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Cumulative Enforcement of European and National Competition Law and the *Ne Bis In Idem* Principle

Case Comment to the Judgement of EU Court of Justice of 3 April 2019 *Powszechny Zakład Ubezpieczeń na Życie S.A. v Prezes Urzędu Ochrony Konkurencji i Konsumentów* (Case C-617/17)

by

Mario Libertini*

CONTENTS

Abstract

The judgement of EU Court of Justice in response to the request for a preliminary ruling by the Polish Supreme Court confirms that the principle of *ne bis in idem*, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding a national competition authority

* Mario Libertini is emeritus professor of Business Law in the Law Department of "Sapienza" University of Rome; mlibertini@liblex.it. Article received: 18 June 2019; accepted: 3 July 2019.

from fining an undertaking in a single decision for an infringement of national competition law and for an infringement of Article 82 EC (now Article 102 TFEU). In that regard it can be concluded that the judgement does not have anything new and is just a confirmation of settled case-law. Unfortunately, this case represents a lost opportunity to review the 'double barrier' doctrine and to clarify if the relationship between European and national competition law is one of 'bilateral specialty' or not.

Résumé

L'arrêt de la Cour de justice de l'Union européenne en réponse à la demande de décision préjudicielle de la Cour suprême polonaise confirme que le principe *ne bis in idem*, consacré à l'article 50 de la Charte des droits fondamentaux de l'Union européenne, doit être interprété en ce sens qu'il ne s'oppose pas à ce qu'une autorité nationale de concurrence inflige une amende à une entreprise dans une décision unique pour infraction au droit national de la concurrence et pour infraction à l'article 82 CE (devenu article 102 TFUE). A cet égard, on peut conclure que l'arrêt ne comporte rien de nouveau et ne constitue qu'une confirmation d'une jurisprudence constante. Malheureusement, cette affaire représente une occasion manquée de revoir la doctrine de la «double barrière» et de clarifier si la relation entre le droit européen et national de la concurrence est une «spécialité bilatérale» ou pas.

Key words: *ne bis in idem* principle; objectives of EU competition law, objectives of national competition laws.

JEL: K21, K38

I. Introduction

In the decision at hand[1] the EU Court of Justice stated that the principle of *ne bis in idem*, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding a national competition authority from fining an undertaking in a single decision for both an infringement of national competition law and an infringement of Article 82 EC (now Article 102 TFEU). In such a situation, the national competition authority must nevertheless ensure that the fines are proportionate to the nature of the infringement.

[1] EU Court of Justice, 4th Chamber, 3 April 2019, C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A. v Prezes Urzędu Ochrony Konkurencji i Konsumentów.*

Apart from some problems of interpretation of this judgement in itself, it should be noted, above all, that it eluded the questions posed by the Polish Supreme Court. Specifically, the question of whether

> '*the rules of EU competition law and of national competition law which are applied in parallel by the competition authority of a Member State protect the same legal interest*'.

II. The application of EC competition rules before Regulation EC/1/2003

Just to frame the problem, we have to take as a basis the traditional principle of the 'double barrier' in antitrust matters, now established in all national laws of the Member States of the EU (see, for a comprehensive and updated examination of the issue, Filippelli, 2018, pp. 512 ff; see also Tome' Feteira, 2015, in particular § 2.04).[2] According to this principle, National Competition Authorities (hereinafter: NCAs) could apply in parallel, to the same facts, European and national competition rules.

In fact, the original reason of the 'double barrier principle' can now be questioned. At the beginning of European competition law, some Member States (first of all, Germany) could believe that their competition national laws were more detailed and more effective than the European ones. In particular, there was the concern that the European Community could implement competition rules only as a means of building a common internal market, focusing its intervention against agreements aimed to artificially reconstruct boundaries between national markets, but could neglect other important cases of anti-competitive practices and, in particular, the issue of the trade within Member States. In other terms, the original inspiration of the double-barrier principle was that of recognizing a true system of 'crossed vetoes', in order to achieve a more effective contrast to anti-competitive practices. Indeed, at the roots of the question there was also a residual spirit of 'sovereignism' (or at least national pride) of some Member States.

Anyway, the Court of Justice, with the *Wilhelm* decision of 1969,[3] downsized the original inspiration of the double barrier principle. In this famous decision, the Court stated, in the field of competition law, the principle of the primacy of EC law (since then generalized with the *Simmenthal* case in 1978). In

[2] Until a few years ago, two Member States (Italy and Luxembourg) applied the opposite principle of the "single barrier", avoiding a cumulative application of European and national competition laws. Nevertheless, for a "spirit of emulation", also these States (Italy for last, in 2017) complied their internal competition rules with the standard solution of the double barrier.

[3] EC Court of Justice, 13 February 1969, C-14/68, *Walt Wilhelm and others v. Bundeskartellamt.*

fact, the Court admitted the possibility of concurrent proceedings before the Commission and the NCA, respectively in application of European and national antitrust law, but

> '*subject to the condition that the application of the national law must not prejudice the full and uniform application of Community law or the effects of measures taken to implement it*'.

The *Wilhelm* decision did not consider the case of the cumulative application of European and national antitrust law by an authority of a Member State. In fact, at the time the direct application of European antitrust law by the national authorities was still not a general rule (as it became with the Regulation 1/2003), but a faculty left to the single Member States (according to the current interpretation of Article 9.3 Regulation CE/17/62).[4] Nevertheless, the *Wilhelm* decision contained an implicit statement, by which, in case of cumulative application of EC and national competition rules, an NCA would have to apply the national rules only to the extent they could supplement the EC law without prejudice to its '*full and uniform application*'.

The statement of the Court about the '*full and uniform application*' implied that the primacy of European antitrust law not only involved the compliance with European prohibitions, but also compliance with European exemptions, included block exemptions.[5]

In its decision, the Court emphasized the elimination of the obstacles to the trade between Member States as a central issue of EC competition law. Therefore,

> '*where it is established that an agreement is not covered by the prohibition laid down in Article 85 (1) because it is not likely appreciably to affect trade between Member States, a Member State, and consequently the courts and tribunals of that State, is free to apply its more severe legislation thereon*'.[6]

At that time, it was generally believed that the sole goal of EC competition law was that of protecting the freedom of trade, in order to create a single market, while any other goals of competition policy could be pursued separately by national laws. However, the evolution that occurred in European competition law in the last 50 years led to overcome such a conception (see, on this point, the essays collected in Ullrich 2006). The focus has rather been put, on the one hand, on the goals of antitrust law (more economic approach, consumer welfare, dynamic efficiency and so on), under the influence of

[4] In Italy, for example, this faculty was practiced by a specific statute in 1996.

[5] EC Court of Justice, 10 July 1980, in joined cases C-253/78, 1-3/79, *Guerlain and others*, § 17.

[6] S. the decision above quoted (fn. 5), point 8, let. *(a)*.

the international debate (see, Libertini, 2017), and, on the other hand, on the aim to achieve a uniform development of antitrust law all over the EU territory.

III. The application of EC competition rules under Regulation EC/1/2003

In particular, the Regulation EC/1/2003 provides the direct application of EC competition rules by national (administrative and judicial) authorities. Moreover, it (Article 1.2) provides the automatic exemption for '*the agreements which satisfy the conditions of Article 81(3)* [now 101.3] *of the Treaty*', with consequent 'full and uniform' application of this exemption by the national authorities. Further, Article 3.2 states that

> '*The application of national competition law may not lead to the 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) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings*'.

Therefore, Regulation 1/2003 provides a rule of full convergence in the enforcement of European law against cartels having European relevance (that is, '*which may affect trade between Member States*'). In other terms, the 'effect on trade between member States' constitutes a materiality threshold for the application of European antitrust rules, rather than as the main purpose of European competition policy or, even less, as an element marking the distinction between EU and national antitrust policy against cartels.

Instead, as to unilateral conducts, the Regulation does not preclude the application of more severe national rules. This raises an interpretative problem: can national rules be applied even when they contrast with the European ones (in other terms: in a frame of 'crossed vetoes') or should they apply only when they *integrate* the European provisions?

In my opinion, the right response is the last one (see also Filippelli, 2018, p. 527). In fact, EU competition law has evolved along a trajectory of a full consistency between European and national competition rules. This is quite evident if one considers – in addition to the soft law sources – the antitrust damages directive (EU/2014/14) and, above all, the ECN+ directive (EU/2019/1), expressly meant:

'*to ensure a truly common competition enforcement in the Union that provides a more even level playing field for undertakings operating in the internal market and reduces unequal conditions for consumers*'.[7]

The same trend may be inferred from some declarations of principle in TFEU.[8]

With this in mind, it should be reasonable to conclude that:

a) for bi- or multilateral conducts (Article 101 TFEU) there are no exceptions to the full and uniform application of Article 101 for all conducts '*which may affect trade between Member States*'; national rules can apply only for minor conducts which may not affect the trade between Member States;

b) for unilateral conducts, it is above all confirmed the full and uniform application of Article 102 for conducts '*which may affect trade between Member States*' (including the possibility that the conduct is justified on the ground of gains of efficiency in the relevant market, with similar criteria to those laid down in Article 101.3[9]). However, it is possible that the national law prohibits some unilateral conducts (also having European dimension) considered unfair, but not covered by the prohibition of abuse of dominant position (in particular, conducts consisting of abuse of contractual power).

Until 2017,[10] these were the rules provided by Italian law. A principle of 'single barrier' applied (that is, the alternative application of European or national antitrust law, depending on the fact whether the conduct may affect or not the trade between Member States). Nevertheless, for unilateral conducts, there were (and still are) some prohibitions regarding abuses of contractual power (abuse of economic dependence,[11] abuse in contractual relationships in the agri-food sector[12]).

After the introduction of the generally accepted principle of the 'double barrier', the Italian public enforcement practice indeed has not changed. Usually, there are no cases of double assessment of infractions or double fines by the NCA (see also: Filippelli, 2018).

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[7] Dir. EU/2019/1 of 11 Dec. 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, § (8). The Directive covers the application of European rules by NCA, the parallel application of European and national law and also the application of national competition law on a stand-alone basis (Art. 1.2).

[8] See Art. 119.1, Art. 120, Prot. 27 T.F.E.U.

[9] S. *Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, 2009/C 45/02, § 28 ff.

[10] S. Art. 17 Legislative Decree 19 Jan. 2017, n. 3, which modified Art. 1 of L. 287/1990.

[11] Art. 9, Law 18 June 1998, n. 192.

[12] Art. 62, Decree-Law 24 Jan. 2012, n. 1, converted in Law 24 March 2012, n. 27.

IV. The common objectives of European and National competition laws

In fact, the cumulative application of European and national competition laws is consistent with the idea that these pursue different purposes. This assumption was possible in the framework of the 'original' thesis of the double barrier, when it won over the thesis that the two different bodies of law pursued different purposes – respectively, free trade between Member States or within a Member State (see also Tome' Feteira, 2015). But this assumption could not be consistent with the actual aims of European competition law: today, it is generally recognized that both sets of rules (European and national) share the same basic objective of promoting consumer welfare and the efficiency of the markets (an efficient allocation of resources and dynamic efficiency). The pursuit by national competition laws of specific goals (as, for example, defence of 'national champions', allowance of crisis cartels or protection of pluralism in itself) would conflict with the principle of full and uniform application of European law.

In sum, there is no room and no true reason for a double assessment of infraction to European and national competition laws and more for a double fine.

It remains, surely, the possibility of autonomous national prohibitions of unilateral conducts consisting in the abuse of contractual power. However, this possibility does not lead to a double fine, but to an exclusive application of a national prohibition in a field not covered by European Law.

V. The essence of the request for a preliminary ruling by the Polish Supreme Court

In this context, the Polish Supreme Court, facing a case of double fine in antitrust matters, intelligently raised two questions that should have led the Court of Justice to an in-depth review of the whole 'double barrier' issue.

Really, the questions were about the meaning of the *ne bis in idem* principle in Article 50 of the Charter of EU Fundamental Rights and were so formulated:

(i) '*Can Article 50 of the [Charter] be interpreted as meaning that the application of the* ne bis in idem *principle presupposes not only that the offender and the facts are the same but also that the legal interest protected is the same?*'

(ii) 'Is Article 3 Regulation [N° 1/2003], read in conjunction with Article 50 of the [Charter], to be interpreted as meaning that the rules of EU competition law and national competition law which are applied by the competition authority of a Member State protect the same legal interest?'.

The question (i) is a quite rhetorical one. If the same conduct violates two different statutory provisions, protecting different legal interests, there is, according to the general principles of criminal law (see, for example, Palombino, 2016, 89 ff) (and the 'common legal heritage' of the EU), an *ideal* concurrence of offences and the author of the conduct must suffer two penalties, even though the criminal laws generally provide some criteria mitigating the mere accumulation of sanctions.[13] In other terms, there is no room for the application of the *ne bis in idem* principle. On the contrary, if the same conduct violates two different statutory provisions, protecting the same interest, there is an *apparent* concurrence of offences and the guilty will suffer only one sanction, according to the specialty principle. In other terms, the 'substantial' *ne bis in idem* principle will have full application.

Following this traditional approach, the Court should have given a positive response to the first question and should have made an in-depth analysis of the problem of the uniformity (or not) of the interests protected respectively by European and national competition laws. (In my opinion, the right response should be that both these laws pursue the same interest – namely efficiency of markets and consumer's welfare – so that the 'substantial' *ne bis in idem* principle should be applied. Therefore, the subsydiarity principle imposes the exclusive application of European rules, when the conducts influence the competitive process at a European, and not merely national, level. In this case it needs to have a full and uniform application of European competition law, without any exception grounded on national law).

VI. The *ne bis in idem* principle in the case-law of the ECHR, CJEU and national courts

Unfortunately, the actual application of the specialty principle is, notoriously, far from easy (Palombino, 2016. In Italian, see, above all, Zorzetto, 2010). In most cases, it leads to the recognition of a 'bilateral specialty', that is, an interference between two norms. Taking that into account, the most recent case-law of the ECHR follows a flexible approach to the issue, affirming the possibility of cumulative applications of rules protecting the same legal interest, but conceived as complementary by the national legislator (for example criminal and administrative sanctions in proceedings having '*a sufficiently close connection in substance and time*'). However, in those cases the total amount of penalties must comply with the proportionality principle.[14] In other words,

[13] For example, Art. 81 Italian Criminal Code provides that, in case of ideal concurrence of offences, the guilty will suffer the penalty provided for the more serious crime, increased of a third.

[14] European Court of Human Rights, Grand Chamber, 15 Nov. 2016, n. 34130/11, *A a. B v. Norway;* Sec. I, 8 Nov. 2018, n. 19120/15, *Seražin v. Croatia.* The same criteria are applied

the *ne bis in idem* is declined, basically, in a new 'substantial' version. The main issue becomes not the solution of a conflict between norms sanctioning the same conducts, but rather to avoid that different proceedings, founded on different but complementary norms regarding the same facts and the same interests, could lead to an outcome of overdeterrence, contrasting with the proportionality principle.

The case law of the Court of Justice is not very clear in affirming the same criteria and could appear as following a case-by-case approach, but in more recent case-law greater prominence is given to the idea that '*the new aim of the* ne bis in idem *principle is that of ensure overall a proportionate penalty*' (Felisatti, 2018, 121 ff., at p. 141, where a precise analysis of the most recent decisions of the CJEU on these topics can be found).

The national judges, at least in Italy, fully welcomed this approach to the *ne bis in idem* principle in the key of the proportionality principle[15] and follow regularly a 'double track' principle in case of 'complementary' criminal and administrative sanctions (for example in fiscal and in financial matter).The Italian Civil Supreme Court followed the same normative model (cumulative application tempered by the proportionality principle) in order to resolve a long standing problem in Italy: that of the court having jurisdiction over the liability of directors in state-owned companies, in particular providing in house companies (if the civil Tribunal or the Court of Accounting) (see Cass. civ., Sezioni Unite [Grand Chamber], 13 September 2018, n. 22406; for critical comment: Briguglio, 2019).

Nevertheless, the ECHR in the meantime has specified its approach. In the most recent cases (ECHR, sec. II, 16 April 2019, Bjarni Ármansson v. Iceland; ECHR, sec. V, 6 June 2019, Nodet v. France. About this case see the comment: Scoletta, 2019), the ECHR required a strict procedural link between the two proceedings and strengthened the requirement of 'complementarity'. This requirement involves that there is not a full identity between the interests protected by two different norms.

VII. The *ne bis in idem* principle and the proportionality principle

This trend in the interpretation of the *ne bis in idem* principle in connection with the proportionality principle is, in my opinion, quite reasonable.

by the Italian "Cassazione penale" (Italian Criminal Supreme Court), Sec. III, 14 Feb. 2018, n. 6993.

[15] See different judgements of the Italian Criminal Supreme Court, in *Foro italiano*, 2019, II, 279 ff., with a critical comment by G. De Marzo.

Considering the frequent occurrence of 'bilateral specialty' between norms, it is normally hard, in these cases, to choose the prevailing norm. The sole thinkable criterion could be a hierarchical one. Specifically, the statement of a hierarchy of values (or a hierarchy of legal interests). However, the application of a similar criterion would result in great uncertainty and could often lead to arbitrary outcomes. By contrast, the cumulative application of the two norms, tempered by the proportionality principle in order to weigh the penalties, leads, in practical terms, to acceptable results.

It should be noted, however, that this assumption sounds reasonable as long as there is a bilateral specialty between two interfering norms. Conversely, in case of full overlapping between two parallel norms (same facts and same protected interests) or in case of 'unilateral' specialty, the substantial *ne bis in idem* principle should be still applied. I think that the possible 'close connection' between two punitive proceedings cannot justify a double (although proportionate in outcome) sanction, unless the different proceedings are intended to protect complementary, but non identical, legal interests.

I don't know if this will be the final approach of the ECHR and of the CJEU on this evolving matter. In any case, I believe this should be the rational outcome of the discussion.

VIII. The essence of the CJEU ruling in Case C-617/17

In the decision at hand, the Court – according to the general consent towards the 'double barrier' doctrine – takes for granted the possibility of parallel application of European and national competition laws. In particular, the judgement repeats the commonplace whereby

> '*Competition rules at European and at national level view restrictions on competition from different angles and their areas of application do not coincide*'.[16]

On this basis, it is easy to extend to competition law the reported judicial trend conducive to the cumulative application of interfering norms, tempered by the proportionality principle. Moreover, the fact that the same authority will apply both sets of rules makes it easy to acknowledge a 'close connection' between the two proceedings.

[16] The decision at hand quotes, such as most recent, EU Court of Justice, Grand Chamber, 14 February 2012, C-17/10, *Toshiba* (§ 81), where many other quotations.

On the other hand, this conclusion is not really new, in the field of European antitrust law. In fact, already in the leading case (*Wilhelm*[17]), the Court stated that

> '*If, however, the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a general requirement of natural justice, such as that expressed at the end of the second paragraph of Article 90 of the ECSC Treaty, demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed*'.

Today, the (slightly *naïve*) reference to 'natural justice' and the (somewhat forced) reference to the former Article 90 of the ECSC Treaty, have been substituted by the strong reference to the positive 'proportionality principle' of Article 5, al. 4, TEU. However, the substance is practically the same.

IX. Conclusions

That being said, it can be concluded that the judgement at hand does not deliver anything new and is just a confirmation of settled case-law.

Nevertheless, I think that this case represents a lost opportunity to review the 'double barrier' doctrine and to clarify if the relationship between European and national competition law is one of 'bilateral specialty' or not. The question posed by the judge *a quo*, whether the two sets of rules protect the same legal interest or not, would indeed require a specific response in this sense.

The Court implicitly considers to have given a negative response to the second question of the Polish Supreme Court with the reference to the commonplace ('*Competition rules at European and at national level view restrictions on competition from different angles and their areas of application do not coincide*'). Nevertheless, the issue of 'different area of application' should logically lead to the result of an alternative, rather than a cumulative, application of the two sets of rules. Instead, the issue of the 'different angle of view' of the same facts could actually lead to recognize a bilateral specialty; however, in reaching this conclusion, it should be acknowledged that the legal interests protected by the two sets of rules are partially identical and partially different. But the Court eluded this question.

Moreover, this conclusion cannot be reached if the only difference between the two sets of rules is that the European ones pose as a requirement of application that the relevant conducts '*may affect trade between Member*

[17] EC Court of Justice, 13 February 1969, C-14/68, *Walt Wilhelm and others v. Bundeskartellamt*, § 11.

States'. This requirement just involves the dimension of markets affected by the conduct, not legal interests protected. When this dimension affects trade between Member States, the current principle is that of 'full and uniform' application of EU antitrust law, so that national laws are prevented to lay down rules conflicting with the European ones. Below this threshold, national law has full application (without prejudice of general principles of EU law).

In other terms, the linear relationship of European and national competition law should be that of separate areas of application, depending on the markets affected by the conduct at issue, under a subsydiarity principle. This relationship is expressly stated for merger control, and should be extended, by way of proper interpretation, to cartels and abuses of dominant position too.

On the contrary, if the two sets of rules would actually protect different legal interests and could have parallel application, in order to ensure the concrete protection of these different interests, double application and double fine should be compulsory, rather than optional (such as it is deemed in the common opinion).

In conclusion, there is room for further discussion about the double barrier doctrine and the *ne bis in idem* principle in European competition law.

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