Croatian Trade Ban: How Economic Operators Can Protect Their Rights Against Anti-Trade State Conducts?

Alert Brief

The purpose of this brief is to highlight the **consequences of the unilateral decision by the state of Croatia**, as a member of the European Union, **to close its borders** for transport coming from Serbia between 17 and 25 September 2015 and to emphasize potential breaches of legal principles the EU has been founded on.

We take into consideration the multitude of acts, treaties and agreements which constitute legal sources of the European Union, as well as precedents set by the highest court of the EU, and explore potential avenues for legal redress for those whose interests were harmed by the ban.

Introduction

The ongoing political "migrant crisis", unfortunately, had serious spill-over effect on the trade relations between Serbia, Croatia and the EU, on the one hand, and between Croatia and other Member States, on the other hand.[1] The trade relations between Serbia and the EU and its Member States are governed by the *Stabilisation and Association Agreement (SAA)*, while the conduct of Croatia is subject to obligations and responsibilities stemming from the *EU Founding Treaties* that regulate the **functioning of the Single Market, Custom Union and the Common Commercial Policy, as well as conditions of the Croatian accession**. This invites for analysis of whether economic operators from Serbia, Croatia, and elsewhere have legal basis, paths and remedies to protect their economic interests affected by the restrictive, and possibly illegal, conduct of a state authority.

Background

Croatia opened its borders with Serbia, following a week in which it kept its borders closed for any transport coming from Serbia during mid-September.[2] Effectively, **the measure targeted the entire Serbian exports to Croatia, as well as services and goods transiting through the country**, hence distorting the trade with the entire EU as well as provision of transport services. Croatia had accused Serbia that it deliberately directed migrants to its borders, and stipulated that therefore it was forced to resort to the harsh measures against Serbia, in order to protect its security. After unsuccessful talks between relevant authorities, Serbia retaliated and introduced a ban limited on imports of goods originating from Croatia.

The crisis escalated after Croatia introduced further bans affecting free movement of individuals carrying Serbian passports. **Croatian measures were more restrictive in terms of scope, and intensity, covering goods and services, regardless of the origin of the supplier or provider, including goods**

[1] See http://english.blic.rs/News/10921/Brussels-seeks-urgent-explanation-from-Croatia
[2] See http://english.blic.rs/News/10920/Croatia-ends-blockade-of-border-with-Serbia

in transit through Serbia which may as well had the EU origin. After receiving the information that the European Commission started probes on legality of the Croatian conducts against the SAA rules, Croatia soon lifted the measures.[3]

What is at stake?

There are several sources of the EU law that could be potentially violated by a unilateral conduct of a Member State, and the *Stabilisation and Association Agreement* is just one of them. Namely, it should be noted that **Croatia has committed** to other Member States, to the EU and to the citizens of the EU, **to respect obligations stemming from the *Treaty on Functioning of the EU (TFEU)*, the *Treaty on European Union (TEU)*, the *Accession Treaty (AT)* and from the rules adopted by the EU institutions**. If products and services affected by the restriction originate from other Member States (goods and services in transit through Serbia) Internal Market rules of the TFEU establishing the Custom Union and the Single Market like free movement of goods, free movement of services, transit, etc. are directly applicable.

Croatia, in addition, must protect rights of legal persons and individuals coming from third parties if the EU sources of law provide protectable rights to them. These **rights may stem from the international treaties binding the EU and the Member States alike**. For instance, SAA, World Trade Organization (WTO) rules or other free trade agreements (including the EU custom union established with Turkey). Such international agreements are the source of the EU law as well and must be enforced by authorities and courts of Member States. Furthermore, **the AT forces Croatia to implement international agreements that bound the EU** before accession, like the SAA.

The SAA prohibits all quantitative restrictions on imports into the EU for Serbian industrial and agricultural products (see Articles 21(2) and 26(1) respectively). Furthermore, the SAA mandates that "no new quantitative restriction on imports [...] shall be introduced from the date of the entry into the force of this Agreement" (Article 36(2) "Standstill" clause). [4] However, the SAA shall not preclude prohibitions or restrictions on imports or on transit justified on grounds of public security, unless such prohibitions or restrictions constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties (Article 45).

While the trade policy **(Common Commercial Policy) is an exclusive competence of the EU**, border checks, asylum and immigration policy are a part of shared competences between the EU and the Member States. Within the area of shared competences, "the Member States shall exercise their competence to the extent that the Union has not exercised its competence." (Article 2.2. TFEU). The Member State may, thus adopt measure within the area of immigration policy if confronted by an emergency situation such as a sudden inflow of nationals of third countries, unless the EU has already intervened by its measure (see Article 78 of TEU). Assuming that the former is the case, Croatia is still bound by a general obligation to "refrain from any measure which could jeopardise the attainment of the Union's objectives" (Article 4.3

[3] See http://www.b92.net/eng/news/politics.php?yyyy=2015&mm=09&dd=24&nav_id=95549

[4] In addition to these rules, Parties to the SAA agreed to grant unrestricted access to Serbian transit traffic through the EU, and to refrain from taking any unilateral measures that might lead to discrimination between the carriers or vehicles of the Parties (Protocol 4, Articles 11(2) and 11(5) of the SAA).

of the TEU). As a result, **the security measure would not be found illegal unless it goes beyond what is necessary to achieve objectives for which it was originally adopted (principle of proportionality)**. Otherwise it may interfere with the exclusive competences of the EU to govern the trade policy, hence, it may be found in breach with the international trade agreements like the SAA, the WTO, etc.[5]

It is a settled case law that the burden of proof of legality lies upon the party which introduces the restrictive measure. Namely, the exceptions to free trade rules are construed narrowly. Therefore, it would have been upon **Croatia to discharge the burden of proof that the measure had been proportionate to the reasons declared**. The measure must be the least distortive to the trade in terms of choice of measure, its scope and time. Principle of proportionality is, hence, a legal hurdle difficult to work around. In this case **the measure targeted all goods and services originating from or in transit through Serbia, instead of the "inflow of nationals"**, making it disproportional and *prima facie* illegal.

Furthermore, within the exclusive competences of the EU, the Member States may not introduce unilateral trade measures, even if the EU fails to act, except under a mandate given by the EU. Member States, in principle, may not invoke SAA provisions as a legal basis for their unilateral conduct if the measure trespasses into the exclusive competences of the EU and without the prior EU's authority, even if the SAA provides certain exceptions to the rules on free trade, such as public security. Therefore, **violation of international trade agreements may as well qualify as trespassing into the EU exclusive competences**. Moreover, such a trespass can be qualified as a self-standing legal ground for an action.

On the other hand, **trade retaliation by Serbia**, although affecting the trade between the Parties to the agreement, may be **governed by the special SAA rules regulating the disputes between the Parties**. These rules allow the Party to resort to the "appropriate measures" against the Party which violates SAA, but it must promptly communicate the content and reasons to the Stabilisation and Association Council (see Article 129 of the SAA), a body in charge for an interpretation of the Agreement. However, these measure as well must be governed by the principle of proportionality and to be the least distortive.

What can economic operators do now (access to justice)?

Legal persons and individuals, being the EU citizens or not, cannot bring the case against Member States directly before the Court of Justice of the EU (ECJ) to seek redress against the breach of the EU law. However, non-EU nationals should be aware that **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**. As a general rule, **national authorities and courts of a Member State are obliged to apply the EU law sources directly** and to set aside any conflicting national rule. Article 126 of the SAA stipulates that:

[5] "When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."(Article 2.1 of the TFEU).

"Within the scope of this Agreement, each Party undertakes to ensure that natural and legal persons of the other Party have access free of discrimination in relation to its own nationals to the competent courts and administrative organs of the Parties to defend their individual rights and their property rights."

The term "Party" stands for the EU, its Member States, and Serbia alike. By signing the AT, Croatia assumed all obligations stemming from the membership. Croatia, thus, took the obligation to implement all international agreements that already bound the EU. Namely, *"the principle whereby a State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty."*[6] Therefore, **the non-EU national enjoys access to the Croatian courts free of discrimination in order to establish State liability and to seek damages.** In order to succeed claimant must establish the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the claimant as the injured party.[7] However, the substantive and procedural conditions for reparation of loss and damage must not be less favorable than those relating to the similar domestic claims, and framed as to make it vitrtually impossible or exessively dificult to obtain reparation.[8]

Furthermore, **national courts may refer a question to the ECJ** to give preliminary rulings concerning clarifications of the EU law where such question is raised before them. If such question is raised before the court of a Member State against whose decisions there is no judicial remedy under national court, that court have no choice but to bring the matter before the ECJ (Article 267 TFEU).

One of the preliminary questions that may arise in a case against a national measure, is whether an EU provision invoked is *directly applicable*. Specifically, the question would be if particular provisions of the EU source of law has a quality to convey the rights to the individual that can be invoked before the court. In our case, the question would be **if provisions prohibiting quantitative restrictions and measures having equivalent effect, including the standstill clause are directly applicable**, i.e. if they have quality to confer the rights to legal persons and individuals affected by the Croatian measure.

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 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

[6] Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, para. 35.
[7] Ibid., para. 40.
[8] Ibid., para. 43.

the adoption of any subsequent measure."[9]. It is settled case law that the TFEU's provisions with an equivalent wording as Articles 21(2), 26(1), 36(2) of the SAA have such quality, as well.[10] However, in the ***Polydor ruling***[11] that considered provisions of the international agreement abolishing restrictions of trade between Portugal (then non-member state) and the EU (then European Economic Community) the ECJ stated that although agreement "makes provision for the unconditional abolition of certain restrictions on trade between the Community and Portugal such as quantitative restrictions and measures having equivalent effect, it does not have the same purpose as the EEC Treaty, inasmuch as latter [...] seeks to create a single market".[12] As a result, the similarity of terms in provisions of the TFEU and the SAA agreement alone is not a sufficient reason for automatically transposing the case-law relevant to the TFEU provisions to the similar provisions of the SAA.

However, the case law referred in this judgment was **limited to the applicability of the Internal Market case law on conflict between the free trade rules and territorial restriction based on protection of the intellectual property rights** (IPRs) (i.e. another trade related interest), within the international agreement.[13] In other words, the *Polydor ruling* balanced between two legitimate economic interests (free movement of goods and protection of IPRs) protected by the agreement. Furthermore, the ECJ did not state that the free trade rule in question does not possess the capacity of being directly applicable, either.[14] The ruling only confirmed that trade restrictions steaming from the national IP law are legitimate, and authorized by the international agreement.[15] The decision in fact recognized that free trade rules of the agreement are statements of "the *unconditional* abolition of certain restrictions on trade (emphasis added)".

Therefore, the question of direct applicability of the SAA provisions against the unilateral Croatian measure would be answered in a different legal setup, having in mind the goals of the SAA, and taking into account the magnitude of the unilateral measure compared to the importance of the affected rights.

In our opinion the following arguments supports the finding of direct applicability of the relevant SAA provisions:

- Articles 21(2), 26(1), 36(2) of the SAA are **clear, precise and unconditional** statements of law;

[9] Case 12/86 *Demirel,* para. 14.
[10] Case 8/74 *Dassonville.* See also Commission's *Free movement of goods - Guide to the application of Treaty provisions governing the free movement of goods* (European Union, 2010) p. 9-14.
[11] Case 270/80 *Polydor v Harlequin Record Shops* (Polydor Ruling)
[12] Polydor Ruling, para. 18.
[13] Ibid., para. 15.
[14] Ibid., para. 23.
[15] Ibid, paras 15 and 23.

- Unlike restrictions based on IPR protection, the Croatian unilateral measure **cannot qualify as an authorized restriction** under standards of Article 45 of the SAA being an outright ban on trade, disproportional to the purpose it allegedly sought to protect;
- Article 126 of the SAA provides the **right to access to the justice** to the individuals and legal persons of the Parties to the Agreement.

Namely, instead of pursuing protection of aims of the affected public policy, which is a control of the inflow of migrants, the Croatian trade ban targeted the free flow of goods and services. While rules on **protection of intellectual property rights are "business as usual" measures having equivalent effect to quantitative restrictions, the closure of borders is the outright restriction on trade**. As a result, the fact that the SAA provisions in question contain "clear and precise" rules, and require "unconditional abolition" of trade restrictions in our opinion, suffice to qualify them as directly applicable. Otherwise, the agreement's recognition of the rights to legal persons and individuals to access to the courts of the Parties would have been meaningless.

Any other means for supporting your claim?

Natural and legal persons cannot bring the case against the Member States directly to the ECJ. However, in the case of an infringement of the EU rules by one of the Member States, both the European Commission and other Member States can react in order to remedy its failure to fulfil the obligations stemming from the Founding Treaties and other European legislation. The **essence of the European Union legal order is a "*sincere cooperation*"[16] between the EU and the Member States** which implies, both for the EU institutions and for the Member States, a positive obligation to assist each other, "*in full mutual respect*", in carrying out tasks which flow from the Treaties. More importantly, the **Member States must refrain from any action which might jeopardize achievements of the EU objectives as set up in the Treaties**[17].

While Member States are reluctant to bring the procedure before the ECJ against one another for political reasons, **the European Commission as the guardian of the Treaties and the defender of the EU's interests, has the obligation to ensure the application of the Treaties, and to take appropriate initiatives to that end**[18]. If one of the Member States does not fulfill its obligations, there is a powerful mechanism provided in the Article 258 TFEU in order to ensure the compliance. **The Commission is empowered to request the Member State to cease acts that breach obligations stemming from the Treaties** before delivering its reasoned opinion on the subject. Only if the State does not comply with the request, and following the compulsory administrative phase of the procedure, the case shall be brought before the ECJ by the Commission, and the Member State failing to conform to it risks the severe sanctions.

[16] See Article 17 TEU.
[17] Article 4 TEU in relation to Article 3.
[18] Article 17 TEU.

Since the decision to bring the action against the Member State before the ECJ falls within the discretion of the Commission, it is highly unlikely that individuals could be in the position to bring the action against the Commission in the case of its inertia or failure to act[19]. Furthermore, this is more difficult in the situation where an act that potentially breached the Treaties ceased before any initiative of individuals before the Commission has taken place.

The Commission has at its disposal other, less formal ways to remedy to the wrongdoings of the Member States, and, in that sense, **tends to choose the most efficient extrajudicial way**. Through internal channels of communication with the Member State, the Commission can present its point of view regarding a behavior potentially breaching the EU *acquis,* and request that the Member State cease it and comply with the Treaties. However, with respect to natural and legal persons, even those **extrajudicial actions of the Commission might be of interest as the evidence in support of their complaints before the national courts**.

For instance, since the Croatian ban represented such an obvious infringement of the Treaties regarding, on one hand, the exclusive competence of the EU in the area of the Common Commercial Policy, and the express prohibition of any trade restrictions both under TFEU and the SAA, on the other hand, **affected individuals may request the Commission, by invoking the freedom of information, to give information on concrete actions it had undertaken regarding Croatia's ban** and, even more importantly, on which grounds it based its requests or any inquiries.

For any questions with respect to the issues addressed herein, please contact the Gecic Law's EUROPEAN LAW, TRADE & ENLARGEMENT TEAM.

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[19] See Cases 48/65 *Alfons Lütticke GmbH v Commission*, 247/87 *Fruit Star v Commission*.