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Surprising transfer prices

Transfer prices in the Czech Republic are gradually evolving, and tax administrators are being more careful, more rigorous and more sophisticated. Still, we operate within OECD boundaries, and could boldly argue that developments are foreseeable. A glance at some more advanced jurisdictions gives a sense of where the state administration will be heading and what will be in store for us eventually. Historically, we compared interest to what we get at the bank; now, we calculate credit rating. The cost-plus markup has always been about the markup, but now the taxman is worried about whether the cost should actually include financing and forex. The Berry ratio was an exotic indicator; now it's a standard tool.

Sometimes, we can be unpleasantly surprised, for example when there can be no loss years in comparable samples. Then again, sometimes we're pleasantly surprised when the Supreme Administrative Court says that every observation in a given sample is correct, not just the interquartile range. But the surprises are few; the baseline remains unchanged and has been affirmed repeatedly by the courts. The tax administrator must detect a related-party transaction, must prove the entities are indeed related, must find a similar transaction and then establish its price. And once it has all that, it must give the taxpayer a chance to explain the difference.

This was exactly the case until the Supreme Administrative Court issued its decision in Aisan Industry (7 Afs 398/2019 - 49), a nice guide for the tax administrator on how none of the above actually has to apply.

The company purchases from and sells to third parties. But because the price is essentially negotiated by the group, these are related-party transactions (even though they're not actually related). And so market price rules come into play. The company is loss-making. This is unacceptable for a limited manufacturer, and the tax authority assesses tax on the profit it should have made. The Supreme Administrative Court confirms it's not actually necessary to find a specific transaction; but rather sufficient to assess profitability. Because the group intervened in the price negotiations, profitability would have to come from it. The Supreme Administrative Court, which at other times is quite precise, here suffices itself with the profit being from "someone" in the group, with no need to prove exactly from whom. The technical explanation for the additional assessment is the taxation of remuneration for a hypothetical service provided by the company to the group (suffered the group's pricing of transactions with third parties). A logical explanation.

Each case is different, of course. Here, the taxpayer was greatly assisted by submitting a transfer pricing study from a reputable consultant that accurately determined it should achieve profitability. The tax administrator just took and assessed what the taxpayer submitted. A subsequent effort involving a completely different study and the opposite conclusion by the same reputable consultant no longer seemed credible. We can only speculate as to whether the court's decision was helped by a very extensive lawsuit with a number of objections. The Supreme Administrative Court felt the need to note that in such a large submission there was no need to deal with every single objection (though it may not have helped its mood that it had to read them, anyway).

The lesson? Don't let your guard down. Established principles are important, but every situation is different and may require a different approach. And what you give the taxman once, you can never take back.

The Supreme Administrative Court confirms it isn't in fact necessary to find a specific transaction; it's enough to calculate profitability. Because the group intervened in the price negotiations, profitability would have to come from it.

EU

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Pillar 2 of BEPS 2.0 – the end of tax incentives as we know them?

We keep you informed about the discussions on revolutionary changes to international taxation taking place at both OECD and EU level.

The 2.0 initiative rests on 2 pillars:

- Taxing more of the profits of selected multinational corporations in the countries where they have customers (Pillar 1) and
- the introduction of a global minimum effective tax rate (Pillar 2).

We have provided an overview of the main parameters of this 2-pillar approach HERE.

A little history and political process

In this context, the OECD has issued model rules on the main design elements of the so-called GloBE rules under Pillar 2 (our observations HERE) and related commentary and examples (HERE). The European Commission has promptly published a draft implementing directive (HERE).

The essence of these rules is to tax the profits of selected multinationals to a minimum effective tax level of 15%. This is to happen either directly in the country where the "under-taxed" entity is domiciled or in another country (typically, but not exclusively, the country of the ultimate parent company).

At this point in time, all indications are that the start of application of the Pillar 2 rules (if approved) - at least within the EU - is likely to be pushed back to 2024 (HERE). EU states have made several attempts to find consensus on the proposed EU Directive, but so far without success, as unanimity needs to be found, with Poland announcing its opposition. The main reason for this seems to be an understandable desire to avoid the adoption of Pillar 2 (minimum taxation) without the simultaneous introduction of Pillar 1 (greater allocation of the taxing rights concerning selected multinational corporations to the countries of their customers). There are whispers in the background that there could be a breakthrough in the negotiations at the Ecofin meeting on 17 June.

Impact of the adoption of Pillar 2 on tax incentives

If this initiative is eventually approved and implemented, it will be without exaggeration a global tax revolution that will certainly affect the way multinational corporations operate and national tax policies.

One area where this revolution could have a significant impact is in the area of tax breaks aimed at encouraging positive taxpayer behaviour, in particular:

- investment incentives,
- research and development tax credits,
- support for vocational training (apprenticeships),
- employment of the disabled.

The effect of these measures is precisely to reduce the effective tax rate in the form of a tax credit or tax deduction granted as a reward for an investment or socially beneficial expenditure.

Some room for manoeuvre may be provided by the effect of the substance carve out (i.e. the exclusion from possible taxation of an amount of income corresponding to a certain percentage of the value of tangible assets and wage costs), which, however, typically does not neutralise the negative impact in full.

Significant modification of existing tax deductions and rebates or a shift to other forms of incentives will be necessary if the State is to maintain support for new investment and R&D and keep pace with competition not only from neighbouring countries. For this reason, a number of EU countries are already preparing or at least considering modifying similar existing rules and replacing them with rebates on other levies or changing the nature of the incentive to a refundable tax credit that does not affect the effective tax rate in the same way as the current tax credit.

We will continue to monitor this initiative.

If you have any questions, please contact either the authors of the article or your usual EY team.

If this initiative is eventually approved and implemented, it will without exaggeration be a global tax revolution affecting the way multinational corporations operate and national tax policies.

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The DEBRA proposal was published

We keep you up to date on tax issues and initiatives discussed at EU level (and beyond).

One of the initiatives that the EU was planning for this year is the possible introduction of the so-called DEBRA. DEBRA stands for Debt Equity Bias Reduction Allowance.

In most tax systems, the interest on a loan is (at least partially) tax deductible in certain circumstances, while the remuneration for the equity invested is typically not. The DEBRA initiative is intended to propose measures to make equity investment more attractive in this context.

The European Commission has published the related legislative proposal – the draft Directive on laying down rules on a debt-equity bias reduction allowance and on limiting the deductibility of interest for corporate income tax purposes.

We summarize below our initial observations about the main features of this new proposed measure:

Scope

- The Directive should apply to taxpayers subject to corporate income tax in one or more Member States, including permanent establishments in one or more Member State of entities resident for tax purposes in a third country.
- It should not apply to certain financial undertakings.

Base

- The base of the allowance should generally be calculated as the difference between the level of net equity at the end of the tax period and the level of net equity at the end of the previous tax period.
- Net equity means the difference between the equity of a taxpayer and the sum of the tax value of the taxpayer's participation in the capital of associated enterprises and the taxpayer's own shares.

Rate

- The allowance should be equal to the base of the allowance multiplied by the 10-year risk-free interest rate for the relevant currency and increased by a risk premium of 1% or, where the taxpayer is an SME, a risk premium of 1.5%.
- The Directive anticipates a possibility of a rate adjustment in case of major fluctuations.

Allowance limit

- The allowance should be deductible, for 10 consecutive tax periods, from the corporate tax base up to 30% of the taxpayer's EBITDA.
- Some kind of carry forward of the excess allowance should be allowed.

Claw back

- The Directive provides for a claw back of the claimed allowance if the base of the allowance on equity is negative unless the taxpayer provides evidence that this is due to accounting losses or due to a legal obligation to reduce capital.

Anti-Abuse

- Certain types of equity increases may be disregarded – such as those resulting from:
  - granting loans between related parties,
  - related party transfers of participations/going concern

  unless evidenced that done for valid commercial reasons and not leading to allowance double deduction.

Additional interest deduction limitation

- Exceeding borrowing costs (in the meaning of the ATAD Directive) are proposed to be newly limited up to the lower of

i. 85% of the exceeding borrowing costs,

ii. the exceeding borrowing costs limitation under the ATAD Directive (with a possibility of transferring the amount corresponding to any difference between (i) and (ii)).

Effectiveness

- The Directive is proposed to apply from 1 January 2024.

We will continue to monitor this initiative.

If you have any questions, please contact either the authors of the article or your usual EY team.

One initiative that the EU is working on is the introduction of DEBRA, which stands for Debt-Equity Bias Reduction Allowance. This initiative also introduces a proposal to further limit exceeding borrowing costs (in the meaning of the ATAD Directive).

Grants

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Co-funding in the form of grants

For EY, sustainability is a key value. We help clients make the transition to a sustainable business, which often triggers the need to invest. Some of these investments can be co-funded by grants to help accelerate the transition to supported technologies.

Current status of programs

The 2014-2020 program period is over. The program period for Structural Funds 2021-2027 has not yet started and the first calls for grants will not be launched until the second half of 2022. The National Recovery Plan is currently underway and the next round of support from the Modernisation Fund is being prepared. Approximately one trillion crowns are allocated in subsidy programs for the next decade. In the coming years, there will be great pressure for rapid disbursement. The National Recovery Plan is to be funded by 2026. The Structural Funds will run with a two-year overlap until 2029 and the Modernisation Fund until 2030.

Current grant opportunities

Photovoltaics

There is currently an open call for photovoltaic (PV) power plants. Businesses can apply for a 35% subsidy for solar panels and a 45-50% subsidy for energy storage. An advantage compared to previous grant calls is the possibility to provide support also to entrepreneurs in the territory of Prague. After the closure of this grant call, support from the Operational Program Technology and Applications for Competitiveness (OP TAC) or from the Modernisation Fund will be possible.

Water conservation

In mid-May, a water conservation grant call was launched. Four types of projects can be supported:

- Increasing water distribution efficiency;
- Reducing water consumption in technology;
- Using rainwater within an enterprise;
- Water recycling.

Investors can receive up to 40% of eligible expenses up to CZK 25 million. A water audit to define the potential for achievable savings is an essential part of the application.

Digitization

A grant call for digitization in companies is expected to be launched in early June. This should primarily concern non-production processes, such as cloud solutions, but also logistics software and hardware, including warehouse robotization. Support of up to 40% of eligible expenditure and a push to implement advanced IT solutions is expected. Eligible technical solutions will be defined in the call documents.

Upcoming calls for grants

As soon as Structural Funds (specifically OP TAC) are approved, we expect the launch of further calls.

Energy savings

In the context of the geopolitical situation and the price of emission allowances, investments in cost-saving measures will continue to be a major topic this year. These measures include not only PV or insulation of business buildings, but also investments such as:

- Installation of more efficient technology lines and units;
- Use of waste heat for heating or production;
- Modernisation of electricity, gas, cooling or light distribution systems;
- Heat pumps;
- Energy storage.

The level of support will depend on the size of the enterprise and the region in which the implementation takes place.

Innovation

The transformation of business into a more sustainable form also requires research into new technologies and, above all, their subsequent implementation in practice. Support from the OP TAC Innovation Program is being prepared expressly for the introduction of technologies into commercial use. Projects must build on completed research on the technology. Alternatively, commercialisation rights may be purchased. The support is thus aimed at product or process innovation. The level of support will also depend on the size of the enterprise and the region in which the implementation takes place.

We can help you, too

A large number of subsidy programs with a high allocation of funds are in the pipeline for the next few years. COVID, energy and materials prices, the war in Ukraine, the Green Deal, Fit for 55 and other external influences will only compound the demands to make changes to business. Grants can help transformation, and not just green transformation. Getting and keeping a grant for your project does not have to be difficult, but there is a certain amount of bureaucratic red tape involved. We'll also be happy to help you with your project plan, from verifying its supportability, through processing the grant application and disbursing the grant right all the way to project completion.

If you have any questions about the above topic, please contact the author of the article or your usual EY team

Of course, there are many more areas of support. In addition to the above, support is given for research and development, the integration of recycled materials into production, the reduction of waste production, water retention in the landscape and the remediation of environmental burdens.

VAT

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Digital wallets and VAT

The European Commission ("EC" or "Commission") published Working paper No 1039[1], which deals with the application of VAT on commissions for services provided by digital payment providers that are not banking entities. The EC analyzes several types of services to determine whether they can be considered as exempt financial services for VAT purposes as "transactions concerning payments and transfers".

This is a working analysis submitted to individual EU Member States for VAT Advisory Committee discussion[2]. While this document doesn't guarantee a future consensus among all Member States on the method of taxation, it at least contains the Commission's own view and the arguments for it.

Using available CJEU case law, the paper assesses the four most common business models and offers solutions depending on the nature of the digital payment provider's involvement. The notional dividing line is whether the service provider is actually transferring funds between the paying and receiving parties or merely providing technical support. It is irrelevant whether the service provider is authorised as a payment institution under the European Payment Services Directive.

Digital wallet – "e-wallet" type

This type of service is specific as compared to the others in that the seller and buyer have an e-money account and this account is used to transfer e-money between e-accounts and from/to a regular bank. The provider of such service retains a commission for making the payment, which is usually paid by the seller. It may also charge e-account holders a fee for transferring money from the e-account back to a traditional bank account. In both cases, according to the EC's conclusions, it is clear that the service provider is effectively changing the legal and financial position of the parties and therefore qualifies for VAT exemption. However, according to the Commission, this conclusion cannot be extended to other optional multi-services of an administrative nature that may be offered by these providers.

1 Digital payment services – Selected issues in e-commerce (e-wallets, marketplaces and "Buy Now, Pay Later" offerings)
2 The VAT Advisory Committee is set up on the basis of Article 398 of Directive 2006/112/EC on the common system of VAT

Digital wallet – "pass-through" type

This type of service does not allow the transfer of money to an electronic wallet, but only links the payment application to a standard payment card. It therefore serves as a repository for payment information. During payment, information is exchanged between the seller's terminal and the buyer's application, or their banks. Although this exchange of information is necessary for the subsequent payment, it does not qualify as a financial service for VAT exemption. The provider only provides the technical solution (data transmission), not the transfer itself. As an example, the EC cites the various wallets used to buy and hold crypto assets.

E-shop collecting payments on its own behalf

This service is now commonly offered by e-shop and marketplace operators to sellers who use these platforms to sell their goods. The e-shop contracts with providers of different payment methods so that individual sellers do not have to do so. It then collects payments for goods from customers on its own behalf, aggregates these payments and transfers the total amount less a service fee to the retailer. According to the EC, such a service is more of a separate service for the seller, which is similar in nature to debt collection. According to the EC, the VAT exemption also does not apply in this case.

"Buy now, pay later" services"[3]

Three entities are usually involved in this type of service: the seller, the non-banking institution and the customer. The service is usually paid for by the seller, who immediately receives the price of the goods sold less a fee, with the customer repaying it in stages.

The Commission mentions three possible options. In the first option, it likens the service to a traditional credit card and considers that it would be an exempt financial service of providing a cash guarantee. In the second option, it considers a taxable debt collection service (factoring). The third option is the exempt financial service of granting credit.

According to the Commission, it will depend on the legal setting and the economic substance of the specific case. If you receive or provide similar digital payment services, we will be happy to discuss their taxation with you.

If you have any questions, please contact either the authors of the article or your usual EY team.

The European Commission is responding to current trends in the digitization of payments and seeking to bring greater legal certainty. The position of the Member States will have to be awaited. Some of the Commission's arguments may not be accepted by Member States. For example, the VAT exemption for credit cards, which the Commission uses as an analogy, seems to contradict the wording of some CJEU judgments. Consequently, the practical application of the conclusions to individual digital wallet providers and their clients will also be of interest. It should also be remembered that these services evolve and improve over time, which may change the application of VAT.

3 BNPL – „buy now pay later"

Judicial window

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Investment incentives: additional application of a higher tax credit

In an April decision[4], the Regional Court in Prague dealt with the question of whether a tax credit for investment incentives can be claimed in a supplementary tax return.

Supplementary tax returns

The taxpayer filed an ordinary tax return for the tax year 2014 claiming a tax credit under § 35b of the Income Tax Act. Due to the claimed tax credit, the resulting tax liability was zero. In 2017, the taxpayer filed a supplementary tax return for 2014 reporting a higher tax base and claiming a higher tax credit. The resulting tax liability was again zero. The taxpayer followed a similar approach in the ordinary tax return for the 2015 tax year and the subsequent supplementary tax return for 2015.

The Specialised Tax Office disagreed with the application of the higher tax credit in the supplementary tax return on the grounds that the amount of the tax credit could not be increased if a higher tax liability was subsequently assessed.

The essence of the dispute is the interpretation of the sentence after the semicolon in § 35b(1)(a) of the Income Taxes Act, according to which: *"A taxpayer who has been granted a promise of an investment incentive under a special legal regulation and to whom the provisions of section 35a do not apply may, if he has fulfilled the general conditions laid down in the special legal regulation and the special conditions laid down in this Act, apply a tax rebate calculated according to the formula S1 minus S2, whereby (a) S1 equals the amount of tax calculated in accordance with paragraph 2 for the tax period in respect of which the rebate is to be applied;* ***this amount is not increased if a higher tax liability is subsequently assessed.****"*

Opinion of the Regional Court

The Regional Court concludes that the S1 amount cannot be increased if a higher tax liability is additionally assessed, i.e. a higher final tax amount is assessed. The taxpayer reported the resulting zero tax liability in the ordinary tax returns and the supplementary tax returns, so the additional tax liability was not changed. The Regional Court therefore annulled the decision of the Specialised Tax Office.

4 Regional Court in Prague Decision No. 51 Af 62/2020 - 44 of 29 April 2022

The litigants referred to another Regional Court in Brno judgment[5] that dealt with the same issue, but where the taxpayer's initial situation was different. The taxpayer filed an ordinary tax return claiming a tax credit of S1. After the tax audit, the tax administrator issued an additional payment order, which increased the tax base and newly determined a higher tax liability (compared to the last known tax liability), while the tax administrator used the same S1 value as the tax entity in the ordinary tax return. The tax entity then filed a supplementary tax return in which it claimed a higher S1 tax rebate based on the higher tax base determined by the tax administrator. According to the court, this was a case where a higher tax liability had been additionally assessed by the tax administrator, therefore it was no longer possible to increase the S1 amount in the tax entity's supplementary tax return.

The decision of the Regional Court is in line with the historical position of the Czech Ministry of Finance expressed within the Coordination Committee.[6]

Reference amount of tax S2

The court also addressed the issue of the additional modification of S2. If an investment incentive is granted to an existing manufacturing company to expand production, the tax credit can be applied to the increased tax liability resulting from investment implementation (the difference between amounts S1 and S2). The S2 amount, very simply, is based on the tax liability for the period preceding the period when the recipient of the investment incentive starts to claim the tax credit. This so-called reference amount is not reduced if a lower tax liability is subsequently assessed for the relevant (reference) tax year.

The Regional Court states that it is irrelevant who subsequently discovers that the tax liability should have been lower in a previous year, i.e. whether the tax administrator or the tax entity. If a lower tax liability is subsequently assessed for a previous year, the amount of S2 is no longer reduced.

The Supreme Administrative Court?

The Financial Administration filed a cassation complaint against the judgment of the Regional Court in Prague. The Supreme Administrative Court will therefore also consider the above described question of the additional application of a higher tax credit in a supplementary tax return, and we'll let you know the outcome.

If you have any questions about the above topic or investment incentives, please contact the authors of the article or your usual consulting team.

The S1 amount (tax credit) cannot be increased if a higher tax liability is subsequently assessed. The taxpayer has reported a resulting zero tax liability in both the ordinary and supplementary tax returns, regardless of the higher tax credit claimed – the additional tax liability has therefore not changed and the restriction on not increasing the tax credit described above does not apply in this situation.

5 Regional Court in Brno Decision No. 62 Af 5/2012 - 44 of 2 April 2013

6 Coordination Committee Paper No. 195/27.11.07 – Tax credit on the basis of a promise of investment incentives under a special legal regulation (complex issue), available on page 33, here: https://www.financnisprava.cz/assets/cs/prilohy/d-prispevky-kv-kdp/KV27112007.pdf

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CJEU on the competition law – abuse of dominant position

Abuse of a dominant position means, inter alia, conduct by a dominant undertaking which restricts competition by means or resources other than those generally used in normal competition. The Court of Justice of the European Union ("CJEU") has recently commented on abuse of dominant position and what is meant by such "other means" in Case C 377/20 Servizio Elettrico Nazionale.

In particular, the CJEU's decision sets out what the competition authorities need to prove when assessing dominant position and its abuse, and what they should take into account when qualifying such conduct:

- it isn't necessary that competition be distorted; merely showing that the use of "other means" may distort the competitive structure is sufficient (competition rules also protect against potential harm);
- it must be proved that the conduct is likely to cause the exclusion of other competitors from normal competition, irrespective of the dominant undertaking's intention;, it isn't necessary to show that the exclusion of a competitor from normal competition actually occurred;
- the evidence submitted by the dominant undertaking showing that no competitor has been excluded from normal competition does not justify the conclusion that there has been no abuse of a dominant position (the mere possibility of exclusion is sufficient);
- when assessing a possible infringement of competition law rules by a dominant undertaking, account should be taken of whether competitors are able to imitate the behaviour of the dominant undertaking; if not, this may indicate an abuse of a dominant position;
- it isn't necessary to show that the conduct may also cause harm to consumers;
- the sanctioning of a dominant position and the level of the sanction should be primarily justified by the benefit of the sanction to end consumers.

The CJEU notes that not every exclusion of competitors from normal competition is an abuse of a dominant position. A dominant undertaking may exclude its competitors from normal competition, but it must do so by means or resources normally used in competition, in particular based on performance. In line with EU law, competitors are marginalised if they are less efficient and, therefore, less beneficial to consumers.

Where, prior to the liberalisation phase, an undertaking had at its disposal in the market in which it operates, by virtue of its former dominant position, means or resources not available to its competitors, it must refrain from using those means and resources in order to ensure the natural development of competition in the post-liberalisation phase. Otherwise, its dominant position will be abused. However, an abuse of a dominant position would not necessarily occur if it turned out that the practice leading to the exclusion of competitors was outweighed or even exceeded by positive effects, in particular for the benefit of consumers.

In this particular case, the dispute was related to the liberalisation of the energy market in Europe. Energy companies in Europe now have to keep their commercial activities (e.g., electricity generation) strictly separate from their monopoly activities (e.g., energy distribution) after unbundling. According to the Italian antitrust authority, the different divisions of the vertically integrated energy company ENEL exchanged data on their customers that were available to them before the liberalisation of the market. This exchange of information was intended to create an undue competitive advantage over competitors who did not have access to that information.

Liability of the parent company for the actions of its subsidiary

In the above decision, the CJEU also reiterated the conditions under which a parent company is liable for abuse of a dominant position by its subsidiaries.

In general, economic units are liable for infringements of EU competition rules[7]. Since these economic units do not have legal personality, liability for the actions of the economic unit is attributed to the legal persons that comprise the economic unit. If more than one entity is part of the economic unit, they shall be jointly and severally liable. Therefore, in order for a holding company to be jointly liable for the acts of its subsidiaries, they must together form an economic unit. For a parent company to form a single economic unit with its abusing subsidiary, and therefore to be liable for actions of its subsidiaries, it must exercise control over the conduct of its subsidiary.

In above-mentioned decision, the CJEU held that the existence of such a unit comprising multiple entities must be regarded as established if, at the relevant time, almost all the capital of those subsidiaries was owned, directly or indirectly, by the parent company. The parent company then has the opportunity to present evidence that it did not have the power to determine or influence the actions of its subsidiaries because those subsidiaries acted independently. The antitrust authorities are subsequently obliged to deal with this evidence and to justify the rebuttal/non-rebuttal of the presumption that the parent company belongs to the economic unit.

7 Competition law understands a competitor as an economic unit consisting of a set of personal, tangible and intangible components carrying out an economic activity irrespective of the legal status of the unit (i.e., including its legal personality) and the manner of its financing. More than one legal entity may belong to one economic unit. In order for these multiple legal entities to constitute a single economic unit from a competition law perspective, such a unit must have a single organisation and, in the long term, pursue a specific economic objective (e.g., a concern). A single economic unit may thus consist of two formally completely separate persons with their own legal personality, provided that their actions on the market are directed towards a single common economic objective.

Prohibition of double punishment in competition law

The principle of *non bis in idem*, or not the same thing twice, is a principle of procedural law which states that the same (the same act by the same person) cannot be the subject of multiple proceedings and cannot be decided twice. This principle also applies in the case of punishment for breaches of competition law and is expressly provided for, inter alia, in the Charter of Fundamental Rights of the European Union, according to which *"no one may be prosecuted or punished in criminal proceedings for an act for which he has already been acquitted or convicted in the Union by a final criminal judgment under the law"*. The scope of protection of this principle in competition law has been addressed by the CJEU in two recent decisions.

In Case C-117/20 Bpost, the company concerned was successively fined by two national authorities for introducing a discriminatory discount scheme, first by the postal regulator and then by the competition authority. After the first fine was annulled by the court, Bpost argued that the second fine infringed the principle of *non bis in idem*.

The CJEU has held that the principle of *non bis in idem* does not preclude a company from being sanctioned for an infringement of competition law if it has already been the subject of a final decision for infringement of sectoral rules (e.g., rules in the postal sector) for the same acts. However, such conjunction can only occur if companies can identify with sufficient clarity under the law which acts are possible and likely to being conjugatable. In addition, the authorities must cooperate with each other in both proceedings and the proceedings must be conducted in close proximity to each other in time. The aggregate of the sanctions imposed must also correspond to the gravity of the infringement committed (the first sanction must be taken into account when deciding on the second sanction). Otherwise, the second public authority intervening will violate the prohibition of double jeopardy by initiating a prosecution.

In Case C-151/20 *Nordzucker*, representatives of that company participated in a telephone conversation in which they discussed the Austrian sugar market with representatives of a competitor. This conversation is both mentioned in the reasoning of the German's decision in which a fine was imposed for competition infringement and became the subject of the subsequent Austrian competition infringement proceedings. The Austrian courts had to assess whether the latter proceedings were precluded by the principle of non-double jeopardy.

The CJEU held that the principle of *non bis in idem* also does not preclude a competition authority of a Member State from initiating proceedings against anticompetitive conduct affecting a territory falling within its jurisdiction, even if the same conduct (or part of it) has already been mentioned in a previous final decision of a competition authority of another Member State, provided that the second decision is not based on a finding of anticompetitive purpose or effect in the territory of the first-mentioned Member State.

... and its relationship to the forthcoming regulation of digital markets – Digital Markets Act

Setting the limits of the non bis in idem principle may play an important role in the context of the planned Digital Markets Act, which is intended to comprehensively regulate the major players in the digital marketplace. The regulation will target companies known as "gatekeepers" (e.g., Google, YouTube, Amazon, Meta) whose strong economic position can create market barriers that prevent entrepreneurs and users from accessing the digital world without depending on these companies. This may lead to market power in the relevant market.

Large digital platforms will be subject to several potentially overlapping regulatory frameworks in the European Union, namely (i) EU digital market rules, (ii) EU competition law rules and (iii) national competition law rules. It is therefore possible that identical actions by digital platforms will be reviewed in multiple proceedings, i.e. under both the Digital Markets rules and the competition law rules. The Digital Markets Act may pave the way for further litigation on the non bis in idem principle, which the CJEU will have to address.

For more detailed information, please contact the authors of the article or other members of EY Law or your usual EY team

Recent decisions of the Court of Justice of the European Union concern competition law. The first decision deals with abuse of a dominant position. In particular, this decision clarifies the conditions for assessing abuse of a dominant position. It also clarifies when parent companies are liable for the conduct of their subsidiaries. The other two decisions bring together the principle of the prohibition of double jeopardy in the same case in competition law.

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For further information please contact either your usual partner or manager.

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Did you know:

- EY is hosting a webcast on the EU Carbon Border Adjustment Mechanism?
- The Ministry of the Environment has launched a grant call for the purchase of electric and hydrogen cars including charging infrastructure?
- The Finance Minister is to review a decision on the waiving of VAT on energy?
- New reporting obligations for digital platform operators are coming?