The Housekeeping of the Court of Justice: the *ne bis in idem* Principle and the Territorial Scope of NCA Decisions

Case Comment to the *Nordzucker* Judgment of the Court of Justice of 22 March 2022, Case C-151/20

by

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Abstract

The case commentary examines the recent ruling of the Court of Justice in the *Nordzucker* case. This judgment is important not only for the new approach to the *ne bis in idem* principle in competition law (which was first established in the *Bpost* case, issued the same day), but also for the clarification of the concept of "idem" with respect to the territorial effects of the infringement on the territories of two member states. The judgment thus provides guidance for the extraterritorial application of EU competition law.

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Résumé

Le commentaire porte sur l'arrêt rendu récemment par la Cour de justice dans l'affaire *Nordzucker*. Cet arrêt est important non seulement en raison de la nouvelle approche du principe *ne bis in idem* en matière de droit de la concurrence (qui avait été établi pour la première fois dans l'arrêt *bpost* publié le même jour), mais aussi en raison de la clarification du terme "idem" en ce qui concerne les effets territoriaux de l'infraction sur les territoires de deux États membres. Ainsi, l'arrêt fournit une orientation pour l'application extraterritoriale du droit européen de la concurrence.

Key words: EU competition law; ne bis in idem; National Competition Authorities; protection of the same legal interest

JEL: K21, K33

I. Introduction

In March 2022, the Court of Justice delivered two seminal judgments in the *Nordzucker*[1] and *bpost*[2] cases. Although they were not adjudicated in the form of a joint case, they share significant common factual elements and findings. This paper is focused on presenting *Nordzucker*'s factual and legal side as well as its analysis. It references the opinion of the Advocate General, alluding remarks to *bpost*, as well as providing insights on the missing elements in the commented ruling.

As a starting point, it should be indicated that both the aforementioned cases are associated with Article 50 of the Charter of Fundamental Rights of the European Union (hereinafter: Charter), which provides 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.' Its application triggered various doubts and issues which the Court had to face. *Nordzucker* altered the manner in which some of them will be functioning from now on. To a limited extent, they correspond to expectations articulated in literature (such as Rizzutto, Lynch, 2021, Veenbrink, 2019, Dobosz, 2018, 256–60). More importantly, when adjudicating, the Court considers the ties of cases being dealt with

[1] Judgement of the Court of Justice of 22.03.2022, Case C-151/20, Bundeswettbewerbsbehörde versus Nordzucker AG, Südzucker AG, Agrana Zucker GmbH, ECLI:EU:C:2022:203.

[2] Judgement of the Court of Justice of 22.03.2022, Case C-117/20, bpost SA v Autorité belge de la concurrence, ECLI:EU:C:2022:202.

by competition agencies. For one, it may be a pure legal analysis carried out towards legal cohesion, but it is unquestionably not devoid of a policy component through touching upon the rules governing the competition law system of the European Union.

II. Circumstances before the national bodies

The preliminary reference has been made in proceedings before the Austrian Oberster Gerichtshof (hereinafter: Austrian Supreme Court), whilst the primary dispute concerned the Bundeswettbewerbsbehörde (Federal Competition Authority of Austria), that is the Austrian National Competition Authority (hereinafter: NCA) and Nordzucker AG, Südzucker AG and Agrana Zucker GmbH. The Austrian NCA established in its proceeding that the above undertakings participated in a practice contrary to Article 101 TFEU and the corresponding provisions of Austrian competition law.

All undertakings concerned operate on the market for the production and marketing of sugar intended for industries and household consumption. Agrana is the main sugar producer in Austria. Nordzucker and Südzucker enjoy a strong position on the German sugar market together with another key player. Nordzucker has factories located in the north part of Germany, while Südzucker has its factories in the south. As noted in the judgement[3], the characteristics of sugar, and its transport costs affect the German sugar market dividing it into three main geographical areas. They are, in turn, dominated respectively by one of these three major producers. This specificity is not found in other countries, especially in Austria.

The enlargement of the European Union in 2004 was welcome with concerns among German sugar producers, due to new competitive pressure from firms from the acceding states. This circumstance is crucial for the whole background of the anticompetitive practices in question. From no later than 2004, several meetings took place between the sales directors of Nordzucker and Südzucker, at the end of which they agreed not to compete by penetrating their traditional core sales areas. This arrangement was supposed to combat new competitive pressure. Towards the end of 2005, Agrana noticed deliveries of sugar from a Slovak subsidiary of Nordzucker that were targeted at the Austrian market. Moreover, deliveries were reaching Austrian industrial customers, although they were, until then, exclusively supplied by Agrana.[4] In February 2006, Agrana's managing director called Südzucker's sales director

[3] Para 9 of *Nordzucker*.

[4] Para 12 of *Nordzucker*.

and informed him of those deliveries and asked him for the name of a contact person at Nordzucker. As a result, Südzucker's sales director reached out – by phone – to Nordzucker's sales director with reference to these deliveries to Austria. He also explained the possible consequences for the German sugar market (hereinafter: the telephone conversation at issue)[5].

Nordzucker eventually decided to submit leniency applications, in particular to the Bundeskartellamt, that is the German NCA (German Federal Competition Authority), and to its Austrian counterpart. Both NCAs launched their own (separate) investigations. Then, in 2010, the Austrian NCA applied to the Oberlandesgericht Wien (hereinafter: Higher Regional Court in Vienna) requesting a ruling that Nordzucker had violated EU and domestic competition law. Sanctions for Südzucker and Agarna were also included. The German NCA issued a decision in 2014 establishing the relevant anticompetitive agreements concluded by Nordzucker, Südzucker and a third German producer and imposed a fine on Südzucker. The German NCA based its decision also on EU and national competition rules.

Interestingly, the telephone conversation at issue was one of the parts of the documentation stored by both NCAs. In terms of the German proceedings, it constituted the only case material concerning Austria. Unsurprisingly, the evidence collected by the Austrian NCA was much broader in this respect. These factors, conducive to the adjudication of the Higher Regional Court in Vienna, caused the latter to dismiss the action brought by the Austrian NCA. The Higher Regional Court in Vienna motivated its ruling by holding that the agreement concluded during the telephone conversation at issue had already been subject to a penalty imposed by another NCA, and thus the *ne bis in idem* principle would be impaired if the Austrian NCA imposed a sanction as well. The Austrian NCA did not agree with that interpretation and challenged the judgement before the referring court. The Austrian Supreme Court had doubts with regard to the *ne bis in idem* principle laid down in Article 50 of the Charter since the telephone conversation at issue was, at any rate, expressly mentioned in the German NCA's final decision.

The Austrian Supreme Court shared some observations with the Court of Justice of the European Union (hereinafter: CJEU or Court). The first issue to be raised was the incongruence throughout the case-law of EU courts in terms of the *'idem'* component of the *ne bis in idem* principle.[6] On the one hand, there is a collection of rulings such as *Toshiba* (14.02.2012, C-17/10, EU:C:2012:72, paragraph 97) that introduces three premises of the principle in question: the 'facts' must be the same, the 'offender' must be the same and the 'legal interest protected' must the same. Compulsorily, they all have to

[5] Para 14 of *Nordzucker*.

[6] Para 21 of *Nordzucker*.

be satisfied to determine that the *ne bis in idem* principle is infringed. On the other hand, among others, *Van Esbroeck* (9.03.2006, C-436/04, EU:C:2006:165, paragraph 36) and *Menci* (20.03.2018, C-524/15, EU:C:2018:197, paragraph 35), are instances where the Court did not qualify the 'legal interest' as a valid criterion. The latter examples are not, however, in the scope of competition law but other fields of EU law.

Another aspect that was considered is the geographical effect of the cartel in the territories of different Member States through the lens of '*idem*'.[7] The referring court, the Austrian Supreme Court, recalled the rulings that may be relevant to this end – *Archer Daniels Midland* (18.05.2006, C-397/03 P, EU:C:2006:328), *Showa Denko* (29.06.2006, C-289/04 P, EU:C:2006:431) and *Toshiba*.

Aside from the above considerations, the Austrian Supreme Court was aware of the position of the Austrian NCA, which consistently held that the fine imposed in the final decision of the German NCA did not take into account the effects that occurred beyond the territory of Germany.[8] Nonetheless, an opposite view was presented by the Higher Regional Court in Vienna for which the telephone conversation at issue was of particular importance for the decision of the German NCA.

The referring court also took into consideration that Nordzucker was granted immunity under national leniency rules. The preliminary request was to clarify the potential correlation between this circumstance and the *non bis in idem* principle. It was also inferred, on the basis of paragraph 94 of *Toshiba*, that this principle could be applied if the imposition of fines was at stake.

Given all the outlined factors, the Austrian Supreme Court posed the following 4 questions for a preliminary ruling:

> '(1) Is the third criterion established in the Court of Justice's competition case-law on the applicability of the *non 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 *non bis in idem* principle whether the first decision of the competition authority of a Member

[7] Para 22 of *Nordzucker*.

[8] Para 23. In addition, a statement of an official of the German NCA was recalled, according to which only anticompetitive effects in Germany were covered by the decision at issue.

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 *non 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)?'

III. The Court's findings

Having the queries reorganised and split, the CJEU commenced with replying to the first and third question. In general, they concern the framework for the application of Article 50 of the Charter, with particular attention to the premise of the 'same facts'. The query focused on whether, in the context of that framework, the proceedings of a NCA are, or are not proscribed against a concrete undertaking. Going into details, the reference asked for instructions from the CJEU on the right of national authorities to impose fines for a breach of Article 101 TFEU, along with its national counterpart, when adjudicating conduct which has had an anticompetitive object or effect in the territory of one Member State, where that conduct has already been referred to, by a NCA of another Member State, in a final decision which the latter NCA has adopted with respect of that undertaking, following its own infringement proceedings under EU and domestic competition law.

Handling the questions, the Court recalled pertinent case-law, starting with *Limburgse Vinyl Maatschappij* (15.10.2002, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 59), to accentuate that the *non bis in idem* principle is deemed to be a fundamental principle of EU law. Besides, the Court made a few more remarks, reflecting the *Menci* judgment (its paragraph 25 and the case-law cited), raising that a duplication of both proceedings and penalties of a criminal nature for the purposes of Article 50 of the Chapter for the same acts and against the same person is prohibited. It is the referring court's task, however, to establish the criminal nature. Doing so, three criteria are relevant: the legal classification of the offence under national law, the intrinsic nature of the offence, and the degree of severity of the penalty which the entity concerned is liable to incur. Nonetheless, having the criminal nature recognised solely on the basis of national law, is not decisive here. This criterion is thus

relative, unlike others that must be fulfilled. In other words, the Court of Justice highlighted the '*bis*' condition and the '*idem*' condition. Extrapolating these rules to competition law, the principle at issue serves to preclude an undertaking being found liable, or the bringing of proceedings against it afresh, on the grounds of anticompetitive conduct for which it has already been penalised or declared not to be liable by a prior decision that can no longer be challenged.[9] Formulating this conclusion, the Court invoked, for the first time in this ruling, the *PZU* judgement (*Powszechny Zakład Ubezpieczeń na Życie*, 3.04.2019, C-617/17, EU:C:2019:283, paragraph 28), which acted, in recent years, the notable judicial source when it comes to the *non bis in idem* principle.

Those observations were followed by additional comments. The first one referred to the very prerequisite for the '*bis*' condition – the decision or judgement has to be made as to the merits of the case. Hence any procedural outcomes or directives do not satisfy it. Unquestionably, the German decision at issue did touch upon the merits of the case. In turn, the '*idem*' condition with respect to the main proceedings, as well as Nordzucker's and Südzucker's situation has to be affirmatively verified.

The Court noticed that whenever identical facts are at stake, Article 50 of the Charter prohibits the imposition of multiple criminal penalties as a result of different proceedings brought for those purposes.[10] Then, far-reaching conclusions were presented – 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.[11] Otherwise, the protection conferred by Article 50 of the Charter would be dependent on the specificities of the different legal regimes of the Member States, as already emphasised in *Menci* (paragraph 36) and *Garlsson Real Estate* (20.03.2018, C-537/16, EU:C:2018:193, paragraph 38).

Having broadly outlined the ambit of the *ne bis in idem* principle against the backdrop of the concrete circumstances of the case, the Court took a meaningful step asserting that for the sake of avoiding differences among various fields of EU law, Article 50 of the Charter shall be applied in accordance with the aforementioned premises in a uniform fashion.[12] This statement is also present in *bpost*. It is not an accident that the Court had the intention to reiterate this approach, and coined it by two rulings delivered at the same time.

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[9] Para 32 of *Nordzucker*.
[10] Para 38 of *Nordzucker*.
[11] Para 39 of *Nordzucker*.
[12] Para 40 of *Nordzucker*.

The territory and the product market related to the object or effects of the anticompetitive practice should be identified, so as to ascertain whether the identity of the facts is the same, or not when deciding if a prohibition to act applies to another (intervening) authority. Clearly, the CJEU does not adjudicate on the facts of cases where preliminary questions were posed. Therefore, it is within the margin of power of the referring court to seek ties in terms of facts between the final decision of the German NCA and the Austrian proceedings (along with the projected Austrian decision). Doing so, the territory, product market and period covered by that decision have to be meticulously checked by the referring court. Access to such decision is moreover possible thanks to procedural solutions stipulated in Article 12(1) of Regulation No 1/2003 when one NCA is entitled to submit a request for access to information held by another NCA. In this case, it would be for the benefit of national courts from the jurisdiction of the fist NCA. As a digression, the extended length of the route to obtain access to a decision and necessary information can be put on the table when EU law is being amended in this respect.

The telephone conversation at issue is of utmost interest for the Austrian court because the discussion pertaining to the Austrian sugar market was mentioned in the German NCA's final decision. This factual element constitutes a challenge for the referring court and impedes decisive assessment in light of the *ne bis in idem* principle. In other words, for the Court of Justice it is out of the question for a mere reference to a fact associated with the territory of another Member State, to be deemed sufficient to evaluate it as one of the constituent elements of the infringement. Another facet to be validated here is to analyse to what extent the fact at issue has affected the liability, for that infringement, of the entity against which proceedings were brought, and whether it was conducive to impose a penalty on that entity. Those aspects altogether should be reviewed in order to determine if the infringement encompassed the territory of the other Member State or not. It can be interpreted that in paragraph 45, the CJEU was essentially attempting to differentiate the overall scope of the cartel that concerned both Austria and Germany and the decision of the German NCA in terms of the factual (and legal) components it contained. Only covering the German sugar market, or including the Austrian market as well, is a pivotal consideration to be taken into account. It is also indicative that for the sake of quantifying the fine, only the turnover achieved in Germany was calculated in its decision. This assessment may have two mutually exclusive outcomes.[13] If the prior proceedings did not relate to the same facts, new

[13] Para 48 and 49 of *Nordzucker*.

proceedings could be brought and, where appropriate, (new) penalties could be imposed. The opposite scenario would be that the German final decision was issued also on the basis of the cartel's anticompetitive object or effects in the Austrian territory, which would preclude later proceedings in Austria, and even more so penalties, as it would amount to a limitation of the fundamental rights enshrined in Article 50 of the Charter.

The considerations of the CJEU could have stopped on that last point, and yet the Court gave further instructions so as to answer the first and third questions by searching for a justification for any limitation of the fundamental right at hand in compliance with Article 52(1) of the Charter. This direction was already determined in the case-law of the CJEU (judgments of 27 May 2014, *Spasic*, C-129/14 PPU, EU:C:2014:586, paragraphs 55 and 56, and *Menci*, paragraph 40). This approach was, however, never before suggested, let alone utilised, in an antitrust case. Article 52(1) of the Charter hence authorises a limitation on the exercise of the rights and freedoms recognised by the Charter only if two sets of criteria are met, elementary and advanced ones (corresponding respectively to the two sentences of this provision). To be specific, a limitation has to be expressed in the law and it cannot compromise the rights and freedoms at stake. Furthermore, a limitation shall be necessary and genuinely meet objectives of general interest recognised by the European Union, or is needed to protect the rights and freedoms of others. The latter set of criteria is not rigid and leaves room for case-by-case interpretations, aside from the fact that it is conditioned by the principle of proportionality.

Having outlined the overall framework for the limitations of the *ne bis in idem* principle, the Court confronted the referred questions with that framework. The core point was to consider how a duplication of proceedings and double penalties could meet an objective of general interest. It all shall be weighed, given that Article 101 TFEU is a provision that pertains to a matter of public policy prohibiting cartels and pursuing the objective, essential for the functioning of the internal market, of ensuring that competition is not distorted in that market.[14] Subsequently, the importance of Article 3(1) and (2) of Regulation No 1/2003 was briefly noted and the basics for the correlation between Article 101 TFEU and its national counterparts explained. According to the Court, this analysis was useful to evaluate if two authorities would pursue the same objective of general interest (ensuring that competition in

[14] To that effect the following judgments were referred to *Eco Swiss*, 1.06.1999, C-126/97, EU:C:1999:269, paragraph 36, and *Manfredi*, 13.07.2006, C-295/04 to C-298/04, EU:C:2006:461, para 31. Especially as regards the former, seemingly it was not fully utilised in the CJEU rulings.

the internal market is not distorted by anticompetitive practices) when they consider both EU and national antitrust norms. In any event, a duplication of proceedings and penalties, which do not pursue complementary aims relating to different aspects of the same conduct, cannot be justified under Article 52(1) of the Charter.[15]

Subsequently, the Court moved to the fourth question, omitting to explain the second question. The CJEU maintained that there is no need to rule on the latter owing to the answer given to the first and third questions – this will be a subject of further insight below. When it comes to the fourth question, the national leniency programme is well known for benefitting undertakings that voluntarily provide significant input to antitrust interventions carried out by competition agencies. An uncertainty remained, however, as leniency may impact other future proceedings and fines. It had to be clarified whether the *ne bis in idem* principle can be applicable if an undertaking that took advantage of leniency.

The Court started its observations with an introductory statement that even a mere bringing of proceedings against an undertaking afresh, on the grounds of an anticompetitive conduct for which it has already been penalised or declared not to be liable by a prior decision (that can no longer be challenged), becomes eligible to be protected by that principle. Essentially, building a bridge between *ne bis in idem* and other principles (*res iudicata* and the principle of certainty), a party shall be secure in the knowledge that it will not be tried again for the same offence (see, to that effect, *PZU*, paragraphs 29 and 33). Thus, the initiation of another (and subsequent if appropriate) proceedings falls within the scope of this principal prohibition. Hence the authority's power to impose sanctions does not matter in this respect as it constitutes a further aftermath of the proscribed proceedings. The Court also listed case-law, Article 101 TFEU, and Articles 5 and 23(2) of Regulation No 1/2003, so as to demonstrate that a finding of an infringement without imposing a fine is an exception, solely legitimised by an active engagement in a national leniency programme; yet it cannot be carried on with prejudice to the effectiveness and uniformity of EU law application either.[16] When answering the fourth question, the Court firmly asserted that the *ne bis in idem* principle covers also leniency, because of the explication of the extraordinary nature of leniency programmes, supposed to pose the ground for the conclusion that they, ultimately, serve as a substitute to a typical finding of an infringement, along with the imposition of sanctions.

[15] Para 57 of *Nordzucker*.
[16] Para 64 of *Nordzucker*.

IV. Comments to the ruling

1. The 'magnitude' of change

Until 22 March 2022, whenever Articles 101 and 102 TFEU were involved, a clear approach could have been employed towards the *ne bis in idem* principle, as laid out by the Court of Justice of the European Union. It predominantly originated from *Toshiba* – a milestone judgement that moulded the framework within which competition law functioned in the European Union. Rudimentary (but by no means complex) rules on the relationship between EU and national competition rules, as well as the discussed *ne bin in idem* principle, were largely set out in this judgement. *Toshiba's* perspective had to be firmly considered here so as to apprehend the actual scale of the changes stemming from the commented ruling (along with *bpost*). In contrast to the *Toshiba* judgement, *Nordzucker* essentially concentrates on the *ne bis in idem* principle and sorting out the usage of the powers of NCAs that were, in fact, procedurally fragmenting (*via* separate proceedings) but related to the same antitrust case (in a substantive sense). Alternatively, this antitrust case could have been handled by the European Commission, or only one of the two intervening NCAs. To avoid the risk of parallel investigations, each case should be dealt with by one authority (Salemme, 2019, 351), but at times, this is a purely theoretical and ideal scenario. On the one hand, since NCAs consider the territory of other Member States in an extremely low number of cases, the *ne bis in idem* principle will be respectively rarely relevant. On the other hand, this is a much telling tendency in the application of EU norms within one European jurisdiction, which weakens the predestined role of NCAs – namely, substituting for the European Commission. By the way, the leniency applications submitted by Nordzucker to both NCAs lack a one-stop-shop effect. All this is associated with the shortcomings of the current antitrust model and its operation.

The antitrust landscape was rooted in *Toshiba's* threefold approach to the *ne bis in idem* principle, which required that the facts, the offender, and the legal interest to be protected must all be the same. This approach, tailored for competition law matters, seriously differed from what was widely practised in other areas of EU law. The legal interest and its protecting umbrella have been playing a role beyond EU antitrust where the legal interest issue was to examine the law in question to grasp its potential criminal nature. This is reflected in *Nordzucker* where the Court rejected whatsoever national legal classifications. Yet the fact should not be overlooked that the reason for which the Court had to build its framework for the principle at issue, is that when

Toshiba was rendered, there was no Charter in *acquis européenne* – Protocol 7 to the European Convention on Human Rights was taken into account instead. There is no doubt that in 2012, the CJEU manoeuvred to shape the preferred contours of the *ne bis in idem* principle within the EU antitrust system. Interestingly, even now, Protocol 7 is relevant for interpreting Article 50 of the Charter (Rossi, Sansonetti, 2020, 59).

2. To have your cake and eat it too

The word 'revolution' is one of those terms that are rarely uttered, only in exceptional instances. Is it really valid here? Usually, the Court of Justice is not willing to be bolder than necessary. Luckily in this case, an unquestionably giant step forward was taken, concurrently with grace and in an equilibristic manner. This is how the direction of the use of Article 52 of the Charter can be translated. Hypothetically (and provocatively), if the Court could not have switched to Article 52, neither *Nordzucker* nor *bpost*, would be an object of study now as a possible turning point for competition law. While merely a guess, it can be argued that it, in fact, corresponds to the characteristics of the Court of Justice. Notwithstanding the apparent wind of change, the objectives associated with protecting the same legal interest can be preserved. In other words, the fundamental question lies in whether everything changed and yet nothing changed at the same time.

Addressing this last contentious issue, Article 52(1) of the Charter shall be scrutinised, possibly *in concreto* and *in abstracto*. As regards the latter, the first paragraph of Article 52 provides that limitations on the exercise of the rights and freedoms recognised by this Charter have to be prescribed by law, and that the essence of those rights and freedoms cannot be compromised. In addition, such limitations must be filtered through the principle of proportionality, assessed as necessary and genuinely meeting objectives of general interest recognised by the EU, or the need to protect the rights and freedoms of others. This provision should be construed coherently throughout the European Union legal system. Nevertheless, it is worth considering what it specifically means for the EU antitrust regime. First and foremost, the grounds for Article 52(1) of the Charter would materialise, if multiple authorities with the competence to apply Articles 101 and 102 TFEU were to find an infringement (regardless of the imposition of sanctions) with regard to the same entities and facts. This would amount to a *prima facie* violation of the *ne bis in idem* principle, which could, however, be theoretically justified by virtue of Article 52(1) of the Charter. The Court of Justice stated in *Nordzucker* that ensuring that competition in the internal market is not distorted by anticompetitive practices

is at the forefront of these interventions.[17] The Court references here the mainstay of EU competition law as stipulated in the Treaties and sees this finding as the pursuit of the same objective of general interest, which, in turn, refers to 'genuinely meeting objectives of general interest recognised by the Union'. Going further, ultimately it can be associated with the criterion 'protecting the same legal interest'. Therefore, it was of key importance to outline, *in abstracto*, what Article 52(1) of the Charter covers, then to capture its implementation *in concreto*, and finally to accentuate how this method is close to the one specifically set out in *Toshiba*. Although the legal frames of reference were altered, in terms of substantive optics, this 'revolution' turned out to be merely an 'evolution'.

3. Crumbs of an (un)eaten cake

This very agile and ingenious *modus operandi* of the Court cannot be deemed tantamount to 'dotting the i's and crossing the t's'. One may say that all the criticism of *Toshiba* can no longer be sustained. New-old doubts have remained though. Bearing in mind what the second question from the Austrian Supreme Court was, '[d]oes the same protected legal interest exists in such a case of parallel application of European and national competition law?' The CJEU considered that the answers it provided were sufficient and so this question was not dealt with individually. This was certainly convenient for the Court. The Advocate General, irrespectively of the different assumptions and approaches adopted by him at the outset, selected a more challenging path in this respect. He started with a comment that the question of whether EU and national competition laws protect the same legal interest occurred in *PZU*, but the CJEU had not found it necessary to address this issue. Upon swiftly ascertaining that there was no '*bis*', it was possible in *PZU* for the Court to then skip the '*idem*' part and beyond. A symptomatic tendency to continue on this path is rather palpable. It is indeed intriguing to consider what motivated the CJEU to dodge the issue in *PZU*, and to then change its approach in the face of similar conditions (that is, discrepancies in the territorial scope of decisions). It can be argued that *PZU* was the first step towards a twofold test (Simpson, 2019), but it is not that convincing. Judge K. Jürimäe was a Rapporteur in both cases, a fact that stimulates curiosity even more. It is clear that *PZU* was delivered by five judges of the fourth Chamber, versus the Grand Chamber assembled in *Nordzucker*. Still, it does not explain possibly why the Grand Chamber could not have dealt with it

[17] There are no contraindications for stating that the considerations cannot pertain to multilateral and unilateral practices.

in 2019. Supposedly, the awareness of the growing issues concerning the principle at issue, together with increasing tensions to make a change, could have constituted sufficient impetus for the Court to make adjustments in this respect. The imponderable issues staying behind this sequence of adjudication will arguably not be unfolded.

Unlike the CJEU, the AG contended that, in general, EU and national competition laws protect the same legal interest.[18] However, he stipulates that the protected legal interest ought to be assessed with regard to a specific provision of a Member State. Hence, a case-by-case analysis appears to be mandatory. Moreover, the AG decisively confirms the major convergence of EU and national competition rules. Without delving into every detail of the AG's considerations, EU and national competition laws have moved closer to each other since their relationship was scrutinised in *Walt Wilhelm*. For the AG, it is, in any event, difficult to imagine how the respective objectives of a national competition rule and of Article 101 TFEU could differ at all.

The approach to the second question can derive from its sheer wording, formulated as: do EU and national competition norms, applied in parallel, protect the same legal interest? This would never be ideal though, if a relationship between them had not been determined in the first place. Seemingly this is what AG Bobek endeavoured to attain, as it constitutes a *conditio sine qua non* for further discussion. If, like the Court, we steer away from the content of the second question, no *novum* would be discovered. There is a fundamental difference between: i) a national competition rule being applied concurrently with Article 101/102 TFEU, and ii) such national norm applied alone. It is not a moot point though and it is worth considering an alternate hypothetical situation. The German NCA did take into account both German and Austrian geographical markets, *inter alia*, because of the telephone conversation at issue; later on, the Austrian NCA targeted the same anti-competitive behaviour but with regard to the Austrian market only. For many reasons, which can be conceived and extensively elaborated on another occasion, the Austrian NCA applied in its proceedings exclusively domestic competition rules. The question is: does the *ne bis in idem* principle come into play in this situation too, or does it not? The ultimate answer should be, however, preceded by a primary finding – what is the relationship between national and EU competition law? This is a potentially groundbreaking question that might shake the very foundations of the current legal architecture (Dobosz, 2022, *passim*). Applying a more complex point of view, the whole scenario could be mixed with Article 3(2) and (3) of Regulation 1/2003 leaving room for qualified policies and provisions in the

[18] Para 44 of the Opinion.

national legal landscape (compare Wils, 2019). The simplified viewpoint should be sufficient to manifest the shortcomings of *Nordzucker*[19].

Nordzucker yielded answers that should have been known. The Supreme Court of Austria did not need to submit a preliminary reference. The Court of Justice just took that chance to modify its position on the *ne bis in idem* principle, as predicted by some scholars (Colangelo, Cappai, 2021). It shall be stressed again that differences between the territorial scopes of the German and Austrian interventions were sufficient to adjudicate that the *ne bis in idem* principle could not have been invoked. The telephone conversation at issue, which was merely mentioned in the final decision of the German NCA, was not, at any point, capable of being evaluated as a precluding factor in the Austrian proceedings. It is a matter of evidence and its assessment. In this case, it elicited discussion on the systemic aspects of competition law – in some part, unnecessarily and inadequately when it comes to the essence of the subject referred before the CJEU.

It is apparent that the Court did not seize the opportunity that presented itself, despite a tentative impression that it might have done so. The commented ruling lacks the same element regarding the bifurcated antitrust regime in the Union, as the *PZU* judgement did (to be precise, in light of the underlying doubts aroused around double sanctions)[20]. The CJEU could have applied in *Nordzucker* a similar approach as it did in *bpost*, to steer the interventions of authorities so as to avert collisions between them. It shall be borne in mind that *bpost* offers a method that can be called a 'coordinating rule'[21], while *PZU* puts more emphasis on a 'proportionality rule'[22]. These instalments are suitable enough to alleviate potential consequences that would derive from acknowledging that EU and national competition norms protect the same legal interests. The Court did have a possibility, resources (instruments) and motifs to address this challenge. Given these favourable factors, one can make

[19] The same cannot be said in terms of *bpost* as it relates to interrelations between antitrust and sectorial regulatory regimes. Thus, from the very beginning, the idea was to focus on Nordzucker in this paper.

[20] Separate fines imposed due to, respectively, national antitrust infringement and EU antitrust infringement.

[21] This 'rule' requires that '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, and also to predict that there will be coordination between the two competent authorities; that the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe; and that the overall penalties imposed correspond to the seriousness of the offences committed.'

[22] A call for proportionality can also be found in *PZU*. However, the more burden of the application of the law will be attached to proportionality, seemingly the more uncertainty we will come across.

a conjecture that the CJEU did not choose to adjudicate on this, and will be reluctant to do so in future as well. One of the reasons behind this strict attitude, may be related to anticipating legislative actions that would trigger their reorganisation. As a result, the Court may not find judicial intervention to be a suitable developmental tool.

V. Potential lessons for the DMA

The first reactions[23] to *Nordzuker* (and *bpost*) were largely linking the findings of the CJEU with the upcoming Digital Markets Act[24] (hereinafter: DMA). Moreover, it can be considered to what extent the forthcoming DMA encouraged the Court to unify the test for the *ne bis in idem* principle (Colangelo, Cappai, 2021, 24). The common areas of interest for the DMA and the TFEU competition provisions are believed to be reconciled particularly in compliance with the 'refurbished' *ne bis in idem* principle. Clearly, this piece of case-law can be viewed as a kind of 'gauge', but it should not be overestimated. Even if we somehow – but unlikely for the foreseeable future – ascertain the interrelationship between EU antitrust rules and the DMA[25], it shall be noted that what the DMA is about to regulate is just one side of the coin. At the same time, Member States are more or less engaged in their own legislative processes within the same scope, or virtually the same one. Further still, there are national competition norms (counterparts to 101 and 102 TFEU) the relation of which to other elements of this puzzle continues to await circumscription.

As the German way to treat Facebook demonstrated, there is great uncertainty about the interrelationship (and potential overlaps) of EU competition law, national competition law, and data protection law (as a manifestation of a 'sectorial' regulation). Legitimate questions are also raised on the abuse of competition law (Van den Bergh, Weber, 2021). Clearly, the DMA shows greater resemblance to competition law, or at least the purposes of competition law, hence a straightforward incorporation of methods formulated whilst dealing with the regulatory paradigm (in particular including sectorial regulations) may not always fit. Yet the relationship between competition law and regulation as such, is considered to be a perennial question for competition policy (Dunne, 2021, 2).

[23] Harrison, Zdzieborska, Wise (2022), Komninos (2022)

[24] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final.

[25] Providing that it does not belong to EU competition law in the first place, which is still being discussed.

VI. Final remarks

Nordzucker is one of those judgements that are seminal due to the issues they touch upon. Simultaneously, this is not one of those rulings that address a legal gap, or make the unknown known. The *ne bis in idem* principle, within the constellation of competition norms, belonged to vastly contested legal institutions for years (van Bockel, 2016, 5, Nazzini, 2014), although paradoxically, its source can be found in both the ECHR system and in the legal systems of many Member States (Rosiak, 2012, 133). Its peculiar treatment was, perhaps surprisingly, ceased for the sake of convergence with other EU fields. The CJEU, however, found its way to retain the *status quo*, but in a new guise. These are key conclusions.

Other than this, what was unknown remains unknown. A final judicial untangling of the relationship between substantive norms of EU and national law was long awaited, but to no avail due to the agile workaround of the Court. This means that the European Competition Network, with the European Commission at the forefront, must intensify efforts to prevent overlapping investigations launched by different competition authorities. In the long run however, one cannot expect much success for this partial solution though.

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