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Judicialisation of Trade Policy and the Impact on National Constitutional Rights of EU Free Trade Agreements with Partner Countries in Europe

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Abstract: *This article looks at the way in which the model of the European Court of Justice (ECJ) as a trade policy actor, both internally and externally, has been emulated by courts of European states with a free trade agreement with the Union. It examines in particular how, through application or rejection of—deference or defence to—EU law as interpreted by the ECJ, those courts have sought to balance the benefits of open international trade with the protection of domestic fundamental constitutional values. The article concludes by emphasising how the 'de-politicisation' of trade policy through its concomitant judicialisation has allowed such courts to seise upon a role in trade policy determination, enabling them to become actors in the process of determining the rate and extent to which the Europeanisation of trade law occurs in their national systems.*

I Introduction

The EU lies at the heart of a network of free trade agreements, negotiated with partner countries in Europe and beyond. Within the purely European context, this article aims to discuss the extent to which the judicialisation of trade policy[1] in the Union has impacted on national constitutional rights in those states which have a free trade agreement (FTA) with it. For present purposes, the notion of 'free trade agreement' is understood broadly as covering a range of treaties concluded between the Union and third countries or entities, even where the FTA component forms only the core of such a treaty.

Although these FTAs have differing objectives, they have nevertheless extended much of the Union's liberal trade regime across the continent[2] and include: the

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[1] P. Ehrenhaft, 'The "Judicialization" of Trade Law', (1980–1981) 56 *Notre Dame Law Review* 595.

[2] For the purposes of selection of the FTAs, one of the important criteria used was the accessibility to national superior court decisions in English, French or German. Thus, regrettably, no reference has been had either to the practice of national courts under the 1963 Association Agreement with Turkey (OJ 1973 C113/2, English version) or under the 1995 EC-Turkey Customs Union (Association Council Decision 1/95, OJ 1996 L35/1). In respect of countries in the Eastern Partnership, see R. Petrov and P.

bilateral FTAs signed in the 1970s by the European Economic Community (EEC) with states of the European Free Trade Association (EFTA);[3] the European Economic Area (EEA) Agreement;[4] the Agreement on Free Movement of Persons (FMPA)[5] which is one of the bilateral agreements with Switzerland;[6] the former Europe Agreements (EAs)[7] with the Central and Eastern European countries (CEECs); and the Stabilisation and Association Agreements (SAAs)[8] with the Western Balkan states. These agreements will be referred to collectively in this article as 'EU-FTAs.'

Section II of this article briefly considers the model of the European Court of Justice (ECJ) as an actor in EU trade policy. While not forming a systematic or exhaustive study, Sections III–V take this model and spread the net wider in order to address the issue why—by means of the extensive European-based network of EU-FTAs—non-EU courts (whether national or supranational) have variously used or refused to use EU law and specifically ECJ rulings in developing their own roles in trade policy. Section VI concludes the article.

II The ECJ: 'The Very Model of a Modern Trade Policy Actor'

While consideration of actor capacity has tended to focus[9] on the triumvirate of major Union institutions charged with trade policy and decision-making functions, de Búrca has observed[10] that the ECJ 'in certain circumstances plays a policy role comparable to that played by other EU institutions, and . . . it is important to consider whether the Court should be constrained by the norms and principles that guide those others'. Moreover, as a strategic actor,[11] the ECJ[12] in its decision-making capacity is regularly confronted with interpretative choices that have considerable policy implications. Thus, while the role of the ECJ cannot be equated with those of the three political institutions of the Union, it is an EU actor with a considerable degree of normative influence and autonomy.[13]

Kalinichenko, 'The Europeanization of Third Country Judiciaries through the Application of the EU *Acquis*: The Cases of Russia and Ukraine' (2011) 60 *International and Comparative Law Quarterly* 325.

[3] See generally N. Wahls, *The Free Trade Agreements between the EC and EFTA countries: Their Implementation and Interpretation: a Case Study* (Stockholm University Institute for Intellectual Property and Market Law, 1988).

[4] Agreement on the European Economic Area: OJ 1994 L1/3.

[5] Agreement between the European Community and its Member States and the Swiss Confederation on the free movement of persons: OJ 2002 L114/6.

[6] A. F. Tatham, *Enlargement of the European Union* (Kluwer Law International, 2009).

[7] EAs were concluded between 1991 and 1999 with Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia: *ibid*, 76–84.

[8] SAAs have been concluded with the Western Balkan states: *ibid*, 167–170.

[9] J. H. J. Bourgeois, 'Trade Policy-Making Institutions and Procedures in the European Community,' in M. Hilf and E.-U. Petersmann (eds), *National Constitutions and International Economic Law* (Kluwer, 1993), at 175, 190.

[10] G. de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', (1998) 36 *Journal of Common Market Studies* 217, 218.

[11] R. Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Macmillan, 1998), at 178.

[12] De Búrca n 10 *supra*, 218, 229.

[13] P. Eeckhout, *EU External Relations Law* (2nd ed., Oxford University Press, 2012), at 458.

While the tale—employing economic and trade means to achieve political integrative ends—has been told and retold by authors down the years,[14] certain aspects of the ECJ model as an actor in both intra- and extra-EU trade policy are worth indicating in the context of the present study:

- the ECJ uses direct effect as a strategic instrument in trade policy and has 'created' Union-based economic trade rights the breach of which are enforceable by affected individuals and private commercial entities before their own national courts.[15]
- EU law primacy generally privileges, over conflicting national constitutional rights,[16] the Union rights to free trade, but this has met with criticism and challenge by domestic (constitutional) courts.[17] Even where national deviations are permitted by Treaty[18] or ECJ case-law,[19] these are tightly circumscribed by ECJ interpretation.
- the ECJ has determined the scope of EU external trade policy in respect of express and exclusive Union policies[20] and interpreted the Union's exclusive internal competence to act in an area as being impliedly transferred to the external plane.[21]
- the ECJ determines whether provisions of third-country FTAs with the EU[22] as well as decisions made by joint institutions set up under such FTAs[23] can enjoy direct effect in the Union before national courts. The ECJ approaches each case on its merits, examining the content of the EU-FTA provision with a similarly worded provision in the Treaty on the Functioning of the European Union (TFEU), the nature of the FTA, the trade as well as the political and economic relationship of the Union with the third country and the temporal stage in the deepening of relations, especially (although not exclusively) the importance of an impending accession.[24]

The wording of EU-FTAs consequently allows for the diffusion of the applicability of EU law as a type of common law of trade, developed through ECJ case-law and

[14] M. Poiares Maduro, *We the Court: the European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing, 1998).
[15] A. F. Tatham, *EC Law in Practice: A Case-Study Approach* (HVG-ORAC, 2006).
[16] Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.
[17] K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, 2001).
[18] For example, Art 36 TFEU on the grounds permitted to maintain national quantitative restrictions and measures having equivalent effect; Arts 45(3) and (4), 51 and 52(1) and 62 TFEU on national restrictions to the free movement of workers and the freedoms of establishment and to provide services justifiable on grounds of public policy, public security and public health as well as the public service exception
[19] Case 379/87, *Groener* [1989] ECR 3967; Case C-159/90, *Grogan* [1991] ECR I-4719.
[20] Opinion 1/75, *(Re: OECD Local Cost Standard)* [1975] ECR 1355.
[21] Case 22/70, *Commission v. Council (Re: European Road Transport Agreement)* [1971] ECR 263.
[22] Case 104/81, *Kupferberg* [1982] ECR 3641; cf Case 270/80, *Polydor* [1982] ECR 329.
[23] Case C-192/89, *Sevince* [1990] ECR I-3461. Provisions of Partnership and Co-operation Agreements—which entail looser trade and economic links than under the EAs and SAAs—may also enjoy direct effect: Case C-265/03, *Simutenkov* [2005] ECR I-2579.
[24] A. F. Tatham, 'The Direct Effect of Europe Agreements: Recent rulings of the European Court of Justice', 2002/6 *Mezinárodní a Srovnávací Právní Revue* 7.

considered as some sort of latter-day *lex mercatoria*.[25] As such, it represents an extension of EU (commercial) power beyond the borders of the Union.[26] EU law accordingly limits the powers of non-Member States having FTAs with the Union that see themselves as being under factual constraint (whether political or economic) to adopt and implement EU law with a view to minimising trade barriers and distortions as well as reducing transaction costs to their own disadvantage.[27]

III Deference or Defence? National Courts' Reactions to EU–Free Trade Agreements in Europe

The way in which courts of states that possess an FTA with the EU (or the EFTA Court in the context of the EEA) strike the balance between protection of domestic constitutional rights and the principle of free trade may be approached from the perspective of the notions of deference or defence.

A Deference Defined

On the one hand, the notion of 'deference' is akin to the notion of 'judicial comity'[28] and in the present work is derived from a concept already used in the intra-Union context as a way to explain the pluri-level constitutional evolution of the EU through acceptance of EU law by domestic courts.[29] Here, deference is extended to the EFTA Court and courts of EU-FTA states to cover a range of devices, whereby these courts seek to comply with the demands of the relevant FTA within permissible national constitutional limits: thus, in ensuring the principle of free trade with the EU, they seek to avoid a conflict with EU law and thereby promote the effectiveness of the FTA as a wealth-enhancing instrument.

Deference may be expressed: (1) by application, according to which domestic courts are required by the relevant EU-FTA to apply ECJ cases before them; (2) by emulation, whereby the national court follows the ECJ rulings to the extent possible within its system; and (3) by interpretation, in which a court formulates a rule (possibly based on the wording of its domestic constitution) that EU law and ECJ rulings may be used to interpret national law, provided such interpretation does not impinge upon the core of national sovereignty.

B Defence Defined

On the other hand, the notion of 'defence' represents a judicial enforcement of the constitutional limits to the principle of free trade, a point at which the bargain between the benefits of open trade with the Union and the deficits on national

[25] A. Stone Sweet, 'The new Lex Mercatoria and transnational governance', (2006) 13 *Journal of European Public Policy* 627, 629–633.

[26] W. Jacoby and S. Meunier, 'Europe and the management of globalization', (2010) 17 *Journal of European Public Policy* 299, 308–309.

[27] T. Cottier and M. Hertig, 'The Prospects of 21st Century Constitutionalism', (2003) 7 *Max Planck Yearbook of United Nations Law* 261, 268.

[28] Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003), 260.

[29] J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', (2010) 17 *European Law Journal* 80.

sovereignty no longer prove to be sustainable by the relevant national court, tilting markedly in favour of domestic constitutional rights. In such circumstances, the relevant court reaffirms the autonomy of the national legal order in the face of the level of integration with the Union, preferring to protect constitutional rights from encroachment by EU law or ECJ rulings.

Domestic courts use defence *vis-à-vis* EU-FTAs: (1) by revision, according to which there is a need to revise the national constitution on the part of the executive and/or parliament before the FTA can enter into force; (2) by review, as against domestic constitutional standards of the relevant national harmonising or implementing legislation of the FTA itself or its related rules; or (3) by refusal, when the national court refuses to follow an ECJ interpretation of a TFEU provision where the latter is incorporated with the same or a similar wording into the FTA.

IV Deference

A By Application

According to Article 6 EEA and Article 3(2) of the EFTA Surveillance and Court Agreement, the EFTA Court is, on the one hand, bound to follow ECJ precedents ('shall . . . be interpreted in conformity with the relevant rulings of the Court of Justice') for the period prior to the signing of the EEA Agreement (2 May 1992) and, on the other hand, required 'to pay due account' to the principles laid down by the relevant ECJ rulings rendered after that date. These provisions concern either the interpretation of the EEA Agreement itself or of such rules of EU law in so far as they are identical in substance to the provisions of the EEA Agreement.

It might appear that the EFTA Court's duty is different depending on when the ECJ ruling was made since an obligation to follow a precedent is not the same as one to pay due account to it. However, the EFTA Court has recognised[30] that the establishment of a dynamic and homogeneous market was inherent in the general objective of the EEA Agreement and has, in turn, taken a dynamic view of the obligations for judicial homogeneity.[31] In practice, the EFTA Court does not distinguish between pre- and post-May 1992 ECJ case-law, thereby respecting it in its entirety[32] and applying it directly in cases before it, without discrimination as to when the ECJ ruling was made. Moreover, the principle of homogeneity has led to a presumption that identically worded provisions in the EEA Agreement were to be interpreted in the same way as in EU law.[33]

Similarly to the EEA, Article 16(2) FMPA between the EU and Switzerland provides that where 'the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland's attention'.

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[30] Case E-4/01, *Karlsson* [2002] *EFTA Court Reports* 240.

[31] Case E-4/04, *Pedicel* [2005] *EFTA Court Reports* 1.

[32] V. Skouris, 'The ECJ and the EFTA Court under the EEA Agreement: A Paradigm for International Cooperation between Judicial Institutions', in C. Baudenbacher, P. Tresselt and T. Örlygsson, *The EFTA Court: Ten Years On* (Hart Publishing, 2005), at 123, 124.

[33] Case E-2/06, *EFTA Surveillance Authority v. Norway* [2007] *EFTA Court Reports* 163.

The Swiss Federal Court has recognised the direct effect of FMPA provisions before it,[34] as well as the Euro-conform interpretation of national law harmonised to EU law and the possibility of taking into account subsequent changes in EU law when interpreting such harmonised law.[35] Moreover, it has considered the wording of the Preamble to the FMPA[36] and of Article 16(1),[37] as compelling enough for it—in some cases—to take into account ECJ case-law in its decision-making, which decisions were made after the entry into force of the FMPA on 1 June 2002.[38] In respect of the EAs and SAAs, provisions in these types of FTAs have made relatively weak demands on courts in associated States to defer to ECJ case-law in respect of intellectual property rights (IPR) and competition law.

In respect of the harmonisation of both European law and practice in the IPR field, eg Article 65 of the 1991 European Communities (EC)–Hungary EA[39] provided:[40] 'Hungary shall continue to improve the protection of intellectual, industrial and commercial property rights in order to provide . . . a level of protection similar to that existing in the Community, including comparable means of enforcing such rights.' In a series of Joint Declarations to the respective EAs, the EU and each associated State agreed that—for the purposes of the EA—the term 'intellectual, industrial and commercial property' was to be given a similar meaning as in Article 30 EC (now Article 36 TFEU).[41] As there were no temporal limits as to which ECJ ruling on the interpretation of this Article could be used by the domestic courts in evaluating IPR protection before them, future ECJ case-law development could not be excluded. Under Article 71(2) of the EU–Croatia SAA,[42] requirements for IPR protection were the same as the EAs but required 'effective means of enforcing such rights' rather than the earlier 'comparable means'.

In respect of European competition law (eg under Article 62(1) of the EC–Hungary EA), anti-competitive practices, abuse of dominant position and state aids were incompatible with the EA in so far as they affected trade between both parties. Article 62(2) EA provided: 'Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 EC

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[34] *A.X. v. Regierungsrat und Verwaltungsgericht des Kantons Zürich*, Case no. 2A.246/2002, 17 January 2003: *Die Amtliche Sammlung der Entscheidungen des Bundesgerichts* (BGE) (*Official Journal of the Decisions of the Swiss Federal Court*) 129 II 249. The BGE are available at: <http://www.bger.ch>.

[35] *Öffentliche Arbeitslosenkasse des Kantons Solothurn v. Metallbau X. GmbH*, Case no. 4C.316/2002, 25 March 2003: BGE 129 III 335, para 6.

[36] 'Resolved to bring about the free movement of persons between them on the basis of the rules applying in the European Community'.

[37] 'In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them'.

[38] *X. and Y. v. Sicherheitsdirektion und Regierungsrat des Kantons Zürich*, Case no. 2C_196/2009, 29 September 2009: BGE 136 II 5 (abandoning Case C-109/01, *Akrich* [2003] ECR I-9607 and using instead Case C-127/08, *Metock* [2008] ECR I-6241); and *A. and Mitb. v. Sicherheitsdirektion und Regierungsrat des Kantons Zürich*, Case no. 2C_269/2009, 5 January 2010: BGE 136 II 65 (using Case C-413/99, *Baumbast* [2002] ECR I-7091): see C. Kaddous and C. Tobler, 'Droit européen: Suisse—Union européenne/Europarecht: Schweiz—Europäische Union', 2010/4 *Revue suisse de droit international et européenne* 597, 609–616.

[39] EA between the EC and their Member States and Hungary: OJ 1993 L347/2.

[40] Similar provisions were contained in all EAs.

[41] A. Evans, 'Voluntary Harmonisation in Integration between the European Community and Eastern Europe', (1997) 22 *European Law Review* 201, 204.

[42] SAA between the EC and their Member States and Croatia: OJ 2005 L26/3.

[now Articles 101, 102 and 107 TFEU].' Similar rules governed the EU–Croatia SAA, but Article 70(2) SAA extended the field of application of ECJ case-law to Article 86 EC (now Article 106 TFEU) on commercial state monopolies and further expressly permitted Croatian courts and competition authorities to use in their decision-making 'interpretative instruments' such as Notices from the European Commission related to the practice in particular matters of EU competition law. In this way, the EU has attempted to bind national courts and competition authorities in the CEECs and Western Balkans to applying not only Treaty provisions but also their European judicial interpretation (both past and future European courts' decisions as there was, yet again, no time limit defined as to which judgments were to apply).

B By Emulation

Like its sister court, the EFTA Court has developed into a trade policy actor by judicious use of and harmonisation of practice to ECJ case-law.[43] Having asserted that the EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own,[44] the EFTA Court subsequently recognised[45] that this distinct legal order was characterised by the creation of an internal market, the protection of the rights of individuals and economic operators and an institutional framework providing for effective surveillance and judicial review.

In fleshing out this economic constitutional order of the EEA, the EFTA Court has emulated the ECJ-created fundamentals of the Union legal order and introduced EEA-equivalent concepts of direct effect,[46] supremacy,[47] state liability,[48] general principles of law[49] (including fundamental rights[50]) as well as the economic freedoms and their permissible limitations.[51] Such activism has allowed the EFTA Court to emulate some of the main constitutional bases of the Union legal order set out in ECJ rulings, albeit in a circumscribed manner and based on the fact that, whilst the depth of integration under the EEA Agreement is less far-reaching than under the TEU and TFEU, the scope and objective of the EEA nevertheless go beyond what is usual for an agreement under public international law.[52]

C By interpretation

A number of CEEC and Western Balkan constitutional courts, when addressing the issue of the enforcement of EU law before accession, have generally considered the judiciary to be under a duty to interpret national law—without infringing the

[43] C. Baudenbacher, 'The EFTA Court—An Example of the Judicialization of International Economic law', (2003) 28 *European Law Review* 880.
[44] Case E-9/97, *Sveinbjörnsdóttir* [1998] *EFTA Court Reports* 95.
[45] Case E-2/03, *Ásgeirsson* [2003] *EFTA Court Reports* 185.
[46] Case E-1/94, *Restamark* [1994–1995] *EFTA Court Reports* 15.
[47] Case E-1/01, *Einarsson* [2002] *EFTA Court Reports* 1.
[48] Case E-9/97, *Sveinbjörnsdóttir* [1998] *EFTA Court Reports* 95.
[49] Case E-3/11, *Sigmarsson* [2011] *EFTA Court Reports* 430.
[50] Case E-8/97, *TV 1000* [1998] *EFTA Court Reports* 68; Case E-2/02, *Technologien Bau- und Wirtschaftsberatung* [2003] *EFTA Court Reports* 52; and Case E-2/03, *Ásgeirsson* [2003] *EFTA Court Reports* 185.
[51] Case E-3/00, *EFTA Surveillance Authority v. Norway* [2000–2001] *EFTA Court Reports* 73; Case E-10/04, *Piazza* [2005] *EFTA Court Reports* 76.
[52] Case E-9/97, *Sveinbjörnsdóttir* [1998] *EFTA Court Reports* 95.

domestic constitution—to comply with the provisions of EU law, thereby in some way conforming to the *Marleasing* jurisprudence.[53] These courts have accordingly viewed EU law, as transmitted through an EA or SAA, to be used as a tool for interpretation of national law.

In the pre-accession period, the Polish Constitutional Tribunal (PCT) sought to balance the gradual opening up to free trade with the EU with the need to respect the constitutional foundations of the national legal order. Over a period of a few short years, the PCT transformed a rule to interpret national law (except the Constitution) by employing EU law and ECJ rulings—by means of the EC–Poland EA[54]—into a constitutional principle of a Euro-friendly interpretation.

The PCT in *Decision K 15/97*[55]—when finding unconstitutional a domestic legal provision that differentiated in compulsory retirement ages since it amounted to sex discrimination—noted that Article 119 EC (now Article 157 TFEU) had fundamental importance for the formulation of the principle of equality of men and women and had been further developed in several directives, the most important being the then Directive 76/207/EEC on equal treatment.[56] It continued that, in the light of this directive, notice had to be taken of the ECJ in *Marshall*[57], and it then proceeded to balance the clear lack of domestic effect of EU law prior to accession with the requirements of the EA:

> Of course, [EU] law has no binding force in Poland. The Constitutional Tribunal wishes, however, to emphasise the provisions of Article 68 and Article 69 of the [EC-Poland EA]. . . . Poland is thereby obliged to use 'its best endeavours to ensure that future legislation is compatible with Community legislation' and this obligation is referred to, for example, provisions regulating 'protection of workers at the workplace.' The Constitutional Tribunal holds that the obligation to ensure compatibility of legislation (borne, above all, by the Parliament and the Government) also results in the *obligation to interpret existing legislation in such a way as to ensure the greatest possible degree of such compatibility.* [Emphasis supplied.]

Nevertheless, the PCT would not countenance an interpretation that would be unconstitutional: such limits were re-emphasised in other pre-accession cases[58] in which it gradually transformed such duty of consistent interpretation into the principle of a friendly approach to European law. In *Decision K 2/02*,[59] it expressly invoked the ECJ rulings in *von Colson*[60] and *Marleasing*[61] and observed that, although in the pre-accession period, Poland did not have the legal obligation to apply the principles of interpretation derived from the *acquis*, it nevertheless stressed that the duty of consistent interpretation could be considered as a practical and the least expensive instrument for law harmonisation.

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[53] Case C-106/89, *Marleasing SA* [1990] ECR I-4135.

[54] EA between the European Communities and their Member States and the Republic of Poland: OJ 1993 L348/2.

[55] *Decision K 15/97*, 29 September 1997: *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (OTK ZU) (*Decisions of the Polish Constitutional Tribunal—Official Gazette*) 1997/3–4, Item 37.

[56] Directive 76/207/EEC: OJ 1976 L39/40.

[57] Case 152/84, *Marshall (No. 1)* [1986] ECR 723.

[58] The need to interpret national law in a Euro-conform manner (within the field of sex discrimination) also arose in *Decision K 27/99* (28 March 2000: OTK ZU 2000/2, Item 62); *Decision K 15/99* (13 June 2000: OTK ZU 2000/5, Item 137) and *Decision K 35/99* (5 December 2000: OTK ZU 2000/8, Item 295).

[59] *Decision K 2/02*, 28 January 2003: OTK ZU 2003/1A, Item 4.

[60] Case 14/83, *Von Colson* [1984] ECR 1891.

[61] Case C-106/89, *Marleasing* n 53 *supra*.

The elevation of this approach to a constitutional principle occurred subsequently in *Decision K 11/03*[62] in which the PCT stated that the interpretation of binding law—whether constitutional provisions or any domestic norms—should take account of the constitutional principle of a friendly approach to European integration and cooperation between States, a point reinforced in *Decision K 33/03*.[63]

The existence of a 'Euro-friendly' interpretation of national law within the competition sector was evinced in the decision of the Constitutional Court (CC) of the Czech Republic[64] in the *Škoda automobilova a.s.* case[65] on abuse of dominant position. The plaintiff car manufacturer had originally challenged the decision of the Czech Competition Authority on the grounds that EU law was not, at that time, a binding source of law in the national legal system and that it therefore could not be taken into account in the interpretation of national law. On appeal, the High Court stated that[66] the 1991 Czech Competition Act had received its basic ideas from the Treaty of Rome, particularly the main competition provisions (now Articles 101, 102 and 107 TFEU) which was considered an absolute necessity in view of the harmonisation requirement of the Czech system to that of the then EC.

The High Court held that it did not amount to an error in law for a national authority to interpret Czech competition law consistently with ECJ case-law and Commission Decisions. In the same case, the Czech CC was seised of a constitutional complaint from the car manufacturer: it affirmed the High Court's approach and maintained that both the EC Treaty and the EU Treaty derived from the same values and principles of Czech constitutional law. As a result, the interpretation of European competition provisions by EU institutions (whether the ECJ, General Court or Commission) was valuable for interpretation of the corresponding Czech provisions.

In a subsequent decision from 2001,[67] the Czech CC was asked to annul a government decree on setting milk production quotas, which decree, *inter alia*, had harmonised domestic law to the relevant EC Regulation. At the oral hearing, the petitioners expressed the opinion that Community law was not relevant to the Czech CC in evaluating unconstitutionality, as the Czech Republic was not an EU Member State. The Court strongly objected to this proposition as being oversimplified and sketchy and stated in its ruling that one of the sources of primary Community law was the general legal principles which the ECJ took from the constitutional traditions common to EU Member States. General legal principles were contained in the concepts of a state based on the rule of law, including fundamental human rights and freedoms and fair proceedings within that framework. Similarly, the Czech CC had repeatedly applied general legal principles which were not expressly contained in legal

[62] *Decision K 11/03*, 27 May 2003: OTK ZU 2003/5A, Item 43.

[63] *Decision K 33/03*, 21 April 2004: OTK ZU 2004/4A, Item 31.

[64] Z. Kühn, 'European Law in the Empires of Mechanical Jurisprudence: The Judicial Application of European Law in Central European Candidate Countries', (2005) 1 *Croatian Yearbook of European Law and Policy* 55, 63–64 and 66–67.

[65] Czech CC, 29 May 1997, Case No. III.ÚS 31/97: N. 66/8 *Sbírku nálezů a usneseni Ústavního soudu* (SbNU) (*Official Journal of the Decisions of the Czech Constitutional Court*) 149. Decisions of the Czech CC are available at: <http://www.usoud.cz>. See generally, M. Bobek and Z. Kühn, 'What about that "incoming tide"? The Application of EU Law in the Czech Republic', in A. Łazowski (ed), *The Application of EU Law in the New Member States—Brave New World* (TMC Asser Press, 2010), at 357, 358.

[66] High Court (Olomouc), 14 November 1996: (1997) 5(9) *Právní rozhledy* 484.

[67] *Milk Quota case*, Czech CC, 16 October 2001, Case No. Pl. ÚS 5/01: N. 149/24 SbNU 79.

rules but were applied in European legal culture (eg the principle of reasonableness). The Czech CC thus viewed itself as having subscribed to European legal culture and its constitutional traditions. It continued: 'Thus, primary Community law is not foreign to the Constitutional Court, but to a wide degree permeates—particularly in the form of general legal principles of European law—its own decision-making. To that extent it is also relevant to the Constitutional Court's decision-making.'

In fact, in order to emphasise its openness to EU law and to support its reasoning, the Court later referred to the ECJ case of *Hauer*[68]—a case which had concerned the issue of limiting the fundamental right to property in connection with the application of Community regulations on agricultural production.[69]

The Croatian CC also followed the interpretation route in *Decision U-III.1410/07*[70] in which it ruled that Article 70(1) SAA prohibited abuse of dominant position and such conduct under Article 70(2) SAA had to be interpreted on the basis of the criteria derived from EU competition rules and interpretative instruments, ie including ECJ case-law and Commission decisions:

> Considering all the above, when assessing the possible disturbance of market competition, the Croatian institutions competent for the protection of market competition are authorised and required to apply the criteria arising from the application of the competition rules of the European Communities and from the interpretative instruments adopted by the Community institutions. Therefore the [SAA obliges] the Croatian competition institutions to apply not only the Croatian market competition legislation but also to take account of the relevant law of the European Community.

Such EU *acquis* was applied not as a primary source of law in Croatia but rather as a subsidiary means of interpretation. Article 70(2) SAA had to be interpreted within the context of Croatia's obligation to harmonise its legislation—including in the competition sector—with the EU *acquis*. As a result, while EU law was not formally introduced into the Croatian legal order by virtue of the SAA, nevertheless Croatian competition rules had to be applied in the light of relevant EU criteria.

V Defence

A By Revision

Slovenia provides an example of defence by revision through a Constitutional Court ruling related to the foreign ownership of property and the EA,[71] *Case Rm-1/97*.[72] The then 1991 Slovene Constitution, Article 68 provided that: 'Foreigners may not acquire title to land. . . .' However, according to the EA with Slovenia, especially Article 45(7c) EA and Annex XIII EA, the Government had committed itself to take the necessary measures: (1) to allow EU citizens and branches of EU companies—on a

[68] Case 44/79, *Hauer* [1979] ECR 3727.

[69] Use of ECJ rulings in its own decision-making was repeated by the Czech CC in the *Sugar Quota II case*, 30 October 2002, Case Pl. ÚS 39/01, Part VI.

[70] Croatian CC, Decision U-III.1410/07, 13 February 2008, and available in English at: <http://www.usud.hr>. Consulted 12 October 2012. See B. Stanić, 'The Interpretative Effect of European Law in the Judgment of the Croatian Constitutional Court No U-III-1410/2007', (2008) 4 *Croatian Year Book of European Law and Policy* 247, 253–262.

[71] EA between the EC and their Member States, acting within the framework of the EU, and Slovenia: OJ 1999 L51/3

[72] Opinion of Slovene Constitutional Court, 5 June 1997, Case Rm-1/97: *Uradni list RS* (*Official Gazette of the Republic of Slovenia*) no. 40/97. Available at: <http://www.us-rs.si>. Consulted 4 October 2012.

reciprocal and non-discriminatory basis—the right to purchase property in Slovenia by the end of the fourth year from the entry into force of the EA; and (2) to grant EU citizens (having permanently resided on the territory of Slovenia for three years), on a reciprocal basis, the right to purchase property from the entry into force of the EA. The Government, in the process of EA ratification, sought the opinion of the Constitutional Court as to the constitutionality of the Agreement.

In its Opinion, the Court declared Article 45(7c) EA and parts of Annex XIII EA unconstitutional and held that the Government could not approve any such commitments on behalf of Slovenia under international law as they would contravene the Constitution. Such commitments would be unconstitutional if, by the coming into force of the EA, the EA created directly applicable unconstitutional norms in domestic law, or if it bound the State to adopt any such instrument of domestic law as would conflict with the Constitution. Nevertheless, the Court did indicate that the possible solution would be to adopt a constitutional amendment which was duly followed: Article 68 now allows foreigners to acquire property ownership rights.

B By Review

The possibility of indirectly reviewing an EU-FTA even after its implementation into the relevant national system—either by means of a domestic legal rule or a constitutional provision (directly applicable)—is exemplified by the Hungarian Constitutional Court (HCC) in *Dec. 30/1998 (VI.25) AB*[73] which concerned the competition provisions of the EC–Hungary EA and their internal application.

The HCC maintained that it had jurisdiction to review the Hungarian statute[74] by which the EA had been incorporated into the domestic system as well as the Hungarian government decree on the national Implementing Rules (IR)[75] in respect of the linked Association Council Decision 2/96.[76]

The relevant contested provisions were Article 62(2) EA which provided: 'Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 EC [now Articles 101, 102 and 107 TFEU]' together with two articles of the IR that made express reference to the criteria in Article 62 which were required to be applied by Hungarian courts and the competition authority in their decision-making. The HCC annulled the latter but found Article 62 EA constitutional although, in giving effect to it, Hungarian courts and the competition authority were constitutionally prohibited from directly applying the stated EU competition criteria.

Such criteria appeared only by way of reference to internal legal rules and to the legal practice of internal fora (European Commission, ECJ) of the EU, another subject of international law. This prevented their application in Hungarian law,[77] since the criteria had neither been ratified and incorporated nor adopted and

[73] Alkotmánybíróság határozatok (Constitutional Court Decisions) (ABH) 1998, 220. See A. F. Tatham, 'Constitutional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI.25) AB of the Hungarian Constitutional Court', (1999) 48 *International and Comparative Law Quarterly* 913; and J. Volkai, 'Solutions to the Unconstitutionality of the EC-Hungary Antitrust Cooperation Regime: Anti-Trust or Antitrust Cooperation?' (2000) 6 *Columbia Journal of European Law* 321.

[74] Act I of 1994: *Magyar Közlöny* (*Hungarian* (*Official*) *Gazette*) 1994/1.

[75] Government Decree 230/1996 (XII.26) Korm.: *Magyar Közlöny* 1996/120.

[76] Decision 2/96 of the EC-Hungary Association Council: OJ 1996 L295/29.

[77] *Decision 30/1998 (VI.25) AB* n 73 *supra*, Part IV.2–3.

transformed into a domestic legal rule which was a necessary precondition for their domestic application according to the then Hungarian Constitution.

The Court noted that one of the requirements of a democratic state under the rule of law, based on the sovereignty of the people, was the fact that state power might only be exercised on the basis of democratic legitimation which imposed the requirement (in respect of legal norms to be applied in Hungary) that their creation be attributable to the ultimate source of domestic public power. In the present case, it was clearly not possible to trace back to a Hungarian legal source the criteria referred to in Article 62(2) EA and the IR since a concrete and precise state undertaking in an international treaty was quite different from the present circumstance wherein some internal legal areas had been subjected to the EU, another system of public power (regardless of its limited sphere of application). A separate constitutional authorisation would have been necessary to permit limitations on Hungarian sovereignty and accordingly allow the courts and the competition authority to apply the European competition legal criteria (effectively foreign norms of a public law nature) in proceedings before them.

C By Refusal

Refusal of national courts to apply ECJ interpretations of EU law to similarly worded provisions of EU-FTAs may be exemplified by the superior courts of Austria and Switzerland—both monist states—in their dealings with arguments before them based on the provisions of their relevant FTAs with the EEC.[78] For example, the Swiss Federal Supreme Court in *Adams*[79] denied the petitioner's claims to apply EEC competition rules as interpreted by the ECJ, by means of the FTA, even though there was room for direct application to the extent that private undertakings nullified and impaired trade liberalisation that had otherwise been achieved: the FTA was purely a trade treaty, the Court held, and confined to regulating industrial free trade. Although Article 23 FTA reproduced the then EEC competition provisions (now Articles 101, 102 and 107 TFEU), it merely laid down what practices were incompatible with the proper functioning of the FTA, but did not prohibit them or designate them as unlawful nor, in contrast to the EEC rules, did it declare them void or lay down sanctions; rather it merely authorised the contracting parties to take suitable measures against such anti-competitive practices. Thus, Article 23 FTA did not create any right of action for private persons before the Swiss courts and thus could not be used to justify the passing on of business secrets to the European Commission, in breach of domestic criminal law.

In a similar way, an attempt to achieve regional exhaustion of intellectual property rights as developed in EEC law was rejected by the Austrian Supreme Court in *Austro-Mechana*,[80] while the plaintiffs' arguments in respect of quantitative restrictions on imports (Article 13 FTA) and on derogations (Article 20 FTA) within the free trade area were rejected by the Swiss Federal Court in *Bosshard*[81] and in

[78] Agreement between the EEC and Austria: JO 1972 L300/2; and Agreement between the EEC and the Swiss Confederation: JO 1972 L300/189.
[79] *Adams* [1978] 3 CMLR 480.
[80] *Austro-Mechana* [1984] 2 CMLR 626.
[81] *Bosshard* [1980] 3 CMLR 664.

Physiogel[82] on the grounds that the provisions of the relevant FTAs—although worded in the same way as the relevant provisions of the then EEC Treaty (now Articles 34 and 36 TFEU)—nevertheless could not be interpreted in the same way as ECJ rulings since the FTAs differed substantially from the Treaty in purpose and nature:[83] in this way, the Federal Court expressly excluded application of *Cassis de Dijon*[84] to the FTA.

Similar ideas on refusal were presented by superior Austrian courts with respect to the EEA Agreement. While both the Austrian Supreme Court[85] and the Administrative Court[86] had recognised that provisions of the EEA Agreement would have priority over earlier, conflicting domestic legislation, the situation was different when it came to a conflict between the EEA Agreement and a subsequent national legal provision. For example, the Administrative Court observed:[87]

> The EEA, however, does not have a supranational character. From the nature of its goals and its systematic methods the EEA-Agreement has essentially to be understood as a multilateral treaty under international law in a traditional manner. . . . The [ECJ supremacy case-law] under Art. 5 EC-Treaty [now Article 4(3) TEU] can in this respect not be applied to Art. 3 EEA-Agreement. Art. 3 EEA-Agreement is to this extent not 'in its essential contents' in the sense of Art. 6 EEA-Agreement identical with Art. 5 EC-Treaty. . . . It *can therefore not be assumed, that* the national implementation of the Agreement is carried out in such a manner that the *EEA-Agreement takes priority over national law* (moreover, no constitutional provision was adopted stipulating that the regulations of the Agreement have supremacy in the discussed manner . . .). [Emphasis in original.]

The Administrative Court thus endorsed the opinion that EEA law in Austrian law did not have priority of effect over subsequent national law.

Refusal based on the non-binding nature of EU law before membership was a factor which also influenced supreme courts of states with an EA.[88] For example, the Czech Supreme Court[89]—when reviewing the validity of a consumer contract on the grounds of its being contrary to sound morals—focused solely on national law in its ruling and refused to accept any arguments based on EU law due to its non-binding nature before accession.

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[82] *Qualicare AG v. Regierungsrat des Kantons Basel-Landschaft*, Case no. 2A.593/2005, 6 September 2006. Available at: <http://www.bger.ch>. Consulted 9 October 2012.

[83] However, the Swiss Federal Court has proceeded on a case-by-case basis in deciding whether or not provisions of the EEC-Swiss FTA may enjoy 'direct effect' or be 'self-executing' in the national system, eg in respect of rules of origin (*Société X. V. Commission fédérale des recours en matière de douane*, 10 December 1985: BGE 111 Ib 323; *Medigros AG v. Eidgenössische Oberzolldirektion*, 11 November 1988: BGE 114 Ib 168) and of the principle of non-discrimination (*Maison G. Sprl v. Direction générale des douanes*, 2 September 1986: BGE 112 Ib 183).

[84] Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649.

[85] *Sportschuh-Special*, Oberste Gerichtshof (OBG) (Austrian Supreme Court), 4 October 1994, Case no. 4 Ob. 88/94: 1995/1 *Wirtschaftsrechtliche Blätter* 21.

[86] Verwaltungsgerichtshof (VwGH) (Austrian Administrative Court), 24 October 1994, Case no. 94/16/0182: 1995/1 *Wirtschaftsrechtliche Blätter* 43.

[87] VwGH, 3 October 1996, Case no. 95/06/0246-8: in English, see G. Loibl, M. Reiterer and O. Jun, 'Austrian Judicial Decisions Involving Questions of Public International Law', (1997) 2 *Austrian Review of International and European Law* 462, 476.

[88] Kühn n 64 *supra*, 64–66.

[89] Czech Supreme Court, Case no. 25 *občanskoprání i obchodněprávní dovolání* (Cdo) (*Civil and commercial appeals*) 314/99, 12 December 2000. Available at: <http://www.nsoud.cz>. Consulted 25 September 2012.

Similarly, the Slovak Supreme Court[90] was asked to consider the fact that a lower court's interpretation of domestic law had been contrary to the very EC directive which that domestic law had been intended to transpose. The Supreme Court expressly refused to deal with EU law as a tool for interpretation of national law in an EU-conform manner. Since at that stage of EU integration, EU law was not binding in Slovakia, any argument based on the directive was accordingly irrelevant.

As regards the Swiss courts,[91] even chambers in the Federal Court have failed to follow the 2003 decision on Euro-conform interpretation of harmonised domestic law[92] or have even ignored it.[93] Such position has also been maintained by the Swiss Federal Administrative Court when it noted:[94] 'It may not be deduced from this that Swiss law should have the same content as EU law, which is not directly applicable in Switzerland. Swiss law must rather be interpreted in an autonomous manner.'

VI Conclusion

Even without the rigours of international trade and the major foreign policy decision to redirect their economic and political future towards the EU, constitutional or superior courts are being increasingly called upon to balance the demands of the free market on the one hand with those of the rule of law and the rights protected under the constitution on the other. They are inevitably drawn into the international political arena that, in previous times, was basically an executive-led competence in external trade policy, possibly subject to parliamentary ratification.

Within Europe, the enhancement by courts of their role as trade policy actors—mediated by the ECJ model—coincides with and takes place against the background of national political decisions to integrate into the Internal Market or to have open trade relations with the Union (without the necessity of eventual membership always impinging upon the scene). Positive engagement of states as well as political and economic élites in popularly pursuing types of economic integration with the EU contextualises the work of the courts of EU-FTA states as well as the EFTA Court, allowing them to benefit from an atmosphere promoting use of EU legal instruments in domestic legal development and thereby implying a more ready acceptance of ECJ interpretations of those instruments harmonised and implemented in the national and EEA–EFTA legal systems.

Further, by employment or otherwise of ECJ case-law in their work, these EU-FTA courts appear to adopt a policy of identifying themselves with or as aspiring to belong to the judicial community centred on the EU and its Internal Market.[95] Engaging

[90] Slovak Supreme Court, *Decision 76/2000*: *Zbierka stanovisk Najvyššieho súdu a rozhodnutí súdov Slovenskej republiky* (*Official Gazette of the Decisions of the Supreme Court of the Slovak Republic*), Issue 4/2000, 55.

[91] F. Maiani, 'Legal Europeanization as Legal Transformation: Some Insights from Swiss "Outer Europe" ', *EUI Working Papers*, MWP 2008/32 (2008), 15–17.

[92] *B. AG and D. Srl v. A. AG*, Case no. 4C.337/4005, 19 December 2005: BGE 132 III 379, para 3.3.5; and *BBC and Swissperform v. GGA-Maur*, Case no. 4A_78/2007, 9 July 2007: BGE 133 III 568, para 4.6.

[93] *Eidgenössische Steuerverwaltung v. Verband Zahntechnischer Laboratorien der Schweiz (VZLS), A. SA, B. SA and C. AG*, 19 March 1998: BGE 124 II 193, para 6.

[94] *Janssen-Cilag AG v. Swissmedic Schweizerisches Heilmittelinstitut*, *Bundesverwaltungsgericht* (Swiss Federal Administrative Court), Case No. C-2092/2006, 5 December 2007, para 3.5. Available at: <http://www.bvger.ch>. Consulted 12 October 2012.

[95] B. Flanagan and S. Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges' (2011) 60 *International and Comparative law Quarterly* 1, 17–20.

in this type of judicial dialoguing[96] in trade also appeals to a broader audience—internally and externally, such courts are targeting not only the ECJ and indeed other states' courts but also their own governments and parliaments as well as economic operators which derive benefits from this judicial trade policy making.[97]

The emulation of the ECJ model as a trade policy actor has influenced the EU-FTA courts' approach with respect to EU law and ECJ case-law as mediated by their relevant FTA.[98] These courts have clearly considered such law and case-law as being legal sources of another system under international law. The EFTA Court, for example, has developed the EEA system along the constitutional and economic lines already determined by the ECJ in reference to the EU: thus, while maintaining that the EEA system is an international law one, it has nevertheless qualified such understanding on the grounds of deepening economic integration with the Union trading bloc and formulated a consideration of another *sui generis* system in international economic trade akin to the Union.

The recognition of the international law nature of EU law in the internal systems of EU-FTA states also permits a much greater degree of flexibility in usage or rejection, deference or defence, which is not permitted to EU Member State courts under the Treaties. The EU-FTA courts can thus maintain their ostensibly complete discretion to determine whether or not to use ECJ case-law in their own rulings and thereby derive the maximum benefit from it where the case before them so requires. This allows them the latitude to control and mould their approaches and institutional perceptions along the lines of the ECJ in the Union.

This view is actually a partial reflection of the ECJ's own case-by-case approach in finding specific provisions of EU-FTAs as enjoying direct effect in the Union system. The asymmetric nature of this protection afforded to third-country individuals or companies in the EU does not (usually) oblige EU-FTA courts to grant reciprocal protection to EU nationals before them when claiming infringement of the same FTA. Nevertheless, against the political and economic background of Internal Market access and integration, such an ECJ determination of direct effect may actually engender a more positive response in EU-FTA courts' decision-making so that, through judicial fiat, they may in practice ensure a reciprocal protection.[99]

Importantly too where the internal court structure of an EU-FTA state has created a number of supreme courts rather than one central one, then diversity of opinions between them on the status of EU law before them (eg in Switzerland or in the Czech Republic) is redolent of the diverging approaches to EU law experienced between some Member State supreme courts.[100]

In conclusion, the requirements—express or implied—to apply ECJ case-law in proceedings before them have been used by EU-FTA courts to reinforce or even gain control over the legal or constitutional relationship between national law and the law deriving from the relevant FTA. The arguments of these courts have been framed in

[96] A. F. Tatham, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland* (Martinus Nijhoff, 2013), 30–40 and 281–308.

[97] Flanagan and Ahern n 95 *supra*, 15–16.

[98] The position of the Swiss Federal Court as a long-standing trade policy actor may be said to have been enhanced by its role in Switzerland's ad hoc approach to integration into the Internal Market.

[99] Petrov and Kalinichenko n 2 *supra*, 340–341, 347–348.

[100] Compare the early reactions direct effect of EU law of the French *Cour de cassation* (*Jacques Vabre* [1975] 2 CMLR 336) to those of the *Conseil d'Etat* (*Cohn-Bendit* [1980] 1 CMLR 543).

varying ways in order to resolve conflicts between obligations under national constitutional law and international trade law, either in deference as evinced by a very strong compulsion to interpret the FTA-derived law in a Euro-conform manner or in defence as exemplified by a rejection of ECJ rulings to interpret EU-FTA provisions similarly worded to those in the TFEU. As trade policy actors, they have therefore used their perceived protection of the national (or EEA) public interest as a means of determining when constitutional rights may be compromised in favour of trade rights or when they can instead be enforced as necessary barriers to trade.

The 'de-politicisation' of trade policy through its concomitant judicialisation has allowed EU-FTA courts to seise upon a role in trade policy determination, enabling them to become actors in the process of determining the rate and extent to which the Europeanisation[101] of this policy sphere evolves: by deferring, such courts seek to ensure the effectiveness of the FTA through consistent or Euro-conform interpretation thereby extending its own citizens' rights to trade and benefit from the economic freedoms and encouraging trade flows; by defending, the courts deny extension of rights and preferences to EU-based individuals and companies thereby justifying discrimination against EU citizens under the cloak of the protection of sovereignty or fundamental constitutional rights and thus limiting trade flows with the EU.

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[101] S. Lavanex and F. Schimmelfennig, 'EU Rules beyond EU Borders: Theorizing Governance in European Politics' (2009) 16(6) *Journal of European Public Policy* 791.

