

# 1.0 COMPETITION ANTI TRUST INSIDER

## TO OUR READERS

**WELCOME TO THE SECOND EDITION OF THE WOLF THEISS COMPETITION AND ANTITRUST PRACTICE GROUP NEWSLETTER**

August 2018

We are pleased to introduce to you the second issue of the WOLF THEISS Competition & Antitrust Insider. The newsletter covers important developments in 13 jurisdictions in the CEE/SEE region on a quarterly basis, namely:

ALBANIA, AUSTRIA, BOSNIA & HERZEGOVINA, BULGARIA, CROATIA, CZECH REPUBLIC, HUNGARY, POLAND, ROMANIA, SERBIA, SLOVAK REPUBLIC, SLOVENIA and UKRAINE.

Local competition authorities throughout CEE/SEE are increasing their scrutiny of companies in many sectors. Our newsletter will be a handy reference that will help you keep up with the fast-paced developments in the quickly changing markets of CEE/SEE.

In this edition, we take a look at legislative and procedural developments that affect companies' operations in the region, including the joint guidance on transaction value based merger control thresholds by the Austrian and German competition authorities.

We hope that you will enjoy reading this newsletter and find it useful.

### Best regards

GÜNTER BAUER  
Partner

ADRIAN STER  
Partner

MICHAL STOFKO  
Senior Associate

### JURISDICTIONS COVERED IN THIS ISSUE

Austria .....	3
Bulgaria .....	5
Croatia .....	6
Czech Republic .....	7
Hungary .....	8
Poland .....	9
Romania .....	10
Serbia .....	11
Slovak Republic .....	12
Slovenia .....	13
Ukraine .....	13

## TABLE OF CONTENTS

<b>Austria</b> .....	<b>3</b>
Policy: Final joint guidance on transaction value based merger control thresholds by the Austrian and German competition authorities .....	3
Vertical agreements: Participation in a public procurement procedure amounts to passive sales .....	4
Policy: First interim report on the Austrian pharmacy market of the sector inquiry into the healthcare sector .....	5
<b>Bulgaria</b> .....	<b>5</b>
Procedural aspects: Maximum fine for failure to cooperate during a dawn raid imposed .....	5
Policy: Report on the media sector inquiry .....	6
<b>Croatia</b> .....	<b>6</b>
State aid: EC approves State aid of EUR 165 million for the extension of Istrian motorway .....	6
State aid: EC clears HRK 105.6 million in restructuring aid for Croatian shipping company Jadroplov .....	7
<b>Czech Republic</b> .....	<b>7</b>
Vertical agreements: The Antitrust Authority intervened against restriction of businesses by the outlet center ("radius clauses").....	7
Procedural aspects: An expired bank guarantee is a justifiable reason for exclusion of the supplier from the tender ...	7
Cartels and horizontal agreements: fine of CZK 20 million (approx. EUR 800,000) for a cartel of window suppliers ....	8
Procedural aspects: Tender of the Transport Ministry for the electronic toll system cancelled by the Czech NCA .....	8
<b>Hungary</b> .....	<b>8</b>
Merger control: first dawn raid concerning merger control in Hungary .....	8
Cartels and horizontal AGREEMENTS: MFC clauses in an online environment .....	9
<b>Poland</b> .....	<b>9</b>
Cartels and horizontal agreements: Fitness network cartel? .....	9
Abuse of dominant position: Kiss&Fly zones under scrutiny.....	9
<b>Romania</b> .....	<b>10</b>
Sector inquiry: E-commerce.....	10
Merger control: Clearance with commitments regarding pharmacies .....	10
Merger control: Phase ii investigation in building materials merger .....	11
<b>Serbia</b> .....	<b>11</b>
Dawn raid: Guidelines .....	11
Antitrust: Investigations & Dawn Raid.....	11
Abuse of dominance: New investigations in 2018.....	12
<b>Slovak Republic</b> .....	<b>12</b>
Vertical agreements: EUR 10 Million fine for the group of Rajo upheld .....	12
Merger control: joint venture of SWAN, a.s., and BENESTRA, s. r. o. approved.....	12
<b>Slovenia</b> .....	<b>13</b>
Merger control: Media Sector.....	13
Abuse of dominant position: commitments accepted .....	13
<b>Ukraine</b> .....	<b>13</b>
Policy: Case law review.....	13
Abuse of dominant position: New developments in the Gazprom case .....	13
About WOLF THEISS .....	14
Contributors .....	14

## AUSTRIA

### **POLICY: FINAL JOINT GUIDANCE ON TRANSACTION VALUE BASED MERGER CONTROL THRESHOLDS BY THE AUSTRIAN AND GERMAN COMPETITION AUTHORITIES**

On 9 July 2018, the **Austrian Federal Competition Authority** and the **German Federal Cartel Office** published the final version of the joint guidance on the application of the new **transaction value** based thresholds in merger control ("**Guidance**"). The publication of the final Guidance was preceded by a public consultation period. The authorities received thirteen submissions that led to changes in the final version of the Guidance. The final guidance paper is available for download on the websites of the [Austrian](#) and [German](#) competition authorities (the Guidance is available in both German and English).

The transaction value based jurisdictional thresholds were introduced into Austrian law in 2017 and complement the previously existing turnover based thresholds (which remain in effect unchanged).<sup>1</sup> Based on the (additional) new thresholds, a concentration is also notifiable in **Austria**, if

- the combined worldwide turnover of all undertakings exceeds EUR 300 million;
- the combined Austrian turnover of all undertakings exceeds EUR 15 million;
- the **value of the consideration** for the transaction **exceeds EUR 200 million**; and
- the target company is (**currently**) **active to a significant extent in Austria**.

The Guidance, although not binding on courts, summarises the **current view** of the authorities with respect to (i) the value of the consideration and its calculation, (ii) the notion of significant domestic activities and (iii) some procedural aspects. The Guidance also sets out a number of practical examples. In the following, we comment on certain selected aspects:

**Value of the consideration.** The Guidance provides principles of the valuation of the consideration as well as details with respect to the methodology of calculation. It specifies that the value of the consideration encompasses all assets and other monetary benefits that the seller receives from the buyer in connection with the merger in question. It covers all cash payments and the transfer of voting rights, securities, tangible assets and intangible assets, as well as earn-out clauses, license fees, payments for non-competition by the seller etc. The Guidance makes clear that a distinction must be drawn between the company value and the consideration value for a company as the latter may be based i.a. on subjective appraisals. Liabilities (only interest-bearing components) assumed by the buyer also form part of the consideration and, in principle, need to be added to the purchase price: (i) in case of an asset deal only if in addition to the assets bought, any liabilities of the seller have been assumed, (ii) in case of a share deal the liabilities of the target.

The value of the consideration also includes future and variable purchase price components. The Guidance specifies that the relevant date for determining the value of the consideration is – in principle – the completion date of the merger. The value of future payments (e.g. resulting from an earn-out) must be based on discounting methods commonly used in the financial sector. Overall, the closer the value of the consideration is to the threshold of EUR 200 million, the more detail

---

<sup>1</sup> The aim of the threshold is to cover cases where current turnover and the purchase price for the company differ to a disproportionate extent. The high purchase price in such takeovers is often an indication of innovative business ideas with great competitive market potential (in particular in the digital and pharma industries). Due to no or low revenues, such cases have previously escaped the preventive merger review.

must be provided with respect to the calculation and its plausibility. In some cases, written confirmation of the valuation by each party independently may suffice.

The Guidance sets out that several acquisitions that are closely connected in material terms and timing may be regarded as a single merger project for the calculation of the consideration value. An early assessment in this regard is important as in some cases already the implementation of the first transaction step may potentially constitute a violation of the standstill obligation under Austrian case law.

**Substantial domestic operations.** Under the new thresholds, a concentration is only notifiable if the target company has substantial operations in Austria. This is meant to exclude cases, which at their core relate to the takeover of a company only operating abroad. According to the Guidance, when assessing the local nexus of operations, different criteria may be applied for different business sectors (e.g. depending on industry standards).

The Guidance gives numerous examples of criteria based on which the significance of domestic activities may be assessed, such as number of users or unique website visitors; location of assets if they are oriented at the domestic market; research and development activities, in particular if the products concerned are likely to be marketed in Austria; other activities aimed at market entry.

The final version of the Guidance (different to the draft) explains that the Austrian Federal Competition Authority will – on a regular basis – **assume** there is **no significant domestic activity** of the target if the target achieved revenues of less than EUR 500,000 in Austria, **provided revenues adequately reflect the market position** and the competitive potential of the target company. Although for activities in some industries, this may provide a first indication, particular attention needs to be given to the second part of the statement, as the assumption only applies if the revenues adequately reflect the market position and the competitive potential of the target.

Overall, the Guidance is a welcome and helpful clarification of the NCA's position and current thinking with respect to the new transaction value based jurisdictional thresholds. The German and Austrian competition authorities intend to update the Guidance to reflect the experience they will gain when applying the new test in practice.

#### **VERTICAL AGREEMENTS: PARTICIPATION IN A PUBLIC PROCUREMENT PROCEDURE AMOUNTS TO PASSIVE SALES**

The Austrian NCA received a complaint by a public hospital operator with respect to difficulties when procuring surgical instruments from distributors abroad through an EU-wide public procurement procedure. The alleged reasons for the difficulties were exclusive distribution rights granted to an Austrian distributor of medicinal devices by the supplier of the products concerned.

The Austrian NCA took the position that the **participation in a public procurement procedure** amounts to **passive sales**, which must not be subject to restrictions in distribution agreements. In response to the concerns raised by the Austrian NCA, the parties have offered commitments that would eliminate the concerns identified and clarify distribution agreements in accordance with EU competition law.

On 22 May 2018, the Austrian NCA therefore requested the Austrian cartel court to make the commitments binding on the undertakings by decision. Such a decision would make no determination as to the existence of a competition law infringement.

**POLICY: FIRST INTERIM REPORT ON THE AUSTRIAN PHARMACY MARKET OF THE SECTOR INQUIRY INTO THE HEALTHCARE SECTOR**

On 18 May 2018, the NCA released the first interim report in connection with the sector inquiry into the health sector, summarizing the findings on the Austrian pharmacy market.

The pharmaceutical sector in Austria is tightly regulated. The partial report evaluates the competitive conditions and identifies potential restrictions of competition on the Austrian pharmacy market, in particular with respect to (i) market entry for pharmacies (e.g. compulsory requirements), (ii) ownership structure of pharmacies (various restrictions on ownership e.g. by third-parties, wholesalers, chains etc.), and (iii) rules governing the operation of pharmacies (i.a. opening hours, online pharmacies, sale of OTC-pharmaceuticals exclusively in stationary pharmacies).

The report presents recommendations – such as liberalization of access to and operation of pharmacies – to counteract potentially restrictive developments and to facilitate more effective competition to the benefit of consumers.

As part of the sector inquiry, the NCA is currently in the process of carrying out in-depth investigations in the following markets: pharmacies, ambulance service and medical transport, healthcare insurance and hospitals.

## BULGARIA

**PROCEDURAL ASPECTS: MAXIMUM FINE FOR FAILURE TO COOPERATE DURING A DAWN RAID IMPOSED**

On 25 April 2018, the Bulgarian NCA ("CPC") carried out on-site inspections at the business premises of Iventas EOOD ("Iventas") as part of its investigation of alleged resale prices maintenance of baby and infant products in contracts with retailers.

During the dawn raid procedure Iventas obstructed the investigation by preventing access of CPC officials to the company's electronic documents stored on its on-site and off-site servers for five hours. After gaining access to the documents, the Bulgarian NCA found out that the company has manipulated the documents during the dawn raid. Iventas also prevented access to the laptop of the company's manager and failed to disclose all e-mails, thereby preventing the collection and review of evidence. The Bulgarian NCA imposed the maximum fine permitted by law in the amount of 1 % of the company's annual turnover for failure of the company to comply with the obligation to cooperate.

It is specific to Bulgarian law that the CPC can collect documents for suspected breaches of competition law identified during the dawn raid which differ from the initial grounds in the authorisation for carrying-out the inspection. In the particular case, the CPC stressed that the company's breach was very serious as it prevented the officials from collecting evidence not only on the alleged infringement (covered by the initial scope of the inspection decision) but also on other potential competition law infringements.

Companies are obliged to cooperate with the Bulgarian NCA during a dawn raid and provide timely, full and uninterrupted access to company's business documents.

**POLICY: REPORT ON THE MEDIA SECTOR INQUIRY**

On 28 June 2018, the Bulgarian NCA ("**CPC**") published its report on the media sector inquiry conducted upon request of the Minister of Economy, Minister of Finance and Minister of Culture, in respect of a new draft law addressing media ownership and financing.

The sector inquiry covers all types of media and media service providers such as print media, media disseminated through electronic communication networks, online news services, etc. The CPC analysed the characteristics and structure of the media sector and respective segments, potential barriers to entry, market participants, level of market concentration, the applicable legislation and self-regulation in the sector during the years 2016 and 2017. The main findings of the CPC concerned potential unfair commercial practices on the TV market regarding the underreporting of subscribers by platform operators.

One of the key recommendations of the CPC includes the establishment of a public register providing information on the ultimate beneficial owners of all types of media and distributors of media content with emphasis on the disclosure of online media ownership. The regulator noted that the direction of the main part of budgets for advertisement to large media companies or economic groups which have presence on various media markets triggers the need for clear, transparent and non-discriminative rules in respect of financing with public funds of media companies. In this regard, the CPC in its analysis in particular referred to the competitive advantage of Nova Broadcasting Group which was also reason for an in-depth investigation of the acquisition of this company by PPF TMT Bidco 2 B.V (see below). Other recommendations include the necessity of discussions in respect of printed media distribution and adoption of legislative or self-regulation measures to address competition law concerns outside the competence of the regulator.

**CROATIA****STATE AID: EC APPROVES STATE AID OF EUR 165 MILLION FOR THE EXTENSION OF ISTRIAN MOTORWAY**

The 145 km long Istrian Y motorway forms a motorway complex linking the Istrian region with the rest of Croatia. Due to a rise of traffic and safety issues during the summer months, the Y needs to be extended by a 28 km long second carriageway costing approximately EUR 165 million. In order to close the investment circle, the motorway's operator Bina Istra Ltd. requested an extension of its highway management concession agreement by an additional five years, until 2032. It is expected that the extension of the concession agreement will promote regional growth and investment, as well as enhance public safety and reduce congestion.

In March, Croatia notified the European Commission of the request to extend the concession agreement. The EC examined the measure under EU State aid rules regarding services of general economic interest and EU public procurement rules by which companies can be compensated for the extra cost of providing a public service under certain conditions, and found that:

- Bina Istra will not be overcompensated in case of (partial) extension of the concession agreement;

- The extension of the concession agreement is proportionate to the amount needed to finance the construction of the new stretch of carriageway.

The extension has only been approved for a period of 18 months and is conditional upon certain commitments relating to the repayment of Bina Istra's debt.

**STATE AID: EC CLEARS HRK 105.6 MILLION IN RESTRUCTURING AID FOR CROATIAN SHIPPING COMPANY JADROPLOV**

Jadroplov, a Croatian state-owned shipping company, has started a comprehensive restructuring project aimed at reducing costs, focusing on its core business and alleviating financial pressure stemming from high indebtedness. The purpose of the plan is to enable Jadroplov to achieve long-term sustainability with minimal state intervention, while retaining six of its existing vessels.

The State is involved in the restructuring through the provision of a subsidy and two State guarantees for bank loans, with the total support amounting to approximately EUR 14.2 million. Jadroplov will contribute to the restructuring with EUR 19.5 million of its own investment, in particular by securing financing from private investors and through assets sales.

As Jadroplov is a state-owned company, the restructuring program was notified to the European Commission to examine it under State aid rules. The EC concluded that it would indeed enable Jadroplov to become more viable without continued State support.

## CZECH REPUBLIC

**VERTICAL AGREEMENTS: THE ANTITRUST AUTHORITY INTERVENED AGAINST RESTRICTION OF BUSINESSES BY THE OUTLET CENTER ("RADIUS CLAUSES")**

The Czech Antitrust Authority imposed a fine of CZK 1 million (approx. EUR 40,000) on Via FAOC s.r.o. for concluding and implementing prohibited agreements.

Via FAOC, as owner of the Fashion Arena Prague Outlet (FAPO) centre, included in the lease agreements with its tenants at the FAPO a clause preventing the tenants from operating in another outlet centre within a defined geographical radius (60 minutes driving time from FAPO).

The Czech competition authority found that the "radius clause" unlawfully distorts competition on the relevant market for the lease of business premises in outlet centres and, as such, is null and void. In addition to the fine imposed, the NCA requested Via FAOC to inform its tenants about the invalidity of this clause in the lease agreements.

**PROCEDURAL ASPECTS: AN EXPIRED BANK GUARANTEE IS A JUSTIFIABLE REASON FOR EXCLUSION OF THE SUPPLIER FROM THE TENDER**

The Czech NCA fined the Prague Public Transit Company (*Dopravní podnik Praha – DPP*) for infringing the competition rules in connection with a public tender procedure. More specifically, the Prague Public Transit Company was fined CZK 100,000 (approx. EUR 4,000) for not excluding one of the participants in its tenders, namely CENTR GROUP, despite the fact that the company had not complied with the tender provisions, failing to secure a valid bank guarantee for the whole term of the tender proceedings.

The Czech NCA held that, through its failure to act, the Prague Public Transit Company had significantly influenced the selection of the most appropriate offer by awarding the tender to CENTR GROUP.

**CARTELS AND HORIZONTAL AGREEMENTS: FINE OF CZK 20 MILLION (APPROX. EUR 800,000) FOR A CARTEL OF WINDOW SUPPLIERS**

The companies have coordinated their applications and participation in tender proceedings awarded by the Liberec Region. The aim of this cooperation was that one of the competitors (SULKO s.r.o.) submits the most advantageous offer. Through their collusive behaviour, competitors have distorted competition on the market of production, distribution and installation of windows and doors, including accessories, in the Czech Republic.

**PROCEDURAL ASPECTS: TENDER OF THE TRANSPORT MINISTRY FOR THE ELECTRONIC TOLL SYSTEM CANCELLED BY THE CZECH NCA**

The Czech NCA annulled the tender proceedings initiated by the Transport Ministry on the grounds that the Ministry breached the Public Procurement Act. More specifically, the Ministry was found to have breached the principle of transparency by not providing a technical solution that would allow to identify and certify whether all tender participants had received the same information, based on which they were expected to prepare and submit their offers. The Czech NCA also found that the Ministry has failed to properly define the terms and conditions of the tender proceedings, which were necessary for the participation of the suppliers in the tender.

## HUNGARY

**MERGER CONTROL: FIRST DAWN RAID CONCERNING MERGER CONTROL IN HUNGARY**

The Hungarian Competition Authority ("**HCA**") closed the *DIGI/Invitel* case, concerning the telecommunication sector, in May 2018, following the unravelling of procedural issues which had occurred during the investigation.

In 2017, DIGI notified its intention to acquire Invitel with the HCA. The HCA initiated investigations to clarify any competition concerns and requested further information from DIGI three times, and on four occasions from Invitel, as well as from competitors, a ministry, the regulator and other national competition authorities.

The HCA was of the opinion that the information provided by DIGI was not sufficient, and, based on information from previous cases, held that it was likely that DIGI was in possession of additional, more detailed, documents regarding the preparation of the transaction. Since DIGI failed to provide such documents to the HCA despite being requested to do so, the HCA asked the court to authorize a dawn raid. The court granted the request within two days, and after an additional period of seven days, the HCA carried out the dawn raid at the registered seat of DIGI. Whether the HCA has found the preparatory documents it was looking for is not clear from the publicly available information (as regards the dawn raid, DIGI has filed a complaint with the HCA but the HCA disregarded this complaint; the grounds of this dismissal are not accessible.) Eventually, the HCA cleared the merger subject to conditions and obligations as proposed by DIGI to address the concerns.

**CARTELS AND HORIZONTAL AGREEMENTS: MFC CLAUSES IN AN ONLINE ENVIRONMENT**

Competition on online platforms has been a focus of interest for a number of competition authorities in Europe over the past years. In April 2018 the Hungarian NCA closed with commitments a case concerning NetPincér, the operator of the largest Hungarian online food delivery platform.

For offering food delivery services on their websites, NetPincér required restaurants to offer their services under the same conditions on the NetPincér-operated website as via their own distribution channels (websites, orders by phone, leaflets etc.). The agreements were silent on the matter of prices offered to the operators of other online platforms, but the investigation of the Hungarian NCA found that the clause restricted price competition on the market and amounts to a potential restriction of competition by effect.

In order to address the competition concerns, NetPincér offered certain commitments, which narrowed the scope of the restrictions and allowed the restaurants to offer more advantageous prices for orders placed on their own or third-party online platforms or offline, e.g. by phone. The Hungarian NCA accepted the commitments without finding that an infringement occurred.

**POLAND****CARTELS AND HORIZONTAL AGREEMENTS: FITNESS NETWORK CARTEL?**

Have the largest fitness network companies in Poland created a cartel that divided the market and made it difficult for other companies to compete? This question is about to be answered by the Polish NCA. Suspecting that 16 large fitness network companies colluded to divide the market by allocating themselves different cities in Poland, the Polish NCA, in cooperation with the Police, has conducted dawn raids at the fitness network headquarters and, allegedly, found evidence proving that collusion in the form of market sharing had taken place.

In case infringement is found, the fines can be as high as PLN 2 million (approx. EUR 470,000) and may potentially be imposed even on the management of the fitness network companies.

**ABUSE OF DOMINANT POSITION: KISS&FLY ZONES UNDER SCRUTINY**

The Polish NCA initiated an investigation regarding the practices of airport operators – in particular Warszawa, Modlin, Kraków and Katowice. The investigation concerns the parking rules applicable to Kiss & Fly zones and their compliance with competition law rules and regulations. Kiss & Fly zones are zones at airports where passengers can be dropped off or from where they can be picked up without paying a parking fee. The time one can spend in a Kiss & Fly zone is limited both in duration and in frequency – i.e. maximum number of entries / exits per day.

The Polish NCA is assessing whether this practice may, in effect, restrict competition (and abuse a dominant position) at the detriment of consumers by foreclosing the market for undertakings offering parking services at a certain distance from the airport. More precisely, there is the possibility that, in the absence of a frequent shuttle service, travellers will be reluctant to use the parking services which are not particularly close to an airport, and a shuttle service cannot operate on the strict terms which currently govern the Kiss & Fly rules. The Polish NCA will have to perform a balancing act between ensuring that the market for parking services is not foreclosed

while, at the same time, keeping the Kiss & Fly zones operational – the removal of the restrictions could result in traffic jams, delays and debatable commercial practices such as taxis stationing there for a long period of time, in an attempt to pick up clients. Indeed, it may well be that the restrictions are indispensable for ensuring the smooth functioning of the Kiss & Fly zones.

## ROMANIA

### SECTOR INQUIRY: E-COMMERCE

In the framework of its sector inquiry regarding e-commerce the Romanian NCA carried out an analysis on whether retailers comply with the legal provisions regarding price reduction campaigns.

According to the applicable legislation, any retailer who intends to market a discount must market it together with a "reference price", which is defined to be the lowest price offered in the same retail space in the last 30 days. The NCA found that the price to which the reduction was applied and displayed by online retailers, i.e. the initial price of the product before discount, was higher than the "reference price" as defined by statutory legislation in approximately 80% of the monitored products, making the discounts 'misleading' discounts. When carrying out the assessment, the NCA specifically looked at the Black Friday prices in 2017.

The NCA found that failure to comply with the legislative provisions on price reduction campaigns distorts the "mechanisms of price competition as regards discounts", as consumers are misled. The NCA proposed to amend the legal framework and require online retailers to display information on the evolution of the reference price.

### MERGER CONTROL: CLEARANCE WITH COMMITMENTS REGARDING PHARMACIES

The Romanian NCA cleared with conditions what was one of the largest transactions in Romania on the pharmaceutical market in 2017. The transaction concerned the takeover by Glebi Holdings PLC of A&D Pharma Holdings NV.

Glebi Holdings PLC is part of Penta Group, which is active in Romania in the gambling as well as medical sector. As for the medical sector, Penta Group carries out wholesale and retail trading activities of pharmaceutical and para pharmaceutical products. The retail pharmaceutical activities are carried out through the Arta pharmacies. A&D Pharma Holdings NV is a company of A&D Pharma Group which is active in the medical sector. The A&D Pharma Group is vertically integrated and has production, distribution and retail activities in the pharmaceutical and para pharmaceutical sector. The retail pharmaceutical activities are carried out through the Sensiblu and Punkt pharmacies.

In its assessment, the Romanian NCA found that the transaction would lead to overlaps both on wholesale and retail trading markets with pharmaceutical and para pharmaceutical products and would consolidate Glebi Holdings PLC's position on the retail trading market of the mentioned products. In order to alleviate the competition concerns, Glebi committed to divesting 18 Arta pharmacies.

**MERGER CONTROL: PHASE II INVESTIGATION IN BUILDING MATERIALS MERGER**

The Romanian NCA initiated a Phase II investigation into the acquisition by Wienerberger Bricks Systems Ltd of Brikston Construction Solutions SA, in order to assess the transaction's effects on the relevant market for the production and marketing of bricks and ceramic blocks in Romania.

Wienerberger Bricks Systems SRL, a company of the Wienerberger Group, is active in Romania mainly in the production and marketing of bricks and ceramic blocks, operating four brick and ceramic blocks production units in Romania. It is also active in the field of tile and ceramic accessories for roofing, concrete paving, plastic and ceramic pipes. Brikston Construction Solutions SA is mainly active in the production and marketing of bricks and ceramic blocks.

Following the assessment in Phase I, the NCA concluded that the transaction would likely significantly impede effective competition by creating a dominant position on the market for the production and marketing of bricks and ceramic blocks in Romania. The Parties offered certain commitments in Phase I, but these were found not sufficient to eliminate the competition concerns.

Following the instigation of Phase II, the Parties abandoned the transaction.

**SERBIA****DAWN RAID: GUIDELINES**

The Serbian NCA recently published dawn raid guidelines. The instructions outline the scope of the Serbian NCA's investigative powers, the undertakings' rights and obligations, as well as possible sanctions in case of failure to cooperate. . The Serbian competition authority carried out the first dawn raid only in 2015 (although the instrument is available as an investigative tool since 2009). Given the relatively new development in enforcement practices in Serbia the guidelines are extremely welcome in the business community. Since its first dawn raid in 2015, the Serbian authority has used dawn raids as an investigative tool in a number of cases. In fact, most of the infringements the Serbian authority found and imposed sanctions for have been identified with the help of dawn raids.

**ANTITRUST: INVESTIGATIONS & DAWN RAID**

In the second quarter of 2018, the Serbian NCA initiated a number of antitrust investigations and heavily relied on dawn raids as an investigative tool in these investigations.

The Serbian NCA raided 5 different locations and opened investigative proceedings against 7 undertakings that allegedly colluded when participating in public procurement proceedings of the City of Niš.

On 24 April 2018, the Serbian NCA initiated an investigation and carried out dawn raids against two importers of baby and infant products. The dawn raids were carried out at 3 different locations in Belgrade. At this stage, the investigation seems to focus on resale price maintenance clauses in agreements entered into by the importers with retailers.

**ABUSE OF DOMINANCE: NEW INVESTIGATIONS IN 2018**

The Serbian NCA also opened a number of investigative proceedings for alleged abuses of dominance in the second quarter of 2018.

A major telecommunication operator, found to have abused its dominant position in the past, is now under investigation for allegedly not complying with its commitments offered merger control proceedings that concerned the acquisition of a local cable network operator.

Investigative proceedings have also been opened against the public utility company Gradska Toplana Niš for the alleged abuse of dominance by excessive pricing on the market of thermal energy supply to the city of Niš.

**SLOVAK REPUBLIC****VERTICAL AGREEMENTS: EUR 10 MILLION FINE FOR THE GROUP OF RAJO UPHELD**

The Slovak NCA Council upheld the first-instance decision of the Slovak NCA – "Division for Abuse of Dominant Positions and Vertical Agreements", by which the authority imposed fines on the undertaking RAJO, a.s., Bratislava (a producer of dairy products) and a number of grocery retailers which included Kaufland Slovenská republika, BILLA, s.r.o., Retail Value Stores, a.s. and TESCO STORES SR, a.s., for engaging in anticompetitive behaviour from 2009 to 2014.

The anticompetitive behaviour found concerned the inclusion of retail price maintenance clauses in the distribution agreements for Rajo-branded products in the categories of milk, butter and cream for end consumers in the territory of the Slovak Republic.

The total fine amounted to EUR 10.3 million, with the individual fines (taking account of the gravity of the infringement) amounting to 5 % of the relevant turnover, multiplied by the number of years the infringement took place.

**MERGER CONTROL: JOINT VENTURE OF SWAN, A.S., AND BENESTRA, S. R. O. APPROVED**

The Slovak NCA approved the creation of a full-function joint venture controlled by the undertakings Swan (owned by Ing. Juraj Ondriš and Ing. Pavol Ondriš) and Sandberg Capital, správ. spol., a.s.

The Slovak NCA's assessment focussed on the effects of the merger in the field of electronic communications. Several relevant markets and segments in this field were identified by the parties in the merger control notification. The NCA analysed in more detail the wholesale market for the lease of circuits, services of complex ICT solutions, retail markets in relation to fixed internet access (with possible breakdown by customer type – referred to as services for mass market and for business customers) and services of individual data transfer solutions, business customers.

On these markets the activities of the merging parties overlap horizontally and vertically. Competing providers of electronic communications networks and services submitted a number of complaints. The NCA assessed the horizontal effects of the merger on the wholesale level as well as on the retail level regarding high-quality fixed internet access services and also assessed the effects of the vertical relationship of the parties' activities.

The Slovak NCA concluded that the merging parties' overlaps and markets shares are sufficiently limited with significant other players to clear the transaction after a careful analysis of all markets concerned.

## SLOVENIA

### MERGER CONTROL: MEDIA SECTOR

The most prominent case concerning the largest merger in the media industry Slovenia, the concentration between Slovenia Broadband (Luxembourg), Proplus (Slovenia) and Nova TV (Croatia) is still pending with the Slovenian NCA, following the proposal of a number of commitments by Slovenia Broadband and the market testing of these commitments.

The Croatian NCA cleared the concentration resulting from the acquisition of a directly controlling interest over Nova TV d.d., Zagreb, by Slovenia Broadband in May 2018.

The case has been under intense media scrutiny, attracting public statements from the US Ambassador to Slovenia calling for the issuance of a decision as soon as possible.

### ABUSE OF DOMINANT POSITION: COMMITMENTS ACCEPTED

The competition authority accepted commitments proposed by Renault (Renault Nissan Slovenija, d.o.o.) in the course of proceedings initiated due to abuse of a dominant position of Renault in the relevant market of providing technical information and courses to mechanical service providers. The authority raised concerns that by providing access to technical information and training only to authorised mechanical service providers, Renault left independent service providers at a competitive disadvantage.

## UKRAINE

### POLICY: CASE LAW REVIEW

In May 2018, the Antimonopoly Committee of Ukraine published on its website an overview of the case law of the Supreme Economic Court of Ukraine and the Supreme Court of Ukraine on issues relating to the application of statutory competition law over more than ten years (2006 to end of 2017). This is seen as another step in the positive trend of the authority becoming more transparent.

### ABUSE OF DOMINANT POSITION: NEW DEVELOPMENTS IN THE GAZPROM CASE

Following the Ukrainian NCA's 2016 decision to impose a fine on Gazprom in the amount of USD 3.2 billion for allegedly abusing its dominant position as the only buyer of gas transit services through Ukraine, as well as several challenges filed by Gazprom with different courts (ultimately dismissed), Gazprom has announced, at the beginning of April 2018, that it is preparing a lawsuit in international arbitration against Ukraine, as it does not recognize the legitimacy of the imposed fine. This step marks an interesting turn in what has been a case with deeply rooted political implications.

## ABOUT WOLF THEISS

Wolf Theiss is one of the leading law firms in Central, Eastern and South-eastern Europe (CEE/SEE). We have built our reputation on a combination of unrivalled local knowledge and strong international capability. We opened our first office in Vienna almost 60 years ago. Our team now brings together over 340 lawyers from a diverse range of backgrounds, working in offices in 13 countries throughout the CEE/SEE region.

For more information about our services, please contact:



### GÜNTER BAUER

Partner

[guenter.bauer@wolftheiss.com](mailto:guenter.bauer@wolftheiss.com)

T: +43 1 51510 5600



### ADRIAN STER

Partner

[adrian.ster@wolftheiss.com](mailto:adrian.ster@wolftheiss.com)

T: +40 21 3088 107



### MICHAL STOFKO

Senior Associate

[michal.stofko@wolftheiss.com](mailto:michal.stofko@wolftheiss.com)

T: +43 1 51510 5605

## CONTRIBUTORS

Austria: Michal Stofko, Michael Otti

Bulgaria: Anna Rizova, Ralitsa Lachezarova

Croatia: Luka Colic

Czech Republic: Katerina Kulhankova

Hungary: Janos Toth, Zoltan Banki

Poland: Marcin Rudnik

Romania: Adrian Ster, Raluca Maxim

Serbia: Maja Stankovic, Marina Bulatovic

Slovak Republic: Katarina Bielikova, Vladimira Rostarova

Slovenia: Klemen Radosavljevic, Tjasa Lahovnik

Ukraine: Olga Ivlyeva, Mykhailo Razuvaiev

This newsletter has been prepared solely for the purpose of general information and is not a substitute for legal advice.

Therefore, WOLF THEISS accepts no responsibility if – in reliance on the information contained in this memorandum – you act, or fail to act, in any particular way.

If you would like to know more about the topics covered in this newsletter or our services in general, please get in touch with your usual WOLF THEISS contact or with:

Wolf Theiss  
Schubertring 6  
AT – 1010 Vienna

[www.wolftheiss.com](http://www.wolftheiss.com)