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## **THE POSSIBILITY OF DIRECT APPLICATION OF DIRECTIVES IN THE CASE PRACTICE OF THE CONSTITUTIONAL COURT OF MONTENEGRO**

### ***ABSTRACT***

*Analysis of the practice of the Constitutional Court of Montenegro in the last few years shows an evident increase in the number of cases in which the applicant is asking for an assessment of the compatibility of national legislative acts with the Constitution of Montenegro, asking for annulment because of alleged incompatibility with a certain EU directive. Therefore, this article discusses one of the most interesting questions which countries in the process of the accession to the European Union are facing – the status of the sources of EU law in the legal system of candidate countries before they become members of the European Union. In this context, the authors will examine the case law of the Constitutional Court of Montenegro related to situations where the Montenegrin legislator has transposed a directive into the domestic legal order. After comparative analysis, the article will shed more light on the subject stances and will discuss possible solutions depending on the facts of the case when the principle of the direct application of directives can be established.*

**Keywords:** *directives, direct application, Association Agreement, Constitutional Court of Montenegro*

## 1. INTRODUCTION

The legal regime of the association of Montenegro to the European Union (hereinafter: EU) is defined by the Stabilisation and Association Agreement between the European Communities and its member states on the one side, and Montenegro on the other<sup>1</sup> (hereinafter: SAA) which entered into force on 1 May 2010. This is a type of international agreement that the EU concluded with “Western Balkans” countries, which establishes specific relations with the subject countries, giving them the possibility to become an EU member state (hereinafter: Member State). As a precondition for this political goal, the SAA requires the harmonisation of the Montenegrin legal system with the *acquis*. Regarding the secondary sources of EU law, directives represent the most important tool of this harmonisation. In this process Montenegro, according to the SAA, has the obligation to adopt all the directives from the *acquis* before it can become a full member of the EU.

Because the association process lasts for an uncertain period of time, the status of EU law sources – primary and secondary – in the Montenegrin legal system will represent a major challenge for all national state institutions, especially for the judiciary. Therefore this article deals with the question of the application of directives in the domestic legal system with special reference on the potential direct application of this secondary EU law sources before the Montenegrin judiciary. In this respect, significant guidelines can be found in the case law of the Constitutional Court of Montenegro (hereinafter: Constitutional Court) and the case law of the Court of Justice of the European Union (hereinafter: CJEU). In 2014 the Constitutional Court delivered its first decision in which it assessed the compatibility of domestic legislation with a directive which was incorporated into the domestic legal system. Until today the Constitutional Court had a few similar cases on the same subject and today we can say that those positions can be regarded as settled case law. However, reality creates specific legal situations which produce new challenges for the judiciary, including the possible “direct application” of directives that are not implemented in the Montenegrin legal system before the end of the association process.

## 2. THE STATUS OF EU LAW IN THE MONTENEGRIN LEGAL SYSTEM

One of the most important legal questions for every candidate state during the EU association process is the status of EU law in the national legal system. The legal basis for the application of EU law in the Montenegrin legal system is the

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<sup>1</sup> Stabilisation and Association Agreement between the European Communities and its member states on the one side, and Montenegro on the other, Official Gazette No. 7/07

SAA, which represent a specific type of international agreement. A similar type of agreement, so-called “European agreements”, represents the legal basis for the association process of Central and South-East European countries, therefore in this article we will use the term “association agreements” for both categories of international agreements. With the goal of ascertaining, the basic concepts of the SAA application in the Montenegrin legal system, comparative analysis shows that because of the lack of special constitutional provisions on the effects of EU law, in the majority of candidate countries association agreements were treated in the same way as any other international treaty or agreement.<sup>2</sup> Following this concept, the Constitution of Montenegro (hereinafter: Constitution) has provided direct application of the SAA, in the sense that citizens can exercise their rights and duties before the Montenegrin judiciary.<sup>3</sup> In other words, the founding fathers of the Constitution opted for a monistic approach which assumes that ratified and published international agreements make up part of the domestic legal order and have the supremacy over national legislation – laws and secondary legislation.

After entering into force, the SAA’s provisions provide protection for citizens and legal persons directly acquiring rights on which they can rely before the judiciary of the contracting states.<sup>4</sup> Because of the fact that the preliminary ruling reference can be made only from the state courts of the Member States, the judiciary of the candidate state does not have this possibility, and they give an interpretation of the SAA’s provisions or certain provisions from EU law. More precisely, interpretation of the association agreement’s provisions in the domestic legal system of the candidate state is made by the highest national court instances – the supreme courts or constitutional courts.<sup>5</sup> The Montenegrin constitutional configuration of the judiciary gives this role to the Constitutional Court. This jurisdiction of the supreme court instances has brought about the question of whether legislative harmonisation should be accompanied by judicial harmonisation, that is, whether the national courts should apply the interpretation of the CJEU and take account of EU legislation when applying the provisions of domestic laws or the provisions of the association agreements?<sup>6</sup> Some authors define this process as “voluntary

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<sup>2</sup> Rodin, S., *Pridruživanje Hrvatske Europskoj uniji – Preobrazba pravnog sustava*, in: Ott, K., (ed), *Pridruživanje Hrvatske Europskoj*, Institut za javne financije, Zaklada Friedrich Ebert, 2006, p. 224

<sup>3</sup> Articles 9, 17 and 118 Constitution of Montenegro, Official Gazette of Montenegro, 01/07

<sup>4</sup> Stanivuković, M., Đajić, S., *Sporazum o stabilizaciji i pridruživanju i prelazni trgovinski sporazum Srbije i Evropskih zajednica – pravno dejstvo i značaj*, Zbornik radova Pravnog fakulteta u Novom Sadu, 1-2/2008. p. 398

<sup>5</sup> Stanivuković, M., *Pojedinac pred Sudom evropskih zajednica*, Službeni glasnik, Beograd, 2007, p. 161

<sup>6</sup> Albi, A., *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge University Press, 2005, p. 52

harmonisation”<sup>7</sup>. This dilemma is more emphasised because, unlike the European Economic Area Agreement, the association agreements contain no provisions to the effect of consulting EU secondary legislation and the case law of the CJEU in the interpretation of its provisions.<sup>8</sup>

Since the judiciary is bound by the Constitution, legislation and international agreements which have the primacy over the law and are directly applicable, the logical conclusion is that in cases where a provision of the law represents a violation of a right which an individual has according an international agreement, the subject law cannot be applied, or – in the CJEU vocabulary – the legislative provision must be “set aside”<sup>9</sup>. In other words, it is possible to challenge the validity of the national legislative act before the Constitutional Court when it is not in line with the international agreement, claiming that is not in conformity with the Constitution. Confirmation of the subject statement can be found in the case law of the Croatian Constitutional Court, which considers that in cases where the law is contrary to an international agreement, it is at the same time contrary to the Croatian Constitution because there is a breach of the constitutional principle of the rule of law.<sup>10</sup>

Confirmation of this stance can be found in the general principle of interpretation of international agreements – *favour conventionis*. According to this principle, all the legislation must be interpreted by the courts in the context of international agreements, which represent part of the domestic legal system. This principle can be found in the case law of the German Constitutional Court:

“...taking into account the guaranties of the European Convention for Human Rights and the Court for Human Rights decisions when interpreting the law...”<sup>11</sup>

It follows that when it comes to the interpretation of a certain legal provision related to the application of the *acquis*, national law is the first interpretative tool that must be used. However, if there is a lack of valid indicators in the framework of the national legal system, it is logical to look through the guidelines in the EU law. One of the most significant SAA provisions – the “general harmonisation clause” – represents the best confirmation of this logic.<sup>12</sup>

<sup>7</sup> Evans, A., *Voluntary Harmonization in Integration between the European Community and Eastern Europe*, Eur. L. Rev., (22) 1997, p. 204

<sup>8</sup> Albi, *op. cit.* note. 6, p. 52

<sup>9</sup> Case C-106/77 Amministrazione delle finanze dello stato v Simmenthal, paragraph 22

<sup>10</sup> Constitutional Court of Croatia U-I-925/95 and U-I-950/96

<sup>11</sup> BVerfGE 111, 307 (Berücksichtigung der EMRK), in: Izabrane odluke Njemačkog Ustavnog suda, Konrad Adenauer Stiftung, 2009, p. 600

<sup>12</sup> Article 72 paragraph 1 of the Stabilisation and Association Agreement between the European Communities and its member states on one side, and Montenegro on the other, Official Gazette No. 7/07

These legal positions are in line with the Constitutional Court's settled case law regarding the "interpretative effects of EU law", which provides the legal basis that in certain situations assesses the compatibility of national legislation with EU law sources. The Constitutional Court confirms the obligation that Montenegro has to harmonise its legal system with the *acquis* on the basis of the SAA and the fact that the dynamics of this process are governed by the National Programme of Integration of Montenegro into the EU (hereinafter: NPI):

*"...the Constitutional Court in this case had in mind the relevant provisions of the SAA...by which Montenegro took on the obligation to harmonise its legal order with the EU legal order before it became a member of the EU...and the dynamics of harmonisation is defined by the NPI."*<sup>13</sup>

In the beginning of the analysis the Constitutional Court took a conservative approach considering that, at this moment of EU integration, Montenegro is a candidate state and therefore the Montenegrin legal system is still not a part of the EU's "constitutional legal order". This point of view was supported by the fact that the Constitution has not one provision that, in an explicit manner, clarifies the application of EU law in the national legal system. On the other hand, this circumstance means that the constitutional text also does not contain a prohibition preventing the provisions which are adopted in the process of harmonisation of the Montenegrin legal system with the *acquis* being interpreted in conformity with EU law:

*"A member state, in which status Montenegro is at this moment, is not part of the EU constitutional order. The Constitution does not contain provisions on the interpretations of EU law to which the Constitutional Court has to adhere, but also there is no (legal) ban against the Constitutional Court interpreting provisions which are adopted in the process of harmonisation of Montenegrin law with EU law."*<sup>14</sup>

The principle of "interpretative effects of EU law" has its legal basis in the "general obligation to harmonise" the national legal system as a precondition of EU membership. In addition, Montenegro has agreed to harmonise certain parts of the domestic legal system within "clearly defined time limits":

*"This primarily comes out of the fact that harmonisation with the whole *acquis* is a necessary precondition for EU membership. Taking into account the interpretative effects of EU law by Montenegrin state bodies, and also by the Constitutional Court, represents an instrument of legal harmonisation, considering that Montenegro accepted*

<sup>13</sup> Constitutional Court of Montenegro U-I No. 29/16, 31 October 2017, paragraph 10.3.2

<sup>14</sup> Constitutional Court of Montenegro U-I No. 29/14, 21 April 2015, paragraph 11.3

*the legal obligation to harmonise certain parts of its domestic law within clearly defined time limits.*<sup>15</sup>

### 3. COMPARATIVE APPROACH IN THE APPLICATION OF DIRECTIVES IN THE CANDIDATE STATES

The “EU friendly” approach in interpreting association agreements was demonstrated by several highest national instances of countries that afterwards became EU Member States. Already in the 1997, the Polish Constitutional Court stated this Euro-friendly general rule of construction of domestic law:

*“Of course, EU law has no binding force in Poland. The Constitutional Court wishes, however, to emphasize the provisions of Article 68 and Article 69 of the (Polish Association Agreement)...Poland is thereby obliged to use “its best endeavours to ensure that future legislation is compatible with Community legislation”... The Constitutional Court holds that the obligation to ensure compatibility of legislation (born, above all, by the Parliament and Government) results also in the obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility”.*<sup>16</sup>

The Polish Supreme Administrative Court exploited this position in a statement that the obligation under the association agreement was violated not only by an improper legislative implementation at the national level, but also by a judicial interpretation of the respective national legislative act, disregarding the *acquis communautaire* as a subsidiary source of law.<sup>17</sup>

The Czech Constitutional Court faced a claim of petitioners in the *Milk Quota* case which argued that EU could not be applied because it was not binding (note here a tension between binding and persuasive sources of law, typical for post-communist legal thinking, often unable to realize the importance of the latter sources). The Court rebuffed this idea, emphasizing the existence of general principles of law, common to all EU Member States. The content of these principles is derived from common European values; the general principles imbue with content the abstract concept of the state governed by the rule of law, which includes

<sup>15</sup> Constitutional Court of Montenegro U-I No. 35/10, 28 February 2014, paragraph 10.3

<sup>16</sup> Kühn, Z., Arbor, A., *Making of European Transnational Constitution – Some Central European Perspectives*, in: Pernice I., Zemánek J. (eds.), *The Treaty on a Constitution For Europe Perspectives After The IGC*, NOMOS, 2005, p. 10

<sup>17</sup> Zemánek, J., *The Constitutional Courts in the New Member States and the Uniform Application of European Law*, in: Pernice I., Kokott J., Saunders C. (eds.), *The Future of European Judicial System in a Comparative perspective*, NOMOS 2006, p. 258

human rights. The Constitutional Court must apply these principles - thus it must follow European legal culture and its constitutional traditions.<sup>18</sup>

*“Primary Community law is not foreign law for the Constitutional Court, but to a wide degree it penetrates into the Court’s decision making – particularly in the form of general principles of European law.”*<sup>19</sup>

Similarly, the Czech antitrust authority, staffed by young lawyers, many of whom have the benefit of foreign legal education and knowledge of foreign languages, has taken into account EU law in almost every important case. This practice was approved by the Czech High Court in the Skoda Auto case. In that case, the appellant, the most important Czech company, challenged the decision of the antitrust authority with the argument that EU law was not a binding source of law in the national legal system and that, therefore, it could not be taken into consideration in the interpretation of the domestic law. The High Court rejected this claim, emphasizing the international links between national antitrust laws<sup>20</sup>:

*“The protection of free trade is specific in the way that national law is often not sufficient, and therefore is often enriched by the application of rules used in the countries with a long tradition of antitrust law (Germany, the United States). For that matter [the Czech antitrust law of 1991] received the basic ideas of the Treaty of Rome, particularly already mentioned articles 85, 86 and 92; this was from the perspective of harmonization of the legal systems of the European Communities and the Czech Republic an absolute necessity.”*<sup>21</sup>

Subsequently the High Court concluded that it was not error of law if the public authority interpreted the Czech antitrust law consistently with the case law of the European Court of Justice and the Commission. The decision of the Constitutional Court validated this approach, emphasising that both the Treaty of Rome and the EU Treaty result from the same values and principles as Czech constitutional law; therefore, the interpretation of European antitrust law by European bodies is valuable for the interpretation of the corresponding Czech rules.<sup>22</sup>

<sup>18</sup> Kühn, Z., *The Application of European Law in the New Member States: Several (Early) Predictions*, German Law Journal, Vol. 06 No. 03, 2005, p. 568

<sup>19</sup> Milk Quota Case, published as No. 410/2001 Official Gazette (English translation available at [<http://www.concourt.cz>])

<sup>20</sup> Kühn, *op. cit.* note 18, p. 566-567

<sup>21</sup> *Ibid.*, p. 566-567

<sup>22</sup> Kühn, Z. *European law in the empires of mechanical jurisprudence: the judicial application of European law in Central European candidate countries*, Croatian Yearbook of European Law and Policy; Vol.1. No. 1, 2005, p. 7

But notwithstanding the general position of the highest national courts that EU law must be taken into account when interpreting domestic legislation, the question remains: what place do the EU's sources of law have in the national legal system? The Croatian Constitutional Court faced this dilemma in 2007 in the *Volkswagen* case. The highest Croatian court instance decided that EU law must be taken into account, but not as the primary source of law, but that its criteria, standards and instruments could be used as a supplementary interpretative tool:

*“In this way the Association Agreement and the Temporary Agreement obligate the bodies responsible for the protection of competition when delivering decisions in certain cases, to apply not only Croatian competition law but also to take into consideration the relevant EU Communities law... The EU Communities’ interpretative criteria, standards and instruments are not applied as a primary source of law, but only as a supplementary interpretative tool.”*<sup>23</sup>

More precisely, EU law has the purpose of filling in legal loopholes, taking into consideration the spirit of the national law and in a manner that is not contrary to domestic legislation:

*“It concerned the filling of legal loopholes in such a manner that it is appropriate to the spirit of the national law and is not contrary to the explicit solutions of the Law on competition... which was applied in this case.”*<sup>24</sup>

Maybe the most complex legal situation arose when the applicant recalled the application of a certain EU law source which had not been implemented into the national legal order. In 1996 Professor Berke of ELTE University (Budapest) filed a submission with the Hungarian Constitutional Court contesting the constitutionality of certain provisions of the competition cooperation regime established by Article 62 EA and its Implementing Rules. In particular, Berke claimed that, by agreeing to directly apply the law of a foreign sovereign, the future formation of which cannot be influenced by Hungary, the Hungarian Republic had unconstitutionally transferred part of her legislative powers to that foreign sovereign. The Hungarian Constitutional Court rejected the possibility of applying the ‘criteria’ referred to by Article 62 (2) EA as private international law on the basis of the public nature of the competition law. Similarly, it rejected the possibility that the ‘criteria’ could enter the Hungarian legal system as generally accepted rules of international law on the basis that<sup>25</sup>:

<sup>23</sup> Constitutional Court of Croatia U-III-1410/2007

<sup>24</sup> Constitutional Court of Croatia U-III-2934/2011

<sup>25</sup> Volkai, J., *The Application of the Europe Agreement and European Law in Hungary: The Judgment of an Activist Constitutional Court on Activist Notions*, Harvard Jean Monnet Working Paper 8/99, p. 4, 5, 14, 15



“...the relevant criteria of the Community law cannot be equated in any respect with the generally accepted rules of international law or the norms of international *ius cogens*.”<sup>26</sup>

Finally, the Hungarian Constitutional Court found the law implementing the accession agreement partially unconstitutional, by ruling that EU law had no direct effect or direct applicability before accession. It highlighted that:

“The mechanism of direct applicability is a typical characteristic of the relationship between the Community’s legal system and the EU Member States. However, the situation following from the combination of Article 62(2) EA and Article 11R has to be assessed in the course of constitutional control with regards to the fact that the Hungarian Republic is not presently a Member State of the European Union.”<sup>27</sup>

Typical example of the subject legal dilemma was when the applicant alleged a violation of right contained in a certain directive before the Czech Constitutional Court and the Supreme Court in the case *Sugar Quota*<sup>28</sup>, *tako i pred Vrhovnim sudom*. Both court instances supported the idea that directives are not directly applicable in the Czech legal order because the Czech Republic at the time was not EU Member State:

“...validity of the agreement made between the parties on August 31, 1993 must be decided according to the then valid law, as both lower courts did. In contrast, laws and directives valid in the countries of the European Community are not applicable, as the Czech Republic was not (and still is not) a member of the Community, and that is why the Czech Republic is not bound by these laws...”<sup>29</sup>

Another example is the decision of the Slovak Supreme Court of August 25, 1999.<sup>30</sup> In that case the Supreme Court was invited by the parties to consider the fact that the interpretation of the law employed by the lower courts was contrary to the EU directive which the law was intended to transpose. The Court openly refused to consider EU law as an argumentative tool to interpret domestic law in a Euro-friendly way. The Court did not distinguish authoritative and persuasive arguments because in the world of limited law only binding sources exist; anything else is not the law and cannot be taken into consideration by a court. In the

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<sup>26</sup> *Ibid.*, p. 16

<sup>27</sup> Piqani, D., *Constitutional Courts in Central and Eastern Europe and their Attitude towards European Integration*, European Journal of Legal Studies, Vol. 1, No. 2, p. 8

<sup>28</sup> Kühn, *op. cit.* **note 22**, p. 9

<sup>29</sup> Czech Supreme Court of December 12, 2000, 25 Cdo 314/99 (not published, but available at [<http://www.nsoud.cz>])

<sup>30</sup> Kühn, Z., *The Application of European Law...op. cit.* note 18, p. 569

Slovak Supreme Court's view, "considering the current stage of EU integration," an argument based upon a European directive was not relevant.<sup>31</sup>

#### 4. THE APPLICATION OF DIRECTIVES IN THE CASE LAW OF THE CONSTITUTIONAL COURT

Notwithstanding the fact that the SAA is directly applicable before the Montenegrin judiciary, there is a question mark over the application of a directive whose provision is contrary to a certain domestic provision when the text of the SAA does not mention at all the text of the subject directive. The Constitutional Court, according the principle of interpretative effect of EU law, has developed case law which can be considered as settled case law in situations where the directive has been implemented in the Montenegrin legal system. In this line of cases, the Constitutional Court assessed the constitutionality of the national legislation:

*"...taking into consideration the possibility of the interpretative effect of EU law, the Constitutional Court has assessed that the disputed provision of Article 27 paragraph 7 of the Law... is not contrary to the provisions of Article 135 paragraph 1(i) of Council Directive 2006/112 EC..."*<sup>32</sup>

The Constitutional Court treats directives as any other international source – an international agreement or generally accepted international rules – which means that the directive must be properly implemented in the national legal order. In other words, there is no direct applicability of directives, and their provisions must be incorporated into the national legislation – as laws or secondary legislation:

*"The Constitutional Court points out that only confirmed international agreements and generally accepted international rules form part of the Montenegrin legal order, in the sense of Article 9 of the Constitution, and that directives ... notwithstanding whether they are legally binding secondary source of international law, are not directly applicable, but EU Member States and also states that want to become members of EU or are in the process of negotiations, implement them in national law in a manner that they regard as appropriate and determine in their own form and methods of implementation... For directives (in principle), legal acts which transpose them into the domestic legal order are necessary."*<sup>33</sup>

We consider it important to clearly define the difference between the notion of "direct application" and the notion of "direct effect" of a certain EU law source.

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<sup>31</sup> *Ibid.*, p. 569

<sup>32</sup> Constitutional Court of Montenegro U-I No. 11/15, 25 July 2017, paragraph 13

<sup>33</sup> Constitutional Court of Montenegro U-I No. 29/14, 21 April 2015, paragraph 11

The difference between those two notions is not always clearly visible because both have the purpose of providing enforceable rights for individuals. When it comes to direct application, then the issue is about the way that an international source becomes valid law in the internal legal order of the state. In other words, it represents their applicability before the courts in actual cases. Direct effect, on the other hand, concerns the possibility of an individual to acquire certain subjective rights directly on the basis of international agreements and to claim this right before the national judiciary. Therefore, the fact that a certain international agreement fulfils the requirements of being directly applicable does not automatically mean that it will have a direct effect. On the other hand, there is no direct effect without direct applicability.<sup>34</sup>

The position of the Constitutional Court implies the logical conclusion that, if a directive is not transposed into the Montenegrin legal order, an individual cannot claim rights from the directive. In other words, if the directive is not implemented, the Constitutional Court has to refuse to assess the constitutionality of the national provision. Therefore, notwithstanding that this case law can be viewed in general terms as clear and precise, real life can be much more complicated and create legal situations the facts of which are not covered by those two clear-cut situations. The first example is the situation in which the SAA or NPI contains explicit time limits for the harmonisation of a certain part of the Montenegrin legal order with EU law, but the legislator fails to transpose a directive. A similar situation could arise when the time limit for harmonisation has expired and the EU legislator adopts changes to a certain directive which has already been implemented in the Montenegrin legal order. So, can the individual obtain legal protection before the Montenegrin judiciary in situations when the time limit for the implementation of a directive in the domestic legal system has elapsed? In this case Montenegrin citizens are in the same situation as EU citizens when a Member State fails to implement a certain rule from a directive within a time limit explicitly defined by this EU legislative act. At the level of the EU legal order, in this sort of legal situation EU citizens have the possibility to claim direct applicability of a directive which was not properly transposed or where there is a delay in its implementation in the domestic legal system.

The question is: could the Constitutional Court in this legal situation create a similar “principle of direct application of directives” based on the subject CJEU case law, before Montenegro gains full membership of the EU? We regard that this scenario is not impossible and that the legal basis for this view can be already found in the case law of the Constitutional Court. Namely, this conclusion is

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<sup>34</sup> Medović. V., *Međunarodni sporazumi u pravu Evropske unije*, Službeni glasnik, Beograd, 2009, p. 133

made by combining two positions. Firstly, the Constitutional Court adopted a position that the directive “in principle” had to be transposed into the domestic legal order in the form of a general legal act – law or secondary legislation. This legal position does not sound final or exclude the possibility of exceptions. In other words, the fact that there is a legal principle does not mean that there are no situations when it may not be applied if there is a valid justification. Precisely for this reason, the CJEU has developed the doctrine of “direct application of directives” as an exception from a general principle, which the Constitutional Court has already emphasised in its case law:

*“Exceptionally, directives in EU Member States can have a direct vertical effect (an individual in relation to the state) but not a horizontal direct effect (an individual in relation to another individual). The direct effect of directives is exclusively the consequence of the failure of an EU Member State to implement in a proper manner a directive in the domestic legislation. In this case national courts recognize the direct effect of a directive (if the nature of the subject provision provides this possibility)... If it is not possible to apply the directive directly the provision of the domestic law is applicable, but in this case the subject provision must be interpreted in the spirit of the directive.”<sup>35</sup>*

The second position from the case law of the Constitutional Court which is relevant for this subject is the explicit assertion that Montenegro has accepted “the legal obligation to harmonise certain parts of domestic law within clearly defined time limits”. Therefore, if there is a delay in implementing a directive in part of the Montenegrin legal system for which the SAA establishes an explicit time limit for its harmonisation, the omission to transpose this EU source of law could be regarded as a breach of the obligations that Montenegro accepted on the basis of an international agreement. This omission could create the basis for individuals to claim direct effect of the provision of international law (directive) before the Montenegrin judiciary. This assertion is clearly related to the time limits contained in the SAA but, in regard to the time limits defined by the NPI, the situation is not so certain. Hence, the NPI is a general legal act which is adopted by the Government of Montenegro relating to the obligations that Montenegro has from the SAA. Therefore, this document is not an international agreement which is ratified in the Parliament of Montenegro. On the other hand, if we look at the case law of the CJEU regarding legal acts delivered in the implementation and execution of association agreements, there could be positions that support the idea that individuals can rely also on the time limits provided by the NPI. Namely, the CJEU has developed clear guidelines regarding the legal effects of decisions delivered by the Council for the implementation of association agreements in the EU legal

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<sup>35</sup> Constitutional Court of Montenegro U-I No. 35/10, 28 February 2014, paragraph 10.2

system. Even though the CJEU has confirmed the direct effect of the association agreements provisions it has also confirmed the direct effect of decisions of bodies that have the jurisdiction to implement the SAA referring to same criteria:

*“The same criteria apply in determining whether the provisions of a decision of the Council of Association can have direct effect... Article 2(1)(b) of Decision No 2/76 and the third indent of Article 6(1) of Decision No 1/80 uphold, in clear, precise and unconditional terms, the right of a Turkish worker, after a number of years’ legal employment in a Member State, to enjoy free access to any paid employment of his choice.”*<sup>36</sup>

## 5. CONCLUDING REMARKS

The idea of “direct application of directives” in situations when the national legislator of a candidate state omits to transpose the directive into the particular area of the legal system for whose harmonisation the SAA provides explicit time limits basically relies on the fact that this legal document represents an international agreement which is signed, ratified and published, and is therefore binding for the parties. Therefore, the SAA is an international agreement that is legally binding for Montenegrin institutions and especially the judiciary. The fact that the SAA has the political goal of Montenegro becoming a full Member State does not mean that the subject fact must occur. In other words, the SAA has an indefinite duration and it will be applicable until Montenegro becomes a full Member State, or until it is cancelled. But while this international agreement is valid its provisions will be in force and “will have supremacy over national legislation and will be directly applicable when regulating relations differently from internal legislation”, according to the explicit wording of Article 9 of the Constitution. Namely, the goal of the explicit time limits provided by the SAA is to ascertain that legal harmonisation in certain parts of the Montenegrin legal system will not depend on an uncertain political event – full EU membership – and to create a stable legal regime which will be in force regardless of the future development of the EU accession process. The question is: why should Montenegrin citizens and citizens of EU suffer negative consequences in situations when the Montenegrin legislator fails to implement a certain directive given that the SAA provides for an explicit time limit?

The relevant guidelines for the development of the “direct application of directives principle” can be found in the CJEU case law relating to similar legal situations. It is precisely the goal of this CJEU doctrine to give protection to an EU individual against the irresponsible behaviour of Member States when they fail to comply

<sup>36</sup> Case C-192/89 S. Z. Sevince v Staatssecretaris van Justitie, paragraphs 15 and 17

with international obligations, in the subject situation – to implement the rules contained in the directives. The article shows that the same case law of the Constitutional Court has not shut the door on this possibility. Despite the fact that the Constitutional Court took the position, as did practically all other national supreme court instances in the process of EU accession, that “for directives (in principle), legal acts which transpose them into the domestic legal order are necessary”, the specific facts of a future case could create exemptions from this general principle.

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