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COMPETITION PROVISIONS IN TRADE AGREEMENTS – Contribution from Serbia

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Competition Provisions in Trade Agreements

- Contribution from the Republic of Serbia[1] -

1. Introduction

1. The Republic of Serbia has signed four trade agreements which contain competition provisions:

   1. Agreement on Amendment of and Accession to the Central European Free Trade Agreement – CEFTA,
   2. The 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 (hereinafter referred to as the SAA), along with the 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, (hereinafter jointly referred to as the EU Agreement),
   3. Free trade agreement between the EFTA states and the Republic of Serbia,
   4. Free trade agreement between the Republic of Serbia and Republic of Turkey.

2. Other recent trade agreements, such as those between the Republic of Serbia and Russian Federation, between the Republic of Serbia and Republic of Kazakhstan, between the Republic of Serbia and Republic of Belarus, as well as the Protocol on Trade Negotiations (PTN) signed by developing countries in 1971, do not contain competition provisions.[2] This paper will focus primarily on the EU Agreement, considering its impact and economic significance for the Republic of Serbia.

3. The EU Agreement is an instrument often used by the EU to implement a series of Stabilization and Association processes with its partners from the Balkan region.[3] In the case of Serbia, the aim of the EU Agreement is to promote economic development and political stabilisation, and to establish a close long-term association between the EU and the Republic of Serbia. Both the SAA and the Interim agreement on trade and trade-related matters were signed in 2008. However, the SAA did not enter into force until September 1,

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[2] On 25 October 2019, Serbia signed the free trade agreement with the Eurasian Union (EAEU) that does not contain competition provisions. The agreement still did not enter into force.

[3] The Stabilisation and Association Agreement constitutes the framework of relations between the European Union and the Western Balkan countries for implementation of the Stabilisation and Association Process that is the European Union's policy towards the Western Balkans, established with the aim of eventual EU membership. Western Balkan countries are involved in a progressive partnership with a view of stabilising the region and establishing a free-trade area. See also https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/saa_en.

2013, while the latter had entered into force for both parties on 1 February 2010. Therefore, the main goal of the Interim Agreement was to achieve speedy implementation of the SAA provisions relating to trade matters, such as trade in goods, competition and intellectual property. Ever since the SAA has entered into force, the Interim Agreement applies as part of the SAA.

4. According to an OECD study and categorization of trade agreements,[4] the EU Agreement is a good example of the EC-family type of trade agreements.[5] The EC-style approach has been adopted in a number of agreements which came to life as part of the association processes. They generally declare anticompetitive agreements and abuse of dominance incompatible with the functioning of the agreement, prohibit the granting of anti-competitive state aid, provide for an obligation to notify state aid, and require state monopolies to be operated in a non-discriminatory way. These agreements further contain provisions on dispute settlement, provisions concerning special and differential treatment of certain products and competition-specific clauses regarding non-discrimination, transparency, due-process, trade remedies and the exclusion of antidumping.

5. Such approach to competition provisions in trade agreements, however, is not a 'one-size-fits-all' approach and the agreements are adapted to the specific situation of each partner country. This is a reflection of the mixed nature of those agreements, which establish a free trade area between the EU and the country concerned, but also identify common political and economic objectives and encourage regional co-operation, thus serving as a basis for implementation of the accession process.

6. In the context of Serbia, the aims of the Association process, among others, are to support the efforts of the Republic of Serbia to complete the transition from a state-led into a functioning free market economy, to promote sound economic relations with the EU and gradually develop a free trade area between the signatories. Hence, the overarching objectives of the competition provisions in the EU Agreement relate to trade, considering the commitments of the Republic of Serbia and EU to the principles of free market economy and free trade. The competition provisions in particular are intended to ensure that potential gains from trade liberalisation are not undermined by the lack of rules on competition and by anticompetitive behaviour of market participants. Under the EU Agreement, as a condition to become member of the EU, the Republic of Serbia is required to establish a functioning market economy, to adopt competition rules which are harmonised with the *acquis* and to establish a competition authority which would enforce those rules.

7. The analysis of the EU Agreement shows that its competition provisions cover a range of issues. With reference to the classification in the paper by Laprévote et al.,[6] the following types of competition provisions have been included in the EU Agreement:

[4] Solano, O. and A. Sennekamp (2006), "Competition Provisions in Regional Trade Agreements", OECD Trade Policy Papers, No. 31, OECD Publishing, Paris, https://doi.org/10.1787/344843480185.

[5] Solano and Sennekamp find it appropriate to distinguish between two families of agreements, the EC-style agreements and the North American style agreements. The agreements involving the EU tend to be oriented more toward substantive rules addressing anticompetitive behaviour rather than toward coordination and cooperation in competition issues. See *ibid*, page 15.

[6] Laprévote, François-Charles, Sven Frisch, and Burcu Can. Competition Policy within the Context of Free Trade Agreements. E15Initiative. Geneva: International Centre for Trade and Sustainable

1.1. Adopting and maintaining competition laws

8. This category of provisions is broad and diverse because it requires Serbia to adopt a competition law and harmonise its national legislation with the EU *acquis*, and at the same time ensure compatibility of its legislation with EU competition law. For example, Article 72(1) of the SAA requires Serbia to "recognise the importance of the approximation of the existing legislation in Serbia to that of the Community and of its effective implementation" and to "ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*."

9. In addition, the SAA contains specific competition rules which cover, i.e. prohibit anticompetitive practices, such as anticompetitive agreements, abuse of dominance and grant of anti-competitive state aid. Pursuant to Article 73(1) of the SAA, the following are incompatible with the proper functioning of the agreement, insofar as they may affect trade between the Community (EU) and Serbia:

- 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;
- abuse by one or more undertakings of a dominant position in the territories of the EU or Serbia as a whole or in a substantial part thereof;
- any State aid which distorts or threatens to distort competition by favouring certain undertakings or certain products.

10. As can be seen from the above quoted provisions, there are no explicit rules in the SAA regarding merger control, from which it would follow that Serbia is not explicitly required to harmonise its legislation with the entire EU competition law corpus, but only with the rules concerning anticompetitive agreements, abuse of dominance and state aid. Nonetheless, Serbia adopts and harmonises its legislation with the EU competition law in this field as part of the general process of approximation of laws.

1.2. Enforceability of competition laws and establishing national competition authorities

11. The SAA sets forth competition enforcement principles in the context of a general obligation to ensure the enforcement of national competition rules and defining due process standards for enforcing competition rules.

12. In accordance with Articles 72(1) and 73(2) of the SAA, Serbia has to ensure that existing and future legislation will be properly implemented and enforced, and that any anticompetitive practices contrary to Article 73(1) are assessed on the basis of criteria arising from the application of the competition rules applicable in the EU – in particular from Articles 101, 102, 106 and 107 TFEU and interpretative instruments adopted by the EU institutions.

13. Article 73(3) of the SAA further requires Serbia to ensure that an operationally independent authority is entrusted with the powers necessary for the full application of the above mentioned competition provisions, regarding private and public undertakings and

Development and World Economic Forum, 2015. www.e15initiative.org, 2-12. See also Solano, Sennekamp (2006), 9-13.

undertakings to which special rights have been granted. This requirement has already been fulfilled by the Republic of Serbia through the founding of the Commission for Protection of Competition of the Republic of Serbia, as an independent and autonomous organization performing public competencies in accordance with the Law on Protection of Competition from 2005 ("Official Gazette of the RS", no. 79/05). The Commission has had the status of a legal entity ever since.

1.3. Regulating designated monopolies/state-owned enterprises

14. The SAA imposes an obligation upon Serbia to regulate designated monopolies and state-owned enterprises with the aim to level the playing field to the extent practicable. Thus, Article 74 requires that public and private enterprises entrusted with special or exclusive rights are subject to competition law, expressly referring to Article 106 TFEU: "Serbia shall apply to public undertakings and undertakings to which special and exclusive rights have been granted the principles set out in the EC Treaty, with particular reference to Article 86."

1.4. Regulating state aid/subsidies

15. The competition provisions of the SAA concerning subsidies and state aid prohibit any State aid which distorts or threatens to distort competition by favouring certain undertakings or certain products declaring it incompatible with the proper functioning of the Agreement, in so far as it may affect trade between the EU and Serbia (Article 73(1)(iii)).

16. In addition to this, Serbia has to ensure that any anticompetitive practices contrary to Article 73(1)(iii) are assessed on the basis of criteria arising from the application of the competition rules applicable in the EU, in particular from Article 107 TFEU and interpretative instruments adopted by the EU institutions.

17. Further still, Article 73(4) requires Serbia to establish an operationally independent authority which is entrusted with the powers necessary for the full application of the Article 73(1)(iii) of the SAA, including, inter alia, the powers to authorise State aid schemes and individual aid grants in conformity with the Article 73(2), as well as the powers to order the recovery of State aid that has been unlawfully granted.

1.5. Competition-specific exemptions

18. Article 73(9) of the SAA exempts agricultural and fishery product subsidies from the general prohibition on state aid.

1.6. Dispute settlement mechanisms for conflicts on competition

19. Article 129 of the SAA provides for a general dispute settlement mechanism which applies in respect of fulfilment of the prescribed obligations under the Agreement and any matter concerning the interpretation or implementation of the Agreement, as well as other relevant aspects of the relations between the Serbia and EU. This means that the general dispute settlement mechanism covers competition-related issues and competition provisions.

20. Under the SAA, the Parties will consult promptly through appropriate channels at the request of either Party to discuss any matter concerning the interpretation or implementation of the Agreement and other relevant aspects of the relations between the

Parties. Each Party is required to refer to the Stabilisation and Association Council any dispute relating to the application or interpretation of the Agreement.

21. In addition to the above said, Protocol 7 of the SAA regulates a specific dispute settlement mechanism (arbitration), which applies to certain areas covered by the SAA, but not to competition-related issues and State aid.

2. Impact of competition provisions

22. Having in mind the obligation to harmonise its competition rules with EU law, in general, Serbia started the harmonisation process early on, in accordance with Article 72 of the SAA. Thus, Serbia already had a competition law in place when it signed the SAA (i.e. before it came into force), but there was a need to develop the secondary legislation, as well as the institutional framework which would ensure Serbia is able to adequately apply those competition rules.

23. The modern system of protection of competition in the Republic of Serbia was established in 2005, when the first Law on the Protection of Competition was adopted. The Commission for Protection of Competition of the Republic of Serbia (hereinafter the CPC) was also established in 2005 by the same Law and began with its operations in 2006, as an independent body.

24. The Law from 2005 followed many of the legal solutions already existing in the EU law, according to which the CPC was an autonomous and independent body which exercises public powers and which is accountable to the National Assembly. According to the Law, the CPC does not form part of any other Serbian administrative or public body, but has a status of a separate legal entity, with its own premises, human and financial resources and decision-making powers. In the context of institutional set-up of the CPC, it is worth pointing out that Republic of Serbia has adopted the most common institutional model among the national competition authorities – administrative enforcement model, where the investigative and decision-making powers are integrated within a single institution.[7]

25. In order to achieve further harmonisation of national legislation with EU *acquis* in the field of competition, as well as secure conditions for greater efficiency in the implementation of competition law and policy within the Republic of Serbia, a new Law on Protection of Competition was adopted in 2009 and thereafter, the amendments to that Law in November 2013. The major novelties resulting from the adoption of amendments to the Law were related to the improvement in the procedural framework for application of competition rules, as well as implementation of the remarks from the EC Progress Report for Serbia for 2012 and the identified shortcomings in the practice of the CPC since the period of implementation of the Law adopted in 2009.

[7] Prior to 2005, instead of an independent competition authority, Serbia had an Antimonopoly Department, first within the Federal Government of Serbia and Montenegro and then, as of 2003, within the Ministry of Trade, Tourism and Services of the Republic of Serbia. However, the aforesaid department mainly dealt with prices and was not a modern competition authority, as a consequence of the provisions of the Antimonopoly Law from 1996.

26. In accordance with its competences envisaged by the Law on Protection of Competition and with the National program for adoption of the EU *acquis*, in the period after 2013, the CPC has prepared proposals of numerous by-laws, in order to continue with the activities directed at further harmonisation of national competition rules with the EU *acquis*.

27. According to the European Commission's Annual Reports for Serbia for 2018 and 2019,[8] the Serbian legislative framework on antitrust and mergers remains broadly in line with the *acquis* (Article 101 – restrictive agreements and Article 102 – abuse of dominant position) of the TFEU and the relevant provisions of the EU Agreement. The law on protection of competition provides for *ex ante* control of mergers, following the principles of the EU Merger Regulation. Implementing legislation continues to be progressively aligned with the acquis in the areas of antitrust policy and mergers and the number of antitrust cases and the relative size and significance of companies under investigation continued to increase. The CPC's decisions have also been increasingly upheld by appeal courts.

28. The main provisions of the Serbian national competition law are almost identical to the EU competition law which means that, as for Serbia, the EU Agreement has had a major impact on the establishment and development of the national competition rules landscape. Whenever there has been an amendment of the competition law in Serbia, the reasons, among others, have been related to the developments in the EU law and needs of further harmonisation with the EU competition *acquis*. The EU influence on the Serbian competition regime has been strong, since the adoption of the EU *acquis* in the field was a requirement to be eligible for EU accession. Overall, the EU Agreement has had a positive impact on the development of competition rules and policy in Serbia, particularly when it comes to competition provisions concerning the adoption and maintenance of competition rules and their enforceability, as well as establishing national authorities in the field of competition, as mentioned above.

29. When it comes to the issue of any interpretation problems in implementing the competition provisions of the SAA into national legislation, it is generally considered that such issues do not exist since the relevant provisions clearly follow the corresponding provisions of the TFEU. Furthermore, it is evident that Serbia is obliged not only to harmonise its competition laws with EU competition rules, but to properly implement and enforce domestic competition rules resulting from harmonisation with the EU law, as well. In that regard, it is important that CPC already uses the possibility to implement EU rules in said manner and properly interpret them, i.e. to interpret national competition laws in accordance with the EU law.

30. Last, but not least, during 2017, a Working group has been formed by the Serbian Ministry of Trade, Tourism and Telecommunications, with the task to prepare a new Draft Law on Protection of Competition. The CPC has a very prominent and active role in this important task, the aim of which is twofold: 1) securing an enhanced regulatory framework which would be even further harmonised with the EU *acquis*, and 2) simultaneously adjusting such framework to the specificities of the national law and market. Considering the entry into force of the new Law on General Administrative Procedure, the most important amendments to the Draft Law on Protection of Competition should relate to the special procedural rules which will deviate from the Serbian rules of general administrative

[8] See European Commission's Annual Report on Serbia 2018, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf and European Commission's Annual Report on Serbia 2019, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-serbia-report.pdf.

procedure, and at the same time be more aligned with the EU rules and practice. For the past two years, the Working group has worked very actively, by discussing concrete legal solutions and reviewing potential new institutes aimed towards regulatory harmonisation with the EU *acquis*. It is expected that this process will bear fruit in the near future.

3. Role of the competition authority

31. Bearing in mind its status of an independent authority with public competences, which is accountable to the National Assembly of the Republic of Serbia and not part of the Government structure, the CPC is not involved directly in the negotiation process of trade agreements. This was also the case with the EU Agreement at the time when it was drafted. Nonetheless, the CPC may have a consultative role in the negotiation of trade agreements (for example, by giving its opinion to the Draft of CEFTA Agreement or drafting the relevant part of the Report of the Republic of Serbia for Accession to the WTO) and/or contribute by delivering its opinions and written submissions regarding provisions of the draft agreements concerning competition to the relevant ministries in charge.

32. Furthermore, the CPC has legal powers to participate in preparation of regulations enacted in the field of protection of competition, to provide opinions to competent authorities on draft and current laws and regulations which have an impact on market competition, as well as to provide opinions regarding implementation of regulations in the field of protection of competition. The CPC uses these legal competencies to a great extent and publishes an overview of its activities in this field on its webpage.

33. When it comes to the SAA, unlike in the case of initial drafting and negotiation of this agreement, the CPC has been very active in the phase of its implementation and reporting to the European Commission on the fulfilment of the country's obligations thereof. The CPC has done so through participation of its representatives in the Negotiating Group for Chapter 8 (Competition Policy), which has been chaired for multiple years by the Serbian Ministry of Trade, Tourism and Telecommunications and more lately, by the Serbian Ministry of Finance.

34. In the context of this process, the CPC regularly submits its contributions for the Annual Progress Report on Serbia to the European Commission via line ministries. Those contributions set out in detail the CPC's legislative activity, administrative capacity and overview of decisions in antitrust and merger control proceedings, as well as other activities undertaken in order to achieve efficient implementation of the competition law. Also, the CPC actively cooperates with representatives and experts, both from the Ministry of European Integration of the Republic of Serbia and the EU Delegation to the Republic of Serbia.

35. In addition to participating in the work of the Negotiating Group for Chapter 8: Competition Policy, the CPC also takes an active role in drafting materials for negotiation within the Negotiating Groups for Chapter 5: Public Procurement and Chapter 23: Justice and Fundamental Rights.

36. While the CPC participates in the aforementioned Negotiating groups as a member, it also contributes, in a less formalised way, to the work of the Negotiating Groups for Chapter 10: Information Society and the Media, Chapter 14: Transport Policy and Chapter 15: Energy Policy, and drafts its contributions for the meetings of the EU/Serbia Subcommittee for Economic and Financial Issues and Statistics.

37. Most importantly, in substantive terms, the CPC provides considerable contribution to the country's progress, both in terms of ensuring regulatory compliance with the EU *acquis* in the relevant areas and adequate implementation of the law thus harmonised.