Case Notes

The Case Notes section will identify and analyse important judgments that shape the interpretation and application of the EU law in the field of competition and regulation. If you are interested in contributing, please contact the Case Notes Editors Dimitris Vallindas at <dvallindas@sheppardmullin.com> or Silvia Pronk at <silviapronk@gmail.com>.

The Duplication of Proceedings and Penalties under Sectoral Rules and Competition Law Recast: *Toshiba* Is Dead, Long Live *Bpost*?

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Case C-117/20 bpost, Judgment of the Court (Grand Chamber) of 22 March 2022

The Court of Justice confirms that the non bis in idem principle, as guaranteed by Article 50 of the Charter, also applies in the event of a duplication of proceedings and penalties under sectoral rules and competition law. However, it is added that the application of this principle does not preclude a legal person from being fined for an infringement of competition law where, on the same facts, that person has already been the subject of a final decision following proceedings relating to an infringement of sectoral rules, provided that there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the competent authorities; that the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe; and that the overall penalties imposed correspond to the seriousness of the offences committed.

I. Introduction

On 22 March 2022, the Grand Chamber of the Court of Justice of the European Union (CJEU) delivered its answers to the two preliminary questions referred to it by the Brussels Court of Appeal on the interpretation of the *non bis in idem* principle. By its questions, the referring court asked, in essence, whether this principle precludes a national competition authority to prosecute and sanction an undertaking where, on the same facts, that undertaking has already been the subject of a final decision following proceedings relating to an infringement of sectoral rules concerning the liberalisation of the relevant market.

When the case landed in Luxembourg, it was generally hailed as a unique opportunity for the CJEU to (re)define how competition law is to be applied alongside sector-specific regulations. In fact, the preliminary questions of the referring court read as an open invitation for the CJEU to set aside its restrictive and heavily criticized *Toshiba* case-law[1], making the application of the *non bis in idem* principle in competition law matters subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected, and to align its case-law with that of the European Court of Human Rights (ECtHR).

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1 Case C-17/10 *Toshiba* [2012] ECLI:EU:C:2012:72.

As it turns out, however, the CJEU has not fully grasped the opportunity, but has merely replaced the *Toshiba* condition of the unity of legal interest protected with an equally problematic interpretation according to which the *non bis in idem* principle can be relied upon but in a way that it is basically reduced to a mere right to be informed *ex ante* and to seek an *ex post* control.

II. Facts

The case leading up to the preliminary reference dates back to 2010 when bpost, the Belgian incumbent postal services provider, implemented a system with quantitative discounts for bulk mail on a strict 'per sender' basis.[2] This 'per sender' model had of course a negative impact on the business of intermediary consolidators because they could no longer aggregate the volumes of mail handled for various customers in order to receive higher discounts.

Both the Belgian Institute for Postal Services and Telecommunications (BIPT) and the Belgian Competition Authority (BCA) considered this new pricing model to be unlawful.

According to the BIPT, the 'per sender' model was in breach of the non-discrimination principle laid down in the Belgian provision implementing Article 12 of Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service. The BIPT consequently imposed a fine on bpost for an amount of €2.3 million. The BCA for its part decided that, by introducing this model, bpost had abused its dominant position within the meaning of Article 102 of the Treaty on the Functioning of the European Union (TFEU) and imposed an additional fine of €37.4 million.

Bpost first sought the annulment of the BIPT decision. Following a preliminary ruling of the CJEU[3], the referring court decided that bpost's 'per sender' rebate system did not infringe the principle of non-discrimination and consequently annulled the BIPT decision.

In parallel proceedings, bpost also challenged the BCA fine. In these proceedings, bpost argued that the fine infringed the *non bis in idem* principle which dictates that no one can be tried or punished twice for the same offence once there is a final judgment of acquittal or conviction. The BCA disputed the application of this principle. With reference to the *Toshiba* case-law, the BCA claimed that the condition of unity of legal interest protected is not fulfilled because the postal legislation protects a different legal interest than the European competition law rules. According to the BCA, bpost could not rely on the *non bis in idem* principle to prevent the BCA from pursuing and sanctioning it for its abuse of dominance.

In a judgment of 10 November 2016, the Brussels Court of Appeal sided with bpost considering that, where all proceedings take place at the national level within the same Member State, the application of the *non bis in idem* principle is not conditional upon the condition of the unity of legal interest protected. The Court therefore annulled the decision of the BCA.

The BCA however lodged an application before the Belgian Supreme Court (*Cour de cassation*) that took an entirely different approach. In particular, it discarded the discussion on the condition of unity of legal interest protected and referred instead to the reasoning adopted by the CJEU in *Menci* stating that a restriction of the *non bis in idem* principle can be justified under Article 52(1) of the Charter of Fundamental Rights of the European Union (Charter).[4] On the basis of this case-law, the Supreme Court concluded that a duplication of prosecutions of a criminal nature is possible if they pursue, for the purpose of attaining a general interest objective, complementary aims covering different aspects of the same unlawful conduct. It subsequently quashed the judgment of the Court of Appeal and referred the case back to it to give another ruling on this matter.

In the course of these new proceedings, the Brussels Court of Appeal found itself to be caught between a rock and a hard place. On the one hand, the Court stated that the case should in principle be assessed in view of the *Toshiba* case-law and that disregarding this case-law would, as pointed out by the Euro-

2 For a more comprehensive overview of the facts and the background of the case with further references to the relevant national decisions, see eg J Dewispelaere, 'The Non Bis in Idem Principles and Decisions of National Regulatory Authorities' (2017) 1(4) CoRe and J Dewispelaere and J Vuylsteke, 'Request for a Preliminary Ruling on the *Non Bis in Idem* Principle in Competition Law Matters, or How to Reconcile Homogeneity and Effectiveness' (2020) 4(2) CoRe.

3 Case C-340/13 *bpost* [2015] ECLI:EU:C:2015:77.

4 Case C-524/15 *Menci* [2018] EU:C:2018:197.

pean Commission that intervened as *amicus curiae*, run counter to the effectiveness of European competition law. On the other hand, the Court endorsed the criticism put forward by several Advocate Generals concerning the diverging approach adopted by the CJEU for the application of the *non bis in idem* principle in the context of competition law.[5] The Court particularly pointed out that this diverging approach might constitute a violation of the requirement of homogeneity laid down in Article 52(3) of the Charter that stipulates that rights contained in the Charter are to have the same meaning as the corresponding rights laid down by the European Convention for Human Rights. In view of these diverging opinions and interests, the Court decided to stay the proceedings and to seek the CJEU's guidance on how to apply the *non bis in idem* principle in the event of a duplication of proceedings and penalties under sectoral rules and competition law.

III. Judgment

As a first preliminary observation, the CJEU reminds that the application of the *non bis in idem* principle is subject to a twofold condition, namely, first, that there must be a prior final decision (the '*bis*' condition) and, secondly, that the prior decision and the subsequent proceedings or decisions must concern the same facts (the '*idem*' condition).[6]

As regards the '*bis*' condition, the CJEU observes that it is apparent from the findings of the referring court that the BIPT's decision was annulled by a judgment which has acquired the force of *res judicata* and according to which bpost was acquitted in the proceedings brought against it under rules governing the postal sector. Accordingly, the CJEU concludes that it appears that the first proceedings against bpost were disposed of by a final decision within the meaning of the CJEU's case-law.

The CJEU then specifies that the '*idem*' condition requires a twofold identity of facts and offender only, while the '*legal classification under national law of the facts and the legal interest protected are not relevant*'.[7] It adds that

> [t]he same is true of the application of the non bis in idem principle laid down in Article 50 of the Charter in the field of EU competition law, inasmuch as [...] the scope of the protection conferred by that provision cannot, unless otherwise provided by EU law, vary from one field of EU law to another.[8]

This is an important clarification because it implies a departure of the previous *Toshiba* case-law where the CJEU held that the *non bis in idem* principle in competition law matters is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected.

On the basis of this reasoning, the CJEU concludes that, should the referring court consider that the facts which are the subject of the proceedings under sectoral rules and competition law are identical (the unity of the offender was not challenged), that duplication would constitute a limitation of the fundamental right guaranteed by Article 50 of the Charter.[9] Accordingly, this brings the CJEU to verify if such limitation could be justified on the basis of Article 52(1) of the Charter.

In this context, the CJEU first of all underlines that, in accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter may be justified if it is provided for by law and respects the essence of those rights and freedoms.[10] In this respect, the CJEU observes that

> [...] a duplication of proceedings and penalties respects the essence of Article 50 of the Charter, provided that the national legislation does not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provides only for the possibility of a duplication of proceedings and penalties under different legislation.[11]

Moreover, according to the second sentence of Article 52(1) of the Charter, subject to the principle of proportionality, limitations on the fundamental

5 Case C-17/10 Toshiba [2012] ECLI:EU:C:2011:552, Opinion of AG Kokott; Case C-524/15 *Menci* [2018] ECLI:EU:C:2018:197, Opinion of AG Campos Sánchez-Bordona; Case C-617/17 *PZU* [2018] ECLI:EU:C:2018:976, Opinion of AG Wahl and Case C-10/18 P *Mowi* [2019] ECLI:EU:C:2019:795, Opinion of AG Tanchev.

6 Case C-117/20 *bpost* [2022] ECLI:EU:C:2022:202, para 28.

7 C-117/20 *bpost*, paras 33-34.

8 C-117/20 *bpost*, para 35.

9 C-117/20 *bpost*, para 39.

10 C-117/20 *bpost*, para 41.

11 C-117/20 *bpost*, para 43.

rights and freedoms should be necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. In this context, the CJEU finds that a duplication of proceedings and penalties under sectoral rules and competition law meets an objective of general interest because these two sets of legislation pursue distinct legitimate objectives.[12] As regards compliance with the principle of proportionality, the CJEU notes that

> [...] public authorities can legitimately choose complementary legal responses to certain conduct that is harmful to society through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned.[13]

The practical implication of this proportionality test remains however unclear. In fact, the CJEU seems to indicate that this test is intrinsically linked to the question whether the proceedings pursue distinct legitimate objectives. Indeed, according to the CJEU,

> [...] the fact that two sets of proceedings are pursuing distinct objectives of general interest which it is legitimate to protect cumulatively can be taken into account, in an analysis of the proportionality of the duplication of proceedings and penalties, as a factor that would justify that duplication, provided that those proceedings are complementary and that the additional burden which that duplication represents can accordingly be justified by the two objectives pursued.[14]

The proportionality test therefore adds little to the legal analysis in the case at hand. Finally, the CJEU explains that the assessment of whether the duplication of proceedings and penalties is strictly necessary must be undertaken by looking at

> [...] whether there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the different authorities, whether the two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe and whether any penalty that may have been imposed in the proceedings that were first in time was taken into account in the assessment of the second penalty, meaning that the resulting burden, for the persons concerned, of such duplication is limited to what is strictly necessary and the overall penalties imposed correspond to the seriousness of the offences committed.[15]

Quite remarkably, in its answer to the questions referred for a preliminary ruling, the CJEU only refers to the elements relating to the strict necessity of a duplication of proceedings and penalties. By doing so, the CJEU indicates that it is of the opinion that the duplication at issue is provided for by law, respects the essence of the *non bis in idem* principle, meets an objective of general interest and respects the principle of proportionality. At the same time, however, the CJEU states that it is for the referring court to verify these elements.[16]

Looking at the contested duplication of proceedings, the CJEU furthermore explains that, in practice, the requirement for 'coordination between the competent authorities' will be respected where national legislation provides for cooperation and exchange of information between the authorities concerned.[17] Regarding the condition of 'a proximate timeframe', it notes that the fact that the BIPT and the BCA have conducted their proceedings at least partly in parallel and that the two decisions have been taken within a year and a half of each other seems to satisfy that condition.[18] Finally, the CJEU considers that the fact that the fine imposed in the second set of proceedings is larger than that imposed in the first does not in itself show that the duplication was disproportionate with regard to the legal person concerned.[19]

The CJEU concludes that the assessment of whether Article 52(1) of the Charter is satisfied is ultimately for the national referring court to conduct. However, on basis of the indications provided by the CJEU, the odds of overturning the decision of the

12 C-117/20 *bpost*, paras 44-47.

13 C-117/20 *bpost*, para 49.

14 C-117/20 *bpost*, para 49.

15 C-117/20 *bpost*, para 51.

16 C-117/20 *bpost*, paras 42 and 50.

17 C-117/20 *bpost*, para 55.

18 C-117/20 *bpost*, para 56.

19 C-117/20 *bpost*, para 57.

BCA in the course of the proceedings in front of the Brussels Court of Appeal are not in bpost's favour.

IV. Comment

At first sight, the CJEU seems to have fully seized the opportunity to (re)define the limits to parallel investigations initiated under sectoral rules and competition law. Not only has the Court set aside its *Toshiba* case-law, it also aligned its case-law on the *non bis in idem* principle with the case-law of the ECtHR and, at the same time, brought unity to the application of Article 50 of the Charter in all areas of EU law. On top of that, the CJEU elaborated upon the *Menci* conditions as to when restrictions to Article 50 of the Charter are acceptable.

But for all its virtues, the annotated judgment calls for three major criticisms.

First, what should be an *ex ante* protection against double jeopardy is transformed in an *ex post* test of whether a restriction to the *non bis in idem* principle was indeed justified.

This argument is developed at length in Advocate General Bobek's opinion where he explains that the purpose of Article 50 of the Charter is to protect the individual from the second set of proceedings: 'Article 50 of the Charter is a bar. If validly triggered, it prevents the other proceedings from even starting. Such a bar must be defined ex ante and normatively'.[20]

In the test applied by the CJEU, however, the application of the non bis in idem principle becomes 'an ex post corrective test that may or may not apply depending on the circumstances and the exact amount of sanctions imposed'.[21] Indeed, according to the CJEU, the analysis of the question as to whether the duplication of proceedings can be justified can only be undertaken *ex post* because it depends on elements that are only available once the two sets of proceedings have already been conducted. Accordingly, the CJEU deprives national authorities and individuals of a way to assess, *ex ante* and *in abstracto*, whether a second prosecution in relation to the same facts is acceptable. This is of course very unfortunate, especially in a moment in time where sectoral regulation at the EU and at national levels is multiplying.

Second, the test provided to assess whether a restriction to the *non bis in idem* principle is acceptable under Article 52(1) of the Charter is shrouded in legal and semantic mists with seemingly overlapping conditions. In fact, a closer look at the conditions cited by the CJEU seems to indicate that, for a restriction of the *non bis in idem* principle to be acceptable, only three criteria should be fulfilled: (i) there must be two separate legislations which pursue distinct objectives and clearly provide for a possibility of duplication of proceedings and penalty; (ii) the two proceedings must be carried out in a sufficiently coordinated manner, including in temporal terms; and (iii) the combined penalty must be proportionate to the offence. By doing so, the CJEU not only transforms the *non bis in idem* principle in a simple *ex post* check, as was already the case in *Menci*, but it now also nearly reduces this fundamental principle to a mere right to be informed, *a priori* and by law, of the possibility of double jeopardy.

Third, and associated with the previous points, the CJEU seems to somehow trivialise the '*essence*' of the *non bis in idem* principle. Indeed, whereas in accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms, the CJEU finds in the annotated judgment that the mere fact that the national legislation provides for 'the possibility of a duplication of proceedings and penalties under different legislation' is sufficient to preserve the essence of the ne bis in idem principle.[22] This notion of 'different legislation' is further explained as relating to legislation that pursues 'distinct legitimate objectives'[23] or, stated differently, 'complementary aims relating to different aspects of the same unlawful conduct'[24]. In our view, this finding seems to be another emanation of the condition of the unity of the protected legal interest as previously provided in *Toshiba*. Indeed, whereas this criterion is no longer considered to be relevant to apply the '*idem*' condition and so as to check whether or not a duplication of proceedings and penalties could come under the application of the *non bis in idem* principle, the CJEU seems to reintroduce this element through the back-door in the

20 Case C-117/20 *bpost*, Opinion of AG Bobek, para 107.

21 Case C-117/20 *bpost*, Opinion of AG Bobek, para 109.

22 Case C-117/20 *bpost*, para 43.

23 Case C-117/20 *bpost*, paras 44 and 50.

24 Case C-117/20 *bpost*, para 50.

context of its assessment if a limitation of that principle could nonetheless be justified on the basis of Article 52(1) of the Charter. In practical terms, this of course leads to a similar result. In particular, although *bpost* can now legitimately rely on the *non bis in idem* principle, this principle will eventually not prevent a duplication of proceedings and penalties under sectoral rules and competition law.