Kluwer Competition Law Blog

Ne Bis in Idem: The Final Word?

Patrick Harrison, Monika Zdzieborska, Bethany Wise (Sidley Austin LLP) · Thursday, April 7th, 2022

On 22 March 2022, the Court of Justice of the European Union (**CJEU**) issued judgments in Cases C-117/20 bpost (***bpost***) and C-151/20 Nordzucker and Others (***Nordzucker***). The judgments clarify the scope of protection afforded by the principle of *ne bis in idem* where EU competition law operates to regulate the same or similar conduct as sectoral rules (*bpost*), or is applied in tandem by national authorities in various Member States (*Nordzucker*).

The following outlines some key takeaways from the judgments and the potential application of the *ne bis in idem* principle moving forward, particularly as it concerns the EU's upcoming Digital Markets Act (***DMA***).

Key takeaways

Proportionality and due process

In *bpost* the CJEU focused its analysis on the general EU law principles of proportionality and due process. The CJEU determined that the *ne bis in idem* principle does not preclude an undertaking from being investigated and fined for an infringement of competition law where, on the same facts, it has already been the subject of a final decision for failure to comply with sectoral rules, provided that:

- there are **clear and precise rules** that make it possible to predict which acts or omissions are liable to be subject to such duplication;
- there is **coordination between the two competent authorities**;
- the two sets of proceedings have been conducted in a **sufficiently coordinated manner within a proximate timeframe**; and
- the **overall penalties imposed correspond to the seriousness of the offences committed**. The CJEU also emphasised that the accumulation of penalties should not exceed the limits of what is appropriate and necessary to achieve the legitimate objectives pursued by the relevant legislation.

In consequence, if a second investigation or sanction imposed with respect to the same conduct does not take into account the first investigation and/or sanction, there may have been a breach of the *ne bis in idem* principle.

Crucially, while authorities may legitimately opt for complementary legal responses to certain

socially harmful conduct, these combined legal responses should "*not represent an excessive burden for the person concerned*". Accordingly, the "*additional burden*" represented by the accumulation of prosecutions and penalties should be justified by the various objectives pursued, and any accumulation should be "*strictly necessary*" for achieving those objectives.

The 'bis' condition

The CJEU reiterated that the application of the *ne bis in idem* principle is subject to a double condition: firstly, that there is a prior final decision (the '*bis'* condition), and secondly, that the same facts are covered by the previous decision and by the subsequent proceedings or decisions (the '*idem'* condition).

To satisfy the *bis* condition, in both *bpost* and *Nordzucker* the CJEU emphasised that the prior decision must be "*final*". This means that protection under the principle of *ne bis in idem* would not apply until the first final decision had been adopted and therefore risks unduly narrowing the protection provided and fails to account for the significant burden imposed on undertakings that are subject to multiple overlapping investigations often lasting several years.

Nonetheless, it appears that authorities will still be bound by the general rules on proportionality and due process summarised in section (i) above.

The 'idem' condition

The '*idem*' condition is contingent on the identity of the facts, identity of the offender, and identity of the legal interest protected by the respective rules being the same.

In line with AG Bobek's Opinions in *bpost* and *Nordzucker*, the CJEU has helpfully confirmed that different legal classifications (*e.g.*, statutory definitions) in national law of the facts and legal interest protected are not relevant for determining the *idem* condition insofar as the scope of protection conferred by *ne bis in idem* cannot vary from one Member State to another. Rather, to have an identity of the facts means that the "*material*" facts are identical, which is understood as a set of concrete circumstances arising from events that are, in substance, the same, in that they involve the same author and are inseparably linked to each other in time and space.

As for the identity of the legal interest protected, somewhat surprisingly given the above observation of the CJEU that legal classifications should be disregarded, in *bpost* the CJEU concluded that the two rules at issue pursued "*legitimate and distinct objectives*", namely (i) the sector-specific rules have as their objective "*the liberalisation of the internal market for postal services*"; and (ii) the competition rules seek to ensure that "*competition is not distorted in the internal market*". Given that the postal sector rules at issue were introduced in part to promote competition in postal services, the distinction between these objectives is not self-evident. The CJEU did not elaborate on this point, which might pave the way for authorities to declare that they are protecting different legal interests that are, in essence, the same.

For example, in the context of the forthcoming DMA, the Commission might argue that *ne bis in idem* protection does not apply because the purpose of the DMA is to ensure that markets remain

"*contestable and fair*", whereas the purpose of competition law is to ensure "*undistorted competition*". This could lead to situations where the same undertaking could be subject to two or more overlapping investigations (and fines) regarding the same conduct.

In *Nordzucker*, the CJEU found that if two national competition authorities (***NCAs***) were to pursue and sanction the same facts in order to ensure compliance with the prohibitions of cartels under Article 101 TFEU (and the corresponding provisions of national law), both NCAs would pursue the same general interest of ensuring that competition in the internal market is not distorted. As such, *ne bis in idem* protection would preclude the second investigation unless the NCAs were to pursue complementary aims having as their object different aspects of the same conduct (*e.g.*, if the NCAs were to investigate the object and effect of the conduct in different territories/markets).

The final word?

Looking ahead, the DMA (which itself is derived from competition law principles) will likely create an additional layer of potential overlap and inconsistency – between its own enforcement on the one hand and existing competition rules (and potentially other applicable regulations) on the other. This could expose companies to a number of simultaneous and overlapping investigations at any one time with respect to the exact same conduct.

As such, in line with the criteria on proportionality and due process set out by the CJEU in *bpost*, it will be essential that the DMA (either directly or indirectly through separate guidance) provides for: (i) clear and precise rules which make it possible to predict with certainty in which circumstances its provisions could overlap with the enforcement efforts of other EU and national authorities; and (ii) a stringent enforcement and case allocation mechanism which facilitates coordination between these bodies. Furthermore, to ensure that robust *ne bis in idem* protection is properly administered, the authorities must cooperate to ensure that overall penalties imposed with respect to the same conduct are proportionate to the seriousness of any offences committed.

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