



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

3 April 2019*

(Reference for a preliminary ruling — Competition — Article 82 EC — Abuse of a dominant position — Regulation (EC) No 1/2003 — Article 3(1) — Application of national competition law — Decision of a national competition authority to impose one fine on the basis of national law and another on the basis of EU law — Charter of Fundamental Rights of the European Union — Article 50 — Principle of *ne bis in idem* — Whether applicable)

In Case C-617/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decision of 26 September 2017, received at the Court on 30 October 2017, in the proceedings

Powszechny Zakład Ubezpieczeń na Życie S.A.

v

Prezes Urzędu Ochrony Konkurencji i Konsumentów,

intervening parties:

Edward Dętka,

Mirosław Krzyszczyk,

Zakład Projektowania i Programowania Systemów Sterowania Atempol Sp. z o.o. w Piekarach Śląskich,

Ommers Polska Sp. z o.o. w Krapkowicach,

Glimat Marcinek i S-ka spółka jawna w Gliwicach,

Jastrzębskie Zakłady Remontowe Dźwigi Sp. z o.o. w Jastrzębiu Zdroju,

Petrofer-Polska Sp. z o.o. w Nowinach,

Pietrzak B.B. Beata Pietrzak, Bogdan Pietrzak Spółka jawna w Katowicach,

Ewelina Baranowska,

Przemysław Nikiel,

* Language of the case: Polish.

Tomasz Woźniak,

Spółdzielnia Kółek Rolniczych w Bielinach,

Lech Marchlewski,

Zakład Przetwórstwa Drobiu Marica spółka jawna J.M.E.K. Wróbel sp. jawna w Bielsku Białej,

HTS Polska Sp. z o.o.,

Paco Cases Andrzej Paczkowski, Piotr Paczkowski spółka jawna w Puszczykowie,

Bożena Kubalańca,

Zbigniew Arczykowski,

Przedsiębiorstwo Produkcji Handlu i Usług Unipasz Sp. z o.o. w Radzikowicach,

Janusz Walocha,

Marek Grzegolec,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, K. Jürimäe (Rapporteur), D. Šváby, S. Rodin and N. Piçarra, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Powszechny Zakład Ubezpieczeń na Życie S.A., by W. Boruń and J. Wójcik, radcy prawni,
- the Prezes Urzędu Ochrony Konkurencji i Konsumentów, by B. Cebula, radca prawny,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by T. Christoforou, M. Farley, J. Szczodrowski and F. van Schaik, acting as Agents,
- the EFTA Surveillance Authority, by C. Zatschler, M. Sánchez Rydelski and C. Simpson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 November 2018,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of the principle of *ne bis in idem* enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 ('the Charter'), and in Article 3(1) 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 (OJ 2003 L 1, p. 1).
- 2 The request has been made in proceedings between Powszechny Zakład Ubezpieczeń na Życie S.A. ('PZU Życie') and the Prezes Urzędu Ochrony Konkurencji i Konsumentów (Head of the Polish Office of Competition and Consumer Protection, 'the Head of the UOKiK') concerning a decision of the latter to fine the former for an abuse of a dominant position on the basis of infringements of national and EU competition law.

Legal context

European Union law

- 3 Recital 6 of Regulation No 1/2003 reads as follows:

'In order to ensure that [EU] competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply [EU] law.'

- 4 Article 3(1) of that regulation states:

'Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) [EC] which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 [EC] to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 [EC], they shall also apply Article 82 [EC].'

- 5 Under the heading 'Powers of the competition authorities of the Member States', Article 5 of the regulation provides:

'The competition authorities of the Member States shall have the power to apply Articles 81 and 82 [EC] in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

...

- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.'

- 6 Under the heading 'Cooperation between the Commission and the competition authorities of the Member States', Article 11 of the regulation provides:

'1. The Commission and the competition authorities of the Member States shall apply [EU] competition rules in close cooperation.'

...

3. The competition authorities of the Member States shall, when acting under Article 81 or Article 82 [EC], inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.

...'

7 Under Article 16 of Regulation No 1/2003:

'1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 [EC] which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 [EC].

2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 [EC] which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.'

Polish Law

8 Article 8(1) of the ustawa o ochronie konkurencji i konsumentów (Law on the safeguarding of competition and consumers) of 15 December 2000 (Dz. U. 2000, No 122, item 1319, 'the UoOKiK') states:

'The abuse of a dominant position in the relevant market by one or more undertakings shall be prohibited.'

9 Article 101(1) of the UoOKiK provides:

'The [Head of the UOKiK] may, by decision, impose on an undertaking a fine not exceeding 10% of the revenue which the undertaking achieved in the financial year preceding the imposition of the fine in the case where that undertaking, even if negligently, has infringed:

(1) the prohibition laid down in Article 5, where no exclusion criterion under Articles 6 and 7 applies, or the prohibition in Article 8;

(2) Article 81 or Article 82 [EC];

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 By decision of 25 October 2007, the Head of the UOKiK found that, from 1 April 2001 until the date on which that decision was adopted, PZU Życie had abused its dominant position in the market for group life insurance for employees in Poland and, by doing so, infringed Article 8 of the UoOKiK.

- 11 The Head of the UOKiK also found that the conduct which amounted to an abuse could have a negative effect on the opportunities for foreign insurers to enter the Polish market which, in turn, could adversely affect trade between the Member States. The Head of the UOKiK therefore considered that PZU Życie had infringed Article 82 EC as well as national law.
- 12 The Head of the UOKiK fined PZU Życie in the amount of 50 381 080 Polish złoty (PLN) (approximately EUR 11 697 000), consisting, on the one hand, of a fine in the amount of PLN 33 022 892.77 (approximately EUR 7 664 000) on the basis of infringement of national competition law from 1 May 2001 to 25 October 2007 and, on the other, of a fine in the amount of PLN 17 358 187.23 (approximately EUR 4 033 000) on the basis of infringement of Article 82 EC from 1 May 2004, the date of accession of the Republic of Poland to the European Union, to 25 October 2007.
- 13 In a judgment of 28 March 2014, the Sąd Okręgowy w Warszawie — Sąd Ochrony Konkurencji i Konsumentów (Regional Court, Warsaw — Court for the Protection of Competition and Consumers, Poland) dismissed the action brought by PZU Życie against the decision of 25 October 2007. That judgment was upheld by a judgment of the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland) of 17 September 2015.
- 14 PZU Życie brought an appeal on a point of law before the Sąd Najwyższy (Supreme Court, Poland) on the basis of an infringement of the principle of *ne bis in idem* enshrined in Article 50 of the Charter and in Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'). The appellant in the main proceedings claims that it was fined twice for an infringement of EU law, namely, first, directly, on the basis of Article 82 EC, read in conjunction with Article 5 of Regulation No 1/2003 and, a second time, indirectly, on the basis of national competition law.
- 15 The referring court notes that the principle of *ne bis in idem* is of major significance in a democratic State governed by the rule of law and prohibits the renewed prosecution and punishment of the same person for the same offence. The referring court states that the case in the main proceedings essentially turns on the circumstances in which, in the same case, an infringement of competition law may be the subject of a second judgment or fine for the purposes of applying the principle of *ne bis in idem*.
- 16 In the first place, it notes that, in the judgment of 10 February 2009, *Sergey Zolotukhin v Russia* (EC:ECHR:2009:0210JUD001493903, paragraphs 78 to 82), the European Court of Human Rights held that that principle applies in regard to the same facts and not in regard to the same offence. According to that court, it follows from the rule in that case that the twofold punishment or prosecution of the same person for the same anticompetitive conduct, as in the present case, amounts to a breach of that principle. The referring court considers that the Court of Justice followed the same approach in areas other than competition law, in particular in the judgments of 5 May 1966, *Gutmann v Commission* (18/65 and 35/65, EU:C:1966:24), and of 9 March 2006, *Van Esbroeck* (C-436/04, EU:C:2006:165).
- 17 In the second place, the referring court notes that, in its competition law case-law, the Court of Justice has, by contrast, held that the principle of *ne bis in idem* is subject to the threefold condition of the same facts, offender and protected legal interest. More particularly, in ascertaining when the facts are the same, the Court is to have specified, in the judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraph 99), that not only the conduct of the undertaking but also the period during which and territory in which the conduct produced its effects must be taken into account.

- 18 Thus, according to the referring court, the Court has adopted a difference in approach in relation to competition cases and other fields of EU law. In competition cases, the Court requires, in addition to the same facts and same offender, that the protected legal interest be the same. That additional condition would limit the scope of the principle of *ne bis in idem*. It would lead, in the present case, to a finding that the principle has not been infringed.
- 19 The referring court therefore harbours doubts as to the scope of the principle of *ne bis in idem*, given that it must apply both the provisions of the ECHR and those of the Charter. In addition, it asks whether the Court's case-law on the application of that principle to competition cases complies with the second sentence of Article 52(3) of the Charter, since that case-law affords more limited protection than that enshrined in the ECHR.
- 20 In the third place, were the Court to confirm that the need for the protected legal interest to be the same amounts to an additional condition restricting the application of the principle of *ne bis in idem*, the referring court asks whether the judgment of 13 February 1969, *Wilhelm and Others* (14/68, EU:C:1969:4), which was delivered in a case which did not call into question the principle of *ne bis in idem*, must be interpreted as meaning that EU and national competition law protect the same legal interest. The referring court considers that the same ambiguity also arises in the judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraphs 81 and 98), which could, however, be construed to the effect that both sets of rules protect the same legal interest. That issue, which has not yet been determined, is essential to the outcome of the case in the main proceedings, in which the facts are the same and to which, in the same proceedings, analogous provisions of EU law and of national law were applied simultaneously.
- 21 In those circumstances, the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) 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?
- (2) Is Article 3 of Regulation [No 1/2003], read in conjunction with Article 50 of the [Charter], to be interpreted as meaning that 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?’

Consideration of the questions referred

- 22 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether the principle of *ne bis in idem* enshrined in Article 50 of the Charter must be interpreted as precluding a national competition authority from fining an undertaking in a single decision for an infringement of national competition law and for an infringement of Article 82 EC.
- 23 According to recital 6, Regulation No 1/2003 aims, in order to ensure that EU competition rules are applied effectively, to associate the authorities of the Member States more closely by empowering them to apply EU law.
- 24 Thus, in accordance with the second sentence of Article 3(1) of the regulation, where the competition authorities of the Member States apply national competition law to any abuse prohibited by Article 82 EC, they shall also apply that article.

- 25 The Court has repeatedly held that EU law and national law on competition apply in parallel. Competition rules at European and at national level view restrictions on competition from different angles and their areas of application do not coincide (judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 81 and the case-law cited).
- 26 It follows that, where the Commission has not opened a proceeding for the adoption of a decision under Chapter III of Regulation No 1/2003, where the national competition authority applies provisions of national law prohibiting unilateral conduct of undertakings capable of affecting trade between the Member States within the meaning of Article 82 EC, the second sentence of Article 3(1) of that regulation requires that Article 82 EC also be applied to it in parallel (see, by analogy, as regards Article 81 EC, judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraphs 77 and 78).
- 27 Article 5 of Regulation No 1/2003 specifies that the national competition authority with the power to apply Article 82 EC may impose fines, periodic penalty payments or any other penalty provided for in its national law.
- 28 In that regard, the Court held that the *ne bis in idem* principle must be observed in proceedings for the imposition of fines under competition law. That principle thus precludes an undertaking being found liable or proceedings being brought against it afresh on the grounds of anti-competitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged (judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 94 and the case-law cited).
- 29 It thus follows from the Court's case-law that the principle of *ne bis in idem* aims to prevent an undertaking from 'being found liable or proceedings being brought against it afresh', which assumes that that undertaking was found liable or declared not liable by an earlier decision that can no longer be challenged.
- 30 That interpretation of the principle of *ne bis in idem* is supported by the wording of and rationale behind Article 50 of the Charter.
- 31 In the first place, as regards the wording of Article 50 of the Charter, it is provided that 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'.
- 32 As the Advocate General stated in point 21 of his Opinion, that article thus specifically targets the repetition of proceedings concerning the same material act which have been concluded by a final decision. In a situation where, in accordance with the second sentence of Article 3(1) of Regulation No 1/2003, a national competition authority applies national competition law and Article 82 EC in parallel, there is in fact no such repetition.
- 33 In the second place, as regards the rationale behind the principle of *ne bis in idem*, it must be borne in mind, as stated, in essence, by the Advocate General in point 18 of his Opinion, that, as a corollary to the principle of *res judicata*, that principle aims to ensure legal certainty and fairness; in ensuring that once the person concerned has been tried and, as the case may be, punished, that person has the certainty that he will not be tried again for the same offence.
- 34 Thus, the protection which the principle of *ne bis in idem* aims to afford against the repetition of prosecution leading to a criminal sentence bears no relation to the situation in which national and EU competition law are applied in parallel in a single decision.

- 35 As the Head of the UOKiK, the Polish Government, the Commission and the EFTA Surveillance Authority have, in essence, submitted in their observations, it follows that the principle of *ne bis in idem* should not apply to a situation, such as that at issue in the main proceedings, in which the national competition authority applies, in accordance with Article 3(1) of Regulation No 1/2003, national and EU competition law in parallel and, under Article 5 of that regulation, fines an undertaking in a single decision for an infringement of the former and for disregarding the latter.
- 36 It must, however, be noted that, where, under Article 5 of Regulation No 1/2003, a national competition authority decides to impose a fine for an infringement of Article 82 EC, that authority must exercise its powers in accordance with EU law.
- 37 It is settled case-law that, where an EU regulation does not specifically provide any penalty for an infringement of that regulation or refers for that purpose to national laws, regulations and administrative provisions, Article 10 EC requires the Member States to take all measures necessary to guarantee the application and effectiveness of EU law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of EU law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty proportionate (see, by analogy, judgment of 10 July 1990, *Hansen*, C-326/88, EU:C:1990:291, paragraph 17).
- 38 Thus, as maintained by the EFTA Surveillance Authority in its observations, where the national competition authority imposes two fines in a single decision in respect of an infringement of national competition law and of an infringement of Article 82 EC, that authority must ensure that, taken together, the fines are proportionate to the nature of the infringement, which, in the case in the main proceedings, is for the referring court to ascertain.
- 39 In the light of the foregoing, the answer to the questions referred is that the principle of *ne bis in idem* enshrined in Article 50 of the Charter must be interpreted as not precluding a national competition authority from fining an undertaking in a single decision for an infringement of national competition law and for an infringement of Article 82 EC. In such a situation, the national competition authority must nevertheless ensure that the fines are proportionate to the nature of the infringement.

Costs

- 40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

The principle of *ne bis in idem* enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000, must be interpreted as not precluding a national competition authority from fining an undertaking in a single decision for an infringement of national competition law and for an infringement of Article 82 EC. In such a situation, the national competition authority must nevertheless ensure that the fines are proportionate to the nature of the infringement.

[Signatures]