August – September 2021

EU Competition Law Newsletter

Highlights

— Commission Opens In-Depth Investigations Into Two Article 22 EUMR Upward Referral Cases

— The General Court Upholds The Commission's Record Gun-Jumping Fine In Altice

Commission Opens In-Depth Investigations Into Two Article 22 EUMR Upward Referral Cases

In March 2021, the Commission adopted a Communication (the "Guidance")[1] on the application of the referral mechanism pursuant to Article 22 of the EU Merger Regulation ("EUMR"). The Guidance encourages national competition authorities ("NCAs") to refer to the Commission certain transactions[2] that do not meet national merger control thresholds and would otherwise escape merger control review in the EU. The Commission had long discouraged the referral of such cases, considering that they were generally unlikely to have a significant impact on the internal market.

While the impact of the new policy will vary by industry, mergers in the digital and pharmaceutical sectors are likely to be among the most affected. Since this policy shift became effective, two cases, *Illumina/GRAIL* and *Facebook/Kustomer*, have been referred to the Commission under Article 22 EUMR, both of which have now triggered a Phase II investigation.

Illumina/GRAIL: the Commission launches Phase II review of the first effective Article 22 EUMR upward referral

On April 19, 2021, after encouraging national competition authorities to make Article 22 EUMR referrals,[3] the Commission accepted a request by several NCAs of genomic sequencing company Illumina's proposed acquisition of cancer detection test maker GRAIL, a transaction

[1] Communication Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C(2021) 1959 final of March 26, 2021. *See*, for reporting on the broader application of Article 22 EUMR and its practical implications, our April 23, 2021 Alert Memorandum "European Commission Implements New Policy To Investigate Transactions That Would Otherwise Escape Merger Review."

[2] Including cases where the target is a nascent competitor, important innovator, actual or potential important competitive force, has access to competitively significant assets, and/or provides products or services that are key inputs/components for other industries (Guidance, para. 19). In the Commission's view, transactions that may be appropriate for a referral include transactions where the turnover of at least one of the parties "does not reflect its actual or future competitive potential."

[3] See Commission Press Release IP/21/1384 "Mergers: Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control," March 26, 2021.

that did not meet notification thresholds in any Member State.[4]

On July 22, 2021, the Commission opened an in-depth investigation into the transaction, expressing concerns that the transaction may reduce competition and innovation in the emerging market for the development and commercialization of cancer detection tests based on sequencing technologies.[5]

According to the Commission, Illumina could have the ability and incentive to engage in vertical input foreclosure strategies following its acquisition of GRAIL. In particular, Illumina has a leading position in the market for next-generation genomic sequencers, which are crucial inputs for the development and commercialization of sequencer-based cancer detection tests of the type developed by GRAIL. Consequently, the Commission suspects that Illumina could leverage its market position to foreclose potential GRAIL competitors after this acquisition, denying them access to these crucial inputs.

While the Commission has until the end of November to adopt a decision,[6] Illumina decided, on August 18, 2021, to close the transaction because, according to Illumina, its agreement to acquire GRAIL would otherwise expire before the end of the Commission's review. The Commission is now investigating, in parallel to its merger control review of the transaction, whether Illumina's conduct amounted to gun-jumping, *i.e.*, a breach of the EUMR standstill obligation.[7]

On September 20, 2021, the Commission sent Illumina and GRAIL a Statement of Objections informing them of interim measures it contemplated adopting pursuant to their alleged infringement of the standstill obligation,[8] to which the response remains pending. Illumina has in parallel challenged, before the General Court, the Commission's jurisdiction in the proceedings.[9]

The Commission launches Phase II review of referred *Facebook/Kustomer* transaction

On May 12, 2021, the Commission accepted, at the request of a number of NCAs, the referral of Facebook's proposed acquisition of Kustomer, a Customer Relationship Management ("CRM") services provider.[10] Unlike *Illumina/GRAIL*, the *Facebook/Kustomer* transaction was reportable to the Austrian Competition Authority.

The Commission opened an in-depth investigation into the transaction on August 2, 2021, alleging, first, that it could reduce competition in the markets for the supply of CRM software and for the supply of customer service and support CRM software. The Commission suspects that Facebook may have the ability to degrade or foreclose access of potential Kustomer competitors to its B2C over-the-top ("OTT") messaging channels post-acquisition, whereas these messaging channels account for a large portion of the B2C OTT messaging market, which is in turn an important input for the supply of CRM software services.

Second, the proposed transaction could strengthen Facebook's market position in the online display advertising market, on which Facebook might—according to the Commission—already hold a dominant position in several

[4] France submitted a referral request to the Commission pursuant to Article 22 EUMR and was subsequently joined by Belgium, Greece, Iceland, the Netherlands, and Norway. *See* Commission Press Release MEX/21/1846 "Commission to assess proposed acquisition of GRAIL by Illumina," April 20, 2021. For reporting on the referral process in *Illumina/GRAIL*, see also our April 2021 EU Competition Law Newsletter.

[5] *See* Commission Press Release IP/21/3844, "Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina," July 22, 2021.

[6] At the time of the writing of the article, the proceedings' clock had been stopped since August 11, 2021, after the Commission found that the parties had failed to provide essential information. *See* update on the Commission's website page dedicated to *Illumina/GRAIL* (Case COMP/M.10188), available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_10188.

[7] Article 7(1) EUMR. See Commission Press Release IP/21/4322, "Commission starts investigation for possible breach of the standstill obligation in Illumina/GRAIL transaction," August 20, 2021.

[8] *See*, Commission Press Release IP/21/4804, "The Commission adopts a Statement of Objections in view of adopting interim measures following Illumina's early acquisition of GRAIL," September 20, 2021.

[9] *Illumina v Commission* (Case T-227/21) EU:T:2021:672, case pending.

[10] Austria submitted a referral request to the Commission pursuant to Article 22 EUMR and was subsequently joined by Belgium, Bulgaria, France, Iceland, Italy, Ireland, the Netherlands, Portugal, and Romania. *See* Commission Press Release MEX/21/2464, "Commission to assess proposed acquisition of Kustomer by Facebook," May 12, 2021.

Member States. The acquisition of Kustomer could in particular facilitate Facebook's collection of valuable data from businesses using Kustomer's CRM software.[11] The transaction could thus raise barriers to entry and expansion for Facebook's competitors for these advertising services, impacting publishers that would face higher prices and less choice.

Conclusion

The *Illumina/GRAIL* referral is the first illustration of the Commission's Article 22 EUMR policy shift, as it involves the referral of a vertical acquisition of a developing undertaking active in an innovation-focused field that would otherwise not have been reportable anywhere in the EU. By contrast, *Facebook/Kustomer* is a more conventional horizontal Article 22 EUMR referral of a transaction that met a national notification threshold.

The Commission's new policy has run into criticism due to the regulatory uncertainty it creates.[12] Interestingly, pending the General Court's *Illumina* judgment and absent any official guidance, merging companies have begun anticipating the risk of Article 22 EUMR referrals in their deals. For example, in its recent offer to acquire computer software company Avast, antivirus maker NortonLifeLock envisaged the possibility of an Article 22 EUMR referral despite emphasizing that the projected transaction should not meet EUMR thresholds.[13]

The General Court Upholds The Commission's Record Gun-Jumping Fine In Altice

On September 22, 2021, the General Court dismissed Altice's appeal against two fines totalling €124.5 million imposed by the Commission in 2018 (the "Decision") [14] for exercising control over PT Portugal before the acquisition had received merger control clearance, *i.e.*, gun-jumping.[15]

While the General Court upheld most of the Commission's reasoning in relation to Altice's unlawful exercise of decisive influence over PT Portugal, it ordered a 10% reduction of the €62.25 million fine relating to the breach of the obligation to notify the transaction to the Commission.

The Commission Decision sanctioning Altice

In December 2014, telecommunications operators Altice and PT Portugal entered into a Share Purchase Agreement ("SPA") for the former to acquire the latter. In February 2015, Altice notified the transaction to the Commission. On April 20, 2015, the Commission conditionally cleared the transaction.[16] However, following press reports on contact that occurred between the companies' executives in advance of clearance, the Commission launched an investigation regarding a possible gun-jumping infringement.[17]

[11] Including data on gender, order and purchase history, website views, wish lists and store visits. Business store this data in Kustomer's CRM software and may decide to share it with Facebook. In the online display advertising market, the Commission opines that such data could provide Facebook with an important competitive advantage, making it more difficult for rivals to match Facebook's online advertising services.

[12] *See*, for example, the August 2, 2021, position paper of the Association of In-House Competition Lawyers (ICLA), stating that the Commission's policy is "incompatible with the spirit of the EUMR and goes against a number of EU legal principles, [...] in particular legal certainty, legitimate expectation and the subsidiarity principle." *See*, for reporting on the regulatory uncertainty generated by this policy shift, our April 23, 2021, Alert Memorandum "European Commission Implements New Policy To Investigate Transactions That Would Otherwise Escape Merger Review."

[13] *See* NortonLifeLock Inc.'s offer to acquire Avast Plc, August 10, 2021, available at: https://www.investegate.co.uk/nortonlifelock-inc./rns/recommended-merger-of-avast-with-nortonlifelock/20210811070009222 1I/.

[14] *Altice/PT Portugal* (Case COMP/M.7993), Commission decision of April 24, 2018.

[15] *Altice v European Commission* (Case T-425/18) EU:T:2021:607 ("*Altice*").

[16] *Altice/PT Portugal* (Case COMP/M.7499), Commission decision of April 20, 2015.

[17] Commission Press Release IP/17/1368, "Commission alleges Altice breached EU rules by early implementation of PT Portugal acquisition," May 18, 2017.

In particular, the Commission sought to determine (i) whether Altice had infringed the obligation for concentrations to be notified to the Commission before they are implemented under Article 4(1) EU Merger Regulation ("EUMR"); and (ii) whether Altice had infringed the obligation for concentrations not to be implemented before the Commission declares them compatible with the internal market under Article 7(1) EUMR.[18]

The Commission's investigation concluded that Altice had exercised decisive influence over PT Portugal's business before clearance and, in some instances, even before notification.[19] First, the SPA entitled Altice to veto a broad range of PT Portugal's corporate and commercial decisions and "went beyond the aim of value preservation of the target."[20]

Second, the actions that Altice took following the signing of the SPA showed that Altice had actually exercised control over PT Portugal before notification.[21] Third, from the signing of the SPA, the parties had exchanged sensitive, recent, and granular financial data without the necessary confidentiality measures.[22]

On April 24, 2018, the Commission fined Altice €62.25 million for implementing the transaction before its notification, and an additional €62.25 million for implementing the transaction before clearance. The Commission regarded Altice's infringements as "serious"[23] and "intentional or at the very least negligent" given Altice's significant past experience in merger control, attested awareness of gun-jumping risks, and the serious competition concerns that the transaction raised.[24]

The General Court's judgment

On July 5, 2018, Altice brought an action before the General Court seeking to annul the Decision. Altice argued that the obligation to notify the transaction under Article 4(1) EUMR and the fine sanctioning the failure to comply were redundant in light of the standstill obligation under Article 7(1) EUMR.

The General Court dismissed the claim, and held that Articles 4(1) and 7(1) EUMR pursue autonomous objectives and, therefore, are not redundant: while the former imposes a positive obligation to act (*i.e.*, obligation to notify a concentration), the latter sets out a negative obligation not to act (*i.e.*, prohibition to implement a concentration before it is cleared).[25] The General Court noted that these provisions are distinct given that an undertaking may comply with the notification obligation while simultaneously infringing the standstill obligation.[26]

Altice also disputed the existence of the infringement, arguing that the Commission had erred in law and in fact by finding that Altice acquired sole control of PT Portugal.

First, Altice contended that the SPA did not give it a right to veto PT Portugal's strategic decisions. The General Court dismissed Altice's claim and noted that the SPA afforded Altice the possibility to influence PT Portugal's decision-making via a range of senior management appointment and dismissal rights. The General Court observed that such powers usually confer on their holder a decisive influence over the target's commercial policy.[27]

[18] *See*, Cleary Gottlieb's July-September 2018 EU Competition Quarterly Report for reporting on the Commission's decision.

[19] Decision, paras. 483–484 and 488–491.

[20] *Ibid.*, para. 480–481.

[21] *Ibid.*, paras. 489–490.

[22] *Ibid.*, para. 482.

[23] *Ibid.*, para. 573.

[24] *Ibid.*, paras. 580 *et seq.*

[25] *Altice*, paras. 56.

[26] *Ibid.*, para. 63.

[27] *Ibid.*, paras. 109–114.

Second, the General Court found that the SPA included "extremely broad" provisions on pricing policies, including standard terms and conditions, that obliged PT Portugal to request Altice's consent to revise its pricing policies.[28]

Third, the General Court noted that the SPA allowed Altice to enter into, terminate, or modify a broad range of PT Portugal's contracts subject to a specific monetary threshold of €1, which the General Court deemed "so low that it must be held that [the SPA] indeed [goes] beyond what is necessary to preserve the value of the applicant's investment."[29] In addition, PT Portugal confirmed that it had to seek Altice's "consent to all material contracts," regardless of whether it was in the ordinary course of business.[30]

The General Court concluded that Altice's extensive rights, combined with the low monetary threshold permitting Altice's intervention, went beyond what was necessary to preserve the value of the target's business.[31] The General Court held that the terms of the SPA gave Altice the possibility of exercising decisive influence over PT Portugal before the notification of the transaction.[32] In fact, the General Court found that exchanges of sensitive information took place before notification, allowing Altice to exercise decisive influence over PT Portugal,[33] and that Altice intervened in PT Portugal's ordinary course of business on seven instances before clearance.[34]

In response to Altice's claim that the Commission's fines infringed the principle of proportionality, the General Court found that Altice had informed the Commission of the transaction before the signing of the SPA and had sent, immediately after the signing, a case team allocation request to the Commission, followed by a draft notification form, including a copy of the SPA and its annexes.[35] The General Court thus took account of the steps Altice had taken towards a notification and reduced the €62.2 million fine relating to the breach of Article 4(1) EUMR by 10%.[36]

Conclusion

Following a spate of gun-jumping decisions and judgments at the EU level,[37] the *Altice* judgment further confirms that extensive rights for the acquirer in the sale agreement may be construed as conferring control over the target and lead to high fines. A case-by-case analysis of the related clauses and monetary thresholds must therefore be conducted to determine whether such covenants go beyond what is necessary to prevent any material changes to the target's business and preserve the value of the acquired business.

This judgment also reaffirms the standstill obligation as a cornerstone of EU merger control and strengthens the Commission's stringent policy *vis-à-vis* gun-jumping cases. Interestingly, the *Altice* judgment was issued shortly after pharmaceutical company Illumina closed its acquisition of GRAIL before obtaining the Commission's approval.[38]

The ruling may also find an echo in the *Canon* case, in which Canon is seeking annulment of a €28 million fine imposed by the Commission in

[28] *Ibid.*, para. 115.

[29] *Ibid.*, paras. 109 and 117.

[30] *Ibid.*, para. 118.

[31] *Ibid.*, paras. 117 and 131.

[32] *Ibid.*, para. 132.

[33] *Ibid.*, paras. 240 and 366.

[34] *Ibid.*, paras. 181–199. For instance, PT Portugal requested Altice's consent before launching a campaign "to speed up customer migration from pre-paid contracts to post-paid contracts" for mobile services. Altice also intervened in negotiations over whether PT Portugal would renew the distribution agreement for the Porto Canal sports channel.

[35] *Ibid.*, para. 367.

[36] *Ibid.*, para. 368.

[37] *See*, in particular, *Marine Harvest/Morpol* (Case COMP/M.7184), Commission decision of July 23, 2014; *Marine Harvest v Commission* (Case C10/18 P) EU:C:2020:149; *Ernst & Young* (Case C-633/16) EU:C:2018:371 (and our June 25, 2018 Alert Memorandum "EU Merger Control Standstill Obligation – EY Judgment"); and *Canon/Toshiba Medical Systems Corporation* (Case COMP/M.8179), Commission decision of June 27, 2019.

[38] *See* Commission Press Release IP/21/4322, "Commission starts investigation for possible breach of the standstill obligation in Illumina/GRAIL transaction," August 20, 2021. The Commission recently issued a Statement of Objections in view of adopting interim measures, despite Illumina's promise that it would hold GRAIL as a separate company in consideration of the Commission's ongoing review.

2019 for implementing its acquisition of Toshiba Medical Systems Corporation before seeking and obtaining merger control clearance.[39] Although the issue is distinct from *Altice*, Canon contends that the "warehousing" deal structure did not give it any control over the target. The General Court's assessment in *Altice* may thus provide a useful parallel for the assessment of Canon's conduct.

News

Commission Updates

Commission Continues Quest For Green Revolution With Competition Policy In Support Of Europe's Green Ambition

On September 10, 2021, the European Commission published a policy brief on "Competition Policy in Support of Europe's Green Ambition" (the "Policy Brief").[40] A year after Executive Vice-President Margrethe Vestager called for a greener EU competition policy,[41] the Policy Brief summarizes the key takeaways from the stakeholder consultation and sets out the Commission's ambitions for a greener competition policy. The key message being that "a green competition policy still has to be – well, a competition policy."[42]

Background and scope of Policy Brief

In its Policy Brief, the Commission outlines that competition policy should support and complement Europe's green ambition, because the effectiveness of environmentally ambitious policies hinges, according to the Commission, on fair competition enabling companies "to innovate by competing intensely and fairly with each other."[43]

In essence, the respondents to the Commission consultation agreed that competition policy has a significant role to play in reaching the Green Deal objectives. The Policy Brief summarizes the input thus received and puts forward policy proposals covering the fields of (i) antitrust, (ii) merger control, and (iii) State aid control.[44]

Antitrust

In response to stakeholder input, the Commission pinpointed several topics for discussion.[45]

— First, a number of respondents called on the Commission to clarify how to jointly invest, identify solutions, produce, and distribute sustainable products without breaching Article 101(1) TFEU. The Commission confirms that the revised guidelines on horizontal cooperation and vertical agreements will provide more guidance on the application of Article 101 TFEU to agreements that pursue sustainability objectives or otherwise impact the environment. The guidance is expected to provide concrete examples of how sustainability objectives can be pursued safely, via, for instance, joint production or purchasing agreements and standard-setting agreements.[46]

[39] *See Canon v Commission* (Case T-609/19), case pending. *See*, for broader reporting on the *Canon* case, our June 2019 EU Competition Law Newsletter.

[40] *See*, Commission Competition Policy Brief 1/2021 "Competition Policy in Support of Europe's Green Ambition," September 10, 2021, available at: https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF. *See also*, for further information on the European Green Deal, https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

[41] *See*, for reporting on Executive Vice-President Vestager's speech and the publication of the call for contributions, our October 19, 2020 Alert Memorandum "EU Commission Call for Contributions on 'Competition Policy Supporting the Green Deal."

[42] *See*, Executive Vice-President Vestager's keynote speech at the 25th IBA Competition Conference, available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en.

[43] *See*, Policy Brief, p. 1.

[44] *See*, Policy Brief, pp. 2–3.

[45] *See*, Policy Brief, pp. 5–6.

[46] *See*, Policy Brief, pp. 2 and 5.

— Second, a number of respondents asked the Commission to clarify whether and how to assess sustainability benefits in the context of its assessment of conducts under Article 101(3) TFEU (*e.g.*, consideration of non-economic benefits occurring outside the investigated markets, expansion or revision of the notions of "consumers" and "fair share"). The Commission confirms it will commit to taking sustainability benefits into account—whether qualitative or cost efficiencies—as part of its assessment of the exemption under Article 101(3) TFEU.[47]

— Third, the Commission maintains that the competitive effects and benefits should be assessed "within the confines of each relevant market."[48] The Commission states that "benefits achieved on separate markets can possibly be taken into account provided that the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same." According to the Commission, this would incentivize companies to invest in green solutions through joint investment, production and distribution, while preserving the consumer welfare standard—a "soun[d] princip[e]" of competition law—and ensuring that consumers are fully compensated for any harm suffered.[49] However, experts have criticized the Commission's approach, deeming it overly prudent and arguing that there are no policy reasons to limit an agreement's benefits to those in the relevant market.[50]

Finally, the Commission expresses its readiness to provide individual guidance letters on specific sustainability initiatives, encouraging companies to request such an assessment.[51]

Merger control

As regards merger control,[52] respondents emphasized the need for the Commission to strengthen enforcement concerning possible harm to innovation, including so-called green "killer acquisitions." The Commission refers to the guidance on the Article 22 EUMR referral mechanism it recently adopted.[53] Beyond "killer acquisitions," the Commission notes it will continue enforcing innovation theories of harm, as it did in *Dow/Dupont*,[54] in order to protect innovation benefiting the environment, especially in industries with long innovation cycles, such as environmental technologies.[55]

State aid control

Respondents identified State aid control as a key instrument to support Green Deal targets. They insisted on the need to focus on the funding of non-fossil fuels, called for a clarification and simplification of the Commission's rulebook (*e.g.*, transparency on potentially harmful State aid initiatives), and its adaptation to enhance research & development possibilities.[56]

The Policy Brief essentially points to the broadness of the existing regulatory tools in this field. For instance, the Commission signals that the new

[47] *See*, Policy Brief, pp. 2–3 and 5–6. The Commission further recalls that sustainability benefits need not be "direct or immediately noticeable" product quality improvements or cost-savings.

[48] *See*, Policy Brief, p. 6.

[49] *See*, Policy Brief, p. 6.

[50] *See*, Netherlands Authority for Consumers and Markets and Hellenic Competition Commission's "Technical Report on Sustainability and Competition" of January 2021, available at: https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf. *See also*, OECD, "Climate Change and Competition Law – Note by Simon Holmes," October 27, 2020. See, finally, Maurits Dolmans, "Sustainability agreements and antitrust – three criteria to distinguish beneficial cooperation from greenwashing," Chillin' Competition Blog, September 9, 2021, available at: https://chillingcompetition.com/2021/09/09/sustainability-agreements-and-antitrust-three-criteria-to-distinguish-beneficial-cooperation-from-greenwashing-by-maurits-dolmans.

[51] *See*, Policy Brief, p. 6.

[52] *See*, Policy Brief, pp. 6–7.

[53] Council Regulation (EC) No 139/2004 of January 20, 2004, on the control of concentrations between undertakings OJ 2004 L 24 ("EUMR"). *See*, for reporting on the application of Article 22 EUMR and its practical implications, our April 23, 2021 Alert Memorandum "European Commission Implements New Policy To Investigate Transactions That Would Otherwise Escape Merger Review."

[54] *See, Dow/DuPont* (Case COMP/M.7932), Commission decision of March 27, 2017.

[55] In particular, the Commission commits to protecting "innovation efforts on environmentally friendly technologies or capabilities when there is a risk of discontinuation of overlapping lines or research, or there is a risk of a reduction of incentives and the ability to achieve the same level or type of innovation." See, Policy Brief, p. 7.

[56] *See*, Policy Brief, pp. 2, 3–5.

Climate, Energy, and Environment Aid Guidelines and the revised related sections of the General Block Exemption Regulation will provide new opportunities for Member States and businesses to act consistently with the Green Deal.

The new rules will expand the scope of compatible aid, including by allowing investments in green infrastructure without the need for prior Commission approval, and discourage governments from making investments in fossil fuels. Separately, the Commission recalls that it is reviewing the rules for Important Projects of Common European Interest,[57] in order to involve a greater number of participants (*e.g.*, SMEs), favor environment-neutral investments, and better conform to Green Deal objectives.

Finally, the Policy Brief emphasizes the critical role of other instruments, such as the regional aid guidelines, State aid frameworks in agriculture, forestry, fisheries, which all have recently been, or soon will be updated.[58]

The way forward

The Commission's Policy Brief takes place in the broader context of its ambitious reform of competition law to address the current challenges of climate change, the COVID-19 pandemic, and the digital economy. The call for contributions has stirred up considerable interest across the spectrum of competition instruments, highlighting the need for stakeholders to receive clearer guidance on the interaction between competition policy and sustainability. It remains to be seen how the Commission's ambitions will translate into its various enforcement tools.

Court Updates

Ne Bis In Idem And EU Law: One Test To Rule All?

On September 2, 2021, Advocate General ("AG") Bobek issued his opinions on two preliminary ruling requests, *Bpost*[59] and *Nordzucker* (the "Opinions"),[60] recommending to harmonize the principle of *ne bis in idem*—otherwise known as the double jeopardy test—in the EU, as it applies to all branches of EU law. AG Bobek suggested that application of the *ne bis in idem* principle should be based on a "triple identity" test: namely, of the offender, the relevant facts, and the protected legal interest.[61]

The *ne bis in idem* principle

The principle of *ne bis in idem* is laid down in Article 50 of the EU Charter of Fundamental Rights (the "Charter") as a fundamental EU law principle.[62] Its purpose is to prevent the same defendant from being tried or punished twice for the same offence and facts for which a final decision has been previously handed down.[63]

Relevant case law suggests that the prohibition of double jeopardy applies in competition law cases if, between two cases (provided that a final decision on one of them has been issued), their facts, the offender, and the legal interest protected are the

[57] Important Projects of Common European Interest comprise innovative research projects that often entail significant risks, and require joint, well-coordinated efforts and transnational investments by public authorities and industries from several Member States. *See*, for more information on those rules and their ongoing review, Commission Press Release IP/21/689, "Commission invites stakeholders to provide comments on revised State aid rules on Important Projects of Common European Interest," February 23, 2021.

[58] *See*, Policy Brief, p. 5.

[59] *Bpost* (Case C-117/20), Opinion of Advocate General Bobek, EU:C:2021:680 ("*Bpost*").

[60] *Nordzucker and Others* (Case C-151/20), Opinion of Advocate General Bobek, EU:C:2021:681 ("*Nordzucker*").

[61] *Bpost*, para. 133; *Nordzucker*, para. 32.

[62] Charter of Fundamental Rights of the European Union, OJ 2000 C 364/01, Article 50: "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."

[63] The Charter further clarifies that the principle is also applicable to Member States when they implement EU law—hence including competition law. See, Charter of Fundamental Rights of the European Union, OJ 2000 C 364/01, Article 51(1).

same.[64] But this principle has been interpreted more broadly in matters outside of competition law.[65] AG Bobek sought to unify these varied approaches with other areas of EU law through the *Bpost* and *Nordzucker* Opinions.[66] AG Bobek also recommended that the Court provide guidance to Member States on "what is currently a fragmented and partially contradictory mosaic of parallel regimes"[67] related to the *ne bis in idem* principle. This is because of a set of judgments[68] allowing for the duplication of proceedings and penalties under specific circumstances, which sits with difficulty with the "triple identity" *ne bis in idem* test.

Background and AG Bobek's Opinions

Both the Belgian regulator for postal services and the Belgian national competition authority ("NCA") fined Bpost for the same rebate scheme. Bpost challenged the legality of the second set of proceedings, claiming the *ne bis in idem* principle should apply. The Brussels Court of Appeal ultimately sought guidance from the Court of Justice on the interpretation and application of the double jeopardy test to sectoral and competition law proceedings.[69]

Nordzucker concerned parallel Article 101 TFEU proceedings by the German and Austrian NCAs for partitioning the markets for industrial sugar. The Austrian Supreme Court requested a preliminary ruling from the Court of Justice to clarify the *ne bis in idem* principle as to whether it applies to parallel or subsequent competition law proceedings in different Member States for the same conduct.[70]

In both cases, AG Bobek suggested that a unified *ne bis in idem* test should apply in all branches of EU law, which would solve the currently fragmented guidance resulting from the EU Courts' case law.[71] The test, in his view, should take into account three factors: the identity of the offender, the relevant facts, and the protected legal interest. AG Bobek emphasized that the protected legal interest prong underpins the *ne bis in idem* analysis, like a "chameleon" for all branches of EU law. [72]

According to AG Bobek, a legal interest is "the societal good or social value that the given legislative framework or part thereof is intended to protect and uphold."[73] He used the example of a violent assault resulting in an individual's death. The protected legal interest is the "life and bodily integrity of another person," regardless of whether national law defines the act as murder, manslaughter, or serious bodily harm resulting in death.[74]

On this basis, AG Bobek noted that in *Bpost*, the sectoral and competition law proceedings were protecting different legal interests. While the sectoral proceedings were aimed at liberalizing the internal market for postal services, the competition law proceedings were aimed at

[64] *See, Toshiba Corporation and Others* (Case C-17/10) EU:C:2012:72, para. 97; *Aalborg Portland and Others v Commission* (Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, and C-219/00 P) EU:C:2004:6, para. 338; *Slovak Telekom* (Case C-857/19) EU:C:2021:139, para. 43. As EU and national competition law apply in parallel, this principle does not prevent national competition authorities from fining an undertaking for the same conduct on the basis of both national and EU competition law. *See also, Wilhelm and Others* (Case C-14/68) EU:C:1969:4, paras. 3–9.

[65] The European Court of Human Rights does not require that the legal interest protected be the same between two cases for the double jeopardy prohibition to apply. *See, e.g., Sergey Zolotukhin v Russia*, CE:ECHR:2009:0210JUD001493903, paras. 36–37, and 81–82 ("the approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual").

[66] *Bpost*, para. 51 ("the criterion of legal interest is only well established in the abstract. It has never been applied in practice. The intra-Union competition law cases that the Court has so far dealt with have involved, in the Court's view, different acts. As a result, the Court has never actually explained in any great depth how the protected legal interest should be assessed.").

[67] *Bpost*, para. 6.

[68] *See, Menci* (Case C-524/15) EU:C:2018:197, paras. 41–48; *Garlsson Real Estate and Others* (Case C-537/16) EU:C:2018:193, paras. 43–50; *Di Puma and Zecca* (Cases C-596/16 and C-597/16) EU:C:2018:192, para. 42.

[69] *Bpost*, paras. 14–33.

[70] *Nordzucker*, paras. 9–20.

[71] *Bpost*, paras. 95 and 122 ("[…] agree with the proposition that 'the crucial importance of the ne bis in idem principle as a founding principle of EU law which enjoys the status of a fundamental right means that its content must not be substantially different depending on which area of law is concerned' ").

[72] *Bpost*, paras. 92 and 129.

[73] *Bpost*, para. 136.

[74] *Bpost*, para. 140.

protecting competition within the internal market.[75] But in *Nordzucker*, AG Bobek noted that where the competition authorities of two Member States apply Article 101 TFEU and the corresponding provision of national law, it appears that they protect the same legal interest.[76]

AG Bobek further suggested that the Court of Justice should also consider whether the "temporal and geographical scope of the subject matter of both proceedings is the same."[77] It is therefore also relevant for the application of the *ne bis in idem* principle that the German NCA in the first proceeding considered the conduct in Austria.[78]

A single test in future proceedings?

It remains to be seen whether the Court of Justice will follow the approach proposed by AG Bobek. As AG Bobek notes, the Court is presented with "a unique opportunity to provide national courts with coherent guidance" on the *ne bis in idem* principle.[79] In the context of increasing sectoral regulation in the EU, which co-exists with other EU law branches, shedding light on the double jeopardy test would serve as a step towards legal certainty. And the inner legislator of many legal minds could root for a "legal interest" prong to ensure that all legal interests are sufficiently protected.

[75] *Bpost*, paras. 160–162.

[76] *Nordzucker*, paras. 44–58 ("I do not believe that the mere (quantitative) difference in the territorial scope of the same infringement, and thus of the given rule, is per se indicative of a (qualitative) difference in the legal interest"; "when two national competition authorities then apply the same EU law provision, namely Article 101 TFEU, with regard to which they are precluded from deviating at national level, then surely the specific protected legal interest pursued by both NCAs must also be identical").

[77] *Nordzucker*, paras. 87 and 96 ("The fact that a national competition authority took into account extraterritorial effects of a given anticompetitive conduct in an earlier decision, provided that it was entitled to do so under national law, is relevant for the examination of the applicability of the principle ne bis in idem in the subsequent proceedings").

[78] *Nordzucker*, paras. 79–87. AG Bobek noted, in addition, that the *ne bis in idem* principle not only prevents the imposition of a second fine, but also the initiation of a second set of proceedings for the same conduct. It therefore also applies to proceedings regarding leniency programs, even if they do not result in a fine. *See Nordzucker*, paras. 88–95.

[79] *Bpost*, para. 6.

AUTHORS

Géraldine Babin
T: +32 2 287 2151
gbabin@cgsh.com

Lydia Bitsakou
T: +32 2 287 2242
lbitsakou@cgsh.com

Alexandra Zaytseva
T: +32 2 287 2261
azaytseva@cgsh.com

Nuna Van Belle
T: +32 2 287 2146
nvanbelle@cgsh.com

Thomas Verheyden
T: +32 2 287 2063
tverheyden@cgsh.com

PARTNERS AND COUNSEL, BRUSSELS

Antoine Winckler
awinckler@cgsh.com

Maurits Dolmans
mdolmans@cgsh.com

Romano Subiotto QC
rsubiotto@cgsh.com

Wolfgang Deselaers
wdeselaers@cgsh.com

Nicholas Levy
nlevy@cgsh.com

F. Enrique González-Díaz
fgonzalez-diaz@cgsh.com

Robbert Snelders
rsnelders@cgsh.com

Thomas Graf
tgraf@cgsh.com

Patrick Bock
pbock@cgsh.com

Christopher Cook
ccook@cgsh.com

Mario Siragusa
msiragusa@cgsh.com

Till Müller-Ibold
tmuelleribold@cgsh.com

François-Charles Laprévote
fclaprevote@cgsh.com

Esther Kelly
ekelly@cgsh.com

21.1129.04_120221