

## MONTENEGRO: COMPETITION

### New Competition Act

After several years of announcements, the new Montenegrin Law on the Protection of Competition has been recently enacted<sup>1</sup> and will come into force on 9 October 2012.

The most significant changes, compared to the previous Montenegrin competition legislation, pertain to the notification threshold, deadlines for the submission of a notification and the decision by the antitrust authority and the powers of the authority, now called the Montenegrin Competition Agency.

Merger clearance is required if:

- a) the combined annual revenue of the concentration participants generated on the Montenegrin market in the financial year preceding the concentration exceeds EUR 5 million; or
- b) the combined annual revenue of the concentration participants generated world-wide in the financial year preceding the concentration exceeds EUR 20 million, provided that at least one of the concentration participants has generated more than EUR 1 million on the Montenegrin market in the same year.

The new thresholds are higher than those under the previous legislation (EUR 3 million on the Montenegrin market and EUR 15 million world-wide).

The Competition Agency may, upon gaining knowledge of a conducted concentration, order its participants to submit a concentration filing if the joint market share of the concentration participants on the relevant market in Montenegro exceeds 60%.

The law also stipulates that market participants acquiring control over joint stock companies via takeover offer must notify the Competition Agency of the offer.

The deadline for the submission of a concentration filing is increased from seven to fifteen days from the occurrence of the earliest of the following relevant events: signing of the SPA, "publication of the public invitation or the offer or the closure of the public offer" or acquisition of control.

The new Montenegrin Competition Act slightly shortens some of the deadlines for reaching the relevant decision by the Competition Agency upon a notified concentration:

- the deadline for reaching a decision on unconditional approval of a notified concentration is now 105 business days from a complete notification, as opposed to 115 business days under the previous law;
- the deadline for reaching a decision on conditional approval of a notified concentration is 125 business days from a complete notification, as opposed to 115 business days under the previous law;
- the deadline for reaching a decision on prohibition of a notified concentration is 130 business days from a complete notification (same as under the previous law).

If the relevant decision is not rendered within the prescribed deadline, the concentration shall be deemed approved.

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<sup>1</sup> Zakon o zaštiti konkurencije, "Official Gazette of the Republic of Montenegro" no. 44/12 of 9 August 2012

There are two apparent defects in the deadline provisions of the new Competition Act. It is unclear under the wording of the above-mentioned presumption of approval that a concentration can be deemed approved if no decision is rendered within the shortest of the three deadlines (105 days for unconditional approval), even if the deadlines for conditional approval and prohibition of concentration are longer (125 and 130 days, respectively). As such conclusion would annihilate the longer deadlines, in practice it is most likely that the market participants will be able to rely on the presumption of approval only upon the expiry of the longest, 130-day deadline. Furthermore, even though the new Competition Act allows the Competition Agency to decide in summary proceedings if there are no reasons for the initiation of a full-scale investigation (a possibility that hardly requires legislative sanction), there is no presumption that the concentration will be deemed approved if the Competition Agency neither decides upon the filing nor initiates a full-scale investigation within the 20-day deadline from the receipt of a complete notification (this deadline is not prescribed in the Competition Act but stems from the subsidiary application of the general Law on Administrative Proceedings).

With regards to reaching decisions in investigation of restrictive agreements/abuse of dominance cases, the Competition Agency now has a staggering 24 month deadline which may even be extended "for justified reasons" for another 24 months. Under the previous legislation the competition authority had 4 months to decide in these cases but also had the option to extend the deadline "in exceptional cases" without any limitation.

The Competition Agency is to be established as an independent agency responsible, however, directly to the Government, and headed by a Director appointed by the Government for a four-year term. The Competition Agency will publish (upon obtaining consent from the Government) a list of tariffs which will apply to the proceedings before the Competition Agency.

Besides being able to implement a full array of measures against market participants found in breach of the Competition Act (i.e. temporary measures, behavioral measures, structural measures) the Competition Agency has been vested with a new power to impose limited procedural fines on infringers. Namely, the Competition Agency will be competent to impose fines in the amount between EUR 500 and EUR 5,000 for each day of non-fulfillment by the market participant of a prescribed obligation (including obstruction of the Competition Agency's inspectors during a dawn raid), up to 3% of the total annual revenue generated by such market participant in the year preceding the year when the proceeding was initiated.

However, just like under the previous legislation, the Competition Agency remains incompetent to impose fines for breaches of substantive provisions of the Competition Act. It may only initiate proceedings against the infringers before the misdemeanor courts. Given that misdemeanor courts do not have specialized knowledge of antitrust matters and that this route has not been followed under the previous legislation either, misdemeanor proceedings are likely to remain a paper tiger.

The fines that can be imposed in misdemeanor court proceedings are as follows:

- for breach of statutory provisions on restrictive agreements, abuse of dominance, and prohibited concentrations, and for breach of measures imposed by the Competition Agency - in the range from 1% to 10% of annual revenue generated in the year preceding the breach;
- for a failure to notify a concentration within the prescribed deadline - in the range from EUR 4,000 to EUR 40,000;
- fines applicable to responsible persons in the entity committing the breach - in the range from EUR 1,000 to EUR 4,000.

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The new law vests the Competition Agency with the power to perform dawn raids. The law contains definitions of "privileged communication" and "protected data". Privileged communication involves documents, information, data, and other forms of communication related to the proceeding between the party involved in the proceeding and its attorney. Such communication cannot be used as evidence in the proceedings. The status of protected data is afforded to those data for which the Competition Agency has satisfied itself that the interest of the party to the proceedings in maintaining the confidentiality of the data (or its source) outweighs the public interest in having access to such data.