



Double sanctions imposed by NCAs on the basis of national law and EU law do not breach the *ne bis in idem* principle

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On 3 April 2019, the Court of Justice of the European Union published its judgment in Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A. v. Prezes Urzędu Ochrony Konkurencji i Konsumentów*, regarding the interpretation of the *ne bis in idem*

principle enshrined in Article 50 of the Charter of Fundamental Rights of the European Union (the “Charter”)¹, and of Article 3(1) of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)².

¹ OJ C 326, 26.10.2012. Article 50 of the Charter, entitled “Right not to be tried or punished twice in criminal proceedings for the same criminal offence”, reads: “... 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...”.

² 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, OJ L 1, 04.01.2003. Article 3 of Regulation No 1/2003, entitled “Relationship between Articles 81 and 82 of the Treaty and national competition laws”, at paragraph 1 reads: “... Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or

The request for a preliminary ruling was presented by the Polish Supreme Court (*Sąd Najwyższy*; “referring Court”) in proceedings between *Powszechny Zakład Ubezpieczeń na Życie S.A.* (“PZU Życie”) and the Head of the Polish Office of Competition and Consumer Protection (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*; “Head of the UOKiK”) concerning a decision of the latter to fine the former for an abuse of dominant position on the basis of infringements of both national and EU competition law.

On 25 October 2007, the Head of the UOKiK fined PZU Życie considering that, from 1 April 2001 until the date on which that decision was adopted, the company had abused its dominant position in the market for group life insurance for employees in Poland, infringing both Article 102 TFEU and Article 8 of the UoOKiK³. According to the Head of the UOKiK, the behaviour of PZU Życie produced exclusionary effects on foreign insurers wishing to enter the Polish market and affected trade between the Member States.

The PZU Życie challenged the decision of the Head of the UOKiK before the Regional Court of Warsaw — Court for the Protection of Competition and Consumers (*Sąd Okręgowy w*

Warszawie — Sąd Ochrony Konkurencji i Konsumentów) and thereafter the Court of Appeal of Warsaw (*Sąd Apelacyjny w Warszawie*). Both Courts dismissed the action. PZU Życie then brought an appeal of law before the referring Court, claiming that it had been fined twice for an infringement of EU law, first on the basis of Article 102 TFEU, read in conjunction with Article 5 of Regulation No 1/2003⁴, and, second, on the basis of national competition law. According to the appellant, this constituted an infringement of the principle of *ne bis in idem* enshrined in Article 50 of the Charter and Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (“the ECHR”).

The referring Court noted that the Court of Justice of the European Union had adopted different approaches in cases concerning issues of competition law and in cases related to other fields of EU law. In competition cases, the Court of Justice required, in addition to the same facts and same offender, that the protected legal interest be the same. Such additional condition would limit the scope of the principle of *ne bis in idem*, leading, in that case, to a finding that the principle had not been infringed⁵. Therefore, the referring Court decided to stay the

concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty...

³ Law of 15 December 2000 on the safeguarding of competition and consumers, Dz. U. 2000, No 122, item 1319. Article 8, at paragraph one, reads: “... *The abuse of a dominant position in the relevant market by one or more undertakings shall be prohibited...*”.

⁴ Article 5 of Regulation No 1/2003, entitled “Powers of the competition authorities of the Member States”, reads: “... *The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:*

- *requiring that an infringement be brought to an end,*
- *ordering interim measures,*
- *accepting commitments,*

- *imposing fines, periodic penalty payments or any other penalty provided for in their national law.*

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part...”.

⁵ See paragraphs 15-17 of the judgment: “... *The referring court notes that the principle of ne bis in idem is of major significance in a democratic State governed by the rule of law and prohibits the renewed prosecution and punishment of the same person for the same offence. The referring court states that the case in the main proceedings essentially turns on the circumstances in which, in the*

proceedings and ask the Court of Justice whether the *ne bis in idem* principle should be interpreted as precluding a National Competition Authority (“NCA”) from fining an undertaking in a single decision for an infringement of national competition law and an infringement of Article 102 TFEU.

In answering the question, the Court firstly recalled that EU law and national law on competition apply in parallel, since competition rules at European and at national level view restrictions on competition from different angles⁶. Therefore, where the Commission has not opened proceedings under Chapter III of Regulation No 1/2003, NCA applying national law prohibiting the unilateral conduct of undertakings on the basis of Article 102 TFEU, under the second sentence of Article 3(1) of that Regulation, are required to also apply Article 102 TFEU in parallel⁷.

The Court, though, confirmed that the *ne bis in idem* principle must be observed in proceedings for the imposition of fines under competition law, in the sense of precluding an undertaking from being found liable or proceedings being brought against it afresh on the grounds of anti-competitive conduct for which it was already sanctioned or declared not liable by an earlier decision that can no longer be challenged⁸. This interpretation of the *ne bis in idem* principle is supported by the wording of and rationale behind Article 50 of the Charter. According to the Court, however, the protection afforded by that principle aims at preventing the repetition of prosecution leading to a criminal sentence, and bears no relation to a situation where national and EU competition law are applied in parallel in a single decision⁹.

same case, an infringement of competition law may be the subject of a second judgment or fine for the purposes of applying the principle of ne bis in idem.

In the first place, it notes that, in the judgment of 10 February 2009, Sergey Zolotukhin v Russia (EC:ECHR:2009:0210JUD001493903, paragraphs 78 to 82), the European Court of Human Rights held that that principle applies in regard to the same facts and not in regard to the same offence. According to that court, it follows from the rule in that case that the twofold punishment or prosecution of the same person for the same anticompetitive conduct, as in the present case, amounts to a breach of that principle. The referring court considers that the Court of Justice followed the same approach in areas other than competition law, in particular in the judgments of 5 May 1966, Gutmann v Commission (18/65 and 35/65, EU:C:1966:24), and of 9 March 2006, Van Esbroeck (C-436/04, EU:C:2006:165).

In the second place, the referring court notes that, in its competition law case-law, the Court of Justice has, by contrast, held that the principle of ne bis in idem is subject to the threefold condition of the same facts, offender and protected legal interest. More particularly, in ascertaining when the facts are the same, the Court is to have specified, in the judgment of 14 February 2012, Toshiba Corporation and Others (C-17/10, EU:C:2012:72, paragraph 99), that not only the conduct of the undertaking but also the period during which and territory in which the conduct produced its effects must be taken into account...”

⁶ CJEU 14.02.2012, Case C-17/10, Toshiba Corporation and Others, paragraph 81.

⁷ *Ibidem*, paragraphs 77 and 78.

⁸ *Ibidem*, paragraph 94 and the case-law cited.

⁹ Paragraphs 31-34 of the decision: “... In the first place, as regards the wording of Article 50 of the Charter, it is provided 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’.

As the Advocate General stated in point 21 of his Opinion, that article thus specifically targets the repetition of proceedings concerning the same material act which have been concluded by a final decision. In a situation where, in accordance with the second sentence of Article 3(1) of Regulation No 1/2003, a national competition authority applies national competition law and Article 82 EC in parallel, there is in fact no such repetition.

In the second place, as regards the rationale behind the principle of *ne bis in idem*, it must be borne in mind, as stated, in essence, by the Advocate General in point 18 of his Opinion, that, as a corollary to the principle of *res judicata*, that principle aims to ensure legal certainty and fairness; in ensuring

As a result, the *ne bis in idem* principle should not apply to a situation, such as that at issue in the main proceedings, in which the NCA applies, in accordance with Article 3(1) of Regulation No 1/2003, national and EU competition law in parallel and, under Article 5 of that Regulation, fines an undertaking in a single decision for an infringement of the former and for disregarding the latter. However, where the NCA imposes two fines by a single decision in respect of an infringement of national competition law and of Article 102 TFEU, that authority must ensure that, taken together, the fines are proportionate to the nature of the infringement.

“The principle of ne bis in idem enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000, must be interpreted as not precluding 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 82 EC. In such a situation, the national competition authority must nevertheless ensure that the fines are proportionate to the nature of the infringement”.

In light of the above, the Court held that:

*that once the person concerned has been tried and, as the case may be, punished, that person has the certainty that he will not be tried again for the same offence.
Thus, the protection which the principle of ne bis in idem aims to afford against the repetition of prosecution leading to a criminal sentence bears no relation to the situation in which national and EU competition law are applied in parallel in a single decision...”.*






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