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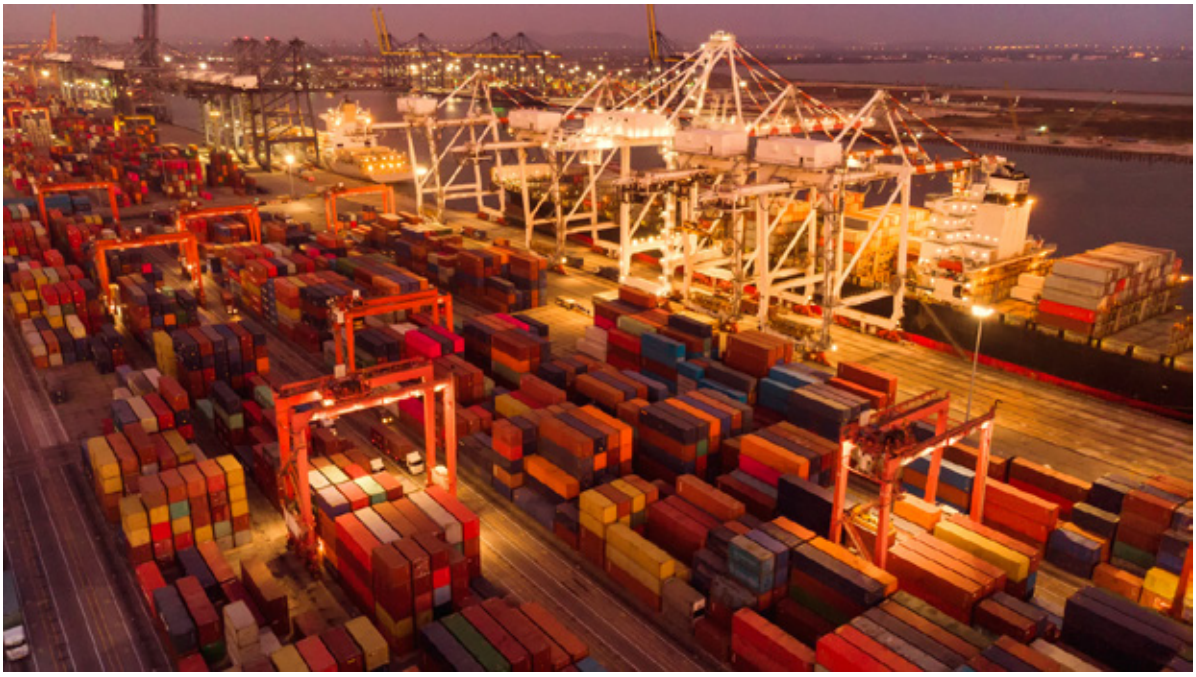


Sectoral integration opportunities in the SAA regime

The case for the internal market treatment of products

Author: Zoran Sretic, independent expert

Background

The EU is the main trading partner of the Western Balkans (WB). According to the estimates from 2021, 81% of total WB exports went to the EU while 58% of the WB imports came from the EU, peaking at €28.2 and €36.9 billion, respectively.[1] The manufactured goods dominate the EU trade with the WB, making up 75% of the EU exports to and 76% of the EU imports from the WB.[2] Trade with the region has grown by almost 130% over the past 10 years.[3] Indeed, the EU-WB trade increase in volume owes to the implementation of Stabilisation and Association Agreements (SAAs) providing for a zero tariff trade between the EU and the region.

1 Eurostat, Archive: Western Balkans-EU - international trade in goods statistics, last time accessed on 22 June 2023.

2 Ibid.

3 European Commission, EU extends trade preferences for the Western Balkans for 5 more years

However, the trade between the SAAs parties is inhibited by numerous non-tariff barriers to trade (NBTs). NTBs come from various sources – technical regulations, licensing requirements, customs procedures, and other regulatory obstacles - that can distort the flow of goods between the parties. These barriers result in increased costs, delays, and administrative burdens for businesses engaged in cross-border trade. As a matter of illustration, the waiting time only at crossing points in CEFTA states generates up to 300 M€ annually.[4] Arguably, given the scale of trade, the detrimental effect of the NBTs applied between the WB and the EU could be much higher. Indeed, failure to eliminate NBTs between SAA parties is reflected in the costs of doing business, lost opportunities and a slower pace of market integration. This is all the more surprising given that the SAAs parties have agreed to abolish all the quantitative restrictions and measures with an equivalent effect to the free cross-border movement of goods.

The revised enlargement methodology (REM) envisages potential for "closer integration of the country with the EU"[5], including the "work for accelerated integration and 'phasing-in' to [...] the EU market"[6] based on the countries' sufficient progress in reform priorities agreed in the accession negotiations. To that end, the REM foresees the SAA institutional structures as a venue for monitoring "the progress in [...] [implementation of] specific measures of accelerated alignment"[7] with the relevant Union *acquis*. In particular, the SAA sub-committees would be used for "identification of opportunities for accelerated alignment and integration in all EU policy areas, with clear benefits for European Union and candidate countries",[8] which, arguably, includes the abolition of remaining obstacles to the free movement of goods, in accordance with the SAA provisions.

Indeed, an institutional framework established between parties of the Association Agreement (AA) and the Deep and Comprehensive Free Trade Area (DCFTA) has already been employed for purposes similar to those envisaged by the REM for the SAA structures. IN the 2022 State of the Union Address, Von der Leyen said that the European *Commission will work together with Ukraine to ensure seamless access to the Single Market.*[9] The European Council's conclusions of 20-21 October 2022 called for the use of "the full potential of the [AA] and [DCFTA] [with Ukraine] to ease its access to the Single Market."[10] In the EU-Ukraine Association Committee in Trade Configuration (ACTC)[11] meeting held on 25-26 October 2022 both sides agreed to revise and extend the Priority Action Plan (PAP) so to reflect these new priorities for 2023-2024.[12] In particular, PAP provides measures for implementing clear commitment to activating the internal market treatment for Ukraine, starting with a clearer timeline for the conclusion of an Agreement on Conformity Assessment and Acceptance (ACAA), Mutual Recognition Agreement of authorized Economic Operators, commitments in the Sanitary and Phytosanitary (SPS) area and further opening of the access to the public procurement market based on Ukraine's dynamic approximation with the relevant EU acquis.[13]

4 Transport Community, The Permanent Secretariat "Ensuring the fast flow of goods through Green Lanes linking the EU and Western Balkans" A potential contribution of the Transport Community to the conclusions of the EU-Western Balkans Leaders' summit of 6 May (Zagreb summit), p. 3.

5 Enhancing the accession process - A credible EU perspective for the Western Balkans, COM(2020) 57 final, p. 5

6 Ibid.

7 Ibid. p. 4

8 Ibid.

9 2022 State of the Union Address by President Von der Leyen, 14 September 2022 last time accessed 22 June 2023.

10 European Council Conclusions (20-21 October 2022) https://www.eeas.europa.eu/delegations/ukraine/european-council-conclusions-20-21-october-2022_en last time assessed 18 July 2023

11 According to article 465(4) of the AA, the ACTC deals with matters related to Section IV "Trade and trade-related matters" of the Agreement. It assists the Association Council in the performance of its duties and functions and performs the tasks stipulated by the Agreement.

12 PRIORITY ACTION PLAN For enhanced implementation of the EU-Ukraine DCFTA in 2023-2024.

13 Ibid.

Clearly, this begs the question if the SAAs provisions grant sufficient legal basis for achieving *seamless* access to the internal market, i.e., to *activate an internal market treatment* for Western Balkan countries' products, including their *phasing-in* into the EU market[14] based on the reform progress. As this legal analysis will show, the SAA provides sufficient legal basis to obtain the internal market treatment for Western Balkan products based on their progress in alignment with the relevant *acquis*. The analysis starts with defining the concept of the internal market treatment of goods and methods, and explaining how it is achieved within the EU. It then analyses the possibilities to extend the internal market treatment of products to the Western Balkan states within the legal framework of the SAAs. Based on the findings derived thereby, the conclusions and possible solutions are proposed.

The analysis, its findings and conclusions are limited to the area of the internal market treatment of goods. However, the document's proposed approach could also find its application in the area of free movement of services, capital and workforce.

The internal market treatment of goods

The internal market is "an area without internal frontiers in which the free movement of goods […] is ensured in accordance with the provisions of the Treaties."[15] In other words, the internal market is the zone in which the elimination of all the barriers to the free circulation of goods is guaranteed as a right enforceable by the economic operators against measures of the Member States in accordance with the rules set by the European Union.[16] Indeed, the internal market treatment of the goods assumes:

1. the elimination of all customs duties and all charges having equivalent effect imposed upon a product imported between the Member States;[17] and
2. the elimination of all non-tariff barriers to free, undistracted cross-border circulation of a product within the internal market area.[18]

It is the second feature that distinguishes the internal market treatment of goods from the *free trade treatment* under free trade agreements (FTAs).

The free trade treatment of products is mostly limited to lowering or eliminating most tariffs and duties that countries impose on imports and exports with the goal of reducing or eliminating trade barriers. However, the FTAs do not eliminate enforcement of national measures that act as a barrier to international trade[19], such as technical rules which set pre-requirements that a product must satisfy before it is placed on the national market (non-tariff barriers).[20] As a result, the countries

14 Enhancing the accession process - A credible EU perspective for the Western Balkans, COM(2020) 57 final, p. 5.

15 Treaty on the Functioning of the European Union (TFEU), Art. 26.2 (ex Art. 14.2 of the Treaty on the European Community).

16 For instance, Art. 34 of TFEU prohibiting non-tariff barriers (quantitative restrictions and measures having equivalent effect) to free movement of goods can be relied on to contest not only positive action of a Member State, but also its inaction (See C-112/00 – Schmidberger).

17 TFEU, Art. 30. The Court of Justice of the European Union considers that any charge, whatever it is called or however it is applied, 'which, if imposed upon a product imported from a Member State to the exclusion of a similar domestic product has, by altering its price, the same effect upon the free movement of products as a customs duty', may be regarded as a charge having equivalent effect, regardless of its nature or form (Joined cases 2/62 and 3/62, and Case 232/78).

18 TFEU, Arts. 34 and 35.

19 Institute for Government, „Non-tariff barriers", 16 January 2017.

20 Indeed, the FTA may provide certain grounds for further mutual facilitation of trade between the parties for certain sectors/products, such as faster clearance procedures, limited inspection controls, etc. that does not amount to disapplication of local technical rules to the imported product.

that are parties to the FTA may still deny access to their market on the ground that a product does not satisfy locally fixed technical requirements.

The internal market treatment, on the other hand, assumes the sweeping elimination of all non-tariff barriers between trading parties through the disapplication of national technical rules and any other form of quantitative restrictions whatsoever to the free cross-border flow of goods. Namely, the principle prohibits application of national technical rules to deny access, or otherwise distorts inflow of products legally placed in one Member State, to the national market of another. The abolition correlates to the equivalent right of the economic operators to seek legal protection before competent national authorities from employment of national rules that violate the free movement of goods rules, thereby affecting undistorted pass of such goods.[21] The prohibition of application of non-tariff barriers is *sweeping* since it requires from the authorities to disapply national rules across entire categories of products, rather than through an individual administrative clearance of a particular batch of products on the case-by-case basis.

The internal market treatment is achieved through two methods of elimination of the non-tariff barriers:

- by applying the *principle of mutual recognition* of products; and
- by harmonising national technical requirements by means of directives and regulations.

The principle of mutual recognition of products: non-harmonised products

The principle of mutual recognition applies to *non-harmonised products*, i.e., it governs the free movement of goods in areas in which there are no applicable Union *acquis*. The principle of mutual recognition derives from the case-law of the Court of Justice of the European Union (CJEU).[22] *Products lawfully marketed in one Member State should in principle move freely throughout the Union.*[23] According to the rule, on their territory, Member States may not prohibit the sale of goods which are lawfully marketed in another Member State, notwithstanding any divergences in national technical regulations and standards that exist.[24] Therefore, it is sufficient that the product satisfies the requirements of the Member State where it was first placed on the market to freely circulate in all 27. As a result, the product may not be prohibited from being placed on the market in another Member State on the ground that it does not satisfy locally fixed technical requirements, or otherwise their access slowed or made more costly on the pretext that compliance with such rules must be checked prior to its entry. In point of fact, the mutual recognition of products principle requires a high level of mutual trust between the EU Member States regarding nationally applicable consumer protection, health and safety requirements, and their enforcement.

21 See Case 8-74 – Dassonville; C-112/00 – Schmidberger.

22 Case 120/78 *Rewe-Zentrale v Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon* case) para. 14.

23 Commission notice – The 'Blue Guide' on the implementation of EU product rules (20222022/C 247/01), p. 7.

24 REGULATION (EU) 2019/515 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008, Recital 4.

Nevertheless, on duly justified cases, the Member States can still restrict the marketing of goods that have been lawfully marketed in another Member State, where such restrictions are justified on the grounds set out in Article 36 TFEU.[25] The exception from the mutual recognition of the product principle resulting from differences in national legislation may only be accepted if:

1. the national rule of the Member State of destination pursues a legitimate public interest objective, and
2. the measure restricting or denying access is proportionate, meaning that the measure is appropriate for securing the attainment of the objective and necessary (it does not go beyond what is necessary for attaining the objective).[26]

In order to eliminate remaining barriers to free circulation of goods stemming from differences in national legislation, the EU adopted the policy of setting common technical requirements at the level of the Union – harmonisation policy.

Harmonisation policy: harmonised products

Harmonisation legislation consists of EU regulations and directives which aim at creating common rules which are equally applicable in all Member States.[27] The objective of the harmonisation instruments is two-pronged:

- elimination of the remaining non-tariff barriers to free movement of goods stemming from any divergences in national technical regulations and standards; and
- setting minimum requirements that must be met before products are placed in the internal market to achieve high level of consumer protection, safety, health and environmental protection.

The EU harmonisation instruments regularly insert *a free movement clause* which guarantees the free movement of products complying with the EU legislation requirements.[28] As a result, the key legal effect of setting common standards by the EU harmonisation instruments is disapplication of Art. 36 TFEU as the only remaining ground for a member state to lawfully restrict or deny access to the national market of a product legally placed in another Member State on the basis of the local requirements. Free movement clauses, in other words, expressly prevent the Member States from enforcing different, additional or more restrictive measures on a product if the product fulfils the requirements of the EU law in question. Therefore, the Member States cannot impede making available on the market a product which complies with all the provisions of sectoral harmonisation legislation.

25 TFEU, Art. 36: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

26 Commission notice – The 'Blue Guide' on the implementation of EU product rules (20222022/C 247/01), p. 7.

27 COMMISSION NOTICE Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (Text with EEA relevance) (2021/C 100/03) p. 41.

28 Commission notice – The 'Blue Guide' on the implementation of EU product rules, 2022, p. 126

SAA rules on *free movement of goods - nomen est omen*

SAAs provide for progressive establishment of "a free trade area between the [EU] and [a WB country]"[29] in which *free movement of goods*[30] exists, competition is undistorted[31], and cross-border provision of services, capital and movement of workforces is liberalised.

The SAAs free movement of goods rules are based on:

1. **the abolishment of all import and export customs duties and charges having equivalent effect** between the parties for industrial products and their progressive mutual abolition for agricultural and fishery products[32];
2. **the abolishment of quantitative restrictions on imports and exports and measures having equivalent effect**[33]; and
3. **standstill clause** prohibiting reestablishment of the duties, *charges having equivalent effect*[34], new quantitative restriction on imports or exports or *measures having equivalent effect*[35] nor shall those existing be made more restrictive in trade between the EU and WB states.[36]

However, SAAs provide an exemption clause, authorizing prohibitions or restrictions on imports, exports or goods in transit justified on equivalent grounds to those provided in Art. 36 TFEU (*authorised restrictions clause*).[37]

The SAA and any trade agreement to which the EU is a party represent a source of the EU law as much as any other EU legislation. The wording of provisions of the SAA governing prohibition of non-tariff barriers and authorized exemptions to the rule is identical *letter to letter* to the wording of Articles 34 and 36 TFEU that the CJEU used to devise the mutual recognition doctrine. One could argue that equal wording must amount to the equal results, i.e., that an EU Member State may not deny a market access to a product lawfully manufactured in a WB country on grounds that those products have been produced in accordance with different technical rules to that applicable in the EU. The same wording in the different legal context does not necessarily allow for the same legal outcomes.[38] Therefore, it seems legitimate to argue that (most of the) EU and national technical rules qualify as authorised restrictions, within the meaning of the SAA, capable of denying free movement of goods without the need to be specifically justified by the EU and Member States authorities.

Nevertheless, it is generally accepted by the ECJ's case law that "a provision in an agreement concluded by [the EU] with non-member countries must be regarded as being directly applicable

29 SAA Serbia, Art. 1.2(f).

30 See SAA Serbia, TITLE IV "Free Movement of Goods".

31 See SAA Serbia. Art. 73.

32 SAA Serbia, Articles 20-23, and 26 and 27.

33 Ibid.

34 "Any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on […] goods when they cross a frontier, and which is not a custom duty in the strict sense, constitutes a charge having equivalent effect" (Joined Cases 2/69 and 3/69 Sociaal Fonds voor de Diamantarbeiders v S.A. Ch. Brachfeld & Sons and Chougol Diamond Co.).

35 Measures having equivalent effect to the quantitative restrictions are defined by the EU law as '[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' (Case 8/74 Dassonville [1974] ECLI:EU:C:1974:82).

36 Ibid. Art. 36.

37 SAA Serbia, Art. 45: „This Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property, or rules relating to gold and silver. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties."

38 Case 270/80 Polydor v Harlequin Record Shops (Polydor Ruling), para. 18.

when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure."[39] That being said, the objective of the SAA to establish the free movement of goods between the parties is a clear statement of law, which suggests that any diversion from the *free movement of goods* principle must be interpreted narrowly and that it is upon the party imposing such restrictions to justify the legality of their measures denying or distorting access to the market. As a result, it is within the SAA rules to claim that if a WB country's technical requirements are aligned with the EU's consumer, health, and safety protection requirements, any enforcement of the EU technical rules to restrict the free circulation must be abolished per the provisions of the SAA, without a need to sign specific international agreements/protocols to that matter.

To interpret the SAA provisions otherwise would have meant that non-tariff barriers between the SAA parties operate as a standard rather than an exception. That is certainly not the case, since provisions of the SAA concerning the trade between the parties are placed under a title "Free Movement of Goods" and pursue the same objective as the like provisions of the TFEU; hence, an ultimate legal outcome must be as close, if not the same, as the ones set between the member states. *Nomen est omen,* as they say, which is why parties to the SAA are more than equipped with adequate tools to interpret its provisions in favour of free circulation of goods and to act accordingly to eliminate remaining barriers to seamless cross-border flow of products across the board.

De facto, Stabilisation and Association Councils (SAA Councils), established by the SAAs, have the power to interpret the agreement and pass binding decision for purpose of attaining its objectives[40] and to settle disputes in case of parties' failure to comply with the free movement of goods rules.[41] As a result, the parties to the agreement and bodies thereby established are equipped with the competence to interpret the SAA free movement of goods provisions to accommodate progress made in alignment with the internal market *acquis* and extend the internal market treatment to the Western Balkan Countries' products accordingly.

In the following sections of the document, the legal avenues available under the SAA legal frameworks to extend the internal market treatment to products from the WB countries shall be discussed through:

- Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAs) - SAA, Art. 77[42];
- Unilateral measures and/or interpretation of the SAA clauses - SAA, Articles 129.1 and 129.2;
- Binding SAA Council decisions - SAA, Articles 8, 121, 129.3; and/or
- Specific protocols governing the mutual recognition of products in the framework of the SAA.

39 Case 12/86 Demirel, para. 14.

40 SAA Serbia, Art. 121.

41 SAA Serbia, Art. 129.

42 All numerations are based on the SAA agreed with the Republic of Serbia. Provisions with equal effect agreed with other WB countries may have slightly different numerations in their respective SAAs.

Agreements on Conformity Assessment and Acceptance of Industrial Products – ACAAs

Provisions of the SAAs determine that the parties may conclude an ACAA "once the legislative framework and the procedures of [a WB country] are sufficiently aligned on that of the [Union], and appropriate expertise is available".[43]

The ACAAs provide *mutual acceptance of industrial products*[44] and results of *conformity assessment procedures*[45] on the basis of the full alignment of the partner country's legal framework with EU legislation and standards. This is also provided on the basis of the upgrading of the horizontal infrastructure implementing in line with the model of the EU system in relation to standardisation, accreditation, conformity assessment, metrology and market surveillance.[46] ACAAs consist of a framework agreement and annexes, setting out a list of categories of products and a list of the EU and national rules accepted by parties and to which the trade facilitation is extended.[47] Mutual acceptance of products provides that industrial products listed and "which fulfil the requirements for being lawfully placed on the market in one of the Parties, may be placed on the market of the other Party, without further restriction".[48] By the mutual acceptance of conformity assessment procedures, parties "agree to recognise the results of conformity assessment procedures carried out in accordance with the Community or national law listed" and "shall not require procedures to be repeated, nor shall they impose additional requirements, for the purposes of accepting that conformity".[49]

> In other words, the ACAA allows industrial products covered by the agreements and attested as compliant in accordance with national rules, thereby listed, to be placed on the internal market without having to undergo any further approval procedures, and vice versa. The ACAA provides for a substantial reduction of costs for cross-border marketing by removing the need for double-certification of products covered by the agreement and reducing "red tape" at the border clearance. The benefits of such agreements are both economic and political, for both parties. "The internal market is widened for products in the sectors included in the agreements." Trade between the EU and the partner is facilitated thus improving the candidate country's access to the internal market, as its products are able to compete with those from the EU.[50]

43 SAA Serbia, Art. 77.2(d).

44 ACAA Malta, Art. 4.

45 ACAA Malta, Art. 5.

46 The "Blues Guide", p. 128.

47 ACAA Malta covered: 1. Electrical safety 2. Electromagnetic compatibility (EMC) 3. Machinery 4. Lifts 5. Personal protective equipment (PPE) 6. Equipment and protective systems intended for use in potentially explosive atmospheres (ATEX) 7. Safety of toys 8. Radio communication and telecommunication terminal equipment (RTTE).

48 ACAA Malta, Art. 4.

49 ACAA Malta, Art. 5.

50 COMMISSION STAFF WORKING PAPER Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAs) Brussels, 25.08.2004 SEC(2004)1071, p. 3.

"Politically, the EU benefits from the effective 'export' of the [Union] system."[51] For the candidate countries, the ACAA *certifies* the full compliance of their legislative systems and infrastructure with the EU's.[52] ACAAs provide treatment of goods in trade with the EU close to the application of the mutual recognition principle between the EU member states for the products covered.

However, ACAAs do not assume the application of the free circulation principle across the board. Instead, the scope is limited to industrial products and technical rules listed in the agreement. As a result, acceptance of the SPS rules regarding agricultural products and a large share of industrial products are out of the trade facilitation scope. Furthermore, the ACAAs do not cover so-called non-harmonized products, i.e., the products for which there are no applicable common EU standards and only national technical rules apply. As a result, non-tariff barriers stemming from the national technical rules in the non-harmonised area are also not eliminated by the ACAA. In addition, ACAAs do not entirely remove border customs clearance, controls and physical barriers between the parties, yet significantly reduce the costs associated with the multiple certifications and the *red tape.*

The first ACAA was signed with Malta in February 2004[53], a couple of months before Malta's formal accession to the EU in May 2004, which made the economic impact of the exercise limited at best. With Israel, a country not seeking membership, for instance, the first ACAA on pharmaceutical products entered into force in January 2013.[54] Declaratively, the ACAAs are available to interested countries seeking full EU membership.[55] However, ACAAs require launching of time-consuming negotiations and ratification procedures, and they have been rarely used in practice. No credible timelines were offered to the SAA countries for the conclusion of the ACAAs, comparable to Priority Action Plan (PAP)[56] under the Deep and Comprehensive Free Trade Area (DCFTA).

Therefore, while the limited sectoral internal market treatment of certain industrial products of the SAA country prior to the accession is, hypothetically, possible through the ACAAs, the SAAs provide additional stand-alone legal avenues to achieve equal results without any need to resort to the time-consuming ratification procedures.

Unilateral measures and/or instruments of interpretation of the SAA clauses

The parties are under legal duty to abstain from taking measures contrary to the SAA provisions as well as to take *any general or specific measures* required to fulfil their obligations under the agreement[57] and to pursue objectives set by the agreement. To that end, either party to the SAA "is able to discuss any matter concerning the interpretation or implementation of the Agreement

51 Ibid.

52 Ibid.

53 Agreement between the European Community and Malta on conformity assessment and acceptance of industrial products (ACAA Malta) (OJ L 34, 6.2.2004, p. 42).

54 The "Blue Guide", p. 128.

55 Commission notice – The 'Blue Guide' on the implementation of EU product rules (20222022/C 247/01), p. 127.

56 PRIORITY ACTION PLAN for enhanced implementation of the EU-Ukraine DCFTA in 2023-2024, Group 1 Measure providing "clear commitment to activate internal market treatment for Ukraine – starting with roaming; a clearer perspective and timeline for the conclusion of an Agreement on Conformity Assessment and Acceptance (ACAA); and commitments in the Sanitary and Phyto-sanitary (SPS) area and additional market opening for public procurement upon Ukraine's further approximation with the relevant EU acquis".

57 SAA Serbia, Art. 129.1.

and other relevant aspects of the relations between the Parties".[58] That being said, parties to the agreement, including the European Commission[59] and the EU Member States, are either:

- under the legal duty to comply with the SAA by adopting appropriate measures and abstaining from acts that may affect operation of its provisions; or
- empowered to interpret the SAA provisions in favor of the free circulation of goods.[60]

The non-tariff barriers to access to the internal market stemming from the EU technical rules may no longer be considered justified against the SAA free movement of goods provisions if the full alignment of the WB country legal framework with the *acquis* applicable to products is achieved. To remove the non-tariff barriers to free access to the market where sufficient equivalence of technical rules and competence of WB authorities is in place, parties to the agreement are empowered to agree to disapply SAA *authorized restrictions clause* unilaterally with the similar legal effect that is provided by a *free movement clause* in the EU harmonization instruments. In particular, parties to the SAA may, by acting unilaterally, take appropriate *general or specific measures* to lift the restrictions in place to accommodate results of the progress in "dynamic approximation" and/or of "accelerated alignment" and accept the equivalence of products and conformity assessment procedures, accept the equivalence of specified sanitary or phytosanitary measures, accept food establishments, eliminate documentary or physical checks and/or introduce free lanes at borders, etc.

However, unless done under the institutional framework of the SAA as the free trade agreement, unilateral measures can be unilaterally withdrawn, providing less legal certainty and long-term predictability for the economic operators. To place the seemingly unilateral steps under the umbrella of the free trade agreement, the parties may opt to act trough the SAA Council to reach uniform interpretation of the agreement's provisions as an appropriate venue to agree on disapplying the SAA authorized restrictions clauses to categories of products on the basis of the equivalence of rules, procedures and administrative capacities. Hence, on the basis of prior review of progress made by the WB country, the SAA Council may adopt an agreement interpretation instrument for the parties to start accepting products and to adjust their competent authorities' practices accordingly in order to eliminate practices of prior clearance procedures and controls.[61]

The SAA rules interpretation instruments, therefore, would be aimed at taking out trade areas from the SAA' *authorized restriction clause* application scope where the sufficient alignment with the Union *acquis* has been achieved to provide seamless access to the WB products to the internal market in *harmonised* areas, as well as to limit application of national technical rules to provide undistorted access for the WB products to the internal market in *non-harmonised* areas.[62]

58 SAA Serbia, Art. 129.2.

59 TFEU, Arts. 3.1(e), 206, 207.1 and 207.2.

60 For example, the Commission's interpretative communication on 'facilitating the access of products to the markets of other Member States: the practical application of mutual recognition' (2003/C 265/02) described the rights and obligations of economic operators supplying products to the EU market from Turkey in the *non-harmonised area*.

61 SAA Serbia. Arts. 8 and 121.

62 The measure would provide for application of the mutual recognition of products principle between the EU and a WB country in non-harmonised areas in order to eliminate non-tariff barriers stemming from the national technical rules. In other words, the aim of the arrangement would be to limit the grounds for application of national technical rules and border controls to imports of products with SAA origin in area where there are no common EU standards.

Binding decisions of the SAA Councils

The SAA-established SAA Council[63] is to supervise the application and implementation of the SAA and to examine any major issues arising within the framework of the agreement and any other bilateral or international issues of mutual interest.[64] The SAA Council has the power to take decisions *binding on the Parties*.[65] Indeed, decisions adopted by the Association Councils under Association Agreements have been held to constitute "an integral part of the [European Union] legal system".[66] As a result, the SAA Councils' decisions have the equivalent legal effect in the EU law. That being said, the SAA sets clear rules governing free movement of goods, protecting the interest of the economic operators that must be observed by all parties alike. The SAA prohibits all non-tariff barriers, i.e., quantitative restrictions and measures having equivalent effect to the free movement of goods between the parties.[67] Furthermore, the SAA prohibits re-introduction of non-tariff barriers and making existing ones more stringent (*standstill* clause).[68]

It is within the SAA Council's power to take binding measures, declare the *authorised restrictions clause* inapplicable to certain groups of products, ensure *seamless access to the Single market*, and vice versa, once the satisfactory level of alignment is achieved. That being said, parties may decide to adopt binding SAA rules interpretation instruments in the form of the SAA Council decisions with a legal effect of a SAA disapplying authorized restriction clause to particular sector of products. This can be progressively extended to the entire trade between the parties, subject to the progress made in implementing the applicable *acquis*. In particular, the following measures could be adopted by the SAA Council:

- decision governing mutual acceptance of products and conformity assessment procedures once sufficient compliance with the applicable EU *acquis* has been achieved (internal market treatment of products in *harmonised* areas);
- decision governing regime of mutual recognition of products in the *non-harmonised* areas (internal market treatment of products in the areas not regulated by the *acquis*);
- decision accepting the equivalence of food safety rules, SPS measures and food establishments; and/or
- decision governing elimination of documentary or physical checks and/or relax procedures for the clearance of products at the borders in relation to the goods with the SAA origin, including faster lanes/passages for lorries at the border crossings, etc.[69]

The list of products covered by the internal market treatment decisions could be open to extensions to take into account the progress made by a WB country under the *accelerated alignment*. As a result, a decision could set up appropriate roadmaps and deadlines that, when fulfilled, would facilitate gradual opening up of a seamless internal market access. Decisions should also indicate the WB country's duty to timely update and accommodate the national rules to any modification of the *acquis* that occurs in the process. Unlike with the unilateral approach where parties voluntarily decide to interpret the SAA provisions in a manner that limits the application of the SAA authorised restrictions clause to certain products, this approach provides parties and economic

63 The SAA Council consists of the Council of the European Union members and the members of the European Commission, on the one hand, as well as of the Government of Serbia members, on the other (SAA Serbia, Art. 120).

64 SAA Serbia, Art. 119.

65 SAA Serbia, Art. 121.

66 Case 30/88, Greece v Commission, para. 13.

67 SAA Serbia, Arts. 20, 21, 26.1, 27.1.

68 SAA Serbia, Art. 36.

69 DECISION No1/95OFTHEEC-TURKEYASSOCIATION COUNCIL of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC) can be used as a useful example for the decision governing the regime, conditions and a timetable for elimination of the non-tariff barriers to free movement of goods between the EU and a non-EU party to the association agreement.

operators with clear set of binding rules to follow as well as with legal certainty that trade pathways for placing their product on the internal market and the WBs markets, alike, are clear.

Mutual Recognition Protocols

The "Blue Guide" of the European Commission indicates a variety of measures that can be applied in order to facilitate trade. In particular, the document assumes that "the expansion of the single market of products [can be] pursued through international legal instruments that enable the achievement of appropriate levels of cooperation, convergence or harmonisation of legislation and thus facilitate the free movement of goods."[70] These instruments include conclusion of a specific Protocol on conformity assessment in the framework of a Free Trade Agreement (FTA) negotiated with a third country.[71]

SAAs establish the FTAs based on the specific free movement of goods rules. Namely, SAAs have an entire section titled "Free Movement of Goods" governing elimination of duties, charges, and non-tariff barriers to the mutual market access. The parties are obliged to align their rules and practices with the SAA free movement of goods rules. Therefore, *seamless access to the internal market* for goods originating from the WB countries is not only possible within the SAAs rules, but it is a legal requirement for the parties to take general and specific measures to achieve it.

Therefore, the SAA provides sufficient legal grounds to establish the internal market treatment of goods between the parties through the appropriate interpretation of its provisions and decision-making within its institutional framework. As a result, the SAA Councils have power to accommodate the progress made by a WB country in national rules alignment, conformity assessment procedures, and quality infrastructure with the EU *acquis*, as well as to establish mutual recognition of products on the basis of the equivalence of the WB rules with the *acquis*.

Consequently, parties may seek to regulate the internal market treatment of WB country products through conclusion of special "mutual recognition" protocols to the SAA. However, it is disingenuous to insist on going through the time-consuming negotiations and procedures for adoption a special international agreement to govern substance and obligations that parties already took under the free movement of goods provisions of the SAAs, and which are within the powers of SAA Councils to regulate.

Conclusion

The trade between the EU and the Western Balkans is affected by the non-tariff barriers (NTBs) to free circulation of goods. They can include various measures such as technical regulations, licensing requirements, quotas, customs procedures, and other regulatory obstacles that can impede trade between the SAA parties. These barriers result in increased costs, delays, and administrative burdens for businesses engaged in cross-border trade. The SAAs agreed between the EU and WB is a tool meant to solve the problem of NTBs, not to perpetuate it.

Namely, the SAAs objective is to establish the free trade area in which free movement of goods is achieved. To that end, SAAs dedicate entire section titled "Free Movement of Goods" with rules governing elimination of duties, charges, and non-tariff barriers to market access between the parties. The free movement of goods is part of the SAA *source code*. Hence, SAAs are *programmed* to provide for the free circulation of goods between the EU and the WB states.

70 Commission notice – The 'Blue Guide' on the implementation of EU product rules (20222022/C 247/01), p. 127.

71 Ibid.

That being said, *seamless access to the internal market* for goods originating from the WB countries under the SAA is not only a possibility. It is rather a legal requirement of the SAA that correlates to the freedom of economic operators that parties to the SAA must observe. Parties to the agreement are either:

- under the legal duty to comply with the SAA by adopting appropriate measures to eliminate remaining non-tariff barriers to free movement of goods, including abstaining from employment of measures to restore them; and/or
- empowered to interpret the SAA provisions in favor of the free circulation of goods.

The SAA *authorized restrictions clause* allows for the free movement of goods rules exemption authorizing the party to deny or restrict the access to the market based on the grounds of product safety, health protection, environmental protection, etc. On this ground, the EU technical rules provide a justified restriction to the free flow of goods, requiring clearance of each individual import on the *case-by-case* basis at the border. However, under the clause, the EU technical rules remain lawful and justified restrictions to seamless access to the internal market only until the WB country achieves the equivalent level of competence through the enforcement of national rules aligned with the Union *acquis* applicable to the product. That being said, once the comparable level of competence has been achieved in the given product area by the WB state, the SAA provides sufficient legal grounds and appropriate legal avenues for establishing the internal market treatment of goods between the parties.

Such treatment can be achieved unilaterally through the appropriate interpretation of the SAA provisions by parties to the agreement and/or through decision-making within the SAA structures. Namely, to utilize SAAs free movement of goods rules to their full potential, parties may decide unilaterally to accept each other's products on their respective markets without a requirement of prior clearance procedures on the basis of sufficient equivalence of the applicable technical rules (mutual recognition). In other words, the EU as party to the SAA is under duty to take general or specific measures to observe the SAA requirements.[72] Hence, once satisfied that the equivalence of the standards and comparable level of competence has been achieved in a given area, by acting within the SAA rules, the European Commission may take appropriate measures or the agreement interpretation instruments to accept the products of the particular WB state.[73]

De facto, parties may decide to act through the SAA structures to achieve a uniform interpretation of the SAA rules. To accommodate the progress made in alignment with the acquis, the SAA Council may recommend that parties adopt appropriate general and/or specific measures enforcing mutual acceptance of products in the given area. For example, based on such recommendation, the EC may adopt measures or instruments of the SAA free movement of goods provisions interpretation, requiring enforcement of automatic recognition of products from a WB state by the member states' authorities.

Finally, the parties may agree that SAA Council adopts appropriate decisions, i.e., *internal market treatment decisions,* disapplying the SAA *authorized restrictions clause* to the entire group of products, setting rules and conditions governing mutual acceptance of products and conformity assessment procedures in harmonised areas and mutual recognition of products in the non-harmonised

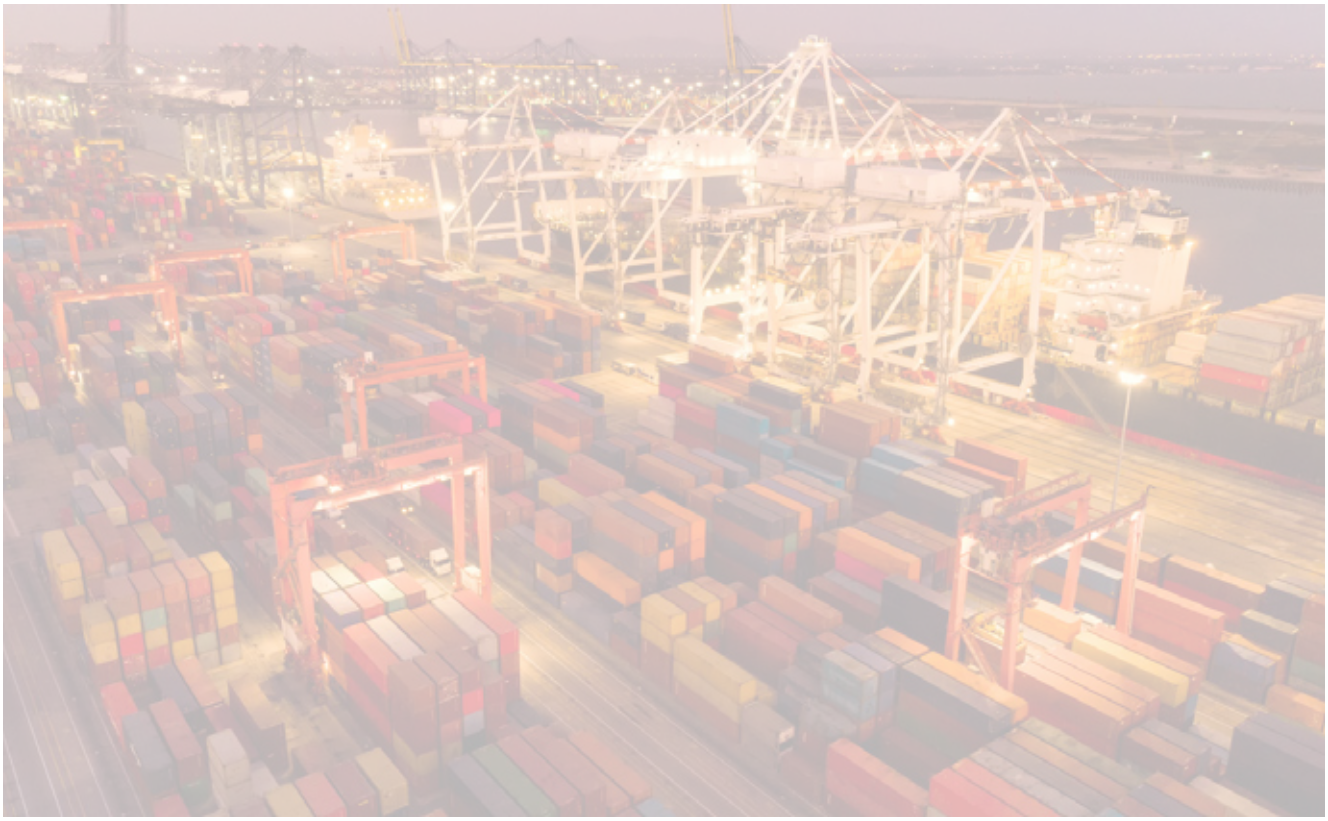
72 SAA Serbia, Art. 129.1

73 For example, the Commission's interpretative communication on 'facilitating the access of products to the markets of other Member States: the practical application of mutual recognition' (2003/C 265/02) described the rights and obligations of economic operators supplying products to the EU market from Turkey in the *non-harmonised area*.

areas (i.e., products in the areas not regulated by the *acquis*). The internal market decisions would govern abolition of documentary or physical checks and/or relaxation of product clearance procedures at the borders in relation to the goods with the SAA origin, including faster lanes/passages for lorries at the border crossings. Such decision can be extended to entire group of products and trade sectors depending on the progress made by a WB state in certain area of *acquis* - for example, accepting the equivalence of food safety rules, SPS measures and food establishments based on the food safety acquis. The decision should also indicate the WB country's duty to timely update and accommodate the national rules to any modification of the *acquis* that occurs in the process.

The options recommended here are fair given they depend upon the progress of the WB in accelerated alignment with the relevant *acquis*. They are flexible since they utilize the SAAs to "the full potential", avoiding time-consuming negotiations and ultimately unnecessary procedures for adoption of a special international agreement (such as ACAA or mutual recognition protocols) to govern substance that parties have already agreed upon under the free movement of goods terms of existing agreements. Finally, they are in accord with the REM proposal to use the SAA structures to take stock of progress of the WB parties and exploit opportunities to progressively *phase-in* the WB in the internal market.[74] Whether parties desire to use the SAAs and their structures to that end - that is another question.

74 Enhancing the accession process - A credible EU perspective for the Western Balkans, COM(2020) 57 final, p. 5.



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