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AG Kokott's Opinion in Toshiba: framing the application of the ne bis in idem principle in EU competition law enforcement

Damien Gerard (College of Europe, Belgium) · Tuesday, September 20th, 2011

One of the main concerns raised by the decentralization of EU competition law enforcement related to the risk of different competition authorities prosecuting and sanctioning the same cross-border anticompetitive practice, in breach of the *ne bis in idem* principle (protection against double jeopardy, as provided for by Art. 50 of the EU Charter of Fundamental Rights and Art. 4 of Protocol 7 to the ECHR). This is notably because Regulation 1/2003 does not contain clear rules allocating jurisdiction/competence horizontally among the various national competition authorities ("NCAs"). In contrast, the vertical allocation of jurisdiction between NCAs, on the one hand, and the European Commission ("Commission"), on the other hand, is relatively well settled.

The interest of the *Toshiba* case lies in the fact that it displays both vertical and horizontal features as it relates to the relationship between one NCA and the Commission but for a period preceding the accession of the relevant country, i.e., the Czech Republic, to the EU. Concretely, the Czech competition authority ("CCA") adopted a decision in 2007 imposing fines on various companies to sanction their participation in a collusive scheme that was previously prosecuted by the Commission in what is known as the "gas insulated switchgear" case. In its decision, the Commission found that the cartel operated between 1988 and 2004. The CCA expressly limited its decision to the effects of the cartel on the territory of the Czech Republic prior to May 1, 2004, date of the latter's accession to the EU.

"*How many competition authorities in Europe may deal with one and the same cartel and impose penalties on the participating undertakings? That, in essence, is the question which the Court has been asked to answer in this reference for a preliminary ruling*", Advocate General ("AG") Kokott noted in the introductory paragraph of her Opinion in Case C-17/10. How did she address that question? First, AG Kokott confirmed that, in her view, "[H]*owever desirable a uniform and efficient interpretation and application of competition law within the European Union may be*", EU law and therefore Regulation 1/2003 was not applicable in the Czech Republic prior to May 1, 2004: it is a question of compliance with "*the rule of law*" (para. 54). Since the CCA limited its decision to anticompetitive effects pre-dating May 1, 2004, there was "*no risk of any conflict of competence between the Commission and the* [CCA] *and no need to avoid a conflict of findings as between Article* [101 TFUE] *and national competition law*" in this case (para. 94).

Still, the AG addressed the vertical issues raised by the referring judge in his request for preliminary ruling, which are generally informative on the interpretation of a number of provisions of Regulation 1/2003. She interpreted Art. 11(6) of Regulation 1/2003, in combination with Art.

3(1), as relieving NCAs "automatically" of their competence to apply both EU but also their domestic competition law once the Commission initiates proceedings (paras 74-77 and 80). However, NCAs are only relieved of their competence for the duration of the proceedings initiated by the Commission; conversely, they are not deprived permanently and definitively of their competence to apply their domestic competition law (para. 90-91). Should they wish to adopt their own decision once the Commission has concluded its proceedings, they are nevertheless prohibited pursuant to Art. 16(2) of Regulation 1/2003 from contradicting the Commission's decision and must act in compliance with the *ne bis in idem* principle (see below). Likewise, AG Kokott confirmed that Art. 13 of Regulation 1/2003 makes it "possible" for competition authorities within the European Competition Network (ECN) to suspend proceedings or reject a complaint where another authority is dealing with the same case, but that the relevant authority is "*by no means obliged to proceed in this way*" (para. 89).

Generally, AG Kokott opposed the need for exclusive jurisdiction/competence rules in order to ensure the uniform and effective enforcement of competition law within the EU. Rather, that objective is ensured "*by having the European Commission and the national competition authorities cooperate and coordinate their activities within a network (ECN)*" (para. 83). Taking her reasoning further, she claimed that "[E]*ven after the entry into force of Regulation 1/2003, the fact that a case is dealt with and investigated from different points of view by a number of competition authorities is compatible with the aims and scheme of European antitrust law*" (para. 82). That compatibility, however, is subject to an important caveat, namely "*the prohibition against prosecution and punishment for the same cause of action*", i.e., compliance with the *ne bis in idem* principle (para. 91).

On the interpretation of the *ne bis in idem* principle in the EU competition law enforcement context, precisely, AG Kokott formulates a number of interesting propositions. First, she confirms that the principle "*extends beyond purely national cases and includes cross-border situation*" (para. 100) and that it "*affects not only matters of substance but also matters of procedure*" (para. 106). Second, she acknowledges that, in competition matters, the decisive element in the application of the *ne bis in idem* principle is "*the meaning of idem*" (para. 113). In that respect, she suggests to depart from the threefold condition of identity of facts, unity of offender and unity of the legal interest protected. Indeed, she notes that the third (key) condition is not relied upon when controlling compliance with the *ne bis in idem* principle in areas such as freedom, security and justice or civil service law. Thus, in the name of "*the unity of the EU legal order*" (para. 117), she suggests to merge the condition of the unity of legal interest protected (and that of unity of offender) with the one of identity of facts. As such, that suggestion is unlikely to have any significant consequences, however. For the AG, indeed, competition law infringements such as cartels "*must always be examined with reference to a specific period of time and a specific territory*" (para. 129). When examining whether two cases brought by two different competition authorities "*concern identical facts or facts which are substantially the same*" (or "*concrete circumstances which are inextricably linked together*"), account must therefore be given to the spatial and temporal scope of the parallel cases, and not to the legal qualification of the infringement. Thus, "[T]*he mere fact that* [concurrent] *decisions concern*[…] *a single international cartel which was continuously active for an extended period is not sufficient to support the assumption of the existence of an idem*" (para. 134): "*the ne bis in idem principle does not in any way prohibit more than one competition authority or court from penalising restrictions of competition – by object or by effect – resulting from one and the same cartel in different territories or during different periods of time within the European Economic Area*" (para. 131). That proposition does not solve all relevant interpretative issues, though, and reveals in fact a tension

between the territorial scope of the infringement and that the fine imposed by the relevant authority, as apparent from the remainder of AG Kokott's Opinion.

In the case at hand, the AG concludes that the decisions of the Commission and the CCA, respectively, are based on different facts and "*do not relate to the same material acts*" (paras 145-146) so that the CCA "*did not infringe the prohibition against prosecution and punishment for the same cause of action*", i.e., the *ne bis in idem* principle (para. 146). To justify her conclusion, the AG relies heavily on the fact that the fine imposed by the Commission was based on the cartel members' turnover at EEA level in 2003, that is before the accession of the Czech Republic to the EU. She derives from that element that the fines imposed by the Commission did not aim to penalise an infringement of competition law on the territory of the Czech Republic. In other words, "*the Commission decision does not cover any anticompetitive consequences – by object or by effect – to which the cartel at issue gave rise in the territory of the Czech Republic in the period prior to 1 May 2004, whereas* […] *the decision of the* [CCA] *imposed fines only in relation to that territory and that period*" (para. 145). By assimilating the territorial and temporal scope of the infringement with the territorial and temporal scope of the fine imposed or, more precisely, with the territorial and temporal scope of the relevant turnover used as the basis for the calculation of the fine, AG Kokott raises a particularly sensitive point with potentially far-reaching consequences for horizontal antitrust enforcement and the relations within the ECN.

Indeed, various NCAs are empowered pursuant to their domestic competition rules to impose fines based on a turnover basis that exceeds sales made on their national territory. Does it mean that, in case such an NCA adopts a decision and imposes a fine based on, *e.g.*, the worldwide turnover of the relevant company/-nies, any other NCA would be precluded pursuant to ne bis in idem to prosecute and sanction the same company/-ies for the anticompetitive effects that arose on its own domestic territory? The AG Opinion reveals therefore a tension between the territorial scope of infringements and the scope of the fining powers of the respective NCAs, which are set forth under national law in accordance with the principle of procedural autonomy. In the interpretation of the AG, the *ne bis in idem* principle could therefore further constrain the procedural autonomy of Member States (after VEBIC, etc.) and force NCAs to limit the basis of their fines to the relevant sales/turnover affected by the infringement on their respective domestic territory and, potentially, cap their fines to a percentage of that "domestic turnover".

Moreover, the interpretation given to the *ne bis in idem* by AG Kokott could force the Commission to specify more precisely the territorial scope of its decisions and fines, instead of relying on broad formulations such as "EEA-wide" infringement or, conversely, deprive NCAs of the possibility to prosecute companies for the anticompetitive effects of any infringement previously sanctioned at EU level by a fine based on an EU or EEA-wide turnover. Such proposition echoes the AG's approach to the *ne bis in idem* principle as a rule "*to prevent conflicts of jurisdiction*" (para. 106). Likewise, it implies that NCAs would in effect be permanently and definitively barred from exercising their competence to apply their domestic competition law once the Commission has initiated proceedings and adopted a decision imposing such an EU or EEA-wide fine. Generally, the Opinion of AG Kokott adopts a territorial approach to EU antitrust enforcement, which credits the thesis according to which NCAs ought to remain national enforcers coordinating their respective policies and priorities within the ECN, and are not designed to evolve into decentralized "Commissions" with EU-wide sanctioning powers.

It remains to be seen whether and how the Court of Justice will reflect AG Kokott's Opinion in its judgment expected in a few months from now and in future cases raising similar questions.

Surprisingly, in view of the concerns expressed at the time of the entry into force of Regulation 1/2003, a “real” horizontal case of parallel enforcement and sanction has yet to reach Luxembourg. As a reminder, in the only such case referred to by the Commission in its 2009 Report on the Functioning of Regulation 1/2003, the Belgian NCA had justified the imposition of a fine to sanction the domestic anticompetitive effects of a EU-wide cartel after the German NCA had already done so based on the fact that “*the first fine had been imposed by the German authority in view of the effects in the German territory only*” (Staff Working Paper, para. 223). To be continued…

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