

Screening report

Montenegro

Chapter 8 – Competition Policy

Date of screening meetings:

Explanatory meetings: 3, 4 and 5 October 2012

Bilateral meetings: 3 and 4 December 2012

I. CHAPTER CONTENT

The competition *acquis* covers both anti-trust and State aid control policies. It includes rules and procedures to fight anti-competitive behaviour by companies (restrictive agreements between undertakings and abuse of dominant position), to scrutinise mergers between undertakings, and to prevent governments from granting State aid which distorts competition in the internal market. Generally, the competition rules are directly applicable in the whole of the Union and Member States must co-operate fully with the Commission in enforcing them. The competition *acquis* is based on Article 37 (State monopolies of a commercial character), Articles 101-105 (Rules applicable to undertakings), Article 106 (Public undertakings and undertakings with special or exclusive rights) and Articles 107-109 (Rules applicable to State aid) of the Treaty on the Functioning of the European Union (TFEU).

The *acquis* under this chapter is to a large extent linked to obligations under the EU-Montenegro's Stabilisation and Association Agreement (SAA) presently in force.

In the field of **anti-trust**, national competition authorities must closely co-operate with the Commission in EU competition procedures. Since 1 May 2004, all national competition authorities are also empowered to apply fully the provisions of the TFEU (and formally the EC Treaty) in order to ensure that competition is not distorted or restricted. National courts may also apply EU anti-trust rules directly so as to protect the individual rights conferred on citizens by the TFEU.

In the field of **State aid**, the decision as to whether or not aid granted by Member States is compatible with the Single Market can be taken only by a supranational and independent authority. Exclusive authority for scrutinising the State aid measures was conferred on the European Commission by the Member States.

The term **liberalisation** refers in substance to Article 3 of the TFEU which states that the activities of the EU shall include a system ensuring that competition in the internal market is not distorted. For this purpose, there is a specific surveillance system in the case of public undertakings and undertakings to which Member States grant special or exclusive rights. With respect to the liberalisation of specific sectors, reference is made to the relevant sector-specific negotiating chapters.

II. COUNTRY ALIGNMENT AND IMPLEMENTATION CAPACITY

This part summarises the information provided by Montenegro and the discussion at the screening meeting.

Montenegro indicated that it can accept the *acquis* regarding competition policy. Montenegro indicated that it does not expect any difficulties in implementing the *acquis* by accession.

II.a. Anti-trust and mergers

Montenegro stated that the Law on Protection of Competition, adopted in 2012, contains the basic rules on restrictive agreements, abuses of dominant positions and merger control. Articles 139 and 140 of the Constitution provide the legal foundation for a free and open market economy with unrestricted competition.

The principle of supremacy of international law over national law applies in Montenegro. Article 9 of Montenegro's Constitution stipulates that the ratified and published international agreements and generally accepted rules of international law are an integral part of the national legal order. They have supremacy over the national legislation and are directly applicable when differing from national legislation. Therefore, according to Montenegro, in case of conflict with national legislation, or in the absence of it, the Stabilization and Association Agreement prevails or is directly applicable respectively.

Montenegro considers its anti-trust legislation to be generally in line with the *acquis*.

Procedural rules applicable to competition proceedings are included in several pieces of legislation. The Law on Protection of Competition contains rules for initiating proceedings, inspections, the issue of Statements of Objections, cooperation with the Agency, confidentiality, timelines for issuing decisions, legal remedies, etc. The General Administrative Act sets out rules for conducting oral hearings, collecting statements, rights of parties and witnesses, evaluation of evidence, the use of experts, etc. The rules for the Leniency Application and Settlement Procedure, the Misdemeanor Act and the Law on Administrative Disputes include additional procedural rules.

Montenegro's Agency for Protection of Competition is not authorised to impose, reduce or waive fines, a possibility that is attributed only to judiciary bodies. Montenegro considers that, although not frequent in the EU, this approach is known in some EU Member States and considered as acceptable if the legislation is correctly implemented.

As to secondary legislation, Montenegro stated that it is aligned with the *acquis*. Existing by-laws, including regulations, rules, instructions and guidance adopted under the previous law had to be replaced by new by-laws within 6 months of the entry into force of the 2012 Law on Protection of Competition, i.e. by 9 of April 2013. According to Montenegro, these changes were only procedural since the by-laws adopted under the previous Law were already aligned with the *acquis*.

The authority responsible for anti-trust and mergers in Montenegro is the Agency for the Protection of Competition. It has four employees on anti-trust cases and two working on merger control cases. Montenegro stated that two additional case handlers and one IT specialist will be recruited in the near future and considered its current administrative capacity as insufficient. Over the last three years 31 merger decisions were issued, five abuses of dominant position were established and three vertical and horizontal cooperation agreements

were approved. Montenegro added that the Agency for the Protection of Competition is functionally independent from the government and parliament. Parliament's only obligation is to examine the Agency's Annual Reports. The government appoints the Director and Deputy Director of the Agency.

II.b. State aid

Procedural regulations:

The Law on State Aid Control adopted in December 2007, replaced by a new Law in November 2009 and amended on 17 November 2011, the Law on General Administrative Procedure, the Law on Administrative Dispute and the Law on Courts contain the main procedural principles of State aid control. Montenegro stated that its State aid legislation is largely in line with the *acquis*. They contain provisions on definitions, procedures, interested parties and common provisions.

As in the case of antitrust and mergers, Montenegro stated that the principle of supremacy of international law over national law applies in Montenegro. Article 9 of Montenegro's Constitution stipulates that the ratified and published international agreements and general accepted rules of international law are an integral part of the national legal order; they have supremacy over the national legislation and are directly applicable when differing from national legislation. Therefore, according to Montenegro, in case of conflict with national legislation, or in the absence of it, the Stabilization and Association Agreement prevails or is directly applicable respectively.

Horizontal and sector specific rules

Montenegro stated that the Decree on more detailed criteria, conditions and manner for granting state aid as amended in June 2011, together with the Law on State aid control contains the main provisions applicable in this area, namely rules on regional aid, rules on research and development aid, rules on environmental aid, rules on aid to SMEs, rules on training aid and rules on employment aid.

Montenegro considers its legislation to be largely in line with the *acquis*.

As regards Montenegro's regional aid map, Montenegro stated that the State Aid Control Agency adopted a formal Decision on 15 March 2012 (O.G 22/12) approving it, following the Commission's acceptance and in fulfilment of article 73 (7) of the Stabilization and Association Agreement.

Reference/discount rates and recovery of interest rates, State guarantees:

Montenegro indicated that Article 5 (4) of the Law on State aid Control and the Decree on more detailed criteria, conditions and manner for granting state aid contain the relevant provisions in this area in Montenegro. It sets the basis for calculating the reference rate to measure the grant equivalent of aid resulting from interest subsidy schemes, when aid is

disbursed in several instalments. The reference rate sets the reference and discount rates to be applied as a proxy for the markets rates. On State guarantees, the Decree allows to determine if a guarantee constitutes aid and to calculate the aid element.

Montenegro considers its legislation in this field to be largely in line with the *acquis*.

Public land sales:

Montenegro indicated that Article 5 (3) of the Law on State aid Control (purchase and sale of immovable property by the state aid grantor) and the Decree on more detailed criteria, conditions and manner for granting state aid contain the relevant provisions in this field in Montenegro.

Montenegro considers its legislation in this area to be largely in line with the *acquis*.

Export credit insurance:

The main provisions in this area are articles 52, 59 and 63 of the Decree on more detailed criteria, conditions and manner for granting state aid. Montenegro stated that the general terms and conditions are aligned with the rules in place in the OECD and the EU. According to Montenegro, the legislation in place allows to remove distortions of competition (between exporters, between insurers) in short-term export-credit insurance.

Temporary rules in response to the economic and financial crisis

Montenegro indicated that the Law on Measures for the Protection of the Banking sector, the Rulebook on more detailed criteria, manner and procedures of issuing guarantees, as well as the rules on settlement liabilities and credit support to banks were the relevant provisions in this area in Montenegro at the time the temporary rules were in force in the EU. The Central Bank of Montenegro monitored the execution of contracts and reported on a regular basis. The Ministry in co-operation with the State Aid Control Authority checked every six months the need to provide guarantees and credit support to banks.

Montenegro indicated that its legislation in this field was aligned with the *acquis*.

Fiscal aid and direct business taxation:

Montenegro stated that Articles 2 and 7 (2) of the Law on State Aid Control are the relevant general provisions in this area.

Fiscal State aid measures are prescribed in the Law on Personal Income Tax (no. 01-112/1-2011), the Law on Corporate Profit Tax (no. 01-113/1-2011), the Law on Free Zones (O.G. 42/04, 11/07, 76/08 and 40/11) and the Law on Business Zones (Business Development Incentive Programme).

As regards the Law on Personal Income Tax and the Law on Corporate Profit Tax, the State Aid Control Agency concluded that they need to be brought in line with the state aid rules.

Rescue and restructuring aid:

Articles 14, 15 & 16 of the Decree on more detailed criteria, conditions and manner for granting state aid contain the rules regarding rescue and restructuring aid but Montenegro indicated that it has no specific legislation in this field.

Montenegro considers its legislation in this area to be largely in line with the *acquis*.

Postal services:

The main provisions in this field in Montenegro are the Postal Services Act (O.G. 57/11) and Article 44 of the Decree on more detailed criteria, conditions and manner for granting state aid. Account separation is regulated in articles 60, 61 and 62 of the Decree.

State aid for the transport sector:

The Law on transport, international agreements, the Decree on more detailed criteria, conditions and manner for granting state aid, the Law on Ports and the Railways Law contain the main provisions in this field in Montenegro.

The main authority responsible for state aid matters in Montenegro is the State Aid Control Agency. It was established by Decision of the Government (O.G. 8/07 i 16/08). The State Aid Control Law prescribes that professional and administrative activities for the State Aid Control Agency are carried out by the State Aid Control Unit, a separate body within the Ministry of Finance. The Agency has 5 members, 4 of which are representatives of the ministries and 1 from the association of employers (Montenegro Business Alliance). Montenegro indicated that the State Aid Control Agency is an operationally independent body. A number of training activities have been undertaken. In 2012 (up to 31 October 2012) the Agency has assessed 11 cases, passed 10 decisions, 8 of which were positive, 1 conditional and 1 negative asking for the aid to be reimbursed. The Agency submits its annual reports on granted state aid measures to the Parliament by 30 of June at the latest.

II.c. Liberalisation

Public undertakings and undertakings with special or exclusive rights:

The legal framework is provided by the Law on State Aid Control, which is applicable to all cases falling under Article 106 (2) of the Treaty on the Functioning of the European Union, i.e. to all legal or natural persons, including public undertakings and undertakings with special or exclusive rights. Montenegro indicated that therefore, its legislation in this area is in line with the *acquis*.

State monopolies of a commercial character:

Montenegro indicated that there are no national monopolies of a commercial character.

III. ASSESSMENT OF THE DEGREE OF ALIGNMENT AND IMPLEMENTING CAPACITY

Although Montenegro has taken significant steps to align its legislation with the *acquis*, its legislation is not overall in line with it. Montenegro needs to further amend and complement its legislation in all fields covered in this chapter. Montenegro has set up a State aid authority but it now needs to ensure that it is operationally independent, mainly that its members cannot be affected by any conflict of interest and that its decisions cannot be overruled by the Parliament. Montenegro also needs to establish a comprehensive inventory of all State aid measures covered by the Stabilisation and Association Agreement, which shall be the basis for an action plan on alignment of aid measures identified as incompatible. Montenegro also needs to strengthen its administrative capacity and to build up an effective enforcement record. Particular attention needs to be given to State aid to the aluminium plant KAP as well as to fiscal aid schemes.

Given that in the Competition chapter Montenegro's present legal obligations under the Stabilisation and Association Agreement are equivalent to those of the *acquis* in the field of Competition, the Commission notes that its assessment could carry specific legal implications. Therefore, the Commission assessment must be understood as being based on a provisional appraisal of the information provided by the Montenegrin authorities and is without any prejudice to the outcome of any further procedure to be carried out at a later stage.

III.a. Anti-trust and mergers

The Law on Protection of Competition of 2012 is broadly in line with the *acquis* but requires further alignment in certain respects (e.g. on the definition of a dominant market position). Although Montenegro has continued to develop its administrative capacity, there is a need to further increase staff numbers, budget resources and training, and to ensure full independence in the process of decision-making. The enforcement record still needs considerable improvement, particularly as regards the economic and legal assessment of anti-trust and mergers cases.

III.b. State aid

Procedural regulations:

Montenegrin legislation in this area is not in line with the *acquis*. The Law on State Aid Control, as amended in November 2011, together with the different Decrees in this area, in particular the Decree on more detailed criteria, conditions and manner for granting state aid are only partially aligned with the EU State aid rules. Significant further alignment is still needed. Montenegro needs to correct and complement its legislation together with general fine-tuning of the provisions.

The current control system is insufficient, particularly as regards the power of the Parliament to overrule the State Aid Control Agency. Montenegro should enforce proper state aid control.

Rules on Regional aid:

The Commission notes positively that Montenegro has adopted a regional aid map in line with its obligations under the Stabilization and Association Agreement. Conditions for granting regional aid need to be brought in line with the *acquis*. In particular, the provisions for the granting of State aid to large investment projects are incomplete. Moreover, the scope for operating aid must be limited to the mitigation of exceptional and important regional handicaps.

Rules on Research and Development aid:

Conditions for granting R&D aid need to be brought in line with the *acquis in this field*. In particular, the public funding of economic activities carried out by and in co-operation with research organizations needs to be included in the legislation. Moreover, some provisions need to be included, particularly provisions on the incentive effect of Research and Development projects, or completed.

Rules on environmental aid:

Montenegrin legislation in this area is incomplete and not in-line with the *acquis*. In particular, the provisions for the granting of State aid for increasing the level and standards of environmental protection, of State aid for investments into energy savings, of State aid for waste management and of State aid for the rehabilitation of contaminated sites should be further developed in compliance with the *acquis*.

Rules on aid to SMEs:

In line with the *acquis*, the definition of SMEs should establish a distinction between SMEs and companies which are part of a group. The definitions of partner enterprises and linked enterprises are missing.

Rules on reference/discount rates and recovery interest rates and State guarantees

Montenegrin legislation in this area is not in line with the *acquis*. The Montenegrin system needs to be further elaborated and specify the methodologies for the establishment of correct reference rates so that Montenegrin authorities can correctly apply the legislation.

Temporary rules in response to the economic and financial crisis:

Since these rules have already expired, or about to expire, Montenegrin legislation in this area raises no concern at this stage.

Fiscal aid and direct business taxation:

Montenegro's legislation in this area is not in line with the *acquis*. At present, at least four laws provide a legal basis for granting incompatible fiscal aid measures: the Law on Personal Income Tax and the Law on Corporate Profit Tax, the Law on Business Zones (Business Development Incentive Programme) and the Law on Free Zones.

The Law on Personal Income Tax and the Law on Corporate Profit Tax provide the legal basis for a total exemption of profit tax for 8 years for newly established legal entities in underdeveloped municipalities. This exemption, insofar as it constitutes operating aid, is not clearly linked to a policy objective and is not proportionate, does not comply with the *acquis*.

The Law on Business Zones (Business Development Incentive Programme) provides the legal basis for granting operating aid, without a clear link with any regional development or employment objective. The Law does not seem to respect the principle of proportionality.

The Law on Free Zones does not seem to have a policy objective and its tax exemptions must be brought in line with the *acquis*.

Taking into account the acquired rights of beneficiaries, the longer the aid schemes are in place, the more difficult it will be to address the situation. Consequently, Montenegro needs to urgently align its existing fiscal aid schemes with the *acquis*. Any fiscal aid scheme subsequently adopted by Montenegro needs also to comply with the *acquis*.

Rescue and restructuring aid:

Montenegro's legislation in this area is very incomplete and not in line with the *acquis*. In particular, the provisions must be complemented with a method for the calculation of permissible rescue aid amount, specific eligibility criteria for rescue aid, a clear distinction between restructuring measures and compensatory measures, the possibility to adopt rescue and restructuring schemes for SMEs, and a stricter definition of exceptional circumstances for the non-application of the "one time, last time" principle.

Other State aid rules:

Montenegro's legislation is incomplete and not in line with the *acquis*.

Specific case:

- Aluminium plant KAP.

The Aluminium Plant Podgorica (KAP) is Montenegro's largest industrial company, generating 51% of the country's exports. KAP produces 120,000 tons of aluminium each year. The company is a major player in the national economy and a key business partner of other

major companies, such as Bauxite Mines, Electricity Company (EPCG), Jugopetrol, Port of Bar and Railways of Montenegro.

Montenegro partly privatised the company in 2005 when it divested 65.5% of the company's shares to the Central European Aluminium Company "CEAC", part of Russia's En+ Group. KAP was seriously affected by the global economic crisis and the unfavourable developments in the global metal markets; it reduced its output substantially in 2008 and 2009 and was obliged to produce at a loss.

In 2009, Montenegro and KAP's new owners agreed that the State would buy back a 29.4% stake in the company and a 31.5 % stake in the bauxite Mines in exchange for State guarantees. In addition, the government reaffirmed its commitment to continue subsidising electricity supply until the end of 2012. This new agreement of 2009 annulled the privatization agreement of 2005.

In April 2012 the Parliament requested the government to renationalise the ailing aluminium company and to execute the collateral of a state guaranteed loan after the majority owner of the company failed to honour it. The State currently owns 30% of the company and seeks to get an additional 30% from the current owner after it failed to service its debt to the banks.

On 30 April 2013 the Parliament adopted a resolution on KAP according to which, its work and manufacturing process should continue. The resolution on KAP also sets a date (20 October 2013) for presenting a feasibility study on the aluminium plant.

Finding a definite solution to the complicated economic situation of the aluminium factory remains a critical issue. The company is highly indebted (EUR 350 million), recording losses (EUR 44 million in the first 9 months of 2012), and represents a risk for the public finances.

The Commission's assessment is that KAP is a company in difficulties benefiting from State aid in a form and quantity still to be clearly defined. Both EU rules and the Stabilization and Association Agreement requirements as regards restructuring aid should be respected. In particular, a restructuring plan should be designed to restore the long-term viability of the plant, compensatory measures should be taken to minimize the impact of aid on competition and the contribution of any new investor from their own resources should be real and significant.

In light of this assessment and given the impact of the company on Montenegro's economy, urgent action is required from the Montenegrin authorities, who should also keep the Commission informed on developments regarding KAP.

The administrative capacity in the area of State aid is insufficient. The State Aid Control Agency urgently needs further qualified staff, in order to deal with the upcoming increased workload to establish a good enforcement record. The knowledge of civil servants and

administrative staff employed in other ministries and aid granting bodies dealing with State aid issues is not sufficient.

III.c. Liberalisation

Public undertakings and undertakings with special or exclusive rights:

The Montenegrin system currently in place does not fully reflect EU rules. Montenegro should better define the scope of Services of General Economic Interest (SGEI) in its legislation.

State monopolies of a commercial character:

The Commission takes note that there are no monopolies of a commercial character in Montenegro. Montenegro should keep the Commission informed of any new developments in this area.