Case C-311/24

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:

29 April 2024

Referring court:

Oberlandesgericht Wien (Austria)

Date of the decision to refer:

26 April 2024

Applicant:

Bundeswettbewerbsbehörde

Defendant:

M. GmbH

Subject matter of the main proceedings

Imposition of an appropriate fine pursuant to Paragraph 6(2) of the Faire-Wettbewerbsbedingungen-Gesetz (Law on fair conditions of competition, 'the FWBG') in respect of requests for payment sent to suppliers

Subject matter and legal basis of the request

Interpretation of Article 6(1)(e) of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain ('the UTP Directive'); compatibility of Austrian law with that directive; Article 267 TFEU

Questions referred for a preliminary ruling

1(a) Must Article 6(1)(e) of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 concerning unfair trading practices in

business-to-business relationships in the agricultural and food supply chain be interpreted, in a situation in which a buyer, on the basis of a decision with a single intent and on the same day, separately requests – in breach of Article 3(1)(d) of that directive – a payment from various suppliers who are protected under Article 1 of that directive, as precluding national legislation according to which those requests for payment are to be regarded as a single infringement (several offences committed by means of a single act) in respect of which only a single penalty is to be imposed?

1(b) Is it relevant to the answer to Question 1(a) – in the light of the requirement in the last sentence of Article 6(1) of Directive (EU) 2019/633, according to which the penalty is to be effective, proportionate and dissuasive, taking into account the nature, duration, recurrence and gravity of the infringement – that a fine of up to a maximum amount of (only) EUR 500 000 may be imposed for that infringement under the Austrian national rule imposing a penalty (Paragraph 6(2) of the FBWG)?

2. If Question 1(a) is answered in the affirmative:

Must Article 6(1)(e) of Directive (EU) 2019/633 be interpreted as meaning that each request for payment sent to a supplier – in so far as it infringes the prohibition in Article 3(1)(d) of Directive (EU) 2019/633 – must be regarded as a trading practice which must be penalised independently and for which a separate penalty (fine) must be imposed in accordance with the principle of cumulation, so that several fines must be imposed, taking into account that the Austrian national rule imposing a penalty (Paragraph 6(2) of the FBWG) provides for the imposition of a fine of up to a maximum amount of EUR 500 000?

Provisions of European Union law and international law relied on

Article 101(3) TFEU

Article 102 TFEU

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, Article 25

Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (‘the UTP Directive’).

Article 6(1)(e) and the last sentence of Article 6(1) of the UTP Directive reads:

‘1. Member States shall ensure that each of their enforcement authorities has the necessary resources and expertise to perform its duties, and shall confer on it the following powers:

…

(e) the power to impose, or initiate proceedings for the imposition of, fines and other equally effective penalties and interim measures on the author of the infringement, in accordance with national rules and procedures;

…

The penalties referred to in point (e) of the first subparagraph shall be effective, proportionate and dissuasive, taking into account the nature, duration, recurrence and gravity of the infringement.'

Article 4 of Protocol No 7 to the European Convention on Human Rights

European Union and international case-law

Judgment of 8 July 1999, *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356

Judgment of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266

Judgment of 5 June 2012, *Bonda*, C-489/10, EU:C:2012:319

Judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416

Judgment of 26 January 2017, *Villeroy & Boch Belgium* v *Commission*, C-642/13 P, EU:C:2017:58

Judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197

Judgment of 12 September 2019, *Maksimovic and Others*, C-64/18, C-140/18, C-146/18 and C-418/18, EU:C:2019:723

Judgment of 22 October 2020, *Silver Plastics and Johannes Reifenhäuser* v *Commission*, C-702/19 P, EU:C:2020:857

Judgment of 22 March 2022, *Nordzucker and Others*, C-151/20, EU:C:2022:203

Judgment of 16 June 2022, *Sony Corporation and Sony Electronics* v *Commission*, C-697/19 P, EU:C:2022:478

Judgment of 16 June 2022, *Toshiba Samsung Storage Technology and Toshiba Samsung Storage Technology Korea* v *Commission*, C-700/19 P, EU:C:2022:484

Judgment of 9 November 2023, *Altice Group Lux* v *Commission*, C-746/21 P, EU:C:2023:836

European Court of Human Rights ('the ECtHR'), 10 February 2009, *Zolotukhin v. Russia*, Application no. 14939/03

Provisions of national law relied on

Faire-Wettbewerbsbedingungen-Gesetz (Law on fair conditions of competition; 'the FWBG') (BGBl I 2021/239), which transposes the UTP Directive:

Points 1 to 5 of Paragraph 5a(2) of the FWBG transpose Article 1(2)(a) to (e) of the UTP Directive with the same wording; Paragraph 5a(3) of the FWBG requires a territorial connection of the sales to the European Union in accordance with Article 1(2) of the UTP Directive.

Paragraph **5a of the FWBG** reads:

'(1) The provisions of this section govern the fight against unfair trading practices in connection with the sale of agricultural and food products. They are aimed at implementing Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ L 11, 30.12.2019, p. 59 ("Directive (EU) 2019/633"). The first section and the Kartellgesetz 2005 (2005 Law on cartels), BGBl I *No 61/2005 remain unaffected.*

(2) The provisions of this section shall apply to trading practices in connection with the sale of agricultural and food products by:

1. suppliers which have an annual turnover not exceeding EUR 2 000 000 *to buyers which have an annual turnover of more than EUR* 2 000 000*;*

2. suppliers which have an annual turnover of more than EUR 2 000 000 *and not exceeding EUR* 10 000 000 *to buyers which have an annual turnover of more than EUR* 10 000 000*;*

3. suppliers which have an annual turnover of more than EUR 10 000 000 *and not exceeding EUR* 50 000 000 *to buyers which have an annual turnover of more than EUR* 50 000 000*;*

4. suppliers which have an annual turnover of more than EUR 50 000 000 *and not exceeding EUR* 150 000 000 *to buyers which have an annual turnover of more than EUR* 150 000 000*;*

5. suppliers which have an annual turnover of more than EUR 150 000 000 *and not exceeding EUR* 350 000 000 *to buyers which have an annual turnover of more than EUR* 350 000 000*;*

…

(3) This section applies to sales where either the supplier or the buyer, or both, are established in the European Union.

…'

Paragraph **5c(1) of the FWBG**: *'The trading practices listed in Annex I are prohibited. …'*

The heading of Annex I to the FWBG is 'Trading practices that are prohibited in all circumstances:'

Point 4 of Annex I to the FWBG reads: *'The buyer requires payments from the supplier that are not related to the sale of the agricultural and food products of the supplier.'*

The prohibited practice referred to in Paragraph 5c of the FWBG, read in conjunction with point 4 of Annex I thereto, corresponds to that in Article 3(1)(d) of the UTP Directive. The prohibition was transposed verbatim.

Point 2 of Paragraph **5b of the FWBG** reads as follows:

'"Buyer" means any natural or legal person, irrespective of that person's place of establishment, or any public authority in the Union, who buys agricultural and food products; the term "buyer" may include a group of such natural and legal persons;'

Point 3 of Paragraph **5b of the FWBG** reads as follows:

'"Supplier" means any agricultural producer or any natural or legal person, irrespective of their place of establishment, who sells agricultural and food products; the term "supplier" may include a group of such agricultural producers or a group of such natural and legal persons, such as producer organisations, organisations of suppliers and associations of such organisations;'

The definitions of 'buyer' and 'supplier' contained in points 2 and 3 of Paragraph 5b of the FWBG are identical to those of the UTP Directive (points 2 and 4 of Article 2 of the UTP Directive).

Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch) (Federal Law of 23 January 1974 on acts punishable by law (Criminal Code; 'the StGB')), BGBl I No. 60/1974, Paragraph 28(1)

Verwaltungsstrafgesetz (Law on administrative offences; ‘the VStG’), BGBl I No. 52/1991, Paragraph 22(2)

Kartellgesetz (Law on cartels; ‘the KartG’) BGBl I No. 61/2005; Paragraphs 1, 2, 4a, 5, 29, 33

Oberster Gerichtshof (Supreme Court, Austria), 20 June 2001, 11 Os 51/11a

Supreme Court, 27 February 2006, 16 Ok 52/05

Supreme Court, 11 April 2007, 13 Os 1/07g

Supreme Court, 17 September 2013, 11 Os 73/13i

Supreme Court, 8 October 2015, 16 Ok 2/15b

Supreme Court, 11 May 2023, 16 Ok 3/23m

Succinct presentation of the facts and procedure in the main proceedings

1 The defendant was severely impacted economically by the effects of the Covid pandemic on tourism and the resulting lack of customers in the food retail sector and faced massive cost increases, especially in the energy sector, as well as high inflation and increased financing costs due to interest rate developments.

2 The defendant instructed a consultancy firm to support it in the implementation of a ‘transformation process’ in order to ensure the long-term survival of the company and its competitiveness.

3 The change in strategic direction entailed a transformation in all areas of the company, but in particular category management, logistics, marketing and a reorganisation of the stores (for example, shelf extensions with new ceiling heights were planned, which made new, lower floors necessary).

4 On the advice of the consultancy firm, the defendant organised an online ‘Supplier Day conference’ on 16 May 2023, during which it provided its suppliers with an overview of the current market situation and related problems as well as the current losses on the part of the defendant. The transformation process undertaken by the defendant was explained as an outlook for the future,.

5 During the Supplier Day conference, the defendant announced to its suppliers that a request for financial support for the transformation process would follow.

6 On 17 May 2023, follow-up emails with attached pro-forma invoices for different lump sums were sent out. Those invoices served the purpose and overall plan of financing the costs of that transformation process by way of a monetary contribution from suppliers. The emails were each addressed to one supplier and were sent simultaneously.

7 With the exception of the amount in the pro-forma invoice and the distinction as to whether or not the respective supplier had attended the Supplier Day conference, those emails are identical for all suppliers:

‘…

In order to implement [that transformation process], we need your support. Specifically, [the defendant] has the expectation that you, as a key account, will make an investment of EUR 15 000 [note: the emails contain different amounts] towards our joint future.

We have already issued a pro-forma invoice for that purpose.

We will follow up on your willingness to provide support as a partner. Please note that your investment will sustainably strengthen our partnership and support us in building a successful future together. It is in your hands to turn that plan into reality.’

8 On 10 November 2023, the applicant filed 16 separate applications against the defendant with the Kartellgericht (Cartel Court, Austria) for the imposition of an appropriate fine pursuant to Paragraph 6(2) of the FWBG on the grounds that the defendant, as a buyer, had infringed Paragraph 5c(1) of the FWBG, read in conjunction with point 4 of Annex I thereto, by demanding a payment from 16 suppliers that was not related to the sale of agricultural and food products.

9 The present Chamber of the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), which has made the request for a preliminary ruling, is ruling on four requests for payment amounting to between EUR 10 000 and EUR 18 000.

The essential arguments of the parties in the main proceedings

10 According to the **applicant**, the defendant had infringed Paragraph 5c(1) of the FWBG, read in conjunction with point 4 of Annex I thereto, with each of the requests for payment.

11 The condition relating to the ratio of turnover (set out in Paragraph 5a(2) of the FWBG) between the turnover of the defendant as a buyer within the meaning of Paragraph 5b(2) of the FWBG and the turnover of the supplier within the meaning of Paragraph 5b(3) of the FWBG, which is necessary for the application of Section 2 of the FWBG, is fulfilled.

12 The **defendant** challenges the alleged infringement of the FWBG on the ground that the defendant did not request any payments within the meaning of Paragraph 5c(1) of the FWBG, read in conjunction with point 4 of Annex I thereto. The defendant had merely issued a request for investment, with an explicit reference to the voluntary nature of the payment.

Submission regarding the separate filing of the applications

13 The **applicant** submits that the defendant infringed Paragraph 5c(1) of the FWBG, read in conjunction with point 4 of Annex I thereto, 16 times by demanding a payment prohibited under Paragraph 5c(1) of the FWBG, read in conjunction with point 4 of Annex I thereto, from 16 different suppliers in various amounts.

14 The relevant part of the FWBG transposed the UTP Directive. The choice of wording in the UTP Directive and the FWBG clearly indicates that it was the intention of the legislature to assess the infringements committed on the basis of the supplier and the buyer who were individually involved or to use those two individuals as the central identity-shaping assessment criterion. That already follows from the definitions of 'buyer' and 'supplier' since those terms were defined as 'any natural or legal person, irrespective of their place of establishment' or 'a group of such natural and legal persons'. Read in conjunction with the provisions on the calculation of the relevant annual turnover (Paragraph 5a(2) of the FWBG), it could be inferred that 'buyer' and 'supplier' – based on the definitions of 'autonomous enterprise', 'partner enterprise' and 'linked enterprise' in the Annex to Recommendation 2003/361/EC – are principally to be regarded as individual and autonomous enterprises, except in the case of a group of enterprises.

15 When drafting the penalty, the Austrian legislature decided to provide for a maximum amount of EUR 500 000 instead of a percentage of the annual turnover (Paragraph 6(2) of the FWBG).

16 The singular form for 'supplier' and 'buyer' is used in the list of individual prohibited unfair trading practices established by law. The intended use of the singular form is logically related to the annual turnovers to be used in accordance with Paragraph 5a FWBG, which are generally only to be calculated for 'autonomous enterprises', 'partner enterprises' and 'linked enterprises'. The specific choice of the singular form for 'supplier' or 'buyer' follows, in particular, from the wording of the unfair trading practice under point 4 of Annex I to the FWBG. That provision states that requesting one or more payments (use of the plural) from a supplier constitutes an unfair trading practice.

17 The protective purpose of the UTP Directive as well as the second section of the FWBG requires separate proceedings to be conducted for each supplier affected by an unfair trading practice on the part of a buyer.

18 The UTP Directive, transposed in the second section of the FWBG, does not – as claimed by the defendant – constitute a 'special cartel law'. Rather, a regulatory environment should be created in which the negotiation process between the players in the food supply chain leads to a fair outcome.

19 A distinction must be drawn in that regard between problems arising from potentially unfair trading practices and problems relating to anti-competitive conduct. The UTP Directive is not concerned with protecting competition as an

institution or with protecting consumers from misleading advertising and other unfair practices, but with maintaining an appropriate balance of interests between suppliers and their customers in the business-to-business sector (see recitals 1 and 6).

20 In addition, it is clear from recitals 7 and 14 of the UTP Directive that its protection extends to primary producers in the agricultural and food supply chain, who need to be protected against the direct or indirect negative effects of unfair trading practices. That is always based on the relative bargaining power between the individual supplier and the individual buyer, which is to be assessed on the basis of the respective annual turnover.

21 It is precisely the existence of an imbalance in that bargaining power – between the individual supplier and the individual buyer – that opens up the scope of application of the UTP Directive and thus the need to combat unfair trading practices. The imbalance in bargaining power therefore constitutes an essential characteristic of the individual infringement. As regards the identity of the act, on account of the protective purpose of the UTP Directive, the individual relationship between buyer and supplier needs to be taken into account, on the basis of which the individual degree of unlawfulness of the unfair trading practice used is to be assessed.

22 In the explanatory memorandum to the draft UTP Directive (Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, 12 April 2018, COM(2018) 173 final, 2018/0082 (COD), ('the draft UTP Directive') eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0173, accessed on 3 January 2024), the European Commission clearly made the point that cartel law has a scope that is different from the law on combating unfair trading practices and that those sets of rules exist independently alongside each other and are complementary to each other. Last, the legal basis underpinning the adoption of the UTP Directive is also worth noting. If the intention had been to create competition rules (special cartel law) for the agricultural and food supply chain, Article 103 TFEU would have been available as a legal basis. That option was not used, however. Instead, Article 43(2) TFEU was chosen, which is aimed at achieving the objectives of the common agricultural and fisheries policy.

23 This means that there is no basis for the application of the legal concept of a single, complex and continuous infringement developed in European competition law.

24 When drafting the penalty, the Austrian legislature chose, unlike in cartel law, to lay down a fixed maximum amount instead of a percentage. Within that maximum amount, the turnover size category (Paragraph 5a(2) of the FWBG) of a buyer will also be relevant when assessing a specific fine. While a penalty of up to EUR 500 000 would pose an existential threat for a buyer falling under point 1 of that provision, in the case of a buyer in the higher turnover categories up to

point 6 of that provision, that does not appear to be suitable for adequately reflecting serious and far-reaching offences within a common maximum amount. Rather, similarly to administrative criminal law, the principle of cumulation should be assumed to apply here, meaning that a fine of EUR 500 000 should be imposed for each individual infringement. In connection with the foregoing consideration and with regard to an interpretation in conformity with the UTP Directive, this means that the second section of the FWBG is fundamentally based on a case-by-case approach and, accordingly, on the conduct of separate proceedings.

25 The conduct of 16 individual proceedings is therefore not an artificial separation but is required on the basis of the individual assessment criteria of the FWBG.

26 The **defendant** objects to the separate filing of the applications and the separate conduct of the proceedings on the ground that all 16 applications filed separately by the applicant are based on the same facts and therefore constitute an allegation that a single infringement had been committed. Splitting the proceedings artificially into 16 proceedings breaches the principle *ne bis in idem*.

27 Recently, the ECtHR had based the question of the existence of the same punishable act primarily on the factual situation being assessed (same facts) (fundamental ruling ECtHR, 10 February 2009, 14939/03, *Zolotukhin v. Russia* paragraph 71 et seq., 82 et seq.). An infringement of Article 4 of Protocol No. 7 to the ECHR therefore exists if identical facts or facts which are substantially the same lead to multiple prosecutions or punishments. According to the case-law of the ECtHR, an '*idem*' can always be assumed to exist if both offences are based on identical or substantially identical facts. In the opinion of the ECtHR, the focus should be on those facts which constitute a set of concrete factual circumstances that are inextricably linked together in time and space. According to the ECtHR, the existence of an identical act, the '*idem*', must be assumed to exist – irrespective of the legal classification or the legal interest affected – if the proceedings or decisions are based on the same historical circumstances. The Supreme Court emphasised in 11 Os 73/13i: *'The criteria to be used for the assessment are the time, place and object of the acts, the actions taken, the perpetrators, the victims and the actual or intended outcome. In this process a set of facts which, by their very nature, are inextricably linked and correspond in space and in time cannot be divided into artificially separate episodes.'*

28 That definition of the '*idem*' means that the allegation, made by the applicant against the defendant in 16 proceedings, of an infringement of Paragraph 5c(1) of the FWBG, read in conjunction with point 5 of Annex I thereto, concerns a single identical set of facts.

29 Paragraph 6(2) of the FWBG provides that the Cartel Court may '… impose a fine up to a maximum amount of EUR 500 000'.

30 By initiating separate proceedings, the applicant circumvents the legal provision providing for **one** fine of up to a maximum amount of EUR 500 000. That not only overburdens the defendant's financial capacity, but also multiplies the costs of the proceedings and places an excessive burden on court operations.

31 Since all of the requests for investment sent to the suppliers stem from the overall plan to offset the costs of the transformation process through a financial contribution from its suppliers of agricultural and food products in order to secure the continued existence of the defendant, that constitutes a single act.

32 In the alternative, the defendant submits that this case concerns an allegation that a **single and continuous infringement** had been committed. According to settled case-law, an infringement of cartel law may be the result not only of an isolated act, but also of a series of acts or of continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision (CJEU, C-697/19 P, paragraph 62). That is a legal concept created by way of judge-made development of the law, stemming from the landmark decision of the CJEU in Case C-49/92 P. The European Courts have held in that regard that *'[…] because of their identical object, the agreements and concerted practices found to exist, formed part of systems of regular meetings, target-price fixing and quota–fixing, and that those schemes were part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices. It […] would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements.'*

The legal concept of a single and continuous infringement is also used in Austria in settled case-law in the case of infringements of competition law (16 Ok 2/15b).

The concept of 'single and continuous infringement' presupposes the existence of an 'overall plan' into which the various acts fit owing to their identical object, irrespective of whether one or more of those acts could also, in themselves and taken in isolation, constitute an infringement of competition law.

33 European case-law also applies that legal concept to infringements of Article 102 TFEU/Paragraph 5 of the KartG. According to the General Court of the European Union (T-321/05, paragraph 892 et seq.), when applying the legal concept of a single and continuous infringement to abusive conduct, it is necessary to establish whether the various instances of conduct complement each other.

34 The legal concept of a single and continuous infringement is also applicable to infringements of the FWBG and the provisions transposing the UTP Directive in Paragraph 5a et seq. of the FWBG if the infringements complement each other, that is to say that they are similar in the way they are committed, they are closely related in time and are supported by a general intent or plan, given that the provisions transposing the UTP Directive in Paragraph 5a et seq. of the FWBG

and the infringements referred to therein have a systematic approach in terms of their protective purpose, legislative objective and effect that is very similar to the prohibitions under cartel law in Article 102 TFEU/Paragraph 5 of the KartG.

35 The conduct of the defendant towards the 16 suppliers concerns a complex of facts which, by their very nature, are inextricably linked. The investment plan was developed in its entirety by the management consultancy firm instructed by the defendant and (partially) accepted by the defendant. The aim was to achieve an improved market presence by way of restructuring and additional investments. To that end, financially strong suppliers were to be invited to invest in order to contribute to the survival of their customer. Against that background, it can be assumed that the abovementioned requirement of an 'overall plan' is clearly fulfilled in connection with the request for investment.

36 An analysis of the purpose of the UTP Directive and the FWBG shows that the FWBG may be categorised as competition law or cartel law.

37 It follows from the recitals of the UTP Directive that it is intended to protect suppliers in a sector-specific way from customers with a strong market power. To that end, the UTP Directive defines a number of types of 'conduct' that appear to be absolutely or relatively prohibited. It is striking that those types of conduct by dominant undertakings already infringe the provisions of cartel law on the assessment of abusive practices. The abovementioned practices are closely related to cartel law. The UTP Directive and cartel law pursue the same basic idea of 'protection against market imbalances'.

38 In particular, the wording of recital 9, namely 'bargaining power resulting from the economic dependence of the supplier on the buyer', establishes a direct link to the provisions on the assessment of abusive practices under Paragraph 5 of the KartG/Article 102 TFEU.

39 Moreover, the description of 'fair and efficiency-creating agreements' is broadly comparable to the exception in Article 101(3) TFEU or Paragraph 2 of the KartG.

40 Last, the structural design of the UTP Directive and also of Paragraph 5a et seq. of the FWBG should not be disregarded, which, in terms of the 'list of prohibited conduct', is broadly similar to the provisions of the same name in the block exemption rules under cartel law, known as the 'black list' and the practices permitted under certain conditions, known as the 'grey list'.

41 In the light of the foregoing, it must be concluded that the legal concept of a single and continuous infringement has been developed for overall situations such as those in the present case. The scheme of the provisions in Paragraph 5a et seq. of the FWBG is based on cartel law, in particular Paragraph 5 of the KartG, the scope of application of which differs from the UTP Directive and the FWBG only with regard to the strict market dominance requirement. Ultimately, it would be artificial if a coherent infringement characterised by an overall plan were to be split into separate infringements simply because it was being prosecuted under

Paragraph 5a et seq. of the FWBG and not under Paragraph 5 of the KartG. Rather, the case-law on single and continuous infringements should also be applied to infringements of the FWBG.

42 The failure to apply the legal concept of a single and continuous infringement or a continuous offence also breaches the principle of equivalence under EU law.

43 The obligation to guarantee the practical effectiveness of EU law, which is based on the Member States' duty of loyalty and cooperation under Article 4(3) TEU, also includes the effective protection of subjective legal positions derived from an objective rule of conduct when implementing EU law. That results in specific requirements for the structuring of national law applicable in the absence of any provisions under European law. The substantive and procedural rules for penalising infringements of EU law must therefore be equivalent to the rules under which corresponding infringements of national law would be penalised (principle of equivalence).

44 That also applies to the relationship between Paragraph 5a et seq. of the FWBG, which is based on EU law (the UTP Directive), and the national provisions in Paragraph 1 et seq. of the KartG. Procedural autonomy and also in part the substantive freedom of shaping laws (when transposing the UTP Directive) ends where equivalence is impaired. Such an impairment of equivalence exists if the domestic enforcement of Paragraph 4a et seq. of the FWBG were to follow different enforcement arrangements despite being largely similar to the KartG. The same also follows from the UTP Directive itself, according to which the buyer's rights of defence (guaranteed under EU law) must be safeguarded by the enforcement authorities (recital 35 and Article 6(2) of the UTP Directive). Those rights of defence must not be reduced by excessively splitting a (continuous) infringement, since that would be incompatible with the principle of equivalence.

Succinct presentation of the reasoning in the request for a preliminary ruling

45 In view of the objective defined in the UTP Directive, namely to compensate for the frequent imbalances in bargaining power between buyers and suppliers in the agricultural and food supply chain, it is necessary to measure national implementation against that guiding principle. Next, the financial penalty under Paragraph 6(2) of the FWBG must be classified in legal terms and, last, the Austrian doctrine of concurrence regarding the treatment of multiple infringements of the law must be discussed and the system placed in relation to the UTP Directive.

46 The power imbalance between the economic performance of supplier and customer (buyer) is expressed in Article 1 of the UTP Directive on the basis of turnover thresholds, which were transposed into Austrian law by means of points 1 to 5 of Paragraph 5a(2) of the FWBG. In accordance with the UTP Directive, points 1 to 5 of Paragraph 5a of the FWBG define maximum and

minimum turnover thresholds as a prerequisite for the application of Paragraph 5a et seq. of the FWBG.

47 The recitals of the UTP Directive were not included in the FWBG. However, they are reproduced, in essence, in the legislative materials, specifically in the explanatory notes to the government bill (ErlRV 1167 XXVII. GP, 1) for the FWBG.

48 Paragraph 6(2) of the FWBG, which transposes Article 6 of the UTP Directive, provides for the imposition of a fine in the event of an infringement of the prohibition of unfair trading practices.

49 In the opinion of the present Chamber, that rule imposing a penalty is of a criminal nature.

The fine under the Austrian Law on cartels

50 According to its purpose and effect, the fine under the Austrian Law on cartels is a penalty of a quasi-criminal nature (Supreme Court in RIS-Justiz RS0120560). The purpose of fines under Paragraph 29 of the KartG is to punish wrongdoing (repression) and to prevent the commission of further infringements (prevention), irrespective of whether unauthorised conduct is still ongoing or its effects still persist. Fines under cartel law are a means of State enforcement and are therefore part of criminal law in the broader sense (Koprivnikar/Mertel in Egger/Harsdorf-Borsch, Kartellrecht § 29 KartG 2005).

51 The fine under Paragraph 29 of the KartG also fulfils the criteria established by the CJEU in Case C-151/20 for a classification as a penalty of a criminal nature.

52 In Case C-151/20, the CJEU ruled in that regard:

‘Paragraph 29: Article 50 of the Charter provides that “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”. Therefore, the *ne bis in idem* principle prohibits a duplication both of proceedings and of penalties of a criminal nature for the purposes of that article for the same acts and against the same person (judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 25 and the case-law cited).

Paragraph 30: As regards the assessment as to whether the proceedings and penalties concerned are criminal in nature, which is a matter for the referring court, it must be noted that three criteria are relevant. The first is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty which the person concerned is liable to incur (see, to that effect, judgments of 5 June 2012, *Bonda*, C-489/10, EU:C:2012:319, paragraph 37, and of 20 March 2018, *Menci*, C-524/10, EU:C:2018:197, paragraph 26 and 27).

Paragraph 31: It should be pointed out in that regard that the application of Article 50 of the Charter is not limited to proceedings and penalties which are classified as "criminal" by national law, but extends regardless of such a classification under national law to proceedings and penalties which must be considered to have a criminal nature on the basis of the two other criteria referred to in the preceding paragraph (see, to that effect, judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 30).'

The fine under Paragraph 6(2) of the FWBG

53 The criteria established in connection with the classification of the fine under the KartG as a penalty of a criminal nature are also fulfilled by Paragraph 6(2) of the FWBG.

54 The threat of a fine in Paragraph 6(2) of the FWBG transposes the provision imposing a penalty in Article 6(1)(e) of the UTP Directive. According to Article 6(2) of the FWBG, the severity and duration of the infringement, the enrichment achieved based on the duration of the infringement, the degree of culpability and the economic capacity must be taken into account when calculating the fine. In accordance with the requirements of the last sentence of Article 6(1) of the UTP Directive, that penalty is to be effective, proportionate and dissuasive, taking into account the nature, duration, recurrence and gravity of the infringement. Article 6(1) of the UTP Directive thus provides, as a benchmark for the severity of the penalty that may be imposed on the person concerned (C-151/20, *Bundeswettbewerbsbehörde* v *Nordzucker AG, Südzucker AG, Agrana Zucker GmbH*), that it must be an effective way of penalising wrongdoing (repression) and preventing the commission of further infringements in the sense of deterrence (prevention). Since the repressive and preventive effect, as the typical characteristics of a penalty (Supreme Court 16 Ok 52/05), must be achieved in accordance with the clear requirements of the last sentence of Article 6(1) of the UTP Directive, the transposition in Austria by Paragraph 6(2) of the FWBG with a penalty of up to EUR 500 000 establishes a penalty of a criminal nature.

55 In view of that legal classification of the Austrian rule imposing a penalty as a provision imposing a penalty of a criminal nature, the question to be answered is how conduct that repeatedly infringes Paragraph 5c(1) of the FWBG, read in conjunction with point 4 of Annex I thereto (Article 3(1)(d) of the UTP Directive), as has been alleged by the applicant in the present proceedings, is to be penalised.

Concepts in Austrian criminal law in the event of multiple infringements of the law – the doctrine of concurrence

56 In contrast to the Strafgesetzbuch (Austrian Criminal Code, 'the StGB') and the Verwaltungsstrafgesetz (Austrian Law on administrative offences, 'the VStG'), the FWBG makes no provision for the way in which penalties are to be imposed if several infringements are committed.

57 The Austrian Law on cartels does not contain any provisions to that effect either (see Koprivnikar/Mertel in Egger/Harsdorf-Borsch, Kartellrecht, § 29, paragraph 5).

58 In the case of repeated, continuous infringements of competition law, the legal concept of a single and continuous infringement has developed, under the conditions explained in more detail below, according to case-law and prevailing legal theory, which dogmatically treats multiple infringements as a single act in the sense of *Idealkonkurrenz* (multiple offences committed through one act).

59 In the present case, the question arises as to whether the legal concept of a single and continuous infringement should be applied in the case of multiple infringements of the FWBG. That requires a more detailed analysis of the legal concept of a single and continuous infringement.

Single and continuous infringement

60 Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty uses the term ‘continuing infringement’ in Article 25(2) thereof.

61 According to the settled case-law of the CJEU, the concept of ‘single and continuous infringement’ presupposes the existence of an ‘overall plan’ which consists of various acts, each of which has the identical object of distorting competition in the internal market, irrespective of the fact that one or more of those acts could also, in themselves and taken in isolation, constitute an infringement of Article 101 TFEU (CJEU, C-702/19 P; CJEU, C-642/13 P).

62 Accordingly, if the different actions form part of an ‘overall plan’ because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (CJEU, C-642/13 P; see, to that effect, judgment in Cases C-293/13 P and C-294/13 P, paragraph 156 and the case-law cited).

63 If those conditions are met, it would be artificial to split up continuous conduct, characterised by a single purpose, by treating it as a number of separate infringements (see CJEU, C-642/13 P; CJEU, C-702/19 P; CJEU, C-700/19 P).

64 In contrast to Article 25 of Regulation 1/2003, the Austrian Law on cartels does not differentiate between continuous infringements and other types of infringements (Schwarz in Egger/Harsdorf-Borsch, Kartellrecht § 33 KartG 2005).

65 Since Decision 16 Ok 2/15b, the legal concept of a single and continuous infringement in the case of infringements of Article 101 TFEU has also been recognised in Austria by the highest courts.

66 The Supreme Court ruled that several successive unlawful actions constitute a continuous infringement and a legal unity if the actions are linked by a common purpose (all actions have the same objective). The individual sub-acts must be similar in the way they are committed, be closely related in time and be supported by a general intent (16 Ok 2/15b).

67 Such an overall infringement is generally characterised by continuous anti-competitive conduct of the participants in the cartel with a single economic objective (16 Ok 3/23m).

68 The Supreme Court emphasises that, for the purpose of characterising various instances of conduct as a continuous infringement, it is necessary to establish whether they are complementary, in that each of them is intended to deal with one or more consequences of the normal pattern of competition, and whether, through interaction, they contribute to the attainment of the set of anti-competitive effects desired by those responsible, within the framework of an overall plan based on a single objective. An overall plan need not have existed from the outset, but may have been developed over time (16 Ok 2/15b).

69 This means that, according to the consistent case-law of the CJEU and the Supreme Court, the legal concept of a single and continuous infringement in competition law presupposes the overall plan of the parties involved to distort competition through their actions.

70 Applying the legal concept of a single and continuous infringement developed in competition law to the penalising of multiple infringements of the FWBG does not appear to be consistent with the system:

71 In view of the fact that the UTP Directive and therefore the FWBG are primarily aimed at compensating for differences in bargaining power between buyers and suppliers in the agricultural and food supply chain and the focus is on relative bargaining power (recital 14 of the UTP Directive), it is clear that in the case of multiple infringements of the prohibition on unfair trading practices, the classification of those acts as a single and continuous infringement fails due to the lack of an overall plan to distort competition in the sense of a broad strategy of obstruction. The individual supply relationship and the relative bargaining power imbalance within that relationship is always the key issue under the FWBG.

72 Austrian legal scholars also deny that there is a basis for the application of the legal concept of a single and continuous infringement developed in competition law in connection with unfair trading practices (Seper in Egger/Harsdorf-Borsch, Kartellrecht § 6 FWBG, paragraph 6).

73 This means that the question of how multiple infringements of the prohibitions laid down in the UTP Directive are to be prosecuted must be resolved in accordance with Austrian (administrative) criminal law.

74 As will be shown below, it is unclear to the present Chamber whether the approach according to Austrian legal doctrine is in line with the criteria set out in the UTP Directive.

Principle of absorption versus principle of cumulation

75 The question of how to deal with a case where a person commits several infringements is governed in Austrian criminal law by Paragraph 28 of the StGB and in Austrian administrative criminal law by Paragraph 22 of the VStG.

76 Paragraph 28(1) of the StGB provides that the 'principle of absorption' is to apply in the case of similar penalties.

77 Paragraph 28(1) of the StGB reads: 'Where, through one act or several separate acts, a person has committed several criminal offences of the same or different nature and those offences are tried concurrently, a single custodial sentence or fine shall be imposed if the coinciding laws provide for only custodial sentences or only fines. That penalty shall be determined in accordance with the law that imposes the highest penalty. However, apart from cases of extraordinary mitigation of a sentence, no penalty lower than the highest of the minimum penalties provided for in the coinciding laws may be imposed.'

78 By contrast, in Paragraph 22(2) of the VStG, Austrian administrative criminal law provides that the 'principle of cumulation' is to apply as a basic rule when several punishable administrative offences coincide: 'If a person has committed several administrative offences through several separate acts or if an act is subject to several non-exclusive penalties, the penalties shall be imposed in parallel. The same applies if administrative offences coincide with other criminal offences to be punished by an administrative authority.'

79 The principle of cumulation applies to all cases of *Idealkonkurrenz* (multiple offences committed through one act) and of *Realkonkurrenz* (multiple offences committed through multiple acts). Thus, if the offender commits several separate offences by repeating the offence, a penalty must be imposed for each administrative offence, with the result that several penalties are imposed in parallel (Lewisch in Lewisch/Fister/Weilguni, VStG3, § 22, paragraph 9).

80 However, when cumulating penalties, the restrictions under EU law, in particular the principle of proportionality, must be taken into account (CJEU, C-64/18; CJEU, C-746/21 P).

81 The FWBG does not contain any provision as to which principle is to apply when imposing penalties in the event of concurrent infringements.

82 Based on the consideration that the application of the principle of cumulation does not require any further provision apart from the provision imposing the penalty as such, whereas the principle of absorption (the set-off principle) must entail provisions on set-off, it is safe to assume that in the event of multiple

infringements of the FWBG, the penalties (fines) are to be imposed in parallel in accordance with the principle of cumulation.

83 According to Austrian (administrative) criminal law doctrine, however, neither the principle of absorption nor the principle of cumulation would apply in the present case, since the conduct of which the applicant accuses the defendant would have to be assessed as a 'unity of action' (continuous offence).

Unity of action – several offences committed by means of a single act

84 Decision 13 Os 1/07g of the Supreme Court, sitting in extended composition to rule on a fundamental question of law, marked a paradigm shift from the legal concept of a continuous offence to that of unity of action.

85 That court gave the following reasons in 13 Os 1/07g:

'In so far as, in earlier case-law, the concept of a "continuous offence" (based on further requirements occasionally demanded but handled inconsistently) combined several acts that constitute the same offence (whether attempted or completed) and were committed with a "general intent" into a legal unity of action that had not been provided for by any law, with the consequence that only one single punishable offence would be established by each of the independent similar offences, the Supreme Court already abandoned that legal concept in substance by confirming its procedural divisibility in the landmark decision SSt 56/88 = EvBl 1986/123. […]. Recognising the continuation of an offence solely on the basis of unities of action is a deliberate rejection of an absolute approach to continuous offences in favour of an offence-specific approach. The difference between the legal concept of a continuous offence and unity of action is that the legal concept of a continuous offence is derived from the general part of substantive criminal law, whereas the legal concept of unity of action combines similar actions in accordance with individual elements of offences. The criteria for combination can therefore vary between offences without creating contradictions that affect the entire criminal law system. Following Jescheck/Weigend[5] (711 et seq.), there is unity of action in the case of mere commitment of the offence, that is to say the fulfilment of the minimum requirements of the offence provided for by law, in particular in the case of multi-act offences and continuous offences (unity of action in the narrower sense) and where it is only a question of the intensity of the uniform execution of the offence (SSt 56/88), namely in the event of a repeated commitment of the same offence in quick succession, accordingly, where there is only a quantitative increase (uniform wrongdoing) and uniform motivation (uniform guilt), even if highly personal legal interests of different persons have been infringed, as well as in the case of continuous commitment of the offence, that is to say, gradual steps towards a commitment of the full offence through several individual acts in the case of a uniform situation and the same motivation, for example when transitioning from attempt to completion or in the case of burglary in two stages (unity of action in the broader sense).'

86 Since then, unity of action in the broader sense has been the legal concept that is applied in settled case-law (RIS-Justiz RS0122006) provided that the following conditions are met:

– repeated commitment of the same offence, that is to say, that there is a quantitative increase (uniform wrongdoing),

– in quick succession,

– with uniform motivation (uniform guilt).

87 If those conditions are met, the legal concept of unity of action must also be applied if the legal interests of different persons have been infringed (Ratz in Höpfel/Ratz, Wiener Kommentar[2] StGB, Vorbemerkungen zu §§ 28-31, paragraph 89).

88 The combination of actions to form a unity of action means that the offence has been committed only once (RIS-Justiz RS0120233; RS0122006). That is because a unity of action constitutes one offence, both substantively and procedurally (11 Os 51/11a).

89 In administrative criminal law, the legal concept of a continuous offence continues to be applied in the case of intentional offences. The Verwaltungsgerichtshof (Supreme Administrative Court, Austria) defines the continuous offence as ‘a series of unlawful individual acts which, due to the similarity of the form of commission and the external circumstances within a recognisable temporal connection’, linked by a ‘preconceived single decision’ (‘general intent’), ‘come together to form a unit’, subject to the proviso that the single decision must be directed towards the successive achievement of a roughly defined overall objective. Most recently, the Supreme Administrative Court has described the single decision as a ‘motive for committing repeated, similar offences’ (Lewisch in Lewisch/Fister/Weilguni, VStG[3], § 22, paragraph 20). The function of the continuous offence is to combine the repeated occurrence of the offence (‘continuous offences’) into a single ‘continuous offence’. If a continuous offence exists, it therefore constitutes a single offence in legal terms for which a single penalty must be imposed; there is no room for cumulation of penalties for the individual acts committed as part of the continuous offence (ibid, paragraph 24).

Conclusion

90 For the situations at issue, that means that the allegations made by the applicant against the defendant of having infringed Paragraph 5c(1) of the FWBG, read in conjunction with point 4 of Annex I thereto, by sending 16 emails including pro-forma invoices to 16 different suppliers with the abovementioned content, which were sent at the same time, would have to be classified as a single offence according to Austrian criminal law doctrine.

91 The applicant's allegation concerns the repeated similar commitment of the same offence, namely that set out in Paragraph 5c(1) of the FWBG, read in conjunction with point 4 of Annex I thereto, (uniform wrongdoing) closely related in terms of time, even simultaneously, with uniform motivation in the sense of a general intent to implement the transformation process under the same external circumstances, namely, in particular, the implementation of the advice provided by a commissioned management consultant (uniform guilt). Thus, the acts must be combined as a unity of action in accordance with established national case-law (RIS-Justiz RS0122006), which means that the multiple infringements of the FWBG alleged by the applicant against the defendant must be classified as a single infringement of the FWBG.

92 This means that – if the applicant's accusation proves to be correct after evidence has been taken – only one fine with a maximum penalty of EUR 500 000 would have to be imposed for only one single offence, even if 16 supply relationships were affected.

93 However, in the opinion of the present Chamber, that result is at variance with the objective pursued in the UTP Directive of compensating for existing imbalances in terms of bargaining power between buyers and suppliers in the agricultural and food supply chain, since such compensating can only ever be achieved by reference to the individual supply relationship. The fact that the individual supply relationship and the relative difference in bargaining power in that relationship are always the key issue for the purposes of the UTP Directive also follows from Article 1 of the UTP Directive, which establishes an annual turnover ratio between supplier and buyer and assumes that the buyer's bargaining position is at risk if that annual turnover ratio applies (see also recital 7 of the UTP Directive). That objective suggests that each infringement of the FWBG should be analysed separately for the buyer and the supplier with regard to their annual turnover figures. That way, the individual supplier relationship is prioritised.

94 By combining the infringements of the FWBG committed by a buyer against a number of suppliers as a unity of action, the relative bargaining power, and the frequently ensuing inequality that was the reason for adopting the UTP Directive, is no longer the focus of the assessment. Classifying the conduct of a buyer in relation to a number of suppliers as a unity of action that fulfils the constituent elements of an offence also means that the requirement of effectiveness, proportionality and deterrence of the fine is not satisfied and thus the effectiveness of the UTP Directive may suffer. By contrast, in the referring court's view, the cumulative imposition of fines according to the number of supply relationships affected by the infringement or infringements would effectively take account of relative bargaining power.

95 Since such cumulation of fines is not permitted under national criminal law doctrine and thus under Austrian law, the CJEU is called upon to interpret the UTP Directive and the conformity of Austrian law with that directive in accordance with the questions referred for a preliminary ruling.

Summary of the reasoning in the request for a preliminary ruling

Question 1:

96 According to Austrian criminal law doctrine, the conduct of which the applicant accuses the defendant, namely of sending several requests for payment (pro-forma invoices) unrelated to the sale of agricultural and food products to 16 suppliers at the same time, with the same motive (implementation of the transformation process) and in the same factual situation, would have to be classified as a unity of action in the sense of a single infringement of Paragraph 5c(1) of the FWBG, read in conjunction with point 4 of Annex 1 thereto.

97 It appears questionable whether the classification of the conduct of which the applicant accuses the defendant as a unity of action resulting in the imposition of a (single) fine would achieve, in an equivalent and effective way, the objective defined in the UTP Directive of compensating for existing imbalances in terms of bargaining power between buyers and suppliers in the agricultural and food supply chain. Question 1 and its sub-questions 1(a) and 1(b) are intended to clarify whether the classification as a single offence to be made according to national legal doctrine is consistent with the UTP Directive.

Question 2:

98 In the absence of a provision in the FWBG for the imposition of penalties in the event of several offences being committed concurrently, a fine would have to be imposed cumulatively for each offence in the event that the applicant's allegation of multiple infringements of Paragraph 5c(1) of the FWBG, read in conjunction with point 4 of Annex I thereto, must be classified as several offences and not as a single offence. Whether the application of the principle of cumulation in the present case is in conformity with the UTP Directive is the subject of the second question referred.

99 If the conduct of which the applicant accuses the defendant vis-à-vis 16 suppliers, which is classified under Austrian legal doctrine as constituting a unity of action that fulfils the constituent elements of an offence, is found to be contrary to the UTP Directive and the first question referred is therefore answered in the affirmative, the referring court's decision requires clarification as to whether the application of the principle of cumulation, that is to say the imposition of several fines in parallel under Paragraph 6(2) of the FWBG, is in conformity with the UTP Directive.