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

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

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

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

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

Literature

Ascione A and Motta M, 'Settlements in Cartel Cases', *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (2008) <https://mpra.ub.uni-muenchen.de/24416/>

Beleš A, 'Dočasné Odloženie Vznesenia Obvinenia' in Jozef Čentéš and others (eds), *Trestný poriadok II. § 196–596* (C H Beck 2021)

Blažo O, 'Úsvit Urovnania Na Slovensku' (2011) 3 Antitrust 81

——, 'Vývoj Urovnania Ako Nástroja Zefektívnenia Konania v Súťažnom Práve' (2015) 98 Právny obzor 58

——, '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

——, 'Proper, Transparent and Just Prioritization Policy as a Challenge for National Competition Authorities and Prioritization of the Slovak NCA' (2020) 13 Yearbook of Antitrust and Regulatory Studies 117

Blockx J, 'The Impact of EU Antitrust Procedure on the Role of the EU Courts (1997–2016)' (2018) 9 Journal of European Competition Law and Practice 92

Bobek M, '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)

Brook O and Cseres K, 'Policy Report: Priority Setting in EU and National Competition Law Enforcement' (2021) <https://www.ssrn.com/abstract=3930189>

Ciubotaru Ş, 'At the Mercy of the Gatekeeper: The Theory and Practice of Undertakings' Fundamental Rights in the EU Cartel Settlement Procedure' (2021) 12 Journal of European Competition Law & Practice 236 <https://academic.oup.com/jeclap/article/12/3/236/6189675>

De La Torre FC and Fournier EG, *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar Pub 2017)

Dekeyser K and Roques C, 'The European Commission's Settlement Procedure in Cartel Cases' (2010) 55 The Antitrust Bulletin 819 <http://journals.sagepub.com/doi/10.1177/0003603X1005500406>

Dunne N, 'A "Tunney Act for Europe"? Settlement and the Re-Judicialisation of European Commission Competition Enforcement' (2020) 11 Journal of European Competition Law and Practice 423

Giangaspero M, 'Pometon v Commission: Reviving Staggered Hybrid Settlements?' (2020) 11 Journal of European Competition Law and Practice 509

Hellwig M, Hüschelrath K and Laitenberger U, 'Settlements and Appeals in the European Commission's Cartel Cases: An Empirical Assessment' (2018) 52 Review of Industrial Organization 55

Hüschelrath K and Laitenberger U, 'The Settlement Procedure in EC Cartel Cases: An Empirical Assessment' (2015) 15–064 <https://nbn-resolving.de/urn:nbn:de:bsz:180-madoc-397438>

——, 'The Settlement Procedure in the European Commission's Cartel Cases: An Early Evaluation' (2017) 5 Journal of Antitrust Enforcement 458

Kalintiri A, *Evidence Standards in EU Competition Enforcement: The EU Approach* (Bloomsbury Publishing 2019)

Kowalik-Bańczyk K, Król-Bogomilska M and Zientara A, '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 – Central European Perspectives European Frameworks – Central European Perspectives* (Europa Law Publishing 2016)

Laina F and Bogdanov A, 'The EU Cartel Settlement Procedure: Latest Developments' (2016) 7 Journal of European Competition Law and Practice 72

Laina F and Laurinen E, 'The EU Cartel Settlement Procedure: Current Status and Challenges' (2013) 4 Journal of European Competition Law & Practice 302

MacCulloch A, 'The Privilege against Self-Incrimination in Competition Investigations: Theoretical Foundations and Practical Implications' (2006) 26 Legal Studies 211

Maillo J, '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>

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

——, *Harmonisation of EU Competition Law Enforcement* (Springer International Publishing 2020) <http://link.springer.com/10.1007/978-3-030-30233-7>

Martyniszyn M and Bernatt M, 'Implementing a Competition Law System'Three Decades of Polish Experience' (2020) 8 Journal of Antitrust Enforcement 165

Nagy CI, '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)

Neruda R, 'Narovnání. Chcete Mě?' (2011) 2 Antitrust 2

Pecotic Kaufman J and Šimic Banovic R, 'The Role of (In)Formal Governance and Culture in a National Competition System: A Case of a Post- Socialist Economy' (2021) 44 World Competition 81 <http://www.kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals%5CWOCO%5CWOCO2021005.pdf>

Pecotić Kaufman J, 'On the Development of (Not so) New Competition Systems—Findings from an Empirical Study on Croatia' (2022) 10 Journal of Antitrust Enforcement 326 <https://academic.oup.com/antitrust/article/10/2/326/6432017>

Petr M, 'Narovnání v Českém Soutěžním Právu' (2011) 4 Antitrust 176

——, '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)

Pipková PJ and Šimeček I, 'New Procedural Notices of the Czech Office for the Protection of Competition: Leniency, Settlement, and Alternative Problem Resolution' (2015) 8 Yearbook of Antitrust and Regulatory Studies 185

Prokeinová M, 'Mimoriadne Zníženie Trestu v Konaní o Dohode o Vine a Treste' (2009) 61 Justičná revue 552

——, 'Konanie o Dohode o Vine a Treste' in Jozef Čentéš and others (eds), *Trestný poriadok II. § 196–596* (CH Beck 2021)

Rodriguez EA and Noorali R, 'Case T-180/15 Icap v Commission: The Facilitator Doctrine and Other Cartel Concepts in Hybrid Settlements' (2018) 9 Journal of European Competition Law and Practice 320

Rusu CS, 'The Real Challenge of Boosting the EU Competition Law Enforcement Powers of NCAs: In Need of a Reframed Formula?' (2018) 13 The Competition Law Review 27

Ščerba F, '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 International and Comparative Law Review 7 <https://doi.org/10.1515/iclr-2016-0055>

Scordamaglia A, '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>

Stephan A, 'The Direct Settlement of EC Cartel Cases' (2009) 58 International and Comparative Law Quarterly 627

Valentina GD, 'Competition Law Enforcement in Italy after the ECN+ Directive: The Difficult Balance between Effectiveness and Over-Enforcement' (2019) 12 Yearbook of Antitrust and Regulatory Studies 91

Weatherill S, '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

Wils WPJ, 'Antitrust Compliance Programmes and Optimal Antitrust Enforcement' (2013) 1 Journal of Antitrust Enforcement 52 <http://ssrn.com/abstract=1729135> accessed 14 February 2020

Zingales N, 'Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law?' (2010) 11 German Law Journal 419 <https://www.cambridge.org/core/product/identifier/S2071832200018617/type/journal_article>

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

by

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

CONTENTS

Abstract

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

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

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

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

Resumé

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

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

JEL: K21, K23

I. Introduction

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

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

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

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

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

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

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

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

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

This need was answered by EU legislators, first in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter: Regulation 1/2003)[5] and more recently, in Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (hereinafter: ECN+ Directive).[6] This article will look into the transposition[7] of the latter into the Slovak legal order. It aims to explore how it was implemented with respect to inspections in non-business premises, and how such an inspection would be conducted in practice. It looks at the issue of inspections in private premises from the bottom up, taking into account not only the wording of the relevant acts but also other local circumstances.

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

Interference with the rights of individuals, including legal persons, must be proportionate[8]. Interference with the right to privacy is no exception, and its protection must be ensured even in the context of increasing demands for transparency, as the recent conclusions of the Grand Chamber of the CJEU in *Luxembourg Business Registers* show[9]. However, this article does not examine the compatibility of inspections in non-business premises with the

[5] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2004] OJ L1/1 (hereinafter: Regulation 1/2003).

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

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

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

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

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

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

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

II. Inspections conducted in private premises under EU law

The European Commission is one of the competition authorities enforcing EU competition law. The possibility to conduct a dawn raid was incorporated already in EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (hereinafter: Regulation 17)[11] introduced in 1962. However, this enforcement tool was limited to business premises. The enlargement of the scope of inspections to cover also private premises was brought by Regulation 1/2003. Pursuant to rec. 26 of Regulation 1/2003, prior experience has shown the need for the Commission to enter private premises as well as business ones. This is one of the extensions of the powers of the Commission brought by Regulation 1/2003.[12]

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

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

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

1. Regulation 1/2003

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

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

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

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

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

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

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

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

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

limited[15] to the control of the authenticity of the decision, the prevention of arbitrarity and excessiveness of the measure – any form of study of the necessity of the inspection is out of the question.

The final, 7th safeguard, relates to *ex-post judicial review*. As indicated in Article 21 para 2., the decision is reviewable by the CJEU following, the most suitable here, action for annulment based on Article 263 TFEU. Since the *ex-ante* judicial review is limited, it is the *ex-post* review that must be in line with the protection of the right to privacy, as provided by Article 8 ECHR.[16] However, one should bear in mind that the actual carrying out of the inspection is reviewed by the CJEU only in certain instances[17].

Apart from the safeguards for the inspected entities, Regulation 1/2003 provides also "safeguards", or rather "guarantees" for the Commission. In other words, the Commission shall be able to conduct any necessary inspections and its power shall be assured. For instance, the person concerned is obliged to submit themselves to the inspection. The investigatory powers of the Commission correspond to the obligation placed on the side of the inspected person. However, the Commission may not also impose fines or penalties in case of failure to submit to an inspection[18]. If the person concerned opposes the inspection, the same provision applies as in the case of business premises. It is for the national authorities, police included, to provide assistance to the Commission.[19]

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

2. ECN+ Directive

In Article 35 para. 1, Regulation 1/2003 aims for the effective enforcement of competition law by NCAs. The EU adopted also a separate directive which specifies such enforcement on the national level in more detail. As established above[21], the aim of the ECN+ Directive lies in the effective enforcement of competition law.

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

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

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

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

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

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

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

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

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

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

1st, the type of premises is the same.

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

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

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

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

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

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

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

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

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

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

III. Inspections conducted in private premises under Slovak law[23]

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

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

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

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

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

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

1. What the legislation says

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

Section 17 para. 8 of the APC:

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

Section 17 para. 9 of the APC:

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

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

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

Section 17 para. 10 of the APC:

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

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

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

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

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

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

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

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

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

[30] Ibid 34.

2. Safeguards and guarantees present in the legislation

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

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

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

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

4th, as to the act that orders the inspection[32], there is a need for judicial consent. All details are comprised of the court's resulting decision. As stated in Section 437 para. 2 of the ACPC, the decision specifies the aim of the inspection; respective objects, premises or means of transport; persons carrying out the inspection and their powers; the period of no less than 30 days, within which the inspection can be carried out; name, surname and address (permanent or temporary) of the guardian.

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

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

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

established in Article 7 para. 3 of the ECN+ Directive. In Slovakia, inspectors are entitled to ask for explanations and they are entitled to seal[33] materials or hard drives.

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

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

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

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

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

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

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

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

[34] Section 431 ACPC.

[35] Section 17 para (8) APC.

[36] Section 436 and Section 434 ACPC.

para. 3 sets of fines of: up to 80 000 € for failure to allow entrance or failure to secure a seal[37]; and up to 25 000 € for failure to cooperate, give explanations, provide information and materials, or give access to all materials, information and data in electronic form.

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

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

The status of the guardian

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

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

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

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

[39] See footnote 25 above.

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

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

persons, namely when the exercise of their rights arising from substantive law was not assured, e.g. when they did not have an elected managing director. Since 2016, the new law of civil procedure has introduced the institution of a civil guardian *sensu stricto* (procedural guardian, see below) only for natural persons[42]. However, legal rules, not only in the context of competition law, continue to operate with the concept of a guardian for legal persons also, causing legal uncertainty.[43]

Considering the position of the guardian as an individual who, as an impartial person with no interest in the investigation, is to participate in an inspection of private premises, meant to obtain evidence of anti-competitive conduct, we consider it adequate (with regard to the purpose of the institution of the guardian), to rely primarily on the provisions of the criminal procedural law of the Slovak Republic[44]. The Criminal Procedure Code requires the compulsory presence of an uninvolved person during a search and an entry into a dwelling.[45]

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

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

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

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

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

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

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

It follows from the ruling that the purpose of the impartiality of the "observer", when conducting a search or entering a dwelling, is fulfilled only if both the subjective and objective aspects of impartiality (as defined by the case law of the ECtHR, and to which reference is made in the reasoning[47]) are met.

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

First, as to the person of the guardian

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

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

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

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

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

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

Moving to the suggestion that a court officer should be appointed as the guardian, we find this more practical. However, an officer of which court? It seems practical that it should be a court officer from a court in the vicinity of the place of the inspection, not the court deciding on the consent of the inspection. This is due to the fact that there is only one court having jurisdiction over the whole Slovak territory, and that is the Administrative Court in Bratislava[49], having its seat in the very west of the country. Should the inspection take place in the east part of Slovakia, it could take seven or eight hours by car to get there. It would seem more convenient to appoint a person from a local court. However, one should bear in mind that the confidentiality of an inspection may be threatened if there is too much proximity between the person to be inspected and the local court.

The authors of another leading commentary to the Administrative Court Procedural Code[50] state that the position of the guardian should not be filled by an employee of a court, since it is not the court who supervises the inspection. On the contrary, the Office should propose a trustworthy person from among professional associations of entrepreneurs. Once again, we see this as a threat to the secrecy of an inspection. Should colleagues of the entrepreneur know about the inspection, it is reasonable to suppose that they will reveal it to the (to-be-inspected) entrepreneur.

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

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

[49] Section 15 ACPC.

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

[51] Section 433 ACPC.

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

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

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

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

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

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

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

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

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

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

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

Third, as to contacting the guardian

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

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

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

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

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

[55] Section 437 para (3) ACPC.
[56] Section 437 para (2 *in fine*) ACPC.

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

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

Administrators

First, we suggest drawing inspiration from legal persons involved in liquidation proceedings. In companies in which, after their dissolution with liquidation, no liquidator is appointed, the court appoints a liquidator from a list of administrators that are not primarily intended for the purpose of liquidating the company. The administrator shall be a natural person, or a legal person, included in the list of administrators. Administrators shall act in insolvency proceedings, debt restructuring proceedings, or public preventive restructuring proceedings pursuant to special provisions. Pursuant to Section 19 of the Act on Administrators (Law No. 8/2005 Coll. of 9 December 2004), as amended (hereinafter: Act on Administrators), the Ministry of Justice of the Slovak Republic maintains a public list of administrators. This legislation lays down the basic duties of administrators[57], the situations where they are excluded from the position of an administrator[58], as well as the duty of confidentiality.[59] As such, the problems associated with the position of an administrator as an impartial observer when carrying out inspections should be minimised.

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

[57] Act on Administrators, Section 3 Basic duties of the administrator, para (1).
[58] Act on Administrators, Section 4 Exclusion of the administrator, para (1).
[59] Act on Administrators, Section 6 Confidentiality, para (1).

Notaries

Second, notaries pursuant to the Notary Code (Law 323/1992 Coll. of 6 May 1992) (hereinafter: Notary Code), as amended, may be taken into consideration too. They are legal professionals[60], therefore, they would observe inspections with (high-level) legal knowledge. Notaries and their employees are under a statutory confidentiality obligation.[61] The list of notaries is kept by the Notary Bar Association.[62] Therefore, the identified weaknesses are minimised.

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

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

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

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

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

[61] Section 39(1) Notary Code.

[62] Section 29(2) Notary Code.

[63] Section 27(2) APDR.

[64] Section 11(1) APDR.

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

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

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

IV. Conclusion

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

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

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

[66] Section 2(1) para AESNCHR.

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

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

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

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

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

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

Literature

Baricová J and others (2018), Správny súdny poriadok. Komentár (C.H. Beck).

Bellodi L and Piazza L (2015), 'Chapter 5 Powers of investigation' in Tosato GL and Bellodi L (eds), EU Competition Law. Volume I. Procedure Antitrust – Mergers – State Aid (2nd edn Claeys & Casteels) 127.

Bernatt M (2011), 'Powers of Inspection of the Polish Competition Authority. Question of Proportionality' 4(5) YARS 47.

Blažo O (2017), 'Definícia pojmu podnikateľ v zákone o ochrna ehospodárskej súťaže ako prekážka eurokonformnej aplikácie súťažného práva' in Patakyová MT (ed), Efektívnosť právnej úpravy ochrany hospodárskej súťaže – návrhy de lege ferenda. Zborník konferencie (Univerzita Komenského v Bratislave, Právnická fakulta 12.

Capobianco A, Gonzaga P and Nyeső A (OECD Competition Division), 'Algorithms and Collusion, Background Note by the Secretariat' <https://one.oecd.org/document/DAF/COMP(2017)4/en/pdf> accessed 25 March 2023.

Caforio V, 'Algorithmic Tacit Collusion: A Regulatory Approach' (2022), Bocconi Legal Studies Research Paper No 4164905 <https://ssrn.com/abstract=4164905> accessed 22 January 2023.

Castillo de la Torre F and Gippini Fournier E (2017), Evidence, Proof and Judicial Review in EU Competition Law (Edward Elgar).

Ezrachi A and Stucke ME (2016), Virtual Competition (Harvard University Press).

Fečík M. and Nosa M. (2018), in Baricová, J., Fečík M., Števček M., Marek, Filová A., and others, Správny súdny poriadok: Komentár (C.H. Beck).

Hanzelová I, Rumana I and Šingliarová I (2016), Správny súdny poriadok – komentár (Wolters Kluwer).

Jones A, Sufrin B and Dunne N (2019), Jones & Sufrin's EU Competition Law. Text, Cases and Materials (7th edn OUP).

Kalesná K and Blažo O (2012), Zákon o ochrane hospodárskej súťaže. Komentár (C.H. Beck).

Kalesná K and Patakyová MT (2019), 'Subjects of Legal Regulation – Different Approaches of Competition, Public Procurement and Corporate Law' in Milkovic M, Kecek D and Hammes K (eds), Economic and Social Development, 46th International Scientific Conference on Economic and Social Development – „Sustainable Tourist Destinations", Book of Proceedings (Varazdin Development and Entrepreneurship Agency) 210.

Kaplow L (2013), Competition Policy and Price Fixing (Princeton University Press).

Mazúr J and Patakyová MT (2019), 'Regulatory approaches to Facebook and other social media platforms: towards platforms design accountability' (2019) 13(2) Masaryk University Journal of Law and Technology 219.

Patakyová M and others (2022), Obchodný zákonník. Komentár (C.H. Beck).

Patakyová M and Patakyová MT (2019), 'Právnické osoby ako nositeľky ľudských práv' in Eichlerová K and others (eds), Rekodifikace obchodního práva – pět let poté. Svazek II (Wolters Kluwer ČR).

Patakyová MT (2022) (ed), Zákon o ochrane hospodárskej súťaže. Komentár (Wolters Kluwer SR).

Patakyová MT (2017), 'Inspections – Do Undertakings Have the Access to the Court of Justice of the European Union?' (7th CER Comparative European Research Conference – International Scientific Conference for PhD Students of EU Countries, March 2017) 30.

Patakyová MT and Patakyová M, 'ECN+ Directive Implementation: Slovak Republic' (2021) 5(3) European Competition and Regulatory Law Review 310.

Patakyová MT, 'Notion of Anticompetitive Agreement Challenged in Digital Environment' (2020) 7 European Studies. The Review of European Law, Economics and Politics 237.

Patakyová MT, 'Nový zákon o ochrane hospodárskej súťaže – starý zákon v novom šate?' (2022) 74(5) Justičná Revue 577.

Patakyová MT (2019), Ľudskoprávne aspekty hospodárskej súťaže: antitrust z pohľadu ľudských práv (Wolters Kluwer SR).

Whish R and Bailey D (2015), Competition law (8th edn OUP).

Šabová Z (2014), 'Výkon inšpekcií v podnikateľských priestoroch Protimonopolným úradom SR – právna úprava a praktické skúsenosti' in Vozár J (ed), Míľniky súťažného práva VEDA 118.