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Ne bis in idem and Enforcement of EEA Competition Rules

Exploring briefly whether the maxim *ne bis in idem* has any relevance for the enforcement of the competition rules of the European Economic Area (hereinafter: the EEA) is a modest tribute to Professor *Carl Baudenbacher* who contributed, and continues to contribute, very significantly to the development of the law of the EEA in his dual capacity as judge in, and president of, the EFTA Court and as eminent academic: *bis in aliud*, Professor *Baudenbacher*!

I. Introductory remarks

The maxim *ne bis in idem* is an old and respectable one. It stems from Saint *Jerome*'s commentary on Prophet *Nahum*, Book 1: «*Non iudicabit Deus bis in id ipsum*».[1] It is enshrined i.a. in Article 4(1) of Protocol No 7 to the European Convention on Human Rights and in Article 50 of the Charter of Fundamental Rights of the European Union. It is reflected in clauses of certain conventions which were entered into in the EU framework, such as the Convention implementing the Schengen Agreement. The Court of Justice (hereinafter: the ECJ) found it to be a fundamental principle of EC law, also in competition matters.[2]

This exploration starts with a brief state of play with respect to this maxim in EC competition law, first in situations where undertakings are punished both within and outside the EC for the same anti-competitive conduct (e.g. an international cartel) and second in situations where undertakings could be punished within the EC both by the European Commission and by an EC Member State competition authority or by several such competition authorities for the same anti-competitive conduct. The analysis is limited to enforcement by competition authorities. Criminal enforcement by courts in the EEA may be left aside for obvious practical reasons.

1 I owe this reference to the eminent legal historian Prof.em. Raoul Baron *Van Caenegem*.
2 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* [2002] ECR I-8375, paragraph 59, with reference to a situation in which an undertaking would be found guilty in proceedings brought against it for a second time on the grounds of anti-competitive conduct in respect of which it has been penalized or declared not liable by a previous unappealable decision.

II. *Ne bis in idem* in EC competition law – conduct within and outside the EC

The ECJ addressed the *ne bis in idem* maxim in a situation in which the European Commission had fined an undertaking for conduct that infringed EC competition rules and that had also led to sanctions outside the EC, arguably for the first time in the 1972 *Boehringer Mannheim* judgment.[3] It has been argued repeatedly in the EC Courts.

In *Aalborg Portland and Others*, the ECJ held that the application of the principle of *ne bis in idem* is subject to the threefold condition of identity of facts, unity of offender and unity of legal interests protected.[4]

At the time of writing *SGL Carbon*[5] and *Showa Denko*[6] were the latest competition cases in which the ECJ dealt with this principle. These two companies had appealed against a judgment of the Court of First Instance of the EC (hereinafter: the CFI) in *Tokai Carbon Co Ltd and Others*.[7] In this judgment the CFI had essentially dismissed appeals brought against a decision of the European Commission. The European Commission had found that various American, German and Japanese undertakings had fixed prices for graphite electrodes on a worldwide basis and had shared markets according to the ‹home producer market› principle.[8]

The European Commission had imposed fines which it set according to the methodology described in its 1998 guidelines on the method for setting fines.[9] This involved basing the ‹basic fine› on worldwide market shares and turnover of the undertakings with respect to the relevant product and included a ‹deterrence factor› based on the undertakings' conglomerate worldwide turnover. One of the pleas of *SGL Carbon* and of *Showa Denko* in the ECJ was that, by assessing the fines in that way and by not taking into account the fact that the applicants/appellants had already been fined in Canada, Japan and the United States, the European Commission had infringed the principle *ne bis in idem*.

After recalling that the principle of *ne bis in idem* constitutes a fundamental principle of EC law[10] the ECJ considered that:

> *«when the Commission imposes sanctions on the unlawful conduct of an undertaking, even conduct originating in an international cartel, it seeks to safeguard the free competition within the common market, which constitutes a fundamental objective of the Community under Article 3(1)(g) EC. On account of the specific nature of the legal interests protected at Community level, the Commission's assessment pursuant to its relevant powers may diverge considerably from those of authorities of non-Member States».*[11]

The EC concluded that:

> *«. . . the Court of First Instance was fully entitled to hold in paragraph 134 of the judgment under appeal that the principle of ne bis in idem does not apply to situations in which the legal systems and competition authorities of non-Member States intervene within their own jurisdiction.»*[12]

Two tentative conclusions may be drawn from this very brief overview. First, the inference that was drawn, rightly or wrongly, in the past from *Boehringer Mannheim*, i.e. that the *ne bis in idem* principle is complied with in international cases since the Commission assesses fines solely on the basis of the effects of the infringement within the EC[13] is no longer valid in fact. It is true that the Commission asserts, and that the EC Courts have accepted,[14] that the worldwide turnover is used only to determine the relative size of the undertakings concerned and to set the deterrence factor. However, the Commission guidelines on fines and its decisional practice under these guidelines on setting the basic fine and applying the deterrence factor do in fact depart from the principle that fines are assessed solely on the basis of the effects of an infringement of competition rules within the EC.

Second, as results i.a. from *SGL Carbon*, there is no unity of legal interest protected in situations in which the legal systems and competition authorities of non-Member States intervene within their own jurisdiction.[15] This means that for all practical purposes the principle does not apply under EC law in any such situation and the European Commission may, when setting a fine for an infringement of EC competition rules, completely disregard fines and other measures taken by non-Member States intervening within their own jurisdiction with respect to the same conduct.

This result is not out of line with public international law. In *Archer Daniels Midland, Tizzano* AG demonstrated convincingly that there is no principle of public international law that prevents authorities or courts of different states from trying and convicting a person on the basis of the same facts.[16] On the other end of the spectrum, i.e. within the EU Member States' legal systems upholding *ne bis in idem*, this principle is generally only applicable internally[17] and, as a rule, international

3 Case 7/72 [1972] ECR 1281. Arguably, because this is disputed i.a. by *Geelhoed* AG who considers in his opinion in *SGL Carbon*, Case C-308/04 that *Boehringer* does not deal with this issue (paragraph 50). The ECJ shared that view in its judgment of 18 May 2006, Case C-397/03 P *Archer Daniels Midland*, nyr, paragraph 49.
4 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P [2004] ECR I-123, paragraph 338.
5 Judgment of 29 June 2006, Case C-308/04 nyr.
6 Judgment of 29 June 2006, Case C-289/04 nyr.
7 Judgment of 29 April 2004, Joined Cases T-236/01, T-239/01, T-246/01, T-251/01 and T-252/01, nyr.
8 OJ 2002 L 100/1.
9 OJ 1998 C 9/3.
10 *SGL Carbon*, loc. cit., paragraph 26; *Showa Denko*, loc. cit., paragraph 50.
11 *SGL Carbon*, loc. cit., paragraph 31; *Showa Denko*, loc. cit., paragraph 55.
12 *SGL Carbon*, loc. cit., paragraph 32; *Showa Denko*, loc. cit., paragraph 56.
13 See note on *Showa Denko* by C. *Reyngaert* in 54 SEW 441 (2006).
14 E.g. the ECJ in *Showa Denko*, loc. cit., paragraphs 15-17 on the CFI judgment and referring to other judgments.
15 Paragraph 32.
16 Supra fn. 3, paragraphs 93-98, multilateral instruments limit the application of *ne bis in idem* to judicial decisions within the same state, a position which is confirmed by international case law and shared by the German and Italian constitutional courts. In *SGL Carbon*, supra fn. 3, the ECJ upheld the findings of the CFI on the absence of public international law *ne bis in idem* principle (paragraph 34).
17 According to *Tizzano* AG, ibid fn. 38.

agreements, such as the ones referred to earlier, are needed to render *ne bis in idem* applicable between EU Member States.

III. *Ne bis in idem* in EC competition law – conduct within the EC

Pursuant to Regulation (EC) 1/2003,[18] when applying national competition law to conduct covered by Articles 81 and 82, EC Member State competition authorities are obliged to apply also Articles 81 and 82 EC. Notwithstanding the operation of the European Competition Network and the various arrangements provided by or under Regulation 1/2003, simultaneous prosecution by EC Member State competition authorities and prosecution by the Commission following one by a Member State competition authority cannot be excluded.[19]

In *SGL Carbon* the ECJ stated that the legal situation in relation to the *ne bis in idem* principle:

> *«is completely different when an undertaking is caught exclusively – in competition matters – by the application of Community law and the law of one or more Member States on competition, that is to say, when a cartel is confined exclusively to the territorial scope of the application of the legal system of the European Community».*[20]

This means that within the EC legal order there is unity of legal interest protected, when EC competition rules are enforced with respect to the same conduct by different entities. Obviously, for the principle *ne bis in idem* to apply the two other conditions i.e. the identity of facts and the unity of offender need to be fulfilled.[21]

To the extent *Walt Wilhelm*[22] is seen as considering cumulative application of Article 81 EC (and its requirement of effect on trade between Member States) and Member States competition rules as consistent with *ne bis in idem*, it is no longer good law. As *Ruiz-Jarabo Colomer* AG stated in *Italcementi*, the EC authorities and the Member State authorities are involved in a similar task and when they penalize anti-competitive conduct they do so to protect a single legal right.[23]

18 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 1/1.

19 See *W. Wils*, The Principle ne bis in idem in EC Antitrust Enforcement: A Legal and Economic Analysis, 26 World Competition at 144-145 (2003).

20 Paragraph 30.

21 In *Aalborg Portland and Others*, supra fn.13 the ECJ upheld the CFI finding that there was no breach of *ne bis in idem* on the ground that the decision of the Italian competition authority in respect of the cooperation agreement between Calcestruzzi and the Italian cement producers had a different object from that pursued by the Cement Decision of the European Commission. In the case of the gas insulated switch gear cartel the Czech and Hungarian competition authorities imposed fines alongside the European Commission but did so for the period before the accession of the Czech Republic and Hungary to the EC. «Czechs fine 16 firms $45 mln in cartel case», Reuters News, February 12, 2007; «Hungarian competition authorities slap fine of HUF 702 mln on electrical equipment cartel», Hungarian Business Newsline, December 23, 2005.

22 Case 14/68 [1969] ECR 1.

23 Paragraph 93. *W. Wils*, op.cit. supra fn. 16, argues that Member State competition laws would appear to cover the same ground as Articles 81 and 82 EC.

One may conclude that with respect to the third condition to which the application of the principle *ne bis in idem* is subject, i.e. the unity of legal interests protected, the situation within the EC is completely different from the situation obtaining when an undertaking is caught by the EC competition rules and by competition rules of a third State.

IV. *Ne bis in idem* in EEA competition law – conduct within the EEA

What then is the position within the EEA? Maybe surprisingly, one ought to examine first whether under the EEA competition rules prosecution by more than one competition authority for the same anti-competitive conduct is conceivable.

In a radical departure from the situation obtaining at the international level and even departing from the regime applying in this respect within the EC, in EEA competition law there is a clear division of responsibilities and a ‹one-stop-shop› system.[24] Restrictive agreements that only affect trade between EFTA States or where the turnover of the undertakings concerned in the territory of the EFTA States equals 33 % or more of their turnover in the EEA are to be dealt with by the EFTA Surveillance Authority (thereinafter: ESA), except where trade between EC Member States is affected;[25] others are to be dealt with by the European Commission. Abuses of dominant position are dealt with either by the ESA or by the European Commission, depending on the territory in which the dominant position is found to exist; when dominance exists within the territory of both the ESA and the European Commission, the same division of responsibilities applies as in cases of restrictive agreements.[26] In addition, there are wide-ranging obligations of mutual information and consultation, including mutual assistance in investigations and consultations before statements of objections are issued in all cases where trade in both the EC and the ETFA is affected.[27] While a surveillance authority does not participate in the decision-making of the other, it has the possibility to have a role in its decision-shaping.

This division of enforcement responsibilities between the EFTA and the EC pillars of the EEA, operating under a ‹one-stop-shop› principle, means that the ESA or the European Commission determines the effects of a restrictive agreement and of an abuse of dominant position in the entire EEA or in any «substantial part» thereof.

24 See *J. Bourgeois*, The EEA Rules on Competition: Odd Man out or Model for Multilateral Rules, in: M. Johansson/N. Wahl/U. Bernitz (eds.), Liber Amicorum in Honour of Sven Norberg – A European for all Seasons (Bruylant, Bruxelles), 2006, 125.

25 As *Marino Baldi* underlines in «Bemerkungen zum EWR-Wettbewerbsrecht aus grundsätzlicher Sicht» in O. Jacob-Guillarmod (ed.), Accord EEE. Commentaires et réflexions, Stämpfli, Bern, 1992, 285 at 298, the allocation rule based on percentage of turnover applies only where trade between EC Member States is not affected, which will rarely be the case.

26 Article 56 of the Agreement on the European Economic Area and additional rules in Protocols 21 and 23 and in Annex XIV to the Agreement OJ L 1, 3.1.1994, pp. 3-36.

27 Protocol 23.

The EEA Agreement does not address the question as to whether and how either authority, when assessing fines, takes account of the fact that it deals with the whole of the EEA. However, e.g. in its 2006 guidelines on fining, the European Commission indicates clearly that, in order to determine the «basic amount» of the fine, it will take the value of the undertaking's sales to which the infringement directly or indirectly relates in the relevant geographic market *within the EEA* (emphasis added).[28]

It would seem that in this one-stop-shop system, there is no room for the *ne bis in idem* principle in the relationship between the ESA and the European Commission, as they have no concurrent authority.

The EEA Agreement does not say anything about the further allocation of tasks within the EC and the EFTA pillar of the EEA. This matter is left to the relevant rules of each pillar. This means that if e.g. a cartel is to be dealt with by the European Commission, this will not automatically exclude the power of the EC Member State competition authorities to deal with such cartel. In that event the *ne bis in idem* principle would apply as in a straightforward EC case.

It is thus even difficult to imagine a situation in which the ESA and the European Commission would consider that each of them is called upon to take measures against the same conduct of the same offender infringing EEA competition rules. Should such situation nonetheless occur the question would arise as to whether or not there would be unity of legal interest protected. In *SGL Carbon* the ECJ stated that by imposing sanctions on anti-competitive conduct of the European Commission «*seeks to safeguard the free competition within the common market which constitutes a fundamental objective of the Community . . .*», which is considered as a legal interest of a specific nature protected at Community level.[29] In *Italcementi*, *Ruiz-Jarabo Colomer* AG considered that «*in the arrangement designed to ensure free competition, it is not possible to speak, within the European Union, of separate spheres, the Community sphere and the national spheres . . . Both sectors seek to protect free and open competition in the common market*».[30]

In the hypothetical case, when taking each one measures against the same conduct of the same offender, the ESA and the European Commission would seek to safeguard free competition within the EEA which is considered as fundamental for the EEA as it is for the EC.[31] The EEA Agreement is arguably more explicit than the EC Treaty on «*equal conditions of competition*» and «*respect for the same rules*» which are to serve the creation of «*a homogeneous European Economic Area*». The ESA and the European Commission would seek to protect the same legal interest. The *ne bis in idem* would require either the ESA or the European Commission to abstain from fining the undertaking(s) concerned.

28 OJ 2006 C 210/2, paragraph 13.
29 *SGL Carbon*, loc. cit. supra fn. 3, paragraph 31.
30 Opinion of 11 February 2003, Case C-213/00 *Italcementi*, nyr, paragraph 91.
31 It is enough to compare Articles 2 and 3(1)(g) EC with Article 1(1) and 1(2)(e) EEA.