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The DMA Proposal and the Court of Justice: All eyes on Luxembourg

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In my second post on matters related to the DMA Proposal (see for another post here), I would like to draw the readers' attention to the role of the Court of Justice. I am not going to touch upon potential challenges of the DMA or questions of judicial review of acts taken by the Commission in the context of the DMA enforcement. There will be time to analyse these questions in the future. Instead, my aim is to discuss a few cases that are currently pending before the EU Courts and which are bound to be of particular relevance to the DMA and may influence the legislative process for its adoption.

I am not going to discuss the pending appeals in *Google Shopping* and *Google Android*. These are certainly important cases for Article 102 TFEU and they seem to have inspired Articles 6(1)(d) and 5(f) / 6(1)(b) of the DMA Proposal, respectively. But I am not sure how relevant they will be for the DMA since the *per se* rules of the prohibition contained therein will apply once included in the final text of the Regulation, irrespective of what the General Court decides on the application of Article 102 TFEU to the *Google* cases.

The cases I have in mind are more procedural in nature and are all preliminary references pending before the Court of Justice. They relate to two questions that will be of critical importance to the DMA and its relationship with competition law (whether national or EU): the **first question** is the possible application of the **principle of *non bis in idem*** between the legal orders of regulation and competition and the **second question** is whether there should be a rule of **precedence** between the two enforcement systems.

Let us start with the **first question**. On 22 March 2021, the Grand Chamber of the Court of Justice heard together two cases that relate to the principle of *non bis in idem* and competition proceedings. That principle precludes an undertaking from being found liable or proceedings from being brought against it afresh on competition law grounds, for conduct for which it has been penalised or declared not liable by an earlier decision.

The first of these two cases is of particular relevance to the future enforcement of the DMA: Case C-117/20 – *bpost* is about whether the principle of *non bis in idem* applies between regulatory and competition proceedings, where the same facts may be examined under two different legal regimes. In that case, the Belgian Competition Authority (BCA) imposed a fine on bpost, the historical postal service provider in Belgium, for abuse of dominance. According to the BCA, the abuse related to quantity discounts offered by bpost that encouraged major clients to contract

directly with it, thus placing at a competitive disadvantage consolidators (who supply senders with routing services upstream of the postal distribution service). The complication here was that a year earlier the Belgian regulatory authority for postal services (IBPT) had also found an infringement of the regulatory regime based on the same or similar facts and had imposed a fine. In the end, that finding was annulled on appeal, but the fact remained that there have been two consecutive proceedings leading to fines (under regulation and competition law) for the same facts.

After a long process of appeals and remands, the finding of the competition infringement came back to the Brussels Court of Appeal, which referred the *non bis in idem* question to the Court of Justice. The Belgian court asks whether the principle of *non bis in idem* applies to this situation, although the case relates to two infringements of different legal regimes: regulation and competition law. The most critical question is the following:

> *Must the principle non bis in idem, as guaranteed by Article 50 of the Charter, be interpreted as not precluding the competent administrative authority of a Member State from imposing a fine for infringing EU competition law, in a situation such as that of the present case, where the same legal person has already been finally acquitted of an offence for which an administrative fine had been imposed on it by the national postal regulator for an alleged infringement of postal legislation, on the basis of the same or similar facts, in so far as the criterion that the legal interest protected must be the same is not satisfied because the case at issue relates to two different infringements of different legislation applicable in two separate fields of law?*

The second case is about *non bis in idem* as between national and EU competition law-based proceedings (Case C-151/20 – *Nordzucker*). This is a preliminary reference from Austria and relates to a cartel fine imposed by the Austrian competition authority on an undertaking in the sugar sector (Südzucker). However, that undertaking had already been fined by the Federal Cartel Office in Germany exactly for the same facts. A further complication of this case is that there is a disagreement as to whether the German decision had taken into account or not the effects of the infringement of EU competition law in Austria. It is also questionable whether that fact is relevant for the applicability of the *non bis in idem* principle.

The most critical questions are the following:

> *Is the third criterion established in the Court of Justice's competition case-law on the applicability of the 'ne bis in idem' principle, namely that conduct must concern the same protected legal interest, applicable even where the competition authorities of two Member States are called upon to apply the same provisions of EU law (here: Article 101 TFEU), in addition to provisions of national law, in respect of the same facts and in relation to the same persons? In the event that this question is answered in the affirmative: Does the same protected legal interest exist in such a case of parallel application of European and national competition law? Furthermore, is it of significance for the application of the 'ne bis in idem' principle whether the first decision of the competition authority of a Member State to impose a fine took account, from a factual perspective, of the effects of the competition law infringement*

> *on the other Member State whose competition authority only subsequently took a decision in the competition proceedings conducted by it? […]*

The fact that these cases are heard by the Grand Chamber may mean that the Court is willing to re-examine its *Toshiba* line of case law, which follows a very restrictive interpretation of double jeopardy in competition cases, as opposed to other areas of EU law. Indeed, in areas other than competition law, the Court of Justice assesses "*idem*", i.e. the identity of an offence, on the basis of only a two-fold criterion, identity of facts and of the offender (see case law cited by AG Wahl's Opinion in *Powszechny Zak?ad*, para. 25). In competition cases, however, the Court of Justice employs an additional criterion, identity of the legal interest protected (*Aalborg Portland*, para. 338; *Toshiba*, para. 97, although AG Kokott had urged the Court to align the position in EU law and dispense with the third condition, without success). So it will be interesting to see whether the Grand Chamber will change its case law.

These are critical questions for the DMA enforcement. If the Court adopts a unified approach in EU law, it is clear that the cumulative application of the DMA and competition law will not be possible. Indeed, the Commission is raising this precise argument in *bpost*. It argues that there is a risk of considerably reducing the scope of competition law, or even reducing it to nothing. If there is an overlap and the sectoral rules apply in priority, "*competition law would risk becoming ineffective*".

However, to my mind, the DMA is a great example of the problem posed by the current state of the EU case law. Undertakings may be deprived of the *non bis in idem* protection, simply because of the label given to certain rules, while all other parameters are the same or similar. While the DMA Proposal proclaims that the "*Regulation […] aims at protecting a different legal interest from [the competition] rules*" (Recital 10), both of the DMA Proposal's two proclaimed objectives, fairness and contestability, are inextricably linked with competition law. Fairness is specifically mentioned in the text of Article 102(a) TFEU, a provision that has been applied by the EU case law to both exclusionary (mostly in the distant past) and exploitative cases. Likewise, contestability is a key economic concept in competition law and industrial organization. Thus, there is no doubt that the DMA Proposal clearly pursues competition policy goals.

Besides, the problem is present not so much in the interaction of the DMA with the EU competition rules (since the enforcer is the same: the Commission) but rather with the national competition rules, which according to Recital 9 and Article 1(6) of the DMA Proposal are not affected. Curiously – or perhaps not so curiously – Recital 9 includes a rather novel definition of what constitutes "competition law" and is therefore unaffected: "*national competition rules regarding unilateral behaviour that are based on an individualised assessment of market positions and behaviour, including its likely effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question*". In other words, this definition tells us that all the newly adopted and proposed national competition rules for digital markets will not be pre-empted and superseded by the DMA, to the extent they are categorised as "competition law", because they rely on market power or dominance, require an effects-based analysis and allow defences. Yet this is pure fiction since it is clear that these rules have exactly the same or very similar objectives and lead to the same results as the DMA itself. Suffice it to look at the new Section 19a of the German Competition Act (see here), the recent proposals to amend the Italian Competition Act (see here) or the idea to amend the Greek Competition Act and introduce the concept of an undertaking holding

a "*dominant position in an ecosystem of paramount importance for competition*" (see here).

That being said, there are some recent statements by Executive Vice President Vestager that seem to accept that there is a *non bis in idem* issue. On 26 March 2021, at the American Bar Association's (ABA) annual Spring meeting, the Commissioner was reported as saying that "*[NCAs] can apply national competition rules and of course they will have work to do, as long as it's not the same – because you can't deal with the same thing twice*". It is unclear whether this was a slip of the tongue or a substantive remark indicating that the Commission is now realising the problem. In any event, this is very much a real issue and I am sure the Court's judgments in the above two cases will be eagerly awaited.

Let us now go to the **second question**: is there a rule of precedence between regulation and competition law? And, is such a rule desirable especially in private enforcement cases, where national courts may decide on specific cases and thus lead to fragmentation?

Case C-721/20 – *DB Station & Service* raises some interesting questions. This is a private action in Germany brought against a subsidiary of Deutsche Bahn, a railway infrastructure undertaking that maintains 5,400 stations (traffic hubs), by a rail transport undertaking that uses the defendant's traffic hubs for passenger railway services. The civil action alleged that the charges levied for that purpose were excessive and thus constituted an abuse of a dominant position. The complication here was, however, that the sector is regulated by EU secondary law (Directive 2001/14/EC, later repealed by Directive 2012/34/EU) and the Federal Network Agency, acting as the competent regulatory body, declared the DB price system to be invalid, albeit with effect from a later date than their adoption. That decision is currently under appeal. The referring court entertained doubts as to whether national civil courts are entitled and obliged to review the charges levied based on Article 102 TFEU and national competition law, independently of the monitoring carried out by the regulatory authority. In other words, shouldn't the Federal Network Agency take precedence?

The German court's doubts were fuelled by a previous ruling of the Court of Justice, not related to competition law, which had imposed limitations on national courts. In *CTL Logistics*, the Court held that the German courts' reliance on the German Civil Code (BGB) to perform a review of the equity of the charges levied by railway infrastructure undertakings was incompatible with the provisions of Directive 2001/14/EC. In essence, the Court thought that this constituted "excessive protection" incompatible with the requirements and objectives of EU sectoral legislation.

So the currently pending case focuses on whether the existence of EU secondary regulation should impose a rule of precedence and by consequence some limitations on private enforcement of EU competition law. The critical question referred to the Court of Justice is the following:

> *Is it compatible with Directive 2001/14/EC […] for national civil courts to review the charges levied based on the criteria laid down in Article 102 TFEU and/or in national competition law on a case-by-case basis independently of the monitoring carried out by the regulatory body? If Question 1 is answered in the affirmative: Are the national civil courts permitted and required to conduct an assessment of abusive practices in the light of the criteria laid down in Article 102 TFEU and/or in national competition law, even where the rail transport undertakings have the*

> *possibility to request the competent regulatory body to review the fairness of the charges paid? Must the national civil courts wait for a decision in the matter by the regulatory body and, where applicable, if it is contested before the courts, for that decision to become enforceable?*

Of course, we know from *Deutsche Telekom* and *Telefónica* that sector-specific legislation does not preclude the undertakings it governs from engaging in autonomous anti-competitive conduct, so the application of regulation is without prejudice to the competition rules. This is especially so when, despite the intervention of a sectoral regulator, the undertaking concerned retains a commercial discretion, which would have allowed it to avoid engaging in the anti-competitive behaviour. However, both judgments were about the European Commission and not national authorities or courts applying the competition rules. Indeed, there are doubts as to whether the *Deutsche Telekom* and *Telefónica* case law also cover the case of private enforcement, where civil courts apply Article 102 TFEU on a case-by-case basis. Contrary to the facts in those two cases, the application of Article 102 TFEU by the national courts creates the risk of a plethora of possibly different court judgments and paves the way for numerous uncoordinated legal processes.

It remains to be seen whether the Court will prefer to give more weight to *CTL Logistics* than to *Deutsche Telekom* and *Telefónica* and thus impose limitations on private enforcement of EU competition law, in order to protect the effectiveness of the system of enforcement established by the EU secondary legislation. One thing is for sure: the pending case is very relevant to the DMA. In fact, if such limitations were recognised by the Court, they would *a fortiori* be appropriate in the DMA scenario, where the regulator would not be a national authority but rather the Commission itself. And the question of whether national competition authorities and national courts applying EU and/or national competition law should accord precedence to the Union regulator can be legitimately posed.

Finally, another important case on the point of precedence between regulation and competition law is the *Facebook* preliminary reference from the Düsseldorf Higher Regional Court (Case C-252/21). The questions sent to Luxembourg include the relationship between the GDPR and competition law and the powers of the Federal Cartel Office, e.g. whether the latter acted *ultra vires* since it has no powers to enforce the GDPR (see here for an informal translation of the questions into English).

In short, watch this space! The next year in Luxembourg is going to be interesting for the DMA observers…

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