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Press and Information

Advocate General's Opinions in Cases
C-117/20 bpost and C-151/20 Nordzucker and Others

Advocate General Bobek proposes a unified test for the protection against double jeopardy (ne bis in idem) under the EU Charter of Fundamental Rights

That test should rely on a threefold identity: of the offender; of the relevant facts; and of the protected legal interest

A Belgian[1] and an Austrian[2] court, seised of competition cases, are seeking guidance from the Court of Justice as to the protection against double jeopardy (the principle *ne bis in idem*) under the Charter of Fundamental Rights of the European Union[3].

The company bpost, the historical provider of postal services in Belgium, was successively fined by two Belgian authorities. First, it was fined 2.3 million euros by the national sectoral regulator for postal services which concluded that the rebate system applied by bpost in 2010 discriminated against some of bpost's clients[4]. That decision was later annulled by the Belgian court, following a request for a preliminary ruling to the Court of Justice[5], as the situation at issue did not amount to discrimination under the postal sectoral legislation. Second, bpost was fined almost 37.4 million euros by the Belgian competition authority for an abuse of a dominant position due to application of the same rebate system between January 2010 and July 2011. bpost disputes the legality of that second set of proceedings, relying on the principle ne bis in idem.

The Austrian court is seised of proceedings in which the Austrian competition authority[6] seeks a declaration that Nordzucker and Südzucker, two German sugar producers, have breached the EU ban on restrictive agreements[7] and Austrian competition law. With respect to Südzucker, it also seeks the imposition of a fine. Previously, the German competition authority[8] found that those two undertakings infringed Article 101 TFEU and German competition law and imposed on Südzucker a fine of 195.5 million euros. In this context, several questions about the principle ne bis in idem arise.

In today's Opinions, Advocate General Michal Bobek considers that Article 50 of the Charter, enshrining the principle ne bis in idem, must have the same content irrespective of the area of EU law to which it is applied, safe where a specific EU-law provision expressly guarantees a higher level of protection.

He also stresses that the very purpose of the principle ne bis in idem is to protect the party from the second set of proceedings. It is a bar. If validly triggered, it prevents a subsequent set of proceedings from even starting. Such a bar must be defined ex ante and normatively. It cannot depend on circumstantial elements specific to a given (subsequent) set of proceedings.

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[1] The Cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium).
[2] The Oberster Gerichtshof (Supreme Court, Austria).
[3] Article 50 of the Charter.
[4] bpost granted quantity discount, calculated on the basis of the volume of mail items delivered, to both bulk mailers and consolidators. However, unlike before, the rebate granted to consolidators was no longer calculated on the basis of the total volume of mail items from all the bulk mailers to which they provided their services, but on the basis of the volume of mail items generated individually by each of those bulk mailers.
[5] Case C-340/13 bpost.
[6] The Bundeswettbewerbsbehörde.
[7] Article 101 TFEU.
[8] The Bundeskartellamt.

He therefore proposes a unified test of ne bis in idem under Article 50 of the Charter to replace what is currently, according to the Advocate General, a fragmented and partially contradictory mosaic[9]. **The unified test should rely on a threefold identity: of the offender; of the relevant facts; and of the protected legal interest.**

As regards the bpost case, Advocate General Bobek proposes to reply to the Belgian court that the principle ne bis in idem enshrined in the Charter does not preclude the competent administrative authority of a Member State from imposing a fine for the infringement of EU and national competition law where the same person has already been finally acquitted in a previous proceedings conducted by the national postal regulator for an alleged infringement of postal legislation, provided that, in general, the subsequent set of proceedings are different either as to the identity of the offender, or as to the relevant facts, or as to the protected legal interest the safeguarding of which the respective legislative instruments at issue in the respective proceedings pursue.

According to the Advocate General, it would appear that, subject to verification by the Belgian court, both offences that have been pursued successively in the sectoral and competition proceedings seem to be linked to the protection of a different legal interest and to a legislation pursuing a different objective.

First, in terms of the protected legal interest, achieving liberalisation of certain, previously monopolistic, markets follows a different logic than the ongoing and horizontal protection of competition. Second, that is also evident with regard to the undesirable consequences that punishment of each of the offences is intended to prevent. If the aim is to liberalise a sector, then potential harm caused to competition upstream or downstream is not necessarily an issue that regulatory framework must tackle. By contrast, an abuse of dominance that results in the distortion of competition upstream or downstream from the dominant undertaking is very much a concern of competition rules.

In the case Nordzucker and Others, the Advocate General confirms that the unified test to be applied to the principle ne bis in idem shall be used also in the specific area of competition law.

In his view, whether EU competition law and national competition law protect the same legal interest must be established by examining the specific rules applied. That involves the assessment of whether the national rules at issue depart from the EU ones. **Where the competition authorities of two Member States apply the EU ban on restrictive agreements and the corresponding provision of national competition law, then they protect the same legal interest.**

Furthermore, the fact that a national competition authority took into account the extraterritorial effects of a given anti-competitive conduct in an earlier decision, provided that it was entitled to do so under national law, is relevant for the examination of the applicability of the principle ne bis in idem in the proceedings conducted subsequently. **The principle ne bis in idem enshrined in the Charter prevents a national competition authority or a court from sanctioning an anti-competitive conduct that was already the object of previous proceedings concluded by a final decision adopted by another national competition authority. That prohibition applies nevertheless only to the extent that the temporal and geographical scope of the object of both proceedings is the same.**

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[9] In this respect, the Advocate General refers, first, to well-established case-law that subjects the application of ne bis in idem in the EU competition law to the three criteria of the identity of the offender, facts and protected legal interest; and, second to the case-law on the Schengen rules and on the rules on the European arrest warrant that have always been based on the premise that the legal interest protected and the legal classification of the given acts do not matter for considerations related to the applicability of the principle ne bis in idem. Moreover, the Advocate General notes that the Court followed yet another approach in the recent Menci case-law of 2018 concerning a second (criminal or administrative) set of proceedings, which was brought about for the reasons of tax evasion, market manipulation and insider trading delicts, despite the fact that previous (criminal or administrative) proceedings had already been initiated for the same acts,. In this context, the Court permitted a second set of proceedings where, among other conditions, that seems justified by an objective of general interest, where the proceedings and penalties pursue additional objectives and where the penalties imposed taken together respect the principle of proportionality.

In essence, **the principle ne bis in idem enshrined in the Charter applies also in the context of national proceedings that involve the application of a leniency programme and which do not lead to the imposition of a fine.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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