, we have reached the point where many concerns have been raised about the fairness of VAT, however, some authors attach particular importance to reducing the related VAT rate in order to make VAT fairer. As mentioned above, the Hungarian legislator decided to reduce the tax rate for reasons and objectives of social policy. In view of this, I aim below to answer the question of what is the relationship between taxation and social policy, what can be considered social policy or social policy objectives.

Taxation and social policy are inextricably linked in many respects. Several principles of economic theory of taxation, such as horizontal and vertical fairness or utilitarian and solvency taxation, have important social policy aspects and raise questions relevant to the target system of social policy. It is also well known that there are proposals for social policy reforms, such as negative income tax or the problem of family versus personal income taxation, in which the two areas are directly linked. However, indirect links between the two spheres are much more significant. It is not only that taxes constitute the main source of revenue for the budget and general government (in a broader sense, social security contributions are also considered taxes in economic literature), and thus their size greatly limits the expenditure that can be spent on social policy. Taxes already embody, in themselves, one half of the government's income redistributive activity.[23]

[21] Kálmán Dezséri, 'A csökkentett ÁFA-kulcsok és az ÁFA-szabályok felülvizsgálata az EU-ban' (2007) (10) Európai Tükör.

[22] Cnossen (n 15) 353.

[23] András Semjen, 'Adózás és szociálpolitika' 1992 (1-2) Szociálpolitikai Értesítő, 5–6.

According to the authors of the literature, social policy is a complex concept, the profession and public discourse mean all state, governmental, individual and community measures, as well as a multi-sectoral system of forms of support and intervention, which aim to preserve and improve people's everyday life, living conditions, quality of life and life chances, in short: their well-being. International literature mostly uses the term "welfare or social protection systems".[24]

In the toolbox of social policy, the literature highlights tax policy, which is becoming an increasingly important player, the presence and weight of which we evaluate between employment policy incentives and family support.[25] In summary, it can be stated that in the complex relationship between wages, taxation and social policy, it is not possible to formulate clear normative statements about what kind of relationship is the only right or desirable[26] expectation or system of relationships.

In view of the fact that value added tax is a type harmonized at EU level,[27] the legislation governing domestic value added tax should comply with EU legislation.

From the point of view of the present study, the definition of social policy is particularly important because, as I mentioned above, the Hungarian legislator decided to reduce the tax rate for social policy reasons and objectives in accordance with the related legal justification. The latter was based on the fact that the reduced rate under Article 98 of the VAT Directive [28] could be applied only to supplies of goods and services in categories listed in Annex III to the VAT Directive. Point 10 of Annex III states that the reduced rate may be introduced in respect of 'provision, construction, renovation and alteration of housing, as part of a social policy'. In other words, the VAT Directive allows the domestic legislator to apply a reduced rate to housing, construction and related works if it is provided within the framework of social policy. It should be noted, however, that the VAT Directive does not expressly mention the supply of dwellings within the scope of application of the reduced rate.

[24] Zoltán Lakner, *Szociálpolitika* (Szent István Társulat 2012) 29.

[25] Ibid 23.

[26] Zsuzsa Ferge, *Szociálpolitika és társadalom. Társadalompolitikai olvasókönyvek* (1991).

[27] Gábor Szlifka, *A hozzáadottérték-adó jelene és jövője Európában* (2019) 6.

[28] Directive 2006/112/EC of 28 November 2006 on the EU's common system of value added tax [2006] OJ L347/1.

Social policy is not defined in the VAT Directive. The interpretation of this concept was dealt with by the European Court of Justice in Case C-161/14 European Commission v United Kingdom.[29] The starting point for the infringement procedure against the United Kingdom was the introduction of reduced VAT rates on the installation of energy-saving building blocks. In its grounds of judgment, the European Court of Justice argued that it was the intention of the EU legislature that the reduced rate should be extended to essential goods or services which have a social or cultural objective.[30] The European Court of Justice also points out that, in the present case, the reduced rate introduced in the United Kingdom cannot serve social policy objectives either because it does not discriminate between people on the basis of income, age or other criteria, thereby giving an advantage to persons who would otherwise find it more difficult to obtain energy-saving building blocks.[31] The example shows that a Member State's VAT decision raises the possibility for the European Commission to initiate infringement proceedings against that Member State if there is no appropriate social policy element.

The Charter of Fundamental Rights of the European Union,[32] according to which socially-motivated housing subsidies can be used to combat poverty, can also help in interpreting the term social policy objective: “In order to combat social exclusion and poverty, the Union recognises and respects the right to social assistance for a decent living in accordance with the rules laid down in Union law and national laws and practices; housing allowance for all those who do not have sufficient funds."

Based on the above, it can actually be concluded that social policy aims to improve everyday living conditions and quality of life in scientific

[29] Case C-161/14 *Commission v United Kingdom* [2015] ECLI:EU:C:2015:355.

[30] According to paragraph 25 of the decision in Case C-161/14: “(...) the EU legislature intended that essential commodities and goods and services having social or cultural objectives may be subject to a reduced rate of VAT (...)”

[31] According to paragraph 31 of the decision in Case C-161/14: “By providing for the application of the reduced rate of VAT to all supplies of services of installing energy-saving materials and to supplies of such materials, irrespective of the housing concerned and with no differentiation among people living in that housing, in particular with no regard to levels of income, age or other criteria designed to give an advantage to those who have more difficulty in meeting the energy needs of their accommodation, the provisions of national law at issue cannot be regarded as adopted for reasons of exclusively social interest or even for reasons of principally social interest, within the meaning of EU law.”

[32] Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

terms, but the toolbox of social policy cannot be defined by an exhaustive list. The rule laid down in the VAT Directive providing for the possibility of reduced rates for housing is interpreted very strictly by the European Court of Justice and it is not enough to demonstrate that it increases people's welfare generically and encourages investment in order to achieve the social policy objective, but more is necessary, namely that it actually helps poorer strata to gain access to certain housing-related products and services.

4. The prominent role of residential real estate

After summarizing the above, I believe it is necessary to take a brief outlook on the housing market in order to review how the reduced tax rate introduced for new home sales introduced from 2016 has affected supply and demand and real estate market prices since then.

The housing market is an area of paramount importance both at the level of individual economic actors (households, financial institutions) and at the level of the national economy. Developments in housing markets are not only closely linked to financial stability dilemmas, but also fundamentally determine the short- and long-term outlook for economic activity. Overall, it can be stated that the housing market is organically connected to all areas of the national economy. Developments in the housing market, and in particular fluctuations in house prices, influence the sector's saving and consumption decisions through household wealth, and the portfolio, profitability and lending activity of financial institutions through mortgage collateral.[33]

Studies on housing market cycles in Hungary have been published by several authors. The housing subsidy scheme introduced in 2000 (interest rate subsidy on housing loans) encouraged people to bring forward their planned home purchases, which led to a drastic increase in the stock of state-subsidised housing loans. The financing of this proved to be unfeasible and sustainable in the long run. In the years following the regime change, real prices on the housing market decreased by about 35-40%, but between 1998 and 2001 prices increased by about 100-150%. Subsequently, house prices continued to increase until 2008, which was

[33] Magyar Nemzeti Bank [National Bank of Hungary], 'Lakáspiaci jelentés' <https://www.mnb.hu/kiadvanyok/jelentesek/lakaspiaci-jelentes>.

the result of an increase in demand for housing, after which the crisis resulted in a significant drop in demand in the housing market. At the same time, house prices increased again from 2011 onwards, which lasted until the end of 2019.[34] In other words, the period 2016-2019 was characterized by a continuous increase in house prices. The latter is confirmed by the analysis prepared by the State Audit Office, according to which no decrease in the price of new residential properties could be detected as result of the VAT reduction,[35] as the rapidly increasing demand at the time of the VAT rate reduction increased prices, which offset the effect of the tax reduction.[36]

In addition, the renewal rate of the domestic housing stock remained low even in regional comparison. In Hungary, a number of new homes were built in 2018 equivalent to 0.4% of the housing stock existing at the end of 2017. This is low in regional comparison: less than two-thirds of the Romanian and Czech proportions, about 40% of the Slovak proportion, and a third of the Polish and Austrian proportions. If we examine the situation of Budapest among the regional capitals, there is an even greater gap.[37] Housing problems, which are a very serious problem in Hungary, have also not decreased. These are partly housing quality problems (for example, according to statistics, about 2.5 million people live in wet housing), and many families also face serious difficulties in housing affordability. (Nearly 840,000 people face serious affordability problems with housing.[38]) The solution of these housing issues is obviously not just a matter of responsibility and competence of housing policy in the narrow sense, but a current housing policy must at least take into account the aspects of these problems and problems.[39]

[34] László Harnos, *A lakásárakat befolyásoló tényezők, különös tekintettel a településfejlesztési döntésekre Sopron példáján* (2019).

[35] Állami Számvevőszék [State Audit Office of Hungary] (n 16) 7.

[36] ELTINGA – ELTEcon Real Estate Market Research Centre (Ingatlanpiaci Kutatóközpont), *Az újlakás áfakulcs emelésének várható lakáspiaci hatásai* (24 June 2019) 4.

[37] Magyar Nemzeti Bank [National Bank of Hungary], 'Lakáspiaci jelentés 2019. november' (2019) <https://www.mnb.hu/kiadvanyok/jelentesek/lakaspiaci-jelentes/lakaspiaci-jelentes-2019-november>.

[38] See http://www.ksh.hu/docs/hun/xftp/megy/164/index.html>.

[39] László Mádi, 'Egy kívánatos és reális lakáspolitika körvonalai Magyarországon 2017-ben' (2017) (1) Acta Wekerleensis, 11.

Summarizing all this, it can be stated that the (temporary) VAT reduction introduced for new homes made entrepreneurial housing construction more attractive for investors and construction companies, and due to the reduced capacities and shortage of professionals since 2008, the supply side was able to react to the increased demand with a delay in time. Nevertheless, increased demand drove up the prices of land suitable for housing construction, as well as the severe shortage of professionals in the construction industry. The previously extremely depressed wages, as well as the increased demand for professionals and the whitening economy, also had a significant effect on raising prices.[40] Accordingly, the VAT reduction achieved its other assumed objectives (i.e. whitening economy, stimulating construction industry, mitigate tax evasion), however, these circumstances worked in the opposite direction to the social policy objectives.

5. Conclusions

From 2010 onwards, an important tax policy objective was to increase the emphasis on consumption-type taxes in taxes over taxes on income, and to reform the complex and over-regulated tax and tax collection system, including the system of VAT payment and collection.[41]

As result of the measures taken to whiten the economy, the tax gap in the case of VAT in Hungary decreased to 9% by 2018, according to the estimates of the European Statistical Office. All this was achieved by simultaneously reducing VAT in several areas and product groups, and reducing the VAT rates on several products and services from 2014 and in the following years. Although the aim of the measures, in addition to whitening the economy, was to reduce the prices of certain products and increase demand, it can be seen that in about half of the products and services affected by the VAT reduction – such as pork, milk, fish, catering in dining establishments, internet use – the effect of reducing the VAT burden was not or not fully reflected in the prices. Following the introduction of the VAT reduction, average price decreases occurred for internet subscriptions, pork, poultry meat and fish meat, while no price decreases were detected for eggs, milk and new residential properties.[42]

[40] Ibid 10.
[41] Állami Számvevőszék [State Audit Office of Hungary] (n 16) 5.
[42] Ibid.

The latter justifies the view referred to in section 2 above, according to which the reduction of the VAT rate is not necessarily the most effective economic policy instrument and even less effective social policy instrument. These doubts can also be read from the analysis of the State Audit Office, which concludes that it is necessary to assess the impact of tax rate reduction measures and, based on these results, to proceed thoughtfully with the measures.

A key moment of the VAT reduction measures was the reduction of the VAT rate on new home sales from 2016. Such a reduction is possible under the applicable rules of EU law if the measure serves social policy objectives. We have seen that taxation plays a key role in social policy instruments, and the relationship between taxation and social policy is extremely close, yet in my view it is questionable whether the reduced tax rate introduced for new homes can be regarded as a social policy step, especially if social policy can be regarded as a step that aims to preserve people's everyday life, living conditions, quality of life and life chances, in short: their well-being, and are aimed at improving it. For example, the reduction of the VAT rate was not a solution to what I consider to be the most serious social problem, the housing crisis, which, as I mentioned above, affects some 2.5 million people in Hungary today.

The latter doubts are reinforced by the findings of the European Court of Justice in the UK infringement procedure cited in section 3 above, in which the Court expressly stated that the social policy nature of the VAT reduction must be interpreted narrowly with regard to the reduction. It is not social policy if the measure in question generally improves people's well-being or encourages investment, but more is necessary, namely that the measure actually helps poorer sections of the population to have access to certain housing-related goods or services. With regard to Hungarian legislation, such a specification cannot be seen either, since the territorial and other conditions formulated in connection with the concept of new housing[43] include all newly built apartments, with few exceptions. In my view, therefore, in addition to the above, it is also questionable whether domestic legislation would pass the social policy

[43] Points 50-51 of Annex 3 to the VAT Act:
"50. Dwellings falling within Paragraph 86(1)(j)(ja) or (jb) to be constructed or constructed in multi-dwelling residential real estate, the total usable floor area of which does not exceed 150 square metres (except dwellings within the meaning of point 59);
51. A single-dwelling residential property covered by Section 86(1)(j)(ja) or (jb) with a total usable floor area not exceeding 300 square metres."

test of the European Court of Justice in a possible infringement procedure. This question is also important since as I have indicated above, the rule on preferential VAT rate to new residential property sales will form the part of the Hungarian VAT legislation until the end of 2026 (and with certain conditions until the end of 2030) due to the repeated extension of the applicability of this rule.

References

- Állami Számvevőszék [State Audit Office of Hungary], *Az általános forgalmi adó csökkentés hatásai a fenntartható kifehérítés folyamatára* (December 2019).
- Hansjörg Blöchliger, 'Reforming the Tax on Immovable Property: Taking Care of the Unloved' (2015) OECD Economics Department Working Papers No. 1205.
- Sijbren Cnossen: 'A hozzáadottérték-adóra való áttérés társadalmi, gazdasági és politikai vonatkozásai' (1993) (1-2) Szociálpolitikai Értesítő.
- Sijbren Cnossen, 'Improving the VAT treatment of exempt immovable property in the European Union' (2010) Oxford University Centre For Business Taxation WP 10/19.
- Sijbren Cnossen, *VAT Treatment of Immovable Property,* In: V. Thuronyi, *Tax Law Design and Drafting* Ch. 7, IMF, 1996.
- Dániel Deák, Hungary: 'Does the Hungarian Local Trade Tax Fall within the substantive scope of DTC?' M. Lang, P. Pistone, J. Schuch, C. Staringer, A. Storck, L. de Boe, P. Essers, E. Kemmeren, F. Vanistendael (eds), *Tax Treaty Case Law Around the Globe* (Linde 2011)
- Kálmán Dezséri, 'A csökkentett ÁFA-kulcsok és az ÁFA-szabályok felülvizsgálata az EU-ban' (2007) (10) *Európai Tükör*.
- Liam Ebrill, Michael Keen and Victoria J. Perry, *The Modern VAT* (International Monetary Fund 2001).
- ELTINGA – ELTEcon Real Estate Market Research Centre (Ingatlanpiaci Kutatóközpont), *Az újlakás áfakulcs emelésének várható lakáspiaci hatásai* (24 June 2019).
- Zsombor Ercsey, *Az Szja- és az Áfa-szabályozás igazságossága a magyar adórendszerben* (Pécs 2012).

- Zsuzsa Ferge, *Szociálpolitika és társadalom. Társadalompolitikai olvasókönyvek* (1991).
- György Imre Fülöp, 'Állami szerepvállalás a lakástámogatási rendszer keretében megvalósuló otthonteremtésben' (2018) (9) Studia Iuvenum Iurisperitorum.
- János Frivaldszky, 'Jog és igazságosság a Caritas in veritate enciklikában' in András Lóránt Orosz, Lóránd Újházi (eds), *Szerzetesi fogadalmak kánonjogi szempontból* (L'Harmattan 2012).
- László Harnos, *A lakásárakat befolyásoló tényezők, különös tekintettel a településfejlesztési döntésekre Sopron példáján* (2019).
- Zoltán Lakner, *Szociálpolitika* (Szent István Társulat 2012).
- László Mádi, 'Egy kívánatos és reális lakáspolitika körvonalai Magyarországon 2017-ben' (2017) (1) Acta Wekerleensis.
- Magyar Nemzeti Bank [National Bank of Hungary], 'Lakáspiaci jelentés' <https://www.mnb.hu/kiadvanyok/jelentesek/lakaspiaci-jelentes>.
- Attila Menyhárd, *Dologi jog* (Osiris 2007).
- Satya Poddar, 'Taxation of Housing Under a VAT' (2010) 63(2) Tax Law Review.
- András Semjen, 'Adózás és szociálpolitika' 1992 (1-2) Szociálpolitikai Értesítő.
- Gábor Szlifka, *A hozzáadottérték-adó jelene és jövője Európában* (2019).
- Ben Terra, Julie Kajus, *A Guide to the European VAT Directives 2007* (IBFD 2007) vol 1.
- Bálint Ván, Dániel Oláh, 'Szerepel-e az áfacsökkentés az étlapon? A 2016. és 2017. évi magyarországi áfacsökkentések árhatásai' (2018) (3) Pénzügyi Szemle.

Short biography of the author

Gábor Butor graduated from Eötvös Loránd University Faculty of Law in 2014 with summa cum laude degree. He joined Becher, Torma & Partners Law Firm in 2015 as a trainee lawyer and has been working as an attorney-at law since 2019. During the years spent as an attorney-at law he gained extensive experience in the field of tax due diligences and tax advising, he participated in the representation of numerous companies before the tax authority and the court.

In 2020 he started his PhD studies at Pázmány Péter Catholic University Faculty of Law, where the subject of his PhD research related to the value added tax rules on real properties. Within the framework his PhD studies in 2024 he obtained an absolutory. As of 2021 he also contributes as an appointed lecturer of the university's Financial Law Department. His main area of interest is the domestic and EU regulations on value added tax and the development of the corresponding legal practice.

The WTO Agreement on E-Commerce: the EU perspective

Gábor Hajdu*

Abstract: The World Trade Organization has long been working on questions of electronic commerce. However, it was only in 2017, when substantive progress was made. In 2017, 71 WTO members (including the EU) agreed to begin exploratory work for a future negotiation on e-commerce topics. This materialized in 2019, and after five years of work, in July 2024, a new draft agreement was published, the so-called "Agreement on Electronic Commerce". The paper's principal purpose was to examine the role of the EU in the negotiation of this draft text, and compare how much the EU's objectives align with it. Through the use of comparative analysis, the author was able to determine the exact level of continuity between the EU's proposals and the July 2024 draft.

Keywords: WTO, e-commerce, EU, international trade law

1. Introduction

Electronic commerce has long been a staple of international trade discussions. The field of law is no different in this regard. Since the late 20th Century, both national and international law has been attempting to address this newly emerging economic sector, though at least with regards to the latter, there has not been much success. Although the World Trade Organization did establish a specialized Working Group for the matter, they had little concrete achievements to show, such as an international agreement. Until now.

In this particular paper, we will look into recent developments that occurred in relation to international trade law. Namely, that within the confines of the WTO, a new treaty has emerged in July 2024, though it is

The research was supported by the ICT and Societal Challenges Competence Centre of the Humanities and Social Sciences Cluster of the Centre of Excellence for Interdisciplinary Research, Development and Innovation of the University of Szeged. The author is a member of the "*Jog és Versenyképesség*" research group.

* PhD; senior lecturer; University of Szeged, Faculty of Law and Political Sciences, Department of Private International Law (Szeged, Hungary); Junior Research Fellow; HUN-REN Centre for Social Sciences, Institute for Legal Studies (Budapest, Hungary). Email: Hajdu.Gabor2@tk.hu.

The chapter has been reviewed by Balázs Horváthy.

merely a so-called “stabilized” draft at the moment. Still, it enjoys the support of dozens of WTO member states, and thus we should give it our full consideration. Interestingly, it is also not directly the result of the Working Group, but rather of a Joint Statement Initiative established in 2019.

Our particular focus is on the role of the EU in these negotiations, and to briefly evaluate the current state of play with regards to the proposed treaty’s contents. If we are to formulate a research question, the following ones should serve as our guides:

1. Can we state that the treaty’s text advances the EU’s views on regulating e-commerce to an international, global setting?

2. Is it possible to resolve existing points of contention, and what role the EU could play in this regard?

To answer these questions, we shall use the following structure: first, we will briefly go over the history of e-commerce within the WTO, starting with the already mentioned Working Group on Electronic Commerce, before moving on to the Joint Statement Initiative and the negotiations, with particular emphasis given to the EU’s role. Afterwards, we will briefly discuss the current contents of the e-commerce agreement, compared to the EU’s own proposals on the given areas. And in the end, we shall summarize our findings, answer our research questions conclusively, and formulate predictions on how the situation is likely to evolve.

The latter point is especially of great importance, as one of the opponents of the current draft text includes the United States. With the recent election of Donald Trump to the presidency, the future of this draft looks somewhat more uncertain. Regardless, if it were to become a ratified treaty, it would mark a landmark achievement in international trade law, covering an area that is presently barely touched by existing multilateral treaties, save for a few highly specific regional trade agreements.

2. Work Programme on Electronic Commerce

To begin with, we have to briefly explore the history of e-commerce regulations within the WTO. During the second Ministerial Conference of the WTO in Geneva, a Declaration was adopted in May 1998. This Declaration was titled "*Declaration on Global Electronic Commerce*" and contained an affirmation by the participating ministers that the General Council of the WTO will assemble in a special session and create a detail work programme on matters relating to global e-commerce. The Declaration also emphasized that the needs of developing countries must be taken into account by the work programme, and that the programme should synchronize with related work in other international forums.[1] Furthermore, this Declaration was the first official promulgation of the e-commerce tariff moratorium, as the adopting ministers declared that WTO member states will "continue their practice of not imposing customs duties on electronic transmissions."[2] These elements will be of much importance in later developments, as the interests of developing countries in contrast to the developed ones will be one of the primary points of contention between WTO member states, especially with regards to the question of imposing tariffs on electronic transmissions.

This Declaration was followed a few months later by the General Council adopting a work programme on electronic commerce. This document from September 1998 acknowledged the Ministerial Conference's directive on the matter, and it also provided a definition of electronic commerce. According to this Programme, electronic commerce is defined as "*the production, distribution, marketing, sale or delivery of goods and services by electronic means*."[3] Furthermore, it outlined the various tasks to be undertaken by WTO bodies: namely, the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS[4] and the Committee for Trade and Development. For each body, the Work Programme instructed them to examine the issue of e-commerce from

[1] WTO Ministerial Conference, 'Declaration on Global Electronic Commerce' (1998) WT/MIN(98)/DEC/2.

[2] WTO (n1).

[3] WTO General Council, 'Work Programme on Electronic Commerce' (1998) WT/L/274, para 1.3.

[4] The TRIPS Agreement concerns trade-related intellectual property questions. It is a major agreement of the WTO framework.

their own particular perspective, for instance, with regards to Trade in Services, the interaction between e-commerce and modes of supply under GATS.[5] To expand somewhat on this, the GATS recognized four modes for supplying services: cross-border supply, consumption abroad, commercial presence and presence of natural persons.[6] Explaining each mode in detail would naturally be beyond the scope of the present paper, though with regards to e-commerce, we can note that the first two modes of supply are most often raised in connection with, while the last two modes are largely viewed as unconnected.[7] The other bodies received similar tasks, such as examining the protection and enforcement of trademarks in e-commerce for the Council for TRIPS, or analysing the developing countries' perspective for the Committee for Trade and Development. With this document, work actively began in the WTO with relation to e-commerce questions.

Since its inception, the Work Programme produced a large number of documents, such as minutes of various meetings, as well as reports by the various WTO bodies taking part in the negotiation process.[8] However, despite the promising start, no actual treaty emerged as a result of the negotiations. In contrast, many points of difference did emerge between members of the WTO, especially with regards to the controversial customs duties moratorium. Overall, it appeared that the original 1998 Work Programme made little substantive progress in resolving e-commerce issues.[9]

[5] WTO (n3).

[6] For a more detailed overview regarding modes of supply in GATS, see: Soumya Shekhar, 'Definition of Trade in Services: A Critical Analysis' (2013) SSRN <http://dx.doi.org/10.2139/ssrn.2267472> accessed 10 November 2024. 3–5.

[7] Rolf H. Weber, 'Digital Trade and E-Commerce: Challenges and Opportunities of the Asia-Pacific Regionalism' (2015) 10(2) Asian Journal of WTO & International Health Law and Policy 321, 324. For a more detailed analysis regarding the place of e-commerce within GATS-modes, see: Rolf Weber and Rainer Baisch, 'Tensions between developing and traditional GATS classifications in IT markets' (2013) 43(1) Hong Kong Law Journal 77, 91–98.

[8] WTO, 'Work Programme on E-Commerce' <https://www.wto.org/english/tratop_e/ecom_e/ecom_work_programme_e.htm> accessed 10 November 2024.

[9] Murali Kallummal, 'Global Digital Trade and Implications for Trade Negotiation: Deciphering the Data Flows and Implications on Revenues Losses' (2020) SSRN <http://dx.doi.org/10.2139/ssrn.3527690> accessed 10 November 2024, 1–2.; Andrew D. Mitchell and Neha Mishra, 'Regulating Cross-Border Data Flows in a Data-

In conclusion, it appears that despite the WTO's efforts to address e-commerce regulation, the Work Programme approach seemed to have not achieved much success. With regards to the existing moratorium, the status quo seems to have become the dominant approach, and with regards to regulation on other fields (such as market access or consumer protections), there hasn't been much material progress.

3. Road to the E-Commerce Agreement: the EU Perspective

With the Work Programme's issues, it is perhaps unsurprising that eventually, WTO member states invested in achieving a more tangible solution would explore another approach. That another approach would be the Joint Statement Initiative. Through such Joint Statement Initiatives, WTO member states were capable of negotiating plurilaterally on various areas they desired an enhanced level of cooperation compared to the WTO overall. One such area where a Joint Statement Initiative was launched was electronic commerce. In December 2017, within the framework of the 11th Ministerial Conference, 71 WTO member states (including Brazil, China, the United States and the European Union) released a "*Joint Statement on Electronic Commerce*" in which (among other matters) declared their intent to kickstart exploratory work on e-commerce negotiations, open to all WTO members.[10]

Little more than a year later, in January 2019, this exploratory work officially commenced, as the participating WTO member states (with the addition of five new negotiating countries) announced their intent to commence negotiations.[11] The main framework for this negotiations was through the use of negotiation rounds, each involving four to six focus groups dedicated to discussing proposals falling under one of the fifteen different categories of the Joint Statement Initiative (JSI). These fifteen categories consisted of: facilitating electronic transactions, non-discrimination and liability, consumer protection, transparency, customs duties on electronic transmissions, flow of information, personal information protection/privacy, cybersecurity, telecommunications, digital

Driven World: How WTO Law Can Contribute' (2019) 22(3) Journal of International Economic Law, 27.

[10] WTO, 'Joint Statement on Electronic Commerce' (2017) WT/MIN(17)/60.

[11] WTO, 'Joint Statement on Electronic Commerce' (2019) WT/L/1056.

trade facilitation and logistics, access to internet and data, business trust, capacity building and technical assistance, market access and cross-cutting issues.[12] But even before this official beginning, we had numerous communications from participating WTO member states, highlighting what they saw as particularly important policy agendas. As the EU is of a particular focus in this paper, we will now discuss the submissions of the EU in the context of the Joint Statement Initiative negotiations.

Over the course of the negotiations, six of the fifty-five publicly available JSI-related documents were directly connected to the European Union. Two of these were joint communications, while the remaining four were the EU's own. By comparison, China and the United States both only have a single publicly available JSI-related document tied to them. Some countries of course had more submissions than the EU, such as Brazil and Canada.[13] However, given the high number of participating WTO member states, this ratio still clearly shows the energetic role the EU took in the negotiations.

Based on these documents, we can establish some clear priorities the EU had in the negotiations, and we will be able to see in the next chapter how much these priorities align with the stabilized draft text. The very first document we can tie to the EU is a communication from May 2018 (we have to note that the dates of communication and their circulation date can differ, we will use the latter for references, and the former for our discussion here). In this short text, the EU identified six crucial areas where negotiations have to take place in its view: electronic contracts (broadening recognition and allowance of electronic contracts by national legal systems), electronic authentication and trust services (ensuring that courts do not deny the legal effect and admissibility as evidence of electronic authentication and trust services solely based on their electronic nature), consumer protection (preventing fraudulent and deceptive commercial practices, ensuring transparency and effective

[12] Yasmin Ismail, 'E-commerce in the World Trade Organization: History and latest developments in the negotiations under the Joint Statement' (International Institute for Sustainable Development & CUTS International 2020) <https://www.iisd.org/system/files/publications/e-commerce-world-trade-organization-.pdf> accessed 10 November 2024, 14-23.

[13] WTO, 'Joint Statement Initiative on E-commerce' <https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm> accessed 10 November 2024.

redress), unsolicited commercial communications or messages (protecting consumers against "spam"), prior authorization (ensuring that the supply of services by electronic means may not be subject to prior authorization requirements specifically and exclusively targeting services provided by electronic means) and the tariff moratorium on electronic transmissions (permanent extension).[14] The second document we can tie to the EU followed soon after, a short communication from July 2018, that outlined the EU's stance on telecommunications. This document significantly referred to the existing GATS (General Agreement on Trade in Services) Telecommunications Reference Paper, with the EU proposing that the JSI negotiating member states should commit fully to implementing this Reference Paper. Otherwise, this document focused on extending the Reference Paper's existing provisions on matters such as transparent regulation, effective telecommunications competition, legal certainty and predictability for suppliers, open and neutral internet and the safety net of telecommunication services.[15] Based on these two initial documents, we can already see that the EU placed a particularly great emphasis on developing negotiations when it comes to telecommunications (as it devoted an entire communication document to just this one area), though it did not neglect discussing the other e-commerce topics it felt relevant.

The next document connected to the EU originates from April 2019. In this communication, the EU seemed to have expanded upon its previous proposals in both of the earlier documents. Namely, it outlined concrete text proposals with regards to electronic contracts, electronic authentication and signatures, consumer protections, unsolicited commercial electronic messages, customs duties on electronic transmissions, transfer or access to source codes, cross-border data flows, protection of personal data and privacy and open internet access. Furthermore, it also outlined a proposed revision of the aforementioned Reference Paper on telecommunications. Finally, the EU also called on the other member states to expand market access, via joining the Information Technology Agreement and its expansion.[16] Overall, it

[14] WTO, 'Establishing an enabling environment for electronic commerce - Communication from the European Union' (2019) INF/ECOM/10.

[15] WTO, 'Communication from the European Union' (2019) INF/ECOM/13.

[16] WTO, 'EU proposal for WTO disciplines and commitments relating to electronic commerce – Communication from the European Union' (2019) INF/ECOM/22.

appears that the EU mostly kept its original proposal outlines at this stage of the negotiations but expanded it with new questions such as data flow and source code issues. Its material positions on various issues appear consistent with its earlier communications as well. The increased emphasis on telecommunications is likewise still observable, as around half of the communication is dedicated to the topic.

The fourth public document of the JSI involving the EU is another communication from October 2019. As explained by the EU itself in the document, this is a revision of the earlier proposals of the EU with regards to the Reference Paper on telecommunications, based on feedback and discussions that happened over the course of that year. If we are to examine this revision, we would find it largely similar to the earlier proposal of the EU, with only a few changes. The most notable of these is the alterations to the definitions. Compared to the earlier proposal, this new communication included an expanded list of definitions, adding "*public telecommunications network*", "*public telecommunications service*" and "*telecommunications service*" to its list of definitions. It also notably altered the definition of "*user*" from "*any natural or juridical person using a public telecommunications transport service*"[17] to "*a service consumer or a service supplier*"[18]. The other notable change occurred with regards to a slight rewording of the Essential Facilities section. In the first proposal of the EU, major suppliers were mandated to make their "*essential facilities available to suppliers of public telecommunications transport networks or services on reasonable, transparent and non- discriminatory terms and conditions for the purpose of providing public telecommunications transport services.*"[19] However, they were allowed an exception to this when the telecommunications regulatory authority deemed it not necessary to achieve effective competition.[20] In contrast, the revised proposal has largely the same requirement, but rewords it: essential facilities have to be made available if it is deemed necessary for effective competition by the telecommunications regulatory authority.[21] Thus, the telecommunications

[17] Ibid para 3.2.6.

[18] WTO, 'Communication from the European Union – EU proposal for WTO disciplines and commitments relating to electronic commerce: revision of disciplines relating to Telecommunications Services' (2019) INF/ECOM/43, para 3.2.9.

[19] WTO (n16) para 3.9.1

[20] Ibid.

[21] WTO (n18) para 3.9.

regulatory authority's decision has a slightly different angle in the two proposals: in the first, they were tasked with determining when is making available essential facilities not necessary for effective competition, in the second, they have to determine when it is necessary for effective competition. Instead of a negative evaluation, it has been changed to a positive evaluation.

The fifth document of note was extremely short, though of some importance. It was a joint communication from Canada and the European Union, in March 2021. For both Canada and the EU, it served as a revision of their proposal on market access, specifically with regards to the Information Technology Agreement of 1996 and the WTO Ministerial Declaration on the Expansion of Trade in Information Technology Products of 2015. In essence, they proposed that within a certain amount of years after the proposed e-commerce agreement comes into force, parties shall join the aforementioned agreement and ministerial declaration.[22] This is consistent with the EU's earlier stance on the matter, though with some further clarification of how this exactly would be achieved.

With regards to the final publicly available document from the negotiations directly tied to the EU, it is a joint communication from the EU, Norway, Ukraine and the United Kingdom. In substance, this proposal is essentially identical to the previous proposal the EU made with regards to revising the WTO Reference Paper on telecommunications, but this time, with additional countries providing the EU with their assent to the proposal.[23]

Now that we have examined the involvement of the EU in the negotiations, we should move on chronologically speaking. Over the years of negotiations, the various topics and issues discussed by the JSI members gradually whittled down. These include topics such as data flow, data localization, source code related provisions, competition policy, intermediary liability, and most notably, market access, to name a few of these dropped topics. The primary motivation behind this seemed to be that many of the participating countries were unwilling to give up their own policy space (an example of this is the US dropping its attempts to

[22] WTO, 'Communication by Canada and the European Union – Joint proposal on the Information Technology Agreement and its expansion' (2021) INF/ECOM/63.

[23] WTO, 'Communication by the European Union, Norway, Ukraine and the United Kingdom - Joint text proposal for the disciplines relating to telecommunications services' (2021) INF/ECOM/64.

liberalize data flow rules), or because the positions of the member states were simply too divergent.[24] Regardless, by the end of 2023, a substantial conclusion to the negotiations was announced by the JSI's three chairing member states (Japan, Australia and Singapore), though it also meant that no final draft was ready to be presented at the 13th WTO Ministerial Conference in Abu Dhabi.[25] In the end, a stabilised draft text of the so-called "Agreement on Electronic Commerce" was publicized at the end of July 2024. However, a number (11) of JSI participants did not endorse the draft text, most notably including Brazil, Indonesia, Taiwan, Türkiye and the United States.[26]

As we have seen from the discussed documents, the EU took part in the negotiations to a significant extent, particularly with regards to telecommunications. In the next chapter, we will attempt to examine how well does the EU's own proposals match the final content of the stabilised draft we mentioned above.

4. Comparative Analysis of the Stabilized Draft Text

As we previously mentioned, while the JSI members decided to drop several topics that were discussed during the original negotiations, the stabilized draft agreement is still a substantial text, covering multiple different aspects of electronic commerce. To note, it contains provisions on enabling electronic commerce (electronic transactions, contracts, payments, etc.), openness and electronic commerce (addressing most importantly the question of customs duties), trust and electronic commerce (including consumer protection, cybersecurity and personal data protection), transparency, cooperation and development and telecommunications. It also provides for various exceptions and addresses relevant institutional arrangements.[27] An in-depth examination

[24] Rashmi Jose and Rashid S. Kaukab, 'WTO Joint Initiative on E-Commerce State of Play – Past, present, and future' (International Institute for Sustainable Development 2024) <https://www.iisd.org/system/files/2024-07/wto-joint-initiative-e-commerce-state-of-play.pdf> accessed November 10 2024, 3–4.

[25] David E. Bond et al, 'WTO Extends E-Commerce Tariff Moratorium as Broader Negotiations Continue' (*White & Case*, 7 March 2024) <https://www.whitecase.com/insight-alert/wto-extends-e-commerce-tariff-moratorium-broader-negotiations-continue> accessed November 10 2024.

[26] WTO, 'Agreement on Electronic Commerce' (2024) INF/ECOM/87.

[27] Ibid.

of the entire draft would be beyond the scope of our paper. Instead, we will focus on a comparative analysis of certain key topics that the EU had proposals for and discuss how well those match the stabilized draft text of the agreement.

If we are to identify these key points, the most useful reference points for us would be the April 2019 and October 2019 communications from the EU, with regards to e-commerce questions in general and telecommunications respectively. In the April 2019 communication, the EU proposed provisions for electronic contracts, electronic authentication and signatures, consumer protections, unsolicited commercial electronic messages, customs duties on electronic transmissions, transfer or access to source codes, cross-border data flows, protection of personal data and privacy and open internet access.[28] We can already eliminate two topics from these, as they didn't make it into the stabilized draft text: cross-border data flows and transfer/access to source codes. The other topics are addressed, however, by the stabilized draft text and thus will be useful for our purposes. Thirdly, while the EU made proposals regarding market access, as we already mentioned in the previous chapter, this topic did not make it into the stabilized draft either. Thus, we have the following eight points of comparison in total: electronic contracts, electronic authentication and signatures, consumer protections, unsolicited commercial electronic messages, customs duties on electronic transmissions, protection of personal data and privacy, open internet access and telecommunications. We will look over each in turn, contrasting the EU proposal with the July 2024 draft text of the Agreement.

To begin with, let us examine *electronic contracts*. In the April 2019 proposal of the EU, it proposed a two-paragraph provision. The first mandating that contracting states ensure that contracts may be concluded by electronic means, their legal systems does not create obstacles for the use of electronic contracts, and finally, that they will not cause contracts to be deprived of legal effect or validity solely on the basis of their electronic nature. The second paragraph, meanwhile, outlines various exceptions to this, such as in relation to broadcasting services, gambling services, contracts that establish or transfer rights in real estate, and so on.[29] By contrast, in the stabilised draft, we can only find a single

[28] WTO (n16).
[29] Ibid para 2.1.

short sentence under electronic contracts: "*[e]xcept in circumstances otherwise provided for under its laws or regulations, a Party shall not deny the legal effect, legal validity, or enforceability of an electronic contract solely on the basis that the contract has been made by electronic means.*"[30] It also further explains in a footnote, that electronic contract includes contracts made by interaction with an automated message system. If we are to compare these two provisions, we can already see that despite the greater brevity of the stabilized draft text version, there is a degree of continuity.

The EU proposal version essentially consisted of the following major elements: making available electronic contracts as an option (1); not putting legal obstacles before electronic contracts (2); not denying the validity and legal effect of contracts solely on their electronic basis (3); and exceptions (4). The stabilized draft mostly followed the third element of the proposal, with a broader, more general provision for exceptions compared to the EU's list. Overall, it appears that the EU largely succeeded in having a provision for electronic contracts suitable to its stated objectives. However, it is undeniably not a perfect transition, as the stabilized draft makes no specific provisions for ensuring the availability of electronic contracts or the lack of legal obstacles to such contracts.

By comparison, *electronic authentication and electronic signatures* are topics covered in roughly equal length by both texts. If we are to identify the key points of the EU proposal here, we would have to highlight the following major elements: contracting states should not deny legal effect and admissibility as evidence in legal proceedings of electronic signature solely on the basis that it is in electronic form (1); contracting states should ensure that parties to electronic transactions are not prevented from mutually determining the appropriate electronic authentication methods for their transaction (2); contracting states should ensure that parties to electronic transactions are able to prove to judicial and administrative authorities that the use of electronic authentication or an electronic signature in that transaction complies with the applicable legal requirements (3). However, the proposal also provides for the contracting states being allowed to pose certification requirements for particular transaction categories, though it has to be objective, transparent and non-discriminatory.[31] The stabilized draft text

[30] WTO (n26) Article 6.
[31] WTO (n16) para 2.2.

largely matches the proposal's major elements, though with altered wording at a few places. Notably, it is somewhat more lenient on contracting states, as it incorporates an "*except in circumstances otherwise provided for under its laws or regulations*"[32] clause to the first major element mentioned above, and its language for exceptions is likewise broader and does not explicitly state the objectivity, transparency, and non-discriminatory requirements the EU proposals had. Interestingly, the stabilized draft also adds a paragraph allowing contracting states to work together on a mutual basis towards encouraging the recognition of electronic signatures.[33] In combination with the previous area, we can now start observing a potential pattern. The EU proposal typically had more stringent and clear-cut rules for the contracting states to follow, while the stabilized draft text uses more permissive language so far and seems to continually highlight the importance of domestic laws and regulations. We shall see if the pattern endures in the other areas.

Moving onto *consumer protection*, this is the first instance where the EU proposal is less detailed compared to the stabilized draft text. However, in actual substance the two appear to be highly similar. Among other details, the EU proposal included provisions mandating members to enact measures for the protection of consumers from fraudulent and deceptive commercial practices in the context of e-commerce, measures to require good faith from traders, provisioning of accurate information from traders, and access to redress. It also contained a provision about the contracting states recognizing the importance of promoting cross-border cooperation between consumer protection agencies.[34] The stabilized draft text largely follows these provisions, with a few changes and additions. For instance, it adds a provision regarding contracting states being required to enact measures that ensure the safety of goods, and where applicable, services. It also states that the contracting states should recognize the importance of affording no less protection to consumers in electronic commerce as to consumers in other forms of commerce. Interestingly, in a reversal of the previous trend, the requirement of accurate information is actually expanded in the stabilized draft text with the addition of completeness and transparency.[35]Thus, we

[32] WTO (n26) Article 5(2).
[33] Ibid Article 5.
[34] WTO (n16) para 2.3.
[35] WTO (n26) Article 14.

can largely state that the EU's intents with regards to consumer protection was met by the stabilized draft.

The next area we should examine is *unsolicited commercial electronic messages*. In this area too, the two texts are largely identical in substance. The EU proposal outlines the necessity of consent from the recipient and facilitating the ability of the recipient to prevent ongoing reception of electronic messages like these. It also contains provisions for clear identifiability of the nature of these messages, and access to redress.[36] The stabilized draft largely follows these provisions in substance, with the addition of a further requirement to "*provide for the minimisation of unsolicited commercial electronic messages*".[37] In this area as well, it seems the EU's proposals were largely integrated into the text.

Regarding *customs duties on electronic transmissions*, both texts are short and largely identical in substance. They maintain that the contracting states should not impose customs duties on electronic transmissions, and that this includes the contents of the transmission. However, it has to be noted that the stabilized draft also includes a provision allowing for contracting states to impose internal taxes, fees or other charges on electronic transmissions, so long as they are not inconsistent with the Agreement. Furthermore, the stabilized draft text proposes a periodical review of this area, starting with the fifth year of the Agreement coming into force.[38] This approach is closely linked to the EU's long-existing stance on the customs duties moratorium, and effectively decides the debate in favour of those countries preferring the maintenance of the moratorium.

To continue with *protection of personal data and privacy*, this is another area where the stabilized text, rather than paring down the terms in comparison to the EU proposal, seems to actually expand it. In the original EU proposal, we find a somewhat ambiguous language of "*may*" with regards to data protection safeguards.[39] In comparison, the stabilized draft employs a more active language, mandating the adoption of legal frameworks, non-discrimination when it comes to said frameworks, information publishing rules, and endeavours to increase

[36] WTO (n16) para 2.4.
[37] WTO (n26) Article 15.
[38] Ibid Article 11.
[39] WTO (n16) para 2.8.2.

compatibility between personal data protection regimes.[40] While the stabilized draft is significantly expanded compared to the EU proposal, it seems clear that the text largely follows the EU's intent for the area.

With regards to *open internet access*, we have one of the most interesting comparisons to make here. While the substance of the two texts is at a surface level identical, with the EU proposal outlining three principles to be followed: end-user ability to access, distribute and use services and applications of choice available on the internet, connect devices to the internet, and have access to information on the network management practices of their service supplier, and the stabilized draft following the same set, there is one crucial difference. The EU proposal uses the term "*should maintain or adopt*" with relation to them.[41] Meanwhile, the stabilized draft only states that the parties recognize the benefits of these principles, and in fact incorporates a provision that clearly states that this recognition cannot be interpreted as requiring a contracting state to adopt, amend or maintain a particular measure.[42] In this case, we can observe a clear softening of terms, and perhaps even that in this format, the stabilized draft version has very limited binding force in comparison to the original proposal of the EU.

Finally, we come to *telecommunications*. This area has been of elevated importance to the EU, and as we have seen, it also managed to acquire multiple negotiating partners to support its position with a joint communication. For this area, we shall use this latest document as our point of comparison with the stabilized draft. The relation between the two texts is somewhat less straightforward than what we had seen previously. In the stabilized draft, telecommunications is separated into two parts: an actual treaty article on the topic, and an annex containing more detailed rules.[43] How does it compare to the original EU proposal? Overall, we can state that there is a definitely observable continuity between the two, with subsections where they largely seem in accord, such as with regards to telecommunications regulatory authority, or competitive safeguards, but there are also some areas where we can observe notable differences. An example of this is universal service provisions. In the final EU joint

[40] WTO (n26) Article 16.
[41] WTO (n16) para 2.9.
[42] WTO (n26) Article 13(3).
[43] Ibid Article 21, Annex.

communication text, universal service is regulated in relative detail, including a provision mandating the use of an efficient, transparent, non-discriminatory mechanism with regards to designating universal suppliers.[44] If we look at the stabilized draft's annex, this portion is missing from the rules on universal service (which overall appear to be significantly condensed compared to the EU proposal).[45] As such, it is clear that while the telecommunications provisions largely follow the EU's own intents, there is some degree of divergence, or even paring down.

To summarize our findings in this chapter, we have observed that despite a great degree of similarity between the EU's proposal and the stabilized draft, there are still some notable differences, both in the direction of more pared down provisions, and to some extent, expansion of provisions, depending on the area. And as we have seen, the stabilized draft omits a number of topics the EU sought to address, including most importantly market access.

5. Conclusion

In this final chapter, we shall attempt to answer the research questions we posed at the beginning of this paper. Our first question was: can we state that the treaty's text advances the EU's views on regulating e-commerce to an international, global setting? Overall, the answer seems to be a yes. Based on the comparative analysis we have performed on the EU's publicly available communications and the stabilized draft text, we can see that there is definitely a great degree of similarity between the two, and at a few places, the EU's proposals were even outpaced by the stabilized draft text. However, we also have to note that at other areas, such as open internet access, the stabilized draft text seems to have ended up being far more conservative than the EU's original proposals. As such, we have to temper our positive answer to the research question by noting that not all of the EU's proposed agenda for the JSI was achieved in this stabilized text. Especially with regards to the omitted sections, some of which the EU did attempt to advance regulations on (such as market access and data flow).

[44] WTO (n23) para 5.3.
[45] WTO (n26) Annex Section III.

This also ties to our second research question, whether is it possible to resolve existing points of contention, and what role the EU could play in this regard. Answering this question seems much more problematic. As we have seen in the previous chapters, there are areas where it appears there is significant contention between WTO member states, and even within the countries participating in the JSI discussions. The US seemed to have aimed at liberalizing data flow and market access rules, but at first withdrew these proposals, and now backtracked its support for the agreement. In a similar vein, the EU had its own ideas on this matter, and it appears it was forced to drop them to get an agreement through in the JSI negotiations. But even so, the lack of endorsement from large economies like the US, Indonesia, or Brazil bodes unfortunately for the stabilized draft. Beyond the already discussed areas, the customs duties issue could also once again appear. Many developing countries are rather keen on dismissing the moratorium, and their willingness to participate in an agreement that would solidify it might be uncertain, even if there is a periodical review of the relevant provisions. Therefore, with regards to this question, our answer would likely be that a full resolution of all issues seems unlikely, especially in a global context. However, a pared down and simplified foundational agreement still seems possible, especially if the EU continues to support the JSI and the current draft. Whether further changes will be made to the text to accommodate those who did not endorse it, remains to be seen.

A final issue we also have to briefly mention is the question of legal architecture. It is somewhat uncertain at the moment how this E-commerce Agreement would fit into the existing WTO framework. A multilateral agreement, adopted by the whole of the WTO seems very unlikely, thus leading us to the conclusion that the likely outcome would be a plurilateral agreement, limited only to the countries taking part in JSI negotiations.[46] Perhaps in time, this agreement would be expanded to include all of the WTO member states, but in the current state of affairs, we can state that what has been accomplished so far is already a great step forwards. The next years will likely be decisive, especially with regards to how US policy will develop after January 2025. From the EU's perspective, however, this is an opportunity to take the reins on driving international regulation on e-commerce.

[46] For more information on the legal architecture issue, see: Jose and Kaukab (n24) 13.

References

- David E. Bond et al, 'WTO Extends E-Commerce Tariff Moratorium as Broader Negotiations Continue' (*White & Case*, 7 March 2024) <https://www.whitecase.com/insight-alert/wto-extends-e-commerce-tariff-moratorium-broader-negotiations-continue> accessed November 10 2024.
- Yasmin Ismail, 'E-commerce in the World Trade Organization: History and latest developments in the negotiations under the Joint Statement' (International Institute for Sustainable Development & CUTS International 2020) <https://www.iisd.org/system/files/publications/e-commerce-world-trade-organization-.pdf> accessed 10 November 2024.
- Rashmi Jose and Rashid S. Kaukab, 'WTO Joint Initiative on E-Commerce State of Play – Past, present, and future' (International Institute for Sustainable Development 2024) <https://www.iisd.org/system/files/2024-07/wto-joint-initiative-e-commerce-state-of-play.pdf> accessed November 10 2024.
- Murali Kallummal, 'Global Digital Trade and Implications for Trade Negotiation: Deciphering the Data Flows and Implications on Revenues Losses' (2020) SSRN <http://dx.doi.org/10.2139/ssrn.3527690> accessed 10 November 2024.
- Andrew D. Mitchell and Neha Mishra, 'Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law Can Contribute' (2019) 22(3) Journal of International Economic Law, 27.
- Soumya Shekhar, 'Definition of Trade in Services: A Critical Analysis' (2013) SSRN <http://dx.doi.org/10.2139/ssrn.2267472> accessed 10 November 2024.
- Rolf H. Weber, 'Digital Trade and E-Commerce: Challenges and Opportunities of the Asia-Pacific Regionalism' (2015) 10(2) Asian Journal of WTO & International Health Law and Policy 321.
- Rolf Weber and Rainer Baisch, 'Tensions between developing and traditional GATS classifications in IT markets' (2013) 43(1) Hong Kong Law Journal 77.
- WTO General Council, 'Work Programme on Electronic Commerce' (1998) WT/L/274.

- WTO Ministerial Conference, 'Declaration on Global Electronic Commerce' (1998) WT/MIN(98)/DEC/2.
- WTO, 'Agreement on Electronic Commerce' (2024) INF/ECOM/87.
- WTO, 'Communication by Canada and the European Union - Joint proposal on the Information Technology Agreement and its expansion' (2021) INF/ECOM/63.
- WTO, 'Communication by the European Union, Norway, Ukraine and the United Kingdom - Joint text proposal for the disciplines relating to telecommunications services' (2021) INF/ECOM/64.
- WTO, 'Communication from the European Union - EU proposal for WTO disciplines and commitments relating to electronic commerce: revision of disciplines relating to Telecommunications Services' (2019) INF/ECOM/43.
- WTO, 'Communication from the European Union' (2019) INF/ECOM/13.
- WTO, 'Establishing an enabling environment for electronic commerce - Communication from the European Union' (2019) INF/ECOM/10.
- WTO, 'EU proposal for WTO disciplines and commitments relating to electronic commerce - Communication from the European Union' (2019) INF/ECOM/22.
- WTO, 'Joint Statement on Electronic Commerce' (2017) WT/MIN(17)/60.
- WTO, 'Joint Statement Initiative on E-commerce' <https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm> accessed 10 November 2024.
- WTO, 'Work Programme on E-Commerce' <https://www.wto.org/english/tratop_e/ecom_e/ecom_work_programme_e.htm> accessed 10 November 2024.

Short biography of the author

Dr Gábor Hajdu is a senior lecturer at the University of Szeged, Faculty of Law and Political Sciences, and a Junior Research Fellow of the Institute for Legal Studies in the Centre for Social Sciences. He obtained his Juris Doctor degree in the Faculty of Law and Political Sciences of the University of Szeged, and also completed the university's American Legal Expert

program simultaneously. He later completed his PhD at the University of Szeged's Doctoral School of Law and Political Sciences. His main areas of interest include foreign investment protection and international trade law.

Sustainable agricultural policy in a "European Green Dream" – Hungary and the aims and impacts of the European Green Deal and the "F2F" strategy

Gergely Horváth*

Abstract: The "European Green Deal" tries to set out how to make the EU climate-neutral by 2050. The Farm to Fork Strategy is at the centre of the European Green Deal aiming to make food systems fair, healthy and environmentally-friendly as a key stone for the achievement of the Union's climate-neutrality objective. This ideal and distant aim of achieving negative emissions is based on environmentally adequate utilization as a necessity, but several sacrifices are already here and now squeezing producers and food business operators with this disadvantageous psychological effect of the particularly long time horizon (2050). The scale of the objectives itself raises questions and encodes certain obstacles related to farmer and consumer acceptability (in connection with eg. insect-based proteins and meat substitutes). It is a pervasive agro-economic and - at the same time - social question, whether the reduction in competitiveness that necessarily comes from the increase of production costs can be tolerated by the actors of EU agriculture, which has already been made "green" almost to the limit of possibilities. The farmer protests and blockades across Europe show that the planned and initiated "green transition" does not promise to be smooth, so the strategy may need to be reconsidered and transformed along the pillars of sustainability.
The comprehensive strategy system however sets a number of forward-looking goals that are advantageous and promising also from Hungary's point of view and interests, such as preserving and restoring ecosystems and biodiversity, reaching the objective of at least 25% of the EU's agricultural land under organic farming and reducing the overall use and risk of chemical pesticides by 50% or halving per capita food waste at retail and consumer levels by 2030.

Keywords: sustainability, agriculture, environment, European Green Deal, food chain

1. Food safety and organic farming, "growth" and the sustainability background

First and foremost, it is important to emphasize that the biological and biophysical food supply of mankind inevitably requires the fulfilment of

* PhD; associate professor, Széchenyi István University, Faculty of Law and Political Sciences (Győr, Hungary). Email: horvg@sze.hu.
The chapter has been reviewed by Balázs Horváthy.

strict sustainability conditions. Recently, it has become evident that, on the one hand, the local (national), regional (European) and global protection of the environment is a matter of existence in itself, in relation to which agricultural production is as an environment-damaging factor, therefore it needs to be replanned by "greening" for the sake of environmental sustainability (environmental pillar). The other sustainability condition – related to the pillar of social sustainability built on top of the former – is the guarantee of food security and food safety, i.e. that there must be something to eat at all, and that the food should not be harmful to human health. The challenge is therefore twofold: it is necessary to protect the environment in itself, but also in order to be able to maintain food production that meets both the increased quantity and quality requirements by ensuring the appropriate environmental condition, so that our „daily bread" can still be put on the table in the future. All this cannot be achieved without bearable and predictable climatic conditions, fertile soil and sufficient clean water. In the meantime, the soil, which serves as the common source of nutrients for the biosphere and humanity, as well as the sphere of water (hydrosphere), which is the basis of life, are being degraded to a significant extent precisely because of intensive agricultural production and the linear food system. In the relationship between man and nature, especially in food production – which always faithfully reflects this relationship – renewal is needed as the only sustainable path, which can be smoothed by the agri-environmental law strengthened by supranational strategic documents in topic.

The Regulation (EU) 2021/1119 of the European Parliament and of the Council sets the achievement of climate neutrality as a normative EU goal by 2050.[1] The Commission took the most significant strategic step towards this goal with the communication of 11 December 2019 entitled "The European Green Deal" (hereinafter: EGD). The EGD sets out how to make Europe the first (and the only one) climate-neutral continent by 2050. The agricultural "chapter" of this comprehensive "green pact", the Farm to Fork strategy (hereinafter: F2F) covers the line from producer to consumer placed at the centre of the comprehensive package aiming to

[1] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2022] OJ L243/1.

drive the agri-business sector towards more sustainable practices. See European Commission, 'Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system' (COM/2020/381 final).

According to its self-definition, the EGD presents itself in its introduction as a "new growth strategy", with an ambition based on the EU's ability to "transform and thereby set its economy and society on a more sustainable path". The use of the expression "growth" sounds confusing in light of the fact that the better term of "development" rightly took its place decades ago. This conceptual confusion is also confirmed a few lines below, as according to the vision, we are "firmly on the new path of sustainable and inclusive growth". In the context of sustainability "growth" as a goal is quite illogical due to the well-known limits. "Growth" simply cannot be sustainable in a biophysically inherently finite world. The strive for constant growth (always pursued also by Hungary) presented even in the EGD is the true *differentia specifica* of capitalism eroding the environment that can never be sustainable.

Hungary's competitiveness and self-sufficiency can be significantly enhanced with its agri-food sector products. There is an increased demand for our premium quality products with a rich content and meeting the highest food safety requirements, which are the basis for the rational establishment of a qualitative rather than a quantitative direction of development. Our comparative advantage – in line with the strategies - is not in the field of capital-intensity (e.g. genetic modification, agro-chemicalization) or in quantity-oriented solutions, but in an environmentally adequate, eco-efficient, sustainable system producing high quality food (like organic farming). Building on agricultural expertise, the so-called conventional, industrial-style agriculture can be cost-effectively replaced in large areas with environmentally-friendly production systems, in addition to being truly sustainable, so the environmental pillar of sustainability is not destroyed or even adversely affected. One of the best changes in the right direction that can be seen in connection with sustainability is that European trend reflects the rise of the ecological method. In addition to reactive regulatory tools aimed at reducing the negative environmental effects of agriculture, the proactive element, such as increasing the rate of organic farming, is on the agenda.

The EU strategies and regulation – coupled with the increasing awareness of consumers and the demand for sustainable food – encourages Hungarian agriculture to become the "organic garden" of the

EU. Hungary is a dynamically developing country in terms of the expansion of areas under organic farming.[2] The main goal of the National Organic Action Plan is also to further develop the organic food chain – in line with the relevant expectations set by the European Union. The logical basic goal of this is to double the domestic territorial share of organic production in a few years, by 2027.[3]

In the context of preserving and restoring ecosystems and biodiversity, land farmed organically has about 30% more biodiversity than land farmed conventionally[4]. The viability of agriculture as a whole also depends on whether, like organic farming, it can be transformed back into an environmentally adequate system, a subsystem of the environmental system that is in harmony with its other parts. For this, beyond the economic dimension, it is essential to take the environmental dimension more prominently into account, both at the level of legal regulation and practice.

As opposed to organic farming, some so called "climate neutral technologies" are transforming the environmental relations of agriculture not just into large-scale operations (industrial-style agriculture), but into totally artificial "factories" (like "meat-laboratories" and insect protein factories). It is not obvious that this method is more "environmentally friendly" than a pasture or forest grazing that is not so far apart from the natural environment. For example, as a necessary first step, the

[2] The history of organic farming in Hungary dates back to 1983. Within the Rural Development Programme adopted for the 2014–2020 EU budget period, the applications for the transition to organic farming and the maintenance of organic farming highly contributed to the implementation of the objectives and the rapid growth of the production volume of organic farming. Just between 2015 and 2019, more than twice as many people joined organic agricultural production than in previous years from the beginning. Központi Statisztikai Hivatal [Hungarian Central Statistical Office]: Az ökológiai gazdálkodás szerepe egyre nagyobb az agráriumban [The role of organic farming is growing in agriculture] <https://www.ksh.hu/docs/hun/xftp/stattukor/okogazd/index.html#abiogazdlkodshelyzetemagyarorszgon> accessed 11 July 2024.

[3] Although the Hungarian ministry of Agriculture considered the European Green Deal's organic farming ratio target (25%) too ambitious, however, our actual practice is definitely pointing in a positive direction, and finally it is actually the action that counts: it is not the son saying he will go out to work in his father's vineyard, but then does not, who fulfills the father's will, but the one who reluctantly says no, though ultimately goes out and cultivates it (See Matthew 21, 28-31.).

[4] European Commission, 'On an Action Plan for the Development of Organic Production' (Communication) COM (2021) 141 final.

construction of the infrastructure network of this factories dedicated to the production of protein and carbohydrate raw materials are hardly carbon neutral. The question logically arises: is it really possible to maintain, operate and dispose of these facilities in a perfectly closed system, despite their energy and material intensity, in a completely carbon-neutral, waste-free, eventually sustainable manner?

2. Pre-questions partly remaining rhetorical questions

When considering a long-term strategy package, the most important preliminary question is the achievability of the objectives. This is in tight connection with the question whether the sectors the strategy is based on - particularly the agri-food industry, the actors of the food chain - have the “ability to perform” and at the same time are they “willing to perform” in terms of implementing the strategy. The main issue of social sustainability is how the regulated community, especially the farming community and the consumers relate to the strategic ideas.

In case of economic sustainability, a similar question arises: can the planned “green transition” be carried out while preserving the competitiveness of the EU agricultural sector and producers, and is Europe able to perform this transition and to persuade the full global agri-food industry to change so radically? The third question is about environmental sustainability: is the tool system of the strategy suitable for achieving carbon neutrality or - the significantly more complex - environmental sustainability? It is questionable - in details - whether all new tools and production practices are really sustainable, more environmentally-friendly than the previously used ones? Is this new kind of agri-business planned actually greener at all or is it just another “business model”? Finally, what should be the main source of the sufficient income of farmers: “green” direct payments or higher market prices?

3. The responsibility and sensitivity of agriculture: small contribution – great business

In case of agriculture, a partial solution - in principle - could be achieved by financial means, e. g. in the form of the operative “direct

payments" that are independent from production volume given for environmental benefits, which have been operating for several decades along the agri-environmental schemes - in line with the social needs related to agricultural activities and the eco-social function. But the farmers' demand must be appreciated that their income also depending on raising production costs should not be fully subject to subsidies that can be taken out of the system at any time by (professional) political decision, but the higher market price as reasonable "*quid pro quo*" for their high quality products and decent profit gained in the market should cover their costs and needs. In this respect allowing producer incomes to be jeopardized for any political reasons (see market distortion resulting from the partial abandonment of market protection against the Ukrainian "dumping" of several basic agricultural products)[5] is also a controversial phenomenon in the spirit of the F2F[6], which also proactively states that for the success of the transition and recovery it is essential to ensure a sustainable livelihood for primary producers. In sum, ensuring social sustainability – and as part of it – to guarantee a sustainable livelihood for primary producers, who still lag behind in terms of income[7] remains an ongoing task.

[5] This kind of "dumping-effect" is problematic, while ensuring food security that really meets the EU standards in Ukraine is important with a proper strategy until 2030. See Oleksii D. Kuzmichov, 'Administrative and Legal Instruments for Ensuring Food Security of Ukraine' (2024) 2024 JE Eur L 122, 122-4.

[6] See the actually ignored lines in the F2F stating that „imported food must continue to comply with relevant EU regulations and standards. The Commission will take into account environmental aspects when assessing requests for import tolerances for pesticide substances no longer approved in the EU" (F2F, 4. Promoting the global transition). After the war in Ukraine stopped the sea transport to the Middle East and African countries, certain Ukrainian agricultural products actually found a new market in Europe (free of any quotas and duties). The serious market disruptions caused primarily in the Member States bordering Ukraine could have been mitigated by introducing a unilateral import ban, but since the „dumping" also reached the most important EU markets (Italy, Spain) of these bordering countries, they cannot compete with the low Ukrainian agricultural product prices there either.

[7] EGD, 1. Need for action.

For example, the average EU farmer currently earns around half of the average worker in the economy as a whole. Source: CAP Context indicator C.26 on Agricultural entrepreneurial income. See Directorate-General for Agriculture and Rural Development: 'Jobs and growth in rural areas – Infopage'

According to the plans, the environmental protection goals, which can be considered justified in themselves, would restrict agricultural production to disproportionately narrow limits. This is despite the fact that no technological breakthrough can be expected to lead to such a significant reduction in greenhouse gas emissions in production processes (methods) based on natural, traditional, reasonably irreplaceable branches of cultivation (orchards, pastures, etc.). However, the Commission’s proposals for the common agricultural policy for 2021 to 2027 stipulate that at least 40% of the common agricultural policy’s overall budget and at least 30% of the Maritime Fisheries Fund would contribute to climate action[8].

It is ambivalent that agriculture appears as both an environmental burden and an impact factor bearing the consequences of environmental degradation of the waters, soil, biodiversity and other components. As far as climate change is concerned, agriculture is responsible for just 10.3% of the EU’s greenhouse gas (GHG) emissions (approximately just eighth of the emissions of the energy sector) and nearly 70% of those come from the animal sector[9]. Thus, while the contribution of agriculture cannot be called marginal, but it accounts for only one-tenth of the total GHG emissions of the EU, and the fashionably almost cursed animal husbandry in reality is responsible for just 7%. Approximately the same percent of contribution can be seen in Hungary according to domestic data. Hungarian GHG emissions[10] have essentially followed the EU27 trend since 1992. In Hungary, emissions decreased by 32% by 2021 compared

<https://agridata.ec.europa.eu/Qlik_Downloads/Jobs-Growth-sources.htm> accessed 16 May 2024.

[8] EGD 2.1.6. From ‘Farm to Fork’: designing a fair, healthy and environmentally-friendly food system.

[9] 2.1.2. Supplying clean, affordable and secure energy.

The production and use of energy across economic sectors account for more than 75% of the EU’s greenhouse gas emissions. Energy efficiency must be prioritised.

[10] To illustrate emission rates, in 2022, our total carbon dioxide (CO2) emissions were 45,280,000 tons, which is 145 times more than the methane (CH4, 312,000 tons), and 3,000 times more than the nitrous oxide (N2O) emissions, which are only 14,000 tons. See Központi Statisztikai Hivatal [Hungarian Central Statistical Office], ‘Légszennyező anyagok és üvegházhatású gázok kibocsátása [Emissions of air pollutants and greenhouse gases]’ <https://www.ksh.hu/stadat_files/kor/hu/kor0017.html> accessed 21 October 2024.

to the 1990 level, which is even more favourable than the EU27 average (–28%)[11].

Therefore, since the emissions of agriculture are not significant (as we can see, almost 90% of greenhouse gas emissions can be linked to other sectors) is it really a necessity - among the relevant climate protection policy tools, areas, subjects – that agricultural and food production, the actors and "stakeholders" of the Common Agricultural Policy are to be given such a huge burden even if their emigration from the sector is increased? The costs of the "dehumanization" of the agricultural sector seems unpredictable and threatening.

The other point is that if the comparatively low GHG emissions of this sector can reasonably be reduced just to a little extent, it would be more worthwhile to renounce the radical and forced carbon-free adjustment of the agricultural production. It would be more appropriate to focus on the problem of food waste, in connection with which the goal of zero emissions can really be set without objection, and which is of unreasonably undervalued importance, although unfortunately it has similar emission rates as the entire agriculture.

While global emissions increased by 57 % from 1990 to 2019, EU-27 emissions decreased by 26 %. As a result, the EU's share of global emissions dropped from 15.3 % to 7.9 % in the same period[12], while global greenhouse gas emissions continue to rise, reaching record levels. So can it be possible for a single polluter whose share of global emissions is only about 8 % to solve the global problem caused by others sharing more than 90%? This does not mean of course that nothing should be done, but European plans must be realistic. After the „refreshing"[13] COVID-period 2022 already saw a 1% increase in total primary energy consumption taking it to around 3% above the 2019 pre-COVID level globally. Carbon dioxide emissions continued to rise to a new high growing

[11] Központi Statisztikai Hivatal [Hungarian Central Statistical Office], 'Fenntartható fejlődési célok [Sustainable development indicators]' <https://ksh.hu/s/kiadvanyok/fenntarthato-fejlodes-indikatorai-2023/3-38-sdg-13> accessed 23 May 2024.

[12] European Court of Auditors, 'EU climate and energy targets 2020 targets achieved, but little indication that actions to reach the 2030 targets will be sufficient' (Special report 18/2023) <https://www.eca.europa.eu/ECAPublications/SR-2023-18/SR-2023-18_EN.pdf> accessed 21 October 2024.

[13] Just from an air quality protection point of view of course.

0.8% in 2022[14]. Literally „on top of all that” 2023 was a year of production and consumption records across the board with most markets returning to at least or over their 2019 pre-COVID long-term trends as supply chain issues finally eased. Greenhouse gas emissions from energy use, industrial processes, flaring and methane (in carbon dioxide equivalent terms) increased 2.1% to exceed the record level set in 2022[15].

Of course – as a small, but relatively developed country – Hungary also has a proportional responsibility (in Act XLIV of 2020 on climate protection, we stated that we support the achievement of the complete climate neutrality by 2050), but a country, the size of a bite, is unable to solve either the climate crisis or the global food crisis. Global population growth must be acknowledged as a sensitive factor, therefore considered untouchable in world politics, but the world's population is expected to jump from 8 billion in 2023 to 9.8 billion by 2050 (the Hungarian domestic population will always be approximately a thousandth of this, the EU is also relatively small and keeps shrinking in this respect), which parallel to overall food demand in the developing world is projected to grow by more than 50 percent[16]. Meanwhile, the arable land area per capita shows a downward trend in global terms: from 1970 to the turn of the millennium, it fell from 0.38 hectares to 0.23 hectares and according to forecasts, will decrease to 0.15 hectares by 2050[17]. However, these restrictive tendencies do not characterize Europe, where certainly severe population decline is experienced, along with a more moderate loss of arable land. Hungary also has enough agricultural land and there is no need to replace, or "rescue" these land parcels on a significant scale - for a specific (e.g.

[14] Energy Institute, ‘Statistical Review of World Energy 2023’ 72nd edn <https://www.energyinst.org/__data/assets/pdf_file/0004/1055542/EI_Stat_Review_PDF_single_3.pdf> accessed 25 November 2024

The Energy Institute (EI) Statistical Review of World Energy™ analyses data on world energy markets from the prior year. The Review has been providing timely, comprehensive and objective data to the energy community since 1952.

[15] Energy Institute, ‘Statistical Review of World Energy 2024’ 73nd edn <file:///C:/Users/horvg/Downloads/Statistical%20Review%20of%20World%20Energy.pdf> accessed 25 November 2024.

[16] Tim Searchinger et al, ‘Creating a Sustainable Food Future. A Menu of Solutions to Feed Nearly 10 Billion People by 2050’ (July 2019) Final Report, <https://research.wri.org/sites/default/files/2019-07/WRR_Food_Full_Report_0.pdf> accessed 25 November 2024.

[17] Food and Agriculture Organization of the United Nations, <https://www.fao.org/3/i0765e/i0765e08.pdf > accessed 25 November 2024.

recreational) or unspecified purpose - from traditional agricultural use. There is nothing wrong with the fact that half of the territory of a traditional agricultural country is under classical agricultural usage. In addition, a quarter of the country's territory can realistically be forested (we have a ratio close to this), but it would be an idea a little far from reality, if we doubled this in the middle of the world food crisis, if we reforested large areas with excellent productivity, focusing on just ecological footprint aspects or carbon balance statistics, that are logically obviously always to be taken into account, but not exclusively.

Of course, most directions of greening are a far-reaching justified and noble aspiration, but the conditions of the EU, and Hungary in particular, are significantly more favourable compared to the world average. Our relevant parameters do not give the slightest reason to force agriculture - which is otherwise hardly “green” - into vertical farm buildings, factories, fermenters, or to modify the gene pool of the vital environmental element at the cellular level letting exacerbate problems related to seed patents monopolizing them, threatening farmers' access to seeds and seed diversity in general.

4. The complexity of the EGD

The EGD is a comprehensive set of policy measures, a series of legislative proposals, which are intended to ensure the initiation and implementation of the green transition process in the Union. At the level of ideology and declaration, it supports the transformation that will result in the EU becoming a fair and prosperous society with a modern and competitive economy. Logically and in terms of its primary legal basis, it is the implementation of the external integration principle of environmental law (Article 11 of the EU Treaty), a cross-sectoral approach in which all relevant policy areas contribute to the achievement of the set climate policy goal - apparently not equal to victims, but united to the extent that there is no way out. The package of measures actually encompasses initiatives brought together by the goal of climate neutrality, which are not necessarily related to each other, from the ban on the distribution of internal combustion engines to the labelling of organic food intended for pets, at the level of sectors, therefore, from energy, transport, through industry to agriculture. The main elements of the EGD strategy package are:

- F2F - switching from the current EU food system to a "sustainable" model
- EU strategy for adapting to the effects of climate change
- Biodiversity strategy of the EU for the period up to 2030
- The circular economy action plan
- EU sustainability strategy for chemicals
- EU forest strategy for the period up to 2030

The comprehensive strategic goal is the decarbonization of the energy sector, industry and basically all sectors.

5. Grabbing the global leader role?

In addition to the undoubtedly lofty and resounding goal of sustainability, the implementation of the EGD, i.e. a radical and mandatory transformation of the production and energy infrastructure, similarly to the American “New Deal”, also promises a huge business opportunity: an economic boost marked by a noble goal (greening), a continental creation of GDP and profit resources on the largest scale at the global level.

From the point of view of usefulness, cost-benefit balance, and the balance of advantages and disadvantages, it is not an incidental circumstance that the plan may also have an intercontinental aspect. “The ecological transition will reshape geopolitics, including global economic, trade and security interests” (EGD 3. The EU as a global leader). It is unprecedented in the historical past, creating and conserving recurring inequalities again, since decarbonization, “greening”, and making it sustainable are primarily and is almost exclusively limited to Europe, while its external effects lead to exactly the opposite result in the regions that supply and export resources and raw materials (see, for example, mining of rare metals in African countries to ensure the financial conditions of European electromobility).

At the level of the declaration, the “greening” of trading partners and ultimately the entire globe is also mentioned. The EGD is realistic in that “the environmental ambition of the Green Deal will not be achieved by Europe acting alone. The drivers of climate change and biodiversity loss are global and are not limited by national borders”. However, it is doubtful

that “the EU, with its influence, expertise and financial resources”, can be a sufficiently effective factor to persuade its “neighbours and partners to “follow the sustainable path”.

Realizing the necessity of greening, the EU wants to act as a flagship: The EU will continue to lead international efforts. At the same time, it is aware that it must maintain its security of supply and competitiveness even if others are unwilling to act. However, this ambition may turn out to be excessive even in relation to the fact that the EU will ensure full implementation and enforcement of the trade and sustainable development provisions in all trade agreements – as the F2F states with unwavering confidence mixed with optimism in relation to the promotion of the global transition (F2F Chapter 4).

In the case of the EGD, it is surprising that it is practically a “unilateral agreement”.[18] Neither the international partners, nor its own farmers participated in the codification of the “deal”, no contracting parties signed it and at some points even the lack of consensus can be seen. It is both unusual and unreasonable that a unilaterally issued document from the Commission[19] was called a “deal” and even more so that a strategy born in an issue requiring broad international (see global food system), or at least EU and Member State level, social and professional consultation, which should be based on a real agreement, was nevertheless announced after a unilateral formulation. This is not a mere formal issue: indeed, it is not clear from the beginning who the “contractual partner” in the “deal” would be according to the logical regularity of the transactional doctrine.

[18] Polish farmers – obviously thinking of a classic agreement – are already demanding that their government withdraw from the EGD.

[19] It should be noted that it is unusual that the Commission has chosen to deal with such an important issue through a Communication and not following the experienced "Green Paper - White Paper" method that has produced such good results. See José Pío Beltrán et al, ‘The Impact of the European Green Deal from a Sustainable Global Food System Approach’ (2022) 17(1) European Food and Feed Law Review 20.

6. The most (un)popular issues and aims from the F2F

6.1. New innovative technologies and the steps of the technological revolution

According to its own positioning, F2F is at the heart of the green agreement and aims to encourage the consumption of sustainable food and to promote affordable healthy food for everyone. In this context, the F2F strategy has a particularly comprehensive "food chain perspective". It not only establishes goals to reduce fertilizers, pesticides and antibiotics and increase organic production, but also goes into the promotion of healthier diets, reduction of food losses and waste[20].

New innovative technologies, including biotechnology[21] and the development of bio-based products, can play a role in increasing sustainability, provided they are safe for consumers and the environment.[22] Perhaps, but even the most progressive gene-editing technology, the newest genomic techniques do not fulfil the slogan that has been repeated for several decades, but which has always proved to be a mere promise, that we could eliminate hunger by producing a significant increase in crop yield. Despite the continuous efforts of the GMO industry for forty years, it has only achieved quantitative increase results that are barely reaching even the level of statistical significance. In contrast to which yeasts and algae are really suitable for rapid and exponential reproduction, quantitative jumps, but they also cannot do that without sufficient material (feed) and energy sources. In addition to the fact that it is necessary to establish an infrastructure in advance - which requires a huge financial outlay - for production, any number of tons of protein, fat, and carbohydrates cannot be continuously produced from nothing even in the most modern factories and industrial fermenters. Biochemistry is not the science and practice of creation from nothing, without any GHG emissions, just like genetic engineering is totally unable to replace precipitation. In this respect, the technological solutions,

[20] Ibid.

[21] The field of biotechnology presents us with a great chance to use many organisms, such as mushrooms, to find suitable solutions for issues that include the accumulation of agro-wastes in the environment. See Hassan El-Ramady et al, ‘Green Biotechnology of Oyster Mushroom (Pleurotus ostreatus L.). A Sustainable Strategy for Myco-Remediation and Bio-Fermentation’ (2022) (6) Sustainability, 3667.

[22] F2F 2.1. Ensuring sustainable food production.

startup ideas, and magnificent innovations hardly differ from traditional agriculture.

The next step of the technological revolution is the so-called smartfarming (our university also has its “smart farm” at the Albert Kázmér Faculty of Agricultural and Food Sciences) or of e-agriculture based on the analytics of data collected from the crop fields. The application of big data technology gave rise to “precision agriculture”, which is about supporting the decision-making processes of farmers, but that is applicable by large farms, rather than small ones, due to high costs of installation and maintenance.[23]

It should be noted that, according to experimental data, the use of precision technology results in only 5-10% input material savings compared to conventional technology. Agricultural product and food production does not become sustainable just if we intensify, fertilize, agrochemicalize, then digitize and robotize,[24] so that in the end we may end up making the necessarily closed (territorially non-expandable) system a little less toxic again. As opposed, organic farming offers a truly sustainable practice. In this context, the document flawlessly argues that the organic food market is expected to continue to grow and that organic farming should continue to be supported as it has a positive impact on biodiversity, creates jobs and attracts young farmers, while consumers also appreciate it. The only strategic problem can be that probably it is going to be affordable for a narrow social class, on the other side the rest is threatened to be fed with cheaper artificial, low quality and unhealthy food.

6.2. The high-quality, healthy food and sustainable diet

The measures in connection with diet presented in the action plan at the end of the F2F document sound practically perfect, highlighting the above mentioned organic products, in line with the better regulation

[23] Magdalena Knapp, 'Global Food Value Chains and Competition Law' (2023) 28 YARS 173, 174.

[24] In agriculture, as precision farming increasingly employs robots to monitor crops, the use of weeding and harvesting robots is expanding the need for also better computer vision. See László Moldvai, Péter Ákos Mesterházi, Gergely Teschner and Anikó Nyéki, ‘Weed Detection and Classification with Computer Vision Using a Limited Image Dataset’ 2024 14(11) Applied Sciences. https://doi.org/10.3390/app14114839.

principles, including evaluations and impact assessments as appropriate "to promote sustainable food consumption, facilitating the shift towards healthy, sustainable diets", also in schools and public institutions. It seems to be the right direction, but a scientific question arises: what is really healthy[25] and sustainable?

What is certain is that reversing the rise in overweight and obesity rates across the EU by 2030 is really critical[26] just like in the USA. It must be in tight connection with not just quantity, but quality, with the fact that yet, in the EU, 33 million people cannot afford a quality meal every second day.[27]

However, the enthusiasm is far from undivided, and a greater proportion of expressed rejection can be felt on the part of society and consumers regarding the expressed intention of rewriting their "menu" and changing their diet (see F2F, 2.4. Promoting sustainable food consumption and facilitating the shift to healthy, sustainable diets). Indeed, F2F already declares in its introduction that "it is clear that the transition will not happen without a shift in people's diets", and later insists that it is essential to take measures to change consumption habits. Concerns may arise in relation to the programmatic transformation of consumption habits, as the insect-based[28] food products already considered novel foods are on the shelves in unrecognizable forms made from for example dried and powdered locusts and house crickets[29] mixed

[25] There is no scientific consensus in several questions regarding diet (such as the value and substitutability of different animal proteins, fats and oils etc.), even the „FAO and WHO (2019), Sustainable healthy diets – guiding principles" referred in the F2F cannot be considered free from scientific uncertainty.

[26] 2.4. Promoting sustainable food consumption and facilitating the shift to healthy, sustainable diets.

[27] F2F referring Eurostat, 'EU statistics on income and living conditions' (2018) <https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_mdes03&lang=en> accessed 12 November 2024

[28] Insects cannot be gutted before introduction to the food chain, so they must be starved before being powdered, but still may contain some faeces, dangerous parasites and pathogens, amoebas, worms, even naturally occurring toxins that cannot be removed by heating. Chitin can cause allergic reactions by a number of consumers and on the other hand, there are vital nutrients that we cannot get into our bodies with insects, such as collagen, which plays an important role in the structure of the space between cells, the elasticity of bones, and the structure of cartilage tissue.

[29] There are some species legally approved for sale in Europe e.g. migratory locust, house cricket or yellow mealworm. Some of these are already used to make protein bars,

in biscuits or breads. Lab-grown meat[30] and other ("sustainable") products[31] are of course still of interest to the average EU consumer,[32] however, the transformation and artificial limitation of supply can reach a level under the auspices of ensuring environmental sustainability, which is to much to those who, in full possession of their freedom of choice, would prefer to stay with the products of livestock sector actors (in the

special flours and other products. In Hungary the Ministry of Agriculture (MA) has amended the food labelling regulation to ensure that products containing insect proteins can be clearly distinguished and separated on store shelves in order to provide accurate information to customers so as to guarantee the freedom of choice.

30 The Paris-based start-up company specializing in laboratory-produced foods (Gourmey) just now in the summer of 2024 applied for the EU pre-market authorization of its product imitating the tasty product "foie gras", produced under in vitro conditions. To be marketed in the EU, the product must be approved by the European Food Safety Authority (EFSA). The method also has an additional (environmental) EGD relevance: the environmental impact of products grown or "cultured" in the laboratory may be greater than that of products based on traditional animal husbandry, since the bioreactors in which the cells are grown are quite energy-intensive. "Cultured meat" (cell-based meat, artificial meat, clean meat or *in vitro* meat) refers to animal cells grown in bioreactors. They go through maturation and differentiation into the skeletal muscle, fat, or connective tissues that make up meat. The differentiated cells are then harvested, prepared and packaged into final products. All growth factors are currently produced in genetically modified microorganisms and isolated from them as a pure sub-stance for use in the culture medium. Cultured meat is only more sustainable than beef, but very similar to chicken and pork. Plant-based alternatives are much more sustainable. See Iris Vural Gursel, Mark Sturme, Jeroen Hugenholtz and Marieke Bruins, Review and analysis of studies on sustainability of cultured meat' (Wageningen Food & Biobased Research 2022) 9-10. DOI 10.18174/563404.

31 Several terms are in use in science, industry and the media, such as "cellular agriculture", "cellular food technologies", "cell-based techniques" and "cell-based food production." The use of these terms is currently dictated by the end user, and no studies have been performed on the perception and acceptance of alternative terms by different social or professional groups. See FAO & WHO, 'Food safety aspects of cell-based food' (2023) 25. https://doi.org/10.4060/cc4855en.

32 Increasing the availability of "alternative proteins" such as microbial, marine and insect-based proteins and meat substitutes sounds very progressive, as well as the use of digital technologies and nature-based solutions for agri-food. These innovative foods aim to compete with conventional animal products by offering sustainable, nutritious, and tasty protein-rich choices. There are five main protein alternatives under development in Europe: plant-based meat substitutes, lab-grown meat, fermentation products, edible insects and algae. See Jette Feveile Young et al, 'Protein Diversification – EIT Food White Paper' (2022) <https://www.eitfood.eu/files/EIT-FOOD-WHITE-PAPER-PROTEIN-DIVERSITICATION-2022_FINAL15-12-22.pdf> accessed 23 November 2024.

Netherlands, Denmark, Ireland, etc) who, in their opinion, should be spared from downsizing, liquidation, “replacement”, because of the valuable taste and nutritional value provided by grazing livestock or (not vertical, specifically horizontal) tomato fields in Italy. The acceleration of the transition to the projected, so-called "inclusive food systems" may be limited by this static, perhaps not so opened consumer taste, in addition, environmental and human health (food safety) risks, the impact on markets and traditional food production can also be significant.

6.3. Reducing food loss and waste

One of the most important sustainability issues in the context of circularity is the high rate of food loss. Also according to the F2F, tackling food loss and waste is key to achieving sustainability, so halving per capita food waste at retail and consumer levels by 2030 (SDG[33] Target 12.3) is one of the most unquestionable intentions not just in the F2F, but in the whole EGD-strategy. The Hungarian Food Bank is trying to alleviate this problem, for example by redistributing food stocks that are close to or slightly past their expiration date and are in the market. This also has an important social dimension. This is why the amendment to the law aimed at reducing food waste is of great importance, according to which the largest grocery stores are required to offer food products to the Food Rescue Center Nonprofit Ltd. (ÉMK) or charitable organizations from February 2022 - at least 48 hours before the expiration - in order to prevent expired goods from ending up as waste.

According to the FAO, 3 billion tons of greenhouse gases are generated annually in connection with food waste, which accounts for 8 % of total anthropogenic GHG emissions. If we were to consider food waste as a fictitious country, it would be the third largest emitting country after China and the United States. This means that the emissions of food waste also almost equivalent (87%) to global road transport emissions[34].

[33] Sustainable Development Goals (SDGs).

[34] FAO, ‘Food wastage footprint & Climate Change’ (2015) <https://www.fao.org/3/bb144e/bb144e.pdf> accessed 12 November 2024.

7. Evaluation made by farmers: waking up from the „European Green Dream"

Unfortunately, the EGD has revealed not just sustainability ("green") contexts, but also numerous conflicts of interest related to them. In addition to the ever-increasing production costs and burdens, also the admission of several agricultural products through the eastern borders played a key role in the fact that protests broke out in many EU capitals (Berlin, Paris, Rome, Strasbourg, Brussels, Madrid, etc., but – it must be mentioned - not in Hungary, as a traditional agricultural country). The French farmers' union directly announced an indefinite siege of the capital for example, farmers organized demonstrations for a (fair) living from Strasbourg to Bulgaria referring to losing competitiveness, simply being no more able to make ends meet. As the agricultural crisis also became a prominent campaign topic before the EP elections, the European Commission began to make corrections related to the EGD. It is really disadvantageous and sorrowful in environmental aspect, that it was "the input issue" in which the Commission felt to be forced to step back, withdrawing the proposal to reduce the overall use and risk of chemical pesticides by 50% and the use of more hazardous pesticides by 50% by 2030, because this is a really beneficial and forward-looking key environmental effort envisaged by the EGD package. At the same time it is clear that the difficulty of the situation is perhaps can be attributed to realistic economic feasibility, to the intolerably increased competitive disadvantages compared to non EU farmers, who are actually free from - otherwise vitally important - requirements of greening.

Farmers, who are characterized by the diligence of a good farmer (like the consciousness of a "*bonus et diligens pater familias*"), are interested in the environmental condition of their land and the well-being of their farm animals, generally just need up-to-date information about the best environmental practices of farming and the truly necessary elements of greening. However, if an industrial, factory-like vertical farm or a lab-grown meat firm replace their work taking away all its productive objects, then this - otherwise natural - diligence and environmental awareness in relation to their means of production simply becomes pointless. Food sovereignty would also be violated this way, and eventually the farming society practically shrinks, finally largely disappears. In the case of lab-grown meat production, and vertical, factory-like vegetable production, or new genomic techniques, both control and profit are completely

transferred from the agricultural producers to the operators of the factories and the patent holders of GM seeds. This "transaction", the "great business dimension" is also understood also by the farmers without naivety yet losing their remaining profit and assets, until they finally leave the agri-food sector, which otherwise still has more than enough agricultural land resources to meet its needs, both in the European and domestic dimensions, therefore, it should not rely on artificial meat, algae cake or insect meals. Greening is important, but the means and measures must be selected along the lines of real environmental, economic and social utility and sustainability.

Decisions can easily be rationalized after a simple cost-benefit analysis: If agriculture is responsible for just 10.3 % of the EU's GHG emissions (that is stated by the F2F itself), while the EU's share of global emissions dropped to 7.9 % (under 8 %), it means that at most 1% that depends on EU agriculture. Thus, the maximum benefit that can be gained in the global climate protection process, which could be achievable in the case of the complete elimination of EU agriculture, is not more than this, but with the planned transformation (industrial fermenters, gene editing, artificial lab meat, etc.), only a part of that 1% reduction can be realized. Compared to this really small benefit, the EU farmers' community considers the "cost" to be disproportionately high, and apparently does not want to pay the fatally high "prices".

References

- Beltrán et al, 'The Impact of the European Green Deal from a Sustainable Global Food System Approach' (2022) 17(1) European Food and Feed Law Review 2-38.
- Directorate-General for Agriculture and Rural Development: 'Jobs and growth in rural areas – Infopage' <https://agridata.ec.europa.eu/Qlik_Downloads/Jobs-Growth-sources.htm> accessed 16 May 2024.
- Hassan El-Ramady et al, 'Green Biotechnology of Oyster Mushroom (Pleurotus ostreatus L.). A Sustainable Strategy for Myco-Remediation and Bio-Fermentation' (2022) (6) Sustainability.
- European Court of Auditors, 'EU climate and energy targets 2020 targets achieved, but little indication that actions to reach the 2030 targets will be sufficient' (Special report 18/2023)

<https://www.eca.europa.eu/ECAPublications/SR-2023-18/SR-2023-18_EN.pdf> accessed 21 October 2024.

- Eurostat: 'EU statistics on income and living conditions' (2018) <https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_mdes03&lang=en> accessed 12 November 2024.
- FAO, 'Food wastage footprint & Climate Change' (2015) <https://www.fao.org/3/bb144e/bb144e.pdf> accessed 12 November 2024.
- FAO & WHO, 'Food safety aspects of cell-based food' (2023) 25. https://doi.org/10.4060/cc4855en.
- Food and Agriculture Organization of the United Nations, <https://www.fao.org/3/i0765e/i0765e08.pdf > accessed 25 November 2024.
- Iris Vural Gursel, Mark Sturme, Jeroen Hugenholtz and Marieke Bruins, Review and analysis of studies on sustainability of cultured meat' (Wageningen Food & Biobased Research 2022). DOI 10.18174/563404.
- Magdalena Knapp, 'Global Food Value Chains and Competition Law' (2023) 28 YARS 173.
- Központi Statisztikai Hivatal [Hungarian Central Statistical Office]: Az ökológiai gazdálkodás szerepe egyre nagyobb az agráriumban [The role of organic farming is growing in agriculture] <https://www.ksh.hu/docs/hun/xftp/stattukor/okogazd/index.html#abiogazdlkodshelyzetemagyarorszgon> accessed 11 July 2024.
- Központi Statisztikai Hivatal [Hungarian Central Statistical Office], 'Fenntartható fejlődési célok [Sustainable development indicators]' <https://ksh.hu/s/kiadvanyok/fenntarthato-fejlodes-indikatorai-2023/3-38-sdg-13> accessed 23 May 2024.
- Központi Statisztikai Hivatal [Hungarian Central Statistical Office], 'Légszennyező anyagok és üvegházhatású gázok kibocsátása [Emissions of air pollutants and greenhouse gases]' <https://www.ksh.hu/stadat_files/kor/hu/kor0017.html> accessed 21 October 2024.
- László Moldvai, Péter Ákos Mesterházi, Gergely Teschner and Anikó Nyéki, 'Weed Detection and Classification with Computer Vision Using a Limited Image Dataset' 2024 14(11) Applied Sciences. https://doi.org/10.3390/app14114839.

- Oleksii D. Kuzmichov, 'Administrative and Legal Instruments for Ensuring Food Security of Ukraine' (2024), 2024 JE Eur L 122.
- Tim Searchinger et al, ‘Creating a Sustainable Food Future. A Menu of Solutions to Feed Nearly 10 Billion People by 2050’ (July 2019) Final Report, <https://research.wri.org/sites/default/files/2019-07/WRR_Food_Full_Report_0.pdf> accessed 25 November 2024.
- Jette Feveile Young et al, ‘Protein Diversification – EIT Food White Paper’ (2022) <https://www.eitfood.eu/files/EIT-FOOD-WHITE-PAPER-PROTEIN-DIVERSITICATION-2022_FINAL15-12-22.pdf> accessed 23 November 2024.

Short biography of the author

Gergely Horváth PhD is an associate professor at the Department of Commercial and Agricultural Law, Deák Ferenc Faculty of Law and Political Sciences, Széchenyi István University (Győr, Hungary) dealing with environmental law, agricultural and food law as research areas, as well as teaching plant protection law, land registration law and cooperative law.

How the EU is shaping the WTO dispute settlement reform

Balázs Horváthy*

Abstract: The EU plays a pivotal role in shaping the reform of the WTO dispute settlement mechanism, especially in light of the current Appellate Body crisis since 2019. The paper examines these efforts made by the EU to maintain a rule-based multilateral trading system. The EU was already a key contributor to WTO dispute settlement reform efforts even in the Doha Round negotiations, launched in 2001 and aimed at agreeing also on improvements of the Dispute Settlement Understanding. The EU pushed for reforms that would address concerns related to the transparency and efficiency of the mechanism, specifically the length of disputes, access for developing countries, and the implementation of the decisions. Although the Doha Round ultimately stalled, the EU's contributions laid important basis for future reform discussions. In the current crisis, the EU's proposal has been originally based on the European Commission's 2018 concept paper on WTO modernization, in which dispute settlement reform has been a key focus. The EU proposal emphasizes the importance of maintaining the binding, two-tier dispute settlement system; calls to make the mechanism more efficient by speeding up the procedure, addressing the problems over the AB's 'judicial overreach' (as perceived by the US), and makes proposal for the appointment of judges. Moreover, the EU has actively promoted an interim mechanism and played major role in the negotiations on the Multi-Party Interim Appeal Arbitration Arrangement to temporarily bypass the Appellate Body's paralysis and maintain a rules-based dispute resolution framework. The paper concludes that the EU's approach to the WTO dispute settlement reform reflects its broader objective of strengthening global trade governance, fostering international cooperation, and ensuring that the WTO remains a central pillar of the global trading system.

Keywords: World Trade Organization, European Union, Dispute Settlement Body

* PhD; research fellow, HUN-REN Centre for Social Sciences, Institute for Legal Studies (Budapest, Hungary); Associate professor, Széchenyi István University, Deák Ferenc Faculty of Law and Political Sciences (Győr, Hungary). Email: horvb@ga.sze.hu.
The chapter has been reviewed by László Milassin.

1. Introduction – The European Union and the WTO dispute settlement mechanism

The European Union (EU) has been committed for promoting the idea of a rules-based international trading system[1] since the very outset of the Uruguay round negotiations. In 1995, the new dispute settlement mechanism became the "crown jewel"[2] on the World Trade Organization (WTO), which ensured the predictability and fairness in global trade. The WTO is facing unprecedented institutional crisis, the dispute settlement mechanism is nearly defunct since December 2019, which threatens not only the effective implementation of the WTO law, but also the broader infrastructure of trade that has underpinned economic growth and development for decades. The EU's commitment to reforming this system has become pressing, and not surprisingly, the EU is vocal in addressing these challenges, as well as playing a significant role in the ongoing negotiations with the definite aim to restore confidence in the multilateral trading system.

This rules-based system and specifically, the predictable procedural framework for resolving disputes are existential for the European Union. Since the EU is one of the largest exporters in the world, the WTO's role in reducing tariffs and non-tariff barriers is essential for maintaining and expanding the access to the third countries' markets. More generally, this system helps ensuring that EU exports benefit from non-discriminatory treatment in foreign markets. The EU has been involved in numerous disputes at the WTO, using this platform to challenge unfair trade practices by other nations and showcasing its reliance on this mechanism to uphold its trade rights and interests.[3] It is important, however, that the mechanism is available for all members of the WTO, and in this way, even

[1] Steve Woolcock, 'The Role of the European Union in the International Trade and Investment Order' (2019) *University of Adelaide Discussion Paper* No. 2019-02, 3.

[2] Heinz Hauser, Thomas A. Zimmermann, 'The Challenge of Reforming the WTO Dispute Settlement Understanding' (2003) 38(5) Intereconomics, 242; Matthias Oesch, 'Das Streitbeilegungsverfahren der WTO' (2004) 22(5) Recht – Zeitschrift für juristische Weiterbildung und Praxis, 192.

[3] As of end of September 2024, the EU has been involved directly or indirectly in more than 2/3 of the cases (426 out of 628). The EU participated as complainant in 112 cases; as respondent in 96 procedures, and as third party in 218 cases. WTO – Disputes by member <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>.

the EU's trade policy leeway is framed by this multilateral system. The main objective of this paper is to explain how the EU's reform contributions could bring these two aspects together. In doing so, the paper will highlight how the EU's proactive stance not only seeks to safeguard its own economic interests but also strives to reinforce a rules-based order that benefits all WTO member states.

Keeping in line with this objective, the paper analyses the EU's role in shaping the reforms by focusing on three questions. First, it will explore the EU's contribution to the reform process taken place during the Doha Round, which ultimately failed. Second, the paper sheds light on how the EU is responding to the current institutional crisis; and third, the chapter will delve into the possible pathways forward.

2. The WTO dispute settlement mechanism and the reform process in the Doha Round

Even the GATT 1947 encompassed certain provisions on dispute settlement, this framework was much limited in nature than the later negotiated WTO dispute settlement mechanism.[4] In 1995, the WTO reform replaced this less effective system by an institutionalised judicial mechanism, providing a more predictable nature for the future procedures between the WTO members. Implementing the rules-based approach into practice, the Dispute Settlement Understanding (DSU) codified the relevant rules and strengthened significantly the binding character of the mechanism. Even though the WTO dispute settlement mechanism has been still governed by consensus, but this principle has been reversed to so-called negative consensus for the establishment of a panel, the adoption of a report by a panel or the Appellate Body and the authorisation of the suspension of concessions and other obligations. In other terms, the consensus is needed not to block these proposals, which

[4] WTO, 'GATT Disputes – Procedural legal basis' <https://gatt-disputes.wto.org/disputes/overview/legal-basis>; Marc L. Busch, 'Democracy, Consultation, and the Paneling of Disputes under GATT' (2000) 44(4) The Journal of Conflict Resolution, 425–446. For an overview of the GATT 1947 dispute settlement system, see William J. Davey, 'Dispute Settlement in GATT' (1987) 11(1) Fordham International Law Journal, 51–109.

means that this rule has led to the nearly automatic establishment of panels, the approval of their reports and the suspension of concessions.[5]

It was also a significant change, that the DSU introduced a two-instances procedure. The consultations were referred into the panel proceedings, whose rulings could be reviewed by the permanent Appellate Body (AB).[6] This institutional framework is based, apart from a very limited scope of exceptions, on the principle of compulsory and exclusive jurisdiction, which contributes to the WTO DSB becoming the main forum for trade disputes between states. Moreover, one of the key features of the procedure is its enforcement mechanism, which allows for retaliation if a Member State fails to comply with a decision. This aspect underscores the binding nature of decisions made under the mechanism and serves as a deterrent against non-compliance, thereby promoting adherence to WTO rules.

In addition to the institutional novelties, it is worth noting, that the increasing weight of the mechanism was ensured also by material changes in the WTO legal order. The extended scope of WTO law incorporated not only the GATT vis-à-vis the trade in goods, but laid down substantial provisions on trade in services (GATS) and the protection of intellectual property (TRIPs). If it comes to the effectiveness of the new system, comparing it to the GATT mechanism, it is important to stress, that unexpectedly high number of successfully handled disputes speaks in favour of the reputation and attractiveness of the WTO procedure. Although a few cases (e.g. EU and US disputes over bananas, or hormone-

[5] Claus-Dieter Ehlermann and Ehring Lothar, 'Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?' (2005) 8(1) Journal of International Economic Law, 51–75; James Tijmes-LHL, 'Consensus and majority voting in the WTO' (2009) 8 World Trade Review, 417–437; Robert Wolfe, 'The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor' (2009) 12(4) Journal of International Economic Law, 835–858.

[6] Norio Komuro, 'The WTO Dispute Settlement Mechanism — Coverage and Procedures of the WTO Understanding' (1995) 29(4) Journal of World Trade, 5–96; Amelia Porges, 'The New Dispute Settlement: From the GATT to the WTO' (1995) 8(1) Leiden Journal of International Law, 115–133; Zoltán Víg, 'International economic and financial organizations' in: Zsuzsanna Fejes et al (eds), *Interstate relations* (Iurisperitus 2019) 131–149.

treated meat) have led to tensions between the parties, the level of legal compliance is relatively high.[7]

Despite the forward-looking nature of the institutional framework, the need for reform was already expressed in the Doha Round, which was an ambitious reform attempt to establish a more equitable global trading system.[8] The negotiations were launched in November 2001 in Doha (Qatar) by adoption of the Doha Ministerial declaration, which gave an express mandate to open negotiations in order to improve and clarify the DSU.[9] The Member States commenced structured negotiations and introduced a special session of the DSB to elaborate proposals and draft texts to amend the Dispute Settlement Understanding. The meetings were chaired by ambassador Péter Balás (Hungary), the work of the body was progressed from a general exchange of views to a discussion of conceptual proposals put forward by Members.[10] The 'Chaiman's text' was compiled and circulated on the basis of the incoming proposals in 2003, which contained modifications to all stages of the dispute settlement.[11]

During the negotiations, Members submitted more than 60 documents covering reform proposals aimed at improving the effectiveness and efficiency of the dispute settlement mechanism. The contributions of the EU addressed major substantive, institutional and also procedural changes. The EU proposed to move from the ad hoc panel structure toward a permanent mechanism of setting up the panels. It was argued that changing the way panellists were selected and providing them a more permanent basis for their work was likely to lead to faster

[7] However, the level of compliance depends on the sectors involved, e.g. the compliance is lower (and also slower), if politically relevant industries are implied, see: Gabriele Spilke, 'Compliance with WTO Dispute' (2011) NCCR Trade Regulation Working Paper 2011/25.

[8] Gábor Hajdu, 'A Doha Forduló célkitűzéseinek utóélete: befektetési és kereskedelmi implikációk' (2020) 10 Acta Universitatis Szegediensis: publicationes doctorandorum juridicorum, 63–77.

[9] Ministerial Declaration of 14 November 2001, WT/MIN(01)/ DEC/1, para. 30.

[10] Thomas A. Zimmermann, 'The DSU Review (1998-2004): Negotiations, Problems, and Perspectives' in Georgiev, Dencho and Kim Van Der Borght (eds), *Reform and Development of the WTO Dispute Settlement System* (Cameron May 2006) 450.

[11] Chairman Balás left the most controversial proposals out of consideration, and integrated into the compromise text the less problematic submissions were integrated into a compromise text. See ibid 451

procedures and increase the quality of the panel reports. Moreover, a permanent system could enhance the legitimacy and credibility of the panel process, as the possibility of conflicts of interests would be eliminated and the independence of the panellists would be protected.[12] As another horizontal issue, the EU advocated for a balance transparency in the dispute settlement procedure. This included proposals to reconcile the interests of the parties to keep certain parts of the proceedings not accessible to the public, on the one hand, with the aim of a larger transparency, on the other hand. The former concern – restricting the transparency – could provide the adequate atmosphere to the negotiations and help to resolve the dispute. For this reason, the EU found acceptable to the restrict the transparency over certain procedural parts of the dispute settlement, e.g. consultations could remain confidential, but proposed to consider the access of the public to other phases of the procedures.[13] More transparency could enhance the accountability of the dispute settlement procedure and allow for greater scrutiny by stakeholders.

In addition the to this horizontal issues, the EU's contribution touched upon the "sequencing issue" in context with the implementation of the DSU, and suggested that the text of the DSU should be clarified in this regard,[14] and elaborated reform proposals to strengthen the compliance mechanisms, and specific provisions of the retaliation and other minor issues.[15]

[12] TN/DS/W/1 – Contribution of the European Communities and its Member States to the improvement of the WTO Dispute Settlement Understanding. Communication From The European Communities (13 March 2002) 2.

[13] Ibid 2.

[14] Ibid 4. The "sequencing" issue relates primarily to the procedural complexities that arise when implementing decisions regarding retaliation and compliance. The application of two rules of DSU raises questions here: article 21.5 DSU deals with the compliance phase of dispute resolution, and Article 22 DSU addresses retaliation measures. There is often a lack of clarity on whether a member can retaliate before a compliance determination has been made under Article 21.5 DSU, leading to procedural confusion and potential disputes over timing. See: Sergei Gorbylev and Milica Novaković, 'Retaliation under the WTO Agreement: The "Sequencing Problem"' (2013) 14(2) Estey Journal of International Law and Trade Policy, 118–132.

[15] E.g. in case of suspension of trade concessions, exempting goods *en route* from retaliation would be reasonable; the prohibiting so called 'carousel retaliation'; termination of retaliation; procedure for the withdrawal of consultation requests, ensuring compliance with mutually agreed solutions, an explicit time-frame for third party interest notification, full-time appointment for AB members etc, see TN/DS/W/1.

The final deadline set down by the mandate of the special session of the DSB was finally extended, therefore the negotiations continued even in 2004, but Members could never agree on a final text version. Later the whole Doha Round itself has been collapsed.

3. The EU and the current institutional crisis

In search of the roots of the current institutional crisis, we can go back to China's accession and look for the main conflicts primarily in the China-US trade relationship. The US originally supported China's accession to the WTO, but in the late 2000s, tensions have emerged specifically in context with actual dispute settlement procedures. The view began to arise that the promises expected by China's accession had not been delivered, growing scepticism was articulated about whether China's integration into the global trading system had achieved its intended goals. Therefore, during the Obama administration, concerns regarding China's membership emerged prominently. It was highlighted several issues that reflected broader apprehensions about China's compliance with WTO rules and the effectiveness of the DSB in addressing these challenges. The US expressed concerns that China was not fully adhering to its commitments under WTO agreements. This included issues related to subsidies, state-owned enterprises, and market access, where the U.S. argued that China's practices were inconsistent with its obligations, undermining fair competition in global markets.[16] There were significant worries about China's use of non-tariff barriers and other trade restrictions that limited U.S. exports. The US pointed to instances where China employed regulatory measures that disproportionately affected foreign companies, raising questions about the transparency and fairness of its trade practices. Moreover, it was held the China violated the intellectual property rights, its policies forced technology transfers, which not only harmed American businesses but also contradicted the principles of fair trade expected within the WTO framework.[17] Later these concerns

[16] Stuart S. Malawer, 'Obama, WTO Trade Enforcement, and China' (2016) (2) CWR – China & WTO Review, 361–368.

[17] Bruna Bosi Moreira, 'Between Contention and Engagement: US response to China's rise in the Obama and Trump administrations' (2019) 8(3) Brazilian Journal of International Relations.

were channelled into the ongoing disputes before the WTO DSB and it was held, that WTO DSB was ineffective in addressing systemic issues posed by China. Although the U.S. had successfully filed numerous cases against China in the DSB, there were frustrations regarding the lengthy processes and perceived limitations in enforcing compliance with rulings.[18] Furthermore, China could win certain cases, which were crucial for the United States.[19] These concerns contributed to a broader discourse on reforming the WTO's dispute settlement system, particularly regarding how it could better address issues related to major economies like China. The Obama administration's criticisms highlighted a need for enhanced mechanisms within the DSB to ensure compliance with international trade rules and to adapt to challenges posed by state capitalism and non-market practices.

In the broader context of discussions over these issues, the key concerns of the US were slightly turned to the Appellate Body's institutional setting and practices and was held that the AB is committing 'judicial overreach' as a systemic problem. In other terms, it was criticised that the Appellate Body have exceeded their intended authority or have interpreted WTO rules in ways that extend beyond what Member States agreed upon during negotiations. This concept has become a focal point in debates about the functioning and legitimacy of the DSB.[20] The argument of 'judicial overreach' has condemned more aspects of the AB's practices. It was argued, that Appellate Body has engaged in judicial activism by interpreting WTO agreements in a manner that effectively creates new obligations for member states. This has led to claims that the Appellate Body is overstepping its role as an adjudicator and acting more like a legislator. But on the other hand, this extensive, authoritative

[18] Malawer (n 16).

[19] See the "zeroing practices" and the „double remedies" by imposing antidumping and countervailing duties on the same product. Thomas J. Prusa and Luca Rubini, 'United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea: It's déjà vu all over again' (2013) 12(2) Journal of World Trade, 409–425; Sungjoon Cho and Thomas H. Lee, 'Double Remedies in Double Courts' (2015) 26(2) European Journal of International Law, 519–535.

[20] See especially, Ernst-Ulrich Petersmann, 'Rule-of-law in international trade and investments?: between multilevel arbitration, adjudication and 'judicial overreach' (2020) EUI Working Papers LAW 2020/10; Jeffrey J. Schott and Euijin Jung, 'The WTO's Existential Crisis: How to Salvage Its Ability to Settle Trade Disputes' (2019) Peterson Institute for International Economics Policy Briefs PB19-19.

interpretation led to a quasi precedent system, so that the AB rarely departs from its previous decisions.[21] Criticism has been voiced about the AB's 'obiter dicta' statements, which are not directly relevant to the dispute at hand, and the AB has also been criticized for frequently exceeding procedural deadlines.

During the Obama administration, China's alleged violations against the WTO law were still addressed in the WTO dispute settlement mechanism by filing complaints against China. Subsequently, the US has turned slightly to more assertive steps. In 2011, it was not really noticed that the US government refused to support the routine re-appointment of US Member of AB, giving no reasons for its decision.[22] But five years later, in 2016, immediately got the headlines that the US blocked the re-appointment of South Korean AB Member, arguing that he had failed to act within his mandate and his performance did not reflect the role assigned to the AB in the DSU.[23] The Trump government put the criticism over the AB in a much larger strategy to undermine the functionality of the WTO,[24] and continued to block the appointment of new AB members in

[21] For this debate, see: James Bacchus, and Simon Lester, 'The Rule of precedent and the role of the Appellate Body' (2020) 54(2) *Journal of World Trade*, 183–198.; Timothy Meyer, 'How to treat the WTO's Problem with precedent' (2021) 54(3) *Vanderbilt Journal of Transnational Law*, 587–610; It is worth mentioning, that Palmeter and Mavroidis exposed the question of precedents in WTO law much earlier than the above debate has been triggered by the US. They gave an insight even into international law aspect of the problem, addressed also the status of the panel reports (including the non-adopted reports) from the GATT era, and introduced the concept of the 'non-binding precedents', pointing out that "[a]dopted reports have strong persuasive power and may be viewed as a form of nonbinding precedent, whose role is comparable to that played by *la jurisprudence* in the contemporary civil law of many countries, such as France, and that played by decisions of courts at the same level in the United States." David Palmeter, and Petros C. Mavroidis, 'The WTO Legal System: Sources of Law' (1998*)* 92(3) The American Journal of International Law, 398–413, 401.

[22] Kerremans highlights, that the roots of blocking AB members leads back much further. The US exerted pressure on Merit Janow, one of its nationals, not to apply for a reappointment already in 2007, and in 2011, Jennifer Hillman was not reappointed (also US national). But the first explicit blocking of an appointment showed up in 2013, when it was refused by the US the appointment of Kenyan candidate James Thuo Gathii. See, Bart Kerremans, 'Divergence Across the Atlantic? US Skepticism Meets the EU and the WTO's Appellate Body' (2022) 10(2) Politics and Governance, 208–218.

[23] Ibid.

[24] Rachel Brewster, 'The Trump Administration and the Future of the WTO' (2018) 44(6) Yale Journal of International Law Online, 3; Richard H. Steinberg, 'The Impending

2018.[25] As a result, only 3 members remained in charge that time, but two of the Members' terms expired on 10th December 2019, therefore the AB lost its no quorum and became practically defunct. That day, the intense, decade long debates about the AB's shortcomings turned into a real, serious institutional crisis of the WTO.

How did the European Union react to the debates and the collapse of the dispute settlement mechanism of the WTO?[26] The negotiations on the WTO reform and modernisation have been formalized in 2018, which the European Commission joined by submitting a detailed reform proposal (concept paper).[27] The paper went beyond the DSB crisis and outlined a comprehensive approach to modernizing the WTO. The concept paper analysed the key challenges and formulated proposals with regard to three significant areas: the rulemaking, the transparency of the regular work, and the dispute settlement. Below we are focusing predominantly on the last item.

The point of departure of the EU's concept paper is the concerns regarding the dispute settlement mechanism put forward by the Trump administration in 2018.[28] Considering the US criticism, the concept paper laid down a comprehensive proposal to address the deadlock situation, and improve the functioning of dispute settlement mechanism. In doing so, the EU's proposal is divided into two phases. In a first stage, the most

Dejudicialization of the WTO Dispute Settlement System?' (2018) 112 Proceedings of the ASIL Annual Meeting, 316–321.

[25] For the US concerns of the Trump administration regarding the WTO dispute settlement, see United States Trade Representative, 'President's 2018 Trade Policy Agenda' (2018) <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf> 22–28.

[26] This paper deals only with the reform proposals of the EU, but does not go into the EU's efforts to set up a mechanism for temporal replacement of the AB. This latter aim led a part of the Member States to negotiate and conclude the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) in May 2020. The MPIA, covering actually 54 WTO member states, has installed a specific procedure, which is in fact an alternative dispute resolution mechanism in sense of the Article 25 DSU and replaces temporally the AB procedure. See: Joost Pauwelyn, 'The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New' (2023) 22(5) World Trade Review, 693–701.

[27] European Commission, 'EU Concept Paper on WTO Reform' (18 September 2018). The original document is not available on the Commissions homepage. The copy of the document published by the Washington International Trade Association (WITA) is accessible at <https://www.wita.org/atp-research/eu-concept-paper-on-wto-reform>.

[28] United States Trade Representative (n 25).

urgent proposals aim at unblocking the appointments, then in the second stage, substantive issues concerning the application of WTO rules can be considered. As far as the first stage is concerned, the paper formulating the EU's suggestions reflecting directly to the US concerns. Below we summarize the EU commitment structured by the major concerns put forward by the US government.

a) The 90-day deadline for appeals

The AB disregards the 90-day deadline for appeals, which raises the concerns of transparency, inconsistency with prompt settlement of disputes, and uncertainty regarding the validity of the report issued after 90 days. The proposes to change this 90-day rule by providing an enhanced transparency and consultation obligation for the AB. The 90-day timeframe could be extended by the parties, if the AB signalizes in advance, if it estimates that the report will be circulated outside 90 days. In addition to this, the concept paper has put forward other issues that would help increasing the efficiency of the AB: increasing the number of Appellate Body members from 7 to 9; providing that the AB membership of the is a full time job (currently, de jure, it is a part time job); and expansion of the resources of the AB Secretariat could also be considered as an accompanying measure.[29]

b) Continued service by persons who are no longer AB members

The US argued that under the DSU, the DSB and not the AB has the capacity to decide whether a person whose term of appointment has expired should continue serving. Responding this claim, the EU proposes transitional rules for outgoing AB members, e.g. the DSU could provide that an outgoing AB member shall complete the disposition of a pending appeal in which a hearing has already taken place during that member's term.[30]

c) 'Obiter dicta' statements

The US critics has focused also on the AB's practice to issue advisory opinions on questions not necessary to resolve a dispute. The EU concept paper proposes here make the related DSU provisions clearer in order to restrict the extent of the AB's decision on the issues, which are necessary for the resolution of the dispute.[31]

d) AB review of facts and Member's domestic law

[29] European Commission (n 27) 15–16.
[30] Ibid 16.
[31] Ibid.

The US also criticised the AB's approach to reviewing facts. Under the DSU, appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel, but, as the US argued, the AB has consistently reviewed panel fact-finding under different legal standards, and has reached conclusions that are not based on panel factual findings or undisputed facts. In US' view, this is particularly the case for AB review of panel findings as to the meaning of domestic legislation, which should be an issue of fact. In this respect, the concept paper also tries to give a template to improve the provisions of the DSU. The EU would integrate a definition of the municipal law, in order to ensure that, issues of law covered in the panel report and legal interpretations developed by the panel do not include the meaning of the municipal measures.[32]

e) Precedents

As mentioned earlier, one of the most prominent issues raised by the US focused on the practice and interpretation of the AB. The US has taken the view that AB claims its reports are entitled to be treated as precedent, panels are to follow prior AB reports absent 'cogent reasons', which has no basis in the WTO rules. For solving this issue, the Commission proposed to strengthen the additional channels of communication between the WTO members and the AB.[33] For instance, annual meetings could provide for regular exchanges between the parties, which is in line with the right of the WTO members to express their views on an AB report stipulated expressly in the DSU.[34] This would open up the opportunity to voice concerns with regard to AB approaches. As the commission argued, this change would not be inconsistent with the independence of the AB members. Adequate transparency and framework provisions for these meetings could also be put in place, in order to avoid undue pressure on AB members.[35]

4. The path forward – Concluding remarks

The reform of the WTO dispute settlement mechanism is a critical issue that has received considerable attention in academic debates,

[32] Ibid 16–17.
[33] Ibid 17.
[34] Cf. with DSU Article 17.14, last sentence.
[35] European Commission (n 27) 17.

especially in light of the ongoing crisis that has rendered the AB inoperable since December 2019. As the above analysis has shown, the reform is not merely a technical adjustment; it is a fundamental necessity for the future of global trade governance. The EU has emerged as a prominent actor in this reform process, demonstrating a commitment to maintaining a rules-based multilateral trading system that underpins global trade.

The EU's involvement in WTO reforms, dating back to the Doha Round, showcases its proactive stance in addressing systemic challenges within the dispute resolution framework. The EU has consistently emphasized the need for transparency, efficiency, and accessibility for developing countries. Despite the failure of the Doha negotiations, the EU's contributions laid essential groundwork even for the ongoing reform discussions, emphasizing a need for a more permanent and independent panel structure that could expedite proceedings and improve the quality of rulings. These proposals are exposed by the European Commission's 2018 concept paper on the WTO modernization, which identifies the shortcomings of the system, based mostly on the arguments formulated by the US, which are then explicitly addressed by the solutions offered in the document.

As it was seen, the EU reform proposal advocates for maintaining a binding system while addressing perceived issues such as the lengthy procedures or the judicial overreach by the AB. Although the focus of the paper has been narrowed down to the EU position, it also shows, that these reform attempts go far beyond to the economic interests of the European Union. Reform of the WTO dispute settlement mechanism represents an opportunity to reinforce multilateralism at a time when unilateral actions threaten to undermine global trade stability. The EU's leadership in this process is essential, but not fully enough to solve the deadlock of the dispute settlement mechanism. The path forward will require collaboration among all WTO member states to create a resilient framework capable of addressing contemporary challenges while safeguarding the principles of international trade.

References

– James Bacchus and Simon Lester, 'The Rule of precedent and the role of the Appellate Body' (2020) 54(2) Journal of World Trade,

183–198.
- Rachel Brewster, 'The Trump Administration and the Future of the WTO' (2018) 44(6) Yale Journal of International Law Online.
- Marc L. Busch, 'Democracy, Consultation, and the Paneling of Disputes under GATT' (2000) 44(4) The Journal of Conflict Resolution, 425–446.
- Sungjoon Cho, Thomas H. Lee, 'Double Remedies in Double Courts' (2015) 26(2) European Journal of International Law, 519–535 <https://doi.org/10.1093/ejil/chv026>.
- William J. Davey, 'Dispute Settlement in GATT' (1987) 11(1) Fordham International Law Journal, 51–109.
- Claus-Dieter Ehlermann and Ehring Lothar, 'Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?' (2005) 8(1) Journal of International Economic Law, 51–75
- Sergei Gorbylev and Milica Novaković, 'Retaliation under the WTO Agreement: The "Sequencing Problem"' (2013) 14(2) Estey Journal of International Law and Trade Policy, 118–132.
- Gábor Hajdu, 'A Doha Forduló célkitűzéseinek utóélete: befektetési és kereskedelmi implikációk' (2020) 10 *Acta Universitatis Szegediensis: publicationes doctorandorum juridicorum*, 63–77.
- Heinz Hauser, Thomas A. Zimmermann, 'The Challenge of Reforming the WTO Dispute Settlement Understanding' (2003) 38(5) Intereconomics.
- Bart Kerremans, 'Divergence Across the Atlantic? US Skepticism Meets the EU and the WTO's Appellate Body' (2022) 10(2) Politics and Governance, 208–218 <https://doi.org/10.17645/pag.v10i2.4983>.
- Norio Komuro, 'The WTO Dispute Settlement Mechanism — Coverage and Procedures of the WTO Understanding' (1995) 29(4) Journal of World Trade, 5–96 <https://doi.org/10.54648/trad1995024>.
- Stuart S. Malawer, 'Obama, WTO Trade Enforcement, and China' (2016) (2) CWR – China & WTO Review, 361–368 <http://dx.doi.org/10.14330/cwr.2016.2.2.09>.
- Timothy Meyer, 'How to treat the WTO's Problem with precedent'

(2021) 54(3) Vanderbilt Journal of Transnational Law, 587–610.
- Bruna Bosi Moreira, 'Between Contention and Engagement: US response to China's rise in the Obama and Trump administrations' (2019) 8(3) Brazilian Journal of International Relations <https://doi.org/10.36311/2237-7743.2019.v8n3.07.p544>.
- Matthias Oesch, 'Das Streitbeilegungsverfahren der WTO' (2004) 22(5) Recht – Zeitschrift für juristische Weiterbildung und Praxis.
- David Palmeter, Petros C. Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92(3), The American Journal of International Law, 398–413 <https://doi.org/10.2307/2997915>.
- Joost Pauwelyn, 'The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New' (2023) 22(5) World Trade Review, 693–701 <https://doi.org/10.1017/S1474745623000204>.
- Ernst-Ulrich Petersmann, 'Rule-of-law in international trade and investments?: between multilevel arbitration, adjudication and 'judicial overreach' (2020) EUI Working Papers LAW 2020/10 <https://cadmus.eui.eu/handle/1814/67990>.
- Amelia Porges, 'The New Dispute Settlement: From the GATT to the WTO' (1995) 8(1) Leiden Journal of International Law, 115–133 <https://doi.org/10.1017/S0922156500003137>.
- Thomas J. Prusa and Luca Rubini, 'United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea: It's déjà vu all over again' (2013) 12(2) Journal of World Trade, 409–425 <https://doi.org/10.1017/S1474745612000614>.
- Jeffrey J. Schott, Euijin Jung, 'The WTO's Existential Crisis: How to Salvage Its Ability to Settle Trade Disputes' (2019) Peterson Institute for International Economics Policy Briefs PB19-19 <https://www.piie.com/publications/policy-briefs/wtos-existential-crisis-how-salvage-its-ability-settle-trade-disputes>.
- Don (Dong Hyun) Song, 'The Case Against Judicialization of the WTO Dispute Settlement System' (2015) University of Chicago Law School International Immersion Program Papers No. 15 <https://chicagounbound.uchicago.edu/international_immersion_program_papers/8>.

- Gabriele Spilke, 'Compliance with WTO Dispute' (2011) NCCR Trade Regulation Working Paper No 2011/25 <https://www.wti.org/media/filer_public/aa/60/aa608a46-86d6-4b0a-83e7-01806c8bd7b3/compliance_spilker_2012.pdf>.
- Richard H. Steinberg, 'The Impending Dejudicialization of the WTO Dispute Settlement System?' (2018) 112 Proceedings of the ASIL Annual Meeting, 316–321 < https://doi.org/10.1017/amp.2018.10>.
- James Tijmes-LHL, 'Consensus and majority voting in the WTO' (2009) 8 World Trade Review, 417–437.
- Steve Woolcock, 'The Role of the European Union in the International Trade and Investment Order' (2019) University of Adelaide Discussion Paper No. 2019-02.
- Thomas A. Zimmermann, 'The DSU Review (1998-2004): Negotiations, Problems, and Perspectives' in Georgiev, Dencho and Kim Van Der Borght (eds), *Reform and Development of the WTO Dispute Settlement System* (Cameron May 2006).
- Zoltán Víg, 'International economic and financial organizations' in Zsuzsanna Fejes et al (eds), *Interstate relations* (Iurisperitus 2019) 131–149.
- Robert Wolfe, 'The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor' (2009) 12(4) Journal of International Economic Law, 835–858.

Short biography of the author

Balázs Horváthy (PhD) is research fellow at HUN-REN CSS Institute for Legal Studies (Hungary, Budapest) and associate professor at Széchenyi Istvan University, Faculty of Law and Political Sciences, Department of International and European Law (Hungary, Győr). He obtained his PhD from ELTE University (Hungary, Budapest) in protective measures of the Common Commercial Policy in 2009. He teaches courses in EU public law and policies of the EU, international trade law; and his current research interests include social policy conflicts of EU and international trade law, 'Trade and Environment' issues.

Expanding the EU internal market: The Deep and Comprehensive Free Trade Area

László Knapp*

Abstract: The concept of a Deep and Comprehensive Free Trade Area (DCFTA) was developed by the European Union as a type of 'new generation' free trade agreements (FTAs) to deepen economic relations with some of the neighbouring countries. The idea was to establish a system of relations between the EU and the countries concerned similar to the internal market, which would cover not only the content of the classic FTAs but also the related areas 'behind the border'. To date, the EU has concluded such 'deep and comprehensive' agreements with three Eastern Partnership countries, Georgia, Moldova and Ukraine, as part of their Association Agreements (AAs). A key element of these agreements is the progressive approximation of the relevant rules of the national legal systems concerned to the EU acquis, which requires continuous cooperation between the parties. Among the elements of the internal market, the free movement of goods, services and capital and the approximation of related rules are widely achieved, while the free movement of persons remains governed by bilateral agreements. A new context for the further development of the DCFTA has been created by their submission of the applications for membership to the European Union.

Keywords: EU external relations, free trade agreements, Eastern Partnership

1. Introduction

Throughout their history, the European Communities and the European Union have sought a gradual deepening of integration, which meant the establishment of the common market, then the internal market, later the foundations of a political integration has been laid down. At the same time, they have developed ever closer relations with third countries and their associations, with the states of the European area playing a prominent role. The aim of this study is to examine whether and by what means the so-called deep and comprehensive free trade agreements (DCFTA agreements), a specific type of 'new generation' FTAs, have achieved the planned extension of the internal market to the states

* PhD; Associate professor, Széchenyi István University, Deák Ferenc Faculty of Law and Political Sciences (Győr, Hungary). Email: knapp.laszlo@ga.sze.hu.
The chapter has been reviewed by László Milassin.

concerned. With this in mind, the study analyses the concept of the DCFTA, the EU's related agreements with Georgia, Moldova and Ukraine, and the experience of the decade since the conclusion of these treaties.

2. EU regional economic relations and the concept of the Deep and Comprehensive Free Trade Area

Since their creation, European integration organisations have developed intensive relations with many countries around the world, typically through the conclusion of AAs. These international treaties can take many forms, Walter Hallstein's formulation of any agreement that is "free trade plus 1% to membership minus 1%".[1] Most of them were not a precursor to EU accession, either because they were were non-European states, or because they were explicitly designed as an alternative to membership. Originally, the so-called Europe Agreements concluded with Central and Eastern European states were alike, but these became a yardstick for their eligibility for EU membership after the submission of their applications for accession.[2]

The so-called Eastern enlargement of the Union in 2004 and 2007 marked the beginning of a new period in the history of the integration, which not only transformed internal affairs, but also fundamentally changed relations with the neighbouring regions to the South and East, especially as the latter became the immediate neighbours of the Union. In 2003–2004, the EU developed a European Neighbourhood Policy (ENP) to take account of this interdependence and to rebuild its relations with Russia, the Western Commonwealth of Independent States and the Southern Mediterranean. Relations were to be renewed in order to achieve prosperity and shared values, which would have meant deeper economic integration, intensified political and cultural dialogue and

[1] Andriy Tyushka, 'Association-Cum-Integration: the EU-Ukraine Association Agreement and Association Law as an Institution of Ukraine's European Integration' (2017) 13 Croatian Yearbook of European Law and Policy, 88.

[2] Peter Van Elsuwege, 'Revisiting the EU-Ukraine Association Agreement: A Crucial Instrument on the Road to Membership' in Maryna Rabinovych and Anne Pintsch (eds), *Ukraine's Thorny Path to the EU: From "Integration without Membership" to "Integration through War"* (Palgrave Macmillan 2025) 70.

shared responsibility for conflict prevention, without the short-term prospect of accession to the EU.[3]

The idea behind the closer economic ties was to develop a system of relations similar to the EU's internal market, which would include a higher degree of liberalisation of the movement of goods, persons, services and capital. In preparing the policy, account was taken of the fact that different types of relations had been established with various groups of countries. The development of FTAs concluded earlier with the southern Mediterranean countries was considered as a way of achieving the free movement of services with them. In contrast, the Partnership and Cooperation Agreements concluded with Moldova, Russia and Ukraine had not resulted in preferential treatment or approximation of legal systems. Therefore, while keeping in mind the common objectives, a differentiated approach was envisaged for each group of states.[4] The internal market related Action Plans focused on achieving the deepest possible trade liberalisation, with the approximation of rules on goods, such as the elimination of non-tariff barriers, the modernisation of customs procedures and the fight against customs fraud, which were also addressed to the Southern Mediterranean countries on the basis of the partnership with the EU.[5]

These were further developed by the European Commission in its Global Europe Strategy, announced in 2006, which foresaw a 'new generation' of FTAs with third countries to increase the external competitiveness of the European Union.[6] The comprehensive nature of these agreements would ensure the liberalisation of trade as a whole, but the obligations they would impose would go beyond the principles laid down in the framework of the World Trade Organisation (WTO).[7] In line

[3] Commission of the European Communities, 'Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (Communication) COM (2003) 104 final, 4.

[4] Ibid 15–16.

[5] Commission of the European Communities, 'European Neighbourhood Policy: Strategy Paper' (Communication) COM (2004) 373 final, 15.

[6] Guillaume Van der Loo, Peter Van Elsuwege and Roman Petrov, 'The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument' (2014) EUI Working Papers LAW 2014/09, 4 <https://cadmus.eui.eu/handle/1814/32031>.

[7] Commission of the European Communities, 'Global Europe: Competing in the World: A Contribution to the EU's Growth and Jobs Strategy' (Communication) COM (2006) 567 final, 9–10.

with this, the drafts appeared shortly afterwards to develop the European Neighbourhood Policy already referred to the conclusion of 'deep and comprehensive free trade agreements' with all partner countries, covering not only goods but services as well, in the economic and trade dimension. At the same time, accession to the WTO was defined as a precondition for the negotiation of these agreements, which was still lacking in the case of Ukraine.[8] The novelty of the concept was that they intended to regulate a wide spectrum of behind the border' issues of free trade, which meant not only the dismantling of non-tariff barriers, but also a step-by-step convergence of related regulatory areas such as technical norms and standards, competition policy, good governance in the tax area and public procurement.[9] In terms of the international legal framework for relations between the European Union and the countries participating in the ENP, the first stage was the conclusion of bilateral agreements, which could lead to the establishment of a 'Neighbourhood economic community'.[10]

The economic and political events of the following years spurred the EU to develop closer cooperation with its partners in Eastern Europe and the Southern Caucasus. Also considering the impacts of the 2008 conflict in Georgia, the Eastern Partnership was announced at the end of the same year as a dimension of the European Neighbourhood Policy, targeting Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.[11] Cooperation was to be further deepened by the conclusion of AAs, which, in addition to strengthening democratic institutions and good governance, set out broad economic objectives such as energy security and the creation of DCFTA.[12] The latter would have gone a step further than previously envisaged, as it would have involved economic cooperation, not only in goods and services but also in improving the free movement of capital, including by facilitating the conditions for the establishment of companies. Given the proximity of the countries of the region to the EU and the specificities of their economies, the draft also called for the

[8] Commission of the European Communities, 'A Strong European Neighbourhood Policy' (Communication) COM (2007) 774 final, 4.

[9] Commission of the European Communities, 'On Strengthening the European Neighbourhood Policy' (Communication) COM (2006)726 final, 4.

[10] Ibid 5.

[11] Commission of the European Communities, 'Eastern Partnership' (Communication) COM (2008) 823 final, 2.

[12] Ibid 5.

continuation of dialogue on agriculture and the protection of intellectual property and the conclusion of an agreement on geographical indications linked to agriculture.[13]

3. Agreements with Georgia, Moldova and Ukraine

Among the Eastern Partnership countries, the first to start negotiations on an AA was Ukraine in 2007, followed by Georgia, Moldova and Armenia in 2010. While bringing Ukraine closer to the European Union was a priority objective, the agreement deliberately did not address the issue of eventual accession. As this concept was also applicable to Georgia and Moldova, the treaties with them essentially reproduced the text of the draft agreement with Ukraine, including the part on a "DCFTA".[14] As result of the internal political events in Ukraine in February-March 2014, the EU and Ukraine signed the AA in two parts, on 21 March 2014 for the so-called political parts[15] and on 27 June 2014 for the economic parts, which also constitute the FTA,[16] at the same time as the AAs with Georgia[17] and Moldova[18]. Under the EU's rules on competence, the agreements are concluded as so-called mixed agreements, i.e. the contracting parties are not only the EU and the third country concerned, but also the Member States.[19]

[13] Ibid 6.

[14] Rilka Dragneva and Kataryna Wolczuk, 'Integration and Modernisation: EU's Association Agreement with Ukraine' in Maryna Rabinovych and Anne Pintsch (eds), *Ukraine's Thorny Path to the EU: From "Integration without Membership" to "Integration through War"* (Palgrave Macmillan 2025) 45–46.

[15] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3.

[16] Final Act between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Association Agreement [2014] OJ L278/4.

[17] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261/4.

[18] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/4.

[19] Olesia Tragniuk, 'European Union and Ukraine: Some Issues of Legal Regulation of Relations - From Partnership and Cooperation Agreement to Association Agreement -' (2016) 99 KritV, CritQ, RCrit 56.

The part of the AAs concerning the establishment of a DCFTA constitutes a new generation FTA on track of the Global Europe Strategy, but it differs substantially from other such international agreements. The distinction is important because the EU has concluded trade agreements also with non-ENP countries in the past, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA) or the EU-Japan Economic Partnership Agreement (EPA), which also contain provisions on 'behind the border' trade barriers.[20] The specificity is already given by the objectives of the AAs, one of which sets out the creation of conditions for enhanced economic and trade relations, allowing the gradual integration of the countries concerned into the EU internal market. As a means to this end, the treaty sets out the establishment of the DCFTA. A related objective is to complete the transition to a functioning market economy in the states concerned, including through gradual approximation to EU legislation.[21] It is therefore the adoption of the EU acquis and the resulting harmonisation of legislation that primarily distinguishes deep and comprehensive FTAs from other new generation FTAs.[22]

One of the aims of the AA is therefore to integrate the countries concerned into the EU's internal market. However, the titles on economic matters[23] are intended to establish, after a transitional period of up to ten years, a free trade area[24] albeit a deep and comprehensive one. The comprehensive nature of the agreement is reflected in the fact that free trade in goods does not simply mean the mutual opening of markets, but also includes provisions for the dismantling of non-tariff barriers and, in addition, the progressive realisation of the free movement of services and capital. In this context, the AA also lays down binding rules in areas related to the activities of the World Trade Organisation, such as investment, public procurement, competition law and intellectual property law, which are an outcome that goes beyond the WTO's partially optional rules.[25]

[20] Bernard Hoekman, 'Deep and Comprehensive Free Trade Agreements' (2016) EUI Working Papers RSCAS 2016/29, 2 <https://cadmus.eui.eu/handle/1814/41405>.

[21] Article 1(2)(d) EU-Ukraine AA.

[22] Hoekman (n 20) 2.

[23] Above all the title on trade and trade-related matters (Title IV in EU-Ukraine AA), but related provisions can be found also under the title on economic and sector cooperation (Title V in EU-Ukraine AA).

[24] Article 25 EU-Ukraine AA.

[25] G. Van der Loo, 'The EU-Ukraine Free Trade Agreement: "Deep" and "Comprehensive"?' (2013) 2013 Law of Ukraine: Legal Journal, 226.

Nevertheless, the absence of free movement of persons between the EU and the contracting third countries is a significant departure from the concept of the internal market,[26] which requires the maintenance of the possibilities provided for in the already existing bilateral agreements on the free movement of workers.[27]

The deep character of the FTA is therefore the obligation to gradually approximate the national legislations concerned to EU legislation, on which the success of cooperation essentially depends. This conditionality is well reflected in the preamble of the EU-Ukraine AA, which states that "political association and economic integration of Ukraine within the European Union will depend on progress in the implementation of the current agreement, on Ukraine's track record in ensuring respect for common values, and progress in achieving convergence with the EU in political, legal and economic areas."[28] This is particularly the case in the title on trade and trade-related matters, which is the main focus of this study, and which essentially contains different provisions for each chapter.[29] Broad commitments have been made on subjects directly linked to completion of the internal market, such as technical barriers to trade (TBT), sanitary and phytosanitary measures, customs cooperation and trade facilitation, establishment, services, e-commerce and competition.[30] For example, the provisions on the approximation of technical regulations, standards and conformity assessment stipulate that Ukraine "shall incorporate the relevant EU acquis into its legislation" and that once the necessary institutional and regulatory reforms have been achieved in the judgement of the EU, the parties shall conclude an Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA).[31] The chapter on establishment, provision of services and e-commerce requires Ukraine to "progressively make its existing and future legislation compatible with the EU acquis".[32] In the case of public procurement, approximation of legislation is to be achieved in successive stages, as set out in the annexes to the AA, taking "due account" of the

[26] Ibid 232.
[27] Article 18(1) EU-Ukraine AA.
[28] Quoted by Van der Loo, Van Elsuwege and Petrov (n 6) 3.
[29] Article 474 EU-Ukraine AA.
[30] Dragneva and Wolczuk (n 14) 52–53.
[31] Article 56(2)(i)-(ii) EU-Ukraine AA.
[32] Article 114(1) EU-Ukraine AA.

case law of the Court of Justice, the Commission's implementing measures and "any changes to the acquis of the European Union which may have occurred in the meantime", while the Commission is to be informed without delay of the latter.[33] The AA has established a monitoring system to follow up the legislative harmonisation, with the mutual participation of the contracting parties, the results of which are to be submitted to the Association Council. This body also decides on further market opening under the title on trade and trade-related matters.[34]

4. Experiences of the first decade

AAs, which include DCFTA agreements, are so-called mixed agreements, and therefore required the approval of all Member States to enter into force. As regards the EU-Ukraine AA, the decision authorising its signature already provided for its provisional application for the parts falling within the EU's competence.[35] Therefore, the political and cooperation provisions were already applied as of November 2014 and the DCFTA agreement was applied as of 1 January 2016. Following the handling of the situation created by the negative referendum in the Netherlands in April 2016,[36] the AA finally entered into force on 1 September 2017.[37] The DCFTA agreements with Georgia and Moldova

[33] Article 153(2) EU-Ukraine AA.

[34] Article 475(2)-(5) EU-Ukraine AA.

[35] 2014/295/EU: Council Decision of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof [2014] OJ L161/1, Article 4.

[36] See Daniel Haitas, 'The EU-Ukraine Association Agreement, the 2016 referendum in the Netherlands and visa liberalisation' (2018) 14 Iustum Aequum Salutare, 155.

[37] European Commission, 'EU-Ukraine Association Agreement fully enter into force' (Press release, 1 September 2017) <https://ec.europa.eu/commission/presscorner/detail/hu/ip_17_3045>.

were provisionally applied from September 2014,[38] and the AAs with both countries entered into force on 1 July 2016.[39]

In line with the provisions of the AA, work has started to remove barriers to trade and to align the relevant national rules with EU legislation. This has produced different results in the countries and fields concerned. There has been a significant reduction in tariffs, mainly on industrial products, while the parties have been cautious on agricultural products, where reductions are largely gradual, and the use of tariff quotas is still present. Extensive harmonisation has been achieved in areas such as technical regulations, conformity assessment procedures and product safety, and the parties have mutually allowed the movement of services and participation in public procurement procedures.[40] Of the three countries, Ukraine is in a special situation, as in view of the aggression launched against it by Russia on 24 February 2022, the European Union has granted several concessions linked to the AA, primarily through the Agreement on the Carriage of Freight by Road[41] and the temporary trade-liberalisation measures[42].[43]

[38] See 2014/494/EU: Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261/1, Article 3 and 2014/492/EU: Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/1, Article 3.

[39] European Commission, 'Full entry into force of the Association Agreement between the European Union and the Republic of Moldova' (Press release, 1 July 2016) <https://ec.europa.eu/commission/presscorner/detail/en/ip_16_2368>, European Commission, 'EU-Georgia Association Agreement fully enters into force' (Press release, 1 July 2016) <https://ec.europa.eu/commission/presscorner/detail/cs/ip_16_2369>.

[40] European Commission, 'Deep and comprehensive free trade agreements' < https://trade.ec.europa.eu/access-to-markets/en/content/deep-and-comprehensive-free-trade-agreements>.

[41] Agreement between the European Union and Ukraine on the carriage of freight by road [2022] OJ L179/4.

[42] Regulation(EU) 2022/870 of the European Parliament and of the Council of 30 May 2022 on temporary trade-liberalisation measures supplementing trade concessions applicable to Ukrainian products under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2022] OJ L152/103.

[43] Nataliya Haletska, 'Legal Aspects of EU-Ukraine Bilateral Trade Relations During the Full-Scale War: More Trade Liberalisation, but Under Conditions' in Maryna Rabinovych and Anne

Although the AA, including the DCFTA agreement, implicitly followed the concept of 'integration without membership',[44] of the three countries concerned, Georgia now has candidate status,[45] and Moldova and Ukraine are in accession negotiations.[46] Their aspiration to join the European Union has been decades in the making, but Ukraine finally applied for membership in February 2022 in response to Russia's aggression, followed by Georgia and Moldova in March of the same year.[47] The EU's supportive stance and the rapid progress of the process are not merely geopolitical, but also a recognition of the progress made by the countries in implementing the AA, in particular the harmonisation of their national rules and the adoption of the EU acquis.[48] At the same time, the gradual dismantling of trade barriers has highlighted the need to manage certain policies carefully during the accession process, in particular the common agricultural policy.[49]

5. Conclusions

While the European Union has concluded new generation FTAs, announced in the Global Europe Strategy, also with countries in the more distant parts of the world, deep and comprehensive FTAs have been concluded only with the countries of the Eastern Partnership, a dimension of the ENP. The geographically narrower circle is not by chance, since the legal harmonisation requirements for the legal systems of the partner countries have so far been undertaken by states that have already

Pintsch (eds), *Ukraine's Thorny Path to the EU: From "Integration without Membership" to "Integration through War"* (Palgrave Macmillan 2025) 180, 186.

[44] Van der Loo (n 25) 226.

[45] European Council, *European Council conclusions, 14 and 15 December 2023* (EUCO 20/23, CO EUR 16, CONCL 6).

[46] International ministerial meetings, 'EU opens accession negotiations with Moldova' (Press release, 25 June 2024) <https://www.consilium.europa.eu/en/press/press-releases/2024/06/25/eu-opens-accession-negotiations-with-moldova/>, International ministerial meetings, 'EU opens accession negotiations with Ukraine (Press release, 25 June 2024) <https://www.consilium.europa.eu/en/press/press-releases/2024/06/25/eu-opens-accession-negotiations-with-ukraine/>.

[47] Maryna Rabinovych and Anne Pintsch, 'Ukraine's Thorny Path to the EU-From "Integration without Membership" to "Integration through War" in Maryna Rabinovych and Anne Pintsch (eds), *Ukraine's Thorny Path to the EU: From "Integration without Membership" to "Integration through War"* (Palgrave Macmillan 2025) 4.

[48] Ibid 5.

[49] Van Elsuwege (n 2) 79.

expressed their intention to join the EU. This does not, however, preclude the EU from concluding such agreements with states that are not otherwise eligible for membership but are covered by the ENP. The adoption of the EU acquis is therefore a key element of the normative framework, which is a permanent requirement and thus a condition for the participation of states in the integration but could make it difficult to talk of a DCFTA with a single content. In terms of content, the AA does not imply the extension of all elements of the internal market to the states concerned, since if a free trade area is established after the planned ten-year transitional period, the free movement of workers will continue to be ensured by purely bilateral agreements. All in all, more comprehensive regimes and deeper economic integrations have been established compared to other trade agreements of the European Union. There were primarily external, political reasons for the earlier than expected start of the accession process with Georgia, Moldova and Ukraine, but the proper implementation of the AAs with these countries could facilitate their accession to the EU, as in previous Europe Agreements.

References

- Rilka Dragneva and Kataryna Wolczuk, 'Integration and Modernisation: EU's Association Agreement with Ukraine' in Maryna Rabinovych and Anne Pintsch (eds), *Ukraine's Thorny Path to the EU: From "Integration without Membership" to "Integration through War"* (Palgrave Macmillan 2025) 43–66.
- Daniel Haitas, 'The EU-Ukraine Association Agreement, the 2016 referendum in the Netherlands and visa liberalisation' (2018) 14 Iustum Aequum Salutare, 151–161.
- Nataliya Haletska, 'Legal Aspects of EU-Ukraine Bilateral Trade Relations During the Full-Scale War: More Trade Liberalisation, but Under Conditions' in Maryna Rabinovych and Anne Pintsch (eds), *Ukraine's Thorny Path to the EU: From "Integration without Membership" to "Integration through War"* (Palgrave Macmillan 2025) 177–200.
- Bernard Hoekman, 'Deep and Comprehensive Free Trade Agreements' (2016) EUI Working Papers RSCAS 2016/29 <https://cadmus.eui.eu/handle/1814/41405>.

- Maryna Rabinovych and Anne Pintsch, 'Ukraine's Thorny Path to the EU-From "Integration without Membership" to "Integration through War"' in Maryna Rabinovych and Anne Pintsch (eds), *Ukraine's Thorny Path to the EU: From "Integration without Membership" to "Integration through War"* (Palgrave Macmillan 2025) 3–18.
- Olesia Tragniuk, 'European Union and Ukraine: Some Issues of Legal Regulation of Relations - From Partnership and Cooperation Agreement to Association Agreement -' (2016) 99 KritV, CritQ, RCrit 44–63.
- Andriy Tyushka, 'Association-Cum-Integration: the EU-Ukraine Association Agreement and Association Law as an Institution of Ukraine's European Integration' (2017) 13 Croatian Yearbook of European Law and Policy, 87–132.
- G. Van der Loo, 'The EU-Ukraine Free Trade Agreement: "Deep" and "Comprehensive"?' (2013) 2013 Law of Ukraine: Legal Journal, 44–63.
- Guillaume Van der Loo, Peter Van Elsuwege and Roman Petrov, 'The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument' (2014) EUI Working Papers LAW 2014/09 <https://cadmus.eui.eu/handle/1814/32031>.
- Peter Van Elsuwege, 'Revisiting the EU-Ukraine Association Agreement: A Crucial Instrument on the Road to Membership' in Maryna Rabinovych and Anne Pintsch (eds), *Ukraine's Thorny Path to the EU: From "Integration without Membership" to "Integration through War"* (Palgrave Macmillan 2025) 67–91.

Short biography of the author

László Knapp (JD, PhD) is associate professor at Széchenyi Istvan University, Faculty of Law and Political Sciences, Department of International and European Law (Győr, Hungary) teaching EU law and private international law related subjects. His PhD focused on the legal personality of the European Union, research interests of him involve EU public law issues and international law aspects of EU law.

Objective necessity or administrative convenience? Standards of assessing effects on trade and competition in state aid law and under Foreign Subsidies Regulation – A comparative analysis

Jakub Kociubiński*

Abstract: By examining the much-criticised standard of assessment of the effect of State aid on trade and competition and attempting to determine how this standard may apply to the Foreign Subsidies Regulation in the European Union law, and analysing specific challenges associated with handling State aid and Foreign Subsidies cases, this paper seeks to determine whether the existing interpretive approach is driven by objective limitations in control systems' capability or merely by administrative convenience. By examining the different characteristics of each of these frameworks, the question to be answered is to what extent these differences dictate varying assessment standards and what improvements can be made.

Keywords: Foreign Subsidies Regulation, State aid, Subsidisation, Protectionism, Competition

1. Introduction

European subsidy discipline, introduced in the nascent European Economic Community, is widely regarded as one of the cornerstones of the Internal Market's success. By removing the competences of Member States to decide on aid to businesses, it became possible to curb the widespread traditional European interventionism and protectionism, and to limit wasteful subsidy races.[1] In response to increasingly vocal arguments proclaiming the existence of a "regulatory gap" due to the

* LLM, PhD, DSc (dr hab. prof. UWr); Faculty of Law, Administration and Economics, University of Wrocław (Wrocław, Poland). Email: jakub.kociubinski@uwr.edu.pl. ORCID: 0000-0002-4391-7439.

The chapter has been reviewed by László Knapp.

[1] This was stated as early as the 1956 Spaak Report (Résolution adoptée par les ministres des Affaires étrangères des États membres de la CECA, doc MAE 6/55 (anexe X au doc. MAE 11/55)) and see the commentary in David Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (OUP 2010).

European Union (EU, the Union) State aid rules not being applicable to subsidies granted abroad—resulting in EU businesses being placed at a competitive disadvantage vis-à-vis heavily subsidised foreign undertakings— *Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market* (FSR) was adopted.[2] Essentially, it extends the EU State aid law's telos beyond the European Union's borders.

Although there is general consensus in economics that subsidies are, in most cases, wasteful, there is at the same time an observable trend of increased interventionism, where some States attempt—for a mix of political and economic reasons—to abuse free market rules by creating a competitive edge for their own companies and facilitating their expansion abroad through subsidies.[3] The Foreign Subsidies Regulation was designed to address the negative effects of these practices on the Internal Market. The regulation's scope comprises the following: concentrations; procurement bids; and market operations, when in all these cases, the financial contribution by a non-EU government may translate into un market like, distortive advantage.[4] This paper will focus exclusively on the latter area, concerning subsidised foreign enterprises competing with European companies in the Internal Market. Although, at the time of writing, no competition-related case under the FSR has been fully assessed and concluded, given the European Commission's (EC, the Commission) extensive experience in the field of State aid, one can reasonably expect foreign subsidies to be assessed using the same standards as State aid. This, in turn, poses a problem, because complaints about the perfunctory assessment standards of State aid's effects on trade and competition, insufficiently utilising economic expertise, have been formulated with telling regularity.[5]

[2] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1. The perceived "regulatory gap" was described in: European Commission, 'White Paper on levelling the playing field as regards foreign subsidies' COM (2020) 253 final).

[3] The issue is not new: Ian Bremmer 'State capitalism comes of age: The end of the free market?' (2009) 88(3) FA 40–41 but it has recently become more acute Ilias Alami and Adam D. Dixon, *The Spectre of State Capitalism* (OUP 2024).

[4] Regulation (EU) 2022/2560 (n 2) art 1(2).

[5] Christion Ahlborn and Claudia Berg, 'Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules' in Andrea Biondi, Piet Eeckhout and James Flynn (eds), *The Law of State Aid in the European Union*

In this context, this paper, by providing an overview of the assessment standard of aid impact on the market and the challenges associated with applying State aid law on the one hand and the FSR on the other, will attempt to answer whether the standard used in State aid—and likely carried over to the FSR—is dictated by objective necessity, or whether it is merely an administrative convenience. It will also explore whether the FSR is condemned to automatically adopt the State aid standard or whether there is room for improvement in both the FSR and State aid. To tackle the research problem, this paper takes the following line of inquiry: The analysis will begin with a synoptic overview of the role of the criteria for distortion to the market in State aid and the FSR, respectively. It will then move to discussing the existing interpretive standard for assessing distortion of trade and competition in State aid cases and assess how this standard could be utilised in FSR cases. In the next part, the unique challenges associated with the application of State aid and the FSR will be presented.

2. The Role of the Twin Criteria of Effect on Trade and Competition in State Aid Law

The criteria of distortion of trade and competition listed in Article 107(1) TFEU are formally separate; nevertheless, in practice, they are almost always analysed jointly due to being functionally interconnected[6]. They are assessed using the same methodological standard, and fulfilling one typically means the other is fulfilled as well, with only rare exceptions in case law concerning "purely local" operations—due to their small scale being incapable of affecting trade.[7]

(OUP 2004) 40-65; John Temple Lang, 'EU State Aid Rules – The Need for Substantive Reform' (2014) EStAL 440-453; Pier-Luigi Parcu, Giorgio Monti and Masimo Botta (eds), *EU State Aid Law. Emerging Trends at the National and EU Level* (Elgar 2020) 15, 54 et seq; Sebastiaan Cnossen and Georges Dictus, 'Big on big, small on small: never ending promise?: critical assessment of the commission decision practice with regard to the effect on trade criterion' (2021) 20(1) EStAL 30–40.

[6] Eg T-288/97 *Regione autonoma Friuli-Venezia Giulia* [2001] EU:T:2001:115, para 41; T-50/06 RENV *Ireland v Commission* [2012] EU:T:2012:134, para 113.

[7] Eg *Kiel-Gaarden* (SA.33149) [2015] OJ, C188; *Port of Wyk* (SA.44692) [2016] OJ C302; *Basque Language* (SA.44942) [2016] OJ C369.

The role of these twin criteria in State aid law is twofold: Initially, they are among the criteria used to determine whether a measure constitutes State aid and subsequently, they are used as a factor in the balancing test, for Article 107(3)(c) TFEU aid categories not automatically compatible with the Internal Market.[8] As the Court stated in, inter alia, T-254/00, T-270/00 & T-277/00 *Hotel Cipriani* and T-369/06 *Holland Malt*, the assessment must be carried out in the "European context".[9] This is generally interpreted as the requirement that the positive effects of aid extend beyond the granting Member State's territory. The argument ran that if aid distorts competition and trade, the positive counterweight must be a goal that is important from the EU perspective, rather than purely national.[10]

3. The Role of Market Distortion Criteria in the Foreign Subsidies Regulation

The role of the distortion to market criterion is somewhat different under the FSR in comparison to the role distortion to trade and competition plays in the State aid acquis. The wording of Article 3 FSR resembles the WTO Subsidies and Countervailing Measures Agreement because, unlike in State aid law, a measure does not have to be distortive to be regarded as a subsidy. Distortions are only subsequently taken into consideration as a condition for employing redressive measures.[11] Notably, however, unlike the WTO SCM, there is no requirement for serious injury, understood as a significant overall impairment in the position of a domestic industry.[12]

Although the concepts are linked and partially overlapping, under the WTO SCM, "injury to domestic industry" is not comparable to a distortion

[8] Aid automatically compatible with the Internal Market, granted under Article 107(2)(b) TFEU, is beyond the scope of this paper and will thus be omitted.

[9] See eg T-254/00, T-270/00 & T-277/00 *Hotel Cipriani* [2008] EU:T:2008:537, para 295; T-369/06 *Holland Malt* [2009] EU:T:2009:319, para 132.

[10] Stig Eidissen, 'Common Interest as a Condition for State Aid Compatibility' (2020)19(4) EStAL 452.

[11] Cf Article 1 & 5 WTO SCM Agreement *with* Articles 3 & 4 FSR.

[12] Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (OUP 2009) 167–168.

in competition.[13] Injury to competitors is not the same as injury to competition, which is inherent to the competitive process, where there are—bluntly speaking—winners and losers. Under the WTO SCM, domestic competitors can be regarded as suffering an injury from competing imports without necessarily implying that any distortion in the normal process of competition has been caused by a subsidy.[14]

Conversely, the lack of reference to injury in the FSR wording suggests a telos similar to State aid law, where distortion is understood as a negative effect on the generalised market rather than specific undertakings.[15] According to Article 4 FSR, subsidies will be considered distortive when they are "liable to improve the competitive position of an undertaking in the Internal Market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the Internal Market." This formula conceptually closely resembles the well-established position in State aid law, having its origins in the 730/79 *Philip Morris* judgment, according to which a distortion is caused by improving beneficiaries' situations.[16] Moreover—this is another difference of the FSR from the WTO SCM and a similarity with State aid—distortion does not have to be actual; in a similar vein to State aid, which is, in principle, based on ex ante control, it suffices for a subsidy to be liable to cause distortion.[17]

[13] "See Interpretive Note 11 and 45 of the ASCM. *Per analogiam*, WTO SCM cases define causality of injuries in e.g.: United States – Definitive Safeguard Measures on Imports of Certain Steel Products, 10.290–293, WT/DS248/R/WT/DS249/R/WT/DS251/R/WT/DS252/R/WT/DS253/R/WT/DS254/R/WT/DS258/R/WT/DS259/R/and Corr.1; United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea 7.318, WT/DS296/R; Mexico—Definitive Countervailing Measures on Olive Oil from the European Communities 7. 317 WT/DS341/R.

[14] Rubini (n 18) 167–168.

[15] See *per analogiam* State aid cases where the Court stated that damages are irrelevant: Case C-372/97 *Italy v Commission* [2004] EU:C:2004:234, para 62; Case T-195/01 and T-207/01 *Gibraltar v Commission* [2002] EU:T:2002:111, para 125.

[16] Case 730/79 *Philip Morris* [1980] EU:C:1980:209, para 11, subsequently restated in eg Case C-148/04 *Unicredito Italiano* [2005] EU:C:2005:774, para 56; Cases C-182/03 and C-217/03 *Forum 187* [2006] EU:C:2006:416, para 131.

[17] See *per analogiam* Case T-728/17 *Marinvest* [2019] EU:T:2019:325, para 80; Case C-76/15 *Vervloet* [2016] EU:C:2016:975, para 102; Case C-480/09 P *AceaElectrabel* [2010] EU:C:2010:787, para 102.

However, how balancing will be carried out remains unclear. Article 6 FSR states that distortions should be pitted "[…] against the positive effects on the development of the relevant subsidised economic activity on the Internal Market, while considering other positive effects of the foreign subsidy, such as the broader positive effects in relation to the relevant policy objectives, in particular those of the Union". Unlike State aid, however, there are no horizontal or sectoral regimes or general provisions setting out a permissible set of objectives. One cannot, therefore, repeat the manoeuvre from State aid law by counterbalancing the identified distortion with the objective of the measure, as the latter would not directly stem from specific provision of State aid law in the FSR case. Instead, the reference to "relevant policy objectives, in particular those of the Union". somewhat resembles the telos of the post-SAM and pre-Hinkley Point approach, where required common interest objectives would have to fit within the broader objectives of the EU, rather than being analysed solely with reference to specific aid compatibility criteria.[18]

One must, nevertheless, express serious doubts as to whether balancing in the manner described in Article 6 FSR can ever be successfully accomplished in practice;[19] These doubts can be reframed as the question: can there be a foreign subsidy that serves whatever national policy goals—which can be assumed, at least to some extent, to be more or less directly linked with promoting domestic industries abroad—that simultaneously distorts the Internal Market (as it would otherwise fall outside the scope of the FSR) and yet, by coincidence, as it must be only coincidence, serves the goals of the European Union significantly enough for the distortion to be overlooked?

4. Assessment Standard for Distortion of Trade and Competition in State Aid Cases

Conceptually, the heuristic framework of distortive effect in State aid—originating from the 730/79 *Philip Morris* ruling—is built on the assumption that distortions to trade and competition occur when, as a

[18] See the discussion Edissen (n 12) 452.

[19] Somewhat similar conclusion in Morris Schonberg, 'The EU Foreign Subsidies Regulation: Substantive Assessment Issues and Open Questions' (2022) 21(2) EStAL 143.

result of aid, the beneficiary's position becomes strengthened vis-à-vis its competitors.[20] The distortive effect does not have to be actual; it suffices for State aid to be "liable" or "capable" of creating it[21]. Even though there is a significant and ever-growing number of block exemptions, ex ante control of State aid remains the default mode. Accepting actual effects and real data, as the Court stated in C-298/00 P *Italy v Commission*, would favour those Member States who violated their obligation to notify aid.[22] The practical result – despite declarations to the contrary – is the distortive effect of State aid becoming an almost automatic consequence of an identified selective advantage (selectivity and advantage are separate criteria but interconnected).[23] Even though in the C-15/98 *Sardegna Lines* ruling, the Court stated that the Commission cannot merely reuse its conclusions on selectivity and advantage when addressing the issue of distortion.[24] In practice, however, the obligation to assess distortion independently is more a matter of the editorial aspect of drafting decisions than a substantive concern.[25]

The extent of reasoning required to prove distortions to trade and competition caused by State aid is not particularly high. Although, in principle, the competitive situation in a Member State should be taken as a point of reference, there is no requirement to determine the relevant market[26]. Nor is there a need to identify competitors or assess the scale and dynamics of trade flow.[27] Nevertheless, the Court stated in the T-254/00 *Hotel Cipriani* ruling that a distortive effect cannot be assumed.[28]

[20] Case 730/79 *Philip Morris* [1980] EU:C:1980:209, para 11.

[21] Eg Case C-148/04 *Unicredito Italiano* [2005] EU:C:2005:774, para 55; Case C-667/13 *Banco Privado Português* [2015] EU:C:2015:151, para 46.

[22] Case C-298/00 P *Italy v Commission* [2004] EU:C:2004:240, para 49.

[23] Alberto Heimler and Frédéric Jenny, 'The limitations of European Union control of State Aid' (2012) 28(2) OREC 347.

[24] Case C-15/98 *Sardegna Lines* [2000] EU:C:2000:570, paras 66-67.

[25] Alberto Heimler, 'European State Aid Policy in Search of a Standard: What is the Role of Economic Analysis' in Barry Hawk (ed), *International Antitrust law and Policy* (Juris 2010) 91.

[26] Case T-298/97 *Alzetta Mauro* [2000] EU:T:2000:151, para 95; Case T-55/99 *CETM* [2000] EU:T:2000:223, para 102; Case T-58/13 *Club Hotel Loutraki* [2015] EU:T:2015:1, para 88-89.

[27] Case T-160/16 *Groningen Seaports* [2018] EU:T:2018:317, para 91; Case C-654/17 P *BMW* [2019] EU:C:2019:634, para 91

[28] Case T-254/00 *Hotel Cipriani* [2008] EU:T:2008:537, paras 227-228 and eg Case T-515/13 *Spain and Others v Commission* [2015] EU:T:2015:1004, paras 198-204;

Instead, the European Commission must present factors and circumstances on which its conclusion regarding the distortive effect was based.[29] This amounts to presenting a theoretically valid mechanism that is defensible on the grounds of economics and nomothetic knowledge, illustrating how the aid may have affected the market.[30]

The above interpretative approach is often criticised, including by the author, as a certain evidentiary shortcut.[31] It results in placing entities willing to challenge the European Commission's conclusions on the back foot. If the Court itself, in eg C-290/07 P *Scott* and C-225/91 *Matra* cases, stated that it cannot replace the Commission's analysis with one of its own and that its review is limited to questions of law, then these analyses are, for all intents and purposes, unchallengeable.[32] Such a challenge would have amounted to confronting two theoretical and general analyses—the Commission's and the plaintiff's. Since the burden of proof lies with the plaintiff, there are no grounds for setting aside the Commission's analysis if it is equally theoretical and equally defensible on the grounds of economics as that of the plaintiff. If there is no need to identify the relevant market or conduct an analysis on par with those in antitrust and merger control, there is equally no feasible avenue to challenge the Commission's assessment on more technical grounds, such as a failure to apply proper methodology or to carry out specific tests.

5. The Balancing Under Foreign Subsidies Regulations - Unanswered Questions

"The most high-profile cases being investigated under the FSR at the time of writing concern the unfair competitive advantage granted to

Case T-228/99 *WestLB* [2003] EU:T:2003:57, para 295. As stated in Case 210/02 *RENV British Aggregates* [2012] EU:T:2012:110, paras 112, 144 the existence of competition holds relevance, yet it is not the sole decisive factor.

[29] Case 248/84 *Germany v Commission* [1987] EU:C:1987:437, para 18; Cases T-515/13 and T-719/13 *Lico Leasing* [2015] EU:T:2015:1004, paras 198-204.

[30] Case C-346/03 *Atzeni* [2006] EU:C:2006:130, para 74.

[31] Eg Jakub Kociubiński 'On the need of a (genuinely) more economic approach in European State aid control in times of economic uncertainty' (2023) 44(3) ECLR 112; Heimler (n 31) 91–120; Heimler and Jenny (n 29) 91.

[32] Case C-225/91 *Matra* [1993] EU:C:1993:239, para 23; Case C-290/07 P *Scott* [2010] EU:C:2010:480, para 64.

Chinese electric vehicle (EV), wind farm, and photovoltaic cell manufacturers.[33] By applying the standard for identifying distortive effects developed in State aid law to prospective FSR cases, the matter becomes straightforward. A measure will almost automatically be considered distortive.[34]

If one were to attempt to apply the balancing test set out in Article 6 FSR, regarding wind turbines, EVs, or photovoltaic cells, one might attempt to link support for these operations to environmental goals, which are currently at the top of the EU agenda.[35] The argument could be that such support translates into a wider availability of greener technologies. In the author's opinion, however, such a prima facie tenuous argument could never succeed. Linking support for specific products to prioritised goals could only succeed if those products were unavailable or available in insufficient quantities.[36] Whereas, EVs, photovoltaic cells, and wind farm equipment production are highly competitive markets with multiple players, many of whom are EU undertakings.[37] In a somewhat analogous context, the Court stated in the T-214/95 *Vlaamse Gewest* and T-217/02 *Ter Lembeek* rulings that the more competitive the market, the greater the distortion caused by State aid.[38]

Furthermore, one could convincingly argue that subsidies increasing the availability of green products for only selected undertakings would be

[33] European Commission, 'Commission launches investigation on subsidised electric cars from China' (Press release, 4 October 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4752>; European Commission, 'Commission opens two in-depth investigations under the Foreign Subsidies Regulation in the solar photovoltaic sector' (Press release, 3 April 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1803>.

[34] See per analogiam reasoning in eg Case C-690/13 *Trapeza Eurobank Ergasias* [2015] EU:C:2015:235, para 24; Case C-522/13 *Navantia* [2014] EU:C:2014:2262, para 52.

[35] Vela Almeida et al, 'The "Greening" of Empire: The European Green Deal as the EU first agenda' (2023) 105 PG 1.

[36] While admittedly tenuous, this would suggest the existence of market failure, and State aid is supposed to address such failures. This is arguably confirmed in the EC's soft law. See Karsten Mause and Friedrich Gröteke, 'The Economic Approach to European State Aid Control: A Politico-Economic Analysis' (2017) 17(3) JICT 185.

[37] If the market functions well, no aid is necessary: Case C-110/03 *Belgium v Commission* [2005] EU:C:2005:223, para 67.

[38] Case T-214/95 *Het Vlaamse Gewest* [1998] EU:T:1998:77, para 46; Case 217/02 *Ter Lembeek* [2006] EU:T:2006:361, para 178.

directly contrary to EU industrial policy, as they would result in shifting production to subsidised non-EU operators outside the EU, at the expense of European producers with higher costs. In the author's opinion, there can be no situation where placing European producers at a competitive disadvantage vis-à-vis non-EU producers can be justified on the grounds of EU objectives if the products in question were already being produced in the EU.

If, given the assumed impossibility of passing the balancing test set out in Article 6 FSR, one were to consider—purely as an intellectual exercise—abandoning the State aid standard and attempting to prove the absence of a distortive effect from foreign subsidies, then for such an endeavour to be economically sound (although it would never be non-controversial), the relevant market would need to be identified. This would include assessing existing competitors, their size and strength, analysing competitive conditions in their home countries, and so on.[39] One could then tentatively argue that the subsidies aim merely to offset structural competitive disadvantages in home countries, rather than to create an unmarketlike advantage for overseas operations, thereby levelling the playing field.[40]

In State aid law, such a line of reasoning would have been impossible. The Court has stated on multiple occasions that measures aimed solely at balancing pre-existing disadvantages do not cease to confer an unmarketlike advantage.[41] Moreover, according to the Court, State aid granted in response to other aid does not balance out distortion, but further exacerbates it.[42] However, since in the FSR, unlike in State aid law, all actors are not bound by the same rules, this interpretation may not necessarily apply.

Nevertheless, the more serious problem is that competitiveness is shaped by a multitude of factors, ranging from labour costs, taxation, and

[39] Cf Assessment standard in merger and antirust cases: Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (OUP 2014); Richard Whish and David Bailey, *Competition Law* (OUP 2021) and cases quoted therein.

[40] This is a certain analogy with WTO SCM, where a similar balancing exists: Rubini (n 18).

[41] Joined Cases 6 and 11-69 *Commission v France* [1969] EU:C:1969:68, para 21; Case C-76/09 P *Italgas* [2011] EU:C:2011:368, para 95.

[42] Case 78-76 *Steinike & Weinlig* [1977] EU:C:1977:52, para 24; Case T-214/95 *Het Vlaamse Gewest* [1998] EU:T:1998:77, para 54.

infrastructure, to access to workforce and raw materials, geography, and climate.[43] The fabled "level playing field" therefore has never existed and never will. For this reason, one must express serious doubts as to whether it would be methodologically possible to isolate structural competitive disadvantages among these numerous factors and quantify them to calculate the amount of balancing subsidies required. The absence of such a possibility is strongly supported by research.[44] Moreover, economics rarely provide absolute black-and-white data that can be directly translated into actionable legal conclusions.[45] Even within mainstream economics, there are divergent schools of thought and a range of acceptable methodologies. Therefore, even assuming full cooperation from non-EU States in furnishing data, and a level of sophistication in economic analysis at the highest echelon of what is practised in antitrust and merger control, the answer regarding the existence and extent of a distortive effect would always remain questionable.[46]

6. State Aid Law and Foreign Subsidy Regulation: Challenges with Application

To attempt to answer this paper's research question—whether the assessment standard for determining the effect of aid on trade and competition used in State aid law, and likely to be applied in FSR cases, stems from objective necessity or is merely an administrative convenience—the following issues are relevant:

The one issue concerns the mechanisms of the control system. In State aid law, where ex ante control remains the default mode—despite

[43] Jakub Kociubiński, 'The Proposed Regulation on Foreign Subsidies Distorting the Internal Market: The Way Forward or Dead End?' 6(1) CORE 56.

[44] Stuart Mestelman, 'General Equilibrium Modelling of Industries with Production Externalities' (1986) 19 CJE 522.

[45] Herbert Hovenkamp described it as "fairly abstract, sometimes unverifiable, and largely mathematically derived conclusions about human behaviour" (in David Faigman et al (eds), *Modern Scientific Evidence: The Law and Science of Expert Testimony* (West 2002) 723) which ultimately boils down to, in Scott Brewer's words, "justified belief" ('Scientific Expert testimony and Intellectual Due Process' (1998) 107 YLJ 1535, 1600).

[46] Similar sentiment in: Xueji Su, 'A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved?' (2023) 50(1) LIEI 67.

many categories of block-exempted aid—relying on actual data would favour Member States that violated their obligation to notify aid.[47] Assessment under FSR is carried out ex post, thus there is no necessity to rely solely on forecasts.

In State aid law, the interpretive standard for assessing the effect on trade and competition is driven by two opposing objectives: On the one hand, when used to identify State aid, a more expansive and sweeping interpretation—though by necessity somewhat perfunctory—is justifiable on the grounds of increasing the scope of controllable acts. Since the beginning of the European Economic Community, the European subsidy discipline was designed to prevent Member States from granting concealed aid, which is reflected in the EC's exclusive competence to determine whether a measure constitutes State aid within the meaning of Article 107(1) TFEU.[48] This is done based on the measure's observable characteristics, rather than its formal classification.[49] On the other hand, when balancing State aid's pros and cons, the interpretive standard for assessing the distortive effect should ideally produce as accurate results as possible.[50] Currently, within the State aid acquis, there is a much stronger emphasis on detecting as many aid measures as possible, which has resulted in the assessment standard being simplified to the point of becoming rudimentary. In an exclusively State aid context, this is often presented as a manageable issue since there are multiple ways in which State aid can be declared compatible with the Internal Market.

In the case of the FSR, a similar dichotomy of controllability versus balancing does not apply, since the distortive effect is solely used for balancing and potentially applying redressive measures, not for identifying measures as subsidies. As discussed earlier, the balancing test encapsulated in Article 6 FSR seems nearly impossible to pass. The logical conclusion would therefore be for the distortion standard to be as comprehensive as possible to filter out all non-distortive measures before reaching the balancing stage. However, this conclusion needs to be reconsidered in light of the following practical factors:

Unlike State aid law, where the EC enjoys full enforcement powers and can gather all necessary data, in FSR the Commission has no similar room

[47] Case C-298/00 P *Italy v Commission* [2004] EU:C:2004:240, para 49.
[48] Gerber (n 1); Hoffman and Micheau (n 16) 64; Säcker and Montag (n 9) 84–85.
[49] Case T-358/94 *Air France* [1996] EU:T:1996:194, para 56.
[50] Hoffman and Micheau (n 16) 64; Säcker and Montag (n 9) 84–85.

for manoeuvre, not only due to the lack of powers outside the EU but also the potential lack of political cooperation, upon which everything depends in the international environment. It would not be unreasonable to assume that the most subsidising States pursuing expansionist economic policies would not be politically inclined to cooperate with the Commission.[51] This presents a dilemma: On the one hand, the lack of political will to cooperate might suggest lowering the threshold, as one could argue that obfuscation indicates the existence of distortive subsidies that are being hidden. On the other hand, from a practical standpoint, identifying distortive subsidies would still require an in-depth examination of the specifics of transactions within public sectors, between various State-controlled undertakings, proxies, etc., so simply adopting a lower standard would not in itself solve the problem of political recalcitrance or even possible prevarication. This is because, as State aid law provides an analogy here, there are multiple scenarios in which a State can support its undertakings. There may be seemingly business-like transactions between State-owned companies whose conditions do not reflect market norms and thus confer an unmarketlike advantage.[52] For instance, a State may buy something from a beneficiary that it does not need, and despite the price being market-like, the transaction itself constitutes an advantage.[53] Similarly, a State can influence companies through various informal channels and compel them to invest in a beneficiary or use various other semi-independent proxies.[54] These scenarios can be multiplied. Many have

[51] This is already visible in China's reaction to FSR probes: Euractiv, 'EU rebuffs threat of Beijing probe, stands by foreign subsidies' (*Euractiv*, 1 July 2024) <https://www.euractiv.com/section/competition/news/eu-rebuffs-threat-of-beijing-probe-stands-by-foreign-subsidies-law/> accessed 12 October 2024; He Renping, 'Clarification of Function and Positioning of Competition Law and Trade Remedy Law—Focusing on the EU White Paper on Foreign Subsidies' (2021) 4 JIEL; Yuan Quan, Liu Zuozhen, 'Trends and Possible Impacts of EU's Regulation on Foreign Subsidies—A Perspective from WTO Countervailing Rules Reform' (2022) 35(4) Journal of Wenzhou University 68.

[52] Eg Case C-690/13 *Trapeza Eurobank Ergasias* [2015] EU:C:2015:235, para 20; Case T-454/13 *SNCM* [2017] EU:T:2017:134, para 84; Case T-778/16 *Apple Sales* [2020] EU:T:2020:338, para 107.

[53] Case C-442/03 P and C-471/03 P *Vizcaya v Commission* [2006] EU:C:2006:356; Case T-14/96 *BAI* [1999] EU:T:1999:12.

[54] Case T-607/17 *Volotea* [2020] EU:T:2020:180, para 92; Case T-8/18 *easyJet* [2020] EU:T:2020:182, paras 126-127.

been dealt with in the context of State aid, so their occurrence is not merely theoretical. At the same time, they are very difficult to detect, even with the EC's full investigative powers, so expecting to zero in on them in foreign States is unrealistic. Therefore, regardless of what standard of assessing distortion is applied, one must assume that many potentially distortive measures would still fly under the radar.

The objective impossibility of detecting all distortive subsidies notwithstanding, any assessment standard for market distortion must also be seen through a political lens. The repercussions, especially of adopting an expansive interpretative approach heavily reliant on inferences, would result – as is already observed in the FSR context – in accusations of hidden protectionism, with claims of protecting competitors rather than competition as a process.[55] There is a well-researched and observable mechanism where one country's move, deemed protectionist by others, tends to trigger a response that can ultimately spiral into a trade war.[56] Although it must be emphasised that political backlash from foreign actors could and likely would occur regardless of the legal standards built into the FSR, as it is driven by purely political considerations, the perceived problem for non-EU countries is the mere existence of the FSR rather than its specific provisions.[57] In this sense, unless the system is completely "toothless," no design of verba legis can safeguard against political blowback. Whether potential international repercussions are a price worth paying for having foreign

[55] The mechanism has been noted for some time: Donald Regan, 'What are Trade Agreements for? Two Conflicting Stories Told by Economists, With a Lesson for Lawyers' (2006) 9(4) JIEL 951. Statements from the China Chamber of Commerce to the EU seem to confirm this: 'First In-depth Investigation under the Foreign Subsidies Regulation Targeting CRRC Qingdao Sifang Locomotive' (16 February 2024) <http://en.ccceu.eu/2024-02/16/c_4058.htm> accessed 12 October 2024; 'CCCEU Statement on EC proposal for regulation on foreign subsidies' (6 May 2021) <http://en.ccceu.eu/PDF/CCCEUStatementonECproposalforregulationonforeignsubsidies.pdf> accessed 12 October 2024; 'Over 40 Chinese Companies Urge Government Action Against Rapidly Growing EU Protectionism' (7 June 2024) <http://en.ccceu.eu/2024-06/07/c_4322.htm> accessed 12 October 2024.

[56] Louis Kriesberg, *Constructive Conflicts: From Escalation to Resolution* (Rowman & Littlefield 2012) 160.

[57] It is argued that the mere adoption of a law is a political signal in itself Petros Mavroidis, *Trade in Goods* (OUP 2008) 20.

subsidies declared distortive under the FSR, or constitute an appropriate signal, can only be assessed in political terms.

The issue of, broadly speaking, procedural economy also merits separate brief mention. The number of State aid cases is vast. According to the most recent State Aid Scoreboard (2023), at any time, there are almost 8000 aid measures active.[58] In this context, one of the main objectives of the 2012 State Aid Modernisation (SAM) initiative has been to streamline State aid proceedings by easily clearing routine, problem-free cases and focusing only on those with the greatest distortive potential.[59] This has resulted in an increased number of aid measures being block exempted—presumed to be compatible with the Internal Market and thus not notifiable.[60] Therefore, while it would indeed be practically impossible to carry out a detailed economic assessment for the total number of State aid cases, this argument is no longer valid for the remaining notifiable measures, which currently amount to less than 10% of the total number.[61]

The required workload for FSR cases is, at the time of writing, unknown. However, one can venture an educated guess that the total number of cases would be a tiny fraction of the total State aid cases.[62] Therefore, regardless of any other factors impacting the design of the test for assessing subsidies' effect on the market discussed earlier, procedural economy is not one of them.

[58] European Commission, DG Competition, 'State aid Scoreboard 2023' (9 April 2024) <https://competition-policy.ec.europa.eu/document/download/0b2037c5-c43f-4917-b654-f48f74444015_en?filename=state_aid_scoreboard_note_2023.pdf> accessed 12 October 2024.

[59] European Commission, 'State Aid Modernisation (SAM)' (Communication) COM (2012) 209 final, especially para 25.

[60] Parcu, Monti and Botta (n 5) 53–54.

[61] European Commission, DG Competition (n 58).

[62] The number of aggressively subsidising States is relatively small. Although the name is not explicitly stated in the FSR or the accompanying White Paper, there is consensus that China is the primary target: Lena Hornkohl, 'The EU Foreign Subsidy Regulation: Why, What and How?' in Jens Hillebrand Pohl et al (eds), *Weaponising Investments* (Springer 2023).

7. Conclusions

In conclusion, it can be stated that while there are undeniable and objective limitations to assessments of effect on trade and competition both in State aid as well as under the FSR, it seems that in the former sphere, the existing interpretive standard is dictated primarily by administrative convenience. Whereas in the latter, in the FSR – somewhat paradoxically, since the standard was assumed to be carried over from State aid – a similar standard is to a large extent unavoidable.

With regard to State aid, as has been stated, the assessment standard is being criticised as perfunctory. Even though there are certain limitations stemming from the large volume of cases, most of which are problem-free, making the usage of sophisticated economic analyses on par with those employed in the upper echelon of merger and antitrust cases unfeasible, nevertheless, since the source of the criticism is the lack of sufficient methodological rigour, nothing prevents improving the matter – even when only forecasts are taken into account due to ex ante control – by, for instance, introducing a requirement to define the relevant market.

Conversely, when referring to future FSR cases, discovered limitations stemming from the lack of external enforcement and problematic detectability are largely insurmountable. Even though the FSR allows for adopting measures to "pressure" recalcitrant companies to cooperate, detecting forms of subsidies concealed as, for example, seemingly business transactions between State-owned entities and various proxies will remain an uphill battle. While all these concerns are certainly valid, in a politicised world of international trade, they mostly relate to the mere existence of the FSR rather than the particular assessment standard encapsulated within it (although this may further exacerbate political reactions). Ultimately, therefore, the question of whether the political consequences of FSR cases are a price worth paying can only be answered at the political level.

References

– Christian Ahlborn and Claudia Berg, 'Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules' in Andrea Biondi, Piet Eeckhout,

& James Flynn (eds), *The Law of State Aid in the European Union* (OUP 2004).
- Vela Almeida et al 'The "Greening" of Empire: The European Green Deal as the EU first agenda' (2023) 105 PG 1.
- Scott Brewer, 'Scientific Expert testimony and Intellectual Due Process' (1998) 107 YLJ 1535.
- Sebastiaan Cnossen and Georges Dictus, 'Big on big, small on small: never ending promise?: critical assessment of the commission decision practice with regard to the effect on trade criterion' (2021) 20(1) EStAL 30.
- Stig Eidissen, 'Common Interest as a Condition for State Aid Compatibility' (2020) 19(4) EStAL 452.
- Leigh Hancher and Antonios Bouchagiar, 'Hinkley Point C: Trimming the SAM, While Extending the Reach of Wider EU Law Infringements?' (2021) 20(4) EStAL 529.
- Alberto Heimler and Frédéric Jenny, 'The limitations of European Union control of State Aid' (2012)28(2) OREC 347.
- Alberto Heimler, 'European State Aid Policy in Search of a Standard: What is the Role of Economic Analysis' in Barry Hawk (ed), *International Antitrust law and Policy* (Juris 2010).
- Herwig Hofmann and Claire Micheau, *State Aid Law of the European Union* (OUP 2016).
- Lena Hornkohl, 'The EU Foreign Subsidy Regulation: Why, What and How?' in Jens Hillebrand Pohl et al (eds), *Weaponising Investments* (Springer 2023).
- Herbert Hovenkamp, 'Economic Experts in Antitrust cases' in David Faigman et al (eds), *Modern Scientific Evidence: The Law and Science of Expert Testimony* (West 2002).
- Marcus Klamert, Maneul Kellerbauer and Jonathan Tomkin (eds), *Commentary on the EU: Treaties and the Charter of Fundamental Rights* (OUP 2019).
- Jakub Kociubiński 'On the need of a (genuinely) more economic approach in European State aid control in times of economic uncertainty' (2023) 44(3) ECLR 112.
- Jakub Kociubiński, 'The Proposed Regulation on Foreign Subsidies Distorting the Internal Market: The Way Forward or Dead End?' 6(1) CORE 56.

- Joannis Kokkoris and Howard Shelanski, *EU Merger Control A Legal and Economic Analysis* (OUP 2014).
- Louis Kriesberg, *Constructive Conflicts: From Escalation to Resolution* (Rowman & Littlefield 2012).
- John Temple Lang, 'EU State Aid Rules – The Need for Substantive Reform' (2014) EStAL 440.
- Karsten Mause and Friedrich Gröteke, 'The Economic Approach to European State Aid Control: A Politico-Economic Analysis' (2017) 17(3) JICT 185.
- Petros Mavroidis, *Trade in Goods* (OUP 2008).
- Stuart Mestelman, 'General Equilibrium Modelling of Industries with Production Externalities'(1986) 19 CJE 522.
- Pier-Luigi Parcu, Giorgio Monti and Masimo Botta (eds), *EU State Aid Law. Emerging Trends at the National and EU Level* (Elgar 2020).
- Jose Piernas López, 'The Transformation of EU. State Aid Law . . . And Its Discontents' (2023) 60(6) CMLR 1.
- Quan Yuan and Zuozhen Liu, 'Trends and Possible Impacts of EU's Regulation on Foreign Subsidies—A Perspective from WTO Countervailing Rules Reform' (2022) 35(4) Journal of Wenzhou University 68.
- He Renping, 'Clarification of Function and Positioning of Competition Law and Trade Remedy Law—Focusing on the EU White Paper on Foreign Subsidies' (2021) 4 JIEL.
- Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (OUP 2009).
- Franz-Jürgen Säcker and Frank Montag (eds), *European State aid law: a commentary* (C.H. Beck 2016).
- Morris Schonberg, 'The EU Foreign Subsidies Regulation: Substantive Assessment Issues and Open Questions' (2022) 21(2) EStAL 143.
- Xueji Su, 'A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved?' (2023) 50(1) LIEI 67.
- Richard Whish and David Bailey, *Competition Law* (OUP 2021).

Short biography of the author

Jakub Kociubiński LLM, PhD, DSc (dr hab. prof. UWr), Faculty of Law, Administration and Economics, University of Wrocław, Poland. Research interests focus on State aid, competition law, transport policy, especially concerning air transport and Services of General Economic Interest.

EU enlargement and competition law

László Milassin*

Abstract: As candidate countries seek membership, they are required to harmonize their national laws with EU legislation, particularly competition law, which is vital for ensuring a fair and competitive internal market. This process of alignment is not merely a legal obligation; it serves as a catalyst for broader economic reforms that enhance governance and institutional capacities in these countries. The paper frames the Eu competition law by the EU enlargement process and explains the main areas of EU competition law, which should be implemented in the candidate countries.

The significance of EU competition law is underscored by its role in preventing anti-competitive practices and fostering a competitive market environment. The paper outlines how the competition acquis, which includes regulations on anti-trust and state aid control, must be integrated into the legal frameworks of candidate countries prior to their accession. This integration is crucial for enabling new members to contribute positively to the EU's economic cohesion and stability. In detailing the framework of EU competition law, the paper discusses its foundational goals: maintaining undistorted competition in the internal market, ensuring consumer welfare through optimal allocation of resources, and addressing social and environmental considerations in its application. The exclusive competence of the EU in establishing competition rules is highlighted, emphasizing the collaborative role of the European Commission and member state authorities in enforcing these laws. Furthermore, the paper delves into specific aspects of EU antitrust law, including the prohibition of cartels and the scope of application concerning undertakings across member states.

By examining these elements, the paper illustrates how EU competition law not only facilitates economic integration among member states but also promotes regional stability through enhanced cooperation. Ultimately, this study emphasizes that harmonizing competition regulations is essential for candidate countries to thrive within the EU framework, enabling them to participate effectively in a competitive internal market while adhering to shared legal standards.

Keywords: EU competition law, EU enlargement, competition acquis, competition policy

* PhD, honorary university professor, Former head of Centre of European Studies, Jean Monnet chair holder, Széchenyi István University, Faculty of Law, Department of International and European Law (Győr, Hungary). Email: milassin@sze.hu.

The chapter has been reviewed by Balázs Horváthy.

1. Introduction – Integration of new members and EU competition law

The enlargement of the European Union is shaping not only the political landscape of Europe but also its economic and legal framework. As new member states aspire to join the EU, they face the crucial task of aligning their national laws with those of the Union. Among these laws, EU competition law stands out as a fundamental pillar that underpins the functioning of the internal market.

The integration of candidate countries into the EU framework necessitates a comprehensive understanding of competition law, which aims to promote fair competition and prevent anti-competitive practices. The harmonization of competition laws is not merely a bureaucratic requirement; it is essential for fostering a competitive market environment. By adopting EU competition law, candidate countries can create a level playing field for businesses, ensuring that all market participants operate under similar rules and regulations. Moreover, the harmonization with EU competition law serves as a catalyst for broader economic reforms within candidate countries. As these countries work to meet EU law requirements, they often undertake significant regulatory changes that enhance their overall governance and institutional capacities. This process not only strengthens their legal systems but also promotes transparency and accountability in public administration – qualities that are indispensable for sustainable development.

The adoption of these laws is framed as a condition for membership, reflecting the Union's commitment to maintaining a competitive internal market. The EU competition law forms a separate chapter in the acquis, which must be incorporated by candidate countries into their national legal order by the date of their accession to the EU. The competition acquis covers both anti-trust and state aid control policies, includes rules and procedures to fight anti-competitive behaviour by companies (restrictive agreements between undertakings and abuse of dominant position), to scrutinise mergers between undertakings, and to prevent governments from granting state aid which distorts competition in the internal market. [1] This conditionality underscores the importance of

[1] See chapters of the acquis, Chapter 8: Competition Policy published by the European Commission. Available at: <https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/conditions-membership/chapters-acquis_en>.

competition law in ensuring that new members are equipped to contribute positively to the economic cohesion of the EU. Furthermore, harmonizing competition laws contributes to regional stability by fostering economic cooperation among member states.[2]

This paper highlights the significance of EU competition law in the enlargement process and the imperative for candidate countries to harmonize their competition regulations with EU standards. It lays down the framework of the competition acquis, by introducing its horizontal questions and summarizing the major requirements of the antitrust law, abuse of dominant position and merger control.

2. Significance of the EU competition law

The competition law is one of the most important parts of the European Union Law. The regulation of the competition on the Internal Market is very significant, because it ensures the dynamism and the functioning of the European Single Market.[3] Therefore the basic function of EU competition law was the elimination of actions that would tend to restore the national divisions in trade between Member States and might be such as to frustrate the most fundamental objectives of the Union. The EU Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers.[4]

The connection between the Single European market and EU competition law can be observed in the texts of Treaties (TEU and TFEU). According to which the Union shall establish an Internal Market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market

[2] Jens Hölscher, Johannes Stephan, 'Competition Policy in Central Eastern Europe in the Light of EU Accession' (2004) 42(2) Journal of Common Market Studies, 321–345; Kati Cseres, 'Accession to the EU's Competition Law Regime: A Law and Governance Approach' Amsterdam Centre for European Law and Governance Research Paper 2013-07 <https://ssrn.com/abstract=2366256>.

[3] TFEU Article 26.

[4] Joined cases 56 and 58-64 *Consten and Grundig v Commission of the EEC* [1966] EU:C:1966:41.

economy, aiming at full employment and social progress.[5] The Internal Market includes a system ensuring that competition is not distorted.[6] The European Union shall have exclusive competence in establishing of the competition rules necessary for the functioning of the Internal Market.[7] EU competition law is a complement to the Internal Market.[8]

The provisions of the EU competition law are based on the economic and monetary policy of the European Union. For the purposes the activities of the Member States and the Union shall include the adoption of an economic policy which is based on the close coordination of Member States' economic policies on the Internal Market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition. The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources.[9]

3. The main goals of the EU competition law. Scope of application

EU competition law aims at ensuring that competition is not distorted in the Internal Market. An important aspect is that the chance of natural and legal persons should be increased in the Internal Market. Particularly, the consumers should benefit from the optimal allocation of goods and services in the Single Market of the EU. Avoiding the crises threatening time to time the Member States, it would be reasonable to take into account the social aspects at the application of the exceptions of competition rules. Last but not least, by the application of the rules of competition law the environmental aspects should be taken into consideration as well.

According to Art. 3(3) TFEU the European Union has exclusive competence relating to the competition rules which are necessary for the functioning of the Internal Market. The application and enforcement of the

[5] Article 3(3) TEU.
[6] Protocol No. 27 to Art.3 TEU on the Internal Market and Competition.
[7] Article 3(1) (b) TFEU.
[8] Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press 2013).
[9] Articles 119 and 120 TFEU.

EU competition rules are the tasks of the European Commission, authorities of the Member States and the Court of Justice of the European Union.

First of all, the European Commission is responsible for carrying out of the EU competition law as an EU organ.

The Commission shall ensure the application of the principles laid down in the TFEU.[10] On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorize Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

The Commission may adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive.

The European Commission keeps under constant review all systems of aid existing in Member States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the Internal Market.[11]

In order to ensure that the EU competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.[12] Similarly, at the examination of state aids it could be necessary to involve the national authorities of the Member States in the procedure of the Commission regarding unlawful aid.[13]

The rules of TFEU on competition can be divided to two main categories: (1) regulation related to undertakings (Art. 101 and 102 TFEU) and (2) regulation related to States. Nota bene some authors take into consideration the government procurement as well as the 3rd category of

[10] Articles 101 and 102 TFEU.

[11] Articles 107 and 109 TFEU.

[12] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[13] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] OJ L83/1.

the European competition law. Between the regulations undertakings and States is Article106 TFEU, which contains provisions for enterprises to which Member States grant special or exclusive rights. Furthermore the secondary legislation of the EU provide the mergers and different specific economic sectors, e.g. postal services, energy, transportation, telecommunication, transfer of technology, professional services, insurance, agriculture.

4. Antitrust law of the European Union

4.1. The relation of cartel law of the EU and the competition laws of the Member States

When there is conflict between European antitrust law and the cartel law of Member States, European law takes precedence over the existing and future domestic laws. The rules of European competition law can be applied if undertakings from two or more Member States are involved with agreement and concerted action restricting the competition in the Internal Market. If a cartel is legitimate according to the EU law, it should be legitimate by the domestic law as well. If a cartel got an exemption from the prohibition of Art. 101(1) TFEU, the antitrust authority or court of a Member State may not cancel it.

4.2. Scope of application of the EU antitrust law

The EU cartel law covers all subject-matters of the TFEU except the production and trade of agriculture goods and some aspects of the transportation.

The territorial scope of EU cartel law is identical with the territory of the EU. This does not exclude the application of EU cartel law concerning undertakings having registered office in a 3rd country. The antitrust law could be applicable to deals outside the EU, if these have an injurious impact on a market. This is the so-called effects-based approach in the competition law. That means the cartel law provisions can be applied ex-territorially, too. The Court of Justice of the EU (CJEU) has avoided applying this approach for the time being. Essentially, the Court takes the place of enforcement of agreements on a cartel as a decisive principle.

The main subjects of the EU cartel law are the undertakings. The term "undertaking" is not determined in the TFEU. The CJEU interprets broadly it, so undertaking includes all independent economic operators, regardless of their legal form and of whether they are publicly or privately financed.

4.3. Prohibition of cartels – Rules applying to undertakings

The provisions of Art.101 TFEU can divide into three parts:

- The prohibited conduct
- Sanction of the prohibited conduct
- The possibility of exemptions from the prohibition of Art. 101 TFEU

4.3.1. Elements of prohibited conduct of the undertakings

It 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.
- Nullity of agreements and decisions:

Any agreements or decisions prohibited pursuant to Article 101 TFEU shall be automatically void. The possibility of exemptions by the European Commission are the individual exemptions, or so-called block exemptions. The control of keeping the law of prohibition of cartels by the European Commission. If the Commission finds that there has been an infringement, it shall propose appropriate measures to bring it to an end, or it may impose fines and periodic penalty payments.

First of all it is necessary (a) the coordination of certain market practices, namely agreement at least between two undertakings, (b) decisions by associations of undertakings and concerted practices which (c) may affect trade between Member States and which (d) have as their

object or effect the prevention, restriction or distortion of competition within the internal market. These practices are prohibited as incompatible with the internal market.

A restrictive agreement can be concluded horizontally,[14] or vertically.[15]

According to the interpretation of the Court of First Instance in the case Bayer agreements between undertakings are: "*A concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intentions.*"[16] That means, the agreements can be any form of agreement, whether concluded formally, orally or even by tacit acquiescence.

According to the so-called "Single Economic Unit Doctrine" Art 101 does not cover the internal relationship within an undertaking. In Article 101 prohibited action should be bilateral or multilateral but not unilateral. The above mentioned doctrine was explained by the European Court of Justice in the case Centrafarm and de Peijper.[17]

The key element for the non-application of Article 101 was the economic dependence of two – legally independent- undertakings. There is an economic dependence if the subsidiaries do not have autonomy in concluding their commercial policies in the market, but fulfil the instructions of the parent company controlling them. The Court of Justice of the European Union examines at each individual case whether this control effect exists or not. [18]

Decisions by association of undertakings could restrict the competition on the Internal Market. The decision made by an association could impose its members compulsory conduct but a simply recommendation could be prohibited as incompatible with the Internal Market if it is accepted or followed by the membership.

In this context, it is worth recall the Wouters case, in which the European Court of Justice examined the decision of the General Council

[14] Reached by undertakings on the same stage of production or commercial chain, e.g. producers, potential competitors.

[15] Reached by undertakings on different level, e.g. producers and wholesale traders, non-competitors.

[16] Case T-41/96 *Bayer v Commission* [2004] EU:T:2000:242.

[17] Case 15/74 *Centrafarm BV and Others v Sterling Drug* [1974] EU:C:1974:114.

[18] Lorenz (n 8); Robert Schütze, *European Union Law* (Cambridge University Press 2018) Second Edn.

of the Netherlands Bar which refused Mr Wouters and Mr Savelbergh, lawyers enrolled at the Amsterdam and Rotterdam Bars, authorization to enter into partnership with accountancy firms Arthur Andersen and Price Waterhouse, both established in the Netherlands.[19]

The European Court of Justice considered that the Netherlands Bar, as the governing body of a profession adopting a regulation which is binding on all its members, must be regarded as an association of undertakings for the purposes of Community law. The prohibition of such multi-disciplinary partnerships produces effects restrictive of competition on the Netherlands market in legal services. Furthermore, it means clients cannot avail themselves of one-stop-shop services, that is to say, a wide range of services offered by a single firm. Moreover, the Netherlands rules affect trade between Member States in that they apply to visiting lawyers enrolled at the Bar in another Member State, economic and commercial law more and more frequently regulates transnational transactions and, lastly, the firms of accountants looking for lawyers as partners are generally international groups present in several Member States. Nevertheless, having regard to the way in which the legal profession is envisaged in the Netherlands, where the Netherlands Bar is entrusted by the Advocatenwet (the law on the Bar) with responsibility for adopting regulations designed to ensure the proper practice of the legal profession, the essential rules adopted for that purpose are considered to be, in particular, the duty to act for clients in complete independence and in their sole interest, the duty to avoid all risk of a conflict of interests and the duty to observe strict professional secrecy. In this connection, there may be a degree of incompatibility between the 'advisory' activities carried out by a lawyer and the 'supervisory' activities carried out by an accountant. Accountants, who perform a task of certification of accounts, are not, in the Netherlands, subject to a duty of secrecy comparable to that of members of the Bar. That being so, it was reasonable for the Netherlands rules to impose binding measures, despite the effects entailed which are restrictive of competition, because those measures are necessary for the proper practice of the legal profession.

Departing from the associations and moving to the so-called concerted practice between undertakings, its establishment is necessary a real and

[19] Case C-309/99 *Wouters and Others* [2002] EU:C:2002:98.

deliberate common consent between them apart from its legal obligation.[20]

Unlike agreement this is a practical coordination between the undertakings. For instance if the petroleum refineries all together raised the price of gasoline, this is not cartel but a so-called parallel behaviour. On the other hand, when these companies exchange information relating to the prices they conduct knowingly concerted practice. Nota bene the simple fact of similar conduct does not mean that there is collusion. For example, on the oligopolistic market where there are very few competitors, the lack of price competition is a normal situation on this type of market, rather than of artificial conduct.[21]

The European Court of Justice underlined in the case Suiker Unie that not all parallel behaviour between undertakings could be identified with a concerted practice.[22] Furthermore, Article 101would not deprive economic operators of right to adapt themselves intelligently to the existing and anticipated conduct of their competitors. The lack of any direct or indirect contact, undertakings may exercise their commercial activity to the logic of the market.[23] The real problem is that concerted practices are hard to justify, especially in situations where a concerted practice is not the only plausible explanation for parallel conduct.

The EU deals with agreements which have an European relation. It is important to clarify what does it means that an agreement an inter-State, in other words European dimension has.[24] In the event that an agreement effects only the single market of a Member State will thereby not necessarily mean that Article 101 is not applicable. Although, such an agreement relates only to the marketing of products in a single Member State, it might influence intra-Union trade. A cartel which has been established only in one Member State, could effect illegitimately the trade in the EU single market, if

- it carries out export and import activities;
- its activity can potentially be cross-border one;

[20] Case 48-69 *ICI v Commission* 'Dyestuffs' [1972] EU:C:1972:70.
[21] Ibid.
[22] Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Suiker Unie and Others v Commission* [1975] EU:C:1975:174.
[23] See Schütze (n 18) 722.
[24] Joined cases 56 and 58-64 *Consten and Grundig v Commission of the EEC* [1966] EU:C:1966:41.

- the agreement on cartel could restrict the market-access of competitors of other Member States;
- this agreement and its restrictive effect on European competition should extend to the whole territory of the Member State.

It is worth to mention here the Delimitis-case as an appropriate example for the agreement having effect on intra - EU (Community) trade.

In the opinion of the European Commission not all agreements affect appreciably the intra-Union trade. There is a so called "non-appreciably-affecting-trade" (NAAT) rule, according to which (i) the aggregate market share of the parties on any relevant market within the EU affected by the agreement does not exceed 5% (de minimis). (ii) The aggregate annual Union turnover of the undertakings concerned in the products covered by the agreement does not exceed 40 million €.[25]

However, the European Commission pointed out that the assessment of appreciability depends on the circumstances of each individual case, in particular the nature of agreement and practice, the nature of products covered and the market position of undertakings concerned. Furthermore each agreement will need to be considered in the economic context in which they occur. At last, it is necessary to take into account any cumulative effects of parallel networks of similar agreements. This de minimis rule does not apply to conduct that is characterized as a hardcore restriction, even if the undertakings concerned do not reach the relevant threshold.

Under EU law, the most eminent examples on the horizontal level include agreements between competitors that fix prices, limitation of output or sales. Examples of hardcore restrictions in vertical relationships (i.e. between undertakings operating at different levels of the production or distribution chain) are resale price maintenance and certain territorial restrictions. Clauses of an agreement which contains such restrictions are also referred to as black clauses and prevent the agreement from benefiting from a block exemption. Furthermore, agreements containing black clauses can only exceptionally be exempted on the basis of an individual assessment.

[25] European Commission, Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81.

We could differentiate between the applicable clauses according to the type of agreement. The restrictions can be divided into two groups, taking into account their objects.

(i) In relation to horizontal agreements, the restrictions are the price fixing, the limitation of output or sales and the market sharing.
(ii) In relation to vertical agreements the following restrictions can be identified:

- Restricting the buyer's ability to determine the sale price;
- Restricting the territory into which, or the customers to whom the buyer might sell the products;
- Restricting sales to end users by members of a selective distribution system on the retail level;
- Restricting cross-supplies between distributors within a selective distribution system;
- Agreeing on a restriction between a supplier of components and a buyer who incorporates them.

An infringement of Article 101 TFEU may involve a decision of the European Commission imposing commitments, remedies or penalties. The combination of these decisions is possible as well.

4.3.2. Exemptions

The Article 101 (3) makes it possible the applicability of exemptions on certain conditions, namely 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 might be declared inapplicable in the case of

a) which contributes to improving the production or distribution of goods or to promoting technical or economic progress,
b) while allowing consumers a fair share of the resulting benefit, and
c) which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, furthermore

d) which does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

There are two forms of exemptions: (i) individual exemptions and (ii) block exemptions.

a) Individual exemptions

The conditions for exemption under Article 101 (3) TFEU should be examined on a case-by-case basis. Previously, the enforcement of EU competition law was highly centralized. All enforcement actions under Articles 101 and 102 TFEU were initiated by the European Commission. More recently the enforcement of EU competition law has become less centralized. In 2004, essentially in an effort to enhance enforcement capacity in the wake of EU enlargement, the involvement of Member State competition authorities was vitally reinforced by national authorities being given power to pursue infringements of EU competition law mainly on the basis of their own enforcement regimes. This combination of decentralization and enforcement autonomy raises questions how competences in the area of sanctions are distributed between EU and national law, and how this influences the costs of enforcement. The main reason of the decentralization was the fact that the European Commission was unable to manage all competition law affairs of the EU 28. A significant legal source of this decentralization is the Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102. The new element in this Regulation, individual exemptions is based on self-evaluation of the undertakings concerned. In any national or Community proceedings for the application of the EU competition law, the burden of proving an infringement of Article 101(1) or of Article 102 of the TFEU shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 101(3) of the TFEU shall bear the burden of proving that the conditions of that paragraph are fulfilled.

Of course, the European Commission plays henceforward significant role relating to the exemptions. Where the EU public interest relating to the application of EU competition law so requires, the European Commission, acting on its own initiative, may by decision find that Article

101 of the TFEU is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of the above mentioned Article are not fulfilled, or because the conditions of Article 101(3) of the TFEU are satisfied. The undertakings have the opportunity to offer commitments.

The self-assessments of the undertakings are subject to control by the European Commission, the CJEU, furthermore by the domestic competition authorities and the national tribunals.

b) Block exemptions

First, the Regulation No 19/65/EEC of 2 March of the Council made possible the application of block exemptions to certain categories of agreements and concerted practices.[26] This kind of exemptions means a wholescale and general exemption from the provisions of Article 101(1). Furthermore this is an ex lege exemption provided that they comply with any conditions of block exemptions as set out. As a matter of fact, in view of the large number of notifications had been submitted to the European Commission, it was desirable that in order to facilitate the task of the Commission it should be enabled to declare by way of regulation that the provisions of Article 101 (1) do not apply to certain categories of agreements and concerted practices.

These exemptions are formally Regulations which promote the legal security for the actors of the Internal Market. Normally, these Regulations are valid for 10 to 12 years.

The block exemptions extend to the following two fields: (i) markets or industrial branches (automotive industry, insurance, line shipping, air transport, etc.); (ii) certain types of agreements (vertical agreements, research and development agreements, agreement on specialization and technology transfer). As regards block exemption reference should be made to the Commission Regulation N°330/2010/EU on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.[27]

[26] Regulation No 19/65/EEC of 2 March of the Council on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices [1965] OJ 36/533.

[27] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

The Regulation defines the vertical agreement as an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. Essentially, everything that is not prohibited (i.e. hardcore restrictions, excluded restrictions) is allowed if:

- The market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services.
- In the case of associations: if no individual member of the association has a total annual turnover exceeding EUR 50 million.

Nota bene the above mentioned thresholds, individual exemption may be possible under Article 101 (3) TFEU, see the individual exemptions above.

The exemption provided for undertakings above shall not apply to the following obligations contained in vertical agreements, e.g.:

- Resale price fixing, namely establishing of minimum and fix price, whilst the fixing of recommended and maximum price is allowed;
- Restrictions of resales (cross-supplies between distributors, supply of components, rejection of selling at a discount, rejection of shipping, restrain of shipment, menace with breaking the contract, etc.);
- Non –compete obligations of longer than 5 years;
- Obligation on the members of selective distribution system not to sell the brands of particular competing suppliers.
- Territorial restrictions of passive/unsolicited sales.

The European Commission may withdraw the exemption, where it finds in a particular case that an agreement, to which the exemption has effects which are incompatible with Article 101(3) TFEU.

Furthermore, the competition authority of a Member State may withdraw the exemption in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption, has effects which are incompatible with Article 101(3) TFEU in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.

5. Abuse of a dominant position: Article 102 TFEU

This is the second pillar of EU competition law, which concentrates on the conduct of a single undertaking, so called "unilateral behavior".[28]

5.1. The dominant position of the undertaking or undertakings

The European Court of Justice determined the definition of dominant position in the case of Hoffmann – La Roche: The dominant position referred to in article 86 (Art. 102) of the treaty relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.[29]

5.1.1. Collective dominant position within the internal market

Obviously, the Article 102 mentions any abuse one or two undertakings of a dominant position; consequently two or more undertakings are able to create a dominant position within the Internal Market.

Important element in the Article 102 that the dominant position of one or more undertakings is itself not forbidden – only the abuse of this position. Furthermore, the Article 102 may applicable if the abusive conduct of the undertaking or undertakings is incompatible with the internal market in so far as it may affect trade between Member States. It is important to note, that Article 102 of the EC Treaty has no exemptions.

[28] Cf. with Schütze (n 18).

[29] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] EU:C:1979:36.

5.1.2. The conditions of determination of the market dominance

It depends on a lot of factors, in particularly the share of the undertakings in the relevant market. In the case AKZO (C-62/86) the European Court of Justice determined the market share which presumably may establish a dominant market position. This is 50% or more. If the share fewer than 50% may support a conclusion of dominance together with other factors such as the rate of shares of other competitors, technological and commercial advantages of the undertaking concerned (e.g. patents, know-how, copyrights, well-known brand, etc.), financial resources, marketing and distribution of products of the undertaking, furthermore other obstacles hindering the market accession, for instance environmental restrictions. An appropriate example for the market share of an undertaking having a dominant position was the case United Brands "Chiquita Banana" where the company United Brands, a distributor of bananas, had a market share of 40% in the Benelux-countries but the market share of its next competitor was only 7%.[30] If the market share of an undertaking is between 20 and 40 percent, the existence dominant position probably may not establish. If the market share of an understanding is less than 25%, the existence of dominance can be excluded.[31]

5.1.3. The relevant market

The relevant market is specified in terms of the product market, geographic market and the temporal market.

a) The product market

The definition of this market strongly depends upon the possible substitutability of the product for other product. For example, in the above mentioned case United Brands only the bananas meant the relevant product market, rather than bananas and other table fruit. The bananas cannot be substituted for orange, apple or other fruits. Namely, the

[30] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] EU:C:1978:22.

[31] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] EU:C:1979:36.

banana has characteristics (form, taste, and handling) which cannot be found in other fruits.

The substitutability of a product appears mainly in demand substitution. The question is that the consumer considers two products as substitutable by reason of the product characteristics, their price and their use as it was expressed by the European Commission in its Notice on the Definition of Relevant Market for Purposes of Union Competition Law. The Commission offers in its above mentioned Notice a so called cross-price elasticity test whether a small but important non-transitory increase in price in one product encourages the consumers to change to another product. In this case, two goods are in the same product market. The European Court of Justice applied a further aspect is called supply substitution: the extent to which a company could switch from non-competing to a competing product. The question is whether another competitor how quick can take over the supply of goods from the undertaking concerned for consumers. Does he have appropriate goods on hand to be able to substitute the wanting merchandises?

b) The geographic market

The Article 102 TFEU provides a definition concerning the geographic market: 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. The main aim of the definition is to determine those of undertakings offering the sources of supply for the buyers in a geographic market. According to the view of the European Commission the relevant geographic market is in which the goods are marketed and where the conditions of competition are enough homogeneous and can be sharply distinguished from the conditions of other geographic markets. However, the territory of a Member State should be considered as a substantial part of the Internal Market. Similarly, a bigger market segment of a Member State can be considered as a substantial part of the Internal Market, e.g. the Nord-German market of dairy products. The important airports or harbours form also a substantial part of the Internal Market, taking into account their economic significance (e.g. seaports of Hamburg or Genova).

c) The temporal market

The time period could be significant for certain products, there might be limited production time. The European Court of Justice pronounced in the case United Brands that the ripening of bananas takes place the whole agricultural year round without any season having to be taken into account.

5.2. Abuse of market dominance

As it was mentioned above in itself the dominant position of an undertaking is not prohibited. Only the abusive behaviour of undertaking is illegitimate. An abuse consists of conduct outside the limits of regular competition that reduces competition generally either in the market where dominant position was established or in a bordering market. The abusive behaviour of the undertaking in dominant position can affect the other actors on the market in two forms: exploitative abuse (e.g. imposition of unjust conditions on consumers) and exclusionary abuse (e.g. exclusion of competitors from the market).

The abusive behaviour of or more understandings of a dominant position shall be prohibited as inconsistent with the Internal Market in so far as it may affect trade between Member States of the EU. The European interstate relation is a condition sine qua non for the application of the provisions of the European competition law.

5.2.1. Exploitative abuses

The main goal the exploitative abuse is to exploit the situation of other competitors on the market, which are in dependency with one or more undertakings having a dominant position on the market, in order to obtain unfair business advantages. With other words: the undertaking in a dominant position dictates such condition that could not be done in normal competitive circumstances on the market.

a) Unfair prices and contract terms

The unfair prices are discriminatory prices, for instance different prices calculated artificially for different trading parties. The undertaking in a

dominant position is able to demand an unduly high price from other market participant exploiting its dependency. Of course it is not easy to verify the abusive behaviour of the undertaking being in a dominant position without a comprehensive and complex economic analysis. It is advisable to compare the unfairly high prices with those prices demanded by the undertaking in a dominant position from other traders not being in dependency with that undertaking.

b) The discrimination of the trading parties

The application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, means the breach of the European competition law. Typical case is when an understanding in a dominant position gives a favourable treatment to those trading partners who purchase only at this company against those trading partners who buy in at other traders as well.

c) Connecting the sale of one product to the sale of another

According to the Article 102 (2)(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 might establish an abuse of an undertaking having dominance on the Internal Market. For example, the sale of a technical product will be tied to delivery of spare parts and/or to the repairing and maintenance.

In the Hilti AG v Commission case Hilti, a producer of nail-guns, cartridges for the nail-guns and nails, has dominant position in the markets for all of the goods.[32] However, there are number of small, independent manufacturers of nails, compatible with the Hilti cartridges. The company undertook various contractual actions in order to tie the nails to the cartridges, e.g. reducing discounts cartridges when the nails are not ordered, making the sale of cartridges conditional on taking a complement of nails etc. The Commission found that this behaviour is anticompetitive and is preventing or limiting the entry of independent producers of nails, compatible with the Hilti cartridges into the market.

[32] Case T-30/89 *Hilti AG v Commission of the European Communities* [1991] EU:T:1991:70.

The decisions was upheld by the General Court and affirmed by the European Court of Justice.

In connection with the above mentioned Hilti case the European Commission laid down the following elements concerning the illegitimacy of tying: (1) the tying and tied products are two separate products; (2) the undertaking concerned is dominant in the market for the tying product; (3) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; (4) the practice in question forecloses competition.

d) Lack of innovation

The refusal of the application of modern, innovative technology could create an exploitative abuse of a dominant position on the market. The following approach of European Court of Justice in the case Merci Convenzionali Porto di Genova illustrates this behaviour.[33] According to national law the unloading of goods in Italy's ports was reserved to specifically authorize unloading undertakings, prohibiting other companies as well as the ships' crews from performing this task. In the port of Genoa, the concessionaire was Merci Convenzionali. This concessionaire refused to use modern technology in uploading ships, thereby making the unloading more time consuming and costly and furthermore thereby caused damages to the owner of an incoming ship. In its decision, the European Court of Justice concluded that Merci Convezionali had abused its dominant position on the market.

e) Limiting production

The Article 102 (2) (b) provides provision relating to the limitation of production, markets or technical development to the prejudice of consumers. This is the so-called "refusal to supply" as a generic term of that category. The undertaking in a dominant position may not restrict the volume, the distribution and technical development of production of the goods. Generally, any contracting party may reject an offer for a contract according to the principle of freedom of contract. Although, this principle

[33] Case C-179/90 *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli* [1] EU:C:1991:464.

cannot be applied if there is no alternative supply on the market concerned.

5.2.2. Exclusionary abuses

Exclusionary abuses compose all conducts that a dominant undertaking may use to hinder others, restrict their options, establish entry barriers and therefore remove or weaken the potential competition. Different example of exclusionary abuses is shortly indicated below:

a) Predatory pricing

A dominant undertaking may set a very low price for a period of time, even below average variable costs in order to squeeze a rival from the market and later to increase the prices or to discipline its competitors, to influence their behaviour.

b) Refusal to deal

A dominant firm may eliminate competitors from the downstream market and thereby prevent effective competition by refusing to supply or give competitors access to an input. This abusive conduct is used as a potential strategy for vertically integrated dominant undertakings. The European Court of Justice dealt with the refusal to supply a competitor an essential row material in the case Commercial Solvents.[34]

c) Loyalty rebates/discounts:

The loyalty rebate means that the buyer engages himself in a long-term contract to purchase goods only at the undertaking having dominance on the market. This undertaking sells the good consumer on a discount price. Although, the discounts granted by an undertaking in a dominant position may benefit consumers, they could lead to the distortion of competition. Loyalty rebate may create a suction effect by increasing the consumers'

[34] Joined cases 6 and 7-73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* [1974] EU:C:1974:18.

switching costs, restrict buyers to choose their trading partners independently and hamper potential competitors from entering the market. It is worth it to mention here the case Van den Bergh Foods.[35]

The European Court of Justice defined three categories of rebates:

- Pure quantity/volume based rebates, linked to the volume of purchase and granted in respect of each individual order (as opposed to aggregate across multiple orders) are presumptively legal.
- Exclusivity rebates were considered as per se abusive. Exclusivity rebates require customers to obtain all or most of their requirements from the dominant supplier.
- "Third category" rebates, which involve neither pure quantity nor exclusivity linked volume rebates. For "third category" rebates the assessment was a nuanced one, involving an assessment of "all the relevant circumstances".

The European Court of Justice in the Intel case swept aside these categories.[36] It noted that "not every exclusionary effect is necessarily detrimental to competition". If the defendant puts forward reasons why its scheme is not capable of having exclusionary effects, then a full market analysis is required.

6. EU merger control

The Treaty on the Functioning of the European Union does not regulate specifically the aspects of the merger control. Mergers can be established in two forms: (i) a merger between two competing undertakings on the same level (horizontal merger), (ii) a merger between two undertakings on different level (vertical merger). These two types of mergers may raise competition concerns under Article 101 and 102. The merger control of the EU basically diverges from the provisions of Article 102 and 102 TFEU. It does not punish an illegal conduct of undertakings; it pursues an "ex ante" approach with the aim of the prevention of the illegitimate behaviour.

[35] Case T-65/98 *Van den Bergh Foods Ltd v Commission of the European Communities* [2003] EU:T:2003:281.

[36] Case C-413/14 P *Intel Corp. v European Commission* [2017] EU:C:2017:632.

There is a Regulation 139/2004/EC on the control of concentrations between undertakings, the so called "Merger Regulation" (hereinafter: Regulation).[37] This legal instrument is necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the EU and to be the only instrument applicable to such concentrations.

6.1. Scope of the Regulation

This Regulation shall apply to all concentrations with an EU dimension.

6.1.1. Concentrations

a) Mergers

A concentration shall be deemed to arise where a change of control on a lasting basis results from the merger of two or more previously independent undertakings or parts of undertakings.

b) Acquisitions

A concentration shall be deemed to arise where a change of control on a lasting basis results from the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

c) Full-function joint ventures

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration.

[37] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

To the extent that the creation of a joint venture constituting a concentration has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 101(1) and (3) of the TFEU, with a view to establishing whether or not the operation is compatible with the Internal Market.

6.1.2. Union dimension

A concentration has a union dimension where:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

A concentration that does not meet the thresholds laid down above has an EU dimension where:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;
- in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
- in each of at least three Member States the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

6.2. System of prior notification and examination

According to the Merger Regulation, merger control is to be realized by the European Commission. The companies planning a merger are obliged to notify it to the European Commission which should review the notification. The so-called one-stop-shop principle is applied by European Commission. It shall have sole jurisdiction to take the decisions which is subject to review by the European Court of Justice. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

The examination procedure of the notification has two phases: (i) examination of the notification; (ii) appraisal of the notified concentration.

6.2.1. Examination of the notification

The Commission shall examine the notification as soon as it is received and it shall test the following:

- Where it concludes that the concentration notified does not fall within the scope of the Regulation, it shall record that finding by means of a decision.
- Where it finds that the concentration notified, although falling within the scope of the Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the Internal Market.

There is a time limit for initiating proceedings and for decisions: it shall be taken within 25 working days at most. Where the Commission has not taken a decision within 25 working days, the concentration shall be deemed to have been declared compatible with the Internal Market.

The finding of the European Commission might be the following:

- Where it concludes that the concentration notified does not fall within the scope of the Regulation, it shall record that finding by means of a decision.
- Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the Internal Market, it shall

decide not to oppose it because it is compatible with the Internal Market.

– Where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the Internal Market, it shall decide to initiate proceedings.

6.2.2. Appraisal of a notified concentration by the European Commission

Concentrations within the scope of the Regulation shall be appraised in accordance with the objectives of the Regulation with a view to establishing whether or not they are compatible with the common market.

The European Commission should assess whether would or would not a concentration significantly impede effective competition in the Internal Market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position? If not it shall be declared compatible with the common market. If yes it shall be declared incompatible with the common market.

There is here a time limit for initiating proceedings and for decisions as well: Commission decisions concerning notified concentrations shall be taken within not more than 90 working days of the date on which the proceedings are initiated. This period may be extended by the Commission with the agreement of the notifying parties.

Where the Commission has not taken a decision within the above mentioned time limits the concentration shall be deemed to have been declared compatible with the common market.

According to the European Commission's finding the notified concentration can be

– acceptable, that means it is compatible with the Internal Market,
– acceptable under certain conditions: the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the Internal Market,
– not acceptable, the concentration is declared incompatible with the Internal Market.

Where the Commission finds that a concentration has already been implemented and that concentration has been declared incompatible with the common market, or has been implemented in contravention of a condition attached to a decision of the Commission, the European Commission may require the undertakings to dissolve the concentration. The Commission has the right to impose fines.

7. Undertakings with a special position under national law

The aim of the rules of TFEU relating to public and privileged undertakings is that the Member State as owner of these companies may not to use them for circumvention of the EU competition law. The Article 106 TFEU regulates the applicability of EU competition law to undertakings with a special or exclusive position under the domestic law of a Member State.

Although, the European Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States but the application of the EU law shall in no way prejudice the rules in Member States governing the system of property ownership. (Article 345 TFEU)

7.1. Setting up of public undertakings

In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the TFEU. Although, the Member States are free to establish public undertakings and undertakings having exclusive rights but they should be with respect not only to the EU competition law but all other rules of EU law, too. The Article 106 (1) has direct effect. Considering the jurisdictions of European Court of Justice the conduct of privileged public undertaking is unlawful if it abuses its dominant (monopolistic) position. The next case of the European Court of Justice on the quasi monopoly of medical aid

organizations over the transport of patients by ambulance in the Land of Rheinland-Pfalz (Germany) illustrates this approach.[38]

7.2. Undertakings with special task and rights

The Article 106 (2) TFEU relates to undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the European Union. This is a sort of exceptional treatment of those undertakings having special tasks: service of public interest or monopolies of financial character. But there are not identical with the above mentioned public and privileged undertakings. There is a broad discretion of the Member States in defining the services of general economic interests, e.g. gas,-electricity,- online services, public transportation, railway. It is important that the task of these undertakings must have been entrusted by the State and must have been installed in accordance with the provisions of EU law, such as objectivity, non-discrimination and transparency. Particularly, the Article 106 (2) should be used together with other rules of EU law (direct effect). The undertaking falling under this article should be in conformity with provisions of EU concerning financial transparency.

8. Conclusion

The main reason of this paper was to highlight the importance the intersection of the EU competition law and the EU enlargement. The competition acquis plays an essential role in the integration of candidate countries into the European Union. As these nations strive for membership, they must align their national laws with the EU's competition acquis, which encompasses components such as anti-trust law, state aid control, and merger control regulations. As it was already emphasized, the

[38] Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] EU:C:2001:577.

harmonisation of the candidates is not merely a procedural obligation; it represents a significant step towards fostering a competitive market environment. Moreover, the paper underscored that EU competition law is not only about regulatory compliance but also about ensuring that new member states contribute positively to the EU's broader economic objectives. The exclusive competence of the EU in establishing competition rules is crucial for maintaining a coherent legal framework across member states, thereby preventing the re-emergence of national barriers to trade.

As it was explained in detail, the legal framework of the EU competition policy is designed to prevent anti-competitive practices that could disrupt trade between Member States and undermine the fundamental objectives of the European Union. The primary goals of EU competition law include ensuring fair competition, protecting consumer interests, and fostering an environment conducive to economic growth and innovation.

The analysis reveals the complexity of the EU competition law, encompassing various aspects such as antitrust regulations, merger control, and state aid rules. The enforcement of these laws is primarily the responsibility of the European Commission, which collaborates with national authorities to investigate and address violations. Notably, the precedence of EU law over national laws ensures a uniform application across Member States, which is essential for preserving the integrity of the Internal Market.

Furthermore, the paper highlights the significance of Articles 101 and 102 TFEU, which prohibit anti-competitive agreements and abuse of dominant positions, respectively. The provisions are crucial for preventing cartels and other forms of collusion that can distort competition. The concept of effects-based application allows EU competition law to extend its reach beyond its borders, addressing anti-competitive behaviours that may impact the EU market even if they originate outside its jurisdiction.

Overall, EU competition law serves as a regulatory mechanism but at the same time also as a catalyst for economic cooperation among Member States. The accession to this internal market and regulatory framework could bring mutual benefits: the new member states also gain from level playing field within one of the largest market of the world, but on the other hand, they also add substantially to the common objectives of the competition policy, which make the whole EU stronger in the global markets.

References

- Bill Batchelor and Sophia Real, 'A practical approach to rebates' (2018) Thomson Reuters Practical Law UK Articles w-010-9828.
- Kati Cseres, 'Accession to the EU's Competition Law Regime: A Law and Governance Approach' (2013), Amsterdam Centre for European Law and Governance Research Paper 2013-07 <https://ssrn.com/abstract=2366256>.
- Jones Day, 'Essential Facilities in the European Union: Bronner and Beyond' (2004) 10 Columbia Journal of European Law, 2–3.
- Jens Hölscher, Johannes Stephan, 'Competition Policy in Central Eastern Europe in the Light of EU Accession' (2004) 42(2) Journal of Common Market Studies, 321–345.
- Michael J. Frese, '*Sanctions in EU Competition Law: Principles and Practice*' (Hart Studies in Competition Law 2014).
- Juan Jorge Piernas Lopez, *The Concept of State Aid under EU Law* (Oxford University Press 2015).
- Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press 2013).
- András Osztovits (ed), 'Recent Developments in European and Hungarian Competition Law' in *Acta Caroliensia Conventorum Scientiarum Iuridico-Politicarum I.* (Karoli Gaspar University of the Reformed Church in Hungary 2012).
- András Osztovits (ed.), *EU-jog* (HVG Orac 2021).
- Lydia Scholz and Eduardo Cunha, 'Art. 102 TFEU – specific abusive conduct – tying and bundling' (*OnComment: Wikis der Freie Universität Berlin*, 17 June 2017) <https://wikis.fu-berlin.de/collector/pages.action?key=oncomment>.
- Robert Schütze, '*European Union Law* (Cambridge University Press 2018) 2nd Edn.
- Christa Tobler and Jacques Beglinger, *Essential EU Law in Text. Companion text to Essential EU Law in Charts* (HVG Orac 2010) 2nd „Lisbon" edn.
- Floris O. W. Vogelaar, *The EU Competition Rules – Landmark Cases of the EU Courts and the European Commission* (Europa Law Publishing 2010) 2nd edn.

Short biography of the author

László Milassin, PhD, honorary university professor, formerly associate professor, head of Centre of European Studies, and Jean Monnet chair holder at the Széchenyi István University, Faculty of Law, Department of International and European Law. He obtained his doctorate (PhD) in the 'Internet and the EU copyright law' in 2005. His research interests focus on copyright issues in the information society, alternative dispute resolution, World Trade Organization (WTO) law and UNCITRAL. Previously, he was serving as secretary at Hungary's UN-GATT mission in Geneva in the 1980s. Later, he was senior legal adviser at the 'Culture' Foreign Trade Corporation in Hungary, attorney at Boesebeck Barz & Partner in Frankfurt, Germany and subsequently he was acting as attorney in Budapest, Hungary. In the 2000s, in addition to his academic work, he returned to public administration and worked as a senior advisor in the International Law Department of the Ministry of Foreign Affairs, with the focus on UNCITRAL. He has been an active participant in UNCITRAL conferences and was elected Vice-Chairman at the thirty-fifth annual general conference in New York in 2002, on the recommendation of the Eastern European Group. In this sense, his work is a successful combination of rich practical experience and theoretical research. His research has been presented to the professional community in numerous academic publications and events.

The history and practice of transnational and territorial cooperation in the region of the Western Balkans

István József Polgár*

Abstract: The main conflicts of the twentieth century occurred mainly because of political and ideological reasons. The borders of states became real insurmountable barriers not only for enemies, but several times also for their own citizens. This character of the borders created rather the role of elements that prevented the emergence of common activities and values. The dissolution of Yugoslavia at the beginning of the 90s created seven new independent states. After the armed conflicts that followed the initial proclamation of independence in several of these countries, a period of consolidation came, along with European integration as well as cooperation and reconciliation efforts. The process of European integration seemed to be the solution in the context of widespread aspirations of the populations of these states towards EU accession.
The study aims to realize an inventory of the general trends and evolutions from the past decade, regarding the perception of the border in the Western Balkan space, but also focuses on the border cooperation activities which had an impact on transnational institution building in the process of cross-border cooperation.

Keywords: Western Balkans, cooperation, transnational, border, EU

1. Introduction & methodology

The main conflicts of the twentieth century occurred mainly because of political and ideological reasons. The borders of states became real insurmountable barriers not only for enemies, but several times also for their own citizens. This character of the borders created rather the role of elements that prevented the emergence of common activities and values. Although from a strategic point of view, strictly from the perspective of border regions, they were directly interested in developing a strategy based on cooperation with neighbouring regions. Nevertheless, the specificity of Europe is given not only by the diversity of cultural and

* PhD; associate professor, Department of International Relations and European Studies, University of Oradea (Oradea, Romania). Email: istvan.polgar@uoradea.ro.
The chapter has been reviewed by László Knapp.

historical realities, but also by the existence of numerous borders between states.

The creation of today's status quo from the European continent is the result of a long and complex process. Over the years, this process has been influenced by numerous historical, political, economic and social factors. The understanding and good management of borders and neighbourhood relations had a key role in the European construction process. The expansion of the European community has gradually changed the situation of the external borders of the EU. These changes produced socio-economic and political transformations that generated many opportunities in the field of regional development, but also created many potential problems and tensions. The new conjuncture created in an expanded Europe emphasizes the need for long-term commitments to support local and regional cross-border cooperation initiatives.

The issue of territorial and transnational cooperation in general goes beyond geographical, economic and legal approaches. If we intend to treat the phenomenon from a specific point of view, we will find ambiguities and uncertainties regarding the role of states and the functioning of some institutions in the process of territorial and transnational cooperation and partnerships.

Strong identity cleavages, which culminated in violent inter-ethnic conflicts, have profoundly marked Balkan societies. The new geopolitical realities, associated with a process of national-identity emancipation, have led to the redrawing of political maps in the Balkan space. Competition and mutual distrust marked the first two decades after the fall of communism. Slowly, these societies matured and the injuries of the past began to heal. Even though there are still many open wounds, a reconciliation process has begun at the level of public discourse, at the political level and even at the level of identity. This dialogue, nevertheless, is not obvious everywhere and by no means is it irreversible. Proof of this are the complicated realities in Bosnia and Herzegovina, and Serbia's disputes with Kosovo[1].

The process of European integration seemed to be the solution in the context of widespread aspirations of the populations of these states

[1] Mircea Brie, Islam Jusufi and Polgar Istvan, 'Is Inclusivity Necessary for Legitimacy of New Regionalism? Unpacking Open Balkan Initiative Negotiations' (2023) XXIX (Suppl. 2) Transylvanian Review (Regional and Ethnic Communities, Past and Present), 185–209.

towards EU accession. However, the process of European integration is not a simple one and requires, in addition to the EU's openness to make this integration (the numerous internal crises of the EU in the last decade, but also the need for institutional reform have slowed down or stopped the enlargement process) an integrating realignment of all identity communities within these states. Even if in the past years the process was promising, the actual situation shows that this is a highly contested and unfinished project[2]. The European Union always proclaims the idea of an open door for the Western Balkans, but at almost all times adjoined by "*not yet*". This indecision has led to deception at both the political and societal levels[3].

Some states seem resigned in this continuous antechamber. Some, like Serbia, are looking to find geopolitical alternatives to justify their policy. Thus, the Balkan space has once again become the theatre of complicated geopolitical realities involving first-rate global actors. The European Union, the U.S.A., the Russian Federation and China are developing a competition here, rather than a collaboration for smoothing out old identity conflicts. In this context, several new regional cooperation initiatives appear. These type of initiatives promises even more ambitions of some political leaders, but also provokes the opposition of some states in the region.

Methodologically, the emphasis of our analysis primarily falls on the legitimacy of this type of regional cooperation initiatives. In this regard, we use the pro and counter arguments of the states that support new initiatives but also the ones that challenge it. Last but not least, special attention is paid to the EU's perspective, in the context of its official position through the Berlin Process.

The purpose of this research is to analyse the unfolding of the negotiations regarding the operationalization of new regional cooperation initiatives. The paper proposes the following objectives:

- Carrying out a conceptual analysis, with concrete references to the realities of the Western Balkans, regarding new forms of

[2] Mircea Brie, Islam Jusufi and Polgar Istvan, 'The role of the Albanian Community in the European Inegration Process of North Macedonia' in Laura Herta and Adrian Corpădean (eds), *International Relations and Area Studies: Focus on Western Balkans* (Presa Universitară Clujeană 2021) 65.

[3] Adrian Corpădean and Laura M. Herta, 'The Dangers of Halting Enlargement prospects in the Western Balkans' (2019) 55(3) Stosunki Myedzidaronowe/International Relations, 7–9.

cooperation and regionalism
- Identifying the role of the deadlock over the uncertain prospects of EU accession for the emergence of new cooperation initiatives
- Analysis of the pro and counter arguments within the new regional cooperation initiatives

The main question is configured around the phenomena of transnational and regional cooperation: Is there any tendency towards new regionalism in the Balkan space? The other research question is: Does the new cooperation models represent another step towards European integration?

2. Context, historical elements and background to regional cooperation

The fall of communism and the disintegration of Yugoslavia have amplified the process of national emancipation and the emergence of new cleavages in the Balkans. Against the background of conflicts and the desire for socio-economic development, the societies of the new Balkan states have repositioned themselves in favour of a reconciling dialogue[4]. History has taught the Western Balkan nations to be suspicious, especially of their neighbours. Some of that suspicion has re-emerged recently considering the tensions on the Serbian and Kosovar border which are blocking the EU membership talks. The EU, with some exceptions, has fallen silent on the case several border incidents.[5] In the absence of the EU membership, the countries of the region are asked to do more for their own reforms in their own. This for the countries of the region has meant that they will need to wrap up their problems by their own. However, it is impossible for the countries of the region so much dependent on the outside world experiencing constant crises with neighbouring states to sustain their internal economic and political stabilities. Thus, the emerging foreign policy context and culture can be characterized as Hobbesian, which has a deep mistrust of the international system and

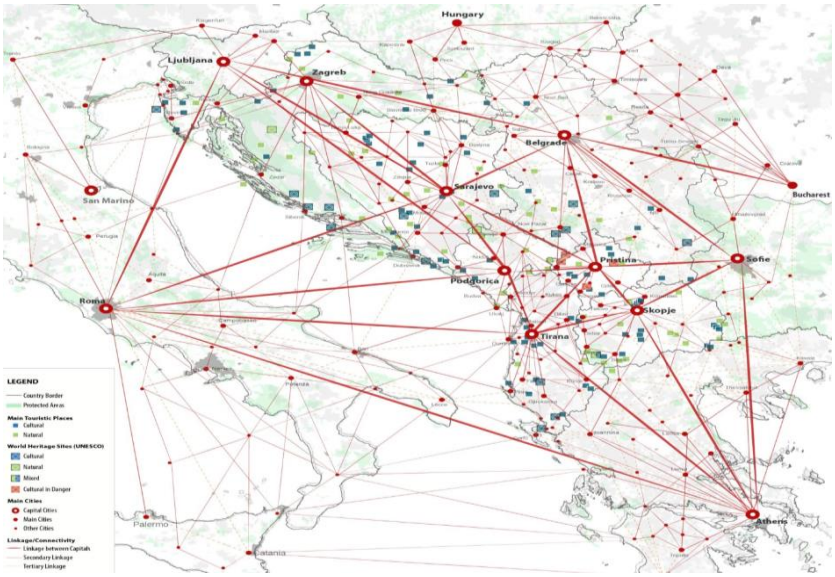
[4] Brie, Jusufi and Polgar (n 2) 65.

[5] Goce Atanasov, 'Џозеф: Недозволива толеранција на ЕУ за бугарската блокада на Македонија [Joseph: Inadmissible EU tolerance for the Bulgarian blockade of Macedonia]' *Slobodna Evropa* (5 January 2022).

relies on self-help for solving problems[6].

Still, the countries of the Western Balkan region: Albania, Bosnia and Herzegovina, Kosovo, North Macedonia, Montenegro, and Serbia share a common objective, to be part of the EU. This commonly shared goal is valid and represents the future despite the huge diversity which characterize the Balkan space.

Map. 1. Regional Cooperation – WB Visioning Territorial Futures in the context of the EU



Source: Regional Studies Association, *The Western Balkan Network on Territorial Governance – a regional initiative for cooperation*, <https://www.regionalstudies.org/news/blog-the-western-balkan-network-on-territorial-governance-a-regional-initiative-for-cooperation/>, accessed in 19.09.24

3. The idea of regional cooperation and new regionalism

The idea of regional cooperation or regionalism, seen as policy

[6] Laura M. Herta and Adrian G. Corpădean, 'The social construction of identity and belonging. Perceptions of EU in the Western Balkans' in Anna Skolimowska (ed.) *Perceptions of the European Union's identity in the International Relations* (Routledge 2019) 42–88.

cooperation in different areas among geographically proximate neighbours,[7] has been a main tendency in the foreign policies of the countries, particularly in Europe, starting from early 20th century. The initial ideas of regionalism were concerned with the ambition of achieving coherence among the countries within a specific region, as is the establishment of the European Communities in the 1950s. In this initial phase, the concept of regionalism also featured aspects of regional fragmentation and competition, arising in particular as a result of the rivalry between the West and East in the Cold War circumstances.[8]

With the end of the Cold War, the idea of regionalism gave way to what became known as New Regionalism. The end of the bipolarity fostered a more decentralized international system with the countries and the regions increasingly enjoying more freedoms in their foreign policy choices. Thus, the New Regionalism has seen regionalization in the direction of the establishment of the multipolar world,[9] as a source for achievement of Regionness[10] with the capacity of a region to articulate its interests through relevant institutions.[11]

The above external explanations of regional cooperation are particularly important in cases of conflictual or post-conflict, developing and aid dependent societies like the Western Balkans.[12] These external sources are not necessarily the only factors, however. It is also possible that the regional relations are derived from the internal economic and political dynamics of a region or of a country. In reality, the intra-regional factors probably interact and thus shape each other. All regions have their characteristic paths of economic and political development that impact

[7] Diana Bozhilova, 'Energy security and regional cooperation in South-East Europe' (2009) 11(3) Journal of Balkan and Near Eastern Studies, 293–311 <https://doi.org/10.1080/19448950903152151>.

[8] Malin Gunnarsson, 'Regionalism and Security - Two concepts in the Wind of Change' in P. Axensten and G. Weissglas (eds), *Nuclear Risks, Environmental, and Development Co-operation in the North of Europe* (CERUM 2000).

[9] Ibid.

[10] Björn Hettne and Fredrik Söderbaum, 'Theorising the Rise of Regionness' (2000) 5(3) New Poltical Economy, 457–472.

[11] Björn Hettne and Fredrik Söderbaum, 'The New Regionalism Approach' (1998) 17(3) Politeia, 6–21.

[12] Othon Anastasakis and Vesna Bojicic-Dzelilovic, *Balkan Regional Cooperation & European Integration* (The Hellenic Observatory, The European Institute, The London School of Economics and Political Science 2002).

on intra-regional politics. Regionalism can be also market-driven for instance as a reaction against challenges imposed by globalization either to protect against the competitive pressures or to benefit from them.[13] Regionalism has been further encouraged by the democratization and new attitudes towards international cooperation in which absolute rather than relative gains have come to dominate.[14] In addition, authoritarian leaders can exploit regionalism to boost their domestic regimes[15]. Thus, the New Regionalism[16] features a diverse and multi-dimensional cooperation as it has come to involve many actors, including both state and non-state actors, cooperation is exercised in the fields of both high and low politics[17] and with both external and internal incentives in play that have kept the regional cooperation alive[18].

The regional cooperation initiatives, deriving from Neo-Realism explanation that considers regions to be defined by the physical boundaries of their members, are heavily defined by relative material power of the member states and their respective national interests[19]. In

[13] James H. Mittelman, 'Rethinking the New Regionalism in the Context of Globalization' (1996) 2(2) Global Governance, 189–213. <https://doi.org/10.1163/19426720-002-02-90000004>.

Barry Buzan, Ole Wæver and Jaap de Wilde, *Security. A New Framework for Analysis* (Lynne Rienner Publishers 1998).

[14] Richard Rosecrance, 'Regionalism and the Post-Cold War Era' (1991) 46(2) International Journal, 373–93. <https://doi.org/10.1177%2F002070209104600301>.

[15] Maria J. Debre, 'The dark side of regionalism: how regional organizations help authoritarian regimes to boost survival' (2021) 28(2) Democratization, 394–413. <https://doi.org/10.1080/13510347.2020.1823970>.

[16] Marianne Kneuer, Thomas Demmelhuber, Raphael Peresson, and Tobias Zumbrägel. 'Playing the Regional Card: Why and How Authoritarian Gravity Centres Exploit Regional Organisations' (2018) 40(3) Third World Quarterly, 451–470. <https://doi.org/10.1080/01436597.2018.1474713>.

[17] Anastasakis and Bojicic-Dzelilovic (n 12); Şule Kut and N. Asli Şirin, 'The bright side of Balkan politics: Cooperation in the Balkans' (2002) 2(1) Southeast European and Black Sea Studies, 10–22. <https://doi.org/10.1080/14683850208454669>.

[18] Alexander Libman and Anastassia V Obydenkova, 'Understanding Authoritarian Regionalism' (2018) 29(4) Journal of Democracy, 151–165. <https://doi.org/10.1353/jod.2018.0070>.

[19] Alessandra Russo & Edward Stoddard, 'Why Do Authoritarian Leaders Do Regionalism? Ontological Security and Eurasian Regional Cooperation' (2018) 53(3) The International Spectator: Italian Journal of International Affairs, 20–37. <https://doi.org/10.1080/03932729.2018.1488404>.

this way, the regional cooperation boils down to a movement between the desire for domination[20], on the one hand, and of emancipation in the struggle for core and peripheral positions, on the other.[21] In these circumstances, tensions occur between large and small member states that both may try to augment regional cooperation to strengthen their economic and political positions respectively[22]. Their struggle is for relative gains and regional cooperation is pursued to establish a regional industrial base, enhance bargaining power, lock in domestic political reforms, or avoid national isolation.[23] There are also critical political attitudes towards regionalism in play that are also often shaped by the negative historical experiences.[24]

4. The history and practice of regional cooperation in the Western Balkans

The main area of EU involvement in the Western Balkans happened at the beginning of the 90s and it had a humanitarian nature. The EU adopted a regional approach towards Southeastern European countries, whereby the main aim was to achieve basic stability and prosperity for the region as a whole[25]. At that time, the region had been witnessing a chain of violent interethnic conflicts, so stability was obviously the minimum condition for further cooperation with the EU. One of the first European

[20] Edward Stoddard, 'Authoritarian Regimes in Democratic Regional Organisations? Exploring Regional Dimensions of Authoritarianism in an Increasingly Democratic West Africa' (2017) 35(4) Journal of Contemporary African Studies, 469–486. <https://doi.org/10.1080/02589001.2017.1347254>.

[21] Raimo Väyrynen, 'Post-Hegemonic and Post-Socialist Regionalism: A Comparison of East Asia and Central Europe' (2017) The Joan B. Kroc Institute for International Peace Studies, University of Notre Dame Occasional Paper no. 13.

[22] Thomas Ambrosio, 'Catching the Shanghai Spirit: How the Shanghai Cooperation Organization Promotes Authoritarian Norms in Central Asia' (2008) 60(8) Europe-Asia Studies, 1321–1344. <https://doi.org/10.1080/09668130802292143>.

[23] Clinton Shiells, 'Regional Trade Blocs: Trade Creating or Diverting' (1995) 32(1) Finance and Development, 30–31.

[24] Peter Duus, 'Remembering the Empire: Postwar Interpretations of the Greater East Asia Coprosperity Sphere' (1993) The Woodrow Wilson Center, Asia Program Occasional Paper no. 54.

[25] Kathleen Collins, 'Economic and Security Regionalism among Patrimonial Authoritarian Regimes: The Case of Central Asia' (2009) 61(2) Europe-Asia Studies, 249–281. <https://doi.org/10.1080/09668130802630854>.

initiatives to stabilize SEE was launched in 1996, called the Royaumont Process, its aim was to support the implementation of the Dayton Peace Agreements and to promote regional projects in the field of civil society, culture and human rights[26].

Later, the EU encouraged reforms in the region which were meant to serve as pre-conditions for accession into the EU[27]. It became clear that the countries from the region needed to establish bilateral and multilateral relationships among themselves, and therefore the EU attempted to launch "a regional multilateral tool". This tool was The Stability Pact. Launched in 1999, the Stability Pact was an initiative that drew together the EU and some other partner states with the aim of bringing peace, stability and economic development to the Balkans.

The backbone of the EU's strategy towards the Western Balkans after the post Kosovo crisis was the introduction of the Stabilization and Association process. This process promotes stability within the region and facilitates a closer association of the Western Balkan countries with the EU, and ultimately assists countries in their preparation for EU membership[28].

In 2000, a new EU financial instrument, the Community Assistance for Reconstruction, Development and Stabilization strategy was set up. The initiative represented a financial instrument used to manage EU assistance by the WB countries[29].

The New Regionalism has been emerging pattern all around the world, but it has been in particular evident and dominant in Europe, where existing regional cooperation institutions such as the European Communities/European Union, NATO and the CSCE/OSCE were strengthened and new regional and sub-regional arrangements emerged in various parts of Europe,[30] including in the Balkans, the southeast corner of the European continent. The Western Balkans, a geo-political term coined starting from early years of the 21st century, is a sub-region that refers to the six Balkan countries located in the western side of the Balkan peninsula that have not yet been able to achieve membership in

[26] Antonija Petričušić, *Regional Cooperation in the Western Balkans – A key to Integration into the European Union* (Institute for International Relations 2005) 4–6.
[27] Anastasakis and Bojicic-Dzelilovic (n 12) 5–7.
[28] Petričušić (n 26) 4-6.
[29] Ibid 7.
[30] Anastasakis and Bojicic-Dzelilovic (n 12) 11–15.

the European Union. These include Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia.[31]

The Western Balkans has had interesting features as regards the regional cooperation. In thirty years since the end of the Cold War, this region has seen changes in its name from Balkans to South East Europe to Western Balkans for re-branding purposes.[32] It has not been a permanent fixture; its political-territorial shape has changed, and has moved from one zone of economic and political development to another. Its shape has been dynamic, with constant reproduction[33]. The intra-regional economic integration has been limited. The trade and economic relations among the countries of the region is very minimal. For all countries of the region, trade with the EU is far more significant.[34] Thus, the Western Balkans is an emerging region rather than full-fledged regional arrangement as it has not yet fully developed its economic and political potential[35]. However, increasingly, this region has faced the new challenges in the direction of marketisation and democratization, and there are emerging regional preferences[36].

A question arises on whether Western Balkans region has a center either within itself or outside the region. Responses to this question reveal whether this region has autonomy in relation to major powers and core

[31] Mircea Brie, Islam Jusufi and Polgar Istvan, 'Is Inclusivity Necessary for Legitimacy of New Regionalism? Unpacking Open Balkan Initiative Negotiations' (2023) XXIX (Suppl. 2) Transylvanian Review (Regional and Ethnic Communities, Past and Present), 187–188.

[32] Svetlozar A. Andreev, 'Sub-regional cooperation and the expanding EU: the Balkans and the Black Sea area in a comparative perspective' (2009) 11(1) Journal of Balkan and Near Eastern Studies, 83–106 <https://doi.org/10.1080/19448950902724489>.

[33] Dimitar Bechev, 'Contested borders, contested identity: the case of regionalism in Southeast Europe' (2004) 4(1) Journal of Southeast European and Black Sea Studies, 77–96 <https://doi.org/10.1080/1468385041233132172 8>.

[34] Jim Seroka, 'Issues with regional reintegration of the Western Balkans' (2008) 10(1) Journal of Southern Europe and the Balkans, 15–29 <https://doi.org/10.1080/14613190801895912>.

[35] Tito Favaretto, 'Paving the Way for Possible Balkan Regional Cooperation' (2000) 35(1) The International Spectator: Italian Journal of International Affairs, 73–82 <https://doi.org/10.1080/03932720008458115>.

[36] Andrei Pippidi, 'Changes of Emphases: Greek Christendom, Westernization, South-Eastern Europe, and Neo-Mitteleuropa' (1999) 3(2) Balkanologie, 1–11 <https://doi.org/10.4000/balkanologie.747>.

economies or not.[37] The conventional wisdom says that this region's economies and polities are in transition to dependence on the EU. The alternative vision however, formulated by the founders of Open Balkan initiative, which is the case of this study, suggests that, while external orientation to the EU remains a dominant trend, but in the absence of the EU membership, there is a place for an alternative vision, which searches for regional self-organization and limited dependence to outside the world[38].

For more than 30 years since the end of the Cold War and disintegration of Yugoslavia in 1991, the region of Western Balkans has witnessed series of external and internal efforts to foster the regional cooperation. There is no major regional initiative that has been inherited from communist times. All the existing and functional regional cooperation initiatives are established in the post-Cold War era, and with few exceptions, have mainly been initiated with the assistance of the actors external to the region, including the EU, NATO and the US. The dominant international actors engaged in the region have been experimenting with alternative regional strategies and approaches which have not always been consistent and have had limited or unsuccessful results.[39] While the initiatives that concern the wider region of Balkans or of South East Europe include many and have longer history, such as the Regional Cooperation Council or the South East Europe Cooperation Process, the initiatives that are limited to the six Western Balkan countries are only recently established and they include the initiatives such as the Regional Youth Cooperation Office, Open Balkan, the Western Balkans Fund and few others.

Due to historical differences, the legacy of Yugoslav wars of 1990s and the ethnic cleavages, the region does not fulfil qualifications for a Security Community where there is a shared sense of belonging combined with development of common political and foreign policy practices and behavior.[40] National identities in the Western Balkans have been defined

[37] Väyrynen (n 21).

[38] Loukas Tsoukalis, 'Economic aspects of European and Balkan regional integration' (1999) 34(4) The International Spectator: Italian Journal of International Affairs, 41–48 <https://doi.org/10.1080/03932729908456887>.

[39] Anastasakis and Bojicic-Dzelilovic (n 12).

[40] Srdian Vucetic, 'The Stability Pact for South Eastern Europe as a Security Community-Building Institution' (2001) 2(2) Southeast European Politics, 109–134.

and have operated in opposition to each other.[41] The disintegration process still continues in the region. The definition of borders is still unclear. All in all, the region of the Western Balkans is diversified and composed by a variety of countries and governmental authorities. Such a regional context limits the capacity of its actors to define regional objectives and pursue regional cooperation. There has been also limited economic ability to initiate and sustain regional initiatives. Something is clear and that is the countries of the region have not been able to deal with the trans-border threats without the support of the external factors such as the EU, NATO and the US. Nevertheless, there is wide conviction that the issues and problems - economic, political and security - in the Western Balkans cannot be resolved on a national basis alone. They are regional in character and therefore require additional regional measures.[42]

Despite the fact that it is not yet a Security Community, the idea of genuine regional cooperation stems from the fact that regional cooperation is a relations-related matter. Inter-state relations are about how states relate to each other not only in terms of common objectives, but also in terms of dangers and risks. The Western Balkans is enmeshed in a web of interdependence in terms of problems and desires. In the Western Balkans we have indivisibility situation, where a set of states have major problems so interlinked that these problems cannot reasonably be resolved apart from one another. Aware of this situation, the commitment for regional cooperation has been dominant feature of the foreign policies of the countries of the region. It is seen as important point in the entire process of the European integration, as the source for stability, security, democracy and prosperity, and as an important confidence building measure among the countries.[43] The snowball effects of regional cooperation coming from the northern Europe also have enhanced the agenda for regional cooperation in the Western Balkans. The benefits seen by countries of Central Europe from initiatives such as Visegrad Group or Central European Free Trade Agreement have

[41] Maria Todorova, *Balkan Identities: Nation and Memory*. (NYU Press 2004); Bechev (n 33); Paschalis M. Kitromilides, 'Balkan Mentality: History, Legend, Imagination' (1996) 2(2) Nations and Nationalism, 163-191 <https://doi.org/10.1111/j.1354-5078.1996.00163.x>.

[42] Anastasakis and Bojicic-Dzelilovic (n 12).

[43] Ibid.

encouraged the countries of the region to follow the suit.[44] The countries thus have started to demonstrate a considerable readiness to pledge and commit substantial effort for regional cooperation. The Regional Youth Cooperation Office, Open Balkan and the Western Balkans Fund are results of this emerging trend[45].

The study has focused on assessing the major regional cooperation initiatives from the past decade, formed and proposed by states from the Western Balkans or by external actors. Some of these initiatives become an issue around which major recent discussions have been held on the regional cooperation in the Western Balkans. Two issues have mainly guided these discussions. First, discussions focused on the assumption that this type of cooperation initiatives were initiated because of the impasse in the EU membership prospects for the countries of the Western Balkans. Second concern is focusing on the legitimacy of the cooperation proposals, since not all six countries of the region are part in certain proposals.

5. Conclusions

European enlargement through the accession of the Western Balkan states to the EU has been announced as a central goal of EU policy, but also that of the six countries concerned. Accession to the European Union has proved to be, through its own mechanisms for accession negotiations, an important motivating factor with a large impact on the process of implementing structural reforms and democratizing this region. The political integration of the Western Balkans is, as in other cases, preceded by an economic, cultural, educational or security integration that all these Balkan states have been in need of. Deepening integration through opening up and conducting accession negotiations has most often also meant a process of stabilization and resolution of the political turmoil that is constantly encountered in these states. However, the integration process of these countries fell into trap as they were exposed to be crisis management countries for the EU rather than as countries to which the EU should enlarge, which damaged their integration prospects. This

[44] Dangerfield, Martin, 'Regional cooperation in the Western Balkans: Stabilisation device or integration policy?' (2004) 5(2) Perspectives on European Politics and Society, 203-241. <https://doi.org/10.1080/15705850408438886>.

[45] Brie, Jusufi and Polgár (n 31) 189.

legacy has continued to harm their European integration prospects. Once the countries are recipients of the EU crisis management, it is difficult to expect a change in the paradigm from a crisis to a member.

All the Western Balkans countries have Stabilization and Association Agreements with the EU, opening up trade and aligning the region with EU standards and also very important, provides the overall framework for the relations of the EU with these countries. The EU, through its policies and financial instruments also provides political and financial support for the countries of the region to foster good neighbour relations and build shared prosperity through regional integration. In addition to its strong political support for the Western Balkans and the Berlin Process, the EU supports regional co-operation organizations, to boost economic development, improve connectivity, and enhance security and many other benefits across the region.

This research has illustrated the importance of regional cooperation initiatives and presented how the cooperation initiatives has faced difficulties in claiming its relevance and legitimacy. This study contributes to the literature on legitimacy in regional cooperation arrangements and on the role of the legitimacy in their functioning. This study shows that the factors of legitimacy such as inclusivity is indeed challenging the legitimacy of the regional cooperation arrangements. Of course, this does not necessarily mean that other regional cooperation arrangements are better representative or inclusive, but the specific context and circumstances that surround the perception and the negotiations regarding The Berlin Process or the Open Balkan Initiative have underlined the importance of the consultation and representativity.

Regarding the research questions, drawn at the methodological part of the paper, we consider the Q1 is answered through the fact that Regional cooperation has been one of the greatest achievements of the Western Balkans. The combination of the shared objectives for the integration into Euro-Atlantic institutions and the relatively high level of regional integration is what makes the Western Balkans different, better, today from other transition regions. In terms of Q2, due to the objective needs of the Western Balkans, and since stronger regional cooperation and good neighbour relations are explicit requirements for the Western Balkans aspirant countries in their EU membership bids, we can definitely affirm that the process of regional cooperation will increase in the future. The importance of regional cooperation is underlined by two key benefits.

First, it reduces tension and strengthens regional stability, which in turn is a key precondition for sustainable development and second, it brings various practical benefits as the fulfilment of the accession criteria.

The inability of both sides, the European Union on the one hand, and the Western Balkan states on the other, to find solutions to deepen the integration process has led to the need to legitimize a new roadmap. Adapting to new realities, including new EU demands, is a difficult process and most often creates frustration and mistrust.

We can conclude that if the European integration process will not succeed, good-neighbourly relations can be damaged and threaten the European security. Not least, the European geopolitical and geostrategic interests in the WB will be reduced making place for the influence of other global powers. Absence of EU membership progress in both the reality and in the perceptions of the public has decreased the credibility and leverage of the EU in the region, laying the basis for criticism of the EU role and for emergence of alternative thinking in the minds of the Western Balkan leaders.

References

- Svetlozar A. Andreev, 'Sub-regional cooperation and the expanding EU: the Balkans and the Black Sea area in a comparative perspective' (2009) 11(1) Journal of Balkan and Near Eastern Studies, 83–106 <https://doi.org/10.1080/19448950902724489>.
- Thomas Ambrosio, 'Catching the Shanghai Spirit: How the Shanghai Cooperation Organization Promotes Authoritarian Norms in Central Asia' (2008) 60(8) Europe-Asia Studies, 1321–1344 <https://doi.org/10.1080/09668130802292143>.
- Othon Anastasakis and Vesna Bojicic-Dzelilovic, *Balkan Regional Cooperation & European Integration* (The Hellenic Observatory, The European Institute, The London School of Economics and Political Science 2002).
- Goce Atanasov, 'Џозеф: Недозволива толеранција на ЕУ за бугарската блокада на Македонија [Joseph: Inadmissible EU tolerance for the Bulgarian blockade of Macedonia]' *Slobodna Evropa* (5 January 2022).
- Dimitar Bechev, 'Contested borders, contested identity: the case

of regionalism in Southeast Europe' (2004) 4(1) Journal of Southeast European and Black Sea Studies, 77–96 <https://doi.org/10.1080/14683850412331321728>.

- Diana Bozhilova, 'Energy security and regional cooperation in South-East Europe' (2009) 11(3) Journal of Balkan and Near Eastern Studies, 293–311 <https://doi.org/10.1080/19448950903152151>.
- Mircea Brie, Islam Jusufi and Polgar Istvan, 'Is Inclusivity Necessary for Legitimacy of New Regionalism? Unpacking Open Balkan Initiative Negotiations' (2023) XXIX (Suppl. 2) Transylvanian Review (Regional and Ethnic Communities, Past and Present), 185–209.
- Mircea Brie, Islam Jusufi and Polgar Istvan, 'The role of the Albanian Community in the European Inegration Process of North Macedonia' in Laura Herta and Adrian Corpădean (eds), *International Relations and Area Studies: Focus on Western Balkans* (Presa Universitară Clujeană 2021) 65–72.
- Barry Buzan, Ole Wæver and Jaap de Wilde, *Security. A New Framework for Analysis* (Lynne Rienner Publishers 1998).
- Kathleen Collins, 'Economic and Security Regionalism among Patrimonial Authoritarian Regimes: The Case of Central Asia' (2009) 61(2) Europe-Asia Studies, 249–281 <https://doi.org/10.1080/09668130802630854>.
- Adrian Corpădea and Laura M. Herta, 'The Dangers of Halting Enlargement prospects in the Western Balkans' (2019) 55(3) Stosunki Myedzidaronowe/International Relations, 7–9.
- Maria J. Debre, 'The dark side of regionalism: how regional organizations help authoritarian regimes to boost survival' (2021) 28(2) Democratization, 394–413 <https://doi.org/10.1080/13510347.2020.1823970>.
- Peter Duus, 'Remembering the Empire: Postwar Interpretations of the Greater East Asia Coprosperity Sphere' (1993) The Woodrow Wilson Center, Asia Program Occasional Paper no. 54.
- Tito Favaretto, 'Paving the Way for Possible Balkan Regional Cooperation' (2000) 35(1) The International Spectator: Italian Journal of International Affairs, 73–82 <https://doi.org/10.1080/03932720008458115>.
- Malin Gunnarsson, 'Regionalism and Security - Two concepts in the

Wind of Change' in P. Axensten and G. Weissglas (eds), *Nuclear Risks, Environmental, and Development Co-operation in the North of Europe* (CERUM 2000).

- Laura M. Herta and Adrian G. Corpădean, 'The social construction of identity and belonging. Perceptions of EU in the Western Balkans' in Anna Skolimowska (ed.) *Perceptions of the European Union's identity in the International Relations* (Routledge 2019) 42–88.
- Björn Hettne and Fredrik Söderbaum, 'Theorising the Rise of Regionness' (2000) 5(3) New Poltical Economy, 457–472.
- Björn Hettne and Fredrik Söderbaum, 'The New Regionalism Approach' (1998) 17(3) Politeia, 6–21.
- Şule Kut and N. Asli Şirin, 'The bright side of Balkan politics: Cooperation in the Balkans' (2002) 2(1) Southeast European and Black Sea Studies, 10–22 <https://doi.org/10.1080/14683850208454669>.
- Alexander Libman and Anastassia V Obydenkova, 'Understanding Authoritarian Regionalism' (2018) 29(4) Journal of Democracy, 151–165 <https://doi.org/10.1353/jod.2018.0070>.
- Marianne Kneuer, Thomas Demmelhuber, Raphael Peresson, and Tobias Zumbrägel. 'Playing the Regional Card: Why and How Authoritarian Gravity Centres Exploit Regional Organisations' (2018) 40(3) Third World Quarterly, 451–470 <https://doi.org/10.1080/01436597.2018.1474713>.
- James H. Mittelman, 'Rethinking the New Regionalism in the Context of Globalization' (1996) 2(2) Global Governance, 1996, 189–213 <https://doi.org/10.1163/19426720-002-02-90000004>.
- Antonija Petričušić, *Regional Cooperation in the Western Balkans – A key to Integration into the European Union* (Institute for International Relations 2005) 4–6.
- Andrei Pippidi, 'Changes of Emphases: Greek Christendom, Westernization, South-Eastern Europe, and Neo-Mitteleuropa' (1999) 3(2) Balkanologie, 1–11 <https://doi.org/10.4000/balkanologie.747>.
- Richard Rosecrance, 'Regionalism and the Post-Cold War Era' (1991) 46(2) International Journal, 373–93 <https://doi.org/10.1177%2F002070209104600301>.

- Alessandra Russo & Edward Stoddard, 'Why Do Authoritarian Leaders Do Regionalism? Ontological Security and Eurasian Regional Cooperation' (2018) 53(3) The International Spectator: Italian Journal of International Affairs, 20–37 <https://doi.org/10.1080/03932729.2018.1488404>.
- Jim Seroka, 'Issues with regional reintegration of the Western Balkans' (2008) 10(1) Journal of Southern Europe and the Balkans, 15–29 <https://doi.org/10.1080/14613190801895912>.
- Clinton Shiells, 'Regional Trade Blocs: Trade Creating or Diverting' (1995) 32(1) Finance and Development, 30–31.
- Edward Stoddard, 'Authoritarian Regimes in Democratic Regional Organisations? Exploring Regional Dimensions of Authoritarianism in an Increasingly Democratic West Africa' (2017) 35(4) Journal of Contemporary African Studies, 469–486 <https://doi.org/10.1080/02589001.2017.1347254>.
- Loukas Tsoukalis, 'Economic aspects of European and Balkan regional integration' (1999) 34(4) The International Spectator: Italian Journal of International Affairs, 41–48 <https://doi.org/10.1080/03932729908456887>.
- Raimo Väyrynen, 'Post-Hegemonic and Post-Socialist Regionalism: A Comparison of East Asia and Central Europe' (1997) The Joan B. Kroc Institute for International Peace Studies, University of Notre Dame Occasional Paper no. 13.
- Srdian Vucetic, 'The Stability Pact for South Eastern Europe as a Security Community-Building Institution' (2001) 2(2) Southeast European Politics, 109–134.

Short biography of the author

Polgár István József, Assoc. Prof., PhD at the Department of International Relations and European Studies, University of Oradea, str. Universității no. 1, Oradea, Romania. He has an intensive scientific and research activity, which includes 6 books, more than 50 articles and studies in international and national journals. His research interests are the minority-majority relations in the European space, ethnical and religious diversity and integration process in the European space.

The proposal on the new regulation on the screening of foreign direct investments into the European Union

Zoltan Vig*

Abstract: Foreign direct investments play an important role in the economic landscape of the European Union, driving growth, innovation, and competitiveness. At the same time, it is important to have a complex mechanism for the protection of all parties involved. The EU's open market policy has historically attracted significant foreign direct investments, strengthening various sectors from technology to infrastructure and manufacturing. However, the evolving global context, marked by rising geopolitical tensions and rapid technological advancements is in need for a reassessment of how such investments are screened to safeguard the EU's strategic interests. There are several reasons for the revision of the existing screening regulation (Regulation (EU) 2019/452): there are new challenges, like the pandemics, the war in Ukraine, the energy crisis and the strengthening of protectionism globally.
The draft of the proposed new Regulation in the field signifies a major advancement toward creating a more unified investment screening system within the EU. Its aim is to improve both the security and attractiveness of the EU as an investment destination by establishing a more harmonized approach to foreign direct investment screening. The main novel features of the proposal are: requiring all member states to have a screening mechanism in place (and harmonizing these rules), extending EU screening to investments by EU investors that are ultimately controlled by individuals or businesses from a non-EU countries, and identifying the sectors in which all member states must screen foreign investments.

Keywords: FDI, screening, EU

1. Introduction

The world economy is currently undergoing transformation: national economies are becoming increasingly anti-globalist as well as isolationist. Earlier achievements of multilateralism and market liberalization seem to

* PhD, SJD, LLM; University of Technology and Economics Budapest, Faculty of Economic and Social Sciences, Department of Business Law (Budapest, Hungary). Email: jogasz@gmail.com.
The chapter has been reviewed by Balázs Horváthy.

disappear bit by bit. Therefore, a slow process of isolation and strengthening protectionism can be observed in global trade and investment as well.[1]

As foreign direct investments play an important role in the economic landscape of the European Union, driving growth, innovation, and competitiveness, it is important to have a complex mechanism for the protection of all the parties involved. The EU's open market policy has historically attracted significant foreign direct investments, strengthening various sectors from technology to infrastructure and manufacturing. However, the evolving global context, marked by rising geopolitical tensions and rapid technological advancements is in need for a reassessment of how such investments are screened to safeguard the EU's strategic interests.[2] There are several reasons for the revision of the existing screening regulation:[3] there are new challenges, like the pandemics, the war in Ukraine, the energy crisis. In addition, another reason for the strengthening the regulation at the EU level might be that in the case of large member states with significant market players, there is a strong interest in the protection of the market (while smaller states usually have the interest to attract foreign direct investment).[4] Furthermore, as already mentioned, the global competition is intensifying, China is unwilling to give up the state subsidy system and to provide reciprocity to European investors, the United States and some other countries are getting increasingly protectionist[5], and Russia, on the other

[1] Debashis Chakraborty et al, 'The Rise and Fall of Free Trade Agreements: Analytical Evidence from India's Practice' (2022) 17 JL Econ & Pol'y 54; Ylli Dautaj, 'Between Backlash and the Re-Emerging "Calvo Doctrine": Investor-State Dispute Settlement in an Era of Socialism, Protectionism, and Nationalism' (2021) 41 Nw J Int'l L & Bus 294.

[2] It should be mentioned that the EU has not been strict at all in this regard. In 2020, its OECD FDI Restrictiveness Indicator was 5, and compared to China and the USA, the EU still has the fewest restrictions in this area.

[3] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79I/1.

[4] However, it is also true that countries that are major investors abroad may be concerned about reciprocity. See: Najib Zamani, 'A Legal Comparative Approach towards the Screening of Outbound FDI. What Can the EU and Its Member States Learn from the US National Critical, Capabilities and Defense Act Proposal?' (2022) 15 Erasmus L Rev, 301.

[5] Gábor Hajdu, 'Developments in EU-USA Trade Relations during the Trump Era' (2020) 8(2) Central and Eastern European Legal Studies, 249.

hand, is exploiting Europe's energy dependence.[6] Thus, the concept of national security has broadened to include issues that were not previously considered strategic.[7]

This article analyses the draft of the proposed Regulation on the screening of foreign investments in the Union repealing the existing one, examines its key provisions, the rationale behind their introduction, and their potential impact on the EU's economic security. By exploring these proposed measures and strategic objectives of the Regulation, the article aims to provide a comprehensive understanding of how the EU plans to navigate the complex relationship between maintaining an open investment environment and ensuring the protection of its strategic interests.

2. Background

The foundation of the EU's approach to foreign direct investment screening was laid with the introduction of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (hereinafter: Regulation). This Regulation established a framework allowing member states to screen foreign investments and coordinate with the European Commission. Its primary goal was to protect security and public order across the EU by identifying and addressing potential risks posed by foreign investments, particularly in critical infrastructure and technologies. This framework marked a significant step towards a more unified and secure approach to managing FDI within the EU. Cecilia Malmström clearly articulated the two fundamental goals of the Regulation: *"In an increasingly interconnected and interdependent world, we need means to protect our collective security while keeping Europe open for business."*[8]

[6] Sarah Bauerle Danzman and Sophie Meunier, 'Naïve no more: Foreign direct investment screening in the European Union' (2023) 14(Suppl. 3) Global Policy 40.

[7] Lorenzo Bencivelli et al, 'The rise of foreign investment screening in advanced economies' (*CEPR*, 16 November 2023) <https://cepr.org/voxeu/columns/rise-foreign-investment-screening-advanced-economies>.

[8] EU Trade Commissioner Cecilia Malmström, see European Commission, Commission welcomes agreement on foreign investment screening framework' (Press release, 20

The Regulation came into effect in April 2019, and efforts were focused on implementing the necessary operational structures for its full application, starting from October 11, 2020. According to the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation and enforcement of EU trade agreements, there is a noticeable increase in the formal screening of cases from the time of implementation of the Regulation.[9]

Despite improvement made with Regulation (EU) 2019/452, several shortcomings have become apparent. One of the most critical issues is that not all member states dispose with a screening mechanism.[10] As of recent reviews, six member states still lack a screening mechanism, creating vulnerabilities in the EU's collective security.[11] Additionally,

November 2018) <https://ec.europa.eu/commission/presscorner/detail/en/ip_18_6467>.

[9] Approximately 55% of all authorization requests and ex officio cases were formally reviewed, a significant rise from the 29% recorded in the second annual report for 2021 and the 20% in the first annual report for 2020. Conversely, around 45% of the applications were either deemed ineligible or did not require formal screening, compared to 71% in the previous report. The distribution of authorization requests varies among EU Member States. However, there has been a shift in screening patterns, with the top four Member States accounting for 66% of all authorization requests in 2022, down from 70% in 2021 and nearly 87% in the first report. Among the formally screened cases in 2022, the majority (86%) were approved without conditions. In contrast, 9% of the decisions involved approvals with conditions or mitigating measures, a decrease from 23% in 2021. In these instances, national screening authorities negotiated or imposed specific actions, assurances, or commitments from investors prior to approving the foreign direct investment. Ultimately, national authorities blocked transactions in 1% of the decided cases, while 4% of the transactions were withdrawn by the parties involved. Source: European Commission, 'Strategic Trade & Investment Controls Report on the screening of Foreign Direct Investments into the Union' (Publications Office of the European Union 2023) 17-18 <https://op.europa.eu/en/publication-detail/-/publication/7d6c9f02-72e2-11ee-9220-01aa75ed71a1/language-en>.

[10] European Court of Auditors, 'Screening foreign direct investments in the EU – First steps taken, but significant limitations remain in addressing security and public-order risks effectively' (Special report 27/2023) 8 <https://www.eca.europa.eu/en/publications?ref=SR-2023-27>.

[11] European Parliament, 'Revision of the EU Foreign Direct Investment Screening Regulation' (2024) Briefing, 9 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762844/EPRS_BRI(2024)762844_EN.pdf> accessed 18 November 2024.

differences in the scope and definitions of important sectors and key concepts have led to inconsistent protection measures. These discrepancies not only reduce the effectiveness of the existing framework but also create blind spots that foreign investors could exploit. The increasing complexity of global geopolitical dynamics and the fast pace of technological advancements further show the need for a more substantial approach to FDI screening.[12]

In response to these challenges, the European Commission and the High Representative introduced the European Economic Security Strategy on June 20, 2023.[13] This strategy provides a comprehensive framework for addressing the potential risks to the EU's economic security. It identifies four primary risk categories: supply chains, the physical and cyber-security of critical infrastructure, technology security and leakage, and the weaponization of economic dependencies. The strategy is structured around three pillars: promoting the EU's competitiveness, protecting its economic security through various policies and tools, and strengthening partnerships with countries that share the EU's economic security interests. This strategic approach aims to ensure that the EU remains an attractive destination for business and investment while safeguarding its strategic interests against emerging threats.

However, for the proper functioning of the internal market screening mechanism based on harmonized standards is needed in all member states.[14] The problem is that there are different mechanisms in different Member States and this carries a risk for the whole of EU undermining the internal market by creating an uneven playing field.[15] The screening of foreign investments in the EU is definitely a transnational issue with cross-border implications that need to be addressed at Union level.[16] Experience from implementing the Regulation indicates that Member

[12] European Court of Auditors (n 10) 8.

[13] European Commission, 'Memo on European Economic Security' (Press release, 24 January 2024) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_24_364>.

[14] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council' COM (2024) 23 final (hereinafter referred to as: Proposal), 10.

[15] Proposal 11; Danzman and Meunier (n 6).

[16] Proposal 12; Stefano Riela, 'The EU's foreign direct investment screening mechanism two years after implementation' (2023) 22(1) European View 57.

States are unlikely to harmonize their standards and procedures for screening foreign investments based on security and public order concerns. Additionally, they are unlikely to strengthen the comprehensive EU-wide cooperation framework for exchanging information among themselves and with the Commission.[17]

The Proposal signifies a major advancement toward creating a more unified investment screening system within the EU. Its aim is to improve both the security and attractiveness of the EU as an investment destination by establishing a more harmonized approach to foreign direct investment screening. However, to fully realize these objectives, further efforts are needed to enhance and align national screening regimes and clarify the framework's approach to critical assets.[18]

3. Key provisions of the proposed Regulation

The main novel features of the proposed Regulation are: (1) requiring all member states to have a screening mechanism in place (and harmonizing these rules), (2) extending EU screening to investments by EU investors that are ultimately controlled by individuals or businesses from a non-EU country, and (3) identifying the sectors in which all Member States must screen foreign investments.

3.1. Requiring all Member States to have a screening mechanism in place

The proposed Regulation mandates that all EU Member States establish a screening mechanism for foreign direct investments.[19] This requirement addresses the gaps left by the current Regulation, ensuring a unified approach across the EU to identify and manage potential security

[17] Proposal 12.

[18] American Chamber of Commerce to the European Union, 'Consultation Response: Proposal for a new regulation on the screening of foreign investments' (2024) <https://www.amchameu.eu/system/files/position_papers/amcham_eu_consultation_response_foreign_investment_screening_regulation_20240405.pdf>.

[19] Chapter 2 of the proposed Regulation outlines the framework for national screening mechanisms. Article 3 mandates that each Member State establish and maintain a screening mechanism in accordance with the new regulations and inform the European Commission of its implementation. The Commission is then responsible for publishing a list of these national screening mechanisms based on the provided notifications.

threats posed by FDIs. This requirement is not just a bureaucratic adjustment, but an essential element designed to safeguard the EU's collective interests. By introducing and enforcing a mandatory framework, the Regulation aims to prevent any Member State from becoming a weak link in the EU's collective economic security.

Currently, some Member States possess sophisticated review systems, while others have none. This unevenness creates significant security gaps, allowing potentially risky foreign investments to flow into the Union through less aware jurisdictions. By mandating that every Member State implement a screening mechanism, the Regulation aims to close these loopholes and ensure a uniform level of protection across the EU.[20]

Additional issue is that there are significant variations among Member States in terms of the scope, thresholds, and criteria used to determine whether an investment may negatively impact security or public order, thus the screening processes also differ.[21]

The necessity for uniformity cannot be overstated. Important sectors, including those involving advanced technologies, infrastructure, and essential services, are increasingly targeted by foreign investors from countries that might have strategic motives contrary to the EU's interests. A fragmented approach leaves parts of the EU vulnerable, undermining the security and economic integrity of the entire Union. By requiring all Member States to have a screening mechanism, the proposed Regulation ensures that every potential entry point for FDI is scrutinized under a standardized framework. It is important to understand that in a single market, investment made in one Member State might impact other Members, as well as the whole Union.[22]

Article 4 of the Proposal details the specific requirements for these national mechanisms. They must cover at least two categories of investments: (i) investments in EU companies involved in projects or programs of EU interest, as listed in Annex I of the regulation; and (ii) investments in EU companies operating in sectors deemed critical for the security or public order interests of the EU, as outlined in Annex II. These

[20] Zoltan Vig, 'The Regulation of Screening of Foreign Direct Investments in the European Union' (2020) 10(4) Pro Futuro, 11–18.

[21] Proposal 19; Bencivelli et al (n 7).

[22] Proposal 12; Riela (n 16).

are referred to as "notifiable investments". The article also includes various provisions to ensure the effective functioning of these screening mechanisms.[23]

This new mandate also enhances the EU's ability to act cohesively and decisively in response to foreign investment threats.[24] Under the current regime, the differences in national screening practices can lead to inconsistent assessments and actions, weakening the overall security of the EU. Therefore, the preamble of the Proposal states the following: *"To ensure consistent and predictable screening processes, […] features should at least include the scope of the transactions to be subject to an authorisation requirement, deadlines for the screening and the possibility for undertakings concerned by the screening decision […]".*[25]

The harmonization of screening mechanisms also serves to improve trust among Member States. In an interconnected single market, the security of one Member State affects the security of all. By ensuring that all countries adhere to minimum screening standards, the Proposal promotes a sense of shared responsibility and collective security. Furthermore, the Proposal notes that the "*experience gained with the implementation of the Regulation shows that it is unlikely that Member States would converge on aligned standards and procedures on how to screen foreign investments on grounds of security and public order or reinforce the systematic Union-wide cooperation mechanism to exchange information with each other and the Commission."*[26] However, the proposed regulation would leave the final decision on any investment with the Member State where the transaction is planned or is completed.

Moreover, the requirement for a screening mechanism is not just about defense; it is also about maintaining the EU's openness and attractiveness as a destination for investment. By establishing clear, transparent, and uniform screening processes, the EU can reassure legitimate investors that their investments will be evaluated fairly and consistently. This predictability is crucial for maintaining investor confidence and ensuring that the EU continues to attract the kind of FDI that drives growth and innovation.

[23] Proposal 16.
[24] Danzman and Meunier (n 6).
[25] Ibid 22.
[26] Ibid 12.

3.2. Extending EU screening to investments by EU investors that are ultimately controlled by individuals or businesses from a non-EU country

The current Regulation focuses on direct investments coming from non-EU countries, leaving a gap when it comes to investments that are channelled through EU-based entities controlled by foreign actors. This loophole has become more apparent, especially in strategic areas like technology, energy, and infrastructure. A significant new development in this area is the expansion of the EU's screening process to include investments made by EU-based investors who are controlled by companies or individuals from outside the EU.

The decision to extend FDI screening to include EU investors controlled by non-EU entities comes from concerns that foreign powers might use complex corporate structures to hide their influence. These structures can disguise the true source of investments, allowing non-EU entities to gain control over important sectors in the EU under the appearance of being EU-based. Such investments could threaten national security, public safety, and the stability of the EU's market.[27]

The new rules aim to close this gap by introducing several key provisions. First, they require that any investment by an EU-based entity that is ultimately controlled by non-EU investors be scanned just as closely as direct investments from outside the EU.[28] This applies even if the investment seems to be purely domestic or within the EU but is actually under the control of non-EU entities. At the same time, the notion of national security has expanded beyond the defence industry to assets previously not deemed strategic.[29] For EU investors, especially those in sensitive or important sectors, this means more responsibility in terms of due diligence and reporting. They must be clear about their ownership structures and be prepared for more thorough checks from national and EU authorities.

The concern about indirect ownership also arose in a Hungarian case: in 2021 Hungary's Interior Minister blocked Vienna Insurance Group AG's

[27] European Commission, 'Joint Communication to The European Parliament, The European Council and The Council on "European Economic Security Strategy"' (Communication) JOIN (2023) 20 final.

[28] Proposal 3–5.

[29] Bencivelli et al (n 7).

purchase of Aegon Group's assets, citing national interests.[30] The European Commission found this veto violated EU Merger Regulation and required Hungary to reverse its decision because: the European Commission has sole authority over EU-wide mergers, with national measures allowed only for specific interests and must be approved by the European Commission. At the same time, the veto did not clearly protect fundamental interests, considering both companies were already established in Hungary. Hungary also did not properly inform the European Commission about the veto and the veto was deemed restrictive without proper justification. The Budapest Capital Regional Court has asked the European Court of Justice to review Hungary's veto on a raw material extraction acquisition. The Minister's block was based on concerns about indirect Bermudan ownership and supply security during the pandemic. The European Court of Justice was asked to determine whether Hungary's FDI laws align with EU regulations on public interest, notification, and transaction blocking; if the European Commission's approval of a merger precludes national vetoes. The Decision concluded that Hungary violated Article 21 of Regulation (EC) No 139/2004 by blocking Vienna Insurance Group AG's acquisition of AEGON Hungary on April 6, 2021, without prior communication to or approval from the European Commission. This action was found to be inconsistent with Article 49 of the Treaty on the Functioning of the European Union and improperly interfered with the Commission's exclusive authority over EU-wide mergers. Hungary was ordered to revoke the veto by March 18, 2022.[31]

3.3. Identifying economic fields in which all member states must screen foreign investments

The proposed Regulations contains two annexes, which identify the fields in which member states must screen foreign investments. Annex I

[30] Bálint Kovács, 'Facilitating and Scrutinizing National Security Measures: Analysis of an Investment Screening Case in the European Union' in J.H. Pohl, T. Papadopoulos, and J. Wiesenthal (eds), *National Security and Investment Controls (*Springer Studies in Law & Geoeconomics) (Springer 2024) vol 3.

[31] Summary of Commission Decision of 21 February 2022 relating to Article 21, paragraph 4, of Council Regulation (EC) No 139/2004 [2024] OJ C/2024/578.

lists projects and programs of Union interest that involve the development, maintenance, or acquisition of critical infrastructure, technologies, or inputs essential for security or public order.[32]

Annex II specifies the list of technologies, assets, facilities, equipment, networks, systems, services and economic activities of particular importance for the security or public order interests of the Union. There are five categories in which Member States must screen foreign investments:

- common list of dual-use items subject to export controls,
- common military list of the European Union,
- critical technology areas: advanced semiconductors technologies, artificial intelligence technologies, quantum technologies, biotechnologies, advanced connectivity, navigation and digital technologies, advanced sensing technologies, space & propulsion technologies, energy technologies, robotics and autonomous systems, advanced materials, manufacturing and recycling technologies,
- listed critical medicines,
- critical entities and activities in the Union's financial system.

It is clearly important to establish a unified list of these categories at the European Union level. There are several cases from the recent times worth mentioning related to the acquisition of companies which own sensitive technologies of particular importance for the security or public interests in a Member State.

One of the notable cases involved Zhejiang Jingsheng Mechanical's attempt to establish a joint venture with the Hong Kong branch of Applied Materials. The joint venture sought to acquire Applied Materials' screen-printing equipment business based in Italy. The Italian government, in alignment with the EU's investment screening framework, intervened to block the venture.[33] This decision reflects the concern about foreign control over sensitive technology and intellectual property. The screen-printing equipment in question is integral to advanced manufacturing processes, including those used in semiconductor production. The

[32] Proposal 28.

[33] Giuseppe Fonte and Ella Cao, 'Italy's Draghi vetoes third Chinese takeover this year' (*Reuters*, 23 November 2021) <https://www.reuters.com/markets/deals/italys-draghi-vetoes-third-chinese-takeover-this-year-2021-11-23/>.

potential transfer of such technology to a non-EU entity raised alarms about its implications for Europe's technological sovereignty and industrial capabilities.

In another Italian case, Marco Tronchetti Provera in 2015 sold the Italian tire manufacturer Pirelli to ChemChina (subsidiary of Sinochem) for $7.7 billion, raising concerns about the potential transfer of Pirelli's technology to China. The development of microchip technology by Pirelli, which could potentially transmit sensitive data, has intensified these concerns. Internal documents suggest that Beijing is extending its control over Sinochem's subsidiaries, including Pirelli, which could jeopardize Pirelli's access to the U.S. market.[34] In 2023 Italy invoked its "Golden Power" legislation (designed to safeguard assets considered strategic for the nation) to curtail Sinochem's influence over Pirelli. As part of these measures, the Italian government prohibited Pirelli from taking directives from the Chinese group.[35] And this year, in November the Italian government has initiated an administrative process against Sinochem, over a potential violation of regulations aimed at safeguarding national strategic assets.[36]

In October 2023, U.S.-based Flowserve Corporation announced the cancellation of its planned acquisition of Canadian firm Velan Inc., following a prohibition by the French Ministry of Economy. As part of its FDI review, the Ministry blocked Flowserve's indirect acquisition of Velan's two French subsidiaries, which manufacture critical components for France's nuclear submarines and reactors. These components are considered essential to the country's nuclear deterrence capabilities. The decision was made to protect France's military interests and to prevent the subsidiaries from falling under U.S. International Traffic in Arms

[34] Silvia Sciorilli Borrelli, Amy Kazmin and Yuan Yang, 'Rome considers wheeling out curbs to temper China influence at Pirelli: Rules on investments in strategic assets raise prospect of Sinochem being forced to reduce stake' *Financial Times* (London, 7 June 2023) 11.

[35] Reuters, 'Italy studies potential Pirelli governance breach by Sinochem' (*Reuters*, 7 November 2024) <https://www.reuters.com/business/autos-transportation/italy-opens-procedure-against-sinochem-over-pirelli-possible-governance-breach-2024-11-06/>.

[36] Ibid. See also: AP World News, 'Italy opens procedure against China's Sinochem for possible breach of Pirelli governance' (*The Associated Press*, 7 November 2024) <https://apnews.com/article/italy-golden-power-china-pirelli-sinochem-67a3276b8e391fe0c7903ae8ea9cbc8b>.

Regulations (ITAR), which would have restricted their future export activities.[37]

There were also interesting cases in Germany. A notable example is the attempted acquisition of the German satellite and radar technology company IMST GmbH by the Chinese defense firm Addsino Co. Ltd. This transaction was ultimately blocked by the German government. Several factors influenced this decision: the buyer, Addsino, is a subsidiary of the Chinese state-owned enterprise China Aerospace and Industry Group (CASIC); the target company, IMST GmbH, supplies components to the German military; and IMST had benefited from state funding.[38] Or in another case, the German government recently blocked the sale of MAN Energy Solutions' gas turbine division to the Chinese company CSIC Longjiang GH Gas Turbine Co., citing national security concerns. This Chinese firm is associated with the China State Shipbuilding Corporation, which produces vessels for the Chinese military. German authorities feared the turbines could be used for military purposes, such as powering warships, despite their civilian energy applications. At the same time the German government emphasized the importance of protecting critical technologies linked to public security while maintaining openness to foreign investments.[39]

[37] Debevoise & Plimpton, 'Debevoise Advises White Cap in Its Acquisition of Dayton Superior' (*Debevoise & Plimpton*, 14 June 2024) <https://www.debevoise.com/news/2024/06/white-cap-in-its-acquisition>; Reuters, 'France blocks US takeover of Canada-owned French nuclear valve makers' (*Reuters*, 6 October 2023) <https://www.reuters.com/markets/deals/france-blocks-us-takeover-canada-owned-french-nuclear-valve-makers-2023-10-06/>.

[38] C. Neßhöver and K. Slodczyk, 'Altmaier verbietet Verkauf von Kleinfirma nach China' (*Manager Magazin*, 3 December 2020) <https://www.manager-magazin.de/unternehmen/industrie/peter-altmaier-wirtschaftsminister-bremst-chinesische-investoren-aus-a-1083ae9e-14cd-4eea-9fc4-29e18b7c388a>; L. F. von Rummel and R. M. Stein, 'Snapshot: foreign investment law and policy in Germany' (*Lexology*, 16 January 2024) <https://www.lexology.com/library/detail.aspx?g=7b44bbc8-3553-4396-8a9b-cd4ca5876f37>.

[39] Dana Heide and Julian Olk, 'Habeck sieht bei China-Deal von MAN öffentliche Sicherheit gefährdet' (*Handelsblatt*, 3 July 2024) <https://www.handelsblatt.com/politik/deutschland/gasturbinen-habeck-sieht-bei-china-deal-von-man-oeffentliche-sicherheit-gefaehrdet/100050217.html>.

4. Conclusion

The current global economic and political situation, as well as the cases examined confirm that unified action is needed in the area of investment screening within the EU. The proposed Regulation represents a significant step forward in protection of strategic interests of the EU. At the same time, full harmonization of national investment screening mechanisms across EU Member States would be desirable in the long term.[40]

Regarding the current proposal, it is important that it tries to balance security concerns with investment facilitation. At the same time, in order to ensure successful implementation, the EU should provide technical assistance and capacity-building initiatives to help Member States align their national screening mechanisms with the centralized EU framework. This support could include training programs, workshops, and the provision of necessary resources.

It would also represent a significant advancement if economic fields requiring foreign investment screening were uniformly defined across all member states. As well as extending EU screening to investments by EU investors that are ultimately controlled by individuals or businesses from a non-EU country.

Although not discussed in supra among the main issues, we should like to mention here that the regulation should incorporate measures to expedite the clearance of low-risk cases. It is important to clearly define what constitutes a low-risk investment based on specific criteria such as the investor's profile, the nature of the investment, the sector involved, and the absence of potential threats to national security or public order. Another possible solution for the low-risk assessment and clearance is to implement an automated or semi-automated screening system for low-risk cases. This system could use predefined algorithms to evaluate the risk level, allowing for instant or near-instant clearance of low-risk investments. At the same time, the introduction of a pre-clearance or certification program for investors with a track record of low-risk investments in the EU can help streamline the clearance process for existing investors, reducing the need for repetitive screening. Addressing these issues should lead to several positive outcomes, as a more harmonized and clearly defined screening process will lower uncertainty

[40] American Chamber of Commerce to the European Union (n 18).

for investors, providing clearer regulatory expectations and reducing potential delays. Streamlining the process for low-risk investments will cut administrative costs for both investors and national authorities, contributing to a more efficient investment environment. This in exchange will increase Europe's attractiveness as an investment destination, potentially boosting the flow of beneficial investments into the region.[41]

To ensure the regulation's success in promoting investment while protecting economic security, ongoing dialogue is essential. Engaging with stakeholders and incorporating their feedback will be important for refining the system even after the proposal enters into force, to achieve a balance that supports investment and protects national interests. By working together, the EU can establish an efficient system that fosters investment while protecting critical national interests. Collaboration among policymakers, industry experts, and other stakeholders will be crucial in addressing these challenges and ensuring that the new investment screening framework meets its intended goals.

References

- AP World News, 'Italy opens procedure against China's Sinochem for possible breach of Pirelli governance' (*The Associated Press*, 7 November 2024) <https://apnews.com/article/italy-golden-power-china-pirelli-sinochem-67a3276b8e391fe0c7903ae8ea9cbc8b>.
- Lorenzo Bencivelli et al, 'The rise of foreign investment screening in advanced economies' (*CEPR*, 16 November 2023) <https://cepr.org/voxeu/columns/rise-foreign-investment-screening-advanced-economies>.
- Debashis Chakraborty et al, 'The Rise and Fall of Free Trade Agreements: Analytical Evidence from India's Practice' (2022) 17 JL Econ & Pol'y 54.
- Sarah Bauerle Danzman and Sophie Meunier, 'Naïve no more: Foreign direct investment screening in the European Union' (2023) 14(Suppl. 3) Global Policy 40.
- Ylli Dautaj, 'Between Backlash and the Re-Emerging "Calvo Doctrine": Investor-State Dispute Settlement in an Era of Socialism, Protectionism, and Nationalism' (2021) 41 Nw J Int'l L & Bus 294.

[41] Ibid.

- Debevoise & Plimpton, 'Debevoise Advises White Cap in Its Acquisition of Dayton Superior' (*Debevoise & Plimpton*, 14 June 2024) <https://www.debevoise.com/news/2024/06/white-cap-in-its-acquisition>.
- European Commission, Commission welcomes agreement on foreign investment screening framework' (Press release, 20 November 2018) <https://ec.europa.eu/commission/presscorner/detail/en/ip_18_6467>.
- European Commission, 'Commission proposes new initiatives to strengthen economic security' (Press release, 24 January 2024) <https://ec.europa.eu/commission/presscorner/detail/en/IP_24_363> accessed 17 November 2024.
- European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council' COM (2024) 23 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024PC0023> accessed 18 November 2024.
- European Commission, 'Strategic Trade & Investment Controls Report on the screening of Foreign Direct Investments into the Union' (Publications Office of the European Union 2023) 17-18 <https://op.europa.eu/en/publication-detail/-/publication/7d6c9f02-72e2-11ee-9220-01aa75ed71a1/language-en>.
- European Court of Auditors, 'Screening foreign direct investments in the EU – First steps taken, but significant limitations remain in addressing security and public-order risks effectively' (Special report 27/2023) 8 <https://www.eca.europa.eu/en/publications?ref=SR-2023-27>.
- European Parliament, 'Revision of the EU Foreign Direct Investment Screening Regulation' (2024) Briefing <https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762844/EPRS_BRI(2024)762844_EN.pdf> accessed 18 November 2024.
- Giuseppe Fonte and Ella Cao, 'Italy's Draghi vetoes third Chinese takeover this year' (*Reuters*, 23 November 2021)

<https://www.reuters.com/markets/deals/italys-draghi-vetoes-third-chinese-takeover-this-year-2021-11-23/>.

- Gábor Hajdu, 'Developments in EU-USA Trade Relations during the Trump Era' (2020) 8(2) Central and Eastern European Legal Studies, 249.
- Dana Heide and Julian Olk, 'Habeck sieht bei China-Deal von MAN öffentliche Sicherheit gefährdet' (*Handelsblatt*, 3 July 2024) <https://www.handelsblatt.com/politik/deutschland/gasturbinen-habeck-sieht-bei-china-deal-von-man-oeffentliche-sicherheit-gefaehrdet/100050217.html>.
- European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Communication to The European Parliament, The European Council and The Council on "European Economic Security Strategy' (Communication) (JOIN(2023) 20 final).
- Bálint Kovács, 'Facilitating and Scrutinizing National Security Measures: Analysis of an Investment Screening Case in the European Union' in J.H. Pohl, T. Papadopoulos, and J. Wiesenthal (eds), *National Security and Investment Controls (*Springer Studies in Law & Geoeconomics, vol 3) (Springer 2024), <https://doi.org/10.1007/17280_2024_24> accessed 18 November 2024>.
- C. Neßhöver and K. Slodczyk, 'Altmaier verbietet Verkauf von Kleinfirma nach China' (*Manager Magazin*, 3 December 2020) <https://www.manager-magazin.de/unternehmen/industrie/peter-altmaier-wirtschaftsminister-bremst-chinesische-investoren-aus-a-1083ae9e-14cd-4eea-9fc4-29e18b7c388a>.
- Reuters, 'France blocks US takeover of Canada-owned French nuclear valve makers' (*Reuters*, 6 October 2023) <https://www.reuters.com/markets/deals/france-blocks-us-takeover-canada-owned-french-nuclear-valve-makers-2023-10-06/>.
- Reuters, 'Italy studies potential Pirelli governance breach by Sinochem' (*Reuters*, 7 November 2024) <https://www.reuters.com/business/autos-transportation/italy-opens-procedure-against-sinochem-over-pirelli-possible-governance-breach-2024-11-06/>.

- L. F. von Rummel and R. M. Stein, 'Snapshot: foreign investment law and policy in Germany' (*Lexology*, 16 January 2024) <https://www.lexology.com/library/detail.aspx?g=7b44bbc8-3553-4396-8a9b-cd4ca5876f37>.
- Stefano Riela, 'The EU's foreign direct investment screening mechanism two years after implementation' (2023) 22(1) European View 57 <https://doi.org/10.1177/17816858231164292> accessed 18 November 2024.
- Silvia Sciorilli Borrelli, Amy Kazmin and Yuan Yang, 'Rome considers wheeling out curbs to temper China influence at Pirelli: Rules on investments in strategic assets raise prospect of Sinochem being forced to reduce stake' *Financial Times* (London, 7 June 2023) 11.
- Summary of Commission Decision of 21 February 2022 relating to Article 21, paragraph 4, of Council Regulation (EC) No 139/2004 [2024] OJ C/2024/578.
- Zoltan Vig, 'The Regulation of Screening of Foreign Direct Investments in the European Union' (2020) 10(4) Pro Futuro 9-24 <https://doi.org/10.26521/profuturo/2020/4/9463> accessed 18 November 2024.
- Najib Zamani, 'A Legal Comparative Approach towards the Screening of Outbound FDI. What Can the EU and Its Member States Learn from the US National Critical, Capabilities and Defense Act Proposal?' (2022) 15 Erasmus L Rev 299.

Short biography of the author

Zoltán Víg obtained his LLM and SJD in International Business Law from Central European University in Budapest. He teaches business law at the University of Technology and Economics Budapest, Hungary and at the Faculty of Economics, Finance and Administration in Belgrade, Serbia. He worked as a research fellow at the Hungarian Academy of Sciences, and during his earlier career he conducted research at Max Planck and Asser Institutes, as well as at Humboldt, Hamburg, Emory and Yale Universities. He has published several books and articles in English, Hungarian, Serbian and German languages.

ISBN 978-615-6443-37-3