

CEE: EU & Competition Monthly Bulletin - September

Stay informed about the latest developments in competition law in Central and Eastern Europe with Schoenherr's multi-jurisdictional newsletter. Each issue offers insight into developments in merger control, anti-trust, as well as public and private enforcement in the region.



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Merger Control

Belgium/EU: European Commission (EC) clears Shazam/Apple merger unconditionally

- ▶ On 6 September the EC [announced](#) that the proposed acquisition of the music recognition software provider Shazam by Apple was cleared unconditionally after a Phase II review.
- ▶ In March this year the EC initiated proceedings after receiving referrals from seven national competition authorities, including Austria's competition authority (BWB).
- ▶ The EC assessed whether the acquisition would allow Apple to obtain sensitive data of competing music streaming platforms' customers, which could enable Apple to persuade them to switch to its own Apple Music streaming platform. Another part of the investigation was the potential harm to Apple's competitors in music streaming services if Apple were to discontinue referrals from Shazam to streaming services other than Apple Music.
- ▶ The EC ultimately found that obtaining Shazam's data would not enable Apple to foreclose on its competitors' music streaming services from the market and thus the merger raises no competition concerns.

Bulgaria: First sanction for incomplete information in merger notification

- ▶ Through Decision No 1046 / 20.09.18, the Commission for Protection of the Competition (the "**CPC**") authorised the acquisition of sole control by Speedy AD of Rapid Express and Logistics OOD and ordered immediate enforcement of its decision (Bulgarian press release can be found on www.cpc.bg).
- ▶ At the same time, the CPC imposed a sanction on Speedy AD for not providing full and accurate information at the date of submission of the merger notification, which was essential for the overall assessment of the concerned relevant markets. The relevant information had been obtained from a competitor.
- ▶ The sanction imposed is approx. EUR 102,000, which represents 0.2 % of the total turnover of the sanctioned undertaking.
- ▶ This is the first ever such sanction imposed in Bulgaria. The decision of the CPC can be appealed before the Supreme Administrative Court.

Cartel Prohibition

Austria: Semperit fined EUR 1.6 million for market sharing within a JV

- ▶ Semperit, a company active in the rubber and plastics industry, was fined EUR 1.6m for violating the cartel prohibition (German press release of the BWB can be found [here](#)).
- ▶ As part of its production joint venture with Sri Trang Agro-Industry, it was agreed that the European market would be reserved exclusively to Semperit. the unlawful agreement lasted from the establishment of the JV in 2002 to 2017.
- ▶ Sri Trang Agro-Industry was granted immunity from fines following its leniency application in 2015.

Czech Republic: Rail freight transporters fined for bid-rigging

- ▶ In a first-instance decision the Czech Competition Authority (“CCA”) found that Rail Cargo Austria AG, České dráhy, a.s. (Czech Railways) and AWT Čechofracht a.s. acted in breach of EU and Czech competition rules by illegally cooperating in the rail freight transport project Italia (Czech press release of the CCA can be found [here](#)).
- ▶ Rail Cargo Austria AG was granted immunity from fines following its leniency application. The fines of the remaining cartelists were significantly reduced following a settlement procedure (CZK 3.7m (approx. EUR 145k) for AWT Čechofracht and CZK 48m (approx. EUR 1.9m) for Czech Railways).
- ▶ The decision is not yet final; further details of the case will be communicated by the CCA once the decision has become binding.

Hungary: Substantial reduction of medical equipment bid rigging fine

- ▶ The Hungarian competition authority (*Gazdasági Versenyhivatal*; “GVH”) found that GE Hungary Kft and Silver Wood – IT Kft had entered into an agreement to determine the winner of a tender in May 2015.
- ▶ Because of the cooperation of both undertakings with the GVH during the process the total fine was reduced by more than HUF 10m. According to an

GVH [press release](#), the reduction is a result of GE Hungary Kft. submitting a leniency application and Silver Wood – IT Kft. acknowledging the statement of facts established by the GVH. In Addition, Silver Wood – IT Kft introduced a compliance programme.

- ▶ Due to the leniency application GE Hungary Kft received immunity from fines and Silver Wood – IT Kft was fined a total of HUF 2.6m (approx. EUR 8 k) including a reduction of 35 %.

Moldova: Three construction companies fined for bid rigging

- ▶ According to its Romanian language [press release](#), the Moldovan Competition Council (CC) fined Ozun-Cons SRL, Oztor SRL and Eurodeviz SRL a total of MDL 0.78m (EUR 0.04m) for bid rigging in several construction tenders in 2012.

Romania: Market for non-prescription medicine and dietary supplements under scrutiny

- ▶ Romania's Competition Council (CC) has commenced a sector inquiry into non-prescription medicines and food supplements and therefore has opened an investigation.
- ▶ The agency put forward a [press release](#) in which it made clear that in case the suspicion will turn out to be true, the CC may ask existing regulations to be amended, issue clarifications, or even send warnings to companies.
- ▶ Investigations of the CC will be focusing on screening the market's structural conditions. Therefore, it needs information of both the producers and suppliers the agency said.

Serbia: Four new cartel probes against baby care companies have been opened

- ▶ Serbia's antitrust agency suspects illegal price-fixing in the market for baby care products and therefore opened four additional investigations into ten companies (see [here](#) for the agency's press release).
- ▶ The latest preoccupation comes from two other probes in the same market started in April earlier this year. Premises of importers and distributors of baby and infant products were raided because of the suspicion of illegally maintaining prices.

- ▶ To the agency this is a major concern because this market has "special significance" for consumers and society. Hence, the agency plans to conduct a sector inquiry as well.

Slovakia: Slovakia's Antimonopoly Office (SAO) has opened an e-commerce sector inquiry

- ▶ In a recent [press release](#), the agency stresses the importance to ensure that competition law is correctly applied in this important sector.
- ▶ Between 2015 and 2016, the European Commission conducted a similar sector inquiry into the e-commerce sector and identified various antitrust concerns.
- ▶ The goal is to identify possible issues regarding competition law. Questionnaires will serve as a medium to obtain information on the given subject. These will be sent to a wide range of recipients, including mainly e-commerce retailers.

Abuse of Dominance

Austria: Data firm abused dominant position according to court

- ▶ The Cartel Court has ruled (see [here](#) for the German version of the ruling) that a so-called multi-supplier clause (MSC) is seen to be anticompetitive if it is used by a dominant company and no appropriate compensation is contractually agreed.
- ▶ IQVIA, a data analysis firm, used an MSC in its contracts with wholesalers. The clause implied a 40 % discount on the fee for aggregated sales data if wholesalers sell their data to third parties.
- ▶ IQVIA was a monopolist until 2013. In 2013 INSIGHT Health entered the market. As both companies operate in the data analysis business, they must rely on data obtained from wholesalers. The court held that the relevant market is considered to be the national market for the supply of sales tracking analysis for pharmaceutical products and that IQVIA has a dominant position in this Market.
- ▶ According to the court, MSC pushed INSIGHT to increase its purchase price in order to make up for IQVIAs discount. Because there is no reasonable justification for the MSC, the usage of this clause restricts competition as it foreclosed on the data input market.

Moldova: Moldova's Supreme Court upholds abuse fine against electricity firm

- ▶ In October 2012, the Competition Council (CC) learned that Naturgy's Moldovan subsidiary abused its position of dominance in the electricity market.
- ▶ According to the agency's Romanian language [press release](#), Naturgy's Moldovan subsidiary infringed competition rules by transferring power equipment owned by a construction company to its annual balance sheet in return for connecting the construction company to the power grid.
- ▶ Naturgy contested the decision of the CC but the Supreme Court confirmed the breach of competition rules.

Agricultural service company fined for abusing its dominance

- ▶ According to a [press release](#) of Moldova's Competition Council (CC) Cereale Cupcini SA was fined MDL 51.693 (approx. EUR 2.600) for abusing its domi-

nant position by applying disproportionate tariffs to Wetrade Argo LLC for the loading and unloading services of wheat.

- ▶ In November 2017 a probe was opened against Cereale Cupcini SA regarding unfair conditions for loading and unloading wheat from the state material reserves. The market analysis showed that Cereale Cupcini SA holds a dominant position on this market.

Poland: Polish window maker Fakro challenges a decision of the European Commission (EC) before the General Court

- ▶ Window maker Fakro complained to the European Commission about market foreclosing practices of its main rival, market leader Velux.
- ▶ The EC concluded in its decision that Velux, the Danish rival of Fakro, did not abuse its dominant position by using predatory pricing. The agency also argued that further investigations presumably won't reveal any findings that would suggest an infringement of competition law took place.
- ▶ Fakro, on the other hand, will challenge the decision before the General Court arguing that it is not "legally valid". Fakro believes it is also treated unfairly by the European Commission.

Romani: Romania's Competition Council (CC) commenced proceedings against a hydropower firm

- ▶ Hidroelectrica, a hydropower producer, is suspected of increasing the price of electricity by limiting supply.
- ▶ According to its [press release](#), it appeared to the agency that Hidroelectrica manipulated the day ahead market (DAM) to influence the price on the balancing market (BAM). While the DAM serves as the "main forum" for trading electricity the following day, the BM is responsible for regulating supply and demand.
- ▶ Dawn raids were carried out at the premises of Hidroelectrica and its electricity transporter Transelectrica. The latter, though, is not under investigation; rather the agency's sole attempt is to find other documents concerning the functioning of the BM.
- ▶ It is also not the first time that Hidroelectrica is subject of an investigation carried out by the local agency. In November 2016, the company and ten of its contractors were fined a total of EUR 37m for vertical restraints within long-term contracts. Hidroelectrica was fined EUR 4.6m.

Serbia: MasterCard may have restricted competition by imposing excessive fallback interchange feeds

- ▶ Serbia's Commission for Protection of Competition (CPC) [has opened](#) investigations against MasterCard arguing that the company restricts competition by illegally abusing its dominant position in the payment card market.
- ▶ Fallback fees apply when no other interchange fee has been agreed between the issuing and the acquiring bank and therefore determine the floor price for accepting payment cards. The agency concluded that these feeds have been set several times higher than those applied in other EU member states.
- ▶ The market restriction hereafter is that MasterCard's practice may have prevented acquiring banks from negotiating a service charge below the interchange fee.
- ▶ This could lead to unwelcomed pass on of the fee to consumers which then leads to higher prices. Furthermore, banks have an incentive to offer only cards that yield the highest interchange fee revenue which also leads to distortion of competition.

Turkey: Google fined for abuse of dominance

- ▶ Google has been fined approx. EUR 12.7m in Turkey for abuse of dominance in relation to its mobile operating system Android as well as mobile application and services provision (see here for a link to the [announcement](#) in Turkish).
- ▶ The Turkish competition authority (TCA) found that agreements with mobile phone producers pursuant to which Google is the default search engine and Google Webview the default single app of its kind, breached competition law.
- ▶ To remedy the situation the TCA imposed a series of obligations on Google, all aimed at allowing rivals of Google to compete effectively even if Android is used as the operating system.

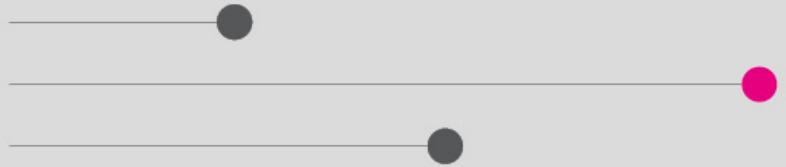
Public Enforcement

Czech Republic: Czech Competition Authority (CCA) and Czech Energy Regulatory Office (CERO) cooperate in monitoring the wholesale electricity and gas markets

- ▶ Following a cooperation memorandum signed between the CCA and CERO last year, representatives of both institutions met at a joint workshop to discuss the functioning of the REMIT Regulation and the possibilities of its use to detect anti-competitive behavior in the wholesale electricity and gas markets (Czech press release to be found [here](#)).
- ▶ The REMIT Regulation (Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency) requires wholesale energy market participants to report information on transactions, capacity and utilisation of facilities for the production, storage, consumption and transmission of electricity, gas and LNG. Suspicious transactions are then reported to the national regulatory authorities.
- ▶ The joint negotiations between the CCA and CERO were mainly about how the institutions will share input - from initial information to sharing of evidence concerning specific cases.
- ▶ The CCA stated further in its press release that this workshop kicked off the cooperation between the CCA and CERO to the benefit of both small and large energy consumers. Restricting competition and price increases resulting therefrom would damage consumers first and foremost.

Slovakia: Slovakia's Antimonopoly Office (SAO) has published updated guidelines on its method of setting fines

- ▶ Following a consultation on proposed changes to the fining guidelines that started in December 2017, the SAO has published an updated version of these guidelines (Slovak version to be found [here](#)).
- ▶ The new guidelines introduce changes especially in relation to mitigating circumstances. An implicated undertaking can expect a reduction of fine if:
 - its role in the infringement was limited;
 - it ceased the behavior before it received the statement of objections (previously, prohibited behavior had to cease after the competition au-



thority intervened). This fine reduction is possible only for restrictions "by effect" not for restrictions "by object"; or

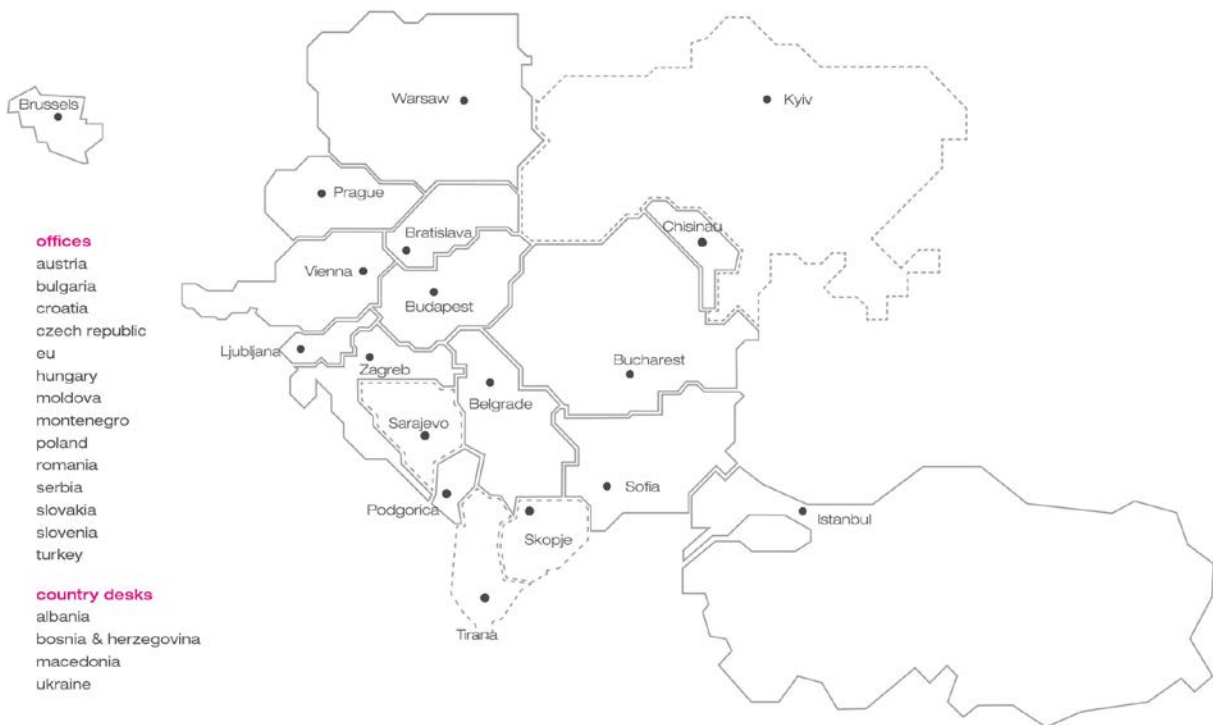
- it has reasonably assumed that its conduct was in accordance with the law because it was authorised by a public authority.

Private Enforcement

Hungary: Hungarian court has asked the ECJ to give guidance on jurisdiction regarding truck cartel damages claims

- ▶ Following the EC Decision fining truck companies for illegal conduct (see [here](#)), damage claims have been raised in Hungary.
- ▶ A Hungarian court is asking the ECJ whether it has jurisdiction in case the illegal behavior took place outside Hungary. The case bears the reference [C-451/18](#).
- ▶ Furthermore, it is questionable whether indirect purchasers of trucks have a claim for damages against the manufacturers (in this case DAF).
- ▶ The claimant, Tibor-Trans Fuvarozó és Kereskedelmi Kft., argued that although trucks were purchased indirectly via leasing contracts from a distributor, the company suffered a loss through the higher prices charged by the distributors (meaning that they were passed on to the claimant).
- ▶ DAF denied these allegations arguing that the Hungarian court had no jurisdiction because the prohibited meetings took place in Germany meaning that a German court has jurisdiction. Moreover, DAF noted that the claimant is an indirect seller and therefore financial loss is only a consequence of an infringement in another country.

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