

# PRIVATE ENFORCEMENT OF EU COMPETITION LAW – HOW TO KILL STAND-ALONE ACTIONS IN SLOVAK STYLE<sup>1</sup>

Mária T. Patakyová<sup>2</sup>

**Abstract:** EU competition law may be enforced in two ways: public enforcement via competition authorities (such as the European Commission or the Antimonopoly Office of the Slovak Republic) or private enforcement via actions for damages on national courts. The latter enforcement was supposed to be stimulated by Damages Directive (2014/104/EU), which was implemented on the Slovak level by Act No. 350/2016 Coll. Private actions for damages caused by infringements of competition law in the EU are far from frequent, especially within Slovakia. There are undisputably various causes for this, not all of them being legal. This contribution presents one particular legal cause for this struggle which have national roots, i.e. the impossibility of stand-alone actions for damages in Slovakia. The aim of this contribution is to show how stand-alone actions for damages are hindered by interpretation of procedural rules of the Slovak procedural code, thus leaving enforcement of competition law ineffective.

**Keywords:** EU law, competition law, Slovak law, Damages Directive (2014/104/EU), Act No. 350/2016 Coll., stand-alone actions

## Introduction

EU competition law consists of four pillars: 1) prohibition of anticompetitive agreements; 2) prohibition of abuse of dominant position; 3) regulation of concentrations; 4) regulation of state aid. The enforcement of the first two, also

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<sup>2</sup> doc. JUDr. Mária T. Patakyová, PhD., Associate Professor, Institute of European Law, Faculty of Law, Comenius University in Bratislava the Slovak Republic. <https://orcid.org/0000-0001-5640-2381>.

known as antitrust, is regulated by Regulation 1/2003<sup>3</sup>. Pursuant to Articles 4-6 of Regulation 1/2003, there are three types of institutions that may apply this law: the European Commission (“**EC**”), national competition authorities (“**NCA**s”) and national courts.

The enforcement can take the form of public enforcement, by the EC or the NCAs; or private enforcement, where damaged parties take their fate in their hands and sue for damages suffered by illegal, anticompetitive conduct. Private enforcement is much more used on the other side of Atlantic and, in order to increase the number of cases within the EU<sup>4</sup>, a directive was adopted. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (“**Damages Directive**”) shall ensure that anyone who has suffered harm due to anticompetitive conduct can effectively claim damages.<sup>5</sup> Thus, “*the primary justification for harmonisation here has been the desire to strengthen the enforcement of EU competition law by empowering private litigants and, additionally, to apply these rules at national level*”.<sup>6</sup>

In general, actions for damages can be either “follow-on” actions, following a decision of the EC or the NCAs; or “stand-alone” actions, which are more difficult for the claimant as it must prove not only the calculation of damages suffered in the causal nexus to the anticompetitive conduct, but also the anticompetitive conduct<sup>7</sup> itself. As pointed out by Dunne, “[...] *the bulk of private enforcement activity has ‘followed on’ from infringement decisions of the Commission or NCAs, while stand-alone actions are uncommon*”<sup>8</sup>. This is also confirmed by Freund.<sup>9</sup>

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<sup>3</sup> 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.

<sup>4</sup> PAIS, Sofia Oliveira, PISZCZ, Anna: Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All?. In: YEARBOOK of ANTITRUST and REGULATORY STUDIES, vol. 7, no. 10 (2014), p. 209-234, p. 211.

<sup>5</sup> Article 1(1) of the Damages Directive.

<sup>6</sup> DUNNE, Niamh: Antitrust and the Making of European Tort Law. In: Oxford Journal of Legal Studies, vol. 36, no. 2 (2016), pp. 366–399, p. 398-399.

<sup>7</sup> To prove infringement of competition law is difficult even for well-equipped competition authorities, thus it is not surprising that claimants rarely achieve this feat. PROMPERS, Anke, ROMKENS, Ellen, BOUMAN, Aron: Two Paths of Enforcement, Procedural Autonomy and the Risk of Fragmentation. In: Journal of European Competition Law & Practice, Vol. 14, No. 8 (2023), p. 475-482, p. 478.

<sup>8</sup> DUNNE, Niamh: Antitrust and the Making of European Tort Law. In: Oxford Journal of Legal Studies, Vol. 36, No. 2 (2016), pp. 366–399, p. 379.

<sup>9</sup> FREUND, Benedikt: Reshaping Liability – The Concept of Undertaking Applied to Private Enforcement of EU Competition Law. In: GRUR International, vol. 70(8) (2021), pp. 731–743, p. 731.

Many studies<sup>10</sup> have dived into the problem of (non-)functioning of action for damages in the EU. It is a well-known fact that the number of actions is far from the desired level, especially when it comes to actions from (end) consumers<sup>11</sup>.

This paper aims to contribute to the discussion. From the lot<sup>12</sup>, it chooses a legal issue stemming from the national (Slovak) legal order, showing how this may hinder actions for damages, stand-alone actions in particular. The question asked is as follows: How are stand-alone actions for damages hindered by interpretation of procedural rules of the Slovak procedural code?

In order to answer the questions, the paper is organized as follows. First, we will present the legal playground, showing how the Damages Directive was implemented. Second, we will present how the interpretation of certain procedural rules stopped stand-alone actions in Slovakia; and whether this is a correct interpretation of the procedural rules, Slovak-wise as well as EU-wise. We will sum up the findings and answer the research questions in the Conclusion.

## Implementation of the Damages Directive in Slovakia

When the Damages Directive was adopted, it was proposed by Blažo to complexly implement it into the Slovak legal order.<sup>13</sup> In other words, that a complex transposition into several acts of law will be more consistent than adopting a brand new act.<sup>14</sup> We share the Blažo's view, as the Damages Directive "*sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or*

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<sup>10</sup> PISZCZ, Anna: Introduction to the issues of the implementation of the EU Damages Directive in CEE countries. In: PISZCZ, Anna (ed.). Implementation of the EU Damages Directive in Central and Eastern European Countries. Warsaw: University of Warsaw, Faculty of Management Press, 2017. P. 13-23. ISBN 978-83-65402-52-3.

<sup>11</sup> FERRO, Miguel Sousa: Consumer Antitrust Private Enforcement in Europe. In: Journal of European Competition Law & Practice, Vol. 13, No. 8 (2022), p. 578-593, p. 578.

<sup>12</sup> There are certainly other issues, such as how to transpose the concept of undertakings into strict procedural rules on passive legitimation. SIAKKA, Tatiana: Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions: Transposition of the Concept of an 'Undertaking' into Civil Damages Actions. In: Journal of European Competition Law & Practice, Vol. 10, No. 8 (2019), 479-481, p. 480. FREUND, Benedikt: Reshaping Liability – The Concept of Undertaking Applied to Private Enforcement of EU Competition Law. In: GRUR International, vol. 70(8) (2021), pp. 731–743.

Another issue is the standard of proof. PROMPERS, Anke, ROMKENS, Ellen, BOUMAN, Aron. Two Paths of Enforcement, Procedural Autonomy and the Risk of Fragmentation. In: Journal of European Competition Law & Practice, Vol. 14, No. 8 (2023).

<sup>13</sup> BLAŽO, Ondrej: Directive on Antitrust Damages Actions and Current Changes of Slovak Competition and Civil Law. In: YEARBOOK of ANTITRUST and REGULATORY STUDIES, vol. 8(12) (2015), p. 259-272. DOI: 10.7172/1689-9024.YARS.2015.8.12.12

<sup>14</sup> Ibid., p. 272.

association.”<sup>15</sup> Therefore, it does not regulate a brand new area; it rather aims to amend, or to specify, existing rules, mainly of procedural nature.

Nevertheless, the Damages Directive was, in Slovakia, implemented into a brand new act, namely Act No. 350/2016 Coll. on Some of the Rules of Enforcement of Claims for Damages Arising from Violation of the Law of Competition, as amended (“**Act 350/2016**”). This method of implementation is an easy one for the legislator; however, it is to the detriment of the legal system as whole.<sup>16</sup> Most of the text of the Damages Directive was simply put into the Act 350/2016.<sup>17</sup>

This is a shame, in particular due to the fact that, shortly before the implementation period passed, there was a recodification of courts’ procedural rules. There are three different Codes: (i) Act No. 160/2015 Coll. Civil Dispute Procedural Code, as amended (“**CDPC**”); (ii) Act No. 161/2015 Coll. Civil Non-Dispute Procedural Code, as amended; (iii) Act No. 162/2015 Coll. Administrative Courts’ Procedural Code, as amended (“**ACPC**”). When it comes to cases related to the application of competition rules, there is a special jurisdiction designated in both CDPC<sup>18</sup> and ACPC<sup>19</sup>. However, these are not the same courts and, interestingly, also the particular supreme court dealing with a possible (extraordinary) appeal will be different: the Supreme Court of the Slovak Republic according to CDPC, the Supreme Administrative Court of the Slovak Republic according to the ACPC.

## No Stand-Alone Actions for Damages in Slovakia

Actions for damages are, from the procedural point of view, governed by the CDPC. There are two provisions related to prejudiciality, which proved to be of vital importance.

Pursuant to Section 193 of the CDPC (titled “Court is bound by other decisions”), a Slovak general court is “*bound by the decision of the competent authorities that a criminal offense, misdemeanor, or other administrative offense punishable under a special regulation has been committed, and by the decision on personal status, the establishment or dissolution of a company.*” (NB: underlining added).

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<sup>15</sup> Article 1 (1) of the Damages Directive.

<sup>16</sup> BLAŽO, Ondrej: Slovakia. In: PISZCZ, Anna (ed.). Implementation of the EU Damages Directive in Central and Eastern European Countries. Warsaw: University of Warsaw, Faculty of Management Press, 2017, p. 247-262. ISBN 978-83-65402-52-3, p. 249.

<sup>17</sup> Ibid., p. 261.

<sup>18</sup> Section 27 of the CDPC gives the jurisdiction to Municipal Court Bratislava III; this applies to cases from the whole territory of the Slovak Republic.

<sup>19</sup> Section 15 of the ACPC gives the jurisdiction to Administrative Courts in Bratislava, again, having jurisdiction over the whole territory of the Slovak Republic.

Pursuant to Section 194(1) of the CDPC (titled "Prejudiciality"), a court *"may assess a matter over which another public authority other than the authority referred to in Section 193 has jurisdiction but may not decide on it."* (NB: underlining added).

The quoted provisions, interpreted in a literal and unsystematic way, led to the conclusion presented in the following judgement.

### **3Obdo/108/2019 Union zdravotná poisťovňa, a.s. vs. Detská fakultná nemocnica s poliklinikou Banská Bystrica<sup>20</sup>**

Claimant in this stand-alone action was a private health insurance company: Union, health insurance company, joint-stock company ("**Union Insurance Company**"); who claimed that a hospital participated in a meeting of the Association of State Hospitals, where an allegedly prohibited agreement was made which the defendant allegedly abused, as well as abusing his dominant position in the healthcare provider market. This resulted in the defendant's termination of the Healthcare Provision Agreement and damage for the Union Insurance Company.<sup>21</sup>

The case went from a district court, an appellate court to the Supreme Court of the Slovak Republic ("**Supreme Court**"). This court, while assessing the decision of the appellate court, stated that the scope of issues within the meaning of Section 193 CDPC in the sense that it cannot make a preliminary ruling on them.<sup>22</sup> *"It follows from the above interpretation that there is no jurisdiction to assess, in an action for damages caused by a breach of competition law, as a preliminary question, a breach of competition law as the basis for a claim within the meaning of Section 193 in conjunction with Section 194(1) of the CDPC, as well as within the meaning of European law, since a competition offense (which is another administrative offense) is stated in Section 193 of the CDPC, as one of the cases that the court cannot resolve as a preliminary ruling"*<sup>23</sup>. In other words, Slovak courts may not assess whether there is an abuse of dominant position or anticompetitive agreement as long as there is no precedent decision of a relevant authority, mainly the EC or Antimonopoly Office of the Slovak Republic, ("**AMO**"). The Supreme Court considers these questions to be out of the competence of courts.

The Union Insurance Company lodged a constitutional complaint against this finding which was, unfortunately, rejected by the Constitutional Court of the Slovak Republic ("**Constitutional Court**").<sup>24</sup> The Constitutional Court confirmed the interpretation of the Supreme Court, stating that the existence of competition law infringement is an

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<sup>20</sup> Decision of the Supreme Court of the Slovak Republic from 24.06.2020, 3Obdo/108/2019 Union zdravotná poisťovňa, a.s. vs. Detská fakultná nemocnica s poliklinikou Banská Bystrica („**3Obdo/108/2019 Union**“).

<sup>21</sup> Ibid., para. 5.

<sup>22</sup> Ibid., para 44.

<sup>23</sup> Ibid., para 50.

<sup>24</sup> Order of the Constitutional Court of 2 December 2021, case No II. ÚS 564/2021.

exclusive competence of competition authorities.<sup>25</sup> *“In the case of the interpretation chosen by the complainant, it would be possible to hold the alleged violator of public (competition) law, who has not been recognized as guilty of a specific unlawful act by a final decision of the competent public authority (competition authority) guilty of a specific unlawful act, it would be possible to infer private law liability for an act which it is presumed not to have committed until the competition authority, by its final authoritative decision, states the contrary”*.<sup>26</sup>

The correctness of the Supreme Court’s findings (confirmed by the Constitutional Court) is doubtful. We will put forward a handful of arguments why, divided into, first, interpretation of Slovak law as such, second, interpretation taking into account the sources of EU law.

### Criticism from the Slovak perspective

The first argument lies in the non-application of the obligation to stay the procedure by courts in the *Union Insurance Company* cases. Even if we accept that the Slovak courts had doubts regarding their competence to assess anticompetitive practices, they should have stayed the procedure and asked the relevant authority to assess them. Section 162(1)(a) of the CDPC states that the court shall (!) stay proceedings if the decision depends on the question which the court is not allowed to solve. This is a case of classic prejudiciality.<sup>27</sup> As pointed out by Blažo<sup>28</sup>, neither court found it necessary to stay the procedure pursuant to Section 162(1)(a) CDPC. The procedure should have been stayed until the final and lawful decision on the preliminary question.<sup>29</sup>

In this regard, it is interesting to note that the Supreme Court pointed out Section 162(1)(a) of the CDPC<sup>30</sup>, however, did not suggest that the lower instance courts should have stayed the procedure.

Second argument is related to the existence of *amicus curiae* provision in CDPC. Pursuant to Section 94 (1) CDPC, the EC and the AMO may submit statements

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<sup>25</sup> Ibid., para 14.

<sup>26</sup> Ibid.

<sup>27</sup> KOTRECOVÁ, Alexandra, ŠTEVČEK, Marek. In: Števček et al. *Civilný sporový poriadok. Komentár*. Praha: C. H. Beck, 2016. ISBN 978-80-7400-629-6, p. 617.

<sup>28</sup> BLAŽO, Ondrej. PRIVATE (NON-)ENFORCEMENT OF COMPETITION LAW IN SLOVAKIA. In: EU AND COMPARATIVE LAW ISSUES AND CHALLENGES SERIES ECLIC, vol. 8 (2024), p. 40-69, p. 49.

<sup>29</sup> KOTRECOVÁ, Alexandra, ŠTEVČEK, Marek: § 162. In: Števček et al. *Civilný sporový poriadok. Komentár*. Praha: C. H. Beck, 2016. P. 615-626. ISBN 978-80-7400-629-6, p. 617.

<sup>30</sup> *“The court is bound by this scope [of matters stated in Section 193 CDPD] in the sense that it cannot even make a preliminary ruling on these issues. In a situation where the court cannot continue the proceedings without resolving these issues, it shall suspend the proceedings and continue them only after the obstacle to jurisdiction has been removed (Section 162 of the CDPC)”*. 3Obdo/108/2019 Union, para. 50.

pursuant to a special regulation, which shall be<sup>31</sup> Article 15 of Regulation 1/2003<sup>32</sup>. Section 94 (2) CDPC states that *"In proceedings in which the court applies the provisions of competition law, the [AMO] may submit written statements on legal issues or factual issues directly related to the case under consideration."* What would be the purpose of this provision, if not helping the court out in stand-alone actions? In follow-on actions, there is already a decision of competition authority, therefore, it is not fruitful to ask the AMO for its position; the AMO has already stated its position in the decision.<sup>33</sup>

Naturally, the AMO may give a helping hand towards other aspects of the case, such as existence of damage, its calculation etc. However, in our view, this is not a competition-specific issue that could justify pointing out to the AMO (or the EC) exclusively. Finding expert opinions is a general competence of civil courts. *"If it is necessary to assess facts that require expert knowledge, the court shall, upon request, seek an expert opinion from a professionally competent person."*<sup>34</sup> *"If the decision depends on the assessment of facts requiring scientific knowledge and the procedure under Section 206 is insufficient due to the complexity of the issues under consideration, the court shall, upon request, order expert evidence and appoint an expert."*<sup>35</sup>

Moreover, with respect to judicial review of AMO's decisions, these are not heard by civil courts pursuant to CDPC, but by administrative courts governed by different procedural rules, ACPC. Thus, if an AMO's decision is challenged, the AMO will be in the position of defendant, not *amicus curiae*.

### Criticism from the EU perspective

Firstly, Article 6 of Regulation 1/2003 states that national courts shall (!) have the power to apply articles 101 and 102 TFEU. Therefore, at least with respect to private enforcement of EU competition law (antitrust part), there is an explicit empowerment for national courts, in a directly applicable regulation. Should Slovak courts feel uncertain as to how to apply this provision and if it covers also stand-alone

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<sup>31</sup> Section 94 (1)CDPC uses a blank reference. BLAŽO, Ondrej. In: Števček et al. Civilný sporový poriadok. Komentár. Praha: C. H. Beck, 2016. ISBN 978-80-7400-629-6, p. 346.

<sup>32</sup> 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 ("**Regulation 1/2003**").

<sup>33</sup> BLAŽO, Ondrej: § 94. In: Števček et al. Civilný sporový poriadok. Komentár. Praha: C. H. Beck, 2016. P. 345-350. ISBN 978-80-7400-629-6, p. 349.

<sup>34</sup> Section 206 of the CDPC.

<sup>35</sup> Section 207 of the CDPC.

actions, they might have asked a preliminary question to the CJEU pursuant to Article 267 TFEU.<sup>36</sup>

Second, Articles 101 and 102 TFEU produce direct effects.<sup>37</sup> With respect to principles of equivalence and effectiveness (mainly the latter), national procedure rules should enable protection of rights arising from EU law. This also applies to Article 101 TFEU, as already established in the case C-453/99 *Courage*<sup>38</sup>. Article 101 TFEU “contains an implicit right for persons affected by a breach of competition law to claim damages from the infringer.”<sup>39</sup> It is doubtful that this effective protection is enabled if stand-alone actions are not allowed. Bearing in mind that neither the EC nor the AMO are obliged to start administrative procedure, even if they receive a qualified complaint from a consumer.<sup>40</sup>

Third, we believe that the interpretation is at odds with several provisions of the Damages Directive. Act 350/2016 was not used to a great extent in the *Union Insurance Company* case, due to temporary provisions. Pursuant to Section 23 of the Act 350/2016, this Act is applicable to claims arising after 26 December 2016; and to procedures commence after 26 December 2016.

Damages Directive states that:

- “National courts [...] have an equally essential part to play in applying the competition rules (private enforcement).”<sup>41</sup>
- “Actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are complemented by alternative avenues of redress, such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation.”<sup>42</sup>
- “To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules.”<sup>43</sup>

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<sup>36</sup> This was also pointed out by BLAŽO, Ondrej: PRIVATE (NON-)ENFORCEMENT OF COMPETITION LAW IN SLOVAKIA. In: EU AND COMPARATIVE LAW ISSUES AND CHALLENGES SERIES ECLIC, vol. 8 (2024), p. 40-69, p. 53.

<sup>37</sup> This is also confirmed by Rec. 3 of the Damages Directive.

<sup>38</sup> Case C-453/99. Judgment of the Court of 20 September 2001. *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*. ECLI:EU:C:2001:465.

<sup>39</sup> FRANCK, Jens- Uwe: Striking a Balance of Power between the Court of Justice and the EU Legislature: The Law on Competition Damages Actions as a Paradigm. In: *European Law Review*, vol. 43 (2018), p. 837-857, p. 840.

<sup>40</sup> See Section 16(2) of the Act No. 187/2021 Coll. On Protection of Competition, as amended („APC”).

<sup>41</sup> Rec. 3 of the Damages Directive.

<sup>42</sup> Rec. 5 of the Damages Directive

<sup>43</sup> Rec. 6 of the Damages Directive

- “Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.”<sup>44</sup>
- “In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law.”<sup>45</sup>

Although the Damages Directive does not explicitly require that stand-alone actions shall be possible, we believe that it is implicitly required, at least by the quoted provisions.

## Conclusion

Public enforcement of competition law, although used more frequently within the EU, shall be accompanied by private enforcement. Otherwise, the enforcement of EU competition law, as well as national competition law is threatened. Taking into account the lack of obligation to investigate a possible infringement of competition law by the EC and the AMO, stand-alone actions may be the only one tool left for damaged parties. This paper outlines how difficult it is for stand-alone actions for damages to be successful, focusing on one legal cause for this difficulty.

The research question was formulated as: how are the stand-alone actions for damages hindered by interpretation of procedural rules of the Slovak procedural code? The Supreme Court interpreted certain Slovak procedural rules (namely Sections 193 and 194 CDPC) in such a way that stand-alone actions are practically impossible. The *Union Insurance Company* case, delivered by the Supreme Court and confirmed by the Constitutional Court, shows that a precedent administrative decision is necessary. We put forward several arguments, stemming from Slovak law as well as EU law, showing how wrong this interpretation is.

Stand-alone actions are non-functioning in Slovakia - is there a way forward? We believe so. The solution is rather simple. The Slovak civil courts should re-interpret the relevant procedural provisions in order to enable stand-alone actions, using preliminary procedure pursuant to Article 267 TFEU if necessary. However, even this simple solution would require an entrepreneurial damaged party, who would be willing to claim damages under currently impossible conditions, thus giving Slovak courts another case that they may assess.

Private enforcement of competition law is far from its potential, the *status quo* being caused by many (legal and non-legal) reasons. We believe that certain legal

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<sup>44</sup> Article 4 (1) of the Damages Directive

<sup>45</sup> Article 4 of the Damages Directive.

hindrances, identified hereby, should be erased, thus leaving the road for private claimants a little bit safer.

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### **Contact details**

doc. JUDr. Mária T. Patakyová, PhD.

maria.patakyova5@flaw.uniba.sk

Institute of European Law, Faculty of Law, Comenius University in Bratislava the Slovak Republic