

Parallel Enforcement of EU and Croatian Competition Law after The New EU Vertical Block Exemption Regulation

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On June 1, 2022, *Commission Regulation (EU) 2022/720 on the application of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) to categories of vertical agreements and concerted practices (EU VBER)* entered into effect in all EU member states. The new EU-level rules were adopted, *inter alia*, to align the existing framework with the specifics of the online platform economy which plays an important role in the distribution of goods and services across the whole EU. Still, although the new VBER has significantly changed the rules on the application of Article 101(3) TFEU to vertical agreements, the existing *Croatian Regulation on Block Exemption of Vertical Agreements between Undertakings (Croatian VBER)* has not (yet) undergone a similar revision.

The Croatian VBER entered into force on April 7, 2011, and is still applicable to vertical restraints falling under Article 8(1) of the *Croatian Competition Act* (modeled upon Article 101(1) TFEU). As a result, and despite the fact that the *Croatian Competition Act* requires domestic law to be interpreted consistently with EU rules, the statutory provisions of Croatian and EU law are currently in conflict when it comes to several aspects of vertical agreements. This conflict may reduce legal certainty due to different possible outcomes of proceedings conducted by the Croatian Competition Agency (CCA), depending on whether it applies EU or Croatian law, or both. Ultimately, this may have a negative effect on legal certainty and undertakings distributing goods and services in Croatia.

Regulation (EU) 1/2003 requires national competition authorities that, where they apply national competition law to agreements and practices within the meaning of Article 101(1) TFEU, they also apply Article 101 TFEU, and where they apply national competition law to any abuse prohibited by Article 102 TFEU, they also apply Article 102 TFEU. In addition, under Article 3(2) of *Regulation (EU) 1/2003*, the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between EU member states but which do not restrict competition within the meaning of Article 101(1) TFEU, or which fulfill conditions of Article 101(3) TFEU, or which are covered by a block exemption regulation (on the application of Article 101(3) TFEU).

Specific conflicts between the new EU VBER and Croatian VBER may result in a situation where the application of national competition law would lead to the prohibition of agreements that are otherwise block exempt under the EU VBER, notably where the CCA would hold that there is an effect on trade between member states and that it should therefore apply both Croatian and EU competition law. For example, a conflict would arise when applying the amended rule on pass-on restrictions to buyer's customers from Article 4(b)(i) EU VBER. Based on the EU VBER, the restriction of active sales by the exclusive distributor and its direct customers into a territory or customer group reserved for a supplier or allocated to a maximum of five other exclusive distributors may be block exempt. On the other hand, within an exclusive distribution system, the Croatian VBER still qualifies restriction of active sales imposed on an indirect buyer (i.e., a customer of the buyer) as a hardcore restriction of competition which cannot be exempt from the prohibition laid down in Article 8(1) of the *Croatian Competition Act*.

Since the CCA is prevented from applying the rules of Croatian VBER if this would lead to a prohibition of agreements that are exempt based on EU law, the above conflict is not an issue in cases with an effect on trade between member states. However, in a purely domestic situation, the application of Croatian competition laws would result in the qualification of the contractual clause as a hardcore restriction of competition, while the same clause would be legal under new EU rules, resulting in legal uncertainty for many undertakings dealing with both Croatian and EU-based distributors. Considering these opposite outcomes triggered solely by whether or not there is an effect on trade between member states in a specific situation, a revision of national rules on vertical block exemption is required to improve legal certainty and to adapt to the requirements of the digital economy recognized by the EU VBER and accompanying guidelines.

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