Kluwer Competition Law Blog

Timely Launch of Antitrust Investigations: The Right of Defence Vis-à-Vis The Effectiveness of Public Enforcement – Are There Any Elephants in the Room? The Word to the CJEU (Case C-511/23)

Marco Cappai (Università Roma Tre) · Tuesday, October 24th, 2023

The contested decision

With decision No. 30086 of 29th March 2022, the Italian Competition Authority (ICA) imposed a fine of more than 3.7 million euros on Caronte & Tourist S.p.A. (CT) for excessive pricing in the market for Strait of Messina's ferry services for passengers with vehicles, where it holds a dominant position. The legal basis of the case was Article 3(a) of the Italian Competition Law (Law No. 287/1990, ICL), which corresponds to Article 102(a) TFEU. Under Article 1(4) ICL, the rules contained in Title I, including Article 3, shall be interpreted in accordance with the European rules on competition.

CT appealed the decision before the first instance Italian Administrative Court (IAC).

The referred case and request for a preliminary ruling

One of the grounds for the appeal is that the ICA allegedly started the investigation after the expiration of the 90-day time limit which is prescribed to notify the opening of a sanctioning proceedings under Article 14(2) of the Italian law on administrative offences (Law No. 689/1981 – ILAO). The time limit would apply to competition law proceedings under Article 31 ICL, which refers to the general principles governing administrative offences. In a nutshell, according to Italian Statutes, administrative proceedings of a punitive nature shall be initiated within 90 days from the enactment of the unlawful conduct.

Over time, this provision has been subjected to changing interpretations in the antitrust field.

According to a more lenient case law, the term would not apply at all to antitrust investigations, which are characterized by a too high degree of complexity to comply with such requirements (e.g. Council of State – CoS, VI Chamber, 12th February 2020, No. 1046). According to a halfway case law, the term applies to the antitrust investigation but shall be "reasonable", meaning that not necessarily it must count 90 days (e.g. IAC, Rome, I Chamber, 3rd October 2022, No. 12507).

Finally, according to a stricter case law, the term literally applies to antitrust investigations launched by the ICA, so it must be, mandatorily, a 90-day one (e.g. CoS, VI Chamber, 4th October 2022, No. 8503).

The difference between the second and third streams of case law is narrower than it might appear. Indeed, in both cases, the term for triggering a sanctioning proceeding starts to expire only when the ICA has retained sufficient knowledge of the fact, which could take months (or even years) of pre-investigation activity, depending on the complexity of the issue. For instance, if the ICA received a complaint but needed to verify and/or deepen some of the alleged conducts, the period between the filing of the complaint and the moment the ICA collects sufficient circumstantial evidence would not be considered for the purposes of Article 14(2) ILAO. Administrative judges typically assess the reasonability of the time elapsed on a case-by-case basis and according to a backwards-looking perspective: it all boils down to the complexity of the pre-investigative activities effectively undergone in such period (the burden of proof is, here, on the ICA). In this context, it is possible for the ICA to justify part of the (apparent) delay with the institutional duty to coordinate enforcement within the European Competition Network (ECN), at least when the decentralised application of Articles 101 and 102 TFEU comes into play.

In the case at stake, the ICA notified the opening decision on 4 August 2020, although it had received a consumer complaint on the same practice on 24 March 2018. Most importantly, the competent administrative authority (the Port System Authority of Stretto) had fully replied to the request for information submitted by the ICA on the 26th of November 2019. That is, 245 days before the notification of the opening decision to CT.

The IAC considers this a case where Article 14(2) ILAO could potentially apply. However, it doubts the conformity of the described national jurisprudence with European law. In this regard, the Italian doctrine represents a *unicum* with respect to both European law and other national legal systems. As a rule, indeed, the only limits encountered by antitrust enforcers are the five-year limitation period – Articles 25-26 Reg. (EC) No. 1/2003 and, similarly, Article 28 ILAO – and, above all, the "*reasonable duration of the proceedings*" (Articles 47 CDFEU and 6 ECHR). Article 14(2) ILAO acts in combination with (and not in substitution of) those principles. You cannot retrieve a provision like that elsewhere. Meaningfully, the IAC notes that the European Commission is evaluating the possibility of opening an infringement procedure under Article 258 TFEU against the Italian Republic.

More to the point, the case law established in Italy may be in contrast with the effectiveness of European competition law. In fact, when national judges ascertain a violation of Article 14(2) ILAO, the antitrust decision is annulled in all its elements. Therefore, not only the sanction is invalidated, but also the order to cease the unlawful conduct, which could then be continued (or resumed) by the involved undertaking(s).

Against this background, EU case law on the reasonable duration of proceedings requires to prove that, due to the excessive length of the investigation, the charged party is no longer able to effectively exercise its right of defence (e.g. *Limburgse Vinyl Maatschappij NV et al.*, C-238/99 P). In contrast, Article 14 ILAO, as applied in the living law, establishes a genuine irrebuttable presumption: whenever the 90-day period has expired, the undertaking's right of defence is infringed. Additionally, since the recognition of a time limit of 90 days implies, as a matter of fact, an obligation to launch investigations according to a purely chronological criterion, the competition authorities' power to identify their own enforcement priorities may be under threat

(see Articles 3 and 4(5) of Directive No. 1/2019/EU, ECN+ Directive). Finally, the need to initiate proceedings within a short timeframe could result in less thorough and accurate (pre)investigations.

In light of the above, the IAC refers to the CJEU with the following question: "*must Article 102 TFEU, read in the light of the principles of protection of competition and effectiveness of administrative action, be interpreted as meaning that it precludes national legislation, such as that arising from the application of Article 14 ILAO – as interpreted in the most recent case-law – which requires the ICA to initiate the investigation procedure with a view to establishing an abuse of a dominant position within a time limit of 90 days, starting from the moment the Authority has knowledge of the essential elements of the infringement, the latter of which may be met by the first report of the infringement?"* (IAC, Rome, I Chamber, 1st August 2023, Order No. 12962, introducing Case C-511/23).

Likely preliminary ruling, in light of the rights to (1.0) good administration and fair proceedings

Time matters in European administrative law. Especially when the proceedings may be concluded – as is the case for competition law investigations – with the imposition of a "penalty" under Article 6 ECHR, according to the renowned *Engel* criteria.

Statutes of limitation primarily safeguard legal certainty. They represent a milestone of the rule of law, but are not sufficient, alone, to secure a proper system of protection for citizens.

Therefore, the elapsing of time is relevant at least under two further constitutional perspectives.

First, a core element of the right to good administration set forth by Article 41(1) CFREU is that "*every person has the right to have his or her affairs handled (…) within a reasonable time*". As A.G. Jacobs noted, "*slow administration is bad administration*". Indeed, "*the principles of good administration require the Community administration, in all procedures which may lead to the adoption of a measure adversely affecting the interests of one or more individuals, to avoid undue delay and to ensure that each step in the procedure is carried out within a reasonable time following the previous step*" (Opinion in Case C-270/99, *Z. v European Parliament*, para 40).

However, timely handling of one's own affairs is not an absolute goal, since good administration implies not only "*promptness*", but also "*diligence*". Notably, "*the aim of promptness (…) must not adversely affect the efforts made by each institution to establish fully the facts at issue, to provide the parties with every opportunity to produce evidence and submit their observations, and to reach a decision only after close consideration of the existence of infringements and of the penalties*" (*DSM v Commission*, C-244/99 P, para 234).

In a nutshell, good administration calls for the maximum reasonable effort in terms of promptness with the minimum reasonable sacrifice of the duty of diligence.

Second, under Articles 47(2) CFREU and 6(1) ECHR "*everyone is entitled to a fair and public hearing within a reasonable time*". Interestingly, the General Court referenced that general principle in a case where the fined party claimed that the pre-investigative activities undergone by the Commission took too long. And it did so after having noted that, unlike Italian law, in European law, there is no mandatory term to launch an antitrust investigation. In this context, it

ruled that "*in order to overcome the adverse consequences which may result from the absence of a [time limit to launch an investigation], the fundamental requirement of legal certainty has the effect of preventing the Commission from indefinitely delaying the exercise of its powers, and (…), therefore, the Community judicature, when examining a complaint alleging that the Commission's action was too late, must not merely find that no limitation period exists, but must satisfy itself that the Commission did not act with unreasonable delay*" (*Jean-Paul François v Commission*, T-307/01, para 46).

Apparently, there is no contradiction between the 90-day term set forth under Article 14(2) ILAO, on the one hand, and Articles 41(1) and 47(2) CFREU, together with Article 6(1) ECHR, on the other hand. Indeed, if we look at the substance, all of those provisions share the same values: legal certainty, legitimate expectation and the right of defence.

However, the IAC rightly notes that, from the point of view of the legal consequences of the breach, there is a remarkable misalignment between Italian and European law. Notably, while the violation of the 90-day time limit leads, *per se*, to the annulment of the antitrust decision in all its aspects, in European law we find no such automatism.

As for the principle of promptness ensuing from Article 41(1) CFREU, it is settled case law that not every breach of the right to good administration leads to an annulment. Rather, if it is established that the content of the decision at stake would not have differed in the absence of that irregularity, no annulment takes place (*Suiker Unie et al. v Commission*, C-40/73, para 91). This is without prejudice to the right of the person to seek compensation for damages if any (*Volkswagen v Commission*, C-338/00 P, paras 164-165).

Mutatis mutandis, the same goes for the principle of reasonable time of proceedings. Indeed, it is settled case law that the antitrust decision may be annulled only when "*the excessive duration of the first phase of the administrative procedure (…) have an effect on the future ability of the undertakings concerned to defend themselves, in particular by reducing the effectiveness of the rights of defence where they were relied on in the second phase of the procedure, because of the passage of time and the resulting difficulty in collecting exculpatory material*" (*Lietuvos geležinkeliai Ab v Commission*, T-814/17, para 359). If the charged undertaking fails to provide such an allegation, again the excessive elapsing of time, albeit at odds with the general principles of European law, will not affect the lawfulness of the contested decision (*Technische Unie v Commission*, C?113/04 P, paras 54 and 60-71).

In light of the above, it seems that the living law consolidated in Italy, while moving from the same basic principles underpinning European law, arrives at outcomes that are difficult to reconcile with it. Thus, if it were to stop its scrutiny here, the CJEU would likely follow the doubts raised by the referring Court, declaring the Italian case law incompatible with EU law.

Elephant(s) in the room: *ne bis in idem* and right to (2.0) good administration

This analysis does not stop itself at the ground 0 level of the rights to (1.0) good administration and fair proceedings. The reason is quite simple. Case C-511/23 originates from the competition law arena. The institutional framework designed for antitrust enforcement is the ECN, a system of parallel competences. Therefore, although the case at hand concerns a practice producing anti-competitive effects of a local dimension, the Court shall answer the referred question in a future-

proof way, providing a solution scalable to complex multilevel enforcement scenarios.

By enlarging the perspective angle, we can shed some light on quite important, but so far ignored elephant(s) in the room.

The first one is the *ne bis in idem* (or double jeopardy) principle enshrined in Articles 50 CFREU and 4, Protocol 7 ECHR. In brief, it prevents the same person from being prosecuted twice for the same criminal charge. Both the Charter and the Convention adopt a wide notion of sameness, identifying an *idem* any time we find "*a set of concrete factual circumstances inextricably linked together in time and space*" (*Van Esbroek*, C-436/04, para 36; ECtHR, *Sergey Zolotukhin v Russia*, Appl. No. 14939/03, para 84). For a long time, antitrust enforcers benefitted from a narrower interpretation of the guarantee. Namely, limited to this policy area the Court used to attach relevance to the legal interest protected, thus excluding *bis in idem* hypotheses in case of parallel enforcement on the same fact by the European Commission and national authorities (*Toshiba Corporation et al. v Commission*, C-17/10, para 97).

Nowadays, following two seminal judgements rendered by the Grand Chamber, the principle applies in its full stringency to all areas of EU law, including competition (*bpost SA v Autorité belge de la concurrence*, C-117/20, para 35 and *Bundeswettbewerbsbehörde v Nordzucker AG et al.*, C-151/20, para 40).

How is this relevant to the preliminary ruling under examination?

The nexus is not self-evident but exists. In application of the general limitation clause set forth by Article 52(1) CFREU, the CJEU acknowledges that the *ne bis in idem* guarantee may be subject to limitations where they are envisaged by law, respect the essence of those rights, and comply with the principle of proportionality. According to the *Menci case law*, the principle of proportionality is respected when, *inter alia*, the two overlapping prosecutions are "*closely connected in time*" (*Menci*, C-524/15, para 61, recalling ECtHR, *A & B v Norway*, App. Nos 24130/11 and 29758/11, para 132). If the two enforcers fail to coordinate their investigations in such a way that no excessive time elapses between them, the *ne bis in idem* bar will apply and the second decision will be annulled in all its parts, irrespective of the actual impact of such a delay on the right of defence of the involved person(s).

Here comes the second elephant in the room: the right to (2.0) good administration.

Roughly speaking, we can define good administration as a holistic balance between guarantee (of the person) and efficiency (of the administrative action). Article 41 CFREU emphasizes the first aspect, but the latter remains on the table. The principle of solidarity allows us to reconcile those (apparently) compelling needs in a meaningful and consistent way. Indeed, any violation of the rules on good administration is relevant to the person. However, if the irregularity was not such as to affect the decision-making process, which would have been the same even without it, then the private party's claim for justice cannot go as far as the annulment of the administrative decision, since compensation for damages may be an appropriate measure to remedy the breach suffered. This satisfies the individual (through pecuniary protection in equivalent terms) without harming third parties, in whose interest the administration also proceeds. Public administration should remain efficient because this meets the interest of third parties, to whom Article 41 CFREU is addressed too. In this respect, it shall be noted that antitrust decisions do not speak to a single category of individuals: they punish one (or more) person(s) while safeguarding the interests of

others (competitors, suppliers, customers, and consumers).

If this assumption is correct, then it is part of the duty of good administration to act in such a way to neutralise the risk of a future annulment of the decision on *bis in idem* grounds.

One may consider such a concern ephemeral and over-theoretical. But is the risk of *bis in idem* defences so neglectable in the competition law sector? Not really. Rather, overlapping prosecutions are quite a common scenario in a complex multilevel environment such as the ECN. Indeed, the European legislator designed a system of parallel competences, where each national authority is entitled to apply Articles 101 and 102 TFEU, and those decentralised powers act in combination with the centralised ones conferred to the Commission.

The judgements of the Grand Chamber in *bpost* and *Nordzucker* will likely increase the number of double jeopardy-related issues since they ruled out the criterion of the legal interest protected. Additionally, as argued here and here, the entry into force of the Digital Markets Act (DMA) may further exacerbate this problem, provided that the institutional forum for the exchange of information between the Commission's DMA task force and NCAs is identified, under Article 38(1) DMA, by the ECN. Moreover, it follows from a recent judgement rendered on the *Dieselgate* that any punitive intervention grounded on DMA-like national provisions, such as Section 19A GWB, may automatically fall under the scope of Article 50 CFREU, if the same fact has already been scrutinised under Article 102 TFEU and/or the DMA (see, *mutatis mutandis*, *Volkswagen v Autorità Garante della Concorrenza e del Mercato*, C-27/22, para 37; notably, the Court reached this conclusion regardless of the fact that the national piece of legislation at stake could be considered as "implementing Union law" or not, for the purposes of Article 51 CFREU).

Hence, neutralising the inflated risk of *ex-post* annulment of (complex and time-consuming) investigations shall become a primary concern for the (2.0) good administration.

Put it so, one may consider under a different lens the question of the compatibility of Article 14(2) ILAO with Union law. Indeed, by forcing the ICA to launch the investigations within a given time limit, the referenced provision, as a matter of fact, also ensures that, in the event of parallel enforcement, on the same fact, by the Italian authority and other NCAs and/or the Commission, the former will guarantee that the prosecutions are "*closely connected in time*". Thus, this strengthened version of the duty of promptness may help prevent *ne bis in idem* defences and, in so doing, produce, at least in this respect, a positive impact on the right to good administration.

Sure, one may object that the Italian solution goes too far, as it automatically links the annulment of the whole decision to the untimely notification of the opening decision. But this is only part of the problem, which could eventually be solved with more modular and less draconian solutions (for instance, by making the right to seek compensation for the untimely notification of the opening decision more effective and easily enforceable).

On a different note, the attention point is broader and relates to the ability, on a larger scale, of the jurisprudence on *ne bis in idem* to construct, as a positive side effect, a more robust and meaningful idea of good administration. Indeed, the present case demonstrates that there are significant points of contact between what, in the negative, the authorities must do in order to render the prohibition of *bis in idem* inoperative under Art. 52(1) CFREU (e.g., ensure a "*close connection in time*"), and the standard of good administration that, in the positive, public administrations shall pursue by default, regardless of the chance that bis *in idem* scenario will emerge or not. This is something I

tried to argue elsewhere.

As a matter of fact, we can hardly expect the Court to embrace such a paradigm shift in case C-511/23. Yet, it seems important to be (at least) conscious that a positive relationship between the general principles of *ne bis in idem* and good administration exists, and it is stronger than it so far appeared. This awareness might provide the opportunity to develop an enhanced right to (2.0) good administration, filling the gaps often shown by EU administrative law. If we accept this major re-orientation, further research will be needed to identify the most suitable solutions.

This entry was posted on Tuesday, October 24th, 2023 at 9:00 am and is filed under Double jeopardy, Italy, Procedures, Proportionality, References for a preliminary ruling

You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.