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QUICK LINKS

CJ clarifies double jeopardy principles

On 22 March 2022 the European Court of Justice (CJ) clarified the scope of the protection afforded by the prohibition against double jeopardy in competition proceedings in its judgments in C-117/20 bpost and C-151/20 Nordzucker and Others.

BACKGROUND

Article 50 of the Charter of Fundamental Rights of the European Union establishes that "*no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*".

This prohibition against double jeopardy was at the centre of two requests for a preliminary ruling from the CJ - one made in the context of proceedings between the Belgian competition authority and bpost SA, and one in the context of proceedings between the Austrian competition authority and Nordzucker AG, Südzucker AG and Agrana Zucker GmbH.

BPOST

In July 2011 Belgian postal services provider, bpost, was fined €2.3 million by the Belgian postal regulator for introducing a discriminatory tariff system which led to an unjustified difference between mail preparation firms and bulk mailers. Bpost successfully appealed this decision, with the Belgian Court of Appeal annulling the postal regulator's decision in 2016 on the ground that the pricing practice was not discriminatory.

In the meantime, in December 2012 the Belgian competition authority determined that bpost's actions amounted to an abuse of a dominant position and fined bpost approximately €37.4 million. The fine imposed by the competition authority took into account the fine previously imposed by the postal regulator, and the procedure leading to the fine did not address the existence of discriminatory practices.

Though the Belgian Court of Appeal annulled the competition authority's decision in 2013 on the basis that it was contrary to the principle against double jeopardy, the Belgian Supreme Court referred the case back to the Court of Appeal. As a consequence, the Court of Appeal asked the CJ to clarify its position on the principle of double jeopardy.

NORDZUCKER AND OTHERS

The Austrian case pertains to a cartel between German sugar producers, Nordzucker and Südzucker, which was subject to parallel investigations by both the Austrian competition authority and the German competition authority, following leniency applications to both.

In September 2010 the Austrian competition authority brought a claim before the Austrian Higher Regional Court seeking a declaration that Nordzucker had breached Article 101

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TFEU and the corresponding provisions of Austrian national law. It also sought the imposition of a fine on Südzucker. The evidence relied on by the Austrian authority included a telephone call between the sales directors of Nordzucker and Südzucker pertaining to the Austrian market.

In February 2014, the German competition authority found that Nordzucker, Südzucker and another producer had infringed Article 101 TFEU and the corresponding provisions of Germany national law, and fined Südzucker €195.5 million. In its decision the German competition authority reproduced as evidence the content of the same telephone conversation.

As a consequence, in 2019 the Austrian court dismissed the action brought by the Austrian competition authority on the basis that the agreement concluded during the telephone conversation had already been subject to a fine by the German competition authority, and any fresh penalty would be contrary to the principle against double jeopardy. The Austrian competition authority appealed to the Austrian Supreme Court which asked the CJ to clarify the application of the principle against double jeopardy.

THE CJ'S RULINGS

In both cases, the CJ recalled that the application of the principle against double jeopardy requires that: (i) there must be a prior final decision; and (ii) that prior decision and the subsequent proceedings or decisions must concern the same facts – it noted that this condition requires the material facts to be identical, not merely similar, and that it is for the referring court to determine whether the facts in respect of which the two sets of proceedings were initiated were identical.

BPOST RULING

The CJ noted that if the referring court did consider the facts in issue in the two proceedings identical, that duplication would amount to a limitation of the fundamental right guaranteed by Article 50. It nevertheless clarified that such a limitation may be justified if the limitation is: (i) provided for by law; (ii) respects the essence of Article 50; and (iii) is necessary and genuinely meets objectives of general interest to the EU or the need to protect the rights and freedoms of others.

As to the first of these questions, the CJ noted it was for the referring court to verify whether the involvement of each of the national authorities in question was provided for by law. Regarding whether the possibility of duplication of proceedings and penalties respected the essence of Article 50, the CJ considered it did, provided that the national law only allowed the possibility of a duplication of proceedings and penalties under different legislation. As for whether the duplication of proceedings and penalties under sectoral rules and competition law met an objective of general interest, the court noted that the two sets of legislation pursue distinct legitimate objectives. It considered it legitimate for a Member State to punish infringements of sectoral rules in order to advance the ongoing liberalisation of the internal market for postal services and, separately, to punish infringements of competition law to ensure the proper functioning of the market.

Further, the CJ considered the issue of proportionality, noting that penalties provided for by national legislation must not exceed what is "*appropriate and necessary*" to meet the objectives legitimately pursued by the legislation. Moreover, it added that public authorities may choose complementary legal responses relating to different aspects of the same unlawful conduct through different procedures which form a coherent whole as long as the cumulative response is not overly burdensome for the individual concerned.

Finally, the CJ emphasised that where there is a duplication of proceedings, there must be clear and precise rules which make it possible to predict: (i) which acts or omissions are liable to be subject to a duplication of proceedings and penalties; (ii) that there will be coordination between the different authorities; (iii) whether the two sets of proceedings have been conducted in a sufficiently coordinated manner and within a proximate

timeframe; and (iv) whether any penalty imposed in the first proceedings was taken into account in the assessment of the second penalty, so that the overall penalties imposed correspond to the seriousness of the offences committed.

NORDZUCKER AND OTHERS RULING

The CJ considered that the fact that the competition authority of one Member State refers - in a decision finding an infringement of EU and national competition law - to a factual element relating to the territory of another Member State is not sufficient to suggest that the factual element was a key element of the infringement. Indeed, it must be proven that the authority actually based their ruling on that factual element and used it to establish liability and impose a penalty. In this respect it held that the referring court must decide whether the German competition authority's final decision sought to penalise the cartel on the basis of its anticompetitive object or effect in Austria as well as in Germany – if not, the referring court should find that the proceedings do not relate to the same facts and Article 50 would not be infringed; if so, such duplication of proceedings and penalties would constitute a limitation of the right guaranteed by Article 50.

Ultimately, the CJ concluded that Article 50 does not preclude an undertaking from having proceedings brought against it in a Member State and being fined for breaking competition law because it has had an anticompetitive effect in that Member State, even where that conduct has already been referred to in a final decision of a competition authority of another Member State, provided that that decision is not based on a finding of an anticompetitive object or effect in the territory of the first Member State.

OTHER DEVELOPMENTS

MERGER CONTROL

CMA CLEARS AWAL/SONY MUSIC AT PHASE 2

On 16 March 2022 the UK Competition and Markets Authority (CMA) announced that, following a Phase 2 review, it has cleared the completed acquisition by Sony Music Entertainment of AWAL and Kobalt Neighbouring Rights businesses from Kobalt Music Group Limited.

Sony is a major record label that also owns The Orchard, an artist and label (A&L) services provider. A&L services generally cover promotion, marketing and distribution, and also enable artists to retain full ownership of their copyrights and a larger share of royalties. AWAL is an emerging music distributor that provides an alternative to traditional music deals, offering both A&L services and a 'DIY platform' that allows artists to upload their own music for distribution.

The CMA focussed on two key areas of overlap between the two businesses. Firstly, it assessed the extent to which The Orchard and AWAL may be expected to compete in the provision of A&L services. Secondly, the CMA investigated how closely Sony and AWAL may be expected to compete in relation to the signing of successful and emerging artists who require higher levels of support and investment.

The CMA found that The Orchard and AWAL are not currently in close competition due to their different areas of focus and, while The Orchard may have become a stronger competitor to AWAL in the future, there are many other providers of A&L services who will continue to compete effectively with both businesses, including independent A&L companies, the A&L branches of other major labels (like Warner's ADA and Universal Music Group's Virgin) and independent labels. As regards AWAL's competition with Sony, the CMA found that AWAL is still a relatively small player when it comes to signing artists who require higher levels of support and

investment, and it is expected to continue to compete with Sony only on a limited basis. The CMA further noted that there are many other firms who have begun providing similar services which can be expected to compensate for the limited loss of competition from AWAL. As a result, the CMA has decided to clear the transaction unconditionally.

ANTITRUST

HONG KONG COMPETITION COMMISSION TO FOCUS ON DIGITAL ECONOMY CASES RELEVANT TO THE HONG KONG PUBLIC

During a webinar organised by the British Chamber of Commerce in Hong Kong held on 10 March 2022, the Executive Director of Operations of the Hong Kong Competition Commission (HKCC), Jindrich Kloub, emphasised that the HKCC will focus on cases that have a particular connection to Hong Kong rather than replicating enforcement action in other jurisdictions. In particular, he noted that, given its limited size and resources, the HKCC will prioritise cases for which it is the only authority capable of achieving remedies in the interests of Hong Kong consumers. This means the HKCC is unlikely to pursue cases if it feels its counterparts in overseas jurisdictions have addressed matters in a manner that will also resolve the issue for consumers in Hong Kong.

In December 2021 the HKCC announced that one of its enforcement focuses will be on cases and market studies involving digital markets. In furthering this aim, Kloub noted that the HKCC has engaged external consultants to conduct a study related to the online retail market. The HKCC has launched an investigation into the conduct of the companies behind online food delivery platforms Foodpanda and Deliveroo (for further details, see our February newsletter) and Kloub revealed that the HKCC is currently looking into cases in the digital sector that involve large multinational companies.

STATE AID

EUROPEAN COMMISSION PUTS IN PLACE NEW STATE AID CRISIS FRAMEWORK TO DEAL WITH IMPACT OF UKRAINE WAR

On 23 March 2022 the European Commission announced the adoption of a Temporary Crisis Framework, enabling Member States to use the flexibility foreseen under EU State aid rules to support the economy in the context of Russia's aggression against Ukraine. The Commission recognised that sanctions imposed on Russia are causing a serious disturbance to the European economy. "*We need to mitigate the economic impact of this war and to support severely impacted companies and sectors. And we need to act in a coordinated manner*", said Executive Vice-President Margrethe Vestager.

The Temporary Crisis Framework will be in place until 31 December 2022. It provides for three types of aid:

- **Limited amounts of aid**: Member States will be able to set up schemes to grant up to €35,000 for companies affected by the crisis active in the agriculture, fisheries and aquaculture sectors and up to €400,000 per company affected by the crisis active in all other sectors.
- **Liquidity support in form of State guarantees and subsidised loans**: Member States will be able to provide (i) subsidised State guarantees to ensure banks keep providing loans to all companies affected by the current crisis; and (ii) public and private loans with subsidised interest rates.

- **Aid to compensate for high energy prices**: Member States will be able to partially compensate companies, in particular intensive energy users, for additional costs due to exceptional gas and electricity price increases. This support can be granted in any form, including direct grants. The overall aid per beneficiary cannot exceed 30 per cent of the eligible costs, up to a maximum of €2 million at any given point in time. When the company incurs operating losses, further aid may be necessary to ensure the continuation of an economic activity. In such cases, Member States may grant aid exceeding these limits, up to €25 million for energy-intensive users, and up to €50 million for companies active in specific sectors.

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