WOLF THEISS

COMPETITION ANTITRUST INSIDER

TO OUR READERS

WELCOME TO THE FIRST EDITION OF THE QUARTERLY NEWSLETTER OF THE WOLF THEISS COMPETITION AND ANTITRUST PRACTICE GROUP

April 2018

We are pleased to introduce to you the first 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 quarterly 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 first issue we take a look at legislative and procedural developments that affect companies' operations in the region, including one of highest fines for gun jumping in Austria, the sector inquiries launched by the Bulgarian Competition Authority, efforts to identify bid rigging in Romania and why it has become more difficult to prove cartel agreements in Croatia. Learn more about these and other topics on the following pages.

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

Best regards

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JURISDICTIONS COVERED IN THIS ISSUE

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AUSTRIA

CARTELS AND HORIZONTAL AGREEMENTS: CARTEL FINE OF EUR 120,000 IMPOSED ON PIONEER & ONKYO FOR VERTICAL RESTRICTIONS

At the request of the Federal Competition Authority ("**FCA**"), the Austrian Cartel Court imposed a fine of EUR 120,000 on Pioneer & Onkyo Europe GmbH for an infringement of Article 101 TFEU and Article 1(1) Austrian cartel act for participation in vertical resale price maintenance for home audio and visual equipment products (in particular receivers, amplifiers and turntables) of the brands "Onkyo" and "TEAC" in the period from March 2011 to April 2017. The company did not dispute the facts of the case. The decision is final.

MERGER CONTROL: AUSTRIAN CARTEL COURT IMPOSES FINES IN TWO SEPARATE CASES FOR EARLY IMPLEMENTATION OF MERGERS

In the first quarter of 2018, at the request of the FCA, the Austrian Cartel Court imposed fines for the implementation of a notifiable transaction prior to obtaining clearance in two separate cases. The court imposed a fine of EUR 185,000 on Stahl Lux 2 S.A. regarding the acquisition of sole control over the leather chemicals business of Clariant International AG, Switzerland. According to the press release of the FCA, the infringement lasted from 30 April 2014 until 1 September 2017. In the other case, the court imposed a fine of EUR 40,000 on Comparex AG with respect to the acquisition of all shares in Datalog Software AG. The infringement lasted from 6 February 2012 until 28 October 2017. The fine amounted to approx. 0.00189% of Comparex' 2016/17 revenues of approx. EUR 2,114 million.[1]

Under Austrian merger control rules, a notifiable concentration must not be implemented prior to obtaining clearance from the Austrian competition authorities ("standstill obligation"). If the undertakings concerned implement a notifiable transaction prior to clearance ("gun jumping"), the Austrian cartel court – at the request of the Austrian competition authorities – may impose a fine of up to 10% of the undertaking's (group) turnover in the preceding year. In practice, however, the fines for the violation of the standstill obligation in Austria have been much lower; in most cases ranging from EUR 15,000 to EUR 150,000 (in an exceptional and singular case, a fine of EUR 1.5 million was imposed for gun jumping).

The summary decisions in the two cases have not been published yet. However, the fine against Stahl Lux is one of the highest fines for gun jumping in Austria to date.

PROCEDURAL DEVELOPMENTS: UPDATE TO LENIENCY HANDBOOK OF THE AUSTRIAN COMPETITION AUTHORITY

The leniency/immunity guidelines of the Austrian competition authority have been amended in order to reflect changes to the national legislation implementing the antitrust damages directive (2014/104/EU) into Austrian law. The changes pertain *i.a.* to (i) the non-disclosure of the leniency declaration and (ii) the limitation of the liability of the leniency applicant in damage proceedings, as well as to (iii) the immunity from criminal proceedings of employees of a company who (under certain preconditions) made an important contribution to the clarification of an antitrust infringement.

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1 COMPAREX Facts & Figures 2016/17

FCA's handbook on leniency is available in English at:
https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Leniency_Handbook_final_version.pdf

PROCEDURAL DEVELOPMENTS: AUSTRIAN COMPETITION AUTHORITY LAUNCHES ONLINE WHISTLEBLOWER TOOL

In February 2018, the FCA launched an online whistleblowing system. The online tool allows submitting information and documents on competition law infringements to the FCA on an anonymous basis. The whistleblowing system provides a secured and encrypted communication platform, allowing sending and receiving messages/documents to/from the FCA. As long as no personal data is entered, the whistleblowing system remains completely anonymous and untraceable.

The whistleblowing system can be accessed online at: https://report.whistleb.com/en/bwb.

BULGARIA

POLICY: BULGARIAN NCA LAUNCHES A SECTOR INQUIRY INTO ELECTRICITY MARKETS

On 22 January 2018, the Competition Protection Commission ("**CPC**") announced that it opened a sector inquiry into the electricity markets in Bulgaria.

The CPC decision follows recent public statements alleging potentially speculative prices on the free market of electricity for business customers and price alignment between electricity traders. The inquiry aims to provide a detailed picture of the current market processes and to identify possible additional measures which could contribute to efficient competition.

The CPC is expected to approach a wide range of market participants through questionnaires which are to be sent in the coming weeks. The previous electricity sector inquiry carried out by the CPC in Bulgaria led to three decisions imposing considerable sanctions on electricity distribution companies and their trader affiliate companies for abuse of dominance, making this a particularly interesting case.

POLICY: BULGARIAN NCA LAUNCHES A SECTOR INQUIRY INTO THE BANKING SECTOR

On 7 March 2018, the CPC opened a sector inquiry into the banking sector. The aim of the sector inquiry is to examine the competitiveness and transparency in the banking sector and the conditions of banking services in Bulgaria. The CPC will review any existing barriers preventing customers from switching to another bank, the existence of product tying (i.e. binding / bundled sales), and other practices potentially harmful to competition. Furthermore, the CPC indicated that, in advance of the sector inquiry, it has carried out a review of the publicly available information on the websites of the respective banks concerning the applicable interest rates, fees and commissions applied in the provision of services to customers by the member banks of the Association of Banks in Bulgaria.

The inquiry will allow the CPC to identify possible competition concerns in the banking market and may lead to enforcement actions against individual banks for competition law breaches. All stakeholders should be prepared to receive information requests / questionnaires by the CPC in the following weeks.

PROCEDURAL DEVELOPMENTS: THE PRIVATE DAMAGES DIRECTIVE IMPLEMENTED INTO BULGARIAN LAW

On 3 January 2018, the act implementing the Private Damages Directive into Bulgarian law was published in the Official Gazette (the "**Act**"). The Private Damages Directive was adopted to facilitate efforts by victims of cartels and abuses of dominant positions to claim compensation, by harmonizing the relevant procedures throughout the EU. The Act will, therefore, cover cartels and abuse of dominance, but will not apply to damages resulting from breaches of Bulgarian specific competition provisions, such as abuse of a stronger bargaining position, or from unfair competition practices.

In line with the Private Damages Directive, Bulgarian law recognizes the binding effect on civil courts of the sanctioning decisions of the European Commission and of final sanctioning decisions of the CPC, and introduces a rebuttable presumption that cartels cause damage, both of which will facilitate damage claims.

Other key points concern the collection of evidence enabling the court to order the parties or a third party to disclose evidence which is within their control. The Act amends the applicable limitation periods for bringing actions for damages and introduces a joint and several liability of the infringers, expressly stating that the injured party has the right to demand full compensation from any of them.

Following the entry into force of the Act, companies will be more exposed to claims for antitrust damages. Any individual – i.e. any natural or legal person – may claim damages for a loss caused by an infringement of the respective provisions of the European and / or Bulgarian competition law before the competent civil courts.

CROATIA

PROCEDURAL DEVELOPMENTS: CROATIAN CONSTITUTIONAL COURT MAKES PROVING CARTEL AGREEMENTS MORE DIFFICULT

In its recent controversial decision, the Croatian Constitutional Court potentially reduced procedural powers of the Croatian Competition Agency ("**CCA**") to a significant degree, holding it to a much higher standard of proof when proving the existence of cartels.

In 2013, six of the largest personal protection and security service providers in Croatia held a private meeting to discuss several issues, including the establishment of a minimum cost of their services, setting it at HRK 32.50 (EUR 4) per hour. The meeting was featured in a magazine article. Soon after the article was published, the CCA commenced proceedings and found that the undertakings that attended the meeting had entered into a cartel agreement by fixing the costs of their services. The CCA found that several of the undertakings subsequently proceeded to quote the hourly rate of HRK 32.50 (EUR 4) in several tenders. The security companies appealed to the High Administrative Court of Croatia, which confirmed the decision of the CCA, fining the companies HRK 5.3 million (approx. EUR 710,000).

The fined undertakings filed a complaint to the Croatian Constitutional Court arguing *i.a.* that the standard of proof for establishing the existence of a cartel agreement had not been met and

therefore, their right to a fair trial had been violated. The Constitutional Court upheld the complaint. It held that a magazine article alone could not serve as primary evidence in a cartel case (*i.e.*, that circumstantial evidence must be much broader) and that the burden of proof to establish the existence of an operating cartel agreement lies with CCA.

This ruling of the Croatian Constitutional Court sheds new and unconventional light on the standard of proof that CCA has to meet in order to fine undertakings (in earlier cartel cases, even slight indications were typically sufficient for finding an infringement). The new interpretation may become a powerful tool for defence counsels in competition law matters; however, it potentially makes public enforcement and supervision of competition law compliance by the CCA harder and potentially less efficient.

LEGISLATIVE DEVELOPMENTS: ACT ON THE PROHIBITION OF UNFAIR TRADING PRACTICES IN THE FOOD SUPPLY CHAIN COMES INTO FORCE

The Croatian Parliament passed the Act on the Prohibition of Unfair Trading Practices in the Food Supply Chain ("**Act**") on 7 December 2017. The "implementation period" for all stakeholders concerned to make their contracts and sales compliant with the Act ended on 31 March 2018.

The Act is in fact a competition law statute, both in the procedural part (the responsible authority for its implementation is the CCA) and the substantive part (it sets out new rules on rebates, payment policies and similar). The Act seeks to regulate trading practices in the food supply chain from top down by protecting the "suppliers" within the meaning of the Act.

The Act applies to buyers, food processors or merchants within the meaning of the Act, that hold a "significant bargaining power" and engage in one or more of almost 40 unfair trading practices. An undertaking is considered to have "significant bargaining power", if the group's consolidated turnover in Croatia in the preceding business year exceeded HRK 50 million for buyers/food processors or HRK 100 million for merchants.

The Act penalises four groups of infringements, with fines for material breach ranging up to HRK 5 million and up to HRK 100,000 for procedural infringements.

CZECH REPUBLIC

CARTELS AND HORIZONTAL AGREEMENTS: CARTEL FINES GREATLY REDUCED DUE TO LENIENCY AND SETTLEMENT

Ascendum Stavební stroje Czech s.r.o. and Josef Červenka – HYDRAULIKSERVIS coordinated their participation and pitches in tenders between 2012 and 2015 for the distribution of Volvo construction machinery. By doing so, they participated in market sharing and customer sharing agreements.

Both parties applied for leniency and at the same time used a settlement procedure. Josef Červenka – HYDRAULIKSERVIS received full immunity; the fine for Ascendum was reduced by approximately 50% from the original CZK 14,056,000 to the final CZK 6,747,000.

CARTELS AND HORIZONTAL AGREEMENTS: CZECH COURTS DEFINITIVELY UPHELD FINES FOR THE BAKERY CARTEL AND CONFIRMED THAT LOCAL DAWN RAIDS WERE CONDUCTED LEGALLY

The Czech Supreme Administrative Court rejected an appeal by bakery companies Delta Pekarny, Penam and OK Rest against a cartel decision that imposed a fine of CZK 52.8 million for their participation in a cartel with the purpose of increasing prices, more than 15 years ago. The judgment also confirmed the legality of dawn raids that were subject to a human rights challenge.

This is one of the most complex competition cases in the Czech Republic, due to several court decisions, including the decision of European Court of Human Rights ("**ECHR**"). The case itself was closed in 2012, but had to be rolled out again due to a judgment by the ECHR. The ECHR stated that the Czech Republic has to ensure that undertakings subject to unannounced inspections have access to an effective judicial review of the legality of such investigations.

This Supreme Administrative Court confirmed that the inspections were legal, which should put an end to any disputes regarding this old case.

STATE AID: EUROPEAN COMMISSION APPROVED TWO MEASURES IN FAVOUR OF THE CZECH POST

In February, the European Commission has positively decided in two cases regarding state support for the Czech Post. Firstly, the European Commission approved the support for the financing of the operation of the information system for data boxes in the years 2018 - 2022. Subsequently, the European Commission has also expressed its agreement with the state aid aimed to finance the so-called "general postal services" in the years 2013-2017.

In both cases, according to the European Commission, the particular state support is compatible with the EU internal market and as such allowed. The State aid involved totaled CZK 4.6 billion.

HUNGARY

LEGISLATIVE DEVELOPMENTS: STRICTER RULES ON LIMITATION IN COMPETITION LAW INTRODUCED IN HUNGARY

In accordance with general principles of administrative procedural laws, the Hungarian Competition Authority ('**HCA**') is time barred from initiating an investigation against any undertaking after the lapse of the five-year limitation period since the undertaking has ceased the infringement.

The HCA launched cartel proceedings against a group of undertakings in relation to which the general five-year limitation period had not lapsed, but decided, later on, to extend its investigation to another undertaking in relation to which the five-year limitation period had, in fact, expired. The investigation resulted in a finding of infringement and all the investigated undertakings were fined.

The undertakings challenged the HCA decision on different grounds, including, for the latter undertaking, the lapsing of the limitation period. The Supreme Court of Hungary eventually confirmed the decisions of the lower courts and found that the Hungarian Competition Act required that the limitation period be calculated separately for each of the undertakings brought

under investigation. Consequently, the HCA should not have been allowed to extend its case against and impose fines on the said undertaking.

In response to this court decision, the Hungarian Competition Act was amended upon the initiative of the HCA, and now states that the limitation period does not continue to run to the benefit of undertakings brought under the scope of the investigation at a later stage. The new rule regarding the limitation period in cartel cases in Hungary comes closer to the European approach, whereby the launching of an investigation against any of the cartelists stops the running of the limitation period for all the undertakings investigated; irrespective of when they were brought under the scope of the investigation.

POLAND

MERGER CONTROL: EUROPEAN COMMISSION CONDITIONALLY APPROVES DISCOVERY'S ACQUISITION OF SCRIPPS; REJECTS REFERRAL REQUEST BY POLISH NCA

The European Commission approved the acquisition of Scripps Network Interactive by Discovery Communications, subject to certain behavioural commitments undertaken in relation to Poland.

The two US-based media companies both provide basic pay-tv channels to TV distributors in the EEA, with Scripps being particularly focused on the UK market, where it works together with BBC to operate UKTV, and the Polish market, where it acquired TVN, a local company, in 2015.

Even though the Commission found that there is limited overlap in the companies' activities in the UK, it was concerned that Discovery's bargaining power towards TV distributors in Poland would increase because of the indirect acquisition of TVN. In particular, the Commission was concerned that, following the transaction, Discovery could be in a position to increase licensing fees as regards its entire portfolio; in particular because the Polish news channel TVN24 (part of the TVN group) was identified as crucial to retail TV offerings.

As a consequence of the above, Discovery offered and the Commission accepted certain behavioural commitments. More precisely, Discovery must, for a period of seven years, offer external distributors and platforms the possibility to distribute the news channels TVN24 and TVN24 BiS, without imposing any exclusivity or bundling conditions.

It is worth noting that the Commission rejected a request from Poland to refer the merger to the Polish Competition Authority, as it found that it was better placed to handle the merger, due to its vast experience in assessing similar transactions in the mass media sector, as well as the need to maintain consistency across Europe in this respect.

Following the clearance by the US and European authorities, the merger was completed on 6 March 2018.

MERGER CONTROL: POTENTIAL MERGER OF STATE-OWNED COMPANIES IN REFINERIES MARKET

The Polish government is pushing to combine the country's two biggest state controlled refiners, PKN Orlen and Lotos Group, in a bid to create a Polish group capable of competing in international markets and, possibly, capable of taking part in Poland's plans to build the first nuclear power plant.

Both companies are amongst the top 10 on the Polish market insofar as turnover is concerned, with PKN Orlen being the largest company on the Polish market for years, whereas Lotos Group has always been among the top 5-7 largest companies in Poland.

According to a letter of intent between PKN Orlen and the Polish government signed in late February, PKN Orlen is to take over a 53% controlling stake in the Lotos Group. The high turnover figures involved trigger the Commission's jurisdiction. The President of the Polish Competition Authority has already confirmed that, even though the Polish NCA is ready to assess the deal, it will be up to the Commission to decide whether to evaluate the transaction on its own or to refer the merger.

Taking into account the recent practice of the Commission, as well as the fact that the deal seems to be driven by political rather than economic reasons, and in view of the recent tensions between the Commission and Poland over the rule of law in Poland, this is a case which bears watching closely.

ROMANIA

POLICY: THE ROMANIAN COMPETITION COUNCIL IMPLEMENTS A BIG-DATA SOFTWARE SYSTEM AIMED AT IDENTIFYING BID RIGGING CASES

Bid rigging has long been a priority of the Romanian Competition Council ("**RCC**"), and a few years back, it set up a separate department looking to deal in particular with this type of infringement. In addition, in 2017, the RCC issued two guides on anticompetitive conduct in relation to (public) tenders – one Guide regarding participation in a public tender in a consortium and one Guide aimed at identifying anticompetitive procedures during (public) tenders.

However, recently the RCC aims to refine its approach to benefit from modern technology. To this end, the RCC will acquire a Big Data IT system, to be used to identify likely bid rigging cases. The acquisition of the IT system will be financed with EUR 10.7 million of non-reimbursable EU funds. The project will be developed in partnership with the Special Telecommunications Service STS, which will provide the know-how and logistic support.

Once implemented, the system will allow the RCC to analyse high data volumes significantly quicker.

CARTELS AND HORIZONTAL AGREEMENTS: THE RCC ISSUES A SANCTIONING DECISION AGAINST TWO LOCAL NOTARIES PUBLIC BODIES AND THEIR MEMBERS

The Romanian Competition Council recently sanctioned two local notary public bodies and their members with fines amounting to approximately EUR 600,000 for price fixing agreements.

The activity of notaries public is subject to a number of regulations, including a Minister of Justice order setting out minimum fees to be charged. Even so, the notary ruling bodies in two counties, Suceava and Botosani, decided to establish their own minimal fees, which were higher than the ones imposed by order of the Minister of Justice, and to disseminate them to members during meetings, by email and by posting them on their websites. Consequently, the vast majority of notaries in the two counties followed the minimum fees thus established. The RCC found that this amounts to a price-fixing agreement.

In December 2017, the RCC finalised another investigation into possible anti-competitive practices of the National Union of Notaries Public in Romania (UNNPR) by accepting certain behavioural commitments, whereby UNNPR undertook, amongst other things, to refrain from setting any minimal fees except the ones provided for by law.

CARTELS AND HORIZONTAL AGREEMENTS: THE RCC STARTED AN INVESTIGATION OVER SUSPECTED BID-RIGGING IN PUBLIC TENDERS

The RCC has recently started an investigation into potential bid-rigging by two public tenders organised by Transelectrica, the national power grid company, in connection to the upgrading and refurbishment of the power grid. According to the RCC representatives, during the two tenders held by Transelectrica, the winning participant after the electronic bidding stage intentionally either failed to answer or provided incomplete answers to requests of the contracting authority, and was thus disqualified. The contract was consequently granted to the second ranked bidder, for a significantly higher price.

The investigation was initiated following information provided by Transelectrica, which is not under investigation, and targets four companies, ELM Electromontaj Cluj, Energobit, Energotech and Smart, a subsidiary of Transelectrica.

SERBIA

MERGER CONTROL: CONDITIONAL CLEARANCE IN THE YEAST MARKETS

In the merger control sector, the Serbian Competition Commission ("**SCC**") conditionally cleared Lesaffre's acquisition of sole control over Alltech's yeast extract facility in Serbia. The concentration raised competitive concerns as it could potentially lead to a dominant market position on the national markets for the production and sale of bakery yeast and yeast extracts. The clearance decision was made conditional upon several reporting commitments and behavioral remedies. These commitments and remedies are aimed at monitoring the production and utilization rate of the target's capacity in the three years following the clearance. Furthermore, if the target decides to terminate the production contract with its sole remaining customer, it must promptly report the reasoning behind such termination to the SCC. This is the first conditional clearance issued by the SCC since the beginning of last year, whereas the overall number of such clearances issued since the SCC was first set up in 2006 is less than 20.

CARTELS AND HORIZONTAL AGREEMENTS: INVESTIGATION INTO TENDER FOR MAINTENANCE SERVICES OF ROLLING STOCK EXPOSED BID RIGGING AGREEMENTS

Within its long standing efforts to minimize bid rigging behavior, the SCC fined four local companies active in the field of maintenance and repair of rolling stock. Following several market inquiries and dawn raids of the companies involved, the investigation revealed that the respective companies pre-agreed on minimal prices to offer in the tender for maintenance of Arbel type freight cars announced by one of the major local thermal power plant operators. The SCC considered that the parties cooperated throughout the entire investigation which it acknowledged as a mitigating circumstance when setting the fines. The fines, which were nonetheless imposed, varied between approx. EUR 12,500 and EUR 42,200.

POLICY: RESULTS OF 4 SECTORAL ANALYSES PUBLISHED

The SCC published the results of four sectoral analyses it conducted in the following national markets:

- Sports Footwear, Clothing and Equipment (2014-2016): The SCC analysed each product market separately, and found that all of them are highly concentrated. The SCC indicated that the market for sports equipment may in particular be the source of competition law concerns. In turn, no barriers to entry were identified.
- Retail of Oil Derivatives (2016): The focus of the SCC's sectoral analysis for 2016 was on relations between competitors in the retail market for oil derivatives. The SCC also assessed the level of compliance with its recommendations from previous reports relating to this sector, and emphasized the importance of establishing precise statistical reports for this sector. Consequently, the SCC announced that it would continue monitoring this market and produce a separate report for 2017.
- Software and IT Equipment (2014-2016): The SCC focused on contract awards in public procurement procedures. The SCC singled out the most important players in these markets and expressed concerns that both software and hardware procurement may provide grounds for bid rigging practices. The SCC announced that it will, in cooperation with the Serbian public procurement authority and other competent institutions, pay particular attention to raising awareness of competition rules in these markets in the forthcoming period.
- Purchase and Export of Raspberry (2015-2017): This sectoral analysis did not end up finding an infringement; however, it identified four categories of inherent problems confronted by local raspberry farmers (e.g. lack of quality and sanitary standards and controls, vague contracting terms in standard business cooperation agreements with suppliers of fertilizers and pesticides, unified purchase prices irrespective of production costs and quantities ordered). The SCC concluded that the problems identified require a comprehensive approach on the part of all relevant institutions to allow the continued development of this very important industry (having in mind that raspberries accounted for 42% of all Serbian fruit exports in 2016). The SCC also emphasized the need for improving the quality of available statistic data, particularly in regard to plantation areas and production capacities.

LEGISLATIVE DEVELOPMENTS: PROPOSAL OF A NEW LAW ON PROTECTION OF COMPETITION

The working group set up within the Serbian Government tasked with the preparation of a new Competition Protection Law has circulated the first proposal of the new law for comments by specialized local associations that include Foreign Investors Counsel (FIC) and AmCham Serbia. On the one hand, the proposal attempts to consolidate into existing rules SCC's practice of the past 12 years and, on the other, to reconcile the procedural aspects of SCC's work with recently enacted Law on Administrative Proceedings.

In merger control, new proposals include (i) an increase of the current jurisdictional thresholds (something that has long been lobbied for by industry representatives) as well as (ii) the introduction of a market share based threshold (notification obligation if the concentration leads to a market share of more than 40% in a product market). The existing exceptions to the notion of a "concentration" shall be amended in a way that, for example, the acquisitions by investment funds can no longer benefit from the exception. The deadlines for filing the notification and deciding the

case shall prolonged and the procedure for requesting the implementation of a concentration despite the suspension obligation (e.g. in public take overs and/or privatizations) shall be elaborated. Finally, the reporting obligation may be introduced in case the parties fail to meet the closing deadlines stated in the notification or where the transaction is abandoned after it is cleared.

SLOVAK REPUBLIC

ABUSE OF DOMINANT POSITION: BRATISLAVA AIRPORT FINED FOR ABUSING ITS DOMINANT MARKET POSITION

On 18 January 2018, the Antimonopoly Office of the Slovak Republic ("**NCA**") imposed a fine amounting to EUR 127,000 on the operator of M.R. Štefánik airport in Bratislava ("**Bratislava Airport**"), on the grounds of abuse of its dominant position.

In July 2016, Bratislava Airport introduced a fee amounting to EUR 49 ex. VAT for "VIP services" provided at the general aviation terminal. This fee had to be paid by every departing passenger passing through. It was not connected to the real provision of VIP services, but was payable upon entrance to the general aviation terminal, while the entrance to this terminal is already subject to a different fee. The charge in question has been introduced during Slovakia's presidency of the Council of the EU and included unlimited stay at the terminal, full assistance with the check-in and check-out processes, refreshments, assistance with luggage, free parking and free wifi connections. The above mentioned resulted in a situation, that even clients who did not intend to use such services, were charged as if they did.

Bratislava Airport has fully accepted the opinion of NCA, which led to a 30% reduction of the fine. Passing through the general aviation terminal is now free of charge.

POLICY: INSPECTION IN THE CONSTRUCTION INDUSTRY

The NCA has confirmed unannounced inspections at the premises of several undertakings operating in the construction industry in the course of February 2018. The inspections were carried out on the basis of a reasonable suspicion that these undertakings may have coordinated their participation in and submission of bids in public tenders, in particular in the years 2014 and 2015.

Bid rigging is considered as one of the most serious forms of competition law infringement. If proven guilty, the undertakings at hand may face fines of up to 10% of their respective groups' turnover in the preceding accounting period.

SLOVENIA

STATE AID: COMMISSION TO INVESTIGATE IN-DEPTH THE NEW COMMITMENTS PROPOSED BY SLOVENIA FOR NOVA LJUBLJANSKA BANKA D.D.

In December 2013, the European Commission ("**Commission**") approved the restructuring plan and State aid of up to EUR 2.32 billion to Nova Ljubljanska Banka d.d. ("**NLB**") to ensure its long

term viability on the basis of the commitments offered by the Slovenian authorities. One of the key commitments was a sale of its 75%-1 share in NLB by 2017. In May 2017, after Slovenia produced evidence that it will not be able to divest the respective share in NLB one time, the Commission approved the sale in two tranches. After putting the divestment process on hold in June 2017 and failing to nominate the trustee to comply with the alternative commitment of divesting NLB's Balkan subsidiaries, Slovenia failed to comply with the commitments and unlawfully implemented the State aid granted to NLB in 2013.

In December 2017, the Slovenian authorities formally notified the Commission of a new commitment package to replace the original commitments which foresees a significant extension of the sales deadline and the appointment of an independent trustee that would exercise the State's shareholder rights until the sale has been completed. However, due to its doubts the Commission has opened in-depth investigation to assess whether the newly proposed commitments are equivalent to those originally provided by Slovenia, in particular whether the new commitments ensure viability of NLB and address potential additional competition distortions to the same extent. The Commission particularly has doubts whether the appointment of an independent trustee would be as effective as change in ownership, which would allow the bank to operate solely for commercial objectives, especially since the corporate governance issues were a main factor leading to NLB's past financial difficulties and the need for State aid.

ABUSE OF DOMINANT POSITION: THE SLOVENIAN ADMINISTRATIVE COURT UPHOLDS THE FINDINGS OF THE COMPETITION AUTHORITY

In January 2018, the Slovenian administrative court adopted a decision with which it upheld the findings of the competition authority that the major Slovenian mobile network operator Telekom Slovenije d.d. ("**Telekom**") abused its dominant position in two wholesale telecommunications markets for the access to its network to alternative telecommunication service providers necessary for the provision of broadband services to final users on fixed locations.

In its decision from February 2015, the competition authority established that Telekom abused its dominant position in the period from 2005 until 2014 on the wholesale market of broadband access with bit current by (i) refusing access of alternative operators to DSLAM, (ii) conditioning their use with lease of telephone connection by final users, even if this was not technically necessary. In addition, Telekom in the shorter periods between 2005 until 2014 abused its dominant position on the wholesale market for the access to physical network infrastructure by (i) limiting the access to alternative operators to refuse their queries on colocations; (ii) not allowing the alternative users to select types of collocations; (iii) giving alternative operators insufficient information on networks; and (iv) other practices.

The administrative court upheld all of the findings of the competition authority. It rejected only one point of the operative part referring to the abuse of dominant position by conditioning the access to network with a lease of telephone connection by final users, even if this was not technically necessary and returned this matter back to the competition agency for re-assessment. Therefore, the decision of the competition authority became final in its major part. Further developments in this respect, especially possible imposition of fine, are yet to be seen.

MERGER CONTROL: SLOVENIA BROADBAND PROPOSES NEW CORRECTIVE MEASURE

Currently a hot case in Slovenia concerns the telecommunications sector and the concentration between Slovenia Broadband (Luxembourg), Proplus (Slovenia) and Nova TV (Croatia). Slovenia

Broadband is part of the United Group originating back to 2007, when it was founded through the combination of SBB and Telemach Slovenia, providing all telecommunication services in one household and largest alternative pay TV platform in the region of former Yugoslavia. The content and advertising sales business is represented by United Media providing top pay TV channels in the region (sports, news, entertainment, movies, kids). Proplus is an umbrella company comprising top viewed TV channels in Slovenia, namely Pop TV, Kanal A, Kino and Brio.

As the Slovenian competition authority has concerns that the concentration could have a negative impact on the wholesale and retail markets of supply of TV channels and advertising markets, Slovenia Broadband proposed remedies, which comprise of (i) maintaining separate undertakings for five years, separate management and editorial policy for all Pro Plus channels; (ii) divestiture of certain business (kids TV channels); (iii) remedies relating to advertising policies; and (iv) no changes in the access to Proplus TV channels (no changes to licensing agreements).

The competition authority is currently carrying out a market test of the proposed remedies.

UKRAINE

POLICY: THE ANTIMONOPOLY COMMITTEE OF UKRAINE ISSUES GUIDELINES ON THE ASSESSMENT OF NON-HORIZONTAL MERGERS

In what is another significant step towards the alignment of Ukrainian competition law with the European approach, the Antimonopoly Committee of Ukraine ("**AMCU**") has published Guidelines on the Assessment of Non-Horizontal Mergers ("**Guidelines**") on 22 March 2018.

Essentially, the Guidelines provide the relevant criteria used by AMCU in its assessment of vertical and conglomerate mergers. Upon establishing the relevant product and geographical markets, the AMCU shall proceed to evaluate the impact of the potential merger on competition in these markets. This impact may be determined by analysis of the following criteria:

(i) market shares of merging undertakings and concentration levels on relevant markets;
(ii) potential anticompetitive effects on relevant markets,
(iii) possible balancing effects of the buyer's power;
(iv) possible balancing effects of the new undertaking's entry on the market; and
(v) the risk of bankruptcy.

The above criteria should be applied on a case-by-case basis and the Guidelines establish specific guidance on how the cited criteria should apply in case of a simplified merger notification. The Guidelines also provide that if as a result of an analysis of criteria (i) and (ii) above there is a risk of market monopolization or significant restriction of competition, then criteria (iii) and (v) shall be additionally applied by the AMCU.

The market power of the merging entities is also considered, with AMCU being unlikely to identify concerns where the post-merger market share is below 30% and the HHI is below 2000.

However, the AMCU shall consider whether any of the following additional factors, which would increase the risk of anticompetitive effects on the market, are in place:

(i) significant cross-shareholdings or cross-control relations among the market participants;
(ii) one of the entities is likely to disrupt the coordinated conduct among the entities;
(iii) indications of past or ongoing coordination of actions among the merging entities and competitors; or
(iv) one of the entities is likely to broaden its activity in the future (e.g. due to the implementation of innovation technologies). At the same time, even if the post-merger market share exceeds 30% and the HHI is above 2000, the AMCU should still analyse whether a particular merger may affect market competition.

The Guidelines recognize that the anticompetitive effects of non-horizontal mergers may either be coordinated in nature, or non-coordinated (with the latter leading to concerns such as input or customer foreclosure for vertical mergers and foreclosure in related markets for conglomerate mergers). The foreclosure likelihood shall be assessed on a case-by-case basis, taking into account:

(i) the ability to foreclose;
(ii) the incentive to foreclose; and
(iii) the impact on competition.

Notably, the Guidelines do not include non-coordinated theories of harm other than foreclosure. While the Guidelines are modelled after the Guidelines on the assessment of non-horizontal mergers issued by the European Commission in 2008, they do not precisely mirror the latter, which may lead to different assessment standards.

ABOUT WOLF THEISS

Wolf Theiss is one of the leading law firms in Central, Eastern and Southeastern 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.

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