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LEGAL ALERT

THE CJEU SETS LIMITS TO THE APPLICABILITY OF THE *NE BIS IN IDEM* PRINCIPLE IN COMPETITION LAW

JUDGMENT OF THE COURT OF JUSTICE IN CASE C-857/19 – *SLOVAK TELEKOM*

I. Introduction

On 25 February 2021, the Court of Justice of the European Union ("**CJEU**") handed down a judgment specifying the limits to the applicability of the *ne bis in idem* principle in the context of European Union ("**EU**") competition law enforcement.

In this judgment, the CJEU clarified that the fundamental right to *ne bis in idem*, provided for in the Charter of Fundamental Rights of the EU and recognised as a general principle of EU law, is not applicable in cases where the same undertaking is punished twice for anti-competitive practices, once by the National Competition Authority of the Member State ("**NCA**") and once by the European Commission ("**Commission**"), if:

a) The unlawful acts occur in different relevant markets; or
b) The NCA loses its competence by virtue of the enforcement priority granted to the Commission under Regulation no. 1/2003.

This is a fundamental judgment to understand the legal possibility of parallel enforcement initiatives, at national level and at Commission level, for similar or even identical practices and time periods.

II. Facts

In 2005, the Slovak NCA initiated an enforcement procedure against Slovak Telekom ("**ST**"), based on an alleged breach of Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**"), which prohibits the abuse of a dominant position. This resulted in the adoption, in 2007, of a sanctioning decision. In 2009, that authority amended its 2007 decision, now sanctioning ST on the grounds of an alleged margin squeeze strategy. ST filled an action for annulment against this decision before Slovak courts.

In 2008, the Commission also initiated an enforcement procedure against ST, which was also based on an alleged breach of Article 102 TFEU. In 2014, the EU executive adopted a sanctioning decision in the procedure opened in 2008, fining ST on the grounds of an alleged margin squeeze strategy and refusal to supply. ST filled an action for annulment against this decision before EU Courts. That appeal is pending before the General Court of the EU ("**GCEU**").

In 2019, the Supreme Court of the Slovak Republic ("**SCSR**"), deciding the case concerning the action for annulment brought by ST against the Slovak NCA's 2009 decision, decided to stay the proceedings and to refer two questions to the CJEU for a preliminary ruling. It did so because it had doubts:

a) As to the competence of the Slovak NCA in light of the 2008 Commission procedure;
b) As to the conditions of applicability of the *ne bis in idem* principle in the national procedure.

III. The judgment of the CJEU of 25.02.2021 (C-857/18)

Regarding the first question concerning the competence of the Slovak NCA, the CJEU clarified that under Article 11(6) of Regulation no. 1/2003, the EU legal act regulating the division of competences between the Commission and the NCAs, the Commission's opening of a procedure for the enforcement of Articles 101 and 102 TFEU entails the loss of enforcement powers of the NCAs, but only on the relevant market(s) and in the period(s) of time forming the object of the Commission's procedure. In the present case, the CJEU found, in light of the facts presented to it, that the proceedings conducted by the Slovak NCA and by the Commission appear to concern

practices which took place on different relevant markets. If this was the case, the Slovak NCA would retain its enforcement powers even after the Commission's procedure was opened in 2008. The CJEU has, however, decided to leave such a finding to the SCSR.

On the second question concerning the application of the *ne bis in idem* principle, the CJEU clarified that this fundamental right would not be applicable in the absence of an *idem*.

In other words, if the sanctioned practices, even if identical, concerned different relevant markets, as it appeared to be the case, the principle would not apply. In fact, in that case, even if the infringing agent and the protected legal interest were identical, the facts could not be considered to be so. The CJEU opted, once more, to leave such assessment to the SCSR. But it also added that even if the SCSR considered that there was an *idem*, if there was no *bis*, the same conclusion should be reached. In other words, even if the sanctioned practices were identical and concerned the same relevant market, if the NCA had no jurisdiction under Regulation no. 1/2003, by virtue of the priority granted to the Commission, there would be no *bis*. Indeed, in that case, a prior final decision could not be considered to exist.

This is, using Takis Tridimas's expression, a *guidance* judgment rather than an *outcome* judgment:[1] the CJEU set the interpretative guidance to be followed by the SCSR, but left the national court with a margin to adapt this clarification to the facts of the case, in particular to verify the identity of the relevant markets concerned, something that is only achieved through the interpretation of a national legal act, *i.e.*, the NCA's sanctioning decision.

IV. Implications of the CJEU judgment

The *Slovak Telekom* judgment lays down two important principles concerning the applicability of the *ne bis in idem* principle in cases of multi-level application of the same EU competition law norm, be it Article 101 or Article 102 TFEU.

[1] Takis Tridimas, "Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction", *International Journal of Constitutional Law*, vol. 9, no. 3-4, October 2011, pp. 737–756.

Firstly, although the facts constituting infringements of EU competition law may be intertwined (the same business decision may, for example, give rise to the same type of unlawful practice in two different markets), the decisive element for successfully invoking the fundamental right to *ne bis in idem* will be, in addition to the temporal identity of the facts, the identity of the relevant market targeted by the competing sanctioning procedures

Secondly, if an NCA ignores the enforcement priority conferred on the Commission by Regulation no. 1/2003, the *ne bis in idem* principle will not be the appropriate defense against the NCA's sanctioning decision. In such cases, and even though the CJEU did not specify this in its *Slovak Telekom* judgment, the undertaking may invoke the *Simmenthal* principle,[2] requesting the disapplication of the national decision on the grounds of non-compliance with EU law, specifically on the basis of a combined breach of Article 11(6) of Regulation no. 1/2003 and of the principle of sincere cooperation, enshrined in Article 4(3) of the Treaty on European Union.

V. Practical recommendations

Undertakings which have been sanctioned in EU competition law enforcement proceedings, either by the Commission or by an NCA, must guard against the risk of further convictions for practices objectively and temporally similar to those for which they were already sanctioned. In fact, as clarified by the CJEU in the *Slovak Telekom* judgment, the *ne bis in idem* principle does not preclude, in the abstract, such a hypothesis.
It is important to bear in mind that the *Slovak Telekom* judgment did not render the application of the fundamental right to *ne bis in idem* impossible in such cases, but rather delimited its scope and conferring on national courts, in the case of national appeals against NCAs' decisions, the final word to assess the applicability of that fundamental right.

In such cases, the definition of the relevant market becomes a fundamental exercise for a defense based on the principle of *ne bis in idem*, and it is for undertakings to prove the identity of the markets targeted by the sanctioning proceedings carried out by the two types of institutional actors, *i.e.*, the Commission and the NCAs.

[2] Judgement of 9 March 1978, Simmenthal, C-106/77, ECLI:EU:C:1978:49.

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