

# 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

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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 *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.<sup>1</sup> 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)<sup>2</sup>, via its amendment of 2014, and

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<sup>1</sup> 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.

<sup>2</sup> 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).<sup>3</sup> Its details have been provided by a Decree of the PMÚ.<sup>4</sup>

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 (1<sup>st</sup> instance/2<sup>nd</sup> 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).

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<sup>3</sup> 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*).

<sup>4</sup> 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 procedures<sup>5</sup>

### 1. Settlement pre-history

#### 1.1. Vertical agreements

For the first time, the PMÚ concluded a case via a settlement<sup>6</sup> in the 2009 *ELCOM* case.<sup>7</sup> 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* case<sup>8</sup> that served, undoubtedly, as an inspiration for settlement procedure in Slovakia.<sup>9</sup>

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 notice<sup>10</sup>, 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

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<sup>5</sup> 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.

<sup>6</sup> 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.

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

<sup>8</sup> 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).

<sup>9</sup> Blažo, ‘Úsvit Urovnania Na Slovensku’ (n 5).

<sup>10</sup> The PMÚ as the 1<sup>st</sup> instance body issuing 1<sup>st</sup> instance decision based on its investigation, as well as the Council of the PMÚ as the 2<sup>nd</sup> instance body issuing decision on administrative appeals against 1<sup>st</sup> 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.<sup>11</sup>

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,<sup>12</sup> 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

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<sup>11</sup> More details in Part 8 of grounds of the decision in *ELCOM* case.

<sup>12</sup> 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,<sup>13</sup> 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.<sup>14</sup>

In the *Consumer Detergents* case,<sup>15</sup> 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%’.<sup>16</sup>

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

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

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

<sup>16</sup> *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,<sup>17</sup> since the Commission’s decision did not cover the Slovak territory.<sup>18</sup> 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’,<sup>19</sup> where the PMÚ clearly affirmed the content of its

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

<sup>18</sup> *Consumer Detergents* (n 17) [1].

<sup>19</sup> Podmienky uplatnenia inštitútu urovnania (1 January 2012) <[https://www.antimon.gov.sk/data/files/42\\_podmienky-uplatnenia-institutu-urovnania.pdf](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*,<sup>20</sup> *Slovak Bar Association*,<sup>21</sup> *the Chamber of Restorers*,<sup>22</sup> *the Chamber of Veterinary Doctors of the Slovak Republic*.<sup>23</sup> 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

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<sup>20</sup> Case 0009/ODOS/2012.

<sup>21</sup> Case 2012/KH/1/1/007.

<sup>22</sup> Case 0033/ODOS/2011.

<sup>23</sup> Case 2011/KH/1/1/031.

case, did not join the final settlement.<sup>24</sup> In this case, the PMÚ imposed its historically lowest fine (€ 54.00) and the total fine was only € 4,131.00.<sup>25</sup> While the *Association of Real Estate Brokers* (more precisely its members) settled the case during 1<sup>st</sup> instance proceedings, the *Slovak Bar Association* settled during 2<sup>nd</sup> instance proceedings when the case was assessed by the Council of the PMÚ for the second time (after the previous annulment of the 1<sup>st</sup> instance decision).<sup>26</sup> In the *Chamber of Veterinary Doctors of the Slovak Republic* case, settlement was reached during the repeated 1<sup>st</sup> instance procedure<sup>27</sup>, after the previous annulment of the 1<sup>st</sup> 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

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

<sup>25</sup> Ibid.

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

<sup>27</sup> 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)<sup>28</sup>; 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,

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<sup>28</sup> 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.<sup>29</sup> 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)<sup>30</sup> 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

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<sup>29</sup> 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.

<sup>30</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> instance proceedings only in circa 70% cases. Moreover, one more case was terminated after its judicial review<sup>31</sup>, and two cases were terminated after their 2<sup>nd</sup> instance review by the Council of the PMÚ<sup>32</sup>. 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.<sup>33</sup> While all of the undertakings were denying their participation in the investigated bid rigging during the 1<sup>st</sup> instance of these proceedings, and all of them appealed the 1<sup>st</sup> instance decision, in the course of the 2<sup>nd</sup> 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 2<sup>nd</sup> 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’ cases<sup>34</sup> were successfully closed within 1<sup>st</sup> 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

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<sup>31</sup> Case 0021/OKT/2014.

<sup>32</sup> Case 0033/OKT/2014 and 0006/OKT/2014.

<sup>33</sup> 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).

<sup>34</sup> *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* case<sup>35</sup>, 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.<sup>36</sup> During the 1<sup>st</sup> 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 2<sup>nd</sup> instance proceeding, settlement proceedings were launched again and, in this case, all undertakings agreed to settle but one (IMPA Bratislava, a.s.).<sup>37</sup> The only undertaking that did not settle successfully challenged the fine within judicial review<sup>38</sup> 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),<sup>39</sup> 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 1<sup>st</sup> instance proceedings and appeals at the PMÚ<sup>40</sup> quashed by the Regional Court in Bratislava.<sup>41</sup> During the ‘second’ 1<sup>st</sup> 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

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<sup>35</sup> 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).

<sup>36</sup> It is not the purpose of this article to evaluate this element of the decision.

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

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

<sup>39</sup> Case 0012/OKT/2016.

<sup>40</sup> 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).

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



during 1<sup>st</sup> 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 1<sup>st</sup> instance proceedings.

In the remaining two settlement cases, *Dunajškrob Starch* (full settlement)<sup>42</sup> and *Municipality of Čavoj* (hybrid settlement),<sup>43</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> instance proceedings (the *Dunajškrob Starch* case, the *Škoda* case), or during the ‘repeated’ 1<sup>st</sup> instance proceedings (the *Volkswagen* case), where the positive impact of a settlement on the length and effectiveness of the proceeding decreases.

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<sup>42</sup> 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).

<sup>43</sup> 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,<sup>44</sup> it is hard to draw any general observations.

Between 2014 and 2021, the PMÚ closed only 5 cases during 1<sup>st</sup> instance proceedings (between 2015–2018 zero per year).<sup>45</sup> However, compared to cartel cases, in the only settlement in an abuse of dominance case, *Letisko M.R.Štefánika – Airport Bratislava, a.s. (BTS)*,<sup>46</sup> 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.<sup>47</sup> Out of three infringement cases, two (*ŠKODA AUTO*<sup>48</sup> and *ags 92 (Chicco)*<sup>49</sup>) 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.

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<sup>44</sup> 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.

<sup>45</sup> 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).

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

<sup>47</sup> 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).

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

<sup>49</sup> 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.<sup>50</sup> 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'.<sup>51</sup>

The situation was not different in the case of the settlement procedure. After the introduction by the Commission of the Settlement Regulation in 2008<sup>52</sup>, 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.<sup>53</sup> 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,<sup>54</sup> while settlement procedures were introduced later on in other CEE countries.<sup>55</sup> If we compare the practice of the European Commission (and the conditions

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<sup>50</sup> 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.

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

<sup>52</sup> 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.

<sup>53</sup> Malinauskaite (n 49) 216–217.

<sup>54</sup> 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.

<sup>55</sup> 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,<sup>56</sup> 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.<sup>57</sup> 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* case<sup>58</sup>, due to initiative of the investigated undertaking, as was the situation in the *ELCOM* case.

The generosity of the competition authority (even though later criticized<sup>59</sup>) 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%).<sup>60</sup> This success ratios were substantially different than those of the Commission (26%–27% reduction<sup>61</sup>), and the unconditionally expected fine

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

<sup>56</sup> 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.

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

<sup>58</sup> Case no. S95/2008/KD *Kofola/Kofola Holding*.

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

<sup>60</sup> 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).

<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup>

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<sup>62</sup> 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.

<sup>63</sup> 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](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 law<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> 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*)<sup>67</sup>, where the authority issues a decision without conducting any previous proceedings with the offender as a party to the proceedings.<sup>68</sup> 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 law<sup>69</sup>, along with other instruments on cooperation between a suspect and the police<sup>70</sup>, evolved a certain type of settlement in the form of an agreement on the 'guilt and penalty' concluded between a defendant

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

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

<sup>66</sup> Slovak Act on Minor Offences, § 66.

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

<sup>68</sup> Slovak Act on Minor Offences, § 67.

<sup>69</sup> 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

<sup>70</sup> 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.<sup>71</sup> This regime resembles plea bargaining, but judicial overview limits the margin for bargain of prosecutors.<sup>72</sup> An agreement on the ‘guilt and penalty’<sup>73</sup> shall not be abused as an investigative measure, and shall be applied only in cases where the circumstances of a crime are sufficiently investigated.<sup>74</sup> On the other hand, if used, it allows to impose a penalty lower than the statutory limits stipulated by the Slovak Penal Code.<sup>75</sup> An appeal against a judgment of the court approving the agreement on the ‘guilt and penalty’ is not admissible,<sup>76</sup> except for an extraordinary review due to a ‘substantial violation of the right of defence’<sup>77</sup> submitted by the Minister of Justice of the Slovak Republic.<sup>78</sup>

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 Procurement<sup>79</sup> – 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.<sup>80</sup> 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

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

<sup>72</sup> Slovak Penal Procedural Code, § 331(1)b).

<sup>73</sup> 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.

<sup>74</sup> Slovak Penal Procedural Code, § 232.

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

<sup>76</sup> Slovak Penal Procedural Code, § 334(4).

<sup>77</sup> Slovak Penal Procedural Code, § 371(1)(c).

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

<sup>79</sup> 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*).

<sup>80</sup> *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	? <sup>a</sup>	Y	Y	Y	N
Negotiation expected by law	Y	Y	N	Y	N
Fixed fine reduction	Y	Y	? <sup>b</sup>	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

<sup>a</sup> 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’.

<sup>b</sup> 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 1<sup>st</sup> and during 2<sup>nd</sup> instance proceedings. It is obvious that the contribution to the effectiveness and speed of procedures is different in 1<sup>st</sup> instance proceeding and after an appeal. In fact, in the case of a 2<sup>nd</sup> 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 cooperation<sup>81</sup>, 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 2<sup>nd</sup> 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.

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<sup>81</sup> 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 2016<sup>82</sup>, 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).<sup>83</sup> 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’.<sup>84</sup> 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,<sup>85</sup> since one of the requirements for launching a settlement procedure is to have the facts of the case established.<sup>86</sup> 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.

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

<sup>83</sup> Slovak Competition Act (2021), § 48.

<sup>84</sup> Slovak Competition Act (2021), § 33.

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

<sup>86</sup> 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.<sup>87</sup> Indeed, it does not prevent the undertakings to submit other declarations or submissions outside of the settlement regime that can be handled as evidence.<sup>88</sup> 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 law<sup>89</sup> (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.<sup>90</sup> 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

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<sup>87</sup> 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.

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

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

<sup>90</sup> 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.<sup>91</sup> 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, 1<sup>st</sup> instance and 2<sup>nd</sup> instance proceedings are considered to form a ‘single and continuous’ proceeding under Slovak administrative law, and all of the parties of given 1<sup>st</sup> instance proceedings are *ex lege* also parties to the following 2<sup>nd</sup> 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 practice<sup>92</sup> 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 1<sup>st</sup> 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.

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

<sup>92</sup> 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 <sup>st</sup> 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.		
<b>0010/OKT/2021</b>	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	–	–	–	–
<b>0011/OKT/2015</b>	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	–	–	–	–
<b>0021/OKT/2019</b>	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 <sup>st</sup> 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	–	–	–	–
<b>0028/OKT/2014</b>	590,085	5,310,762	23,396	210,565	9	56	89	–	33
<b>0012/OKT/2016</b>	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	–
<b>0029/OKT/2014</b>	308,186	616,371	308,186	616,371	2	100	100	–	100
<b>0030/OKT/2014</b>	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	–	–	–	–
<b>0019/OKT/2013</b>	153,411	613,644	97,740	390,961	4	–	50	–	25
0016/ OKT/2013	10,670	106,695	10,106	101,055	10	–	–	–	–
<b>0016/ ODOS/2011</b>	930	930	1,420	1,419	1	–	100	–	–
<b>0008/ ODOS/2011</b>	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 <sup>st</sup> 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 1<sup>st</sup> instance proceedings (excluding cases returned after appeal); h: % of parties settled (total); i: % of parties with zero fine during 1<sup>st</sup> 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, 1<sup>st</sup> 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 1<sup>st</sup> 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 <sup>st</sup> instance pre-decision notice (SO)	Administrative proceeding from 1 <sup>st</sup> instance pre-decision notice (SO) to 1 <sup>st</sup> instance decision	1 <sup>st</sup> instance proceeding total	2 <sup>nd</sup> instance proceeding total	Administrative proceeding total	Administrative Proceeding + investigation	Judicial review	Proceeding total (administrative + judicial)	From end of infringement to final decision
<b>0010/OKT/2021</b>	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
<b>0011/OKT/2015</b>	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 <sup>st</sup> instance pre-decision notice (SO)	Administrative proceeding from 1 <sup>st</sup> instance pre-decision notice (SO) to 1 <sup>st</sup> instance decision	1 <sup>st</sup> instance proceeding total	2 <sup>nd</sup> instance proceeding total	Administrative proceeding total	Administrative Proceeding + investigation	Judicial review	Proceeding total (administrative + judicial)	From end of infringement to final decision
<b>0021/OKT/2019</b>	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
<b>0028/OKT/2014</b>	1,891	93	146	149	295	714	1,009	1,102	531	1,633	2,993
<b>0012/OKT/2016</b>	-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
<b>0029/OKT/2014</b>	1,817	73	121	215	336	0	336	409	0	409	2,226
<b>0030/OKT/2014</b>	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
<b>0019/OKT/2013</b>	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
<b>0016/ODOS/2011</b>	-105	0	46	164	623	375	998	998	0	998	893

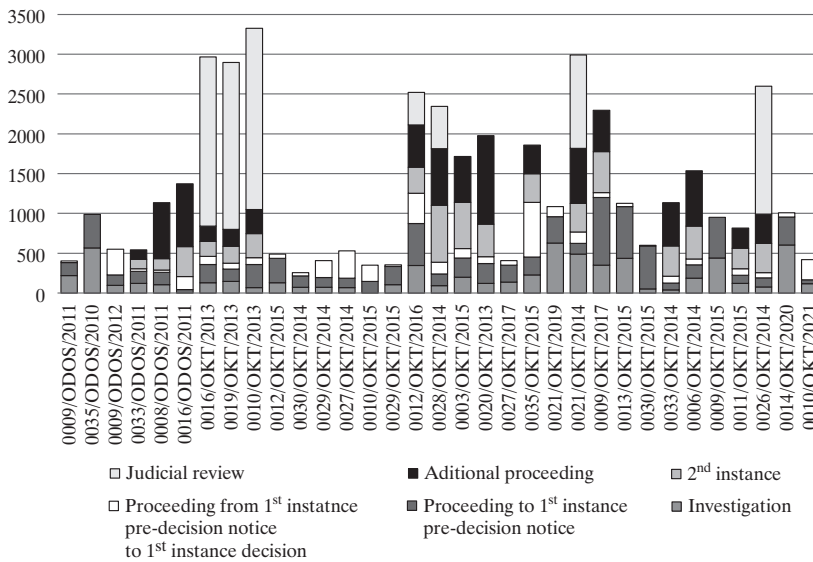
Table 3 – continued

Case number	Days between the end of infringement to beginning of investigation	Investigation	Administrative proceeding to 1 <sup>st</sup> instance pre-decision notice (SO)	Administrative proceeding from 1 <sup>st</sup> instance pre-decision notice (SO) to 1 <sup>st</sup> instance decision	1 <sup>st</sup> instance proceeding total	2 <sup>nd</sup> instance proceeding total	Administrative proceeding total	Administrative Proceeding + investigation	Judicial review	Proceeding total (administrative + judicial)	From end of infringement to final decision
<b>0008/ODOS/2011</b>	-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
<b>0009/ODOS/2012</b>	193	98	131	322	453	0	453	551	0	551	744
<b>0035/ODOS/2010</b>	1,559	568	420	0	420	0	420	988	0	988	2,547
<b>0009/ODOS/2011</b>	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 1<sup>st</sup> 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.

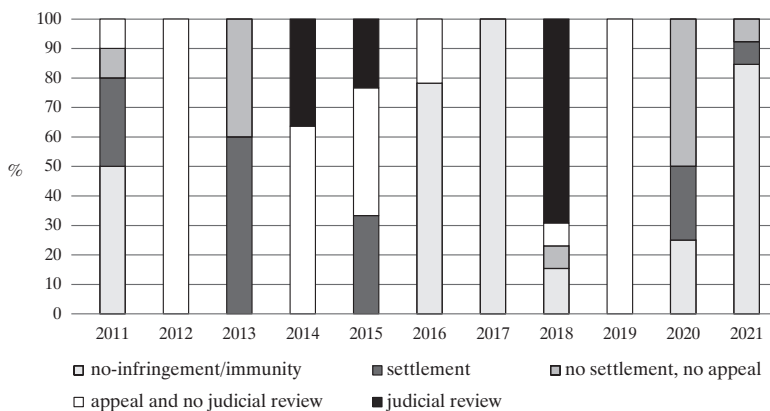
**Figure 1.** Length of specific sections of proceedings and overall length of proceedings (in days)



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.

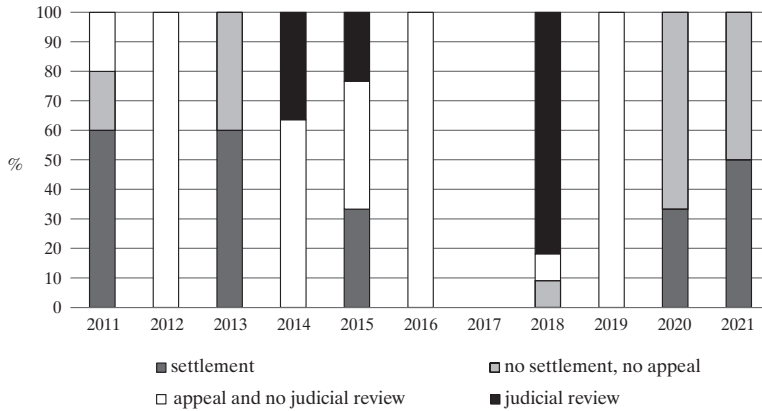
Source: Author’s own elaboration based on sources listed under Table 2.

**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 1<sup>st</sup> instance proceedings vis-à-vis the 'original' 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> instance administrative proceedings. The average number of employees and overload was calculated as arithmetical average between the year of issuing a 1<sup>st</sup> 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 <sup>st</sup> 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 <sup>st</sup> 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 <sup>st</sup> 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 <sup>st</sup> instance total	0.37835			0.21672	0.43519	0.41938		

Table 4 – continued

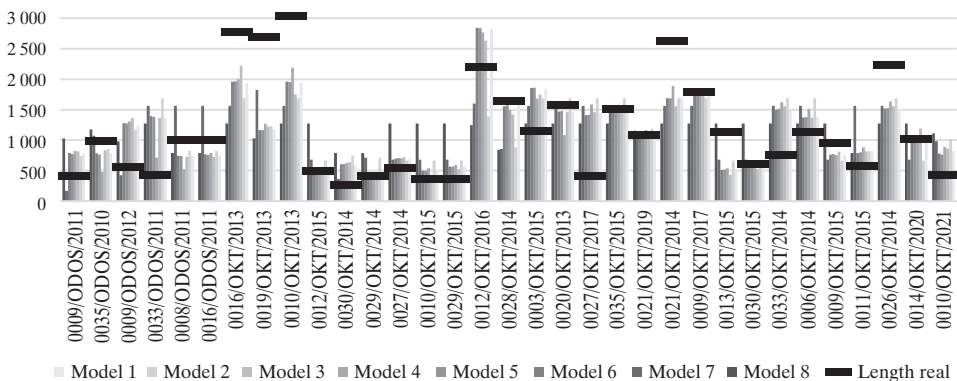
	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8
No of undertakings	0.21528		0.0074	0.27005	0.23223	0.21917		
% settlements (all)	0.10721	0.03884	0.09008	0.07113	0.13469	0.12708		0.19488
% Non-infringement 1 <sup>st</sup> / immunity	0.00534	0.00256	0.00093	0.00238	0.0073	0.00618	0.01363	
% 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 <sup>st</sup> instance							0.25009	
	<b>Model values</b>							
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

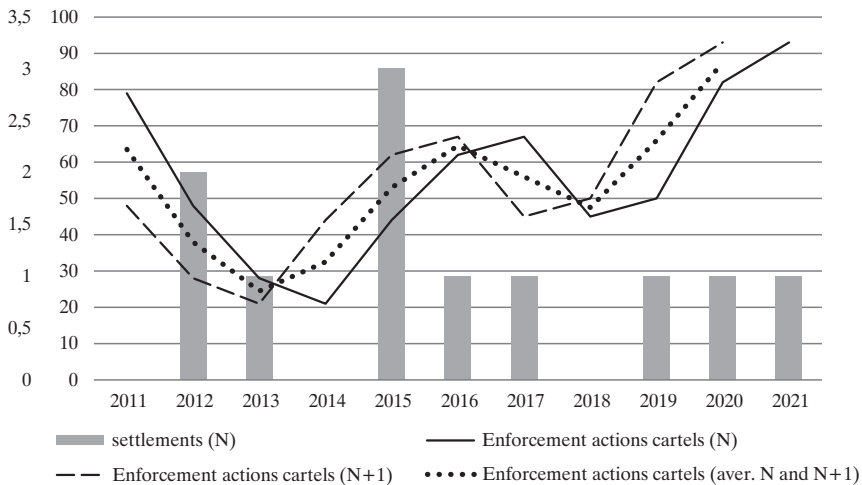


Source: Author’s own elaboration based on sources listed under Table 2.

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.<sup>93</sup> 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.

<sup>93</sup> 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 lawyers<sup>94</sup> 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.

<sup>94</sup> 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)		
<b>0010/OKT/2021</b>	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%
<b>0011/OKT/2015</b>	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%
<b>0021/OKT/2019</b>	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%
<b>0028/ OKT/2014</b>	90.24	5,100.20	97.08	61.96	187.32	272.53	41%	96%
<b>0012/ OKT/2016</b>		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%	–
<b>0029/ OKT/2014</b>	264.16		23.45	5.71	287.61	622.08	32%	0%
<b>0030/ OKT/2014</b>	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%
<b>0019/ OKT/2013</b>	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%
<b>0016/ ODOS/2011</b>	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,<sup>95</sup> later analyses showed that this fear was not substantiated<sup>96</sup> as the Commission currently settles more than

<sup>95</sup> Ascione and Motta (n 1).

<sup>96</sup> 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](https://repositorioinstitucional.ceu.es/bitstream/10637/10807/1/eu_maillo_2017.pdf)> accessed 1 May 2022.



half of its cartel cases with a settlement.<sup>97</sup> In comparison, the more generous Slovak regime led only to 13 settlements out of its 33 cases (40%) including merely two that were 1<sup>st</sup> 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 innocence<sup>98</sup> 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.<sup>99</sup> It is hard to estimate whether the number of actions for judicial review is dropping<sup>100</sup> 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 considerations<sup>101</sup> 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 rules<sup>102</sup>, and that

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<sup>97</sup> 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.

<sup>98</sup> 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.

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

<sup>100</sup> 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.

<sup>101</sup> 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.

<sup>102</sup> 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 Pecotić 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.<sup>103</sup> Since a substantial part of settlements were concluded during 2<sup>nd</sup> instance proceedings, some of the undertakings used settlements in a quite speculative manner, apparently letting the PMÚ reveal how ‘strong’ its case is. Moreover, 2<sup>nd</sup> 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 2<sup>nd</sup> instance settlements compared to the 1<sup>st</sup> 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.

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

<sup>103</sup> 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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