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Centre for Antitrust and Regulatory Studies (CARS)
University of Warsaw, Faculty of Management
PL – 02-678 Warszawa, 1/3 Szturmowa St.
Tel. + 48 22 55 34 126; Fax. + 48 22 55 34 001
e-mail: yars@uw.edu.pl
www.cars.wz.uw.edu.pl; www.yars.wz.uw.edu.pl

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ALEXANDR SVETLICINII
JASMINKA PECOTIĆ KAUFMAN

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Editorial foreword

Competition law systems in Central and East European Member States of the European Union, EU candidate countries, and the members of the European Neighbourhood Instrument are facing various enforcement and institutional challenges. These include: deficiencies of the institutional capacity of their national competition authorities (NCAs), slow-growing enforcement records, modest fining policies, low levels of media visibility of both the NCAs and their competition advocacy efforts, insufficient competition culture, as well as the limited experience of national judges with respect to (EU) competition rules, including the lack of specialisation.

Despite a strong EU influence and, in some countries, the mechanism of EU conditionality, the national characteristics of these jurisdictions continue to prominently shape their competition law systems, within the limits permitted by EU *acquis* (applying national competition rules in the absence of “effect on trade” under Regulation 1/2003,¹ exercising legislative discretion in implementing the Damages Directive² and the ECN+ Directive³). These national practices may present a challenge for the harmonised application of competition law throughout the EU, and in its immediate neighbourhood, and hence require an in-depth understanding of the competition law systems in the discussed jurisdictions.

By taking a “bottom-up approach”, this volume of the Yearbook of Antitrust and Regulatory Studies (YARS) explores the specifics of the national competition law systems of the discussed countries looking at particular challenges faced by the individual jurisdictions that derive from the distinct features of their legal traditions.

Edition of that article was financed under Agreement Nr RCN/SP/0324/2021/1 with funds from the Ministry of Education and Science, allocated to the “Rozwoj czasopism naukowych” programme.

¹ 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, 4.1.2003, p. 1–25.

² Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

³ Directive (EU) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3–33.

The articles section of this Yearbook includes five papers exploring national characteristics with the backdrop of EU competition law standards. Two papers relate to Slovakia and one to Poland, both examples of EU Member States, while the remaining two relate to Serbia (an EU candidate) and Kosovo⁴ (an EU potential candidate) respectively.

In his paper titled ‘More Than a Decade of the Slovak Settlement Regime in Antitrust Matters: From European Inspirations to National Inventions’, Ondrej Blažo provides a quantitative and qualitative analysis of the use of the settlement procedure in Slovakia. Blažo shows how the Slovak system was “horizontally” inspired by the Czech example, rather than via “top-to-bottom” harmonization from the EU. In addition, he shows how in both Slovakia and Czechia, settlements developed without being regulated by law, at best on the basis of non-binding NCA guidelines, with the NCAs being very generous in terms of fine reductions while also applying settlements to a wide range of infringements that extend beyond cartels.

The article by Mária T. Patakyová and Mária Patakyová titled ‘Inspections in Private Premises Under Slovak Competition Law: Did the Implementation of the ECN+ Directive Miss the Point?’, addresses the inadequacies of the Slovak transposition of Article 7 ECN+ Directive, which requires NCAs to have the power to carry out inspections of non-business premises. The authors focus in particular on potential issues related to the implementing the notion of the “guardian”, a natural person that should be present during an inspection. In this sense, they point to problems of legal certainty, as it is not clear what type of persons could be appointed as guardians, as well as note the lack of non-disclosure obligations on the side of guardians.

In his paper titled ‘Selective Enforcement and Multi-Party Antitrust Infringements: How to Handle “Unilateral Agreements”?’, Jan Polański addresses a peculiar enforcement practice applied by the Czech and Polish NCAs when dealing with vertical agreements, such as resale price maintenance arrangements that involve numerous parties. In such cases, the NCAs choose to identify and prosecute solely the organizers of specific distribution networks, as opposed to prosecuting all cartel members in horizontal agreement cases. This practice of what could be called “unilateral agreements”, as developed at the national level, would need to withstand scrutiny under EU competition rules if, and when it reaches the Court of Justice of the European Union (CJEU). The author makes proposals on how to accommodate this enforcement practice under Article 101 TFEU, without curtailing the enforcement powers of the NCAs.

⁴ This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

In the paper titled ‘Focus on Competition Law Enforcement in E-commerce Sector in Serbia’, Darija Ognjenović and Ana Krstić Vasiljević discuss the wide range of activities of the Serbian NCA in the e-commerce sector. The authors point to certain shortcomings, such as the lack of NCA guidelines, and provide recommendations for going forward.

Avdylkader Mucaj and Isuf Zejna, in their paper titled ‘The Role of the Judiciary in Effective Enforcement of Competition Law in New Jurisdictions: the Case of Kosovo’, critically examine the functioning of the judicial system in Kosovo when it comes to judicial review in competition cases. The authors address in particular the changes of the designation of the court competent to hear such cases, as well as focus of judicial review on procedural aspects.

The legislative developments and case law section of this Yearbook contains two papers. The first summarizes competition policy developments in Serbia; the second tackles the CJEU ruling related to services of general economic interest.

Among the dynamics observed in the younger competition law regimes, is the slow start of competition advocacy, aimed to educate undertakings and the general public about the merits of market competition and the applicable rules designed for its protection. Serbia’s example presented in the paper titled ‘Overview of New Soft-Law Materials Designed to Promote Competition Law Compliance in Serbia’, authored by Maja Dobrić, presents a different picture. She shows that after accumulating substantial experience in enforcing competition law, the Serbian NCA turns to competition advocacy in the form of compliance programmes in order to foster voluntary compliance with competition rules. The toolbox of the Serbian NCA now includes guidelines on designing corporate compliance programs, templates and checklists, all to assist companies in developing and implementing compliance mechanisms from the “bottom-up”.

In his paper titled ‘Between Scylla and Charybdis. Whatever a Member State Does, It May Expose Itself to Attacks From Both Sides. *Lux Express Estonia AS*’, Marek Rzutkiewicz comments on the CJEU ruling in *Lux Express Estonia* (C-614/20) assessing the legality of imposing the duty to provide services of general economic interest on private undertakings with, and without compensation through the prism of EU state aid law.

In the conference reports section, Jasminka Pecotić Kaufman provides an account of the 8th Competition Law and Policy Conference in memory of Prof. Vedran Šoljan “Goals of Competition Law and the Changing World” that took place in Dubrovnik in May 2023. Jurgita Malinauskaite reports then on the webinar “Judicial Review of Competition Cases: The CEE and SEE Countries Perspectives” that took place in June 2023.

Finally, we would like to express our sincere gratitude to Maciej Bernatt (YARS Editor-in-Chief) for inviting us to co-edit this volume, to Laura Zoboli (YARS Managing Editor) for efficiently guiding us through the process, and to Michał Rzemyszkiewicz (YARS Editorial Assistant) for aptly assisting us in the completion of the present volume.

Macao and Florence, October 2023

Alexandr Svetlicinii (Volume Editor)

Jasminka Pecotic Kaufman (Volume Editor)

A R T I C L E S

More Than a Decade of the Slovak Settlement Regime in Antitrust Matters: From European Inspirations to National Inventions

by

Ondrej Blažo*

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* Doc. JUDr. Ing. Ondrej Blažo, PhD., Professor, Comenius University Bratislava, Faculty of Law, Institute of European Law, Bratislava, Slovakia. E-mail: ondrej.blazo@flaw.uniba.sk; ORCID: <https://orcid.org/0000-0001-9721-8724>.

The paper was prepared within the project supported by the grant VEGA 2/0167/19 ‘Real Convergence in the European Union: Empirical Evidence of Application’ as well as follow up of the project APVV-17-0641 ‘Improvement of effectiveness of legal regulation of public procurement and its application within EU law context’. The text and data were prepared on the basis of the state of the legislation and the knowledge of decisions and judgments in May 2022.

Edition of that article was financed under Agreement Nr RCN/SP/0324/2021/1 with funds from the Ministry of Education and Science, allocated to the “Rozwoj czasopism naukowych” programme.

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Abstract

The settlement procedure in Slovakia stems from three sources of inspiration: top-to-bottom (European Union law), bottom-up (incentive of an undertaking's lawyer) and horizontal sources (Czechia). After more than ten years of application of this feature of Slovak competition law, there are several cases which were settled. These cases show a certain variety from the point of view of the legal basis, the stage of procedure as well as the character or relevance of the case. This makes it possible to assess their features, practice, effects, and consequences of settlements from the empirical point of view.

The present paper analyses the legal framework and practice from a historical point of view. It provides a qualitative overview with evaluation of the settlement procedure in the context of European law and the Slovak legal order as well as a quantitative overview based on data extracted from the decisions of the Slovak NCA (PMÚ) and court rulings. In its conclusions it brings forward fresh suggestions *de lege ferenda*.

Resumé

Il existe trois sources d'inspiration à la procédure de transaction en Slovaquie: de haut en bas (droit de l'Union européenne), de bas en haut (incitation de l'avocat d'une entreprise) et de sources horizontales (Tchéquie). Après plus de dix ans d'application de cette caractéristique du droit slovaque de la concurrence, plusieurs affaires ont été réglées. Ces affaires présentent une certaine variété du point de vue de la base juridique, du stade de la procédure ainsi que du caractère ou de la pertinence de l'affaire. Cela permet d'évaluer leurs caractéristiques, leur pratique, leurs effets et les conséquences des règlements amiables d'un point de vue empirique.

Le présent article analyse le cadre juridique et la pratique d'un point de vue historique. Il fournit un aperçu qualitatif avec une évaluation de la procédure de transaction dans le contexte du droit européen et de l'ordre juridique slovaque ainsi qu'un aperçu quantitatif basé sur des données extraites des décisions de l'autorité slovaque de la concurrence (PMÚ) et des décisions de justice. Il conclut en présentant de nouvelles propositions de *lege ferenda*.

Key words: cartels; settlements; Slovak competition law; EU competition law; convergence; length of antitrust proceeding.

JEL: K21, K23, K42

I. Introduction

The ‘settlement’, as a procedural feature in competition matters, was introduced as an instrument of procedural efficiency when the investigated undertaking does not further challenge the facts and, as an exchange, when the competition authority reduces the fine.¹ Towards the end of 2009, the Antimonopoly Office of the Slovak Republic (*Protimonopolný úrad Slovenskej republiky*; hereinafter: PMÚ) issued its first decision where the final fine was ‘settled’. This first settlement had no backing in legislation, not even in internal rules of the PMÚ. The outline of the settlement regime was subsequently published in the Guidelines of the PMÚ (2012) and finally, it obtained a legal basis in the Slovak Competition Act (2001)², via its amendment of 2014, and

¹ Wouter PJ Wils, ‘Antitrust Compliance Programmes and Optimal Antitrust Enforcement’ (2013) 1(1) *Journal of Antitrust Enforcement* 52 <<http://ssrn.com/abstract=1729135>> accessed 14 February 2020; Flavio Laina and Elina Laurinen, ‘The EU Cartel Settlement Procedure: Current Status and Challenges’ (2013) 4 *Journal of European Competition Law & Practice* 302; Andreas Scordamaglia, ‘The New Commission Settlement Procedure for Cartels: A Critical Assessment’ (2009) 1 *Global Antitrust Review* 61 <<http://www.icc.qmul.ac.uk/docs/gar2009/143894.pdf>> accessed 1 May 2022; Kris Dekeyser and Christian Roques, ‘The European Commission’s Settlement Procedure in Cartel Cases’ (2010) 55(4) *The Antitrust Bulletin* 819 <<http://journals.sagepub.com/doi/10.1177/0003603X1005500406>> accessed 1 May 2022; Flavio Laina and Aleko Bogdanov, ‘The EU Cartel Settlement Procedure: Latest Developments’ (2016) 7(1) *Journal of European Competition Law and Practice* 72; Aurora Ascione and Massimo Motta, ‘Settlements in Cartel Cases’, *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law (2008)* <<https://mpr.aub.unimuenchen.de/24416/>> accessed 1 May 2022; Andreas Stephan, ‘The Direct Settlement of EC Cartel Cases’ (2009) 58(3) *International and Comparative Law Quarterly* 627.

² Slovak Act Coll. On Protection of Economic Competition and Amendment of Act of the Slovak National Council No 347/1990 on Organization of Ministries and Other Central Government Bodies of the Slovak Republic as Amended (Law No 136/2001 of 27 February) (*zákon č. 136/2001 Z. z. o ochrane hospodárskej súťaže a o zmene a doplnení zákona Slovenskej národnej rady č. 347/1990 Zb. o organizácii ministerstiev a ostatných ústredných orgánov štátnej správy Slovenskej republiky v znení neskorších predpisov*) as amended.

in the re-codified act of 2021 – Slovak Competition Act (2021).³ Its details have been provided by a Decree of the PMÚ.⁴

Although there is no doubt that the PMÚ settlement regime drew its inspiration from the settlement regime of the European Commission, in the end, its parameters are different: the scope of its possible application and the possible framework for decreasing the fine. Moreover, additional features have been added to the Slovak regime, in particular the reduction of the length of the prohibition to participate in public procurement.

After more than ten years of the application of this feature of Slovak competition law, there are several cases which were settled. These cases show a certain variety from the point of view of their legal basis (no legal basis/guidelines/decreed), the stage of the procedure (1st instance/2nd instance), as well as the character or relevance of the case. These cases also allow us to assess the features, practice, effects, and consequences of settlements from the empirical point of view – impact on the speed of the procedure, cost savings and their differentiation from the leniency programme.

The present paper analyses the legal framework and practice from a historical point of view (Part II), including an overview of the decision-making practice, a qualitative overview and evaluation of the settlement procedure in the context of European law as well as the Slovak legal order (Parts III, IV and V), and a quantitative overview and regression analysis based on data extracted from the decisions of the PMÚ and the courts (Part VI).

³ Slovak Act Coll. On Protection of Economic Competition and Amendment of Some Other Acts (Law No 187/2021 of 11 May)(*zákon č. 187/2021 Z. z. o ochrane hospodárskej súťaže a o zmene a doplnení niektorých zákonov*).

⁴ If the act or the decree is not distinguished by the year of the enactment, the same is valid for both versions.

II. Historical overview of the introduction of settlement procedures⁵

1. Settlement pre-history

1.1. Vertical agreements

For the first time, the PMÚ concluded a case via a settlement⁶ in the 2009 *ELCOM* case.⁷ Although the PMÚ referred to the process as a ‘settlement’ (*urovnanie* in Slovak) in the press release, this term does not appear in the text of this decision itself. The PMÚ did not even proceed to formalise the procedure, as did the Czech competition authority (*Úřad pro ochranu hospodářské soutěže*; hereinafter: ÚOHS) in the *Kofola* case⁸ that served, undoubtedly, as an inspiration for settlement procedure in Slovakia.⁹

During the administrative procedure in the *ELCOM* case, the parties to the investigated vertical agreement denied that their conduct was unlawful. In their submissions to the pre-decision notice¹⁰, they pointed out that the provisions of the contracts that were seen as prohibited by the PMÚ, were not actually applied in practice. It was only at the final stage of the administrative procedure that the parties, through their legal counsel, voluntarily submitted a statement whereby they all admitted their participation in the anticompetitive conduct in its entirety, as assessed by the PMÚ in its pre-decision notice. At the same time, the parties requested the PMÚ to take such submission of the parties

⁵ This part was partially presented within the ‘7th Competition Law and Policy Conference in Memory of Prof. Vedran Soljan’ held in Opatija 12–13 May 2022 with the title: ‘Ten years of Slovak settlement regime in antitrust matters: From European inspirations to national inventions in Four Acts’. It also refers to the author’s previous work Ondrej Blažo, ‘Úsvit Urovnania Na Slovensku’ (2011) 3(2) Antitrust 81; Ondrej Blažo, ‘Vývoj Urovnania Ako Nástroja Zefektívnenia Konania v Súťažnom Práve’ (2015) 98(1) Právny obzor 58.

⁶ TASR, *Firmy priznali porušenie zákona, úrad to zohľadnil vo výške pokuty* <<https://index.sme.sk/c/4991015/firmy-priznali-porusenie-zakona-urad-to-zohladnil-vo-vyske-pokuty.html>> accessed 30 September 2022.

⁷ Decision No 2009/KV/1/1/038 of 21 August 2009.

⁸ S95/2008/KD *Kofola/Kofola Holding*. The case was analysed in Michal Petr, ‘Narovnání v Českém Soutěžním Právu’ (2011) 4 Antitrust 176; Michal Petr, ‘The Legal Consequences of Breaching Competition Rules in the Czech Republic’ in Csongor István Nagy (ed), *The Procedural Aspects of the Application of Competition Law. European Frameworks – Central European Perspectives* (Europa Law Publishing 2016).

⁹ Blažo, ‘Úsvit Urovnania Na Slovensku’ (n 5).

¹⁰ The PMÚ as the 1st instance body issuing 1st instance decision based on its investigation, as well as the Council of the PMÚ as the 2nd instance body issuing decision on administrative appeals against 1st instance decisions of the PMÚ, are obliged to issue a pre-decision notice (similar to the statement of objections) where the authority states the established facts, the evidence and the conclusions of the investigation and allows the addressee to provide its comments or objections to these findings.

into account when setting the amount of the fine for each of the procedural parties. Finally, the PMÚ has also received a written ‘Statement of the parties to the administrative procedure’ where they all declare the following:

- they agree with the PMÚ’s preliminary conclusions in their entirety, as set out in the pre-decision notice,
- they acknowledge that the existence of the provisions of the contracts in question has led to an infringement of the relevant provisions of the Slovak Competition Act (2001), committed by them throughout the entire duration of the contracts,
- declare that the contracts are currently not in force, and that the process of preparing a new contractual basis for the cooperation between ELCOM, a limited liability company, and its distributors is ongoing, which will also include a professional assessment of the new contractual proposals in terms of their compliance with competition law,
- do not insist for the PMÚ, in the final decision in the present administrative procedure, to address all their arguments and objections raised during the administrative procedure, in particular those raised in their comments to the pre-decision notice, and in their comments to the pre-decision notice following the completion of the investigation.¹¹

The parties’ admissions were reflected in the part of its decision where the PMÚ justified the amount of the fine imposed. However, the decision does not include any information on the negotiation between the PMÚ and the undertaking, nor any discussion of the amount of the fine. The PMÚ accepted the statement of the undertakings as mitigating circumstances and thus reduced the basic amount of the fine for the parties by 50%. On the date of the decision, the parties waived their right to appeal, and the decision became final.

It follows from the above procedure that the PMÚ did not use the settlement as an investigative tool, but as a tool of procedural efficiency, since, at the time of the settlement, the facts of the case had been properly established, and the reduction of the fine was granted in exchange for not challenging the PMÚ conclusions in the subsequent proceedings.

The PMÚ did not refer to its approach towards fine reductions as a ‘settlement’ procedure in further proceedings, nor in press releases. It did, however, issue two more decisions dealing with vertical restraints, the content of which shows that a settlement has been reached between the PMÚ and the parties. In the *FM Group* case of 2009,¹² the PMÚ states in the reasoning of its decision that the anticompetitive, and thus prohibited, provisions of the distribution contracts were discussed with the representatives of the parties, and the principle of

¹¹ More details in Part 8 of grounds of the decision in *ELCOM* case.

¹² Decision 2009/KV/1/1/061 (16 December 2009).

imposing fines for legal infringements and the possibilities for resolution were clarified. The parties subsequently submitted a written statement where they acknowledged the competition law infringement, submitted an amendment to the investigated distribution agreements, and requested for their cooperation with the PMÚ to be considered as a mitigating circumstance. In its Decision, the PMÚ states that it considers the above statements to be mitigating circumstances and reduces the amount of the fine by 50%.

In the *COOP Jednota/ORFEX* case of 2010,¹³ the PMÚ merely noted that the parties had withdrawn their objections and submissions to the pre-decision notice, and that the joint legal counsel for both parties had admitted their participation in the restrictive agreement, and asked the PMÚ to take this into account when setting the amount of the fine. The PMÚ considered these facts as mitigating circumstances, which did have an impact on the final amount of the fine, but the PMÚ did not quantify the level of the reduction of the fine.

1.2. Cartels

After the initial application of the settlement procedure in vertical agreement cases, the PMÚ subsequently closed two cartel cases via settlements as well.

In the case of the agreement between stationary suppliers (*PAP-PEX/SLOVPAP*), which consisted of the coordination of their participation in public procurement, the undertakings formally applied for the application of the settlement procedure, both undertakings submitted also a declaration admitting their participation in the anticompetitive conduct, as qualified by the PMÚ in the pre-decision notice. The PMÚ eventually reduced the fine for these two undertakings by 40%, but it is not clear to what extent the fine was reduced on account of the settlement itself. When deciding on the size of the fine reduction, the PMÚ considered, in addition to the cooperation of the undertakings and their admission of the violation of competition rules, the overall circumstances of the course of the tendering procedure and the absence of any real benefit for the parties to the proceedings from their participation in the tendering procedure in question.¹⁴

In the *Consumer Detergents* case,¹⁵ the PMÚ does not explicitly mention the concept of ‘settlement’ and limits itself to stating that ‘the statements of the Henkel Group participants were assessed by the PMÚ as a mitigating circumstance, based on which it reduced the basic amount of the fine by 20%’.¹⁶

¹³ Decision 2010/KV/1/1/013 (9 March 2010).

¹⁴ Decision 2010/KV/1/1/013 (9 March 2010), para 174.

¹⁵ Decision 2011/KH/1/1/055 (22 December 2011).

¹⁶ *Ibid.*, para 81.

Both of these cartel cases, *PAP-PEX/SLOVPAP* and *Consumer Detergents*, had one feature in common. In both cases, the PMÚ was not able to cover or investigate the entire possible cartel and, due to the circumstances, engaging in any further procedure could not have a substantial effect on the market conditions. In the *PAP-PEX/SLOVPAP* case, the PMÚ was barred from the use data collected during an inspection at the premises of the other participant of the public procurement at issue (*ŠEVT* case). Moreover, both companies, *PAP-PEX* and *SLOVPAP*, were of minor economic importance compared to the other two participants of the public procurement at issue, including the winner of the tender. Therefore, the PMÚ was not able to investigate the possible broader context of the bid rigging, if there was any at all. On the other hand, due to the minor importance of the companies that were fined, the impact on the market could not be considered substantial.

The *Consumer Detergents* case was a ‘residual’ case after the European Commission’s investigation,¹⁷ since the Commission’s decision did not cover the Slovak territory.¹⁸ Compared to the proceedings at the EU, where the leniency application was submitted by companies of the Henkel group, in the proceedings at the PMÚ, the leniency application was submitted by companies of the Procter & Gamble group. In this context, the incentive of the Henkel group to settle is apparent.

2. Guidelines on the application of settlement procedure (2012)

2.1. Introduction of guidelines

From the analysis of the practice of the PMÚ regarding the settlement of competition cases in the ‘pre-Guidelines’ era, a lack of certainty and transparency is apparent. Firstly, it was not clear which cases could be covered by the possible application of settlements, and the scope was developed on the case-by-case basis. Similarly, the level of fine reductions was not foreseeable.

A breakthrough in the PMÚ’s relatively unsystematic practice occurred with the publication of a document titled ‘Conditions for the application of the settlement procedure’,¹⁹ where the PMÚ clearly affirmed the content of its

¹⁷ *Consumer Detergents* (Case COMP/39.579) Commission Decision C(2011) 2528 final [2011] OJ C 193/14(-).

¹⁸ *Consumer Detergents* (n 17) [1].

¹⁹ Podmienky uplatnenia inštitútu urovnania (1 January 2012) <https://www.antimon.gov.sk/data/files/42_podmienky-uplatnenia-institutu-urovnania.pdf> accessed 1 May 2022.

previous practice of terminating cases by way of settlement. The basic principles and elements of the Slovak settlement mechanism are:

- 1) settlement negotiations might be initiated on the initiative of both an undertaking and the PMÚ;
- 2) the negotiations were informal and mainly oral, only the conclusions were formalised;
- 3) there was no legal entitlement to a settlement;
- 4) the undertaking was required not only to admit its participation in the infringement, but also to acknowledge the legal qualification of the violation of competition law, as well as declare the size of a fine which the undertaking was willing to accept;
- 5) the level of fine reduction was 30% in the case of horizontal agreements, and 50% in the case of vertical agreements and infringements of § 39 of the Slovak Competition Act (2001) (infringements by public authorities);
- 6) in cases of an abuse of a dominant position as well as an illegal implementation of a concentration, the settlement procedure could not be applied.

Thus, in its document, the PMÚ has, on the one hand, enshrined its previous practice and, on the other hand, provided procedural parties with a certain degree of legal certainty by declaring the procedural aspects of the application of the settlement institute, as well as the level of the reduction of the fine that can be reasonably expected.

2.2. The Guidelines in practice

The era of the application of the Guidelines on the Application of Settlement Procedure (2012–2014), covered the period of several minor cases pursued by the PMÚ: *Association of Real Estate Brokers*,²⁰ *Slovak Bar Association*,²¹ *the Chamber of Restorers*,²² *the Chamber of Veterinary Doctors of the Slovak Republic*.²³ From these cases, only the *Chamber of Restorers* case was not settled (in fact, in this case even the ‘full’ fine was quite symbolic – € 261.00). Although the approach of the PMÚ to settlements was foreseeable in this period, the attitude of the undertakings varied. In the *Association of Real Estate Brokers* case, it was revealed that, in fact, the parties were a group of ‘micro’ undertakings, rather than an association of undertakings, and that the undertaking which was the leader of the group, and proposed settling the

²⁰ Case 0009/ODOS/2012.

²¹ Case 2012/KH/1/1/007.

²² Case 0033/ODOS/2011.

²³ Case 2011/KH/1/1/031.

case, did not join the final settlement.²⁴ In this case, the PMÚ imposed its historically lowest fine (€ 54.00) and the total fine was only € 4,131.00.²⁵ While the *Association of Real Estate Brokers* (more precisely its members) settled the case during 1st instance proceedings, the *Slovak Bar Association* settled during 2nd instance proceedings when the case was assessed by the Council of the PMÚ for the second time (after the previous annulment of the 1st instance decision).²⁶ In the *Chamber of Veterinary Doctors of the Slovak Republic* case, settlement was reached during the repeated 1st instance procedure²⁷, after the previous annulment of the 1st instance decision by the Council of the PMÚ.

All these cases have common features. They involved an association of undertakings that gathered micro- and small enterprises, the majority of them sole traders and self-employed persons. The level of fines was quite irrelevant from the budgetary point of view, and thus the reduction of the fine had a purely symbolic character for both the PMÚ and the undertakings. The most important outcome of all of these proceedings was the revocation of the statutes and by-laws of the associations violating competition rules, rather than the imposition of a fine. Indeed, fines at such low levels (€ 11,944.95 in all cases together, that is, from € 54.00 to € 6,133.00) can have hardly any preventive or deterring effect.

3. Decrees on settlements (2014)

3.1. Reform of competition law and introduction of statutory basis for settlements

The competition law reform of 2014 introduced an explicit rule on the application of settlements into the law (§ 38e). The Act set the basic framework for settlements, while its details, including the level of fine reduction, were referred to a decree of the PMÚ (in the Slovak legal system, generally binding legal instrument).

Compared to the ‘Guidelines on Application of Settlement Procedure’, the 2014 Amendment to the Slovak Competition Act (2001) extended the possibility of using the settlement procedure to cover all types of infringements, except cases of procedural fines for obstructions in the proceedings and the failure to provide requested documents and data.

The provision of § 38e of the Slovak Competition Act (2001) requires the fulfilment of a set of conditions for launching the settlement procedure (based

²⁴ Decision 2013/KH/1/1/014 (4 June 2013).

²⁵ Ibid.

²⁶ Decision 2014/KH/R/2/009 (11 April 2014).

²⁷ Decision 2013/KH/1/1/017 (7 August 2013).

on the undertaking's own initiative or initiated by the PMÚ) and conditions for the application of the settlement for a fine reduction.

The settlement procedure could be launched only if the following 'substantial' conditions are met:

- 1) facts collected by the PMÚ give enough reasons for the conclusion that there was a violation of competition law (national or European); and
- 2) the PMÚ shall be guided by the goal of procedural effectiveness or the aim to increase the swiftness and effectiveness of market remedies.

These 'substantial' requirements for settlements exclude the possibility to use a settlement procedure as an investigative measure, since it can be applied only in those cases when all facts are established in a reasonable manner. The second condition appears to be formal or declaratory, describing the aim of the settlement procedure itself. However, it shall also be read as a limitation of the powers and discretion of the PMÚ, and so it limits the application of the settlement procedure to only those situations where a settlement can lead to procedural effectiveness or effective remedies on market.

The 'procedural' conditions for settlement include:

- 1) common accord of the PMÚ and the undertaking on the outcome of the settlement negotiation;
- 2) the undertaking admits its participation in the infringement of competition rules and takes responsibility for the infringement.

Although the Act explicitly stipulates that an undertaking has no legal entitlement for a settlement, the provision of § 38e contains an imperative norm, that is, the PMÚ '...shall reduce the fine that it would have imposed under § 38 paras 1 and 2.' In fact, this wording is not contradictory, although it can appear to be so since it gives legal certainty and legitimate expectations to the undertaking. Indeed, there is no legal entitlement for a 'settlement' itself – the PMÚ has discretion whether it enters negotiations on a settlement and whether it is willing to reach the final terms of settlement. However, there shall be no discretion of the PMÚ in reducing the fine in case the undertaking fulfils all requirements and terms of settlement, that is, when it admits its participation in the infringement of competition rules and takes responsibility for the infringement.

The details of the Slovak settlement procedure were established by the PMÚ Decree on Conditions of Settlement (2014)²⁸; in order to reach a settlement, two documents produced after the settlement negotiations are required:

- 1) a proposal of the PMÚ for a settlement containing a description of the infringement of competition rules, including the timeframe of the infringement, and the level of fines that the PMÚ plans to impose,

²⁸ Decree of the Antimonopoly Office of the Slovak Republic 171/2014 Coll. Establishing details on conditions of settlement (*Vyhlaška Protimonopolného úradu Slovenskej republiky č. 171/2014 Z. z., ktorou sa ustanovujú podrobnosti o podmienkach urovnania*).

according to the decrease specified by the Decree on Conditions of Settlement;

- 2) a declaration of the undertaking containing, *inter alia*,
 - a) a confession of violating competition rules, as established in the proposal of the PMÚ,
 - b) its consent to the fine envisaged in the proposal of the PMÚ,
 - c) a declaration by the undertaking that it was properly informed on the preliminary conclusions of the PMÚ's investigation, and that a reasonable time for assessing these conclusions was provided to that undertaking.

In terms of the fine reduction the Decree followed the previous practice of the PMÚ – 30% in case of horizontal agreements, and 50% in case of other infringements.

The provisions of § 38e of the Competition Act (2001) were replaced within the 2021 'reform' of competition law in Slovakia when transposing the ECN+ Directive.²⁹ Although a new Act was adopted, the Slovak Competition Act (2021) maintained all features of the previous Competition Act (2001), expanding details on the cooperation within the European Competition Network, and some formal declarations on independence, without any substantial changes in the area relevant for this analysis. Hence the wording of § 52 of the Slovak Competition Act (2021) is the same as the wording of § 38e of the Slovak Competition Act (2001), except, *mutatis mutandis*, its references to other provisions of the Act. Similarly, the wording of the Decree on Conditions of Settlement (2021)³⁰ corresponds, *mutatis mutandis*, to the PMÚ Decree on Conditions of Settlement (2014). Therefore, even after the 2021 reform, the legal framework for settlements has remained unchanged since 2014.

3.2. Settlement practice under the current regime

3.2.1. Cartels

By the end of 2021, within the framework of the current settlement rules, 26 cartel cases were closed in total, of which 3 were closed by a 'full' settlement (all parties to the proceedings settled) and 5 via a 'hybrid' settlement (only

²⁹ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2018] OJ L 11/3.

³⁰ Decree of the Antimonopoly Office of the Slovak Republic 192/2021 Coll. Establishing details on conditions of settlement (*Vyhlaška Protimonopolného úradu Slovenskej republiky č. 192/2021 Z. z., ktorou sa ustanovujú podrobnosti o podmienkach urovnania*).

some parties settled). However, the total number of cases and the success of the activities of the PMÚ looks different when noticed that 8 cases were closed by a 1st instance non-infringement decision (more precisely, a procedural decision terminating the proceedings on the grounds that the PMÚ failed to prove the existence of any violations of competition law), and 3 more cases were terminated *vis-à-vis* some of the procedural parties only. Thus, the PMÚ succeeded in finding any legal violations during 1st instance proceedings only in circa 70% cases. Moreover, one more case was terminated after its judicial review³¹, and two cases were terminated after their 2nd instance review by the Council of the PMÚ³². This lowers the ‘successfulness’ of the PMÚ to prove a cartel to 58%.

The bid rigging case *Reconstruction of Juraj Schopper Nursing Home in Rožňava* was the first case closed via settlement under the new settlement regime.³³ While all of the undertakings were denying their participation in the investigated bid rigging during the 1st instance of these proceedings, and all of them appealed the 1st instance decision, in the course of the 2nd instance proceedings, the GMT Slovakia and Ján Maduda undertakings changed their attitude. First, GMT Slovakia applied for leniency, which was granted by the Council of the PMÚ. After the issue of the 2nd instance pre-decision notice, GMT projekt, spol. s r.o. and Vladimír Maduda – PLYSPO requested a settlement that was granted by the Council of the PMÚ. Since the two remaining undertakings (Vertikal-SOLID, s.r.o. and J.P.–STAV spol. s.r.o.) were still rejecting the participation in the bid rigging, the case was reviewed by the Regional Court in Bratislava, as well as, after a cassation complaint, by the Supreme Court of the Slovak Republic. Under the Slovak procedural law on judicial review of administrative decisions, all parties to the administrative proceedings are called to be parties of the judicial review proceedings, irrespective of whether they had filed an action or appeal or not. Hence, GMT projekt, spol. s r.o. and Vladimír Maduda – PLYSPO were unwillingly dragged through the judicial review proceedings, which took 3 years, in the case of J.P.–STAV spol. s.r.o. and 5¾ years in the Vertikal-SOLID, s.r.o.

The following two ‘settlement’ cases³⁴ were successfully closed within 1st instance proceedings. In the *IT Infrastructure and modernization at Matej Bel University* case, both undertakings, GPMÚ, a.s., and S&T Slovakia s.r.o., applied for leniency as well as for a settlement, which was subsequently

³¹ Case 0021/OKT/2014.

³² Case 0033/OKT/2014 and 0006/OKT/2014.

³³ Case 0019/OKT/2013 Decision of the PMÚ 2014/KH/1/1/021 (28 July 2014); Decision of the Council of the PMÚ 2015/KH/R/2/004 (25 February 2015).

³⁴ *IT Infrastructure and modernization at Matej Bel University* (Case 2015/KH/1/1/039) and *STM POWER* (Case 2015/KH/1/1/016).

granted. Similarly, in the *STM POWER* case, ČKD PRAHA DIZ, a.s., and A.EN.INVENT AG case, the parties successfully applied for a fine reduction based on the leniency programme and all of the three undertakings (together with ETIN s.r.o.) settled.

Whilst all of the previous settled cases dealt with bid rigging involving a single contracting authority (and in the latter two of them, a single tender only), in the *Škoda* case³⁵, the PMÚ identified a broader scheme of cooperation in tenders for the purchase of new motor vehicles. Therein, all of the undertakings were dealers of the Škoda brand, and their cooperation covered 30 tenders, which the PMÚ has split into 9 individual cartels with a different combination of participants.³⁶ During the 1st instance proceedings, 3 of these undertakings successfully applied for leniency and 5 for a settlement (out of the total 9 undertakings). It does not seem logical that one of the successful leniency applicants (DANUBIASERVICE, a.s.) did not apply for settlement as well, while two others did (Todos Bratislava, Škoda Auto Slovensko, s.r.o.). Since the Council of the PMÚ re-calculated fines during the 2nd instance proceeding, settlement proceedings were launched again and, in this case, all undertakings agreed to settle but one (IMPA Bratislava, a.s.).³⁷ The only undertaking that did not settle successfully challenged the fine within judicial review³⁸ and again, all the remaining undertakings remained parties of these proceedings.

Similarly, in the *Volkswagen* case that dealt with the distribution of new cars of the Volkswagen brand (including bid rigging),³⁹ although the PMÚ initially had two leniency applications for immunity (which was granted), and later on two other leniency submissions for fine reductions, the case went twice through 1st instance proceedings and appeals at the PMÚ⁴⁰ quashed by the Regional Court in Bratislava.⁴¹ During the ‘second’ 1st instance proceeding (that is, after the annulment of the previous PMÚ decision) two undertakings applied for settlement (BOAT, a.s. and Auto Unicom s.r.o.) but only BOAT agreed with the settlement. Even though BOAT a.s. agreed to the settlement

³⁵ Case 0028/OKT/2014 Decision of the PMÚ 2015/KH/1/1/033 (11 September 2015); Decision of the Council of the PMÚ 21/2017/ODK-2017/KH/R/2/022 (25 August 2017).

³⁶ It is not the purpose of this article to evaluate this element of the decision.

³⁷ Decision of the Council of the PMÚ 21/2017/ODK-2017/KH/R/2/022 (25 August 2017), paras 1249-1252.

³⁸ Judgment of the Regional Court in Bratislava 7 February 2019 Case 6S/139/2017.

³⁹ Case 0012/OKT/2016.

⁴⁰ Decision of the PMÚ 2018/DOH/POK/1/40 30 November 2018; Decision of the Council of the PMÚ 2019/DOH/ZPR/R/19 (12 July 2019); Decision of the PMÚ 2020/DOH/POK/1/2 (3 February 2020); Decision of the Council of the PMÚ 2020/DOH/POK/R/15 (15 May 2020).

⁴¹ Judgment of the Regional Court in Bratislava 29 June 2021 Case 2S/166/2020.

during 1st instance proceedings, it became a party to the appellate proceedings (without actually filing an appeal) and the Council of the PMÚ recalculated its fine. Equally, it became a party to the judicial review proceedings.

The *Agriculture Machines* case was again a bid rigging case (small scheme regarding a purchase of agriculture machinery) with a leniency fine reduction and a hybrid settlement (only AGROSERVIS spol. s.r.o. applied for leniency as well as for settlement). Indeed, fines of the remaining undertakings were relatively small (Alžbeta Tóthová – € 500.00 and ISA projekta, s.r.o. – € 14,079.00) comparing to AGROSERVIS spol. s.r.o. (€ 416,516.00) and the case was closed during 1st instance proceedings.

In the remaining two settlement cases, *Dunajškrob Starch* (full settlement)⁴² and *Municipality of Čavoj* (hybrid settlement),⁴³ the PMÚ dealt with only one tender in each case. In *Municipality of Čavoj*, one of the undertakings applied for a leniency fine reduction as well as for a settlement (BECO, spol. s.r.o.). Although the *Dunajškrob Starch* case was fully settled, the settlement was achieved during the 2nd instance of these proceedings.

Summing up the practice of the PMÚ regarding the application of the settlement regime, it is completely possible to draw a line between the successful application of this approach and the unsuccessful ones. Subsequent appeals and judicial review in the *Reconstruction of Juraj Schopper Nursing Home in Rožňava* case, the *Škoda* case and the *Volkswagen* case frustrated the benefits of the PMÚ closing them effectively and, due to administrative rules and the rules on judicial review, all the parties were ‘forced’ to be parties to subsequent proceedings despite the settlement. It must be noted that undertakings that became ‘unwillingly’ parties to judicial proceeding do not have the right for the recovery of costs, as compared to undertakings that filed a successful appeal. Another frequent feature can be seen in settlements reached during the 2nd instance proceedings (the *Dunajškrob Starch* case, the *Škoda* case), or during the ‘repeated’ 1st instance proceedings (the *Volkswagen* case), where the positive impact of a settlement on the length and effectiveness of the proceeding decreases.

⁴² Case 0011/OKT/2015; Decision of the PMÚ 2015/KH/1/1/038 (30 September 2015); Decision of the Council of the PMÚ 2016/KH/R/2/034 (30 June 2016).

⁴³ Case 0010/OKT/2021; Decision of the PMÚ 2021/DOH/POK/1/76 (22 December 2021).

3.2.2. Other cases

Due to the low frequency of enforcement activities in areas other than cartels,⁴⁴ it is hard to draw any general observations.

Between 2014 and 2021, the PMÚ closed only 5 cases during 1st instance proceedings (between 2015–2018 zero per year).⁴⁵ However, compared to cartel cases, in the only settlement in an abuse of dominance case, *Letisko M.R.Štefánika – Airport Bratislava, a.s. (BTS)*,⁴⁶ the proceedings were quite swift. The proceedings were launched on 12 July 2017 and the PMÚ received an application for settlement on 11 September 2017. The undertaking submitted its settlement declaration on 19 October 2017, the day after it was confirmed by the PMÚ. Thus, the case was closed in less than 6 months.

For the activity of the PMÚ in the area of vertical restraints, commitments were a typical way of closing cases.⁴⁷ Out of three infringement cases, two (*ŠKODA AUTO*⁴⁸ and *ags 92 (Chicco)*⁴⁹) were closed in a timely manner (in 2½ and 6 months respectively) via a settlement and the fines were reduced by 50%.

It appears that, in the area of abuse of dominance and vertical restraints, a settlement (together with commitments) is quite an effective measure of closing cases. However, due to the low number of such cases, it is hard to evaluate the practice in a comparatively relevant manner.

⁴⁴ For an overview of enforcement activities see, e.g., Ondrej Blažo, 'Proper, Transparent and Just Prioritization Policy as a Challenge for National Competition Authorities and Prioritization of the Slovak NCA' (2020) 13(22) Yearbook of Antitrust and Regulatory Studies 117, 137–138.

⁴⁵ However, in comparison to the fall of the activity of the Polish competition authority (UOKiK) that deals with a larger economy, the PMÚ's low intensity of actions does not appear as shocking (see Marek Martyniszyn and Maciej Bernatt, 'Implementing a Competition Law System' Three Decades of Polish Experience' (2020) 8 Journal of Antitrust Enforcement 165, 194–197).

⁴⁶ Case 0012/OZDPaVD/2017 Decision of the PMÚ 2018/DOZ/POK/2/2 (18 January 2018).

⁴⁷ Case 0031/OZDPaVD/2019 Decision of the PMÚ 2021/DOV/UPZ/2/11 (10 March 2021); Case 0038/OZDPaVD/2015 Decision of the PMÚ 2016/KV/2/1/021 (27 May 2016); Case 0039/OZDPaVD/2015 Decision of the PMÚ 2016/KV/2/1/020 (27 May 2016); Case 0040/OZDPaVD/2015 Decision of the PMÚ 2016/KV/2/1/023 (30 May 2016); Case 0042/OZDPaVD/2015 Decision of the PMÚ 2016/KV/2/1/027 (7 June 2016); Case 0041/OZDPaVD/2015 Decision of the PMÚ 2016/KV/2/1/026 (7 June 2016); Case 0027/OZDPaVD/2016 Decision of the PMÚ 89/2017/OZDPaVD-2017/KV/2/1/014 (24 May 2017); Case 0024/OZDPaVD/2016 Decision of the PMÚ 188/2017/OZDPaVD-2017/KV/2/1/015 (2nd June 2017).

⁴⁸ Case 0018/OZDPaVD/2014 Decision of the PMÚ 2014/KV/2/1/029 (22 October 2014).

⁴⁹ Case 0001/OZDPaVD/2019 Decision 2019/DOV/POK/2/20 (15 July 2019).

III. Settlement procedure in Slovakia – between top-to-bottom, bottom-up and horizontal sources of inspiration

There is no doubt that Slovak legislation, along with the legislative framework of the other Central and Eastern European (CEE) countries, has been mirroring features of the European Commission's enforcement toolkit, such as the methodology of calculating fines, leniency programmes and settlement procedures.⁵⁰ Indeed, during their path of voluntary convergence, CEE countries developed tools specific for their legal framework to adapt themselves to the reality of their national economies and the overall legal environment, such as to overcome a lack of resources or their 'smallness'.⁵¹

The situation was not different in the case of the settlement procedure. After the introduction by the Commission of the Settlement Regulation in 2008⁵², CEE countries also introduced this 'procedural' feature of EU competition law into their legal systems, but transformed it into their own form, for instance in terms of the scope or the reduction of fines.⁵³ The inspiration taken by Slovakia from Commission rules is visible in the details, particularly the content of the declaration of an undertaking which is, *mutatis mutandis*, an adaptation of a settlement submission under the Commission Notice.

The practice in Slovakia closely followed the practice in Czechia,⁵⁴ while settlement procedures were introduced later on in other CEE countries.⁵⁵ If we compare the practice of the European Commission (and the conditions

⁵⁰ Jurgita Malinauskaite, *Harmonisation of EU Competition Law Enforcement* (Springer International Publishing 2020) 185–212 <<http://link.springer.com/10.1007/978-3-030-30233-7>> accessed 1 May 2022.

⁵¹ Jurgita Malinauskaite, 'Public EU Competition Law Enforcement in Small "newer" Member States: Addressing the Challenges' (2016) 12(1) *The Competition Law Review* 19, 51.

⁵² Commission Regulation (EC) 622/2008 of 30 June 2008 amending Regulation (EC) 773/2004, as regards the conduct of settlement procedures in cartel cases [2008] OJ L171/3; 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 [2008] OJ C 167/1.

⁵³ Malinauskaite (n 49) 216–217.

⁵⁴ Petr, 'The Legal Consequences of Breaching Competition Rules in the Czech Republic' (n 8) 283; Petra Joanna Pipková and Ivo Šimeček, 'New Procedural Notices of the Czech Office for the Protection of Competition: Leniency, Settlement, and Alternative Problem Resolution' (2015) 8(11) *Yearbook of Antitrust and Regulatory Studies* 185.

⁵⁵ Csongor István Nagy, 'The Legal Consequences of Breaching Hungarian Competition Rules in Hungary' in Csongor István Nagy (ed), *The Procedural Aspects of the Application of Competition Law. European Frameworks – Central European Perspectives* (Europa Law Publishing 2016) 299; Krystyna Kowalik-Bańczyk, Małgorzata Król-Bogomińska and Anna Zientara, 'The Legal Consequences of Breaching Competition Rules in Poland' in Csongor István Nagy (ed), *The Procedural Aspects of the Application of Competition Law. European Frameworks –*

of the elements of the settlement procedure) to the practice of the Czech authority,⁵⁶ it is apparent, that the Slovak competition authority was inspired more ‘horizontally’ by Czech practice rather than taking a ‘top-to-bottom’ inspiration from the Commission. In both jurisdictions, Czech and Slovak, first settlements were achieved in an ‘unregulated’ environment, without any well-founded rules presupposed by law or, at least, by non-binding guidelines.⁵⁷ Furthermore, both authorities were quite generous in terms of the reduction of fines (initially 50%), and this generous reduction remained in case of cartels as well (20% Czechia and 30% Slovakia). Finally, both authorities apply this regime not only to cartels but also to other types of infringements.

There are not only formal similarities between the introduction of a settlement procedure in the Slovak and the Czech legal orders, a ‘bottom-up’ incentive appeared in both cases also. In Czechia, a settlement was used for the first time in the *Kofola* case⁵⁸, due to initiative of the investigated undertaking, as was the situation in the *ELCOM* case.

The generosity of the competition authority (even though later criticized⁵⁹) stemmed, at least in Slovakia, from disastrous, for the competition authority, outcomes of judicial reviews following its decisions. In *anni horribiles* 2005–2009, only 11 judgments out of 22 were delivered in favour of the competition authority and merely 2% of the value of the fines imposed by the authority were in fact upheld (that is, the probability of winning the case by the undertaking was 98%).⁶⁰ This success ratios were substantially different than those of the Commission (26%–27% reduction⁶¹), and the unconditionally expected fine

Central European Perspectives European Frameworks – Central European Perspectives (Europa Law Publishing 2016) 317.

⁵⁶ Pipková and Šimeček (n 53); Blažo, ‘Úsvit Urovnania Na Slovensku’ (n 5); Blažo, ‘Vývoj Urovnania Ako Nástroja Zefektívnenia Konania v Súťažnom Práve’ (n 5); Robert Neruda, ‘Narovnání. Chcete Mě?’ (2011) 2 Antitrust 2.

⁵⁷ Pipková and Šimeček (n 53) 192; Blažo, ‘Úsvit Urovnania Na Slovensku’ (n 5).

⁵⁸ Case no. S95/2008/KD *Kofola/Kofola Holding*.

⁵⁹ Petr, ‘Narovnání v Českém Soutěžním Právu’ (n 8) 283.

⁶⁰ Author’s own calculation based on judgments of the Regional Court in Bratislava and the Supreme Court of the Slovak Republic: Sž 82/2004 (20 July 2005); 1 Sž-o-NS 207/2005 (21 July 2005); 1S269/2005 (22 July 2005); 1sžhpu/3/2008 (23 July 2005); 1S 42/05 (8 December 2005); 4 Sž 110/2004 (17 February 2006); 1 Sž-o-NS 37/2006 (17 February 2006); 2S 99/2006 (15 November 2006); 2S 380/2006 (21 March 2007); 1S 424/06 (21 June 2007); 2S 258/06 (7 November 2007); 1S 27/2007 (6 December 2007); 1S 263/2006 (17 April 2008); 8Sžhpu 1/2008 (14 August 2008); 2 Sžhpu 4/2008 (14 October 2008); 2S/430/06 (10 December 2008); 2 Sžh 3/2007 (21 January 2009); 1S 309/2006 (31 March 2009); 1S 258/2006 (18 September 2009); 2S 102/2006 (18 September 2009); 2S 172/2007 (16 November 2009); 3S 9/2009 (15 December 2009).

⁶¹ Kai Hüschelrath and Ulrich Laitenberger, ‘The Settlement Procedure in EC Cartel Cases: An Empirical Assessment’ (2015) 15–064 23–24 <<https://nbn-resolving.de/urn:nbn:de:bsz:180-madoc-397438>> accessed 1 May 2022.

reduction imposed by the Commission was estimated at about 12.7% based on the probability of winning the case by an undertaking.⁶² Thus, the parameters of the Commission's regime correspond to those levels of fine reductions and the probability of losing the case by the Commission. Therefore, the Slovak competition authority was eager to close its cases via settlements when there was such an opportunity. On the other hand, a reduction of the fine by only 10% could have hardly served as an incentive for undertakings to settle in a situation when their chances of winning the case during judicial review were high. It must be noted that the majority of the PMÚ's decisions were annulled based on procedural issues, or on arguments related to the calculation of fines.

The European Commission evidently acknowledged this diversity in settlement regimes across EU countries and settlements did not become part of the harmonization package of national procedural law within the ECN+ Directive (except the protection of settlement submissions if they are relevant). In the case of the absence of such provisions on the EU level, settlements remained within the sphere of the procedural autonomy of the Member States, provided the effectiveness and equivalence of the application of EU law as well as of the right for a fair trial are safeguarded.⁶³

⁶² Michael Hellwig, Kai Hüschelrath and Ulrich Laitenberger, 'Settlements and Appeals in the European Commission's Cartel Cases: An Empirical Assessment' (2018) 52(1) *Review of Industrial Organization* 55, 66.

⁶³ E.g. Case C-201/02 *Wells* EU:C:2004:12; Case 33-76 *Rewe v Landwirtschaftskammer für das Saarland* EU:C:1976:188; Case 45-76 *Comet BV v Produktschap voor Siergewassen* EU:C:1976:191; Case C-582/20 *SC Cridar Cons* EU:C:2022:114. In literature, e.g. Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 *German Law Journal* 827; Catalin S Rusu, 'The Real Challenge of Boosting the EU Competition Law Enforcement Powers of NCAs: In Need of a Reframed Formula?' (2018) 13(1) *The Competition Law Review* 27; Michal Bobek, 'Why There Is No Principle of "Procedural Autonomy" of the Member State' in Hans Micklitz and Bruno de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2011); Ondrej Blažo, 'Shaping Procedural Autonomy of the Member States of the European Union – A Case of "Market Regulators"' (2018) 5 *European Studies – The Review of European Law, Economics and Politics* 271; Giacomo Dalla Valentina, 'Competition Law Enforcement in Italy after the ECN+ Directive: The Difficult Balance between Effectiveness and Over-Enforcement' (2019) 12(20) *Yearbook of Antitrust and Regulatory Studies* 91; Nicolo Zingales, 'Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law?' (2010) 11(4) *German Law Journal* 419 <https://www.cambridge.org/core/product/identifier/S2071832200018617/type/journal_article> accessed 1 May 2022.

IV. Settlements in the context of the Slovak legal order

The PMÚ's procedure in competition matters operates within the scope of general administrative law⁶⁴ with several adjustments stipulated by the Slovak Competition Act. Competition settlements can also be assessed in the context of the Slovak legal order as a whole.

Since specific administrative liability for administrative offences is applied in competition matters, the context of the general rules of administrative liability can be considered. There is no comprehensive code on administrative offences and the only 'quasi-codified' area covers minor offences of natural persons.⁶⁵ In this regime (although the level of fines is unparallexly lower *vis-à-vis* competition matters), offenders can benefit from a lower level of fine, by not for objecting the charge of committing a minor offence, if the offender accepts her guilt and the sanction immediately after he is charged for the infringement 'on the spot'. If a fine is imposed in this 'ticket procedure' (*blokové konanie*), the authority is not obliged to issue a formal decision and no appeal is admissible.⁶⁶ Similarly, an offender can benefit from a lower fine if a fine is imposed by a decision within the so-called 'order procedure' (*rozkazné konanie*)⁶⁷, where the authority issues a decision without conducting any previous proceedings with the offender as a party to the proceedings.⁶⁸ If an offender refuses to accept a fine by a 'ticket', or a fine by an 'order' of the authority, the authority launches 'full scale' proceedings with all rights of defence, detailed evidence as well as the right to appeal and the right for judicial review. However, in this case, the accused generally face at least double sanction comparing to a 'ticket' or a 'order' procedure if they are found to have committed an infringement.

Slovak criminal law⁶⁹, along with other instruments on cooperation between a suspect and the police⁷⁰, evolved a certain type of settlement in the form of an agreement on the 'guilt and penalty' concluded between a defendant

⁶⁴ Slovak Act 71/1967 Coll. on Administrative Procedure (Administrative Code).

⁶⁵ Slovak Act of the Slovak National Council 372/1990 Coll. on Minor Offences as amended.

⁶⁶ Slovak Act on Minor Offences, § 66.

⁶⁷ In Slovak language the term '*rozkaz*' actually corresponds to military 'command' rather than more civilian '*prikaz*' (order).

⁶⁸ Slovak Act on Minor Offences, § 67.

⁶⁹ For comparative aspects see e.g. Filip Ščerba, 'The Concept of Plea Bargaining Under the Czech Criminal Law and the Criminal Law of Other Countries Within the Region of Central Europe' (2013) 13(1) *International and Comparative Law Review* 7 <<https://doi.org/10.1515/iclr-2016-0055>> accessed 1 May 2022

⁷⁰ Andrej Belež, 'Dočasné odloženie vznesenia obvinenia' in Jozef Čentéš and others (eds), *Trestný poriadok II. § 196–596* (CH Beck 2021).

and a public prosecutor and then approved by the court.⁷¹ This regime resembles plea bargaining, but judicial overview limits the margin for bargain of prosecutors.⁷² An agreement on the ‘guilt and penalty’⁷³ shall not be abused as an investigative measure, and shall be applied only in cases where the circumstances of a crime are sufficiently investigated.⁷⁴ On the other hand, if used, it allows to impose a penalty lower than the statutory limits stipulated by the Slovak Penal Code.⁷⁵ An appeal against a judgment of the court approving the agreement on the ‘guilt and penalty’ is not admissible,⁷⁶ except for an extraordinary review due to a ‘substantial violation of the right of defence’⁷⁷ submitted by the Minister of Justice of the Slovak Republic.⁷⁸

The Slovak rules on the protection of public procurement introduced a 50% decrease of fines for cases when a contracting authority fully accepts the findings of the audit of the Office for Public Procurement (*Úrad pre verejné obstarávanie ÚVO*). This measure was introduced by the amendment of the Slovak Act on Public Procurement⁷⁹ – Act 345/2018 Coll. According to the explanatory note attached to the draft act on the settlement procedure in competition cases, the settlement regime was, in fact, an explicit inspiration for such a measure in public procurement law.⁸⁰ However, a substantial novelty was introduced into Slovak public procurement law – if the fine is reduced, appeal and judicial review are not admissible.

All three examples show that the settlement procedure introduced by the PMÚ in competition matters is not a unique measure in the Slovak legal order (comparison in Table 1.). Nevertheless, the quality or relevance of its legal consequences is different. While in the abovementioned examples, appeal or

⁷¹ Slovak Act 301/2005 Coll. Penal Procedural Code as amended.

⁷² Slovak Penal Procedural Code, § 331(1)b).

⁷³ For more details Margita Prokeínová, ‘Konanie o Dohode o Vine a Treste’ in Jozef Čentéš and others (eds), *Trestný poriadok II. § 196–596* (CH Beck 2021); Margita Prokeínová, ‘Mimoriadne Zníženie Trestu v Konaní o Dohode o Vine a Treste’ (2009) 61(4) *Justičná revue* 552.

⁷⁴ Slovak Penal Procedural Code, § 232.

⁷⁵ Slovak Act 300/2005 Coll. Penal Code as amended, § 39(2)d).

⁷⁶ Slovak Penal Procedural Code, § 334(4).

⁷⁷ Slovak Penal Procedural Code, § 371(1)(c).

⁷⁸ Order of the Supreme Court of the Slovak Republic of 5 September 2012 Case No 3 Tdo 47/2012.

⁷⁹ Slovak Act on Public Procurement and Amendment of Some Other Acts (Law No 343/2015 of 18 November 2015) (*zákon č. 343/2015 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov*).

⁸⁰ *Národná rada Slovenskej republiky. Parlamentná tlač 1073: Vládny návrh zákona, ktorým sa mení a dopĺňa zákon č. 343/2015 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov v znení neskorších predpisov a ktorým sa menia a dopĺňajú niektoré zákony. Dôvodová správa – osobitná časť.* <<https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=456426>> accessed 1 May 2022.

judicial review is either excluded or limited, settlement in competition matters has no such consequence. Therefore, even agreeing to a settlement does not prevent the undertaking from launching a judicial review procedure and to frustrate the benefits of procedural economy of the settlement.

Table 1. Comparison of settlement procedure with other similar procedural instruments

	Settlement – EC	Settlement – PMÚ	Minor offences	Criminal offences	Public procurement infringements
Statutory legal basis	Y	Y	Y	Y	Y
Details in decree or guidelines	Y	Y	N	Y	N
Initiative of authority (A) or suspect (S)	A/S	A/S	A	A/S	S
Facts duly established	? ^a	Y	Y	Y	N
Negotiation expected by law	Y	Y	N	Y	N
Fixed fine reduction	Y	Y	? ^b	N	Y
Authority authorized to settle the case	EC	PMÚ	n.a.	Prosecutor	n.a.
Approves ‘settlement’	EC	PMÚ	Authority	Court	ÚVO
Simplified or streamlined procedure	Y	N	Y	Y	n.a.
Shorter or simplified decision	?	N	Y	Y	n.a.
Appeal	n.a.	Y	N	N	N
Judicial review	Y	Y	N	N/A	N

^a A settlement is, however, different from ‘the voluntary production of evidence to trigger or advance the Commission’s investigation, which is covered by the Commission Notice on Immunity from fines and reduction of fines in cartel cases’.

^b Act on Minor Offences stipulates a lower range for the imposition of the fine.

Source: Author’s own elaboration.

V. Qualitative assessment of the settlement regime

1. Conditions for settlement

As it was mentioned before, both the Slovak Competition Act (2001) and the Slovak Competition Act (2021) required the fulfilment of two sets of conditions – ‘substantial’ ones and ‘formal/procedural’ ones. The PMÚ in all its decisions mentioned the fulfilment of formal and procedural conditions for a settlement, that is, the declaration of the undertaking consistent with the decree of the PMÚ (or non-fulfilment, when the undertaking failed to produce such a declaration). However, none of these cases contained the evaluation of ‘substantial’ or substantive conditions for a settlement (in several cases, the PMÚ merely cited the provision of the Act without further elaboration of its relevance and reasons for its application in the particular case). While the first condition (the facts collected by the PMÚ give enough reasons for a conclusion that a violation of competition law occurred) can be considered fulfilled after the PMÚ sends a pre-decision notice, the fulfilment of the second condition cannot be granted automatically (the PMÚ shall be guided by the interest of procedural effectiveness or to achieve speedy and effective market remedies). It seems to be apparent from the practice of the PMÚ that the authority agrees to a settlement whenever an undertaking is willing to settle. The PMÚ and its Council does not even distinguish between settlement during 1st and during 2nd instance proceedings. It is obvious that the contribution to the effectiveness and speed of procedures is different in 1st instance proceeding and after an appeal. In fact, in the case of a 2nd instance settlement, there is no additional value of a settlement in the terms of the effectiveness of an administrative procedure itself. At this stage, the Council of the PMÚ shall explain why it is willing to decrease the fine for an undertaking that opposed the conclusions of the PMÚ at least twice (opposition to a pre-decision notice and appeal). Therefore, a fine reduction can be hardly a ‘reward’ for cooperation⁸¹, and can be an attempt of an undertaking, that is losing the case, to bargain for a fine reduction. Indeed, full settlement can avoid lengthy judicial review but such impact of a hybrid 2nd instance settlement is dubious. Hence, it is impossible to qualitatively review the fulfilment of the conditions for a settlement since the PMÚ has kept on failing to fulfil its duty to give reasons for its decision in this part.

⁸¹ Compare 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 (n 51), para. 2.

2. Consequences of settlements

The Decree on the Conditions of Settlement (2021) distinguishes the conclusion of the settlement procedure from the actual settlement. The settlement procedure can be terminated either by a settlement or otherwise.

The settlement procedure can be terminated in a way other than by settlement if:

- 1) the PMÚ suggested settlement negotiations but the undertaking remains inactive within the time limit set by the PMÚ [§ 1(2) of the Decree];
- 2) the undertaking fails to respond to the preliminary conclusions of the PMÚ, if the settlement procedure is launched prior to the delivery of the pre-decision notice to the undertaking [§ 2(1) of the Decree];
- 3) the undertaking fails to respond to the proposal of the PMÚ to settle (via a settlement declaration) or explicitly rejects the settlement [§ 2(3) and § 3(1) of the Decree].

If the settlement procedure is unsuccessful (terminated without settlement), the PMÚ cannot consider further requests of the same undertaking for a settlement [§ 3(5) of the Decree]. However, the Decree is silent about launching a new settlement procedure on the initiative of the PMÚ which is, *a contrario*, possible.

The settlement is concluded if an undertaking submits its settlement declaration in line with the proposal of the PMÚ and the PMÚ subsequently confirms the settlement.

Questions can be raised regarding the meaning of § 4(3) of the Decree, which proclaims that declarations of an undertaking are legally irrelevant if the settlement procedure is not, in actuality, terminated by the settlement. The first, obvious, option is that it covers situations when the undertaking submits a declaration that does not correspond with the proposal of the PMÚ. However, there is also an option whereby the PMÚ or its Council can, at the end of the proceedings, ultimately abandon the planned settlement, and so disregard previous settlements. From the literal interpretation of the provisions of the Slovak Competition Act and the Decree, the PMÚ is obliged to reduce the fine as a consequence of a settlement and there is no provision on revoking the settlement. Equally, there is no provision on revoking the settlement by the undertaking. Even though there is no provision that requires the PMÚ to be bound by the settlement, requirements of due process and rule of law prevent it from such a divergence at the expense of an undertaking. A different situation occurs when the decision of the PMÚ is annulled due to a violation of substantive or procedural law (including settlement) by the Council of the PMÚ or by the court, because the PMÚ cannot rely on or continue erroneous proceedings. The settlement does not mean an ‘agreement’

on the conclusion of the whole case, or *res iudicata*, because the PMÚ can still launch new proceedings (or continue in the ongoing) with regard to an infringement not covered by the settlement.

On the other hand, a settlement does not prevent an undertaking from appealing the decision of the PMÚ, or to file an action for judicial review, and this right is not limited.

Since 2016⁸², settlements bring another benefit to undertakings in the form of a shorter, one-year long, period of being excluded (banned) from participating in public procurements (compared to no exclusion for successful leniency applicants, and three years in ‘normal’ cases).⁸³ This decrease of the length of the exclusion can be another incentive for settling in bid rigging cases.

3. Settlement versus Leniency and Commitments

Although all three measures, settlement, leniency and commitments, contribute to the effectiveness of public enforcement of competition law, they differ in their consequences within public enforcement as well as within private enforcement of competition law. First, decisions on commitments do not (or shall not) contain a declaration that a restriction of competition has taken place – they shall merely remove a ‘possible restriction of competition’.⁸⁴ Therefore, this type of decision cannot serve as evidence of a violation of competition law for the purpose of private enforcement. On the other hand, both leniency and settlements are linked with a decision establishing a violation of competition law. On the other hand however, while the leniency programme is a clearly fact-finding instrument (the undertaking shall produce new evidence), settlements cannot have such a function,⁸⁵ since one of the requirements for launching a settlement procedure is to have the facts of the case established.⁸⁶ Therefore, settlements can be used as evidence neither against the ‘settling’ undertaking, nor towards other undertakings. As a result, a settlement declaration (as well as the proposal) shall be prudently drafted in order not to interfere with the presumption of innocence of other undertakings.

⁸² Slovak Competition Act (2001) as amended by Act 343/2015 Coll. on Public Procurement and amendment of other laws.

⁸³ Slovak Competition Act (2021), § 48.

⁸⁴ Slovak Competition Act (2021), § 33.

⁸⁵ Fernando Castillo De La Torre and Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar Pub 2017) 223–224.

⁸⁶ Slovak Competition Act (2021), § 52.

Moreover, since the settlement procedure can be launched on the initiative of the PMÚ, it cannot be perceived as an incentive to self-incriminate.⁸⁷ Indeed, it does not prevent the undertakings to submit other declarations or submissions outside of the settlement regime that can be handled as evidence.⁸⁸ In the context of private enforcement, settlement submissions alone should not have additional evidential value compared to the decision of the PMÚ itself, because the court is bound by the decision of the PMÚ on the infringement of competition law⁸⁹ (settlement declarations cannot be required to be disclosed in damage claims proceedings).

4. Appeal and Judicial Review

The Slovak Competition Act (2021) (or its predecessor) does not specify the procedural consequences of settlements in terms of: the possibility to issue a simplified decision; splitting the proceedings in case of ‘hybrid’ settlements; streamlining the proceedings by reducing procedural steps; the prohibition or limitation of the right to appeal; nor does it contain the limits of the right for full judicial review. Indeed, the Commission framework for settlements does not exclude full judicial review on the one hand, and, on the other hand, it gives broader discretion regarding splitting decisions among addressees – the PMÚ operates in a different legal framework.

First, secondary EU law cannot exclude or shape the possibility of judicial review because this right of individuals stems from the ‘constitutional’ basis of EU law – Article 263 TFEU. Even though ‘criminal charges’ shall be subject to judicial scrutiny under Article 6 European Convention on Human Rights (hereinafter: ECHR), the case law of the European Court of Human Rights (hereinafter: ECtHR) acknowledged the possibility to waive rights stemming from that provision.⁹⁰ For the compliance of plea bargain instruments with the ECHR, the ECtHR required the following conditions: ‘(a) the bargain had to be accepted by the first applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain

⁸⁷ On the protection against self-incrimination see e.g. Angus MacCulloch, ‘The Privilege against Self-Incrimination in Competition Investigations: Theoretical Foundations and Practical Implications’ (2006) 26(2) *Legal Studies* 211.

⁸⁸ Adriani Kalintiri, *Evidence Standards in EU Competition Enforcement: The EU Approach* (Bloomsbury Publishing 2019) 124–130.

⁸⁹ Act 160/2015 Coll. Civil Court Proceeding Code, § 193.

⁹⁰ E.g. *V.C.L. and A.N. v The United Kingdom* App no 77587/12 and 74603/12 (ECtHR, 16 February 2021), para 201.

and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review.⁹¹ Thus, the ECtHR does not require judicial review of a ‘bargained’ decision as a whole but only ‘sufficient’ review, that is, review that safeguards an individual against the abuse of law. As it was described above, the Slovak legal order contains instruments of a plea-bargain type that limit further judicial review.

Compared to the powers of the Commission, the PMÚ cannot employ the possibility of ‘splitting’ the case into ‘settled’ and ‘not-settled’ decisions. First, 1st instance and 2nd instance proceedings are considered to form a ‘single and continuous’ proceeding under Slovak administrative law, and all of the parties of given 1st instance proceedings are *ex lege* also parties to the following 2nd instance proceedings. Furthermore, all parties to the administrative proceedings are subjects of the following court proceedings, notwithstanding whether they appealed the settlement or not. These features, together with the impossibility of the PMÚ to issue a simplified decision, limit the impact of settlements on procedural effectiveness.

VI. Quantitative assessment of the settlement regime

Several empirical and quantitative reviews of Commission practice⁹² served as an inspiration for the quantitative analysis in the PMÚ practice as well as for the impact of this practice. It is hardly possible to evaluate the impact of a settlement on solving a problematic situation, since recently the PMÚ targets its activity on bid-rigging and the majority of such cases are not part of the settlement scheme. The abuses of dominance and vertical agreements are excluded from this analysis as well, due to the sparse enforcement activity in these fields. Thus, only cases closed during 1st instance proceedings after 2010 are considered in the analysis; cases ‘returned’ by the court to the PMÚ in this period are excluded as well. Table 2 gives an overview of cases taken into consideration for the analysis, including data on fines, on settlements and on leniency.

⁹¹ *Natsvlishvili and Togonidze v Georgia* App no 9043/05 (ECtHR, 29 April 2014), para 92.

⁹² Kai Hüschelrath and Ulrich Laitenberger, ‘The Settlement Procedure in the European Commission’s Cartel Cases: An Early Evaluation’ (2017) 5(3) *Journal of Antitrust Enforcement* 458; Hellwig, Hüschelrath and Laitenberger (n 61); Hüschelrath and Laitenberger (n 60); Ascione and Motta (n 1).

Table 2. Overview of cartel cases issued by the PMÚ between 2011 and 2021

A	b	c	d	e	f	g	h	i	j
Case number	Fine imposed by 1 st instance decision (in euro)		Fine imposed by final decision (in euro)		No. of parties	% of parties			
	Average	Total	Average	Total		Settlement		Zero fine	Leniency
						1. inst.	Tot.		
0010/OKT/2021	10,985	32,956	10,985	32,956	3	33	33	33	33
0014/OKT/2020	–	–	–	–	10	–	–	100	–
0026/OKT/2014	85,693	257,079	85,693	257,079	3	–	–	–	–
0011/OKT/2015	48,366	96,733	33,857	67,713	2	–	100	–	–
0009/OKT/2015	–	–	–	–	6	–	–	100	–
0006/OKT/2014	185,939	185,939	–	–	1	–	–	–	–
0033/OKT/2014	49,371	148,115	–	–	3	–	–	–	–
0030/OKT/2015	–	–	–	–	3	–	–	100	–
0013/OKT/2015	–	–	–	–	2	–	–	100	–
0009/OKT/2017	198,344	1,190,062	190,739	1,144,435	6	–	–	–	–
0021/OKT/2014	849,184	2,547,551	–	–	3	–	–	–	–
0021/OKT/2019	107,774	431,095	107,777	431,095	4	25	25	25	25
0035/OKT/2015	140,609	281,218	140,609	281,218	2	–	–	–	–
0027/OKT/2017	153,773	307,546	153,773	307,546	2	–	–	–	–
0020/OKT/2013	249,101	498,202	64,327	128,653	2	–	–	–	–

Table 2 – continued

A	b	c	d	e	f	g	h	i	j
Case number	Fine imposed by 1 st instance decision (in euro)		Fine imposed by final decision (in euro)		No. of parties	% of parties			
	Average	Total	Average	Total		Settlement		Zero fine	Leniency
						1. inst.	Tot.		
0003/ OKT/2015	596,470	2,982,351	596,470	2,982,351	5	–	–	–	–
0028/OKT/2014	590,085	5,310,762	23,396	210,565	9	56	89	–	33
0012/OKT/2016	521,470	9,386,456	373,863	6,729,539	18	–	6	22	22
0029/ OKT/2015	–	–	–	–	3	–	–	100	–
0010/ OKT/2015	–	–	–	–	2	–	–	100	–
0027/ OKT/2014	–	–	–	–	5	–	–	100	–
0029/OKT/2014	308,186	616,371	308,186	616,371	2	100	100	–	100
0030/OKT/2014	51,191	153,573	51,191	153,573	3	100	100	–	67
0012/ OKT/2015	–	–	–	–	2	–	–	100	–
0010/ OKT/2013	856,236	4,281,182	411,277	2,056,382	5	–	–	–	–
0019/OKT/2013	153,411	613,644	97,740	390,961	4	–	50	–	25
0016/ OKT/2013	10,670	106,695	10,106	101,055	10	–	–	–	–
0016/ ODOS/2011	930	930	1,420	1,419	1	–	100	–	–
0008/ ODOS/2011	2,708	2,708	6,133	6,133	1	–	100	–	–
0033/ ODOS/2011	261	261	261	261	1	–	–	–	–

Table 2 – continued

A	b	c	d	e	f	g	h	i	j
Case number	Fine imposed by 1 st instance decision (in euro)		Fine imposed by final decision (in euro)		No. of parties	% of parties			
	Average	Total	Average	Total		Settlement		Zero fine	Leniency
						1. inst.	Tot.		
0009/ ODOS/2012	826	4,131	826	4,131	5	60	60	–	–
0035/ ODOS/2010	97,020	485,100	97,020	485,100	5	20	20	60	40
0009/ ODOS/2011	15,846	63,387	15,846	63,387	4	50	50	50	–

Legend: f: number of undertakings in proceeding; g: % of parties settled during 1st instance proceedings (excluding cases returned after appeal); h: % of parties settled (total); i: % of parties with zero fine during 1st instance proceedings (immunity or non-infringement); j: % of leniency applicants.

Source: Author's own elaboration, based on data extracted from:

- the annual reports of the PMÚ [Protimonopolný úrad Slovenskej republiky, *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2018* (2019) <<https://www.antimon.gov.sk/data/att/2044.pdf>> accessed 14 February 2020; Protimonopolný úrad Slovenskej republiky, *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2014* (2015) <<https://www.antimon.gov.sk/data/att/1665.pdf>> accessed 1 February 2020; Protimonopolný úrad Slovenskej republiky, *Výročná Správa/Annual Report 2009* (2010) <<https://www.antimon.gov.sk/data/att/85.pdf>> accessed 14 February 2020; Protimonopolný úrad Slovenskej republiky, *Výročná Správa/Annual Report 2008* (2009) <<https://www.antimon.gov.sk/data/att/86.pdf>> accessed 14 February 2020; Protimonopolný úrad Slovenskej republiky, *Výročná Správa/Annual Report 2019* (2020) <<https://www.antimon.gov.sk/data/att/2108.pdf>> accessed 11 September 2020; Protimonopolný úrad Slovenskej republiky, *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2012* (2013) <<https://www.antimon.gov.sk/data/att/76.pdf>> accessed 1 February 2020; Protimonopolný úrad Slovenskej republiky, *Správa o Činnosti Protimonopolného Úradu Slovenskej Republiky Za Rok 2016* (2017); Protimonopolný úrad Slovenskej republiky, *Správa o Činnosti Protimonopolného Úradu Slovenskej Republiky Za Rok 2018* (2019) <<https://rokovania.gov.sk/RVL/Material/23907/1>> accessed 22 February 2020; Protimonopolný úrad Slovenskej republiky, *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2011* (2012) <<https://www.antimon.gov.sk/data/att/77.pdf>> accessed 1 February 2020; Protimonopolný úrad Slovenskej republiky, *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2015* (2016) <<https://www.antimon.gov.sk/data/att/1797.pdf>> accessed 1 February 2020; Protimonopolný úrad Slovenskej republiky, *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2013* (2014) <<https://www.antimon.gov.sk/data/att/1404.pdf>> accessed 1 February 2020; Protimonopolný úrad Slovenskej republiky, *VÝROČNÁ SPRÁVA/ANNUAL REPORT 2016* (2017) <<https://www.antimon.gov.sk/data/att/1899.pdf>> accessed 1 February 2020; Protimonopolný úrad Slovenskej republiky, *Správa o Činnosti Protimonopolného Úradu Slovenskej Republiky Za Rok 2017* (2018)],
- decisions of the PMÚ [2011/ZK/1/1/027 (12 August 2011); 2011/ZK/1/1/028 (12 August 2011); 2011/KH/1/1/031 (5 September 2011); 2011/KH/1/1/038 (28 September 2011); 2011/KH/1/1/055

(22 December 2011); 2012/KH/1/1/007 (13 February 2012); 2012/KH/1/1/015 (23 April 2012); 2013/KH/1/1/014 (4 June 2013); 2013/KH/1/1/017 (7 August 2013); 2013/KH/1/1/025 (25 October 2013); 2014/KH/1/1/012 (2 June 2014); 2014/KH/1/1/021 (28 July 2014); 2014/KH/1/1/023 (7 August 2014); 2014/KH/1/1/038 (13 November 2014); 2014/KH/1/1/041 (19 December 2014); 2015/KH/1/1/015 (25 May 2015); 2015/KH/1/1/016 (25 May 2015); 2015/KH/1/1/017 (10 June 2015); 2015/KH/1/1/023 (7 July 2015); 2015/KH/1/1/033 (11 September 2015); 2015/KH/1/1/038 (30 September 2015); 2015/KH/1/1/039 (26 October 2015); 2016/KH/1/1/004 (11 February 2016); 2016/ZK/1/1/006 (26 February 2016); 2016/ZK/1/1/010 (8 March 2016); 2016/ZK/1/1/013 (30 March 2016); 2016/ZK/1/1/014 (31 March 2016); 2016/ZK/1/1/041 (11 August 2016); 2016/ZK/1/1/051 (14 November 2016); 2016/ZK/1/1/054 (15 December 2016); 68/2017/OKT-2017/ZK/1/1/004 (2 February 2017); 52/2017/OKT-2017/ZK/1/1/005 (6 March 2017); 16/2017/OKT-2017/KH/1/1/023 (23 August 2017); 2018/DOH/POK/1/7 (11 April 2018); 2018/DOH/POK/1/32 (5 October 2018); 2018/DOH/POK/1/40 (30 November 2018); 2019/DOH/POK/1/39 (5 December 2019); 2020/DOH/POK/1/2 (3 February 2020); 2020/DOH/POK/1/29 (18 November 2020); 2021/DOH/ZKN/1/17 (1 April 2021); 2021/DOH/ZKN/1/60 (12 November 2021); 2021/DOH/POK/1/76 (22 December 2021)],

– decisions of the Council of the PMÚ [2012/KH/R/2/006 (27 January 2012); 2012/KH/R/2/042 (7 September 2012); 2012/KH/R/2/041 (7 September 2012); 2014/KH/R/2/009 (11 April 2014); 2015/KH/R/2/005 (12 February 2015); 2015/KH/R/2/004 (25 February 2015); 2015/KH/R/2/010 (31 March 2015); 2015/KH/R/2/037 (24 September 2015); 2016/KH/R/2/003 (4 February 2016); 2016/KH/R/2/028 (9 June 2016); 2016/KH/R/2/031 (23 June 2016); 2016/KH/R/2/034 (30 June 2016); 2016/KH/R/2/033 (30 June 2016); 21/2017/ODK-2017/KH/R/2/022 (25 August 2017); 31/2017/ODK-2017/KH/R/2/025 (11 September 2017); 16/2017/ODK-2017/KH/R/2/035 (27 November 2017); 2019/DOH/POK/R/11 (4 April 2019); 2019/DOH/ZPR/R/19 (12 July 2019); 2020/DOH/POK/R/15 (15 May 2020); 2021/DOH/POK/R/24 (19 May 2021)],

– judgments of the Regional Court in Bratislava [5S/106/2015 (15 November 2015); 1S/131/2015 (17 March 2016); 1S/136/2015 (12 May 2016); 1S/103/2015 (16 June 2016); 1S/103/2015 (16 June 2016); 1S/121/2015 (27 October 2016); 5S/106/2015 (15 November 2016); 5S/134/2015 (29 November 2016); 6S/162/2016 (18 January 2017); 5S/133/2016 & 6S 147/2016 & 6S 173/2016 (23 May 2017); 2S/94/2015 (6 December 2017); 6S/106/2015 (3 May 2018); 2S/273/2017 (21 November 2018); 6S/139/2017 (7 February 2019); 2S/92/2020 (30 September 2020); 1S/93/2019 (24 June 2021)],

– the Supreme Court of the Slovak Republic [8Sžhk/1/2016 (26 October 2017); 3Sžh/2/2016 (23 November 2017); 4Sžhk/1/2016 (6 March 2018); 6Sžhk/1/2017 (20 March 2019); 5Sžhk/1/2017 (30 April 2019); 8Sžhk/1/2017 (20 February 2020); 5Asan/19/2018 (27 February 2020); 4Sžhk/1/2019 (4 November 2020); 2Sžhk/2/2017 (25 November 2020); 2Sžhk/2/2018 (8 December 2020)]

as well as a database created thereof by the Author.

Since speeding-up the procedure is the most relevant expectation for the settlement procedure, Table 3. and Figure 1. show the length of the investigation of the case, the administrative procedure and the judicial review, as well as the time delay between the end of the violation (or alleged violation in non-infringement cases) and the end of the proceedings. For a more detailed analysis, 1st instance proceedings were split by the moment of issuing the

pre-decision notice (equivalent to the Commission's statement of objection). It can be expected that the given case should be closed soon after the pre-decision notice in settlement cases. These figures show the substantial diversity of the length of the proceedings (including judicial review). This variability also corresponds to the variability of undertakings' reaction to 1st instance decisions, namely whether they settled, appealed and requested judicial review (Figure 2. and Figure 3.).

Table 3. Length of specific sections of proceedings and overall length of proceedings (in days)

Case number	Days between the end of infringement to beginning of investigation	Investigation	Administrative proceeding to 1 st instance pre-decision notice (SO)	Administrative proceeding from 1 st instance pre-decision notice (SO) to 1 st instance decision	1 st instance proceeding total	2 nd instance proceeding total	Administrative proceeding total	Administrative Proceeding + investigation	Judicial review	Proceeding total (administrative + judicial)	From end of infringement to final decision
0010/OKT/2021	901	119	49	252	301	0	301	420	0	420	1,321
0014/OKT/2020	270	603	355	53	408	0	408	1,011	0	1,011	1,281
0026/OKT/2014	1,793	76	114	68	182	367	549	625	1,609	2,234	4,027
0011/OKT/2015	492	123	102	82	184	255	439	562	0	562	1,054
0009/OKT/2015	1,658	443	510	0	510	0	510	953	0	953	2,611
0006/OKT/2014	1,330	189	168	73	525	412	937	1,126	0	1,126	2,456
0033/OKT/2014	2,323	42	85	85	334	379	713	755	0	755	3,078
0030/OKT/2015	259	53	541	8	549	0	549	602	0	602	861
0013/OKT/2015	340	435	651	40	691	0	691	1,126	0	1,126	1,466
0009/OKT/2017	-312	351	849	63	912	516	1,428	1,779	0	1,779	1,467
0021/OKT/2014	534	488	136	145	613	359	972	1,460	1,171	2,631	3,165

Table 3 – continued

Case number	Days between the end of infringement to beginning of investigation	Investigation	Administrative proceeding to 1 st instance pre-decision notice (SO)	Administrative proceeding from 1 st instance pre-decision notice (SO) to 1 st instance decision	1 st instance proceeding total	2 nd instance proceeding total	Administrative proceeding total	Administrative Proceeding + investigation	Judicial review	Proceeding total (administrative + judicial)	From end of infringement to final decision
0021/OKT/2019	1,229	629	333	124	457	0	457	1,086	0	1,086	2,315
0035/OKT/2015	370	230	225	687	912	358	1,270	1,500	0	1,500	1,870
0027/OKT/2017	2,407	137	214	57	271	0	271	408	0	408	2,815
0020/OKT/2013	12	124	249	83	1,031	411	1,442	1,566	0	1,566	1,578
0003/OKT/2015	-22	200	242	118	360	578	938	1,138	0	1,138	1,116
0028/OKT/2014	1,891	93	146	149	295	714	1,009	1,102	531	1,633	2,993
0012/OKT/2016	-216	345	529	381	1,116	326	1,442	1787	410	2,197	1,981
0029/OKT/2015	1,471	105	229	23	252	0	252	357	0	357	1,828
0010/OKT/2015	2,315	0	146	203	349	0	349	349	0	349	2,664
0027/OKT/2014	1,250	69	117	346	463	0	463	532	0	532	1,782
0029/OKT/2014	1,817	73	121	215	336	0	336	409	0	409	2,226
0030/OKT/2014	1,802	73	143	39	182	0	182	255	0	255	2,057
0012/OKT/2015	1,977	132	306	51	357	0	357	489	0	489	2,466
0010/OKT/2013	-33	68	290	88	378	302	680	748	2,277	3,025	2,992
0019/OKT/2013	1,088	147	155	73	228	212	440	587	2,100	2,687	3,775
0016/OKT/2013	764	130	231	101	332	189	521	651	2,126	2,777	3,541
0016/ODOS/2011	-105	0	46	164	623	375	998	998	0	998	893

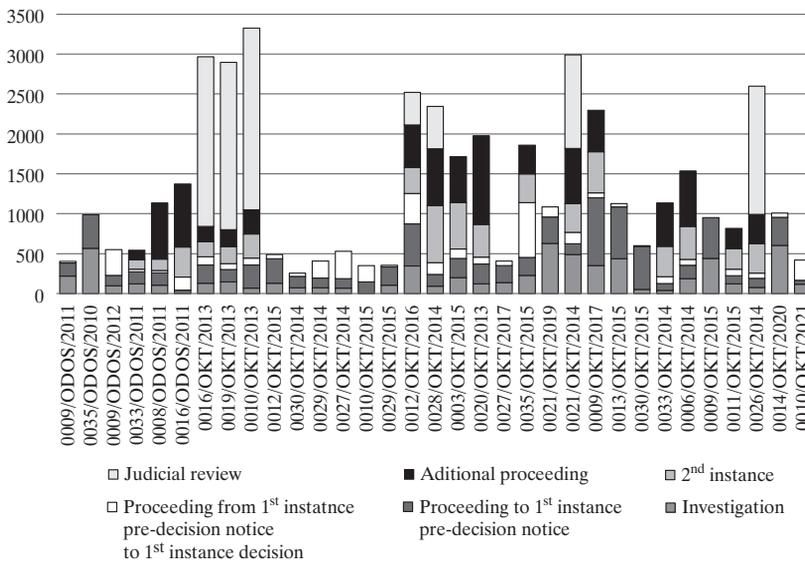
Table 3 – continued

Case number	Days between the end of infringement to beginning of investigation	Investigation	Administrative proceeding to 1 st instance pre-decision notice (SO)	Administrative proceeding from 1 st instance pre-decision notice (SO) to 1 st instance decision	1 st instance proceeding total	2 nd instance proceeding total	Administrative proceeding total	Administrative Proceeding + investigation	Judicial review	Proceeding total (administrative + judicial)	From end of infringement to final decision
0008/ODOS/2011	-290	105	158	27	743	144	887	992	0	992	702
0033/ODOS/2011	-306	124	148	34	182	119	301	425	0	425	119
0009/ODOS/2012	193	98	131	322	453	0	453	551	0	551	744
0035/ODOS/2010	1,559	568	420	0	420	0	420	988	0	988	2,547
0009/ODOS/2011	241	221	164	20	184	0	184	405	0	405	646

Source: Author's own elaboration based on sources listed under Table 2.

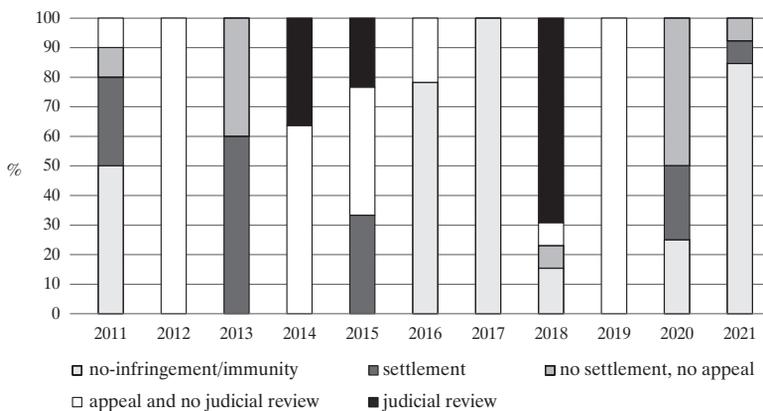
Due to this substantial variability, the relationship between settlements and the length of the overall proceedings was tested within the regression analysis. The function (Figure 4.) was simplified to basic elements notwithstanding the 'substantial' difficulty of the cases, because none of the cases can be considered difficult from the legal point of view, the involvement of EU law or other elements out of the influence of the PMÚ or the courts (a preliminary ruling was not requested in any of these cases). Eight possible variables were used for the estimation of the length of the proceeding: length of infringement, fine imposed during 1st instance proceedings (total), number of undertakings in the procedure, share of settlements, share of non-infringement/ immunity decisions, share of leniency applications, number of the employees of the PMÚ and the average workload of the PMÚ. Based on the single linear function (Table 4.), eight alternative models were created by omitting some of the variables respectively (Table 4.) (blank cell in the table for the estimated coefficient), estimated coefficients were calculated as well as statistical relevance of these models.

Figure 1. Length of specific sections of proceedings and overall length of proceedings (in days)



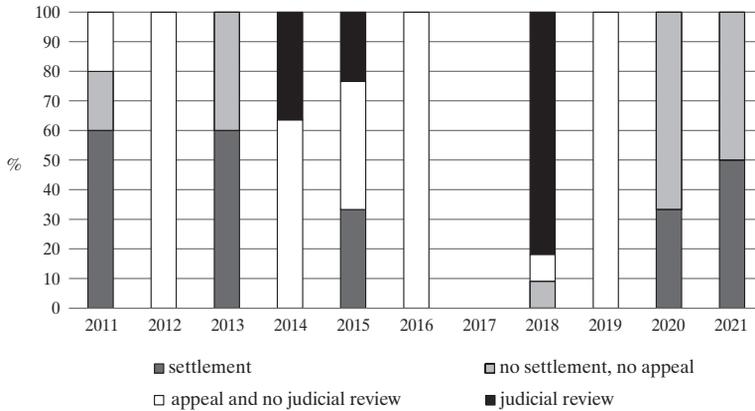
Note: ‘Additional proceedings’ means administrative proceedings after the annulment of the decision by the Council or by the court or other proceedings that do not fit into other categories.
 Source: Author’s own elaboration based on sources listed under Table 2.

Figure 2. Undertakings’ reactions to 1st instance proceedings vis-à-vis the ‘original’ 1st instance decision of the PMÚ in respective years – all cartel cases (in %)



Source: Author’s own elaboration based on sources listed under Table 2.

Figure 3. Undertakings' reactions to 1st instance proceedings vis-à-vis the 'original' 1st instance decision of the PMÚ in respective years – undertakings with fines only (in %)



Source: Author's own elaboration based on sources listed under Table 2.

Figure 4. Linear function – estimation of the length of the proceedings

$$\begin{aligned}
 [\text{Length of proceeding}] = & a + b*[\text{Length of infringement}] + c*[\text{Fine 1}^{\text{st}} \text{ instance total}] + \\
 & + d*[\text{No of undertakings}] - e*[\% \text{ settlements (all)}] - f*[\% \text{ Non-infringement I. inst/} \\
 & / \text{immunity}] - g*[\% \text{ leniency}] - h*[\text{Number of employees (average)} - \\
 & - i*[\text{Average workload of the PMÚ}]
 \end{aligned}$$

Alternatively, % of undertakings that settled during 1st instance proceedings was used instead of % of all settlements.

The workload of the PMÚ was calculated by the number of enforcement actions, i.e. investigations and 1st instance administrative proceedings. The average number of employees and overload was calculated as arithmetical average between the year of issuing a 1st instance decision and the year when the case was closed.

Source: Author's own elaboration.

Table 4. Linear function – coefficients based on regression analysis

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8
	Coefficients [a, b, c, d, e, f, g, h, i]							
Intercept	1,299	1,690.88	1,269.6	1,519.15	1,637.07	1,676.76	1,561.06	1,272.59
Length of infringement				-78.493				
Fine 1 st instance total	7.9E-05			0.00011	7.5E-05	7.6E-05		
No of undertakings	62.7351		95.5433	54.4052	65.7363	64.8335		
% settlements (all)	-615.19	-867.76	-643.52	-678.5	-647.34	-647.26		-483.85
% Non-infringement 1 st instance/immunity	-923.53	-1,030.1	-1,032	-1,013.1	-927.11	-925.27	-883.44	
% leniency	-462.8	-116.62	-416.43	-475.8	-471.34	-475.03	1051.24	
Number of employees average					-4.4894	-5.6772		
Average workload of the PMÚ					-0.7589			
% Settled 1 st instance							-1,899.3	
	P-value							
Intercept	5.2E-06	1.3E-09	5.3E-06	3.9E-06	0.43409	0.40022	2.4E-10	1.3E-08
Length of infringement				0.11644				
Fine 1 st instance total	0.37835			0.21672	0.43519	0.41938		

Table 4 – continued

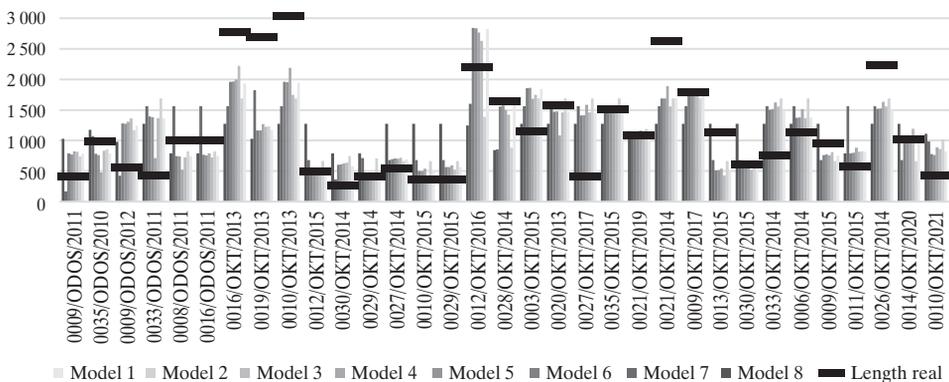
	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8
No of undertakings	0.21528		0.0074	0.27005	0.23223	0.21917		
% settlements (all)	0.10721	0.03884	0.09008	0.07113	0.13469	0.12708		0.19488
% Non-infringement 1 st / immunity	0.00534	0.00256	0.00093	0.00238	0.0073	0.00618	0.01363	
% leniency	0.44082	0.85821	0.48408	0.41505	0.45372	0.43995	0.00455	
Number of employees average					0.89379	0.84763		
Average overload of the PMÚ					0.93654			
% Settled 1 st instance							0.25009	
	Model values							
Multiple R	0.69708	0.55944	0.68604	0.69708	0.69771	0.69762	0.59615	0.2315
R Square	0.48593	0.31297	0.47065	0.48593	0.4868	0.48667	0.35539	0.05359
Adjusted R Square	0.39073	0.2419	0.39503	0.39073	0.34311	0.36821	0.28871	0.02306
Standard Error	629.556	702.249	627.329	629.556	653.696	641.084	680.225	797.19
Significance F	0.00202	0.01138	0.00103	0.00169	0.01107	0.00496	0.00476	0.19488

Source: Author's own elaboration based on sources listed under Table 2.

Reviewing the data of the models, all of them have quite a low 'Adjusted R Square', that is, none of the models explains more than 40% of the cases. Models 7 and 8 can be excluded due to an abnormal outcome (leniency prolongs the proceedings) and due to an extremely low 'Adjusted R Square' respectively. The length of the infringement does not contribute to the length of the proceedings (Model 4) as well as the level of the fines (across the models, each 100 000 Euro adds little more than a week to the proceedings).

The following approximate figures are, however, quite convergent across the models: the basal length of the proceedings is between 3.5 and 4.5 years; settlements can shorten the procedure by almost 2 years; cases without fines are shorter by 2.5 years; and leniency cases are shorter between 1 and 1.5 years (this variable has, nevertheless, a quite high P-value). The number of cases handled in respective years and the number of employees does not seem to be significant. Figure 5. shows the comparison between the length of the proceedings calculated based on respective models, and the real length of the proceedings – in 18 cases (54.5%), some of the models can be used for the estimation of the length of the proceedings at least approximately. Hence, there is a circa 50% probability that the length of the proceedings will converge to figures estimated above. Nonetheless, the statistical confirmation of the hypotheses is not strong enough.

Figure 5. Length of the proceeding based on models and real length of proceedings

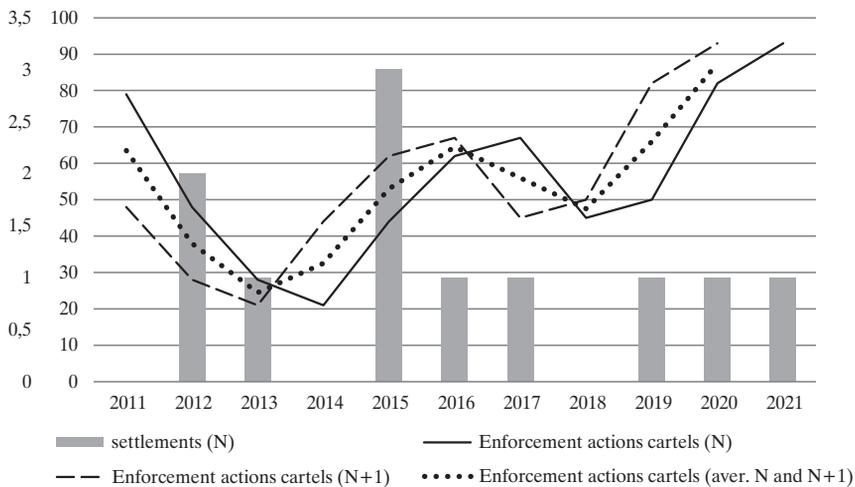


Source: Author’s own elaboration based on sources listed under Table 2.

Another goal of the settlement is to save resources of the competition authority and allow it to dedicate itself to key cases and so it can serve as one of the tools of prioritization.⁹³ Therefore, based on the data of the number of cartel enforcement activities in the years when cases were settled, the hypothesis – that settlements will boost enforcement activity – can be tested. From Figure 6., it is apparent that the hypothesis of higher number of cases due to settlements is far from being convincing.

⁹³ Or Brook and Kati Cseres, ‘Policy Report: Priority Setting in EU and National Competition Law Enforcement’ (2021) 49 <<https://www.ssrn.com/abstract=3930189>> accessed 1 May 2022.

Figure 6. Number of settlements in a year (N) and number of cartel enforcement actions



Source: Author's own elaboration based on sources listed under Table 2.

Finally, a settlement shall bring resource savings of an undertaking. These avoided costs are hard to estimate, but the calculation of the tariff fee of lawyers⁹⁴ can be used as reference. A lawyer and a client can agree on another type of remuneration (flat-rate or based on hours, usually higher than the tariff), or an undertaking does not have to be represented by a lawyer, but the estimation of legal costs based on tariff remuneration can serve as an estimation of statutory value of work of a person with legal education (including in-house lawyer). Table 5. shows the estimated costs incurred by undertakings (based on the final fine and stages of procedure) as well as possible costs avoided by not launching further steps of proceedings. In the selected 33 cases, the total amount of fines was € 29,984,047, which was then reduced by appeals to the current € 16.452 million. It can be estimated that the total additional costs of an undertaking (lawyers' fees) were at least € 0.5 million. On the other hand, settlements enabled undertakings to save € 0.833 million of fines and approximately € 0.2 million on costs, that is, over € 1 million in total. Thus, the reduction of fines is not so immense when compared to successful appeals. However, the reduction of fines by appeals by € 13.5 million may cost the undertakings at least € 0.3 million (that is, fees that cannot be reimbursed after successful judicial review). Therefore, the threat of immense costs that will never be repaid by the 'loosing' party can serve as an incentive to close the case by settlement.

⁹⁴ Decree of the Ministry of Justice 655/2004 Coll. on Fees and Compensations of Attorneys as amended.

Table 5. Estimation of costs, fines and savings of undertakings in cartel proceedings (in thousands of euros)

Case number	Fine reduction (in thousands of euros)		Lawyers' fees (in thousands of euros)		Total (in thousands of euros)		% of possible saving due to settlement	% of fine reduction due to appeal
	Settlement	Appeal	Saved	Paid (reduced by repaid judicial costs)	Saved	Burden (fine + fee)		
0010/ OKT/2021	5.62		3.18	2.57	8.81	35.53	20%	0%
0014/ OKT/2020				4.81		4.81	0%	
0026/ OKT/2014				18.15		275.23	0%	0%
0011/ OKT/2015	29.02	29.02	6.23	4.66	35.25	72.37	33%	30%
0009/ OKT/2015				2.31		2.31	0%	
0006/ OKT/2014		185.94		3.44		3.44	0%	100%
0033/ OKT/2014		148.12		6.45		6.45	0%	100%
0030/ OKT/2015				1.18		1.18	0%	
0013/ OKT/2015				0.78		0.78	0%	
0009/ OKT/2017		45.63		19.19		1,163.62	0%	4%
0021/ OKT/2014		2,547.55		25.53		25.53	0%	100%
0021/ OKT/2019	178.51		14.54	5.31	193.04	436.41	31%	0%
0035/ OKT/2015				6.13		287.35	0%	0%
0027/ OKT/2017				3.48		311.03	0%	0%

Table 5 – continued

Case number	Fine reduction (in thousands of euros)		Lawyers' fees (in thousands of euros)		Total (in thousands of euros)		% of possible saving due to settlement	% of fine reduction due to appeal
	Settlement	Appeal	Saved	Paid (reduced by repaid judicial costs)	Saved	Burden (fine + fee)		
0020/ OKT/2013		369.55		7.85		136.50	0%	74%
0003/ OKT/2015				33.21		3,015.56	0%	0%
0028/ OKT/2014	90.24	5,100.20	97.08	61.96	187.32	272.53	41%	96%
0012/ OKT/2016		2,656.92		104.05		6,833.59	0%	28%
0029/ OKT/2015				1.17		1.17	0%	–
0010/ OKT/2015				0.78		0.78	0%	–
0027/ OKT/2014				1.90		1.90	0%	–
0029/ OKT/2014	264.16		23.45	5.71	287.61	622.08	32%	0%
0030/ OKT/2014	65.82		13.04	3.64	78.86	157.21	33%	0%
0012/ OKT/2015				0.77		0.77	0%	–
0010/ OKT/2013		2,224.80		43.94		2,100.32	0%	52%
0019/ OKT/2013	80.79	222.68	10.02	12.65	90.81	403.61	18%	36%
0016/ OKT/2013		5.64		10.13		111.19	0%	5%
0016/ ODOS/2011	0.61	-0.49	0.31	0.45	0.92	1.87	33%	-53%

Table 5 – continued

Case number	Fine reduction (in thousands of euros)		Lawyers' fees (in thousands of euros)		Total (in thousands of euros)		% of possible saving due to settlement	% of fine reduction due to appeal
	Settlement	Appeal	Saved	Paid (reduced by repaid judicial costs)	Saved	Burden (fine + fee)		
0008/ODOS/2011	2.63	-3.43	0.67	0.67	3.30	6.80	33%	-126%
0033/ODOS/2011				0.39		0.65	0%	0%
0009/ODOS/2012	0.24		0.64	1.86	0.88	5.99	13%	0%
0035/ODOS/2010	72.77		11.31	5.57	84.07	490.67	15%	0%
0009/ODOS/2011	42.26		9.23	3.18	51.49	66.57	44%	0%

Source: Author's own elaboration based on sources listed under Table 2.

VII. Conclusions

The introduction of settlements in competition cases in Slovakia was gradual, from informal and non-transparent mirroring of the practice of the Czech competition authority, through Guidelines of the PMÚ, to, finally, embedding it into a binding legal form in the Slovak Competition Act complemented by a Decree of the PMÚ. From the beginning, it was extended to vertical agreements, completely mirroring the practice of the European Commission. Moreover, the Slovak settlement regime is much more generous when compared to the 10% fine reduction offered by the Commission. Although the low level of the 'discount' introduced by the Commission was criticised for lacking sufficient attractiveness,⁹⁵ later analyses showed that this fear was not substantiated⁹⁶ as the Commission currently settles more than

⁹⁵ Ascione and Motta (n 1).

⁹⁶ Jerónimo Maillo, 'EU Cartel Settlement Procedure: An Assessment of Its Results 10 Years Later' (2017) 47/2017 <https://repositorioinstitucional.ceu.es/bitstream/10637/10807/1/eu_maillo_2017.pdf> accessed 1 May 2022.

half of its cartel cases with a settlement.⁹⁷ In comparison, the more generous Slovak regime led only to 13 settlements out of its 33 cases (40%) including merely two that were 1st instance ‘full’ settlements, and 5 that were ‘full’ settlements overall – the rest were ‘hybrid’ settlements where some parties settled while other did not. The question of the presumption of innocence⁹⁸ does not become an issue in ‘hybrid’ cases in Slovakia. However, the PMÚ has incidentally undermined the character of the settlement as a non-evidentiary measure in court proceedings, when it claimed that all other undertakings admitted, in their settlement declarations, to have participated in the cartel, but only the applicant did not.⁹⁹ It is hard to estimate whether the number of actions for judicial review is dropping¹⁰⁰ due to successful settlements or due to an overall decrease in the activity of the PMÚ. Even though the number of settlements is lower compared to Commission practice, the PMÚ seems to be ‘rubber-stamping’ all settlements proposed by the undertakings, and it does not evaluate the material requirements for a settlement as stipulated in the law. It appears that the authority is eager to settle notwithstanding public considerations¹⁰¹ or public interest. Although the statistical data showed that, with a 50% probability, a settlement can shorten the proceedings by 2 years, it does not have an impact on boosting the PMÚ’s enforcement activity.

The lower tendency of undertakings to settle cases can also derive from their lack of awareness of the existence of competition rules¹⁰², and that

⁹⁷ Ștefan Ciubotaru, ‘At the Mercy of the Gatekeeper: The Theory and Practice of Undertakings’ Fundamental Rights in the EU Cartel Settlement Procedure’ (2021) 12(3) *Journal of European Competition Law & Practice* 236, 236 <<https://academic.oup.com/jeclap/article/12/3/236/6189675>> accessed 1 May 2022.

⁹⁸ Ciubotaru (n 104); Elvira Aliende Rodriguez and Ruba Noorali, ‘Case T-180/15 Icap v Commission: The Facilitator Doctrine and Other Cartel Concepts in Hybrid Settlements’ (2018) 9(5) *Journal of European Competition Law and Practice* 320; Laina and Bogdanov (n 1); Matteo Giangaspero, ‘Pometon v Commission: Reviving Staggered Hybrid Settlements?’ (2020) 11(9) *Journal of European Competition Law and Practice* 509.

⁹⁹ Judgment of the Regional Court of 29 June 2021, Case 2S/166/2020.

¹⁰⁰ Compare Jan Blockx, ‘The Impact of EU Antitrust Procedure on the Role of the EU Courts (1997-2016)’ (2018) 9(2) *Journal of European Competition Law and Practice* 92.

¹⁰¹ Compare Niamh Dunne, ‘A “Tunney Act for Europe”? Settlement and the Re-Judicialisation of European Commission Competition Enforcement’ (2020) 11(8) *Journal of European Competition Law and Practice* 423.

¹⁰² On the low awareness of competition law and cooperation between undertakings in post-socialist countries see, e.g. Jasminka Pecotic Kaufman and Ružica Šimic Banovic, ‘The Role of (In)Formal Governance and Culture in a National Competition System: A Case of a Post-Socialist Economy’ (2021) 44(1) *World Competition* 81 <<http://www.kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals%5CWOCO%5CWOCO2021005.pdf>> accessed 1 May 2022; Jasminka Pecotic Kaufman, ‘On the Development of (Not so) New Competition Systems – Findings from an Empirical Study on Croatia’ (2022) 10 *Journal of Antitrust*

they consider coordination in public procurement to be a normal practice.¹⁰³ Since a substantial part of settlements were concluded during 2nd instance proceedings, some of the undertakings used settlements in a quite speculative manner, apparently letting the PMÚ reveal how ‘strong’ its case is. Moreover, 2nd instance settlements do not have full effect in terms of speeding up proceedings and saving resources of the PMÚ, as well as helping manage the workload of the authority.

On the one hand, an undertaking must have the right for review of its case in terms of a possible violation of its rights, and so it is not possible to completely exclude appeal and judicial review of ‘settled’ cases. On the other hand, a ‘narrowing window’ for appeals and for speculative settlements does not frustrate the procedural rights of undertakings, and, at the same time, it allows the PMÚ to benefit from the full potential of settlements. *De lege ferenda*, there is considerable space for adjusting the Slovak settlement regime (apart from a more prudent application of the current one, as described above). First, appeals (and hence judicial review as well) could be limited by a positive, or a negative enumeration to allow an undertaking to challenge substantial violations of its procedural rights, its right of defence and the protection against discrimination; rather than purely against matters of fact, legal qualification and level of fine in line with its own settlement declaration. Second, the law should allow the PMÚ to divide the case into its ‘settled’ and ‘unsettled’ parts, with an *ex officio* review of the settled part, if the outcome of an appeal or judicial review can have a substantial beneficial impact on the ‘settled’ part. Moreover, the law should allow the PMÚ to issue a simplified decision with a simple description of the established facts, evidence thereof and a legal qualification of the act, as well as information on the settlement and the fulfilment of its conditions. Last, but not least, the PMÚ should be less generous in terms of 2nd instance settlements compared to the 1st instance.

While the introduction of settlements required several new sentences on fines to be inserted into the Slovak Competition Act, and a relatively short complementary decree (but was, in fact, operable without them as well), the abovementioned suggestions require more detailed changes to Slovak administrative law, as well as to court rules dealing with judicial review. Furthermore, they shall be drafted more diligently since they may restrict constitutional rights and rights stemming from the Charter on Fundamental Rights of the EU.

Enforcement 326 <<https://academic.oup.com/antitrust/article/10/2/326/6432017>> accessed 1 May 2022.

¹⁰³ E.g. answers of undertakings and their representatives reported in decision 2014/KH/1/1/023 and 2011/KH/1/1/038.

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Inspections in Private Premises Under Slovak Competition Law: Did the Implementation of the ECN+ Directive Miss the Point?*

by

Mária T. Patakyová** and Mária Patakyová***

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Abstract

We face the era when tech giants are getting ever more powerful, when there are subtle ways of collusion via algorithms, and when home offices are the new normal. One would expect competition authorities to have suitable tools to investigate any infringement of competition law even under these difficult conditions. Inspections

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** Associate professor at Institute of European Law, Faculty of Law, Comenius University in Bratislava, Slovakia. E-mail: maria.patakyova5@flaw.uniba.sk; ORCID: <https://orcid.org/0000-0001-5640-2381>.

*** Professor at Department of Commercial Law and Economic Law, Faculty of Law, Comenius University in Bratislava, Slovakia. E-mail: maria.patakyova@flaw.uniba.sk; ORCID: <https://orcid.org/0009-0009-4339-4939>.

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are arguably the most powerful investigatory tool within the realm of the powers of competition authorities. Although inspections are very often conducted in business premises, there might be a need to search private premises too. Regulation 1/2003 has recognised this need for almost two decades. The ECN+ Directive expects national competition law to provide their competition authorities with the power to inspect non-business premises. How was this provision transposed into the Slovak legal order? What obstacles would the Slovak Antimonopoly Office (Slovak NCA) face if it wanted to conduct an inspection on private premises? These are the questions asked in this article. The article finds that, although the legislation itself seems in compliance with the ECN+ Directive, any attempt to conduct an inspection on private premises would be difficult. Particularly, we look into shortcomings related to the institution of the guardian who should be present during an inspection; and we present solutions *de lege ferenda*.

Resumé

Nous sommes à une époque où les géants de la technologie sont de plus en plus puissants, où il existe des moyens subtils de parvenir à une collusion par le biais d'algorithmes, et où le travail à domicile est une nouvelle normalité. On devrait s'attendre à ce que les autorités de la concurrence disposent d'outils appropriés pour enquêter sur toute violation au droit de la concurrence, même dans ces conditions difficiles. Les inspections sont sans doute l'outil d'enquête le plus puissant dont disposent les autorités de la concurrence. Bien qu'elles soient très souvent effectuées dans des locaux professionnels, il peut également être nécessaire de fouiller des locaux privés. Le règlement 1/2003 reconnaît cette nécessité depuis près de vingt ans. La directive ECN+ prévoit que les législations nationales en matière de concurrence confèrent à leurs autorités de concurrence le pouvoir d'inspecter des locaux non professionnels. Comment cela a-t-il été mis en œuvre dans l'ordre juridique slovaque? À quels obstacles l'autorité slovaque de la concurrence serait-elle confrontée si elle souhaitait effectuer une inspection dans des locaux privés? Telles sont les questions posées par cet article. Celui-ci constate que, bien que la législation elle-même semble conforme à la directive ECN+, toute tentative d'inspection dans des locaux privés serait difficile. En particulier, nous examinons les insuffisances liées au gardien qui devrait être présent lors de l'inspection; et nous présentons les solutions de *lege ferenda*.

Key words: ECN+ Directive 2019/1; inspections; private premises; non-business premises; Antimonopoly Office of the Slovak Republic; Act No. 187/2021 Coll.

JEL: K21, K23

I. Introduction

Competition law is an important regulatory tool within the market economy. Nowadays, we face the unprecedented power of tech giants to influence not only the economy but also political life.¹ As competition authorities are one of the public watchdogs, though only with respect to competition law, they should be able to investigate any infringements committed by these huge companies.

Moreover, the ability to hide a cartel, or rather, to reorganize a cartel into, at first glance, innocent tacit collusion, is becoming more prevalent than ever. Algorithmic (tacit) collusion has been a highly discussed topic for the past decade at least.² We do not wish to jump into the discussion on whether the notion of an “agreement” should be broadened, in order to cover algorithmic tacit collusion, as proposed by the OECD or certain scholars.³ However, even under competition law *de lege lata*, there is a possibility that Article 101 TFEU is infringed using algorithms, as confirmed by *ETURAS*⁴. Thus, competition authorities should have the ability to collect enough relevant evidence, in order to assess whether suspicious market behaviour is an illegal concerted practice or a legal parallel behaviour. Inspections are undoubtedly one of the needed tools.

Plus, especially since 2020, working from home has become common for white-collar employees. This implies having laptops, mobile phones and other working tools at home. As relevant evidence of illegal behaviour might be hidden in tools (temporarily) placed in private premises, competition authorities should have access to them, though under conditions.

These three instances (presence of tech giants, of algorithmic collusion and of home office) were to demonstrate that there is an ongoing, and possibly increasing, need for competition authorities to have the power to conduct

¹ Ján Mazúr and Mária T. Patakyová, ‘Regulatory approaches to Facebook and other social media platforms: towards platforms design accountability’ (2019) 13(2) Masaryk University Journal of Law and Technology 219.

² Ariel Ezrachi and Maurice E. Stucke, *Virtual Competition* (1st edn, Harvard University Press 2016); Mária T. Patakyová, ‘Notion of Anticompetitive Agreement Challenged in Digital Environment’ (2020) 7 European Studies. The Review of European Law, Economics and Politics 237; Valeria Caforio, ‘Algorithmic Tacit Collusion: A Regulatory Approach’ [2022] *Bocconi Legal Studies Research Paper No. 4164905* <<https://ssrn.com/abstract=4164905>> accessed 22 January 2023.

³ Antonio Capobianco, Pedro Gonzaga and Anita Nyesó (OECD Competition Division ‘Algorithms and Collusion, Background Note by the Secretariat’, 35-37 <[https://one.oecd.org/document/DAF/COMP\(2017\)4/en/pdf](https://one.oecd.org/document/DAF/COMP(2017)4/en/pdf)> accessed 25 March 2023; Louis Kaplow, *Competition Policy and Price Fixing* (Princeton University Press 2013).

⁴ Case C-74/14 “*Eturas*” *UAB and Others v Lietuvos Respublikos konkurencijos taryba* [2016] ECLI:EU:C:2016:42.

inspections. Although in the vast majority of cases, competition authorities inspect business premises, a need for inspections of private premises cannot be excluded.

This need was answered by EU legislators, first in 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 (hereinafter: Regulation 1/2003)⁵ and more recently, in Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (hereinafter: ECN+ Directive).⁶ This article will look into the transposition⁷ of the latter into the Slovak legal order. It aims to explore how it was implemented with respect to inspections in non-business premises, and how such an inspection would be conducted in practice. It looks at the issue of inspections in private premises from the bottom up, taking into account not only the wording of the relevant acts but also other local circumstances.

These issues are important also from the rule of law perspective. First, as stated above, competition authorities are one of the watchdogs of giant tech, the latter being able to deform many aspects of our society. Second, the correct implementation of directives is inevitable not only for the proper functioning of the EU but also for national legislation to be as transparent and certain as possible.

Interference with the rights of individuals, including legal persons, must be proportionate⁸. Interference with the right to privacy is no exception, and its protection must be ensured even in the context of increasing demands for transparency, as the recent conclusions of the Grand Chamber of the CJEU in *Luxembourg Business Registers* show⁹. However, this article does not examine the compatibility of inspections in non-business premises with the

⁵ 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 [2004] OJ L1/1 (hereinafter: Regulation 1/2003).

⁶ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3 (hereinafter: ECN+ Directive). It is interesting that the Directive in its Recital 34 points out the use of flexible working conditions as the substantiation for inspections of other premises.

⁷ In this article, we took the liberty to understand the term “implementation” and “transposition” of EU directives as synonyms.

⁸ Mária Patakyová and Mária T. Patakyová, ‘Právnické osoby ako nositeľky ľudských práv’ in Katarína Eichlerová et al. (eds) *Rekodifikace obchodního práva – pět let poté. Svazek II* (Wolters Kluwer, ČR, 2019), 13–24.

⁹ Joined Cases C-37/20 and C-601/20 *WM (C-37/20), Sovim SA (C-601/20) v Luxembourg Business Registers* ECLI:EU:C:2022:912.

right to privacy (Article 8 ECHR), as this would require a different legal analysis. For this reason, we will not analyse the case law of the CJEU and the ECtHR related to the application of the right to privacy to inspections in business premises, and the possible analogical application of such case law to inspections in private premises.¹⁰

In essence, this article asks how the relevant provision of the ECN+ Directive regarding inspections in private premises was implemented into the Slovak legal order; and what obstacles the Slovak NCA – the Slovak Antimonopoly Office (hereinafter: the Office) would face if it planned to conduct an inspection in private premises. We concentrate on issues related to the guardian who should be present during an inspection. Bearing in mind the identified shortcoming, we propose solutions *de lege ferenda*.

Thus, the article is organised as follows. First, we will briefly present how inspections in private premises are regulated on the EU level, in order to compare them with the Slovak system. Second, we will focus on the implementation of the ECN+ Directive into the Slovak legal order, taking its practical considerations into account. The findings will be summarised in the conclusion.

II. Inspections conducted in private premises under EU law

The European Commission is one of the competition authorities enforcing EU competition law. The possibility to conduct a dawn raid was incorporated already in EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (hereinafter: Regulation 17)¹¹ introduced in 1962. However, this enforcement tool was limited to business premises. The enlargement of the scope of inspections to cover also private premises was brought by Regulation 1/2003. Pursuant to rec. 26 of Regulation 1/2003, prior experience has shown the need for the Commission to enter private premises as well as business ones. This is one of the extensions of the powers of the Commission brought by Regulation 1/2003.¹²

¹⁰ We have partially conducted such analysis in Mária T. Patakyová, *Eudskoprávne aspekty hospodárskej súťaže: antitrust z pohľadu ľudských práv* (Wolters Kluwer SR 2019) 121 et seq.

¹¹ EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13.

¹² Leonardo Bellodi, Lorenzo Piazza, 'Chapter 5 Powers of investigation' in Gian Luigi Tosato and Leonardo Bellodi (eds) *EU Competition Law. Volume I. Procedure Antitrust – Mergers – State Aid* (2nd ed Claey's & Casteels 2015) 127, 133.

1. Regulation 1/2003

Inspections in private premises are regulated by Article 21 of Regulation 1/2003. Several important safeguards and limitations can be identified therein.

The 1st concerns the *type of premises*. Article 20 concerns inspections in business premises. Article 21, although entitled “Inspection of other premises”¹³, does not cover all imaginable (other than business) premises. An inspection may be conducted only in such premises (land, means of transport), which may contain books or other records related to the business and to the subject matter of the inspection. Since the Commission cannot possibly be certain whether this is, in fact, the case, until it actually inspects the premises, the provision requires that there is (at least) a reasonable suspicion. However, apart from the above, the type of non-business premises as such is not limited. For instance, if the books are kept in an ordinary employee’s home in spite of a CEO’s home, this fact in itself does not hinder the inspection.

The 2nd guarantee relates to the *type of infringement*. Article 21 para. 1 presupposes that the infringement of competition law cannot be merely minor. It must be a serious violation of Article 101 or 102 TFEU.

The 3rd safeguard lies in the *type of suspicion*. As already mentioned, there shall be a *reasonable* suspicion that there is evidence in the contested non-business premises and that this evidence may be relevant to prove the infringement. This does not imply that there is a need for a prior inspection of business premises showing that evidence might be in the private homes of the employees of the investigated undertaking. The reasonability of the suspicion may derive from a complaint, etc.¹⁴

An *act ordering an inspection* is the 4th limitation. Article 21 para. 2 requires for the inspection to be based on a decision, not a simple request. Plus, the decision shall be duly justified and consulted with the respective national competition authority (hereinafter: NCA) in whose territory the inspection is to be conducted.

5th, the *powers of the inspectors* are also relevant here. Pursuant to Article 21 para. 4, these powers are similar to those available in inspections conducted on business premises, except for the power to seal premises or books/records, and the power to ask for explanations.

The 6th safeguard concerns *ex-ante judicial review*. Article 21 para. 3 provides for prior approval by the respective national court. However, this review is

¹³ The relation between Article 20 and Article 21 of the Regulation was challenged in case C-606/18 P *Nexans France SAS, Nexans SA v European Commission* [2020] ECLI:EU:C:2020:571, para 71.

¹⁴ Leonardo Bellodi, Lorenzo Piazza (12 n) 127, 138.

limited¹⁵ to the control of the authenticity of the decision, the prevention of arbitrariness and excessiveness of the measure – any form of study of the necessity of the inspection is out of the question.

The final, 7th safeguard, relates to *ex-post judicial review*. As indicated in Article 21 para 2., the decision is reviewable by the CJEU following, the most suitable here, action for annulment based on Article 263 TFEU. Since the *ex-ante* judicial review is limited, it is the *ex-post* review that must be in line with the protection of the right to privacy, as provided by Article 8 ECHR.¹⁶ However, one should bear in mind that the actual carrying out of the inspection is reviewed by the CJEU only in certain instances¹⁷.

Apart from the safeguards for the inspected entities, Regulation 1/2003 provides also “safeguards”, or rather “guarantees” for the Commission. In other words, the Commission shall be able to conduct any necessary inspections and its power shall be assured. For instance, the person concerned is obliged to submit themselves to the inspection. The investigatory powers of the Commission correspond to the obligation placed on the side of the inspected person. However, the Commission may not also impose fines or penalties in case of failure to submit to an inspection¹⁸. If the person concerned opposes the inspection, the same provision applies as in the case of business premises. It is for the national authorities, police included, to provide assistance to the Commission.¹⁹

There are few examples of applying Article 21 of Regulation 1/2003 in practice. Although they are applied rarely, they seem to be a necessary tool within the spectrum of the Commission’s powers.²⁰

2. ECN+ Directive

In Article 35 para. 1, Regulation 1/2003 aims for the effective enforcement of competition law by NCAs. The EU adopted also a separate directive which specifies such enforcement on the national level in more detail. As established above²¹, the aim of the ECN+ Directive lies in the effective enforcement of competition law.

¹⁵ The reason for the limitation is explained in Recital 27 of Regulation 1/2003.

¹⁶ Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin’s EU Competition Law. Text, Cases and Materials* (7th edn, OUP 2019) 909.

¹⁷ Mária T. Patakyová ‘Inspections – Do Undertakings Have the Access to the Court of Justice of the European Union?’ (7th CER Comparative European Research Conference – International Scientific Conference for PhD Students of EU Countries, March 2017) 30.

¹⁸ Alison Jones, Brenda Sufrin and Niamh Dunne (n 16)909.

¹⁹ Article 21 para 4 of the Regulation refers to Article 20 para 6 of the Regulation.

²⁰ Richard Whish and David Bailey, *Competition law* (8th edn, OUP 2015) 290.

²¹ Mária T. Patakyová, ‘Nový zákon o ochrane hospodárskej súťaže – starý zákon v novom šate?’ (2022) 74(5) *Justičná Revue* 577.

Naturally, the ECN+ Directive is not a self-standing piece of procedural regulation, such as Regulation 1/2003. The ECN+ Directive had to be implemented into the national legal orders of the Member States and be merged into their procedural rules. However, we believe that a partial comparison, focused on inspections in non-business premises, is possible.

Similar to Regulation 1/2003, the ECN+ Directive distinguishes between inspections of business premises (Article 6) and of other premises (Article 7). The wording of Article 7 is similar to the wording of Article 21 of Regulation 1/2003. However, the ECN+ Directive provides more details with respect to the decision that orders an inspection, and to judicial review. This is due to the fact that the ECN+ Directive is meant to be implemented into national legal orders, which would cover the necessary details.

Considering the safeguards listed above, several similarities and certain differences can be identified.

1st, the type of premises is the same.

2nd, a serious violation of Articles 101 and 102 is not required. Therefore, this safeguard is missing. It is not clear from the Preamble of the ECN+ Directive what caused this change. However, we believe that any inspection shall be carried out only after a test of proportionality has been fulfilled. This is due to the fact that any inspection is an intrusion into the right to privacy.²² Therefore, even if the seriousness of the competition law infringement is not explicitly required, it may be derived from the principle of proportionality.

3rd, as in Regulation 1/2003, a suspicion must be reasonable that there is a piece of evidence and that it may prove the infringement in the investigated case. This is also highlighted by Recital 34 of the ECN+ Directive.

4th, details regarding decisions that order an inspection are not provided, as explained above.

5th, the powers which national inspectors shall have in relation to non-business premises are similar to those in the case of business premises, except for the power to seal premises or books/records, and the power to ask for explanations. This safeguard is similar to the fifth safeguard of Regulation 1/2003, but not quite the same. The ECN+ Directive sets the *minimum* standard, meaning that national laws may go further and give their inspectors with more power.

6th, *ex-ante* judicial review is required by Article 7 para. 2. However, as stated in Recital 34, Member States should not be prevented “[...] *in cases of extreme urgency from entrusting the tasks of a national judicial authority to a national administrative competition authority acting as a judicial authority or, by*

²² Mária T. Patakyová, *Eudskoprávne aspekty hospodárskej súťaže: antitrust z pohľadu ľudských práv* (Wolters Kluwer SR 2019); Maciej Bernatt, ‘Powers of Inspection of the Polish Competition Authority. Question of Proportionality’ (2011) 4(5) YARS 47.

way of exception, allowing for such inspections to be carried out with the consent of those subject to inspection.”

7th, *ex post* judicial review is not explicitly mentioned, however, it will be required by national law. This derives, among others, from Article 47 of the EU Charter of Fundamental Rights of the European Union (Charter) as well as from Article 6 of the ECHR.

On the other hand, the ECN+ Directive provides for “guarantees” for competition authorities too, as it requires for national laws to ensure the ability of the competition authorities to carry out all necessary inspections. Article 7 para. 1 of the ECN+ Directive states that: “*Member States shall ensure that [...] national administrative competition authorities are able to conduct unannounced inspections in such premises, land and means of transport*”. Persons concerned are required to submit themselves to the inspection, as it flows from Article 7 para. 3 of the ECN+ Directive referring to Article 6 para. 2 of the ECN+ Directive.

However, similarly to Regulation 1/2003, the ECN+ Directive does not require fines. It should be pointed out that Article 13 para. 2 of the ECN+ Directive provides for minimum harmonisation. Hence, national laws may impose such fines.

III. Inspections conducted in private premises under Slovak law²³

The ECN+ Directive was transposed into the Slovak legal order by the Act on Protection of Competition (Law No. 187/2021 Coll. of 11 May 2021) (hereinafter: APC). The implementation triggered a re-codification of Slovak competition law, as the previous Act on Protection of Competition (Law No. 136/2001 Coll. of 27 February 2001), as amended (hereinafter: Previous APC) was repealed. We characterised the process of the implementation elsewhere.²⁴

The possibility to carry out inspections on private premises was already established in the Previous APC. It was introduced in 2004 by the Act Amending the Previous APC (Law No. 204/2004 Coll. of 9 March 2004).²⁵ However, this

²³ For more information on inspections, see Mária T. Patakyová in Mária T. Patakyová (ed), *Zákon o ochrane hospodárskej súťaže. Komentár* (Wolters Kluwer SR 2022) 273–292.

²⁴ Mária T. Patakyová and Mária Patakyová, ‘ECN+ Directive Implementation: Slovak Republic’ (2021) 5(3) ECLR 310.

²⁵ The amendment of the APC was justified in point No. 42 of the Explanatory notes as follows: *The constitutional rights of the person inspected shall not be affected and shall also be ensured by the presence of a guardian appointed for that purpose for such person by the court, which*

investigatory tool had never been used before the re-codification, nor has it been used since.²⁶ Therefore, in this part, we will focus on the wording of the legislation and its hypothetical application in practice.

1. What the legislation says

Inspections of other premises have their legal basis in Section 17 paras. 8–10 of the Act on Protection of Competition. These three paragraphs are incorporated into Section 17, which is otherwise dedicated to inspections of business premises. The legislation reads as follows:

Section 17 para. 8 of the APC:

“If there is a substantial suspicion that in premises or means of transport of the entrepreneur other than such as mentioned in paragraph 1 [premise and means of transport of the entrepreneur which are related to its activity or conduct of the entrepreneur] in private premises or private means of transport of current or former employee of the entrepreneur, there are materials or documents which are related to activity or conduct of the entrepreneur based on which it is possible to prove restriction of competition, the office may carry out an inspection in such premises with the court’s consent with the inspection issued on the proposal of the office. [Reference to Sections 430 to 437 of the Administrative Court Procedural Code (Law No. 162/2015 Coll. of 21 May 2015), as amended (hereinafter: ACPC)]. The court’s consent to the inspection shall be delivered by the office in person to the person inspected at the beginning of the inspection. If the person to be inspected is not present, the office shall deliver the court’s consent to the inspection by post within 24 hours of the inspection, together with a copy of the minutes of the inspection.”

Section 17 para. 9 of the APC:

“The office shall invite the guardian appointed by the court which made the decision to consent to the inspection to carry out the inspection referred to in paragraph 8.”

shall issue an order of consent to the inspection. Persons carrying out an inspection shall have the right to enter the premises subject to inspection and to require explanations from the person using them, to make an audio recording of the explanation given, and also to require the production of the documents or documents sought.... They may also carry out the inspection in the absence of the person concerned, in which case a guardian appointed by the court shall ensure that his rights are respected <<https://zakony.judikaty.info/predpis/zakon-204/2004/audit-dovodove-spravy>> accessed 27 March 2023.

²⁶ However, the inspections of business premises have been used regularly since 2004. Zuzana Šabová, ‘Výkon inšpekcií v podnikateľských priestoroch Protimonopolným úradom SR – právna úprava a praktické skúsenosti’ in Jozef Vozár (ed) *Milníky súťažného práva* (VEDA 2014) 118, 125.

Section 17 para. 10 of the APC:

“Apart from the sealing of premises and means of transport, paragraphs 4 to 7 [powers] shall apply to the carrying out of the inspection referred to in paragraph 8.”

Naturally, this extract from the Act on Protection of Competition is not self-standing, and one shall know the rest of the Act (and, to some degree, also the referred to Administrative Court Procedural Code) in order to comprehend its meaning. Therefore, we would like to clarify the following terms.

The term *entrepreneur* is defined in Section 2 para. 1 of the APC; it is understood in the same manner as the term *undertaking* under EU competition law. This was not always the case, as pursuant to the Previous APC, an *entrepreneur* was understood as a type of *person*.²⁷ This was a matter criticized by Slovak scholars.²⁸

The term *employee* is defined by Section 2 para. 5 of the APC. It covers not only employees in labour relations, but also in similar relations, members of statutory or control bodies of the undertaking, or other natural persons if they perform activities for an undertaking or if they take part in the activities of an undertaking. This is a wide definition.²⁹ However, it excludes persons who are not subordinated to the undertaking, such as suppliers, customers, barristers, tax advisors etc.³⁰

The term *office* refers here to the Antimonopoly Office of the Slovak Republic (*Protimonopolný úrad Slovenskej republiky*), that is, the Slovak NCA.

²⁷ Katarína Kalesná and Mária T. Patakyová, ‘Subjects of Legal Regulation – Different Approaches of Competition, Public Procurement and Corporate Law’ in Marin Milkovic, Damira Kecek and Khalid Hammes (eds.), *Economic and Social Development, 46th International Scientific Conference on Economic and Social Development – „Sustainable Tourist Destinations”, Book of Proceedings*. (Varazdin Development and Entrepreneurship Agency 2019) 210.

Regarding the terms “entrepreneur” and “undertaking” within the frame of commercial law see in details Mária Patakyová, Barbora Grambličková and Mária T. Patakyová in Mária Patakyová et al. *Obchodný zákonník. Komentár* (C.H. Beck 2022) 34.

²⁸ Ondrej Blažo, ‘Definícia pojmu podnikateľ v zákone o ochrane hospodárskej súťaže ako prekážka eurokonformnej aplikácie súťažného práva’ in Mária T. Patakyová (ed), *Efektívnosť právnej úpravy ochrany hospodárskej súťaže – návrhy de lege ferenda. Zborník konferencie* (Univerzita Komenského v Bratislave, Právnická fakulta 2017) 12.

²⁹ Zuzana Šabová in Mária T. Patakyová (ed), *Zákon o ochrane hospodárskej súťaže. Komentár* (Wolters Kluwer SR 2022) 32.

³⁰ Ibid 34.

2. Safeguards and guarantees present in the legislation

Looking into the safeguards identified with respect to Regulation 1/2003 and the ECN+ Directive, it can be concluded that these are similar to the Act on Protection of Competition. However, they are not the same and several differences can be identified.

1st, as to the type of premises, these are characterised as 1) other premises or means of transport of the entrepreneur as well as 2) private premises or means of transport of current or former employees of that entrepreneur. With respect to the former, by interpretation of *a contrario*, it can be concluded that these are premises owned by the entrepreneur, but are not related to their business activity. Otherwise, the inspection would fall under an inspection of the business premises, pursuant to Section 17 para. 1 of the APC.

2nd, as to the type of infringement, the wording of the Act on Protection of Competition does not require a serious infringement of competition law and in that it differs from Regulation 1/2003. Moreover, while the ECN+ Directive covers only 101 and 102 TFEU, Article 17 para. 8 of the APC has a broader scope, and it refers to the restriction of competition, including mergers.

3rd, as to the type of suspicion, EU law, in its English version or French versions, uses the term *reasonable suspicion*, *un soupçon raisonnable*. However, the Slovak version of the ECN+ Directive uses the term *substantial* (*odôvodnený*); and a similar wording is used in Regulation 1/2003 – *substantial suspicion* (*dôvodné podozrenie*).³¹ Therefore, Slovak law did not adopt the English or French term (*rozumný*) but uses the term *substantial* (*dôvodný*). The difference in these terms may prove to be non-existent in practice, as both aim to prevent inspections being initiated despite the lack of suspicion, or when the suspicion is very weak.

4th, as to the act that orders the inspection³², there is a need for judicial consent. All details are comprised of the court's resulting decision. As stated in Section 437 para. 2 of the ACPC, the decision specifies the aim of the inspection; respective objects, premises or means of transport; persons carrying out the inspection and their powers; the period of no less than 30 days, within which the inspection can be carried out; name, surname and address (permanent or temporary) of the guardian.

5th, as to the powers of inspectors, these are the same as in the case of business premises, apart from the power to seal premises or means of transport. Section 17 para. 10 of the APC goes beyond the minimum harmonisation level

³¹ We would like to thank the reviewers of this article for this point.

³² Note that inspections in business premises are carried out based on an act of the vice-president (first-instance procedure) or the president (appeal procedure) of the Office. The details of such act are provided by Section 17(2) para APC.

established in Article 7 para. 3 of the ECN+ Directive. In Slovakia, inspectors are entitled to ask for explanations and they are entitled to seal³³ materials or hard drives.

6th, as to *ex ante* judicial review, this is regulated by the Administrative Court Procedural Code. Pursuant to Section 435 para. 1 of the ACPC, judicial review is limited to: the proportionality and substantiation of the inspection, taking into account the seriousness of the possible restriction of competition; the importance of the search material or document; the participation of the entrepreneur on the possible restriction of competition; the substantiation of the assumption that the material or the document is in specific objects, premises or means of transport.

It is interesting that the same provision applies to the situation when the Commission is asking for prior judicial approval of an inspection pursuant to Regulation 1/2003. Therefore, the extent of the judicial review is the same no matter what institution is conducting the inspection.

The status of a participant in the court proceedings is limited to the applicant only, i.e. the Office or the Commission.³⁴ The person who is becoming the subject to an inspection learns about the judicial decision at the beginning of the inspection.³⁵

The court decides within 3 days from the delivery of the application, or from the delivery of the explanations given by the Office or by the Commission, if the court asks for explanations.³⁶

Seventh, as to *ex-post* judicial review, the Administrative Court Procedural Code provides for a broad spectrum of actions which enables natural and legal persons to seek protection from possible wrongdoings of administrative bodies. For the actual carrying out of an inspection, the most suitable approach would be an action against other interferences of the public administration body pursuant to Section 252 et seq. of the ACPC.

As to securing the possibility to carry out an inspection in private premises, the person whose premises are to be inspected is obliged to allow the inspectors to enter the premises and to cooperate with the inspection. Pursuant to Section 17 para. 11 of the APC, policemen are obliged to protect and assist the competition Office upon request.

Interestingly, the Office is permitted to sanction persons in whose (non-business) premises the inspection is carried out. This goes beyond the possibilities of the Commission pursuant to Regulation 1/2003. Section 44

³³ This is explicitly acknowledged by the Explanatory note to the APC <<https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=489766>> accessed 26 March 2023, 60.

³⁴ Section 431 ACPC.

³⁵ Section 17 para (8) APC.

³⁶ Section 436 and Section 434 ACPC.

para. 3 sets of fines of: up to 80 000 € for failure to allow entrance or failure to secure a seal³⁷; and up to 25 000 € for failure to cooperate, give explanations, provide information and materials, or give access to all materials, information and data in electronic form.

3. What would practice say – example of the institution of “the guardian”

As it flows from the discussion above, the wording of the Slovak legislation suggests that Article 7 of the ECN+ Directive was duly implemented into the Slovak legal order. However, what would an attempt to conduct an inspection in private premises actually look like? We have identified several obstacles that such inspections would face in practice.³⁸ We will present three of them related to the institution of “the guardian” (*opatrovník*). In general, a guardian is a person tasked with impartially “guarding” the interests of another person who may not do so on his/her own.

The status of the guardian

The primary mission of the guardian in carrying out an inspection is the protection of public and subjective rights of the inspected person as guaranteed by the Slovak Constitution, the Charter and the ECHR.³⁹ This corresponds to the case law of the ECtHR, such as *Delta Pekárny*⁴⁰, where the ECtHR highlighted the necessity to provide guarantees against the abuse of the power to conduct inspections. However, it shall be pointed out that in the case of inspections in non-business premises, certain *ex-ante* judicial review is possible. Therefore, the concerns of the ECtHR presented in *Delta Pekárny*⁴¹ (related to an inspection in business premises without *ex-ante* judicial review) cannot be automatically applied to inspections in non-business premises.

At the outset, it should be recalled that the concept of the guardian was, at the time of its introduction into the provisions of Slovak competition law (2004), an institution that was, aside from natural persons, also used for legal

³⁷ Note that it is possible to seal particular documents or hard-disks. Section 17 para (10) of the APC excludes the power to seal premises and means of transport in the case of an inspection in non-business premises.

³⁸ Mária T. Patakyová in Mária T. Patakyová (ed) *Zákon o ochrane hospodárskej súťaže. Komentár* (Wolters Kluwer SR 2022) 273.

³⁹ See footnote 25 above.

⁴⁰ *DELTA PEKÁRNY A.S. c. RÉPUBLIQUE TCHÈQUE* App no 97/11 (ECHR, 2 January 2015).

⁴¹ See *DELTA PEKÁRNY A.S. c. RÉPUBLIQUE TCHÈQUE* App no 97/11 (ECHR, 2 January 2015), para 93.

persons, namely when the exercise of their rights arising from substantive law was not assured, e.g. when they did not have an elected managing director. Since 2016, the new law of civil procedure has introduced the institution of a civil guardian *sensu stricto* (procedural guardian, see below) only for natural persons⁴². However, legal rules, not only in the context of competition law, continue to operate with the concept of a guardian for legal persons also, causing legal uncertainty.⁴³

Considering the position of the guardian as an individual who, as an impartial person with no interest in the investigation, is to participate in an inspection of private premises, meant to obtain evidence of anti-competitive conduct, we consider it adequate (with regard to the purpose of the institution of the guardian), to rely primarily on the provisions of the criminal procedural law of the Slovak Republic⁴⁴. The Criminal Procedure Code requires the compulsory presence of an uninvolved person during a search and an entry into a dwelling.⁴⁵

In a recent ruling of the Supreme Court of the Slovak Republic, the court commented on this institution as follows:

“Pursuant to Section 30 of the Criminal Procedure Code, an uninvolved person is an auxiliary person in criminal proceedings whose task is to guarantee the objectivity and legality of the performance of these acts by his presence during the performance of procedural acts. The purpose of bringing an uninvolved person into the proceedings is to ensure control of the regularity and lawfulness of the performance of a specific procedural act by the participation of an uninvolved person (impartial observer) in that act. ... The role of the uninvolved person is to control the lawfulness of the performance of the procedural act. Consequently, the role of the ‘controller’ implies the role of the ‘verifier’, who is to provide information on the conduct of the procedural act. If a party to the proceedings contests the lawfulness of a procedural act, the uninvolved person (as verifier) may be heard as a witness on the course of the procedural act. At this point – the second stage highlights the scope of the inquiry into the uninvolved person’s impartiality, and thus the need for a comprehensive assessment of the issue.”⁴⁶

⁴² Alexandra Kotrecová and Marián Fečík in Marek Števíček, Svetlana Ficová, Jana Baričová, Soňa Mesiarkinová, Jana Bajánová, Marek Tomašovič et al. *Civilný sporový poriadok. Komentár*. C.H. Beck Praha, 2016, 237.

⁴³ Legal certainty does exist, however, when it comes to a provision from the Tax Procedure Code (Law No. 563/2009 Coll. Of 1 December 2009), as amended, which allows the appointment of a representative for a legal person, as well (Section 9, paras 6 and 7). However, we believe that the position of the representative in the Tax Procedure Code is to a substantial extent different from the concept of the guardian.

⁴⁴ We would like to thank the reviewers of this article for this point.

⁴⁵ Section 30 and Section 105 of the Criminal Procedure Code (Law No 301/2005 Coll. Of 24 May 2005), as amended (hereinafter: Criminal Procedural Code).

⁴⁶ Decision of the Slovak Supreme Court 1Tdo/13/2021, dated on July 20, 2022.

It follows from the ruling that the purpose of the impartiality of the “observer”, when conducting a search or entering a dwelling, is fulfilled only if both the subjective and objective aspects of impartiality (as defined by the case law of the ECtHR, and to which reference is made in the reasoning⁴⁷) are met.

With the help of these starting points, we will analyse three issues related to the institution of the guardian who shall be present during an inspection in non-business premises. We will conclude the analysis by proposing *de lege ferenda* solutions.

First, as to the person of the guardian

Neither the Act on Protection of Competition nor the Administrative Court Procedural Code specifies who shall be the guardian. There are several possibilities for how to interpret this term. First of all, “guardian” can be understood as a *procedural guardian*, pursuant to Section 36 para. 2 of the ACPC. To put it simply, a procedural guardian is a person appointed if a participant in a procedure cannot act on their own (Section 37 of the ACPC). Such procedural guardians may be a family member or a municipality or, in specific cases, a court officer (Section 39 of the ACPC).

Yet, the concept of a procedural guardian is addressed only to natural persons. This is why we do not believe that the term guardian should be understood as a procedural guardian *sensu stricto*. Consequently, a grammatical interpretation leads to the conclusion that there should be a difference between a *procedural guardian*, a term defined by the Administrative Court Procedural Code, and a *guardian* who is not *procedural*.

Another possibility is that the *guardian* is a *guardian sui generis*.⁴⁸ The authors of one of the leading commentaries to the Administrative Court Procedural Code suggest that a municipality can be appointed as the guardian; however, it would be preferable to appoint a court officer. In our view, a municipality would not be a good choice for the position of the guardian. Suppose that a CEO of an entrepreneur lives in a small village of 300 inhabitants. The Office is preparing an inspection in the private home of that CEO. Would it be wise to inform the village, as the guardian, about the planned inspection? How likely it is that someone from the village office will disclose the imminence of an inspection to the CEO? This issue is even more pressing due to the lack of non-disclosure obligation analysed below.

⁴⁷ *Piersack v Belgium* (– ECtHR judgement from 1st October 1982) Series A no 53, *Delcourt v Belgium* (1970) Series A no 11., *Saraiva de Carvalho v Portugal* (1994) Series A no 286-B.

⁴⁸ Marián Fečík and Michaela Nosa in Jana Baricová, Marián Fečík, Marek Števček and Anita Filová et al. *Správny súdny poriadok. Komentár*. (C.H. Beck 2018) 258.

Moreover, we believe that the legislation does not permit a legal person, such as a municipality, to be appointed as the guardian. This is due to the fact that judicial consent to the inspection shall contain the permanent or temporary address of the guardian (Section 437 para. 2 *in a fine* of the ACPC). This would not be possible for legal persons, as these have seats rather than addresses.

Moving to the suggestion that a court officer should be appointed as the guardian, we find this more practical. However, an officer of which court? It seems practical that it should be a court officer from a court in the vicinity of the place of the inspection, not the court deciding on the consent of the inspection. This is due to the fact that there is only one court having jurisdiction over the whole Slovak territory, and that is the Administrative Court in Bratislava⁴⁹, having its seat in the very west of the country. Should the inspection take place in the east part of Slovakia, it could take seven or eight hours by car to get there. It would seem more convenient to appoint a person from a local court. However, one should bear in mind that the confidentiality of an inspection may be threatened if there is too much proximity between the person to be inspected and the local court.

The authors of another leading commentary to the Administrative Court Procedural Code⁵⁰ state that the position of the guardian should not be filled by an employee of a court, since it is not the court who supervises the inspection. On the contrary, the Office should propose a trustworthy person from among professional associations of entrepreneurs. Once again, we see this as a threat to the secrecy of an inspection. Should colleagues of the entrepreneur know about the inspection, it is reasonable to suppose that they will reveal it to the (to-be-inspected) entrepreneur.

Moreover, it is not clear whether it is in fact the Office that should propose the person to be appointed the role of the guardian. The wording of Section 17 para. 9 of the APC suggests that the Office merely invites the guardian who has already been designated by the court. It does not flow from this wording that it is the Office that proposes the guardian. This is confirmed by the fact that proposing whom to appoint as the guardian is not within the requirements concerning the content of the submission filed to the court.⁵¹

As to the objection to appointing court employees, we do not believe that the mere fact that a court employee is appointed as the guardian leads to the conclusion that the court supervises the inspection. There is no provision

⁴⁹ Section 15 ACPC.

⁵⁰ Ida Hanzelová in Ida Hanzelová, Ivan Rumana and Ina Šingliarová, *Správny súdny poriadok – komentár* (Wolters Kluwer 2016) 499.

⁵¹ Section 433 ACPC.

in the Administrative Court Procedural Code that suggests that the guardian represents the court in an inspection.

Should we choose from all the proposed (types of) persons to be appointed the guardian, a court officer seems the most suitable one. However, even in this case, to appoint one person seems unwise. Anything may happen, sickness, a traffic accident, or merely the impossibility to reach the person (see below). It would be more appropriate to appoint a list of persons who could be guardians. However, in such a case, the lack of confidentiality is even more likely dangerous.

Second, as to the lack of confidentiality on the side of the guardian

Employees of the Office are under a statutory non-disclosure obligation. This follows from Section 56 of the APC. However, an explicit non-disclosure obligation for the guardian is present neither in the Act on Protection of Competition nor in the Administrative Court Procedural Code. The obligation of confidentiality is also not contained in the Judicial Officers Act, which lays down the rules governing the status and activities of these public servants.⁵²

The moment of *surprise* is pivotal for inspections.⁵³ If not for the presumption that the entrepreneur at hand would hide information from the Office, a mere request for information would be sufficient. The Office would ask for it, and the entrepreneur would provide it. However, the essence of unannounced inspections lies in the presumption that the entrepreneur has the information and that the entrepreneur is not willing to provide it otherwise. Once the entrepreneur knows what the Office would want to find, the entrepreneur has a motive and ability to hide or destroy that information. Therefore, it is crucial that the Office enters the entrepreneur's premises by surprise.⁵⁴ The same applies to inspections on other premises.

Therefore, it is shocking that guardians, assisting in inspections in other premises, are not explicitly legally required *not* to disclose to anyone that an inspection will be carried out, especially not to the respective entrepreneur and its employees.

The disclosure of a planned inspection may put the whole inspection into jeopardy, taking into account the timing of the inspection and the delivery of

⁵² Judicial Officers Act (Act No 549/2003 Coll. of 24 October 2003), as amended.

⁵³ The CJEU also acknowledges the importance of the element of surprise. Fernanco Castillo de la Torre and Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar 2017) 209. The authors were referring to case T-462/07, *Galp v Commission*, EU:T:2014:459.

⁵⁴ As put by Blažo, the goal of an inspection (dawn raid) is to gain necessary materials and information, and to prevent their destruction. Ondrej Blažo in Katarína Kalesná and Ondrej Blažo, *Zákon o ochrane hospodárskej súťaže. Komentár* (C.H. Beck 2012) 132.

judicial consent to the guardian. To explain, the guardian is one of the two entities (the guardian and the Office) receiving the consent of the court to the inspection.⁵⁵ As stated above, judicial consent contains many details regarding the inspection, including the aim of the inspection and the affected premises. Since the inspection does not have to be carried out immediately (note that the Office will have a period of at least 30 days to carry out the “approved” inspection), the chosen guardian, if willing to tip off the inspection, has enough time to do so.

Third, as to contacting the guardian

Last but not least, the practical application of the provisions on inspections in other premises is threatened by the absence of provisions requiring the guardian to provide their contact details. Pursuant to Section 17 para. 9 of the APC, the Office shall summon the guardian to participate in the planned inspection. However, how should the Office do that?

Judicial consent to an inspection shall contain the permanent or temporary address of the appointed guardian.⁵⁶ Unfortunately, no other details are required. Should the Office send a letter to the guardian? What if they are on vacation, or simply live elsewhere? We believe that more details, such as telephone or email address shall be provided to the Office.

4. Considerations *de lege ferenda* with respect to the institution of “the guardian”

The previous part showed that there are three important weaknesses of the current Slovak provisions on the institution of the guardian. First, it is not clear who this person should be. Second, there is no non-disclosure obligation on the side of the guardian, which may put the whole inspection in jeopardy. Third, inviting the guardian to the inspection requires interactive contact details, which are not required under current legislation.

Should the guardian have a similar role as an uninvolved person pursuant to the Criminal Procedure Code – the person appointed as the guardian shall be an independent observer who shall guarantee the objectivity and legality of the performance of the inspection. Taking into account this requirement, together with the necessity not to disclose the planned inspection to the person in whose premises the inspection should take place, the guardian shall not be

⁵⁵ Section 437 para (3) ACPC.

⁵⁶ Section 437 para (2 *in fine*) ACPC.

linked to this person or entrepreneurs investigated by the Office (so-called “*Involved Persons*”).

Consequently, in our view, there are several (types of) persons who may be considered candidates for the position of the guardian. We will present three of them.

Administrators

First, we suggest drawing inspiration from legal persons involved in liquidation proceedings. In companies in which, after their dissolution with liquidation, no liquidator is appointed, the court appoints a liquidator from a list of administrators that are not primarily intended for the purpose of liquidating the company. The administrator shall be a natural person, or a legal person, included in the list of administrators. Administrators shall act in insolvency proceedings, debt restructuring proceedings, or public preventive restructuring proceedings pursuant to special provisions. Pursuant to Section 19 of the Act on Administrators (Law No. 8/2005 Coll. of 9 December 2004), as amended (hereinafter: Act on Administrators), the Ministry of Justice of the Slovak Republic maintains a public list of administrators. This legislation lays down the basic duties of administrators⁵⁷, the situations where they are excluded from the position of an administrator⁵⁸, as well as the duty of confidentiality.⁵⁹ As such, the problems associated with the position of an administrator as an impartial observer when carrying out inspections should be minimised.

On the other hand, administrators are often lawyers as well. It cannot be excluded that the person called to the position of the guardian has other links to the Involved Person. In order to exclude this, the court would need to contact the specific administrator it has in mind to appoint as the guardian in a given case, and to ask about their relationship (or lack of it) to the Involved Persons. Alternatively, if the court would only refer to the list of administrators in its judicial consent to the inspection, it would be the Office that would need to do the inquiry. In any case, once the possible guardian is contacted, and it is revealed that there is a link to the Involved Persons, they shall not be appointed the guardian. However, they will already be aware that the Office started an investigation. Subsequently, they might disclose this to the Involved Persons.

⁵⁷ Act on Administrators, Section 3 Basic duties of the administrator, para (1).

⁵⁸ Act on Administrators, Section 4 Exclusion of the administrator, para (1).

⁵⁹ Act on Administrators, Section 6 Confidentiality, para (1).

Notaries

Second, notaries pursuant to the Notary Code (Law 323/1992 Coll. of 6 May 1992) (hereinafter: Notary Code), as amended, may be taken into consideration too. They are legal professionals⁶⁰, therefore, they would observe inspections with (high-level) legal knowledge. Notaries and their employees are under a statutory confidentiality obligation.⁶¹ The list of notaries is kept by the Notary Bar Association.⁶² Therefore, the identified weaknesses are minimised.

However, similarly to administrators, the impartiality of the particular notary would need to be controlled, whereas a possible disclosure of information on a planned inspection cannot be excluded. Nonetheless, the link between a notary and their client is arguably less intense than the link between an advocate (barrister) and their client.

The Office of the Public Defender of Rights and the Slovak National Centre for Human Rights

Thirdly, given the fact that the position of the guardian is linked to the protection of human rights, the right to privacy in particular, we believe that a suitable person can be drawn from an institution for the protection of human rights. In Slovakia, there are two institutions that might be considered, namely the Office of the Public Defender of Rights pursuant to the Act on Public Defender of Rights (Law No. 564/2001 Coll. of 4 December 2001), as amended (hereinafter: APDR) and the Slovak National Centre for Human Rights (hereinafter: National Centre) pursuant to the Act on Establishment of Slovak National Centre for Human Rights (Law No. 308/1993 Coll. of 15 December 1993), as amended (hereinafter: AESNCHR).

The Office of the Public Defender of Rights is a legal entity, which performs tasks related to the professional, organisational and technical support of the activities of the Public Defender of Rights.⁶³ The competencies of the Public Defender of Rights are related to (possible) violations of fundamental rights and freedoms, the rule of law or the principles of a democratic state governed by the rule of law, in proceedings, decision-making processes or through inaction of a public authority.⁶⁴

⁶⁰ A second-degree diploma (Master diploma) in the field of law is required. Section 11(1)(b) para Notary Code.

⁶¹ Section 39(1) Notary Code.

⁶² Section 29(2) Notary Code.

⁶³ Section 27(2) APDR.

⁶⁴ Section 11(1) APDR.

The National Centre is the Slovak national human rights institution as well as the national equality body.⁶⁵ It is an independent legal person.⁶⁶

With respect to confidentiality, state employees working at the Office of the Public Defender of Rights are legally obliged to respect confidentiality.⁶⁷ The same applies to other employees of the Office of the Public Defender of Rights pursuant to Section 8 para. 1 lit. c) of the Act on Performance of Works in Public Interest (Law No. 552/2003 Coll. of 6 November 2003). However, with respect to other employees of the Office of the Public Defender of Rights (employed pursuant to the Labour Code (Law No. 311/2001 Coll. of 2 July 2001), as amended, and with respect to employees of the National Centre, confidentiality shall be explicitly required.

There are several advantages of the appointment of the Office of the Public Defender of Rights or of the National Centre to the position of the guardian. Both of them are legal persons, should legislation allow their appointment, there is little risk that there would not be a natural person within them who would not be able to attend an inspection. Moreover (state) employees working in these institutions are familiar with human rights and so they may serve as good “observers” of inspections *qua* intrusion into the right of privacy. Last but not least, the risk of (professional) links between these institutions and the inspected person or the undertakings is minimised.

IV. Conclusion

The aim of this article was to take the bottom-up approach to the implementation of the ECN+ Directive into the Slovak legal order. We chose to focus on Article 7 of the ECN+ Directive – the power to carry out inspections on non-business premises. After setting the scene on the EU level, we zoomed in on the Slovak legislation. We compared the Slovak law to Regulation 1/2003 and the ECN+ Directive. It was proven that although all three texts seem similar, there are differences among them.

As to the implementation itself, at first sight, no major issues seem to exist as far as the mere wording is concerned. However, if we look into the practical application of the provisions, we identified several possible challenges. We presented three of them related to the institution of the guardian.

⁶⁵ Competencies of the Slovak National Centre for Human Rights are governed by Section 1 AESNCHR.

⁶⁶ Section 2(1) para AESNCHR.

⁶⁷ Section 111(1) of the Act on State Service (Law No. 55/2017 Coll. Of 1 February 2017), as amended.

The first challenge is related to the problem of which type of person to appoint as the guardian. It seems that nobody knows for sure who such a person should be. Moreover, the fact that it should be only one single natural person may prove to be very impractical. Therefore, *de lege ferenda*, one solution would be to keep a list of possible guardians to which the court could refer in its rulings. The second challenge consists of the simply shocking lack of a non-disclosure obligation on the side of the guardian. This issue should be remedied by a legal amendment and by inserting an explicit non-disclosure obligation into the Administrative Court Procedural Code. Last but not least, the fact that the Office might not be able to contact the chosen guardian illustrates the lack of practical applicability of the Slovak provisions. Once a list of possible guardians is created or referred to, their contact details should be easily available as well.

We believe that all these issues are pressing. The ECN+ Directive in its Article 7 para. 1 requires that Member States (Slovakia included) shall ensure that their national competition authorities are able to conduct unannounced inspections in non-business premises. *De lege lata*, such inspections are theoretically possible in Slovakia, in practice, however, this may prove onerous. We do not claim that Article 7 of the ECN+ Directive has not been implemented. However, the implementation is not thought through.

The identified insufficiencies may lead to two conclusions. First, it will not be possible to conduct a planned inspection. It cannot be excluded that the Antimonopoly Office itself will hesitate to start the process, taking into account the possible obstacles. Second, the inspection will be carried out but it will be challenged on the basis of the arguments that it is not carried out legally and that it is an illegal intrusion into the privacy of the person concerned. Naturally, all the shortcomings mentioned above could be overcome *ad hoc*, especially if judges involved in a given case are open-minded, and the designated guardian is available. However, if there are no problems, legal rules are often unnecessary. Legal rules are necessary precisely to solve problems. In this particular case, the problem is related to the right to privacy. For this reason, we believe that there is a necessity for a clear and comprehensive set of legal rules.

Should the legislation change, we discussed three possible groups of persons who could serve as guardians: administrators, notaries or public institutions tasked with the protection of human rights, namely the Office of the Public Defender of Rights and the Slovak National Centre for Human Rights.

The possibility of an illegal intrusion into the privacy of the person concerned is a significant and unfortunately negative outcome from the rule of law perspective. Therefore, we suggest that the legislation is revisited in order to provide not only better and more genuine implementation of the ECN+ Directive, but also more legal certainty for everybody concerned.

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Selective Enforcement and Multi-Party Antitrust Infringements: How to Handle “Unilateral Agreements”?

by

Jan Polański*

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* Antitrust Policy Advisor, Polish Office of Competition and Consumer Protection (UOKiK). The views expressed in this text are the author’s own and do not necessarily reflect those of the Polish Office of Competition and Consumer Protection (UOKiK). ORCID: <https://orcid.org/0000-0002-4048-1860>.

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Abstract

In cartel cases, there are good policy reasons to investigate all cartel members and to address a decision to each of them. Yet, the case is different when it comes to vertical infringements. Vertical infringements often involve more undertakings, but their continued existence depends on the participation of e.g. wholesalers. In consequence, antitrust authorities might be interested in pursuing a policy of selective enforcement and targeting investigations at single undertakings, even despite the fact that such infringements are multi-party ones. This, however, raises concerns whether such an approach is valid and how it affects the rights of defence. Taking into account that the European Commission's return to RPM cases in 2018 provided national competition authorities (NCAs) with additional incentives to investigate vertical cases, this article reflects on what might be the reaction of the European Court of Justice (CJEU), if the aforementioned approach is questioned either during an appeals procedure or within a preliminary request.

Résumé

Dans les affaires de cartel, il existe de bonnes raisons politiques d'enquêter sur tous les membres du cartel et d'adresser une décision à chacun d'entre eux. Toutefois, le cas est différent lorsqu'il s'agit d'infractions verticales. Ces dernières impliquent souvent un plus grand nombre d'entreprises, mais leur existence dépend de la participation, par exemple, des grossistes. Par conséquent, les autorités de la concurrence pourraient être intéressées par la poursuite d'une politique d'application sélective et de ciblage des enquêtes sur des entreprises uniques, même si ces infractions sont multipartites. Cela soulève toutefois des questions quant à la validité d'une telle approche et à la manière dont elle affecte les droits de la défense. Compte tenu du fait que le retour de la Commission européenne aux affaires relatives à l'imposition des prix de ventes (*retail price maintenance* – RPM) en 2018 a davantage incité les autorités nationales de concurrence (ANC) à enquêter sur les affaires verticales, cet article réfléchit à ce que pourrait être la réaction de la Cour de justice de l'Union européenne (CJUE) si l'approche susmentionnée devait être remise en question, soit au cours d'une procédure d'appel, soit dans le cadre d'une demande préliminaire.

Key words: selective enforcement; procedure; vertical agreements; procedural autonomy; due process.

JEL: K21

I. Introduction

The difference between Article 101 and 102 TFEU may seem straightforward. The former is about collective practices, the latter about unilateral actions. Article 101 TFEU investigations typically concern groups of undertakings, while Article 102 TFEU investigations concern single undertakings.¹ Yet, at some point of the enforcement history of Polish antitrust law, a doubt has been cast over whether “unilateral agreements” might be a thing. This would be the case of an Article 101 TFEU investigation that is directed at a single undertaking. Recently, a case of this kind has also attracted attention in the Czech Republic, where the Czech National Competition Authority (hereinafter: NCA) decided to only fine an organiser of a distribution system but then saw its decision being overturned in judicial review for not identifying clearly enough the members of collusion.²

The term “unilateral agreements” was originally used by Jurkowska-Gomułka, and then more extensively by Kolasiński, as a criticism of the approach adopted by the Polish NCA in relation to vertical agreements.³ The approach has been that in vertical cases (mostly Retail Price Maintenance, RPM) the Polish NCA often initiates proceedings only against the undertakings responsible for setting up distribution systems, that is, it pursues a policy of selective enforcement. In consequence, decisions of UOKiK (the Polish Competition and Consumer Protection Office, hereinafter: UOKiK) are only addressed to the “organisers” of such systems and fines are imposed only on them. Conversely, other undertakings (typically retailers) remain unpunished and there is no finding of an infringement with regard to them. Against this backdrop, Jurkowska-Gomułka and Kolasiński argued that “unilateral agreements” are becoming a target of antitrust enforcement – something not envisaged under antitrust law, and thus an enforcement error.⁴ Instead, all collusion members should be prosecuted and infringement decisions should indicate them clearly.

Yet, the practice followed by the Polish and Czech NCAs is not uncommon in the European Union. In fact, one of the arguments put forward by the Polish NCA has been that the European Commission implements a similar

¹ Except rare cases of collective dominance.

² Case 31 Af 5/2021-844 *Baby Direkt* (Czech Republic).

³ Agata Jurkowska-Gomułka, ‘1+1=1, czyli o „jednostronnych” porozumieniach według Prezesa UOKiK’, not available online as of 31 March 2023, referred to by Marcin Kolasiński, ‘Czy istnieją „jednostronne porozumienia” ograniczające konkurencję?’ (2017) Faculty of Management Warsaw University Press, Working Papers (1).

⁴ Jurkowska-Gomułka (n 3); Kolasiński (n 3).

approach.⁵ The issue is thus relevant also in a broader European context. This is even more so taking into account that in digital markets agreements may involve hundreds, if not thousands, undertakings – a restriction of the power of antitrust authorities to “selectively” enforce Article 101 TFEU may undermine the effectiveness of competition rules for years to come.

There are some challenges in discussing this topic in a broader European context. This is because the controversy occurred at the national level, meaning that many arguments are of a more national nature, mostly coming from national procedural frameworks. There is thus a risk of either going too deeply into the peculiarities of national laws, or leaving certain arguments that are relevant in a specific national context unanswered, due to their non-universal character which does not justify a thorough analysis in a supra-national context.

The article looks for a possibly balanced approach. It focuses on two general issues. First, what might be the reaction of the Court of Justice of the European Union (hereinafter: CJEU) if someday the approach adopted by the European Commission is challenged in an appeal? Second, what might be the reaction of the CJEU, if it is asked for a preliminary ruling by a national court? The article starts with an outline of the policy adopted by the European Commission and EU Member States. Subsequently, counterarguments to this policy are presented. With this background, the validity of these claims is discussed. This discussion does not aim for an exhaustive rebuttal of the counterarguments discussed earlier – such a rebuttal would need to address each specific argument made on the national level, while the goal of the article is to think about these issues from a broader European perspective. Still, based on this discussion, the article concludes that courts should be wary of curtailing antitrust authorities’ powers when it comes to how they establish infringements of Article 101 TFEU. Antitrust authorities themselves, however, should be more cautious in their enforcement practice and more aware of the consequences of the policies they adopt.

⁵ Kolasiński (n 3), 37–40.

II. The current way

1. General outline

The number of undertakings involved in cartel cases is typically limited. While not impossible, it is harder to set up and maintain a cartel that involves many market players (mostly due to coordination issues, communication, balancing interests, monitoring, cheating etc.).

Conversely, in vertical cases, there is typically a supplier that has a lot of power in deciding how its distribution network works.⁶ The supplier may also easily keep a bird's eye view on actions taken by the buyers. On the other hand, buyers' impact on the distribution system is often limited. In essence: "eliminate" the supplier, and any anticompetitive agreement that emerged thanks to the supplier will likely collapse. This can be seen as a form of "selective enforcement".⁷

The European Commission used to target suppliers only in a more distant past, around the time of the notification system.⁸ However, this is also an approach that has been used more recently when the European Commission made its comeback to RPM cases.⁹ If the European Commission follows this way of enforcement, its decisions include findings that there

⁶ In this paragraph and throughout this article, the terms "supplier" and "buyer" (both included in e.g. Article 3 of Regulation 2022/720) are used. However, insofar RPMs are concerned, typically an agreement will take place between wholesalers and retailers.

⁷ Marcin Kolasiński, 'Wpływ rozstrzygnięć prawomocnych decyzji Prezesa UOKiK dotyczących porozumień ograniczających konkurencję na postępowania w sprawie roszczeń o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji' (2021) internetowy Kwartalnik Antymonopolowy i Regulacyjny 2021, nr 4(10) 48; for selective enforcement outside the scope of antitrust, see Alberto J. Gil Ibáñez, 'The "Standard" Administrative Procedure for Supervising and Enforcing EC Law: EC Treaty Articles 226 And 228' (2004) *Law And Contemporary Problems*, Vol. 68, 139–141. Selective enforcement (or "selective prosecution") is also known under US law, leading to e.g. claims concerning discrimination, see: Spencer Weber Waller and Jacob E. Morse, 'The Political Misuse of Antitrust: Doing the Right Thing for the Wrong Reason' (2020) *Competition Policy International*, 16 July, 6–7; John D. Aldock et al., 'Abuse of Discretion: Administrative Expertise vs. Judicial Surveillance' (1966) *University of Pennsylvania Law Review*, Vol. 115, 40. The problem of selective enforcement attracted attention also in China, yet in a different context, i.e. a concern that Chinese authorities might selectively apply antitrust laws to target foreign companies, see: Jingmeng Cai, 'Public Antitrust Enforcement of Resale Price Maintenance in China: A Crusade or Discrimination?' (2016) *Brooklyn Journal of International Law*, Vol. 42, Issue 1, 1–62.

⁸ *Yamaha* (Case COMP/37.975); *SEP* (Cases F-2/36.623/36.820/37.275); *Mercedes-Benz* (Case COMP/36.264); *Volkswagen* (Case COMP/F-2/36.693).

⁹ *Philips* (Case AT.40181); *Asus* (Case AT.40465); *Denon & Marantz* (Case AT.40469); *Philips* (Case AT.40181); *Pioneer* (Case AT.40182).

were agreements (or agreement) between the supplier and buyers, with the buyers being indicated by cross-references to the discussion of the facts of the case. These agreements are found to be part of the same (single and continuous) infringement. The operative part of a decision, in turn, indicates that the supplier infringed Article 101 TFEU by restricting the ability of buyers to set their market policies independently.

In the European Commission's enforcement practice, the reasons for such an approach are not provided, and there are no court judgments known to this author that discuss this issue in detail.¹⁰ Generally, it seems justified to assume that expediency is the main reason for opening proceedings against just the organiser of a distribution system.

At the national level, the Polish case is an interesting example where the standpoints of the NCA, the judiciary, and of antitrust literature were considered. Generally, the approach adopted in Poland is similar to that used by the European Commission.¹¹ However, in some instances, the Polish NCA opens proceedings against all undertakings – typically, when the number of undertakings involved is smaller and the infringement itself is more akin to a cartel.¹²

The legal reasoning behind this approach has been more thoroughly discussed in Poland than at the EU level. The Polish Competition Act includes a provision saying that the party to antitrust proceedings is the undertaking against whom proceedings were opened.¹³ This is in contrast to general Polish administrative rules, which specify that the term “party to proceedings” should be understood as everyone whose legal interest or obligation is the subject of proceedings.¹⁴ Given the language of the Polish Competition Act, the Polish NCA and the judiciary concluded that: (a) a decision can be addressed to just one undertaking and the operative part of the decision does not have to list all members of collusion; (b) the authority enjoys discretion in deciding against whom proceedings will be opened (and may thus choose just one undertaking, e.g. the organiser).¹⁵

This approach received a mixed reception by lower instance courts.¹⁶ Yet, so far it has received unequivocal support from the Polish Supreme Court. According to the Supreme Court, as long as a decision indicates concrete

¹⁰ No such cases were discovered by Kolasiński (n 3) either. See, however, Case C-306/20, *Visma* EU:C:2021:935, para. 91–100.

¹¹ See e.g. most recent cases: *Brother* (Decision RKR-10/2019, Poland); *Yamaha* (Decision DOK-4/2020, Poland); *Solgar* (Decision DOK-4/2021, Poland); *Karcher* (Decision RKR-2/2022, Poland).

¹² See e.g. *Swatch* (Decision DOK-4/2015, Poland).

¹³ Article 88 of the Polish Competition Act.

¹⁴ Article 28 of the Polish Code of Administrative Procedure.

¹⁵ Kolasiński (n 3), 10–11 and 33–36.

¹⁶ Kolasiński (n 3), 33–36.

facts and evidence of collusion, it cannot be said that the supplier could not defend itself.¹⁷

In *Baby Direkt*, on the other hand, the Czech NCA addressed a decision to just the organiser of a distribution system and, at the same time, it did not include the names of the relevant retailers in the operative part of its decision.¹⁸ This, and the fact that the Czech NCA did not discuss communications with each specific retailer, led the Czech Court of 1st instance to conclude that it cannot properly review the case, as proving the concurrence of wills was crucial.

A more targeted review aimed at identifying examples of how NCAs handle investigations suggests that the European Commission, the Polish NCA, and the Czech NCA are not the only ones that follow the approach outlined above. For example, in its recent *Samsung* case, the Dutch NCA addressed its decision and imposed a fine only on Samsung.¹⁹ In *Super Bock Bebidas* (which was subject to a preliminary judgment by the CJEU, albeit concerns a different issue), the Portuguese NCA followed a similar route.²⁰ The German NCA also appears to see this approach as feasible, e.g. this is how it handled its *Booking.com* investigation, which was part of a broader effort of the NCAs to tackle MFN clauses in the hotel sector in 2015–2016.²¹

2. Stakes and practical relevance of the doctrine

To illustrate the practical relevance of this approach, it is useful to look at actual cases. Poland offers an interesting example, as it used to prosecute all members of anticompetitive vertical agreements, but over time changed its policy to a more nuanced one. In consequence, some of the older cases followed by the Polish NCA show actual instances of a competition authority prosecuting large numbers of undertakings.

For instance, in case *Tikkurila I*, the Polish NCA found an infringement that involved 86 undertakings.²² In case *Poltrade*, it prosecuted 141 undertakings.²³ Both cases were in fact “small” in the sense that they were handled by one of the regional offices of the NCA (which in Poland are generally tasked with

¹⁷ Case I NSK 10/18 *Anyro* (Poland).

¹⁸ *Baby Direkt* (n 2). The case was initially decided under Article 101 TFEU, but this was reversed.

¹⁹ *Samsung* (Case ACM/21/167383, Netherlands).

²⁰ *Super Bock Bebidas* (Case PRC/2016/4, Portugal); Case C-211/22 *Super Bock Bebidas* (EU:C:2023:529).

²¹ *Booking.com* (Case B9-121/13, Germany).

²² *Tikkurila I* (Case RKT-79/2007, Poland)

²³ *Poltrade* (Case RKT-88/2008, Poland).

pursuing smaller cases) and did not involve large entities. On a technical level, in each of these cases all undertakings had to be served with relevant legal documents, could access the file, make their views known, and have their liability proven in unequivocal terms. With regard to each of the undertakings, the decisions indicated when undertakings' liability ended and so forth.

While these investigations were national, one can easily imagine cases of similar sort at the EU level. The example of agreements between hotels and booking sites, which was mentioned earlier, illustrates this. While the hotel agreements were dealt with by the NCAs, it is likely that the European Commission could have also been well-placed to conduct an investigation. Had it done so, it would have likely needed to deal with thousands of hotels around the European Union, unless it had decided (in accordance with its current practice) to just focus on the booking sites.

The practical issue is, in fact, not only limited to classic vertical agreements. As there are more and more business models that revolve around digital services and platforms, it is not unfathomable to see, in the future, agreements of a more horizontal character that involve large numbers of undertakings. Uber's case may provide an example, as there was a time when it was theorised whether Uber's pricing algorithm might result in price-fixing.²⁴ Had it been so, thousands of car drivers would need to be considered as colluding undertakings.

III. The right way?

The approach outlined above is not without controversy. The primary one is that an anticompetitive practice that results from actions taken by at least two undertakings, is then found to be illegal within a procedure that involves just one undertaking, and leads to an attribution of liability and fine to just this single undertaking.²⁵ As mentioned earlier, it is argued that this is in a way a "unilateral" agreement – something akin to an abuse of a dominant position, yet still an agreement.²⁶ Rights of defence are also indicated as a concern.²⁷ Since not all members of an alleged anticompetitive agreement become parties to a procedure, competition authorities also feel less pressure to prove the

²⁴ Mark Anderson and Max Huffman, 'The Sharing Economy Meets the Sherman Act: Is Uber a Firm, a Cartel, or Something in Between?' (2017) *Columbia Business Law Review*, vol. 2017, 859–933.

²⁵ Kolasinski (n 3).

²⁶ A comparison to Article 102 TFEU was also one of the points made in *Baby Direkt* (n 2), para. 22.

²⁷ Kolasinski (n 7) 51.

agreement with regard to each member of collusion – thus, the question of the level of detail of decisions, as well as their operative parts, is raised.²⁸

Before moving to a more detailed discussion of these arguments, a clarification seems justified though, as it appears there is confusion as regards what actually takes place within the type of proceedings in question. While the phrase “unilateral agreement” is catchy, it is a confusing one. This is because competition authorities do, in fact, establish the existence of agreements in this type of cases. It does not logically follow from the fact that liability was attributed to one undertaking that there was only one party to an agreement. Therefore, the question is rather whether liability can be attributed to just one undertaking, if an agreement involved more undertakings (and an agreement must involve at least two undertakings) – and if so, what are the consequences of doing so.

The counterarguments to the approach at hand can be grouped in a following way: (a) arguments concerning substantive rules (Article 101 TFEU and its national equivalents); (b) formal arguments concerning procedural frameworks; (c) rights of defence; (d) procedural autonomy (this is of relevance only in relation to the NCAs); (e) private enforcement; (f) leniency (this might be of relevance in Member States that use broad leniency programmes that include e.g. RPMs – this is the case in Poland, but also e.g. in Romania).

1. Substantive rules

The substantive argument can be phrased as a “wide substantive argument” or a “narrow substantive argument”.²⁹

The wide argument is following. Article 101 TFEU says that an agreement takes place between undertakings. It can be argued therefore that to find such an infringement, liability has to be attributed to all undertakings involved. This is because the legal question in Article 101 TFEU investigations is about the interaction between a group of entities (i.e. the fact that they agreed on something that constituted a common plan to restrict competition). The argument follows that since establishing that A agreed with B, that means that B agreed with A – this requires having both A and B in the same legal proceeding. Moreover, if there are A, B, C, and D involved, all four need to become the addressees of a decision – the authority cannot just opt for a “legal fiction” of an agreement between e.g. two of them, while ignoring the remaining parts of the infringement. This is because the objective and

²⁸ This issue became of particular controversy in *Baby Direkt*.

²⁹ The “wide” argument was originally presented by Kolasiński (n 3), 18–22 in relation to the Polish equivalent of Article 101 TFEU, but is transferable to EU law.

material fact, which is under investigation, is the market interaction in its entirety. This market interaction as a whole gives rise to a legal consequence (an infringement of Article 101 TFEU) – establishing an infringement between two undertakings when, objectively, four undertakings were involved is not an option.³⁰

Furthermore, Article 101 TFEU does not provide any room to treat undertakings differently and e.g. initiate proceedings and address a decision only in relation to the organiser of an agreement – it speaks of all undertakings in equal terms.³¹

The narrow argument is that the competition authority is in fact allowed to select undertakings it will prosecute and to find an infringement just between them (without making reference to any of their contacts with other undertakings, i.e. ignoring them).³² Still, there will always be at least two undertakings that are addressees of a decision (and in such a case only an agreement between these two undertakings will be covered, while their actions with regard to possible other members of a single and continuous infringement will be ignored and no fines will be imposed in that regard).

2. Formal requirements

It might be that procedural frameworks prevent competition authorities from adopting decisions just in relation to a single undertaking if an infringement follows from a collective practice. It is argued that this is the case in e.g. Poland.³³ Since in a broader European context specific rules included in national legislation are of less relevance, this subsection focuses on the ideas underlying this argument, rather than the peculiarities of national laws.

³⁰ In Poland, this argument is further supported by saying that it is unjustified to conclude that there was one agreement (between the wholesaler and retailers in general), if evidence indicates multiple agreements with specific retailers. However, this argument seems to be based on a misunderstanding. The context here is that the Polish NCA does not mention in the operative part of its decisions that a single and continuous infringement took place. It instead replicates the statutory wording of the Polish Competition Act and mentions that there was an “agreement”. It is not uncommon under EU law that when a single and continuous infringement is established, the contribution of undertakings to this infringement may vary. This has been called by some as “asymmetric liability”, see Kevin Coates, ‘Defining a single and continuous infringement in cases with asymmetrical participation’ (2016) <<https://www.twentyfirstcenturycompetition.com/2016/05/sci-and-asymmetry>> accessed 31 March 2023.

³¹ Kolasiński (n 3), 20–22 (insofar he refers to the Polish equivalent of Article 101 TFEU).

³² Kolasiński (n 27).

³³ Kolasiński (n 3), 23–36.

Overall, national procedural rules might, for example, require a specific level of precision as regards the finding of an infringement. This may follow directly from national legal acts or their judicial interpretation. In Poland, for example, there are no specific legal provisions envisaged by the Polish Competition Act that list the elements of an antitrust decision (e.g. a provision saying that all members of an anticompetitive agreement need to be listed by name, even if they are not parties to the procedure). At the same time, it is argued that since administrative courts require a high level of precision with regard to the operative parts of administrative decisions, so should antitrust courts, since the Polish NCA is an administrative body.³⁴ The argument further goes that since: (a) one of the formal requirements of an administrative decision under general Polish administrative law is that it includes a list of the parties to given proceedings; (b) then all members to an anticompetitive agreement need to be party to proceedings because of the wording of the Polish equivalent of Article 101 TFEU (see the substantive rules argument discussed earlier) – addressing a decision to just a single undertaking is thus an error.³⁵

A similar argument can also be made in relation to EU law. It is argued that while the European Commission had adopted the approach of addressing (some) decisions to just single undertakings, this approach had not been approved by EU courts.³⁶ At the same time, it is suggested that case law, such as *Air Canada*, indicates that EU courts might not support the European Commission's approach, if they are given a chance to review its policy.³⁷

Air Canada was a case concerning an air freight cartel that operated on various routes within the EEA and from/to the EEA. In the grounds of its decision, the European Commission characterised the cartel as a single and continuous infringement. However, due to a complex nature of the case (the cartel was long-lasting, it concerned multiple routes, and the applicable law included the TFEU, the EEA agreement, and the EU-Switzerland agreement, with significant differences with regard to which specific provision the European Commission was empowered to enforce at a given point in time), the European Commission divided, in the operative part of the decision, the conduct into four articles. This gave an impression of four separate infringements and led to certain inconsistencies in comparison to the grounds of the decision. The decision was thus annulled by the General Court, which

³⁴ In Poland, antitrust cases are heard by general courts (which handle also criminal and civil cases), not administrative ones. However, the NCA is bound by administrative procedural rules.

³⁵ Cf. *Baby Direkt* (n 2), para. 16, 21.

³⁶ At least as of 2017, when this argument was made, see Kolasiński (n 3), 37–40. See, however, section V.5.

³⁷ Case T-9/11 *Air Canada* EU:T:2015:994.

pointed out that the operative part of the decision needs to be “*particularly clear and precise*”.³⁸

In consequence, an argument against the current approach of the European Commission can be that it leads to the adoption of decisions that are not clear enough – in other words, “different route, same conclusion” as under national law.

3. Rights of defence

The undertaking needs to understand the identity of the accusation levelled against it. It is argued, therefore, that when a competition authority opens proceedings just against the organiser of an agreement, and issues a decision (and earlier a Statement of Objections) that does not name each and every undertaking involved in the agreement, the undertaking cannot effectively defend itself.³⁹ This is because it is unaware of the identity of whom it allegedly colluded with (or rather, for what it is charged, since it may very well know with whom it colluded).⁴⁰

4. Procedural autonomy

Insofar as national proceedings are concerned, it can be argued that even if it is possible for the European Commission to address a decision to just the organiser of the practice, it might still be impossible to do so by NCAs, if only their procedural frameworks prohibit doing so (i.e. the formal argument discussed earlier is incorrect in relation to the European Commission, but correct with regard to an NCA).⁴¹ This is, therefore, not a standalone argument, but rather a supporting one.

³⁸ *Air Canada* (n 37), para. 35.

³⁹ Kolasiński (n 7), 51.

⁴⁰ In *Baby Dirket*, this was also found relevant by the court insofar as the infringement decision did not list all members of collusion, see para 24. See also para. 27 where the court observes that an argument that the undertaking “knows very well” with whom it colluded is not a proper argument.

⁴¹ Kolasiński, (n 3), 39. This is thus a “procedural autonomy” argument. Some argue that the concept of “procedural autonomy” is misleading, and suggest replacing it with the term “procedural competence”, see Walter van Gerven, ‘Of rights, remedies and procedures’ (2000), *Common Market Law Review*, Vol. 37, 501–536; Denis Baghrizabehi, ‘The Current State of National Procedural Autonomy: A Principle in Motion’ (2016) *Journal for International and European Law, Economics and Market Integrations*, Vol. 3, No. 1, 23–26. See also case C-591/10 *Littlewoods Retail*, Opinion of AG Trstenjak, EU:C:2012:9, para. 24–25. Since the term “procedural autonomy” is generally used in EU case law, this article follows this wording.

5. Private enforcement

An argument against finding of an infringement by just one undertaking might be that this makes private enforcement harder.⁴² The reason for which private enforcement would be hindered is that the infringement decision would only be binding on courts with regard to one undertaking (rather than all of them) and it would be unclear whether a specific plaintiff would in fact have sustained damage (e.g. whether retailer A, with whom the plaintiff contracted, was in fact involved in collusion).

6. Leniency

The leniency argument is simple: if leniency is available in vertical cases, and a competition authority establishes a policy that it only investigates the organisers of distribution systems, there are no incentives for the distributors to file for leniency.⁴³ The distributors might assume that whatever happens, no proceedings will be instigated against them. In consequence, there is no point to bother with leniency, which in turn lowers deterrence and detection.

IV. The middle way?

Taking into account the arguments discussed above, the default alternative would be to expect competition authorities to open proceedings against all parties to agreements.

Yet, there is also another possibility. For instance, the authority may open proceedings (and address a decision) with regard to only some undertakings involved in an agreement – selecting which distributors are chosen could be based on e.g. their volume of sales.⁴⁴ To some extent, this was the approach adopted by the Polish NCA in e.g. *Fischer*, where its decision was addressed to the supplier and one of the distributors.⁴⁵

⁴² Kolasiński (n 7), 55.

⁴³ This was originally argued by Jurkowska-Gomułka as referred to by Kolasiński (n 3), 41.

⁴⁴ This was originally criticised by Kolasiński (n 3), 20–22 based on the wide substantive argument discussed earlier. Yet, Kolasiński (n 7), 48–49 seemingly changed his position in 2021 (although without specifying the reasons for doing so).

⁴⁵ *Fischer* (Decision DOK-7/2013, Poland). It should be stressed, however, that the authority still found a wide agreement in this case (i.e. the decision covered all distributors). The decision was simply addressed to two undertakings instead of one. In the decision, the authority

Such an approach goes against the wider substantive argument discussed earlier, since it explicitly accepts that not all undertakings involved in an infringement are prosecuted. However, it eliminates some of the doubts concerning the proper way of proving the concurrence of wills. Also, more than one party to an agreement would be clearly listed in the resulting decision – all parties whose participation in an agreement is discussed in the decision would also be in a position to challenge it, since liability would be attributed also to them.⁴⁶

V. Arguments supporting the current approach

Taking into account the discussion above, there appear to be at least three possible approaches: (a) antitrust authorities should always prosecute all members of collusion; (b) antitrust authorities should always prosecute at least two undertakings (and when doing so, they should not attribute liability for any actions involving undertakings that are not party to the proceedings); (c) antitrust authorities may prosecute single undertakings and attribute to them liability for all their actions taken in connection with an anticompetitive agreement. In the last scenario, controversy remains on how the authority should establish an infringement, e.g. whether it should list all members of collusion one by one and prove the concurrence of wills, and/or whether it should indicate them all in the operative part of the decision.

This section discusses reasons for which the last approach might gain the support of the CJEU, in case of an appeal from an antitrust decision or a preliminary ruling, despite the arguments outlined earlier. The discussion in this section is “reversed” in the sense that it starts with addressing the least convincing arguments covered earlier, and then moves to discuss more relevant ones. Section VI, in turn, covers practical guidelines.

1. Leniency

The leniency argument is not, in fact, of much relevance. First, because it is only applicable in jurisdictions where vertical leniency is available. Second, since leniency might serve as a reason not to follow a policy of selective enforcement, but it is not a proper legal argument for not doing so.

explained that the distributor had a large volume of sales. However, it should be pointed out that “coincidentally” the very same distributor was also a leniency applicant. It was granted immunity under the leniency system.

⁴⁶ The word “discussed” is of relevance here, since there is a difference between discussing someone’s actions and attributing liability – see section V.5.

It is true that the incentives of distributors to file for leniency might become weaker if liability is only attributed to the organiser (in fact, in terms of economic models, they should be expected to become weaker). However, this is a policy question concerning costs and benefits. If a competition authority loses more on litigating against distributors than it can possibly gain from hypothetical leniency from distributors, it is reasonable to focus on organisers. This is ultimately an area of political accountability, not a legal issue to be decided by courts – there are no legal links between the issue of addressing decisions and leniency incentives.

2. Private enforcement

Like leniency, private enforcement may also serve as a reason for a specific policy choice, but not as a legal argument.⁴⁷ There are two types of links between public enforcement and private enforcement: legal and practical.

Legal links have been defined in the private enforcement directive – they concern e.g. presumptions associated with infringement decisions, *amicus curiae* opinions with regard to the assessment of damages, and discovery rules. Nevertheless, there are no other obligations on how antitrust authorities should shape their proceedings. Furthermore, to construe the private enforcement directive in such a way that antitrust authorities are obligated to prosecute undertakings in a specific way (which maximises the chances of private plaintiffs in a specific case), would be tantamount of creating a universal right to have a case investigated and prosecuted so that it is easier to claim damages, as this is the goal of the private enforcement directive. Such an interpretation remains highly questionable in its own rights; still, if such an argument is considered, then one should also take into account the ECN+ Directive which provides the NCAs with much leeway on how they prioritise their cases.

Practical links, on the other hand, come down to the fact that, admittedly, addressing a decision to all undertakings might make it easier for those injured to recover damages. Yet, as with leniency, this is merely a policy issue. Ultimately, there is a cost on the part of competition authorities of both conducting investigations against multiple parties, and of litigating against (likely) a large number of them. As there are no free lunches, one can expect

⁴⁷ I first argued this in: Jan Polański, 'O skuteczności zwalczania naruszeń wertykalnych. Komentarz do wyroku Sądu Najwyższego z 15 lutego 2019 r. w sprawie I NSK 10/18 (Anyro)' (2019) internetowy Kwartalnik Antymonopolowy i Regulacyjny 2019, nr 6(8), 107–116, criticising a ruling of the Polish 2nd instance court for accepting this argument – this ruling was set aside in *Anyro* (n 17).

that resources devoted to these tasks would need to be re-located from other tasks.⁴⁸ The way these issues are balanced by an antitrust authority remains a question of policy – and the role of courts is not policy-making.

3. Procedural autonomy

Member States enjoy procedural autonomy with regard to the application of Article 101 TFEU. However, this autonomy is not without limits⁴⁹ – otherwise, NCAs could easily be prevented from investigating infringements of EU law by overly burdensome national procedural rules. Without limits in relation to procedural autonomy, each Member State could then define such rules in a “*Roma locuta, causa finita*” manner, having the last say over how antitrust infringements, including Article 101 TFEU violations, should be investigated. Supposing that, EU courts would support an approach where the European Commission may address a decision to just one undertaking (and as it will be discussed further on, there seem to be indications that the CJEU might do so), a national procedural rule that requires an NCA to conduct an investigation and address a decision to all members of collusion might thus be found to go against the duty of sincere cooperation, enshrined in Article 4(3) TEU.

To require an NCA to conduct proceedings against e.g. all Uber drivers, all hotels, restaurants, or fitness clubs in a country would be to force it to perform a gargantuan task, likely depriving EU law of its effectiveness.⁵⁰ Cases such as *T-Mobile*, or more recently *Whiteland*, show that to preserve the effectiveness of EU law, the CJEU is willing to define standards of conduct even in relation to seemingly procedural issues.⁵¹

Admittedly, this issue can be easily brought to an extreme. While it can be clearly shown that the effectiveness of EU law would be significantly impeded when the number of undertakings is large, this is more ambiguous when the number of undertakings is smaller. Taking into account that effectiveness is

⁴⁸ Kolasiński (n 7), 56 argues that it is doubtful that an authority that conducts an investigation for a number of years would find it difficult to obtain evidence necessary to prove the infringement of undertakings other than the organiser. This is incorrect: while the authority might be in possession of such evidence (after all, this evidence might even be used to prove the liability of the organiser), it would still need to bear the costs of proceedings and litigation in relation to each and every party.

⁴⁹ On procedural autonomy itself, see also n 41.

⁵⁰ More generally about procedural autonomy and the principle of effectiveness, see e.g. Eva Lachnit, *Alternative Enforcement of Competition Law* (Eleven International Publishing 2016), 69–74.

⁵¹ Case C-8/08 *T-Mobile* EU:C:2009:343 (presumption of a causal connection); case C-308/19 *Whiteland* EU:C:2021:47 (limitation period).

a general principle of the EU and that the CJEU would need to apply it (if ever) in the context of a preliminary ruling, it might be that the CJEU would give a response adjusted to a specific case context, i.e. one that might be different when asked about a national provision and 10 undertakings, and a different one when asked about the very same provision and 1000 undertakings. It would likely also be a response that would require a national court to exercise its own scrutiny and make a factual decision regarding the risk of restricting the effectiveness of EU law in a specific case.

However, taking into account the aforementioned, it would be prudent for national courts and legislators to opt for the current model as the one that causes least problems when defining the mandate of competition authorities. There seems to be no good solution that could be adopted by national courts or legislators to discriminate between cases concerning 10, 100, or 1000 undertakings and define clear-cut rules.

4. Rights of defence

It is interesting that in *Baby Direkt*, the Czech court leaned towards the conclusion that the lack of a precise identification of members of collusion was a fundamental problem. By contrast, the Polish Supreme Court in *Anyro* arrived at a completely opposite conclusion, observing that the undertaking could exercise its rights of defence, as the Polish NCA named specific pieces of evidence showing that the undertaking operated an RPM within its distribution system. Is it then possible to defend oneself if other members of a multi-party infringement are not listed by their names?

When it comes to theory and models, it does not seem impossible to defend oneself, even if other undertakings are not indicated as parties to the proceedings, are not addressees of the relevant decision, are not mentioned by name in its operative part, or are not named at all. An example might help understanding this – the example is abstract and extreme, but it flashes out the relevant legal question.⁵² Since the example serves as a “model” (in a similar way as perfect competition and monopoly can be used as models in economics), it concerns a horizontal infringement, i.e. a type of conduct which is more straightforward than vertical restraints.

Let’s imagine a tight oligopolistic market with four undertakings (A, B, C, D). One day, three of them meet and agree to raise prices. “A” is one of the participants of the meeting and one of its employees writes a memo about this meeting. The memo says that an agreement was reached with “our

⁵² This example builds upon an argument that I first discussed in Polański (n 48).

two competitors”, but that “the remaining competitor did not attend, yet can be expected to increase its price to follow others” (remember that this is a tight oligopoly and it is not unusual to intelligently adapt oneself to the actions of others in such circumstances). And indeed: despite the fact that price increases were not implemented on the same day, they slowly rose to the agreed level.⁵³ The competition authority conducts an investigation and finds the memo. However, it is unable to identify (name) other members of the collusion. Having the memo, should the authority prosecute the one and only perpetrator it knows, or close the case?⁵⁴ Is it possible for “A” to defend itself?

In my view: (a) it is not impossible to defend oneself in such circumstances; (b) there are no reasons to drop the case against the undertaking “A”. This also shows that the legally relevant question is not whether the party to the proceedings was informed of the authority’s beliefs with regard to the identity of other cartel members. The relevant issue was that it was given the opportunity to explain why e.g. the mentioned evidence was unreliable – and this is something that needs to be analysed case-by-case; it is not a deceive argument against the model of selective enforcement itself.

To remain objective, a possible weakness of this parallel is that it simply replaces other collusion members with otherwise specific anonymous figures on a “*nomen nescio*” basis, while antitrust decisions that are typically subject to controversy refer broadly to “some” retailers. Sometimes such a general characterisation might still allow effective defence (e.g. when evidence is clearly presented), but it might be that in specific circumstances it will be questionable. Since this issue is nuanced, it might require more caution on the part of antitrust authorities, which will be further discussed in section VI.

A different way of looking at the rights of defence argument is from the point of view of undertakings which are not prosecuted. They do not face any liability (at least not within the proceedings that were opened), but their actions are discussed in the context of some other undertaking’s liability. A concern can be voiced that their “liability” is established without giving them an opportunity to defend themselves. Since this issue is connected with more recent case law developments, which are relevant also from the point of view of the formal argument, this issue is covered in more detail in the next subsection.

⁵³ Recall also the presumptions established in *T-Mobile* (n 52).

⁵⁴ A different example could be a facilitator, who is an external lawyer, i.e. an undertaking, and whose identity remains unknown due to the precautions that this person took.

5. Formal argument

In April 2021, the CJEU delivered a ruling on an issue seemingly very different than the one discussed in this article, namely the validity of a so-called “hybrid settlement” procedure in *Pometon* (the *Steel Abrasives* case).⁵⁵ However, interestingly, the situation in this type of cases might be relevant from the point of view of selective enforcement.

Hybrid settlement procedures are used by the European Commission in the context of cartel cases, when some parties decide to settle and some do not. In consequence, the European Commission adopts a settlement decision (which is a type of an infringement decision) against some parties, and then (typically after some time) delivers another decision (or decisions) against the non-settling party (or parties). This caused concerns when it comes to the rights of defence of the non-settling party, in particular the presumption of innocence. However, on the theoretical level, the situation here is also similar to issuing a decision with regard to just a single undertaking – this is because an infringement is found, yet not all undertakings who actually took part in it are made the addressees of the decision.

In *Pometon*, the CJEU found that hybrid procedures are possible, but that caution should be exercised when it comes to describing the conduct of a non-settling party. This is because the non-settling party might be found liable in a future decision. Indicating in the settlement decision that the company did infringe competition rules, would put in question whether the presumption of innocence was respected, and thus jeopardise the integrity of a possible future infringement decision. What needs to be emphasised is that the CJEU did not consider whether any of the decisions would be invalid due to a lack of precision with regard to the members of collusion. It was merely the possibility of “saying one word too many” in an earlier decision which could put at risk the decision that comes later.⁵⁶

Pometon can be taken as an indication that if the CJEU is confronted with an appeal or preliminary request, it might not follow a formal argument of the kind discussed earlier and based on e.g. *Air Canada*; apparently, even in cartel cases, settlement decisions that do not indicate all members of collusion as co-infringers are not an issue for the CJEU. Conversely, the CJEU appears to support the position that in some circumstances (i.e. hybrid procedures), indicating all members of a cartel as co-infringers should be avoided so that liability is not prejudged.

⁵⁵ Case C-440/19 P *Pometon* EU:C:2021:214.

⁵⁶ It should also be stressed that “saying too much” does not necessarily need to cause the invalidity of a decision, see Case T-180/15 *Icap* EU:T:2017:795, para. 276–278. See also: case C-440/19 P *Pometon*, Opinion of AG Hogan EU:C:2020:816, para. 82.

This is in fact not uncommon also in other types of cases, even outside antitrust. For example, in *Pometon*, the EU courts referred to similar issues in criminal cases. This concerned e.g. *Karaman*, which was heard by the ECHR.⁵⁷ In *Karaman*, a criminal investigation took place in which co-conspirators were tried in separate procedures. This did not infringe fundamental rights, as long as the prosecuting authorities exercised caution with regard to the presumption of innocence.

This also seems to be the case in the US. American antitrust investigations make extensive use of plea bargaining. Settlements with specific parties do not have to be reached at the same moment – they can be staggered and lead to a “snowball effect”.⁵⁸ This indirectly means that a guilty plea of one party can be accepted before handling the liability of other parties – it is also possible to have a jury trial with regard to a cartel member that did not settle, even if others did.

While the outcome of *Pometon* can be used as a supporting argument for the current approach to addressing decisions, admittedly there are some differences between this case and prosecuting just one member of collusion. Still, upon closer inspection, none of those differences seems to undermine the *Pometon* parallel.

First, it can be argued that in *Steel Abrasives*, the European Commission first issued a settlement decision, wherein a single and continuous infringement was found, for which the Commission attributed liability to four undertakings, in other words, the decision did not include *Pometon* (the 2014 settlement decision).⁵⁹ Then, it adopted an infringement decision (the 2016 infringement decision), which ultimately led to *Pometon*.⁶⁰ This may give an impression that the first decision covered a part of the infringement, and that the second decision covered another part of the same infringement.

However, the language of the 2014 settlement decision indicates that it concerned all facts giving rise to a single and continuous infringement as a whole, but its legal conclusions were only relevant insofar as the liability of the four settling parties was concerned. In other words, the four settling parties’ conduct with regard to *Pometon* was relevant, but without *Pometon* being an addressee of the decision.

⁵⁷ *Karaman v. Germany* (ECHR, 27 February 2014).

⁵⁸ See remarks about building up momentum through plea bargaining in: Ann O’Brien, ‘Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions’ <<https://www.justice.gov/atr/speech/cartel-settlements-us-and-eu-similarities-differences-remaining-questions>> accessed 31 March 2023.

⁵⁹ *Steel Abrasives* [2014] (Case AT.39792).

⁶⁰ *Steel Abrasives* [2016] (Case AT.39792).

For example, in paragraph 18, the 2014 settlement decision lists all five undertakings (including Pometon) and calls them “parties”, as opposed to “settling parties” – a term which it introduces in paragraph 22. Then, on multiple occasions, the European Commission refers to “the parties” when discussing conduct relevant for the decision, and says e.g. “*The geographic scope of the conduct, as regards all five parties, was EEA-wide during the entire period concerned by this Decision*”. Then, in the legal assessment it mentions e.g. that “*With their contacts, the parties pursued a single anti-competitive object and a single economic aim, namely the distortion of the normal movement of prices in relation to steel abrasives*”. Still, the European Commission does not use the word “parties” in the context of attributing liability or when it directly states that some conduct was an infringement. Thus, the 2016 infringement decision “did the legal work” with regard to Pometon, and attributed liability to this undertaking also; nonetheless the conduct of the other four parties with respect to Pometon had been already covered by the 2014 decision.⁶¹

This, in fact, became a major point of contention when Pometon appealed the General Court’s judgment.⁶² Pometon argued that the European Commission did prejudge its liability by including in the contested decision the aforementioned references. The Advocate-General also leaned towards a conclusion that the European Commission did not act with full impartiality.⁶³ Still, this approach was not followed by the CJEU, which accepted that, in 2014, there was a binding decision that covered certain actions of Pometon, but attributed liability to just the other four undertakings – Pometon not being any of them. Addressing a decision to just a single undertaking leads to a similar result.

Another argument against the hybrid procedure parallel may come from the language of *Pometon* itself. The ECHR, General Court, and the CJEU use the following wording: “*in complex criminal proceedings involving several persons who cannot be tried together (...)*”. The word “cannot”, used originally by the ECHR, can be taken as an objective and unavoidable obstacle that

⁶¹ An alternative reading would be that the 2014 decision did, in fact, concern a single and continuous infringement, covering the actions of the four settling undertakings between themselves – while the actions of Pometon were not covered. Yet, this would mean that the 2016 decision (which was addressed only to Pometon) concerned Pometon’s conduct with regard to the four settling parties, without making them the addressees of the 2016 decision. As discussed in the main text above, this was not what happened in this case. Had it happened though, this would still undermine the formal argument discussed earlier (yet this time, because of the scope of the 2016 decision).

⁶² Case T-433/16 *Pometon* EU:T:2019:201.

⁶³ See *Pometon* (n 57), para. 70, 76–78, where the Advocate-General makes important caveats to this position.

prevents adopting a joint (single) decision against all parties at the same time – this is not the case of ordinary investigations concerning e.g. RPMs.

Still, the actions of the CJEU suggest that this is not how it construes the requirements that open the path towards the issuance of a decision that is not addressed to all members of collusion. This is because a decision to settle taken only by some parties, is not an objective obstacle (the European Commission is in a position to refuse a settlement submission and issue a full infringement decision against all parties, even those willing to settle). Furthermore, this argument in no way affects the relevant legal fact, i.e. that the CJEU appears to be comfortable with seeing decisions that are not addressed to all parties – settlement decisions issued in hybrid procedures become binding and effective, even despite the fact that the liability of some members of collusion is not decided at the time when such settlement decisions are adopted.

To conclude, there appears to be no indication that EU courts see any formal requirements to address a decision to all undertakings involved in an agreement. It is true that discussing the actions of an undertaking, which is not an addressee of a decision, might increase the risk of a further decision being invalidated due to a violation of the presumption of innocence. Nonetheless, this is not automatic, and: (a) such later decision may still hold, provided that caution was exercised; (b) if there is no further decision, no liability is attributed, and hence the issue does not arise at all; (c) this has no effect whatsoever on the earlier decision (since the presumption of innocence cannot be used as an argument by the addressee of the original decision, just by the addressees of a possible future decision).

6. Substantive argument

Much of the discussion that was relevant in relation to the formal argument is also applicable to the substantive argument. When it comes to the formal argument, the emphasis was on whether it is possible to issue a decision that does not attribute liability to all members of collusion. As regards the substantive argument, the emphasis is on whether it is even possible to find an infringement in such a case (this was called the wide substantive argument). This includes whether a concurrence of wills can be found without all parties being the addressees of a decision (this is also relevant to what was earlier called the narrow substantive argument).

Pometon suggests that the CJEU does not see an issue with this. As it was explained earlier, in *Pometon* the European Commission has found a “wide” cartel – it had not referred to *Pometon* as a liable undertaking in

the legal assessment within the 2014 settlement decision, but it had referred to Pometon's actions in the discussion of case facts.

Furthermore, given the unwillingness of EU courts to compromise the effectiveness of EU law, it seems unlikely that they would settle in situations such as those discussed in section II.2 and V.4, which would make it prohibitively difficult or impossible to find an infringement.

There is also a different problem with the substantive argument, in particular the "wide" one. If it is concluded that under substantive law all members of collusion need to be made into the addressees of a decision, then the decision is invalid if the authority fails to prove someone's liability. This leads to a somewhat absurd situation in which if the authority fails to establish someone's liability, or does not pursue a case in relation to someone (e.g. due to lack of evidence), it is in the interest of other undertakings to attempt striking down the decision by saying that there were more parties to the agreement. This could marginally increase their liability, but it would also make it possible to drag out the investigation for years – and doing so may both work as a defence strategy and a life-saver for board members, whose interests are not always fully aligned with those of shareholders. This might not be a huge issue in cartel cases, but in RPM cases, that may involve hundreds of undertakings, it is not unlikely. This would make Article 101 TFEU highly ineffective.

The "narrow" substantive argument, that requires finding an infringement by at least two members of collusion, is also questionable from the point of view of the effectiveness of Article 101 TFEU. First, it requires leaving some parts of a single and continues infringement unaddressed, unless all undertakings involved are made into addressees of a decision. Second, this would have an even stronger impact on the "by effect" part of Article 101 TFEU. Under the narrow substantive argument, the proposal is that the competition authority can simply pick the largest undertakings and prove an agreement between them. The (alleged) substantive requirements would be met, since an agreement between a group of addressees of a decision would be clearly proven, and, at the same time, the authority would alleviate itself from the need of prosecuting all members of collusion. Still, in "by effect" infringements, picking just the largest undertakings might still be insufficient to prove an infringement – in cases such as hotel booking this would likely require addressing a decision to all hotels.

Ultimately, there is also nothing in Article 101 TFEU itself that says that all members of collusion need to be the addressees of a decision, and that this is somehow part of substantive law. The "*there is nothing saying that...*" issue is not an official element of CJEU's method of legal analysis, yet one could say that there is a tendency within the EU judiciary to opt for the effectiveness of EU law. Thus, the EU courts opted for effectiveness when e.g. they were asked

to decide on cartel facilitation, continued inspections, and also in *Pometon* itself, with regard to hybrid settlement procedures.⁶⁴

The fact that the requirement of addressing a decision to all members of collusion might not be part of Article 101 TFEU on the substantive level is of high relevance. It means that any attempt to introduce such an obligation in relation to the NCAs would need to rely on merely national procedural law, since there is no autonomy when it comes to the interpretation of what follows from Article 101 TFEU. Thus, in a worst case scenario (from the point of view of the effectiveness of competition rules), an NCA could simply enforce Article 101 TFEU (if possible).

VI. Speed limits

The discussion above suggests that out of the three options mentioned at the outset of section V, the option of requiring antitrust authorities to always address a decision to all members of collusion, and the option of requiring them to always open a case against at least two undertakings, might not gain the support of the CJEU. Does it then mean that antitrust authorities face no risks in addressing a decision to just a single undertaking? There seem to be indeed certain limits to this approach.

One of clear technical limits follows from *Pometon*. Supposing that an authority would e.g. issue a decision with regard to just the organiser of an RPM system, any other decisions adopted with regard to distributors would run a serious risk of violating the presumption of innocence. This is more of a theoretical concern, in the sense that the authorities specifically target organisers to achieve more efficiency – they typically do not issue further infringement decisions after the first one is adopted (contrary to what happens in hybrid procedures). Nonetheless, it would still be good practice to ensure that decisions addressed to just a single undertaking mention only the most relevant facts in relation to non-addressees, and, in particular, that such decisions do not impose “in passing” liability on them.

Furthermore, since the policy of not opening cases against any other undertakings after addressing a decision to the organiser is not stated anywhere, there might be added value, in terms of transparency and good governance, to clearly formulate such a policy. Obviously, however, this is not a requirement of any form.

⁶⁴ Case C-606/18 P *Nexans* EU:C:2020:571, para. 78; case C-194/14 P *AC-Treuhand* EU:C:2015:717, para. 27; *Pometon* (n 63), para. 100.

A different issue is whether competition authorities should generally increase transparency in relation to who will become an addressee of a decision, e.g. just the organiser of a vertical agreement if it concerns an entire distribution system that was initiated by the supplier; or a selected group of undertakings in some other circumstances; or to all undertakings involved in the agreement in yet another type of situation.⁶⁵ While this might increase transparency, it is not necessarily a good policy choice. This is mostly because delineating such scenarios might be difficult in abstract terms, and what can be expected is that whenever some other undertaking, rather than the organiser, is made subject to an investigation, arguments will follow that the authority misapplied its soft law, which in turn means that its decision should be annulled. Such transparency might also have a stronger negative effect on deterrence.

The more contentious issue is whether an antitrust authority should always provide a clear and precise list of members of collusion, even when a decision is addressed to just a single undertaking – as indicated earlier this was of much relevance in *Baby Direkt*. This issue appears to be case-specific. On the one hand, antitrust authorities should produce “*sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place*”.⁶⁶ However, to construe this as an indication that, in each and every case, all undertakings have to be identified, might go too far. This is because the standard of proof, at least under EU law, is that the authority should provide a coherent body of evidence indicating that there was an infringement. Evidence is assessed in a holistic way.⁶⁷ Thus, in some circumstances, case facts might suggest that merely a general description of, for example, a distribution system will indicate that all retailers were involved in the practice – in such a case listing them does not seem indispensable. Still, in a case where there was a tighter group of retailers, with some of them clearly not participating in e.g. meetings – a different approach might be needed: either explaining why in spite of such non-attendance they were still involved, or a clear indication that they were not involved.

A suggested approach therefore should be that merely because a case is vertical, the analysis conducted by antitrust authorities should not become overly superficial and automatic. However, as pointed out by the Czech court in *Baby Direkt*, this does not necessarily mean the same level of precision as in relation to cartels, e.g. reservations such as “at least” can be used more

⁶⁵ Certain criteria for selective enforcement were set e.g. with regard to the enforcement of EU law outside the area of antitrust, see: Ibáñez (n 7) 140–141.

⁶⁶ See e.g. case T-348/08 *Aragonesas Industrias y Energía* EU:T:2011:621, para. 94–99.

⁶⁷ Fernando Castillo de la Torre and Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar 2017), 78–86.

easily.⁶⁸ Also, if it is shown that a distribution system generally worked in a specific way, then there is more scope for using presumptions that already exist under competition law, e.g. concerning failing to distance oneself from communications, or of a causal link.⁶⁹

VII. Conclusion

Vertical agreements have different dynamics than horizontal ones. They often involve far more undertakings, yet are also far more reliant on the actions of undertakings that organise them, i.e. suppliers, who act as ring-leaders. Targeting leaders has always been an efficient and effective strategy: this includes crime-fighting, warfare, and antitrust enforcement.

The European Commission's comeback to RPM investigations in 2018 was exceptionally smooth, since each of the decided cases was closed in a cooperative way and without litigation, even despite the fact that the EU cartel settlement procedure does not apply to RPM. Nevertheless, such a successful outcome is not guaranteed in the future. Furthermore, the actions of the European Commission provided additional incentives to NCAs to re-adjust their priorities and also investigate more vertical cases. However, the "rules of engagement" in relation to vertical investigations seem under-developed in comparison to horizontal infringements. Hence, without unambiguous standards on how to conduct proceedings in such cases, it is possible that at some point the CJEU will be faced with either an appeal or a preliminary request concerning this issue.

There are at least three models of enforcement that can be used: (a) expecting antitrust authorities to address decisions to all members of collusion; (b) picking more than one undertaking and imposing liability only for the part of infringement that took place between the parties of proceedings; (c) allowing decisions to be addressed to single undertakings, with liability being imposed for all anticompetitive actions. The first two approaches have been already advocated in literature and e.g. in Poland have been considered and (so far) rejected by the Supreme Court. Yet, as the recent *Czech Baby Direkt* case shows the issue of how to shape proceedings is still lively debated and one can imagine that arguments that were unsuccessful in one jurisdiction might become successful in another one.

⁶⁸ *Baby Direkt* (n 2), para. 24.

⁶⁹ See e.g. case T-342/18 *Nichicon Corporation* EU:T:2021:635, para. 383. See also e.g. *Guess* (n 9), para. 97–98 on tacitly agreeing to vertical restraints. When it comes to the causal link, see e.g. *T-Mobile* (n 52).

This article suggests that courts should not opt for the first and second model outlined above, and that there seem to be unexpected parallels between the case of targeting just organisers of anticompetitive agreements, on the one hand, and hybrid cartel settlements, on the other.

When it comes to the current approach, however, it would be useful if antitrust authorities exercised more caution in drafting their decisions, as it seems that ambiguous drafting of decisions might be of itself a source of attempts to introduce a requirement of addressing decisions to all members of collusive agreements.

The discussion provided in the article also suggests that despite ongoing soft harmonisation that is possible through the European Competition Network, and harmonisation through such instruments as the ECN+ Directive, the EU enforcement system still runs serious risks of arriving at divergent results that can come from developments in national courts. While the system of preliminary rulings will likely still serve as an important counter-measure in that regard, the upcoming revision of Regulation 1/2003 might offer important opportunities to bringing more uniformity to e.g. the shape of decisions issued by the NCAs with regard to infringements of Article 101 TFEU. This could happen by e.g. introducing a more detailed regulation in what is today Article 5 of Regulation 1/2003, which currently merely says that infringement decision can be issued, but does not list necessary elements of such decisions.

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Focus on Competition Law Enforcement in E-commerce Sector in Serbia

by

Darija Ognjenović* and Ana Krstić Vasiljević**

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Abstract

Competition authorities in countries in development in Europe have a long way to go until they meet the EU standards. Although the local legislation in non-EU members is harmonized with EU legislation for the most part, the enforcement part is the one where obstacles are traditionally more challenging, and Serbia is no

* Darija Ognjenović, LL.M, Partner/Attorney at Law and Head of Competition Department at Prica&Partners Attorneys at Law, Belgrade, Serbia. E-mail: dognjenovic@pricapartners.com; ORCID: <https://orcid.org/0009-0009-1948-5822>.

** Ana Krstić Vasiljević, LL.M, Associate at Prica&Partners Attorneys at Law, Belgrade, Serbia. E-mail: akrstic@pricapartners.com; ORCID: <https://orcid.org/0009-0002-5863-2134>.

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exception to this rule. Serbia has had its share of problems when trying to enforce rules on protection of competition, and some of those battles are still being fought, however, the national competition authority now also needs to face rapid changes that come with emerging markets, especially e-commerce. Although e-commerce itself may facilitate anti-competitive behaviors, it seems that they may also have had an effect of a much-needed nudge for the Serbian Commission for the Protection of Competition (CPC) to finally dive into variety of enforcement powers that they have been entrusted with.

Résumé

Les autorités de la concurrence des pays européens en développement ont encore un long chemin à parcourir avant d'atteindre les normes européennes. Bien que la législation nationale des pays qui ne sont pas membres de l'UE soit en grande partie harmonisée avec la législation européenne, c'est au niveau de l'application que les obstacles sont traditionnellement les plus difficiles à surmonter. La Serbie ne fait pas exception à cette règle. La Serbie a connu sa part de problèmes lorsqu'elle a tenté de faire respecter les règles de protection de la concurrence. Alors que certaines de ces batailles sont encore en cours, l'autorité serbe de la concurrence doit désormais également faire face aux changements rapides qui accompagnent les marchés émergents, en particulier le commerce électronique. Bien que le commerce électronique en lui-même puisse faciliter les comportements anticoncurrentiels, il semble qu'il ait également eu l'effet d'un coup de pouce dont la Commission serbe pour la protection de la concurrence (CPC) avait bien besoin pour enfin se plonger dans les divers pouvoirs d'exécution qui lui ont été confiés.

Key words: competition law enforcement; e-commerce; price monitoring mechanisms; retail price maintenance; control of concentrations; Serbia; competition advocacy.

JEL: K21

I. Introduction

The emergence of digital markets, e-commerce specifically, has been a trending topic lately. It has certainly prompted the European Commission to render new regulations, namely the Digital Services Act (“DSA”)¹ and

¹ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ 2022 L 277/1, p. 1–102.

the Digital Market Act (“DMA”)². As stated on the official website of the European Commission, the DSA and the DMA form a single set of rules that apply across the whole EU³. Their two main goals are (i) to create a safer digital space in which the fundamental rights of all users of digital services are protected; and (ii) to establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally.

The above acts of the European Commission were preceded by several publications by OECD, one of which – “Implications of E-Commerce for Competition Policy”⁴, emphasizes that specific dynamics arise within e-commerce markets, and that e-commerce is, at its core, effectively a question of retail competition.

In Serbia, the general Law on Protection of Competition⁵ (the “Law”) only contains general rules that mostly include the same provisions as Articles 101 and 102 the Treaty on the Functioning of the European Union. The Serbian Law on Electronic Commerce⁶ (hereinafter: “LEC”) also consists of very basic provisions relating to information society services, commercial communication rules, and entering into contracts by electronic means. The LEC explicitly provides that it does not apply to restrictive agreements in terms of antitrust regulations. There are in total eight decrees and several guidance documents enacted by the Serbian Commission for Protection of Competition (“CPC”), but none of them tackling any matter of specific importance for e-commerce. The decrees relate to procedural issues and block exemptions. Therefore, Serbian legislation, both antitrust and sector-specific, does not regulate any issues relating specifically to e-commerce.

Regardless of the above, in the last two years, following these global trends, the CPC’s special focus has been on the e-commerce sector, in a double sense: as a sector that deserves special attention and control, to protect consumers, but also as a means of detecting violations of competition rules. The purpose of

² Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ 2022 L 265/1, p. 1–66.

³ European Commission, *The Digital Services Act Package* <<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>> accessed 2 April 2023.

⁴ In June 2018, the Organization for Economic Cooperation and Development (OECD) held a roundtable discussion to explore the implications of e-commerce on competition law and policy within the OECD. The publication “Implications of E-Commerce for Competition Policy” includes materials from said roundtable, and can be viewed at the following link: <<https://www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm>>.

⁵ The Serbian Law on Protection of Competition – Official Gazette of the Republic of Serbia nos. 51/2009, and 95/2013. English translation is available on the website of the Serbian Commission for Protection of Competition at the following link: <<https://kzk.gov.rs/en/zakon-2>>.

⁶ The Serbian Law on Electronic Commerce – Official Gazette of the Republic of Serbia nos. 41/2009, 95/2013 and 52/2019.

this article is to provide and discuss the CPC's activities in this sector, to make a comparison between local and global trends in competition enforcement in e-commerce, as well as to provide some conclusion and highlight what would, in our opinion, be some favorable solutions in terms of update of relevant legislation as well as beneficial enforcement activities of the CPC.

II. Overview of CPC's activities relating to e-commerce

The CPC seems to be following, to a certain extent, the global trends related to enforcement of competition rules between undertakings in e-commerce sector and other related markets (the comparison will be provided under the next section of this paper). The importance of relationships in this market, and the effect of such relationships on consumer wellbeing, prompted the CPC to perform more than several dawn raids due to suspicion of both explicit and tacit conclusion of restrictive agreements⁷, as well as to perform a specific sector analysis related to the market of digital platforms that intermediate in the sale and delivery of certain goods, which then led to launching of proceedings for abuse of dominant position. Therefore, this paper will include an overview of the following CPC's activities related to e-commerce:

- 1) Proceedings initiated *ex officio* for the purpose of infringement determination relating to restrictive agreements;
- 2) Sector analysis of the market of digital platforms that intermediate in the sale and delivery of mainly restaurant food and other products (on-demand delivery platforms);
- 3) proceeding for the determination of abuse of dominant position against one of the major participants on the on-demand delivery platforms market;
- 4) CPC's limited activities in concentrations in e-commerce sector.

1. Proceedings relating to Restrictive Agreements

In the last two years, the CPC has initiated five *ex-officio* proceedings whereby the CPC's starting point was analysis of prices of online shops and official websites of retailers, in order to determine whether infringement relating to restrictive agreements has occurred, as further examined below:

⁷ *Ibid.*, Article 10, paragraph 2, «Restrictive agreements can be contracts, certain provisions of contracts, express or tacit agreements, concerted practices, as well as decisions on the form of association of market participants.»

1) Case 4/0-01-176/2021-35, Comtrade Distribution and others⁸

The CPC initiated an *ex officio* procedure against Comtrade Distribution for the purpose of determining whether the company has influenced prices relating to the Tesla brand (owned by Comtrade Distribution). The case was expanded to an additional five undertakings that perform retail sale of the Tesla brand. By analyzing the conditions of competition on the market of wholesale and retail trade in consumer electronics in Serbia, and by looking at publicly available price data, the CPC found that retail stores as well as the websites of retailers, in particular the retailers who are parties to the proceedings in question, offer Tesla brand products at identical or nearly identical prices. CPC's aim during this proceeding was to examine whether price fixing infringement had occurred, specifically if Comtrade Distribution limited its resellers to determine the price of Tesla brand products freely and independently. As explained in the CPC's decision, price fixing constitutes a serious antitrust infringement since it significantly limits the competition between resellers, thus leading to an increase of retail prices and damages to consumers. Therefore, such restrictive agreements are prohibited, without the need to prove the significant anticompetitive effect that such agreements have.

To correctly determine the facts, the CPC also performed dawn raids at the premises of all six undertakings concerned, two of which were conducted at Comtrade's premises⁹. According to statements of employees given during the dawn raids, it was determined that Comtrade Distribution employees monitored and documented the retail prices of its buyers (i.e. resellers) through an online portal that provides retail price comparison. Further, the most significant proof that the CPC found was extensive e-mail correspondence between the Comtrade Distribution employees, as well as between Comtrade Distribution and the other undertakings under review, the subject of which was price determination in stores as well as through online sale.

The CPC determined that Comtrade Distribution and the five other undertakings under review entered into restrictive agreements and were all fined.

⁸ CPC Case 4/0-01-176/2021-35 – Comtrade Distribution d.o.o. – Tehnomanija d.o.o. – Gigatron eksport-import, prodaja i servis računara na veliko i malo d.o.o – Tehnomedia Centar d.o.o. – Emmezeta Srbija d.o.o. – XLS d.o.o, 2 July 2020 <<http://www.kzk.gov.rs/kzk/wp-content/uploads/2022/01/re%C5%A1enje-02-07-2021-ComTrade.pdf>> accessed 2 April 2023.

⁹ This is a highly unusual practice and one can say that such dawn raid may have been a fishing expedition, although there is no statutory limitation when it comes to the number of dawn raids conducted within one proceeding. For more information about EU-level case law related to fishing expedition see Case C-583/13 P *Deutsche Bahn AG and Others v European Commission* EU:C:2015:404.

2) Case 4/0-01-177/2021-03, Roaming Electronics and others¹⁰

The case was initiated *ex officio* by the CPC against Roaming Electronics and five other undertakings. Roaming Electronics is the importer/distributor of consumer electronics, which it sells to retailers, the five other undertakings in this procedure being the major ones. The CPC was prompted to initiate this investigation since by looking at the available data on the prices of individual consumer electronics products, it emerges that in the retail stores of these companies, as well as on their websites, the products in question are offered at identical or almost identical prices.

The case is essentially identical to the one described above, both in terms of the actions undertaken by the CPC as well as in its findings. It is worth mentioning that the CPC found that Roaming Electronics monitored the retail prices of its customers and achieved this in several ways, among other through publicly available information (retailers' websites), as well as through the "Kliker" platform – a price tracking web application, that allowed the undertaking in question not to visit each customer's website separately, thus making it easier for it, as the distributor, to monitor and enforce restrictions on the implementation of the retailer's suggested retail price.

The CPC determined that Roaming Electronics and four out of the five other undertakings under review entered into restrictive agreements and were fined.

3) Case 4/0-01-175/2021, SF1 Coffee¹¹

The CPC states that, based on Eurostat data for year 2019¹², it determined that the prices of consumer electronics in Serbia were 13% higher compared to the average prices in the European Union and for this reason, the CPC analyzed the conditions of competition on the wholesale and retail market of consumer electronics in Serbia. By reviewing the official websites of six retailers of consumer electronics, it was determined that for four models of coffee machines of the Nespresso brand, all observed retailers have identical prices for the models they offer. The CPC concluded that the importer, i.e. the distributor of

¹⁰ CPC Case 4/0-01-177/2021-03 – Roaming Electronics d.o.o. – XLS d.o.o. – Gigatron eksport-import, prodaja i servis računara na veliko i malo d.o.o. – Tehnomedia Centar – Emmezeta Srbija, 2 July 2021 <<http://www.kzk.gov.rs/kzk/wp-content/uploads/2022/01/RESENJE-ROAMING.pdf>> accessed 2 April 2023.

¹¹ CPC Case 4/0-01-65/2022-11, SF1 Coffee, 19 August 2022 <http://www.kzk.gov.rs/kzk/wp-content/uploads/2022/09/Resenje-SF1_Coffee.pdf> accessed 2 April 2023.

¹² *Ibidem*, p. 2.

the Nespresso brand coffee machines, was the company SF1 Coffee. Based on the aforementioned, the CPC reasonably assumed that the identical or almost identical prices are the result of infringement in the terms of price fixing by company SF1 Coffee and thus initiated an *ex officio* procedure against this undertaking.

The CPC performed a dawn raid, and provided a review of the documents, agreements, pricelists, and e-mail correspondence. The CPC found that: a) SF1 Coffee formed its wholesale price based on its own retail price, which was presented in price lists as “price without VAT”; b) SF1 Coffee had determined the same rebate amount with all of its customers; c) both SF1 Coffee and all its customers, according to the provisions of the contract, respected the obligation to apply the percentage of the agreed rebates as a percentage of the margin, both during regular and during promotional sales, as a result of which there were no deviations between customers in the placement of selling prices, except for certain specifics; d) the amount of the basic price rebate had a sufficient value for the customer to accept such an amount; e) customers requested from SF1 Coffee to provide them with the prices that they will apply in further sales, and SF1 Coffee complied with such requests.

Based on the aforementioned, the CPC concluded that the described determination of the margin percentage, in conditions of an equal purchase price, indirectly leads to the determination of the retail price, thus factually represents price fixing in resale. The CPC further concluded that the objective of SF1 Coffee’s business strategy was the determination of resale prices in a fixed amount equal to retail prices of SF1 Coffee. Implementation of this business strategy constitutes a restrictive agreement with retailers that is intended to significantly limit and prevent competition. SF1 Coffee was fined.

4) Case 4/0-01-650/2022-1, Apcom CE, Hungary and Apcom Serbia¹³

The CPC analyzed the competition conditions on the market for: 1) mobile phones, 2) smart watches, 3) accessories (headphones and wireless headphones), 4) “smart” TV boxes and 5) peripheral computer equipment (keyboards and mice), among other for the Apple brand product in the Republic of Serbia. Looking at publicly available data, the CPC concluded that the prices of individual Apple brand products in the Republic of Serbia are the same at the observed retailers of products of this brand, regardless of whether the retailers is a “Apple” authorized seller or not,

¹³ CPC case 4/0-01-650/2022-1, Apcom CE and Apcom Serbia, 22 September 2022 <<http://www.kzk.gov.rs/kzk/wp-content/uploads/2022/10/ZAKLJUCAK-O-POKRETANJU-POSTUPKA-Apple.pdf>> accessed 2 April 2023.

and regardless of in store or online sale. Taking into account the above, the CPC has suspected the existence of competition infringement in terms of restrictive agreements and has decided to investigate the case. At this point, there is no published decision of the CPC regarding the outcome of this case, therefore it may be concluded that the procedure is still ongoing.

5) Case 4/0-01-318/2023-1, Vaillant¹⁴

On the website of Vaillant company, the CPC found the price list of “Vaillant” brand, and upon its inspection, the CPC determined that it contains the wholesale and retail prices of the brand’s products. Bearing in mind the above, the CPC compared the retail prices from this price list with the retail prices shown on the websites of the observed authorized distributors. The CPC determined that the prices are identical at all observed retailers, for the Vaillant brand as well as for the Protherm brand (also a brand of Vaillant group). These prices were also identical with the ones from the price list available on the Vaillant and Protherm websites.

Taking into account the above, the CPC has suspected the existence of competition infringement in terms of restrictive agreements and has decided to investigate the case. At this point, there is no published decision of the CPC regarding the outcome of this case, therefore it may be concluded that the procedure is still ongoing.

Judging by the explanations provided in the relevant decisions and conclusions of the CPC, it may be concluded that e-commerce is of particular importance to the CPC as a tool for detecting anticompetitive behavior. As described above, the CPC has extensively used e-commerce tools to detect violations in the retail sector on more than several occasions, and it may be anticipated that this practice will further expand.

2. Sector analysis of the market of on-demand delivery platforms

In February 2023, the CPC published a Sector Analysis for the Market of Digital Platforms that Intermediate in the Sale and Delivery of Mainly Restaurant Food and Other Products¹⁵, relating to years 2020 and 2021

¹⁴ CPC case 4/0-01-318/2023-1, Vaillant, 19 January 2023 <<http://www.kzk.gov.rs/kzk/wp-content/uploads/2023/01/ZAKLJUCAK-O-POKRETANJU-POSTUPKA-Vaillant.pdf>> accessed 2 April 2023.

¹⁵ “Digital platforms that intermediate in the sale and delivery of mainly restaurant food and other products” are here also referred to as “on-demand delivery platforms” for short.

(hereinafter referred to as “Sector Analysis”)¹⁶. The main aim of the Sector Analysis was to review and analyze the state of competition in the subject area market and point out possible problems in terms of restrictions or any other anticompetitive issues.

The CPC was prompted to perform an analysis of this market due to the dynamic development of the on-demand delivery platforms and frequent changes in the ownership structure of market participants. The adoption of new acts in the European Union that regulate certain aspects of online business platforms, and above all platforms that have market power, also contributed to this choice.

The main sources of information for the Sector Analysis were: i) data submitted by market participants, i.e. on-demand delivery platforms, as requested by the CPC in survey form, as well as documents / agreements requested by the CPC; ii) data provided by market participants’ partners, i.e. data delivered by restaurateurs and other vendors, also requested by the CPC in survey form and iii) other publicly available data.

2.1. Definition and business models of digital platforms

The CPC views digital platforms as intermediaries that connect two or more user groups, i.e. virtual places where users can independently act or perform transactions with other user groups. The CPC differentiates three basic types of business models of digital platforms in the sector that is reviewed, i.e. on-demand delivery platforms: i) business model that involves only receiving orders via digital platforms; ii) business model that includes receiving orders and organizing delivery through digital platforms; and iii) business model of vertically integrated platforms (“full-stack model”) which, in addition to only receiving orders and organizing deliveries via digital platforms, also includes food preparation in cloud kitchens (delivery-only restaurants without dining areas for customers and no physical storefront). In line with the data obtained during the analysis, most (although not all) of the market participants in Serbia are business models listed under “ii)” in the above paragraph.

The CPC has singled out several of the most significant segments that characterize the on-demand delivery platforms in Serbia, such as the fact that all of the market participants have stated their web applications as their key resources; their end users (consumers) and service providers (restaurants /

¹⁶ CPC, Izveštaj o sektorskoj analizi stanja konkurencije na tržištu digitalnih platformi za posredovanje u prodaji i isporuci pretežno restoranske hrane i ostalih proizvoda 2020–2021. Godina (2022), published on February 21, 2023 (Sector Analysis). It is available at the CPC’s website, at the following link: <http://www.kzk.gov.rs/kzk/wp-content/uploads/2023/02/Sektorska-analiza_digitalnih-platformi_dostava-hrane.pdf> accessed 2 April 2023.

/ stores and delivery partners) as their key user categories; that most market participants indicate intermediary services, i.e. networking and connecting users in search of food or consumer goods as their key activities; etc.

2.2. Market structure and market share

The analysis of the on-demand delivery market structure was carried out based on the amount of revenues generated on the territory of the Republic of Serbia. The revenues of market participants in 2020 was around RSD 1,3 billion (about EUR 11 million), while in 2021 revenues amounted to about RSD 2,4 billion (about EUR 20 million), which means that there was an increase in business income by over 80%¹⁷, and could explain the CPC's special interest in this fast-growing market.

Reviewing the market share of relevant participants (six in year 2020 and five in year 2021), it was concluded that the relevant market is highly concentrated, and that three digital platforms stood out in year 2020¹⁸. In June 2021, the leading market participant of the year 2020 was acquired by another market participant that ranked third at the time. As a result, the acquiring party gained a market share of 60-70% in the year 2021¹⁹.

The market structure and share were also analyzed, considering all orders and deliveries for each territorial unit separately, and the overall market share results only marginally varied compared to the market share calculated based on revenue.

2.3. Market entry barriers

The CPC concluded that, apart from certain administrative requirements that apply to any market, market participants are not obliged to fulfill any other legal and regulatory prerequisites. Moreover, the Serbian Classification of Business Codes does not include a code for the provision of food delivery mediation services using digital platforms, therefore market participants have registered different codes as their main business activity, for example “computer consultancy activities – 6202” and “advertising agencies – 7311” (these codes are harmonized with the EU NACE codes).

In general, market participants themselves have stated that in their opinion there are no regulatory, administrative, or other types of technical barriers for their businesses in Serbia²⁰. Based on its analysis of this matter, the CPC states

¹⁷ Ibidem, p. 9.

¹⁸ Ibidem, p. 9.

¹⁹ Ibidem, p. 9.

²⁰ Ibidem, p. 12.

that there are no legal (institutional) barriers for the entry of new participants into the on-demand delivery platforms market. On the other hand, significant investments for platform development, marketing, and advertising, including procurement of branded equipment and promotional materials, as well as investments in the purchase of technical equipment (equipment for receiving orders, etc.) can represent an economic barrier. Also, investments for integration with the systems and services of global Internet service providers as well as conclusion of partnership agreements with Internet service providers can represent entry barriers for new market participants. In addition, the CPC is of the opinion that significant indirect network effects may imply competition for the market, instead of competition within the market itself.

Further, the CPC analyzed relations between on-demand delivery platforms and i) restaurants and other vendors²¹; ii) delivery partners; iii) technical partners:

1) Cooperation between on-demand delivery platforms, restaurants and other vendors

This cooperation is defined by agreements or general business terms of the on-demand delivery platforms. The analysis of the CPC took into account various aspects of this cooperation, including:

- Preconditions for cooperation: the CPC has raised its concern that providing special equipment for receiving orders by the digital platforms, can lead to the binding of partners to only one digital platform, which in the end may lead to a decrease in positive effects of simultaneous use of multiple digital platforms (multihoming).
- Commission rate: the commission rate is subject to negotiation, however, it may be worth mentioning that the surveyed restaurants and other vendors also stated that they were unable to achieve significantly more favorable conditions using their bargaining power.
- Product pricing: the market participants have stated that the prices listed on the on-demand delivery platforms are determined freely by the restaurants and other vendors and that the prices may differ between those stated on the on-demand delivery platforms and those at the restaurant's and other vendor's premises (or their own websites), as well as in comparison to all other sale channels, i.e. other on-demand delivery platforms.
- Termination of cooperation: in most cases termination was due to organizational and financial reasons. However, signing exclusive contracts is also listed as one of the reasons for termination of cooperation, which raises concern with the CPC. Signing of exclusive contracts, as well as

²¹ Other vendors include supermarkets, and various shops selling mostly groceries or consumer goods.

offering various forms of discounts and other incentives that reward restaurants and other vendors for their “loyalty” to the digital platform, may as a result exclude competitors from the market, thus also lowering the level of competition on the subject market.

In conclusion, reviewing the provided agreements, the CPC has noticed provisions that could result in the CPC’s concern, in terms of behavior that is (1) exclusive– aimed at exclusion of other platforms, (2) exploitative – aimed at discrimination of restaurants and other vendors through the application of unequal business terms, and that individual contractual provisions could even be considered as (3) limiting technical development.

- 2) Cooperation between on-demand delivery platforms and delivery partners – Cooperation between on-demand delivery platforms and delivery partners is regulated by agreements concluded between the on-demand delivery platform and companies or entrepreneurs that possess the adequate technical, material and human resources for delivery services. The CPC notes that digital platforms act not only as intermediaries, but through their algorithms, exert a significant influence on all important aspects of that relation. For instance, algorithms enable the selection of the delivery person who will carry out a specific order, perform supervision of the delivery (via GPS), as well as of the provided evaluation. Such a business concept may indicate a significantly more complex subordination system between the delivery partners and on-demand delivery platforms.
- 3) Cooperation between on-demand delivery platforms and technical partners establishing and regulating cooperation with technological and technical partners are key to performing the activities of on-demand delivery platforms. Depending on the type and scope of the required services, market participants have established cooperation with global (Amazon, Hetzner, Google), and local technical partners, mainly providers of payment services. The CPC is of the opinion that connection and integration of on-demand delivery platforms with digital services of their primarily global technical partners can significantly influence their market power. Bearing in mind the character of the market in question, the CPC concluded that the development and implementation of Google’s “Order Online” button affects the creation of a market environment in which Google’s partnerships with certain market participants (on-demand delivery platforms) can contribute to competition distortion on the subject market.

2.4. CPC's recommendations²²

Considering the character and dynamic development of the on-demand delivery platforms market and taking into account the obligations undertaken by Serbia under the Stabilization and Association Agreement²³, the CPC recommends that all competent institutions of the Republic of Serbia analyze the existing legal solutions concerning the subject area, and perform the necessary harmonization of national legislation with current legal acts of the European Union. In particular, the CPC addresses the Ministry of Trade, recommending that it starts drafting relevant legislation that would regulate the activities of digital platforms. This would also include the establishment of the Register of Digital Platforms, and of the Register of Delivery Partners.

3. Abuse of dominant position proceedings

During the term of described Sector Analysis, the CPC received an initiative that describes the business operation of the Glovoapp Technology platform – an on-demand delivery platform (“Glovo”) holding, according to the Sector Analysis, a dominant position in the market. The initiative describes how Glovo uses payments and incentives in attempts to secure partner exclusivity.

By reviewing the contracts concluded by Glovo with individual restaurants, as well as Glovo's general Business Terms, the CPC has determined that certain provisions may be considered as incentives to create exclusivity with Glovo. For instance, partners are obligated to pay a fee in case of entering into cooperation with similar platforms; some restaurants are offered large sums in the form of investments for marketing, with the obligation to return the amount if cooperation with another platform is established; unfavorable conditions for termination of the contract before its expiration and agreed penalties in case of violation of this provision are also provided. The CPC also suspects that Glovo applies unequal business terms for the same services with different partners. This primarily relates to different commissions towards different partners, depending on whether they cooperate exclusively with Glovo. Taking into account these findings, the CPC suspects that Glovo performs abuse of dominant position including, but not limited to the manners that are above described. Therefore, under its Conclusion dated November 2,

²² Sector Analysis, p. 38.

²³ Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, Official Journal L 278, 18/10/2013 P. 0016 – 0473 <<https://eur-lex.europa.eu/EN/legal-content/summary/stabilisation-and-association-agreement-with-serbia.html>> accessed 2 April 2023.

2022²⁴, the CPC has initiated the proceeding for determination of abuse of dominant position against Glovo. As at the time of writing, the CPC has not yet published any decision relating to this case, therefore it is presumed that the procedure is ongoing.

4. CPC's limited activities in e-commerce concentrations

When it comes to Serbia and the CPC's investigation measures to detect failures to notify a concentration, it is worth noting that up until recently the CPC wasn't proactive when it comes to merger notifications. However, it seems that this is about to change as well. The CPC's latest case of unnotified concentration involves a local e-commerce company – Ananas, which acquired a company in the neighboring North Macedonia with similar business activities. This is also the first case that the CPC's initiated due to unnotified acquisition of a foreign target; however, the buyer itself was meeting the thresholds for notification. This only shows that the CPC's interest in the e-commerce will remain in the following period.

However, one of the most recent acquisitions in the past period was certainly the acquisition of Donesi by Glovo. Glovo acquired Donesi (a leading on-demand platform for delivery of food) back in 2021. According to the above-mentioned Sector Analysis, in the year of acquisition (2021), Glovo had a market share of 20–30%, while Donesi had a market share of 30–40%, so the concentration itself resulted in Glovo being a candidate for holding a dominant position in the market. To the best knowledge of authors of this paper, it is unknown whether this concentration was assessed by the CPC, or whether it exceeded the threshold at the time (there are no relevant decisions published at the CPC's website, and no word of Glovo and Donesi in the list of approved concentrations from the CPC's annual report for 2021). Even if it went under the CPC's radar, i.e. it did not exceed the threshold, this concentration may have prompted the CPC to conduct the above sector analysis in this market, which deserves praise. However, this also points to a conclusion that, if this transaction indeed went under the thresholds, the thresholds may not be appropriate for assessment of concentration of fast-growing markets.

²⁴ CPC case 5/0-01-758/2022-01, Glovoapp Technology doo Beograd, 2 November 2022. This conclusion initiated the procedure for determination of abuse of dominant position against Glovoapp Technology doo Beograd. The document is published on the website of the CPC, and may be viewed at the following link: <<https://kzk.gov.rs/kzk/wp-content/uploads/2022/11/Zaklju%C4%8Dak-o-pokretanju-postupka-GLOVO.pdf>> accessed 2 April 2023. A separate decision will be rendered once the procedure is completed.

III. Comparison of global and local trends in competition law enforcement in e-commerce

The above listed case law confirms that problems in e-commerce market in Serbia follow global trends discussed at OECD Roundtable on Implications of E-commerce for Competition Policy, held in June 2018²⁵. By now, the use of algorithms has been widely discussed from various points of view significant for competition legislation²⁶. The Executive Summary from the Roundtable²⁷ confirms that a defining characteristic of e-commerce markets is the re-emergence of vertical restraints as a core competition-law concern, with typical examples of such restrictions being selective distribution systems, bans on internet sales, retail price maintenance (RPM), dual pricing policies, etc.²⁸ However, the participants in this Roundtable also noticed that, although there has been comparatively less enforcement against abuse of dominance to

²⁵ OECD, Implications of E-Commerce for Competition Policy (2018) <www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm> accessed 2 April 2023.

²⁶ Ingrid Vandenborre, Michael J. Frese 'Algorithmic Pricing: Candidate for the New Competition Tool?' in Claire Jeffs (ed), *E-commerce Competition Enforcement Guide* (2020) <<https://www.skadden.com/-/media/files/publications/2020/11/ecommercecompetitionenforcementguidealgorithmprici.pdf?rev=0722f764cf324c62aedc0f50b1a31ddb>> accessed 2 April 2023; OECD, Algorithms and Collusion – Note from the European Union (21–23 June 2017) <[https://one.oecd.org/document/DAF/COMP/WD\(2017\)12/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)12/en/pdf)> accessed 2 April 2023. As explained in paragraph 15: “increased price transparency through price monitoring software enables easier detection of those retailers that deviate from manufacturers’ pricing recommendations. It could therefore allow manufacturers to retaliate against retailers that do not comply with pricing recommendations and, therefore, limit the incentives of retailers to deviate from such pricing recommendations in the first place” and paragraph 36 concludes that “In a vertical context, price monitoring algorithms may be used by suppliers to monitor fixed or minimum prices, or to monitor “recommended” prices so as to exercise pressure on, or provide incentives to, the retailer to respect those recommended prices, thereby turning them into fixed or minimum sale prices (RPM). Finally, the use of price monitoring/matching algorithms by one retailer may have the effect that higher prices spread from sellers that engage in RPM to other sellers”; OECD, ‘OECD Handbook on Competition Policy in the Digital Age’ (2022) <<https://www.oecd.org/daf/competition-policy-in-the-digital-age/>> accessed 2 April 2023 (‘OECD Handbook’), page 37: “Algorithmic pricing may be a tool for collusion... The centrality of digital platforms in certain markets can enable vertical foreclosure, or the imposition of restraints that limit the intensity of competition”; OECD, Algorithms and Collusion: Competition Policy in the Digital Age (2017) <<https://www.oecd.org/daf/competition/Algorithms-and-collusion-competition-policy-in-the-digital-age.pdf>> accessed 2 April 2023.

²⁷ OECD, Executive Summary of the Roundtable on Implications of E-commerce for Competition Policy, Annex to the Summary Record of the 129th Meeting of the Competition Committee held on 6–8 June 2018’ (15 May 2019) <[https://one.oecd.org/document/DAF/COMP/M\(2018\)1/ANN3/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/M(2018)1/ANN3/FINAL/en/pdf)> accessed 2 April 2023 (‘OECD Executive Summary’).

²⁸ OECD Executive Summary, p. 5.

date, this is likely to become a more prominent concern as large e-commerce platforms rapidly increase their market share, especially large online retail platforms²⁹. According to the OECD Executive Summary, the wide e-commerce environment involves a variety of economic factors, including online retailers, marketplaces, and price comparison tools³⁰. This, concludes the Roundtable, presents both opportunities and challenges to competition policy, since online retailing has the potential to increase retail competition, but certain dynamics may prompt anticompetitive agreements or unilateral conduct. Another publication by OECD noted that competition law enforcers should be at least alerted to the risk that collusion might become easier to sustain and more likely to be observed when algorithms are involved³¹.

It seems that the possibility of increasing retail competition has prompted the undertakings in Serbia to conclude anticompetitive agreements, i.e. practice unilateral conduct, having in mind that internet shopping greatly expands consumer choice, both by increasing the range of retail outlets and by increasing the amount of information available, thus reducing search costs³². The CPC has certainly used the advantages of online shopping to identify anticompetitive behaviors – the above cited decisions of the CPC show that the CPC has simple and yet very effective tools in identifying competition law breaches – websites of wholesale and retail companies, especially online retail platforms, but also the above-mentioned aggregators and other price monitoring systems³³. They also show that the level of awareness of competition law rules is quite inadequate, but it can be concluded that undertakings in Serbia do understand the benefits of online shops for consumers, having in mind that

²⁹ Ibidem.

³⁰ Ibidem, p. 2.

³¹ OECD 2017 Report titled “Algorithms and Collusion – Background Note by the Secretariat”, states in section 4.3.1 Monitoring algorithms, p. 24–26: “The most obvious and simple role of algorithms as facilitators of collusion is in monitoring competitors’ actions in order to enforce a collusive agreement. This role may include the collection of information concerning competitors’ business decisions, data screening to look for any potential deviations and eventually the programming of immediate retaliations. The collection of data might be the most difficult step out of this process. Even if pricing data is publicly available it does not necessarily mean that a market is transparent. Companies that take part in a conspiracy still need to aggregate that data from all competitors in an easy-to-use format that can be regularly updated. This is already done by some price comparison websites, also known as aggregators, which either receive data directly from online companies or, instead, use web scraping, an automated process to extract data from websites using software applications such as internet bots [...] In conclusion, monitoring algorithms may facilitate illegal agreements and make collusion more efficient, by avoiding unnecessary price wars.”

³² OECD Executive Summary, p. 1.

³³ For relevant EU practice in this matter, see Case AT.40465, *Asus (vertical restraints)* (2018) (2018/C 338/08).

their anticompetitive practices were mostly focused on keeping or increasing their profits by controlling online prices, by using publicly available aggregator (eponuda.com – intended primarily for consumers) to detect deviations from agreed prices, but also other software tools, such as “Kliker”. As some of these proceedings were (from the CPC’s point of view) successfully completed, at least for now, it can be concluded that the use of online trade tools followed by a dawn raid are the CPC’s most important means for identifying anticompetitive behaviors and initiating *ex officio* proceedings in the retail sector. Although the tools are (mostly) limited to the retail sector, they can also provide valuable hints on deals and breaches at the wholesale level. However, this applies only to specific anticompetitive behavior which is easily identified, such as resale price maintenance. Finally, although online tools (such as pricing algorithms) have their benefits – pricing transparency being the most important one, it must be noted that the identification of other types of (non-publicly available) algorithmic collusion may be difficult to address³⁴. An important common denominator in all cases conducted by the CPC is the fact that the CPC, following their online inquiries, conducted numerous dawn raids, which resulted in more than a solid proof of explicit collusion, including the use of special software for price monitoring. The question remains, has there not been such proof, whether the CPC would try to enforce the law by going for a tacit collusion.

When it comes to abuse of dominant position by leading companies in e-commerce sector, it seems that the CPC depends on initiatives of other market participants, which is not unusual, having in mind that holding a dominant position itself is not prohibited, and proving abuse of such decision is a very sensitive matter which requires more than one indication. In such circumstances, a complaint of the rival platform is not only necessary, but also “constitutes strong evidence of abuse of market power”³⁵. It seems that local law enforcement follows global trends in this area as well. It is reported that exclusive dealing is particularly exclusionary for e-commerce, because the tactic destroys the multi-homing nature of e-commerce, transforming it to a single-homing.³⁶ Thus, the focus of competition authorities around the world have been anticompetitive practices of e-commerce giants, such as

³⁴ OECD, Algorithms and Collusion: Competition Policy in the Digital Age (2017) <<https://www.oecd.org/daf/competition/Algorithms-and-collusion-competition-policy-in-the-digital-age.pdf>> accessed 2 April 2023, p. 34.

³⁵ Toshiaki Takigawa ‘What Should We Do about E-Commerce Platform ‘Giants’? – The Antitrust and Regulatory Approaches in the US, EU, China, and Japan’ (2022) <<https://ssrn.com/abstract=4048459>> accessed 2 April 2023.

³⁶ *Ibidem*.

Alibaba³⁷ in China and Amazon in the EU³⁸. Although there is a number of actions in the e-commerce sector which result in abuse of a dominant position (in the Amazon case, the main concerns were the use of non-public data relating to independent's sellers' activities, unequal treatment of seller when ranking the offers and discriminatory conditions and criteria for qualification of marketplace sellers and offers to Prime), the Serbian CPC is still mostly focused on more "standard" anticompetitive behaviors related to a dominant position, such as exclusivity and predatory pricing.

Finally, when it comes to mergers and acquisition in e-commerce, these are also becoming an interesting topic, with main question being whether the current legislative framework is good enough to assess all the potentially negative effects of mergers and acquisitions. The OECD reports that the dynamic nature of digital markets poses a challenge for competition authorities, particularly when the effects of a merger may continue to develop beyond the time horizon normally considered in merger review³⁹. Some characteristics of mergers and acquisitions in dynamic markets, including e-commerce, are the high rates of entry and exit, tendency of innovations to disrupt business models and the need to pay particular attention to innovation capacity of the firms in the market⁴⁰. The OECD report seem to reflect the situation in Serbia as well, especially considering an important acquisition that was (at least according to publicly available information) not assessed by the CPC, but resulted in potential abuse of a dominant position only two years later. In any case, the CPC will need to assess business and innovation capacities of e-commerce business models to the extent necessary to predict any and all long-term negative effects, which may be a challenging task when e-commerce companies are involved for reasons listed above.

³⁷ 'Alibaba and Tencent Fined in China Tech Crackdown' (*Forbes*, 13 July 2022) <<https://www.forbes.com/sites/qai/2022/07/13/alibaba-and-tencent-fined-in-china-tech-crackdown/?sh=fe3df9e3dadb>> accessed 2 April 2023.

³⁸ European Commission Press Release 'Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime' (20 December 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777> accessed 2 April 2023.

³⁹ OECD Handbook, p. 47.

⁴⁰ OECD Handbook, p. 47; OECD 'Merger Control in Dynamic Markets' (2020) <<https://www.oecd.org/daf/competition/merger-control-in-dynamic-markets-2020.pdf>> accessed 2 April 2023, p. 37–39: "It is now generally recognized that merger control should look at the competitive effects of mergers beyond the very short term, considering how a transaction is likely to affect market outcomes in a foreseeable time horizon [...] As interest in the long-term effects of mergers grows, it is likely that academics and practitioners will keep developing refined assessment tools to help improving the precision of merger enforcement".

IV. Conclusion

We can see that the CPC has recently finally started carrying out multiple duties, entrusted to them under the Law when it comes to enforcement activities, and promoting of competition policy, and we can only hope that the series of enhanced activities will continue in the future. However, there are certain shortcomings that need to be fixed sooner than others.

One such problem is the lack of more detailed guidance and regulations. With the rise of e-commerce and other digital markets, it seems that a more detailed guidance is much needed, to avoid the matter of rising legal uncertainty when applying “traditional” rules to not so traditional markets. The CPC does try to mitigate the effect of the lack of its legislative actions by enhancing its advocacy activities, however it may be argued that legislative intervention by the CPC, and even the legislative body, is necessary.

Apart from harmonization of local regulations with the EU rules, a matter that deserves special attention is whether the CPC can handle more sophisticated cases and what means are necessary for the CPC. The CPC is one of the youngest among European competition authorities, so they are still lacking much needed experience, but also tools to deal with more delicate cases where competition infringement may not be obvious at first sight. The CPC will most certainly have a crucial role in keeping a healthy competitive environment in the fast-changing digital sectors, especially e-commerce. As the OECD Handbook rightfully notices and we cannot agree more: “Some concerns about dynamics in digital markets fall squarely within a competition enforcement context, namely with respect to anti-competitive conduct and mergers giving rise to durable market power. However, competition authorities will need to adapt their analytical tools to the unique conditions of digital markets.”⁴¹. From its most recent case law, it seems that the CPC is aware of its role and importance – the CPC will need to handle more and more sophisticated cases that will undoubtedly be on the rise with constant development in the emerging markets. Our opinion is that CPC’s focus in the following period will remain on hard-core anti-competitive behavior, with simultaneous and constant education of the participants about the importance and the role of competition regulations. In the end, it should be noted that the scope and complexity of the CPC’s activities, as a relatively young competition body, also depends on available resources, both financial and human, as well as their proper allocation, which could especially be challenging, having in mind the complexity of proceedings for anti-competitive behavior in this specific sector.

⁴¹ OECD Handbook, p. 15.

Finally, concentrations in the e-commerce sector also deserve special attention, considering the fast-occurring and long-impact consequences that result from specifics of mergers in fast-growing markets. Control of such concentrations may be an important prevention tool for any future anticompetitive conduct, but the question remains whether all possible effects of such concentrations can be assessed by CPC to a satisfactory extent in advance, and whether the concentration assessment rules currently in place (including threshold rules) are appropriate for assessing such concentrations.

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The Role of the Judiciary in Effective Enforcement of Competition Law in New Jurisdictions: the Case of Kosovo

by

Avdylkader Mucaj* and Isuf Zejna**

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Abstract

This paper aims to discuss the role of the judiciary in the effective, or ineffective, enforcement of competition law. It analyses those jurisdictions that can still be considered ‘new’ in the field of competition law, in particular the case of Kosovo, and by using qualitative research methods. The paper addresses the main findings characterizing the weak enforcement of competition law by the judiciary in Kosovo

* Dr. Avdylkader Mucaj holds a Ph.D. in EU law from University of Ljubljana and LL.M. in EU Law from Stockholm University. Dr. Mucaj also spent two years as a PhD researcher at Free University of Berlin. E-mail: mucajavdylkader@gmail.com; ORCID: <https://orcid.org/0000-0002-9665-4492>.

** Isuf Zejna is an Attorney at Law and the founding partner at Law Firm RZZ. Mr. Zejna holds an LL.M. in international law from Pittsburg University. E-mail: zejna@rzzlaw.com; ORCID: <https://orcid.org/0009-0003-6527-9858>.

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over a period of a decade, that is, from when the courts have started hearing competition cases since 2010. On the other hand, the paper places special attention to the establishment of the Commercial Court in Kosovo in 2022, which now has jurisdiction over the judicial review of competition decisions. The last part of the paper considers recent legal changes in the field of private enforcement of competition law. Kosovo's new competition legislation, approved in 2022, expressly provides for the right to compensation for damage.

Résumé

Cet article vise à examiner le rôle du pouvoir judiciaire dans l'application du droit de la concurrence, qu'elle soit efficace ou inefficace. Il analyse les juridictions qui peuvent encore être considérées comme « nouvelles » dans le domaine du droit de la concurrence, en particulier le cas du Kosovo, en utilisant des méthodes de recherche qualitatives. Cet article aborde les principales conclusions caractérisant la faible application du droit de la concurrence par le système judiciaire au Kosovo sur une période de dix ans, c'est-à-dire à partir du moment où les tribunaux ont commencé à entendre des affaires de concurrence en 2010. D'autre part, l'article accorde une attention particulière à la création du Tribunal de commerce du Kosovo en 2022, qui est désormais compétent pour le contrôle judiciaire des décisions en matière de concurrence. La dernière partie du présent article examine les changements juridiques récents dans le domaine de l'application privée du droit de la concurrence. La nouvelle législation kosovare sur la concurrence, approuvée en 2022, prévoit expressément le droit à la réparation des dommages.

Key words: competition law enforcement; role of judiciary; commercial court; private enforcement; stand-alone actions.

JEL: K23, A23, Z23

I. Introduction

Adopting competition rules was not the most difficult step for Kosovo since the country aspires to become a member of the European Union, and thus already had the EU model to follow. The EU model, in addition to its normative aspect, was also used on the institutional side whereby Kosovo's next step should have been the establishment of executive agencies, responsible for enforcing competition rules. In the institutional chain, however, in addition to the administrative pillar, the judiciary side proved to be a crucial factor too. Therefore, this article concentrates on the role of the judiciary, as a crucial component for the effective enforcement of competition law. It uses qualitative research methods in analysing the normative aspects of competition law, and

paying particular attention to its institutional aspects, discussing mostly judicial rulings on the subject matter.

There are generally two pillars through which competition law is enforced – the administrative pillar, which is carried out in most cases by an executive agency, and the judicial pillar dealing with appeals against administrative decisions.¹ Each is as influential as the other for the effective, or ineffective, enforcement of competition law.

Although in most cases the administrative pillar turns out to be more successful in facilitating effective enforcement of competition law, the same cannot be said for the judiciary. In Southeast European countries with a socialist background, the predominant judiciary logic is formal, rather than focusing on the merits of the cases at hand, especially for pieces of legislation that are new and require specific legal knowledge, such as competition law.² Kosovo is not an exception in this context. On the basis of most of the relevant court judgments, it is possible to say that the judiciary has paid least attention to competition law. Most of the judgments are assessed and decided based on procedural and administrative legislation. This approach is disadvantageous to competition rules, as they are not characterised and bound by legal formality. For instance, it is not at all important for a competitive assessment how a contested document is formulated in order to restrict competition between separate undertakings – what is crucial is what can be deduced from that document. Paul Craig and Gráinne de Búrca note that ‘if the competition rules operated only when an explicit, formal agreement was made they would be of little practical use, since undertakings would achieve their anti-competitive goals in less formal ways. It is therefore necessary to have provisions to catch less formal special agreements’.³ Evaluating a document through a completion

¹ Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 [hereinafter: EU Regulation 01/2003]; KJ Cseres, ‘The Impact of Regulation 1/2003 in the New Member States’ (2010) 6(2) *Competition Law Review* 145; David J Gerber, ‘Two Forms of Modernization in European Competition Law’ (2008) 31(5) *Fordham International Law Journal* 1235; Jürgen Basedow, ‘The Modernization of European Competition Law: A Story of Unfinished Concepts’ (2007) 42 *Texas International Law Journal* 429; Ben Depoorter and Francesco Parisi, ‘The Modernization of European Antitrust Enforcement: The Economics of Regulatory Competition’ (2005) 13(2) *George Mason Law Review* 309.

² See Jasminka Pecotić Kaufman, ‘Competition law enforcement in European post-socialist countries: authoritarian legal culture legacy, semantic dissonance and skewed agencification’ (2021) Non-Resident Research Fellowship Program Institute for Consumer Antitrust Studies – Loyola University Chicago – School of Law [hereinafter: Jasminka Pecotić Kaufman, ‘Competition law enforcement in European post-socialist countries’].

³ Paul Craig and Gráinne de Búrca, *EU Law, Text, Cases and Materials* (5th edn, Oxford University Press 2011) 962, 962. See also Case C-41/69 *ACF Chemiefarma NV v Commission* ECLI:EU:C:1970:71, paras 110–124.

law lens is the object and effect of the document.⁴ Kosovo's existing case law has shown that the form of a document was a more consequential aspect for the judiciary to consider, rather than the content of the document itself.

The situation in Kosovo, among other jurisdictions, proves that the legal transplant of competition rules does not seem to be easy in terms of achieving the goals of competition law. Most countries adopt competition rules enthusiastically, as if they themselves would regulate the market and thus bring undistorted competition. This is not the case however, if there are no professionally competent institutions dedicated to the effective enforcement of competition law, where in addition to the administrative pillar, the judiciary also has an indispensable role to play. Therefore, one of the aims of this paper is to reflect on the challenges that the judiciary in Kosovo has encountered while enforcing competition law.

II. The main stages in the development of competition legislation in Kosovo

With the change of its political system in 1999, a general transformation of Kosovo's economic ecosystem also began. The most significant economic change, in the first years after the war, was the privatization process.⁵ The primary goal of privatization was for the numerous socially or state-owned properties and enterprises, that had been inherited from the former socialist system, to be placed in private hands. The aim was to create a new economic model, based on free market economy, to slowly begin to form alongside the reduction of State presence. What made the privatization process in Kosovo unique is the fact that this process was not started, nor led, by the Kosovo authorities, but by

⁴ See Case T-322/01 *Roquette Frères v Commission* ECLI:EU:T:2006:267, paras 73–75. See also Case C-23/14 ECLI:EU:C:2015:651 paras 66–67; Case C-52/09 *TeliaSonera Sverige* ECLI:EU:C:2011:83, para 64; Case T-127/04 *KME Germany and Others v Commission* ECLI:EU:T:2009:142, para 68; Case T-241/01 *Scandinavian Airlines System v Commission* ECLI:EU:T:2005:296, para 122; Case T-59/02 *Archer Daniels Midland v Commission* ECLI:EU:T:2006:272, paras 159–161; Case T-43/02 *Jungbunzlauer v Commission* ECLI:EU:T:2006:270, paras 153–155; Case T-329/01 *Archer Daniels Midland v Commission* ECLI:EU:T:2006:268, paras 176–178.

⁵ See Robert Muharremi, 'The Role of the United Nations and the European Union in the Privatization of Kosovo's Socially-Owned Enterprises' (2013) 14(7) *German Law Journal* 889; Rita Augestad Knudsen, 'Privatization in Kosovo: The International Project 1999–2008' (2010) *Norwegian Institute of International Affairs* 1. <<https://www.files.ethz.ch/isn/121346/Knudsen%20reportNUI%20Report.pdf>> accessed 4 April 2018. See also Organization for Security and Co-operation in Europe (OSCE) 'Privatization in Kosovo: Judicial Review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo' (2008) <<https://www.osce.org/kosovo/32012?download=true>> accessed 4 April 2018.

the international community that had Kosovo under administration at that time, namely the United Nation Interim Mission in Kosovo (the UNMIK).

In 2004, in the wake of efforts to create a new economic model, the Assembly of Kosovo adopted its first Law on Competition (hereinafter: LC of 2004)⁶ – however, the law entered into force and began its enforcement only after 2008. This legislation has adopted the European model, similar to most other countries in the Western Balkans and beyond.⁷ At this point, the countries aspiring to join the European Union did not have much room to manoeuvre with respect of the competition law model to be chosen, although there were not many choices available either.⁸

This law aimed to achieve an economy based on free competition, by prohibiting acts that restrict, suppress or distort competition.⁹ The first issue in the area of competition that this new legislation addressed was the prohibition of agreements and concerted practices that restrict competition. Its other provisions prohibited the abuse of a dominant position as well as acquisitions. The law provided for the establishment of a competent institution for enforcing Kosovo's competition legislation and thus sanctioning violators of competition rules. In case of an infringement of competition rules by undertakings, the law provided a fine of up to the maximum of 100,000.00 Euro.¹⁰

As in most other countries, Kosovo was not an exception in taking its first step towards a competitive economy by creating the normative part of competition rules. However, the hardest part of putting in place and effectively enforcing competition rules, is its institutional aspect. Like most new countries in the field of competition, Kosovo was not immune to many of the challenges either.¹¹ The main problems emerged quickly in that the legislator

⁶ Law no 2004/36 on Competition (Official Gazette 14/2007, 1 July 2007) [hereinafter: LC of 2004].

⁷ See Marcus Pollard, 'More Than a Cookie Cutter: the Global Influence of European Competition Law' (2014) 5(6) *Journal of European Competition Law & Practice* 329; Ariel Ezrachi, 'Sponge' (2016) 49 *Journal of Antitrust Enforcement* 51; Amber Darr, 'Role of Courts in Enforcing Competition Laws: A Comparative Analysis of India and Pakistan' (2018) 1 *Oxford Journal of Antitrust Enforcement* 1–3.

⁸ See Joel Davidow, 'The Worldwide Influence of United States Antitrust' (1990) 35(3) *Antitrust Bulletin* 603 and Marcus Pollard, 'More Than a Cookie Cutter: the Global Influence of European Competition Law' (2014) 5(6) *Journal of European Competition Law & Practice* 329.

⁹ LC of 2004 (n 6) Art 1.

¹⁰ LC of 2004 (n 6).

¹¹ Cf Jasminka Pecotić Kaufman, 'On the development of (not so) new competition systems – findings from an empirical study on Croatia' (2022) *Journal of Antitrust Enforcement* (2022), 10, 326–364, doi: 10.1093/jaenfo/jnab018; Daniel Sokol, 'Antitrust, Institutions, and Merger Control' (2010) 17(4) *George Mason Law Review* 1055 ('we cannot expect a brand-new antitrust agency with no previous experience to undertake enforcement in the area of bundled discounts. This task challenges even the most experienced antitrust agencies and antitrust systems'); Einer

failed to establish a competition authority, and thus failing in initiating law enforcement. The time gap between the moment the law was enacted (2004) and when it actually started being enforced (2009), was attributable to the lack of a competent authority responsible for its enforcement. This problem had not been addressed for years. The Law on Competition (LC) was adopted in 2004, but by the end of 2008, the Kosovo Competition Authority (hereinafter: the Authority) has still not been established.¹² In fact, the first competition law cases to be investigated in Kosovo at the administrative level only emerged in 2009 – namely the *Insurance Companies Case* and the *Fiscal Electronic Devices Case* (hereinafter: the *FED Case*). In the former, the Authority fined ten insurance companies for a price fixing agreement; in the latter case, it fined two companies, one for the abuse of its dominant position and the other for engaging in concerted practices.

III. The role of the judiciary in competition law enforcement

Originally, the administrative decisions of the Authority, which found a violation of competition rules and, as a result, imposed fines on economic entities, could be appealed to the Administrative Court (hereinafter: the Court). As the field of competition law was new and hardly known in Kosovo, until now, judicial review has mainly focused on procedural aspects of the case, rather than on its competition law side.¹³

‘The judiciary is a key player in the antitrust system via judicial evaluation of antitrust cases. In the US context, generalized courts have evolved over time as a result of shifts in judicial interpretation, economic thinking, and government policies and priorities’.¹⁴ Richard A Posner notes that ‘the real problem of antitrust

Elhauge, ‘Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory’ (2009) 123(2) *Harvard Law Review* 399.

¹² Kosovo Competition Authority, Annual Report 2017 1, 7 [in Albanian only] <https://ak.rks.gov.net/assets/cms/uploads/files/Raporti%20i%20Punes%202017_FINAL_AKK.pdf> accessed 14 April 2018.

¹³ Avdylkader Mucaj, ‘Antitrust Law in Kosovo: Challenges in Following the EU Enforcement Jurisprudence’ (2019) *Journal of European Competition Law & Practice*, vol. 11, Issue 3–4, March–April 2020, 166–172 <<https://doi.org/10.1093/jeclap/lpz069>>; Avdylkader Mucaj, ‘Competition Law Framework in Kosovo and the Role of the EU in Promoting Competition Policies in Other Countries and Regions Wishing to Join the Block’ (2020), *Yearbook of Antitrust and Regulatory Studies*, vol. 2020, 13(22), doi: 10.7172/1689-9024.YARS.2020.13.22.4.

¹⁴ Daniel Sokol, ‘Antitrust, Institutions, and Merger Control’ (2010) 17(4) *George Mason Law Review* 1055.

in the new economy lies on the institutional side: the enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough, to cope effectively with a very complex business sector that changes very rapidly'.¹⁵

There are two key reasons why Kosovo's jurisprudence does not have many judgments in the field of competition law. First, the Authority was established only in 2008,¹⁶ and the competition law enforcement only began in 2009. Second, the decision-making body within the Authority, the so-called Commission, was unable to work due to the fact that the position of its five members remained vacant for years.¹⁷ The members of the Commission have to be elected by the Assembly of Kosovo, on the proposal of the Government, for a 5-year mandate. However, vacancies occurred after the end of the mandate, thus negatively affecting the enforcement of Kosovo's competition rules.

However, the two main cases in which the Authority had imposed fines, and which have been subjected to judicial review, are the aforementioned *Insurance Companies Case* (a total of ten insurance companies were fined) for a price fixing agreement and; the *FED Case* (two undertakings were fined) where one of the companies was fined for the abuse of its dominant position and the other for concerted practices. In both of these cases, as examined in the previous studies,¹⁸ the rulings went against the goals of competition law. For example, despite the fact that in the *Insurance Companies Case* based on a price fixing agreement, the Authority had, in fact, managed to find an actual copy of the contested agreement, the Court adjudicated contrary to the goals of competition law, such as object and effect of the agreement. The goals of the competition law, *inter alia*, were to caught any agreement whose purpose or effect is restriction or distortion of competition. Whereas, the Court assessed different facets such as: who had signed the agreement on behalf of the undertaking(s); the identification of that person by name and surname; whether the person was employed and what kind of position the person has had in the insurance company; on behalf of whom the person acted; whether that person was authorized or was a representative of the Gjakova branch; whether the agreement intended to inflict harm on other companies or certain people; whether the agreement was enforced in practice; and, what were the consequences of that agreement and whether it was in actual fact implemented etc.¹⁹ All these issues were not relevant in the light

¹⁵ Richard A Posner, 'Antitrust in the New Economy' (2001) 68(3) Antitrust Law Journal 925.

¹⁶ See (n 12).

¹⁷ See European Commission, Kosovo Progress Report 2016 (2016) 1, 47.

¹⁸ See Avdylkader Mucaj, 'Antitrust Law in Kosovo: Challenges in Following the EU Enforcement Jurisprudence' and 'Competition Law Framework in Kosovo and the Role of the EU in Promoting Competition Policies in Other Countries and Regions Wishing to Join the Block' (n 13).

¹⁹ Ibid.

of competition law objectives, which is not formalistic in itself or the goals that it intends to achieve. From a competition law point of view, it is sufficient to examine the subject or effect of the agreement, in order to assess its lawfulness or not.²⁰ This approach was not followed by the judiciary in Kosovo; quite the opposite, the Court appraised the price fixing agreement only from the formal and procedural side. This constitutes an obstacle in the effective enforcement of competition legislation.

However, the challenges of reviewing competition law cases, besides their excessive duration, due to the inefficiency of the judiciary in Kosovo, was also reflected in their merits. In most judgments, there was *prima facie* lack of basic knowledge when it comes to the goals that competition law seeks to achieve. In the *Insurance Companies Case*, despite the fact that the Authority had provided a copy of the price fixing agreement, which covered all insurance companies active in the Kosovo market, the Court exclusively dealt with the formal aspects of the agreement, that is, if it meets the formal and procedural criteria to be considered a legally binding agreement, rather than the agreement's object and effect. As well established in EU case law, the document (that is, agreement) as such is not that important for a competition law assessment; rather the conclusions drawn from it. EU case law²¹ is also rich on the issue of the object and effect of an anti-competitive agreement, an essential element of a competition law case, where attention should be focused, rather than on the form of an agreement.

In addition, there were contradictions within the same Court of First Instance (that is, the Administrative Court), depending on which of its judges were adjudicating the case. Unfortunately, the appeals were sent for judicial review by the relevant undertakings separately, and the Court did not merge them, but adjudicated each of the identical cases separately. This may also be due to the fact that the administrative decisions of the Authority that fined these undertakings were also issued separately for each of them, that is, as multiple individual decisions. The same Court has ultimately decided the (same) cases differently. In a few of the rulings, the decisions of the Authority were upheld, as they were seen as grounded and lawful. In the majority of the cases however (where ten insurance companies were fined individually), the decisions of the Authority were annulled because they were judged as lacking grounds and unlawful.²² This happened until the Court of Appeals forced the Court of

²⁰ See (n 4).

²¹ See EU case law cited in (n 4).

²² Basic Court of Pristina – Administrative Department, ruling on the *Dardania Case*, no. A183/2011, 16 July 2014; Basic Court of Pristina–Administrative Department, *Sigma* ruling, no. A2415/14, 03 May 2018; Basic court of Pristina – Administrative Department, *Croatia Sigurimi* ruling, no. A.172/2011, dated 2014; Basic court of Pristine – Administrative

First Instance to unify its rulings on the same issue. As a result, the Authority had almost all of the 10 decisions towards the insurance companies overturned.

What stood out most in the rulings is the fact that the competition law cases were mainly adjudicated based on general administrative law, rather than on competition law, which was in fact their cornerstone.²³ Unfortunately, competition law played a marginal role in these judgments. Even in the few cases where the First Instance Court has attempted to apply the provisions of competition law, it was done in the wrong way and contrary to its goals. However, the formalistic approach of the judiciary in competition law cases turns out not to be limited to Kosovo only. Bernatt argues that although the Polish First Instance Court of Competition and Consumer Protection (SOKiK) is entitled to provide full judicial review of the decisions issued by the Polish NCA (UOKiK), including the merits of the case at hand, from both a legal and factual viewpoint, such review is often limited to superficial and formal issues.²⁴ Almost the same judicial approach appears to be present in competition law cases in Croatia too. Akšamović notes that ‘with regard to the scope of judicial review in competition cases in Croatia, until 2012 the judiciary was only conducting a ‘control of legality’ without going into a deeper evaluation of the facts and evidence. This type of control was rather superficial and insufficient. Following the 2012 administrative justice reform, the powers of the administrative courts in the Republic of Croatia, including the powers of the High Administrative Court of Republic of Croatia (HACRC), have been significantly broadened. After 2012, the HACRC became entitled to conduct a full review (or unlimited review) of administrative decisions including, but not limited to, decisions brought by the Croatian Competition Agency (CCA).²⁵

Department, *Dukagjini* ruling, no. A.184/11, dated 2014; Basic court of Pristina – Administrative Department, *Elsig* ruling, no. A.173/11, dated 2015; Basic court of Pristina – Administrative Department, *Gekos* ruling, no. A.181/2011, dated 2015; Basic court of Pristina – Administrative Department, *Illyria* ruling, no. A.96/2011, dated 2015; Basic court of Pristina – Administrative Department, *Insig* ruling, no. A.198/11, dated 2015; Basic court of Pristina – Administrative Department, *Siguria* ruling, no. A.180/11, dated 2014; Basic court of Pristina – Administrative Department, *Sigma* ruling, no. A.132/2011, dated 2014.

²³ Court cases cited above in (n 22).

²⁴ Maciej Bernatt, ‘Effectiveness of Judicial Review in the Polish Competition Law System and the Place for Judicial Deference’ (2016), *Yearbook of Antitrust and Regulatory Studies*, vol. 2016, 9(14), doi: 10.7172/1689-9024.YARS.2016.9.14.4, 119. See also Maciej Bernatt, ‘The control of Polish courts over the infringements of procedural rules by the national competition authority. Case comment to the judgment of the Supreme Court of 19 August 2009 – Marquard Media Polska (Ref. No. III SK 5/09)’ (2010), *Yearbook of Antitrust and Regulatory Studies*, vol. 2010, 3(3), 302.

²⁵ Dubravka Akšamović, ‘Judicial review in competition cases in Croatia: Winning and losing arguments before the High Administrative Court of the Republic of Croatia’ (2020) *Yearbook of Antitrust and Regulatory Studies*, vol. 2020, 13(22) doi: 10.7172/1689-9024.

Although the decisions of Kosovo's Authority were not the best possible, in terms of justifying the violations of competition rules, seeing as they were the first decisions for the Authority itself, the trajectory of competition law enforcement was on the right course. Its very first case, the *Insurance Companies Case*, saw the Authority impose fines on the ten participating insurance companies for their violation of competition rules, in addition to having managed to obtain a written copy of the agreement on price fixing agreement, directly affecting many consumers. An easy victory was expected to occur, and thus with a positive epilogue for the Authority. Moreover, the decisions of the Authority would have been welcomed by many citizens who do not know the rules of competition law, since Kosovo did not have a competition culture at all.

Apart from the fact that the judiciary lacked a healthy competition culture, since Kosovo had not enforced its LC of 2004 until 2008, the judges did not have any specific education, nor any training, in the field of competition law. This made the aforementioned two cases the first judicial cases in the field of competition law in the country. The Academy of Justice of Kosovo, responsible for training its judges,²⁶ has no training programme in the field of competition law within the initial training process for judges,²⁷ nor does it have one in the more advanced training programme,²⁸ for newly appointed judges as well as existing ones. All these factors taken cumulatively are sufficient indicators of the lack of a judicial culture in the field of competition law in Kosovo. Another factor that had historically put competition law at a disadvantage, was that the competence to review competition law cases rested with Kosovo's Administrative Court. However, after more than a decade of judicial review, the competence to hear competition cases has now shifted from the Administrative to the newly established Commercial Court, which shall be elaborated on in this paper as well.

YARS.2020.13.22.1, 16; see also Alexandr Svetlicinii, 'The Judicial Review of the Standard of Proof in Cartel Cases: Raising the Bar for the Croatian Competition Authority Case – comment to the Judgment of the Constitutional Court of the Republic of Croatia No. U-III-2791/2016 of 1 February 2018 (*Sokol Marić d.o.o.*)' (2018), vol. 2018, 11(18) doi: 10.7172/1689 9024.YARS.2018.11.18.13.

²⁶ See the Academy of Justice of Kosovo <<https://ad.rks-gov.net/en/home>>.

²⁷ The Academy of Justice of Kosovo, Initial Training Program for Newly Appointed Judges 2023–2024 <https://ad.rks-gov.net/Uploads/Documents/PTFgjqtar2023eng_.pdf> accessed 18 June 2023.

²⁸ The Academy of Justice of Kosovo, Training Program 2022 <https://ad.rks-gov.net/Uploads/Documents/PTPTV2022eng_.pdf> accessed 18 June 2023.

IV. The establishment of the Commercial Court

Since the approval of Kosovo's first legislation on the protection of competition, the judicial review power has rested on the Administrative Court, which handled all administrative disputes including fiscal, public procurement, competition, customs and other administrative cases.²⁹ As such, the Administrative Court had exclusive jurisdiction on the adjudication of administrative disputes for all of the Kosovo territory. As a result of the exclusive nature of its jurisdiction, the number of inbound cases was very high, and it took the Administrative Court several years to adjudicate a case because of backlog.

Moreover, the quality of the adjudication of competition cases also left a lot to be desired. Judges in Kosovo did not acquire sufficient knowledge on competition law during their university education, nor from the Academy of Justice of Kosovo.³⁰ Consequently, most of the decisions of the Authority were reviewed more from the procedural point of view, rather than the actual content of the decisions. Judges were more prone to apply the Law on Administrative Procedures, rather than Kosovo's competition law. Likewise, Kosovo's judiciary was widely perceived as biased and professionally incompetent. According to surveys, only 39.7% of citizens believe that the judiciary in Kosovo is impartial.³¹ According to the EU Kosovo 2022 Report, the judiciary needs to increase its efficiency in handling administrative disputes to ensure citizens' rights and access to administrative justice.³²

However, in order to address the challenges of stagnant and poor quality of jurisprudence, especially in business-to-business disputes (including competition cases), the Government of Kosovo has initiated the establishment of a Commercial Court, which took place in 2022. The Commercial Court shall have the competence to adjudicate competition law disputes, among its other powers.³³ By its very nature, the purpose of establishing the Commercial Court was to increase the speed and quality in the handling of commercial cases, with a purpose to improve the business climate in Kosovo.³⁴

²⁹ Law no 06/L – 054 on Courts, Art 17 (Official Gazette 22/18 December 2018), Article 17, Law on Courts <<https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=18302>>.

³⁰ See (n 25) and (n 26).

³¹ Public Pulse XVIII, Prepared by UNDP Kosovo Public Pulse Project team, April 2020, 10. <<https://www.undp.org/kosovo/publications/public-pulse-xviii>>.

³² The EU Kosovo 2022 Report, 15.

³³ Law No. 08/L-015 on Commercial Court <<https://gzk.rks-gov.net/ActDetail.aspx?ActID=53748>> [hereinafter: Law on Commercial Court].

³⁴ Law on Commercial Court, Article 13 [Competences of the Commercial Court].

The Commercial Court of Kosovo is an integrated type of court, since the First Instance and the Second Instance Chambers operate under the same umbrella, and the review of the legality of its rulings is not subject to the Court of Appeal of Kosovo.³⁵ The First Instance Chambers of the Commercial Court are composed of four separate Departments: 1) the Economic Department; 2) the Fiscal Department; 3) the Administrative Department; and 4) the General Department. Within the Department for Economic Matters, a separate division deals with disputes concerning foreign investors, which has jurisdiction over the entire territory of Kosovo. This institutional change was made with the aim that court cases with an economic character, including those based on competition law, are finalized within a shorter time. Through this legal change, the Government intends, on the one hand, to improve the business environment for local companies, and, on the other hand, to attract more foreign investments.

V. The initial challenges of the Commercial Court

Despite the fact that the Commercial Court was established in order to be more efficient and to shorten the decision-making time, because of its broad competences, it has ‘inherited’ a large number of open cases from other courts. As a result, each judge appointed to the Commercial Court, has been assigned

³⁵ Law on Commercial Court, Article 4 [Jurisdiction]. The legal powers of this court are: ‘1.1. disputes between local and foreign business organizations, as well as disputes between public and private legal persons, related to mutual business issues and other issues between them; 1.2. legal remedies, as defined in the applicable law on enforcement procedure, on issues falling under the competences of this Court; 1.3. recognizing and allowing the enforcement of local and international arbitration awards; 1.4. court disputes arising from the applicable Law on Business Organizations; 1.5. reorganization, bankruptcy and termination of business organizations; 1.6. disputes concerning obstruction of possession between business organizations, 1.7. disputes between business organizations regarding the real rights, as provided by the Law on Property and Other Real Rights and the Law on Business Organizations; 1.8. disputes related to the violation of *competition*, misuse or monopoly and the dominant position in the market as well as monopoly agreements including the assessment of illegality; 1.9. protection of copyright and industrial property rights, including trademarks, patents, industrial design, commercial secrets and other forms of industrial property as foreseen by relevant legislation; 1.10. disputes between aviation companies subject to the Law on Aviation, excluding disputes concerning passenger rights; 1.11. administrative disputes initiated by business organizations against the final decisions of Tax Administration, Customs Authorities, Ministry of Finance and any other public body in charge of imposing taxes or other state duties; 1.12. administrative disputes initiated by business organizations against final decisions in administrative proceeding; 1.13. and other matters as may be provided by law’.

one thousand unresolved cases.³⁶ According to data from the monitoring of Kosovo's courts, a case takes an average of 5.3 years to be closed with a final ruling in regular courts.³⁷ In the current situation, if each judge has been assigned a thousand open cases, this means that it will take 4–5 years to resolve only these “inherited” cases, and only in the 1st instance. According to the available data, the average number of cases adjudicated per year by a judge in the regular courts of Kosovo is 213.6 per year;³⁸ still, regulations adopted by the Kosovo Judicial Council require that each judge adjudicate at least 329 per year.

The delay experienced by procedural parties in getting a final verdict in their case within a reasonable timeframe, has not gone unnoticed by the European Union, which, in its Kosovo report states:

‘Also, the time taken for judgments (i.e. the average time from filing a court case to receiving a judgment) remains a cause for concern as they are overall far too long. In 2021, the disposition time stands at 1 339 days for civil/commercial cases in first instance and 798 days for administrative cases in first instance. At second instance, that is 646 for civil/commercial cases and 426 days for administrative cases’.³⁹

Having said that, in the initial phase at least, the Commercial Court is not likely to improve the adjudication of disputes, as it was originally expected. When it comes to the merits of the cases, it remains to be seen whether the quality of judgments will actually improve.

VI. Professional competence of judges within the Commercial Court to handle competition cases

Since the concept of a free-market economy is relatively new to Kosovo, as is the case for most countries in the Western Balkans region, adequate education of judges in relation to competition law is needed. Initially, judges educated in Kosovo receive very rudimentary training on competition law, due to old fashioned law school curricula.⁴⁰ Moreover, the Academy of Justice of

³⁶ Interview of the President of the Commercial Court, Mahir Tutuli <[³⁷ Kosovo Law Institute, ‘Regress of Civil Justice in Kosovo. A monitoring report of 2021’ 9.](https://www.dukagjini.com/kryetari-i-gjykates-komerciale-numri-i-gjyqtareve-eshte-i-vogel-nje-prej-tyre-dote-pranoje-mbi-nje-mije-lende//>.</p></div><div data-bbox=)

³⁸ Ibid. 8.

³⁹ European Commission, Commission Staff Working Document, *Kosovo 2022*, SWD (2022) 334 final. Brussels, 12.10.2022, 1, 22.

⁴⁰ See the list of all subjects to be taken for a Bachelor degree in law (in Albanian only) <[https://juridiku.uni-pr.edu/Departamentet-\(1\)/Bacelor.aspx](https://juridiku.uni-pr.edu/Departamentet-(1)/Bacelor.aspx)>. In the Faculty of Law at the

Kosovo does not have a comprehensive training programme for judges and for professional staff on competition matters.⁴¹ Therefore, it is not surprising that Kosovo's judiciary enforces competition rules based on general administrative law, rather than on competition law.

As a result of the lack of training on competition protection and legal education in the field of competition law, judges are facing a number of challenges as they are having difficulties in recognising their role. For instance, according to the legal framework in places, the Kosovo Competition Authority is allowed to conduct unannounced inspections at the premises of a procedural party, as well as third parties.⁴² However, before conducting such inspection the Authority has to request the court to authorize it. Until June 2021, courts refused to authorize inspections since the Administrative Court and the Criminal Court were having doubts on who should authorize inspections and under what rules, administrative or criminal. Therefore, the Supreme Court of Kosovo had to issue an Instruction that identified the Administrative Court as the competent body to review requests for unannounced inspections.⁴³

This fact illustrates that Kosovo is still at an early stage of the development of a competition culture and of the enforcement of its competition legislation that is currently in force.

VII. Private enforcement of Competition Law in Kosovo

Albeit Kosovo had its first LC of 2004 since 2004, Law on Protection of Competition of 2010 (hereinafter: LPC of 2010), and now its third, the Law on Protection of Competition in 2022 (hereinafter: LPC of 2022), it can be said that the necessary enforcement pillars are complete only now. The first pillar of competition law enforcement, that is public enforcement, has been introduced by the LC of 2004, but it started to be enforced only after 2008 when the Kosovo Competition Authority was actually established. However, it is only the LPC of 2022 that has advanced the private enforcement pillar, by explicitly recognizing stand-alone actions, finally filling the significant and long standing

University of Pristina, which is the oldest and largest law school in Kosovo, competition law is an elective course taught only in the first year of Bachelor studies. At the Master level it is not part of the syllabus.

⁴¹ See (n 24–26).

⁴² Law no 03/L-229 on Protection of Competition, Art. 40 (Official Gazette No 88/2010, 25.11.2010) [hereinafter: LPC of 2010].

⁴³ The Supreme Court of Kosovo, Guide approved at the General Session of the Supreme Court, held on 10 June 2021.

void necessary for an effective enforcement of its competition legislation. The latest legal changes are therefore expected to complete the legal framework in the field of competition law, complementing its public enforcement pillar with private enforcement. These legal changes largely reflect the need for Kosovo to further align its legal framework with that of the EU.⁴⁴

The LPC of 2022 stipulates that an undertaking that violates this law must compensate the damage it has caused to another undertaking or to a person. Such compensation shall be awarded through a regular civil court. Article 63 of the LPC of 2022 reads as follow:

‘Legal remedies against causing damage

1. The enterprise that violates this law must compensate the damage caused to the enterprise or other person, in accordance with the legislation in force.
2. Anyone whose legitimate interest is violated by a restrictive action from Article 5 or 9 of this law can request through the court:
 - 2.1. termination of illegal action;
 - 2.2. compensation for the damage caused’.⁴⁵

Up-to-date research related to the enforcement of competition law in Kosovo⁴⁶, has not found any cases registered in the courts for the compensation of damages as a result of the actions of an enterprise or enterprises that constitutes a violation of Kosovo’s competition law. This fact is mainly attributable to the lack of a specific legal basis that provides for a right to damages. However, this situation is expected to undergo changes based on the new LPC of 2022, which expressly guarantees the right to seek compensation for harm caused to a natural or legal person by any undertaking acting in violation of Kosovo’s competition law.

An adequate legal framework for an effective enforcement of competition rules is a necessary prerequisite, although not sufficient in itself, for the creation of a competitive market. However, such legislation must be supported by an adequate and well-trained institutional framework in the field of competition law. Public enforcement of competition rules in Kosovo has encountered essential challenges when it comes to understanding as well as

⁴⁴ European Parliament and Council Directive 2014/104/EU on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union [2014] OJ L349/1; joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriantico Assicurazioni SpA et al.* [2006] ECR I-6619; Wouter P.J. Wils, ‘Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future’, (2017) *World Competition*, vol. 40, 1.

⁴⁵ Law no. 08/L-056 on Protection of Competition (Official Gazette No. 14, 7 June 2022) [hereinafter: LPC of 2022].

⁴⁶ See (n 13).

correctly and effectively protecting competition law goals by the judiciary; similar difficulties are expected to follow private enforcement as regards stand-alone actions.

A criticism voiced years ago about the ineffective judicial enforcement of competition law, was based on the fact that the Authority's decisions were reviewed by the Administrative Court.⁴⁷ Therefore, the establishment of the Commercial Court, and the transfer of judicial review of competition cases to the new court, was seen as a good opportunity for a substantive shift in the implementation of competition policies. The belief was that the Commercial Court will most likely follow a market-oriented approach, rather than pursue the formal aspects of judicial review, which do not fit competition law.

The shift of judicial review powers from the Administrative Court to the Commercial Court is a significant pre-requisite for a more effective enforcement of competition law, albeit it is not self-fulfilling. In the last decade, assessing the results of judicial review of competition cases by the Administrative Court, one of the problems observed was the approach of the Court – that the main focus of the Administrative Court's assessment was placed on procedural facets,⁴⁸ rather than the merits of the cases from the competition law point of view.

With the establishment of the Commercial Court, and the assignment of the competence to review competition cases to the latter, the legitimate expectations are that competition cases will be given more attention from the prism of competition law objectives, rather than the procedural one. Formalism is not embodied in competition law enforcement.

Kosovo seems to be the last country in the Western Balkans that explicitly provided stand-alone actions in its law, thus making it possible to seek compensation for damages.⁴⁹ However, like most new legislations that bring difficulties in their enforcement, the same is expected to follow for stand-alone actions too. This is more related to the fact that the courts of Kosovo have are notably deficient in the field of competition law in general, and private enforcement in particular, since the Commercial Court is a new institution too.

Having said that, the Authority should organize a widespread education campaign to popularize the rights that natural and legal persons have to seek compensation when they believe that competition law has been violated to their detriment. On the other hand, training for judges of the Commercial Court

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ See Gentjan Skara, 'Europeanisation of Albanian Competition Law: the case of Albania' (1st edn, Springer 2022) 1; Ermal Nazifi and Petrina Broka, 'Review of Ten Years of Albanian Competition Law Developments' (2015), *Yearbook of Antitrust and Regulatory Studies*, vol. 2015, 8(11).

in the field of competition law is necessary. Such training can be organized by the Kosovar Academy of Justice, as the institution competent to provide training for judges. Given the fact that the field of competition is specific, similar training efforts by the Authority in cooperation with the Academy of Justice would also be a good choice. Nevertheless, competition law-related training should be more comprehensive and continuous.

VIII. Conclusion

The role of the Kosovo Competition Authority in the effective enforcement of competition law is indispensable. The Authority is not only the guardian of the enforcement of competition rules itself, but it has a responsibility in relation to other institutions also, with respect to how they play their role towards sound competition in the market. However, a crucial fact must be acknowledged, no matter how effective the Authority is in the enforcement of the LPC, if its efforts are not followed in the judicial review phase, it is almost impossible to have a truly effective enforcement of competition law.

It is imperative therefore, that both sides of the coin work properly within their respective competences to achieve effective enforcement of competition law. The administrative pillar alone cannot achieve the goals of competition law, if the judiciary does not understand and correctly apply the provisions and goals that competition law embodies. In Kosovo, existing judicial practice is not satisfactory. It is exceedingly important for the judiciary to first understand the purposes of competition law, and then its own role in protecting and promoting competition rules. Judges must pay more attention to the merits of a case from the viewpoint of competition law, and not limit themselves to reviewing formal procedural aspects only, as current judicial practice has demonstrated.

The establishment of the Commercial Court is a good foundation for the examination of competition cases with greater attention from the market economy point of view. Formalism is not the best ally of effective enforcement of competition law. However, the aforementioned large number of cases inherited from other courts remains an initial challenge for the Commercial Court. It remains to be seen and assessed in the near future what the Commercial Court's approach towards competition law will be once its first rulings are taken on this subject matter.

The latest changes that the new LPC of 2022 has brought, are also related to, *inter alia*, the fact that from now on it is possible to seek damage compensation by all those whose legitimate interests have been violated by actions breaching

competition law. This was a necessary precondition for affected entities to seek compensation. However, just like public enforcement, stand-alone actions are expected to be accompanied by challenges as well, especially within the judiciary, since it is a completely new mechanism for enforcing the law in general, and competition law in particular.

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LEGISLATIVE DEVELOPMENTS AND CASE LAW REVIEWS

Overview of New Soft-Law Materials Designed to Promote Competition Law Compliance in Serbia

by

Maja Dobrić*

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Abstract

The last three years have been very dynamic for the competition authority in Serbia. The newly elected Council and President of the Commission for Protection of Competition (Serbian NCA) have brought a much-needed change to competition enforcement in Serbia, shifting the focus of enforcement from solely individual cases, to looking at the bigger picture and promoting competition law compliance as the preferred business model. During this period, the Serbian NCA has published

* Maja Dobrić, LL.M., Senior Adviser at the Serbian Competition Authority (Commission for Protection of Competition), Belgrade (Serbia). E-mail: maja.v.dobric@gmail.com. The views expressed here are those of the author and do not necessarily reflect those of the Commission for Protection of Competition.

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several soft-law instruments, issuing its first Guidelines for Drafting compliance programmes, accompanied by a Template compliance programme and two compliance Checklists, aimed at identifying competition law related risks. These materials, meant to raise competition law awareness, were accompanied by vigorous advocacy activities in promoting competition law compliance. The overall aim was to foster voluntary compliance with competition law, promoting competition as a positive value in doing business, and ensuring compliance from the bottom up.

Resumé

L'Autorité de la concurrence serbe a été particulièrement dynamique durant ces trois dernières années. Le Conseil et le président nouvellement élus de la Commission pour la protection de la concurrence (ANC serbe) ont apporté un changement indispensable à l'application du droit de la concurrence en Serbie en mettant l'accent non plus sur les seuls cas individuels mais sur une vision plus globale et en promouvant le respect du droit de la concurrence en tant que modèle d'entreprise à privilégier. Au cours de cette période, l'autorité nationale de concurrence serbe a publié plusieurs instruments juridiques non contraignants, notamment ses premières lignes directrices pour l'élaboration de programmes de conformité, accompagnées d'un modèle de programme de conformité et de deux listes de contrôle de la conformité, visant à identifier les risques liés au droit de la concurrence. Ces activités, destinées à sensibiliser au droit de la concurrence, ont été accompagnées de plaidoyers vigoureux promouvant son respect. L'objectif global était de favoriser le respect volontaire du droit de la concurrence, de promouvoir la concurrence en tant que valeur positive dans la conduite des affaires et d'assurer le respect ascendant (bottom-up) du droit de la concurrence.

Key words: competition law; guidelines; Serbia; competition compliance.

JEL: K21, L4

I. Introduction

Since 2021, competition enforcement by the Serbian National Competition Authority (the Commission for Protection of Competition, hereinafter: the Serbian NCA or NCA) has taken a proactive approach to promoting competition compliance and creating a competition culture. These activities were based on the premise that general competition law education of undertakings and stakeholders, as well as raising awareness of competition rules, can promote voluntary compliance and mitigate ex-post enforcement of competition rules, to help strengthen the overall competitive outlook.

Although more than fifteen years have passed since the establishment of the Serbian NCA and the adoption of the first modern competition law in Serbia, the NCA found an evident lack of awareness of undertakings across economic sectors, regardless of their size, when it comes to the powers and competences of the Serbian NCA, competition rules in general, and competition compliance. What is more, most of the infringement cases in Serbia have been the result of negligent actions of undertakings with insufficient knowledge or understanding of competition law.¹

Even though competition rules are applicable across all sectors of the economy and to all undertakings (all entities involved in the trade of goods and services in the Republic of Serbia),² when it comes to actual awareness of competition rules, there are significant discrepancies across company structures and regions. Multinational companies doing business in Serbia tend to have compliance programmes, often imported from their parent companies or copied from other jurisdictions. However, these programmes are mostly modelled on EU law and often refer to competition law issues in just a few provisions, outlining the most basic principles related to competition infringements.

On the other hand, over 99% of companies in Serbia are classified as micro, small and medium-sized enterprises (SMEs),³ scattered across the national territory, often family-owned and, almost always, doing business without a legal department or ongoing legal aid (except in the areas of labour law or permits). For this second group of smaller, local companies, competition rules and the need for compliance have been largely overlooked, leaving them exposed to the risks of negligent infringements of competition law.

After identifying a pattern that amounts to an overall widespread lack of competition law awareness, the Serbian NCA decided that individual enforcement alone would not be sufficient to tackle all of the market problems and anti-competitive conduct, which occurred as a consequence; hence, proactive steps would be required to remedy this.

Starting from the final quarter of 2021, the Serbian NCA engaged in extensive advocacy activities, ranging from the publication of new materials, to lectures and presentations made to the general public throughout 2022.

¹ Commission for Protection of Competition, 2021. 'Guidelines for Drafting Competition Compliance Programs' <<https://www.kzk.gov.rs/kzk/wp-content/uploads/2011/08/Compliance-guidelines-CPC.pdf>> accessed 29 March 2023.

² Article 3 of the Serbian Law on Protection of Competition (LPC), Official Gazette of the Republic of Serbia, No. 51/2009 and 95/2013.

³ OECD, 2022. 'SME Policy Index: Western Balkans and Turkey 2022: Assessing the Implementation of the Small Business Act for Europe, SME Policy Index'. Paris, OECD Publishing <<https://www.oecd-ilibrary.org/sites/6b999674-en/index.html?itemId=/content/component/6b999674-en>> accessed 29 March 2023.

The NCA also made competition related materials freely available to a wider business community in Serbia. Advocacy activities are one of the core competencies of the Serbian NCA in accordance with Article 21 of the Law on Protection of Competition (“Official Gazette of the Republic of Serbia”, No. 51/2009 and 95/2013, hereinafter: LPC). Among other things, the NCA is authorized to undertake activities to raise awareness on the necessity to protect competition.⁴ In earlier years, advocacy activities have often been aimed at governmental bodies and only sporadically to promoting general awareness of competition rules. However, the last two years show significant progress when it comes to the activities of the Serbian NCA in raising this kind of awareness, and strengthening voluntary competition law compliance and advocacy activities aimed at the wider public. This has been one of the first attempts the NCA has made in promoting compliance programmes as a form of voluntary application of competition law.

II. Soft-law instruments aimed at increasing the level of awareness

To raise awareness and promote a healthy competition culture, the Serbian NCA took proactive steps in two directions – firstly, by drafting and publishing soft-law instruments and, secondly, by engaging directly with representatives of companies in Serbia, through interactive workshops. These activities were combined and developed over time, culminating with the publication of relevant competition law materials online and distribution of these materials through the Serbian Chamber of Commerce (hereinafter: Chamber of Commerce).

It is important to note that all of these activities have been carried out free of charge for any undertakings subject to competition rules, and that both the workshop materials as well as the competition law compliance materials have been made available online for free. This attempt of the Serbian NCA was made primarily with the purpose of providing free general clarifications to companies, which are most likely unable to afford specialized lawyers, and to enable smaller companies to assess their exposure to competition law related risks, and to take steps to mitigate these risks.

⁴ Article 21, par. 1, point 11, LPC (n 2).

1. Guidelines for Drafting Competition Compliance Programmes

The activities of the Serbian NCA of using soft-law instruments as a tool for promoting compliance, began in December 2021, when the NCA published its Guidelines for Drafting Competition Compliance Programs (hereinafter: Compliance Guidelines) on its official website.⁵ The Compliance Guidelines are intended to help undertakings in Serbia in assessing their exposure to competition law related risks, and to help them draft customized compliance programmes to ensure that businesses comply with competition rules. To help undertakings, particularly those without sufficient resources at their disposal, the Serbian NCA provides a general description and clarifications of the individual “steps” to be taken when adopting such programmes and an outline of the key risks to consider.

In addition to providing a simple and comprehensive overview of existing competition rules, the Compliance Guidelines introduce concepts which have been overlooked in the past. One of these is stressing the need for “public distancing” when a company partakes in a meeting that entails the exchange of information, which could be anticompetitive, as a standard established in EU case law. In addition, the Compliance Guidelines clarify for the first time the standards for refusal to deal as well as collective boycott, which have yet to be implemented in the decisional practice of the Serbian NCA. From a more practical point of view, the Compliance Guidelines contain links to comprehensive materials available for competition law training in Serbian, and clarify what companies need to be aware of in conducting their daily business activities.

1.1. Information exchange

In the section on “horizontal agreements” posing competition law risks, the Compliance Guidelines reiterate an older opinion on the exchange of information under the headline “When does an exchange of information give rise to competition concerns”. The Compliance Guidelines clarify that although the exchange of commercially sensitive information allows companies to adapt their commercial policy to their competitors’ strategy better and in a more timely manner but, at the same time, such information exchanges increase the probability of creating anticompetitive effects on the market, or raise concern about increased coordination in the future market scenario.⁶

⁵ Compliance Guidelines (n 1).

⁶ Commission for Protection of Competition, 2015. ‘Annual Report 2014’ <http://www.kzk.gov.rs/kzk/wp-content/uploads/2015/04/godisnji_izvestaj_kzk_2014.pdf> accessed 30 March 2023.

In the section titled “Prevention”, the Compliance Guidelines state that, in principle, the exchange of information is allowed when it concerns (1) non-strategic information, (2) information exchanges among undertakings to create market statistics, depending on the market characteristics, provided the data is older than one year and is in an aggregated form, or (3) exchanges of recent commercial information intended to create statistical data of individual markets to be used by associations of undertakings, provided that individual undertakings can only access aggregated market data.⁷ The Compliance Guidelines continue to clarify which sources of information about competitors are allowed in principle, and which are prohibited.⁸

In the section on practical advice, the Compliance Guidelines contain the standard of “public distancing” as established in *Silec*⁹:

*“If you attend a meeting where competitors agree on pricing or other commercially sensitive information or exchange views on these issues, it is necessary to immediately disassociate (distance) yourself unequivocally from the discussion and recluse yourself from the conversation, i.e., leave the meeting in which they continue, by making it abundantly clear to others that you do not want to take part in any such agreement. Only under such conditions and in those circumstances can you avoid responsibility for the resulting competition violations. Adopting a passive approach during the meeting or subsequent non-application of an agreement following the meeting does not absolve you of responsibility.”*¹⁰

This topic was also one of the key points emphasized by the presenters in the workshops promoting competition compliance programmes. During the workshops, the participants were given examples of competition infringements, such as the recent Serbian NCA’s decision related to *VTI services*,¹¹ which was reviewed by the Administrative Court. The court delivered a ruling in its administrative dispute proceedings, clarifying the standard of proof when it comes to the exchange of information.

The Serbian Administrative Court found that identifying a single meeting where information was exchanged was sufficient to establish the existence of a restrictive agreement, and that such an agreement on prices was a competition

⁷ Compliance Guidelines (n 1).

⁸ *Ibid.*

⁹ Judgement of the Court of 14 November 2019, Case C-599/18 P *Silec Cable SAS v Commission*, ECLI:EU:C:2019:966.

¹⁰ Compliance Guidelines (n 1).

¹¹ Decision of the Commission for Protection of Competition of 30 November 2020, No. 4/0-02-56/2020-33 <<http://www.kzk.gov.rs/kzk/wp-content/uploads/2021/01/Decision-on-measures-for-protection-of-competition-vehicle-inspection-services.pdf>> accessed 29 March 2023.

restriction by object. The Court clarified also that the “incomplete application or non-application of the Price List by the plaintiff in the proceedings does not represent a factor influencing the existence of a violation of competition by object.” The ruling goes on to state that “this is due to the fact that it was established in the proceedings that a meeting was held where information on future prices was exchanged, so that the present representatives of the VTI companies did not make decisions on prices individually and independently, which is the basis of market competition, but in accordance with the information from the meeting, that is, at the agreed prices”.¹² Although this standard has been established in the case law of European courts, this is the first time a court in Serbia has explicitly acknowledged it; hence, the ruling is crucial for the further development of cases related to the exchange of information considered to be restrictive agreements.

1.2. Refusal to deal

The Compliance Guidelines introduced the standard for refusal to deal, which has not yet been clarified in the decisional practice of the Serbian NCA. Dealing with specific forms of abuse of dominance, the NCA notes that: “As a general rule, suppliers have the right to choose who they wish to deal with; however, in certain cases, refusal to deal/supply may be considered to be an abuse of dominance.”

The Compliance Guidelines go on to outline the elements required in order to establish and pursue a theory of harm based on alleged refusal to deal and list these conditions, aside from having a dominant position, as follows:

- “1. the refusal relates to a product or service that is objectively indispensable input, essential for the customers to be able to compete effectively in a downstream market;
2. the refusal is likely to lead to the elimination of effective competition in the downstream market;
3. the refusal is likely to lead to consumer harm;
4. the conduct concerned is not objectively justifiable.”

2. Template Compliance Programme

Following the positive public response to the Compliance Guidelines,¹³ the Serbian NCA identified a need for further clarification to facilitate the implementation of the Compliance Guidelines. As a result, the NCA drafted

¹² Judgement of the Serbian Administrative Court of 4 July 2021, No. I-7 U 24498/20.

¹³ Many law firms published positive critic and informed their clients through newsletters about the activities of the Serbian NCA.

a Template Compliance Programme (hereinafter: Template), published on its official website in June 2022.¹⁴ The Template provides practical guidance and examples of potential structures for compliance programmes, and gives further guidance on issues such as information exchange, business situations that can lead to competition infringements and general advice on implementing and monitoring competition compliance programmes.

The Template is not intended to serve as a mandatory form but as an example, with the aim of enabling undertakings, which decide to create their own compliance programmes, to actually go through with the decision to formulate and implement a compliance programme in their business. The Serbian NCA emphasises the need to tailor-make and customize compliance programmes to the needs of a particular company, and to have such programme adjusted to the market or markets where that specific company operates, as the competitive conditions may vary in different markets and industries.¹⁵

In order to ensure the effectiveness of compliance programmes, the recommendation of the Serbian NCA is to develop a culture of cooperation and trust within the company, aimed at solving problems, rather than focusing only on sanctioning employees for breaching such rules.¹⁶ The basic premise behind this recommendation is that problems tend to grow if kept in the dark, and that most competition law risks can be resolved through adequate and appropriate risk assessment and actions. The Template notes that it is in the best interest of the company for the risks to be identified, and for adequate measures to be taken, as soon as possible. It is better for the company to remove or reduce the perceived risks, rather than for its employees being incentivized to avoid reporting perceived problems, out of fear of internal sanctions that they might suffer themselves, which leaves the company itself exposed to risk.

The Template contains an indicative list of conducts to avoid, situations that may increase risks of competition law infringements, and sources of market information that can lead to collusion, and thus expose the company to risks related to competition law infringements. It also recommends for compliance programmes to contain internal mechanisms for cooperation with the Serbian NCA during its investigative procedures. Companies should also ensure that

¹⁴ More information about the Template are available at: <<https://www.kzk.gov.rs/en/komisija-pripremila-model-programa-u> and the full text in Serbian>; <<https://www.kzk.gov.rs/kzk/wp-content/uploads/2022/10/Model-programa-uskladjenosti-poslovanja-sa-propisima-o-zastiti-konkurencije.pdf>> accessed 30 March 2023.

¹⁵ Commission for Protection of Competition, 2022. 'Template Compliance Program', <<https://www.kzk.gov.rs/kzk/wp-content/uploads/2022/10/Model-programa-uskladjenosti-poslovanja-sa-propisima-o-zastiti-konkurencije.pdf>> accessed 30 March 2023.

¹⁶ Ibid.

employees are familiar with the obligation to submit data, the rights and obligations during the implementation of dawn raids, and the conditions for imposing procedural penalties in accordance with the LPC. The aim of this approach is to avoid risks that may arise due to ignorance of the rules of procedure before the Serbian NCA, such as procedural penalties. In the NCA's decisional practice, this has been identified as a problem, which often occurs out of negligence, and the NCA has already fined¹⁷ several companies for failing to submit requested documents and data. This is a procedural risk that can easily be avoided if companies are aware of the potential consequences of ignoring requests for information.

3. Competition Checklists

As a further step in aiding the business community in complying with competition rules, in October 2022, the Serbian NCA published two Competition Checklists (in the form of printed leaflets) to help identify risks related to competition law infringements – one for restrictive agreements and one for the abuse of dominance. The leaflets are designed as lists of specific YES/NO questions, phrased in simple terms, which companies can use in assessing their exposure to the risks of breaching competition rules and being held liable for competition infringements. The printed materials stress some of the key issues and risks to be taken into consideration in shaping market conduct, and should ensure an easier and faster risk assessment by companies as well as help speed up the compliance process.

The Checklists are the first instruments the Serbian NCA issued to assist companies in assessing individual competition law related risks.

3.1. Competition Checklist: “Dominant Position and Abuse”

The “Dominant Position and Abuse” Checklist contains two segments to be assessed. The first explains the concept of dominance and presents eleven “yes or no” questions to help companies assess whether they could hold a dominant position. In particular, it guides companies through questions related to the structure of the market, the various parameters associated with market power, and the role their company plays on the particular market.

After the first set of questions, the Dominant Position and Abuse Checklist provides guidance on how to assess the results of the aforementioned assessment, stating that if the answer to one or more of the above questions

¹⁷ Article 70 LPC provides for cases where procedural penalties of 500 to 5000 EUR per day can be imposed, including those related to failure to submit requested documents and data.

is “yes” (especially to one of the first five questions), there is a possibility that the company holds a dominant position. In that case, it is desirable to make a risk exposure assessment in terms of committing an abuse of a dominant position. However, if the company does not have a dominant position, until and unless its circumstances change, there is no greater need for the company to review and adjust its operations in terms of the risk related to potential abuse of a dominant position. The Dominant Position and Abuse Checklist advises companies to do this procedure for each market and each level at which the company operates.

The second part of this Checklist is used to assess whether the conduct of a company that holds or may hold a dominant position can be considered abusive. This segment consists of questions related to individual forms of abusive behaviour, by scanning the companies’ market conduct for particular activities that can amount to an abuse of dominance. The eleven questions in the second part of the Dominant Position and Abuse Checklist relate to both exclusionary and exploitative conduct.

Once the second part of the self-assessment is completed, the Dominant Position and Abuse Checklist explains that if the answer to one or more of the questions listed in part two of this Checklist is “yes”, there is a possibility that the company is exposed to the risk that its market conduct amounts to an abuse of a dominant position. In that case, for each of the business policies that represent a competition law risk, it is necessary to assess whether there is an objective reason that could justify the actions of the dominant company.¹⁸

3.2. Competition Checklist: “Restrictive agreements”

The second soft-law document, the “Restrictive Agreements” Checklist, refers to restrictive agreements and is also divided into two parts, distinguishing between: risks that occur in business relations with competitors (horizontal agreements), and risks that occur in relations with customers or suppliers (vertical agreements). The first part of this Checklist helps companies self-assess potential risks of committing a competition law infringement when dealing with competitors. The Restrictive Agreements Checklist guides companies to assess whether their company (or any employee of the company) engages in various forms of information exchange, price fixing or other forms of horizontal collusion with its competitors (or any employee of a competitor).

The Restrictive Agreements Checklist indicates that if the company answers positively to one or more of the aforementioned questions, there is a possibility that that company is exposed to the risk of committing a competition law infringement by colluding with its competitors. Given that agreements

¹⁸ “Dominant Position and Abuse” Checklist.

between competitors are among the most serious competition infringements, the Restrictive Agreements Checklist goes on to inform companies about the Leniency Programme (conditions for exemption from the payment of fines for infringements of competition law).¹⁹

The second part of the Restrictive Agreements Checklist helps companies assess whether they are exposed to the risk of committing a competition law infringement in their dealings with suppliers or customers. The questions listed here relate mostly to individual forms of vertical restraints contained in the current Vertical Block Exemption Regulation²⁰ in Serbia.

Provided that companies respond positively to questions related to vertical agreements, the Restrictive Agreements Checklist advises them to consider whether the conditions stipulated by the Serbian vertical block exemption regulation are met, directing the companies to the relevant regulation. If they are not, this Checklist stresses that companies should consider the possibilities of an individual exemption of the agreement from the prohibition.

III. Conclusion

The Compliance Guidelines, the Template and the two Competition Checklists form a comprehensive soft-law package covering the Serbian NCA's activities aimed at promoting a healthy competition culture in Serbia. Following the cooperation between the NCA and the Serbian Chamber of Commerce in 2022, the compliance materials have been published online on a separate page of the website of the Chamber of Commerce²¹. Moreover, links to these materials have been distributed through the mailing lists used by the Chamber of Commerce to communicate with companies across regions and industry sectors. This solution significantly increased the transparency of competition law materials for all undertakings.

The new soft-law instruments issued by the NCA have been welcomed by the Serbian business community. The first results of its activities to promote competition compliance have already begun to show, and undertakings have already started using the compliance programme Template when drafting their compliance programmes. In addition, since the introduction of the soft-law

¹⁹ "Restrictive Agreements" Checklist.

²⁰ Regulation on agreements between market participants operating at different levels of production or distribution that are exempt from the ban, Official Gazette of the Republic of Serbia, No. 11/2010.

²¹ Materials are available in Serbian: <https://pks.rs/strana/poslovanje-u-skladu-sa-pravilima-konkurencije>

materials on compliance, there has been an increase in activities of law firms, consultants and law schools in promoting competition law and compliance as a topic.

In order to tackle the overall problem regarding the lack of awareness of competition rules, the Serbian NCA will need to continue its advocacy activities and strive to reach as wide an audience as possible when communicating messages related to competition law. For now, the existence of compliance-related materials on competition topics, as well as the ease of the availability of such materials, is a significant step towards ensuring that companies operating in Serbia have the possibility to become familiar with competition rules. Even though significant and systemic changes do not happen overnight, and progress requires a slow and steady pace, the previous three years have set the stage for an improvement when it comes to competition enforcement in Serbia.

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**Between Scylla and Charybdis.
Whatever a Member State Does,
It May Expose Itself to Attacks From Both Sides.
Lux Express Estonia AS**
Case C-614/20, *Lux Express Estonia AS*,
Judgment of the Court of Justice (First Chamber)
of 8 September 2022, EU:C:2022:641*

by

Marek Rzotkiewicz**

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* Judgment of the Court of 8 September 2022, Case C-614/20 *Lux Express Estonia AS* [2022] EU:C:2022:641.

** Marek Rzotkiewicz, Assistant Professor, University Cardinal Stefan Wyszyński in Warsaw, Poland, Faculty of Law and Administration; e-mail: k.marciniak@uksw.edu.pl, ORCID: <https://orcid.org/0000-0001-8428-7966>. The author has nothing to disclose within the meaning of ASCOLA Transparency and Disclosure Declaration. ascola.org/declaration-of-ethics/.

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Abstract

Member States do not need to use state resources when they accomplish their mission. They may employ resources of private undertakings by imposing on them obligations to provide services of general interest (SGI). The latter choice provides Member States with many benefits. But Member States need to be sure that the scheme they created complies with the rules on State aid law. Some Member States make sure that private undertakings carrying out SGI do not obtain the full remuneration for their services. However, the Court's judgment in *Lux Express Estonia* has the potential to change this mechanism, especially as the Court stated that Member States must pay compensation for obligations they impose on private undertakings. What is more, Member States need to be certain they pay the right amount of compensation. Not a penny more, not a penny less.

Résumé

Les États Membres n'ont pas besoin d'utiliser des ressources d'État pour accomplir leur mission. Ils peuvent utiliser les ressources d'entreprises privées en leur imposant l'obligation de fournir des services d'intérêt général (SIG). Ce dernier choix leur offre de nombreux avantages. Mais ils doivent s'assurer que le régime ainsi créé est conforme aux règles relatives à la législation sur les aides d'État. Certains États Membres veillent à ce que les entreprises privées fournissant des SIG n'obtiennent pas la pleine rémunération de leurs services. Toutefois, l'arrêt de la Cour dans l'affaire *Lux Express Estonia* pourrait modifier ce mécanisme, d'autant plus que la Cour a déclaré que les États Membres doivent payer une compensation pour les obligations qu'ils imposent aux entreprises privées. De plus, les États Membres doivent s'assurer qu'ils versent le bon montant de compensation. Ni un sou de plus, ni un sou de moins.

Key words: State aid; services of general interest; public transport; Regulation (EC) No. 1370/2007; obligation to pay compensation.

JEL: K23

I. Introduction

EU law allows Member States to provide services of general interest (hereinafter: SGI) by using the formula of public service obligations (hereinafter: PSO). This means that Member States may impose an obligation on private undertakings to provide SGI under conditions that allow SGI to

fulfil their mission.¹ While doing this, Member States may define or determine specific requirements for the SGI that an operator, if it was considering its own commercial interests, would not assume, or would not assume to the same extent or under the same conditions, without receiving a reward.² Member States can impose such obligations by way of entrustment or based on a general rule. Member States enjoy this freedom in areas such as health care, childcare or care for the elderly, assistance to persons with disabilities or social housing. It provides Member States with an essential safety net for citizens and helps Member States to promote social cohesion.³ But the scope of SGI exceeds social matters and has a broader application.⁴ SGI can cover, e.g. energy, transportation, telecommunications, media, waste disposal and many other areas. Services that Member States at national, regional or local level classify as SGI cover both economic and non-economic activities. The former are subject to the rules on competition, only in so far as it does not obstruct their performance.⁵

By imposing obligations on private undertakings to provide SGI, Member States hope to achieve their goals cheaply and, at the same time, more effectively. They are also keen to escape from the scope of the application of EU rules on State aid. Member States enjoy broad discretion when giving financial assistance to private undertakings, upon which they impose the obligations to provide SGI. However, their discretion has its limits. As the guardian of the Treaties, the Commission has a duty to oversee the application of Union law.

¹ Article 14 of the TFEU. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Quality Framework for Services of General Interest in Europe', COM(2011) 900 final, 3.

² See, e.g. Article 2(e) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 [2007] OJ L 315/1, as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 [2016] OJ L 354/22.

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Quality Framework for Services of General Interest in Europe', COM(2011) 900 final, 2.

⁴ Consolidated version of the TEU – Protocol (No 26) on services of general interest, OJ C 115/308.

⁵ Article 106 para 2 TFEU. See also Commission Staff Working Document, 'Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest', SWD(2013) 53 final/2, para 21.

The Judgment of the Court of Justice (hereinafter: the Court) in *Lux Express Estonia* is a novelty, as it refers to Member States employing the PSO formula but choosing not to give them compensation.⁶ In the case at hand, the Member State was keen both: (a) not to give compensation, and (b) finance its public goals, from private resources of undertakings upon which it imposed the obligation to provide SGI. It is possible that the legal implications of this judgment will exceed the boundaries of the area in which it was given. The Court gave this judgment in the area of public passenger transport services under Regulation (EC) No. 1370/2007⁷, but one may say that the Court could have also given this judgment in any other sector. That would mean that compensation for other PSOs must also be paid, and the amount of the compensation may be the subject of the Court's review.

Even though, to present the opposite view. One may say, first, that in the case at hand, the Court referred specifically to the provisions of Regulation 1370/2007 and, second, that there are significant differences between the legal regime established in the area of public transportation (as *lex specialis*) and other SGEIs (*lex generalis*). There are also conceivable counter-arguments. First, the Court referred specifically to Regulation 1370/2007 only because the referring court asked for its interpretation, and in a reference for a preliminary ruling, the Court is bound by the question put to it.⁸ Second, the fact that the area of public transportation is – to a large extent – covered by *lex specialis* rules does not necessarily mean that the case-law from this area is irrelevant in other areas. It suffices to mention the *Altmark*⁹ case, which also concerned the area of public transportation but nobody denied its larger application. Neither does the Court when it refers to *Altmark* in its case-law concerning many different areas.¹⁰

Member States can derogate from market rules by applying public interventions in establishing the price for the supply of electricity to energy-

⁶ Opinion of the Advocate General Manuel Campos Sanchez-Bordona of 10 March 2022, Case C-614/20 *Lux Express Estonia AS*, EU:C:2022:180, para 55.

⁷ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 [2007] OJ L 315/1, as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 [2016] OJ L 354/22.

⁸ Opinion of the Advocate General Mancini delivered on 10 February 1983, Case C-94/82 *De Kikvorsch Groothandel-Import-Export BV*, EU:C:1983:33; opinion of the Advocate General Mancini delivered on 10 March 1983, Case C-59/82 *Weinvertrieb*, EU:C:1983:64.

⁹ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

¹⁰ Case C-451/03 *Servizi Ausiliari Dottori Commercialisti Srl* [2006] ECR I-2941, paras 55–67; Case C-76/15 *Paul Vervloet et al.* [2016] EU:C:2016:975, para 107; Case C-238/20 *Sātiņi-S' SIA* [2022] EU:C:2022:57, para 46.

poor or vulnerable household customers,¹¹ or to SMEs.¹² The Court's judgment specifically refers to actions taken by Estonia but again, it could have been, or rather it still could be, an action taken by any other Member State.

The Judgment in *Lux Express Estonia* has brought important new developments. Indeed, in its judgment, the Court stated that Member States, when following the PSO formula, are obliged to compensate private undertakings for the tasks imposed upon them. The Court clarified also how to calculate such compensation to escape from EU rules on State aid. However, the actions of Member States are no longer under scrutiny only from the perspective of EU rules on State aid. National courts may also adjudge claims from private undertakings claiming that a Member State caused damage by assigning SGI upon them without compensation, or with too little compensation. This is excellent news for private undertakings, but not for Member States. Any fault made by a Member State exposes it to attacks from the Commission or from a private undertaking.

Nevertheless, the legal appraisal of the Court's judgment in *Lux Express Estonia* should be more balanced. It must not be biased for or against any of those who may be affected by this judgment in the future. However, what is visible at the outset of such appraisal is that the Court has chosen to leave some issues unanswered, which it could have or even should have clarified.

II. Factual and legal background

According to the Law on public passenger transport (hereinafter: the Law) which, in Estonia, entered into force on 1 October 2015¹³, regular transport services are provided both under a public service contract, and as a commercial regular transport service. The tariff for commercial regular services is established by the carrier, while the maximum tariff within the framework of a regular service performed under a public service contract is established by the competent authority. Under Article 34 of the Law, the carrier is obliged, on domestic road, water and rail transport services, to provide transport services free of charge, and without compensation to:

¹¹ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L 158/125.

¹² Council Regulation (EU) No 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices [2022] OJ L 261 I/1.

¹³ RT I, 30 June 2020, 24, in the version applicable to the dispute in the main proceedings.

- a) children who have not reached the age of 7 on 1 October of the current school year,
- b) children for whom the start of compulsory schooling has been postponed,
- c) disabled persons up to the age of 16,
- d) severely disabled persons aged 16 and over,
- e) persons with a significant visual impairment and persons accompanying a person with a severe or significant visual impairment, and
- f) guide dogs or assistance dogs of a disabled person.

Eesti Buss and Lux Express Estonia (hereinafter: Lux Express) obtained a Community licence to provide passenger transport services. They provided domestic regular transport services by bus on a commercial basis. In 2019, they submitted an application for compensation to the Minister for Economic Affairs and Infrastructure (Minister). They argued that the damage arose from their obligation to transport certain categories of passengers free of charge without receiving any compensation from the State for doing so. The Minister rejected this application on the grounds that the carrier is not to receive compensation for transporting passengers free of charge. In July 2019, Lux Express merged with Eesti Buss and, on 12 August 2019, it brought an action for compensation against Estonia before the national court in Estonia.

The applicant took the view that there is a public service obligation under Article 2(e) of Regulation No. 1370/2007. No commercial operator acting in its own economic interests would provide the service free of charge without being subject to a statutory obligation. The fact that the State did not notify the European Commission of this general rule in advance (Article 3(3) of Regulation No. 1370/2007 and Article 108 TFEU) does not preclude the granting of compensation. Moreover, if Regulation No. 1370/2007 is not applicable, compensation should be granted under general principles of EU law.

The defendant (Estonia) denied those claims. It took the view that the contested requirement was imposed to make public transport more affordable for disabled persons and families with small children, and to increase the mobility of those persons. It was also imposed as a requirement with the objective of ensuring the proper use of, and saving public money. However, according to the defendant, Regulation No. 1370/2007 is not applicable as it governs PSOs and, in the case at hand, no public service contract was concluded with the applicant. Hence, if a Member State pays no compensation, there is no need to notify the Commission.

The national court stayed the proceedings and sent questions to the Court which, in essence, referred to the following doubts:

- 1) Does an obligation to transport certain categories of passengers free of charge, imposed on all private law undertakings that operate regular road, water and rail passenger transport services within the national

- territory on a commercial basis, constitute a public service obligation under Articles 2(e) and 3(2) of Regulation No. 1370/2007?
- 2) If it does constitute a public service obligation under Regulation No. 1370/2007, is a Member State entitled under Article 4(1)(b)(i) of Regulation No. 1370/2007 to exclude, by a national law, the payment of compensation to the carrier for the discharge of such obligation? If a Member State is entitled to exclude compensation to the carrier, under what conditions can it do so?
 - 3) Is it permissible under Article 3(3) of Regulation No. 1370/2007 to exclude from the scope of that Regulation general rules for establishing maximum tariffs for certain categories of passengers other than those referred to in that provision? Does the obligation to notify the European Commission under Article 108 TFEU apply even if the general national rules for establishing maximum tariffs do not provide for compensation for the carrier?
 - 4) If Regulation No. 1370/2007 is not applicable, can the granting of compensation be based on another legal act of the European Union, such as the Charter of Fundamental Rights of the European Union? and
 - 5) What conditions must the compensation meet to comply with State aid rules?

III. Judgment of the Court

On 8 September 2022, the Court delivered its judgment in *Lux Express Estonia*. The Court took its decision without holding an oral hearing. This means that it had sufficient information to give a ruling¹⁴ and suggests that it did not regard the case to be controversial.

The Court answered the 1st question in the affirmative, saying that the concept of a ‘public service obligation’, referred to in Articles 2(e) and 3(2) of Regulation No. 1370/2007, covers the obligation for undertakings providing a public transport service by road and by rail to carry certain categories of passengers free of charge and without receiving compensation.

The Court answered the first part of the 2nd question in the negative. It said that a Member State is not entitled under Article 4(1)(b)(i) of Regulation No. 1370/2007 to exclude, via national law, the payment of compensation to the carrier for the discharge of such obligation. As the Court answered

¹⁴ Article 76(2) of the Rules of Procedure of the Court of Justice of 25 September 2012 [2012] OJ L 265/1.

the first part of the 2nd question in the negative, and the referring court asked the second part of the second question only if the answer to the first part of that question was in the affirmative, the Court did not find it necessary to answer the second part of the 2nd question.

The Court found the 3rd question to be hypothetical. It stated that the referring court had, in essence, asked whether Article 3(3) of Regulation No. 1370/2007 allows Member States to exclude, from the scope of that EU regulation, general rules designed to fix maximum tariffs for categories of passengers other than those referred to in that provision. Since the Court found, on the basis of the documents before it, that the Republic of Estonia had not taken any steps to exclude certain general rules relating to financial compensation granted for PSOs from the scope of Regulation No. 1370/2007, the 3rd question was thus ruled inadmissible.

The Court also abstained from answering the 4th question which, in its opinion, the referring court asked only if Regulation No. 1370/2007 is not applicable to the case in the main proceedings.

For the 5th question, the Court said that compensation for the net financial effect on costs incurred, and revenues generated by complying with the tariff obligations established through general rules, must be granted under the principles set out in Articles 4 and 6 of Regulation No. 1370/2007, and in point 2 of the annex thereto, in a way that prevents overcompensation.

IV. Comments

The Court answered the 1st, the 2nd, and the 5th questions. It found the 3rd question to be inadmissible and, as the referring court asked its 4th question only *if* Regulation No. 1370/2007 is not applicable, which turned out to be a false presumption, the Court refused to answer the 4th question. The Court's findings in that regard may seem clear; however, they are not. Before analysing the answers the Court gave in its judgment, it is worth analysing the questions the Court refused to answer.

Specifically, it is worth analysing why the Court decided to abstain from answering the 3rd question, but not the 5th question, which seems to be manifestly hypothetical. Why did the Court decide to abstain from answering the 4th question, which it may have done, but also could have decided differently? Answering the 4th question would be beneficial for the sake of legal certainty and useful to national courts that deal with similar matters in the case at hand. It would be useful for the uniform application of EU law in Member States. After all, one of the reasons the Court has jurisdiction to

provide preliminary rulings on the interpretation of EU law is precisely to ensure the uniform interpretation and application of EU law by the national courts.¹⁵ The Court answering the 4th question would have been welcomed and useful in attaining that goal.

1. Comments on the Court's refusals to answer the 3rd and the 4th questions

The 3rd question

In the first part of the 3rd question, the referring court asked if Article 3(3) of Regulation No. 1370/2007 allows Member States to exclude, from the scope of that Regulation, general national rules designed to fix maximum tariffs for categories of passengers other than those referred to in that provision. Should that answer be in the affirmative, in the second part of that question, the referring court asked if the obligation to notify such measure, laid down in that provision and in Article 108 TFEU, also applies to the general rules excluded from the scope of that Regulation, which do not provide for the granting of any compensation.

The Court found, in para 80 of the judgment *Lux Express Estonia*, that the Republic of Estonia had not taken any steps to make use of the option to which the first part of the 3rd question referred to. It is hard to accept this finding of the Court. First of all, it is not for the Court to make any appraisals of the accuracy of questions on the interpretation of EU law referred to it by a national court in the factual and legislative context. It is the sole responsibility of the referring court to define the accuracy of such questions, which enjoy a presumption of relevance. The Court must take into account, under the rules on the division of jurisdiction between the Courts of the European Union and the national judiciary, the factual and legislative context (set out in the request) of the questions referred for a preliminary ruling.¹⁶ Besides, the Republic of Estonia had, in fact, made use of the option to which the first part of the 3rd question referred to. In Article 34 of the Law, it obliged transport undertakings to carry certain categories of passengers free of charge. In its request for a preliminary ruling, the referring court stated that those categories of passengers were not the same as those stipulated in Article 3(3) of Regulation No. 1370/2007. The first part of the 3rd question then made sense, and was linked to the facts of the case. Where the question referred

¹⁵ Alexandre Geulette, 'Preliminary Rulings on Interpretation' in Viktor Luszcz (ed.), *European Court Procedure. A Practical Guide* (Hart/Bloomsbury 2020), p. 69.

¹⁶ Judgment of the Court of 7 April 2022, Case C-385/20 *EL and TP v Caixabank SA* [2022] EU:C:2022:278, paras 34 and 38.

concerns the interpretation or the validity of a rule of EU law, the Court is, in principle, bound to give a ruling unless:

- a) it is quite obvious that the interpretation sought bears no relation to the actual facts of the main action or to its purpose,
- b) the problem is hypothetical, or
- c) the Court does not have before it the factual or legal materials necessary to give a useful answer to that question.¹⁷

None of the above exceptions existed in the case at hand. The Court could have applied its case-law where it found that it is not manifestly obvious that the problem is hypothetical.¹⁸ It cannot be ruled out that the applicant before the referring court has an interest in obtaining an answer to the first part of the 3rd question.¹⁹ Therefore, the first part of the 3rd question was admissible.

However, the Republic of Estonia failed to notify the Commission about the actions it had taken.²⁰ That was the reason why the referring court asked the second part of the 3rd question. It wanted to know if a Member State is under an obligation to notify the Commission about the measures taken if the Member State has no intention to grant any compensation. The second part of the 3rd question was no more hypothetical than its first part.

The answer to the second part of the 3rd question may be necessary for the referring court to ascertain the legal consequences of Estonia's failure to notify the Commission about its actions. It may depend on what goal does such notification seek to achieve. As these changes must be notified under Article 108 TFEU, it seems that this duty has been established to prevent Member States from granting illegal State aid. According to paragraph 5 of Regulation No. 1370/2007, if a Member State chooses to exclude certain general rules from its scope, the general regime for State aid should apply.

However, this duty may have been established to achieve different goals. The Member State's failure to notify the Commission would, for example, make Article 34 of the Law inapplicable and unenforceable against individuals.²¹

¹⁷ Judgment of the Court of 5 May 2022, Case C-567/20 *A.H. v Zagrebačka banka d.d.*, [2022] EU:C:2022:352, para 43 and the case-law cited.

¹⁸ Judgment of the Court of 19 November 2009, Case C-314/08 *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu*, EU:C:2009:719[2009] ECR I-11049, para 44; Judgment of the Court of 12 December 2019, Case C-376/18 *Slovenské elektrárne a.s. v Úrad pre vybrané hospodárske subjekty, formerly Daňový úrad pre vybrané daňové subjekty*, [2019] EU:C:2019:1068, para 24.

¹⁹ Judgment of the Court of 8 December 2022, Case C-600/21 *Caisse régionale de Crédit mutuel de Loire-Atlantique et du Centre Ouest* [2022] EU:C:2022:970, para 25.

²⁰ See also the opinion of AG Manuel Campos Sanchez-Bordona in C-614/20 *Lux Express Estonia AS* EU:C:2022:180, para 68.

²¹ See e.g. Judgment of the Court of 30 April 1996, Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL*, EU:C:1996:172[1996] ECR I-2201, para 54.

Nevertheless, the Court did not speak in favour of any of the above. So what does that mean? Do the actions of a Member State constitute State aid even though they do not grant an advantage to some undertakings? This is rather doubtful.²² Maybe they are inapplicable and unenforceable against individuals? That would mean that private undertakings are not obliged to transport any passengers free of charge under Article 34 of the Law. This is not impossible. However, to declare Article 34 of the Law inapplicable and unenforceable against individuals, because a Member State did not notify the Commission, there must be a clear legal basis in EU law for doing so, and there is none. In cases such as *CIA Security International*, the Court based its findings on the clear wording of Directive 83/189/EEC.²³

It seems then, that the Court misapplied its own case-law concerning the applicability of preliminary rulings, and refused to answer the 3rd question, which it should have answered. It is doubtful whether the 3rd question was hypothetical, and, evidently, the 3rd question made sense and was linked to the facts of the case. It cannot be ruled out that the applicant before the referring court has an interest in obtaining an answer to the 3rd question. Such answer would also be useful for the uniform application of EU law in Member States.

The 4th question

In its 4th question, the referring court asked – if Regulation No. 1370/2007 is not applicable to the case in the main proceedings – whether an obligation to grant compensation to transport undertakings in return for the discharge of the obligation laid down in Article 34 of the Law, arises from another act of EU law, such as the Charter of Fundamental Rights of the European Union. The Court did not answer this question.

That suits perfectly well the main goal of the preliminary reference procedure, namely to provide referring courts with a useful answer to its questions. As the referring court asked its 4th question only *if* Regulation No. 1370/2007 does *not* apply in the case in the main proceedings, which turned out to be untrue in the light of the answer to the 1st question, the 4th question lost its main purpose. However, the Court still could have answered this question, especially as not all cases in which Member States impose SGI on private undertakings can be

²² Judgment of the Court of 24 January 1978, Case 82/77 *Openbaar Ministerie (Public Prosecutor) of the Kingdom of the v Jacobus Philippus van Tiggele*, [1978] ECR 25, paras 25 and 26; Judgment of the Court of 12 December 1996, Case T-358/94 *Air France v Commission* [1996] ECR II- 02109, para 63.

²³ Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations [1983] OJ L 109/8, as amended by Council Directive 88/182/EEC of 22 March 1988 [1988] OJ L 81/75.

categorised as falling under Regulation No. 1370/2007. It may not be ruled out that some of them may not even be categorised as falling under any sectorial rules. Even if the Court had answered this question in a general manner, this would have given national courts more useful guidance than in a situation where the Court abstained from answering this question.

2. Comments on the Court's decision to answer the fifth question and on the answer's content

The 5th question

In its 5th question, the referring court asked about the conditions the granting of public service compensation must meet to comply with EU rules on State aid.²⁴ The Advocate General found that this question is more like a question seeking hypothetical advice than a real preliminary question seeking the interpretation of a rule of EU law, with implications to the result of the original case.²⁵ It is hard not to agree with the Advocate General.

However, the Court answered this question even though it seems more hypothetical than the 3rd question, which the Court refused to answer. The Court found the 3rd question to be hypothetical, despite the fact that 1) the Republic of Estonia made use of the option to oblige transport undertakings to carry certain categories of passengers free of charge, and 2) those categories of passengers were not the same as those stipulated in Article 3(3) of Regulation No. 1370/2007. The Court answered the 5th question regardless of the fact that the Republic of Estonia did not intend to grant any compensation. In fact, the notion of State aid is objective in character,²⁶ and the State's intentions are not conclusive in that matter. It is evident, however, that the situation where the Member State decided *not* to grant any compensation at all, did not bear any risk of being classified as State aid. If a Member State does not grant any compensation, the question about the method of calculating compensation, to avoid EU rules on State aid, not only may, but *must* be seen as hypothetical and thus inadmissible.

²⁴ Judgment of the Court of 8 September 2022, Case C-614/20 *Lux Express Estonia AS* [2022] EU:C:2022:641, para 84.

²⁵ Case C-614/20 *Lux Express Estonia AS* [2022] EU:C:2022:180, Opinion of AG Manuel Campos Sanchez-Bordona, para 55.

²⁶ Judgment of the Court of 22 December 2008, Case C-487/06 P *British Aggregates Association v Commission of the European Communities and United Kingdom*, EU:C:2008:757[2008] ECR I-10515, para 111.

Lux Express did not ask the referring court to grant it compensation for discharging public service obligations. It brought an action for compensation for the damages it had already suffered. It asked the referring court to order Estonia to cover the damage it sustained. Both types of performance may be called compensation, but they must not be confused. The former is granted *ex ante*, the latter *ex post*. The former is to prevent the damage, the latter to repair it. The former is granted by the body imposing the obligation to provide SGI, the latter by the national court to which an action for damages is brought. The compensation granted in return for the discharge of public service obligations under Article 3 of Regulation No. 1370/2007 is the former, not the latter. To calculate the former, the body imposing the obligation to provide SGI may refer to the method stipulated in *Altmark*.²⁷ To calculate the latter, the national court must refer to case-law, according to which, a Member State may be rendered liable to make reparation for loss and damage caused if:

- a) the rule of EU law that is infringed intends to confer rights on individuals,
- b) the breach of that rule is sufficiently serious, and
- c) there is a direct causal link between that breach and the loss or damage.²⁸

It is visible that the question from the national court where it referred to the former, not to the latter, was thus manifestly hypothetical. As the Court's judgment in *Raffinerie Mediterranée (ERG) SpA* seems to suggest, where the conditions under which the Court may refuse to rule on a question referred by a national court are met, the Court must refuse to rule on such question.²⁹

However, the Court answered the 5th question and, in its answer, referred by analogy to *Altmark*.³⁰ By doing this, the Court not only answered a manifestly hypothetical question but gave the answer that seems not to assist the referring court.

²⁷ Judgment of the Court of 24 July 2003, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, EU:C:2003:415, (n 10), paras 43–53.

²⁸ Judgment of the Court of 5 March 1996, Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:[1996] ECR I-01029, para 51; judgment of the Court of 30 September 2003, Case C-224/01 *Gerhard Köbler v Republik Österreich*, EU:C:2003:513[2003] ECR I-10239, para 51; judgment of the Court of 28 July 2016, Case C-168/15 *Milena Tomášová v Slovenská republika – Ministerstvo spravodlivosti SR and Pohotovost s.r.o.*, [2016] EU:C:2016:602, para 22.

²⁹ Judgment of the Court of 9 March 2010, Case C-378/08 *Raffinerie Mediterranée (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others*, EU:C:2010:126 et al [2010] ECR I-01919, para 74, and the case-law cited.

³⁰ Judgment of the Court of 24 July 2003, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, EU:C:2003:415, (n 10), paras 43–53.

3. Comments on the Court's answer to the 1st and 2nd questions

The 1st question seems to be the most important question the referring court asked. It justifies all other doubts the referring court had, and all of the following questions it asked the Court were relevant only if the answer to the 1st question was in the affirmative. By that question, the referring court asked whether Articles 2(e) and 3(2) of Regulation No. 1370/2007 must be interpreted as meaning that the concept of a 'public service obligation', referred to in those provisions, covers the obligation for undertakings providing, in the territory of the Member State concerned, a regular transport service by land, inland waterway and rail, laid down in Article 34 of the Law, to carry certain categories of passengers free of charge and without receiving compensation from the State.

The Court answered this question by employing grammatical, historical and teleological methods of legal interpretation and answered it in the affirmative. According to the Court, public service obligations may be the subject of either a public service contract or a general rule, that is, a measure which applies without discrimination to all public passenger transport services of the same type in the same area.³¹ According to the Court, it is unlikely that an undertaking, if it were to consider its own commercial interests, would assume that obligation without a return. The Court stated that the second subparagraph of Article 1(1) of Regulation No. 1370/2007 does not distinguish between public service obligations according to the manner in which they are established.

The 1st question seems to have been the most important from the referring court; however, the Court gave its most important answer with regard to the first part of the 2nd question. The answer to the 1st question can hardly be regarded as surprising or unexpected. However, this is not the case with the answer to the first part of the 2nd question on whether a Member State is entitled to exclude the payment of compensation for the discharge of a PSO. Member States frequently employ the PSO formula when they impose SGI on undertakings but, on such occasions, they usually grant undertakings financial assistance for performing those services. When the case becomes contentious in front of the Commission, Member States usually defend their case by claiming that the financial assistance they have given is not State aid. Member States are interested in granting as much financial assistance as it is possible, without classifying it as State aid.

Having said that, Member States sometimes try to achieve their goals by imposing obligations on private undertakings to perform public goals, normally

³¹ Judgment of the Court of 8 September 2022, Case C-614/20 *Lux Express Estonia AS*, EU:C:2022:641, (n 1), para 37.

placed on Member States, and do not provide private undertakings with the financial means they need to perform such obligations. In such instances, Member States try to achieve their goals with the use of private resources. Such practices by Member States may be harmful for the internal market, and may damage the financial situation of the undertakings upon which Member States impose such obligations. Eventually, they can lower the quality of SGI private undertakings offer, in contradiction with the very idea of the PSO formula. Therefore, the answer that the Court gave for the first part of the 2nd question, according to which Member States are not entitled to exclude the payment of compensation for the discharge of the PSO,³² seems to be justified and correct.

According to the Court, the interpretation in which a Member State has not merely an option to compensate an undertaking for the costs incurred in discharging the public service obligations, but is indeed obliged to do so, gains additional support from the objectives of the relevant EU legislation. There is nothing to indicate that EU legislature intended to authorise the competent authorities to depart from the principle of compensation for the financial effect of compliance with tariff obligations established through general rules, laid down in Article 3(2) of Regulation No. 1370/2007.

V. Conclusions

The Court's judgment in *Lux Express Estonia* raises mixed feelings. Member States should have the opportunity to impose SGI on private undertakings by using the PSO formula. However, Member States must not carry out their tasks at the expense of private undertakings, and by using the private resources of those undertakings. The Court's answer that Member States cannot exclude the payment of compensation for the performance of SGI is definitively a good answer.

Nevertheless, this answer exposes Member States to real threats. Their actions will be no longer under scrutiny only from the perspective of EU rules on State aid. National courts may also rule on claims submitted by private undertakings claiming that a Member State caused damage to them by imposing SGI upon them with no compensation, or with too little compensation. It is to be seen in the future how a national court and the Court will, should it receive a preliminary question on that matter, decide on Member States' responsibility for possible damages. In a legislative context characterised by the exercise of

³² *Ibid.*, para 75.

wide discretion, essential for implementing EU policy, Member States cannot incur liability unless they manifestly and gravely disregarded the limits on the exercise of their powers.³³

The last note on the Court's judgment in *Lux Express Estonia* concerns the Court's failure to follow its own case-law on the admissibility of preliminary questions. The Court refused to answer the 3rd question, which it should have answered, but it answered the 5th question, which was manifestly hypothetical. The Court refused to answer the 4th question, and although formally the Court did not err in doing so, it could have answered it for the sake of legal certainty and the uniform application of EU law in Member States.

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C O N F E R E N C E R E P O R T S

8th Competition Law and Policy Conference in Memory of Prof. Vedran Šoljan “Goals of Competition Law and the Changing World”, Dubrovnik, Croatia, 25–27 May 2023

The Šoljan conference series, established in 2009, honours the memory of the late Professor Vedran Šoljan (1962–2008), one of Croatia’s competition law pioneers. His book on the abuse of dominance, an adaptation of his PhD thesis (*Vladajući položaj na tržištu i njegova zlouporaba u pravu tržišnog natjecanja Europske zajednice*. Zagreb, Ibis grafika, 2004) remains his most notable legacy. As Croatia’s EU pre-accession process in the early 2000s brought about wide-ranging changes in the national legal system, Vedran’s book was much appreciated by local practitioners hungry for knowledge on the novel area of competition law. Vedran’s role was one of a bridge builder: his intellectual curiosity about the functioning of EU competition law linked perfectly with Croatia’s early enforcement efforts, as well as more than a few legislative adjustments performed at the national level. He was also a dear colleague of mine in the Law Department at the Faculty of Economics and Business-University of Zagreb (EFZG), where we collaborated on a project related to the reform of EU merger control rules in the mid-2000s.

EFZG was the birthplace of the Šoljan conference series. At first, it was a small-scale event that continued the merger control project after Vedran’s untimely death; later, it developed into a fully-fledged conference, a tribute to his work and legacy. Most of the conferences so far have been held in Zagreb. In 2023, we moved to the beautiful Dubrovnik. Even though the old Ragusa, famous for its motto of liberty, was attractive for many also as a place where the *Game of Thrones* series was filmed, and despite the appeal of fine May weather, the organizers managed to persuade the speakers as well as the audience to spend most of their day(s) indoors discussing competition law issues.

The vision of the Šoljan conferences has initially been to interconnect the members of the relatively small Croatian competition law community, as well as to create a forum to exchange views between all relevant stakeholders (the competition authority, practitioners, judges, corporate lawyers, and scholars). This goal found its institutional fulfilment in 2018 with the formation, based on an academic initiative, of the Croatian Association for Competition Law and Policy (*Hrvatsko društvo za pravo i politiku tržišnog natjecanja*, HDPPTN). The partnership with the Croatian Competition Agency, which supported the Šoljan conferences from early on, proved

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fruitful as they provided a place to exchange ideas between the national enforcer and the broader community. In addition, the organizers continuously strived to bring, to Croatia, contemporary policy and scholarly debate in the field of European competition law, both from Brussels and Luxembourg. As mentioned, the aim was to build bridges between Croatia and other jurisdictions in the broader community of post-socialist European countries, helping to explore relevant challenges to building functioning competition law systems.

The group of the co-organisers of the 2023 Conference (EFZG and its European Documentation Centre, the Croatian Competition Agency (AZTN), and the Croatian Competition Law and Policy Association) fittingly showcases the evolution of this forum as a collaborative effort. In particular, the collaboration with Vlatka Butorac Malnar (University of Rijeka), the President of HDPPTN, proved instrumental in making this Conference a success. The support of Dr Mirta Kapural, President of the Croatian Competition Council, was extremely valuable for us going forward. As always, the assistance of Alexandr Svetlicinii (University of Macau, Member of the Organizing and Programme Committee) was absolutely essential in helping to create a meaningful conference programme. We were also happy to have the 2023 Conference supported by many organizations, such as ASCOLA and its SEE and Central Europe Chapters, the Centre for Antitrust and Regulatory Studies of the University of Warsaw, the ELI Croatian Hub, and the Budapest OECD-GVH's Regional Centre for Competition.

In the years before Croatia acceded to the EU in 2013, the topics explored at the Šoljan conferences mostly related to addressing issues related to understanding how EU competition law functioned, following the most recent developments, both at the national and the supranational level, as well as discussing ongoing enforcement efforts in Croatia. In the years after EU accession, the conferences moved away from its early national law standpoint and towards a rich comparative perspective, in particular, vis-à-vis the competition law systems in CEE and SEE, all the while keeping track of the most pressing policy, normative and enforcement issues.

The 2023 Dubrovnik Conference illustrated the event's evolution in terms of the choice of the topics covered. The overarching issues, such as antitrust goals, were skilfully discussed by the keynote speaker, Prof. Spencer Weber Waller (Loyola University Chicago, also a Fulbright Specialist in Croatia at the time), who provided rich insights into US developments. The ensuing roundtable, moderated by Jasminka Pecotic Kaufman (University of Zagreb), continued to examine the ever-green topic of competition law's goals and objectives through the arguments presented by Oles Andriychuk (Newcastle University), Malgorzata Kozak (University of Utrecht), Marek Martyniszyn (Queen's University Belfast) and Giorgio Monti (University of Tilburg).

Institutional resilience of competition authorities was discussed in a panel moderated by Sinisa Petrovic (University of Zagreb) that included a notable group of enforcers (Mirta Kapural of the Croatian NCA, Margarida Matos Rosa formerly of the Portuguese NCA, Kamil Nejezchleb of the Czech NCA, Andrej Matvoz of the Slovenian NCA, Nebojsa Jovovic of the Monenegrin NCA).

An academic panel, moderated by Dubravka Aksamovic (University of Osijek), critically examined key issues related to judicial review in several Central and East

European jurisdictions. The panellists (Maciej Bernatt for Poland, Ondrej Blazo for Slovakia, Alexandr Svetlicinii for Bulgaria, Ana Vlahek for Slovenia, and Jasminka Pecotic Kaufman for Croatia) presented therein the highlights of their respective national reports prepared within the collaborative research project titled 'Beyond ECN+ Directive – Empirical Study Mapping Judicial Review of National Competition Law Decisions', directed by Or Brook (University of Leeds) and Barry Rodger (University of Strathclyde).

Most interestingly, the panel moderated by Ana Vlahek (University of Ljubljana) examined the under-researched topic of collective consumer redress in the area of antitrust. Miguel Sousa Ferro (University of Lisbon) presented his study on collective consumer redress in Europe, pointing to the inefficiencies of most of the existing systems, as well as identifying features likely to produce satisfactory results. Then, Vlatka Butorac Malnar (University of Rijeka) discussed 'the myth' of collective consumer antitrust redress in Croatia, and focused on *incasso-cession* as the only currently available procedural tool that may substitute collective redress. In addition, Lena Hornkohl (University of Vienna) focused on the concept of fair funds, known from US law, and its 'transposability' to consumer private enforcement in the EU. Subsequently, Mariya Serafimova (Court of Justice of the EU) analysed the power of courts to estimate harm and the impact of disclosure under the recent CJEU case law. Finally, Zoltan Marosi (DLA Piper Budapest) focused on the Hungarian experience of consumer compensation by the Hungarian NCA (GVH), the advantages and disadvantages of a 'public redistribution' method, and its applicability in the field of antitrust.

The culmination of this Conference's intellectually stimulating debate occurred at the 'Rethinking Article 102 TFEU' panel, skilfully moderated by Vlatka Butorac Malnar (University of Rijeka). The panel brought together a number of antitrust powerhouses including Giorgio Monti (University of Tilburg), Assimakis Komninos (White & Case), Massimiliano Kadar (DG COMP), and Renato Ferrandi (Italian Competition Authority). The first part of the panel was dedicated to the review of Article 102 at the EU level, starting with the overview of the Article 102 package of 27 March 2023, followed by a discussion on recent CJEU case law, and the shift in the applicable legal standard. The discussion then proceeded to the consequences of the transition of the legal standard to the effects-based approach, as well as the expectations of the Policy Brief and the initiative for new Guidelines on exclusionary abuse. Expressing their somewhat diverging views, the panellists debated the risk of under-enforcement of Art 102 and the ability to administer the effects-based approach.

The 2023 Šoljan Conference intended also to combine the policy, enforcement, and academic debate with practical elements of training in the area of competition law for both scholars and practitioners. The Dubrovnik event included a workshop on researching and publishing in the area of competition law, aptly taught by Professor Waller. A series of compliance workshops was also conducted for local and regional practitioners, which addressed practical issues related to drafting competition law complaints before the competition authority, drafting antitrust damages claims, and drafting antitrust appeals. The compliance workshops, led by highly qualified

Croatian practitioners (Mislav Bradvica of BMWK, Mario Krka of DTBK, Marijana Liszt of Liszt & Partners, Martina Prpic of KPS) and experienced scholars (Professors Dubravka Aksamovic, Vlatka Butorac Malnar, Sinisa Petrovic, and Jasminka Pecotic Kaufman) proved to be a genuine laboratory for the exchange of skills and ideas, most fruitfully stimulated by the participation of a number of colleagues from the Croatian NCA.

For more information on the Šoljan Conference, please visit <https://pptn.net.efzg.hr>.

Jasminka Pecotic Kaufman

Founder of the Šoljan Conference series

ASCOLA Regional Chapter Co-Director South-East Europe

Jean Monnet Fellow, European University Institute,

Robert Schuman Centre for Advanced Studies

Professor, University of Zagreb, Faculty of Economics and Business,

Department of Business Law

e-mail: jpecotic@net.efzg.hr

ORCID: <https://orcid.org/0000-0002-3598-7090>

Webinar “Judicial Review of Competition Cases: The CEE and SEE Countries Perspectives” 14 June 2023

On 14 June 2023, three ASCOLA (Academic Society for Competition Law)¹ regional chapters (Eastern Europe (Baltics), Central Europe (CEE), and South-East Europe (SEE)) joined together to organise a webinar entitled “Judicial Review of Competition Cases: the CEE and SEE Countries Perspectives”. This webinar was built upon an expansive *Study on Judicial Review of competition law enforcement in the EU and the UK*, led by Professor Barry Rodger, Dr Or Brook and other team members, including Professor Maciej Bernatt, as well as national rapporteurs representing the 27 EU Member States and the UK.²

Judicial review plays an important role in the enforcement of competition law. Jointly with competition authorities, the judiciary shares responsibility for shaping competition law and ensuring its effective enforcement. Most competition cases in the EU are decided at the national level. Yet, research conducted on a national level is not comprehensive, especially in relation to the rules governing the operation of national judicial review systems. To fill this gap in literature, this project sets out to provide much-needed empirical studies undertaken by national rapporteurs covering judicial review of decisions issued by national competition authorities (NCAs) related to the application of Articles 101 and 102 TFEU (and domestic equivalents) during the 2004–2021 period.

The webinar focused on judicial review of competition cases (both EU and domestic) across the selected EU Member States, such as Bulgaria, Estonia, Czechia, Croatia, Lithuania, Slovenia and Poland. The webinar opened with a keynote speech delivered by Professor Krystyna Kowalik-Bańczyk – Judge of the GC (General Court) of the EU. Judge Kowalik-Bańczyk set the scene by speaking of the most common grounds of judicial review undertaken by the GC with respect to the decisions of the European Commission. Judge Kowalik-Bańczyk enriched her speech by commenting on some of the most discussed cases.

The webinar then featured two distinct panels. The first panel, chaired by Professor Alexandr Svetlicinii (University of Macau, China; co-director of the ASCOLA SEE

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¹ ASCOLA regional chapters <<https://ascola.org/regional-chapters/>> accessed 10 July 2023.

² Judicial Review of Competition Law Enforcement in the EU: Empirical Mapping 2004–2021 <<https://www.mappingcomplawreview.com/>> accessed 10 July 2023.

Regional Chapter), was based on the findings from the aforementioned *Study on Judicial Review* research project. Given that the project covered a wide range of issues, the speakers reflected on different aspects of judicial review in their respective jurisdictions. For instance, Professor Jurgita Malinauskaite (Brunel University London, UK; Vytautas Magnus University, Lithuania) focused on the total number of judicial review cases in Lithuania, commenting on the success rate of these cases, as well as observing potential reasons for the current situation. Professor Ana Vlahek (University of Ljubljana, Slovenia) evaluated the developments in Slovenia in terms of judicial review of particular types of NCA decisions (i.e. anti-competitive agreements, different types of abuses of a dominant position). Various trends identified in relation to the grounds of appeal (i.e. substantive, procedural, fines), and related specifics in Czechia, were presented by Professor Michal Petr (Olomouc University, Czechia). The two discussants of this panel, Professor Jasminka Pecotić Kaufman (University of Zagreb, Croatia) and Professor Maciej Bernatt (University of Warsaw, Centre of Antitrust and Regulatory Studies, Poland), took a comparative perspective to reflect on the relevance of EU law, including the CJEU case law, as well as the European Commission's practices, for judicial review of NCAs' decisions. They offered their observations related to the scope and intensity of judicial review, such as the standard of proof, deference to administrative discretion, respectively.

The second panel, moderated by Professor Malinauskaite, focused on practical aspects of judicial review. Professor Dawid Miąsik (Judge of the Polish Supreme Court, Poland) noted that it is difficult to change the approach of judges with respect to their mistrust of companies and their practices. It was also remarked that the focus has been on substantive aspects, while procedural issues (i.e. fair trial) were somehow being ignored. Rita Paukštė (TGS Baltic, Lithuania) further observed that the burden of proof is very high in competition cases. Competition cases are very complex and Lithuanian judges do not have sufficient expertise for an in-depth analysis of such cases, as they present only a small percentage of the administrative cases that they have to adjudicate on. Igor Mucalo (Law Office Mucalo, Croatia) commented on the situation in Croatia. Elo Tamm (Cobalt, Estonia) explained the complex competition law enforcement system in Estonia, which does not ensure sufficient transparency and the predictability of the outcomes. One must note that the European Commission has recently referred Estonia to the CJEU for failing to fully transpose the ECN+ Directive³ into national legislation.⁴ Finally, Professor Jasminka Pecotić Kaufman (University of Zagreb, Croatia), the co-director of the ASCOLA SEE Regional Chapter, closed the event with her final remarks.

³ European Parliament and Council Directive (EU) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L 11, p. 3–33.

⁴ European Commission, The EU Commission refers Estonia to the Court of Justice for failing to transpose the ECN+ Directive, 14 July 2023, e-Competitions July 2023 – II, Art. N° 113182 <<https://www.concurrences.com/en/bulletin/news-issues/july-2023/the-eu-commission-refers-estonia-to-the-court-of-justice-for-failing-to>> accessed 12 July 2023.

This webinar presented a much needed platform for raising awareness of national judicial review systems in the CEE and SEE countries. Simultaneously, it also identified the challenges faced in these jurisdictions.

Professor Jurgita Malinauskaite

ASCOLA Regional Chapter Director Eastern Europe (Baltics)

Brunel University London, UK

Vytautas Magnus University, Lithuania

e-mail: Jurgita.malinauskaite@brunel.ac.uk

ORCID: <https://orcid.org/0000-0001-7617-243X>

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