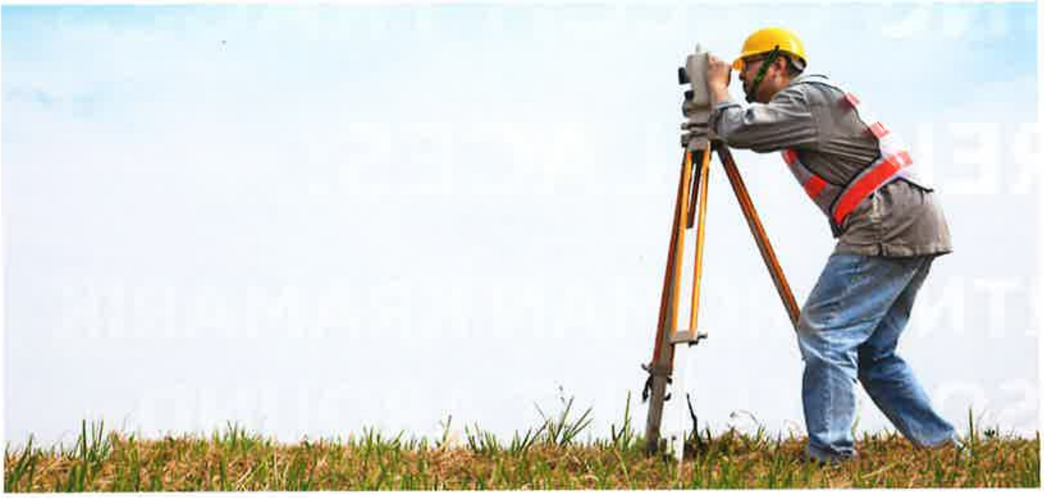
Year 5, Issue 9
September 2018

# CEE Legal Matters

In-Depth Analysis of the News and Newsmakers That Shape Europe's Emerging Legal Markets

## MONTENEGRO

### Territorial Scope of the Montenegrin Competition Law



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Article 2 of the Montenegrin Law on the Protection of Competition limits the law's application to acts undertaken within the territory of Montenegro and acts undertaken outside of Montenegro which have as their object or effect the distortion of competition in Montenegro. In practice, however, the Law on the Protection of Competition (the "Law") seems sometimes to be applied beyond its territorial scope.

Maybe the best example of this is the merger control regime. It appears that transactions that have no obvious and immediate ties to Montenegro – typically called *foreign-to-foreign* transactions – are still reviewed and cleared by the Montenegrin Commission for Protection of Competition (the "Commission"). In other words, the Commission apparently accepts jurisdiction in such cases, even though it seems unlikely that the subject transaction would have *any* effect in Montenegro.

The reason for this could lie in the jurisdictional thresholds of the Montenegrin merger control regime set out in article 50 of the Law. The thresholds are set very low and structured in a way that allows situations in which only one party to the concentration can exceed them. This leads to the absurd situation in which, judging based only on jurisdictional thresholds, an undertaking with any Montenegrin turnover above EUR 1 million has to notify the Commission in Montenegro of each and every transaction in the world (for example, a transaction resulting in control of a company located and exclusively operating in Cambodia).

Yet, it is doubtful that this was the legislator's aim when it drafted the Law and established the Montenegrin merger control regime. In other words, it is unlikely the *ex ante* review of foreign-to-foreign transactions was necessary for the protection of competition in Montenegro.

One possible explanation is that the legislator was being overly cautious. Another is that it was unaware of the volume of transactions that would be caught under the jurisdictional thresholds. Neither explanation seems likely, not just because of globally accepted principles in competition law and merger control, but also because of the wording of the Law and the interplay between the provisions on the territorial scope of the Law and its jurisdictional thresholds.

One of the most commonly accepted competition law principles – especially in EU competition law and the national competition laws of many EU member states – is the domestic effects doctrine. According to this principle, domestic competition law may only be applied to acts carried out by (foreign) entities undertaken abroad if the acts have effects in the domestic territory. Only in such extraterritorial situations is the application of domestic law proportionate and permissible. The wording of Article 2 of the Law, Territorial Scope, resembles the domestic effects doctrine, at least on paper.

Nevertheless, as one of the guiding principles of the Law, the territorial scope of the Law should be interpreted as prevailing. Jurisdictional thresholds are typically set to limit the scope of the merger control to important transactions only – *i.e.*, a transaction large enough to potentially affect competition. However, this particular purpose of the jurisdictional thresholds cannot override the basic principle of the territorial scope of the Law itself.

For these reasons, it appears that the Law should not be applicable to typical foreign-to-foreign transactions. The same should also hold true for agreements – for example those concerning the export of goods outside of Montenegro – as long as they do not contain restrictions that could affect competition in Montenegro.

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