A Reasoned Approach to Prohibiting the Bis in Idem

Between the Double and the Triple Identities

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ABSTRACT

The ne bis in idem protection in Art. 50 CFR restricts the ability of EU and national enforcement authorities to prosecute or punish the same defendant for the same criminal offence more than once. Under the Member States' legal traditions, the notion of "same offence" or idem requires a triple identity: of the offenders, the material facts, and the protected legal interests. A broader notion of idem that only requires a double identity is laid down in Art. 54 CISA, which entails the prohibition of double prosecution of the same offender for the same "material acts". The CJEU's case law is inconsistent: sometimes the Court requires double identity, thus giving effect to Art 54 CISA (as far as intra-state judicial cooperation is concerned), while requiring triple identity in other cases, in particular in the area of competition law. With the Menci judgment the CJEU aligned the interpretation of the notion "same offence" in Art. 50 CFR to "same acts" in Art. 54 CISA, and hence based it on the double identity test. The two pending cases C-117/20 bpost and C-151/20 Nordzucker e.a., both relating to the area of parallel competition proceedings, cast a new light on the interpretation of the idem concept. With two opinions rendered on 2 September 2021, AG Bobek proposed a unified triple identity test. He argued that the CJEU should reverse its jurisprudence based on double identity because it gives rise to legal uncertainty. The present article argues that the AG failed to suggest a viable solution to interpret the idem notion in accordance with ECtHR case law. It is suggested not to get rid of the broader standard of protection against double jeopardy in the EU when justified but to supplement the requirement of "same acts" with the familiar conditions for extracontractual liability, including the conduct, its effects, and casual link.

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CITE THIS ARTICLE

Rossi-Maccanico, P. (2022). A Reasoned Approach to Prohibiting the Bis in Idem : Between the Double and the Triple Identities. Eucrim - The European Criminal Law Associations' Forum. https://doi.org/10.30709/eucrim-2021-032

Published in eucrim 2021, Vol. 16(4) pp 266 – 273

https://eucrim.eu

ISSN:

I. Background

In the EU, the application of the *ne bis in idem* principle protecting defendants from double criminal proceedings has never been more confusing. National judicial and administrative authorities competent to enforce criminal, competition, tax, or other offences are increasingly confronted with legal uncertainties as to whether it is legitimate for them to pursue penalty proceedings in parallel with each other, both domesticly and across borders, for the same acts or for acts that are partially congruent. As an established general principle of law, *ne bis in idem* restricts their ability to prosecute or punish the same offence more than once if it can be qualified as "criminal".[1] The aim of the principle is essentially procedural as it is to prohibit the repetition of criminal proceedings after a first acquittal or conviction. However, it also has repercussions on substantive criminal law as it may preclude duplicate punishments for the same acts, even if they qualify as multiple offences, when pursued in succession.

As far as the EU is concerned, the *ne bis in idem* principle is enshrined in Art. 50 of the Charter of Fundamental Rights (CFR),[2] proclaimed on 7 December 2000 in Nizza, and now attached to the Treaty of Lisbon. The *ne bis in idem* guarantee under the CFR has the purpose of bringing clarity to the right established in different forms in the various EU Member States as it is intended to cover cross-border situations.

Prior to the CFR, the *ne bis in idem* principle was included in Art. 4 of Protocol No 7 to the European Convention on Human Rights (ECHR), signed on 22 November 1984 by the Contracting States.[3] Art. 4 of Protocol No 7 to the ECHR only applies internally within the individual Contracting States but is nevertheless relevant for interpreting the *ne bis in idem* principle at the EU level, considering that Art. 52(3) CFR states:

> [i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

The European Courts (i.e., the Court of Justice of the EU(CJEU) and the European Court of Human Rights (ECtHR)) have traditionally given similar interpretations of the principle, since they both agreed that it prohibits the undue cumulation of proceedings of the same kind, namely criminal, for the same offence.

Hence, the CJEU followed the ECtHR case law whenever the criminal nature of an offence had to be determined. As the ECtHR held in *Engel*,[4] this determination needs to consider not only the classification of the legal provision in domestic law (*nomen juris)* but also the punitive and deterrent nature and the degree of severity of the penalties that may be imposed under the law for the offence.

The judicial assimilation of administrative penalties into criminal ones irrespective of the legal classification has caused an array of concurring administrative and criminal penalties and of successive administrative and criminal proceedings against the same defendant for substantially the same misconduct; normatively, the offences could be qualified to constitute different offences, but materially they were the same. Hence, the question was whether such cases concerned an *idem*.

Moreover, in accordance with Art. 50 CFR, the *ne bis in idem* protection also applies between the jurisdictions of several Member States.[5] This corresponds to the EU law acquis as it resulted from Art. 54 of the Convention Implementing the Schengen Agreement (CISA),[6] Art. 7 of the Convention on the protection of the financial interests of the Communities,[7] and Art. 10 of the Convention on the fight against corruption.[8]

https://doi.org/10.30709/eucrim-2021-032

As regards the application of the principle within the same Member State (purely domestic situations), the guaranteed right in Art. 50 CFR has the same meaning and the same scope as the corresponding right in the ECHR as referred to by Art. 4 of Protocol No 7.

Whereas the principle is worded as an absolute right under the ECHR, Art. 50 CFR entails that it can be subject to exceptions covered by the horizontal clause in Art 52(1) CFR laying down the conditions for limitations on the exercise of the rights and freedoms recognised by the Charter. In other words, *ne bis in idem,* as guaranteed in Art. 50 CFR, entails that a person cannot be judged again for acts for which he or she was already finally acquitted or convicted, except if such acts do not constitute the same offence (*idem*) or if authorised by a law that maintains certain conditions.[9]

In the two judgments of 20 March 2018 in *Menci*[10] and *Garlsson*,[11] the CJEU specified the conditions the concerned national legislations must meet to cumulate administrative and criminal penalties in successive proceedings, and thus to limit the right not to be punished twice under Art. 50 CFR in accordance with Art. 52(1) CFR.

The *Menci* case concerned duplicate criminal proceedings preceded by administrative penalty proceedings (with a criminal nature) for the same non-payment of VAT; the CJEU notoriously held that, under the escape clause of Art. 52(1) CFR, a limitation of the *ne bis in idem* principle due to the second prosecution was justified

> for the purpose of achieving … complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue.[12]

The CJEU further concluded that the cumulative punishments met an objective of general interest, and that the national laws at issue providing for two distinct prosecutions contained rules ensuring that the duplicate administrative/criminal proceedings would only lead to cumulative punishments where strictly necessary and proportionate.[13] This followed an attentive review of the relevant national provisions, and, subject to the confirmation by the referring court, the CJEU concluded that the double penalty proceedings system applicable in Italy in that case could be considered proportionate and did not go beyond what was strictly necessary to sanction the same VAT non-payment.

However, the *Garlsson* case, which concerned a similar constellation of a cumulation of an administrative fine for market abuse following a criminal detention penalty for the same acts, gave rise to unjustified *ne bis in idem* because the CJEU noted that the previous conviction was taken into account only if it consisted in a prior criminal fine. The CJEU found that, under the legislation at issue, the mitigation of penalties under the national legislation at stake appeared

> solely to apply to the duplication of pecuniary penalties and not to the duplication of an administrative fine of a criminal nature and a term of imprisonment.

For this reason the Court concluded that the double proceedings were contrary to the principle of proportionality. The CJEU found that this legislation

> does not guarantee that the severity of all of the penalties imposed are limited to what is strictly necessary in relation to the seriousness of the offence concerned.[14]

Hence, the CJEU concluded in *Garlsson* that the legislation at issue did not fulfil the obligation for competent authorities, in the event that a second penalty was imposed, to ensure that

> the severity of the sum of all of the penalties imposed does not exceed the seriousness of the offence identified.[15]

Such discordant judgments give rise to uncertainty about when the limitations of the *ne bis in idem* protection in case of successive punitive proceedings brought separately are acceptable. The reason is that the CJEU acknowledges that cumulative penalties can in principle be applied for concurring offences in different proceedings. However, a violation of the double jeopardy prohibition can only be justified if the second proceedings serve complementary purposes and the concerned person's burden for defence is limited to the necessary minimum. This, in turn, is only possible if the two distinct proceedings show a sufficiently close connection, both in substance and in time – an antinomy that is difficult to attain in practice.

The uncertainty concerns the existence of concurring penalties and, therefore, the *idem* concept. More precisely, the question is notably whether the notion of "same offence" should correspond to "same criminally punishable conduct", which requires a triple identity: of the offender, the material facts (*idem factum*), and the protected legal interests (*idem crimen*), and not a double identity of the offender and the material acts. In that respect, both the ECtHR and the CJEU have developed diverging case laws on the notion of *idem*, which I will address in the following section.

II. The Equivocal Case Law of the ECtHR and the CJEU on the *Idem* Concept

As regards the interpretation of the *idem* concept, the ECtHR developed a vast jurisprudence on the duplication of administrative penalties of a criminal nature and proper criminal penalties. Considering the scope of the *ne bis in idem* guarantee in Protocol No 7 to the ECHR, these cases concerned the same national legal order. The traditional interpretation of *idem* was based on the triple identity test including the requirement of *idem crimen*. This entailed that the same conduct could legitimately produce a combination of separate administrative/criminal proceedings that, due to their distinct legal qualifications, are separate offences.[16]

A turning point was the ECtHR's Grand Chamber judgment in *Zolotukhin*.[17] The judges in Strasbourg had to deal with a duplication of penalty proceedings, including a first set of disciplinary proceedings, which were qualified as criminal under the *Engel* criteria, followed by a second set of proper criminal proceedings – all based on the same acts of indiscipline.[18] The ECtHR made the examination of the identity of the offences subject to a test of their essential elements rather than their legal qualifications. It concluded that the *idem crimen* approach should be abandoned to allow a broader application of the *ne bis in idem* protection and held that:[19]

> [the previous] approach which emphasises the legal characterisation of the two offences [was] too restrictive on the rights of the individual. [Therefore,] 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.

The ECtHR concluded[20] that from that moment onward the examination of the *idem* notion 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.

In the subsequent landmark judgment, *A and B vs Norway*, the ECtHR partially reconsidered the broad interpretation of the *ne bis in idem* protection in *Zolotukhin*, since the principle does not permit derogations under the ECHR.[21] It allowed a duplication of proceedings whenever these were "combined in an integrated manner so as to form a coherent whole". The combination of administrative and criminal penalties in separate proceedings was held permissible under four conditions, including: (i) the 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.[22]

If the conditions were fulfilled, the ECtHR considered that, in fact, no genuine second set of proceedings took place, so that there was no *bis in idem* even if separate penalty proceedings took place to sanction separate offences. The blending of the *idem* concept with the *bis* element contributed to the lawfulness of duplicate proceedings.[23]

In parallel, the CJEU had developed its own jurisprudence on the *idem* concept, most notably in competition matters, where the principle also found vast application in the EU. The CJEU interpreted the *idem* concept as requiring the triple identity including that of the legal interest protected. The *ne bis in idem* protection was therefore understood as only precluding the European Commission or a national competition authority (NCA) from finding an undertaking guilty a second time if the same authority had already sanctioned a conduct as anti-competitive with an unappealable final decision.[24] Therefore, where the Commission carries on the competition proceedings after national proceedings, two sanctions are not necessarily ruled out, while "a general requirement of natural justice" mandates that the previous punitive decision is taken into account in determining the successive sanction to be imposed.[25] Moreover, the *ne bis in idem* principle does not preclude the Union from imposing sanctions on a person for the same facts for which he/she has already been sentenced or tried outside the Union unless this is precluded by an international agreement.[26]

At the same time, with the establishment of the EU area of freedom, security and justice, the CJEU consistently ruled in relation to Art. 54 CISA that a person whose case has been finally disposed of in a Member State cannot be prosecuted again on the same acts in another Member State, whereas the fact that the same acts can be legally qualified as a separate crime is irrelevant.[27] Thus, according to the CJEU, Art. 54 CISA provides that the same or similar acts should not be prosecuted twice even if qualified differently under two national criminal provisions. This can be explained by the aim of Art. 54 CISA to avoid restrictions to the right to move freely within the single area of freedom, security, and justice, as a consequence of which duplication of (criminal) prosecutions for the same acts are prohibited to a greater extent.

In the leading case on the *idem* concept, the CJEU determined in *van Esbroeck* that the notion of "same acts" must be interpreted irrespective of their legal qualification.[28] Mr van Esbroeck was indicted in Belgium for having *exported* narcotics to Norway, although he served a sentence in Norway for having *imported* narcotics into that country. It was evident that the defendant was being tried again for the same material acts corresponding to the same cross-border crime of exporting/importing narcotics. The different legal qualifications of the same material act by the two legal orders (Belgium and Norway) were thus irrelevant. Should one accept the different qualifications of the same criminal conduct by the two concerned legal orders, this would systematically restrict free movement and unduly double criminal prosecutions:[29]

> Because there is no harmonisation of national criminal laws, a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States. In those circumstances, the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together. (…) [T]he definitive assessment in that regard belongs (…) to the competent national courts which are charged with the task of determining whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter.

Eventually, the CJEU felt obliged to systematise its interpretation of the *idem* concept under Art. 50 CFR as it is under Art. 54 CISA and also to align it to the conceptualisation by the ECtHR. With the above-referred contemporaneous judgments in *Menci* and *Garlsson* – dealing with duplications of administrative penalty proceedings (with a criminal nature) and proper criminal proceedings for the same acts – the CJEU extended its broad interpretation of *idem* to cover situations of duplicative administrative/criminal proceedings in the same national legal order.

The *Menci* case dealt with the sole owner of a business who had failed to pay a VAT debt within the prescribed deadlines in Italy; he was subject to an administrative penalty in an administrative proceeding and was successively charged in criminal proceedings. There was little doubt that the proceedings were a duplication (so-called "twin track" system). The Italian court that conducted the criminal proceedings asked the CJEU to rule whether, in the circumstances at issue, the *ne bis in idem* protection could limit the criminal prosecution of the tax offence in so far as the defendant was already sanctioned for the same facts in the administrative proceedings. The CJEU acknowledged that the *ne bis in idem* precluded a Member State from successively imposing a tax penalty with a criminal nature and a criminal penalty for the same act of non-payment of VAT. The CJEU stated in regard of the interpretation of the *idem* concept:[30]

> According to the Court's case-law, the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together which resulted in the final acquittal or conviction of the person concerned (…). Therefore, 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.
>
> Moreover, the legal classification, under national law, of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another.

Here, the CJEU provided that the notion of "same offence" under Art. 50 CFR should follow the same interpretation as "same acts" in Art. 54 CISA. This entails protection against the risks of double jeopardy for the same material conduct even if it constitutes more than one offence.

Although the *Menci* judgment seemed to be composed of different lines of the CJEU case law, it raises even more questions, e.g.: what did the CJEU intend by the identity of the material facts to be "understood as the existence of a set of concrete circumstances which are inextricably linked together which resulted in the final acquittal or conviction of the person concerned"?[31] And is this interpretation only required "in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another"?

III. A New Opportunity to Clarify the *Idem* Concept

Against this background, the two currently pending cases C-117/20 *bpost* and C-151/20 *Nordzucker e.a.*, both of which relate to the area of concurring competition proceedings, will give the CJEU the opportunity to cast a new light on the interpretation of the *idem* concept. In his two opinions rendered on 2 September 2021, Advocate General (AG) *Bobek* proposed a unified test of *idem* under the triple identity. He argued that the CJEU should reverse its jurisprudence based on the double identity because it gives rise to legal uncertainty and the risk of immunity. The facts of the two cases cast doubts on the double identity interpretation of *idem* as deriving from *Menci*.

https://doi.org/10.30709/eucrim-2021-032

In *bpost*, the Belgian Postal Authority (BPA) imposed in 2011 a fine of €2.3 million on the universal postal services provider bpost for violating the non-discrimination obligation in the Belgian law governing the opening of the market for postal services. The violation consisted in the application of a selective pricing system that denied certain quantity rebates to some business customers (aggregators in the collection of mail). After a separate enquiry in 2012, the Belgian Competition Authority (BCA) imposed a fine of €37.4 million on bpost for abusing its dominant position in violation of Art. 102 TFEU, based on the same selective system of rebates but with the different aim of excluding aggregators from the postal services market. In calculating the fine, the BCA deducted the fine that the BPA had imposed from the fine it would normally have imposed. The first fine by the BPA was contested by bpost and eventually annulled by the Belgian court on the ground that the rebate system was not discriminatory. The acquittal became final as the BPA did not appeal the judgment. Bpost then contested the second fine by the BCA on the ground that the *ne bis in idem* protection had been violated since the antitrust fine was based on essentially the same conduct. In the ensuing national competition proceedings, in which the European Commission intervened to defend the threefold identity test for *idem*, the referring court asked the CJEU whether the *ne bis in idem* principle bars the second competition proceedings even if they are based on a different legal interest than the postal proceedings.

In *Nordzucker e.a.*, the Austrian Supreme Court was seized of proceedings in which the Austrian Competition Authority (ACA) sought to determine that two German sugar producers, Nordzucker and Südzucker, had breached Art. 101 TFEU by organising a cross-border cartel affecting the German and Austrian sugar markets. In these cartel proceedings, the ACA also sought the imposition of a fine on Südzucker with respect to that infringement, although Südzucker was previously sanctioned by the German Competition Authority for that reason with a fine of €195.5 million. In this context, the referring Austrian court raised several preliminary ruling questions about the interpretation of the *ne bis in idem* principle, and most notably about the legal requirements for the condition of *idem* under EU law.

AG *Bobek* supported a narrower scope for the *ne bis in idem* protection than in *Menci* by suggesting that the concept of *idem* requires the triple identity of the offender, the relevant facts, and the protected legal interest. He posits that the aim of the *ne bis in idem* principle is to protect a defendant from a second set of proceedings. Hence, the conditions for its application must be defined *ex-ante* and must be predictable and cannot depend on which authority comes first in sanctioning the facts.

IV. A Reasoned Approach to *Idem*

The pending cases in *bpost* and *Nordzucker* (described above) present a unique opportunity for the CJEU to clarify the *idem* concept. AG *Bobek* is right in identifying the inconsistencies in the CJEU's case law on *idem* by comparing the judgment in *Menci* with the one in *Toshiba* (detailed more precisely below) but he fails to reconcile the two judgments. While the AG held that the two rulings are mutually exclusive, he overlooked that *Menci* refers to a specific notion of *idem*, which combines the material with the procedural dimensions of the *idem* concept as held in *van Esbroeck*. [32] Such an approach entails an appropriate standard of protection against double jeopardy in the EU's single area of justice that is based on the mutual recognition and equivalence of the national punitive proceedings of another Member State. This equivalence finds its basis in an autonomous interpretation of *idem* created by the CJEU and is independent from the national legal qualifications consisting in "a set of concrete circumstances which are inextricably linked together which resulted in the final acquittal or conviction of the person concerned".[33]

I agree that the pending cases in *bpost* and *Nordzucker e.a.* must be assessed against the background of the CJEU's case law in *Toshiba*, which in my view should be understood as being compliant with *Menci* and *van Esbroeck*, and not contradicting them. *Toshiba* forms the most recent case in the area of competition, in

which the judges in Luxembourg confirmed the triple identity test for *idem*.[34] The *Toshiba* case dealt with a preliminary ruling reference by a Czech court on the application of the *ne bis in idem* principle in the context of parallel competition proceedings that were first conducted by the Commission and then by the Czech Competition Authority with respect to the same EU-wide cartel. The Czech Competition Authority fined certain undertakings accused of participating in an international cartel between 1988 and 2004 on the market for gas-insulated switchgear for violating national competition rules, although the Commission had previously sanctioned the same cartel participants for violating Art. 101 TFEU. After having informed the Czech Competition Authority of its enquiry concerning the activities of the cartel in the EU territory before May 2004, i.e., prior to the accession of the Czech Republic to the Union, the Commission adopted its fining decision in January 2007 finding that certain undertakings had taken part in a complex EU cartel between January 1988 and May 2004. In February 2007, the Czech Competition Authority decided to sanction the Czech side of the cartel again by applying Czech law. The Czech authorities established that this cartel had taken place from July 2001 to March 2004, i.e., before accession, and sanctioned it accordingly. Against this backdrop, the main preliminary question raised in *Toshiba* was whether, under EU law, the same cartel violating both Art. 101 TFEU and the applicable national provision could only be sanctioned by the European Commission, which had acted first.

The CJEU confirmed the possibility of concurring proceedings and penalties being applied by separate competent authorities, each acting within the different scope of its respective jurisdictions and laws – namely, EU and national competition laws – and each dealing with a different set of facts. The CJEU called to mind: [35]

> (…) in competition law cases, (…) the application of this principle is subject to the threefold condition that in the two cases the facts must be the same, the offender the same and the legal interest protected the same.

This statement in the *Toshiba* judgment, however, seemed an *obiter dictum*, because the CJEU eventually held that "in any event, one of the conditions thus laid down, namely identity of the facts, [was] lacking" in that case.[36] In *Toshiba*, the CJEU limited itself to pointing out that there was no identity of facts to start with without addressing whether there was identity of the legal interests protected in the national as opposed to the Commission's proceedings.

In so doing, the CJEU, however, used a narrower and more specific concept of identity of facts that transcends the notion of same acts but rather comprises its territorial or market effects. This conclusion in *Toshiba* should be stressed if parallels are drawn to the interpretation of *idem* between, on the one hand, *Toshiba* and, on the other hand, the cases in *bpost* and in *Menci.* As analysed above, the interpretation of the notion of *idem* in *Menci* does not refer to all the material acts but only to those that have led to a preceding final criminal conviction or acquittal or may lead to such a conviction or acquittal.

Against this background, one should note that a criminal conviction or acquittal generally relates to acts that may give rise or are otherwise akin to extracontractual liability. In that respect, the concept of same acts can be understood as comprising the three elements of a conduct (a material act or omission), its effects, and the causal link between the conduct and the effects.

In other words, I am of the opinion that, for a reasoned concept of *idem*, inspiration should be drawn from the CJEU's case law that requires the existence of three cumulative elements for tortuous acts. Thus, besides the material conduct, the *idem* requirement should comprise the effects of the conduct as well as the geographic and temporal scopes in which the conduct takes place. Moreover, the appraisal of *idem* should include its procedural dimension, since a conduct and its effects can only be determined by certain competent authorities which are able to conclude whether certain circumstances are part of the same *idem* and should

be considered together. All such elements (effects, causal link, existence of proceedings) stem from qualifications in law of the material acts and complete the definition of *idem*.

In my view the situation in the *bpost* case concerns a concurrence of separate penalty proceedings in the same Member State by independent authorities; each proceeding corresponds to a different *idem* which cannot be considered a duplication already tried before as intended by the ECtHR in *Zolotukhin*. In the same vein, the *bpost* scenario does not fit with the conditions that the ECtHR laid down in *A and B vs Norway*, where the ECtHR allowed a duplication of proceedings "combined in an integrated manner so as to form a coherent whole". The reason is that there should not be any integration between proceedings that are independent.

The above conclusion follows the CJEU's *dictum* in *Menci:* [37]

> The legal classification, under national law, of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence. [That only applies] in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another.

In that respect, I find that the *bpost* case is not a matter of twin administrative and criminal penalty proceedings for the same acts but of different proceedings regarding different subject matters, which would be tried separately under any legal system of any Member State. The duplication of proceedings thus does not violate the *ne bis in idem* principle, as it does not concern the twin-track punitive system of one Member State only.

Similarly, with respect to *Nordzucker e.a.*, the parallel penalty proceedings of the Austrian Competition Authority and the German Competition Authority were not subject of the same *idem*: the first proceedings could not have sanctioned the infringement that was later the subject matter of the second proceedings because the latter has a different territorial scope.[38] In that case, the second proceedings are not "inextricably linked together [with the first proceedings] which resulted in the final acquittal or conviction of the person concerned", as intended in *Menci* and in *van Esbroeck*.

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1. B. van Bockel, *Ne Bis in Idem in EU Law,* 2016.↩
2. Art. 50 CFR (Right not to be tried or punished twice in criminal proceedings for the same criminal offence): "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."↩
3. Art. 4 of Protocol No 7 to the ECHR (Right not to be tried or punished twice):
"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."↩
4. ECtHR, 8 June 1976, *Engel a. O. v. Netherlands*, Appl. no. 5100/71 et al., para. 82.↩
5. Explanations relating to the Charter of Fundamental Rights on Article 50, *O.J.* C 303, 14.12.2007, 17.↩
6. Art. 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, *O.J.* L 239, 22.9.2000, 19, 35: "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".↩
7. Art. 7(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, *O.J.* C 316, 27.11.1995, 49, 51: "Member States shall apply in their national criminal laws the 'ne bis in idem' rule, under which a person whose trial has been finally disposed of in a Member State may not be prosecuted in another Member State in respect of the same facts, provided that if a penalty was 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 State." The Convention was replaced by Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law, *O.J.* L 198, 28.7.2017, 29. The Directive mentions the *ne bis in idem* protection in its Recital 21: "Given the possibility of multiple jurisdictions for cross-border criminal offences falling under the scope of this Directive, the Member States should ensure that the principle of ne bis in idem is respected in full in the application of national law transposing this Directive."↩

8. Art. 10(1) of the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, *O.J.* C 195, 25.6.1997, 2, 4.: "Member States shall apply, in their national criminal laws, the *ne bis in idem* rule, under which a person whose trial has been finally disposed of in a Member State may not be prosecuted in another Member State in respect of the same facts, provided that if a penalty was 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 State."↩
9. ECJ, 5 May 1966, Joined Cases 18/65 and 35/65, *Max Gutmann v Commission*, p. 119 (as to the finding that the principle prevents the Union from imposing two disciplinary measures for a single offence and from holding disciplinary proceedings more than once with regard to a single set of facts); CJEU, 20 March 2018, Case C-524/15, *Menci*, paras. 40–62 (as to the limitations to the *ne bis in idem* principle).↩
10. CJEU, *Menci*, *op cit.* (n. 9).↩
11. CJEU, 20 March 2018, Case C-537/16, *Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob)*.↩
12. CJEU, *Menci*, *op. cit.* (n. 9), para. 44.↩
13. CJEU, *Menci*, *op. cit.* (n. 9), paras. 63 and 65. A derogation under Art. 52(1) of the Charter could be made if the national referring court ascertained that the second proceedings and/or penalties:
(i) pursued an objective of general interest which is such as to justify such a duplication of proceedings and penalties, making it necessary for those proceedings and penalties to pursue additional objectives;
(ii) contained rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and
(iii) provided 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.↩
14. CJEU, *Garlsson Real Estate*, *op. cit.* (n. 11), para. 60.↩
15. CJEU, *Garlsson Real Estate*, *op. cit.* (n. 11), para. 56.↩
16. ECtHR, 30 July 1998, *Oliveira v. Switzerland,* Appl. no. 25711/94, paras. 25 to 29; ECtHR, 29 May 2001, *Franz Fischer v. Austria,* Appl. no. 37950/97, para. 29.↩
17. ECtHR, 10 February 2009, *Sergey Zolotukhin v. Russia*, Appl. no. 14939/03.↩
18. The *Zolotukhin* case concerned a military member who was verbally abusive towards his superiors during his interrogation conducted for disciplinary purposes. In the ensuing administrative disciplinary proceedings conducted against him, which the ECtHR likened to a criminal procedure, he was convicted of "minor disorderly acts". Several days later, a formal criminal case was opened in respect of, *inter alia*, 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 based on the same acts of indiscipline.↩
19. ECtHR, *Zolotukhin*, *op. cit.* (n. 17), paras. 81 and 82.↩
20. ECtHR, *Zolotukhin*, *op. cit.* (n. 17), para. 84.↩
21. ECtHR,15 November 2016, *A and B v. Norway*, Appl. nos. 24130/11 and 29758/11. The case also concerned cumulative tax penalty proceedings (qualifiable as criminal under the *Engel* criteria) and criminal proceedings for the same failure to declare income on their tax returns conducted (to some extent) in parallel. The ECtHR concluded that that situation did not amount to a breach of Art. 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".↩
22. ECtHR, *A and B v. Norway*, *op. cit.* (n. 21), paras. 132, 147, and 153.↩
23. ECtHR, *A and B v. Norway*, *op. cit.* (n. 21), para. 111.↩
24. Judgment of the Court of First Instance of 20 April 1999 in Joined Cases T-305/ 94, T-306/ 94, T-307/ 94, T-313/94, T-314/ 94, T-315/ 94, T-316/ 94, T-318/ 94, T-325/94, T-328/94, T-329/94, and T-335/94, *Limburgse Vinyl Maatschappij NV and Others v Commission* ('PVC II'), paras. 86–97, as upheld on appeal (judgment of the ECJ of 15 October 2002, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250-252/ 99 P, and C-254/99 P *Limburgse Vinyl Maatschappij NV and Others v Commission,* paras. 59–63).↩
25. ECJ, 13 February 1969, Case 14/68, *Walt Wilhelm*, para. 11; CJEU, 3 May 2011, Case C-375/09, *Tele2 Polska*.↩
26. ECJ, judgments of 29 June 2006, in Case C-289/04 P, *Showa Denko v Commission*, paras. 50–63 and in Case C-308/04 P, *SGL Carbon v Commission*, paras. 26–38.↩
27. For the case law interpreting the *ne bis in idem* principle as laid down in Art. 54 CISA, cf. judgments the following judgments by the CJEU: 11 February 2003, Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, paras. 25-48; 10 March 2005, Case C-469/03, *Miraglia*, paras. 28–35; 28 September 2006, Case C-150/05, *Van Straaten*, paras. 54–61; 28 September 2006, Case C-467/04, *Gasparini and Others*, 2006, paras. 22–37; 11 December 2008, Case C-297/ 07, *Bourquain*, paras. 33–52; 22 December 2008, Case C-491/ 07, *Turanský*, paras. 30–45; 27 May 2014, Case C-129/ 14 PPU, *Spasic*, paras. 51–74.↩
28. CJEU, 9 March 2006, Case C-436/04, *van Esbroeck*, para. 36.↩
29. CJEU, *van Esbroeck*, *op. cit.* (n. 28), paras. 35-36.↩
30. CJEU, *Menci*, *op. cit.* (n. 9), paras. 35-36.↩
31. CJEU, *Menci*, *op. cit.* (n. 9), para. 35 with reference to van *Esbroeck*, *op. cit.* (n. 28), para. 36.↩
32. Ibid.↩
33. Ibid.↩
34. CJEU, 14 February 2012, Case C-17/10, *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže*.↩
35. CJEU, *Toshiba*, *op. cit.* (n. 34), para. 97.↩
36. CJEU, *Toshiba*, *op. cit.* (n. 34), para. 115.↩
37. CJEU, *Menci*, *op. cit.* (n. 9), para. 36.↩
38. As was the case in *Toshiba* of the second fine imposed by the Czech Competition Authority with respect to the period when the Czech Republic had not yet acceded to the EU.↩

Author statement

The author was involved in the cases C-117/20 and C-151/20 as an agent for the European Commission. The opinions expressed in this article are personal in nature and are the sole responsibility of the author.

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union