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Delimitation of the respective competences of the Commission and National Competition Authorities with regard to the application of competition law. Case comment to the preliminary ruling of the Court of Justice of the European Union of 14 February 2012 *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* (Case C-17/10)

Introduction

The analysed judgment was delivered by the Court of Justice (CJ) on 14 February 2012 in case C-17/10 *Toshiba Corporation and Others*. It concerns the interpretation of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1] (hereafter: Regulation 1/2003), with regard to the competences of National Competition Authorities (hereafter: NCAs) to apply Article 81 and Article 82 TEC (now Article 101 and Article 102 TFEU) once the Commission has instituted antitrust proceedings. The investigated case referred to an international cartel which took place in part before, and in part after the date of the Czech Republic's entry into the European Union. The Czech Regional Court in Brno asked for a preliminary ruling whether Article 81 TEC (now Art. 101 TFEU) and Article 3(1) of Regulation 1/2003 must be interpreted as meaning that these provisions must be applied in proceedings brought after 1 May 2004 against the said cartel, which had given rise to anti-competitive consequences on the territory of the Member State before that date. Since the proceedings against the cartel were conducted at European and national levels, it became necessary to make reference to the *ne bis in idem* principle applicable in antitrust law.

Facts of the case

The action brought before the CJ concerned an international cartel on the gas insulated switchgear market. The European Commission initiated its proceedings in April 2006 under Article 81 TEC (now Art. 101 TFEU) in conjunction with Regulation 1/2003. The proceedings were directed against 20 undertakings. The cartel in question was found guilty of committing a single and continuous infringement starting in April

[1] OJ L 1, 4.01.2003, p. 1; hereafter: Regulation 1/2003.

1988. The date of its last working meeting, that is, 11 May 2004, was identified as the time of the termination of the cartel. The Commission imposed fines totalling over EUR 750 million.

The Czech competition authority (Úřad pro ochranu hospodářské soutěže; hereafter Úřad) also took action against the members of the said cartel. It ultimately held that Toshiba Corporation and others participated in the cartel on the territory of the Czech Republic. The date of the last email communication, which demonstrated the existence of links between the investigated cartel members, was found to be the date on which the infringement ceased (3 March 2004). The NCA imposed fines on all members of the cartel.

The penalized undertakings appealed the decision to the Regional Court in Brno. They claimed, *inter alia*, that the Úřad had intentionally shifted the termination date of the cartel to a date prior to the Czech Republic's EU accession in order to justify the application of Czech law on the Protection of Competition. The applicants expressed the view that a NCA has lost its powers to conduct proceedings after the European Commission had initiated proceedings at the European level in the same case (applicants invoked Article 11(6) of Regulation 1/2003). In their opinion, proceedings at a national level infringed the *ne bis in idem* principle. The Regional Court in Brno held that the proceedings conducted by the Úřad had infringed the *ne bis in idem* principle. The NCA brought an appeal against that judgement before the Supreme Administrative Court of the Czech Republic. The latter set aside the judgment of the Regional Court in Brno and referred the case back for renewed assessment. The Regional Court expressed its doubts about the legal basis of the case. In raising its questions, the court wanted to ascertain whether Article 81 TEC (now Article 101 TFEU) and Article 3(1) of Regulation 1/2003 must be interpreted as meaning that, in the context of proceedings initiated after 1 May 2004, they can be applied to a cartel which produced effects on the territory of a Member State before that date.

Case comment

The case brought before the CJ concerned the competences of NCAs to impose penalties for the anti-competitive consequences of a cartel agreement which had taken materialise on the territory of a Member State before its EU accession. Since the cartel constituted a single and continuous infringement of Article 101 TFEU, it became necessary to define appropriate rules to be applied in order to assess the consequences of the activities of the cartel – activities, which took place in different periods (before vs. after the country's EU accession) and places (territory of the Czech Republic vs. the EU).

Before the CJ answered the actual preliminary questions, it first considered:

1) admissibility and scope of a retroactive application of competition rules;
2) distinction between substantive and procedural rules in European competition law;
3) application of European and national competition law in parallel;
4) application of the *ne bis in idem* principle in antitrust law.

Retroactive application of competition law

In the first preliminary question, the referring court was seeking guidance on the admissibility of a retroactive application of competition rules[2]. The CJ was right to note that with regard to this issue, it was indispensable to expressly distinguish between substantive and procedural competition rules. Article 3(1) of Regulation 1/2003 contains substantive provisions governing the assessment, by competition authorities, of agreements as anti-competitive. Both Article 3(1) of Regulation 1/2003 and Article 81 TEC (now Article 101 TFEU) constitute therefore substantive rules of EU law[3]. Relying on earlier jurisprudence[4], the CJ pointed out that the applicability of substantive rules for the assessment of agreements, which took place prior to the entry into force of those rules, is exceptional. It must clearly follow from the terms, objectives or general scheme of such rules that such effect must be given to them. However, retroactive application of substantive rules infringes the principle of legal certainty, which requires that any factual situation should normally be examined in the light of legal rules being in force at the time when the relevant circumstances occurred[5].

The CJ found no reason to retroactively apply substantive rules in this case. It emphasized that there was nothing in the terms, the objectives or the general scheme of Article 81 TEC and Article 3 of Regulation 1/2003 which clearly indicated their retroactive applicability. As a result, the court stated that they may not be applied in proceedings initiated after 1 May 2004, which examined a cartel that, prior to that date, had effects on the territory of a Member State which joined the EU on 1 May 2004.

Delimitation of the respective competences of European and national competition authorities with regard to the application of national competition law

A clear distinction of powers between the Commission and NCAs is vital from the point of view of the answer to the second preliminary question[6]. As mentioned, the CJ made here a clear distinction between substantive and procedural rules applied in the assessment of conduct that took place prior to the entry into force of those rules. Under Article 11(6) of Regulation 1/2003, the initiation by the Commission of proceedings for the adoption of a decision under Chapter III of Regulation 1/2003 shall relieve the NCAs of their competences to apply Articles 81 and 82 TEC (now Articles 101 and 102 TFEU). The above mentioned provision of Article 11(6) of Regulation 1/2003

[2] *Toshiba*, para 36. The CJ made a reference to the principle of retroactive application of a lenient penalty – see *Toshiba*, paras 63–66.

[3] Para. 43, opinion of Advocate General U. Kokott of 8.09.2011.

[4] Judgement of CJ of 24 March 2011, Case C-369/09 P *ISD Polska and Others v. Commission*; judgment of CJ of 22 December 2010, Case C-120/08 *Bavaria*, ECR 2010, p. I-13393; see *Bavaria*, paras 40, 41.

[5] In the absence of any express contrary provision. See *Bavaria*, paras 40, 41.

[6] *Toshiba*, para. 36.

is of procedural nature. It has been applied in all Member States since 1 May 2004, both to situations arising prior and after that date[7]. Where the European Commission initiates proceedings[8], NCAs can no longer apply EU competition law.

Can it be said, therefore, on the basis of Article 11(6) and Article 3(1) of Regulation 1/2003, as claimed by the applicants and the national court, that the Czech competition authority definitively lost its competence to deal with the cartel when the Commission opened EU proceedings for the imposition of fines?

Accepting the above view would be unjustified. It should be noted that the exemption set out in Article 11(6) of Regulation 1/2003 refers to the loss of competences by NCAs to apply EU law. However, it does not affect their ability to apply national competition law. Once the Commission initiates its proceedings for adopting a decision (under Article 11 section 6 of Regulation 1/2003), the NCAs are no longer authorized to apply Article 101 and Article 102 TFEU[9].

In the light of the foregoing, does the opening of proceedings by the Commission relieve NCAs permanently and definitively of their authority to apply national competition law?

In order to answer this question, reference must be made to the principles governing the application of EU competition law. The rules for the application of EU competition law by national courts are specified in Article 3(1) and Article 16(2) of Regulation 1/2003. On the other hand, Article 3(1) of Regulation 1/2003 implies the power to apply Articles 81 and 82 TEC (now Article 101 and Article 102 TFEU). If the conduct analyzed in the main proceedings is also covered by the prohibitions contained in Article 101 and/or Article 102 TFEU and it may affect trade between Member States, then the court is obliged to apply both of these rules in the case at hand[10]. Thus, if NCAs and national courts conduct proceedings under national competition law, the subjects of which are competition restricting practices that may affect EU trade, then Article 101 and Article 102 TFEU shall be applied at the same time (parallel application)[11].

Provisions of Article 3(2) of Regulation 1/2003 govern situations in which national and EU competition law is to be applied in parallel. The said Article provides that the application of domestic competition law by national courts may not lead to the

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[7] See para. 74, opinion of U. Kokott.

[8] Proceedings for the finding and termination of infringements of Article 81 and Article 82 TEC [Article 101 and Article 102 TFEU (Article 7 of Regulation 1/2003).

[9] See para. 78, opinion of U. Kokott.

[10] M.L. Alonso, *Die Neuausrichtung der Zwischenstaatlichkeitsklausel der Art. 81, 82 EG*, Frankfurt am Main 2003, p. 58; H.J. Bunte, *Kartellrecht*, München 2003, p. 370 *et seq*. Regulation /2003 implemented reforms in EU competition law procedures and introduced the so called "decentralisation", self-evaluation and close cooperation. See in this regard S. Jóźwiak, "Obowiązki, uprawnienia i kompetencje decyzyjne Prezesa UOKiK w przypadku prowadzenia postępowania paralelnie na podstawie krajowego i europejskiego prawa ochrony konkurencji" (2010) 8 *Monitor Prawniczy* (*supplement)* 28.

[11] On parallel application J. Barcz (ed.), *Prawo gospodarcze Unii Europejskiej*, Warszawa 2011, p. XXIV-91.

prohibition of agreements, decisions by associations of undertakings or concerted practices, which may affect trade between Member States, but which do not restrict competition within the meaning of Article 81(1) TEC (now Article 101(1) TFEU), or which fulfill the exemption conditions of Article 81(3) TEC (now Article 101(3) TFEU), or which are covered by a Regulation for the application of Article 81(3) TEC. Article 3(2) of Regulation 1/2003 formulates the so called 'convergence rule' – a principle regarding parallel application of European competition law and the equivalent domestic provisions of (relationship between Article 101 and Article 102 TFEU and national competition law). The rules of convergence are expressed not only in Article 3(2) of Regulation 1/2003 but also in its Article 11(6) and their objective is to increase an aligned and harmonized application of competition rules. It should be borne in mind nevertheless that Member States are authorised to implement and apply more stringent rules than those arising from EU competition rules with regard to unilateral practices[12].

The aforementioned provision refers to a situation where the Commission has already settled the case by adopting a decision on an agreement, decision by an associations of undertakings or concerted practice under European rules, or when the case is pending before the Commission[13]. Its primary objective is to prevent national courts from adopting judgments that run counter to the decisions of the Commission or judgments on cases already pending before the Commission. The principle under which national courts may not rule contrary to decisions adopted by the Commission in the same subject matter has its basis in European jurisprudence (for instance Case C-234/89, *Delimitis and Brau* and C-418/01 *IMS Health*[14]). The initiation of proceedings by the Commission does not mean that NCAs permanently and definitively lose their power to apply national competition law (parallel application of EU and national competition law), as emphasized by Advocate General U. Kokott. As stressed by the CJ, European and national competition rules concern different aspects of the restrictive practices and their scope of application does not overlap[15]. European judicature has pointed out that in the above situation NCAs have the power to impose penalties under their domestic competition laws for those effects of the agreement

[12] Authorisation of Member States to implement and apply stricter rules than those arising from EU competition law with regard to unilateral undertaking practices.

[13] National courts are not bound by commitments decisions adopted by the Commission under Article 9(1); recital 22 of preamble to Regulation 1/2003. Article 9(1) of Regulation 1/2003 provides as follows: "Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission".

[14] See judgment of ECJ of 28 February 1991, C-234/89 Case C-234/89, *Delimitis and Brau*, ECR 1991, p. I-935; judgment of 29 April 2004, Case C-418/01 *IMS Health GmbH& Co OHG v NDC Health GmbH*, ECR 2004, p. I-5039.

[15] *Toshiba*, para. 84.

which materialized on the territory of the given Member State in the periods before its EU accession.

Adopting a different view would preclude the possibility of punishment of undertakings for the effects of a cartel that appeared before the accession of the given Member State to the EU. It should be borne in mind that NCAs may not take a position contrary to an earlier decision of the European Commission (Article 16(2) of Regulation 1/2003). Member States' competition authorities, however, retain their powers to act, even if the Commission has issued a decision. National competition authorities may therefore adjudicate on matters which have already been the subject of a decision of the Commission, but their decisions cannot be conflicting with the earlier decisions of the Commission[16].

The *ne bis in idem principle* in competition law

The *ne bis in idem* principle is expressed in Article 50 of the Charter of Fundamental Rights[17]. It reads as follows: "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"[18]. With respect to competition law, the *ne bis in idem* principle should be interpreted as a prohibition of prosecution and punishment of an undertaking by the Commission for a second time for an anti-competitive conduct which has already been penalized or declared not liable by a previous unappealable decision of the Commission[19]. The application of the *ne bis in idem* principle in the context of time entails the necessity to adopt a correct interpretation of the '*idem*' and the determination whether this concept covers the identity of the facts or the unity of the legal interest protected. This issue is of paramount importance in the case examined here by the CJ.

Can an assumption be made, based on the facts of the case, that the decisions adopted by the Commission and the Czech competition authority refer to the same effects of the cartel at issue? In order to answer this question, reference must be made to the concept of identical facts, that is to say, to the same material acts[20].

An indispensable component of the material act (i.e. *'idem'* – note by M.S.) shall be the period of time and the territory in which the cartel had anti-competitive effects or could have had such effects. If the decision of the Commission and the decision of the Úřad referred to the same period of time and the same territory, then the issue of their material acts would have to be dealt with. However, the facts of the case were not identical. On the contrary, the two respective decisions do not concern the same

[16] Absence of possibility to apply EC competition rules against a particular cartel should be borne in mind or decisions adopted by the Commission pursuant to Regulation 1/2003.

[17] OJ C 303, 14.12.2007, p. 17.

[18] See para. 111 of opinion of U. Kokott. See joint Cases *Limburse Vinyl Maatschappij and Others v Commission*, para. 59.

[19] See para. 117 of opinion of Advocate General U. Kokott.

[20] See paras 125 and 130 of opinion of Advocate General U. Kokott.

anti-competitive effects of the international cartel in the electrical engineering sector. The ECJ pointed out that the application of the *ne bis in idem* principle in antitrust law required the fulfilment of a threefold condition covering: (1) identity of the facts, (2) unity of the offender, and (3) unity of the legal interest protected[21].

The decision of the Commission was adopted on 24 January 2007. It does not expressly state whether the fines imposed were intended to penalize competition restricting practices – by object or by effect, on the territory of the Czech Republic in the period before its accession to the European Union, i.e. before 1 May 2004. It therefore becomes imperative to determine this issue through the interpretation of the decision itself[22]. The CJ pointed out that the Commission's decision has repeatedly referred to the cartel's effects within the EEA and the European Community. Moreover, the decision did not penalize the cartel's potential effects in the Czech Republic in the period before its EU accession. Therefore, it is reasonable to assume that the fines imposed by the Commission did not cover infringements committed in the Czech Republic before 1 May 2004. Thus the Commission's decision does not include the cartel's effects on the territory of the Czech Republic prior to that date. By contrast, the Úřad imposed the fines in relation to the said territory and the said period of time. Despite the fact that the subject-matter of the decision of the Commission and that issued by the Czech competition authority is one and the same cartel, the factual circumstances of adopting those decisions differ. On the one hand, the Commission's decision fails to take into account the anti-competitive effects of the cartel in the territory of the Czech Republic before 1 May 2004. On the other hand, the Úřad imposed fines only in relation to its own national territory and the pre-EU accession period. It cannot therefore be assumed (unlike the claimants and the court suggested) that the Commission's decision and the decision of the Czech competition authority refer to the same material acts.

Consequently, no infringement of the *ne bis in idem principle* took place in the proceedings before the Úřad since one of the conditions necessary to apply that principle, namely identity of the material acts, did not take place. Taking into account the facts of the case, the Commission imposed on the cartel participants fines for the cartel's effects on the territory of a Member State after its EU accession (prior to a decision by the Úřad), which does not contradict the *ne bis in idem* principle.

Summarizing, as rightly noted by Advocate General U. Kokott: "the EU principle of *ne bis in idem* does not preclude penalties, which the national competition authority of the Member State concerned imposes on undertakings participating in a cartel on account of the anti-competitive effects to which the cartel gave rise on the territory of that Member State prior to its accession to the European Union, provided that any fines previously imposed on the same cartel members by the European Commission did not relate to the same consequences" (para. 147)[23].

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[21] See the judgment of ECJ of 7 January 2004, ioint Cases C-204/00 P, C-205/00, C-211/00, C-213/00, C-217/00, C-219/00 *Aalborg Portland and Others* v *Commission.*

[22] See para. 137 of opinion of Advocate General U. Kokott.

[23] See judgment in this Case, paras 102 and 103.

Conclusion

In its judgement, the Court of Justice expressed its standing on the competence of NCAs when the Commission initiates its own proceedings. The CJ stated that EU and national competition law were to be applied in parallel. Proceedings conducted by the Commission do not relieve NCAs of their competences to apply their own domestic competition rules. Nonetheless, their decisions cannot run counter to the decisions of the Commission. The CJ also stressed that it was the point of time at which the proceedings for the imposition of a fine were initiated that decided on the applicability of the *ne bis in idem* principle, rather than the time when the infringement was committed. Therefore, the date of the EU accession of a Member State is irrelevant in this regard because the decision of the Commission did not include the anti-competitive effects of the cartel to which it gave rise on the territory of the Member State before its EU accession. On the other hand, the Czech competition authority imposed a penalty for the anti-competitive effects which occurred in the Czech market before 1 May 2004. Thus, the *ne bis in idem* principle was not infringed.

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