ECLI:EU:C:2021:680

Provisional text

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 2 September 2021(1)

Case C-117/20

bpost SA

v

Autorité belge de la concurrence

(Request for a preliminary ruling from the Cour d’appel de Bruxelles (Court of Appeal, Brussels, Belgium))

(Reference for a preliminary ruling – Article 50 of the Charter of Fundamental Rights of the European Union – Principle ne bis in idem – Fine imposed by a national postal regulator – Fine imposed by a national competition authority)

I. **Introduction**

1. Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') encapsulates the noble idea of one single legal space. Within that space, no one shall be tried or punished again in criminal proceedings for the same offence. Protection previously granted at Member State level has been elevated to EU level.

2. The implementation of that idea in EU law has been somewhat difficult for a number of reasons. Three of them are worth singling out. First, in a composite legal space such as the European Union, be it horizontally (Member States – Member States) or vertically (Member States – European Union), the practical implementation of that idea results in an enhanced level of complexity. There are simply too many variables. Second, new segments, layers, and sub-fields of regulation are being introduced. New bodies or authorities responsible for their supervision are being created. This sometimes leads to an overlap in mandates and confusion as to where the competence to investigate and punish lies. Third, there is the 'Engel-multiplication'. The rather expansionist criteria, originally coined by the European Court of Human Rights ('the ECtHR') to broaden its jurisdiction under Article 6(1) of the European Convention of Human Rights (ECHR), are now also being used in other contexts. That includes the assessment of what constitutes a 'criminal offence' for the purposes of Article 50 of the Charter. As a result, many rules and procedures that were in the past perceived on a conceptual level as being administrative, are now considered to be criminal.

3. The combination of those three factors has vastly expanded the set of procedures and sanctions to which the principle *ne bis in idem* has become applicable. Finding a reasonable balance between the protection of fundamental rights and the safeguarding of legitimate interests when punishing certain types of behaviour has thus proven difficult over the years. The case-law of this Court, developed through interactions with the ECtHR, is marked by fragmentation and partial inconsistency. It can hardly be characterised as (*ne*) *bis in idem*, but rather by now a *quater* or *quinquies in idem*, while uncertainty continues to plague *bis* as well.

4. The present case is yet another illustration of those uncertainties. The company bpost, the historical provider of postal services in Belgium, was successively fined by two Belgian authorities. First, the national sectoral regulator for postal services concluded that the rebate system applied by bpost in 2010 discriminated against some of bpost's clients. That decision was annulled by the national court, following a request for a preliminary ruling to this Court. (2) The situation at issue did not amount to discrimination under the legislation relating to the postal sector. Second, bpost was fined by the national competition authority ('NCA') for an abuse of a dominant position due to application of the same rebate system between January 2010 and July 2011.

5. bpost disputes the legality of that second set of proceedings, relying on the principle *ne bis in idem*. After two rounds of judicial review, the dispute in the main proceedings is pending once

again before the Cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium). That court asks, in essence, whether the legality of the proceedings before the NCA must be assessed in the light of the definition of *idem* developed in competition case-law, as confirmed in *Toshiba*, (3) or whether it should be examined under the limitation of the rights clause and the test established in *Menci*, *Garlsson* and *Di Puma* – a set of judgments delivered on the same day ('the *Menci* case-law'). (4)

6. Like the referring court, I have difficulty in seeing how the judgments in *Toshiba* and *Menci* could be reconciled and applied in one and the same proceedings. In my view, the present case, together with parallel proceedings in *Nordzucker*, (5) offers the Court a unique opportunity to provide national courts with coherent guidance on what the protection under Article 50 of the Charter should be, as opposed to what is currently a fragmented and partially contradictory mosaic of parallel regimes.

II. Legal framework

A. ECHR

7. Article 4 of Protocol No 7 to the ECHR reads:

'1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.'

B. EU law

8. Article 50 of the Charter, entitled 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence', states 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.'

9. Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders ('the CISA') (6) states as follows:

'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

10. Article 102 TFEU provides:

‘Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

…

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

…’

11. Article 12 of Directive 97/67/EC of the European Parliament and of the Council 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 (7) provides:

‘Member States shall take steps to ensure that the tariffs for each of the services forming part of the provision of the universal service comply with the following principles:

…

– tariffs shall be transparent and non-discriminatory,

– whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different users, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariffs shall also be available to users, in particular individual users and small and medium-sized enterprises, who post under similar conditions.’

C. **Belgian law**

12. Article 3 of the loi sur la protection de la concurrence économique (Law on the protection of economic competition), coordinated on 15 September 2006, contains provisions similar to those of Article 102 TFEU.

13. Article 12 of Directive 97/67, as amended by Directive 2002/39/EC of 10 June 2002 (OJ 2002 L 176, p. 21) was transposed into Belgian law by Article 144*ter* of the loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques (Law of 21 March 1991 on the reform of certain public commercial undertakings).

III. **Facts, national proceedings and the questions referred**

14. bpost is the historical postal service provider in Belgium. It offers, amongst other services, the collection, sorting, transport and delivery of postal items to addressees. These services are offered to the general public and to two particular categories of clients, bulk mailers (‘senders’) and consolidators.

15. Senders are end consumers of postal distribution services. They determine the message to be sent and initiate requests for mailings. The consolidators supply senders with routing services upstream of the postal distribution service. Those services include preparing mail before handing it on to bpost (sorting, printing, placing in envelopes, labelling, addressing and stamping) and the delivery of the mailings (collection from the senders, sorting and packaging of the postal items in mailbags, transport and delivery to sites designated by the postal operator).

16. In the past, different types of tariff were applied by bpost, including special tariffs consisting in rebates granted to certain clients, applicable to both senders and consolidators who generated a certain turnover. The most common contractual rebates were quantity discounts, granted according to the volume of mail items generated during a reference period, and 'operational discounts' which rewarded certain routing operations and reflected the costs avoided by bpost.

A. **Proceedings before the national postal regulator**

17. bpost informed the Institut belge des services postaux et des télécommunications (the national regulatory authority for postal services in Belgium) ('the IBPT') of a change to its rebate system for the year 2010 as regards the contractual tariffs relating to distribution services of addressed advertising material and administrative mail items.

18. That new rebate system included a quantity discount, calculated on the basis of the volume of mail items delivered, which was granted to both senders and consolidators. However, the rebate granted to consolidators was no longer calculated on the basis of the total volume of mail items from all the senders to which they provided their services, but on the basis of the volume of mail items generated individually by each of those senders ('the quantity discount per sender').

19. By decision of 20 July 2011, the IBPT fined bpost EUR 2.3 million for a discriminatory tariff system based on an unjustified difference in treatment between senders and consolidators.

20. The Cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium) ('the Court of Appeal'), hearing proceedings for annulment of that decision, made a request for a preliminary ruling from the Court of Justice on the interpretation of Directive 97/67.

21. In its judgment in *bpost*, the Court held that 'bulk mailers and consolidators are not in comparable situations as regards the objective pursued by the system of quantity discounts per sender, which is to stimulate demand in the area of postal services, since only bulk mailers are in a position to be encouraged, by the effect of that system, to increase the volume of their mail handed on to bpost and, accordingly, the turnover of that operator'. (8) Consequently, the Court concluded that the difference in treatment between those two categories of clients following from the application of the system of quantity discounts per sender did not constitute discrimination prohibited under Article 12 of Directive 97/67.

22. By judgment of 10 March 2016, the Court of Appeal annulled the IBPT's decision.

B. **Proceedings before the national competition authority**

23. In the meantime, by decision of 10 December 2012, the Conseil de la concurrence (which has since become the Autorité belge de la concurrence) ('Belgian Competition Authority') found that the difference in treatment of quantity discounts amounted to an abuse of a dominant position. It placed consolidators at a competitive disadvantage to bpost by encouraging major clients to contract directly with bpost.

24. In that regard, the Belgian Competition Authority found that between January 2010 and July 2011, bpost had infringed Article 3 of the Law on the protection of economic competition and Article 102 TFEU. Accordingly, it fined bpost EUR 37 399 786 ('the contested decision'). In calculating the amount of that fine, it took into account the fine previously imposed by the IBPT which, at the time of that decision, had not yet been annulled.

25. By an application lodged at the Court of Appeal on 9 January 2013, bpost sought the annulment of the contested decision.

26. By judgment of 10 November 2016, the Court of Appeal held that bpost had correctly invoked the principle *ne bis in idem*. The judgment of 10 March 2016 annulling the IBPT's decision had ruled finally on the merits in relation to acts essentially the same as those at issue in the action taken by the Belgian Competition Authority (bpost's 'per sender' model for its contractual tariffs for 2010). Since the proceedings before the Belgian Competition Authority had thereby become inadmissible, the Court of Appeal annulled the contested decision.

27. By judgment of 22 November 2018, the Cour de cassation (Court of Cassation, Belgium) set aside the Court of Appeal's judgment and referred the case back to that court, to sit in a different composition. The Cour de cassation (Court of 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, under Article 52(1) of the Charter, subject to the principle of proportionality and for the purpose of attaining a general interest objective, those proceedings have additional complementary objectives which cover different aspects of the same unlawful conduct.

28. The remitted case is currently pending before the Court of Appeal. In the main proceedings, bpost claims that the contested decision infringes the principle *ne bis in idem* because the proceedings conducted by the IBPT and that conducted by the Belgian Competition Authority were criminal in nature and related to the same facts. Moreover, bpost maintains that the strict requirements under which criminal proceedings and penalties may be duplicated are not satisfied. The two sets of proceedings are not sufficiently closely connected in substance and in time.

29. According to the Belgian Competition Authority, the contested decision does not infringe the principle *ne bis in idem*. The Court's case-law on *ne bis in idem* in competition law matters involves examination of the criterion of the 'protected legal interest'. Furthermore, both proceedings at issue follow complementary objectives covering different aspects of the same unlawful conduct. They protect different legal interests.

30. The Commission, intervening as *amicus curiae* in the main proceedings, submits that the public interest of the European Union would be put at risk if the criterion of the legal interest were abandoned. In its view, the *Menci* case-law does not concern competition law. That case-law concerns a duplication of proceedings and penalties arising from a single offenceclassified and punished on a dual basis in national law. In contrast to that situation, bpost has been the subject of two separate sets of proceedings for two different offences based on different legal provisions that pursue distinct but complementary objectives of general interest: infringement of the sectoral rules (the prohibition on discriminatory practices and the transparency obligation contained, in particular, in Article 144*ter* of the Law of 21 March 1991 on the reform of certain public commercial undertakings), on the one hand, and infringement of the prohibition on abuse of a dominant position, contrary to Article 102 TFEU and Article 3 of the Law of 15 September 2006 on the protection of economic competition, on the other. According to the Commission, the principle *ne bis in idem* must be *in casu* examined in the light of the criteria established by the Court in cases

relating to competition law. If the protected legal interest were not taken into account, there would be a risk that the scope of competition law would be considerably reduced since competition law applies horizontally.

31. The referring court considers that the application of the principle *ne bis in idem* in the main proceedings requires one to take into account the legal interest, without which the application of competition law runs the risk of becoming ineffective. That being said, the referring court also notes the existence of the *Menci* case-law and relevant case-law of the ECtHR, which must also be considered.

32. In those circumstances, the Court of Appeal decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the principle *[ne] 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, 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?

(2) Must the principle *[ne] 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 *[ne] 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?'

33. Written observations have been submitted by bpost, the Belgian, Czech, Greek, Italian, Latvian and Romanian Governments, as well as the European Commission. bpost, the Belgian, Greek, Latvian and Polish Governments, as well as the Commission, also presented oral argument at the hearing that took place on 22 March 2021. That hearing was organised commonly for the present case, as well as for Case C-151/20 *Nordzucker and Others*.

IV. **Assessment**

34. By both questions, the referring court invites the Court to clarify, in essence, what are the criteria under which the principle *ne bis in idem*, enshrined in Article 50 of the Charter, applies. Those questions are raised in the context of two sets of proceedings. The first, now concluded, concerned the sectoral regulation of postal services and a fine, which was later annulled, imposed on bpost by the IBPT for failure to respect the obligation of non-discrimination ('sectoral proceedings'). The second set of proceedings concern competition law. In that case, a fine was imposed on bpost by the Belgian Competition Authority for an abuse of a dominant position ('competition proceedings').

35. Both sets of proceedings apparently led to the imposition of sanctions that are criminal in nature. The referring court therefore asks whether the assessment of the element of *idem* should depend on the legal interest protected respectively by the two regulatory frameworks at issue, or whether the assessment ought to be carried out with regard to the limitation of rights clause in Article 52(1) of the Charter.

36. In other words, the referring court is unsure of the exact *idem* test it is supposed to apply to the combination of sectoral and competition proceedings. Indeed, should it apply the test for the combination of two competition proceedings, that the Court established in *Wilhelm and Others* (9) and has repeatedly confirmed ever since, particularly in *Toshiba* (10) and most recently in *Slovak Telecom*? (11) Or, should it apply the test that the Court also recently set out for the combination of criminal and administrative proceedings in *Menci*?

37. The question whether the '*Toshiba* or *Menci*' case-law should be applied is the crucial one for the present case. However, in the context of Article 50 of the Charter, it merely represents the proverbial tip of the iceberg. One must recognise that more lurks beneath the surface, and that much more needs to be uncovered, in order to fully appreciate the real size of the iceberg and make an informed decision about the correct course to set.

38. I shall therefore start by setting out concisely the evolution of the principle *ne bis in idem* in different fields of EU law, often by way of express interaction with the ECtHR, against which the proper scope and relevance of the question '*Toshiba* or *Menci*' may best be understood (A). Moreover, given the fact that the evolution of the principle *ne bis in idem* has been rather problematic, resulting in a number of fragmented regimes, I shall highlight some of the issues that such fragmentation has caused. I shall also explain why expanding the test defined in the *Menci* case-law to all cases under Article 50 of the Charter is perhaps not the best way forward (B). Finally, I shall set out a solution to the issues mentioned by proposing an approach (as unified as is possible) to the principle *ne bis in idem* enshrined in Article 50 of the Charter (C).

A. **The evolution of the case-law on *ne bis in idem***

39. At the outset, a terminological note is called for. The existing approaches to the principle *ne bis in idem* are often placed, for ease of reference, into two categories, commonly referred to as *idem factum* or *idem crimen*. Those terms capture what is, in short, the starting premiss of the specific approach to the principle.

40. The approach based on *idem factum* posits that the condition of *idem* is satisfied when two sets of proceedings concern the same acts, without any relevance being attached to whether the second set of proceedings involves another offence that the same acts may have constituted. The factual identity suffices for the condition of *idem* to be satisfied.

41. The approach based on *idem crimen* consists in assessing whether the second set of proceedings concern not only the same acts, but also the same offence. Where a different offence is involved, the second set of proceedings, in principle, will be allowed. There tends to be, however, somewhat of a variety in the definitions of what exactly constitutes the identity of the offence. The latter is often framed in terms of the concepts of protected legal interest, societal goods with which the act is interfering, or, in more abstract terms, the nature of the social misconduct.

42. At EU level, the principle *ne bis in idem* has developed in what can best be described as successive waves of case-law. With some degree of simplification, that evolution started in the area of EU competition law with an approach based on the protected legal interest (1). Then came the

case-law relating to the CISA, based on the *idem factum* approach (2). The developments in the context of the CISA apparently inspired a change in the case-law of the ECtHR, with *idem crimen* first moving to *idem factum*. However, the test was subsequently refined through the introduction of a close connection in substance and time, making a second set of proceeding in the same matter possible under certain circumstances (3). Following this, the Court took note of the developments before the ECtHR. However, it then decided to shift the focus of its analysis from the scope of protection under Article 50 of the Charter to the limitation of rights clause contained in Article 52(1) of the Charter (4).

1. ***The protected legal interest in EU competition law***

43. The origins of the case-law on *ne bis in idem* in competition matters derive from the judgment in *Wilhelm and Others*. (12) The case concerned parallel national and supranational investigations into anticompetitive conduct. It was alleged that the German NCA lacked competence to continue with its investigation into certain breaches of law that were being investigated simultaneously by the Commission. The questions raised concerned, inter alia, whether it was possible to apply to the same factual situation, at that time falling under Article 85(1) of the EEC Treaty, national and Community competition law, in a situation where the Commission had already taken action under Regulation No 17, (13) or whether the action of the NCA applying national competition law was precluded due to the risk of a double sanction and an incompatible assessment.

44. The Court noted that Article 9(3) of Regulation No 17 authorised the national authorities to apply the then Article 85(1) and Article 86 of the EEC Treaty. That said, that provision did not concern the competence of the NCAs when applying the national law. (14) The Court added that 'Community and national law on cartels consider cartels from different points of view' (15) while making it clear that the national proceedings could not prejudice the Community proceedings.

45. Ever since that judgment, the principle *ne bis in idem* has not been viewed as an obstacle to parallel proceedings conducted by the Commission and the respective NCAs. The dictum, according to which the Community and national competition laws consider the protection of competition from different angles, was later supplemented by the Court's observation that the EU and national competition laws protect a different legal interest. As a consequence, under what is today established case-law, the protection of *ne bis in idem* in competition law is triggered only if there is a three-fold identityof the facts, the offender, and the protected legal interest.

46. The latter criterion was applied in the context of proceedings conducted, and the sanctions imposed, within the European Union, whereby the Court concluded that 'the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset'. (16) The Court also applied the criterion of protected legal interest to cases where undertakings were subjected to prosecution and punishment in a third country, (17) explaining its *raison d'être* by the specific nature of the objectives, substantive rules and legal consequences when it comes to sanctioning infringements of competition law. (18)

47. Rather crucially, the Grand Chamber confirmed the applicability of the three-fold condition of *idem* in *Toshiba* (19)even though Advocate General Kokott had invited the Court to abandon it. (20) Indeed, the Advocate General suggested aligning the assessment of *idem* with the same-offender-same-facts approach followed by this Court in the context of Article 54 of the CISA, the European arrest warrant, and in the light of the (at that time, recent) finding of the ECtHR in *Zolotukhin*. (21) She pointed out the absence of any 'objective reason why the conditions to which the *ne bis in idem* principle is subject in competition matters should be any different from those

applicable to it elsewhere'. (22) She also explained that the examination of a given instance of anticompetitive conduct necessarily relates to a specific temporal and territorial context, those being the elements that distinguish the given illegal conduct from any other. (23)

48. Ultimately, the fact that the Court did not embrace the Advocate General's proposal was of limited practical significance for the resolution of that case. Both the Court and the Advocate General agreed that the two decisions at issue, one issued by the Commission and the other by the Czech NCA, related to *different territories and periods of time*, which made the consideration of the criterion of legal interest irrelevant.

49. The next invitation to reconsider the issue came in the judgment in *Powszechny Zakład Ubezpieczeń na Życie*. (24) That case raised the question whether the principle *ne bis in idem* had been applied properly in proceedings relating to an abuse of a dominant position. However, the case involved only one set of proceedings and therefore the Court considered that the principle *ne bis in idem* was not applicable. Nevertheless, Advocate General Wahl used this case as an opportunity to suggest, in essence, that the criterion of the protected legal interest should be abandoned. (25)

50. Shortly thereafter, the criterion of the identity of the protected legal interest was yet again confirmed by the Court in *Slovak Telekom*, (26) a case which involved two sets of proceedings dealing with, apparently, different facts (*in casu* different product market).

51. In view of those developments, the following three points are particularly noteworthy. First, it is by now indeed well-established case-law that the application of the principle *ne bis in idem* in the EU competition law context relies on the three criteria of the identity of the offender, facts and protected legal interest. Second, however, and rather intriguingly, the criterion of legal interest is only well established in the abstract. It has never been applied in practice. The intra-Union competition law cases that the Court has so far dealt with have involved, in the Court's view, different acts. As a result, the Court has never actually explained in any great depth how the protected legal interest should be assessed.

52. Third, at present, three Advocates General have criticised that criterion. After Advocate General Kokott, (27) Advocate General Wahl expressed similar 'difficulty in identifying good reasons why the three-fold criterion should continue to be applied in the context of competition law'. (28) Finally, Advocate General Tanchev observed that 'the relevance of the condition that the legal interest protected must be the same is disputed since, first, that condition is not applied in areas of EU law other than competition law …, and, second, it is at odds with the increasing convergence of EU and national competition rules and with the decentralisation for the application of EU competition rules brought about by Council Regulation (EC) No 1/2003 [(29)]'. (30) Similar doubts have been echoed in the legal scholarship, raising questions as to the reason why the Court has repeatedly confirmed the criterion despite the adoption of the *idem factum* approach in other areas of EU law. (31)

2. **Idem factum** ***in the area of freedom, security and justice***

53. Article 54 of the CISA was historically the first provision of EU law to include the principle *ne bis in idem* in its text. What distinguishes Article 54 of the CISA from the then existing international law expressions of *ne bis in idem*, such as Article 4 of Protocol 7 to the ECHR (32) or Article 14(7) of the International Covenant on Civil and Political Rights, (33) is its express trans-border reach. What was previously required within one State or one Signatory Party became applicable within a broader legal space. A similar expression of the principle *ne bis in idem* was adopted thereafter in instruments of judicial cooperation in criminal matters, such as Framework

Decision 2002/584/JHA on the European arrest warrant, (34) as one of the mandatory grounds for refusal. (35)

54. Within the context of the CISA, considerations relating to the protected legal interest and the legal classification were held to be irrelevant. The only relevant criterion became 'identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together'. (36)

55. The judgment in *van Esbroeck* (37) demonstrates this point rather well. The case concerned a Belgian national sentenced in Norway to five years' imprisonment for illegally *importing* narcotics into Norway. After having served a part of his sentence, he was conditionally released and escorted to Belgium. Several months later, he was prosecuted in Belgium and sentenced to one year's imprisonment for illegally *exporting* the same narcotics from Belgium. In reaching their finding about the permissibility of the second set of proceedings, the Belgian courts applied Article 36(2)(a) of the Single Convention on Narcotic Drugs, (38) according to which each of the offences laid down in that article, which include the import and export of narcotic drugs, are to be regarded as a distinct offence if committed in different countries.

56. Before the Court, the question raised was whether the second set of proceedings infringed Article 54 of the CISA. The Court noted that the wording of Article 54 of the CISA refers only to the nature of the acts in dispute and not to their legal classification. (39) The Court then contrasted that wording with that of Article 4 of Protocol No 7 to the ECHR and that of Article 14(7) of the United Nations Covenant on Civil and Political Rights, both of which refer to 'offence'. That implies that the criterion of the legal classification of the acts is relevant 'as a prerequisite for the applicability of the *ne bis in idem* principle … enshrined in [the latter two] treaties'. (40)

57. In noting the existence of the mutual trust in the national criminal justice systems within the European Union, the freedom of movement and the absence of harmonisation of criminal laws, the Court observed that 'the possibility of divergent legal classifications of the same acts in two different Contracting States is no obstacle to the application of Article 54 of the CISA'. (41) 'For the same reasons, the criterion of the identity of the protected legal interest cannot be applicable since that criterion is likely to vary from one Contracting State to another.' (42)

58. The Court recognised that the situation involving the exporting and importing of the same narcotics, prosecuted in different Contracting States, may constitute a set of facts which, by their very nature, are inextricably linked, but left that assessment to the national court. (43)

59. In short, the case-law on Article 54 of the CISA and on the equivalent provisions of Framework Decision 2002/584 has always been based on the premiss that the legal interest protected and the legal classification of the given acts do not matter for considerations relating to the applicability of the principle *ne bis in idem*.

60. The rejection of the *idem crimen* approach was based first on the textual interpretation. Article 54 of the CISA appears to be distinguished in that it requires a higher level of protection than Article 4 of Protocol No 7 to the ECHR. Beyond the text, the need to embrace the *idem factum* approach was also justified by the reference to the logic underpinning the area of freedom, security and justice which is aimed at overcoming the possible obstacles stemming from the EU multi-jurisdictional background where there is no harmonisation of criminal laws and in which the legal interests, and legal classification of the same conduct, may differ.

61. While the reference to legal classification is rather self-explanatory, the reference to (divergent) legal interests appears much less so. The Court seems to have used those concepts interchangeably. Its reasoning implies that the legal interest protected by penalising a given criminal offence, as defined by the domestic law, is something inherently specific to each Member State. The concept of legal interest does not seem to be understood in terms of a societal interest that a specific offence, or a specific category of offences, seeks to protect regardless of the Member State concerned, such as the interest in protecting human life, health, liberty, property and so on. What protected legal interest in fact amounts to is therefore left unexplored.

62. Be that as it may, it is generally understood that the Court's case-law on Article 54 of the CISA influenced the ECtHR. (44) In fact, it led to a decision by the ECtHR in *Zolotukhin* to harmonise its case-law, which previously oscillated between the *idem crimen* and the *idem factum* approaches, and to embrace the approach, according to which the existence of 'identical facts or facts which are substantially the same' (45) is what matters for the assessment of whether the second set of proceedings is prohibited or not.

3. **The ECtHR: from *idem crimen* via *idem factum*to somewhere else (but closely connected in substance and time**)

63. The case-law of the ECtHR on *ne bis in idem* has developed in phases. In *Zolotukhin*, the ECtHR set out a first overview of how its case-law had approached the condition of *idem* and decided to adopt harmonised interpretation of the concept of the same offence found in Article 4 of Protocol No 7 to the ECHR in order to do away with the 'legal uncertainty' (46) (a). However, several years later, the ECtHR again took stock of the case-law evolution in *A and B*. (47)It decided to provide a nuance to *Zolotukhin*, bringing to the fore the test of close connection in substance and time (b).

(a) ***From* idem crimen *to*idem factum *in*Zolotukhin**

64. The approach to *idem* in case-law predating *Zolotukhin* was predominantly based on *idem crimen*. (48) It relied on the premiss that the same conduct may constitute several offences that, as a matter of law, may be tried in separate proceedings. Some of the examples of the case-law predating *Zolotukhin* are *Oliveira* (49) or *Franz Fischer*. (50) In the latter case, the ECtHR subjected the examination of the identity of the offence to the test of its essential elements. (51)

65. The approach based on *idem crimen* was abandoned in *Zolotukhin*. That case concerned an applicant who was verbally abusive towards police officers during his interrogation. In the administrative proceedings conducted against him, which the ECtHR likened to a penal procedure, he was convicted of 'minor disorderly acts'. Several days later, a criminal case was opened in respect, inter alia, of the charge of 'disorderly acts'. That charge referred to the same conduct for which the applicant had been previously convicted. The applicant was acquitted in respect of that charge, but found guilty on other accounts.

66. Before concluding that the second set of proceedings constituted a breach of Article 4 of Protocol No 7 to the ECHR, the ECtHR held that '[its previous] approach which emphasises the legal characterisation of the two offences is too restrictive on the rights of the individual' and 'that Article 4 of Protocol No 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same'. (52) The ECtHR concluded that the examination should thus 'focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in

time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings'. (53)

(b) ***A and B: idem factum combined with a close connection in substance and time***

67. The approach adopted in *Zolotukhin* was (usually) applied in the case-law which followed. (54) That approach, however, was not met with universal acclaim. The ECtHR decided to reconsider it again in *A and B*. While in principle maintaining the *idem factum* approach, that court nevertheless considered that a duplication of proceedings is possible where the proceedings in question have 'been combined in an integrated manner so as to form a coherent whole'. (55) Under such circumstances, the ECtHR considers that no genuine second set of proceedings has in fact taken place.

68. *A and B* concerned tax surcharges imposed on the applicants in administrative proceedings for the failure to declare income on their tax returns. The applicants were also sentenced for the same acts in criminal proceedings conducted (to some extent) in parallel. The ECtHR concluded that that situation did not amount to a breach of Article 4 of Protocol No 7 to the ECHR stating that 'whilst different sanctions were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, both in substance and in time, to consider them as forming part of an integral scheme of sanctions under Norwegian law for failure to provide information about certain income on a tax return, with the resulting deficiency in the tax assessment'. (56)

69. In other words, the ECtHR decided to push to the fore the test of sufficient connection in substance and in time that had already featured (although not systematically) in its previous case-law, including in cases prior to *Zolotukhin*. (57)

70. The ECtHR explained that the satisfaction of the requirement for a *substantive* link depends on the following elements: (i) complementary purposes pursued by both proceedings addressing different aspects of social misconduct; (ii) whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct; (iii) whether there is a coordination between the relevant sets of proceedings that have to be conducted in such a manner so as to avoid duplication in both the collection and assessment of the evidence; and (iv), the proportionality of the overall amount of the penalties imposed. (58)

71. The *temporal* link was left largely undefined with the exception of the general guidance that 'the weaker the connection in time the greater the burden on the State to explain and justify any such delay'. (59)

72. To explain the change of approach, the ECtHR referred to the inability of the *Zolotukhin* judgment to provide 'guidance for situations where the proceedings have not in reality been duplicated but have rather been combined in an integrated manner so as to form a coherent whole', (60) which appeared to be, in the ECtHR's view, the situation at hand. The ECtHR also noted 'the lack of consensus among the domestic systems of the Contracting States and the variable willingness of States to be bound by [Protocol No 7 to the ECHR]'. (61)

73. The sufficiently close connection in substance and time test allows, in the ECtHR's view, a 'fair balance to be struck between duly safeguarding the interests of the individual protected by the *ne bis in idem* principle, on the one hand, and accommodating the particular interest of the community in being able to take a calibrated regulatory approach in the area concerned, on the other'. (62)

74. In *A and B*, both limbs of the new test were held to be satisfied. Subsequent case-law has provided some further clarifications. However, it would be bold to suggest that there is now clarity in terms of what will constitute a sufficiently close link, particularly as far as its temporal dimension is concerned. (63)

4. *The double track enforcement regimes before the Court: from* idem factum *to* idem factum *combined with the limitation of rights clause*

75. The Court responded to the change of approach adopted by the ECtHR in a set of judgments that make up the *Menci* case-law. (64) These judgments, which have been at the heart of much scholarly discussion, (65) concerned a second (criminal or administrative) set of proceedings, brought on account of tax evasion, market manipulation and insider trading delicts, despite the fact that previous (criminal or administrative) proceedings had already been initiated for the same acts.

76. *Menci*, which could perhaps be qualified as the leading case in this group, concerned an applicant who was subject to administrative proceedings for the failure to pay VAT. The administrative proceedings finished with the imposition of a fine of approximately EUR 85 000 which represented 30% of the tax debt. After the decision in those proceedings had become final, criminal proceedings were initiated in respect of the same facts against the applicant. The question thus raised was whether that second set of proceedings was admissible in the light of Article 50 of the Charter.

77. The Court was faced with the decision of whether to embrace the approach adopted by the ECtHR in *A and B*, or whether to maintain its previous approach adopted in a similar context in *Åkerberg Fransson*. In the latter case, it was held that the principle *ne bis in idem* did not preclude a Member State from successively imposing, for the same acts of non-compliance with VAT obligations, a tax penalty and a criminal penalty in so far as the first penalty was not criminal in nature (based on the *Engel* criteria). (66)

78. In his Opinion, Advocate General Campos Sánchez-Bordona argued that embracing the ECtHR's new test would diminish the existing protection under the principle *ne bis in idem*. (67) The Court was nonetheless of a different view. It would appear that the Court, in essence, sought to follow the ECtHR. However, in order to do so, it chose a rather unique analytical framework. The Court shifted the analysis from Article 50 of the Charter to the limitation of rights clause in Article 52(1) of the Charter.

79. The Court permitted a second set of proceedings subject to the condition that the legislation allowing for a duplication of proceedings 'pursues an objective of general interest which is such as to justify such a duplication …, it being necessary for those proceedings and penalties to pursue additional objectives, contains 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 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 offence concerned'. (68)

80. Pursuing the analysis under Article 52(1) of the Charter, the Court first verified that the limitation at issue was provided for by law and preserved the *essence of the right* enshrined in Article 50 of the Charter. In the latter respect, the Court observed that the legislation at issue allowed 'a duplication of proceedings and penalties only under conditions which are exhaustively defined, thereby ensuring that the right guaranteed by Article 50 is not called into question as such'. (69)

81. Second, the Court then confirmed the existence of an *objective of general interest* (collection of all the VAT due in *Menci*; (70) protecting the integrity of financial markets and public confidence in financial instruments in *Di Puma* (71)and in *Garlsson* (72)), as well as the existence of complementary aims pursued by the legislation at issue. In *Menci*, the Court identified those complementary aims as deterrence and punishment of 'any violation, whether intentional or not, of the rules relating to VAT returns and collection by imposing fixed administrative penalties', on the one hand, and the deterrence and punishment of 'serious violations of those rules, which are particularly damaging for society and which justify the adoption of more severe criminal penalties', on the other. (73)

82. Third, the Court checked the *proportionality* of the limitation at issue. It examined whether it 'does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, it being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued'. (74)

83. In that respect, the Court noted that the legislation at issue was capable of achieving the stated aim and that, as regards the 'strict necessity', it provided for clear and precise rules allowing individuals to predict which acts or omissions may be subject to the duplication of proceedings. It also noted that the legislation at issue ensures coordination limiting to what is strictly necessary the additional disadvantage for the persons concerned that results from a duplication of proceedings, and guarantees that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned. (75)

84. The situation in *Menci* thus passed the newly established test. That was not the case in *Garlsson*, where the Court held that imposing an administrative sanction on undertakings that had already been convicted of a criminal offence and punished by an effective, proportionate and dissuasive sanction for the same facts would exceed what is strictly necessary. The Court reached the same conclusion in *Di Puma*, which involved a final acquittal in the criminal proceedings and subsequent administrative proceedings for the same facts.

B. **Problems raised by the current fragmented regimes of *ne bis in idem***

85. As is apparent from the overview set out in the previous section, the Court's case-law, developed by way of close interaction with the ECtHR, can at best be described as a mosaic of parallel regimes. In this section, I address two crucial questions relating to that state of affairs. First, is this actually a problem? (1) Second, if it is, should the Court not simply expand the test it recently developed in *Menci* to all cases falling under Article 50 of the Charter, including the present one? (2)

1. ***Is there a problem?***

86. It could perhaps be suggested that there is no problem of consistency. That would, however, require a rather demanding exercise of making minute distinctions, arguing that each of the approaches outlined above is different for good reason. The tests are different because they are based on different pieces of legislation and belong to different regulatory contexts.

87. First, Article 54 of the CISA and the equivalent provisions in instruments of judicial cooperation in criminal matters refer to the *identity of the acts*, while Article 50 of the Charter (and Article 4 of Protocol No 7 to the ECHR for that matter) refer to the *identity of the offence*. Therefore, there is a clear textual difference between the two provisions. Moreover, in terms of its

regulatory context, the CISA contains a specific cross-border expression of the principle *ne bis in idem* relevant only to (genuine) criminal law matters arising within the Schengen system. One may thus be able to explain the reason why the relevance of legal interest and legal classification was rejected by invoking the need to overcome, within the multi-jurisdictional Union, obstacles to the freedom of movement that the Court identified in *van Esbroeck*. (76)

88. Second, the applicability of *ne bis in idem* under Article 4 of Protocol No 7 to the ECHR is limited to one Contracting Party of the Convention. Therefore, cross-border issues are unlikely to arise under that provision. The fact that the application of *ne bis in idem* is confined to a single State, where indeed greater stress might be put on integrated procedures and the imperative of coordination, may perhaps justify a stricter approach to the applicability criteria embraced in *A and B*. I note that when the *Menci* case-law reacted to the test defined in *A and B*, it did so precisely in the same single-State context.

89. In the light of those differences, should one simply acknowledge the existence of these parallel regimes in the case-law on *ne bis in idem*? Instead of seeking to re-establish some sort of unity under Article 50 of the Charter, would it not be more logical instead to explain why they are different?

90. I do not think so.

91. First, there are logical limits to such an exercise. Indeed, a distinction can be made between Article 50 of the Charter and the case-law relating to the CISA and Framework Decision 2002/584 on the basis of their text, and in part also the context and purpose. However, that distinction becomes much less obvious when one compares Article 4 of Protocol No 7 to the ECHR with Article 50 of the Charter. Although both refer to the identity of 'offence', the tests developed under each of the provisions differ.

92. Moreover, the distinguishing exercise clearly comes up against a brick wall with respect to the current co-existing lines of case-law *Wilhem/Toshiba*, on the one hand, and *Menci*, on the other. The situations covered by those two lines of case-law are now both subject to Article 50 of the Charter, making it rather difficult to explain convincingly why each of them relies on a different test. Certainly, as to the context, one can always try to run the argument of the special nature of competition law, which eschews all other boxes and classifications. However, in that respect, and in similar vein to all my learned colleagues who have taken a position on that issue in the past, (77) I find myself simply unconvinced. I too cannot subscribe to the view, per se and in the abstract, that today, the area of competition law is any different from other areas of law. (78)

93. Second, there is the ensuing unpredictability of the test(s). As the diverging positions taken by the national courts in the main proceedings illustrate, when two of the areas of application of the principle *ne bis in idem* overlap in one case, there is no rule to determine which of the tests applies. Should the combination of competition and non-competition administrative proceedings be subject to the *Wilhelm/Toshiba* test, involving the consideration of legal interest? Or should one apply the *Menci* case-law and the limitation of rights clause approach? Or has the *Menci* case-law *replaced* the test defined in *Wilhelm/Toshiba*?

94. There does not seem to be anything in the *Menci* test that would exclude the latter possibility. *Menci* relies on an interpretation of Article 50 of the Charter that applies horizontally in all fields of EU law. Yet, *Slovak Telecom*, (79) decided post-*Menci*, confirms that the legal interest-related test laid down in *Wilhelm/Toshiba* still applies, without, however, providing an explanation as to why this is still the case.

95. Third, and perhaps most importantly, it is rather difficult to maintain in conceptual terms the notion that one and the same provision of primary law, Article 50 of the Charter, compliance with which must be ensured in all situations falling within the scope of EU law, may have a different content depending on the area of EU law to which it is applied. However, that appears to be very much the case if the definitional elements of the prohibition contained in that provision, namely *idem* and *bis*, are interpreted differently in different areas of EU law. This begs the question of what role Article 50 of the Charter plays in situations such as that in the main proceedings where it is not a pure competition law situation, but where it does not tally with the *Menci* scenario either because of the absence of one (genuine) set of criminal proceedings?

96. I consider that situation untenable.

97. However, I admit that the present case could be possibly disposed of without attempting any unification of the test to be applied under Article 50 of the Charter. The test emanating from the *Menci* case-law could possibly be expanded to cover also the situation arising in the main proceedings, while the applicability of the *Wilhem/Toshiba* test could be discarded.

98. The present case does not, strictly speaking, require that all of the difficulties identified above, including the tricky question of whether to keep or abandon the criterion of the legal interest in competition law, be resolved. Previously, the issue of the legal interest was clearly linked to the specific structure of competition law enforcement within the European Union, as currently framed by Regulation No 1/2003 and before that by Regulation No 17. Thus it could be argued that, to the extent that in the main proceedings a competition law proceeding is combined with a non-competition one, the application of the criterion of legal interest is not called for because the situation falls outside of the specific issue of enforcement of competition law in the European Union.

99. However, having narrowed down the *Wilhelm/Toshiba* logic in this way, the outstanding issue becomes what test is applicable to the case in the main proceedings? The answer to that would naturally be *Menci*. It is a test recently established by the Grand Chamber of the Court, which, at least in terms of its wording, seems to be a holistic one. It appears to cover all situations where Article 50 of the Charter is applicable. It could thus be expressly endorsed as the proper (and unified) test for *ne bis in idem* under Article 50 of the Charter.

100. Nevertheless, for the reasons I set out in the following section, it would be wise for the Court to avoid doing so. In my view, *Menci* is a problematic decision.

2. ***One* Menci *to rule them all?***

101. *Menci* is a paradox. In the interest of providing increased protection in accordance with the case-law of the ECtHR, its surprising consequence is that it fails to provide effective individual protection.

102. As a preliminary point of context, it must be acknowledged that part of the problem stems at the outset from the definition and application by the ECtHR of what is commonly referred to as the *Engel* criteria, (80) through which the ECtHR developed a rather expansionist view of what constitutes a ‘criminal’ matter. (81) That broad interpretation of the concept of ‘criminal’ matter has been used to bring under the jurisdiction of the ECtHR national proceedings that would have otherwise fallen outside the scope of Article 6 ECHR due to their classification, in national law, as administrative matters.

103. However, the conclusion that the same sweeping approach, developed within a given context for the purposes of asserting jurisdiction under Article 6(1) ECHR, should automatically be applicable to any other concept of 'criminal' under the ECHR, is not an inevitable one. Nevertheless, the ECtHR affirmed that 'Article 4 of Protocol No. 7 must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" in Articles 6 and 7 [ECHR]'. (82) It also confirmed that approach in *A and B*. (83)

104. The Court followed that guidance. (84) Indeed, in view of Article 52(3) of the Charter, it could hardly have done otherwise. However, that initial choice has considerable repercussions on the *idem* test that must follow. As the list of various administrative proceedings and penalties regarded as criminal grows, so too does the range of procedures and sanctions requiring the assessment of *idem*. Next, unless one embraces the conclusion that everything and anything is included in the protection offered by the principle *ne bis in idem*, then a selection must happen somewhere: either at the stage of defining what constitutes 'criminal', or at the point of the definition of *idem*.

105. It would appear that, at present, the *Engel* criteria are unlikely to be revisited. However, this means that, unless any and every second set of administrative-criminal proceedings is to be found inadmissible, irrespective of the various purposes or objectives that it may pursue, the definition of *idem* must become more demanding. Otherwise, if both the definition of *criminal* and the definition of *idem* are too broad, most of the parallel administrative regimes in the Member States will face considerable problems in terms of their enforcement, not to mention the fact that parallel administrative procedures may take place across the Member States or at EU level.

106. Faced with such a difficult prospect, it would appear that the *Menci* test was intended to provide an alternative. Indeed, shifting the analysis from Article 50 of the Charter to Article 52(1) of the Charter might be, at first sight, an elegant way of bypassing the conundrum of the definition of *idem* for the purposes of Article 50 of the Charter. This is because a rather broad (and thus protective) interpretation of *idem* is offset by the possibility of limiting the right enshrined in Article 50 of the Charter. In that way, the resulting rule achieves a balance. However, upon closer inspection, I am afraid that it creates more problems than it offers solutions.

107. First, and foremost, at least in my view, the very purpose of Article 50 of the Charter is to protect the individual from the second set of proceedings. Article 50 of the Charter is a bar. If validly triggered, it prevents the other proceedings *from even starting*. (85) Such a bar must be defined *ex ante* and normatively.

108. However, under the *Menci* test, (86) it is only when the second set of proceedings have finished that it will be possible to verify whether some of the conditions of the test have been fulfilled and thus whether the second set of proceedings is lawful or not. It may be possible to stop some of the 'second' set of proceedings from continuing due to the absence of an objective of general interest or to the absence of the complementary aims pursued. However, provided that those requirements are satisfied, the proportionality of the resulting limitation is dependent on the conditions under which the second set of proceedings will take place, including the determination of the sanction.

109. In other words, the application of the principle *ne bis in idem* stops relying on an *ex ante normatively* defined test. Instead, it becomes an *ex post corrective* test that may or may not apply depending on the circumstances and the exact amount of sanctions imposed. That is not a protection against double jeopardy. It is simply an *ex post* protection against the disproportionality of combined or aggregated sanctions.

110. Second, viewed in this light, I am rather puzzled as to how the principle *ne bis in idem*, designed in such a way, is able to continue protecting the very essence of the right enshrined in Article 50 of the Charter. The explanation provided specifically in *Menci* (87) does not clarify the matter any further. In its judgment, the Court simply axiomatically stated that the legislation at issue 'respects the essential content of Article 50 of the Charter, since … it allows [the] duplication of proceedings and penalties only under conditions which *are exhaustively defined*'. (88) To me, that statement appears to relate more to the condition of legality of the limitation at issue ('prescribed by law'). As far as the essence of the rights is concerned, I have difficulty in seeing how the essence of *ne bis in idem* is protected by a clear and express statement in national law that there will be a second set of proceedings. (89)

111. Third, the criteria of a test that is not designed for an *ex ante* protection, but rather for an *ex post* correction, are bound to be *circumstantial*. (90) In particular, the elements relating to proportionality seem particularly dependent on the circumstances, with coordination between proceedings stated but not always required, and with the description of the mechanism which fixes the overall amount of the sanction that sets out various elements, without, however defining any general test.

112. Such a degree of accidental circumstantiality within a protection that is supposed to be equal for all individuals is yet again striking. Indeed, procedures that involve two persons in very similar situations, conducted by the same authorities, could very well receive a different assessment due to the speed in which the authorities deal with the case or depending on the manner in which the fine is calculated.

113. Fourth, the actual level of individual protection provided by *Menci* appears to be rather low. The essence of the right to be protected against a second set of criminal proceedings for the same offence is considered to be preserved simply because the accused could foresee that he or she would be prosecuted for a second time. (91) The complementary aims pursued are deemed to exist based on the mere fact that the criminal prosecution, as opposed to the administrative one, is limited to 'serious' breaches only while apparently pursuing largely the same goal. (92) It may perhaps be assumed that a number of parallel regimes are in fact likely to satisfy such a test without giving rise to considerable problems.

114. Fifth, there is the requirement, set out in *Menci*, that a duplication be limited to what is strictly necessary for the purposes of achieving the objective of general interest. More specifically, there ought to be rules ensuring coordination of national procedures in order to reduce to the strictly necessary the additional disadvantage associated with their duplication of such procedures for the persons concerned. Indeed, one may see the logic in and the appeal of that suggestion, if it is made in the context of criminal proceedings and within one Member State. (93)

115. However, once the combination of the relevant proceedings involves a number of parallel administrative regimes, and more importantly, more than one Member State or the authorities of the Member States and of the European Union, then suggestions about the desirability of single-track systems might quickly leave the realm of wishful thinking and cross over into science fiction.

116. On an ancillary (or rather, a realistic) note, it took several decades to establish an integrated network of competition law which brings together the Commission and the NCAs. That said, despite the identity of rules to be applied and the entry into force of Regulation No 1/2003, a number of questions of practical enforcement remain unanswered. (94) Other systems of parallel decision-making, such as the recently introduced GDPR (95) one-stop-shop mechanism, seem to suffer from considerable teething problems in terms of the attribution of competence. (96) If that is

the current state of affairs within dedicated and expressly regulated networks across the European Union, it is not immediately obvious how the necessary level of coordination could reasonably be expected and achieved in various areas of law, within various bodies, and across various Member States.

117. In summary, all those elements taken together lead to the rather dissatisfying overall picture mentioned at the beginning of this section. In order perhaps to re-establish some balance, the Court in *Menci* decided to turn to Article 52(1) of the Charter and the limitation of rights. In doing so, however, it paradoxically ended up in a situation in which the very essence of Article 50 of the Charter was lost.

C. **The suggested solution**

118. Having set out, in the previous section, the problems produced by the current regime, I shall start by summarising briefly the parameters that a more suitable approach ought to have (1). Next, I shall turn to the issue of protected societal or legal interest (2), before setting out a possible unified test for *ne bis in idem* under Article 50 of the Charter (3). I shall then further illustrate the operation of such a test in a series of examples (4). Finally, I shall turn to the present case and the application of the test that I propose (5).

1. ***The parameters***

119. First, the scope of protection under Article 50 of the Charter must be ascertainable *ex ante*. The normative scope of a provision of EU law, in particular a fundamental right, cannot be dependent on uncertain and thus unforeseeable circumstances or outcomes of a given procedure. When applicability of Article 50 of the Charter is defined *ex ante*, *ne bis in idem* might be able to guarantee that no second set of proceedings will take place, if need be, barring the second procedure from even commencing.

120. Second, in accordance with Article 52(3) of the Charter, the level of protection provided under Article 50 of the Charter cannot be lower than that provided under Article 4 of Protocol No 7 of the ECHR. That does not necessarily mean, in my view, that the test designed in order to achieve such a compatible outcome must be identical. That is a fortiori the case in situations where the test needs to fit specific characteristics of a given system. The role of this Court is to provide *ex ante* guidance to national courts on how to apply EU law. Its task is not, at least as regards references for a preliminary ruling, to determine *ex post* whether or not a Convention was infringed by a Signatory Party in a given case.

121. Third, the test, while accepting the broad range of what constitutes a ‘criminal’ matter as its starting basis, (97) must make sure that it does not arrive at unreasonable outcomes within the specific composite legal environment of the European Union. A general test under Article 50 of the Charter must be able to operate not only within one Member State, but also, or rather more importantly, across the European Union, both at the horizontal axis (Member States – Member States), and at the vertical one (Member States – European Union). Within that complex domain, a reasonable balance must be re-established between the effective protection of individual rights and the legitimate aims of the Member States or the Union to prosecute acts that clearly impinge on various societal protected interests.

122. Finally, for all situations falling within the scope of EU law pursuant to Article 51(1) of the Charter, within which Article 50 of the Charter becomes applicable, the test must be the same, at least under Article 50 when applied alone. In this regard, I indeed agree with the proposition that

‘the crucial importance of the *ne bis in idem* principle as a founding principle of EU law which enjoys the status of a fundamental right means that its content must not be substantially different depending on which area of law is concerned’. (98) Of course, that does not preclude the possibility that specific regimes within EU law may exist, which provide a higher level of protection. However, where the Charter applies, the default test under Article 50 thereof must be the same.

2. ***The chameleon***

123. It is best to start with the text. Article 50 of the Charter, entitled ‘Right not to be tried or punished twice in criminal proceedings for the same criminal *offence*’, states 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’. (99)

124. That wording differs from Article 54 of the CISA, which uses the term ‘acts’. The latter states that ‘a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same *acts* provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party’. (100)

125. An ‘offence’ is not an ‘act’. The word ‘offence’ has a broader meaning. It generally refers not just to the relevant factual elements, but also to the legal qualification of certain typified conduct, or at least to the negative effects or impact that such conduct has on the interests deemed worthy of protection by society.

126. When a single conduct affects different protected legal or social interests, it often results in several different offences being committed (ideal concurrence). The resulting sanction tends to be, depending on the national legal system, defined on the basis of specific principles, the essence of which is that the offences committed are assessed in an integrated manner. (101)

127. That is generally not possible when the offences committed relate to different areas of law, each of which remains under the control of a different regulatory authority. Stating that under those circumstances, a second set of proceedings is always inadmissible because it relates to the same facts actually precludes the possibility of different legal interests being pursued in parallel.

128. Therefore, sooner or later, one logically arrives at the issue of protected societal or legal interest in order to distinguish the situations at issue. It is intriguing to see that even where the *idem factum* approach has been adhered to, the concept of protected legal interest has in fact never really disappeared. Much like a little chameleon, it simply adopted different colours, gluing itself to the different sticks or branches that were available within each line of case-law at the given time.

129. The only area under EU law where the concept of protected legal interest truly disappears is under Article 54 of the CISA and Framework Decision 2002/584. By contrast, in competition law, the relevance of the protected legal interest has always been confirmed. Even Advocates General who suggested abandoning legal interest as a separate criterion ended up with its content effectively overlapping with a broadly defined ‘identity of facts’. (102) Similarly, in *Menci*, the discussion of the difference in protected legal interests has simply been moved under the heading of different objectives of general interest and the complementarity of aims pursued. (103)

130. However, it is in the case-law of the ECtHR that the concept of protected legal interest exhibits truly chameleonic qualities. First, in the period before *Zolotukhin*, the difference in legal interests pursued seemed to be part of the definition of *idem*, at least in most cases. That is particularly well

illustrated in the case-law of the ECtHR concerning applicants who caused car accidents in respect of which criminal and administrative penalties were imposed on them, the latter consisting in the withdrawal of their driving licence. The ECtHR has accepted the possibility of that combination despite the licence withdrawal usually being qualified as *Engel*-criminal. (104) Second, it is true that the judgment in *Zolotukhin* denied the relevance of the difference in legal interest. Third, a few years later, however, in *A and B*, the difference in protected legal interest was de facto re-introduced once again. This time, and as the Court did later in *Menci*, it morphed into the considerations relating to the complementary objectives pursued by the legislation applied in both proceedings at issue. Unlike the Court's approach in *Menci*, however, and perhaps somewhat surprisingly on a conceptual level, whether 'different proceedings pursue complementary purposes and thus address … different aspects of the social misconduct involved' has suddenly re-emerged as part of the assessment of the *bis* criterion and the question whether (or not) there is a sufficient connection in substance. (105)

131. I do not believe all of this to be a coincidence. Once the decision to allow a second set of proceedings for the same acts is taken in order to accommodate the voices calling for more space to be provided for law enforcement, or simply to accept the reality that all proceedings, be they within the same Member State or a fortiori across them, are unlikely to be single-track proceedings, attention focused on the pursued objectives becomes the only available tool for distinguishing between two or more sets of proceedings. Since the conditions relating to proportionality are clearly contingent upon the specific circumstances of each case, the concept of complementary aims pursued becomes, in my view, the central element of any normative analysis. However, as already stated, that element is simply just another way of describing the same idea as the one which lies at the heart of the concept of the protected legal interest.

3. ***The test***

132. For all those reasons, my proposal is quite simple. I suggest making the examination of the protected legal interests, and thus of the objective pursued, part of the consideration of *idem*. It is that element alone which allows one to decide normatively, clearly and upfront, why the given conduct is being pursued in parallel or subsequent proceedings and allows one to determine whether or not the same alleged offender is again being punished for the same reasons. Unless a closer examination shows that the legal interests protected by the two legislative frameworks at issue are the same, they should be allowed to be pursued in parallel rather than one of them being *de facto* eliminated as a consequence of the application of the *Engel* criteria and a broad concept of *idem*.

133. Therefore, the assessment of *idem* for the purposes of Article 50 of the Charter should rely on *a triple identity*: of the offender, of the relevant facts, and of the protected legal interest.

134. First, the condition relating to the identity of the offender is rather clear and, in any event, uncontested in the present case.

135. Second, in respect of the relevant facts, I would point out that what is in fact required is their *identity*, not a mere 'similarity'. That is naturally with the caveat that it might happen that the subsequent proceedings concerns only a part of the facts (temporal, substantive) taken into account in the previous one. However, the bottom line is that to the extent that the two sets of facts do indeed overlap, there must be identity within that overlap.

136. Third, what is a protected legal interest? It is the societal good or social value that the given legislative framework or part thereof is intended to protect and uphold. It is that good or value that the offence at issue harms, or with which it interferes.

137. The distinction made between the various protected legal interests at a rather specific level is well established under criminal law or administrative law. There, a national code would typically list the interests or values which each criminal act infringes (crimes against life, property, bodily integrity, or the State, and so on). That distinction might indeed become much more complicated in various parallel areas of public administration and when considered across national jurisdictions and areas of regulation.

138. It may nonetheless be pointed out that the protected legal interest is *not* identical with the objective side of an offence as defined in national law. It is just one element thereof, defined at a higher level of abstraction. The identification of the legal interest or value that is intended to be protected by criminalising certain acts in national law is a natural point of departure. However, it is by no means decisive.

139. The definition of protected legal interest assessed for the purpose of Article 50 of the Charter may not copy national labels and national legal specificities. In practical terms, a Member State cannot escape the reach of the principle *ne bis in idem* by simply introducing rather unusual offences into its national legal order. In such situations, for the purposes of the application of *ne bis in idem*, the effectively protected legal interest is to be re-stated, in the light of the facts of the offence allegedly committed, at the appropriate level of abstraction. In a way, that endeavour is similar to the assessment of double criminality under various systems of judicial cooperation in criminal matters. Equally, in that regard, the exact description and facts must be 'de-localised' from the specific national legislative context. (106)

140. One may take the example of crimes against the life and bodily integrity of other persons. If a violent assault on another person results in his or her death, in order to identify the protected legal interest, it does not matter whether the respective national law defines that act, in view of the specific factual circumstances, as murder, manslaughter, or merely serious bodily harm that causes death. The key point is that, by one violent action against another human being (identity of act), the same offender (identity of offender) has harmed the same type of protected legal interest, namely the life and bodily integrity of another person (identity of the protected legal interest).

141. That example calls for a final observation. The concept of the legal interest protected by a specific rule, and the objective that that rule pursues, are likely to be mutually transitive in practice. These are two labels referring to the same issue – the object and the purpose of the given rule.

4. ***The illustrations***

142. The operation and operability of the suggested interpretation of *idem* for the purpose of Article 50 of the Charter might be illustrated through the following three examples.

143. First, there is the scenario involving two sets of criminal proceedings in two different Member States concerning the same offence, the territorial elements and impact of which may be split across the borders. One could refer to it as the *van Esbroeck* scenario. However, in such a scenario (the exportation of illegal drugs from one State and their immediate importation into another, arguably by the same act), one would assume that the protected legal interest in penalising that same act in the two States is in fact the same: the protection of society and public health against narcotic drugs. Thus, far from being irrelevant in such scenarios, the actual identity of the protected legal interests in both proceedings would preclude the subsequent prosecution for the same act in another Member State.

144. Second, there is the *Menci* scenario. It concerns the combination of criminal and administrative proceedings within the same Member State, which the *Engel* criteria transformed into a combination of two sets of criminal proceedings. The second set of proceedings could be permitted if the applicable legislation protects another legal interest, such as the effective collection and recovery of taxes in the administrative proceedings and the punishment for committing a crime in relation to public finances.

145. However, the conceptual problem in such scenarios, for example in the context of VAT, is the existence of what one could refer to as an 'administrative punishment surplus'. This comes about in situations where the (tax) administration is not merely asking for the unpaid sums, possibly coupled with interest, but imposes an additional fine (namely, a fine, a tax surcharge, and so on). It is on account of this surplus that administrative proceedings usually become 'criminal' in nature under the *Engel* criteria.

146. The subsequent proceedings, enforcing such a 'surplus', were considered to be unproblematic in *Menci*, but held to be inadmissible in *Garlsson* and in *Di Puma*. The distinguishing of the objectives pursued and the legal interests protected in such scenarios will not be an easy exercise. To the extent that the given administrative rule is intended not only to obtain the payment of what is due (with possible default interest), but also to impose a punitive fine, the respective ambits of the criminal and administrative rules overlap when it comes to the objectives pursued.

147. This idea seems to be well illustrated in *Menci*. In that case, the Court recognised the legality of the subsequent criminal proceedings. Having established that the combination of the administrative and criminal rules at issue pursue the objective of general interest, namely the collection of the VAT due, the Court further explained that 'a duplication of criminal proceedings and penalties may be justified where those proceedings and penalties pursue … complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue'. (107) While the Court left that exercise to the referring court, it also added that 'it appears legitimate for a Member State to seek, first, to deter and punish … by imposing fixed administrative penalties … and, secondly, to deter and punish serious violations of those rules, which are particularly damaging for society and which justify the adoption of more severe criminal penalties'. (108)

148. By contrast, in *Garlsson*, the Court observed that pursuing administrative proceedings *after* a conviction in the criminal proceedings 'exceeds what is strictly necessary in order to achieve the objective' to protect the integrity of financial markets of the European Union and public confidence in financial instruments. (109) A similar reasoning, pointing out the excessiveness of the punishment, was used in *Di Puma*, involving an acquittal in prior criminal proceedings and subsequent administrative proceedings for the same acts of insider dealing. (110)

149. Whether it be with regard to Article 52(1) of the Charter, or the scope of protection under Article 50 of the Charter, what is key in both scenarios is the difference in protected legal interests or the complementary aims pursued. In my view, the only conceptual distinction that can in fact be made is between the different aims and reasons (and thus legal interests) pursued in the recovery of the money due, on the one hand, and in punishment and deterrence, on the other hand. However, once the tax/administrative proceedings start to punish beyond the recovery of sums with interest, or criminal proceedings also seek recovery of any sums due, then the conceptual difference between the two simply disappears and the prohibition of the repetition of proceedings under *ne bis in idem* is effectively triggered, at least in my view.

150. In such situations, which are likely to be limited to one and the same Member State, it is also entirely justified to ask that Member State to coordinate its relevant procedures. Logically, it is, in

the first place, likely that a tax administration will investigate and prosecute instances of tax evasion. If the tax evasion detected reaches a certain gravity or threshold, the nature of the investigation and prosecution may very well change, from merely administrative to criminal. The exact relationship between the two sets of proceedings is for each Member State to organise, with the caveat that, in the end, it cannot be that both the tax administration and the criminal court punish the same act with sanctions that are criminal in nature.

151. Third, there is the scenario of parallel or subsequent administrative proceedings in different Member States, where the criminal nature of those proceedings is established on the basis of the *Engel* criteria. Those situations may arise within one and the same regulatory regime within the European Union (such as competition, data protection, and so on), but may also arise with regard to the same facts which are pursued under different regulatory frameworks by different authorities. (111) It will be in such situations, in particular, that the issue of identity of the protected legal interest is bound to arise. On the other hand, such situations are, in practical terms, frequently likely to fall short of the identity of the facts in view of the territoriality of the offence, as explained for instance in the context of competition law by Advocate General Kokott in her Opinion in *Toshiba* (112) and developed further in my Opinion in the parallel case of *Nordzucker*.

5. *The present case*

152. The present case concerns two sets of administrative proceedings, qualified a priori as *Engel*-criminal, and conducted within one Member State. It thus represents a variety of the third scenario outlined above, but is limited to the same Member State. Alternatively, it could also be seen as an alteration of the *Menci* scenario: it is situated within the same Member State, but involves two sets of proceedings that are criminal, not because of its national original conception, but because of *Engel*.

153. The sectoral proceedings before the IBPT were based on the national legislation transposing Directive 97/67. That directive, by imposing obligations of non-discrimination and transparency, is aimed at progressively introducing market conditions to the postal services sector. The competition proceedings commenced thereafter. They concerned the enforcement of the prohibition of the abuse of a dominant position intended to protect free competition.

154. It is worth mentioning that the ECtHR has in principle already recognised the offence of abuse of a dominant position as being criminal in nature for the purposes of applying the criminal limb of Article 6 ECHR. (113) There is of course the established case-law of the Court under which *ne bis in idem* applies in the field of EU competition law. (114)

155. No such assessment seems to have been made in respect of the regulatory offences to the non-discrimination and transparency obligations of the postal service providers. However, the starting assumption of the referring court, and that of all intervening parties, seems to be that the *Engel* criteria are also fulfilled with regard to that offence. I shall therefore proceed on the basis of that assumption as well, but noting nevertheless that it is for the referring court to establish whether it is indeed the case.

156. The identity of the offender seems to be established. As regards the identity of the facts, I note that several intervening parties have expressed some doubts in this regard. Moreover, the referring court's questions are worded in a rather questionable manner, assuming that, in order for the criterion of identity of the facts to be satisfied, all that is needed is that there are 'similar facts'.

157. I would again stress that acts concerned by both proceedings at issue need to overlap in order for identity of facts to be satisfied. It is not sufficient that the acts be merely similar. That issue must be verified by the referring court in order to establish that both sets of proceedings indeed rely on the same material facts understood as a set of specific circumstances which are inextricably linked together. (115) If, and to the extent that, there is no identity of facts, the protection under *ne bis in idem* cannot be triggered.

158. Finally, there is the identity of the protected legal interest, which, together with the identity of the offender and facts, may amount to *idem* in terms of the same offence. Does competition law applied in the second proceedings, and in particular the given offence within that regulatory regime, protect the same legal interests as the relevant offence under the postal market legislation applied in the sectoral proceedings?

159. The sectoral proceedings were based on Article 144*ter* of the Law of 21 March 1991 on the reform of certain public commercial undertakings, imposing on universal postal service providers a number of non-discrimination and transparency obligations when adopting and applying their tariff systems. In this context, the IBPT stated expressly in its decision that it was not assessing whether bpost's conduct complied with EU or national competition rules, especially since it does not have the competence to do so.

160. As explained by the Belgian Government at the hearing, the aim pursued by the postal regulation at issue is to liberalise the internal market for postal services. The prohibition of discrimination and the transparency obligation is supposed to frame the conduct of the entities that have in the past been monopolists. That objective is in principle limited in time. The sectoral regulation is based on the premiss that the postal services market will be transformed progressively so as ultimately to embrace the conditions of a free market.

161. As regards the competition proceedings, the referring court explains that the Belgian Competition Authority did not penalise bpost for a lack of transparency or for any discriminatory practices. It applied national and EU competition law in order to penalise bpost's anticompetitive practices. As the referring court noted, and also confirmed by the Belgian Government at the hearing, the aim of that legislation is to protect competition within the internal market by prohibiting economic operators from abusing their dominant position. According to the Belgian Competition Authority, bpost's practices were likely to have an exclusionary effect on consolidators and bpost's potential competitors, on the one hand, and a loyalty building effect on bpost's biggest clients that would increase barriers to entry to the distribution sector, on the other.

162. Thus, it would appear that, subject to verification by the referring court, both offences that have been pursued successively in the sectoral and competition proceedings seem to be linked to the protection of a different legal interest and to a legislation pursuing a different objective. First, in terms of the protected legal interest, achieving liberalisation of certain, previously monopolistic, markets follows a different logic than the ongoing and horizontal protection of competition. Second, that is also evident with regard to the undesirable consequences that punishment of each of the offences is intended to prevent. If the aim is to liberalise a sector, then potential harm caused to competition upstream or downstream is not necessarily an issue that the sectoral regulatory framework must tackle. By contrast, an abuse of a dominant position that results in a distortion of competition upstream or downstream from the dominant undertaking is very much a concern of competition rules.

163. Before concluding, I would like to point out that much has been argued in the present case about the need to preserve the criterion of legal interest *specifically* in competition law. With the

exception of bpost, all parties having submitted observations stress that abandoning that criterion risks stripping competition law of all its effectiveness.

164. In view of the test proposed in this Opinion, that issue is moot. I would, however, note that the exact relationship and consequences of the test proposed, applied in the specific area of competition law, lies at the heart of my Opinion in the parallel case *Nordzucker*. Therefore, a more in-depth discussion on that matter can be found in that Opinion. At this juncture, I would simply recall that when it comes to the conditions of application of Article 50 of the Charter, competition law is, from a structural point of view, no different from any of the other fields covered by EU law. Therefore, in line with the approach suggested in the present Opinion, the consideration relating to legal interest should be part of the assessment of any *idem* under Article 50 of the Charter, subject to a specific regime, such as in Article 54 of the CISA.

165. For all those reasons, I suggest that the principle *ne bis in idem* enshrined in Article 50 of the Charter does not preclude the competent administrative authority of a Member State from imposing a fine for the infringement of EU and national competition law where the same person has already been finally acquitted in a previous proceedings conducted by the national postal regulator for an alleged infringement of postal legislation, provided that, in general, the subsequent proceedings are different either as to the identity of the offender, or as to the relevant facts, or as to the protected legal interest the safeguarding of which the respective legislative instruments at issue in the respective proceedings pursue.

V. **Conclusion**

166. I propose that the Court answer the questions referred for a preliminary ruling by the Cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium) as follows:

– The principle *ne bis in idem* enshrined in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude the competent administrative authority of a Member State from imposing a fine for the infringement of EU or national law provided that the subsequent proceedings taking place before that authority are different from those that have taken place previously either as to the identity of the offender, or as to the relevant facts, or as to the protected legal interest the safeguarding of which the respective legislative instruments at issue in the respective proceedings pursue.

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1 Original language: English.

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2 Judgment of 11 February 2015, *bpost* (C-340/13, EU:C:2015:77).

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3 Judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72).

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4 Judgments of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197); *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193); and *Di Puma and Zecca* (C-596/16 and C-597/16, EU:C:2018:192).

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5 My Opinion in *Nordzucker and Others* (C-151/20) (‘*Nordzucker*’), delivered on the same day as the present Opinion.

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6 OJ 2000 L 239, p. 19.

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7 OJ 1998 L 15, p. 14.

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8 Judgment of 11 February 2015 (C-340/13, EU:C:2015:77, paragraph 48).

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9 Judgment of 13 February 1969 (14/68, EU:C:1969:4).

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10 Judgment of 14 February 2012 (C-17/10, EU:C:2012:72).

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11 Judgment of 25 February 2021 (C-857/19, EU:C:2021:139).

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12 Judgment of 13 February 1969, *Wilhelm and Others* (14/68, EU:C:1969:4).

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13 EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962 (I), p. 87).

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14 Article 9(3) only provided that ‘as long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85(1) and Article 86 …’.

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15 Judgment of 13 February 1969, *Wilhelm and Others* (14/68, EU:C:1969:4, paragraph 3).

16 Judgments of 7 January 2004, Aalborg Portland and Others v Commission (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 338), and of 14 February 2012, Toshiba Corporation and Others (C-17/10, EU:C:2012:72, paragraph 97).

17 Judgments of 29 June 2006, Showa Denko v Commission (C-289/04 P, EU:C:2006:431, paragraphs 52 to 56); of *SGL Carbon* v *Commission* (C-308/04 P, EU:C:2006:433, paragraphs 28 to 32); and of 10 May 2007, *SGL Carbon* v *Commission* (C-328/05 P, EU:C:2007:277, paragraphs 24 to 30).

18 See, for example, judgment of 29 June 2006, *Showa Denko* v *Commission* (C-289/04 P, EU:C:2006:431, paragraph 53). Contrast, however, with judgment of 14 December 1972, *Boehringer Mannheim* v *Commission* (7/72, EU:C:1972:125, in particular paragraph 4).

19 Judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraph 97 and the case-law cited). See also judgment of the General Court of 26 October 2017, *Marine Harvest* v *Commission* (T-704/14, EU:T:2017:753, paragraph 308).

20 Opinion of Advocate General Kokott in *Toshiba Corporation and Others* (C-17/10, EU:C:2011:552, points 114 to 122).

21 Judgment of the ECtHR of 10 February 2009, *Sergey Zolotukhin v. Russia* (CE:ECHR:2009:0210JUD001493903).

22 Opinion of Advocate General Kokott in *Toshiba Corporation and Others* (C-17/10, EU:C:2011:552, point 118).

23 Ibid., points 129 to 134.

24 Judgment of 3 April 2019 (C-617/17, EU:C:2019:283).

25 Opinion of Advocate General Wahl in *Powszechny Zakład Ubezpieczeń na Życie* (C-617/17, EU:C:2018:976, point 45).

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26 Judgment of 25 February 2021 (C-857/19, EU:C:2021:139, paragraph 43).

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27 Opinion of Advocate General Kokott in *Toshiba Corporation and Others* (C-17/10, EU:C:2011:552, points 114 to 122), discussed above in point 47.

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28 Opinion of Advocate General Wahl in *Powszechny Zakład Ubezpieczeń na Życie* (C-617/17, EU:C:2018:976, point 45), discussed above in point 49.

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29 Regulation of 16 December 2002 on the implementation of the rules on competition laid down in [Articles 101 and 102 TFEU] (OJ 2003 L 1, p. 1).

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30 Opinion of Advocate General Tanchev in *Marine Harvest* (C-10/18 P, EU:C:2019:795, point 95, footnote 34).

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31 See, for example, Sarmiento, D., 'Ne Bis in Idem in the Case-Law of the European Court of Justice', in Van Bockel, B. (ed), *Ne Bis in Idem in EU Law*, Cambridge University Press, Cambridge, 2016, at p. 130; Nazzini, R., 'Parallel Proceedings in EU Competition Law. Ne Bis In Idem as a Limiting Principle', in Van Bockel, B. (ed), *Ne Bis in Idem in EU Law*, Cambridge University Press, Cambridge 2016, at pp. 143 to 145. See also Luchtman, M., 'The ECJ's Recent Case Law on Ne Bis in Idem: Implications For Law Enforcement in a Shared Legal Order', *Common Market Law Review*, vol. 55, 2018, p. 1724.

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32 Of 22 November 1984, ETS No.117.

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33 Of 16 December 1966: 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure *of each country*.' (My emphasis.)

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34 Article 3(2) of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

35 See, for further examples, Article 11(1)(c) of Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ 2008 L 337, p. 102) and Article 9(1)(c) of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27).

36 Judgments of 9 March 2006, van Esbroeck (C-436/04, EU:C:2006:165, paragraph 36); of 28 September 2006, *Gasparini and Others* (C-467/04, EU:C:2006:610, paragraph 54); of 28 September 2006, *van Straaten* (C-150/05, EU:C:2006:614, paragraph 48); of 18 July 2007, Kraaijenbrink (C-367/05, EU:C:2007:444, paragraph 26); of 16 November 2010, Mantello (C-261/09, EU:C:2010:683, paragraph 39); of 29 April 2021, *X (European arrest warrant – Ne bis in idem)* (C-665/20 PPU, EU:C:2021:339, paragraph 71 and the case-law cited), the last case concerning a previous sentence imposed by a third State.

37 Judgment of 9 March 2006 (C-436/04, EU:C:2006:165).

38 United Nations Single Convention on Narcotic Drugs, 1961, UNTS, vol. 520, p. 151 (as amended by the 1972 Protocol, UNTS, vol. 976, p. 3).

39 Judgment of 9 March 2006, *van Esbroeck* (C-436/04, EU:C:2006:165, paragraph 27).

40 Ibid., paragraph 28.

41 Ibid., paragraph 31.

42 Ibid., paragraph 32.

43 See also judgment of 28 September 2006, *van Straaten* (C-150/05, EU:C:2006:614, paragraph 41); of 18 July 2007, Kraaijenbrink (C-367/05, EU:C:2007:444, paragraph 26); or of 16 November 2010, *Mantello* (C-261/09, EU:C:2010:683, paragraph 39).

44 As noted, for example, by Advocate General Cruz Villalón in his Opinion in *Åkerberg Fransson* (C-617/10, EU:C:2012:340, point 77).

45 Judgment of the ECtHR of 10 February 2009, *Sergey Zolotukhin v. Russia* (CE:ECHR:2009:0210JUD001493903, § 82).

46 Ibid., § 78.

47 Judgment of the ECtHR of 15 November 2016, *A and B v. Norway* (CE:ECHR:2016:1115JUD002413011).

48 See, however, judgment of the ECtHR of 23 October 1995, *Gradinger v. Austria* (CE:ECHR:1995:1023JUD001596390). In that decision, the ECtHR found that although the designation, nature and purpose of the two offences at issue were different, there had been a breach of Article 4 of Protocol No 7 to the ECHR because both decisions concerned the same conduct.

49 Judgment of the ECtHR of 30 July 1998, *Oliveira v. Switzerland* (CE:ECHR:1998:0730JUD002571194, §§ 25 to 29). See also judgments of the ECtHR of 14 September 1999, *Ponsetti and Chesnel v. France* (CE:ECHR:1999:0914DEC003685597, § 5); of 2 July 2002, *Göktan v. France* (CE:ECHR:2002:0702JUD003340296, § 50); and of 24 June 2003, *Gauthier v. France* (CE:ECHR:2003:0624DEC0006117800, p. 14).

50 Judgment of the ECtHR of 29 May 2001, *Franz Fischer v. Austria* (CE:ECHR:2001:0529JUD00379509, § 29).

51 See also, for example, judgments of the ECtHR of 30 May 2002, *W.F. v. Austria* (CE:ECHR:2002:0530JUD003827597, § 28); of 6 June 2002, *Sailer v. Austria* (CE:ECHR:2002:0606JUD003823797, § 28); of 2 September 2004, *Bachmaier v. Austria* (CE:ECHR:2004:0902DEC00774130); of 14 September 2004, *Rosenquist v. Sweden* (CE:ECHR:2004:0914DEC006061900); of 7 December 2006, *Hauser-Sporn v. Austria* (CE:ECHR:2006:1207JUD003730103, § 45); of 1 February 2007, *Storbråten v. Norway* (CE:ECHR:2007:0201DEC001227704); of 26 July 2007, *Schutte v. Austria* (CE:ECHR:2007:0726JUD001801503, § 42); of 11 December 2007, *Haarvig v. Norway* (CE:ECHR:2007:1211DEC001118705); and of 4 March 2008, *Garretta v. France* (CE:ECHR:2008:0304DEC000252904, § 86).

52 Judgment of the ECtHR of 10 February 2009, *Sergey Zolotukhin v. Russia* (CE:ECHR:2009:0210JUD001493903 §§ 81 and 82).

53 Ibid., § 84.

54 Judgment of the ECtHR of 4 March 2014, *Grande Stevens v. Italy* (CE:ECHR:2014:0304JUD001864010, §§ 221 and 227); of 27 January 2015, *Rinas v. Finland* (CE:ECHR:2015:0127JUD001703913, §§ 45 and 46); of 10 February 2015, *Österlund v. Finland* (CE:ECHR:2015:0210JUD005319713, § 41); of 30 April 2015, *Kapetanios and Others v. Greece* (CE:ECHR:2015:0430JUD000345312, §§ 64 and 74); of 9 June 2016, *Sismanidis and Sitaridis v. Greece* (CE:ECHR:2016:0609JUD006660209, § 44). See also judgment of the ECtHR of 18 October 2011, *Tomasović v. Croatia* (CE:ECHR:2011:1018JUD005378509, §§ 28 to 32).

55 Judgment of the ECtHR of 15 November 2016, *A and B v. Norway* (CE:ECHR:2016:1115JUD002413011, § 130).

56 Ibid., § 147. See also § 153.

57 See judgment of the ECtHR of 13 December 2005, *Nilsson v. Sweden* (CE:ECHR: 2005:1213DEC007366101); of 20 May 2014, *Glantz v. Finland* (CE:ECHR:2014:0520JUD003739411, § 61); of 20 May 2014, *Nykänen v. Finland* (CE:ECHR:2014:0520JUD001182811, §§ 50 and 51); of 27 November 2014, *Lucky Dev v. Sweden* (CE:ECHR:2014:1127JUD000735610, § 62); of 17 February 2015, *Boman v. Finland* (CE:ECHR:2015:0217JUD004160411, §§ 42 and 43). See also judgment of the ECtHR of 30 May 2000, *R.T. v. Switzerland* (CE:ECHR:2000:0530DEC003198296).

58 Judgment of the ECtHR of 15 November 2016, *A and B v. Norway* (CE:ECHR:2016:1115JUD002413011, § 132).

59 Ibid., § 134.

60 Ibid., § 111.

61 Ibid., § 106.

62 Ibid., § 124.

63 Judgment of the ECtHR of 18 May 2017, *Jóhannesson v. Iceland* (CE:ECHR:2017:0518JUD002200711); of 6 June 2019, *Nodet v. France* (CE:ECHR:2019:0606JUD004734214); of 8 July 2019, *Mihalache v. Romania* (CE:ECHR:2019:0708JUD005401210, §§ 84 and 85). In the judgment of the ECtHR of 13 June 2017, *Šimkus v Lithuania* (CE:ECHR:2017:0613JUD004178811, §§ 46 and 47), the ECtHR appears to exclude the satisfaction of both links although the relevance of the *A and B* test seems rather implied. In the judgment of the ECtHR of 8 October 2019, *Korneyeva v. Russia* (CE:ECHR:2019:1008JUD007205117, § 58), the test is recalled but not applied as it has not been argued that both proceedings at issue formed an 'integrated legal response' within the meaning of *A and B*. In contrast, both links were deemed to be satisfied in judgment of the ECtHR of 8 October 2020, *Bajčić v. Croatia* (CE:ECHR:2020:1008JUD00673341, §§ 45 to 46).

64 See, above, footnote 4 of this Opinion.

65 See, for example, Burić, Z., 'Ne Bis in Idem in European Criminal Law – Moving in Circles?' *EU and Comparative Law Issues and Challenges Series*, 2019, pp. 507-520; Luchtman, M., 'The ECJ's Recent Case Law on Ne Bis in Idem: Implications For Law Enforcement in a Shared Legal Order', *Common Market Law Reports*, vol. 55, 2018, pp. 1725–50, p. 1717; Peeters, B., 'The Ne Bis in Idem Rule: Do the EUCJ and the ECtHR Follow the Same Track?', *EC Tax Review*, vol. 4, 2018, pp. 182-185, p. 182; Serneels, C., '"Unionisation" of the European Court of Human Rights' ne bis in idem jurisprudence: the Case of Mihalache v Romania', *New Journal of European Criminal Law*, vol. 11(2), 2020, pp. 232-234; Lo Schiavo, G., 'The Principle of Ne Bis In Idem and the Application of Criminal Sanctions: of Scope and Restrictions', *European Constitutional Law Review*, vol. 14(3), 2018, pp. 644-663; Vetzo, M., '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', *REALaw*, vol. 11(55), 2018, pp. 70-74.

66 Judgment of 26 February 2013, Åkerberg Fransson (C-617/10, EU:C:2013:105, paragraph 37).

67 Opinion of Advocate General Campos Sánchez-Bordona in Menci (C-524/15, EU:C:2017:667).

68 Judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 63).

69 Ibid., paragraph 43.

70 Ibid., paragraph 44.

71 Judgment of 20 March 2018, *Di Puma and Zecca* (C-596/16 and C-597/16, EU:C:2018:192, paragraph 42).

72 Judgment of 20 March 2018, *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193, paragraph 46).

73 Judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 45).

74 Ibid., paragraph 46.

75 Ibid., paragraphs 53 and 55.

76 Above, points 55 to 58 of this Opinion.

77 Above, point 52 of this Opinion.

78 For detail, see my parallel Opinion in *Nordzucker*.

79 Judgment of 25 February 2021 (C-857/19, EU:C:2021:139).

80 Judgment of the ECtHR of 23 November 1976, *Engel and Others v. the Netherlands* (CE:ECHR:1976:1123JUD000510071, § 82).

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81 See, for instance, Franssen, V., 'La notion "pénale": mot magique ou critère trompeur? Réflexions sur les distinctions entre le droit pénal et le droit quasi pénal' in Brach-Thiel, D. (ed), *Existe-t-il encore un seul non bis in idem aujourd'hui?*, L'Harmattan, Paris, 2017, pp. 57 to 91.

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82 See, for example, judgment of the ECtHR of 18 October 2011, *Tomasović v. Croatia* (CE:ECHR:2011:1018JUD005378509, § 19 and the case-law cited).

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83 Judgment of the ECtHR of 15 November 2016, *A and B v. Norway* (CE:ECHR:2016:1115JUD002413011, §§ 105 to 107).

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84 The Court embraced the Engel criteria in judgment of 5 June 2012, *Bonda* (C-489/10, EU:C:2012:319, paragraph 37), and also later in judgment of 26 February 2013, Åkerberg Fransson (C-617/10, EU:C:2013:105).

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85 The Court was recently prepared to push that point even as far as preventing a mere provisional arrest in view of verifying whether or not a person might be extradited to face a second set of criminal proceedings in a third country – see judgment of 12 May 2021, *Bundesrepublik Deutschland (Interpol red notice)* (C-505/19, EU:C:2021:376, paragraphs 72 to 82).

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86 With its individual steps set out above in points 79 to 83 of this Opinion.

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87 That aspect is not analysed in the judgment of 20 March 2018, *Di Puma and Zecca* (C-596/16 and C 597/16, EU:C:2018:192).

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88 My emphasis. See judgments of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 43), and of *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193, paragraph 45).

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89 Similar to Advocate General Campos Sánchez-Bordona in *Menci* (C-524/15, EU:C:2017:667, point 82).

90 Interestingly, in a number of other legislative contexts, including with regard to Article 325 TFEU, the Court has repeatedly emphasised that the *scope* of an EU law provision is to be assessed normatively and *ex ante* with regard to certain types of national proceedings. That scope cannot be made dependent on *ex post* outcomes of the given procedure. For a discussion with further references in that regard, see my Opinion in Joined Cases *Ministerul Public – Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie – Direcţia Naţională Anticorupţie and Others* (C-357/19 and C-547/19, EU:C:2021:170, points 109 to 115).

91 Above, point 80 of this Opinion.

92 Above, point 81 of this Opinion.

93 Where such suggestions have originally been made within the ECHR context – see judgment of the ECtHR of 30 July 1998, *Oliveira v. Switzerland* (CE:ECHR:1998:0730JUD002571194, § 27), and more recently in judgment of the ECtHR of 15 November 2016, *A and B v. Norway* (CE:ECHR:2016:1115JUD002413011, § 130).

94 See, for illustration, my Opinion in the parallel case in *Nordzucker*.

95 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1). (‘the GDPR’).

96 As recently demonstrated in judgment of 15 June 2021, *Facebook Ireland and Others* (C-645/19, EU:C:2021:483).

97 Above, points 102 to 105 of this Opinion.

98 Opinion of Advocate General Kokott in *Toshiba Corporation and Others* (C-17/10, EU:C:2011:552, point 117).

99 My emphasis.

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100 My emphasis.

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101 See also Opinion of Advocate General Campos Sánchez-Bordona in *Menci* (C-524/15, EU:C:2017:667, point 91 and footnote 79).

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102 In the already discussed case of *Toshiba* (above, point 47), my learned colleague Advocate General Kokott conceptually excluded legal interest from the concept of *idem*. Only unity of facts shall matter. She then nonetheless went on to subsume the (adverse) effects of a cartel and the anticompetitive consequences it caused under facts of the case. However, if adverse (social) effects (on the protected legal interests) are included under the facts, has the condition of the unity of protected legal interest really disappeared from the picture?

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103 Above, point 81 of this Opinion.

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104 Judgment of the ECtHR of 13 December 2005, *Nilsson v. Sweden* (CE:ECHR:2005:1213DEC007366101, pp. 10 to 11). Contrast, however, with judgment of the ECtHR of 28 October 1999, *Escoubet v. Belgium* (CE:ECHR:1999:1028JUD002678095, § 38).

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105 Judgment of the ECtHR of 15 November 2016, *A and B v. Norway* (CE:ECHR:2016:1115JUD002413011, §§ 131 and 132).

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106 For, an actual example and a detailed discussion, my Opinion in *Grundza* (C-289/15, EU:C:2016:622).

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107 Judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 44).

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108 Ibid., paragraph 45.

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109 Judgment of 20 March 2018, *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193, paragraphs 46 and 59).

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110 Judgment of 20 March 2018, *Di Puma and Zecca* (C-596/16 and C-597/16, EU:C:2018:192, paragraphs 43 and 44).

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111 See, in this context for example, the proceedings currently pending in Case C-252/21, *Facebook and Others*, raising, amongst others, the issue of competence of a national competition authority of the Member State other than the place of the main establishment of an undertaking, with the latter criterion being normally decisive for the attribution of competence for the national data protection authority under the GDPR.

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112 Opinion of Advocate General Kokott in *Toshiba Corporation and Others* (C-17/10, EU:C:2011:552, points 130 and 131).

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113 Judgment of the ECtHR of 27 September 2011, *Menarini Diagnostics S.R.L. v. Italy* (CE:ECHR:2011:0927JUD004350908, § 40).

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114 Above, points 43 to 52 of this Opinion.

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115 Judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 35).