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Competition Legal Quarters

Q2 2022

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Dentons' selection of news in Czech, Slovak and EU competition law that happened in Q2 of 2022. Enjoy the summer holiday read!

Top news in brief:

- The European Commission's new block exemption on vertical restraints (distribution, franchise, agency agreements) came into effect on June 1, 2022. The accompanying guidelines clarify a plethora of issues related to dual distribution, e-commerce and online intermediaries. Firms have until May 31, 2023 to adjust existing agreements.
- The EU General Court upheld the new practice of merger control of below-threshold transactions. This poses new challenges to M&As, especially in innovative industries.
- The Czech Office for the Protection of Competition (ÚOHS), continuing its streak of judicial victories, issued yet another fine for gun-jumping and may be setting a trend towards resolving antitrust cases outside formal investigations, if firms can remedy the problem quickly.
- The Slovak Antimonopoly Office (PMÚ) published an analytical report on its activities over the past decade, considered several difficult mergers and imposed fines on firms that failed to provide correct information.

How to use: This newsletter also includes references to articles or client briefs where Dentons' lawyers took a deep dive into the selected topics. Links are also provided to primary legal source or press releases.

European Union

Distribution law (r)evolution – new VBER comes into effect

After more than 10 years the European Commission formally adopted a new Vertical Block Exemption Regulation (VBER) and accompanying guidelines. This impacts how suppliers run their distribution, franchise as well as agency relationships.

The new rules are intended to bring EU law on vertical agreements more up to date to reflect developments in e-commerce and experience with various distribution systems from the past decade. The new instrument expands on multiple topics including dual distribution—a setup where the supplier competes with its distributors (where more emphasis is put on information exchange in such cases)—the possibilities of dual pricing (online vs. offline), the use of parity clauses by online intermediaries and much more.

The new block exemption regulation is effective as of June 1, 2022, with a grace period till May 31, 2023 for firms to adjust their existing distribution agreements.

To help navigate the new regulation, Dentons launched its online Antitrust Verticals Tool, which can be used to compare the old and the new rules and legal limits on various distribution systems and franchise and agency agreements. The introductory video is available here.

The text of the Vertical Block Exemption Regulation is here and the Commission's Vertical Guidelines are here.

Potential fine for Czech-Austrian railways cartel

The European Commission suspects České dráhy (ČD) and ÖBB, the Czech and Austrian national railway transport incumbents, respectively, of a collective boycott of the market for used passenger railway wagons.

In its statement of objections sent to the two companies on June 10, 2022, the Commission adopted a preliminary view that between 2012 and 2016 ČD and ÖBB concluded secret agreements to hinder RegioJet, a competitor, from access to ÖBB's used wagons for long-distance passenger transport. The Commission thinks this may have shielded ČD's market position and impeded RegioJet's expansion, given the fact that RegioJet relies heavily on used wagons to be able to compete with the incumbents.

The Commission seems particularly worried because the efficacy of rail transport is one of the environmental pillars of the EU Green Deal policy.

The Commission's press release is available here.

Digital Markets Act across the line, but practical questions remain

While the DMA regulation has been finally adopted as of July 18, 2022, only future practice will shed more light on some pertinent questions about the DMA's application and impact. The EU courts may have inadvertently clarified the issue of double jeopardy under DMA and competition law, though.

In the last CLQ (here) we reported that the EU legislature has reached a high-level agreement on the DMA proposal. The final text got adopted formally by the European Parliament and the Council in July, thus slipping into the purview of the Czech Republic's presidency of the Council.

The DMA seeks to regulate so-called gatekeeper firms, typically large tech platforms that have been found or are suspected to be able to distort competition. The EU legislator considered that traditional competition law ex-post tools were not sufficient to prevent these failures.

The DMA remains controversial, however, with a plethora of open questions about how it will be applied in practice. In addition, estimates of public enforcement costs as well as costs for ensuring compliance by tech companies seem to exceed initial expectations. In recent news, the Commission asked for a threefold increase to the initially requested budget bump and will reportedly seek to hire at least 150 extra staff to bring the DMA to life and could even hire external specialist firms.

In an article we wrote for Dentons TMT Bites we argued that at least the threat of double jeopardy under the DMA and competition law for the same offence could be avoided, thanks to recent case law of the European Court of Justice. Be tempted to read the full article here. The most updated DMA text is available here.

EU General Court annuls €1 billion fine for Qualcomm

In another major blow to the European Commission, the EU General Court (GC) annulled the Commission's 2018 decision fining Qualcomm for abuse of dominant position on the worldwide chipset market.

In 2018 the Commission imposed a fine of almost €1 billion on chipmaker Qualcomm for providing incentive payments to Apple. The Commission found that these payments incentivized Apple to source its chipsets requirements for iPhones and iPads exclusively from Qualcomm to the exclusion of competing chipset suppliers.

The GC identified multiple procedural and substantive flaws in the Commission's approach. It failed, for example, to record various meetings and interviews it held with companies and individuals during its investigation, thereby depriving Qualcomm of an effective right of defense. As regards substance, the GC observed that Apple in fact had had no real technical alternative to Qualcomm's chipsets, so the whole argument about foreclosing competition was rather moot. In any event, the GC found that the Commission has failed to consider all relevant circumstances in its assessment of possible anticompetitive effects of Qualcomm's conduct.

While the judgment is not in itself groundbreaking, it showcases the EU court's stricter scrutiny of the Commission's decisions paved by the Court of Justice's judgment in *Intel* and the striking down of the €1 billion fine for Intel's exclusivity rebates by the GC earlier this year (see our past CLQ here).

The GC's judgment of June 15, 2022 in case T-235/18—*Qualcomm v Commission* may be found here.

EU General Court upholds acceptance of below-threshold merger referral to European Commission (*Illumina/Grail* case)

By a judgment of July 13, 2022, the EU General Court (GC) dismissed Illumina's appeal against the Commission's decision, which accepted the first-ever referral of case under Article 22 of the Merger Control Regulation. The underlying acquisition did not meet any EU or national thresholds for triggering mandatory merger control clearance.

Illumina, an American genomic sequencing company, proposed to acquire Grail, another American biotech company in September 2020. The transaction was not notified for prior merger control screening in any EU country, as it did not meet the requisite thresholds in national or EU merger-control legislation. But several EU member states resorted to trigger Article 22 of the EU Merger Control Regulation and referred the case to the European Commission.

Under that provision member states can request the Commission to review concentrations that don't meet EU notification thresholds (so-called Dutch clause). The clause had been dormant until March 2021, when the Commission altered its longstanding policy not to accept such referrals by issuing a new Article 22 guidance / policy (available here). The Commission announced that it will now regularly accept referrals of transactions below turnover threshold that affect trade between member states and threaten to significantly affect competition. The guidance further explained that the Commission especially wants to review acquisitions of companies whose turnover does not (yet) reflect its actual or future competitive potential, such as start-ups, innovators, or firms with access to important assets or in control of key inputs and components.

Illumina's wish to acquire Grail's highly innovative sequencing business for development of cancer tests clearly met those criteria. The GC's dismissal of Illumina's judicial challenge now means that the court agrees with the overall change of the Commission's policy to accept these types of referrals and that the ensuing merger control proceedings do not amount to a breach of Illumina's and Grail's legitimate expectations.

We anticipate repercussions in the way risk is negotiated and gauged in M&A deals as regards regulatory approvals, particularly in highly innovative industries.

You can find Dentons' deep dive alert on this seminal topic is here. The GC's judgment of July 13, 2022 in case T-227/21 *Illumina v Commission* is available here.

European Commission investigates Vifor Pharma for disparaging practices, other companies also under scrutiny for misleading information about pharmaceutical products

On June 20, 2022 the Commission opened an investigation to assess whether Vifor Pharma illegally disparaged products of Pharmacosmos, its closest competitor on the market for intravenous iron treatment.

The Commission has information that Vifor Pharma conducted a misleading communication campaign, which was mainly targeted at healthcare professionals, about the safety of its competitor's treatment. Should these concerns be proven, Vifor Pharma can expect fines for an abuse of its dominant position up to 10 percent of its annual turnover. The Commission's press release is available here.

The proceedings are being conducted against the backdrop of another case of anticompetitive disparagement, by Roche and Novartis, that has already twice been considered by the Court of Justice of the EU. In that case, investigated by the Italian competition authority, Roche and Novartis colluded to discourage off-label use of Roche's products in favor of a more expensive competing product marketed by Novartis, by falsely claiming that the off-label use has safety implications. The most recent judgment of the CJEU in case C-261/21 *Hoffman-La Roche and Novartis* is available here.

Commission closes investigation into Czech mobile network sharing agreement by accepting commitments

After more than seven years of pending investigation, the European Commission closed the case of alleged anticompetitive network sharing between O2, T-Mobile and CETIN by adopting a commitments decision on July 11, 2022.

Although network sharing is a widespread practice among mobile network operators—as it can reduce costs and lead to quality improvements—in this case the Commission thought that the agreement might have restricted competition. The Commission was concerned that the agreements may have hindered the networks' technological developments in some areas, reduced operators' incentives to invest, and led to exchanges of sensitive information that may have reduced parties' incentives to compete.

O2, T-Mobile and CETIN proposed a set of commitments to dispel these concerns. They include the commitments to modernize mobile network equipment to facilitate the rollout of 5G technology, amend financial conditions in their agreements to remove investment disincentives and to improve contracts and implement measures to keep the exchange of information at the necessary minimum. Operators also undertook not to extend the existing scope of network sharing arrangement to Prague and Brno, where the operators are to develop their networks independently in the next seven to 10 years.

The Commission decision makes these commitments binding on the parties and will be monitored by an independent trustee going forward. You can find the Commission's press release is here; the final decision has not yet been made public.

More EU news: Phase II merger control review in wood paneling industry; dawn raids in fashion industry

The European Commission has pushed the proposed acquisition of Pfleiderer Polska by Kronospan into a Phase II in-depth merger control review. The Commission is concerned that the merger could reduce competition for supply of various types of wood panels in Poland and neighboring regions (press release here).

On May 17, 2022 the Commission, in cooperation with national competition authorities, carried out a series of unannounced inspections in companies of the fashion industry across several member states, on suspicion of a cartel (press release here).

Czech Republic

ÚHOS issues Annual Report FY 2021

The Office for Protection of Competition (ÚOHS), the national competition authority, has published its annual report for 2021 (available here).

ÚOHS has continued its focus on investigating bid rigging (procurement cartels), for which it levied fines in an aggregated amount of over CZK 160 million, and for the first time imposed a prohibition to participate in public tenders as a penalty. ÚOHS also underscored its success rate at winning court cases, which in 2021 concerned important questions of the authority's statutory powers. (Two of those cases were discussed in our last CLQ available here).

ÚOHS continues judicial winning streak

The Office for Protection of Competition (ÚOHS) scored another two court victories concerning cases of supervision of conduct by public authorities and abuse of dominant position.

ÚOHS thus follows up on the good results in the past year when it did not lose a single court case. This time, ÚOHS defended its earlier decisions in (i) the application of Section 19a of the Act on Competition (anticompetitive conduct by public authorities) and (ii) abuse of dominant position.

(i) On April 5, 2022, the Czech Supreme Administrative court dismissed an appeal by the city of Děčín against ÚOHS's decision from 2017 by which it imposed on the city a fine of CZK 499,000 for breach of Section 19a of the competition act. The city infringed competition rules by adopting a local regulation to allocate places where gambling houses can be run legally and to limit the number of gambling machines per place, without adhering to any objective, non-discriminatory criteria publicized sufficiently in advance.

(ii) On March 4, 2022, the Regional Court in Brno dismissed the appeal by České dráhy (ČD), the incumbent railway transport company, against a decision by which ÚOHS imposed a fine of CZK 274 million. ČD had been found to have abused its dominant position in connection with contracts for arranging transport services on the Pilsen-Most and Pardubice-Liberec routes by proposing an offer to the Ministry of Transport with a disproportionally low expected level of provable losses. This seemingly advantageous offer led to ČD's selection as a contractor on those routes for 2005–2014, to the detriment of competitors Viamont and Conex.

Details on each case are provided in ÚOHS's press release here (*in Czech only*).

Gun-jumping remains in ÚOHS's focus

On May 17, 2022 the Office for Protection of Competition (ÚOHS) imposed a fine of CZK 143,000 on Company New a.s., a member of the Natland Group, for closing a transaction before formally seeking ÚOHS's prior clearance.

In April 2020, Company New acquired 100 percent of the shares and voting rights in ZOOT, a.s., an online fashion retailer, and went on to exercise control in ZOOT until May 2021, by making changes in ZOOT's board of directors

and supervisory board. It wasn't until April 30, 2021 that Company New submitted a formal notification to ÚOHS. While the acquisition was eventually cleared as unproblematic as regards competition, ÚOHS still imposed a fine for a clear-cut breach of the stand-still obligation. The authority reduced the fine considerably, though, given the fact that the acquirer volunteered information about the transaction, admitted the infringement in a settlement procedure (which reduces the penalty by 20 percent) and ÚOHS also applied the principle of absorption because the Natland group had recently been fined for gun-jumping in another unrelated case. ÚOHS's press release is here.

ÚOHS accepts commitments from Hruška to ensure retail chain's compliance with Significant Market Power Act

The Office for Protection of Competition (ÚOHS) investigated Hruška, a chain of grocery stores, for imposing on its suppliers an obligation to accept returns of food before the end of its expiration period or to apply reverse discounts on the price of supplies shortly before the period was about to expire. In ÚOHS's opinion, such practice shifted commercial risks and losses to the suppliers and could be considered as abusing the chain's significant purchasing power.

To avoid an infringement decision and fines, Hruška committed to reimburse 74 different suppliers payments of over of CZK 39 million made under the problematic agreements. The grocery chain also committed to remove problematic clauses from its agreements and report to ÚOHS a range of internal measures to ensure that clauses in breach of the Significant Market Power Act are not included in future supply agreements. You can find ÚOHS's press release here.

ÚOHS uses informal "advocacy" approach instead of launching formal investigation in two cases, hopefully indicating a trend

ÚOHS's approach towards an alleged abuse of dominance by Cinema City and potentially illegal price announcements by the Czech Meat Processing Association indicates that it may be increasingly open to resolving antitrust cases outside of a formal investigation procedure if a quick fix can be made. That would be a welcome trend.

Cinema City, the largest multiplex operator in the Czech Republic, had been claiming a €500 fee from film producers for each cinema that screened those producers' movies, justifying this by costs incurred to improve the cinemas' digital equipment. ÚOHS considered this a potential abuse of dominant position because Cinema City could not satisfactorily explain why only some producers were subject to the levy and not others. Instead of launching a formal investigation, however, ÚOHS informed Cinema City that if the bad practice can be quickly and effectively removed, it will consider the file closed. You can find ÚOHS's press release here (*in Czech only*).

The Czech Meat Processing Association had been issuing announcements that commented on future price increase trends of meat products. A ÚHOS probe found this potentially amounting to an illegal agreement between the Association's members and called on the Association to cease such announcements going forward and adopt adequate measures. Specifically, ÚHOS asked the Association to advise its members that price trend announcements may only be done independently by members on their own behalf, and not on behalf of the Association, and to duly discuss the need for compliance at future meetings. ÚHOS considered the Association's guarantees as sufficient and refrained from opening a formal administrative procedure You can find ÚHOS's press release here (*in Czech only*).

From ÚHOS's other decisional practice

On appeal, ÚHOS's chairman confirmed a summary CZK 80 million fine for IT cartel participants. Seven firms coordinated and allocated bids for an e-Government services tender in the Olomouc region in 2012. Their strategy was to submit one offer under which all the other firms served as subcontractors, and then submit one "cover" offer to create an illusion of competition. You can find ÚHOS's press release here (*in Czech only*).

The Association of Language Schools received a fine of CZK 9 million for resale price maintenance practice (RPM). The Association had instructed its approximately 40 member schools to set a minimum price for class/hour for the purpose of tender calls for offers of language education services. This was the first time ÚHOS made use of a 2018 legislative amendment to calculate the fine based on aggregate turnover of the association members. Previously the calculation could only be based on the value of turnover/assets of the association as such. Such fines were considered inadequate. Members must now guarantee that the Association pays the CZK 9 million fine, which represents about 1 percent of the combined members' turnover of over CZK 900 million. You can find ÚHOS's press release here (*in Czech only*).

Slovakia

Slovak Antimonopoly Office (PMÚ) publishes analysis of its enforcement practice for 2011–2021

The 215-page analysis looks at major developments in Slovak competition law and policy over the past 10 years. The report provides insight and statistics on a variety of topics, such as dawn raids, the PMÚ's fining policy, leniency program, merger control and bid rigging. It also deep dives into enforcement, in particular into various economic sectors including healthcare, railway transport, financial services, automotive as well as the food industry.

The PMÚ looks back at the past decade as a "turbulent time" in which the competition authorities had to deal with digitalization—theirs and the world around them. Even though the office shies away from critically evaluating its own performance over the period, the description of its activities serves as a useful retrospective.

The 2011–2021 analytical report is available here (*in Slovak only*).

PMÚ clears MOL's acquisition of Normbenz Slovakia, subject to commitments

On March 28, 2022 the Slovak Antimonopoly Office (PMÚ) cleared the MOL's acquisition of Normbenz SK, which operates a network of 16 fuel stations under the LUKOIL brand, but only subject to substantial divestitures and ancillary commitments.

PMÚ was particularly concerned about the parties' overlap in retail sale of petrol, diesel and LPG fuels, where MOL (via Slovnaft) controls around 30–40 percent of all fuel stations—and where petrol and diesel sales via fuel stations are concerned, the share is about 40–50 percent. This led the PMÚ to believe that adding another 10–20 percent of the market share by acquiring the target's fuel stations, the transaction would create or strengthen MOL's dominant position. On the other hand, the PMÚ did not find any significant issues in the prospect of vertical integration between the companies.

To clear the deal, MOL offered to divest four fuel stations to an independent third-party purchaser in areas where the PMÚ had its main concerns: Košice, Michalovce and Prievidza. The purchaser turned out to be PKN Orlen, which operates 41 fuel station in Slovakia under the Benzina brand. Its acquisition of MOL's assets in Slovakia and Hungary has just been cleared by the European Commission as this newsletter went to press.

These transactions happened on the backdrop of a wider industry restructuring across EU member states, as fuel prices skyrocket. MOL just secured Commission clearance of its acquisition of Polish fuel station operator Lotos Paliwa but is facing some opposition from the Commission to its acquisition of OMV's business in Slovenia.

Another related transaction is the acquisition of 39 fuel stations by PKN Orlen from OLIVA group, which PMÚ cleared at the beginning of June. When assessing the concentration's impact on competition, PMÚ took into consideration the parallel transaction between MOL and PKN Orlen, but in the end found it non-problematic.

In addition, PMÚ is currently reviewing the acquisition by Dalibor Janega (DALITRANS, s.r.o.) of fuel station assets of Oktan, a.s., Progress Trading, a.s., a Petroltrans, a.s.

You can find the PMÚ's press release on the MOL/Normbenz deal here (*in Slovak only*).

PMÚ penalizes several instances of failure to provide correct information

In its decisions of May 7, 2022 the appeal board of the Slovak Antimonopoly Office (PMÚ) changed its three first-instance decisions penalizing company T.E.O., spol. s.r.o. v likvidáci, for a failure to comply with the statutory duty to provide information to the PMÚ. Two decisions on fines were issued for failing to provide information requested by the PMÚ, and in one instance for providing information that was incomplete. In the third case, the PMÚ found that the company should have reported its entry into liquidation on its own initiative, as a relevant fact to pending proceedings. That said, the appeal board decreased the fines somewhat because the PMÚ wrongly identified an aggravating circumstance. The total fines amounted to €15,000. You can find the PMÚ's press release is here (*in Slovak only*).

In another case the PMÚ imposed on an undisclosed company a fine of €14,000 for failing to provide requested information on a yet undisclosed company. The PMÚ's decision of May 13, 2022 is not yet final; the press release is available here (*in Slovak only*).

PMÚ raids a firm active in robotics and conducts other investigations to tackle bid- rigging practices

On April 6, 2022 the Slovak Antimonopoly Office (PMÚ) conducted unannounced inspections at the business premises of a firm active in selling and repairing robotized workplaces, on suspicion that the firm has colluded with three other firms to rig a public tender. The PMÚ's press release is available here.

In another instance of the PMÚ's push against bid-rigging practices, the office launched administrative proceedings regarding possible anti-competitive agreements in multiple public tenders in Eastern Slovakia. According to the PMÚ's information, three bidders coordinated their preparation and submission of offers to tenders for overseeing and servicing an electrical transmission network so that the pre-agreed tenderer would win the deal. The PMÚ's press release is here (*in Slovak only*).

PMÚ's other merger control practice shows closer scrutiny of potentially problematic acquisitions

The Slovak Antimonopoly Office (PMÚ) has had to tackle several complex merger-control cases, which were ultimately cleared but only after closer scrutiny.

On March 30, 2022 the PMÚ cleared the acquisition of control by NN Group N.V., over Finportal, a.s. a company from the Arca Capital group. While the PMÚ found no horizontal overlap between the parties, it had to deep dive into certain vertical links between NN's financial services business and Finportal's financial intermediation activities. In particular, the PMÚ looked at whether the combination of NN's supplementary pension savings services could result in customer or input foreclosure with regard to Finportal's services to intermediate supplementary pension savings services to customers. The PMÚ considered, however, that there were other significant competitors of Finportal active on the market and that supplementary pension companies were using a number of sales channels to market their products. Accordingly, the PMÚ concluded that the parties would not be motivated to restrict access to suppliers or consumers after the merger's completion. You can find the PMÚ's press release here.

On May 27, 2022, the PMÚ cleared the takeover of S IMMO AG by CPI PROPERTY GROUP S.A. The international group CPI owns and operates a portfolio of real estate, including office, retail and residential spaces, as well as investment and development land. In Slovakia, S IMMO is active in leasing office and retail premises (in Trenčín and Prievidza) and in operating hotels and resorts.

It is interesting to note, first, is that the concentration was a follow up to an earlier acquisition of sole control by CPI over IMMOFINANZ AG, which held a 26.49 percent stake in S IMMO (we already reported on this transaction here). Because CPI already held its own 16.06 percent stake in S IMMO, the combined minority stake (42.55 percent) led to CPI's acquisition of a decisive influence over S IMMO, following removal from the company's articles of association of a 15 percent cap on shareholders' voting rights. The PMÚ looked at shareholder turnouts at meetings

over the past three years and the how S IMMO took strategic decisions and concluded that the minority stake was enough to result in sole control by CPI.

Second, the PMÚ defined the relevant geographic market narrowly as the area of a given city. Regarding the market for lease of office spaces, the PMÚ assessed the parties' position in Bratislava, and in case of a lease of retail spaces in Bratislava, Prievidza and Trenčín. Even on such narrow markets, however, the PMÚ concluded that the merger did not pose a threat to effective competition. You can find the PMÚ's press release here (*in Slovak only*).

We are happy to share our know-how. We will continue to prepare a selection of competition news on a quarterly basis, but you can keep track of exciting developments on our LinkedIn profiles (below).

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