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By

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Vertical Restraints under Serbian Competition Law: A Comparison with EU Law

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Introduction

This article analyses the legality of vertical restraints under Serbian competition law and compares Serbian law to the EU regulations in this area. Even though vertical restraints may also amount to abuse of dominance,¹ this article focuses on vertical restraints solely in the context of restrictive agreements.

While Serbian law on vertical restrictive agreements echoes the main EU norms in this area, EU competition rules have been imported into the Serbian legal system in a piecemeal fashion, without always taking into account all relevant aspects of the antitrust issue or the updates made to the imported EU law provisions, which raises

practical problems in the application of these norms. As will be shown, there are significant differences in both block² and individual³ exemption regimes, and some of those differences do not appear to be justified by idiosyncrasies of the Serbian market.⁴ Furthermore, certain topics relevant to the law of vertical restraints are left entirely unregulated in Serbia.⁵

This situation contributes to legal uncertainty and begs the question whether and to what extent Serbian law enforcement authorities can resort to EU competition law when interpreting ambiguous provisions of the Serbian law, which were modelled after or in the spirit of the relevant EU competition rules, or when filling the gaps in Serbian legislation. A related issue is whether the Stabilisation and Association Agreement, signed in 2008 between Serbia, of the one part, and the European Communities and their Member States, of the other part⁶ (SAA), authorises the Serbian competition authority and courts to directly apply EU competition law.⁷

Legislative framework applicable to vertical restraints

Outline of national law on vertical restraints

The main source of Serbian competition law is the 2009 Law on Protection of Competition⁸ (Serbian Competition Act), the enforcement of which is entrusted to the Commission for Protection of Competition (CPC). The CPC, established in 2006,⁹ was vested with the authority to impose penalties on antitrust infringers only by virtue of the 2009 legislation,¹⁰ which accounts for a relatively modest volume of its case law in the area of restrictive agreements.

The substantive law provisions of the Serbian Competition Act rely to a large extent on the EU competition law. Articles 10–11 of the statute, dealing with restrictive agreements, are basically a carbon copy of the Treaty on the Functioning of the European Union art.101¹¹ (TFEU). However, unlike the TFEU, which provides in art.103 that the general principles contained in arts 101 and 102 are to be further regulated through regulations and directives, the Serbian Competition Act provides a special mandate to the Government to regulate only particular issues,¹² including the categories of

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¹ See, e.g. *Établissements Consten Sarl v of the European Economic Community (Consten-Grundig)* (56 & 58/64) [1966] E.C.R. 299; [1966] C.M.L.R. 418 at 339.

² See below, "Block exemption".

³ See below, "Individual exemption".

⁴ See below, "Market-share threshold".

⁵ See below, "Withdrawal of block exemption".

⁶ Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part, available at http://ec.europa.eu/enlargement/pdf/serbia/key_document/saa_en.pdf [Accessed June 25, 2012].

⁷ See below, "International sources and the effect of EU competition law in Serbia".

⁸ *Zakon o zaštiti konkurencije* [Law on Protection of Competition] in (2009) 51 *Official Gazette of the Republic of Serbia*. For a general overview of this statute, see Irena Dajković, "Comments on the new Serbian Competition Law" (2010) 31(2) E.C.L.R. 52.

⁹ The CPC was established by virtue of the Law on Protection of Competition of 2005 (*Zakon o zaštiti konkurencije in (2005) 79 Official Gazette of the Republic of Serbia*), which was in force between September 24, 2005 and November 1, 2009.

¹⁰ Serbian Competition Act art.59.

¹¹ Treaty on the Functioning of the European Union [2008] OJ C115/47.

¹² Serbian Competition Act arts 6(4), 12(4), 13(3), 42(3), 57(8), 59(6), 63(4), 69(5).

agreements eligible and special conditions applicable to block exemptions¹³ and the content of the application for individual exemption.¹⁴ In addition, the Serbian Competition Act art.21 grants general authority to the CPC to pass notices and guidelines for the implementation of the statute.¹⁵

It is important to note that, even though the Serbian Competition Act largely imprints TFEU provisions, it does not refer to the EU competition *acquis* and gives no express instruction or authority to the CPC or Serbian courts to interpret the Serbian national law in line with such *acquis*. Considering that the competition statutes of some other Western Balkan (WB) countries specifically address this issue,¹⁶ a similar provision in the Serbian Competition Act would have been welcome.

International sources and the effect of EU competition law in Serbia

The existence of international sources of law adds to the complexity of the relationship between Serbian national competition law and that of the European Union. As mentioned, Serbia signed the SAA with the European Communities and their Member States in 2008. In parallel to the signing of the SAA, Serbia and the Community signed the Interim Trade Agreement¹⁷ (ITA), which entered into force on February 1, 2010.¹⁸ Its purpose is to regulate certain aspects of the Serbia-EU relationship until the SAA comes into effect.¹⁹ In the field of competition, the provisions of the ITA substantially replicate those of the SAA.²⁰

While SAA art.72 regulates the general obligation to gradually harmonise Serbian law with the EU *acquis*, including the area of competition law,²¹ the provisions of art.73.1(i) and (ii) specifically address the areas of restrictive agreements and abuse of dominance, by stating:

“The following are incompatible with the proper functioning of this Agreement, insofar as they may affect trade between the Community and Serbia:

- (i) all Agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
- (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or Serbia as a whole or in a substantial part thereof.”²²

As can be seen, the provisions of art.73(i) and (ii) SAA are an abbreviated and consolidated version of TFEU arts 101 and 102. However, focusing on the treatment of restrictive agreements, one can identify several noteworthy differences between the two sets of provisions. First, unlike the TFEU, the SAA does not employ express prohibitory language or proclaim nullity of restrictive agreements.²³ Furthermore, SAA art.73.1 does not contain examples of the covered restrictions,²⁴ nor does it foresee exemptions from “incompatibility” or criteria for their implementation.²⁵ Finally, the SAA, for obvious reasons, refers to the affectation of trade between the European Union and Serbia rather than trade between the Member States of the European Union. However, neither the SAA nor any other related document contains guidelines as to the criteria under which an arrangement may be deemed to involve or affect trade between the European Union and Serbia.²⁶

Article 73.2 SAA assigns the content to the general principles of art.73.1 by referring to the EU competition *acquis*:

“Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles [101,

¹³ Serbian Competition Act art.13(3). See below, “Block exemption”.

¹⁴ Serbian Competition Act art.12(4). See below, “Individual exemption”.

¹⁵ The CPC has thus far exercised this authority modestly, enacting only two sets of guidelines in the area of penalties for infringement.

¹⁶ *Zakon o zaštiti tržišnog natjecanja* [Croatian Competition Act] in (2009) 79 *Official Gazette of the Republic of Croatia* art.74 (authorising the Croatian antitrust authority and courts to apply EU competition case law when interpreting the provisions of the national statute itself and also when facing legal gaps and ambiguities in the statute or in secondary legislation, without limiting this authority to cases affecting trade between the EU and Croatia); *Zakon o konkurenciji* [Bosnian Competition Act] in (2005) 48 *Official Gazette of Bosnia and Herzegovina* (as amended) art.43(7) (authorising the Bosnian antitrust authority to use ECJ and European Commission case law in order to assess a given case under the Act); *Zakon za zaštitu na konkurencijata* [Macedonian Competition Act] in (2010) 145 *Official Gazette of the Republic of Macedonia* art.3(3) (authorising the use of EU sources in assessing distortions of competition, limiting this to situations where trade between the EU and Macedonia is affected).

¹⁷ Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Serbia, of the other part, available at http://ec.europa.eu/enlargement/pdf/serbia/key_document/interim_agreement_trade_en.pdf [Accessed June 25, 2012], in Serbia published in (2008) 83 *Official Gazette of the Republic of Serbia* — International Agreements.

¹⁸ Serbian European Integration Office homepage, available at <http://www.seio.gov.rs/serbia-and-eu/history.60.html> [Accessed June 25, 2012].

¹⁹ The SAA is not yet in force pending ratification by Lithuania, the only Member State that has not yet completed the ratification process. For an up-to-date list of the Member States that have ratified the SAA, see the homepage of the Council of the European Union, <http://www.consilium.europa.eu/policies/agreements/search-the-agreements-database.aspx?lang=en&command=details&id=297&lang=en&aid=2007137&doclang=en> [Accessed June 25, 2012].

²⁰ The ensuing discussion of SAA provisions equally applies to the identical provisions of the ITA and references to the provisions of SAA art.73 should be understood as references to the appropriate provisions of ITA art.38 with substantially identical content.

²¹ SAA art.72.1 provides in the relevant part that “Serbia shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*”. According to SAA art.8, the approximation of laws is to be realised over a transitional period of a maximum of six years.

²² An identical provision is found in the ITA art.38(1).

²³ Compare SAA art.73(1) (“The following are *incompatible* with the proper functioning of this Agreement...”) (Emphasis added) with TFEU art.101(1) (“The following shall be *prohibited as incompatible* with the internal market...”) (Emphasis added); TFEU art.102(1) (“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be *prohibited as incompatible* with the internal market...”) (Emphasis added).

²⁴ Compare with TFEU arts 101, 102 (listing examples of prohibited agreements and practices).

²⁵ Compare with TFEU art.101(3) (laying down the conditions for the exemption of restrictive agreements from prohibition).

²⁶ Arguably, one could rely by analogy on the European Commission Guidelines on the Effect on Trade Concept Contained in [Articles 101 and 102 TFEU] [2004] OJ C101/81.

102, 106 and 107 TFEU] and interpretative instruments adopted by the Community institutions.”²⁷

According to the Serbian Constitution, ratified international agreements are the law of the land, placed in the hierarchy of laws between the Constitution and national laws, and they directly apply.²⁸ Accordingly, the SAA, including art.73, forms part of the Serbian legal order. However, this does not necessarily mean that the provisions of the SAA have a direct effect, in the sense that market players can rely on them directly in proceedings before the CPC or the Serbian courts. The relevant question is, therefore, whether SAA art.73 is addressed only to the Parties of the SAA or also to market participants. If SAA art.73 were directly applicable in Serbia, it would represent a vehicle for direct application of EU law by Serbian national authorities (the CPC and courts).

The CPC’s stance on direct application of EU competition law has been inconsistent and inconclusive.

On the one hand, some decisions of the CPC may suggest that EU competition rules are directly applicable in Serbia. In a 2009 decision, the CPC examined whether a horizontal agreement between insurers satisfied the conditions for exemption under the relevant EU regulation not adopted in Serbia, finding that these conditions were not met.²⁹ However, it remains unknown whether the CPC would have equally embraced the EU law had it waded in favour of the defendant in that particular case.

On the other hand, in its 2011 report, the CPC is more cautious, stating that,

“the European *acquis* and the specific regulation cannot be directly applied by the Commission for Protection of Competition, unless they have become an integral part of domestic legislation”

and that:

“[W]here the relevant domestic regulations do not exist, the Commission shall, relying on the principles and criteria adopted in the EU regulations, interpreted in the spirit of domestic regulations, act upon the request of market participants.”³⁰

At the same time, the CPC seems to confuse the harmonisation obligation from SAA art.72 with the obligations stemming from SAA art.73, if any, when it states in its 2011 report that:

“[The CPC is] obliged to ensure full application of Article 73 of the [SAA] (Article 38 of the [ITA]), and, in this sense, when drafting bylaws, harmonisation with the laws and practices of the EU is being exercised, that is, when making a decision in proceedings before the Commission, criteria arising from the application of the relevant competition rules applicable in the EU must be applied, which assumes primary and secondary legislation of the EU, practices of EU institutions, as well as judgments of the European Court of Justice and the General Court.”³¹

While SAA art.72 imposes on Serbia an obligation of result, which is to be achieved gradually and which targets Serbian competition law as a whole, SAA art.73 purports to regulate, independent of the harmonisation process, practices that may affect trade between the European Union and Serbia.

Among Serbian scholars who have written on the topic, there is no agreement as to the meaning of SAA art.73 and the role of EU law. The former chairwoman of the CPC, Professor Markovic-Bajalovic, has submitted that by virtue of SAA art.73 (ITA art.38), Serbia is, at least as far as practices affecting trade with the EU are concerned, bound to directly apply the rules of EU competition law.³² This opinion has been strongly opposed by Professors Begović and Pavić.³³

Even though the decision on the direct effect of the relevant competition law provisions of the SAA in Serbia belongs to the competent Serbian authorities, it is worth examining the issue through the prism of ECJ jurisprudence. The ECJ has consistently held that a provision of an EU law instrument, including a treaty concluded between the EU and its Member States, on the one hand, and non-members, on the other hand, is capable of having a direct effect on individuals before the national authorities of the Member States if:

²⁷ ITA art.38(2); SAA art.73(2).

²⁸ Ustav Republike Srbije [Constitution of the Republic of Serbia] in (2006) 98 *Official Gazette of the Republic of Serbia* arts 16(2), 145(2), 194(5).

²⁹ CPC Decision of June 19, 2009, available at <http://www.kzk.org.rs/kzk/wp-content/uploads/2011/08/resenje-Udruzenje-osiguravaca-Srbije.pdf> [Accessed June 25, 2012]. (The CPC rejected the defendants’ argument that the agreement was exempted under European Commission Regulation 358/2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, [2003] OJ L53/8. The CPC, however, did not explain on what basis it analysed the cartel under this regulation. It should be noted that neither the SAA nor the ITA was in force at the time of the decision and the cartel was in any event purely a domestic one with no effect on trade with the EU).

³⁰ *CPC Annual Report for 2011*, p.58, available at <http://www.kzk.org.rs/kzk/wp-content/uploads/2012/04/Godisnji-izvestaj-o-radu-KZK-2011.pdf> [Accessed June 25, 2012].

³¹ *CPC Annual Report for 2011*, p.3; see also pp.72–73 (noting that based on SAA art.73 Serbia is obliged to take over the standards of application of antitrust rules equal to those in force in the EU and that CPC employees are acquainted with EU procedural regulations in the field of competition law).

³² Dijana Marković-Bajalović, “Preti li jasna i neposredna opasnost od novog Zakona o zaštiti konkurencije?” [“Is there a Clear and Present Danger from the New Law on Protection of Competition?”] (2010) 58(1) *Anali Pravnog fakulteta u Beogradu* 304, 306 (Serb.). See also Siniša Rodin, “Requirements of EU Membership and Legal Reform in Croatia” (2001) 38(5) *Politička misao* 87, 91–93 (Cro.) (submitting that a clause such as SAA art.73.2 requires associated states not only to apply EU competition rules, but also interpretative instruments adopted by the Community institutions, acknowledging, however, that direct application of EU law is not possible without creating an interface between the national and EU law); Bojana Vrcek, “Croatian and EC competition law: state and problems of the adjustment process” (2004) 5(2) *Eur. Bus. Org. L. Rev.* 363, 385 (2004) (arguing that the competition provisions of the Croatian SAA have direct effect since, unlike the Europe Agreements the Croatian SAA does not envisage the adoption of the implementing rules for the competition provisions); Anestis S. Papadopoulos, *The International Dimension of EU Competition Law and Policy* (Cambridge University Press, 2010), pp.97–109.

³³ Boris Begović and Vladimir Pavić, “Jasna i neposredna opasnost II: čas anatomije” [“Clear and Present Danger II: A Class of Anatomy”] (2010) 58(2) *Anali Pravnog fakulteta u Beogradu* 338, 340–44 (Serb.) (arguing against the direct applicability of EU competition rules in Serbia, but without particularly elaborating on the actual meaning of the SAA art.73).

“[R]egard 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.”³⁴

If this test were applied by the CPC or a Serbian court to the competition norms of the SAA, the truncated provisions of art.73.1 (i) and (ii) SAA would, if isolated from art.73.2, unlikely pass the muster. On the other hand, while SAA art.73.2 does give breath to the general principles espoused in art.73.1(i) and (ii), it is not clear from its wording which authority or forum is charged with the duty to “assess” “incompatible practices” in line with the EU competition *acquis* and what such “assessment” actually entails. Article 73.3 SAA, which states that

“the Parties shall ensure that an operationally independent authority is entrusted with the powers necessary for the full application of paragraph 1(i) and (ii) of this Article”

adds to the confusion³⁵ by conspicuously omitting to refer to SAA art.73.2 .

Even though the ECJ has held that

“[t]he mere fact that the Contracting Parties have established a special institutional framework for consultations and negotiations inter se in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of that agreement”,³⁶

in this particular case, the fact that the general authority of a party to the SAA to take appropriate measures after consultation within the Stabilisation and Association Council³⁷ is repeated in art.73.10 specifically with reference to the practices under art.73.1, may be an indication that the procedure under SAA art.73.10 is the only consequence of a breach of arts 73.1 and 73.2 and that the parties did not intend the provisions of arts 73.1 and 73.2 to have a direct effect.³⁸

On a practical level, even if the legal basis for the direct applicability of EU competition law in Serbia were not disputable, its systematic application would be impossible without a permanent platform designed to ensure that Serbian authorities are timely and adequately informed of the content of the ever changing EU competition *acquis*. Consequently, if it were to be expected that the CPC and Serbian courts directly apply EU competition law, a permanent notification mechanism would need to be put into place.³⁹

Conclusion on the role of EU competition law in the Serbian legal system

Based on the above considerations, one cannot expect that the CPC or the Serbian courts would interpret arts 73.1(i) and (ii) and SAA 73.2 as capable of producing a direct effect on market participants. However, this is not to say that EU competition rules and case law should not be relied upon by the CPC and Serbian courts to help interpret provisions of the Serbian national competition law, where no national implementing rule is available, or where a national provision is ambiguous.⁴⁰ This is notwithstanding the absence of an express authorisation to that effect in the Serbian Competition Act,⁴¹ since the relevant EU competition rule can be regarded as legislative history of the Serbian national law modelled thereafter. At the same time, resorting to the EU competition *acquis* can be seen as an exercise of the approximation obligation stemming from the SAA.⁴²

If, however, a particular EU rule stems from a premise singular to the concept of a single European market, which premise therefore cannot be presumed to be shared by the relevant Serbian rule, then such idiosyncratic EU rule and its interpretation by the EU authorities would not be appropriate for application in the context of the Serbian law.⁴³ Resorting to EU law would also be problematic in those cases where an entire antitrust topic, rather than a particular issue, is left unregulated by Serbian law.⁴⁴ Such cases would require enactment of formal regulations by the competent Serbian authorities in line with the relevant EU sources.

³⁴ *Demirel v Stadt Schwäbisch Gmünd* (12/86) [1987] E.C.R. 3719; [1989] 1 C.M.L.R. 421 at [14]. See also *Pabst & Richarz KG v Hauptzollamt Oldenburg* (17/81) [1982] E.C.R. 1331; [1983] 3 C.M.L.R. 11 at [27].

³⁵ Even though the provision is addressed to “the Parties” and not only to Serbia, the reference to “an operationally independent authority” should be understood as a reference to the CPC.

³⁶ *Hauptzollamt Mainz v CA Kupferberg & Cie KG aA* (104/81) [1982] E.C.R. 3641; [1983] 1 C.M.L.R. 1 at [20].

³⁷ SAA art.125.

³⁸ See Begović and Pavić, “Jasna i neposredna opasnost II: čas anatomije” [“Clear and Present Danger II: A Class of Anatomy”] (2010) 58(2) *Anali Pravnog fakulteta u Beogradu* 338, 342–43.

³⁹ See, e.g. Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part [1993] OJ L347/2 art.63(3); Decision 2/96 of the Association Council, association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, adopting the rules necessary for the implementation of Article 62(1)(i), (1)(ii) and (2) of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, and the rules implementing Article 8(1)(i), (1)(ii) and (2) of Protocol No.2 on ECSC products to that Agreement [1996] OJ L295/29 art.6(1). For a discussion about the competition law provisions of the Hungarian Europe Agreement, see Tihamer Toth, “Competition law in Hungary: harmonisation towards EU membership” (1998) 19(6) E.C.L.R. 358.

⁴⁰ See *CPC Annual Report for 2011*, p.58. (“[W]here the relevant domestic regulations do not exist, the Commission shall, relying on the principles and criteria adopted in the EU regulations, interpreted in the spirit of domestic regulations, act upon the request of market participants.”) See also Croatian Constitutional Court, Decision U-III/1410/2007 of February 13, 2008 (2008) 25 *Official Gazette of the Republic of Croatia* para.7 (finding that by virtue of the Croatian SAA the EU competition rules cannot be applied as a primary source of law, but can only be used as an interpretation tool).

⁴¹ See above, “Outline of national law on vertical restraints”.

⁴² See Gordana Ilić and Dejan Popović, “Pravo direktnih poreza i Sporazum o stabilizaciji i pridruživanju Srbije Evropskoj Uniji” [“The Law on Direct Taxes and Stabilisation and Association Agreement between Serbia and the EU”] (2011) 59(1) *Anali Pravnog fakulteta u Beogradu* 5, 25–26 (2011) (Serb.).

⁴³ See *Metalsa Srl v Public Prosecutor (Italy)* (C-312/91) [1993] E.C.R. I-3751; [1994] 2 C.M.L.R. 121.

⁴⁴ See below, “Withdrawal of block exemption”.

Treatment of vertical restraints under Serbian law

Object/effect dichotomy

As aforementioned, the Serbian Competition Act art.10 is substantially similar to TFEU art.101,⁴⁵ prohibiting:

“[A]greements between undertakings which have as their object or effect *significant* restriction, distortion or prevention of competition in the territory of the Republic of Serbia.”(Emphasis added.)⁴⁶

While restraints by object⁴⁷ are considered restrictive of competition per se, other vertical restraints fall under the prohibition of the Serbian Competition Act if it is established that they have the effect of significantly restricting competition in the relevant market.

Any self-assessment of the effects on competition is difficult in Serbia given that the CPC has not enacted any guidelines and no case law on the issue exists. In fact, according to the published cases, all vertical restrictive agreements which the CPC has so far found to be in violation of the Serbian Competition Act involved minimum resale price maintenance, a restriction by object.⁴⁸ In the absence of local guidelines and taking into consideration that the Serbian provision on prohibition of restrictive agreements was taken over from the TFEU, we submit that assessment of the effects on competition should be made based on the relevant EU sources.⁴⁹

De minimis exception

The Serbian Competition Act prohibits only significant restrictions of competition, meaning that de minimis vertical restraints fall outside the scope of prohibition. Pursuant to the statute, the de minimis exception generally applies to vertical agreements where the aggregate⁵⁰ market share of the parties on the relevant market⁵¹ does not exceed 15 per cent.⁵² However, regardless of the

market share, vertical agreements which have as their object “price fixing” or “market division” are not considered de minimis.⁵³

While the CPC has held that “price fixing” encompasses any fixing of prices (without prejudice to the possibility of setting a maximum or recommended price, provided that they do not amount to a fixed or minimum sale price),⁵⁴ it is yet to opine on which acts and practices amount to “market division”. Having in mind that the de minimis provisions of the Serbian Competition Act are inspired by the European Commission’s Notice on agreements of minor importance which do not appreciably restrict competition under Article [101(1) TFEU]⁵⁵, the CPC is likely to read the reference to “market division” to encompass territorial and customer restraints treated as hardcore by the said EU notice.⁵⁶ These restraints would at the same time represent restrictions by object⁵⁷ and correspond to the restrictions blacklisted by the Serbian block exemption regulation for vertical agreements.⁵⁸ However, it is submitted that blacklisted restrictions, which are contained within a particular cross-border context and are unlikely to adversely affect the Serbian market,⁵⁹ should not be able to derogate the application of the de minimis exception.

Exemption from prohibition

General conditions for exemption from prohibition

Restrictive vertical agreements caught by art.10 of the Serbian Competition Act are not necessarily prohibited. Namely, art.11 of the Serbian Competition Act envisages the possibility of exemption from prohibition for agreements which satisfy the same four cumulative conditions that are stipulated in TFEU art.101(3).⁶⁰ This exemption can be block and individual.

⁴⁵ See above, “Outline of national law on vertical restraints”.

⁴⁶ Serbian Competition Act art.10(1).

⁴⁷ According to the CPC’s view, restrictions by object are those restrictions which exclude the application of the de minimis exception. See below fn.57.

⁴⁸ CPC Decision 4/0-02-14/11-12 of May 26, 2011 (*Grand Prom-Idea*); CPC Decision 4/0-02-13/2011-45 of December 23, 2011 (*Swisslion-Idea*).

⁴⁹ See EU Vertical Guidelines paras 111–121.

⁵⁰ This reference to the “aggregate” market shares in the context of vertical agreements is unclear and seems to be an omission of the legislator when copying the relevant parts of the Notice on agreements of minor importance which do not appreciably restrict competition under Article [TFEU art.101(1)] [2001] OJ C368/13 (“EU De Minimis Notice”) (the EU Notice in para.7 refers to the “aggregate” market share of the parties only in the context of horizontal agreements, while with regard to vertical agreements the reference is to the market share held by each of the parties to the agreement on any of the markets affected by the agreement).

⁵¹ Since the statute does not stipulate whether this applies to the downstream or to the upstream market, it is submitted that, in accordance with the EU De Minimis Notice, this provision should be read as referring to all markets affected by the agreement.

⁵² Serbian Competition Act art.14(1)(2).

⁵³ Serbian Competition Act art.14(2).

⁵⁴ *Grand Prom-Idea* Decision at 6; *Swisslion-Idea* Decision at 10.

⁵⁵ Notice on agreements of minor importance which do not appreciably restrict competition under Article [101(1) TFEU] [2001] OJ C368/13.

⁵⁶ See EU De Minimis Notice, para. 11.

⁵⁷ *Grand Prom-Idea* Decision at 6; *Swisslion-Idea* Decision at 10.

⁵⁸ See below, “Hardcore restrictions”.

⁵⁹ See below, “Hardcore restrictions”.

⁶⁰ The four conditions for exemption are: (1) the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress; (2) consumers receive a fair share of the benefit; (3) the restriction is indispensable; and (4) competition in the relevant market is not eliminated.

Article 13 of the Serbian Competition Act authorises the Government to declare categories of agreements which qualify for a block exemption and prescribe special conditions for such an exemption. On that statutory basis, the Government adopted the Decree on Exemption of Particular Categories of Vertical Agreements from Prohibition⁶¹ (Serbian Vertical BER). Promulgated on the eve of the adoption of the 2010 EU vertical block exemption regulation⁶² (EU Vertical BER) and the accompanying Guidelines on Vertical Restraints,⁶³ the Serbian Vertical BER appears to be based on the pre-final drafts of the cited EU documents,⁶⁴ which may explain certain discrepancies between the respective Serbian and EU block exemption systems.⁶⁵

The CPC may grant an individual exemption from prohibition to a vertical restrictive agreement that does not qualify for a block exemption. An individual exemption is granted upon notification of a party to the restrictive agreement, which must show that the agreement satisfies the four conditions laid down in art.11 of the Serbian Competition Act.⁶⁶ The notification requirement makes the Serbian individual exemption regime significantly different from the one in force in the European Union.⁶⁷

Block exemption

Scope of application

Article 3(1) of the Serbian Vertical BER stipulates that the regulation applies to “vertical agreements which determine the conditions under which the parties to the agreement may purchase, sell or resell particular goods or services”, citing *exempli causa* the types of agreements

that may benefit from a block exemption.⁶⁸ Even though the block exemption generally does not apply to vertical agreements entered into between competitors,⁶⁹ it does apply to dual distribution.⁷⁰ Under certain conditions, agreements between joint purchasing associations and their members are also covered by the block exemption.⁷¹

Technology transfer agreements are not covered by the Serbian Vertical BER,⁷² which is in line with the approach of the EU Vertical BER.⁷³ However, unlike the European Union,⁷⁴ Serbia does not have a special exemption regulation for such arrangements. As a result, restrictive vertical agreements which have as their primary object the transfer or assignment of IP rights must be notified to the CPC for individual exemption in order to escape prohibition.⁷⁵ Considering the specificities and practical significance of such agreements, the transposition of the EU technology transfer block exemption regulation into the Serbian legal system is called for.

Market-share threshold

The Serbian Vertical BER exempts vertical restrictive agreements from prohibition provided that none of the parties to the agreement have a market share exceeding 25 per cent of the relevant market.⁷⁶

The choice of a threshold tougher than the 30 per cent boundary found in the European Union⁷⁷ was presumably made on the assumption that it is easier to cause market foreclosure in a smaller market, such as the Serbian market.⁷⁸ However, the justifiability of this approach is disputable. First, if the size of the Serbian market was the rationale behind lowering the exemption threshold, it would have made sense, based on the same consideration, to set the de minimis threshold below 15 per cent. In this

⁶¹ *Uredba o sporazumima između učesnika na tržištu koji posluju na različitim nivou proizvodnje ili distribucije koji se izuzimaju od zabrane* in (2010) 11 *Official Gazette of the Republic of Serbia*.

⁶² Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

⁶³ Guidelines on Vertical Restraints (EU Vertical Guidelines) [2010] OJ C130/1.

The Serbian Vertical BER was officially published on March 5, 2010 and entered into force on March 13, 2010, while the European Commission adopted the EU Vertical BER on April 20, 2010 and the EU Vertical Guidelines on May 10, 2010.

⁶⁴ Draft Commission Regulation on the application of Article [101(3) TFEU] to categories of vertical agreements and concerted practices C(2009) 5365/3 (Draft EU Vertical BER); *Draft Commission Guidelines on Vertical Restraints* SEC(2009) 946/3 (Draft EU Vertical Guidelines).

⁶⁵ See below, “Market-share threshold”.

⁶⁶ Serbian Competition Act art.12.

⁶⁷ See below, “Individual exemption”.

⁶⁸ The definitions of exempted vertical agreements in the main correspond to the definitions found in the EU Vertical Guidelines.

⁶⁹ Serbian Vertical BER art.5(3).

⁷⁰ Serbian Vertical BER art.5(3).

⁷¹ Serbian Vertical BER art.3(2).

⁷² Among the examples of exempted agreements, art.3(1)(8) of the Serbian Vertical BER lists vertical agreements containing IP-related provisions, provided that these provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of products. The CPC has interpreted this as meaning that the Serbian Vertical BER does not apply to restrictive agreements which have as their primary object the transfer or assignment of IP rights: *CPC Annual Report for 2010*, p.50, available at <http://www.kzk.org.rs/kzk/wp-content/uploads/2011/08/GODISNJI-IZVESTAJ-O-RADU-KZK-2010.pdf> [Accessed June 25, 2012].

⁷³ EU Vertical BER art.2(3).

⁷⁴ Commission Regulation 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements [2004] L OJ 123/11.

⁷⁵ *CPC Annual Report for 2010*, p.50.

⁷⁶ Serbian Vertical BER art.4(1).

⁷⁷ EU Vertical BER art.3(1).

⁷⁸ See Michal S. Gal, *Competition Policy for Small Market Economies* (Harvard University Press, 2003), pp.63–64 (“When market shares are used as a prima facie indicator of market power ... in small economies the typical market share that will signify market dominance should be lower than in large ones. The reason is that elasticity of supply will usually be lower, given the prevalence of scale economies and entry barriers in small economies. In other words, the smaller the economy, the higher the typical barriers to entry ... and therefore the lesser the constraints that potential entry places on a firm that tries to raise prices above marginal cost, and the lower the market shares necessary to infer dominant market power”).

light it is also questionable whether the 25 per cent market-share cap is the right measure for Serbia, given that the block exemption regulations of all other WB countries, with markets smaller than the Serbian market, impose a 30 per cent threshold.⁷⁹

Apart from the exemption threshold, another important issue is how the relevant market share is calculated.

The rule on market-share calculation found in the Serbian Vertical BER is both unclear and incomprehensive. It states that the relevant market share of each party to the agreement will be determined “on the basis of sales revenue or, as the case may be, based on the value of supplies or based on production volumes”, in each case in the year preceding the execution of the agreement in question.⁸⁰ What is unclear is whether the relevant market share should be calculated taking into account the upstream or the downstream market. Since the CPC has so far looked downstream when determining the relevant markets with regard to both the supplier and the buyer, one may presume that it would take the same downstream-downstream approach for the purpose of calculating market shares.⁸¹ Such approach would deviate from the solution found in the EU Vertical BER,⁸² but would be in accordance with the Draft EU Vertical BER,⁸³ the document which apparently served as the model for the Serbian Vertical BER.⁸⁴

It should also be noted that the Serbian Vertical BER omits to regulate the consequences of the market threshold being exceeded during the period of the agreement⁸⁵ and how market share is determined in a multi-party agreement under which one party appears as both the buyer and the seller of the contract goods.⁸⁶

Hardcore restrictions

A block exemption does not apply to vertical agreements containing hardcore restrictions listed in art.5 of the Serbian Vertical BER, which is essentially similar to the black list from art.4 of the EU Vertical BER.⁸⁷

Among the blacklisted restrictions is the restriction of passive sales outside the contract territory.⁸⁸ According to the view of the CPC expressed in the summary of an unpublished opinion, this type of restraint excludes the possibility of a block exemption not only when sales inside Serbia are curbed but also when a foreign supplier prevents a Serbian distributor from re-exporting the products.⁸⁹ Such an approach is inadequate—while it is true that the Serbian Vertical BER withholds the benefit of block exemption from agreements imposing absolute territorial protection without further elaboration,⁹⁰ this type of agreement is likely to have only a tangential negative effect, if any, on competition on the Serbian market. What is more, not only that absolute territorial protection might not adversely affect competition in Serbia in a significant way, but under certain conditions it may even lead to lower prices for Serbian consumers than would have otherwise been the case.⁹¹

The Serbian Vertical BER generally does not apply to vertical agreements containing non-compete obligations of indefinite or durations exceeding five years.⁹² Unlike the EU Vertical BER, the wording of the Serbian regulation does not specify that the block exemption is withheld only from the excessive non-compete undertaking but in this respect refers to the entire agreement.⁹³ Consequently, the drafters of the Serbian Vertical BER seem to have decided to exclude the application of the severability rule to non-compete clauses, which would be another instance where Serbian law is stricter than its EU counterpart.

⁷⁹ Odluka o grupnom izuzeću sporazuma između privrednih subjekata koji djeluju na različitim nivoima proizvodnje odnosno distribucije (vertikalni sporazumi) [Bosnian Vertical BER] in (2006) 18 *Official Gazette of Bosnia and Herzegovina* art.11(1); Uredba o skupnom izuzeću vertikalnih sporazuma između poduzetnika [Croatian Vertical BER] in (2011) 37 *Official Gazette of the Republic of Croatia* art.5(1); Uredba za grupno izuzetanje na vertikalne dogovore za isključivo pravo na distribuciju, selektivno pravo na distribuciju, isključivo pravo na kupovanje i franshizing [Macedonian Vertical BER] in (2005) 91 *Official Gazette of the Republic of Macedonia* art.4(1); Uredba o bližim uslovima za izuzetanje sporazuma po vrstama i određivanje vrsta sporazuma koji mogu biti izuzeti od zabrane [Montenegrin Vertical BER] in (2007) 10 *Official Gazette of the Republic of Montenegro* art.3(1).

⁸⁰ Serbian Vertical BER art.4(2).

⁸¹ See *Grand Prom-Idea* Decision at 7 (the imposition of minimum resale prices in a vertical relationship, the CPC determined the relevant product markets as the wholesale and the retail market of the contract product. By determining the retail market as one of the two relevant product markets the CPC could have implicitly recognised that the buyer's market share is to be determined based on its sales in the downstream (retail) market and not based on its purchases in the upstream (wholesale) market. However, in this particular case the CPC did not engage in market share calculation, finding that the said restriction is a restriction by object.).

⁸² EU Vertical BER art.7(a).

⁸³ See Draft EU Vertical BER art.3; Draft EU Vertical Guidelines para.83.

⁸⁴ See above, “General conditions for exemption from prohibition”.

⁸⁵ Compare with EU Vertical BER art.7(d)–(f).

⁸⁶ Compare with EU Vertical BER art.3(2).

⁸⁷ With regard to hardcore restraints, the only difference between the Serbian block exemption and its EU counterpart relates to selective distribution. While art.4 of the EU Vertical BER among non-hardcore restraints lists “the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system”, art.5 of the Serbian Vertical BER in the same context refers to “the restriction of active and passive sales to unauthorised distributors by the members of a selective distribution system”. It remains to be seen whether this variation will have any practical significance or is merely a difference without distinction.

⁸⁸ Serbian Vertical BER art.5 para.1 point 2 and para.2 point 1.

⁸⁹ *CPC Annual Report for 2011*, pp.59–60.

⁹⁰ When listing the restraints which exclude the possibility of a block exemption, art.5 of the Serbian Vertical BER does not distinguish between cross-border and purely domestic transactions.

⁹¹ This would be the case if a foreign supplier would be unable to prevent his Serbian distributor from re-exporting the products to markets stronger than the Serbian market. See Massimo Motta, *Competition Policy* (Cambridge University Press, 2004), pp.495–96.

⁹² Serbian Vertical BER art.6.

⁹³ Compare Serbian Vertical BER art.6(1) (“Vertical agreements ... are not exempted from prohibition if they contain” (Emphasis added)) with EU Vertical BER art.5(1) (“The exemption ... shall not apply to the following obligations contained in vertical agreements” (Emphasis added)).

Withdrawal of block exemption

The Serbian Vertical BER stipulates that a block exemption does not apply if the relevant market is characterised by the existence of parallel networks of vertical agreements which, due to a cumulative effect, do not fulfil the four general conditions for exemption, especially if the agreements, when combined, cover more than 40 per cent of the relevant market.⁹⁴ The threshold is lower than the EU threshold of 50 per cent,⁹⁵ which is consistent with the Serbian approach of having a stricter block exemption threshold. However, the withdrawal provision of the Serbian Vertical BER is unclear and inconclusive in several aspects.

First, it leaves open the definition of criteria other than market share which may contribute to the anti-competitive effects of parallel networks of vertical agreements and the CPC has not enacted any guidelines in this respect.

Furthermore, it is unclear how the withdrawal of a block exemption works. While EU law expressly regulates the withdrawal procedure,⁹⁶ the Serbian Vertical BER merely states that a block exemption does not apply to parallel networks producing anti-competitive effects, without explicitly requiring a prior withdrawal decision of the CPC or a withdrawal regulation by the Government. Accordingly, apart from the procedure of withdrawal, it is also unclear whether any decision of the CPC, if rendered, would have a constitutive or a declaratory effect.

Finally, the Serbian Vertical BER omits to regulate issues such as the duration of the withdrawal, how the benefit of the block exemption is restored, and whether the benefit of a block exemption may also be withdrawn in cases other than those involving parallel networks of agreements.

Given that the shortcomings of the Serbian withdrawal provisions are significant and touch upon the very authority of the CPC, applying the solutions adopted in the European Union as gap fillers would not solve these issues. Rather, amendments to the relevant Serbian legislation are called for.

Individual exemption

Restrictive vertical agreements which do not qualify for block exemption may qualify for an individual exemption, if specific requirements are met. A party to the agreement must submit a motion to the CPC seeking an individual exemption⁹⁷ and provide evidence that the four conditions laid down in the Serbian Competition Act art.11 (efficiency gains, fair share for consumers, indispensability, no elimination of competition) are satisfied.⁹⁸ The CPC must decide on the motion within 60 days from the submission date of the completed request.⁹⁹ Individual exemption may be granted for a period of up to eight years and may be renewed if a renewal request is made not later than two months prior to the expiration of the initial exemption period granted.¹⁰⁰

It follows that individual exemption under Serbian law is an administrative act within the exclusive competence of the CPC. As a consequence, Serbian courts are not authorised to examine whether a restrictive agreement can be individually exempted from the prohibition imposed by the Serbian Competition Act.

These features make the Serbian system of individual exemption significantly different from the EU regime under Regulation 1/2003, which neither requires nor allows precautionary notification.¹⁰¹ The Serbian regime is therefore effectively based in Regulation 17/62 (as last amended by Regulation 1216/1999),¹⁰² but that it is not clear under Serbian law whether the interested party may file an application for individual exemption after the agreement has come into effect, i.e. whether the CPC may retroactively grant exemption, as was possible under Regulation 17/62 following its 1999 amendments.¹⁰³ The dilemma arises because restrictive agreements are declared null and void unless exempted and nullity normally affects the agreement *ex tunc*. This uncertainty significantly undermines this presumed benefit of the notification system.

A further legal uncertainty is caused by the lack of any written criteria for assessing whether an agreement satisfies the conditions for individual exemption. The CPC has not issued any guidelines in this respect and publicly available case law is scarce.¹⁰⁴ Since both Serbian law and EU law prescribe the same four cumulative

⁹⁴ Serbian Vertical BER art.5(4).

⁹⁵ EU Vertical BER art.6.

⁹⁶ Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 art.29; EU Vertical BER art.6.

⁹⁷ Uredba o sadržini zahteva za pojedinačno izuzeće restriktivnih sporazuma od zabrane [Decree on the Content of the Request for Individual Exemption of Restrictive Agreements] in (2009) 107 *Official Gazette of the Republic of Serbia*.

⁹⁸ Serbian Competition Act art.12(1)–(2).

⁹⁹ Serbian Competition Act art.60(1).

¹⁰⁰ Serbian Competition Act art.12(3).

¹⁰¹ Regulation 1/2003 art.1(2). The competition laws of WB countries can be divided into those which still apply the notification system (Bosnian Competition Act arts 5–6, 29; Ligj për mbrojtjen e konkurrencës [Albanian Competition Act], Law 9121 of July 28, 2003 arts 48–52; Zakon o zaštiti konkurencije [Montenegrin Competition Act] in (2005) 69 *Official Gazette of the Republic of Montenegro* (as amended) arts 11–13) and those that have abolished it (Croatian Competition Act art.8; Macedonian Competition Act art.7).

¹⁰² EEC Council: Regulation 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204 para.4(1); Regulation 1216/1999 amending Regulation 17: first Regulation implementing Articles 81 and 82 of the Treaty [1999] OJ L148/5.

¹⁰³ See [old] European Commission Guidelines on Vertical Restraints [2000] OJ C291/1 para.63.

¹⁰⁴ Since not all exemption decisions are put on the CPC's website, often the only source of information with regard to exempted agreements are CPC annual reports. However, these reports only summarise the decisions, without always providing all relevant information concerning the context of the exempted agreement. See below fn.106.

conditions for the exemption of restrictive agreements, it is submitted that in assessing the criteria for exemption the CPC should rely on the relevant EU sources.¹⁰⁵

Finally, it should be noted that, even though the Serbian Competition Act does not a priori exclude the possibility of individual exemption for any category of agreement, it follows from the CPC decisional practice developed so far¹⁰⁶ that an agreement containing a hardcore restraint is unlikely to ever qualify for individual exemption. This corresponds to the stance adopted by the European Commission.¹⁰⁷ Consequently, individual exemption in Serbia in the main remains a realistic option for those vertical agreements which fall short of satisfying the conditions for block exemption due to an excess of market-share threshold.¹⁰⁸

Conclusion

The harmonisation of Serbian competition law with the European Union has been running smoothly. However, as described in this article, the undertaking is still a work-in-progress, characterised by two main deficiencies. First, certain aspects of the EU law on vertical restraints

which are idiosyncratic to the EU concept of a multi-national single market have been imported into the Serbian legal system indiscriminately and without distinguishing between situations where such protection adversely affects competition on the single Serbian market or cross-border situations where competition on the Serbian market is not affected. Secondly, differences between the Serbian law on vertical restraints and the EU model exist where not warranted by circumstances specific to the Serbian market.

The article also showed that Serbian law omits to regulate some important issues related to the treatment of vertical restraints. Since there are no mechanisms currently in place mandating and enabling direct application of EU law in Serbia, until the harmonisation process is complete, the existing gaps can be diminished by resorting to the EU competition *acquis* for the purpose of interpreting the existing Serbian norms deriving from EU competition law, as well as for the purpose of filling-in the gaps in cases where Serbian law regulates a particular competition law notion but is silent on a particular issue.

¹⁰⁵ See European Commission Guidelines on the application of Article [101](3) of the Treaty [2004] OJ C101/97 (Article 101(3) Guidelines); EU Vertical Guidelines paras 122–127.

¹⁰⁶ See *Grand Prom-Idea* Decision at 6; *Swisslion-Idea* Decision at 10. (In these cases the CPC noted that vertical price-fixing arrangements (and, arguably, other restrictions which cannot benefit from the *de minimis* exception) are “without exception prohibited and null and void”. Even though the decisions did not pertain to exemption from prohibition, based on the quoted wording it is doubtful that the CPC would ever grant an individual exemption to vertical price-fixing or other hardcore restrictions.) See also *CPC Annual Report for 2010*, p.20 (describing a decision on granting an individual exemption to a distribution agreement provided that the parties remove from the agreement hardcore restraints, without specifying which restraints exactly).

¹⁰⁷ See Article 101(3) Guidelines para.46 (hardcore/blacklisted restrictions unlikely to satisfy the conditions for exemption laid down in TFEU art.101(3)).

¹⁰⁸ See above, “Market-share threshold”.