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Private (Non-) Enforcement of Competition Law in Slovakia

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Outline

- Legislative development
- Stand-alone actions
- Enforcement by the NCA – basis for follow on
- Avenues forward

1.

Legislative framework

Four generations of competition acts (APEC)

- APEC(1991) –federal
- APEC(1994) - Slovak
- APEC(2001) – European
- APEC(2021) - ECN+

APEC (1991)

- Every person suffered by prohibited competition was entitled to require infringer to
  - to refrain from behaviour (actio negatoria),
  - to remedy the harmful situation (action restitutoria)
  - to provide an adequate compensation,
  - to make good the damage
  - to deliver the unjust economic benefit.
- Quasi opt-in actions for
  - actio negatoria
  - actio restitutoria

APEC (1994)

- ~~Every person~~ Consumers suffered by prohibited competition was entitled to require infringer to
  - to refrain from behaviour (actio negatoria),
  - to remedy the harmful situation (action restitutoria)
  - ~~to provide an adequate compensation,~~
  - ~~to make good the damage~~
  - ~~to deliver the unjust economic benefit.~~
- Quasi opt-in actions for
  - actio negatoria
  - actio restitutoria
- Possible representation by organizations representing consumers

APEC (2001) –until 2014

- Consumers suffered by prohibited competition was entitled to require infringer to
  - to refrain from behaviour (actio negatoria),
  - to remedy the harmful situation (action restitutoria)
- ~~Quasi opt-in actions for~~
  - ~~actio negatoria~~
  - ~~actio restitutoria~~
- Possible representation by organizations representing consumers

APEC (2001) – 2014-2016

- ~~Consumers suffered by prohibited competition was entitled to require infringer to~~
  - ~~to refrain from behaviour (actio negatoria),~~
  - ~~to remedy the harmful situation (action restitutoria)~~
- ~~Possible representation by organizations representing consumers~~
- Immunity applicant
  - damages only if they cannot be recovered from cartelists
    - Direct purchasers only

APEC (2001) –2016-2021

- ~~Consumers suffered by prohibited competition was entitled to require infringer to~~
  - ~~to refrain from behaviour (actio negatoria),~~
  - ~~to remedy the harmful situation (action restitutoria)~~
- ~~Possible representation by organizations representing consumers~~
- ~~Immunity applicant~~
  - ~~damages only if they cannot be recovered from cartelists~~
    - ~~Direct purchasers only~~
- Act No 350/2016 – transposition of the Damages Directive

APEC (2021)

- Act No 350/2016 – transposition of the Damages Directive
  - Almost literal transposition
  - court is bound by the final decision of the Antimonopoly Office of the Slovak Republic or by the final decision of the court reviewing the decision in the part of the verdict on the violation of competition law.
  - A final decision on the infringement of competition law issued in another Member State of the European Union shall be considered as evidence of the infringement of competition law, unless the contrary is proved in court proceedings for compensation of damages

2.

Successful private enforcement cases in Slovakia

List of successful claims arising from competition law violations in Slovakia (published)

3.

Stand-alone actions

Union case saga

- Health insurance sector – one state-owned, two private
- 2013 – several hospitals terminated contracts with Union insurance company
- Union saw coordinated behaviour and notified it to the NCA
- Union lodged
  - Requests for interim injunctions
  - Requests for declaring terminations void
  - Damages claims

Union – interim injunction requests

- Rejected by District Court Bratislava II (2013)

Union – request to conclude agreement

- Proceeding stopped by District Court Bratislava II (2013)
  - Action was withdrawn

Union – damages claims

- Rejected by District Court Bratislava II (2013)
  - Based on § 193 and § 194 CSP (Code on Civil Court Proceeding):
  - §193: „…*Furthermore, the court shall be bound by a 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, as well as by a decision on the personal status, formation or dissolution of a company*."
  - §194: *A question on which a public authority other than an authority under § 193 has jurisdiction may be considered by the court itself, but the court may not decide it.*

No decision – no evidence
District Court Bratislava II (2017)

- During the course of the proceedings, the plaintiff did not adduce or point to any evidence to show that the defendant had been penalised in any way for the conduct which the plaintiff has identified as anti-competitive; and nor has he demonstrated to the court that the competition authority (the Antimonopoly Office of the Slovak Republic, the Commission) has, by its decision, declared his conduct to be unlawful. The applicant did not even provide the court with factual allegations of the existence of such a decision. This means that it can be unequivocally concluded that the applicant has not proved the existence of an anti-competitive behaviour of the defendant, i.e. it has not proved the fulfilment of the basic condition for the liability of the defendant for the damage claimed by the applicant.

Court is bound by the NCA's decision Regional Court in Bratislava (2019)

- Recalling Act No 350/2016 (sic !)
- …the question of the existence of an anticompetitive act (administrative tort) is not entitled to be addressed by the court as a preliminary question, since the Antimonopoly Office of the Slovak Republic has the competence to decide on it.

It is not an EU law issue
Supreme Court of the Slovak Republic (2020)

- The Supreme Court of the Slovak Republic (§ 35 CSP) referring to the above reasons, concluded, that the existence of jurisdiction in an action for compensation for damage caused by an infringement of competition law to resolve as preliminary question of the infringement of competition law as the basis of the claim 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.
- Reference to Art. 6 Reg. 1/2003 unanswered

Selective interpretation of EU law Constitutional Court of the Slovak Republic (2021) II. ÚS 564/2021

- The presumption of innocence
- „In the case of the interpretation chosen by the complainant, it would be possible to hold an alleged violator of public (competition) law norms, who has not been found guilty of a specific unlawful act by a final decision of the competent public authority (the competition authority), liable under private law for an act which he is presumed not to have committed, until the competition authority, by its final authoritative decision, declares to the contrary.“

Selective interpretation of EU law Constitutional Court of the Slovak Republic (2021) II. ÚS 564/2021

- „Deep" analysis of EU law:
  - Treaty on establishing of the European Economic Community
    - Costa/Enel, Van Gend en Loos, Francovich
  - Direct effect of Art. 85 and 86 of the Treaty (sic!)
    - BRT I, Simmenthal, Factortame, Palmisani
  - Art. 6 Reg. 1/2003
  - Art. 5 Reg. 1/2003

Selective interpretation of EU law Constitutional Court of the Slovak Republic (2021) II. ÚS 564/2021

- The legal regulation of Slovak competition law complies with the requirements of proportionality and effectiveness of protection formulated by the case law of the Court of Justice, as a similar procedural procedure is established by national law, e.g. in the application of a claim for compensation for damage caused by an unlawful decision of a public administration body, where the declaration of the unlawfulness of the decision by the administrative court is a prerequisite for its assertion in civil court proceedings.

Selective interpretation of EU law Constitutional Court of the Slovak Republic (2021) II. ÚS 564/2021

- Something missed?
- Art. 1 Reg. 1/2003
  - Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.
  - The abuse of a dominant position referred to in Article 82 of the Treaty shall be prohibited, no prior decision to that effect being required.
- Similar national law
- Path further? C-792/22 Energotehnica [2024]

4.

Follow-on action

Building block for follow-on action

Victim

Undertaking

Case

Existing damage

Building block for follow-on action

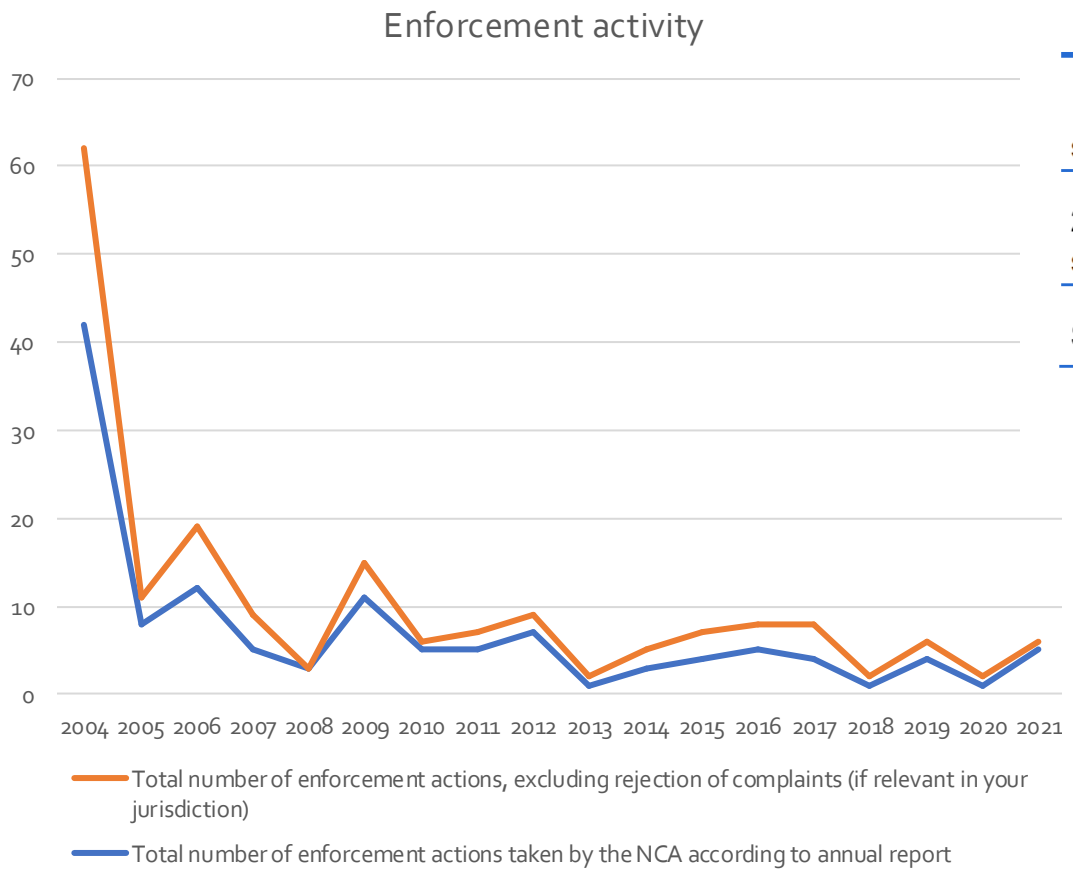
Victim

Undertaking

Case

Existing damage

Number of cases



	Koncentrácie	Zneužívanie dominantného postavenia	Dohody obmedzujúce súťaž	Obmedzovanie súťaže orgánmi štátnej správy a samosprávy
1. stupeň	28	3	0	0
2. stupeň	0	2	0	0
Spolu	28	5	0	0

	Koncentrácie	dominantného postavenia	obmedzujúce súťaž	ne
1.stupeň	23	0	4	
2.stupeň	0	1	1	
SPOLU	**23**	**1**	**5**	

Quality of public enforcement actions

- No theory of harm – restriction by object
- Majority cases – bid rigging
- Public procurement terminated before decision of the NCA
- Cartelists did not win the bid
- Cases still pending at court or annulled
- Agreement on maximum decreasing of prices
  - how to estimate the damage?

Building blocks for follow-on action

Victim

Undertaking

Case

Existing damage

Bid rigging cases

- Majority of cases identified by an audit body
  - the indicia were apparent
- Duty of contracting authority of professional care when handling with public finances
- Successful claims of the State against contracting authority due to violation of subsidies agreement
- In some cases, the contracting authority „somehow" involved in coordination

Building blocks for follow-on action

Victim

Undertaking

Case

Existing damage

No identification of damage in the majority decisions

- Cartels – prohibition by object
  - Agreement of IT distributors – fee 1 € per invoice
- Public calls by the AMO to claim damages

Building blocks for follow-on action

Victim

Undertaking

Case

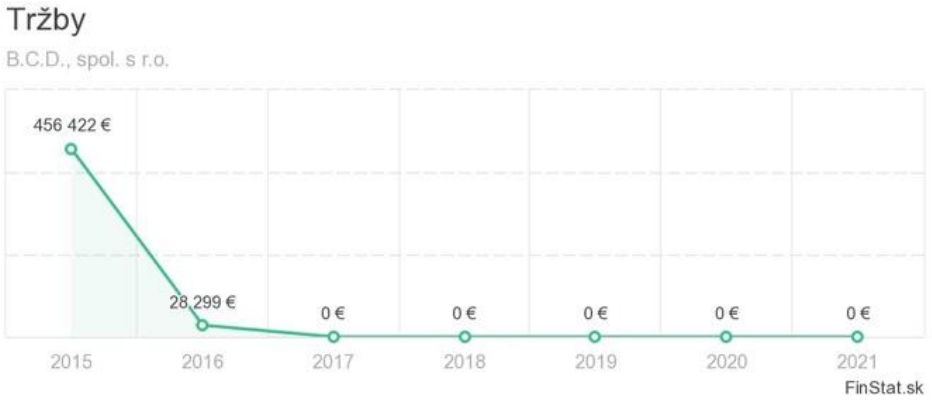
Existing damage

Disappearing undertakings

- 0010/OKT/2021 BECO, spol. s r.o., and WR system, s.r.o
  - no financial report in 2021

Disappearing undertakings

- 0026/OKT/2014 VUMAT SK, s.r.o., B.C. D., s.r.o.



5.

Other activities

Other attempts for private enforcement

- State aid (unsuccessful)
  - Interim injunctions
  - Declaring the contract void
- There is something about Truck Cartel

6.

Avenues forward

Presumption of damage

- Presumption that anti-competitive behaviour raised the prices by 10 %
- Pro – simplification of damage claims
- Con – undue benefits for harmed parties (de facto punitive damages)

Higher number of enforceable cases

- Currently increasing activity
- Personal and financial limits
- Political support
- extremely slow judicial review

Third parties

- Approach similar to criminal procedure
- The NCA
  - calls all known harmed parties to express possible damage
  - public call
- Pros
  - additional information
  - Possible influence on the fine
- Cons
  - Length of the procedure
  - disclosure

Settlement

- Approach similar to criminal procedure
- Settlement involves known harmed parties as well
  - Commitment to cover damages
  - Admitting civil liability
- Pro
  - comprehensive public-private settlement
  - Limiting speculative settlements
- Cons
  - Frustrating the benefits of public settlements

Solving private law issues by private law

- Content of contracts between the contracting authorities and economic operators
  - Termination of contract clause
    - Bid rigging occurred
    - Public/EU funds withdrawn
  - Contractual fine (lump sum damages)

Thank you for your attention

"*Power of truth is invincible if it is armed with the light of knowledge*"

Johannes Amos Comenius

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