Case C-117/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

3 March 2020

Referring court:

Cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium)

Date of the decision to refer:

19 February 2020

Applicant:

bpost SA

Defendant:

Autorité belge de la concurrence

Intervening parties:

Publimail SA

European Commission

Subject matter and facts of the dispute

1 In Belgium, bpost is the historical postal service provider, essentially in charge of the collection, sorting, transport and delivery of postal items to addressees.

2 Not only does bpost offer postal distribution services to the general public, it also offers them to two particular categories of clients, namely bulk mailers ('senders') and consolidators.

3 Senders are end consumers of postal distribution services. They decide on the message which is to be sent and initiate requests for mailings. The consolidators supply senders with routing services upstream of the postal distribution service. Those services can include preparing mail before handing it on to bpost (sorting, printing, placing in envelopes, labelling, addressing and stamping) and the

delivery of the mailings (collection from the senders, sorting and packaging of the postal items in mailbags, transport and delivery to sites designated by the postal operator).

4 Different types of tariff are applied by bpost, including contractual tariffs which are special tariffs compared to the standard tariff paid by the general public. Those special tariffs are the result of an agreement between bpost and the clients concerned, which can provide for rebates granted to certain clients that generate a certain turnover for the operator. The most common contractual rebates are quantity discounts, granted according to the volume of mail items generated during a reference period, and 'operational discounts', which reward certain routing operations and reflect the costs avoided by bpost.

5 For 2010, bpost informed the Institut belge des services postaux and des télécommunications (the national regulatory authority for postal services in Belgium, 'IBPT'), of a change to its rebate system for the contractual tariffs relating to services distributing addressed advertising material and administrative mail items. These represented approximately 20% of bpost's turnover in the postal sector.

6 That new rebate system included a quantity discount calculated on the basis of the volume of mail items delivered, which was granted to both senders and consolidators. Nevertheless, the rebate granted to consolidators was no longer calculated on the basis of the total volume of mail items from all the senders to which they provided their services, but on the basis of the volume of mail items generated individually by each of their clients ('the quantity discount per sender').

7 IBPT is the national regulatory authority for postal services under Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service ('Directive 97/67').

8 By decision of 20 July 2011, IBPT fined bpost EUR 2.3 million on the ground that it had a discriminatory tariff system, in particular as regards its selective discount, which was based on an unjustified difference in treatment as between senders and consolidators.

9 The cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium) ('the Court of Appeal'), hearing proceedings for annulment of that decision, requested a preliminary ruling from the Court of Justice of the European Union on the interpretation of Directive 97/67.

10 In its judgment of 11 February 2015, *bpost* (C-340/13, EU:C:2015:77), the Court of Justice held that bulk mailers and consolidators are not in comparable situations as regards the objective pursued by the system of quantity discounts per sender, which is to stimulate demand in the field of postal services, since only bulk mailers are in a position to be encouraged, by the effect of that system, to increase the volume of their mail handed on to bpost and, accordingly, the turnover of that

operator. Consequently, the different treatment as between those two categories of clients which follows from the application of the system of quantity discounts per sender does not constitute discrimination prohibited under Article 12 of Directive 97/67.

11 The Court of Justice therefore answered the question referred to the effect that the principle of non-discrimination in postal tariffs laid down in Article 12 of Directive 97/67 must be interpreted as not precluding a system of quantity discounts per sender, such as that at issue in the main proceedings.

12 By judgment of 10 March 2016, the Court of Appeal annulled IBPT's decision (the first proceedings).

13 In the meantime, by decision of 10 December 2012 ('the contested decision'), the Autorité belge de la concurrence (Belgian Competition Authority) (formerly the Conseil de la concurrence) found that the different treatment of quantity discounts did not amount to discrimination within the strict meaning of the word, but was an abuse in so far as it placed consolidators at a competitive disadvantage to bpost, because the system in place encouraged major clients to contract directly with bpost.

14 The Autorité belge de la concurrence found that bpost had abused its dominant position and had, consequently, infringed Article 3 of the loi du 15 septembre 2006 sur la protection de la concurrence économique (Law on the protection of economic competition of 15 September 2006) and Article 102 TFEU, as a result of adopting and implementing its new tariff system, between January 2010 and July 2011, and accordingly fined bpost EUR 37 399 786.00, taking into account the fine previously imposed by IBPT.

15 By application lodged on 9 January 2013, bpost applied to the Court of Appeal to annul that decision (second proceedings).

16 By judgment of 10 November 2016, the Court of Appeal held that bpost had correctly invoked the principle *non bis in idem* since the judgment of 10 March 2016 had ruled finally on the merits of the action taken by IBPT against bpost in relation to acts essentially the same as those at issue in the action taken by the Autorité belge de la concurrence and in its decision (bpost's 'per sender' model for its contractual tariffs for 2010). Since the proceedings before the Autorité belge de la concurrence had thereby become inadmissible, the Court of Appeal annulled the contested decision.

17 By judgment of 22 November 2018, the Cour de cassation (Court of Cassation, Belgium) set aside the Court of Appeal's judgment and referred the case back to that appeal court, with a different composition. The Cour de cassation (Court of Cassation) held that Article 50 of the Charter does not preclude the duplication of criminal proceedings, within the meaning of that article, based on the same facts, even where one set of proceedings has ended in a final acquittal, when, under Article 52(1) of the Charter, subject to the principle of proportionality and for the

purpose of attaining a general interest objective, those proceedings have additional complementary objectives, covering different aspects of the same unlawful conduct.

18 Publimail, a 'consolidator', was made a party to the proceedings so that the judgment to be made could be enforced against it.

19 The European Commission intervenes as *amicus curiae*.

2. Provisions at issue

EU law

Charter of Fundamental Rights of the European Union

20 Article 16 provides:

'**Freedom to conduct a business**

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.'

21 Article 50 reads as follows:

'**Right not to be tried or punished twice in criminal proceedings for the same criminal offence**

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

22 Article 52 reads as follows:

'**Scope and interpretation of rights and principles**

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

…'

TFEU

23 Article 102 provides:

‘Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

…

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

…’

Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service

24 Article 12 provides:

‘Member States shall take steps to ensure that the tariffs for each of the services forming part of the provision of the universal service comply with the following principles:

…

– tariffs shall be transparent and non-discriminatory,

– whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different users, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariffs shall also be available to users, in particular individual users and small and medium-sized enterprises, who post under similar conditions.’

Belgian law

25 Article 12 of Directive 97/67, as amended by Directive 2002/39, was transposed into Belgian law by Article 144*ter* of the loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques (Law of 21 March 1991 on the reform of certain public commercial undertakings).

26 Article 3 of the Law on the protection of economic competition, coordinated on 15 September 2006, contains provisions similar to those of Article 102 TFEU.

3. Positions of the parties

bpost

27 The contested decision infringes the principle *ne bis in idem*.

28 In the present case, the proceedings conducted before IBPT and the Autorité belge de la concurrence were in both cases criminal proceedings and the decision relates to facts identical to those examined in IBPT's decision of 20 July 2011, which was finally annulled by the Court of Appeal's judgment of 10 March 2016.

29 Furthermore, the strict requirements for making an exception to the prohibition on duplicating criminal proceedings and penalties are not satisfied. IBPT's proceedings and those of the Autorité belge de la concurrence are not 'sufficiently closely connected in substance and in time'.

Autorité belge de la concurrence

30 The contested decision does not infringe the principle *ne bis in idem*.

31 Given that the case-law of the Court of Justice differs depending on whether or not it relates to competition, it is the competition case-law (in particular the judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72) that is relevant in the present case. That case-law establishes a criterion of the 'legal interest protected' for the purpose of defining *idem factum* (legal *idem factum*).

32 It goes without saying that the fact that the Court has different case-law according to whether or not the matter concerns competition law is justified in view of the specific characteristics of competition law.

33 The proceedings conducted by IBPT on the one hand and those conducted by the Autorité belge de la concurrence on the other have, for the purpose of attaining a general interest objective interest, additional complementary objectives covering, as the case may be, different aspects of the same unlawful conduct at issue or, in other words, they protect different legal interests.

34 Lastly, the Autorité belge de la concurrence concurs with the Commission on the two questions it proposes should be referred to the Court of Justice.

European Commission

35 The Commission has intervened as *amicus curiae* to ensure protection of the Community public interest consisting, in the present case, in avoiding any decision that conflicts with the *Toshiba* case-law and with the criterion it advocates that the legal interest protected must be the same, which remains relevant in the field of competition.

36 The Commission doubts whether the only judgments to which the Court of Cassation refers are relevant: judgments of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197), *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193) and *Di Puma and Zecca* (C-596/16 and C-597/16, EU:C:2018:192). Those three judgments are unrelated to competition law, whereas this case is a competition law case. In addition, those three judgments concern very different situations from that in the present case since they deal with a duplication of proceedings and penalties arising from *a single offence* which is classified and punished on a dual basis in national law, once as an administrative offence (albeit of a criminal nature) and once as a criminal offence.

37 In the present case, bpost has been the subject of two separate sets of proceedings for two different offences based on different legal provisions that pursue distinct and complementary general interest objectives, that is to say:

– proceedings were brought against it by IBPT for infringement of the applicable sectoral rules, specifically the prohibition on discriminatory practices and the transparency obligation contained in particular in Article 144*ter* of the Belgian law of 21 March 1991 (the first proceedings);

– proceedings were brought against it by the Autorité belge de la concurrence for infringing EU and national competition law, specifically the prohibition on abuse of a dominant position, contrary to Article 102 TFEU and Article 3 of the Belgian Law of 15 September 2006 on the protection of economic competition (the second proceedings).

38 Whether or not the principle *non bis in idem* has been infringed in the present case must, according to the Commission, be examined in the light of the criteria established by the Court of Justice in competition law cases. It must therefore be borne in mind that the two authorities have each applied different legislation relating to different legal interests and different offences.

39 Lastly, the Commission is at pains to signal that this is not a matter of an exception to the principle (Article 52 of the Charter) but of the principle itself (Article 50 of the Charter) since there is no legal *idem factum* in the sense used in the judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72).

40 The Commission notes that unless the legal interest protected by each of the different legal fields at issue is taken into account, there is a risk of considerably reducing the scope of competition law, or even reducing it to nothing, since the scope of competition law, unlike that of the sectoral rules, is horizontal. Were they to overlap and the sectoral rules to apply in priority, competition law would risk becoming ineffective.

41 A single undertaking might engage in a practice that simultaneously infringes both competition law and sectoral rules. Since this is a matter of infringements of different legal provisions protected by different authorities in different

proceedings, those provisions can only be effectively applied if the different legal interests they protect in each case are taken into account. This is a prerequisite for the principle *non bis in idem* to apply and was proposed by the judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72).

42 The foregoing is crucial to preventing an undertaking that has been prosecuted under sectoral rules that pursue a very specific objective from being able to rely on the principle *non bis in idem* in order to evade the application of competition law, bearing in mind that competition law pursues a different specific objective from the sectoral rules. That would result in obstacles to free competition going unresolved, and unpunished.

43 The Commission proposes to refer two questions to the Court of Justice.

4. Assessment by the Court of Appeal:

44 First of all, the Court of Appeal outlines the two sets of proceedings at issue.

45 The first proceedings were based in particular on Article 144*ter* of the Law of 21 March 1991 on the reform of certain public commercial undertakings, which imposes on universal postal service providers a number of transparency and non-discrimination obligations when adopting and applying their tariff systems, intended to ensure liberalisation of the postal sector.

46 Whilst acknowledging that competition law does apply to the postal sector and adhering broadly to the Commission's position in that respect, IBPT stated explicitly that it was not assessing whether bpost's conduct complied with national or EU competition rules, it not having competence to apply those, amongst other, competition rules, because they pursue different objectives. IBPT found that its proceedings had been conducted 'without prejudice to application of the competition rules by the competent authorities'.

47 In the second proceedings, the Autorité belge de la concurrence penalised bpost neither for a lack of transparency nor for discriminatory practices. It applied Belgian and EU competition law in order to penalise bpost's anti-competitive practices, namely practices likely to have, on the one hand 'an exclusionary effect' on consolidators and bpost's potential competitors and, on the other, 'a loyalty building effect' on bpost's biggest clients such as to 'increase barriers to entry to the distribution sector'.

48 The Court of Appeal then examined the objectives of the legislation applied in each of the two sets of proceedings and found, in contrast to bpost's contention, that the legislation in each instance did not pursue 'exactly the same aim, that is to say, safeguarding free and fair competition on the postal market'. The connections that bpost highlights between the legislation in each of those two sets of proceedings are not sufficient to find that the legislation has one and the same aim in both.

49 It is common ground that (EU) competition law operates horizontally in so far as it seeks to prevent the distortion of competition throughout the internal market. That internal market is divided into various submarkets, which are subject not only to competition law but also to specific rules that are not aimed, or not aimed solely, at maintaining free and undistorted competition.

50 The objectives of Directive 97/67, which was transposed by the Belgian law of 21 March 1991 and applied by bpost in the first proceedings, cannot be reduced to maintaining free and undistorted competition in the postal market.

51 The Court of Appeal then examined the requirements for the principle *non bis in idem* to apply. In order to determine whether the principle *non bis in idem* has been infringed in the present case it is necessary, in principle, according to the Court of Appeal, to bear in mind that the first and second sets of proceedings each has its basis in different legislation intended to protect different legal interests, that is to say, first, ensuring the liberalisation of the postal sector by means of transparency and non-discrimination obligations (first proceedings) and, secondly, ensuring free competition within the internal market by prohibiting operators from abusing their dominant position (second proceedings).

52 That requirement that the legal interest protected must be the same was established in *Aalborg Portland* [judgment of 7 January 2004, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6] and expressly confirmed by the Court of Justice in its judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72) and by the General Court in its judgment of 26 October 2017, *Marine Harvest* v *Commission* (T-704/14, EU:T:2017:753).

53 The relevance of the condition that the legal interests protected must be the same is particularly apparent from cases where the national competition authorities of a Member State and the Commission have imposed duplicate penalties. The Court of Justice has established and applied that condition in competition cases but not in other areas of law.

54 In its judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72), that Court did not follow the Opinion of Advocate General Kokott, who had explicitly invited the Court not to apply that condition in competition law.

55 In her Opinion, the Advocate General did nevertheless expressly acknowledge that ‘up to now, the EU courts have proceeded on the assumption, when dealing with proceedings under competition law, that the application of the *ne bis in idem* principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected’; that ‘under the *ne bis in idem* principle, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset’; and that ‘it is by reference to that criterion that the Court has rejected the application of a

prohibition against prosecution and punishment for the same cause of action in antitrust proceedings involving the EU's relationship with non-member States' (Opinion of Advocate General Kokott in *Toshiba Corporation and Others*, C-17/10, EU:C:2011:552).

56 However, the Advocate General took the view that the Court should homogenise its case-law and abandon the requirement that the legal interest protected should be the same, which applied only in competition law.

57 The Court did not follow the Advocate General on that point. It stated very clearly that 'the Court has held, in competition law cases, that the application of this principle is subject to the threefold condition that in the two cases the facts must be the same, the offender the same and the legal interest protected the same'. Although the Advocate General invited it to abandon its case-law on *non bis in idem*, which varies depending on the field of law in question, the Court expressly refused to do so and confirmed that, in competition law, the principle *non bis in idem* still requires that the legal interest protected be the same.

58 In his Opinion in *Powszechny Zakład Ubezpieczeń na Życie*, Advocate General Wahl had 'difficulty in identifying good reasons why the three-fold criterion should continue to be applied in the context of competition law' (Opinion of Advocate General Wahl in *Powszechny Zakład Ubezpieczeń na Życie* (C-617/17, EU:C:2018:976, point 45).

59 In the present case, it appears prima facie to the Court of Appeal that the penalty imposed by the regulator IBPT on bpost for infringing the non-discrimination obligation does not punish the same facts as the penalty imposed by the Autorité belge de la concurrence for abuse of a dominant position.

60 Prima facie, there are reasons for deciding that the principle *non bis in idem* should not apply, because the different penalties imposed by the two authorities were not intended to punish the same facts or consequences and because, as the Commission noted, there is a risk that the scope of competition law would be considerably reduced since that scope is 'horizontal', unlike that of the sectoral rules, and since, were they to overlap and sector-specific rules to apply in priority, competition law would risk becoming completely, or at least to a considerable extent, ineffective.

61 The Court of Appeal believes that, prima facie, it is necessary to have regard to the legal interest protected by each of the different legal fields at issue (legal *idem factum*) as proposed by the judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72).

62 The Court of Appeal nevertheless shares the hesitation expressed by Advocate General Tanchev in his Opinion in *Marine Harvest*:

63 'For the sake of completeness, I should specify that the relevance of the third condition mentioned in point 95 above, namely the unity of the legal interest

protected, has been questioned. According to case-law, EU competition rules and national competition rules pursue "different ends" (see judgment of 13 February 1969, *Wilhelm and Others*, 14/68, EU:C:1969:4, paragraph 11) and they protect, therefore, different legal interests. It follows that the principle *ne bis in idem* does not preclude that separate fines are imposed on the same undertaking for the infringement of, on the one side, EU competition rules, and, on the other side, national competition rules. However, the relevance of the condition that the legal interest protected must be the same is disputed since, first, that condition is not applied in areas of EU law other than competition law (see Opinions of Advocate General Kokott in *Toshiba Corporation and Others*, C-17/10, EU:C:2011:552, point 116, and of Advocate General Campos Sánchez-Bordona in *Menci*, C-524/15, EU:C:2017:667, point 27), and, second, it is at odds with the increasing convergence of EU and national competition rules and with the decentralisation for the application of EU competition rules brought about by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in [Articles 101 and 102 TFEU]' (Opinion of Advocate General Tanchev in *Marine Harvest* (C-10/18 P, EU:C:2019:795, point 95, footnote 34).

64 Having regard to the foregoing, the Court of Appeal considers it necessary to enquire of the Court of Justice as to the interpretation to be given to the principle *non bis in idem* in relation to competition. This is a question of interpretation of general interest for the uniform application of EU law, since whether or not the third condition in the judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72) (that the legal interest protected must be the same) continues to apply in relation to competition is likely to arise in similar terms before other courts of the EU Member States.

5. Questions referred for a preliminary ruling:

65 The Court of Appeal refers the questions suggested by the European Commission and the Autorité belge de la concurrence to the Court of Justice for a preliminary ruling:

First question:

Must the principle *non bis in idem*, as guaranteed by Article 50 of the Charter, be interpreted as not precluding the competent administrative authority of a Member State from imposing a fine for infringing EU competition law, in a situation such as that of the present case, where the same legal person has already been finally acquitted of an offence for which an administrative fine had been imposed on it by the national postal regulator for an alleged infringement of postal legislation, on the basis of the same or similar facts, in so far as the criterion that the legal interest protected must be the same is not satisfied because the case at issue relates to two different infringements of different legislation applicable in two separate fields of law?

Second question:

Must the principle *non bis in idem*, as guaranteed by Article 50 of the Charter, be interpreted as not precluding the competent administrative authority of a Member State from imposing a fine for infringing EU competition law, in a situation such as that of the present case, where the same legal person has already been finally acquitted of an offence for which an administrative fine had been imposed on it by the national postal regulator for an alleged infringement of postal legislation, on the basis of the same or similar facts, on the grounds that a limitation of the principle *non bis in idem* is justified by the fact that competition legislation pursues a complementary general interest objective, that is to say, protecting and maintaining a system of undistorted competition within the internal market, and does not go beyond what is appropriate and necessary in order to achieve the objective that such legislation legitimately pursues, and/or in order to protect the right and freedom to conduct business of those other operators under Article 16 of the Charter?