

# CJEU Clarified Duplication of Punitive Administrative Proceedings in Competition Law

## News

**Thomas Wahl**

On 22 March 2022, the CJEU delivered two important judgments that clarify the application of the *ne bis in idem* rule, as enshrined in Art. 50 CFR, in competition law.

[Facts and background of the case \*bpost\*](#)

In the first case (C-117/20, *bpost*), the Belgian postal regulator imposed a fine of €2.3 million on *bpost* (the postal service provider in Belgium) in 2011 for having infringed rules of the postal sector since it applied a discriminatory rebate system. This decision was later annulled by the Court of Appeal, Brussels. In the meantime, in 2012, the Belgian competition authority imposed a fine of €378.4 million on *bpost* for abuse of a dominant market position because of the application of the same rebate system. The fine previously imposed by the postal regulator was taken into account in the calculation of that amount.

The referring court (Court of Appeal, Brussels, Belgium) asked whether the final decision relating to the infringement of sectoral rules in the postal market conducted by a first administrative authority (here: the Belgian postal regulator) prevents the sanctioning of a legal person for infringements of competition rules in a subsequent proceeding conducted by another administrative authority (here: the Belgian competition authority).

[The CJEU's decision and arguments in \*bpost\*](#)

In reply to those questions, the CJEU, sitting in for the Grand Chamber, specified both the scope and the limits of the protection conferred by the *ne bis in idem* principle guaranteed by Art. 50 CFR.

Considering that the referring court affirmed the criminal nature of the proceedings, the CJEU first noted that the application of the *ne bis in idem* principle is subject to a twofold condition, namely:

- There must be a prior final decision (the “*bis*” condition);
- The prior decision and the subsequent proceedings or decisions must concern the same facts (the “*idem*” condition).

The “*bis*” condition was considered fulfilled because there was a judgment on the fine by the Belgian postal regulator which acquired the force of *res judicata*.

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Regarding the “*idem*” condition, the CJEU clarified that in competition law matters, as in any other area of EU law, the relevant criterion is the identity of the material facts regardless of their legal classification under national law or the legal interest protected (“*idem factum*”). Accordingly, it is up to the referring court to determine whether the subject matter of the two administrative proceedings dealt with a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space.

Should that be the case, the CJEU emphasised that the referring court must then examine a possible limitation of the *ne bis in idem* rule guaranteed in Art. 50 CFR. Such a limitation of the *ne bis in idem* principle may nevertheless be justified on the basis of Art. 52(1) CFR. In accordance with that provision, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. That provision also states that, subject to the principle of proportionality, limitations on those rights and freedoms may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

By examining the requirements of Art. 52 CFR, the CJEU referred to its previous case law on the possible duplication of criminal and administrative proceedings, notably its judgment in Case C-584/15, *Luca Menci* → [eucrim 1/2018, 24-25](#). In doing so, it called to mind:

- The possibility, provided for by law, of duplication of the proceedings conducted by two different national authorities and the penalties imposed by them respects the essence of Art. 50 CFR;
- National rules which provide for the possible duplication of proceedings and penalties under sectoral rules and competition law are capable of achieving the objective of general interest of ensuring that each of the two sets of legislation concerned is applied effectively, since they are pursuing the distinct legitimate objectives (here: liberalisation of the postal market, on the one hand and ensuring the functioning of the internal market through the guarantee of competition on the other hand);
- With regard to the strict necessity of such a duplication, it is necessary to assess the following issues:
  - There are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties;
  - There are rules on the coordination between the two competent authorities;
  - The two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe;
  - The overall penalties imposed correspond to the seriousness of the offences committed.

Ultimately, the CJEU indicated that the requirements for a lawful duplication of the proceedings in the Belgian case at issue are fulfilled.

#### Facts and background of the case *Nordzucker & Others*

In the second case (C-151/20, *Nordzucker AG and Others*), both the Austrian and German competition authorities investigated sugar producers’ agreements not to compete with each other and to control the sugar markets in different regions. In 2014, the German competition authority found, by a decision which has become final, that Nordzucker, Südzucker and the third German producer Agrana Zucker had participated in an anticompetitive agreement in breach of Art. 101 TFEU and the corresponding provisions of German law; it imposed a fine of €195.5 on Südzucker. That decision also reproduced the content of a telephone conversation that was conducted between the sales directors of Nordzucker and Südzucker in 2006 concerning sugar deliveries to the Austrian sugar market.

The referring court (Austrian Supreme Court) was unsure whether it can proceed with competition proceedings against the sugar cartel in Austria. In particular the Austrian court doubted as to whether Art. 50 CFR precludes it from taking account of the 2006 telephone conversation in the proceedings pending before it, since that conversation was expressly referred to in the German competition authority's decision of 2014. That court also posed the question whether the *ne bis in idem* principle applies in proceedings finding an infringement, which, owing to an undertaking's participation in a national leniency programme, do not result in the imposition of a fine.

[The CJEU's decision and arguments in \*Nordzucker & Others\*](#)

The CJEU, sitting in for the Grand Chamber, first repeats its findings in *bpost*, i.e. the requirements of Art. 50 CFR to be fulfilled. Although the case is different to *bpost*, since it deals with decisions by two administrative bodies competent in the same field of law, but situated in two different Member States, the CJEU examined the conditions and limits of Art. 50 CFR in the same way as in *bpost*.

The CJEU particularly emphasised that the identity of anticompetitive practices must be examined in the light of the identity of the material facts, regardless of the legal classification of the offending act under national law or the legal interest protected ("*idem factum*"). Similarly to the decision in *bpost*, the CJEU pointed out that it is for the referring court to ascertain, by assessing all the relevant circumstances, whether the German competition authority's decision of 2014 found that the cartel at issue existed, and penalised it, as a result of the cartel's anticompetitive object or effect not only in German territory, but also Austrian territory. If this is the case, the referring court must subsequently verify whether a limitation of Art. 50 CFR is justified in accordance with Art. 52(1) CFR (see above).

In this regard, the main problem was whether the two cartel proceedings pursued complementary aims which relate to different aspects of the same unlawful conduct, as a consequence of which the general interest objective in Art. 52(1) CFR can be met. The judges in Luxembourg, however, argued: if two national competition authorities were to take proceedings against and penalise the same facts in order to ensure compliance with the prohibition on cartels under Art. 101 TFEU and the corresponding provisions of their respective national law prohibiting agreements which may affect trade between Member States, those two authorities would pursue the same objective of ensuring that competition in the internal market is not distorted. Such a duplication of proceedings and penalties would not meet an objective of general interest recognised by the EU, with the result that it could not be justified under Art. 52(1) CFR.

Lastly, the CJEU confirms that the *ne bis in idem* principle also applies if one of the undertakings (here: Nordzucker) takes part in a national leniency programme, as a consequence of which a fine cannot be imposed, but only a declaration of the infringement of the cartel law can be made.

[Put in focus](#)

The two judgments of 22 March 2022 include important clarifications on the protection by the *ne bis in idem* principle. It must first be stressed that the fundamental right in Art. 50 CFR does not only apply if it comes to penalties imposed in criminal proceedings *strictu sensu*, but also in proceedings which are conducted by different administrative authorities and which can lead to the imposition of sanctions of a criminal nature in the wider sense. In essence, the CJEU applies the criteria established in its landmark rulings of 2018 concerning the juxtaposition of administrative and criminal proceedings against the same natural or legal person (→ [eu-crim 1/2018, 24-27](#)).

An important aspect of the two judgments is that the CJEU unifies the interpretation of the "*idem*" condition across law disciplines. This means that the CJEU departed from its special path in the assessment of the

“idem” criterion in the double jeopardy prohibition in competition law (so-called “idem-crimen” approach considering a triple identity involving the protected legal interest next to the identities of person and fact). The Court considered the criticism by Advocate General Bobek, who was responsible for the cases, to be justified in principle, but chose an approach to legal unification other than the one proposed by him, namely the orientation towards the *idem factum* approach as established in the *Menci* case in 2018 (→ analysis by Rossi-Maccanico, “A Reasoned Approach to Prohibiting the Bis in Idem - Between the Double and the Triple Identities”, *eu crim* 4/2021, 266-273).

In addition, the CJEU makes clear that the protection from double jeopardy has its limits, i.e. it is not absolute. The CJEU developed a uniform, multi-stage review programme for Art. 52 CFR in relation to the *ne bis in idem* protection enshrined in Art. 50 CFR. Decisive aspects here are the assessment of the objectives pursued by the two procedures as well as the proportionality of the double punishment.

Even if the CJEU should have unified its previous case law on double jeopardy and created more coherence, caution is required, however, in the assessment of individual cases. The CJEU’s findings are very fact-oriented and different results may be reached in the concrete application of the criteria in other cases.

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