

CPI EU News Presents:

Simultaneous Application of EU and National Competition Law by the Same Competition Authority: No *Ne Bis In Idem*

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April 2019

Two Simultaneous Fines for the Same Competition Law Infringement

Powszechny Zakład Ubezpieczeń na Życie (“PZU”) is a large Polish insurance company, which had abused its dominant position on the Polish market for employees’ life insurance. The Polish Competition Authority (Urzędu Ochrony Konkurencji i Konsumentów or “UOKiK”) found that PZU’s behavior fell within the scope of Polish competition law. As PZU’s behavior closed off the Polish market for foreign insurance providers,² the UOKiK was also obliged to apply Article 102 TFEU.³ Concluding that there was an infringement of both provisions, the UOKiK decided to impose two fines: one of €4,033,000 for the infringement of Article 102 and one of €11,697,000 for the infringement of a similar provision under Polish competition law.⁴

In subsequent review procedures against the UOKiK’s Decision going up all the way to the Polish Supreme Court, PZU raised the question as to whether the imposition of two fines for essentially the same behavior was compatible with the principle of *ne bis in idem* in Article 50 of the Charter of Fundamental Rights of the European Union (hereafter: “the Charter”). Per that provision, “no one shall be liable to be tried or punished again in criminal proceedings for an offense for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.” According to PZU, this provision would imply that one offender can only be convicted for the same facts once. The European Court of Human Rights’ case law, which sets in principle the minimum standard of protection to be adhered to by the EU would confirm that interpretation.⁵ By imposing two fines on PZU for essentially the same infringement of competition laws, the latter maintained that the UOKiK had violated the Charter.

In the case at hand, the Polish Supreme Court referred two particular questions to the Court of Justice in order to be able to rule on the matter. On the one hand, the Polish Court asked whether *ne bis in idem* under EU law requires that the two different legal provisions on the basis of which an offender is prosecuted need to protect the same legal interests. In its earlier case law, the Court had held this condition of protecting the same legal interests needed to be fulfilled in order for a situation to be considered as *ne bis in idem* in competition law cases. The Polish Court thus wanted to know whether that case law was still good law. On the other hand, the Polish judges also wanted to know to what extent EU and national competition laws protect the same legal interests. To the extent that this would be the case, the enforcement of the same behavior on both EU and national competition law grounds would be problematic from the point of view of *ne bis in idem*. In the opposite case, both provisions could be applied concurrently or simultaneously if the Court’s previous *ne bis in idem* case law remained good law. The questions thus raised would enable the Court to delve into two of the most controversial issues that have surrounded *ne bis in idem* debates in this field of law.⁶

The Court’s Approach: No *Ne Bis In Idem* in the Case at Hand

In its answer, the Court held that both questions asked by the Polish Court essentially, and above all, amounted to asking whether the simultaneous imposition of fines on the basis of both EU and national competition laws by one and the same national competition authority would indeed violate the *ne bis in idem* principle recognized by EU law.⁷ To the extent that the situation would not be covered by *ne bis in idem*, there would be no need to answer the

more specific questions raised by the Supreme Court. Contrary to what the Polish Court asked, the Court of Justice thus first analyzed whether this situation would indeed fall within the ambit of the EU's *ne bis in idem* principle.

In its judgment, the Court of Justice confirmed that, under Council Regulation 1/2003, Member States' competition authorities are obliged to apply EU competition law whenever (1) they are applying their national competition law provisions to the behavior at stake; and (2) an effect on trade is present and no procedures have been opened by the European Commission.⁸ As those two conditions were fulfilled in the case at hand, the UOKiK was under an obligation to apply Article 102 TFEU next to its Polish equivalent.

This concurrent application of EU and national law may raise potential *ne bis in idem* problems if two fines are imposed for the same facts. According to the Court, however, *ne bis in idem* only targets the repetition of proceedings concerning the same material act which has been concluded by a final decision. In a situation where a national competition authority applies national competition law and Article 102 TFEU in parallel, there is in fact no such repetition.⁹

As a result, *ne bis in idem* and Article 50 of the Charter do not come into play in this context. It follows that EU law does not preclude a national competition authority from fining an undertaking in a single decision for an infringement of national competition law and for an infringement of Article [102 TFEU].¹⁰ In addition, the Court noted that, when imposing two fines by way of the same decision, the national authorities and courts have to ensure that both fines are proportionate to the nature of the infringement proven. It falls upon the national judge to assess the proportionality of those fines.¹¹

***Ne Bis In Idem* in EU Competition Law: Dodging yet Another Bullet?**

Apart from not answering at all the questions raised by the Polish Supreme Court, the *Powszechny* judgment confirms that the parallel or concurrent application of EU and national competition laws can be shielded from *ne bis in idem* when both provisions are applied in one and the same decision. In doing so, it clarifies an important issue that was not addressed so far in the case law on *ne bis in idem*. At the same time, however, fundamental questions regarding the scope and interpretation of *ne bis in idem* in the field of competition law remain to be settled...

The Court's approach: concurrent application of EU and national competition laws falls outside "ne bis in idem"

The Court's judgment offers a welcome precision to its previous case law by holding that the concurrent application of EU and national competition laws does not violate Article 50 of the Charter. It is well-known that Regulation 1/2003 enshrined the principle of concurrent application of EU and national laws targeting collusive behavior and abuses of dominant economic positions. As Article 3 of that Regulation confirms, when a national competition authority applies its national provisions to certain types of market behavior, it also and concurrently has to apply Articles 101 and/or 102 TFEU when the behavior affects trade between Member States. The national competition authority is obliged to continue applying EU competition law provisions unless and until the Commission decides to take over the case

from it.¹² If the Commission does not do so, the national authority can impose fines for the violation of EU competition law provisions. This is exactly what happened in this case.

Those concurrent application procedures are a consequence of the particular enforcement regime set up by Regulation 1/2003. As the Court implicitly stated in this judgment, the fact that EU law demands the application of both EU and national law in one and the same procedure inevitably results in two fines potentially being imposed. As the procedure flows directly from EU law, there is no such thing as a repetition of a procedure based on the same facts. *Ne bis in idem* only targets such repetition, requiring at least two procedures. Here, only one procedure took place, resulting in this type of action being excluded from the scope of Article 50 of the Charter. As a result, the concurrent EU-national law application within one and the same decision adopted by a national competition authority does not fall within the scope of the *ne bis in idem* principle protected by the Charter.

The Court basically applied the reasoning from its *Toshiba* judgment, where it also stated that no repeated proceedings had taken place. In that case, the national authority imposed a fine for violation of national competition law for a different time period than did the European Commission, resulting again in no repetition of procedures.¹³ On the basis of the same reasoning, subsequent impositions of fines by the Commission and third-country authorities also fall outside the scope of *ne bis in idem*.¹⁴ In all those circumstances, undertakings could not invoke *ne bis in idem* when being fined multiple times for the same kind of behavior.

What the Court did not say, however, is that the parallel application of EU and national competition laws will never give rise to *ne bis in idem* concerns. It only confirmed that the simultaneous concurrent application of EU and national law in one and the same decision did not give rise to those concerns. It did not address whether that would also be the case when a competition authority decides to adopt a decision on the basis of EU competition law first and later also decides to apply national competition law, adopting a second decision regarding the same facts during the same time period. Would such situation, tolerated by Regulation 1/2003, also be excluded from *ne bis in idem*? This question so far remains unanswered as for now...

Open question I: Do EU and national competition laws still protect different interests?

What the Court also refrained from doing in this judgment, despite being asked so explicitly in its second question by the Polish Supreme Court, was address the question whether EU and national competition laws essentially protect the same interests. That question has been puzzling EU lawyers for decades and is likely to remain more puzzling than ever in the wake of this judgment.

In its *Aalborg Portland* judgment, the Court of Justice maintained that the *ne bis in idem* principle in competition law proceedings would only be violated if the two legal provisions under which the same offender and behavior are prosecuted, protect the same legal interests.¹⁵ In the case where those rules protect different legal interests, there would be no *ne bis in idem* concerns. The Court reiterated this point in *Toshiba*.¹⁶ In its 1969 *Walt Wilhelm* judgment, the Court had already confirmed that EU and national competition laws do not protect the same legal interests, as they approach anticompetitive behavior from different points of view.¹⁷ Tying those cases together, the application of EU and national competition laws would never give rise to *ne bis in idem* situations, as the legal interests

protected by both sets of rules differ. To the extent that national and EU competition laws protect different interests, neither their concurrent nor their subsequent application to the same set of facts would not amount to a violation of *ne bis in idem*.

Legitimate questions can be - and have been¹⁸ - raised regarding the relevance of that case law. As EU and national competition laws have grown closer to such an extent that national provisions are essentially carbon copies of the EU provisions, one can wonder whether the interests protected by both provisions are still as different as they were in 1969 when *Walt Wilhelm* was rendered.

It therefore remains unclear how the Court would interpret a situation in which a national competition authority first adopts a decision on the basis of EU law and subsequently also decides to consider and sanction the same behavior during the same time frame from a national competition law point of view. The Advocate General in that regard suggested that *Walt Wilhelm* may no longer be up to date.¹⁹ Although this case would have been a good opportunity to bring some more legal certainty on this matter, the Court remained completely silent on this issue.

Open question II: Is the Court's "ne bis in idem" interpretation in competition law compatible with Article 50 of the Charter?

More generally, the Court did not touch at all upon the first preliminary question whether *ne bis in idem* presupposes not only that the offender and the facts are the same but also that the legal interest protected is the same, as the *Aalborg Portland* judgment had held.²⁰ In a consistent line of cases regarding police and judicial cooperation, the Court of Justice has interpreted the *ne bis in idem* principle as prohibiting the same offender being prosecuted twice for the same material facts committed without making reference to the criterion that the legal interests protected need to be the same.²¹ In order for an offender successfully to invoke *ne bis in idem*, he/she has to assert that there has already been a final conviction resulting directly from a specific type of behavior.

In that analysis, the sameness of the legal interests protected by the different sets of rules no longer forms part of the *ne bis in idem* assessment. A rigorous application of that modern *ne bis in idem* case law to competition law enforcement would imply that the facts giving rise to the same offense (the abusive behavior in the life insurance market) could only be punished once by reference to one set of rules. Applying two sets of legal provisions - EU and national competition laws - targeting essentially the same behavior would violate this fundamental principle of the EU legal order, as the Advocate General also seemed to argue.²²

Again, however, the Court offered no clue to answer this question. Instead, it rather chose to emphasize that two sanctions are possible, yet also need to be proportionate. In not responding to this question despite being asked so explicitly, the judgment, in my opinion, is a truly missed opportunity to further the conditions under which *ne bis in idem* can be invoked in competition law cases. It can only be hoped that the Court would be willing to take on those questions more explicitly in the years to come.

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- ² Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie*, EU:C:2019:283, April 3, 2019, para 10-11.
- ³ Per Article 3(1) of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] O.J. L 1/1
- ⁴ Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie*, *supra*, para 12.
- ⁵ *Ibid.* para 16.
- ⁶ W. Devroe, “How General Should General Principles Be? *Ne Bis in Idem* in EU Competition Law,” U. Bernitz, X. Groussot & F. Schulyok (éd.), *General principles of EU law and European Private Law*, La Haye, Kluwer, 2013, 401-442.
- ⁷ Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie*, *supra*, para 21.
- ⁸ *Ibid.* para 26.
- ⁹ *Ibid.* para 32.
- ¹⁰ *Ibid.* para 34.
- ¹¹ *Ibid.* para 38.
- ¹² See Article 11(6) of Regulation 1/2003, *supra*.
- ¹³ Case C-17/10, *Toshiba Corporation*, EU:C:2012:72, February 14, 2012, para 103.
- ¹⁴ Case C-289/04 P, *Showa Denko v. Commission*, EU:C:2006:431, June 29, 2006, para 52-56; see also the Opinion of Advocate General Wahl to Case C-617/17, EU:C:2018:976, September 28, 2018, para 35.
- ¹⁵ Case 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, *Aalborg Portland et al. v. Commission*, EU:C:2004:6, January 7, 2004, para 338-340.
- ¹⁶ Case C-17/10, *Toshiba Corporation*, *supra*, para 97.
- ¹⁷ Case 14/68, *Walt Wilhelm et al. v. Bundeskartellamt*, EU:C:1969:4, February 13, 1969, para 9.
- ¹⁸ See for an overview, P. Van Cleynenbreugel, “Le *non bis in idem* en droit de la concurrence: un monde de différence avec le pénal?” in D. Brach-Thiel, *Existe-il encore un seul non bis in idem aujourd’hui ?*, Paris, L’Harmattan, 2017, 171-207.
- ¹⁹ Opinion of Advocate General Wahl in Case C-617/17, *supra*, para 49.
- ²⁰ Case 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, *Aalborg Portland et al. v. Commission*, *supra*, para 340.
- ²¹ See for instance Case C-436/04, *van Esbroeck*, EU:C:2006:165, March 9, 2006, para 32; Case C-467/04, *Gasparini and Others*, EU:C:2006:610, 28 September 2006, para 54; Case C-150/05, *van Straaten*, EU:C:2006:614, September 28, 2006, para 48; Case C-367/05, *Kraaijenbrink*, EU:C:2007:444, July 18, 2007, para 28; Case C-261/09, *Mantello*, EU:C:2010:683, November 16, 2010, para 39.
- ²² Opinion of Advocate General Wahl in Case C-617/17, *supra*, para 40.