

# “Ne Bis In Idem in Competition Law: View from Procedural, Regulatory and National Law Aspects”

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☞ Competition law; Croatia; Double jeopardy; EU law; National competition authorities

## 1. Introduction

*Ne bis in idem* principle represents one of the most crucial principles which guarantees that nobody can be tried and accused of the same felony for which he/she was already acquitted or accused and penalized. Besides the application of this important principle of double jeopardy in criminal law, it has emerged and found its presence also in competition law being mostly administrative in nature with criminal character in the form of fines. This principle can be seen from the perspective of procedural rights and procedural fairness, the topic discussed during the international conference “Possibilities and limits of competition law: global trends, regional perspective”.<sup>1</sup>

The legal basis for *ne bis in idem* principle is Charter on fundamental rights of the EU (Charter) and European Convention on Human Rights and its Protocols.<sup>2</sup> In the EU Competition law, the Regulation 1/2003<sup>3</sup> gave parallel competence to national competition authorities to apply alongside national corresponding competition rules, the art.101 (prohibited agreements) and art.102 (abuse of a dominant position) of the Treaty on the functioning of the European Union (TFEU).<sup>4</sup> The *ne bis in idem* is related to the principle of convergence and unanimity of EU competition law which ensures that the European Commission (EC) can still handle the case to establish

infringement of art.101 or 102 TFEU which was dismissed by the national competition authority (NCA) of the EU Member State. In practice, this revealed the need for guidance in *ne bis in idem* principle because the rules on division of cases within European competition network (ECN) proved not to be sufficient.<sup>5</sup> The EU case law started dealing with the issue of *ne bis in idem* principle more coherently in *Toshiba* case by CJEU setting threefold requirements (identity of offender, identity of facts and identity of legal interest). However, the more unified approach with only two requirements aligned with the application of the *ne bis in idem* principle in European competition law was offered by more recent judgements of the CJEU in cases *BPost* and *Nordzucker* from 22 March 2022 both based on the requests for preliminary ruling. The aim of this paper is to present main findings of those judgements analysing them from perspective of procedural rights of the parties and from the perspective of relation between regulatory frameworks and competition law. Additionally, national perspective is given by looking at Croatian General Administrative Act, Competition Act and corresponding relevant practice of Croatian Competition Agency (CCA). Finally, some still open questions for further consideration are highlighted including *ne bis in idem* in relation to damages, proportionality and Digital Markets Act (DMA).

## 2. NE BIS IN IDEM-GENERAL ABOUT THE PRINCIPLE

*Ne bis in idem* is a legal doctrine that prevents an individual from being tried or punished more than once for the same offense. In the criminal law, this principle has developed through two basic postulates: no one can be subject to two criminal proceedings for the same criminal offence, and nobody can be punished twice for the same criminal offence. The condition for the first postulate is a criminal proceeding and condition for the second postulate is sanction. This means that only conviction and criminal sanction prevent from new criminal proceeding for the same offence and against the same person.<sup>6</sup> The *ne bis in idem* principle is crucial for maintaining fairness in judicial proceedings and protection of the individual by ensuring legal certainty by respecting the final court judgements (*res iudicata*).<sup>7</sup>

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<sup>1</sup> International conference “Possibilities and limits of competition law: global trends, regional perspective”, Jean Monnet Southeast European Competition Law Center of Excellence and Croatian Association for Competition Law and Policy, Osijek, Croatia, 3–5 October 2024.

<sup>2</sup> Charter of Fundamental Rights of the European Union, OJ C 326/391, 26.10.2012, European Convention on Human Rights, [https://www.echr.coe.int/documents/d/echr/convention\\_eng](https://www.echr.coe.int/documents/d/echr/convention_eng).

<sup>3</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003.

<sup>4</sup> Consolidated version of the Treaty on the functioning of the EU, OJ C 326/88, 26.10.2012.

<sup>5</sup> Jones A and Sufirin B, “EU Competition Law-text, cases and materials”, fifth edition, Oxford University Press, 2014, pp.1018–1019.

<sup>6</sup> Burić, Z, “Ne bis in idem u Europskom kaznenom pravu—Pravni izvori i sudska praksa Europskog suda/The principle ne bis in idem in European criminal law-legal sources and case law of the European Court of Justice”, UDK 343.153(4)EU 341.645(4)EU, Zbornik Pravnog fakulteta u Zagrebu, December 2009 at [820]–[821].

<sup>7</sup> Burić, Z, “Ne bis in idem u Europskom kaznenom pravu—Pravni izvori i sudska praksa Europskog suda/The principle ne bis in idem in European criminal law-legal sources and case law of the European Court of Justice”, UDK 343.153(4)EU 341.645(4)EU, Zbornik Pravnog fakulteta u Zagrebu, December 2009, pp.820–821.

Although initially the *ne bis in idem* principle was national in its scope, it has developed as transnational principle embodied in the European law as well. One of the first attempts to include *ne bis in idem* principle in the relations between EU Member States is in art.54 of the Convention on the Implementation of the Schengen Agreement.<sup>8</sup> This Article provided that: “A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.” Based on this Article several judgements of the CJEU were adopted trying to give answers on *ne bis in idem* issues including: outside of court settlement between defendant and state attorney (case *Gözütok and Brügger*),<sup>9</sup> dismissal of the criminal prosecution by the state attorney without investigation of the merit of the case (*Miraglia* case),<sup>10</sup> acquittal decision due to the lack of evidence (case *Van Straaten*)<sup>11</sup> or acquittal decision due to the statute of limitation for criminal prosecution (case *Gasparini*).<sup>12</sup>

## 2.1. European Convention on Human Rights and case law of the ECtHR

Mostly, the *ne bis in idem* principle is developed through case law of the European Court of Human Rights (ECtHR). Here few cases bear special importance for further development of the *ne bis in idem* principle in the EU law. Such case is *Zoloutkhin* in which the ECtHR aimed to establish uniform approach and to make sure that the offence for which somebody has been prosecuted is the same as the one of which that person was already acquitted or punished.<sup>13</sup> The *Zoloutkhin* case is significant because it marked a mayor shift in the interpretation of the ECtHR of the *ne bis in idem* principle. Before *Zoloutkhin* case, the ECtHR allowed the duplication of administrative and criminal penal proceedings under certain circumstances based on the *idem* crimen approach required both identity of facts and legal classifications.<sup>14</sup>

Article 4 of Protocol 7 of the European Convention on Human Rights also regulates Right not to be tried or punished twice stating that “no one shall be liable to be tried or punished again in criminal proceedings under the

jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State”.<sup>15</sup> Here the relevant case of ECtHR is *A and B v Norway* in which the ECHR introduced the test to let dual proceedings of administrative and criminal nature avoid prohibition from the art.4 of Protocol 7 of the Convention.<sup>16</sup> In this case, two Norwegian nationals submitted the claim against Norway for the breach of art.4 of Protocol No.7 to the Convention because they had been both prosecuted and punished twice in respect of the same tax offence. In the later proceedings, the national courts concluded that there was no breach of art.4 of Protocol No.7 to the Convention because “there was a sufficient connection in substance and time” between the tax proceedings and the criminal proceedings conducted against the applicants.<sup>17</sup> This connection was founded on the following factors: both proceedings are based in the same factual circumstances, they had been conducted in parallel and had to a great extent been interconnected. The ECtHR had to decide whether this argumentation of the Norwegian national courts was acceptable and whether duplication of criminal and administrative penal proceedings against the same person for the same acts may be in accordance with the *ne bis in idem* principle guaranteed and proclaimed in art.4 of Protocol No.7 to the Convention. The ECtHR concluded that two sets of proceedings may not necessarily represent a duplication of trial and punishment in the meaning of *bis*, provided these two sets of proceedings “were sufficiently closely connected in substance and in time”.<sup>18</sup> Applying these criteria to the circumstances of this case, the Court concluded that there was no violation of art.4 of Protocol No.7 to the Convention, although the applicants were prosecuted for the same acts in criminal proceedings and in administrative proceedings, which were in their essence criminal.<sup>19</sup> According to some authors, this case served as an inspiration for later judgments of the Court of the EU dealing with *ne bis in idem* principle in European law and in particular in European competition law.<sup>20</sup>

<sup>8</sup> Convention implementing the Schengen agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000.

<sup>9</sup> *Hüsein Gözütok and Klaus Brügger* Judgement of the Court, 11 February 2003, Joint Cases C-187/01 and C-385/01.

<sup>10</sup> *Filomeno Mario Miraglia* Judgement of the Court, 10 March 2005, C-469/03.

<sup>11</sup> *Jean Leon Van Straaten* Judgement of the Court, 28 September 2006, C-150/05.

<sup>12</sup> *Gasparini and Others* Judgement of 28 September 2006, C-467/04. This and all other mentioned judgements are very comprehensively explained and analyzed in Buric, Z., “The principle *ne bis in idem* in European criminal law-legal sources and case law of the European Court of Justice”, UDK 343.153(4)EU 341.645(4)EU, Zbornik Pravnik fakulteta u Zagrebu, December 2009, pp.827–852.

<sup>13</sup> ECHR *Sergey Zoloutkhin v Russia* App. Nos. 24130/11 and 2978/11, Judgement of 10 February 2009, p.84.

<sup>14</sup> See also, Burić, Z. “*Ne bis in idem* in European criminal law-moving in circles”, Croatian Judicial Cooperation in Criminal Matters in the EU and the Region: Heritage of the Past and Challenges of the Future” (CoCoCrim), 2019, pp.509–514.

<sup>15</sup> Protocol No.7 to the Convention for Protection of Human Rights and Fundamental Freedom as amended by Protocol 11. Convention and its Protocols, available at: <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=005>.

<sup>16</sup> *A and B v Norway* Appl. Nos. 24130/11 and 29785/11, Judgement of 15 November 2016.

<sup>17</sup> *A and B v Norway* Appl. Nos. 24130/11 and 29785/11, Judgement of 15 November 2016 p.29.

<sup>18</sup> *A and B v Norway* Appl. Nos. 24130/11 and 29785/11, Judgement of 15 November 2016 p.130.

<sup>19</sup> *A and B v Norway* Appl. Nos. 24130/11 and 29785/11, Judgement of 15 November 2016 pp.132 and 134.

<sup>20</sup> For example, Vetzö “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 REALaw(2018), pp.55–84.

## 2.2. Charter of Fundamental Rights of the European Union

Article 50 of the Charter titled Right not to be tried or punished twice in criminal proceedings for the same criminal offence 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”.<sup>21</sup> The exception is provided for in art.52, p.1 of the Charter which states that “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

## 2.3. EU case law

Considering *ne bis in idem* as fundamental right in EU law, several judgments of the CJEU over time developed this principle. In *Menci* case, the Court stated that the *ne bis in idem* principle prohibits a duplication both of proceedings and of penalties of a criminal nature for the purposes of that article for the same acts and against the same person.<sup>22</sup> Moreover, the application of art.50 of the Charter is not limited to proceedings and penalties which are classified as “criminal” by national law, but extends to proceedings and penalties which must be considered to have a criminal nature on the basis of the other criteria, 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 person concerned is liable to incur.<sup>23</sup> Limitation to the application of the principle can be justified under four conditions: it is provided by the law, it respects the essence of the right it limits, it meets an objective of general interest and it is subject to the principle of proportionality. Furthermore, in *Garlsson* case,<sup>24</sup> the Court underlined the importance of the obligation for cooperation and coordination between the Italian prosecution service and the national market supervisory authority which must share with the prosecution the documents collected during the monitoring activity where suspicions of a crime are discovered. Both the administrative and judicial authorities shall cooperate with each other also by means of information exchange. The CJEU found that the safeguards against an excessive severity of the cumulated

penalties were not sufficient in this case, because the offsetting mechanism was applied only to the pecuniary penalties but not between punitive administrative fines and imprisonment.<sup>25</sup> The Court also considered that the bringing of administrative punitive proceedings following a criminal conviction “exceeds what is strictly necessary in order to achieve the objective of general interest, in so far as that criminal conviction is such as to punish the offence committed in an effective, proportionate and dissuasive manner.”<sup>26</sup> In *Di Puma and Zecca* case, the possibility to bring proceedings for an administrative punitive fine following an acquittal in the criminal trial for the same conduct was also considered exceeding the necessity required by the principle of proportionality where the CJEU gave negative conclusions concerning the proportionality requirement.<sup>27</sup>

Looking at the relation of the case law of ECtHR and CJEU in developing so called double track enforcement system for *ne bis in idem* principle it is somewhat divergent but also the judgements of the CJEU in preliminary rulings followed as legal basis the decisions of the ECtHR.<sup>28</sup> It can also be observed from the case law presented that both the jurisprudence of ECtHR and CJEU dealt with *ne bis in idem* in the context of its application and relation in criminal and regulatory or administrative proceedings.

## 3. Implementation of Ne Bis in Idem Principle in EU Competition Law

What about *ne bis in idem* implementation in EU competition law?

In early case law, in the case *C-7/72 Boehringer* the CJEU found that two parallel prosecutions against the same undertaking for the same set of agreements (one by European competition law and other by national law) had not infringed the *ne bis in idem* principle. However, in fixing the amount of a fine, the EC must take account of penalties which have already been imposed to the same undertaking for the same action.<sup>29</sup>

The Case *C-17/10 Toshiba* established so called threefold criteria to be applied for *ne bis in idem* principle in competition law, the identity of the offender, the identity of facts and the same legal interest protected.<sup>30</sup> In the request for a preliminary ruling, the question pertained to the issue whether the national Czech competition authority was entitled to impose a fine under national competition law when the fine was already imposed by the EC which applied the competition provisions of the TFEU. The Court held that the *non bis*

<sup>21</sup> Charter of Fundamental Rights, art.50.

<sup>22</sup> Case C-524/15 *Menci* EU:C:2018:197, Judgement of the CJEU of 20 March 2018.

<sup>23</sup> *Ibid*, Case *Menci* para.25, 26, 27 and 30.

<sup>24</sup> Case C-537/16 *Garlsson Real Estate SA*; Judgement of the CJEU of 20 March 2018, cases C-596/16 and C-597/16 *Di Puma and Zecca*

<sup>25</sup> The divergence of practice between the case law of the ECtHR and CJEU is given by Lasagni, G and Mirandola, S in “The European *ne bis in idem* at the Crossroads of Administrative and Criminal Law”, *Eucrim*, The European Criminal Law Association’s Forum, Issue 2/2019, pp.126–135. <https://eucrim.eu/articles/european-ne-bis-idem-crossroads-administrative-and-criminal-law/>.

<sup>26</sup> *Garlsson Real Estate SA* (C-537/16) p.57.

<sup>27</sup> Cases C-596/16 and C-597/16 *Di Puma and Zecca* Judgement of the CJEU of 20 March 2018.

<sup>28</sup> Lasagni, G and Mirandola, S “The European *ne bis in idem* at the Crossroads of Administrative and Criminal Law”.

<sup>29</sup> Case C-7/72 *Boehringer v Commission*, ECLI:EU:C:1972:125, Judgement of the CJEU of 14 December 1972.

<sup>30</sup> Case C-17/10 *Toshiba Corporation and Others* C-17/10, EU:C:2012:72, Judgement the CJEU of 14 February 2012.

*in idem* principle must be observed in proceedings for the imposition of fines under competition law. That principle precludes, in competition law matters, an undertaking's being found liable or the bringing of proceedings against it again on the grounds of anticompetitive conduct for which it has been penalized or declared not to be liable by a prior decision that can no longer be challenged.<sup>31</sup> In other words, the CJEU ruled that *ne bis in idem* principle does not preclude penalties in which the national competition authority of the Member State concerned imposes on undertakings participating in the cartel, on account of the anti-competitive effects to which the cartel gave rise in the territory of that Member State prior to its accession to the European Union, where the fines imposed on the same cartel members by a decision of the EC taken before the decision of the said national competition authority was adopted, were not designed to penalize the said effects.<sup>32</sup> Some later judgments of the Court remained at the threefold criteria that the facts, the offender and protected legal interest must be the same, for example in *Slovak Telekom* judgement.<sup>33</sup>

### 3.1. NE BIS IN IDEM AS PROCEDURAL GURANTEE IN EU COMPETITION LAW: Case C 151/20 Nordzucker

Regulation 1/2003 determines that NCAs cannot establish non-infringement of EU competition law (art.101 or 102 TFEU) but instead they can only dismiss the case to enable the EC to adopt different decision and establish the infringement.<sup>34</sup> This is in line with unity and convergence of EU competition law but at the same time it represents in a way respect of the *ne bis in idem* principle. Exactly this was the starting point of the CJEU in *Nordzucker* judgement.<sup>35</sup> This judgement is significant because it offers unified approach in *ne bis in idem* as procedural right of the parties and above all it gives clear answer on the question of leniency applicants in the national competition proceedings. It can be stated that greatest benefit of this judgement is that it provides legal certainty for undertakings in *ne bis in idem* situations.

The application of the *non bis in idem* principle laid down in art.50 of the Charter in the field of EU competition law, in as much as the scope of the protection conferred by that provision cannot, unless otherwise provided by EU law, vary from one field of EU law to another.<sup>36</sup>

In *Nordzucker* case, the German federal cartel office (Bundeskartellamt) fined Nordzucker for prohibited agreement as provided for in German Competition act and art.101 TFEU by decision of 18 February 2014, which

has become final. It found that Nordzucker, Südzucker and the third German producer had infringed art.101 TFEU and the corresponding provisions of German competition law and imposed a fine of EUR 195 500 000 on Südzucker. Among other evidence in the decision, the content of the telephone conversation during which the representatives of Nordzucker and Südzucker had discussed the Austrian market was also mentioned.

In Austria, the Oberlandesgericht Wien (Higher Regional Court, Vienna) by order of 15 May 2019 dismissed the action brought by the Austrian authority, on the ground, in particular, that the agreement concluded during the telephone conversation at issue had already been subject to a penalty imposed by another national competition authority, with the result that a fresh penalty would be contrary to the *non bis in idem* principle. The Austrian competition authority lodged an appeal against that order before the Oberster Gerichtshof (Supreme Court, Austria) which as referring court paused the proceeding and referred questions for preliminary ruling to the CJEU. The questions aimed to clarify application of *ne bis in idem* principle when two national competition authorities have proceedings against the same undertakings in relation to the same infringements and with application of the same EU and national law provisions. The issue of fines imposed in first decision of the competition authority of one Member State with additional question related to leniency applicant who applied for leniency according to national leniency program.<sup>37</sup>

The Court first set two conditions for implementation of *ne bis in idem* principle in competition cases and in the present case. The application of the *non bis in idem* principle in proceedings under competition law is now subject to a twofold condition, first, that there must be a prior final decision (the '*bis*' condition) and, secondly, that the prior decision and the subsequent proceedings or decisions concern the same conduct (the '*idem*' condition).<sup>38</sup> It is no longer required that the legal interest protected is the same.

For the *bis* condition, the Court explained that in order for a decision to be regarded as having given a final ruling on the facts subject to a second set of proceedings, it is necessary not only for that decision to have become final, but also for it to have been given after a determination had been made as to the merits of the case. It concluded that in present case the German authority's final decision constitutes a prior final decision in that context.<sup>39</sup>

For the *idem* condition, Court reminded about the art.50 of the Charter prohibits the same person from being tried or punished in criminal proceedings more than once

<sup>31</sup> Case C-17/10 *Toshiba*, p.94.

<sup>32</sup> Case C-17/10 *Toshiba*, p.103.

<sup>33</sup> Case C-857/19 *Slovak Telekom a.s. v Protimonopolny urad Slovenskej republiky* EU:C:2021:139, Judgement of the CJEU of 25 February 2021.

<sup>34</sup> Council Regulation (EC) No 1/2003, art.5.

<sup>35</sup> Case C-151/20 *Bundeswettbewerbshbehörde v Nordzucker AG, Südzucker AG, Sgrana Zucker GmbH* Judgement of the CJEU of 22 March 2022.

<sup>36</sup> Case C-151/20 *Nordzucker* para.40.

<sup>37</sup> Case C-151/20 *Nordzucker* para.25.

<sup>38</sup> Case C-151/20 *Nordzucker* para.33.

<sup>39</sup> Case C-151/20 *Nordzucker* paras 34 and 35.

for the same offence and in the present case the proceedings are conducted against same legal persons (Nordzucker and Suzucker).

The relevant part of the judgement is contained in the explanation regarding establishment of the identity of facts.<sup>40</sup> The relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, they have to be identical, not just similar, so it must be understood as the existence of a set of concrete circumstances which are inextricably linked together in time and space and which have resulted in the final acquittal or conviction of the person concerned. The question whether undertakings have adopted conduct having as its object or effect the prevention, restriction or distortion of competition cannot be assessed in the abstract, but must be examined with reference to the territory and the product market in which the conduct in question had such an object or effect and to the period during which the conduct in question had such an object or effect.<sup>41</sup>

Again, Court turned to Regulation 1/2003 and its art.3(2) according to which the application of national competition law may not lead to the prohibition of agreements which may affect trade between Member States if they do not restrict competition within the meaning of art.101TFEU.<sup>42</sup> It follows from those provisions that the application of provisions of national competition law cannot lead to the prohibition of agreements, decisions and concerted practices, within the meaning of art.101TFEU, if they are not also prohibited under that national provision. In other words, the application of provisions of national competition law cannot lead to a different outcome from that which would result from applying art.101TFEU.<sup>43</sup>

Hence, the Court ruled that art.50 of the Charter must be interpreted as not precluding an undertaking from having proceedings brought against it by the competition authority of a Member State and fined for an infringement of art.101 TFEU and the corresponding provisions of the national competition law, on the basis of conduct which has had an anticompetitive object or effect in the territory of that Member State, even though that conduct has already been referred to by a competition authority of another Member State, in a final decision adopted by that authority in respect of that undertaking following infringement proceedings under art.101 TFEU and the corresponding provisions of the competition law of that other Member State, provided that that decision is not based on a finding of an anticompetitive object or effect in the territory of the first Member State.

In relation to the question about leniency applicant, the Court recalled that *ne bis in idem* principle aims to prevent an undertaking from being found liable or

proceedings being brought against it again, which assumes that that undertaking was found liable or declared not to be liable by a prior decision that can no longer be challenged. Furthermore, the *ne bis in idem* principle aims to ensure legal certainty and fairness in ensuring that once the person concerned has been tried and punished, that person has the certainty that he or she will not be tried again for the same offence.<sup>44</sup>

Finally, the Court ruled that art.50 of the Charter must be interpreted as meaning that proceedings for the enforcement of competition law, in which, owing to the participation of the party concerned in the national leniency program, only a declaration of the infringement of that law can be made, are liable to be covered by the *ne bis in idem* principle.

#### 4. NE BIS IN IDEM AS THE LINK BETWEEN COMPETITION AND REGULATION: Case C 117/20 BPost

The *BPost* judgement is not only important because it unifies the requirements for *ne bis in idem* principle in competition law in the same manner as for other EU law but also because it gave some guidance in the cases where two regulators decide about the same facts and undertakings.<sup>45</sup> *BPost* was first fined for breach of Postal Act by Postal Regulatory Authority and then subsequently for competition law infringement in the form of abuse of a dominant position from art.102 TFEU and corresponding national provisions.

The CJEU focused its ruling on the principle of proportionality and due process determining basically that the *ne bis in idem* principle does not preclude an undertaking from investigated and fined for an infringement of competition law when it was already investigated and fined by another regulatory authority for the breach of sectoral rules and based on the same facts. However, this will only apply if the following conditions are met:

- existence of clear rules regulating such acts which are subject to possible duplication of two proceedings;
- existence of coordination between competition authority and sectoral regulator;
- existence of proximate time frame between two proceedings and,
- the total penalties imposed are aligned with the seriousness of the offence.<sup>46</sup>

<sup>40</sup> Case C-151/20 *Nordzucker* paras 29 and 38.

<sup>41</sup> Case C-151/20 *Nordzucker* paras 38 and 41. Also, case C-17/10, *Toshiba* para.99.

<sup>42</sup> Also based on case C-226/11 *Expedia* EU:C:2012:795, Judgment of the CJEU of 13 December 2012.

<sup>43</sup> Case C 151/20 *Nordzucker* paras 54 and 55.

<sup>44</sup> C-617/17 *Powszechny Zakład Ubezpieczeń na Życie* EU:C:2019:283 Judgment of the CJEU of 3 April 2019, paras 29 and 33.

<sup>45</sup> Case C-117/20 *BPost SA v Autorite belge de la concurrence*, Judgment of the CJEU from 22 March 2022.

<sup>46</sup> Case C-117/20 *BPost SA v Autorite belge de la concurrence* paras 33, 34, 51, 53 and 55.

Related to this, if the second investigation or sanction imposed for the same conduct (but based on two different laws or set of rules) does not consider the first investigation or sanction, then there could be a breach of *ne bis in idem* principle.

The Court of Appeal, Brussels referred two questions to the CJEU for a preliminary ruling asking if *ne bis in idem* principle is not precluding the competent administrative authority of a Member State from imposing a fine for infringing EU competition law, in a situation where the same legal person has already been finally acquitted of an offence for which an administrative fine had been imposed on it by the national postal regulator for an alleged infringement of postal legislation, on the basis of the same or similar facts and related to two different infringements of different legislation applicable in two separate fields of law. The second question continues on the grounds that a limitation of the *ne bis in idem* principle is justified by the fact that competition legislation pursues a complementary general interest objective protecting and maintaining a system of undistorted competition within the internal market.<sup>47</sup>

The Court explained in the same manner *bis* and *idem* conditions like in the *Nordzucker* judgement. Here, the relation between regulation and competition law is defined in para.47 of the judgement where the Court concludes that it is legitimate, for the purposes of guaranteeing the ongoing liberalisation of the internal market for postal services, while ensuring the proper functioning of that market, for a Member State to punish infringements, on the one hand, of sectoral rules concerning the liberalisation of the relevant market and, on the other, of the rules applicable to competition law. The Court continues stating that compliance with the principle of proportionality requires that the duplication of proceedings and penalties provided for by the national legislation does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation. In other words, when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused and must not be disproportionate to the aims pursued.

Furthermore, the Court stated that public authorities can legitimately choose complementary legal responses to certain conduct that is harmful to society through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned. The fact that two sets of proceedings are pursuing distinct objectives of general interest which it is legitimate to protect cumulatively can be taken into account, in an analysis of the proportionality of the duplication of proceedings and penalties, as a factor that would justify that duplication, provided that those

proceedings are complementary and that the additional burden which that duplication represents can accordingly be justified by the two objectives pursued. National rules which provide for the possible duplication of proceedings and penalties under sectoral rules and competition law are capable of achieving the objective of general interest of ensuring that each of the two sets of legislation concerned is applied effectively, since they are pursuing the distinct legitimate objectives.<sup>48</sup>

Here in the presented three paragraphs of the judgement, the Court in more detail elaborates the principle of proportionality and its requirements to be fulfilled when two different public authorities act within the scope of their respective rules. With regard to the strict necessity of such duplication of proceedings and penalties, it is necessary to assess 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 also to predict that there will be coordination between the different authorities, whether the two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe and 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. The resulting burden, for the persons concerned, of such duplication is limited to what is strictly necessary and the overall penalties imposed correspond to the seriousness of the offences committed.<sup>49</sup>

What can be observed here is another important point regarding the duplication of proceedings and the need for more cooperation and coordination between regulators and competition authorities. According to the judgement, this cooperation and coordination had to actually take place with indications of a sufficiently close connection in time between the two sets of proceedings conducted and between the decisions taken pursuant to the sectoral rules and to competition law.

In the case in question, the two authorities adopted their decisions on dates that were close, given the complexity of competition investigations being sufficiently closely connected in time.

Finally, the ruling of the Court is that art.50 of the Charter read in conjunction with art.52(1) of the Charter must be interpreted as not precluding a legal person from being fined for an infringement of EU competition law where, on the same facts, that person has already been the subject of a final decision following proceedings relating to an infringement of sectoral rules concerning the liberalisation of the relevant market, provided 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

<sup>47</sup> Case C-117/20 *BPost SA v Autorite belge de la concurrence* para.20.

<sup>48</sup> Case C-117/20 *BPost SA v Autorite belge de la concurrence* paras 48, 49 and 50.

<sup>49</sup> Case C-117/20 *BPost SA v Autorite belge de la concurrence* para.51 and Case C-524/15 *Menci* paras 49, 52, 53, 55 and 58.

within a proximate timeframe and that the overall penalties imposed correspond to the seriousness of the offences committed.

The two sets of proceedings may constitute complementary and connected, but nevertheless distinct, legal responses to the same conduct. However, the CJEU in this judgement does not offer more guidance on elements which have to be fulfilled to determine with certainty sufficient level of coordination. Hence, this is something to be left on case-by-case basis. The cooperation element is more easily proven because many NCAs and regulators have concluded agreements on cooperation which among other things include exchange of information, technical support and assistance in ongoing cases.

On the other hand, the coordination requirement is more vague and not clear enough what is required level of coordination from the *Bpost* case. Another takeaway from this ruling is that there is obvious necessity for more enhanced cooperation between competition authorities and regulatory authorities.

#### 4.1. The Relevance of *Nordzucker* and *Bpost* Judgements

Main contribution from *Bpost* and *Nordzucker* judgments which are analysed is introduction of unified approach and move from threefold conditions from *Toshiba* judgement to only two conditions. First condition, *bis* refers to prior final decision on the merits and second condition, *idem* refers to the same facts, same offence. Therefore, uniform approach introduced in *Nordzucker* and *Bpost* judgement should be seen as very positive step forward. As pointed out by Zelger, replacing threefold test with twofold criterion while making the establishment of facts subject to “effective approach” is welcomed development.<sup>50</sup> According to the author, “effective approach” is sufficient to effectively guarantee the protection of competition without criterion of the same legal interest being necessary. It is also in line with opinion of the advocate general Kokott in *Toshiba* case who claimed that material facts could always be considered as identical when two decisions of competition authorities relate to the same cartel.<sup>51</sup> This makes sense looking from procedural rights perspective, so it can be argued that the new unified approach also contributes to more legal certainty for undertakings when investigated by two competition authorities or by competition authority and regulatory authority. Zegler goes further in the

analysis on that line and concludes that by making *ne bis in idem* prohibition subject to two criteria only, the standards of individual protection seem to have increased and not decreased.<sup>52</sup>

### 5.1. Ne Bis in Idem from National Perspective-Croatia

#### 5.1. Legislation-Criminal Procedure Act and Law on Administrative Procedure

Criminal Procedure Act explicitly states in art.12 that no one shall be tried again for an offence for which he has already been convicted by a final court’s decision and criminal proceedings against a person who was acquitted by a final court’s decision may not be reopened.<sup>53</sup> This is equally applied to legal persons based on the Act on responsibility of legal persons for criminal offences which states that the provisions of the Criminal Code, the Criminal Procedure Act and the Act on the Office for the Prevention of Corruption and Organized Crime applies to legal persons.<sup>54</sup> However, in competition cases, this would not be applicable because competition law proceedings conducted before the CCA are administrative cases and fines are imposed only on legal persons (undertakings) and not on natural persons.

The only exception is criminal offence “Misuse of Public Procurement Procedures” applying to the prohibited agreement between economic entities in a public procurement procedure when the bid is based on a prohibited agreement between economic entities, the aim of which is that the contracting authority accepts a certain bid”. For this criminal offence the sanction is imprisonment from six months to five years.<sup>55</sup> Even in this situation, the CCA would conduct administrative proceeding based on the Competition Act<sup>56</sup> and the State Attorney would conduct criminal proceeding. Hence, here like in *Nordzucker* and *BPost* cases, two authorities would conduct proceedings for the same prohibited behavior and same material facts but based on different legal texts.

Competition Act does not mention double jeopardy principle, and for any procedural rights and obligations not regulated by Competition Act, General Administrative Act applies.<sup>57</sup>

Looking at other national rules applicable in administrative proceedings, art.13 of General Administrative Act titled “Principle of Protection of Acquired Rights of Parties” is relevant.<sup>58</sup> This Article

<sup>50</sup> Zelger, B, “The principle of ne bis in idem in EU competition law: the beginning of a new era after the ECJ’s decision in BPost and Nordzucker?”, *Common Market Law Review* 60, 239–262, 2023.

<sup>51</sup> Zelger, B, “The principle of ne bis in idem in EU competition law: the beginning of a new era after the ECJ’s decision in BPost and Nordzucker?”, *Common Market Law Review* 60, p.256.

<sup>52</sup> Zelger, B, “The principle of ne bis in idem in EU competition law: the beginning of a new era after the ECJ’s decision in BPost and Nordzucker?”, *Common Market Law Review* 60 p.257.

<sup>53</sup> Zakon o kaznenom postupku/Criminal Procedure Act, art.12, Official Gazette, No.152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 130/20, 80/22, 36/24.

<sup>54</sup> Article 2, Zakon o odgovornosti pravnih osoba za kaznena djela/ Act on responsibility of legal persons for criminal offences, Official Gazette, No.151/03, 110/07, 45/11, 143/12, 114/22, 114/23.

<sup>55</sup> Kazneni zakon/Criminal Code, Official Gazette, art.254., No.125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, 114/23, 36/24.

<sup>56</sup> Zakon o zaštiti tržišnog natjecanja/Competition Act, Official Gazette, No.79/09, 80/13, 41/21.

<sup>57</sup> Competition Act, art.35.

<sup>58</sup> Zakon o opcem upravnom postupku/General Administrative Act, Official Gazette, No.47/09, 110/21.

provides that a decision of an administrative body against which an objection may not be lodged or administrative dispute initiated (final order), and by which a party acquired certain rights or by which a party was obligated to perform certain obligations, may be annulled, revoked or changed only in the cases provided by law.

Article 13 has two important implications, it defines final decision of a public administration body as the decision against which no appeal is allowed, as first instance administrative decision against which appeal was not allowed or the claim was not submitted, as second instance administrative decision against which no claim was submitted or as an administrative decision against which the claim was submitted but the administrative court rejected the claim.

Secondly, the annulment or amendment of final decision is permissible only in cases defined in the law (mostly extraordinary legal remedies) and only in relation to final administrative decisions giving some rights or determining certain obligations on the parties.<sup>59</sup>

The described Article from General Administrative Act can also have bearing in *ne bis in idem* principle as procedural rights in competition proceedings when only national law is applied. CCA already used this Article in several cases where exactly the same initiative to start the proceeding against the same undertakings was again submitted.<sup>60</sup> Besides this, it is expected now that the approach from *Nordzucker* and *BPost* judgement would be followed in parallel proceedings based on national and European competition law.

## 5.2. Case law of the Croatian Competition Agency

In practice of the CCA the issue of *ne bis in idem* and parallel competence of two authorities appeared in case *CCA v Hrvatski telekom d.d.* where the party Hrvatski Telekom d.d. (HT) claimed that the CCA does not have the competence in that case because, HT is subject to regulatory rules.<sup>61</sup> The HT based its claim on the Notice on access in telecommunications and the fact that it is strictly regulated market subject to *ex ante* and *ex post* regulation by sectoral regulator which also has the competence to apply measures to ensure competition. Due to that it is necessary to avoid duplication of proceedings, especially taking into account that said undertaking HT with its autonomous behavior could not

step outside the framework set by national legislation. The CCA remained that based on national legislation (Croatian Competition Act) it has *ex post* competence to conduct proceedings in all markets including electronic communication services as in present case. By doing so, it does not intervene in the competence of sector regulator to deal with issues from its regulatory framework. In that respect, art.6, para.1 of Law on electronic communications prescribes that its implementation does not affect competence and powers of national competition authority (CCA) set in line with special law. Moreover, based on the Article 5 of the same law, telecom regulator will provide expert and technical assistance to the CCA.<sup>62</sup>

The CCA in its explanation relied on the EU case law, primarily on cases *C-83/98 Ladbroke Racing* Case *C-280/08 Deutsche Telekom* and decision of the EC in case *Telekomunikacija Polska*.<sup>63</sup>

All the mentioned cases confirm that competition rules can be applied in the cases where the subject matter is regulated by other sectoral legislation.<sup>64</sup> It means that specific sectoral rules do not exclude implementation of competition law.

Besides that, the undertaking in a dominant position has to be aware that its behavior on the market can be assessed from the aspect of regulatory rules and from the aspect of competition rules by different competent authorities.<sup>65</sup>

## 6. Open Questions in Further Application of Ne Bis In IDEM

The above analysis covered some important aspects of *ne bis in idem principle* in competition law based on relevant EU case law with positive assessment of two presented judgements *Nordzucker* and *BPost* by most researchers. Still, it does not cover everything, and not all the legal questions are answered. One unanswered question is the one on damages claims.

- a) *Damages claims* -The remaining question in the application of *ne bis in idem principle* is its impact on damages claims. Directive on Damages in competition law cases<sup>66</sup> does not include this point probably from the fact that Directive regulates private enforcement usually followed by public enforcement. However, in practice it may occur that damages are awarded only in one

<sup>59</sup> Rajko, A. "Postoji li u upravnom postupku presudena stvar?" "Is there judged administrative act?", 4.2.2014, available at: <https://www.iusinfo.hr/aktualno/u-sredistu/postoji-li-u-upravnom-postupku-presuena-stvar-17614>.

<sup>60</sup> For example, case *CCA v Local and regional self-government units (AZTN protiv Jedinica lokalne i podrucne (regionalne) samouprave)*, Class: UP/I 034-03/23-03/009, Notice about finality of decision of 8 August 2023.

<sup>61</sup> Case *AZTN/Hrvatski telekom/ CCA v Hrvatski telekom d.d.*, Class: UP/I 034-03/2013-01/007, decision of the CCA of 14 November 2018.

<sup>62</sup> Zakon o elektroničkim komunikacijama/Law on electronic communications, Official Gazette, No.73/08, 90/11, 133/12, 80/13, 71/14, 72/17.

<sup>63</sup> Case *C-83/98 France v Ladbroke Racing and Commission* Judgement of the CJEU of 16 May 2000 para.34, Case *C-280/08 Deutsche Telekom v Commission* Judgement of the CJEU of 14 October 2010 para.113, Case *COMP/39.525 Telekomunikacija Polska, decision of the European Commission of 22 June 2011 para.126–128, 131, 133, 143.*

<sup>64</sup> More about the cases in Malnar B V, Kaufman P J, Petrović, S, Akšamović D and Liszt, M, „Pravo tržišnog natjecanja i državnih potpora“, Pravni fakultet Sveučilišta u Zagrebu, 2021, pp.65–67.

<sup>65</sup> Case *Deutsche Telekom* para.124 and case *Telekomunikacija Polska* para.133.

<sup>66</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014.

case and then claimed in another related case, then the question is whether *ne bis in idem* applies and if so, what about damages claims already awarded.<sup>67</sup>

- b) *Implementation of the DMA*-Another important aspect for further discussion is implementation of the DMA and *ne bis in idem* considering divided competence between EC applying DMA and NCAs applying competition rules or similar national regulatory provisions dealing with digital platforms, like in Germany, s.19a of Competition Act deals specifically with undertakings that are active to a significant extent on multi-sided or network markets, and secondly, it must feature paramount significance for competition across markets.<sup>68</sup> Namely, some relevant issues remained unaddressed when application of this principle in digital economy.<sup>69</sup> Considering that DMA does not replace competition rules but that it is applied in parallel, here some potential overlapping and conflicting decisions may emerge. This is well elaborated by Cappai and Colangelo who warn that it is still unclear whether national legislation applying to large digital platforms is implementing EU law for purposes of art.51 of Charter.<sup>70</sup> If the answer to this question is positive, then the centralized application of the DMA might be undermined by earlier intervention by an NCA. If the answer is negative, then the undertakings may lose fundamental protection.<sup>71</sup>
- c) *Sufficient level of cooperation and coordination between two authorities*-The level of cooperation between NCA and a regulator is not concretely described in the recent judgement so the remaining questions remain, how to prove it? What are determining elements? What is considered as sufficient? This is something that the practice will have to show in further application of principles from *BPost* judgement. In addition, the issue of legal interest is not required anymore in two judgments presented and as stated in *BPost*,

two proceedings can be based on the rules aiming at different goals, liberalization of the postal market in postal services by sectoral rules and protection of competition with aim not to distort or limit competition on the relevant market. However, sometimes, those two set of rules actually follow the same objectives, very often sectoral rules aim also to promote competition and even refer to competition in their provisions. Therefore, in this respect the Court left some room for interpretation because it may happen in practice that two authorities could find that they are following different objectives and protecting different legal interests whereas they are the same. The practice will show whether the mere fact that some sectoral regulation mentions competition among its objectives is sufficient to claim that it protects the same legal interest. It can be argued that it is not, due to the fact that core objective and purpose of the sectoral regulation is still different than the one recognized in competition legislation. The danger here of course is that *ne bis in idem* principle does not apply, and as a consequence the undertaking could be investigated by more than one not parallel but overlapping investigations and get fines for its illegal behavior based on both legal grounds. This could come in question with the application of DMA, as explained above.<sup>72</sup>

## 7. Conclusion

There are positive sides of recent EU case law in relation to application of *ne bis in idem* principle in competition law cases, primarily from procedural rights and legal certainty because it offers unified approach in *ne bis in idem* situations. This case law serves as an instrument ensuring further procedural rights and making clearer distinction between regulatory rules and competition law and in the case of two national competition authorities taking action against the same undertaking based on the same facts with unified approach consisted of those two main elements. This can be observed as unified solution for the unanimity of EU law. Considering that competition

<sup>67</sup> Some answers are provided by Kostova L, “The non-interaction between actions for damages and *ne bis in idem*”, LLM Thesis in European Law, Utrecht University, Department of Law, Economics and Governance July 2013. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2295588](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295588)

<sup>68</sup> More about s.19a of German Competition act in, Bauermeister, T, “Section 19a GWB as the German “Lex GAFA”- lighthouse project or superfluous national solo run?”, Jean Monnet Network on EU Law Enforcement Working Paper Series No.22/23.

<sup>69</sup> See, Van de Gronden, JW and Rusu CS, “Competition Law in the EU-principles, substance, enforcement”, second edition, Edward Elgar Publishing, UK, 2024, chapter 2.2.4., pp.335-336.

<sup>70</sup> Article 51 of Charter on Fundamental Rights “Field of application: The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.”

<sup>71</sup> Cappai, M and Colangelo, G, “Applying *ne bis in idem* in the aftermath of *BPost* and *Nordzucker*: the case of EU competition policy in digital markets”, *Common Market Law Review*, 60, 431-456, 2023.

<sup>72</sup> Patrick Harrison warned about this in: “*Ne bis in idem*: The Final Word?”, *Kluwer law competition blog*, 7 April 2022, available at: <https://competitionlawblog.kluwercompetitionlaw.com/2022/04/07/ne-bis-in-idem-the-final-word/>.

cases are increasingly global (especially cartels), it is not uncommon in practice that more than one NCA is dealing with the same behavior on their territory. In that respect, it is very good to have clarity on *ne bis in idem* principle in practice set by *Nordzucker* judgement which is one step further from EU Directive 2019/1 (ECN+Directive)<sup>73</sup> and Commission Notice on cooperation within the Network of Competition Authorities.<sup>74</sup> *BPost* judgment on the other hand, is important development in determining level of cooperation and coordination between NCAs and regulators although here some more concrete guidance would be useful. There are still some remaining questions in the way forward. Further clarifications will be necessary, particularly in the application of the DMA and proportionality principle, on the impact of this principle in damages claims in related competition cases and on the sufficient level of cooperation and coordination between different authorities as main issues to be taken into account in the future.

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<sup>73</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019.

<sup>74</sup> Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004.

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