

CEE: Competition Monthly Bulletin – May 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.



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Main takeaways

▶ **Antitrust:**

Several investigations in CEE pertaining to collusion in response to the current emergency.

▶ **Unfair competition:**

The Czech Supreme Court has ruled that parts of the Czech UTP act are unconstitutional.

A draft UTP act has been proposed in Romania, which would up the ante on local UTP enforcement significantly.

EUR 7m fine in Hungary on booking.com.

- ▶ Austria
- ▶ Czech Republic
- ▶ Hungary
- ▶ Romania
- ▶ Slovakia
- ▶ Slovenia
- ▶ Turkey

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COVID-19 advisory and enforcement

National competition authorities' advisory and enforcement in the context of COVID-19 (April 2020)

- ▶ In the table below, we again provide an overview of advisory and enforcement activities in connection with the coronavirus crisis for the month of April 2020.

Country	Advisory	Enforcement
Austria	None	None
Albania	None	None
Bosnia and Herzegovina	None	None
Bulgaria	None	Proceedings initiated into a refinery and ten oil retailers over potential collusion, as the retail prices of fuel only dropped by 11 % in Bulgaria in the context of the coronavirus crisis, as opposed to a drop of 47 % worldwide.
Croatia	None	None
Czech Republic	<p>The Authority issued a binding statement on how it will proceed with requests for assessment of intended cooperation between competitors in the wake of the COVID-19 pandemic:</p> <ul style="list-style-type: none"> ▶ Given the COVID-19 pandemic, the Authority recognises the necessity of cooperation between competitors to secure certain types of goods or services due to the unprecedented situation. Thus, society's interest in certain cooperation between competitors 	None

	<p>(which under usual circumstances would be regarded as distorting competition) may for a limited time outweigh the interest in protecting the liberal market environment. The agreements under which such cooperation will take place will not be considered prohibited agreements within the meaning of Article 101 TFEU (and the national equivalent), as long as they restrict competition as little as possible, enabling their intended objective to be ensured.</p> <ul style="list-style-type: none"> ▶ The Authority also pointed out that where the object or effect of the cooperation between competitors is to distort competition, it is exempted from the cartel prohibition only if (i) it contributes to the improvement of the production or distribution of goods (or to the promotion of technical or economic development) and reserves a fair share of the benefits to consumers, (ii) it does not impose restrictions on competitors which are not necessary to achieve its objectives, (iii) it does not allow competitors to eliminate competition on a substantial part of the market for goods whose supply or purchase is the subject of the cooperation. ▶ The Authority is willing to assess whether the envisaged cooperation is indeed necessary to ensure the goods and services affected by the COVID-19 crisis, and thus cannot be considered 	
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	<p>anticompetitive. It also provides instructions on the content of such requests and warns that its binding statement should not be interpreted as a block-exemption. In addition, it clarified that the statement does not concern one-sided (abusive) behaviour of undertakings.</p> <p>The Authority also referred to the special measures adopted by the Commission to support the agri-food sector.</p>	
Hungary	<p>A decree issued by the Hungarian Government has temporarily exempted certain financing transactions involving majority state-owned venture capital funds or private equity funds (as long as they are necessary to protect investments in the COVID-19 pandemic) from the obligation to notify.</p>	<p>The HCA initiated a competition supervisory proceeding against Emporia Style Kft., the producer of ÉkszerTv and ATV Zrt, which broadcasts a programme regarding the sale of certain products, such as hand sanitisers, promoted in connection with the COVID-19 pandemic on ÉkszerTv (prices not applied that were originally indicated on the programme and misleading information on available stocks).</p>
Moldova	None	None
Montenegro	None	None
North Macedonia	None	None
Poland	None	<p>An investigation has been initiated into the conditions under which banks offer borrowers the deferral of instalment repayments (credit holidays) that are currently granted due to the COVID-19 pandemic.</p>
Romania	<p>Announcement that the pharmaceutical industry will receive regulatory flexibility to avoid shortages of drugs being used to treat the coronavirus,</p>	None

	including the need to share sensitive information to avoid shortages of essential drugs.	
Serbia	None	None
Slovakia	<p>The Slovak Competition Authority (SCA) updated its prioritisation policy, which will now also focus on abuse of the emergency situation related to COVID-19, either by abuse of a dominant position or by a prohibited agreement restricting competition with effects (including potential ones) on consumers or other market participants.</p> <p>The SCA referred to the ECN's joint statement and to the special measures adopted by the Commission to support the agri-food sector.</p>	None
Slovenia	None	None
Turkey	None	None
Ukraine	None	Investigation started into 18 major pharmacy chains and two suppliers of face masks over suspected price collusion.

Austria

Pool equipment supplier may face fine for vertical restraints

- ▶ Last September the BWB and its French counterparts carried out dawn raids at companies distributing equipment for automatic swimming pool cleaning, suspecting a restriction of resale prices.
- ▶ The infringement has been acknowledged by the supplier.

As a consequence, a fine has been proposed by the Austrian Competition Agency ([BWB](#)). The authority filed a respective request with the Austrian cartel court for the fine to be imposed.

Czech Republic

Unfair Competition: Czech Constitutional Court upholds Act on Significant Market Power but declares 3 % limit on marketing payments unconstitutional

- ▶ The Czech Constitutional Court did not repeal the Act on Significant Market Power as demanded by a group of senators almost four years ago. However, the judges stated that the provision on limiting the amount of suppliers' payments to customers with significant market power to 3 % of the supplier's annual sales is unconstitutional. "It is not a reasonable means to achieve the objective pursued by the Act, as it forces the parties to the supplier-customer relationship to negotiate the limitation of the amount of all monetary performances of the supplier for related customer services by a fixed amount, whereas the maximum amount cannot be determined in advance," the Constitutional Court stated.
- ▶ **Comment:** This decision is of fundamental importance for the future cooperation of suppliers and customers, especially in the promotion of supplier products, marketing events, setting business strategies in the sale of products, etc.

Hungary

Collusion fine on banking association overturned by country's top court

- ▶ A HUF 4bln (EUR 12.6m) fine imposed by the Hungarian Competition Authority (HCA) on banking association Magyar Bankszövetség and industry training provider Nemzetközi Bankárképző Központ for facilitating collusion through an online database, called Bankadat in 2016, has now been overturned by Hungary's top court ("Kúria").
- ▶ According to the agency's findings, Bankadat allowed association members to exchange strategic and sensitive data over the last 12 years.
- ▶ The agency's findings were already overturned by the first instance court, after appeals were made. The Kúria, which ruled on the case in the second instance, confirmed this decision and found that the agency did not fulfil its burden of proof.
- ▶ The HCA tried to challenge the first instance court's findings by arguing that the fining decision contains a counterfactual analysis and it furthermore shows that the information exchanges could have a potential anticompetitive effect.
- ▶ The appeal was then rejected by the Kúria for the following reasons:
 - Firstly, the agency's findings did not uncover an anticompetitive objective and no anticompetitive effects could be demonstrated, as the HCA did not make a detailed effects analysis.
 - The counterfactual analysis only focused on the credit market, but the conclusions were then projected on the entire market.
 - Furthermore, the counterfactual analysis was insufficient in its content, as it did not address the actual competition parameters, such as price, range and quality.

Hungarian Competition Authority imposed a record fine of HUF 2.5bln (approx. EUR 7m) on Booking.com for unfair commercial practices

- ▶ Pursuant to the decision, Booking.com B.V. has committed the following three unfair commercial practices for which it received the fine:
 - i) Misleadingly advertising certain hotel rooms with "free cancellation";
The HCA has objected to two conducts in this respect, namely
 - the same rooms which were advertised with "free cancellation" were also available at significantly cheaper prices (with the exception of the actual cancellation by the consumer);
 - "free cancellation" faced time and other limitations which became evident to the consumer only after choosing the accommodation.
 - ii) using aggressive, psychological pressure to achieve a fast booking by consumers (pressure selling); e.g. ("Highly sought after! (...), "Another booking! (...), "Last booking at the accommodation: Just now!") ("Only 1 room left!", "There are only 2 left!")
 - iii) breaching its duty of professional diligence by the non-unified appearance of "You can pay by Szép Card."
- ▶ The authority has also banned the company from applying the above practices.
- ▶ Booking.com offered commitments in the proceedings, which the authority rejected.

Comments:

This also falls in line with the practice of imposing significantly higher fines in unfair commercial practices cases than in previous years, comparable to that imposed for cartels.

This decision also falls in line with the authority's recent enforcement practice of being highly critical with the use of the expression "free". For instance, in the telecom sector, Magyar Telekom was found guilty (and fined EUR 2m) by the HCA for having failed to inform consumers that if they chose to obtain a mobile device at a discounted price or for free with the subscription contract, the monthly subscription fee would be higher than absent the device. For similar infringements, the HCA charged Telenor approximately EUR 5.45m in December 2019 and Vodafone approximately EUR 600,000 in 2017.

Investigation into aggressive communication practices on website

- ▶ The HCA initiated a competition supervisory proceeding against Alza.hu and Alza.cz a.s. for suspected unfair commercial practices against consumers committed by applying an aggressive sales method on www.alza.hu.
- ▶ The undertakings concerned displayed notifications on their online platforms such as: "Currently X customer is interested in this product", or " Only remaining X product at this price". The HCA suspects that the content and visual appearance of such statements can urge the purchasing decision of consumers.
- ▶ The HCA noted that this communication practice may lead to psychological pressure capable of restricting consumers' freedom to decide, thereby inducing them to take a transactional decision they would not have taken otherwise.

Upcoming amendments to the Competition Act

- ▶ The Hungarian Parliament has recently adopted a new act which amends the Hungarian Competition Act ("Competition Act") and brings numerous changes to Hungarian competition law.
- ▶ Most of the new rules intend to ensure that the Competition Act is fully compliant with the ECN+ Directive, which strives to strengthen the cooperation of European national competition authorities (NCAs) through the existing ECN network.
- ▶ The amendments include the following:
 - More ways for the HCA to acquire evidence;
 - New rules regarding commitments;
 - Further regulations concerning leniency applications;
 - New rules regarding fines imposed on associations of undertakings;
 - Enhanced cooperation between NCAs.
- ▶ Most of the amendments, including the main changes mentioned above, will enter into force on 1 January 2021. They will also apply to cases initiated before this date.
- ▶ For more details please see: <https://ceelegalmatters.com/briefings/13474-hungary-update-upcoming-amendments-to-the-competition-act>.

Romania

The renewal of the Competition Council president's mandate falls outside the scope of the ECN+ Directive

- ▶ According to Commissioner Margrethe Vestager, the mandate of the president of the Romanian Competition Council (CC) does not challenge the independence of the authority and falls outside the scope of the ECN+ Directive.
- ▶ The Romanian government made it possible by means of emergency ordinance that the mandate of members of the CC's governing body can be renewed with no restrictions (instead of the previous limit of two five-year terms).
- ▶ As a result, some voiced that Bogdan Chirițoiu was appointed as the CC's president for life, as his second term would have ended in March 2020.
- ▶ A Romanian member of the European Parliament, Carmen Avram, who argued that this amendment enables a "life-long appointment", directed the following questions to Commissioner Vestager:
 - whether the ordinance is in line with best practices of the European Competition Network (ECN);
 - whether a life-long appointment of the CC's governing body is in accordance with the principles of the ECN+ Directive;
 - and how the EC sees the independence and resources of the authority.
- ▶ Vestager stated that there is harmonisation in the EU on how long decisionmakers can exercise their functions, but there are no binding rules or recommendations.

- ▶ By providing the necessary guarantees, the ECN+ Directive makes sure that all staff members of national competition authorities remain independent and cannot be influenced by any public or private body.
- ▶ Furthermore, it constitutes that national law will set out the conditions for the selection, recruitment and appointment of decision-making bodies of competition authorities in advance.
- ▶ According to Commissioner Vestager, the length of a mandate or the number of possible terms will not challenge the independence of an authority as long as the decisionmakers have the guarantees of independence as set out by the ECN+ Directive.
- ▶ Also, the rules on the duration of mandates or the number of possible terms of decisionmakers of national competition authorities are not governed by the ECN+ Directive and vary significantly in other Member States.

Consultation on draft legislation to implement the Unfair Trading Practices Directive

- ▶ A draft Emergency Government Ordinance (EGO) for the transposition of the Unfair Trading Practices Directive (Directive (EU) 2019/633) is currently under consultation with stakeholders and other interested parties.
- ▶ The EGO aims to apply to certain unfair commercial practices in connection with the sale of agricultural and food products between buyers and suppliers established in Romania and/or in the EU. The enforcement authority will be the CC.
- ▶ The current text of the EGO generally mirrors the provisions of the EU Directive, but is still subject to internal adjustments in view of certain overlapping provisions with the Food Trade Law No. 321/2009, specifically regarding the sanctioning regime. Fines proposed so far amount to up to 1 % of the average daily turnover of the sanctioned company.
- ▶ The deadline for transposing the Unfair Trading Practices Directive is set for 1 May 2021, while implementation can occur not later than 1 November 2021.

Slovakia

Competition Authority opens industrial park abuse inquiry

- ▶ The Slovak Competition Authority (SCA) initiated administrative proceedings over a suspected abuse of dominance by CHEMES, a.s. Humenné, an industrial park owner. The suspected abusive behaviour relates to sales conditions imposed by the industrial park owner on those using the facilities, related to exclusive energy supply and other "media". Customers allegedly were not given the option to partially source energy or other media from third parties nor to produce it themselves.
- ▶ The SCA also imposed an interim measure on CHEMES, a.s. Humenné, since it interrupted energy and media supply to one of the entities seated in the energy park. The interim measure will secure the supply of energy and media and prevent the entity concerned from being forced to leave the market due to the conduct of CHEMES, a.s. Humenné. The SCA further stated that the interim measure will also aim to prevent irreversible changes that could occur before the SCA assesses the adequacy of the business conditions in the administrative proceedings in question.

Slovak postal firm under scrutiny for withholding information

- ▶ The SCA has opened an inquiry into suspected failure to provide information by a company in the postal sector. While the company was not named, the SCA stated that the investigation is being conducted by the department for abuse of dominance and vertical agreements.
- ▶ The company may have failed to provide information by a specified deadline, and then only partially. For withholding information the SCA can issue fines of up to 1 % of the company's turnover in the previous financial year.

Slovenia

The Agency exposes Coca-Cola as an example of good practice in ensuring compliance with competition regulations

- ▶ The Slovenian Competition Protection Agency (CPA) publicly praised the practices of COCA-COLA HELLENIC BOTTLING COMPANY SLOVENIJA, podjetje za prodajo in distribucijo brezalkoholnih pijač, d.o.o. (CCHBC), which implemented improvements to its business practices in the local HoReCa sector. The improvements were implemented voluntarily and were the result of a constructive dialogue between the CPA and CCHBC.
- ▶ CCHBC's improvements of its business practices with customers from the HoReCa sector included: (i) implementation of a formal contractual separation of the sale of its carbonated non-alcoholic beverages from other types of beverages; (ii) ensuring that the customers have the option to enter into exclusivity arrangements only for those beverages where CCHBC is not dominant; (iii) formal exclusion of the obligation of customers to include new CCHBC products in their portfolio; and (iv) a more transparent specification of payments for marketing investments.
- ▶ The CPA also stressed that CCHBC already has a compliance programme in place in the HoReCa sector and that it regularly trains its employees.
- ▶ Considering that CCHBC implemented these measures without the CPA initiating any formal proceeding against it, the CPA pointed out that such proactive conduct and constructive cooperation by CCHBC represents an example of good practice for other companies in ensuring compliance with competition regulations.

Turkey

Turkish Coca-Cola bottling company facing competition investigation

- ▶ The Turkish Competition Authority (CA) has opened an investigation over suspected competition law breaches by Coca-Cola Satış ve Dağıtım (CCSD), a subsidiary of Turkish Coca-Cola bottling company Icecek.
- ▶ The CA informed CCSD on 2 April that it decided to launch a probe after it conducted a preliminary inquiry.
- ▶ The fact that the company is subject to an investigation does not necessarily mean that it breached antitrust rules.

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