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Review article

PRIVATE (NON-)ENFORCEMENT OF COMPETITION LAW IN SLOVAKIA

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Abstract

Slovakia transposed the Damages Directive (2014/104) in the simplest way – copying its provision into separate law and repealing previous provisions tackling possibility of the private enforcement of competition law, including collective rights of consumers or their association. The Damages Directive was popularly presented as a "fresh start" for public enforcement of competition law in the EU Member States and to solve some interplays regarding access to file and protection of leniency submissions. Nevertheless, the Damages Directive left several loopholes in private enforcement since it covers merely "some" provisions on damages claims.

The paper will investigate level of private claims arising from the violation of competition rules in Slovakia, reasons for such a level and provides some avenues for further incentives to enforce competition rules outside the administrative procedure at the Slovak NCA.

First, preliminary observation regarding stand-alone actions can show to us certain unwillingness of Slovak courts to provide a civil remedy in cases of alleged violation of the competition rules. The Supreme Court of the Slovak Republic in the cases involving dispute between a health insurance company and hospitals refused to provide an injunction without prior decision of the competition authority. This decision was based on the argument that courts are bound by the decision of competition authority in terms of administrative offence punished by that authority. Thus, the paper will provide an answer to the question, whether this position of the Supreme Court, in fact, limited the possibility of success of stand-alone actions.

Second, from the analysis of the investigation activity of the Slovak NCA, it is apparent that in the recent years it focuses almost purely on investigation of bid rigging cartels. In this context, the paper will assess whether the decision of the competition authority provide enough information for possible follow-on action. Indeed, in bid rigging cases, such assessment will be easier, comparing to abuse of dominance. Nevertheless, the paper will try to estimate possible overall damages caused by anti-competitive behaviour identified by the Slovak NCA. In this context, it must be noted, that in Slovakia, it is better to call enforcement of competition rules through means of civil law "public-private" enforcement rather that "private" enforcement because action can be filed by public authority (or in some cases more precisely the Slovak Republic as state represented by a public authority) harmed by bid rigging, rather than individuals.

The paper reviewed the recent decisions of the AMO if they can serve as a basis for follow-on action, based on four criteria: (1) if they are final, (2) if the described behaviour caused a rele-

vant harm, (3) if the injured party contributed intentionally or negligently into infringement, and (4) if it is possible to find a liable person with assets enough to cover damages. The analysis showed that only a small fraction of the decision of the AMO passed through this scrutiny.

Finally, the paper suggests non-exhaustive list of suggestions that can improve possibilities of private damages claims in competition matters: the rebuttable presumption that anti-competitive behaviour raised prices by 10 %, involvement of the "victims" as a third parties, including damages consideration in the settlement procedure, solving private-law aspects of competition law enforcement by private-law measures. Although the first suggestion requires the statutory change, the remaining can be achieved also via a new practice of the AMO and contracting authorities. Better involvement of the "victims" of competition infringements is, moreover, consistent with similar policies in criminal proceedings.

***Key words**: competition law, EU law, Slovak law, private enforcement of competition law, bid rigging, stand-alone actions*

1. INTRODUCTION

Directive 2014/104/EU (hereinafter "Damages Directive")[1] was not only a tool of a legal harmonization of incoherent EU-wide framework for damages claim for violation of competition rules. It was also a momentum for establishing such rules clearly in those jurisdictions of the EU which had not adopted specific competition-related rules for civil claims. The legal as well as political purpose of the Damages Directive was multi-fold: protecting effectiveness of public enforcement (e.g., rules on protection of leniency submissions), harmonizing standards for the scope of damages claims and thus streamlining the legal effectiveness of such claims and also a strong statement for injured parties harmed by anti-competitive behaviour that there is a robust EU framework for protection of their rights and the European Commission has been actively promoting damages actions.[2]

After 10 years of the existence of the Damages Directive, the piece of European legislation could not have showed its full potential due to prohibition of retroactivity required by Article 22 of the Damages Directive. Therefore, the Damages Directive fully applies to "new infringements", i.e., infringements committed in the period after the transposition of the Damages Directive. However, some cases involving the private enforcement of competition law have also emerged in Slovakia, although there is still no 'high-profile' successful case on claims arising from competition violation. Indeed, the level and intensity of private enforcement

[1] Directive 2014/104/EU of the European Parliament and of the Council 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. [2014] OJ L 349/1.

[2] P. L. Parcu, G. Monti, and M. Botta, 'Introduction' in P. L. Parcu, G. Monti, M. Botta (eds.), Private Enforcement of EU Competition Law. The Impact of the Damages Directive, (Cheltenham, Northampton: Edward Elgar Publishing, 2018), pp. 1–14 pp. 2–7.

is highly interconnected with the public enforcement of competition which has been hardly vigorous in recent years in Slovakia[3] (except from 2023).

The paper briefly reviews the legislative framework of the private enforcement of competition rules. Based on the case law of the Supreme Court of the Slovak Republic it shows limited avenues for stand-alone actions. Then, it assesses the possibilities of the follow-on action based on the current decision-making activity of the Antimonopoly Office of the Slovak Republic [Protimoponolný úrad Slovenskej republiky] (Slovak NCA) (hereinafter "AMO"), i.e., if the decisions of the AMO provide a solid basis for such claims in the future. Finally, the paper suggests avenues for strengthening the enforcement potential of activities of the AMO vis-à-vis private enforcement.

2. LEGAL FRAMEWORK OF PRIVATE ENFORCEMENT OF COMPETITION LAW IN SLOVAKIA

2.1. Pre-Damages-Directive era

The legal framework for the private enforcement of competition law was established long before the transposition of the Damages Directive. The provisions on "the disputes on prohibited competition" were introduced in the first competition act [Act on Protection of Economic Competition – APEC(1991)] in then-time Czechoslovakia after the Velvet Revolution.[4] Every person suffered by prohibited competition was entitled to require infringer to refrain from behaviour (*actio negatoria*), to remedy the harmful situation (*action restitutoria*) and to provide an adequate compensation, to make good the damage and to deliver the unjust economic benefit.[5] From the procedural point of view, a proto-model of opt-in actions was established for *action negatoria* and *action restitutoria* by allowing single proceeding launched by the first of the plaintiffs and the remaining claimants were allowed as intervenients.[6] The second competition act [APEC(1994])[7] followed the principles and the structure of the provision on private enforcement emanated from APEC(1991) but it shrunk their scope: consumers only were allowed to file and action and *actio negatoria* and *action restitutoria* were covered by this provision.[8]

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3 O. Blažo, 'Proper, transparent and just prioritization policy as a challenge for national competition authorities and prioritization of the Slovak NCA' (2020) 13 *Yearbook of Antitrust and Regulatory Studies* 117–44.

4 Zákon č. 63/1991 Zb. o ochrane hospodárskej súťaže.

5 § 17(1) APEC(1991).

6 § 17(2) APEC(1991).

7 Zákon Národnej rady Slovenskej republiky č. 188/1994 Z. z. o ochrane hospodárskej súťaže.

8 § 17(1) APEC(1994).

On the other hand, it allowed the bodies representing the interests of consumers as plaintiffs in these proceedings.[9] The damages claims and reclaiming unjust benefits were not included in the APEC(1994) and possible claimants could rely on general rules included in the Commercial Code (1991), in particular § 757 thereof. [10] The substantive limb of that provision corresponding to Article 17(1) APEC (1994) was kept in the third competition act [APEC(2001)][11] but the procedural limb of joined actions corresponding to Article 17(2) APEC(1994) was dropped[12] and thus merely general rules of civil court proceedings could be employed. Moreover, this provision was reformed twice. First, in 2014, the original wording of § 42 APEC(2001) was replaced by a provision containing several specific rules for claims against successful leniency applicants.[13] Secondly, § 42 was completely repealed in 2016 by act transposing the Damages Directive (hereinafter "Damages Act").[14] The fourth and current generation of the competition act [APEC(2021)][15] does not contain any provision on damages claims in competition matters, except a general competence of the AMO to cooperate with courts in damages claims and possibility of considering paid damages within the calculation of fine imposed by the AMO for a competition violation.

2.2. Transposition of the Damages Directive in Slovakia

The Damages Act contains an almost literal transposition of the Damages Directive. In the transposition of Article 9(1) Damages Directive, the Slovak legislation

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9 § 17(1) APEC(1994).

10 Zákon č. 513/1991 Zb. Obchodný zákonník.

11 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.

12 § 42 APEC(2001).

13 An undertaking benefiting from immunity was partially exempted from joint and several liability of the members of a cartel, i.e.
- it shall not be liable to pay damages if the damage can be compensated by other participants in the same anti-competitive agreement;
- it is excluded from the obligation to settle with the other participants in the agreement restricting competition who have paid for the damage;
- if the damage cannot be compensated by the other parties to the same agreement restricting competition, a successful immunity applicant shall be liable only up to the amount of the damage caused to its own direct or indirect customers or suppliers.

14 In full: zákon č. 350/2016 Z. z. o niektorých pravidlách uplatňovania nárokov na náhradu škody spôsobenej porušením práva hospodárskej súťaže a ktorým sa mení a dopĺňa 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 v znení neskorších predpisov.

15 Zákon č. 187/2021 Z. z. o ochrane hospodárskej súťaže a o zmene a doplnení niektorých zákonov.

goes further than a minimum standard required by EU law. The Damages Directive requires only that the competition infringement established by a final decision of the competent competition authority or court "is deemed to be irrefutably established "but the Slovak law establishes that the court deciding on damages is bound by the decision of the AMO or the final decision of the administrative court reviewing the decision of the AMO in that part of the decision which establishes the existence of violation of competition law.[16] There is no doubt, that this provision was deemed as strengthening of the position of claimants that were harmed by the infringement of competition law once established by the AMO and, in case of judicial review, also confirmed by the administrative court. It must be noted, that in Slovakia the transposition of Article 9(2) Damages Directive went beyond the minimal requirement stipulated by EU law and the decision adopted in the other Member States shall be "presumed to be evidence of an infringement of competition law, unless the contrary is proved in legal proceedings for damages."[17] Table 1 summarizes the differences between the Slovak transposition of the Damages Directive and the requirements of the Damages Directive. Notwithstanding the intention of the legislative body to provide more solid grounds for damages actions in competition matters, the practice of the courts showed that the consequence can be opposite (see subchapter 3.1)

Table 1: Transposition of Article 9 Damages Directive in Slovakia

Damages Directive, Article 9	Slovak Damages Act, § 4
Decision of the Slovak NCA or reviewing court	
infringement is deemed to be irrefutably established	binding for the court
Decision of the NCA or review court from other Member State	
at least prima facie evidence and may be assessed along with any other evidence	is a rebuttable evidence

For the purposes of this paper, it is not necessary to go into the details of all the provisions of the Damages Act because it contains, with the abovementioned exemption, a literal transposition of the Damages Directive. Nevertheless, it is interesting to mention, that the Slovak legislation has acknowledged specific character of the civil disputes in the competition matters and only one of the first-instance court and one regional court for appeals was designated to handle cases "stemming from economic competition":[18] originally the District Court Bratislava II

16 §4(1) Damages Act.

17 §4(2) Damages Act.

18 § 27 Civil Dispute Code (2015) (Zákon č. 160/2015 Z. z. Civilný sporový poriadok).

(hereinafter "DCBa2")[19] and later the Metropolitan Court Bratislava III[20] as the first instance court for the whole territory of Slovakia and the Regional Court in Bratislava (hereinafter "RCBa") as the appellate court.[21] Nevertheless, due to the ambiguous wording of the competence of the designated court, some district courts have not found cases presented to them as arising from competition, e.g. the District Court Trnava did not hesitate to decide on possible private enforcement of state aid.[22]

3. CONDITIONS FOR PRIVATE CLAIMS DUE TO COMPETITION LAW VIOLATIONS IN SLOVAKIA

The legislative framework in Slovakia is prepared to accommodate both, stand-alone actions and follow-on actions. The interplay between administrative enforcement by the AMO and court enforcement of competition law via private litigation is underpinned by provisions [23]allowing the AMO act as an *amicus curiae* in competition matters similarly to the competence of the European Commission under Article 15 of Regulation No 1/2003.[24] The conditions for private claims shall be evaluated separately for stand-alone actions and follow-on actions due to different situation: in follow-on actions, plaintiffs can rely of evidence collected by a competition authority and conclusions made by that authority, while within stand-alone actions plaintiffs shall collect evidence of anti-competitive behaviour themselves and in the same time they are risking that a competition authority will not confirm their claims regarding the very existence of an anti-competitive behaviour.

3.1. Stand-alone actions

While prior to the Damages Directive transposition the individual jurisdiction of the EU Member States provided different approaches to the position of competition infringement decisions in civil claims proceedings, the Damages Directive established minimal standards for the effects of decisions of competition authorities.

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19 Okresný súd Bratislava II.

20 Mestský súd Bratislava III.

21 For more details see O. Blažo, 'Institutional Challenges for Private Enforcement of Competition Law in Central and Eastern European Member States of the EU' (2017) 10 *Yearbook of Antitrust and Regulatory Studies* 31–47.

22 Judgment of the District Court Trnava of 14 September 2018, case No 39C/30/2017, ECLI:SK:2117221806

23 § 94 Civil Dispute Code (2015).

24 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 [2003] OJ L 1/1.

The mainstream discussion on effects of the decisions of competition authorities is obviously addressed to follow-on actions, in particular the scope of binding effects of decision of administrative authority or other court and feasibility of such a binding effect with the principles of judicial independence and constitutional safeguards.[25] Conversely, in Slovakia, court proceeding rules have contained provisions requiring the courts to acknowledge the binding effect of decision of the other bodies, including administrative agencies, for decades. From its very beginning, Civil Court Code (1963)[26] contained provision stipulating that "The court shall be bound by the decision of the competent authorities that a crime, misdemeanour or offence has been committed and by whom, as well as by the decision on personal status."[27] Although the provision was several times amended and also its wording was adjusted to the changing legal framework, its rationale remained unchanged. Similar wording was included into the current court proceeding regulation: "… the court is bound by the decision of the competent authorities that a criminal offence, misdemeanour or other administrative offence punishable under a special regulation has been committed and by whom (…)".[28] Thus, the extreme and literal interpretation of these provisions became fatal for stand-alone actions as showed the *Union saga.*[29] This case consisting of a series of actions was handled by the all judicial instances of Slovakia, including the Constitutional Court of the Slovak Republic (hereinafter "CC"). The aim of this paper is not to review the substance of the case or whether the claims had merit, and purely the procedural arguments of the courts will be under the scrutiny. The *Union saga* is a typical example of a purely stand-alone action because the AMO made no enforcement action in the case and adopted neither infringement decision nor non-infringement decision.

3.1.1. The beginning of the *Union saga*

The case started in 2013 when Union (Union zdravotná poisťovňa, a.s.) – private health insurance company came into the dispute with several hospitals. Union relied on argument that these hospitals had been members of the Association of State Hospitals and they had agreed under the auspices of that association not to

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25 M. S. Ferro, 'Antitrust Private Enforcement and the Binding Effect of Public Enforcement Decisions' (2020) 3 *Market and Competition Law Review* 51–80 at 76–77.

26 Zákon č. 99/1963 Zb. Občiansky súdny poriadok.

27 § 131(1) Civil Court Code (1963).

28 § 193(1) Civil Dispute Code (2015)

29 R. Macko, 'Stand-alone žaloby na Slovensku v ohrození. Doktrinálny disent k rozsudku Najvyššieho súdu SR z 24. 6. 2020, sp. zn. 3 Obdo 108/2019' (2022) *Antitrust - Revue soutěžního práva* 80–84.

continue in cooperation with Union.[30] Union filed several actions against the individual hospitals requesting preliminary injunction, claiming nullity of the termination of contracts between Union and hospitals as well as damages due to higher costs caused to the health insurance company. Some of this claims of Union were withdrawn by the plaintiff and the request for preliminary injunction was rejected due to procedural reasons linked to necessity of judicial protection and therefore these limbs of the proceeding will not be further analysed in this paper because they are not relevant for the analysis of the private enforcement of competition law. Therefore that part of the claims which was consecutively rejected by the DCBa2, the RCBa, the Supreme Court of the Slovak Republic (hereinafter "SC") and the CC will be followed within the dispute *Union zdravotná poisťovňa, a.s./ Detská fakultná nemocnica s poliklinikou Banská Bystrica*. For simplicity of further text, the remaining disputes will be omitted, notwithstanding whether they were terminated by the decision of the DCBa2 or the RCBa, because the arguments used by the DCBa2 and the RCBa are the same in those cases.

3.1.2. The *Union saga* and the first-instance proceeding (DCBa2)

The DCBa2 rejected all the claims of *Union* by judgment rendered on 6 September 2017,[31] i.e. after almost four-year court proceeding (from the text of the judgment it is apparent that the hearing of the case was held on the day where also the judgment was delivered). From the reasoning of the judgment, it is not possible to identify that the court called witnesses or conducted other forms of investigation and apparently only examined documents, including the minutes of

[30] Based on the fact described by the court in its judgment, Union relied on following description of facts: On 26.06.2013, a meeting of all the major healthcare providers associated with the Association of State Hospitals was held. From the media reports, the plaintiff found out that the subject of the meeting was supposed to be the joint action of the hospitals in the matter of amending their contracts with the plaintiff. Shortly after the meeting, on 26 June, 27 June and 28 June, the plaintiff received termination notices from 16 health care providers. In the case of three other providers, the agreed term of the healthcare contracts was due to expire on 30 September 2013. As a result, the contracts of almost all healthcare providers associated with the Association of State Hospitals were due to expire on 30.09.2013. In addition to the common timing, all terminations have a common termination reason. From the information publicly available to the applicant, it appears that the meeting of the providers was motivated by an offer made by the state insurance company (Všeobecná zdravotná poisťovňa, a. s. -VšZP). The media information publicly presented by the director of the VšZP showed that the essence of the offer of VšZP was to increase the price for certain health care services on condition that other health insurance companies would also increase their contractual prices in that way. These conclusions flow also from articles published in newspaper: Hospodárske noviny of 28.06.2013 and Pravda of 03.07.2013. The plaintiff saw it this joint action agreement restricting competition as well as abuse of dominant position (e.g., judgment of DCBa2 of 06. 09. 2017, case 26CbHs/4/2013, par. 7-9).

[31] Judgment of DCBa2 of 6 September 2017, case No 26CbHs/3/2013, ECLI:SK:OSBA2:2017: 1213230629.3.

the Association of State Hospitals meeting with the director of VšZP. Therefore, it seems that the court decided based on the documents available already in 2013 after almost four years lingering. The court found no evidence of an anti-competitive behaviour in the documents presented and also pointed out that the plaintiff had not presented any decision of the AMO on issue, even though the AMO had been notified by the plaintiff.

The reasoning of the first-instance court was based on the provision of § 193 and § 194 of Civil Dispute Code (2015). The court found that the decision on the existence of claimed anti-competition behaviour falls either into the competence of the AMO or the competence of the European Commission. Furthermore, citing § 193(1) Civil Dispute Code (2015) the court found that in competition-related cases it is bound by the decisions of abovementioned authorities[32] and thus the court has no competence to decide on matters of public enforcement of competition law.[33] The court also rejected application of § 194(1) Civil Dispute Code (2015)[34] suggested by the plaintiff for the cases of inaction of a public body or for cases when a public authority decides to take no action.[35] The reason for non-applicability of § 194(1) relies on the argument that it is applicable outside of the scope of § 193(1) Civil Dispute Code (2015) only. Hence the AMO has the power to decide on violation of APEC, i.e. on the existence of competition offence and on the person who committed that offence, court found that is stripped from the competence to decide on the existence of competition violation and concluded that "[i]f a court in a civil proceeding nevertheless concludes on its own that the defendant has committed an anticompetitive behaviour (similar to concluding on its own that a defendant has committed a criminal offence), it would violate one of the fundamental principles of a democratic state governed by the rule of law, according to which public authorities can only do what they are allowed to do."[36] Finally, the court concluded that the plaintiff produced no evidence of the existence of anti-competitive behaviour and therefore the claims are unfounded when it described decisions of competition authorities as the only admissible evidence of anti-competitive behaviour: "During the proceedings, the plaintiff did not submit or point to any evidence which would show that the defendant was in any way sanctioned for the behaviour which the plaintiff identified as anti-competitive, nor the plaintiff proved to the court that the competition authority (the Antimo-

32 Judgment of DCBa2 of 6 September 2017, case No 26CbHs/3/2013, par. 53.

33 Judgment of DCBa2 of 6 September 2017, case No 26CbHs/3/2013, par. 48.

34 The court itself may assess the question within the competence of an authority other than authority under § 193, but the court may not decide on merits of it.

35 Judgment of DCBa2 of 6 September 2017, case No 26CbHs/3/2013, par. 56.

36 Judgment of DCBa2 of 6 September 2017, case No 26CbHs/3/2013, par. 57.

nopoly Office of the Slovak Republic, the Commission) by its decision identified such a behaviour as unlawful. The applicant did not even provide the court with factual allegations of the existence of such a decision."[37]

3.1.3. The *Union saga* and the second-instance proceeding (RCBa)

The plaintiff appealed the first-instance judgment. The RCBa as the appellate court fully confirmed the first-instance decision and also confirmed the soundness of its reasoning.[38] The RCBa fully followed the arguments of the DCBa2 and correctly refused the plaintiff's argument on the application of the Damages Act as well as the Damages Directive due to *ratione temporis.* However, the arguments on the principle of effectiveness and equivalence of EU law raised by the plaintiff remained unaddressed. However, the RCBa found a space for the courts to decide on competition matters in the cases when damages are not involved, i.e. in cases of nullity of contracts because the AMO has no competence to decide that a contract is null and void.[39] Similarly to the DCBa2, the RCBa concluded that "the question of the existence of an anti-competitive behaviour (administrative offence) is not a preliminary question for the court, since the Antimonopoly Office of the Slovak Republic is competent to decide on it."

It must be noted that both the first-instance court and the second-instance court found that are not competent to decide on the existence of anti-competitive behaviour but neither of the courts found it necessary to stay the proceeding under § 162(1)(a) Civil Dispute Code (2015), i.e. the decision depends on the question which the court is not allowed to solve.

3.14. The *Union saga* and the extraordinary appeal (SC)

Slovak legislation allows parties to a civil proceeding to file an extraordinary appeal (dovolanie) arguing one of the errors exhaustively stipulated by the Civil Dispute Code (2015). The applicant *inter alia* referred to the necessity of euro-conform interpretation of § 193 and 194 Civil Dispute Code (2015) and to follow the principle of full compensation for competition harm, as it was confirmed by the Court of Justice in *Courage/Crehan, Leclerc/Commission, BRT/SABAM, Master Foods/HB Ice Cream, Delimitis/Hennineger Bräu, Manfredi/Lloyd Adriatico Assicurazioni, Pfeiderer.* The plaintiff also claimed that the courts violated Article 6 of Regulation

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37 Judgment of DCBa2 of 6 September 2017, case No 26CbHs/3/2013, par. 58.

38 Judgment of RCBa of 13 June 2019, case No 1Cob/27/2018, ECLI:SK:KSBA:2019:1213230629.3, par. 23.

39 Judgment of RCBa of 13 June 2019, case No 1Cob/27/2018, par. 33.

1/2003. Neither of these arguments were addressed by the SC and the SC fully rejected the extraordinary appeal by the judgment of 24 June 2020.[40] From the reasoning of the judgment it is apparent that the SC did not consider preliminary reference to the Court of Justice on the question if Article 6 of Regulation 1/2003 prevents application of national law as it was employed by the DCBa2 and RCBa. The SC fully followed the arguments of the lower courts finding that "that in a proceeding for compensation for damage caused by an infringement of competition law, the jurisdiction to resolve existence of the infringement of competition law as the basis for the claim as preliminary question within the meaning of § 193 CSP in conjunction with § 194(1) CSP, as well as in the light of the rules of European law, does not exist."[41]

3.15. The *Union saga* and the constitutional complaint (CC)

After almost seven years of judicial proceeding at general courts, the actions by *Union* became more a form of a strategic litigation than a true attempt to claim damages (the requested damages were EUR 8,051.00, only). The order of the CC of 2 December 2021 was the final blow for stand-alone actions in Slovakia.[42] The CC rejected the constitutional complaint by *Union* due to lack of its competence because it did not find any prima facie violation of the Constitution of the Slovak Republic or international treaties or violation of complainant's rights stemming from the constitution. The CC followed the opinions of the courts, that decision of the existence of violation of competition rules is an exclusive competence of the AMO and other competition authorities.[43] On the one hand, the CC confirmed the direct effect of the EU law, including Articles 101 and 102 TFEU, duty of national courts to enforce the norms of the EU competition law and safeguard their full effect, as well as the principles of effectiveness and equivalence, citing the historic case law of the Court of Justice.[44] The CC also quoted Articles 5 and 6 of Regulation 1/2003 and the competence of competition authorities and courts described as follows: "(…) the competence to ensure the protection of individuals' rights in the field of competition is entrusted both to the competition authority (…) and to the courts. In the conditions of the Slovak Republic, this protection is established in a way that the *antimonopoly authority has the competence to decide on the infringement of competitive law* by a specific behaviour (it is an activity prohibited also by Article 101 and Article 102 of the Treaty on the Functioning of the

40 Judgment of SC of 24 June 2020, case No 3Obdo/108/2019, ECLI:SK:NSSR:2020:1213230629.2.

41 Judgment of SC of 24 June 2020, case No 3Obdo/108/2019, par. 51.

42 Order of CC of 2 December 2021, case No II. ÚS 564/2021.

43 Order of CC of 2 December 2021, case No II. ÚS 564/2021, par. 14.

44 Order of CC of 2 December 2021, case No II. ÚS 564/2021, par. 15.

European Union) *and the courts provide protection subsequently in the form of deciding on a claim for compensation for damages caused by an anti-competitive act that has already been found unlawful by a competent competition authority* that is professionally and technically equipped to make such an assessment." (emphasis added).[45] Furthermore, the CC found no violation of the right to judicial protection: "From the point of view of the effectiveness of the protection provided in the field of competition, the injured party is entitled to claim and obtain compensation in the form of a private law action, *provided that the existence of the prohibited conduct has been declared by the antitrust authority*." (emphasis added). [46] Summing up, the CC effectively removed the possibility for stand-alone actions in the Slovak legal order by stressing, that it is possible to claim damages in competition matters only after decision of the competition authority. Misleadingly, the CC compared the situation in competition law with claims for damages in the cases of harm caused by unlawful decision or action of public bodies in which a previous annulment of such a decision of public authority is required.[47] The situation is not comparable, because there is a presumption of validity of decisions of public bodies unless they are duly annulled or repealed, but there cannot be a presumption of non-existence of anti-competitive behaviour of undertakings. The CC also supported its conclusion by argument of the protection of the presumption of innocence suggesting that in stand-alone actions "(…) it would be possible to hold an alleged violator of public (competition) law norms, who has not been found guilty of a certain infringement by a final decision of the competent public authority (the competition authority), liable under private law for a behaviour which it is presumed that it has not committed, until the competition authority, by its final authoritative decision, declares to the contrary."[48]

3.1.6. The *Union saga* and ways forward

Thus, after more than eight years of judicial disputes, the Slovak court have not acknowledged the possibility of stand-alone claim for damages relying on jurisdictional limits stipulated by § 193 and § 194 of the Civil Dispute Code (2015). Even though the *Union saga* dealt with the pre-Damages Directive infringement, it can be little changed in the course of the Slovak courts based on the Damages Directive. Although § 4 of the Damages Act is the *lex specialis* to the Civil Disputes Code,[49] it repeats that the court is bound by the decision of the AMO. Further-

45 Order of CC of 2 December 2021, case No II. ÚS 564/2021, par. 17.

46 Order of CC of 2 December 2021, case No II. ÚS 564/2021, par. 17.

47 Order of CC of 2 December 2021, case No II. ÚS 564/2021, par. 17.

48 Order of CC of 2 December 2021, case No II. ÚS 564/2021, par. 14 .

49 § 22 Damages Act.

more, the explanatory memorandum attached to the proposal of that provision is not amicable for limiting consequences of judicial decisions in *Union saga* as well: "The aim of this norm is to prevent the court from deciding on an infringement of competition law, which constitutes the most important legal condition for the subsequent decision on a claim for damages."

Indeed, the call for consistency of public and private enforcement of competition law shall be addressed within the judicial proceeding stemming from damages claims. However, complete outlawing stand-alone actions went rather too far in securing the legitimate goal. Moreover, the courts in their reasoning omitted several legal aspects of Slovak and EU law.

Firstly, the courts do not distinguish between violation of competition rules as such with its civil, administrative and penal consequences and infringement of competition rules as administrative offence enforced by competition authorities. Even the CC when quoting provisions of Regulation 1/2003 simply omitted Article 1 of that regulation, more precisely paragraph 1[50] and 2[51] thereof. Based on Regulation 1/2003, the prohibition of anti-competitive behaviour exists notwithstanding the existence of a decision declaring infringement of Article 101 or 102 TFEU.

Second, the courts do not elaborate the duty of courts to stand proceeding if it is necessary to wait for the decision of the competent authority under § 162 in conjunction with § 193 and § 194 of the Civil Disputes Code (2015). The Regional Court in Trenčín when deciding on claims of the organization of collective management of authors' rights stand proceeding until the final decision of the AMO.[52] In this case the court found the decision of the AMO relevant for the legality and level of the fees charged by the abovementioned organization since the defendant claimed that the level of the fees is a consequence of abuse of dominant position. In its finding of 20 April 2023 the CC avoided to provide the answer to the argument that refusal to stand proceeding and to wait for the decision of the AMO constitutes a violation of the right for a fair trial.[53] In the line of the limited competence of the CC, it refer this question to the SC which had to decide on the extraordinary appeal again due to annulment of its prior decision by the CC.

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50 "Agreements, decisions and concerted practices caught by Article [101](1) of the Treaty which do not satisfy the conditions of Article [101](3) of the Treaty shall be prohibited, no prior decision to that effect being required."

51 "The abuse of a dominant position referred to in Article [102] of the Treaty shall be prohibited, no prior decision to that effect being required."

52 Judgment of the Regional Court in Trenčín of 31 January 2024, case No 19Co/154/2019, ECLI:SK:KSTN:2024:3116204463.3, par. 18-21.

53 Finding of the CC of 20 April 2023, case No I. ÚS 116/2023, par. 33-36.

Third, the courts omitted the possibility of preliminary reference to the Court of Justice of the EU to clarify the interpretation of Articles 1 and 6 of Regulation 1/2003 and to test their approach to stand-alone actions.

Fortunately, the reasoning order of the CC in case No II. ÚS 564/2021 is not legally binding, but, on the other hand, it explicitly rejected arguments of violation of the right for a fair trial based on de facto refusal of admissibility of stand-alone actions. Within such a strict interpretation of procedural rules, the path followed by the Regional Court in Trenčín may provide a solution to the consistency of public and private enforcement of competition law.

Nevertheless, even abovementioned solution does not address situation similar to that identified by the Court of Justice in C-792/22 *Energotehnica.* Similarly, the persons harmed by an anti-competitive behaviour do not have standing at administrative proceeding at the AMO and thus they cannot procedurally influence the decision of the AMO (they are not addressees and they cannot appeal the decision). Therefore, the final decision of the AMO which is binding to the court in the damages proceeding is "*fait accompli*" for prospective harmed parties.

3.2. Follow-up claims

The transposition of the Damages Directive hardly led to a vigorous private enforcement dispute, at least not visibly (out-of-court settlements cannot be caught by a public survey). By the time of writing this paper, there is no publicly known successful follow-on claim arising from antitrust decision in Slovakia.[54] Nevertheless, several unsuccessful cases can be found.

In *DAMIJO KOMPLET/ Východoslovenská vodárenská spoločnosť* the District Court Svidník from 2004 to 2017.[55] The applicant claimed damages due to refusal to supply water by Východoslovenská vodárenská spoločnosť, a.s., relying on the decision of the AMO of 2004. The court rejected the claims due to insufficient evidence of existence of harm and existence of a causal link (inter alia, argument, that the applicant should not have entered to contract with its customers when it has to be aware that it had not secured supplies of water).).

In the case of refusal to supply fuel, the SC rejected the claims of the applicant based on the following argument, that the claim is not covered by the concept of unfair competition, and thus it is not possible to claim damages under civil (com-

[54] In Slovakia, all final decisions of the courts shall be published.

[55] Judgment of the District Court Svidník of 17 March 2017, Case No 1Cb/230/2004, ECLI:SK:OSSK:2017:8604114180.27

mercial) law because the plaintiff and defendant were not "in competition" but in a contractual relationship: "There was a contractual relationship between the plaintiff and the defendant, from which it cannot be inferred that there was competition in a particular market in order to outcompete competitors and to gain a more advantageous position and greater material benefit in the business. The failure to conclude the sales contracts cannot be regarded as unlawful conduct and an abuse of competition, since the conditions for the fulfilment of the conditions of competition between the complainant and the respondent were not met. The fact that the respondent was fined by the Antimonopoly Office of the Slovak Republic for abuse of its dominant position does not establish that there was a competitive relationship between the complainant and the respondent, an act in competition."[56] The arguments of the SC was "reinforced" within the extraordinary review process by the SC and published in the collection of case law of the SC: "The behaviour, which the Antimonopoly Office in its final decision qualified as abuse of dominant position on the relevant market in the form of discrimination pursuant to § 7(5)(c) of Act No.188/1994 Coll. on the Protection of Competition as amended, may also constitute unfair competition pursuant to § 44(1) of the Commercial Code only if the person who violated the above obligation and the person against whom it was violated are in a position of mutual competitors."[57]

The court, but also the applicant apparently amalgamated the concepts of unfair competition and violation of competition rules, and the court required fulfilment of the conditions unfair competition also for damages stemming from violation of APEC.

Since this case law is quite outdated, it is hard to imagine that in the present time any court will refuse to accept claims for damages stemming from competition infringement confirmed by the AMO. Therefore, we will focus on cases not older than 10 years for the purposes of further analysis.

The following conditions for successful follow-on actions seem to be essential:

1) existing final decisions of a competition authority, i.e., a basis for legal claims for damages;
2) existing damage caused by anti-competitive behaviour;
3) existing "victim" of anti-competitive behaviour;
4) existing undertaking that infringed competition rules.

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[56] Judgment of the SC of 21 October 2008, case No 4 Obo 194/2007.

[57] Judgment of the SC of 20 February 2008, case No: 1 Obdo V 19/2007, https://www.nsud.sk/data/files/510_stanoviska_rozhodnutia_7_2010.pdf.

If all of these above-mentioned conditions are not fulfilled cumulatively, there is no basis (no starting point) for a successful claims in follow-actions and it is not necessary no analyse further incentives or disincentives in the procedural structure of Slovak civil law.

3.2.1. Existence of final decisions

For damages claims, it is necessary to find a decision of a competition authority on which claimants can rely. The decision must meet several formal and material criteria.

1) the decision shall be final, i.e., it cannot be appealed or under the judicial review.

2) the decision shall contain at least description of possible damage caused by anti-competitive behaviour.

Notwithstanding the quality and the content of the decisions of the AMO, the number of cases successfully closed on the level of the AMO (i.e. they were not appealed or the Council of the AMO confirmed the decision). Table 2 shows that in the sphere of cartels the AMO issues at least some decision but in the area abuse of dominant position and vertical agreements are only few enforcement decisions. The figures may be, however, misleading in the sense that the AMO performed only few enforcement actions in the area of abuse of dominant position and vertical agreement. It must be noted that apart from the number of the decisions mentioned in Table 2, the AMO also rendered several decisions on accepting commitments. On the one hand, accepting can be seen as an effective measure to solve the situation on the market, on the other hand, it is not possible to base a claim for damages on a such decision because commitment decision does not state the existence of an infringement of law. As the quantitative analysis showed that after 2004 almost all reviewable decisions of the AMO were actually appealed within the judicial review (88 %).[58] Furthermore, the majority of the cases are closed after a lengthy judicial battle and finally 70 % cases were upheld by the courts[59] but the length of the judicial review (comparing to the length of the proceeding of the AMO)[60] remains the substantial hindering factor of the effectiveness of the competition law in Slovakia. Further private enforcement of competition law

[58] O. Blažo, 'Slovakia Report' in B. Rodger, O. Brook, M. Bernatt, F. Marcos, A. Outhuijse (eds.), Judicial Review of Competition Law Enforcement in the EU Member States and the UK, (Alphen aan den Rijn: Kluwer Law International, 2024), pp. 739–88 p. 755.

[59] Blažo, 'Slovakia Report', p. 760.

[60] O. Blažo, 'More Than a Decade of the Slovak Settlement Regime in Antitrust Matters: From European Inspirations to National Inventions' (2023) 16 *Yearbook of Antitrust and Regulatory Studies* 9–56.

is also narrowed by the scope of the enforcement actions by the AMO. Almost all cartel decisions in the recent decade cover single bid rigging case (or very few interconnected public procurements). Therefore, usually there is a single injured party – contracting authority, i.e. private body. Furthermore, since all bid rigging cartels are considered hardcore cartels – restrictions by object – the AMO provides limited identification of actual harm caused by bid rigging (apart from statements on the effects of bid rigging in general).

Table 2: Number of infringement cases closed by the AMO

Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Cartels	2	4	3	4	1	1	3	1	1	1	1
Abuse	0	0	0	0	1	1	0	0	0	1	1
Vertical agreements	1	0	0	0	1	1	0	0	0	0	0

3.2.2. Existing "damage" or harm

The identification of undertakings that infringed competition law and the confirmation of the existence of violation of competition law are essential for the follow-on actions. The applicant cannot directly base their damages claims solely on the content of the decision of the AMO (because this aspect is not binding for the court and at the same time the AMO is not empowered to decide on damage), nevertheless, the description of possible harm provided by the competition authority is relevant for estimation if the decision can serve as a basis for follow-on claims. In the majority of cases, the AMO has not provided any precise theory of harm relying on *quasi-per se* prohibition of hard-core cartels. Moreover, it is possible to identify several situations that constitute a competition infringement on the one hand, but on the other hand, the facts suggest that the cartel caused no harm or a very small harm that can be requested by the means of civil law. The following examples of situations when damages claims can be difficult or impossible can be identified in the decisions of the AMO:

a) public procurement procedure cancelled: the contracting authority cannot request damages because by cancelling the public procurement procedure effectively avoided the harm;[61]

b) members of the cartel excluded from the procurement procedure: the existence of bid rigging did not cause any pecuniary or non-pecuniary harm because the agreement among the undertaking did not influence the outcome of the public procurement procedure;

[61] Case 0016/OKT/2022, decision of the AMO No 2023/DOH/POK/1/3.

c) members of the cartel were not successful: similarly to the previous alternative, the bids by the members of the cartel did not influence the price of the awarded contract;

d) agreement on limiting of lowering price: the members of the cartel agreed that they limit lowering prices under the recommended price of the cars; it will be extremely hard to estimate how much the distributors of cars decrease the price under the lever of the price recommended by the producer or wholesale distributor;

e) price "generated" by cartel is lower that estimated value of the procurement: again, in theory it is possible to claim that the price is higher than competitive, but on the other hand, it will be extremely hard for the contracting authority to prove that it suffered damage because the price should have been much lower that it estimated with a due diligence;[62]

f) harm is extremely low: in the case of *IT Distributors*, the members of the cartel agree to charge one euro per invoice; the amount of harm and damages but due to a short period or non-enforcement of the agreement, the individual harm caused to individuals was few euro only, if any.

3.2.3. Existence of a "victim"

As it was mentioned in the previous subchapter, the majority of the cartel cases were involving a single bid rigging situation or interconnected bid rigging cases. Thus, in such situations, a contracting authority may appear as a harmed party.

However, sometimes manipulation with tender can create a maze of liability relations as can be shown on *MAHRLO et al.* case.[63] In the tender in issue, the vocational secondary school hired a self-employed expert on public procurement. However, this expert manipulated tender by selecting tenderers and providing exchange information among them. The expert was fined as a member of the cartel together with the rest of "conspirators". Due to Slovak law, if injured party substantially contributed to own harm, the damages can be reduced and even also rejected. Such an approach in competition cases is undoubtedly in the line with *Courage/Crehan* case law.[64] In this particular case, contribution of the contracting authority is apparent since the cartel was co-organized by person acting on behalf of contracting authority (at least vicarious liability). The "real" injured party are

62 Case No 0002/OKT/2020, decision of the AMO No 2023/DOH/POK/1/27.

63 Decision of the Antimonopoly Office No 0016/OKT/2013, Decision of the Council of the Antimonopoly Office No 2015/KH/R/2/005.

64 Case C-453/99 Courage/Crehan [2011] ECLI:EU:C:2001:465, operative part.

students at that school as well as people of the region because students were provided with the required training equipment with the possible consequences of the lower level of their skills obtained during their vocational training. Moreover, all the members of the cartel were small enterprises that ceases their activities during procedure (or transferred them to other legal person) and therefore final fines were ridiculous (in some cases EUR 500.00 and less).

In the context of public authorities that were a "victim" of bid rigging, AG Kokott in Otis introduced her thoughts of possible compensation of "political" harm, i.e., harm caused to the general public due to a cartel that caused non-compliance of public body with the obligation to ensure general welfare.[65] Thus, political harm means a loss of benefits of the general public in public welfare due to lack of funding, as these funds were drained from public budgets due to anti-competitive behaviour.

Of course, the application of this type of damage has at least two pitfalls: the calculation of the damage and the identification of a recipient of damages. In relation to the calculation of the damage is J. Kokott relatively inconclusive and dodging, in the case of a possible plaintiff and the recipient of damages seems to be inspired by US legal order: "However, in such cases, it is possible to consider having a representative of the public interest demand compensation for the harm sustained and making the injuring party pay the compensation into a fund that benefits the general public."[66] Such a model is then resembling the *parens patriae* actions in the United States based on the principles of common law.[67] Nevertheless, such an approach of not confirmed neither in Slovak law not in the EU law in general notwithstanding that some jurisdiction allow *actio popularis* on behalf of general public.[68]

In other cases, the contracting authority (or its agent) was not directly involved into bid rigging but by its actions can (a) either facilitate creation of a cartel or (b) by its negligence and failure of the duty to act with a professional care contributed to harmful outcome public procurement procedure.

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65 Case C-435/18 *Otis and Others*, [2019] ECLI:EU:C:2019:651, Opinion of AG Kokott, par. 127-130.

66 Case C-435/18 *Otis and Others*, [2019] ECLI:EU:C:2019:651, Opinion of AG Kokott, par. 130.

67 S. B. Farmer, 'More lessons from the laboratories: Cy pres distributions in parens patriae antitrust actions brought by state attorneys general' (1999) 68 *Fordham Law Review* 361–405; E. L. . Fisch, 'The Cy Pres Doctrine and Changing Philosophies' (1953) 51 *The Michigan Law Review* 375–88.

68 L. Rossi and M. S. Ferro, 'Private Enforcement of Competition Law in Portugal (II): Actio Popularis - Facts, Fictions and Dreams' (2013) 13 *Competition nad Regulation* 35–87; M. S. Ferro, 'The System for EU Antitrust Enforcement is Misguided and Unfair—Let's Change it' (2020) 11 *Journal of European Competition Law & Practice* 413–17.

In *SPIE Elektrovod et al.* case, the contracting authority requested company *SPIE Elektrovod* to prepare calculation of the estimated value of the contract.[69] Obviously, such a situation is not prohibited, but the consortium led by *SPIE Elektrovod* actually won the bid and the question, whether pervious contacts with the contracting authority might have helped *SPIE Elektrovod* to win the bid or not, may be subject to further investigation or a form of a defence of possible damages claims.

In *AGROSERVIS et al.* case, the AMO analysed procurement procedure launched by several agri-food companies (public procurement was mandatory due to the EU funding). The AMO identified, that *ISA projekta* company was preparing procurement documentation and had "knowledge that bids should be submitted by tenderers designated by the undertaking AGROSERVIS and also that the bids submitted by the bidders *AGROSERVIS* and *Alžbeta Tóthová M E T E O R* are essentially identical."[70] In the same time *EXATA GROUP* prepared all procurement procedures but it was not treated as a member of the cartel due to its link with winner of all public procurement in issue (*AGROSERVIS*) because it was, in fact, a parent company of all contracting authorities involved in case. It is obvious that contracting authorities, that were subsidiaries to the company which contributed to the existence of bid rigging cartel, can hardly successfully claim damages due to anti-competitive behaviour which, at least indirectly, existed because of their very activities.

The judgement of the Regional Court in Trenčín[71] (and previous judgment of the District Court Trenčín[72]) confirmed strict liability of contracting authorities if they fail to detect existence of bid rigging. In several cases was the bid rigging so obvious from the procurement documentation that it was not necessary to perform an inspection of the premises of the undertaking in issue or the inspection did not bring additional evidence. Such a negligence or lack of professional care led to case handled by the abovementioned courts in *The Slovak Republic/STM POWER*. The Slovak Republic (represented by the Ministry of Economy) successfully claimed damages from *STM POWER* company due to violation of the duty to avoid anti-competitive behaviour in the public procurement procedure which entailed to fining decision of the AMO and the refusal to cover the purchase by the EU funds. Therefore, the *Slovak Republic/STM POWER* case covered a spe-

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69 Decision of the AMO of 11 September 2023, No 2023/DOH/POK/1/27, par. 63

70 Decision of the AMO of 11 September 2023, No 2023/DOH/POK/1/27, par. 229

71 Judgment of the Regional Court in Trenčín of 29 June 2022, case No 8Cob/70/2021, ECLI:SK:KSTN:2022:3116212914.2.

72 Judgment of the District Court Trenčín of 8 January 2021, case No 36Cb/211/2016, CLI:SK:OS TN:2021:3116212914.13.

cific form of damages caused by anti-competitive behaviour stemming from harm caused to the state's budget. At the same time, it confirms the possibility of liability of a contracting authority that had not avoided or prevented bid rigging. This approach can also narrow the avenue for damages requested by a contracting authority of the case of its contribution to bid rigging, at least by its own negligence.

3.2.4. Existing undertaking that infringed competition rules

The possible enforceability of damages stemming from anticompetitive behaviour is also determined by the character of cases handled by the AMO and the fact that the majority of the undertakings in issue are small and medium enterprises. Such companies can easily cease their activity, and owners can start a fresh activities with a fresh company.

The Central Register of Outstanding Receivables of the State[73] show, that in cases 0010/OKT/2021, 0026/OKT/2014, 0027/OKT/2017, 0019/OKT/2013, 0016/OKT/2013 the undertakings simply did not pay the fines.

Table 3: Unpaid due fines (based on the registry of outstanding recievables of the state)

Case No	Fine Final Average	Fine Final Total	Unpaid due fines (based on the registry of outstanding recievables of the state)
0002/OKT/2020	1,791,275.00	7,165,100.00	AlterEnergo, a.s.,: 1 792 500,00
0010/OKT/2021	10,985.33	32,956.00	BECO, spol. s r.o.: 8 000,00 EUR WR system, s.r.o.: 19 835,00 EUR
0026/OKT/2014	85,693.00	257,079.00	VUMAT SK, s.r.o.: 165 341,00 EUR B.C.D., spol. s r.o.: 28 176,00 EUR
0027/OKT/2017	153,773.00	307,546.00	PINGUIN, s.r.o.: 153 773,00 EUR HORADSTAV, s.r.o.: 153 773,00 EUR
0019/OKT/2013	97,740.30	390,961.20	J.P.-STAV spol. s r.o., v konkurze: 158 783,00 EUR
0016/OKT/2013	10,105.50	101,055.00	IBANK-CCC, spol.s r.o.: 216.00 EUR

Sources: Annual reports of the AMO, decisions of the AMO, Central Register of Outstanding Receivables of the State (https://crps.pohladavkystatu.sk/en)

If we look at the figures of the companies that did not pay the fines, there are not cases of inability to pay stricto sensu. The following examples provide insight to the strategies of firm caught for an infringement of competition law.

[73] https://crps.pohladavkystatu.sk/en

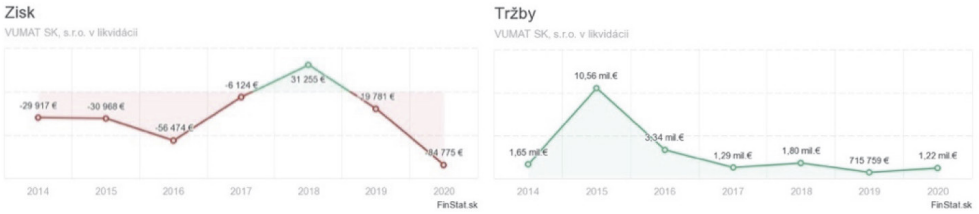
In 0010/OKT/2021 BECO, spol. s r.o., and WR system, s.r.o., simply ceased their activities and they did not even submit a financial report for 2021 and onwards (BECO, spol. s r.o., changed its statutory name and declared bankruptcy in 2023.

Figure 1: Total revenues of BECO, spol. s r.o., and WR system, s.r.o.

Source: Finstat.sk

In 0026/OKT/2014 is the scenario of avoiding of payment of the fine much more apparent. The company VUMAT SK, s.r.o. has generated a loss permanently even in the case of the turnover around EUR 1 million (in one year EUR 10 millions) and B.C. D., s.r.o. ceased its activity after the AMOs investigation. It must be noted that the artificial decrease of the turnover of the company does not influence the ability to pay of the company, but also the possible level of the fine due to 10 % cap. From the public data, it is possible to identify the continuation of activities of one the owners of VUMAT SK, s.r.o. in other companies with increasing revenues (after decreasing activities of VUMAT SK, s.r.o.)

Figure 2: Profit and turnover of VUMAT SK, s.r.o.



Source: Finstat.sk

Figure 3: Profit and turnover of B.C. D., s.r.o.

Source: Finstat.sk

Figure 4: Turnover of the companies of the director of VUMAT SK, s.r.o.

Source: Finstat.sk

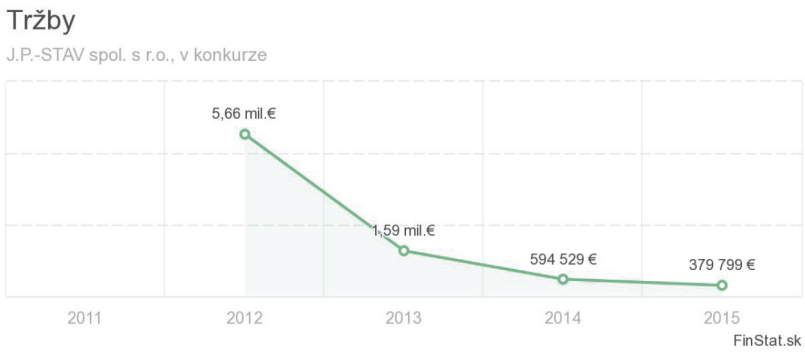
The situation of undertakings in cartel in case No 0027/OKT/2017 was similar. HORADSTAV, s.r.o., submitted its last financial report for 2011[74] and PINGUIN, s.r.o., has been in the liquidation procedure. However, similarly to the previous case, the director of PINGUIN, s.r.o., continues in its entrepreneurial activities within the companies BARDTERM, s.r.o., BARDBYT, s.r.o.

Figure 5: Turnover of PINGUIN, s.r.o. , BARDTERM, s.r.o., BARDBYT, s.r.o.

Source: Finstat.sk

And finally, J.P.-STAV spol. s r. o., in case No 0019/OKT/2013 ceased its activities after investigation of the NCA and in 2014 launched bankruptcy procedures

Figure 6: Turnover J.P.-STAV spol. s r. o.,



Summing up, smaller companies in cartel cases successfully employed a strategy of avoiding payment of the fine. This consequence demonstrated ineffectiveness of

[74] https://www.registeruz.sk/cruz-public/domain/accountingentity/show/643823

the enforcement activities of the PMÚ focusing on small bid rigging cases covering only single procurement case. It is quite easy, for the owner or director of a small firm, to transfer its activities to another company. It is not always easy to consider these new companies of the owner or the director to be part of a single economic unit within the common understanding of the competition law, although the definition of "undertaking" is quite broad. The scope of the application of the concept of single economic unit is limited by the time of infringement and the time of imposition of fine, not for the establishment of a separate undertaking.

Thus the problem of this form of undermining of the enforcement of the competition law lies outside of the traditional boundaries of the competition law and its concepts. If companies (and undertakings) liable for infringement of competition law cannot be linked to a single economic unit through application of competition law, the concept of an "ultimate beneficiary owner" (UBO) may be useful to solve (at least partially) escape routes from liability to pay the fine for violation of competition. In filling this enforcement gaps, the Slovak legislator cannot rely on the EU models since it is full responsibility to bring to effectiveness application of the EU law (including competition law).

Although the previous analysis dealt with impossibility of enforcement of fines, the same approach is applicable to the possibility to retrieve damages from such undertaking, i.e. if an undertaking escapes from the payment of the fine, a fortiori it subsequently probably escapes the civil liability as well.

3.2.5. Summary

Summarizing all factors that can narrow avenues for using certain a decision of the AMO as a successful basis for follow-on damages actions, Table 4 shows that very few decisions are suitable for follow-on actions, based on these criteria. Indeed, criteria based on a possibly limited scope of the relevant extent of damages does not automatically mean that follow-on actions are not possible at all. It is apparent from public information that there is very little activity regarding claims arising from the AMO's infringement decisions. However, the claims stemming from the European Commission's decision in *Truck Cartel* may revive civil claims in competition matters.

Table 4: Decisions suitable for follow-on actions

a	b	c	d	e	f	g	h	i	j	k	l
Year	Case number	DD	Fine imposed by final decision (in euro)		Jud. rev.	Limited damage			CA		Und. dis.
			Average	Total		PP can.	No win	Dam. quest.	Inv.	Neg.	
Cartels											
2024	0002/OKT/2020	No	1,791,275	7,165,100				Yes			
2023	0016/OKT/2022	Yes	2,963	8,890		Yes					
2022	0010/OKT/2021	Yes	10,985	32,956						Yes	Yes
2021	0009/OKT/2017	Yes	190,739	1,144,435	Yes						
2020	0022/OKT/2016	No	39,230	117,690						Yes	
2020	0021/OKT/2019	No	107,777	431,095					Yes		
2020	0012/OKT/2016	No	373,863	6,729,539	Yes						
2019	0035/OKT/2015	No	140,609	281,218							
2018	0027/OKT/2017	No	153,773	307,546						Yes	Yes
2017	0020/OKT/2013	No	64,327	128,653	Yes						
2017	0003/OKT/2015	No	596,470	2,982,351	Yes						
2017	0028/OKT/2014	No	23,396	210,565	Yes						
2017	0050/ODOS/2007	No	132,770	132,770	Yes						
2016	0026/OKT/2014	No	85,693	257,079						Yes	
2016	0011/OKT/2015	No	33,857	67,713						Yes	
2016	0016/OKT/2013	No	10,106	101,055					Yes		Yes
2015	0029/OKT/2014	No	308,186	616,371				Yes			
2015	0030/OKT/2014	No	51,191	153,573						Yes	
2015	0010/OKT/2013	No	411,277	2,056,382				Yes			
2015	0019/OKT/2013	No	97,740	390,961						Yes	
2014	0016/ODOS/2011	No	1,420	1,419							
2014	0064/ODOS/2008	No	3,183,427	3,183,427							
Abuse of dominant position											
2023	0011/OZDPaVD/2020	Yes	57,939	57,939	Yes						
2022	0006/OZDPaVD/2020	Yes	1,181,849	1,181,849	Yes						
2019	0013/OZDP/2012	No	2,990,651	2,990,651							
2018	0012/OZDPaVD/2017	Yes	127,000	127,000							
Vertical agreements											
2019	0001/OZDPaVD/2019	Yes	20,632	20,632							
2018	0014/OZDPaVD/2015	No	?	?	Yes						
2014	0018/OZDPaVD/2014	No	2,182,241	2,182,241				Yes			

Legend: a: year when the decision became effective on the level of the AMO, b: number of administrative case, c: infringement falls into the *ratione temporis* of the Damages Directive, d, e: fine imposed in administrative proceeding (average/total), f: the decision is currently under judicial review (or the final judicial decision has not been published yet), g: public procurement procedure was cancelled, h: none of the members of the cartel was successful; i: Limited possibility to identify a damage; j: possibility of involvement of contracting authority or its agent in bid rigging; k: possible

negligence of contracting authority (apparent indicia of bid rigging); l: undertaking disappeared, ceased activity or bankrupted.

Source: Author's own elaboration, based on data extracted from Annual reports of the AMO, decisions of the AMO, database of judgments published by the Ministry of Justice of the Slovak Republic

4. POSSIBLE WAYS FORWARD

In the short-term horizon, it is hard to expect speeding-up the judicial review procedures. The enforcement intensity and focus thereof are, of course, in the hands of the AMO. Based on apparent disconnection between public and private enforcement of the competition rules a non-exhaustive catalogue of measures together with their advantages and disadvantages can be suggested:

1) **The rebuttable presumption that anti-competitive behaviour raised prices by 10 %:** the presumption can be established by law and due to achieve flexibility its precise amount can be adjusted by the decree of the AMO.
   a. advantages: significant simplification of damages claims.
   b. disadvantages: the presumption can lead to undue benefits of the claimants in the form of excessive damages and thus creating a form of punitive damages.

2) **Involvement of the "victims" as a third parties**: the approach similar to criminal law in Slovakia where victims of the investigated and prosecuted crime have procedural rights in the criminal proceeding, including claim directly damages, call witnesses, submit their observation; effective application of this approach established in criminal law would require amendment of current legislation, however, in a certain form, the aim can be achieved by increasing application of the provisions of the third parties in the current APEC; moreover, the AMO can have a duty (or shall within the ambit of the current legislation) pro-actively search for potential injured party and call them to present their opinions and proposals within ongoing administrative proceeding, including estimation of harm:
   a. advantages**:** involvement of possible injured parties can strengthen the case and raise the interest of these injured parties;
   b. disadvantages**:** the communication with the other parties can prolong the administrative case and can raise tensions on the protection of business secrets and other information from file during the administrative proceeding.

3) **Including damages consideration in the settlement procedure:** again, similar approach to criminal law, i.e. the undertaking can settle with the "State"

(i.e. settle the fine) only if it settles with injured parties (victims); complete settlement with the "victims" or at least admitting the civil liability and a promise to cover damages could be a condition of administrative settlement regarding the fine:

a. advantages: comprehensive public-private settlement and reducing number of speculative settlements (hybrid, second-instance settlements);
b. disadvantages: frustrating the benefits of the settlement procedure by involving elements of uncertainty and by prolonging the settlement procedure.

4) **Solving private-law aspects of competition law enforcement by private-law measures:** this approach is the most flexible and does not create any impediments to the administrative proceedings; the possibility of ensuring compensation of harm caused by anti-competitive behaviour can be covered by contractual clauses which can be, in particular, forced in the contracts arising from public procurement, for example:

a. termination of contract in the case of bid rigging or other anti-competitive behaviour;
b. compensation for any withdrawn public funds, including the EU funds, in the case of bid rigging,
c. contractual fine, i.e. lump sum damages for the cases of any competition law infringement.

5. CONCLUSIONS

Although it is hard to identify any legislative obstacles which impede effective private enforcement of competition law, successful cases on private enforcement of competition law confirmed by a judicial authority are still missing in Slovakia. Moreover, provisions that were deemed to facilitate private enforcement (binding effects of the decisions of the AMO) became inf fact their main obstacles as interpreted by Slovak courts, including the Constitutional Court of the Slovak Republic. Thus, the case law froze the possibility of stand-alone action until it will be overridden due to violation of the EU law.

The sphere of follow-on actions, decisions of the AMO was not taken into consideration because it will be unreasonable to analyse older decisions due to possible lapsing of limitation periods. Nevertheless, also in the context of follow-on actions the courts were reluctant to accept a possibility to award damages based on the arguments stemming from the decision of the AMO.

The paper reviewed recent AMO decisions to see if they can serve as a basis for follow-on action, based on four criteria: (1) if they are final, (2) if the described behaviour caused a relevant harm, (3) if the injured party contributed intentionally or negligently to the infringement, and (4) if it is possible to find a liable person with assets sufficient to cover damages. The analysis showed that only a small fraction of the decision of the AMO passed through this scrutiny.

Finally, the paper suggests a non-exhaustive list of suggestions that can improve possibilities of private damages claims in competition matters: the rebuttable presumption that anti-competitive behaviour raised prices by 10 %, involvement of the "victims" as a third parties, including damages consideration in the settlement procedure, solving private-law aspects of competition law enforcement by private-law measures. Although the first suggestion requires statutory change, the remaining can also be achieved via a new practice of the AMO and contracting authorities. Better involvement of the "victims" of competition infringements is consistent with similar policies in criminal proceedings.

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