

30th Conference on Postal and Delivery Economics
Rimini, 25-27 May 2022

Double jeopardy between regulatory and competition proceedings: the bpost judgement and the DMA

Alessandra Fratini

I. The *ne bis in idem* principle in EU Law

- Article 50 Charter
- *Toshiba*: narrow interpretation in competition law matters
- *Menci*: the limitation of rights under Article 52(1) Charter

II. The *bpost* proceedings at national level

- The two proceedings (IBPT and Competition Authority)
- The doubts of the Brussels Court of Appeal
- The two questions for preliminary ruling

III. The Judgement of the Court

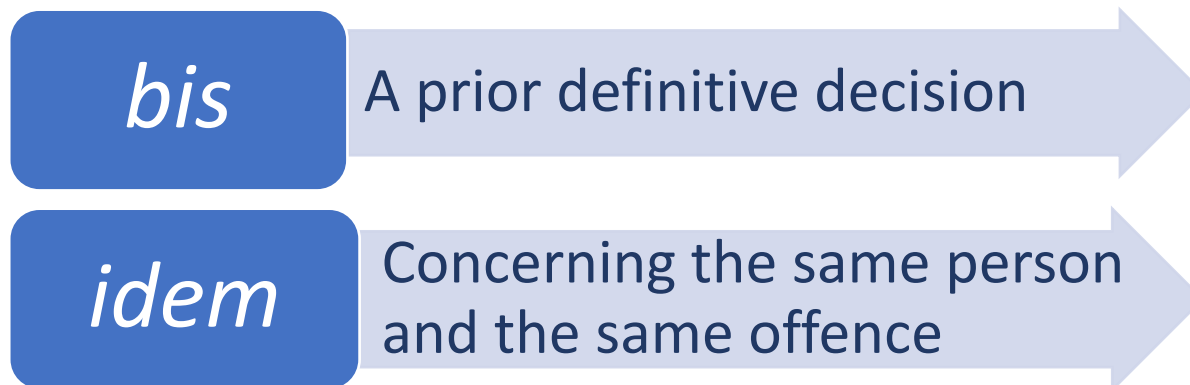
- The *Menci* way: conditions under Article 52(1) explained
- The “strict necessity” test

IV. Implications for DMA enforcement

The *ne bis in idem* principle in EU Law

1. Article 50 Charter

- “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”
- Subject to a twofold condition:




- Criminal law principle, expanded by CJEU to also cover punitive administrative proceedings
 - Growing list of administrative procedures and sanctions considered criminal, thus requiring the assessment of the *idem*
 - Possible consequence: any and every second set of administrative proceedings be found barred, irrespective of various purposes pursued



Enforcement issue for administrative regimes

2. Toshiba: *idem* in competition law matters

- 1969 *Wilhelm and Others*, concerning parallel cartel investigations by  CA and by the Commission
 - National and EU law view competition from different angles
- Confirmed by Grande Chambre in 2012 *Toshiba*
 - Protection of *ne bis in idem* in competition law matters triggered only if there is a 3-fold identity:
same offender / same facts / **same protected legal interest**

➞ An additional 3rd criterion for the *idem* condition



3. Menci: limitation of rights clause

- Shifting from Article 50 to Article 52(1) of the Charter
"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be **provided for by law** and respect the essence of those rights and freedoms. Subject to the principle of **proportionality**, limitations may be made only if they are **necessary** and genuinely **meet objectives of general interest** recognised by the Union or the need to protect the rights and freedoms of others"
- Duplication of proceedings may be justified under Article 52(1) for the purpose of achieving complementary aims, subject to the conditions thereof

The bpost proceedings at national level

1. bpost's discounts: the 2 proceedings


- **IBPT decision** 20/07/2011: €2.3M fine on the ground that its discount system was based on an unjustified difference in treatment between bulk mailers and consolidators
- Challenged by bpost before Brussels Court of Appeal → request for preliminary ruling CJEU
- CJEU judgement 11/02/2015: no discrimination under Art.12 PSD
- Brussels Court of Appeal judgment 10/03/2016: IBPT's decision **annulled**
- **CA decision** 10/12/2012: €37.4M fine on the ground that different treatment was an abuse of dominant position under Article 102 TFEU + equivalent national provision
- Challenged by bpost before Brussels Court of Appeal: decision annulled
- Appealed by CA before *Cour de Cassation*
- CdC judgement 22/11/2018: judgement set aside + case referred back to Court of Appeal
- Brussels Court of Appeal → request for preliminary ruling CJEU


2. The doubts of the Court of Appeal

- CA: IBPT's proceedings and its own covered different aspects of the same unlawful conduct → they protected different legal interests (Toshiba)
- Commission (*amicus curiae*): no legal *idem factum* under Toshiba + risk of making competition law ineffective, were the different legal interests protected by the applicable sets of rules not taken into account
- Court of Appeal: *prima facie*, *ne bis in idem* not applicable with 2 different legal interests (liberalisation of postal sector / ensuring undistorted competition), yet...

3. The questions for preliminary ruling

- Does the *ne bis in idem* principle prevent a national competition authority from imposing a sanction for an offence already fined by the postal NRA
 1. in so far as the protected legal interest is different?

 Toshiba test
 2. on the grounds that a limitation of the principle is justified by the fact that competition legislation pursues a complementary general interest objective, subject to principles of proportionality and necessity?

 Menci test

The Judgement of the Court

1. The Menci way

- Article 50 is subject to the 2-fold condition (*bis + idem*)
- For the *idem*, legal classification of facts under national law and legal interest protected are **not relevant**, "as the scope of the protection conferred by Article 50 cannot vary...from one field of EU law to another"

 Duplication of proceedings, if confirmed, constitutes a limitation of the fundamental right under Article 50 - that could be justified under Article 52(1), if:

✓ it is provided by law	✓ it complies with the principle of proportionality
✓ it genuinely meets objectives of general interest recognised by EU law	✓ it is strictly necessary

2. The strict necessity test

- Clear and precise rules allowing to predict which acts/omissions may be subject to duplication of proceedings, with coordination between authorities
- Proceedings conducted in sufficiently coordinated manner and within a proximate timeframe
- Penalty imposed in 1st proceedings taken into account in the assessment of 2nd penalty (overall penalties correspond to seriousness of the committed offences)



Answer to the preliminary questions: duplication of postal and competition law proceedings may be justified

Implications for DMA enforcement

- Duplication of proceedings allowed under Article 52(1) where proceedings have **complementary** objectives, covering **different aspects of same conduct**
- Provided that “strict necessity” test is satisfied (**provided by law; framed and actual cooperation** btw relevant authorities; proceedings and decisions sufficiently close in **time**; 2nd **fine** taking 1st fine into account)



What if a gatekeeper is subject to two separate proceedings for the same unlawful facts, under the DMA and (EU/national) competition law?

DMA

- Complementary objectives/provided for by law
 - Rec. 10: "since this Reg. aims at **complementing the enforcement of competition law**, ... it is without prejudice to **Articles 101-102 TFEU**, to the corresponding **national competition rules** and to other national competition rules regarding unilateral behaviour that are based on an individualised assessment of market positions and behaviour, including its actual or likely effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question, and to national rules concerning **merger control**"
- + Article 1(6)

DMA

- Cooperation between authorities provided for by law
 - Rec. 90-91, 98 last text
 - Articles 37-38, 46
- But, closeness in substance/time and respective fines can only be checked *ex post*



That leaves the door open for duplication of proceedings under the DMA and (EU and national) competition law

Thank you!

Alessandra Fratini
a.fratini@fratinivergano.eu
www.fratinivergano.eu