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There and Back Again: Towards a Coherent Ne Bis In Idem Principle In EU law

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In his Opinions of 2 September 2021, in Cases C-151/20 *Nordzucker* and C-117/20 *Bpost*, Advocate General (AG) Bobek recommended that the Court of Justice of the European Union (CJEU) set out coherent guidance for national courts on the application of the *ne bis in idem* principle, upholding the unified test which should rely on three elements: the identity of the offender, the relevant facts and the protected legal interest.

Background

Bpost

Bpost was fined first by Belgium's postal watchdog, which found that Bpost's rebate system breached sectoral postal rules, and subsequently by the Belgian competition authority, which, in turn, found that the same rebate system was an abuse of Bpost's dominant position in the Belgian postal sector.

Under the principle of double jeopardy (or *ne bis in idem*), the same person cannot be sanctioned more than once for a single unlawful course of conduct, where the sanctions are designed to protect the same legal interest. The Brussels Court of Appeal asked the CJEU to clarify the application of this principle in a situation where a national competition authority imposes a fine on an undertaking that has already paid an administrative sanction imposed by a different national regulatory authority for the same conduct on the basis of sector-specific regulation.

Nordzucker

The German national competition authority found that Nordzucker and its rival Sudzucker had infringed Article 101 TFEU and German competition law by concluding anti-competitive agreements on sales areas, quotas and prices. Subsequently, relying on the same facts as those already contained in the German decision, the Austrian national competition authority sought a declaration that Nordzucker and Sudzucker had breached Article 101 TFEU and Austrian competition law.

The Austrian Supreme Court asked the CJEU in what circumstances the *ne bis in idem* principle precludes parallel or subsequent competition law proceedings in another Member State relating to

the same conduct.

AG Bobek's assessment of '*idem*'

In an attempt to produce a unified and coherent iteration of the European *ne bis in idem* rules, AG Bobek analysed the case law of both the CJEU and the European Court of Human Rights (ECtHR). The EU Courts had previously held that the principle *ne bis in idem* in proceedings under competition law is subject to a twin condition, namely, first, that there is a prior definitive decision (the '*bis*' condition) and, second, that the prior decision and the subsequent proceedings or decisions concern the same anticompetitive conduct (the '*idem*' condition). Moreover, in EU competition law the application of the '*idem*' condition is, in turn, subject to a separate three-pronged sub-condition that the facts, the offender and the legal interest protected must all be the same (CJEU, Case C-17/10 *Toshiba*). It is the last of these sub-conditions (the legal interest) which sits at the heart of the *Bpost* and *Nordzucker* cases.

As rightly observed by AG Bobek, the consideration of '*idem*' – and, in particular, the legal interest condition – has "*developed in what can best be described as successive waves of case-law*", resulting in "*a fragmented and partially contradictory mosaic of parallel regimes*". In particular, there are disparities as to whether (and if so, how) the legal interest condition fits within the definition of '*idem*', and even whether it applies to other areas of EU law outside competition law. As noted by AG Bobek, the concept "*has never truly been explained*" by the EU Courts. To ensure legal certainty and coherent application of the *ne bis in idem* principle in EU law as a whole going forward, AG Bobek proposed a so-called 'unified' test of *idem*, extending the conditions on the triple identity of the offender, the relevant facts and, specifically, the protected legal interest to *all areas of EU law*, no longer restricting the debate on legal interest to competition cases.

In respect of how the protected legal interest should be defined, AG Bobek suggested that the concept should focus on the *specific* interest or purpose that the provision being applied pursues, what that provision penalises and why. Taking a more normative approach, AG Bobek for the first time puts forward a *unitary* definition for the concept of legal interest in EU law: as "*the societal good or social value that the given legislative framework or part thereof is intended to protect and uphold. It is that good or value that the offence at issue harms, or with which it interferes*". It is therefore immediately apparent that, if such a line of reasoning were to be accepted by the Court, questions of a more ontological nature could lie at the heart of the consideration of the legal interest condition, namely: does sectoral regulation protect the same interest or "societal value" as competition law, and respectively do national competition laws and EU competition law protect the same legal interest?

As regards the *Bpost* case, AG Bobek suggests that, subject to verification by the Belgian court, the infringements pursued successively in the sectoral and competition proceedings seem to be linked to the protection of *different* legal interests, and to legislation pursuing different objectives. According to AG Bobek, the sectoral proceedings were based on national legislation imposing obligations of non-discrimination and transparency to liberalise the postal services sector, whereas the subsequent competition proceedings concerned the enforcement of the prohibition of the abuse of a dominant position intended to protect free competition. Therefore, the AG arrived at the conclusion that achieving liberalisation of certain, previously monopolistic, markets follows a *different logic* than the ongoing and horizontal protection of competition.

For those reasons, AG Bobek suggested that the CJEU rule that the *ne bis in idem* principle does not preclude a national competition authority from imposing a fine for the infringement of competition law where the infringer has already been fined in previous proceedings conducted by the national postal regulator for an alleged infringement of postal legislation, even though the underlying behaviour may be the same.

In the *Nordzucker* case, adopting the same line of reasoning as to the identity of the protected legal interest, AG Bobek focused on the interplay between EU and national competition laws, as opposed to sectoral regulation. AG Bobek went as far as suggesting that "*there is no doubt*" that EU and national competition rules have largely converged, partly due to the decentralisation of the application of EU competition rules brought about by Regulation 1/2003. While AG Bobek acknowledges that EU and national competition laws are not identical, in his view, the mere (quantitative) difference in the territorial scope of the same infringement, and thus of the given rule, is *not* per se indicative of a (qualitative) difference in the legal interest. Nonetheless, whether EU competition law and national competition law protect the same legal interest must be established by examining the specific rules applied. That involves the assessment of whether the national rules at issue depart from the EU rules.

Furthermore, AG Bobek argues that the fact that a national competition authority takes into account the extraterritorial effects of a given anti-competitive conduct in an earlier decision is relevant for the examination of the applicability of the principle *ne bis in idem* in the proceedings conducted subsequently. This is because the principle *ne bis in idem* "*prevents a national competition authority or a court from sanctioning an anti-competitive conduct that was already the object of previous proceedings concluded by a final decision adopted by another national competition authority* […] [provided that] *the temporal and geographical scope of the subject matter of both proceedings is the same*".

AG Bobek also stressed that the very purpose of the principle *ne bis in idem* is to protect not only against the imposition of a second fine for the same matter but also against a second set of proceedings. As such, the concept applies also in the context of national proceedings that involve the application of a leniency programme and which do not lead to the imposition of a fine.

What next?

As suggested by AG Bobek, *Bpost* and *Nordzucker* offer the Court a unique opportunity to provide national courts with coherent guidance on the application of the *ne bis in idem* principle. Indeed, the CJEU is now faced with a historic chance not only to clarify the legal conditions of the *ne bis in idem* principle, but also to clarify how antitrust law applies alongside sector-specific regulations, such as the upcoming Digital Markets Act, and to define the limits to parallel and overlapping EU antitrust investigations.

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