

The Ne Bis In Idem-Principle And Its Limited Scope In The Context Of National And EU Competition Proceedings - The Case Of Slovak Telekom (C-857/19)

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In its judgment of 25 February 2021 in the case of Slovak Telekom, the European Court of Justice (ECJ) reaffirmed its jurisprudence on the *ne bis in idem* rule and clarifies its relationship and functioning with art. 11 (6) of Regulation 1/2003.

Judging from the facts as they are presented in the ECJ's ruling, the legal assessment is rather obvious. In essence, there were two independent procedures, one by the Slovak competition authority and one by the European Commission against Slovak Telecoms. Whereas the national proceedings concerned alleged abuses of a dominant position on the markets for telephone services and low-speed internet access, the Commission procedure concerns the wholesale access to the unbundled local loop (cf. paras 35, 36). There is no apparent link between the two markets. The only coincidence that both alleged anti-competitive practices are infringements of art. 102 TFEU does not trigger art. 11 (6) regulation 1/2003. Obviously, it is not covered by art. 11 (6) that independent procedures concerning different infringements are brought in parallel even if those procedures concern the same undertaking (reiterated by the Court at para 32). As long as the facts of the two cases, being determined by inter alia the relevant product market, are not the same, there is no possible conflict of competences.

The whole purpose of art. 11 regulation 1/2003 is to preclude contradictory decisions and double jeopardy between national and EU competition authorities in the same case. Such a risk does, however, only exist if the cases were indeed identical. In contrast, art. 11 (6) does not apply as long as the procedures do not concern the same infringement by the same undertaking on the same product and geographical market in the same period (answer to the first question at para 38). In these cases, there is no risk of conflicting decisions.

That finding is closely intertwined with the application of the *ne bis in idem* principle to the case. Where the facts of two independent procedures are different, there is no '*idem*' (para 43). The ECJ's convincing standard of a twofold condition of *ne bis in idem* is mainly routed in the *Toshiba case* (para 97). In the present judgment, the ECJ simply applies that criteria. Obviously, after having found that the two procedures relate to different product markets under art. 11 (6) regulation 1/2003, the result cannot be any different for the application of *ne bis in idem*. The only possible finding was that the rule is not violated in the present case (para 44).

However, the ECJ leaves room for a final assessment of the facts before the national court to determine whether indeed, as presumed, the national procedure concerns another product market than the Commission's procedure. Obiter dictum, the Court already clarifies that in any event, the *ne bis in idem*-principle would not preclude the decision of the Slovak authority but art. 11 (6) regulation 1/2003 would apply primarily and the NCA would be relieved from their competence (para 47).

Having regard to the timeline of events, that raises the interesting question of whether it is the original decision or the amendment decision that is significant for the application of art. 11 (6). The national procedure was started in September 2005 and ended with a first decision in December 2007, amended again in April 2009. The Commission's proceedings were initiated one day before that amendment decision in April 2009 and ended with the decision of 15 October 2014 (cf. timeline of events in paras 7-15).

By no means can the Commission proceedings in 2009 affect the existing competence in 2007. In contrast, the amendment decision is rendered after the commencement of EU proceedings so that art. 11 (6) regulation 1/2003 should apply. On the other hand, it only amends an earlier decision for which national competence existed. One could thus argue either that the national procedure was already concluded when the Commission started its investigation and art. 11 (6) should not apply or that the amendment decision of 9 April 2009 rescinded the decision of 2007 and for the amending (new) content art. 11 (6) applied and hinders the NCA's competence. The ECJ does not clearly advise on the answer to that question which remains purely theoretical under the presumed facts. Only if the national court was to find differently that both procedures, the national and the European one, were based on the same facts, it will have to deal with the outlined difficulties.

More generally, the ruling underlines that the principle of *ne bis in idem* could by no means be applied to the present case by the referring Slovak court. That equally must be obvious from a closer look at the timeline of events. The '*bis*' condition could never be met in the first decision as there is no prior definitive decision. It however needed the ECJ to explain that simple consistency to the referring court.

The only possible target of the *ne bis in idem* principle in the present case could be the Commission decision of 2014 which - of course - was no matter of the referred questions. Following the Court's distinction between two separate product markets, there should equally be no issue of *ne bis in idem* in this regard.