

CEE: Competition Monthly Bulletin – August 2020

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.



Christoph Haid

Partner

+43 1 534 37 50119

c.haid@schoenherr.eu

Main takeaways

▶ **Antitrust:**

RPM infringement decisions in several countries, but notably, immunity from fine in one Austrian case.

Uptick in abuse of dominance cases in CEE.

Partial suspension of antitrust rules in Romania.

▶ **Merger Control:**

Several in-depth reviews of transactions in CEE, including prohibitions and repeals of prohibitions.

Hungary continues to impose fines for incomplete information.

Austrian authority publishes paper on "shutdown mergers".

▶ **Foreign Direct Investment Regulations:**

New laws enter into force in Austria and Poland.

- ▶ Austria
- ▶ Bulgaria
- ▶ Croatia
- ▶ Czech Republic
- ▶ Hungary
- ▶ Poland
- ▶ Romania
- ▶ Slovakia
- ▶ Slovenia
- ▶ Turkey

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Austria

Court finds Yamaha Music to have engaged in resale price maintenance, but no fine imposed

- ▶ The Federal Competition Authority found that Yamaha Music set prices or agreed on minimum prices with retailers across Austria between 2004 and April 2017 for musical instruments and audio and video products. Yamaha applied for leniency to avoid a penalty.
- ▶ The Cartel Court confirmed the authority's findings and established the infringement by **Yamaha Music Europe**.
- ▶ Notably, the authority also applied to the court to hold another manufacturer accountable for RPM as well. This manufacturer applied for leniency, but proceedings are still pending.

Austrian court fines pool cleaning equipment firm for RPM

- ▶ Zodiac Pool Care Europe was fined EUR 294,000 for engaging in RPM with retailers and wholesalers.
- ▶ In its 26 June decision, the court backed findings by the Federal Competition Authority that the firm, which supplies automatic pool cleaning equipment, engaged in RPM between March 2016 and September 2019, according to the German-language release.

Abuse of dominance claim against TenneT rejected

- ▶ The Austrian cartel court has rejected an abuse of dominance claim by Austropapier, voestalpine, energy firm Verbund and power exchange EXAA against German network operator TenneT over its cross-border power congestion management.
- ▶ TenneT introduced a congestion management system for the German-Austrian border in October 2018, resulting in Austria being removed from the price zone that until then comprised Germany, Austria and Luxembourg.
- ▶ The companies claimed that TenneT is abusing its dominant position and is distorting competition as the congestion points are located in Germany and not at the border.
- ▶ In February the cartel court dismissed the claim as:

- i) there are multiple operators involved and TenneT cannot be ordered to make changes singlehandedly.
- ii) it doubts that a one-sided implementation would be technically possible; and
- iii) the behaviour in question is also exempted from antitrust scrutiny, as it is required by state regulation.

New FDI Screening Act

- ▶ Austria adopted a new FDI Screening Act (*Investitionskontrollgesetz*, "**ICA**"), following the trend to tighten the regulatory framework for foreign investment screening (read more here: [Austrian government proposes new FDI screening act](#)). It largely transposes the requirements under the EU FDI Screening Regulation (read more here: [A new regulation on FDI screening in Europe](#))
- ▶ Under the ICA, a (mandatory) filing requirement is triggered if:
 - a foreign investor, i.e. non-EU, non-EEA, non-Swiss individual/entity, intends to carry out an investment (directly/indirectly) in an Austrian undertaking. This includes
 - (i) the acquisition of shares reaching/exceeding 10 %, 25 % and 50 % (voting rights);
 - (ii) the acquisition of control; and
 - (iii) the acquisition of essential/all assets of an undertaking (asset deals);
 - the undertaking is active in a sector listed in an **Annex** to the ICA; and
 - the undertaking is Austrian, i.e. has its seat or its central administration in Austria (local nexus).
- ▶ No approval is required for an investment in an undertaking with i) fewer than 10 employees and ii) an annual turnover or balance sheet total of less than EUR 2m (start-up exception).
- ▶ The 10 % share threshold (voting rights) applies for investments in certain highly sensitive sectors.
- ▶ For further information on the FDI Screening Act, please see our detailed newsletter available [here](#).

Authority publishes position paper on "Shutdown Mergers"

- ▶ The authority fears that the economic downturn means that several companies will enter financial difficulties, which opens the door to shutdown acquisitions with negative effects on economic development and competition.
- ▶ The authority has analysed the impact of the COVID-19 crisis on competition in-depth and published a position paper, which can be found [here](#). Among other things, the paper (i) offers companies a checklist for the assessment of shutdown mergers, (ii) explains the criteria applied to assess financially distressed companies, and (iii) lists possible alternatives to shutdown mergers.

Bulgaria

Eurohold/CEZ merger prohibition repealed by first instance court

- ▶ Back in October 2019 the Commission for Protection of Competition (CPC) prohibited the acquisition of CEZ by Eurohold Bulgaria AD.
- ▶ On appeal the Supreme Court quashed the prohibition decision for significant procedural flaws:
 - Any interested party was deprived of the right to submit its opinion regarding the concentration, within 30 days after information about the in-depth review appears on the website of the CPC, as the commission issued the decision 14 days after phase II was initiated.
 - The CPC failed to send a Statement of Objections (SO) to the notifying party despite being obliged to do so.
 - After the CPC concluded that the planned merger will likely impede competition, it also failed to invite the parties to offer remedies and actively communicate with them.
- ▶ The case is now back with the CPC with mandatory instructions to conduct in-depth investigations according to the procedure envisaged under the law.

Supreme Court repeals merger clearance for Sopharma Trading/Pharmastore

- ▶ The Supreme Administrative Court, acting as the second and final instance, repealed the CPC's clearance for the acquisition of Pharmastore OOD by Sopharma Trading AD.
- ▶ When the CPC investigated the merger, it concluded that Sopharma group vertically integrates Sopharma AD (producer), Sopharma trading (wholesaler) and Sopharmacy (retailer), therefore operating on three vertically integrated levels.
- ▶ The CPC concluded that there was no vertical integration between Sopharma and CHS and the total market share of Sopharma and Pharmastore on the retail level lies between 0-5 %. Therefore, Sopharma has no substantial market power on any of the three markets it operates in.
- ▶ In its decision, the Supreme Administrative Court ruled that the CPC failed to analyse the de facto vertical links between Sopharma and CHS. It therefore repealed the clearance and sent it back to the CPC with mandatory instructions to investigate the potential vertical links.
- ▶ Meanwhile, however, the CPC cleared the acquisition of CHS by Sopharma in phase I. In view of the decision of the Supreme Administrative Court, it seems unlikely that this clearance will withstand the test of appeal.

Czech Republic

City of Prague fined for unfair parking rules

- ▶ The Office for the Protection of Competition (Office) fined the City of Prague CZK 0.98m (EUR 36,981) in its first-instance decision for anticompetitive setting of

parking conditions for hybrid vehicles. The decision is not yet final and may be appealed.

- ▶ In its decision, the Office allegedly acknowledged that favouring hybrid vehicles was motivated by the legitimate effort of the City of Prague to reduce the negative impact of transport emissions on air quality.
- ▶ However, City of Prague did not choose the condition limiting the power of the installed internal combustion engine by a limit value based on objective and non-discriminatory criteria and it was not proportionate to the stated regulatory objective. The performance of an installed internal combustion engine is not a reliable indicator of the emission value of a hybrid vehicle. In the end, the City of Prague also came to this conclusion when it changed the above criterion in the course of 2019 to a limit value of CO₂ emissions of 50 g / km, which is based on the Act on Technical Conditions for the Operation of Vehicles on Roads.

E-cigarettes distributor fined for resale price maintenance

- ▶ The Office for the Protection of Competition fined RITCHY EU s.r.o. CZK 6.7m (EUR 270,000) in its first instance decision for resale price maintenance (RPM) practices. The decision is not yet final and may be appealed.
- ▶ According to the decision of the Office, RITCHY EU s.r.o., which is a distributor of electronic cigarettes and their refills, violated the Czech Act on the Protection of Competition from 6 September 2017 to 31 March 2019 by imposing on its customers minimum resale prices of the goods concerned. Thus, these resellers could not offer their customers the products at lower prices than those set by RITCHY EU s.r.o. The company monitored the resellers' compliance with the minimum prices that it set and, in the event of non-compliance, threatened to terminate the cooperation.

Hungary

Hungarian Competition Authority closes merger collusion probe with remedies

- ▶ The Hungarian Competition Authority (GVH) closed its investigation over possible collusion between CodeCool and Enter Tomorrow Kockázati Tőkealap, PortfoLion Regionális Magántőke Alap, HAMV Foundation and six private investors, with remedies after the parties changed a 2018 investment agreement.
- ▶ CodeCool's takeover by these companies was originally cleared by the GVH in January 2019, but on 19 June officials noticed that the investment agreement contained a non-compete clause that foresaw significant penalties for those who did not comply with it.
- ▶ The agreement in question covered IT training, recruitment and hiring, and the GVH's preliminary findings showed that the scope was too wide in relation to what was necessary for the merger.
- ▶ An investigation was opened by the GVH in May 2019, as CodeCool is already active in several countries and is also planning to expand, meaning the agreement could potentially affect trade between EU Member States.
- ▶ The parties then announced that to alleviate any competition concerns they were willing to change the geographical scope and application of the agreement should the GVH find any breaches in competition rules.

- ▶ The GVH found that those amendments were sufficient to remove any competition concerns and therefore accepted the commitments.
- ▶ Due to the changes, any investor that holds a stake in CodeCool must refrain from working for, acquiring a stake in or offering advice to entities that compete with CodeCool for two years after the sale of their stake.
- ▶ The agreement will only cover Austria, Bulgaria, the Czech Republic, Croatia, Hungary, Poland, Romania, Serbia, Slovakia and Slovenia.

Comments: *The GVH views the decision as "guidance", which clarifies that following the acquisition of a start-up enterprise, the founders of the start-up who remain as minority shareholders may undertake non-compete obligations for the existence of their minority shareholding and for two years after they have sold their entire share.*

Annulment of Mastercard's abuse of dominance decision confirmed by top court

- ▶ The Kúria, Hungary's top court, upheld the decision that annulled the fine imposed on MasterCard for abuse of dominance concerning its interchange fees.
- ▶ According to the Kúria, the evidence found by the GVH was insufficient to demonstrate anticompetitive conduct.
- ▶ The GVH found in February 2016, that between February 2011 and December 2013 MasterCard's debit card charges were capable of squeezing competitors out of the Hungarian market.
- ▶ Interchange fees are paid to the bank issuing the MasterCard branded card by the acquiring bank of the retailer.
- ▶ An investigation conducted by the EC in 2010 showed that Visa committed to cap its fees for cross-border and domestic transactions at 0.2 %. MasterCard maintained its fees for Hungary at 0.91 % and from January 2012 onwards at 0.68 %.
- ▶ Since card issuers, such as banks, benefit from the fees, they were incentivised to issue MasterCards instead of rival cards.
- ▶ As a result, MasterCard's market share increased by 15 % and climbed to 85 % between 2010 and 2013, while Visa's share gradually decreased during this period.
- ▶ MasterCard argued in its appeal before the Metropolitan Court of Budapest that the GVH relied on generalised statements instead of concrete facts.
- ▶ The GVH then appealed the decision before the Kúria. The Officials argued that a January 2014 law change, which set the legal maximum for interchange fees, is irrelevant, as it does not apply to the period when the conduct took place.
- ▶ The Kúria agreed with MasterCard's argument that despite the law change its market share increased, which showed that the interchange fees were not the only factor relevant for MasterCard's increase in popularity.
- ▶ The Court upheld the company's argument that the GVH failed to account for the introduction of contactless payment and that banks preferred MasterCard because of its technological developments.
- ▶ The Kúria also did not follow the arguments made by the GVH, as it failed to put forward proper examinations as well as evidence to back their claims.

Second fine imposed by the GVH in telco merger case for false information

- ▶ The GVH imposed its second fine on DIGI for submitting false information during the review of its takeover of Invitel. The fine amounts to HUF 20m (EUR 56,678).
- ▶ Back in May 2018 the GVH cleared the merger between Invitel and DIGI with remedies. The tie-up was subject to the divestment of Invitel's network in 16 towns and DIGI's commitment not to renew network contracts for its i-TV subsidiary in 23 problematic areas.
- ▶ The GVH revoked the clearance and imposed a HUF 90m (EUR 270,000) fine a few months later, as it found there were 89 problematic areas instead of 23.
- ▶ The fine was later cut by 50 % following an appeal by DIGI.
- ▶ Following a repeated review in March 2020 the GVH cleared the merger again, but with more extensive remedies than in the original case.
- ▶ As false information had been submitted again, the GVH had to adjust its decision from March. Therefore, one town which was targeted by the earlier remedies had to be removed.

Comments: *The GVH emphasised that within the framework of a merger control proceeding, the notifying party has a higher degree of cooperation obligation. During these proceedings the GVH works primarily from the data provided by the parties, therefore data accuracy is fundamental.*

Poland

Competition authority will investigate fruit market over potential price fixing

- ▶ The Polish Office of Competition and Consumer Protection (UOKiK) will inspect the country's soft fruit market over suspected price fixing.
- ▶ On 26 June, the National Council of Agricultural Chambers (KRiR) asked the UOKiK to look into potential competition rule breaches in the soft fruit market, especially regarding gooseberries.
- ▶ According to gooseberry growers, the buying price of gooseberries is inadequate to the potential price of further sale, as it can reach PLN 3 per kilo in comparison to the buying price of PLN 0.50.

New foreign investment rules entered into force

- ▶ The UOKiK [announced](#) that the new rules on the control of investment in Poland entered into force on 24 July.
- ▶ The new rules are part of the Anti-Crisis Shield 4.0, which the Polish government introduced as a response to the coronavirus pandemic. It intends to tackle the risk of takeovers of Polish companies that are important for public order, security or health.
- ▶ According to the president of the UOKiK the rules are not intended to block foreign investments that are important to the country's economic development.

- ▶ Most decisions will be issued within less than 30 days and the UOKiK released a document explaining how takeovers should be notified by potential investors.
- ▶ The rules will affect companies that are active in the areas of electricity, gas, fuels, telecommunications, food processing, pharmaceuticals production, manufacturing of chemicals and fertilisers, as well as explosives, weapons and ammunition, and other technology for military or police purposes.
- ▶ Furthermore, the rules will apply to companies that develop software for basic public services, e.g. energy, fuel, water supply, cash supply, card payments, hospitals, prescription drug sales, transport and food supply and public companies, regardless of type and sector.
- ▶ Companies that achieve revenues from sales exceeding EUR 10m in Poland, in any of two financial years preceding the intention to acquire, will be affected by the new rules.
- ▶ The obligation to notify will apply to transactions resulting in an acquisition achieving significant participation or the acquisition of dominance by companies or natural persons that have their registered offices / citizenship outside of the EU, the European Economic Area (EEA) and the Organisation for Economic Cooperation and Development (OECD).
- ▶ Like merger reviews, the reviews will be divided into two phases.
- ▶ During the first phase, a preliminary verification procedure will take place that will split the cases into simple and more complex cases. This phase will last up to 30 days.
- ▶ It is expected that most cases will end during this phase and the president of the UOKiK will issue a decision on the lack of objections.
- ▶ Those few cases that pose a serious threat to public order, public security or public health will be referred to the Phase II procedure. This phase will last a maximum of 120 days.
- ▶ Any acquisition or obtaining significant participation or dominance in a protected enterprise without prior notification, or despite the objection of the UOKiK, will be invalid under law.
- ▶ Furthermore, a fine of up to PLN 50m (EUR 11.2m) and imprisonment of six months to five years can also be imposed. The sanctions may be imposed jointly.

PKP Cargo appeal against abuse decision rejected by second instance court

- ▶ A Polish second instance court has rejected PKP Cargo's appeal against a PLN 14.22m (EUR 3.2m) abuse of dominance fine.
- ▶ The fine was originally imposed by the UOKiK in December 2015, as it found that the company abused its dominant position in the domestic rail freight market by unlawfully changing the rules for the sale of freight services, allowing PKP Cargo to refuse to sign special contracts with competitors.
- ▶ In October 2018 the Court of Competition and Consumer Protection (SOKiK) backed the UOKiK's decision after PKP Cargo filed an appeal. The company then filed another appeal before the second instance Court of Appeal in Warsaw, which was also dismissed.

- ▶ Despite the second instance court's decision being final, PKP Cargo is examining the possibility of lodging a cassation appeal against the second instance judgment together with a request to suspend the payment of the fine.
- ▶ According to PKP Cargo, the Court of Appeal ruling raises doubts that the court did not consider the company's argument that the UOKiK could not issue a new decision imposing a fine without relaunching the proceedings.
- ▶ Furthermore, the UOKiK kept almost the same amount of the fine, despite a court order to re-examine all circumstances affecting its calculation.

Romania

Romanian Competition Council issues recommendations regarding access to movable mortgage registration services

- ▶ After conducting a sector inquiry, the Romanian Competition Council (RCC) concluded that several conditions for accessing the market for movable mortgage registration services in the National Register for Movable Property Publicity (the "Register") are excessive.
- ▶ The registration in the Register can be made by economic operators registered with the Ministry of Justice, based on several access criteria (i.e. territorial coverage of at least 15 administrative units/counties and Bucharest; professional liability insurance of at least EUR 1m).
- ▶ Starting in 2018, credit institutions, insurance companies and bailiffs no longer qualify to act as such economic operators (based on an amendment of the applicable law).
- ▶ The RCC recommends the amendment of the criteria for market access, especially (i) removing the territorial coverage condition, (ii) eliminating any form of intervention on commercial tariffs (such as minimum tariffs), and (iii) setting professional liability insurance proportional with the actual risk undertaken.

Several competition law provisions currently suspended by the Constitutional Court

- ▶ The Constitutional Court of Romania (the "Court") found several provisions of the Competition Law (basically reflecting the transposition of the EU Damages Directive into local legislation) to be unconstitutional due to a procedural breach. As a result, these provisions are suspended and may lose their legal effect starting in September 2020, unless the legislator adopts a restated law to the same effect.
- ▶ The main competition provisions affected by this Court decision refer to: (i) retailers' obligation to report, at the RCC's request, information regarding sale prices; (ii) forensic inspections; (iii) calculation of the fines in the case of economic concentrations; and (iv) RCC attribution to recommend amendments to existing legislation.

These provisions have been suspended, by effect of the Court decision, as of 23 July 2020. The affected provisions may cease their legal effect if the Parliament or the Government do not remedy the constitutional infringements within 45 days of the publication of the decision.



Slovakia

Antimonopoly Office investigating potential abuse of dominant position in carrying out collective management of rights

- ▶ An investigation carried out by the Slovak Antimonopoly Office found information and documentation raising a reasonable suspicion that the conduct of an undertaking engaged in the collective management of rights in public transmission and technical presentation through equipment in hotel rooms in Slovakia may constitute the application of disproportionate prices.
- ▶ The initiation of the administrative proceedings does not mean that the party to the proceedings has violated competition rules, nor does it prejudge the conclusions that the Office may come to in its decision.

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Feel free to contact our legal experts across CEE:

Austria



Christoph Haid
Partner
T: +43 1 534 37 50 119
c.haid@schoenherr.eu



Franz Urlesberger
Partner
T: +43 1 534 37 50196
f.urlesberger@schoenherr.eu



Volker Weiss
Partner
T: +32 2 743 40 44
v.weiss@schoenherr.eu



Hanno Wollmann
Partner
T: +43 1 534 37 50152
h.wollmann@schoenherr.eu

Bulgaria



Galina Petkova
Attorney at Law
T: +359 2 93310 83
g.petkova@schoenherr.eu

Croatia, Serbia



Srđana Petronijević
Partner
T: +381 11 3202 600
s.petronijevic@schoenherr.rs

Czech Republic, Slovakia



Claudia Bock
Attorney at Law
T: +420 225 996 500
c.bock@schoenherr.eu

Hungary



Anna Turi
Counsel
T: +36 1 8700 707
a.turi@schoenherr.eu



András Nagy
Attorney at Law
T: +36 1 8700 684
a.nagy@schoenherr.eu

Poland



Paweł Halwa
Partner
T: +48 22 223 09 11
p.halwa@schoenherr.eu

Romania



Georgiana Bădescu
Partner
T: +40 21 319 67 90
g.badescu@schoenherr.eu

Slovenia



Eva Škufca
Partner
T: +386 1 200 09 82
e.skufca@schoenherr.eu

Turkey



Levent Çelepci
Partner
T: +90 212 230 17 00
l.celepci@schoenherr.eu