ECLI:EU:C:2021:681

Provisional text

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 2 September 2021(1)

Case C-151/20

Bundeswettbewerbsbehörde

v

Nordzucker AG,

Südzucker AG,

Agrana Zucker GmbH

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling – Competition – Conduct investigated by two national competition authorities – Principle ne bis in idem – Simultaneous application of EU and national competition law – Identity of the protected legal interest – Territorial effects of a decision of a national competition authority – Leniency programme)

I. **Introduction**

1. Nordzucker and Südzucker are two sugar producers. The German national competition authority has found that those two undertakings infringed Article 101 TFEU and German competition law. In the main proceedings, the Austrian national competition authority seeks a declaration that those undertakings have breached Article 101 TFEU and Austrian competition law, while apparently relying on the same facts as those already contained in the German decision.

2. It is in this context that the Oberster Gerichtshof (Supreme Court, Austria) raises questions about the scope of the principle *ne bis in idem* enshrined in Article 50 of the Charter of the Fundamental Rights of the European Union ('the Charter'). In essence, does that principle preclude parallel or subsequent competition law proceedings in another Member States for what appears to be, at least in part, the same behaviour?

3. The present case gives rise to two issues in particular. First, what criteria should guide the interpretation of *idem* for the purposes of *ne bis in idem* in competition law and, in general, under Article 50 of the Charter? I deal with those issues in detail in my parallel Opinion in *bpost*. (2) To that extent therefore, this Opinion relies on the analysis already carried out in that Opinion. Second, the specific nature of the present case lies in the need to restate what constitutes the identity of relevant facts for the purposes of the principle *ne bis in idem*. (3) Above all, the Court is also invited – yet again, one might add – to clarify its understanding of the identity of the protected legal interest. Does the same protected legal interest exist in two sets of national proceedings in which two national competition authorities have applied the same provision of EU competition law, as well as their respective national competition rules?

II. **Legal framework**

4. 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.'

5. Article 101 TFEU prohibits as incompatible with the internal market 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'.

6. Article 3 of Regulation (EC) No 1/2003, (4) entitled ‘Relationship between Articles 81 and 82 of the Treaty and national competition laws’, reads as follows:

‘1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.’

7. Article 5 is entitled ‘Powers of the competition authorities of the Member States’, and states as follows:

‘The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

– requiring that an infringement be brought to an end,

– ordering interim measures,

– accepting commitments,

– imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.’

8. Article 13 concerns ‘Suspension or termination of proceedings’:

‘1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case.

2. Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.'

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

9. Nordzucker and Südzucker are two German sugar manufacturers. Agrana is controlled by Südzucker. It operates sugar factories in Austria and in eastern Europe.

10. For historical reasons, and due to product homogeneity and high transport costs, the German sugar market was divided into the core sales areas of the major German manufacturers. In response to attempts by foreign sugar manufacturers to enter the German market, several meetings took place between the sales directors of Nordzucker and Südzucker from no later than 2004. During those meetings, particular emphasis was placed on the importance of avoiding new competitive pressure by ensuring that German companies did not compete with each other by penetrating their respective traditional core sales areas.

11. Towards the end of 2005 and the beginning of 2006, Agrana established that some of its Austrian customers were purchasing sugar from a Slovakian subsidiary of Nordzucker. During a telephone call of 22 February 2006, Agrana's managing director informed Südzucker's sales director of those deliveries and asked him whether he knew anyone at Nordzucker with whom he could discuss the matter. The sales director of Südzucker then called the sales director of Nordzucker. He complained about the deliveries to Austria and implied that that could have consequences for the German market. Nordzucker's sales director was instructed not to react expressly to that request. However, he then made it clear to the sales manager of Nordzucker's Slovakian subsidiary that it was not his wish to expand exports to Austria.

12. By decision of 18 February 2014, the Bundeskartellamt ('the BKA'), the German national competition authority ('NCA'), imposed a fine of EUR 195 500 000 on Südzucker for, in essence, its failure to comply, in the Federal Republic of Germany, with the prohibition on agreements between competing undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. The BKA found that Nordzucker, Südzucker and a third German undertaking had colluded with each other by respecting their core sales areas for industrial and retail sugar. The BKA's decision also reproduced the content of the abovementioned telephone conversation of 22 February 2006 concerning Austria.

13. The main proceedings commenced after Nordzucker had filed an application for leniency in Austria. The Bundeswettbewerbsbehörde (the Austrian NCA) ('the BWB'), filed an application before the competent Austrian court seeking, vis-à-vis Nordzucker, a declaratory finding that the latter had infringed Article 101 TFEU and the relevant provisions of national competition law. With respect to Südzucker, the BWB sought the imposition of a fine amounting to EUR 12 460 000 for the period from 1 January 2005 to 21 September 2006. The BWB also sought a further fine amounting to EUR 15 390 000, on account of joint and several liability of Südzucker and Agrana, for the period from 22 September 2006 to 31 October 2008.

14. The national court of first instance rejected that application. It held that the BWB did not have a legitimate interest in seeking a declaratory finding against Nordzucker. That is because Nordzucker is an undertaking concerned by a leniency programme in respect of which the BWB had refrained from requesting the imposition of a fine. For the period leading up to 22 February

2006, there was no indication, not even impliedly, that Austria was involved in the basic agreement to respect the traditional German sales areas.

15. However, the court of first instance also observed that the request made in the telephone call of 22 February 2006 could have had at least a dampening effect on the deliveries made to Austria by the Slovakian subsidiary of Nordzucker. Thus, the subsequent implementation of that request constituted an agreement between Nordzucker and Südzucker which did infringe Article 101(1) TFEU. However, that court held that if a certain aspect of the conduct were covered by a penalty already imposed by another NCA, then a new penalty would run counter to the principle *ne bis in idem*. According to that court, this was very much the case as regards the agreement of 22 February 2006.

16. The BWB appealed to the Oberster Gerichtshof (Supreme Court), the referring court. It is seeking, on the basis of the agreement made in the telephone conversation of 22 February 2006, a declaratory finding that Nordzucker infringed Article 101 TFEU and the relevant provisions of national law. In respect of Südzucker, the BWB is also requesting the imposition of a fine for the same infringement. The BWB contests the application of the principle *ne bis in idem* made by the court of first instance. It submits that that assessment did not take into account the territories for which the fines were established based on the turnover generated there. In the BWB's view, the decision at first instance is also contrary to the decentralised application of EU competition law, governed by Regulation No 1/2003, which authorises parallel action of several NCAs.

17. The referring court notes that Südzucker was fined by the BKA for acts that include the telephone conversation of 22 February 2006, that being the only relevant infringement in the case pending before it. That court further refers to the case-law of the Court according to which the application of the principle *ne bis in idem* is subject to the triple condition of identity of the offender, of the relevant facts, and of the protected legal interest. It also points to what it considers to be a certain tension between the criterion of the protected legal interest and the approach adopted in other areas of EU law that subjects the application of the principle *ne bis in idem* solely to the identity of the offender and of the facts.

18. The referring court observes that the case-law of the Court does not provide any guidance vis-à-vis the application of the principle *ne bis in idem* in circumstances in which two NCAs apply both EU and national competition law in two sets of proceedings relating to the same facts and the same offender. The referring court also notes that no indication can be drawn from Regulation No 1/2003. Moreover, that court wonders whether the fact that an NCA took into account the effects of the given infringement in another Member State plays a role for the application of the principle *ne bis in idem* and whether the fact that the main proceedings involved the application of a leniency programme to Nordzucker bears any relevance in this respect.

19. In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer to following questions to the Court of Justice for a preliminary ruling:

'(1) Is the third criterion established in the Court of Justice's competition case-law on the applicability of the "*ne bis in idem*" principle, namely that conduct must concern the same protected legal interest, applicable even where the competition authorities of two Member States are called upon to apply the same provisions of EU law (here: Article 101 TFEU), in addition to provisions of national law, in respect of the same facts and in relation to the same persons?

In the event that this question is answered in the affirmative:

(2) Does the same protected legal interest exist in such a case of parallel application of European and national competition law?

(3) Furthermore, is it of significance for the application of the "*ne bis in idem*" principle whether the first decision of the competition authority of a Member State to impose a fine took account, from a factual perspective, of the effects of the competition law infringement on the other Member State whose competition authority only subsequently took a decision in the competition proceedings conducted by it?

(4) Do proceedings in which, owing to the participation of a party in the national leniency programme, only a declaratory finding of that party's infringement of competition law can be made also constitute proceedings governed by the "*ne bis in idem*" principle, or can such a mere declaratory finding of the infringement be made irrespective of the outcome of previous proceedings concerning the imposition of a fine (in another Member State)?'

20. Written observations have been submitted by Südzucker, Agrana, the BWB, the Belgian, German and Italian Governments, as well as by the European Commission. Südzucker, Agrana, the BWB, the Belgian, German and Polish Governments, as well as the Commission presented oral argument at the hearing which took place on 22 March 2021. That hearing was organised commonly for the present case, as well as for Case C-117/20 *bpost*.

IV. **Assessment**

21. This Opinion is structured as follows. I will begin my analysis by addressing the relevance of the first and the second questions raised (A). I shall then turn to the test which, in my view, ought to govern the applicability of the principle *ne bis in idem* in competition law matters and in any other case under Article 50 of the Charter (B). I shall dwell in particular on the issue of the protected legal interest in EU competition law (B.1), before turning to the identity of relevant facts within a given territory and at a given time (B.2). I shall conclude by focusing on the relevance of the declaratory statement being sought in the national proceedings, with no fine imposed because those proceedings have involved the application of a leniency programme, to the applicability of the principle *ne bis in idem* to those proceedings (C).

A. **The relevance of the first and second questions referred**

22. By the referring court's first and second questions, the Court is asked to ascertain whether the criterion of the protected legal interest applies in the context of two sets of national proceedings, relating to the same offenders and to the same facts, in which the respective NCAs apply Article 101 TFEU and national competition law (first question). If the criterion of legal interest is considered relevant, the referring court also asks whether EU and national competition laws protect the same legal interest (second question).

23. Although no plea of inadmissibility has been formally raised, the BWB, the German Government and the Commission do not consider that a reply to the first question (and, to a certain extent, the second question) is decisive for the resolution of this case. In essence, they are of the view that there is no identity of facts in the main proceedings since the BKA and the BWB considered the anticompetitive conduct concerned in respect of their national territory only. There is, therefore, no need to undertake an assessment of the protected legal interest.

24. I would advise against abstaining from replying to the first and second questions raised.

25. First, and foremost, it is not clear whether the BKA limited its action to the German territory. In fact, there seems to be some confusion as to what exactly that NCA took into account and the consequences resulting therefrom. I understand that that confusion originates from the reference, in the BKA's decision, to the telephone conversation of 22 February 2006 during which the Austrian market was discussed. That conversation is also relied on by the BWB in the main proceedings.

26. However, there is no information providing clarity as to whether (and how) the collusion resulting from that conversation was reflected in the setting of the territorial scope of the proceedings before the BKA and in its final decision. The referring court expresses doubts about the territorial scope of the BKA's decision. It further states that that decision does not contain details about the turnover which had served as the basis for the calculation of the fine imposed on Südzucker.

27. Adding to those doubts, the wording of the first question expressly refers to the *same facts*. The third question then enquires about the *same effects* of the competition law infringement at issue. If those questions are taken in the context of the order for reference, it would appear that, in the referring court's view, there might be a territorial overlap between the proceedings conducted by the BKA, on the one hand, and those pending before it, on the other.

28. Second, the referring court clearly invites this Court to provide guidance on the issue of the protected legal interest. While that element is indeed likely to be considered after verification of the identity of the offender and the relevant facts, the specifics of a case and the interest in judicial economy may require the order of assessment to be different. That order is for the referring court to establish.

29. Third, on a rather ancillary note, but one that is still significant, the national court enquires, through the present request for a preliminary ruling, about the *ne bis in idem* test to be applied in competition law proceedings in particular and under Article 50 of the Charter in general. Within that context, I would find it rather puzzling, and certainly not in line with the spirit of judicial cooperation, if the Court were simply to focus on one of the conditions that might not be met (but which is really a question of fact to be established by the referring court), without stating what the other criteria of the same test are.

30. In summary, to the extent that it cannot be ruled out that both sets of proceedings factually overlap in one way or another or that the referring court may wish to examine the question of the legal interest before the issue of the identity of facts, the presumption of relevance (5) enjoyed by requests for a preliminary ruling cannot be regarded as rebutted. Therefore, I suggest that the Court reply to the first and second questions raised.

B. *Ne bis in idem* in EU (competition) law: the test and its components

31. The first and second questions raised relate to the definition of the test that should govern the applicability of the principle *ne bis in idem* in competition law matters and, more specifically in this context, to the definition of *idem*.

32. I shall begin by recalling briefly the reasons which give rise to questions in this respect. My suggested reply to the *first* question relies on the analysis already carried out in my parallel Opinion in *bpost*. I propose a unified test of *ne bis in idem* under Article 50 of the Charter relying on a threefold identity: of the offender; of the relevant facts; and of the protected legal interest (1).

33. Next, I will, in reply to the *second* question, address the issue of the protected legal interest specifically in competition law. In this respect, I conclude that when two NCAs apply Article 101 TFEU and the equivalent national law provisions, they protect the same legal interest (2).

34. Finally, I shall turn to the question whether both sets of proceedings discussed in the present case relate to the same facts and whether, as a matter of law, they are even capable of doing so. I will conclude that the question whether the BKA took into account the effects of the given infringement of competition law in Austria is indeed relevant to the applicability of the principle *ne bis in idem* in the main proceedings, but is far from clear as a matter of fact (3).

1. *The test: a threefold identity*

35. The first and the second questions referred are arguably inspired by the repeated confirmation by the Court that, in competition law, the satisfaction of the condition of *idem* requires not only the identity of the offender and the facts, but also the identity of the protected legal interest. (6)

36. The case-law on *ne bis in idem* in EU competition law began to emerge some 50 years ago with the Court's judgment in *Wilhelm and Others*. (7) That case concerned parallel national and supranational investigations into anticompetitive conduct. The Court's statement that 'Community and national law on cartels consider cartels from different points of view' (8) was later supplemented by the clarification that the protection provided by the principle *ne bis in idem* in competition law is triggered only when the second set of proceedings concern not only the same offender and facts, but also the same protected legal interest. (9) That interpretation of the principle was especially confirmed in *Toshiba*. (10) Despite the growing criticism of the use of the condition relating to the protected legal interest, absent in other areas of EU law, (11) the same interpretation was most recently confirmed in *Slovak Telecom*. (12)

37. The Court expressly limited the consideration of *idem* to the sole identity of the offender and the acts in the case-law relating to 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'). (13) In that context, the Court held that the only relevant criterion for the assessment of the condition of *idem* is 'identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together'. (14) Similarly, in the case-law concerned with a combination of criminal and administrative proceedings, the Court held that 'Article 50 of the Charter does not preclude a Member State from imposing, for the *same acts* of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties'. (15) Later on, the Court clarified that 'Article 50 of the Charter prohibits the imposition, with respect to *identical facts*, of several criminal penalties as a result of different proceedings brought for those purposes'. (16) By shifting the analysis more towards the concept of *bis,* the Court allowed for the second proceedings in the same matter to go forward, subject to the conditions of the limitation of rights clause in Article 52(1) of the Charter. (17)

38. At present, the *Menci* test appears to be of general application; therefore applicable to all situations falling under Article 50 of the Charter. This also allows for the parallel application of more specific rules, such as Article 54 of the CISA or Article 3(2) of Framework Decision 2002/584/JHA on the European arrest warrant. (18) However, the default test now appears to be the very broad concept of *idem factum* as regards the scope of Article 50 of the Charter,

combined with a rather generous ‘escape hatch’ in the form of the possibility of limiting rights under Article 52(1) of the Charter.

39. I do not intend to reiterate the arguments as to why I consider such an approach problematic. I can only refer to my analysis in *bpost* for that. (19) I therefore propose that a (unified) test of *idem* for the purposes of Article 50 of the Charter should be based on a threefold identity: of the offender, of the relevant facts, and of the protected legal interest. (20)

40. The clarification of that starting point prompts me to examine in more depth two elements of that test that are at the heart of the present case, namely the identity of the protected legal interest (2) and the identity of facts (3).

2. *Identity of the protected legal interest*

41. To my knowledge, although the condition of the protected legal interest in competition law matters has been confirmed repeatedly, that condition has never truly been explained, (21) except for the statement that ‘national law proceeds on the basis of the considerations peculiar to it and considers restrictive practices only in that context’. (22)

42. The specific question of whether EU and national competition laws protect the same legal interest was put to the Court rather recently in the judgment in *Powszechny Zakład Ubezpieczeń na Życie*. (23) The Court did not find it necessary to address that issue. The main proceedings, although concerned with the simultaneous application of national and EU competition rules, involved only one procedure before the national competition authority. Thus, the Court limited itself to pointing out that there was no *bis* to start with, without addressing *idem*.

43. In contrast, the present case clearly involves two sets of proceedings that concern, for what is relevant here, the same offenders. (24) Thus, unless the referring court concludes, before considering the issue of the protected legal interest, that both sets of proceedings concern different facts, then the question of the protected legal interest is clearly pertinent.

44. Do EU and national competition laws protect the same legal interest? If viewed generally, with the imperative of fair and undisturbed competition in the internal market in mind, they clearly do. However, I do not think that the analysis can properly stop there. The issue of the protected legal interest ought to be assessed with regard to a specific provision. It must focus on the specific interest or purpose that the provision being applied pursues, what that provision penalises and why. (25)

45. On the one hand, if viewed in the abstract, there is no doubt that, at present, EU and national competition rules have largely converged. Without prejudice to the historical reasons that inspired the statement in *Wilhelm and Others* about Community and national competition laws being different, (26) it is clear that Regulation No 1/2003 brought EU and national competition laws closer together. The need for convergence and cooperation is mirrored by both the substance of the legislation concerned and the institutions applying that legislation.

46. With regard to substantive provisions, Regulation No 1/2003 clearly empowers NCAs to apply Articles 101 and 102 TFEU. (27) It also lays down rules aimed at ensuring consistency in their application. That said, it is perhaps the provisions of Regulation No 1/2003 relating to the institutions and procedures which establish a rather elaborate system of the ‘European Competition Network’, that prompt participation of both the Commission and the NCAs, with the aim of bringing about uniformity in the application of Article 101 and 102 TFEU. Moreover, the adoption

by the EU legislature of Directive (EU) 2019/1 (28) addresses perceived gaps in the current regime. That directive empowers the NCAs to become more effective enforcers of Articles 101 and 102 TFEU in the areas covered by the individual chapters of that instrument. (29)

47. In view of that systemic overhaul, it is difficult to take the view that EU and national competition laws have not moved closer together since the Court discussed their relationship in *Wilhelm and Others*. Such a consideration appears true, not only when the exact wording that the Court used in that judgment referring to 'Community and national law on *cartels*' (30)is taken into account, but also when account is taken of the more general reference to 'restrictive practices' (31) in case-law thereafter.

48. On the other hand, when focus is placed on the specific provisions, it cannot be said with complete certainty that there are no more (or rather there cannot be anymore) divergence in certain areas of competition rules. (32) Article 3 of Regulation No 1/2003 not only governs, contrary to its predecessor Regulation No 17, the relationship between EU and national competition rules, but also specifically acknowledges that there are instances in which, in terms of their substance, national competition rules might differ from EU rules.

49. As regards national application of Articles 101 and 102 TFEU, it follows from Article 3(2) of Regulation No 1/2003 that the Member States cannot subject agreements, decisions by associations of undertakings or concerted practices to stricter rules than to those that exist at the EU level. However, the Member States are able to do so in respect of the *unilateral conduct* of undertakings. There is, therefore, a difference in terms of the permissible space for specific national rules depending on whether the conduct at issue falls under Article 101 TFEU or Article 102 TFEU.

50. Furthermore, Article 3(3) of Regulation No 1/2003 carves out an even larger space for differentiation when it comes to national merger laws, and reserves the possibility for ongoing application of national law rules predominantly pursuing an objective which is different to that pursued by Articles 101 and 102 TFEU. The latter possibility is further borne out by recital 9 of Regulation No 1/2003 which states, inter alia, that 'Member States may … implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual'.

51. In structural terms therefore, the normative interplay between EU and national rules covered by Article 3 of Regulation No 1/2003 foresees at least four distinct scenarios. *First*, there is a full substantive overlap for situations falling under Article 101 TFEU, in which Member States cannot adopt stricter rules. *Second*, there is a rather large but not complete substantive overlap for situations falling under Article 102 TFEU, in which the Member States may adopt stricter rules. (33)*Third*, there is a partial harmonisation of merger control. *Fourth*, and perhaps most importantly, there is a distinct normative space reserved for the Member States when it comes to national rules that pursue different objectives than those of Articles 101 and 102 TFEU, of which the national regulation on unfair trade practices is mentioned as an example.

52. Thus, Article 3 of Regulation No 1/2003 acknowledges the fact that EU and national competition laws are not identical, at least not in all their aspects. (34) However, that potential difference is one relating to the normative quality of the interest (or objective) pursued. It cannot simply lie in a different geographical scope.

53. In other words, I do not believe that the mere (quantitative) difference in the territorial scope of the same infringement, and thus of the given rule, is per se indicative of a (qualitative) difference in the legal interest. (35) While EU competition law covers situations in which trade between the

Member States is affected, national competition law applies to internal situations. In my view, that difference points to the territorial extent of the infringement, possibly coupled with the gravity of the interference with the protected legal interest, but not necessarily to the different quality of that protected legal interest. (36)

54. Put simply, a price cartel, concluded and carried out in the Czech Republic, is likely to affect qualitatively the same protected legal interest, regardless of whether in the end, and in view of trade between the Member States being affected, it will only be the national provision mirroring Article 101 TFEU (37) that will be applied in that regard, or Article 101 TFEU together with that national provision, or possibly just Article 101 TFEU on its own.

55. Indeed, that composite picture is governed by the general rule according to which national competition rules apply only where EU law does not lay down any specific rules. (38) However, to the extent that both sets of rules indeed overlap, or in any case once they start penalising the same set of facts, whether the protected legal interest is the same both at EU and national level is to be determined *in concreto* with regard to the specific provisions that are applied to the same case at both levels.

56. Applying that approach to the present case, it follows from Article 3(1) of Regulation No 1/2003 that when an NCA (or a national court) applies its national law to conduct which, within the meaning of Article 101 TFEU, affects trade between the Member States, it must also apply Article 101 TFEU. In other words, where the given conduct *also* falls under Article 101 TFEU, the NCAs or courts must *also* apply that provision. (39)

57. Next, as is clear from Article 3(1) and (2) of Regulation No 1/2003, the result of applying national law to a situation falling under Article 101 TFEU *cannot differ* from the result achieved if Article 101 TFEU were applied on its own. Without prejudice to the question of what then is the added value in the parallel application of national competition law in such a scenario, (40) it is, in any event, difficult to imagine how the respective objectives of the national rule at issue and Article 101 TFEU could differ. Moreover, when two national competition authorities then apply the same EU law provision, namely Article 101 TFEU, with regard to which they are precluded from deviating at national level, then surely the specific protected legal interest pursued by both NCAs must also be identical.

58. In short, the response to the second question referred ought to be that, whether EU competition law and national competition law protect the same legal interest must be established by examining the specific rules applied. That involves the assessment of whether the national rules at issue depart from the EU rules. Where the competition authorities of two Member States apply Article 101 TFEU and the corresponding provision of national competition law, then they protect the same legal interest.

3. *Identity of the relevant facts: time and space*

59. I shall now turn to the third question. The referring court inquires whether it is relevant that the BKA took into account the effects of the cartel at issue in the other Member State, thus, as I understand it, on the Austrian market.

60. That question is to be answered in the affirmative.

61. As Advocate General Kokott stated in her Opinion in *Toshiba*, ‘cartels are prohibited and prosecuted precisely because they have adverse effects on competition or are in any event capable

of adversely affecting competition'. (41) She also observed that 'whether the conduct in a particular case had as its object or effect the prevention, restriction or distortion of competition cannot be assessed in the abstract, but must always be examined with reference to a specific period of time and a specific territory'. (42)

62. In other words, to determine whether the second set of proceedings is precluded by the principle *ne bis in idem*, what matters is the definition of time and space to which the restriction at issue relates. In *Toshiba*, the Court agreed with the Advocate General in that regard and emphasised that the conduct of undertakings 'having as its object or effect the prevention, restriction or distortion of competition cannot be assessed in the abstract, but must be examined with reference to the *territory* …, in which the conduct in question had such an object or effect, and to the *period* during which the conduct in question had such an object or effect'. (43) According to the Court, both territory and time are relevant elements that form the identity of the *facts*. (44)

63. In the following sections of this Opinion, I shall briefly address, on that basis, the identity of time and space in the main proceedings. First, in view of the information in the case file, I cannot but offer a mere hypothesis as to whether the BKA also took into account the effects of the prohibited conduct in respect of the Austrian market (a). Second, I shall turn to the issue that can best be addressed by this Court, namely whether such an extraterritorial penalising of the effects of certain behaviour apparently materialising in another Member State would in fact have been legally possible (b).

(a) ***The territory taken into account as a matter of fact by the BKA***

64. The order for reference states that the BKA's decision reproduces the content of the telephone conversation of 22 February 2006 concerning Austria. At the same time, in the appeal pending before the referring court, the BWB also relies on the same telephone conversation.

65. It is entirely possible that one telephone conversation is capable of concerning several geographic markets. In this regard, however, there is a lack of clarity as to whether the BKA actually took into account the effects of the market-sharing cartel at issue on the Austrian market and as to what is actually meant by 'taking into account of effects' in the present case.

66. For the protection provided by the principle *ne bis in idem* to be triggered, it is not enough that a certain behaviour or set of facts be mentioned and reproduced somewhere in a decision. The identical factual element must be found to be legally relevant, with its effects qualified and evaluated as such. With regard to the present case, have such factual elements relating to the telephone conversation at issue been factored into the statement of a breach of competition law, delivered by the BKA? Does it follow from the decision of the BKA that that NCA prosecuted and punished the respective undertakings in relation to the Austrian market also? Or, did the BKA take that conversation as an element of proof of an infringement concerning the German market? (45)

67. I would assume that an NCA decision should contain information of this kind, whether that was initially with regard to the definition of the relevant market taken into account, or more importantly, with regard to the finding of where and when, in its view, the infringement of competition rules was committed.

68. It is for the referring court to examine and determine the answer to those questions, if need be, in cooperation with the BKA, in order to establish the actual scope of that NCA's action. That cooperation could take place either indirectly, with the assistance of the BWB, (46) or directly. (47)

69. Finally, as the referring court mentioned in its order for reference, and as pointed out by some of the interested parties, in calculating the total amount of the fine, the BKA took into account the turnover of the undertakings concerned solely within the German territory. Indeed, in *Toshiba*, the Court stated, in a similar context to the Commission's calculation of the fines, that such a factor could be relevant. (48)

70. However, while such a factor might indeed be a useful indirect indicator, it can hardly be regarded as conclusive in itself. First, it requires a certain amount of reasoning backwards. However, reverse causality may not always work: the fact that an authority has calculated the fine in one specific way rather than another might be due to reasons not relating to the intended scope of the decision. Second, there is by now some convergence in the practice of the NCAs with regard to the calculation of fines. (49) However, that practice is not fully harmonised and is bound to be determined in part by divergent national laws and practices.

71. In summary, the clarification of the geographic (and potentially temporal) scope of the BKA's decision is a matter of fact that falls to the national court. However, the question to be addressed at an earlier stage, which is a more suitable question that this Court is in a better position to assess, is that of whether an NCA has the legal power to penalise the extraterritorial effects of a given infringement.

(b) ***The territory that can be taken into account as a matter of law by an NCA***

72. Irrespective of what the BKA did as a matter of fact, could it, as a matter of law, have observed and also penalised the infringement of competition rules on the Austrian market? In this respect, the position of the parties in the present proceedings diverge.

73. Agrana states that the decisions of an NCA applying Article 101 TFEU cannot be limited to the effects on the national territory. When NCAs apply Article 101 TFEU, they have to analyse all aspects of the restriction of competition at issue on the internal market.

74. In contrast, the BWB submits that the principle of territoriality limits an NCA's power to impose sanctions to the national territory. This is also what the BWB did, basing the calculation of the fine to be imposed on Südzucker on the turnover on the Austrian market. The territoriality principle thus excludes the possibility of infringement of the principle *ne bis in idem* because the geographical scope of the sanctioned conduct will always differ. The German Government, for its part, takes a similar view. An NCA can punish an infringement of competition law only in respect of its own territory, reflected by the fine being calculated based on the turnover of the undertaking in the given Member State.

75. The Belgian Government considers that when an NCA applies Article 101 TFEU it must proceed as the Commission would, that is, by taking into account all the effects of the restriction at issue on competition within the internal market. That has, however, two limitations. First, constitutional law and traditions of the Member States can prohibit an NCA from sanctioning extraterritorial effects. Second, sanctioning extraterritorial effects is, in any case, possible only through an agreement with the NCA in the territory that is concerned.

76. As a starting point, I recall that prosecution and punishment have traditionally been governed by the principle of territoriality. It is of course possible that a State might try to 'reach beyond its borders' and seek to punish conduct that took place elsewhere. That might occur in situations governed by special jurisdiction, whether it be with regard to certain types of persons (namely, its own citizens) or with regard to certain types of offences (namely, either those attacking that State's

interest irrespective of where they were committed, or certain types of heinous crimes subject to universal jurisdiction, and so on).

77. However, the bottom line for all those instances of effective extraterritoriality is that they necessitate an *explicit legal basis*, be it in national, international, or EU law. A notable and more recent example of such an extraterritorial empowerment in EU law is the competence of the lead supervisory authority under the one-stop-shop of Regulation (EU) 2016/679 ('the GDPR') to investigate and if need be to sanction the entirety of cross-border processing carried out by a controller or processor within the European Union. (50) Although it would be far-fetched to claim that the exact limits of competence within that regime are undisputed, (51) there is still no doubt that both the substantive provision in terms of the lawfulness of data processing, as well as an express competence clause entrusting power to a given supervisory authority to proceed extraterritorially in applying those substantive rules, exist.

78. What conceptual position is adopted by Regulation No 1/2003 in this regard? I must admit that it is not so easy to encapsulate.

79. On the one hand, there are clear indications that a cross-border scope has been contemplated. First, the triggering point of the obligation for the national authorities to apply Articles 101 and 102 TFEU is that *trade between the Member States may be affected*. It appears that that could also trigger the inherent capacity of an NCA to prosecute and sanction the extraterritorial effects of a given infringement.

80. Second, Article 13 of Regulation No 1/2003 appears to confirm the same point. The first paragraph of that provision states that an NCA can suspend proceedings or reject the complaint where the *same* agreement, decision of an association or practice is being *dealt with* by another authority. (52) Similarly, the second paragraph of that provision states that an NCA may reject a complaint where it received a complaint against an agreement, decision of an association or practice which has already been *dealt with* by another competition authority. (53)

81. Third, the interpretation that an action by an NCA may have extraterritorial scope also appears to be confirmed in the Commission Notice on Cooperation. That notice specifies, in respect of Article 13, that the term '*dealing with the case*' set out in that provision 'does not merely mean that a complaint has been lodged with another authority. It means that the other authority is investigating or has investigated the case on its own behalf'. (54) That notice further states that Article 13 'can be invoked when the agreement or practice involves the same infringement(s) on the same relevant geographic and product markets'. (55)

82. Moreover, the same notice details the concept of a 'well placed authority', which features in the Notice on Cooperation, with respect to a given infringement of competition law. (56) If the competence of an NCA is in all situations limited to the national territory, then the concept of a well placed authority does not make much sense unless one accepts that some parts of an infringement may remain unpunished due to the territorial limits of the competence of such a 'well placed authority'. By contrast, if it is accepted that the effective protection of competition within the internal market may require that a given anticompetitive conduct be investigated solely by one well placed NCA, then indeed such an NCA should be able to investigate the entirety of that conduct so as not to leave a part of it unpunished.

83. Be that as it may, the Notice on Cooperation hardly constitutes a legally binding act of EU law and arguably, the meaning of the possibility 'of suspending or rejecting' the complaint under Article 13(1) of Regulation No 1/2003 is not entirely straightforward. However, what Article 13, if

taken as a whole, implies is that territorial overlaps may exist. If the powers of each and every NCA were strictly limited to the national territory, what use would there be in suspending or rejecting a complaint when faced with proceedings pending before another NCA dealing with the same conduct? Of course, there are a number of different yet related matters in the context of which suspension may be reasonable, but the 'rejection' seems to make sense only when both NCAs have been presented with the same matter, including the same geographical scope.

84. On the other hand, it is fair to admit that these are all mere 'indirect hints' that extraterritoriality was contemplated in the design of Regulation No 1/2003. However, beyond that, I agree with the German Government that a key provision which in fact clearly attributes competence to NCA proceedings extraterritorially is absent from Regulation No 1/2003. As that government pertinently noted, Article 5 of Regulation No 1/2003, entitled 'Powers of the competition authorities of the Member States', where one would normally expect to find a similar empowerment clause, is entirely silent on that matter. It does not therefore constitute a sufficient legal basis for an NCA to adopt an extraterritorial decision when such a basis is not provided for in national law. The Belgian Government also argues to that effect.

85. I agree with those governments that, for the powers of an NCA to be exercised extraterritorially, there must be an adequate legal basis which, as EU law currently stands, can only come from the national legal system. One might briefly add that, at the hearing, the German Government stated that no such legal basis could be found in German law either.

86. I wish to stress that such a proposition is made in full respect of the wording of Article 101 TFEU, which indeed lists, as one of its conditions for application, that the trade between Member States may be affected. However, I find it impossible to interpret Article 101 TFEU, which is, essentially, a substantive provision, as amounting also to an empowerment clause, awarding any and every NCA with the power to prosecute and punish any anticompetitive behaviour anywhere within the European Union. (57)

87. Thus, my suggested reply to the third question is that the fact that an NCA took into account extraterritorial effects of a given anticompetitive conduct in an earlier decision, provided that it was entitled to do so under national law, is relevant for the examination of the applicability of the principle *ne bis in idem* in the subsequent proceedings. Article 50 of the Charter prevents an NCA or a court from sanctioning anticompetitive conduct which has already been the subject of previous proceedings concluded by a final decision adopted by another NCA. That prohibition applies, however, only in so far as the temporal and geographical scope of the subject matter of both proceedings is the same.

C. **The principle *ne bis in idem* in proceedings having involved the application of a leniency programme**

88. By its fourth question, the referring court asks whether the principle *ne bis in idem* applies in proceedings having involved the application of a leniency programme and in which, for that reason, a fine is not imposed.

89. In my view, the reply to that question must be in the affirmative.

90. First, on a conceptual level, as the Italian Government correctly recalls, the principle *ne bis in idem* protects not only against the imposition of a second fine for the same matter but also against a second prosecution. (58) The initiating of second proceedings itself for the same matter constitutes, in my view, a breach of the guarantee enshrined in Article 50 of the Charter. For the

reasons that I have set out in detail in my Opinion in *bpost*, (59) I too disagree on this point with the position that the Court adopted in this regard in *Menci* case-law. (60)

91. Second, the fourth question refers to a situation in which an NCA conducts proceedings in which an undertaking claims the benefit of a leniency programme. Such a programme allows for favourable treatment of undertakings that decided to cooperate with the respective competition authority in the investigation of infringements of Article 101 TFEU. (61)

92. However, the immunity from, or reduction of, a fine is by no means automatically guaranteed. It depends on a number of conditions which have as their common theme the 'added-value' of the undertaking's cooperation for the discovery and punishment of the prohibited agreement. (62) Depending on the circumstances, a leniency applicant may (or may not) be granted full or partial immunity, while the infringement of competition law on its part is stated. (63) Thus, while the conduct or the outcome of national proceedings is likely to be altered by a leniency application, the bottom line is that they still constitute proceedings in their own right, requiring the participation of all undertakings concerned, including the leniency applicant.

93. Third, even if all goes well for the undertaking concerned by the leniency programme, and full immunity from a fine is finally granted, the proceedings will still result in a statement of an infringement of competition law on the part of the leniency applicant. From what I understand therefore, there will still be, metaphorically speaking, a 'statement of guilt' under national law. Such a statement could be quite significant in the future for the undertaking(s) concerned. If, in the future, that undertaking were to be found liable for an infringement of competition law once again, its previous conviction and 'recidivism' would be likely to trigger an automatic increase of the fine. At the same time, one cannot exclude the fact that an authoritative statement of illegality on the part of that undertaking by the competent public authority or a court, to which the public is likely to have access, (64) could be relied upon by private parties seeking compensation for the damage caused by the anticompetitive behaviour in question. (65)

94. In short, I see no principled reason why the applicability and the scope of the principle *ne bis in idem* ought to be assessed differently depending on whether the competition law proceedings at issue involved the application of a leniency programme, even where that effectively results in a full immunity from a fine. In that light, I disagree, therefore, with the Commission's rather circumstantial argument that application of the principle *ne bis in idem* should depend on whether there is still a possibility that Nordzucker loses its status of leniency applicant and a fine may thus still be imposed.

95. I therefore suggest that the reply to the fourth question raised is that the principle *ne bis in idem* enshrined in Article 50 of the Charter applies also in the context of national proceedings which involve the application of a leniency programme and which do not lead to the imposition of a fine.

V. **Conclusion**

96. I propose that the Court answers the questions referred for a preliminary ruling by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

(1) The applicability of the principle *ne bis in idem* enshrined in Article 50 of the Charter of Fundamental Rights of the European Union relies on the examination of *idem* defined by the identity of the offender, of the relevant facts, and of the protected legal interest.

(2) Whether EU competition law and national competition law protect the same legal interest must be established by examining the specific rules applied. That involves the assessment of whether the national rules at issue depart from the EU rules. Where the competition authorities of two Member States apply Article 101 TFEU and the corresponding provision of national competition law, then they protect the same legal interest.

(3) The fact that a national competition authority took into account extraterritorial effects of a given anticompetitive conduct in an earlier decision, provided that it was entitled to do so under national law, is relevant for the examination of the applicability of the principle *ne bis in idem* in the subsequent proceedings. Article 50 of the Charter prevents a national competition authority or a court from sanctioning anticompetitive conduct which has already been the subject of previous proceedings concluded by a final decision adopted by another national competition authority. That prohibition applies, however, only in so far as the temporal and geographical scope of the subject matter of both proceedings is the same.

(4) The principle *ne bis in idem* enshrined in Article 50 of the Charter applies also in the context of national proceedings that involve the application of a leniency programme and which do not lead to the imposition of a fine.

---

1 Original language: English.

---

2 *bpost* (Case C-117/20).

---

3 Which the Court has already done in the past, in greatest detail perhaps in the judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72).

---

4 Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

---

5 Most recently, for example, judgment of 29 April 2021, *Ubezpieczeniowy Fundusz Gwarancyjny z siedzibą* (C-383/19, EU:C:2021:337, paragraphs 29 and 30 and the case-law cited).

---

6 See, in particular, 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); of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraph 97); and of 25 February 2021, *Slovak Telekom* (C-857/19, EU:C:2021:139, paragraph 43).

---

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

---

8 Ibid., paragraph 3.

---

9 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). See also judgment of the General Court of 26 October 2017, *Marine Harvest* v *Commission* (T-704/14, EU:T:2017:753, paragraph 308).

---

10 Judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraph 97 and the case-law cited).

---

11 See Opinions of Advocate General Kokott in *Toshiba Corporation and Others* (C-17/10, EU:C:2011:552, points 114 to 122); of Advocate General Wahl in *Powszechny Zakład Ubezpieczeń na Życie* (C-617/17, EU:C:2018:976, point 45); and of Advocate General Tanchev in *Marine Harvest* (C-10/18 P, EU:C:2019:795, point 95, footnote 34).

---

12 Judgment of 25 February 2021, *Slovak Telekom* (C-857/19, EU:C:2021:139, paragraph 43 and the case-law cited).

---

13 OJ 2000 L 239, p. 19.

---

14 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); and 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 having involved a previous sentence imposed by a third State.

---

15 Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 34). My emphasis.

---

16 Judgments of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 35). My emphasis. However, see also judgment of 20 March 2018, *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193, paragraph 27), where reference is made again to the *same acts*.

---

17 It might be added that the interchangeable use of the concepts of (relevant) facts and (relevant) act might have also contributed in part to the confusion arising as to the type and scope of identity required. On a narrow reading and in specific contexts, 'act' could indeed be equated with 'facts'. However, in some languages, and certainly when discussed in the abstract, the concept of (criminal) act is broader than its mere factual elements. Not only does it involve 'what happened', but also the legal evaluation and qualification of what happened, which in turn is likely to factor in the protected legal interest, at least indirectly by defining the negative societal effects of the behaviour at issue.

---

18 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).

---

19 *bpost* (Case C-117/20, points 101 to 117).

---

20 Guided by the principles also set out therein in points 119 to 122.

---

21 The Court referred (directly or indirectly) to the statement made in *Wilhem and Others* about national and EC competition laws being different, for example, in the judgment of 10 July 1980, *Giry and Guerlain and Others* (253/78 and 1/79 to 3/79, EU:C:1980:188, paragraph 15); of 16 July 1992, Asociación Española de Banca Privada and Others (C-67/91, EU:C:1992:330, paragraph 11); of 26 November 1998, Bronner (C-7/97, EU:C:1998:569, paragraph 19); of 9 September 2003, *Milk Marque and National Farmers' Union* (C-137/00, EU:C:2003:429, paragraph 61); of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 38); or of 1 October 2009, *Compañía Española de Comercialización de Aceite* (C-505/07, EU:C:2009:591, paragraph 50).

---

22 See, for example, judgment of 10 July 1980, *Giry and Guerlain and Others* (253/78 and 1/79 to 3/79, EU:C:1980:188, paragraph 15); of 9 September 2003, *Milk Marque and National Farmers' Union* (C-137/00, EU:C:2003:429, paragraph 61); or of 1 October 2009, *Compañía Española de Comercialización de Aceite* (C-505/07, EU:C:2009:591, paragraph 50).

---

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

---

24 Although not *all* the parties are identical in both sets of national proceedings, with regard specifically to Nordzucker and Südzucker, the identity of the offender(s) is evident.

---

25 In detail in my Opinion in *bpost*, points 136 to 141, together with points 142 to 151 providing further illustrations.

---

26 The Court used more precisely the term of 'Community and national law on cartels'. Judgment of 13 February 1969, *Wilhelm and Others* (14/68, EU:C:1969:4, paragraph 3).

---

27 Which was already, in part, the case under Regulation No 17 as regards Articles 85 and 86 EC – EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

---

28 Directive of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ 2019 L 11, p. 3).

---

29 As the heading of the respective chapters of Directive 2019/1 indicate, these areas concern the independence and resources of the NCAs, powers to exercise their tasks, determination of the fines, leniency programmes, mutual assistance, and limitation periods.

---

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

---

31 See, for example, judgment of 10 July 1980, *Giry and Guerlain and Others* (253/78 and 1/79 to 3/79, EU:C:1980:188, paragraph 15).

---

32 In the legislative works leading up to the adoption of Regulation No 1/2003, the Commission noted that many (of the then 15) Member States enacted national competition laws that reflected the content of Articles 81 and 82 EC. At the same time, it admitted that there was no formal harmonisation in place, and differences remained both in law and in practice. See point 1 (A), 'Context', third paragraph; and point 2 (C)(2)(a) second paragraph of the explanatory memorandum to the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC)

No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (‘Regulation implementing Articles 81 and 82 of the Treaty’) (COM(2000) 0582 final) (OJ 2000 C 365E, p. 284).

---

33 With regard to the term ‘stricter national laws’ referred to in Article 3(2) of Regulation No 1/2003, see, for example, Feteira, L. T., *The Interplay Between European and National Competition Law after Regulation 1/2003: United (Should) We Stand?*, Wolters Kluwer Law International, 2015, pp. 62 to 67.

---

34 Which is arguably why Advocate General Kokott observed in her Opinion in *Toshiba Corporation and Others* that, in essence, the initial statement in the judgment of *Walt Wilhem* still stands (C-17/10, EU:C:2011:552, point 81).

---

35 See also 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, p. 159.

---

36 Advocate General Ruiz-Jarabo Colomer considered that ‘the test of the territorial extent of the unlawful conduct is not substantive, but adjectival, since it does not affect the nature of the infringement, but only its intensity’. He disagreed with the approach taken in the judgment in *Wilhelm and Others* stating that: ‘the rules which guarantee free competition within the European Union do not allow a distinction to be drawn between separate areas, the Community area and the national areas, as though there were watertight compartments. Both sectors are concerned with the supervision of free and open competition in the common market, one contemplating it in its entirety and the other from its separate components, but the essence is the same.’ See Opinions of Advocate General Ruiz-Jarabo Colomer in *Aalborg Portland and Others* (C-217/00 P, EU:C:2003:83, points 176, 173 and footnote 121), and in *Aalborg Portland and Others* (C-213/00 P, EU:C:2003:84, points 94, 91 and footnote 71).

---

37 Currently § 3 zákon č. 143/2001 Sb., o ochraně hospodářské soutěže (the Law on the protection of competition), as amended.

---

38 See, to that effect, judgment of 3 May 2011, *Tele2 Polska* (C-375/09, EU:C:2011:270, paragraph 33). See also judgments of 5 June 2014, Kone and Others (C-557/12, EU:C:2014:1317, paragraph 32), and of 7 December 2010, VEBIC (C-439/08, EU:C:2010:739, paragraphs 56 and 57) stating respectively that national law must ensure that ‘European Union competition law is fully effective’ and must not jeopardise the effective application of that law by the NCAs, which is the objective of Regulation No 1/2003.

---

39 In this respect, recital 3 of Directive 2019/1 states that ‘in practice, most NCAs apply national competition law in parallel to Articles 101 and 102 TFEU.’

---

40 Which, I must admit, still somewhat eludes me. The Commission’s initial proposal for Regulation No 1/2003 contained a somewhat more logical rule in the draft of Article 3, stating that: ‘Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, *Community competition law shall apply to the exclusion of national competition laws*.’ My emphasis. See, Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (‘Regulation implementing Articles 81 and 82 of the Treaty’) (COM(2000) 0582 final) (OJ 2000 C 365E, p. 284).

---

41 Opinion of Advocate General Kokott in *Toshiba Corporation and Others* (C-17/10, EU:C:2011:552, point 128).

---

42 Ibid., point 129.

---

43 Judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraph 99). My emphasis.

---

44 Ibid., paragraph 99. See also Opinion of Advocate General Kokott in *Toshiba Corporation and Others* (C-17/10, EU:C:2011:552, point 130).

---

45 From the facts of the case, as set out by the referring court (see above, point 11), it is equally conceivable that the telephone conversation concerning the Austrian market could have been ‘taken into account’ as circumstantial evidence of the unlawful restriction of competition that concerned the German market in the material period.

---

46 Under Article 12(1) of Regulation No 1/2003, an NCA is certainly entitled to request the final decision of another NCA, including passages considered to be confidential.

---

47 There is indeed no specific provision in Regulation No 1/2003 which empowers a national court to request the copy of a final decision of an NCA from another Member State. I would

nonetheless find it entirely justified for a national court to be entitled to request such a final decision, either under Article 12(1) or Article 15(1) of Regulation No 1/2003 applied by analogy, or relying directly on Article 4(3) TEU.

---

48 Judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraph 101).

---

49 A number of NCAs have, in fact, already followed the Commission guidance on this in the past. In addition, Directive 2019/1, which is nonetheless not applicable *ratione temporis* to the main proceedings, harmonises some aspects of the imposition of fines in its Chapter V.

---

50 Article 56(1) of 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).

---

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

---

52 My emphasis. Although that provision states that '… the fact that one authority is dealing with the case *shall be sufficient grounds* for the others to suspend the proceedings before them or to reject the complaint', the Notice on Cooperation states that an NCA is under no obligation to suspend the proceedings or reject the complaint. This is because the cooperation under Regulation No 1/2003 is governed by flexibility. Commission Notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43, point 22) ('Notice on Cooperation').

---

53 My emphasis.

---

54 Ibid., point 20.

---

55 Ibid., point 21.

---

56 An NCA can be considered as such when, first, the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory; second the authority is able to effectively bring to an end the entire infringement; and third, it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement. Ibid., point 8.

---

57 In view of those considerations, in retrospect, one cannot but admire the clarity of the initial Commission drafting on this (above, footnote 40) and regret that it was not retained.

---

58 See, for instance, judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie* (C-617/17, EU:C:2019:283, paragraphs 29 and 30).

---

59 *bpost* (Case C-117/20, points 107 to 110).

---

60 Indeed, the referring court's fourth question illustrates well one of the conceptual problems of *Menci*. I assume that a mere declaration of illegality, without any sanction being imposed, is likely by definition to satisfy the proportionality element of limitation at issue under Article 52(1) of the Charter. A fortiori, indeed, two parallel proceedings against the same undertaking that came about as a result of two leniency procedures could then never violate the principle of *ne bis in idem*, since no fines were imposed. However, and yet again, the principle *ne bis in idem* cannot be reduced to an *ex post facto* review of the proportionality of the aggregated sanctions.

---

61 See, for example, Article 2, point 15, of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1). See also Article 2(1), point 16, of Directive 2019/1.

---

62 See further Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17, point 8).

---

63 The specific modalities depend on the national law. The BWB explains that the proceedings initiated because of a leniency application are civil judicial non-contradictory proceedings, subject to Paragraph 38 of the 2005 Kartellgesetz. Unlike the proceedings before the Commission, the national proceedings is not integrated within the global proceedings involving all the other parties, but is instead an independent one. It does not result in the imposition of a fine or in a reduction to zero of that fine. Rather, the court observes that an infringement was committed, following the grant of immunity by the BWB.

64 If a statement of infringement of competition rules, with all the assembled evidence forming part of the judicial reasoning, is contained in a decision of a court, then any protective umbrella of Chapter II of Directive 2014/104 appears excluded. The situation is, however, unlikely to be much different with regard to a final infringement decision of national competition authority (in contrast to mere procedural documents or evidence, submitted in leniency procedures, such as those listed in Article 6(6) of Directive 2014/104).

65 Thus removing the heavy evidential burden likely to be faced by a private litigant wishing to initiate a 'stand alone' action for damages for the breach of competition rules in order to establish precisely what is the specific content of such a decision – that an infringement of competition rules took place. Further, see recently my Opinion in *Stichting Cartel Compensation and Equilib Netherlands* (C-819/19, EU:C:2021:373, points 93 to 96).