BPost and *Nordzucker*: Searching for the Essence of *Ne Bis in Idem* in European Union Law

ECJ 22 March 2022, Case C-117/20, *BPost v Autorité belge de la concurrence* Case C-151/20, *Bundeswettbewerbsbehörde v Nordzucker AG e.a.*

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Introduction

Article 50 of the Charter of Fundamental Rights of the European Union entitles a person not to be tried twice for the same criminal offence within the EU (ne bis in idem).[1] Despite its apparent simplicity, the personal and territorial scope of ne bis in idem as well as the exceptions to it continue to raise interpretation problems. That is all the more the case in the increasingly transnational enforcement context the EU continues to develop.[2] The 22 March 2022 *BPost*

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[1]The Court of Justice of the European Union already recognised it as a fundamental principle prior to the Charter becoming a binding legal instrument, *see* ECJ Joined Cases 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, *Limburgse Vinyl Maatschappij and Others* v *Commission*, ECLI:EU:C:2002:582, para. 59.

[2]M. Luchtman, 'The ECJ's Recent Case Law on Ne Bis in Idem: Implications for Law Enforcement in a Shared Legal Order', 55 *Common Market Law Review* (2018) p. 1717. *See also* among others J. Vervaele, 'The Transnational Ne Bis in Idem Principle in the EU: Mutual Recognition and Equivalent protection of Human Rights', 1 *Utrecht Law Review* (2005) p. 2; M. Wasmeier and N. Thwaites, 'The Development of *Ne Bis in Idem* into a Transnational Fundamental Right', 31 *European Law Review* (2006) p. 565; B. Van Bockel, *The Ne Bis in Idem Principle in EU law* (Kluwer 2010) p. 267 and J. Vervaele; 'Ne Bis in Idem: Towards a Transnational Constitutional Principles in the EU?', 9 *Utrecht Law Review* (2013) p. 211; J. Lelieur, '"Transnationalising" Ne Bis in Idem: How the Rule of Ne Bis in Idem Reveals the Principle of Personal Legal Certainty', 9 *Utrecht Law Review* (2013) p. 198; and A. Turma, 'Ne

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and *Nordzucker* Grand Chamber judgments gave the Court of Justice the opportunity to shed light again on how ne bis in idem is to be interpreted and applied within the EU legal order.[3] The first section of this case note will discuss how, in both judgments, the Court clearly rules in favour of a single ne bis in idem standard of protection across different subfields of EU law. The second section highlights how the judgments have contributed to determine and consolidate both the scope of Article 50 of the Charter and the limitations to it allowed for under EU law. Subsequently, the third section posits that the judgments' constitutional importance above all lies in having carved out more or less explicitly what constitutes the essence of ne bis in idem within the meaning of Article 52 of the Charter.

National and transnational double administrative enforcement: ne bis in idem?

Ne bis in idem guarantees that: (1) the same person or persons, (2) who have been convicted or acquitted definitively in criminal (including punitive administrative) proceedings[4] after having their case assessed on its merits,[5] will not be prosecuted or tried a second time (bis) (3) for the same behaviour or offence committed (idem).[6] Although it has relatively rapidly been settled that the criminal proceedings notion extends to punitive administrative proceedings as well, the idem condition gave rise to more controversy and different interpretations. Throughout the case law

Bis in Idem in European Law: A Difficult Exercise in Constitutional Pluralism', 9 *European Papers* (2020) p. 1341. For the ECJ's apparent influence on ECtHR case law, *see* by way of example C. Serneels, '"Unionisation" of the European Court of Human Rights' Ne Bis in Idem Jurisprudence: the Case of Mihalache v Romania', 11 *New Journal of European Criminal Law* (2020) p. 232-234.

[3]ECJ 22 March 2022, Case C-117/20, *BPost*, ECLI:EU:C:2022:202 (hereafter, *BPost*) and ECJ 22 March 2022, Case C-151/20, *Nordzucker*, ECLI:EU:C:2022:203 (hereafter *Nordzucker*).

[4]For the autonomous notion of criminal in EU law, *see* ECJ 5 June 2012, Case C-489/10, *Bonda*, ECLI:EU:C:2012:319, para. 37; ECJ 20 March 2018, Case C-524/15, *Menci*, ECLI:EU:C:2018:197, para. 26; *see also* ECJ 26 February 2013, Case C-617/10, *Fransson*, ECLI:EU:C:2013:105, para. 35. The Court aligns this notion with the ECHR one, *see* ECtHR 23 November 1976, *Engel and Others* v *the Netherlands*, CE:ECHR:1976:1123JUD000510071, para. 82. *See also* V. Franssen, 'La notion "pénale": mot magique ou critère trompeur? Réflexions sur les distinctions entre le droit pénal et le droit quasi pénal', in D. Thiel (ed.), *Existe-t-il encore un seul non bis in idem aujourd'hui?* (L'Harmattan 2017) p. 57.

[5]ECJ 11 February 2003, Joined Cases C-187/01 and C-385/01, *Gözutök and Brügge*, ECLI:EU:C:2003:87, paras. 28-30 and ECJ 10 March 2005, Case C-469/03, *Miraglia*, ECLI:EU:C:2005:156, para. 35. A second procedure includes one which could only result in a declaration of anticompetitive behaviour because of immunity from fines subsequent to a leniency application: *see Nordzucker*, *supra* n. 3, paras. 64-65.

[6]On those conditions *see* M. Luchtman, 'Ne Bis in Idem at the Interface of Administrative and Criminal Law Enforcement - Sufficiently Connected in Substance, Time and Space?', *Revue internationale de droit penal* (2019) p. 339.

of the European Court of Justice, an *idem factum* and an *idem crimen* interpretation had appeared simultaneously.[7] The *idem factum* interpretation[8] implies that the same offender cannot be prosecuted or convicted a second time for the same material facts.[9] By contrast, the *idem crimen* interpretation[10] states that the same person cannot be sanctioned or prosecuted more than once for a single unlawful course of conduct designed to protect the same legal asset.[11] In the latter case, double proceedings, each with a different legal interest justifying them, would not give rise to ne bis in idem, even when the facts giving rise to both prosecutions was identical. The latter interpretation was relied on by the Court in EU competition law, whereas ne bis in idem discussions in EU criminal law and in the context of the Schengen acquis were analysed in accordance with an idem factum approach.[12] *BPost* and *Nordzucker* offered the Court an opportunity to settle the question on whether both approaches still co-existed in EU law.

The *BPost* case concerned the Belgian postal services provider BPost, which had been fined by the Belgian Postal Regulator for failing to respect EU postal regulations in awarding certain discounts for services it offered. That fine was annulled on appeal, resulting in an acquittal for BPost under sectoral regulation.[13] At the same time, however, the Belgian competition authority had initiated proceedings

[7] *See* for a summary of that distinction the Opinion of AG Bobek in ECJ 2 September 2021, Case C-117/20, *BPost*, ECLI:EU:C:2021:680, paras. 39-41.

[8] *See* by way of examples, ECJ 9 March 2006, Case C-436/04, *van Esbroeck*, ECLI:EU:C:2006:165, para. 36; ECJ 28 September 2006, Case C-467/04, *Gasparini and Others*, ECLI:EU:C:2006:610, para. 54; ECJ 28 September 2006, Case C-150/05, *van Straaten*, ECLI:EU:C:2006:614, para. 48; ECJ 18 July 2007, Case C-367/05, *Kraaijenbrink*, ECLI:EU:C:2007:444, para. 26; ECJ 16 November 2010, Case C-261/09, *Mantello*, ECLI:EU:C:2010:683, para. 39.

[9] Opinion of AG Bobek in *BPost*, *supra* n. 7, para. 40.

[10] It goes back to the *Walt Wilhelm* case, where the Court held that EU and national competition laws did target restrictive behaviour from different points of view and with a different focus. Their parallel application was therefore possible, although consecutive sanctions needed to consider that a sanction had already been imposed for the same behaviour under another legal norm: ECJ 13 February 1969, Case 14-68, *Walt Wilhelm*, ECLI:EU:C:1969:4, para. 3.

[11] ECJ 7 January 2004, Case C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland et al.* v *Commission*, ECLI:EU:C:2004:6, para. 338. *See also* R. Nazzini, 'Parallel Proceedings in EU Competition Law – Ne Bis in Idem as a Limiting Principle', in B. Van Bockel (ed.), *Ne Bis in Idem in EU Law* (Cambridge University Press 2016) p. 131; and A. Rosano, '*Ne Bis Interpretatio In Idem*? The Two Faces of the *Ne Bis In Idem* Principle in the Case Law of the European Court of Justice', 18 *German Law Journal* (2017) p. 39.

[12] A. Weyembergh and I. Armada, 'The Principle of Ne Bis in Idem in Europe's Area of Freedom, Security and Justice', in V. Mitsilegas et al. (eds.), *Research Handbook in EU Criminal Law* (Edward Elgar 2016) p. 207; *see also* P. Van Cleynenbreugel, 'Le non bis in idem en droit de la concurrence: un monde de différence avec le penal?', in Thiel, *supra* n. 4, p. 171.

[13] *BPost*, *supra* n. 3, paras. 10-11.

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and, some years after the sector regulator's decision, also imposed a fine on BPost for abusing its dominant economic position under Article 102 TFEU.[14] The Brussels Court of Appeal and the Belgian Supreme Court (Cour de Cassation) differed in opinion with regard to whether the competition law fine constituted a bis in idem and asked the Court of Justice to clarify the legal test to be used in this context.[15]

In *Nordzucker*, the issue at stake concerned two administrative enforcement procedures in two different member states on the basis of a parallel application of EU competition law and its national equivalent. Nordzucker and Südzucker, two sugar-manufacturing businesses, had colluded to partition the market in Germany and Austria.[16] Following Nordzucker's application for leniency, the German Bundeskartellamt had imposed a fine on the businesses concerned for partitioning the German market in the 2004-2006 time frame. As part of that decision, reference was made to a phone call between the two businesses' sales directors on anticompetitive activities taking place in Austria as well.[17] In the meantime, the Austrian competition authority had also taken similar enforcement action against both businesses and Agrana, a Südzucker subsidiary in Austria. Before the Austrian courts, the fact that the behaviour at stake had already been penalised by another national competition authority raised questions as to when and whether ne bis in idem would apply.[18]

In his Opinions to both *BPost* and *Nordzucker*, Advocate General Bobek had proposed to unify the existing *idem factum* and *idem crimen* tests accompanying ne bis in idem tests in EU law. His suggestion was to generalise the *idem crimen* approach, which used to be referred to explicitly only in competition law cases. In his opinion, an idem situation could only exist when the two enforcement actions at stake aimed at protecting the same legal interest.[19] In his words, '[s]tating that [. . .] a second set of proceedings is always inadmissible because it relates to the same facts actually precludes the possibility of different legal interests being pursued in parallel'.[20] In order not to frustrate this possibility from the outset, an *ex ante* and general criterion excluding procedures covering different legal interest from ne bis in idem would be necessary.[21]

[14]Ibid., para. 12.
[15]Ibid., paras. 13-14.
[16]*Nordzucker*, *supra* n. 3, para. 16.
[17]Ibid., para. 17.
[18]Ibid., paras. 21-23.
[19]Opinion of AG Bobek in *BPost*, *supra* n. 7, paras. 132-141. Opinion of AG Bobek in Case C-151/20, *Nordzucker*, ECLI:EU:C:2021:681, para. 39.
[20]Opinion of AG Bobek in *BPost*, *supra* n. 7, para. 127.
[21]Ibid., para. 119.

The Court of Justice did not follow the Advocate General's proposal. It rather opted for an *idem factum* approach and only allowed the protection of legal interests to be invoked as part of an *ex post* proportionality assessment under Article 52(1) of the Charter, after bis in idem had been established. In its judgments, the Court indeed established that the only relevant criterion for the purposes of assessing the existence of the same offence (idem) is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned.[22] The Court also stated that those circumstances must stem from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space.[23] 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.[24]

That identity of material facts test, on which the Court had relied in previous cases of double-track administrative law and criminal law procedures falling within the scope of EU law,[25] was therefore equally deemed to be applicable in the context of dual punitive administrative procedures, one on the basis of competition law and the other on the basis of sectoral regulation.[26] In addition, the Court in *Nordzucker* also confirmed that in double-tracked EU competition law enforcement concerning the same anticompetitive behaviour, that test applies as well.[27] When elaborating on the idem condition, both judgments refrain from referring to previous competition law cases in which the *idem crimen* test was proposed. The Court thus implicitly overruled its previous ne bis in idem case law in competition law and applied the *idem factum* test also to that field.

It follows from this that, contrary to its earlier ne bis in idem case law in competition law, the legal classification under national law of the facts and the legal interest protected are no longer considered relevant for the purposes of establishing the presence of 'idem'.[28] The Court made clear that the protection conferred by Article 50 of the Charter cannot vary from one member state to

[22] *BPost*, *supra* n. 3, para. 33; *Nordzucker*, *supra* n. 3, para. 38.

[23] *BPost*, *supra* n. 3, para. 37. The Court more particularly referred to ECtHR 10 February 2009, *Sergey Zolotukhin* v *Russia*, CE:ECHR:2009:0210JUD001493903, § 83 and 84, and ECtHR 20 May 2014, *Pirttimäki* v *Finland*, CE:ECHR:2014:0520JUD003523211, § 49-52.

[24] *BPost*, *supra* n. 3, para. 33; *Nordzucker*, *supra* n. 3, para. 38.

[25] *Menci*, *supra* n. 4, para. 35; ECJ 20 March 2018, Case C-537/16, *Garlsson Real Estate*, ECLI:EU:C:2018:193, para. 37; ECJ 20 March 2018, Joined Cases C-596/16 and C-597/16, *Di Puma*, ECLI:EU:C:2018:192, paras. 38-40.

[26] *BPost*, *supra* n. 3, para. 37.

[27] *Nordzucker*, *supra* n. 3, para. 38.

[28] Ibid., para. 41.

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another[29] and also cannot vary from one EU law domain to another.[30] In so stating, the Court indirectly overruled earlier competition law cases, in which the idem condition was only said to be satisfied when, in addition to the same material facts, the legal interest protected by the two rules relied on to prosecute the same person was also the same. That requirement is no longer relevant: whenever there is an identity of material facts, the idem condition will be met, thus giving rise to ne bis in idem protection for the person(s) concerned.[31]

The Court's *idem factum* approach implies that no double prosecutions for identical material facts can take place. According to Article 50 of the Charter, which the Court takes as the starting point for ne bis in idem protection in both cases, the principle applies within the EU as a whole. The question therefore arose of what that would imply for material acts covering multiple territories. Would enforcement in one territory always preclude acting against that behaviour in a different member state? In *Nordzucker*, the Court nevertheless stated that nothing would impede a member state from limiting its prosecution to the effects produced by certain behaviour on its own territory.[32] In that scenario, the facts prosecuted in different territories would be similar rather than identical, as they do not concern the same territory affected.[33] As a result, the same substantive market partitioning behaviour could give rise to sanctions in both Germany and Austria, as long as competition authorities in those states limit their enforcement activities to the effects produced on their own territory.[34] The mere reference to another member state's territory without necessarily having analysed the anti-competitive effects on that territory would not be sufficient to establish the presence of identical facts. The Court made clear that it is for the national courts to verify, on a case-by-case basis, the territorial scope of the enforcement action taken in the first member state.[35]

It follows from that reasoning that only subsequent prosecutions of the same material facts covering the same territory could give rise to ne bis in idem as a matter of EU law. However, even in those cases, the Court subsequently confirmed previous case law that ne bis in idem is not an absolute fundamental right. Limits on ne bis in idem can be accepted, as long as they are compatible with Article 52(1) of the Charter. As the Court restates:

[29] *BPost*, *supra* n. 3, para. 34; *Nordzucker*, *supra* n. 3, para. 39.
[30] *BPost*, *supra* n. 3, para. 35; *Nordzucker*, *supra* n. 3, para. 40.
[31] *BPost*, *supra* n. 3, para. 35; *Nordzucker*, *supra* n. 3, para. 40.
[32] *Nordzucker*, *supra* n. 3, para. 41.
[33] Ibid., para. 44.
[34] Ibid., para. 46.
[35] Ibid., para. 47.

> 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. According to the second sentence of Article 52(1) thereof, 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.[36]

In *BPost*, the Court maintained that the two sets of rules in place pursued different legitimate interests and had been foreseen in different legal acts.[37] That could justify a duplication of proceedings, 'provided that those proceedings are complementary and that the additional burden which that duplication represents can accordingly be justified by the two objectives pursued'.[38] To establish whether such duplications are justified, it is necessary to assess: (1) (a) whether 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 (b) to predict that there will be coordination between the different authorities; (2) whether the two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe; and (3) whether any penalty that may have been imposed in the proceedings that were first in time was taken into account in the assessment of the second penalty. As such, the overall penalties imposed must correspond to the seriousness of the offences committed.[39] If and when those criteria are met, the resulting burden, for the persons concerned, of the duplication would be limited to what is strictly necessary. Applied to the cases at hand, the Court seems to indicate that this could be the case for BPost.[40]

A consolidated ne bis in idem legal standard within EU law?

With both judgments, the Court consolidated a ne bis in idem standard applicable across all fields of EU law enforcement.[41] The only test underlying Article 50 of the Charter is an *idem factum* test, which extends to all fields of EU law, including EU competition law. It also confirmed that its ne bis in idem framework applies to both national (two proceedings within one and the same

[36] *BPost*, *supra* n. 3, para. 41; *Nordzucker*, ibid., para. 50.
[37] *BPost*, ibid., para. 43.
[38] Ibid., para. 49.
[39] Ibid., para. 51.
[40] Ibid., paras. 55-58.
[41] As it had been called upon to do, *see* R. Nazzini, 'Parallel Proceedings in EU Competition Law – Ne Bis in Idem as a Limiting Principle', in Van Bockel, *supra* n. 11, p. 160; Luchtman, *supra* n. 2, p. 1724-1725 notes that the rationale for a competition law specific ne bis in idem standard may no longer be correct in light of the Charter.

member state) and transnational (two proceedings in two different member states) situations.[42] Ne bis in idem's applicability is nevertheless conditioned upon different cumulative criteria being fulfilled. Whenever applicable, ne bis in idem is not absolute, but can be subject to limitations in accordance with Article 52(1) of the Charter.

Applicability of the EU's ne bis in idem framework

To be able to invoke the presence of bis in idem, four conditions apply for a situation falling within the scope of EU law:[43]

(1) a person or different persons have been subject to criminal (including punitive administrative) law enforcement action somewhere within the EU; that enforcement action must have resulted in a final determination of the merits of the case (acquittal, immunity, sanction or any other closure of the procedure at stake following a substantive analysis): absent a finalised procedure, no ne bis in idem claims can be made;[44]
(2) those persons are confronted with a subsequent second criminal (including punitive administrative) procedure in the same or a different member state; the Court in that regard maintained that the simultaneous application of both EU and national competition law in accordance with Article 3(1) Regulation 1/2003 does not raise this issue, as only one integrated parallel procedure is taking place in that context;[45]
(3) the second procedure takes place against the same person or persons as the first one;
(4) the second procedure is based on an identical set of material facts covering the same territory as the first case (*idem factum*).

The key element of its general *idem factum* test is the presence of identical material facts. Within this context, the Court makes an important distinction between identical and similar facts. That difference is above all important in transnational situations. In accordance with the Court's earlier case law in relation to the Schengen acquis, in order for material facts to be identical, there must also be

[42]For the difference between national and transnational ne bis in idem issues in EU law, *see also* J. Vervaele, 'The Application of the EU Charter of Fundamental Rights (CFR) and its *Ne Bis in Idem* Principle in the Member States of the EU', 6 *Review of European Administrative Law* (2013) p. 134.

[43]Neither judgment raised questions regarding the scope of EU law; on that notion, *see* M. Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law'', 53 *Common Market Law Review* (2015) p. 1201.

[44]For a criticism regarding the limits of that approach, *see* M. Kaiafa-Gbandi, 'Jurisdictional Conflicts in Criminal Matters and Their Settlement within EU's Supranational Settings', *European Criminal Law Review* (2017) p. 30.

[45]ECJ 3 April 2019, Case C-617/17, *PZU*, ECLI:EU:C:2019:283, para. 37.

overlap in time and space.[46] The Court indeed confirmed that, in competition law proceedings giving rise to *Nordzucker*, the anticompetitive effects on different territories can continue to be prosecuted separately without giving rise to ne bis in idem, without even explicitly mentioning the temporal element in that case.[47]

It follows from *Nordzucker* that the applicability of ne bis in idem in transnational situations is rather limited. If a second procedure concerns the same behaviour but seeks to address its effects on a different territory than the ones covered by the first procedure, the identity of material facts condition would not seem to be met and no ne bis in idem can take place.[48] The identity of material facts presupposes that those facts took place in the same time frame as well, or at least that there is overlap to a sufficiently large extent.[49] If not, the facts would once again not be identical, but only similar. Advocate General Bobek's Opinion was conscious of this situation. He implied that, although it might happen that the subsequent proceedings concern only a part of the facts (temporal, substantive) considered in the previous one, the bottom line is that to the extent that the two sets of facts do indeed overlap, there must be identity within that overlap.[50] When that would be the case, the second proceeding would cover the same facts in his opinion. However, that is not the message that transpires from *BPost* and, above all, *Nordzucker*. The Court for its part maintains that substantive behaviour which manifests itself on different territories can be enforced separately within each state. When done so explicitly by national authorities, a second prosecution of those material facts in another member state would not give rise to ne bis in idem. As a result, the judgments could be understood as a clear invitation for member states to limit the territorial effects of their enforcement activities as a way to avoid ne bis in idem claims being made against them.

With both judgments, the Court also seems to take a different path from rules in place in the context of the Convention Implementing the Schengen Agreement. In the latter context, the prosecution of a substantive behaviour in one member state seemed to preclude a second State on which territory the behaviour also took place in part from taking subsequent enforcement action.[51]

[46]By way of example *van Esbroeck*, *supra* n. 8, para. 38.

[47]*Nordzucker*, *supra* n. 3, para. 41.

[48]Ibid., para. 47.

[49]*BPost*, *supra* n. 3, para. 51.

[50]Opinion of AG Bobek in *BPost*, *supra* n. 7, para. 135.

[51]Art. 55 of the Convention Implementing the Schengen Agreement foresees that member states cannot exclude ne bis in idem claims in cases involving behaviour taking place in part on their territory when the acts also took place in part in the territory of another member state where a first judgment was delivered. The Convention implicitly appears to acknowledge that such situations fall within the scope of ne bis in idem.

In that context, artificial splits between different territories on which the same behaviour had produced effects to avoid ne bis in idem claims were a priori ruled out. The *Nordzucker* judgment makes clear that this is not – or no longer – the case under Article 50 of the Charter.[52]

That conclusion may be somewhat surprising, as Article 50 of the Charter is said to have drawn inspiration from Articles 54-58 of the Convention Implementing the Schengen Agreement.[53] It would be tempting, therefore, to argue that the Court only wished to emphasise territorial limitations as key elements underlying competition and/or regulatory law ne bis in idem cases. The *BPost* and *Nordzucker* judgments indeed only dealt with those types of cases and could therefore be interpreted as not making general statements that apply without reservations in other fields of EU law. Even if that were the case, the Court did not sufficiently clarify the scope of its test or explain why competition law was subject to a different ne bis in idem rationale. It would also be somewhat paradoxical implicitly to overrule competition law precedents containing an *idem crimen* approach in the interest of a single ne bis in idem test at the same time as introducing a new specific territorial element only in the context of those cases. As a result, that conclusion is difficult to maintain. It would be easier to conclude that the Court clearly wanted to develop a generally applicable territorial criterion excluding procedures covering the effects of substantive behaviour in different territories from ne bis in idem. The fact that Article 50 of the Charter applies without any reservation to all fields of EU law reinforces that conclusion.

A fortiori, such a strict territorial interpretation in the context of transnational ne bis in idem does go against the ECHR, which in accordance with Article 52(3) of the Charter determines the meaning and scope for corresponding Charter rights.[54] Protocol 7 to the ECHR only covers double enforcement proceedings within one and the same state.[55] As a result, and unlike the Court of Justice, the European Court of Human Rights is not able to rule on the scope of ne bis in idem in transnational settings.[56] Transnational ne bis in idem would

[52]*Nordzucker*, *supra* n. 3, para 47.

[53]At least according to the Explanations to the Charter of Fundamental Rights, [2007] OJ C303/17; *see also* D. Sarmiento, 'Ne Bis in Idem in the Case Law of the European Court of Justice', in Van Bockel, *supra* n. 11, p. 105.

[54]*See* on that clause, X. Groussot and A. Ericsson, 'Ne Bis in Idem in the EU and ECHR Legal Orders – A Matter of Uniform Interpretation?' in Van Bockel, *supra* n. 11, p. 71-76.

[55]For examples, *see* ECtHR 15 November 2016, *A and B* v *Norway*, CE:ECHR:2016:1115JUD002413011. For a focus on the connection between the substance of procedures, *see* ECtHR 21 July 2020, *Velkov* v *Bulgaria*, CE:ECHR:2000:0518JUD004148898.

[56]*See also* for that difference H. Satzger, 'Application Problems Relating to "Ne Bis in Idem" as Guaranteed under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR', *eucrim – The European Criminal Law Association's Forum* (2019) p. 215.

therefore not correspond to an ECHR equivalent, giving EU law the possibility of developing autonomous interpretations of ne bis in idem, at least in transnational settings.[57] Against that background, the Court has felt able to consolidate its autonomous fundamental rights protection standard in this way.[58]

Limitations justifying bis in idem

It is only when those four conditions are met that ne bis in idem can possibly be invoked. Even when falling within its scope of application, the protection offered by ne bis in idem is not absolute. As the Court had previously stated in *Menci*,[59] under Article 52(1) of the Charter, the member state concerned may justify a new procedure if and when it turns out that a fresh procedure is strictly necessary to pursue another objective of general interest and that procedure forms a coherent whole with the first procedure. Such a justification must be provided for by law,[60] must respect the essence of the right at stake (see next section) and must be proportionate and necessary. The Court in its judgments above all focused on proportionality. In that context, the duplication of proceedings and penalties provided for by the national legislation may not exceed 'what is appropriate and necessary in order to attain the objectives legitimately pursued', also meaning that 'when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued'.[61] In order for that second procedure to be deemed proportionate and strictly necessary,[62] it seems that five elements have to be in place at the very least as well:[63]

(1) an objective of general interest is present, which legitimises complementary forms of enforcement against the same behaviour, which nevertheless constitute

[57] *See also* W. Devroe, 'How General Should General Principles Be? Ne Bis in Idem in EU Competition Law', in U. Bernitz et al. (eds.), *General Principles of EU Law and European Private Law* (Kluwer 2013) p. 407.

[58] That assumption requires a narrow understanding of Art. 52(3)'s homogeneity clause: *see* Groussot and Ericsson, *supra* n. 54, p. 77-78.

[59] *Menci*, *supra* n. 4, para. 46.

[60] This implies that the legal basis which permits the interference with another right must itself define the scope of the limitation on the exercise of the right concerned, *see* ECJ 5 May 2022, Case C-570/20, *BV*, ECLI:EU:C:2022:348, para. 31.

[61] *BPost*, *supra* n. 3, para. 48.

[62] *See* on that strict necessity, M. Vetzo, 'The Past, Present and Future of the *Ne Bis in Idem* Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma', 11 *Review of European Administrative Law* (2018) p. 70-74.

[63] *BPost*, *supra* n. 3, para. 51.

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a coherent whole[64]; member states can invoke any objective of general interest that is recognised in the EU legal order, including the protection of well-functioning markets. That creates numerous possibilities to find reasons that may justify double proceedings when a different legal interest justifies prosecution of behaviour on different legal grounds. Bis in idem situations that protect different legal interests can therefore be justified *ex post*;[65]

(2) 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;
(3) it must be possible to imagine that authorities will coordinate their enforcement actions;
(4) the two procedures must have been conducted within a sufficiently coordinated manner and within a sufficiently proximate timeframe;
(5) the sanction given in the first procedure is to be considered in the second procedure as well.

The justification framework is said to apply both in double enforcement cases in the same state and in transnational cases. By way of example, that would therefore mean that this framework would apply to procedures where the European Commission takes enforcement action under EU competition law, followed by national competition authorities applying national competition law to the same behaviour and on the same territory.[66] Not unlike the Advocate General,[67] the Court nevertheless seemed to have closed the door on consecutive EU and national competition law proceedings concerning the same territory; Article 101 TFEU and its national equivalents are said to contribute to the same objective of general interest. As a result, a second procedure on the basis of national competition law following a procedure on the basis of EU law would no longer be possible.[68]

It also follows from the Court's clear willingness to set up a single ne bis in idem standard that the same principles also apply in transnational settings. National authorities in another member state would therefore not be able to enforce rules against identical behaviour having been subject to criminal proceedings in a first member state before on the basis of the same or complementary legal rules, unless an objective of legitimate interest and sufficient coordination mechanisms allow for those two procedures to form a coherent whole. In practice, that would imply a sufficient level of coordination – most likely at EU level – between

[64]Ibid., paras. 44 and 49; *Nordzucker*, *supra* n. 3, paras. 52 and 56.

[65]G. Lo Schiavo, 'The Principle of Ne Bis in Idem and the Application of Criminal Sanctions: of scope and Restrictions', 14 *EuConst* (2018) p. 660.

[66]Contrary to what the Walt Wilhelm case had implied, but as also proposed by the Advocate General in his Opinion in *Nordzucker*, *supra* n. 19, para. 58.

[67]Opinion of AG Bobek in *Nordzucker*, *supra* n. 19, para. 58.

[68]*Nordzucker*, *supra* n. 3, para. 56.

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different enforcement systems, the extent of which remains open to case-by-case tailoring. In fields such as competition law, where a European Competition Network has been set up to coordinate national enforcement, such mechanisms clearly exist.[69] To some extent, Eurojust also coordinates enforcement activities in areas covered by EU criminal law.[70] It remains to be determined how the Court's ne bis in idem judgments will impact on those networks' activities in the near future. The need for clear and precise rules as such does not automatically mean that member states and EU institutions have to refer explicitly to objectives of general interest justifying complementary legal proceedings. In a follow-up ne bis in idem judgment rendered on 5 May 2022 in a double administrative-criminal enforcement situation under VAT law, the Court held that an explicit mentioning of general interest objective in a legislative instrument would not always be necessary, if it can be derived from judicial interpretations that are sufficiently clear as well.[71]

The importance attached to such coordination nevertheless boils down to the Court leaving the door open for an increase in double enforcement proceedings, both in national and transnational contexts. It is interesting to note that, contrary to what has been argued before, the presence of such coordination mechanisms is not used as a means to apply ne bis in idem more stringently.[72] The Court rather seems to say that exchange of information mechanisms may justify, if the other conditions are met, double proceedings. In doing so, disproportionate double proceedings could be avoided. At first sight, the Court's reasoning calls for more coordinated enforcement, and increased European integration of different fields of criminal and punitive administrative law. However, a side-effect of that interpretation may very well be that more double proceedings will be put in place, as member states or EU bodies believe it is more appropriate to take complementary legal action on the basis of different norms.[73] The end result may be more integrated and coordinated enforcement procedures, but also less attention to individuals' protection against double enforcement.

[69]On the European Competition Network, *see* M. De Visser, *Network-based Governance in EC Law: The Example of EC Competition and EC Communications Law* (Hart Publishing 2009) p. 440.

[70]*See*, in that regard, M. Kaiafa-Gbandi, 'Addressing the Problems of Jurisdictional Conflicts in Criminal Matters within the EU', *eucrim – The European Criminal Law Association's Forum* (2020) p. 209-213.

[71]*BV*, *supra* n. 60, para. 50.

[72]It has indeed been argued quite convincingly that more coordination and transnational exchanges of information should rather result in avoiding double enforcement: *see* Luchtman, *supra* n. 2, p. 1746.

[73]*See* to that extent, A. Perrone, 'EU Market Abuse Regulation: The Puzzle of Enforcement', 21 *European Business Organization Law Review* (2020) p. 379.

Searching for the essence of ne bis in idem in EU constitutional law

In addition to clarifying the scope of and consolidating the justifications to Article 50 of the Charter, the constitutional significance of both judgments above all lies in having shed light on what constitutes – in Charter language – the essence of ne bis in idem. The Court only addresses that question indirectly, but allows the very core of the ne bis in idem fundamental right to be identified. It also follows from the judgments that the Court relies on the inductive, objective and negative identification method it seemingly also already relied on in the context of other fundamental rights. For the large number of cases falling outside this core, it has also become clear that the EU legislator retains freedom to offer less – within the confines of Article 52(1) of the Charter – or more fundamental rights protection.

The essence of ne bis in idem

In its judgments, the Court has offered some indications of what constitutes the essence of this right. That has been welcome, as in the past this issue remained unsettled.[74] In *BPost*, the Court confirmed that any proportionate double proceeding could can take place, when it is not introduced on the basis of the same offence or in pursuit of the same objective.[75] That expression may be puzzling at first sight, as it refers to the notion of objective (of general interest), which returns in the proportionality assessment. That is all the more remarkable since the Court's test no longer depends on the classification of certain behaviour as an offence protecting the same legal interest (*idem crimen*) in its identification of bis in idem situations. The Court nevertheless states, without much further explanation, that only those double proceedings on the basis of provisions that serve the same objective of general interest or legal interest constitute the essence of ne bis in idem and could therefore never be justified.[76] Other double proceedings that fall within ne bis in idem could still be the subject of limitations. In the context of competition law enforcement, the Court also held so explicitly in *Nordzucker*: consecutive procedures covering the same territory and based on EU (first procedure) and national (subsequent procedure) or inversely would impinge upon the essence of ne bis in idem.[77]

[74]For an attempt, *see* Opinion of AG Jääskinnen in Case C-129/14 PPU, *Spasic*, ECLI:EU:C:2014:739, para. 88; the Court for its part did not touch upon the essence prior to *BPost* and *Nordzucker*.

[75]*BPost*, *supra* n. 3, para. 43.

[76]*Nordzucker*, *supra* n. 3, para. 55.

[77]Ibid., para. 56.

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It could thus be inferred that protection against 'same objective double proceedings' constitutes the essence of the EU ne bis in idem right. However, that conclusion only marginally lifts the veil on the actual substantive values underlying ne bis in idem within the EU legal order. In the case law of the European Court of Justice, two such values have emerged. In Schengen cases, it had traditionally been held that ne bis in idem was meant to promote the free movement of persons within the EU internal market.[78] If one wants to create a legal environment in which free movement of persons is to be encouraged, individuals have to be reassured that they would only be punished once for criminal behaviour committed. The risk of facing a second prosecution for the same behaviour in another member state may discourage them from moving to that other State.[79] As a result, free movement of persons may be at risk absent a relatively strict ne bis in idem standard. In that understanding, any second procedure for the same behaviour would have to be discouraged. By contrast, in competition law, it has been held to guarantee the proper administration of justice and to contribute to efficient law enforcement.[80] When effective law enforcement is the underlying value, ne bis in idem is above all an instrument to avoid over-punishment and prevent vexatious multiple proceedings.[81] In that understanding, the essence of ne bis in idem would only be affected when the second procedure in practice results in over-punishment of the behaviour considered problematic. That would most certainly be the case when a second proceeding on the basis of the same objective of general interest takes place after a first procedure protecting that objective has already resulted in a definitive assessment of that case on its merits.[82] In any other scenario, however, double proceedings could be justified whenever there is a sufficient coordination between different enforcement authorities and when no disproportionate sanctions would be imposed.[83]

Both free movement and avoidance of over-punishment could be said to be legitimate values in a developing EU legal order. As such, nothing would seem to impede the Court from considering them both as belonging to the essence of ne bis in idem. Following *BPost* and *Nordzucker*, however, it is submitted that only avoidance of over-punishment would belong to the core or essence of EU ne bis in idem. First, by accepting that behaviour can be (artificially) divided into territorial silos which can be the subject of separate enforcement actions without

[78]*See* Groussot and Ericsson, *supra* n. 54, p. 57.

[79]Ibid.

[80]W. Wils, 'The Principle of "*Ne Bis in Idem2* in EC Antitrust Enforcement: A Legal and Economic Analysis', 26 *World Competition* (2003) p. 136.

[81]Groussot and Ericsson, *supra* n. 54, p. 55.

[82]*Nordzucker*, *supra* n. 3, para. 56.

[83]*BPost*, *supra* n. 3, para. 58.

triggering ne bis in idem,[84] the promotion of free movement no longer seems to have the highest priority. That clearly tends towards avoiding over-punishment. Second, the Court's emphasis on the presence of coordination mechanisms in the proportionality assessment reinforces that conclusion. Those coordination mechanisms indeed and above all are meant to coordinate enforcement operations and, ultimately avoid over-punishment rather than facilitating persons' free movement.[85] What constitutes over-punishment depends on the behaviour concerned and the sanctions that can be imposed. Any norm of EU or national law that would result in over-punishment cannot be justified as it extinguishes the core of ne bis in idem.

The Court's inductive, objective and negative essence-identification method confirmed

In the literature, questions had been raised regarding the methodology of defining the essence of a fundamental right. Different approaches have been distinguished in this regard.[86] The *BPost* and *Nordzucker* judgments essentially confirm that the Court, when determining the essence of a fundamental right, including ne bis in idem, relies on an inductive, objective and negative method. The Court does not set out in advance the core and peripheral elements, but finds them in concrete situations (inductive method[87]). The focus thereby lies on the perspective of the role of the fundamental right in the entire legal order (objective method[88]) rather than on the perspective of the individual confronted with fundamental rights violations. In addition, the Court does not set out in too general terms what constitutes such essence. The Court would only need to intervene when the right would be completely extinguished or abolished. When that is not the case, indices of what may constitute the essence of fundamental rights can only be identified. That would be the case only if and when double proceedings in the protection of the same objective of general interest took place. As long as those circumstances are not present, there is no need to extensively interpret and rule on what constitutes the essence of ne bis in idem (negative method).[89] A similar combination of methodological elements also appears to feature in the case law of the European

[84]Ibid., para. 51; *Nordzucker*, *supra* n. 3, para. 47.

[85]*See BPost*, ibid., para. 58.

[86]For an overview, *see* M. Dawson et al., 'What is the Added Value of the Concept of the "Essence" of EU Fundamental Rights?', 20 *German Law Journal* (2019) p. 765-769.

[87]T. Tridimas and G. Gentile, 'The Essence of Rights: an Unreliable Boundary?', 20 *German Law Journal* (2019) p. 804.

[88]Tridimas and Gentile, *supra* n. 87, p. 804.

[89]K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU', 20 *German Law Journal* (2019) p. 792-793.

Court of Justice on data protection[90] and on equal treatment.[91] It could therefore be submitted that the Court somewhat consolidates its methodological 'essence' approach in the context of the ne bis in idem fundamental right as well.

Individual protection beyond ne bis in idem's essence

Conceptualising the essence of ne bis in idem in such a narrow manner implies that the Court seems a priori very ready and willing to accept limitations on ne bis in idem in every situation falling outside that 'essence'. The playing field created for the member states and the EU legislator therefore remains very large in the wake of both judgments, as long as mechanisms are put in place to avoid over-punishment. One could be inclined to argue that this limited conception of ne bis in idem's core even allows member states to accept too readily limitations on fundamental rights protection in this context. The *BPost* and *Nordzucker* judgments could be understood as presenting ne bis in idem above all as an instrument enabling and promoting enforcement coordination. In doing so, the individual rights focus – protecting individuals against multiple enforcement actions – becomes secondary to the enforcement coordination focus. As long as EU law or member states respect the essence, limitations on ne bis in idem could be justified in accordance with Article 52(1) of the Charter.

At the same time, however, it would also seem that the Court's narrow understanding of ne bis in idem's essence does not exclude more stringent protections being put in place by means of member state law or EU secondary legislation. Absent EU secondary legislation, member states would remain free to rely on more stringent ne bis in idem protections as long as the essence of that right is respected and to the extent that the primacy, unity and effectiveness of EU law is not endangered.[92] In the same way, EU legislation could itself indicate that it wishes to offer individuals a wider scope of ne bis in idem protection by stating that proceedings in one member state exclude proceedings for similar facts in

[90]T. Ojanen, 'Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter', 12 *EuConst* (2016) p. 318; M. Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core', 14 *EuConst* (2018) p. 332 and M. Brkan, 'The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU's Constitutional Reasoning', 20 *German Law Journal* (2019) p. 864.

[91]E. Muir, 'The Essence of the Fundamental Right to Equal Treatment – Back to the Origins?', 20 *German Law Journal* (2019) p. 817.

[92]For that position, *see* ECJ 26 February 2013, Case C-399/11, *Melloni*, ECLI:EU:C:2013:107, para. 60.

another member state, as long as it does not infringe other fundamental rights.[93] It is clear that a lot of possibilities exist should the legislator wish to enhance ne bis in idem beyond the Court's essence interpretation of that right. It remains to be seen whether such initiatives will emerge in the wake of the judgments analysed here.

Conclusion

The *BPost* and *Nordzucker* judgments have allowed the Court to consolidate its previous ne bis in idem case law and propose a single legal test grounded in Article 50 of the Charter. In that context, member states retain the possibility to artificially sub-divide enforcement activities and limit them to a predefined territory. In doing so, no ne bis in idem situations will emerge. When ne bis in idem does come into play, the Court requires additional formats of coordination, which grant additional opportunities for double enforcement mechanisms in and across EU member states. As a result, it would seem that ne bis in idem could be invoked successfully in only a rather limited series of circumstances.

The judgments' constitutional importance lies above all in allowing the identification of what constitutes the 'essence' of the ne bis in idem right in the EU legal order. It follows from the judgments that ne bis in idem is above all meant to avoid over-punishment. Although the Court pays limited explicit attention to the essence notion, it takes an inductive, objective and negative approach towards defining ne bis in idem's essence. It has been questioned whether, by taking this approach, the Court is not too willing to accept justifications limiting ne bis in idem situations. In addition, and despite purporting to offer a generally applicable ne bis in idem test, *BPost* and *Nordzucker* in essence also re-open debates as to how far exactly ne bis in idem protection should reach in the EU legal order. The two judgments demonstrate that both the EU legislator and the member states retain significant discretion to modulate the features of ne bis in idem not belonging to the right's essence of avoiding over-punishment.

[93]O. De Schutter, 'The Implementation of the Charter by the Institutions of the European Union', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights – A Commentary* (Hart Publishing 2013) p. 1627.

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