FRATINIVERGANO
EUROPEAN LAWYERS

DRAFT – NOT TO BE QUOTED

11th bi-annual Postal Economics Conference
E-commerce, Digital Economy and Delivery Services
Toulouse, 7-8 April 2022

Ne bis in idem between sector regulation and competition law: the *bpost* solution

ALESSANDRA FRATINI*

1. Introduction

At least since the establishment of the Single Market in 1992, the delivery sector has been subject to sector-specific regulation and competition law, at both the national and the European level. As the two sets of rules pursue a different objective and are often enforced by different authorities, it may well be that a given conduct is relevant and sanctionable under both sets, which in turn raises the question of the application the principle of *ne bis in idem* (protection against double jeopardy), enshrined in Article 50 of the Charter of Fundamental Rights of the EU (the "Charter").

The question of the application of *ne bis in idem* to parallel sectoral and competition law proceedings was brought to the Court of Justice with regard to the quantitative discounts for bulk mail introduced by bpost on a "per sender" basis, which had been censured by both the sectoral regulator IBPT and the Belgian competition authority. bpost first challenged the IBPT decision, which was annulled by the Brussels Court of Appeal following a preliminary ruling of the Court of Justice[1] on the interpretation of the Postal Services Directive[2]. With a second complaint, bpost challenged the competition authority's fine relying on the principle of *ne bis in idem*. The Brussels Court of Appel, following the referral from the Court of Cassation, requested a new preliminary ruling from the Court of Justice, this time on the interpretation of the principle of *ne bis in idem,* aiming at clarifying which of the two lines of caselaw developed by the Court should apply to the combination of sectoral and competition proceedings.

On 23 March 2022, the Court issued its judgement and clarified that the protection conferred by the Charter does not preclude an undertaking from being penalised for an infringement of competition law where, on the same facts, it has already been the subject of a final decision for failure to comply with sectoral rules, subject however to specific conditions[3].

* Partner, FratiniVergano – European Lawyers, Brussels.

[1] Court of Justice, judgment of 11 February 2015, *bpost*, case C-340/13, ECLI:EU:C:2015:77. The Court held that the different treatment reserved by bpost to bulk mailers and consolidators did not constitute a discrimination pursuant to Article 12 of the Directive, based on the fact that the situation of the two categories was not comparable.

[2] Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15, 21.1.1998, p. 14, as last amended by Directive 2008/6/EC of 20 February 2008, OJ L 52, 27.2.2008, p. 3.

[3] Court of Justice, judgment of 22 March 2022, *bpost*, case C-117/20, ECLI:EU:C:2022:202.

After a brief overview of the two lines of case-law of the Court of Justice on the *ne bis in idem* principle (section 2), this paper reviews the facts and proceedings of the bpost case at national level (section 3) and then focuses on the bpost judgement (section 4). The chapter concludes on the implications of the judgment for postal services providers (section 5).

2. The *ne bis in idem* principle and the two lines of case law of the Court

The principle of *ne bis in idem* precludes a person from being subject to new proceedings against her/him on the grounds of conduct for which she/he has been convicted or acquitted by an earlier decision that can no longer be challenged.

The principle, which is common in the Member States' legal traditions and has been enshrined in Article 4 of Protocol 7 to the ECHR, acquired an additional level of recognition at European level with its inclusion in the Charter of Fundamental Rights of the EU[4], whose Article 50 provides 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".

At its origins, it is a criminal law principle under which a person cannot be punished and subject to several procedures twice for the same facts. The Court of Justice expanded its scope to cover not only formally criminal proceedings but also administrative punitive proceedings with a criminal nature in light of the so-called Engel criteria, developed by the European Court of Human Rights to establish whether or not there was a "criminal charge"[5]. Three criteria are relevant in this respect: the legal classification of the offence under national law; the intrinsic nature of the offence and the degree of severity of the penalty, which the person concerned is liable to incur[6]. That resulted in a growing list of administrative procedures and sanctions considered criminal, and thus a growing range of procedures and sanctions requiring the assessment of the *idem* – with the possible consequence that any and every second set of administrative/criminal proceedings be found barred, irrespective of the various purposes it may pursue.

In that respect, as Advocate General Bobek put it in his Opinion, "[*a*]t EU level, the principle ne bis in idem has developed in what can best be described as successive waves of case-law"[7]. For what matters here, leaving therefore aside the developments in the area of freedom, security and justice, in a first wave the Court of Justice has interpreted the principle more narrowly when applying it to competition law cases. In fact, while in general the principle is subject to a twofold condition - that there is a prior definitive decision (the "bis" condition) and that such prior decision and the subsequent proceedings concern the same person and the same offence (the "idem" condition) - in competition law matters the Court of Justice

[4] OJ C 326, 26.10.2012, p. 391.

[5] See, *ex multis*, A. TURMO, *Ne bis in idem in European law: A Difficult Exercise in Constitutional Pluralis.m*, in *European Papers*, vol.5, 2020, No. 3, p. 1341 ff; X. GROUSSOUT, A. ERICSSON, *Ne Bis in Idem in the EU and ECHR Legal Orders. A Matter of Uniform Interpretation?*, (eds) B. VAN BOCKEL, *Ne Bis in Idem in EU Law*, Cambridge, 2016, p. 53 ff.; D. Sarmiento, *Ne Bis in Idem in the Case Law of the European Court of Justice*, (eds) B. VAN BOCKEL, *Ne Bis in Idem in EU Law*, Cambridge, 2016, p. 103 ff.

[6] Judgments of 5 June 2012, Bonda, C-489/10, EU:C:2012:319, pt. 37, and of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, pt. 26 and 27.

[7] See, AG Opinion, *bpost*, case C-117/20, ECLI:EU:C:2021:680, pt. 42.

required, for the application of the "idem" condition, an additional third criterion, i.e. that not only the offender and the facts, but also the protected legal interest must be the same.

At the origins of the case-law on ne bis in idem in competition matters is the 1969 judgement in *Wilhelm and Others*[8], which concerned parallel investigations in a cartel carried out by the German Competition Authority and by the Commission. The Court of Justice held that the *ne bis in idem* principle was not to be intended as an obstacle to parallel proceedings, because of the different legal interest protected by EU and national competition laws. This stringent test with the additional condition of the identity of the legal interest protected was confirmed in 2012 by the *Grande Chambre* in *Toshiba*[9], where the Court held that the Commission and the national competition authorities can respectively apply the European and the national competition rules to the same company for the same facts because the two sets of rules are considered to view restrictive practices in a different manner. In this respect, however, it has been argued by Advocate General Bobek in *bpost*, "*in similar vein to all* [his] *learned colleagues who have taken a position on that issue in the past*", that it is difficult to maintain that the scope of the protection conferred by Article 50 of the Charter may be different depending on the area of EU law to which it is applied[10].

In a second wave (*Menci*, *Garlsson* and *Di Puma*)[11], the Court shifted the analysis from Article 50 to the limitation of rights clause enshrined in Article 52(1) of the Charter[12], which is an horizontal clause laying down the conditions for limitations on the exercise of the rights and freedoms recognised by the Charter. The relevant judgments concerned a second set of proceedings brought on account of tax evasion, market manipulation and insider trading delicts, in spite of the fact that previous proceedings having criminal nature had already been initiated for the same acts. In those cases, the Court admitted that a duplication of proceedings was justified under Article 52(1) of the Charter for the purpose of achieving complementary aims, subject to the condition that the national laws allowing such duplication pursued an objective of general interest, contained "rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and provides for rules making it

[8] Judgment of 13 February 1969, *Wilhelm and Others*, case 14/68, ECLI:EU.1969:4, pt. 2-9.
[9] Court of Justice, judgment of 14 February 2012, *Toshiba*, case C-17/10, ECLI:EU:C:2012:72.The same approach was accepted by the European Court of Human Rights until its decision in *Zolutukhin v. Russia*.
[10] Opinion, pt. 92, referring to the three Advocates General who have criticised that criterion (Advocate General Kokott, in *Toshiba*, pt. 114 to 122; Advocate General Wahl in *Powszechny Zakład Ubezpieczeń na Życie,* C-617/17, EU:C:2018:976, pt. 45; and Advocate General Tanchev in *Marine Harvest*, C-10/18 P, EU:C:2019:795, pt. 95.
[11] Court of Justice, judgments of 20 March 2018, *Menci*, case C-524/15, cit.; *Di puma*, case C-596/16, ECLI:EU:C:2018:192; *Garlsson Real Estate*, case C-537/16, ECLI:EU:C:2018:193. Those judgments generated many discussions, *ex multi*, see, M. Luchtman, *The ECJ's Recent Case Law on Ne Bis in Idem: Implications for Law Enforcement in a Shared Legal Order*, in *Common Market Law Reports*, 2018, p. 1725 ff.; G. Lo Schiavo, *The Principle of Ne Bis in Idem and the Application of Criminal Sanctions: of Scope and Restrictions*, in *European Consititutional Law Review*, 2018, p. 644 ff.; M. Vetzo, *The Past, Present and Future of the Ne Bis in Idem Dialogue Between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma*, in *REALaw,* 2018, p. 70 ff.
[12] 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".

possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offense concerned"[13].

In his Opinion in *bpost*, Advocate General Bobek found it difficult to see how the caselaw in *Toshiba* and in *Menci* could be reconciled and applied in one and the same proceedings[14]. In his view, the bpost case offered the Court a unique opportunity to provide a coherent guidance on the scope of the protection conferred by Article 50.

3. The bpost case: facts and proceedings at national level

The dispute in the main proceedings concerned the quantity rebate scheme applicable to bulk mailers and consolidators, which bpost had introduced in 2010: different from before, the rebate granted to consolidators was no longer calculated on the basis of the total volume of mail items from all the bulk mailers to which they provided their services, but on the basis of the volume of mail items generated individually by each of those bulk mailers.

With decision of 20 July 2011, the IBPT imposed on bpost a fine of €2.3 million on the ground that its discount system was based on an unjustified difference in treatment between bulk mailers and consolidators[15]. bpost challenged the decision before the Brussels Court of Appeal, which in turn requested a preliminary ruling from the Court of Justice on the interpretation of Article 12 of the Postal Services Directive[16]. In its judgment of 11 February 2015[17], the Court of Justice held that bulk mailers and consolidators are not in comparable situations as regards the objective pursued by the system of *per sender* quantity discounts, which is to stimulate demand, since only bulk mailers are in a position to be encouraged, by that system, to increase the volume of mail handed on to bpost and its turnover. As a result, the different treatment between those two categories of clients was not discriminatory and did not breach Article 12 of the Postal Services Directive. The Brussels Court of Appeal, by judgment of 10 March 2016, annulled the IBPT's decision.

In the meantime, by decision of 10 December 2012, the Belgian Competition Authority had found that the different treatment under the same rebate scheme constituted an abuse of dominant position in breach of Article 102 TFEU and its equivalent national provision, in so far as it placed consolidators at a competitive disadvantage to bpost by encouraging major clients to contract directly with the latter, and fined bpost €37.4 million for the application of that rebate system between January 2010 and July 2011[18]. The amount of the fine was calculated considering the fine previously imposed by the IBPT. bpost applied to the Court of Appeal for the annulment of the decision invoking the *ne bis in idem* principle, arguing that the judgment of 10 March 2016 had ruled on the merits of the IBPT's decision in relation to acts essentially the same as those at issue in the action taken by the competition authority (*i.e.* the "per sender" tariffs of 2010). Based on that principle, the Court of Appeal held that

[13] Court of Justice, judgment of 20 March 2018, *Menci*, cit., pt. 45.

[14] Opinion, pt. 6.

[15] The decision was adopted pursuant to Article 144*ter* of the Law of 21 March 1991 on the reform of certain public commercial undertakings, which transposed the Postal Services Directive into Belgian law.

[16] Directive 97/67/EC, as amended, cit..

[17] Court of Justice, judgment of 11 February 2015, *bpost*, case C-340/13, cit.

[18] Decision 2012-P/K-32 of 10 December 2012, Affaires CONCP/ K-05/0067, CONC-PIK-09 0017 et CONC-P/K- 10/0016 Publimail, Link2Biz International et G3 Worldwide Belgium/bpost.

the proceedings before the competition authority had become inadmissible and annulled the 2012 decision.

Following the appeal of the Belgian Competition Authority, and relying on Article 52(1) of the Charter, the *Cour de Cassation* held that Article 50 of the Charter does not preclude the duplication of criminal proceedings, within the meaning of that provision, based on the same facts, even where one set of proceedings has ended in a final acquittal, when - subject to the principle of proportionality and for the purpose of attaining a general interest objective - those proceedings have additional complementary objectives, covering different aspects of the same unlawful conduct. With its judgment of 22 November 2018, the *Cour de Cassation* set aside the judgment of the Court of Appeal and referred the case back to it, with a different composition.

The Court of Appeal decided to raise two questions to the Court of Justice for a preliminary ruling, as suggested in the course of the proceedings by both the Belgian Competition Authority and the European Commission, intervened as *amicus curiae*. The former claimed that its decision did not breach the *ne bis in idem* principle, as interpreted by the Court of Justice in its competition case-law, i.e. as including the additional criterion of the "legal interest protected" for the purpose of defining the *idem factum*. Recalling the judgement in *Toshiba*[19], the Competition Authority in fact maintained that the two proceedings (the one of the IBPT and its own) were characterized by complementary objectives covering different aspects of the same unlawful conduct and, therefore, they protected different legal interests.

The Commission also pleaded against the application of *ne bis in idem* principle in the case at hand[20], highlighting the risk of depriving competition law of its scope and making it ineffective, were the different legal interests protected by the applicable sets of rules not taken into account[21]: "[*that*] is crucial to preventing an undertaking that has been prosecuted under sectoral rules that pursue a very specific objective from being able to rely on the principle *non bis in idem* in order to evade the application of competition law"[22]. The Commission made the point that it was not a matter of an exception to the principle (Article 52 of the Charter) but of the principle itself (Article 50 of the Charter), since there was no legal *idem factum* in the sense used in *Toshiba*. The case concerned two separate sets of proceedings, for two different offences based on different laws, which are applicable simultaneously within the same Member State but pursue distinct and complementary legal interests.

The Court of Appeal noted that sector-specific legislation and competition law do not pursue one and the same aim. The two sets of proceedings find their basis "in different legislation intended to protect different legal interests, that is to say, first, ensuring the liberalisation of the postal sector by means of transparency and non-discrimination obligations and, secondly, ensuring free competition within the internal market by prohibiting operators from abusing their dominant position" [23].

[19] Court of Justice, judgment of 14 February 2012, *Toshiba*, case C-17/10, ECLI:EU:C:2012:72.
[20] Summary of the request for a preliminary ruling lodged on 3 March 2020 by the Cour d'Appel de Bruxelles, case C-117/20, pt. 35.
[21] *Ibidem*, pt. 40.
[22] *Ibidem*, pt. 42.
[23] *Ibidem*, pt. 44 -64.

While it *prima facie* appeared that the *ne bis in idem* principle should not apply, the Court of Appeal shared the hesitation voiced by some Advocates General and decided to raise two preliminary questions to the Court of Justice[24]. With the first question, it asked whether the *ne bis in idem* principle prevents a national competition authority from imposing a sanction for an offence that has already been subject to an administrative fine by the national postal regulator, in so far as the protected legal interest is different[25]. In essence, the national judge asked whether it should apply the "*idem*" test for the combination of two competition proceedings, as confirmed in *Toshiba*. With its second question[26], the referring court asked whether the legality of the second proceedings should be instead examined under the limitation of rights clause and the test established for the combination of criminal and administrative proceedings in the *Menci*, *Di Puma*, *Garlsson Real Estate* case-law, i.e. if the circumstances of the case called for a restriction of the *ne bis in idem* principle, justified by the fact that competition law pursues a complementary objective of general interest, subject to the principles of necessity and proportionality.

In other words, the doubt of the national judge concerned the test to be applied in the assessment of the *idem*: *Toshiba* or *Menci*?

4. The judgement of the Court

While the Advocate General, after having examined the problems raised by the existing parallel regimes[27], had proposed making the examination of the protected legal interest part of the consideration of the *idem*, thereby suggesting a unified test that should rely on a threefold identity (of the offender; of the relevant facts; and of the protected legal interest), the Court took a different approach.

Without touching upon the parallel regimes, the Court moved from the *ne bis in idem* principle as laid down in Article 50 of the Charter and applied it to the case at issue, subject to verification by the referring court. After noting that the criminal classification of the two proceedings was not in question, it recalled that the principle is subject to the twofold

[24] For a preliminary assessment of the request for preliminary ruling, see G. MALOS, *The bpost Ruling: an "Unsuccessful" Attempt to Square the Circle. The ne bis in idem Principle Standing Between Regulatory and Competition Law*, in *European Networks Law and Regulation Quarterly*, 2015, p. 82 ff.; J. DEWLSPELAERE, J. VUYLSTEKE, *Request for a Preliminary Ruling on the Non Bis in Idem Principle in Competition Law Matters, Ho to Reconcile Homogeneity and Effectiveness*, in *European Competition and Regulation Law Review*, 2020, p. 111 ff.

[25] "Must the principle non bis in idem, as guaranteed by Article 50 of the Charter, be interpreted as not precluding the competent administrative authority of a Member State from imposing a fine for infringing EU competition law, in a situation such as that of the present case, where the same legal person has already been finally acquitted of an offence for which an administrative fine had been imposed on it by the national post regulator for an alleged infringement of postal legislation, on the basis of the same or similar facts, in so far as the criterion that the legal interest protected must be the same is not satisfied because the case at issue relates to two different infringements of different legislation applicable in two separate fields of law?".

[26] "Must the principle non bis in idem as guaranteed by Article 50 of the Charter, be interpreted as not precluding the competent administrative authority of a Member State from imposing a fine for infringing EU competition law, in a situation such as that of the present case, where the same legal person has already been finally acquitted of an offence for which an administrative fine had been imposed on it by the national postal regulator for an alleged infringement of postal legislation, on the basis of the same or similar facts, on the grounds that a limitation of the principle non bis in idem is justified by the fact that competition legislation pursues a complementary general interest objective, that is to say protecting and maintaining a system of undistorted competition within the internal market, and does not go beyond what is appropriate and necessary in order to achieve the objective that such legislation legitimately pursues, and/or in order to protect the right and freedom to conduct business of those other operators under Article 16 of the Charter?".

[27] Opinion, pt. 81 – 117.

condition of there being a prior final decision (the *bis*) and of the prior decision and the subsequent proceedings or decision concerning the same facts (the *idem*). As for the "bis", for a judicial decision to be regarded as having given a final ruling on the facts subject to a second set of proceedings, that decision must not only have become final but must also have been taken as to the merits of the case[28], which appeared to be case for the annulment of the IBPT's decision. As for the "idem", the two sets of proceedings shall concern the same person for the same offence. According to what the Court interestingly defined a "settled case-law"[29], referring to *Menci* and *Garlsson*, the existence of a same offence requires identity of the material facts, understood as the existence of a set of concrete circumstances, which are inextricably linked together in time and space and which have resulted in the final acquittal or conviction of the person concerned. The "idem" condition, in other words, requires the material facts to be identical, not just merely similar.

It is in this context that the Court, nonchalantly, clarified that the legal classification of the facts under national law and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence, as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another. The same holds true, in contrast to the Commission's contention, when it comes to the application of the *ne bis in idem* in the field of competition law, as the scope of protection cannot vary from one field of EU law to another, unless otherwise provided by EU law[30].

While it left it to the national judge to determine whether the facts under the sectoral and competition law proceedings were identical, in particular on account of the infringement period alleged, the Court concluded that, in the affirmative, the duplication of proceedings would constitute a limitation of the fundamental right guaranteed by Article 50 of the Charter. Such a limitation may be justified on the basis of Article 52(1), if it meets the conditions thereof, namely: it is provided by law; it genuinely meets objectives of general interest recognised by EU laws; it complies with the principles of proportionality; and it is strictly necessary.

At this turn, the Court verified that those conditions were met in relation to the case at stake, subject to verification of the national judge:

a) *Duplication provided by law*

The involvement of each of the two national authorities concerned was provided for by law, with the national legislation only providing for the possibility of a duplication of proceedings and penalties under different legislation (sectoral rules and competition law) - not on the basis of the same offence or in pursue of the same objective[31].

b) *Meeting objectives of general interest*

The two sets of legislation pursued distinct legitimate objectives: the liberalisation of the internal market for postal services, when it comes to the national law transposing the Postal Services Directive, and ensuring that competition is not distorted in the internal market, when

[28] Judgement, pt. 29.
[29] *Ibidem*, pt. 33.
[30] *Ibidem*, pt. 34-35.
[31] *Ibidem*, pt. 42-43.

it comes to Article 102 TFEU and national competition law. As such, it is legitimate for a Member State to punish infringements of the sectoral rules and of competition law, as also envisaged in recital 41 of the Postal Services Directive ("[w]*hereas this Directive does not affect the application of the rules of the Treaty, and in particular its rules on competition and the freedom to provide services*")[32].

c) *Proportionality*

As it was acknowledged that the two sets of proceedings pursue different objectives of general interest, which it is legitimate to protect cumulatively, that fact is relevant for the purposes of the analysis of the proportionality of the duplication, provided that those proceedings are complementary (*i.e.* pursue complementary aims relating to different aspects of the same unlawful conduct), the resulting additional burden can accordingly be justified by the two objectives pursued and the overall penalties imposed correspond to the seriousness of the offences committed[33].

d) *Strict necessity*

Compliance with strict necessity is the condition that the Court considered most relevant for the purposes of the preliminary questions, which it smartly considered together. Under the relevant case-law of the Court and of the European Court of Human Rights[34], that condition requires clear and precise rules that make it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties and that there will be coordination between the different authorities; that the two proceedings have been conducted in a sufficiently coordinated manner and within a proximate timeframe; and that any penalty imposed in the first proceedings are taken into account in the assessment of the second penalty. That means, in essence, taking account of "*the existence of a sufficiently close connection in substance and time between the two sets of proceedings involved*", in line with *Menci* (pt. 61).

The Court left it to the national judge to ascertain whether the "strict necessity" condition was satisfied in the main proceedings, in the light of the circumstances of the case. Nevertheless, with a view to providing the referring court with useful answer, the Court made three points: first, for the purposes of ensuring coordination between the authorities, the existence of a provision on the cooperation and exchange of information between the authorities concerned, like the one in the applicable Belgian law[35], appears to provide an appropriate framework; second, the connection in time between the two sets of proceedings appears sufficiently close, the two decisions having been adopted about 17 months apart (20 July 2011 and 10 December 2012, respectively); third, the fact that the second fine was larger

[32] *Ibidem*, pt. 44-47.
[33] *Ibidem*, pt. 48-50.
[34] Judgment of 20 March 2018, *Menci*, cit., pt. 49, 52, 53, 55 and 58, and ECtHR, 15 November 2016, *A and B v. Norway*, CE:ECHR:2016:1115JUD002413011, pt 130-132.
[35] Article 14 of the Law of 17 January 2003 on the statute of the regulator of the Belgian postal and telecommunications sectors: «*3° coopère avec : a) la Commission européenne; b) les autorités de régulation étrangères en matière de services postaux et de télécommunications; c) les autorités de régulation des autres secteurs économiques; d) les services publics fédéraux en charge de la protection des consommateurs; e) les autorités belges en charge de la concurrence* ».

than the one imposed in the firsts proceedings does not, in itself, demonstrate that the duplication oof proceedings and penalties was disproportionate.

For those reasons, the Court ruled that "*Article 50 of the Charter, read in conjunction with Article 52(1) thereof, must be interpreted as not precluding a legal person from being fined for an infringement of EU competition law where, on the same facts, that person has already been the subject of a final decision following proceedings relating to an infringement of sectoral rules concerning the liberalisation of the relevant market, provided that there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities; that the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe; and that the overall penalties imposed correspond to the seriousness of the offences committed*".

5. Final remarks

The paper has reviewed the *ne bis in idem* principle in the *bpost* case against the background of the partially contradictory case law of the Court of Justice, with the aim of drawing the boundaries of its application in the current status of EU law.

The *bpost* judgement confirms that a restriction of the *ne bis in idem* can be justified under Article 52(1) of the Charter, which allows duplication of proceedings based on the same facts, when those proceedings have additional complementary objectives which cover different aspects of the same unlawful conduct. That is the case for postal services regulation and competition law, which can legitimately be applied cumulatively where the "strict necessity" test is satisfied. In other words, for delivery operators that have incurred in a final decision by the postal regulator, a second proceedings for the same facts by a competition authority (be it at national or EU level) will not be barred by the *ne bis in idem* principle, where there was a framed cooperation between the authorities concerned, the two proceedings and decisions were sufficiently close in time (1,5 year apart, as an indication) and the second fine took into account the fine firstly imposed.

The same would apply, *mutatis mutandis*, to the parallel application of other sectoral regulation and competition law. With new "*segments, layers, and sub-fields of regulation*"[36] being introduced in the context of e-commerce and digital services, the potential overlap of mandates to investigate (and fine) and the resulting duplication of proceedings and penalties arising from the same facts make the limitations to the *ne bis in idem* crucially relevant for postal and delivery operators.

* * *

[36] AG Opinion, *bpost*, cit., pt.2.