



The principle of ne bis in idem in Competition Law



AGENDA





RISK OF MULTIPLICITY OF PROCEEDINGS IN COMPETITION LAW



WORKING PROPOSITION

In the absence of clear jurisdictional rules, the only justiciable and, at least in principle, predictable way of limiting the proliferation of proceedings and decisions concerning the same competition infringements against the same undertakings is a robust and coherent application of the *ne bis in idem* principle



THEORETICAL FOUNDATIONS OF THE PRINCIPLE



The principle may be understood as resting on four main theories:

- Rights-based theories
- Free movement theories
- Legitimacy theories
- Disciplinary theories

Foundations of the ne bis in idem principle



THE TEST: FROM *TOSHIBA* TO *BPOST*

C-17/10
TOSHIBA

Three-fold test to the definition of the same offence, requiring a) the identity of the facts, b) the identity of the offender and c) the identity of the legal interest protected

Bpost – the test

The ECJ brings EU law in line with *A and B V. Norway* (ECHR:2016:1115)

From a three-pronged test to a two-pronged test – same legal person and identical material facts – no longer required that the legal interest protected be the same

Same legal person – does it need to be adapted to EU competition law, where what matters is the concept of “undertaking”?

Material facts need to be identical, not just similar – test is stringent but the ECJ adopts the ECHR test:

Identity of the material facts must be understood to mean a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space

Bpost – Limitations on the principle

Article 52(1)

- Provided for by law
- Proportionality
- Necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others

ECJ

General principles:

- Duplication of proceedings respects the essence of Article 50 if it occurs under different legislation
- 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
- Clear and precise rules that identify which acts or omissions may be subject to a duplication of proceedings
- Coordination between authorities – in theory and in practice
- Overall penalties correspond to the seriousness of the offences

Application to the facts:

- postal regulation and competition law pursue distinct legitimate objectives



Outstanding Ne Bis in Idem Issues After *Bpost*



Outstanding issues

Fragmentation of the same offence

What types of decision bar a second prosecution or conviction?

EU competition law and national competition laws of the EU Member States

Eu competition law and competition laws of non-EU Member States



The DMA and Competition Law

DMA and Competition Law

Chapter V -Investigative, enforcement and monitoring powers (Article 20-43)

Enforcement proceedings (Article 20-29):

- Where the Commission has a view to possibly adopt a decision (i) ordering to a gatekeeper to comply with his obligations (Article 8), (ii) finding the non-compliance of the gatekeeper (Article 29) or (iii) imposing on the gatekeeper fines (Article 30), the Commission may adopt a **decision opening the proceedings** (Article 20)
- The Commission, by **request or decision, requires** to undertakings and associations of undertakings **information and /or access to data**, algorithms, information about testing and/or explanations about them (Article 21)
- The Commission may **interview** any natural or legal person which consents to being interviewed (and record such interviews as well), for the purpose of collecting information, relating to the subject-matter of an investigation (Article 22)
- The Commission may **conduct all necessary inspections** of an undertaking or association of undertakings (Article 23)
- In case of urgency due to the risk of serious and irreparable damage for business users or end users of gatekeepers, the Commission may **order interim measures** against a gatekeeper on the basis of a prima facie finding of an infringement of Article 5, 6 or 7 (Article 24)
- If during market investigation for the purpose of examining whether a gatekeeper has engaged in systematic non-compliance (Article 18), the gatekeeper offers commitment for the core platform services to ensure compliance with obligations in Article 5-6-7, the Commission may adopt an **implementing act making those commitments binding on that gatekeeper and declare that there are no further grounds for action**. Conversely, upon request or ex officio, the Commission **may reopen** the proceedings because of (a) material change of facts on which the decision was based, (b) infringement of commitments by gatekeeper, (c) ineffectiveness of commitments (Article 25)
- Within 12 months from the opening of proceedings pursuant to Article 20, the Commission shall adopt **the non-compliance decision** where it finds that a gatekeeper does not comply with one or more of the conditions provided for in Article 29 para.1. (Article 29)
- In the non-compliance decision, the Commission **may impose** on a gatekeeper **fines** not exceeding 10 % of its total worldwide turnover in the preceding financial year where it finds that the gatekeeper, intentionally or negligently, fails to comply with the conditions provided for in Article 30(1)
- Where the Commission decides not to adopt a non-compliance decision, it shall **close the proceedings adopting a decision** (Article 29)

DMA and Competition Law

Recitals

- (9) Fragmentation of the internal market can only effectively be averted if Member States are prevented from applying national rules which are within the scope of and pursue the same objectives as this Regulation. That does not preclude the possibility of applying to gatekeepers within the meaning of this Regulation other national rules which pursue other legitimate public interest objectives as set out in the TFEU or which pursue overriding reasons of public interest as recognised by the case law of the Court of Justice of the European Union ('the Court of Justice')
- (10) At the same time, since this Regulation aims to complement the enforcement of competition law, it should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour, including its actual or potential effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question, and to national rules concerning merger control. However, the application of those rules should not affect the obligations imposed on gatekeepers under this Regulation and their uniform and effective application in the internal market

DMA and Competition Law

Recitals

- (11) Articles 101 and 102 TFEU and the corresponding national competition rules concerning anticompetitive multilateral and unilateral conduct as well as merger control have as their objective the protection of undistorted competition on the market. This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application

DMA and Competition Law

Prohibitions coextensive with competition infringements

- **Article 5(7):** The gatekeeper shall not require end users to use, or business users to use, to offer, or to interoperate with, an identification service, a web browser engine or a payment service, or technical services that support the provision of payment services, such as payment systems for in-app purchases, of that gatekeeper in the context of services provided by the business users using that gatekeeper's core platform services –*Apple App Store* case (App Store developers required to use Apple Pay)
- **Article 6(2):** The gatekeeper shall not use, in competition with business users, any data that is not publicly available that is generated or provided by those business users in the context of their use of the relevant core platform services or of the services provided together with, or in support of, the relevant core platform services, including data generated or provided by the customers of those business users – *Amazon Market Place* case
- **Article 6(5):** The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair a non-discriminatory conditions to such ranking –*Google Shopping* case

DMA and Competition Law

Distinct legitimate objectives?

Complementary legal responses 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?

First appeal set aside or annulled on appeal or judicial review

Coordination between authorities – in theory and in practice?

Overall penalties correspond to the seriousness of the offences?



Thank you

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