

## Twenty Years of Harmonisation and Still Divergent: Development of Slovak Competition Law

by

Ondrej Blažo\*

### CONTENTS

- I. Introduction: Harmonisation of competition law – a global phenomenon
- II. Twenty years of modern Slovak competition law
- III. Notion of an “undertaking”
- IV. Abuse of a dominant position and essential facilities
- V. Settlement
- VI. Conclusions

### *Abstract*

Since the time when the first competition rules were adopted after the Velvet Revolution in early 1990s, Slovak competition law has undergone several changes. Three acts on economic competition were subsequently adopted (in 1991, 1994, 2001), each of them several times amended. Although Slovakia became a member of the EU in 2004, the convergence of national competition rules with the law of the European Union is evident in the significant changes that were introduced in 2004. The evolution of Slovak competition rules cannot be considered finished – major amendments are expected in 2014.

The following paper will analyze in which aspects Slovak competition law is diverging from the rules of the European Union. Court jurisprudence reviewing administrative decisions issued in competition matters is also important in the assessment of the competition law environment.

---

\* Ph.D. at Faculty of Law, Comenius University, Bratislava, Slovakia; [ondrej.blazo@gmail.com](mailto:ondrej.blazo@gmail.com). Preparation of this paper was supported by the grant awarded by Slovak Research and Development Agency: APVV-0158-12 “Efektívnosť právnej úpravy ochrany hospodárskej súťaže v kontexte jej aplikácie a praxi”.

The paper will provide an overview of those features of Slovak competition law that shall be harmonised, as well as reasons for their harmonisations. Yet it must be stressed that European law is not the universal model of convergence and hence the paper will provide thoughts on which features of Slovak competition law might remain country-specific.

### *Résumé*

Depuis l'époque où les premières règles de concurrence ont été adoptées après la Révolution de velours en début des années 1990, le droit slovaque de la concurrence a subi plusieurs changements: trois actes sur la concurrence économique ont été adoptés par la suite (1991, 1994, 2001); chacun d'entre eux a également été modifié à plusieurs reprises. Bien que la Slovaquie soit devenue membre de l'UE en 2004, la convergence du droit slovaque de la concurrence vers des règles européennes de concurrence est évidente et des changements importants ont été introduits en 2004. Les modifications de la législation slovaque en matière de la concurrence ne peuvent pas être considérées comme terminées – les modifications considérables sont attendues en 2014.

Le présent article analysera dans quels aspects le droit slovaque de la concurrence est divergent. De plus, la jurisprudence des tribunaux, examinant les cas en matière de la concurrence, est importante dans l'évaluation de l'environnement de la réglementation de la concurrence.

Cet article offre un aperçu des caractéristiques du droit slovaque de la concurrence qui doit être harmonisé, ainsi que les raisons pour ces harmonisations. D'autre part, il faut souligner que le droit européen n'est pas le modèle universel de convergence et donc l'article présentera des pensées sur lesquelles les caractéristiques du droit national de la concurrence pourraient rester spécifique.

**Classifications and key words:** competition law; Slovak competition law; EU competition law; harmonisation of competition law; divergence from EU law; European Commission; concept of undertaking; essential facilities; settlement procedure

## **I. Introduction: Harmonisation of competition law – a global phenomenon**

The harmonisation of competition law is a world-wide phenomenon discussed by commentators, practitioners, legislators as well as judges, who must face it when ruling on specific cases brought before them. American federal judge D. Wood sought a justification of the need to harmonise competition law in those entities that benefit from it. Undertakings trading on a global or regional level were only interested in harmonising merger

rules, seeing as mergers themselves are not prohibited and thus varying rules in different countries appear problematic<sup>1</sup>. In the case of unilateral conduct and cartel agreements, undertakings can however seek advantages from the fragmentation of their treatment because there is no threat that a global practice will be punished equally harshly in all countries. Hence Wood is of the opinion that entrepreneurs are, in principle, not as interested in the content of harmonised regulations, as in the question whether they are harmonised at all. This approach is, however, different for consumers who are interested in competition and its harmonisation only if it is aimed to their benefit (that is, not designed to protect disadvantaged regions, maintaining employment, etc.)<sup>2</sup>. Nation States, as enforcers of competition policy, are thus the ones with the true interest in harmonisation because it facilitates cooperation and at the same time prevents undertakings from decreasing economic effectiveness by using gaps in national regulation, as explained above. Thus, total global welfare should be the very goal of harmonisation and it shall be guaranteed by nation States.

Legislation on the protection of economic competition is part of the European legal order since the very beginning of the European integration process<sup>3</sup>. Competition protection thus became an exclusive competence of the Community (later the European Union). However, this competence only covers ensuring the functioning of the common (now internal) market, that is, only activities that may affect trade between Member States. The fact that national competition laws may be applied alongside European provisions was confirmed by the Court, for instance, in the *Walt Wilhelm* case<sup>4</sup>. It was said therein that not only was parallel application accepted, the Court rejected also an interpretation whereby the divergence between national arrangements represents a discrimination based on nationality. It was further established that the application of national law must, however, not impede the full and uniform application of European law and that it must be applied in a non-discriminatory manner.

After the reform of European competition law in 2003/2004, part of the responsibility for its application was transferred to national competition

---

<sup>1</sup> D. Wood, "International Harmonization of Antitrust Law: The Tortoise or the Hare?" (2002) 3 *Chicago Journal of International Law* 399.

<sup>2</sup> *Ibid*, p. 400.

<sup>3</sup> Article 65 et seq. of the Treaty on Establishing European Coal and Steel Community (1951), Article 85 et seq. of the Treaty on Establishing European Economic Community (1957); later after renaming a renumbering Article 81 et seq. of the Treaty on Establishing European Community, or Article 101 et seq. of the Treaty on Functioning of the European Union (TFEU).

<sup>4</sup> Judgment of the Court of 13 February 1969 Case 14/68, *Walt Wilhelm et al. v Bundeskartellamt*. ECR 1969, p. 1.

authorities (NCAs). Council Regulation (EC) No. 1/2003<sup>5</sup> thus introduced two solutions that lead to the convergence of national arrangements and their harmonisation with European competition law. The first rests in the obligation to apply EU competition law in addition to national provisions if the conditions set out in Articles 101 & 102 TFEU are met<sup>6</sup>. The second stems from the rule that the application of national competition law must not lead to the prohibition of activities not prohibited by Article 101 TFEU<sup>7</sup>. At the same time, Member States are however not precluded from adopting and applying on their own territory stricter national rules concerning the prohibition or sanctioning of unilateral conduct (abuse). By contrast, such incentive cannot be found in the case of merger control.

Besides the above mentioned legal reasons, there are also other reasons for a gradual convergence and harmonisation of the competition rules of EU Member States with those of the European Union. The first one is economic – when states had declared an affiliation to a certain economic theory, and accepted a certain approach to the solution of market failure at an international level, they can hardly deviate from it at the national level. It is clear in such case that when legal rules share the same aim, these rules naturally converge. The second is a law-application reason which allows countries to develop an application theory and practice in parallel with other Member States. At the same time, they can profit from the jurisprudence of European courts, the case law of the European Commission as well as the enforcement practice accumulated in other Member States. National competition rules are thus not only similar but, for instance, Lithuania promulgated the harmonisation of Lithuanian and European competition legislation as a purpose of its law on competition<sup>8</sup>.

Slovak competition law is not an exemption from this trend. This paper does not, however, focus on examples of successful harmonisation but on the features that remain not harmonised. European competition law seems to be fulfilling all criteria identified by Waller for successful harmonisation: hegemony, deep integration, shared visions and values<sup>9</sup>. This does not mean that European competition law is the only option for drafting the competition

---

<sup>5</sup> In full Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.01.2003, p. 1–25).

<sup>6</sup> Article 3(1) of Regulation No. 1/2003.

<sup>7</sup> Article 3(2) of Regulation No. 1/2003.

<sup>8</sup> The Republic of Lithuania: Law on Competition of 23 March 1999, No VIII-1099, Art. 1(3); English text: [http://www.konkuren.lt/en/index.php?show=antitrust&antitrust\\_doc=law\\_competition](http://www.konkuren.lt/en/index.php?show=antitrust&antitrust_doc=law_competition) (23.04.2014).

<sup>9</sup> S.W. Waller, “The Internationalization of Antitrust Enforcement” (1997) 77 *Boston University Law Review* 344–404.

rules of its Member States. A division must therefore be made between its non-harmonised features that form an obstacle to the effective application of competition law (national or European) and those that represent an adjustment to local conditions meant to enhance the effectiveness of national enforcement.

## II. Twenty years of modern Slovak competition law

The currently applicable Act No 136/2001 Coll. on protection of economic competition<sup>10</sup> (hereafter: APEC) is the third in line Slovak competition act enacted after the fall of the Communist regime and the re-establishment of a market-oriented economy. The APEC itself was amended five times already with a sixth amendment currently underway (the amending act has already been approved by the parliament and signed by the President; it will come into force on 1 July 2014). The explanatory memoranda annexed to these acts, as well as their subsequent amendments, regularly referred to further adjustments and the harmonisation of Slovak competition law to that of the European Communities/European Union. These so-called “Euro-adjustments” were introduced before Slovakia’s EU accession (referring to the Association Agreement) and went on even after it became a Member State in 2004. Under the influence of European competition law, national rules on competition restricting agreements and the abuse of a dominant position were shaped and the SIEC substantive test introduced. Several domestic procedural provisions and practices have their roots in European law also including: inspection powers, calculation of fines, the leniency programme and the settlement procedure applied by Slovak competition authority – the Antimonopoly Office of the Slovak Republic<sup>11</sup>. Thus the divergence of Slovak

---

<sup>10</sup> In full Act No. 136/2001 Coll. on Protection of Competition and on Amendments and Supplements to Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic, as amended.

<sup>11</sup> The Antimonopoly Office of the Slovak Republic is a central body of state administration (there are two types of central bodies of state administration: ministries – bodies headed by a member of the Government and “others central bodies of state administration” that are not headed by a member of the Government; other such bodies are e.g. Office for Public Procurement, Statistical Office, Nuclear Regulatory Authority, Slovak Office of Standards, Metrology and Testing). The Chairman of the Office is appointed by the President of the Republic on a proposal of the Government. Apart from general criteria for civil service and conflict of interests, there are no other criteria or special procedures for choosing the Chairman. The Office is responsible for investigation and first-instance proceedings. In order

competition law from the EU legal framework does not stem from the non-existence of basic substantive or enforcement elements, but rather from their different content or, in fact, their different interpretation.

### III. Notion of an “undertaking”

Unlike European competition law, the Slovak competition act contains a definition of the notion of an “undertaking” for the purposes of the application of national competition rules. Under Article 3(2) APEC, the term “undertaking” means an entrepreneur pursuant to Article 2 of the Commercial Code, as well as natural and legal persons, their associations, and associations of these associations, with respect to their activities and conduct that is, or may be, related to competition, regardless of whether or not these activities and conduct is profit-oriented. The Commercial Code<sup>12</sup> recognizes four types of entrepreneurs:

- a) a person recorded in the Commercial Register;
- b) a person engaged in business activity under a trade licence;
- c) a person engaged in business activity under specialised legislation, e.g. lawyers, auditors, pharmacists, human and veterinary physicians;
- d) a person engaged in agricultural production as a “sole farmer”<sup>13</sup> and registered in a particular register.

Although Slovak competition legislation gives a rather complex definition of the notion “undertaking”, it is clear that the term encompasses a natural person or a legal person. Such person-undertaking is prohibited to enter into agreements restricting competition (Article 4 APEC) and abusing a dominant position (Article 8 APEC). Furthermore, in the case of infringements of competition rules, the undertaking is fined under Article 38 APEC.

Since both restrictive practices (multilateral and unilateral) as well as mergers are regulated by APEC, the definition of the notion of an “undertaking” is

---

to achieve independence of appellate procedure and decision-making process, the Council of the Antimonopoly Office of the Slovak Republic as an appellate body was established. This Council consists of the Chairman of the Office, who serves as the Chairman of the Council, and other members appointed by the Government on a proposal of the Chairman of the Office, who are not employees of the Office (currently the Deputy Chairman of the Office serves as a Deputy Chairman of the Council but this position in the Council shall be abolished by proposed amendment of the APEC).

<sup>12</sup> Act No. 513/1991 Coll. Commercial Code, as amended.

<sup>13</sup> Specific notion used by the Slovak legislation („samostatne hospodáriaci roľníci“) describing specific legal form of business activity in agricultural sector.

used in the context of merger control also. Nevertheless, this paper will not focus on this issue<sup>14</sup>.

It is clear that the Slovak definition does not correspond to how this concept is understood in the EU. Although the term is not defined in the TFEU itself, its framework is well-developed by European jurisprudence which sees an “undertaking” as every entity (economic unit) that performs an economic activity. The key difference between Slovak and European competition law lies here in the understanding of the notion of an “economic unit”, which is not necessarily linked in the EU with a single natural or legal person. Furthermore, Slovak competition law tries to find a person involved in a particular competition case. By contrast, European competition law identifies first the personal and material substance that is involved in the infringement or merger (undertaking itself). Only in the second stage does it try to find a person responsible for the behaviour of the undertaking. Regarding the Slovak definition of the notion of an “undertaking”, it must also be noted that it is to a certain extent similar to the definition of the term “enterprise” under the Slovak Commercial Code.

Because of the parallel application of Slovak and European competition law, the interference and conflict in the definition is inevitable. The European notion is directly “implanted” into the Slovak legal order by the provisions of Article 6(4) APEC regarding exemptions from the prohibition of agreements restricting competition. This provision extends the direct applicability of the Commission’s Block Exemption Regulations (BERs) to cases when trade between EU Member States is not affected<sup>15</sup>. Hence there are no genuine Slovak block exemption provisions – undertakings falling into Slovak jurisdiction can seek safe harbour in the European BERs. Thus, when claiming an exemption under a BER, the question which definition of the term “undertaking” shall be applied must arise, at least theoretically. Hence, a bipolar understanding of this concept might be invoked regarding the same agreement or restriction: the Slovak definition regarding the prohibition (Article 4(1) APEC) and the European definition regarding the exemption (Article 6(4) APEC).

---

<sup>14</sup> So similar problems to those in antitrust cases can arise in concentration cases also where the parties “involved” must be found. Since a flexible notion of the term “undertaking” cannot be used, the real involvement of concentrating persons, turnover calculation and impacts assessment are explained via concepts of direct and indirect control and combined turnover. However, this approach cannot solve all situations (e.g. acquisition of the whole group which is not a legal person) and some solutions are artificial and contrary to economic reality.

<sup>15</sup> “The ban pursuant to § 4 shall not apply to groups of agreements restricting competition that cannot influence trade between European Union Member States, whose objective or effect is or may be restriction of competition on the domestic market and which meet the conditions for exemption from the ban pursuant to special legislation”.

Katarína Kalesná suggests in this context that because of the applicability of the BERs, the “Euro-conform” understanding of the term shall be applied<sup>16</sup>. Often however, the difference in the approach will not cause serious problems in the practice of the application of the exemption under the BERs, provided the particular exemption is based on the very essence of the character of the agreement or restriction in question. Furthermore, if the essence of the exemption is based on turnover, or market share calculation, the “Euro-conform” approach usually covers a broader group of natural or legal persons than the Slovak approach with the concept of a single undertaking. Hence, under European law, the criteria for exemption based on turnover or market share may appear stricter, since more natural and legal persons can be deemed to be one undertaking (in comparison to Slovak law – one person-one undertaking) and therefore market share/turnover may be higher. Finally, the difference in the definition is unlikely to cause any other serious problems and obstacles regarding the effective application of the BERs.

The divergence between the definition of the term “undertaking” in European and Slovak law can, however, lead to obstacles to effective application, or to illogical “fallback” solutions, when the Slovak NCA tries to punish competition infringements, particularly cartels. These hurdles can appear not only in the parallel application of European and Slovak law, when the discrepancies are evident, but also within the application of Slovak competition law on its own. The narrower understanding of the concept in Slovak competition law obliges the NCA to find liability of every natural or legal person separately, as well as to impose sanctions on every natural or legal person separately, even if several persons form a single economic unit and are thus considered one undertaking by European law. This issue is particularly evident in the case of long lasting cartels when persons, representatives or legal subjectivity of companies change during that time. It is thus not sufficient for the Slovak NCA to show and prove a cartel between several “economic groups”, it must instead prove a cartel formed by all persons that are involved in the cartel activity (for instance, a cartel is not defined as a cartel between undertakings A and B but as a cartel formed by undertaking A1, A2, A3, ..., B1, B2, B3 ....<sup>17</sup>). Such approach does not reflect economic reality – it is instead an artificial description of reality seeing as persons that are part of an undertaking as a whole, in the European meaning, are not separate parties to an illicit agreement.

---

<sup>16</sup> K. Kalesná, O. Blažo, *Zákon o ochrane hospodárskej súťaže. Komentár [Act on Protection of Economic Competition. Commentary]*, Praha 2012, p. 18.

<sup>17</sup> A1, A2, A3 are persons that are “part” of the undertaking A or responsible for its actions within the EU meaning. B1, B2, B3 are persons that are “part” of the undertaking B or responsible for its actions within the EU meaning.



The situation is similar in the case of an abuse of a dominant position. For instance, when the parent company and its subsidiary are dealt with as separate undertakings that abuse their dominant position, this description does not correspond to the fact that there is only one, single decision-making centre. In other words, there is only one “manager” of the abusive practice (the parent company), and not two separated decision-making centres, even if the practice is executed by both companies. Furthermore, the approach followed by Slovak law can impede the parental liability principle – if two or more companies forming one undertaking (in the EU sense) are declared liable for an infringement, the fine must be imposed separately. Therefore, the approach involving joint and several liability of persons responsible for an infringement committed by a certain undertaking (in the EU meaning) is inapplicable. These differences became evident in situations where the NCA dealt with the same case under Slovak law as the European Commission did under EU law, for instance, in the pre-accession period. A good example of their different enforcement practice can be found in their respective decisions in the notorious GIS cartel. The Slovak authority imposed 16 separate fines<sup>18</sup> while the Commission imposed 5 separate fines on single companies and 7 fines jointly and severally on groups of companies.

Importantly, the different approach that results in a dissimilar way of applying the concept of an “undertaking” cannot simply be solved by using a purely European approach while applying Article 101 or 102 TFEU. Article 5 of Regulation 1/2003 refers to the application of national rules regarding the imposition of sanctions even in cases concerning European competition law. This reference to the application of national laws involves the assessment of the “undertaking” liable for the infringement within the meaning of Slovak law. The basic reason for this approach is that a fine under Article 38(1) APEC can be imposed only on an “undertaking” within the meaning of Article 3(2) APEC (and not on any entity liable for the infringement).

The Slovak approach to the concept of an “undertaking” as an infringer of competition law does not only cause difficulties at the stage of imposing sanctions but also at the time of their execution and collection. In Slovakia, the fine cannot be imposed jointly and severally on all persons that are responsible for the acts of the given “undertaking” (within the European meaning), but must be imposed on each person separately. Effective execution of the decisions of the NCA is therefore very difficult with respect to foreign persons with no assets within the Slovak territory. It is clear indeed that subsidiaries

---

<sup>18</sup> Decision of the Council of the Antimonopoly Office of the Slovak Republic of 14 August 2009, No. 2009/KH/R/2/035. It must be noted that this decision is currently reviewed by the Supreme Court of the Slovak Republic after its partial annulment by the Regional Court in Bratislava.

located within the Slovak territory have usually a much lower turnover, and therefore their fines are also considerably lower, than the turnover and fines of the parent companies located abroad.

Still, the Slovak NCA accepted a joint leniency application filed in the name of all companies forming the Procter & Gamble group in the consumer detergent cartel case<sup>19</sup>. It did so despite the fact that Slovak provisions on leniency (Article 38 APEC) allow the NCA to grant immunity only to an “undertaking”, and not to “undertakings” or a “group of undertakings”. The Slovak authority tries therefore to apply a “Euro-conform” approach as far as possible within the limits of national legislation.

Developments regarding the “economic continuity test” also proved very interesting and can serve as an example of a “Euro-conform” application of Slovak competition law, notwithstanding the difference in the definitions of the term “undertaking”. While the Regional Court in Bratislava affirmed the application of the “economic continuity test” in “Železničná spoločnosť Cargo Sloviakia”<sup>20</sup>, it nevertheless lowered the amount of the fine seeing continuity as a mitigating factor<sup>21</sup>. The Supreme Court<sup>22</sup> rejected however the arguments of the court of 1<sup>st</sup> instance and made the company fully responsible for the actions of its economic and legal<sup>23</sup> predecessor. Importantly, Železničná spoločnosť Cargo Sloviakia engaged in the same types of activities as those with respect to which the original Železničná spoločnosť had abused its dominant position (cargo transport). Incidentally, another company, the current Železničná spoločnosť, was also seen as a legal successor of Železničná spoločnosť after its structural separation. However, it was not considered an economic successor regarding the infringement itself because it only engaged in the activities of personal transport.

Although the concept of an “undertaking” in Slovak competition law might be a “stumbling block” in the effective and coherent application of competition rules, finding a solution to this problem will not be easy. First, since the EU-like understanding of the concept would be a brand new notion for the Slovak legal order, the establishment of a new legal definition seems to be necessary. Secondly, parties to administrative proceedings shall be defined separately to persons that can be held liable for an infringement and can face

---

<sup>19</sup> Decision of the Antimonopoly Office of the Slovak Republic of 22 December 2011, No. 2011/KH/1/1/055.

<sup>20</sup> It was, however, a case of parallel application of Slovak and European law.

<sup>21</sup> Judgment of the Regional Court in Bratislava of 6 December 2007, No. 1S 27/2007-227.

<sup>22</sup> Judgment of the Supreme Court of the Slovak Republic of 31 January 2012, No. 1Sžhu/1/2011.

<sup>23</sup> The company Železničná spoločnosť Cargo Slovakia was found to be both the legal and economic “successor” of the company which took a part in the infringement.

a fine, because competition law proceedings must “fit” into the principles of the Slovak administrative law system. Thirdly, being held jointly and severally liable for administrative offences should be explained in the law, too.

#### IV. Abuse of a dominant position and essential facilities

The essential facilities doctrine is well developed in European competition law – it is primarily described by the jurisprudence of the Court of Justice of the EU. Hence there are no special provisions on essential facilities in the TFEU and the general rules of Article 102 TFEU apply to abuses of a dominant position employing rights to an essential facility.

By contrast, APEC contains specific provisions on essential facilities – a definition of an essential facility and a subject-matter definition of a specific form of abuse by way of refusing to provide access to the essential facility (Article 8(5) APEC)<sup>24</sup>.

It seemed very useful at first to introduce special provisions on essential facilities into the legal order of a transforming economy with insufficient competition law experience. Ultimately however, this specific definition, with several cumulative conditions for its application, turned out to pose an obstacle to the proper application of the essential facilities doctrine in Slovakia and to the prohibition and punishment of such infringements.

Problems with the application of the essential facilities doctrine became evident in the Slovak Telekom case<sup>25</sup>. Seeing as the specific conditions of

---

<sup>24</sup> “An undertaking that is an owner or administrator of an essential facility abuses its dominant position in the relevant market if such an undertaking refuses to provide access to it and, at the same time:

- a) the essential facility permits satisfying the undertaking’s requirements regarding the utilization of the essential facility, while allowing for simultaneous satisfaction of the requirements of the essential facility’s owner or administrator at the time of peak demand for its services, also taking into account the fulfilment of its long-term commitments;
- b) an undertaking requesting access to the essential facility with the aim of its utilization is able to ensure adherence to the respective qualitative and quantitative parameters of the essential facility resulting from its operational requirements, or if the undertaking requesting the utilization of an essential facility represented by a right is able to ensure adherence to all requirements concerning the aforementioned right as stipulated in special legislation; (i.e. Act on Trade Marks as amended, Copyright Act).
- c) an undertaking requesting access to the essential facility is capable of providing the essential facility’s owner or administrator with adequate payment.”

<sup>25</sup> Decision of the Antimonopoly Office of the Slovak Republic of 25 May 2005 , No. 2005/DZ/2/1/064; decision of the Council of the Antimonopoly Office of the Slovak Republic of 21 December 2005, No. 2005/DZ/R/2/143; judgment of the Regional Court in Bratislava of

Article 8(5) APEC were not met, even though the abusive practice seemed to have been proven, the NCA applied general Slovak provisions prohibiting the abuse of a dominant position (rather than applying the specific provisions of Article 8(5) APEC). The decisive point of this more than seven years long legal analysis (the case concerned an allegation of an abuse from 2002) was the 2011 judgment of the Supreme Court of the Slovak Republic which rejected the NCA's approach. The Supreme Court ruled that only Article 8(5) APEC can be applied to situations where all the specific criteria of an essential facilities case are identified (specific parties – owner of an essential facility, refusal to provide access to an essential facility). Accordingly, there is no general provision that allow the prohibition of abusive practice other than the refusal of access. Indeed, in order to declare that abuse of dominance by way of refusing access to an essential facility took place, all cumulative conditions enumerated in Article 8(5)a-c) APEC shall be met. Since in this case the NCA was not able to prove the existence of a particular undertaking fulfilling the criteria of Article 8(5)b) and c) APEC (the company allegedly refused access in general, so nobody was asking for it), the Supreme Court stated that the Council of the Antimonopoly Office of the Slovak Republic had no other option but to stop its proceedings.

As a result, there is a danger that the practice of Slovak courts will impede the application of the essential facilities doctrine in cases regarding the abuse of a dominant position and that the powers of the NCA can be limited. The situation would be particularly complicated in the case of a parallel application of Slovak and European law. The general provision dealing with the abuse of a dominant position in Slovak law corresponds to Article 102 TFEU. However, in an essential facility case, the Slovak NCA will be obliged to apply the usual provisions of Article 102 TFEU (since there are no specific provisions on essential facilities in EU law) but at the same time banned from applying corresponding APEC provisions, because it is obliged to consider essential facilities under APEC's specific rules. Hence if the Slovak Telecom case was tried under Slovak and European law jointly, the behaviour of the incumbent might have been deemed an infringement of Article 102 TFEU but the application of Slovak competition law would have been deadlocked.

Thus it seems that there is no other option but to change or repeal APEC's specific provisions that deal with the refusal of access to essential facilities.

---

27 September 2007, No. 1S 31/2006-126; decision of the Antimonopoly Office of the Slovak Republic of 14 August 2008, No. 2008/DZ/2/1/066; decision of the Council of the Antimonopoly Office of the Slovak Republic of 15 May 2009, No. 2009/DZ/R/2/026; judgment of the Regional Court in Bratislava of 3 December 2010, No. 4S108/2009; judgment of the Supreme Court of the Slovak Republic of 28 June 2011, No. 4Sžhpu/1/2011; decision of the Council of the Antimonopoly Office of the Slovak Republic of 27 January 2012, No. 2012/ZK/R/2/005.

## V. Settlement

The settlement procedure was introduced into the European Commission's procedural rules by Commission Regulation (EC) No. 622/2008<sup>26</sup> to be applied solely in cartel cases. Where the EU settlement procedure is successful, undertakings can benefit from a 10 % fine reduction<sup>27</sup>.

Although inspired by the European concept, Slovak law outright chose a different approach in this context<sup>28</sup>. The NCA started to use settlements not only without such procedure being based in a legal act, but even without a soft-law basis. Furthermore, Slovakia's approach diverged from the basic features of the European settlement procedure in that the first cases ever to be settled in Slovakia dealt with vertical restraints and the fine reductions imposed reached up to 50%<sup>29</sup>.

Although the invention of the settlement procedure is undeniably derived from the European example, its divergence from the "original" is evident. However, there are several reasons for the individual manner in which the settlement procedure is used by the Slovak NCA. First, the authority deals with many vertical cases giving the NCA an incentive to finish them in an effective manner so as to be able to employ its resources to more serious infringements. Second, the level of success of the Slovak authority has had in judicial review is lower than that of the European Commission. Third, a 10% fine reduction does not seem to be a sufficient incentive for settlement for Slovak entrepreneurs who are not very familiar with competition law or believe in their chances of juridical success.

Since NCAs impose fines for the infringement of Article 101 or 102 TFEU under national law, there is no legal obligation to harmonise Slovak settlement with the respective European procedure. Moreover, the application of the national solution does not cause problems even in the case of the parallel application of European and Slovak law. The only restriction on national fine reductions lies in that it cannot undermine the effectiveness of European competition law. This requirement can be achieved through the application

---

<sup>26</sup> Commission Regulation (EC) No. 622/2008 of 30 June 2008 amending Regulation (EC) No. 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171, 1.07.2008, p. 3–5).

<sup>27</sup> Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases (OJ C 167, 2.07.2008, p. 1–6).

<sup>28</sup> For further reading regarding settlement in Slovakia see e.g. O. Blažo, "Úsvit urovnania na Slovensku" ["Dawn of Settlement in Slovakia"] (2011) 2 *Antitrust* 81–84.

<sup>29</sup> Decision of the Antimonopoly Office of the Slovak Republic of 21 August 2009, No. 2009/KV/1/1/038, and of 16 December 2009, No. 2009/KV/1/1/061.

of the principle whereby there is no legally enforceable right for settlement in Slovakia giving the Slovak NCA the discretionary power to terminate its settlement procedures.

## V. Conclusions

There are two basic incentives for the harmonisation of competition law: a legal obligation, and following “a good example”/“the leader”. Slovak competition law is still increasingly converging towards European provisions seeing as national authorities are well aware of both of the above incentives. First, there is a legal obligation for at least partial harmonisation hidden in the obligation not to impede the effective application of European competition law. Second, the European legal system serves as a good example of an effective competition law regime. Furthermore, harmonised provisions of national law enable authorities, as well as law practitioners, to use European jurisprudence and case-law directly in their argumentation even in purely national cases.

Despite these harmonisation incentives, differences in the Slovak and European competition law systems still exist even after 20 years of harmonisation. Some of these dissimilarities were pointed out in this paper including: (1) the different understanding of the concept of an “undertaking” and a dissimilar manner of regulating abuse of a dominant position by way of refusing access to an essential facility. These two issues are in some situations impeding the effective application of competition law. The paper noted also (2) the different principles governing Slovak and European settlement procedures albeit they do not have a negative impact on the application of EU law and yet enable the NCA to react to the specific conditions of the Slovak economy.

It must be noted in conclusion that a proposal for a comprehensive amendment of the APEC was adopted (the President of the Republic signed the amending act on 29 May 2014) and will come into effect on 1 July 2014. The amendment does not introduce any changes with respect to the term “undertaking” leaving this problem unsolved. Regarding the essential facilities doctrine however, the amendment shall repeal all of the existing specific provisions. Moreover, the APEC amendment is to be accompanied by a decree on the settlement procedure. It is clear from its draft that the decree is based on the principles of the “Conditions for the application of settlement procedure”. However, it is further proposed that Slovak settlements will also be applicable to abuse of dominance cases (with fine reductions of up to 30%) as well as to infringements connected to mergers (breach of APEC’s suspension rules, breach of the duty to notify a transaction) with reductions

of up to 50%. So in the case of the settlement procedure, Slovak competition law will therefore continue diverging from the European example.

Hence, two contradictory processes in the development of Slovak competition law can be observed: its harmonisation with European law and its divergence from European examples. It seems that Slovak competition law fully follows the motto of the European Union: “United in diversity” and alongside harmonisation, has also been paving its own path that reacts to specific national circumstances. However, there are still features of Slovak competition law (especially its definition of an “undertaking”) where such divergence should not exist and where following the European example is desirable.

## Literature

- Blažo O., “Úsvit urovnania na Slovensku” [“Dawn of Settlement in Slovakia”] (2011) 2 *Antitrust*.
- Kalesná K., Blažo O., *Zákon o ochrane hospodárskej súťaže. Komentár [Act on Protection of Economic Competition. Commentary]*, Praha 2012.
- Waller S.W., “The Internationalization of Antitrust Enforcement” (1997) 77 *Boston University Law Review*.
- Wood D., “International Harmonization of Antitrust Law: The Tortoise or the Hare?” (2002) 3 *Chicago Journal of International Law*.