Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 30 March 2023 [1]

Case C-27/22

Volkswagen Group Italia S.p.A.,
Volkswagen Aktiengesellschaft
v
Autorità Garante della Concorrenza e del Mercato,
intervener:
Associazione Cittadinanza Attiva Onlus,
Coordinamento delle associazioni per la tutela dell'ambiente e dei diritti degli utenti e consumatori (Codacons)

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling – Fundamental rights – Principle *ne bis in idem* – Penalties imposed for unfair commercial practices – Criminal conviction with the force of *res judicata* handed down in a Member State – Criminal administrative pecuniary penalty imposed in another Member State against the same person for the same facts – Application of the principle *ne bis in idem* to the duplication of cross-border proceedings in which a penalty is imposed – Limitation on the principle *ne bis in idem* – Coordination of the duplication of proceedings in which a penalty is imposed)

1. This reference for a preliminary ruling concerns the cross-border application of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') in a case that has nothing to do with the free movement of persons in the area of freedom, security and justice.

2. The case at hand deals with the convergence of penalties and proceedings in which a penalty is imposed by the authorities of two Member States, Germany and Italy. [2] The conduct penalised is attributed to a single conglomerate of car manufacturers established in Germany and its effects are felt in both countries (among many others).

3. In disputes of this nature, problems in applying limitations to the principle *ne bis in idem*, on the basis of Article 52 of the Charter, arise where the conduct of proceedings initiated by the authorities of two Member States is not sufficiently coordinated, leading to the duplication of penalties.

[1] Original language: Spanish.

[2] Those authorities are the Autorità Garante della Concorrenza e del Mercato (Competition Authority, Italy; 'the AGCM') and the Public Prosecutor's Office of Brunswick, Germany.

4. The Court has held that the coordination of proceedings in which a penalty is imposed is an essential condition for the application of such limitations. However, the question arises as to whether it is possible (and realistic) to insist on that requirement in the event of the duplication of proceedings in which a penalty is imposed in two Member States, conducted by competent authorities in different sectors of activity, where there is no legal mechanism for coordinating those authorities' actions. [3]

I. Legal framework

A. European Union law

1. Charter of Fundamental Rights of the European Union

5. Article 50 ('Right not to be tried or punished twice in criminal proceedings for the same criminal offence') provides:

'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.'

6. Article 52 ('Scope of … rights') provides:

'1. 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. Directive 2005/29/EC [4]

7. Under Article 1:

'The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.'

[3] To date, the Court has adjudicated on *ne bis in idem* cases concerning penalties issued by different national authorities of the same Member State (such as the case considered in its judgment of 22 March 2022, *bpost* (C-117/20, EU:C:2022:202; 'the judgment in *bpost*'), which involved Belgium's postal regulator and competition authority). It has also ruled on requests for a preliminary ruling concerning penalties imposed by the competition authorities of two Member States (judgment of 22 March 2022, *Nordzucker and Others*, C-151/20, EU:C:2022:203; 'the judgment in *Nordzucker*').

[4] Directive of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ 2005 L 149, p. 22).

8. Article 3(4) states:

'In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.'

9. Article 13 used to read as follows:

'Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.'

10. That same Article 13, as amended by Directive (EU) 2019/2161,[5] with effect from 28 May 2022, now reads as follows:

'1. Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

2. Member States shall ensure that the following non-exhaustive and indicative criteria are taken into account for the imposition of penalties, where appropriate:

…

(e) penalties imposed on the trader for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council [;[6]]

…

3. Member States shall ensure that when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4% of the trader's annual turnover in the Member State or Member States concerned. …

…'

[5] Directive of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ 2019 L 328, p. 7).

[6] Regulation of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (OJ 2017 L 345, p. 1).

B. National law. Legislative Decree No 206 of 6 September 2005 [7]

11. Article 20(2) states:

'A commercial practice is unfair if it is contrary to professional diligence and materially distorts or is likely to materially distort the economic behaviour, as regards the product, of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when the commercial practice is directed at a particular group of consumers.'

12. Article 20(4) identifies two categories of unfair practices: misleading practices (Articles 21, 22 and 23) and aggressive practices (Articles 24, 25 and 26).

13. Article 27(9) provides:

'In addition to the measure prohibiting the unfair commercial practice, the Authority shall impose an administrative pecuniary penalty of EUR 5 000 to EUR 5 000 000, having regard to the seriousness and duration of the infringement. In the case of unfair commercial practices under Article 21(3) and (4), the penalty shall not be less than EUR 50 000.'

II. Facts, dispute and questions referred for a preliminary ruling

14. By Decision No 26137 of 4 August 2016, the AGCM imposed a pecuniary penalty on Volkswagen Group Italia S.p.A. and Volkswagen Aktiengesellschaft ('VWGI' and 'VWAG' respectively) in the amount of EUR 5 million, on the ground that they had engaged in unfair commercial practices of the kind referred to in Article 21(1)(b), Article 23(1)(d) and Article 21(3) and (4) of the Consumer Code. Those provisions transpose Directive 2005/29 into Italian law.

15. According to the order for reference, the infringements attributed to VWGI and VWAG by the AGCM consisted of:

– the placing on the Italian market of diesel vehicles equipped with systems designed to alter the measurement of pollutant emissions for the purposes of their approval; [8]

– the dissemination of advertisements which, notwithstanding the alteration of emission measurements, stressed that those vehicles complied with environmental regulatory requirements.

16. VWGI and VWAG challenged the AGCM's decision before the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy; 'the TAR Lazio').

[7] Decreto Legislativo n. 206 – Codice del consumo, a norma dell'articolo 7 della legge 29 luglio 2003, n. 229 (Legislative Decree No 206 establishing the Consumer Code under Article 7 of Law No 229 of 29 July 2003) of 6 September 2005 (Ordinary Supplement to GURI No 235 of 8 October 2005; 'the Consumer Code').

[8] These were devices fitted to vehicles with Volkswagen engines in which software had been installed capable of detecting when the motor vehicle was on a test rig to check its pollutant emissions, so that at the moment of testing, the motor vehicle would operate with less pollution, thereby reducing gas emissions. Once the tests were over, the emissions produced by the vehicle in normal use would return to their original level, much higher than the legally permitted level. Those devices are prohibited by Article 5(2) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1). See, in that regard, judgments of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)* (C-693/18, EU:C:2020:1040); of 14 July 2022, *GSMB Invest* (C-128/20, EU:C:2022:570); and of 14 July 2022, *Porsche Inter Auto and Volkswagen* (C-145/20, EU:C:2022:572).

17. In 2018, after the AGCM had adopted Decision No 26137 of 2016 but before the TAR Lazio delivered its judgment, the Public Prosecutor's Office of Brunswick notified VWAG of a decision imposing a penalty on it of EUR 1 000 million, in accordance with the Gesetz über Ordnungswidrigkeiten (Law on administrative offences; 'the OWiG'). [9]

18. That penalty concerned, inter alia, the same facts as those penalised by the AGCM. The referring court states that the conduct complained of in Germany consisted of:

– the placing on the worldwide market (a total of 10.7 million vehicles, of which 700 000 were destined for the Italian market) of vehicles equipped with systems designed to alter the measurement of pollutant emissions for the purposes of their approval;

– the dissemination of advertisements that, notwithstanding the alteration of emission measurements, stated that those vehicles were particularly environmentally friendly.

19. The decision of the Public Prosecutor's Office of Brunswick became final on 13 June 2018 because VWAG waived its right to challenge that decision. It also paid the pecuniary penalty on 18 June 2018.

20. On 3 April 2019, the TAR Lazio delivered judgment No 6920/2019 dismissing the action brought by VWGI and VWAG, even though those two companies had invoked the decision of the Public Prosecutor's Office of Brunswick.

21. In particular, VWGI and VWAG cited a number of court rulings from other Member States which had brought an end to national proceedings concerning the alteration of emission measurements because such facts had already been penalised in Germany.

22. The TAR Lazio rejected that argument. It held that the legal basis for the AGCM's penalty was different from the legal basis for the penalty imposed in Germany and that the principle *ne bis in idem* did not preclude the former.

23. VWGI and VWAG lodged an appeal against the judgment of the TAR Lazio before the Consiglio di Stato (Council of State, Italy), which has referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Can the penalties imposed for unfair commercial practices under national legislation implementing [Directive 2005/29] be classified as criminal administrative penalties?

(2) Must Article 50 of the [Charter] be interpreted as precluding a national provision that makes it possible to uphold in court proceedings and make final a criminal administrative [pecuniary] penalty against a legal person in respect of unlawful conduct in the form of unfair commercial practices, for which a final criminal conviction has been handed down against that person in the meantime in a different Member State, where the latter criminal conviction became final before the [decision in the judicial proceedings challenging] the former criminal administrative [pecuniary] penalty became *res judicata*?

[9] The German decision bears the reference 'NZS 411 Js 27840/18'.

(3) Can the provisions laid down in Directive 2005/29, with particular reference to [Article 3(4) and Article 13(2)(e)], justify a derogation from the principle … *ne bis in idem* established by Article 50 of the [Charter] (subsequently incorporated into the Treaty on European Union by Article 6 TEU) and by Article 54 of the Schengen Convention?'

III. Proceedings before the Court

24. The request for a preliminary ruling was received at the Court on 11 January 2022.

25. Written observations were submitted by the AGCM, the association Codacons,[10] VWGI, the Netherlands and Italian Governments and the European Commission.

26. The AGCM, VWGI, the Netherlands and Italian Governments and the Commission attended the hearing on 19 January 2023.

IV. Assessment

A. Admissibility

27. The AGCM argues that the questions referred for a preliminary ruling are inadmissible on two grounds.

– Article 50 of the Charter and Article 54 of the Schengen Convention[11] are not relevant to the present dispute, since the rules on the liability of legal persons underpinning the German penalty do not fall within the scope of EU law.

– The facts giving rise to the adoption of the two penalties are not the same. The German decision penalises VWAG's conduct consisting of negligent breach of the obligation to supervise the fitting of a device that made it possible to falsify tests on pollutant emissions from its vehicles. By contrast, the Italian decision penalises VWAG and VWGI for failing to inform consumers of the existence of that device in vehicles sold in Italy.

28. Neither of those arguments seems to me to be sufficiently persuasive to declare the reference for a preliminary ruling inadmissible.

[10] The association Codacons (Coordinamento delle associazioni per la tutela dell'ambiente e dei diritti degli utenti e consumatori) intervenes in the main proceedings in support of the AGCM.

[11] 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 common borders, which was signed at Schengen on 19 June 1990 and entered into force on 26 March 1995 (OJ 2000 L 239, p. 19; 'the CISA'). Article 54 provides: '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'.

29. As regards the first argument, Article 51(1) of the Charter states that the provisions of the Charter are addressed to the Member States when they are implementing EU law. [12] Since the AGCM's decision is based on provisions of the Italian Consumer Code implementing Directive 2005/29, we are dealing with a situation in which a Member State is implementing EU law.

30. That in itself is sufficient to trigger Article 50 of the Charter, irrespective of whether or not the decision of the German Public Prosecutor's Office was also taken on the basis of a national provision implementing EU law.

31. Moreover, although the German penalty is directly covered by the OWiG (which is, in principle, unrelated to EU law), that penalty ultimately punishes not only the mere *formal* breach of supervisory duties, but also, indirectly, the *substantive* infringements of the EU rules governing the vehicle approval procedure. [13] In that regard, it also implements EU law and, as such, must comply with the Charter, in particular Article 50 thereof.

32. It is also necessary to dismiss the second ground of inadmissibility put forward by the AGCM, which is concerned more with the substance of the dispute than with the conditions for the admissibility of the reference for a preliminary ruling.

33. The facts forming the subject matter of the Italian and German proceedings for the imposition of a penalty are closely linked because they relate, in both cases, to (a) the wrongful fitting of a device to falsify emission tests, and (b) the advertising and sale of vehicles in another Member State without disclosing that fact.

34. Whether or not that link is sufficient to find that the facts penalised in both sets of proceedings are the same is, I repeat, a matter that goes to the substance of the reference for a preliminary ruling and not to the conditions for its admissibility.

B. Preliminary remarks

35. Before proposing an answer to the referring court, I would like to make two remarks on the provisions mentioned in its third question.

36. Of those provisions, Article 3(4) and Article 13(2)(e) of Directive 2005/29 and Article 54 of the CISA do not seem to me to be relevant here.

37. As regards Article 3(4) of Directive 2005/29, [14] read in the light of recital 10 thereof, it follows that that directive is to apply when there are no specific provisions of EU law regulating specific aspects of unfair commercial practices. That provision refers to conflicts between EU rules, not between national rules. [15]

[12] Judgments of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 78 and the case-law cited); of 20 March 2018, *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193, 'the judgment in *Garlsson Real Estate*', paragraph 23); and of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraphs 19 and 21).

[13] As VWGI argued at the hearing.

[14] 'In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.'

[15] See judgments of 13 September 2018, *Wind Tre and Vodafone Italia* (C-54/17 and C-55/17, EU:C:2018:710, paragraphs 58 and 59), and of 16 July 2015, *Abcur* (C-544/13 and C-545/13, EU:C:2015:481, paragraph 79).

38. That article is an expression of the principle of speciality: proceedings under Directive 2005/29 are subsidiary to other more specific proceedings under EU law penalising unfair commercial practices.[16] It is not a rule of law specifically enunciating the principle *ne bis in idem*, protected by Article 50 of the Charter. It is simply intended to prevent the duplication of proceedings governed by different rules on the punishment of unfair commercial practices.

39. As regards Article 13(2) of Directive 2005/29, that provision was incorporated into that directive by Directive 2019/2161[17] and took effect only from 28 May 2022.[18] It is therefore not applicable *ratione temporis* to the facts penalised in the main proceedings.

40. As regards Article 54 of the CISA, the Court has held that 'the principle *ne bis in idem* set out in [that article] is intended to ensure, in the area of freedom, security and justice, that a person whose trial has been finally disposed of is not prosecuted in several Member States for the same acts on account of his or her having exercised his or her right to freedom of movement …'.[19]

41. Although the present case concerns the cross-border application of the principle *ne bis in idem* involving authorities in Germany and Italy, the protection of the free movement of persons, which is the *raison d'être* of Article 54 of the CISA, is not at issue.

42. In the light of the foregoing, I consider that the answer to the referring court's question must be given solely in the light of Article 50 of the Charter.

C. First question referred

43. The Consiglio di Stato (Council of State) enquires whether the penalties imposed for unfair commercial practices under the national legislation implementing Directive 2005/29 can be classified as criminal administrative penalties. The amount of those penalties may vary between EUR 5 000 and EUR 5 million.

44. The principle *ne bis in idem*, enshrined in Article 50 of the Charter, prohibits a duplication of both proceedings and penalties of a criminal nature for the purposes of that article for the same acts and against the same person.[20]

45. It is for the referring court to assess in each case whether the proceedings and penalties are of a criminal nature, applying the criteria upheld by the Court which refer to the case-law of the European Court of Human Rights[21] ('the *Engel* criteria').[22] The Court may, however, provide additional clarification to guide the national court in its interpretation.

16 I refer to the analysis set out in my Opinion in Joined Cases *Wind Tre and Vodafone Italia* (C-54/17 and C-55/17, EU:C:2018:377, points 92 to 119).

17 The new paragraph is reproduced, in part, in point 10 of this Opinion.

18 As provided for in Article 7(1) of Directive 2019/2161.

19 Judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem) (C-435/22 PPU, EU:C:2022:852, paragraph 76).

20 Judgments in *bpost*, paragraph 24; in *Nordzucker*, paragraph 28; and of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, 'the judgment in *Menci*', paragraph 25).

21 'ECtHR'.

22 ECtHR, 8 June 1976, *Engel and Others v. the Netherlands* (Application Nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72 (CE:ECHR:1976:0608JUD000510071)).

46. Those criteria concern: (i) the legal classification of the offence under national law; (ii) the nature of the penalty; and (iii) the degree of severity of the penalty that may be imposed. [23]

1. Legal classification of the offence

47. Italian law classifies the offences (and the proceedings for establishing such offences) provided for in Articles 21 and 23 of the Consumer Code as administrative offences. The applicable pecuniary penalty is also classified as administrative, in accordance with Article 27(9) of that code.

48. As regards the penalty imposed by the Public Prosecutor's Office of Brunswick, the referring court has no doubt that it is criminal in nature.

49. An offence and a penalty which, under national law, are nominally administrative may, nevertheless, be criminal in nature for the present purposes. The Court has held that the application of Article 50 of the Charter is not limited to proceedings and penalties which are classified as 'criminal' by national law, but extends regardless of such a classification to proceedings and penalties which must be considered to have a criminal nature on the basis of the two other criteria referred to above. [24]

2. Nature of the penalty

50. As for the nature of the penalty, it must be ascertained whether '[its] purpose … is punitive … It follows therefrom that a penalty with a punitive purpose is criminal in nature for the purposes of Article 50 of the Charter, and that the mere fact that it also pursues a deterrence purpose does not mean that it cannot be characterised as a criminal penalty. … it is of the very nature of criminal penalties that they seek both to punish and to deter unlawful conduct. By contrast, a measure which merely repairs the damage caused by the offence at issue is not criminal in nature'. [25]

51. Under Article 27(9) of the Consumer Code, the pecuniary penalty must be in addition to the other measures provided for to penalise unfair commercial practices, in particular the prohibition on continuing or repeating such practices.

52. According to the Italian Government, it is those measures, and not the pecuniary penalty under Article 27(9) of the Consumer Code, which are punitive in nature. The fine seeks to neutralise the competitive advantage procured by the undertaking through its fraudulent conduct vis-à-vis consumers and to restore competition in the market as it existed prior to the unfair commercial practice.

[23] Judgments of 5 June 2012, *Bonda* (C-489/10, EU:C:2012:319, paragraph 37); in *Menci*, paragraphs 26 and 27; and in *bpost*, paragraph 25.

[24] Judgments in *Menci*, paragraph 30; in *bpost*, paragraph 26; and in *Nordzucker*, paragraph 31.

[25] Judgment in *Garlsson Real Estate*, paragraph 33. In point 64 of my Opinion in that case (C-537/16, EU:C:2017:668), and in my Opinion in *Menci* (C-524/15, EU:C:2017:667, point 113) I stated that all penalties have a punitive element and their preventive or deterrent effect is derived specifically from the punishment they involve. See, to that effect, judgment of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)* (C-439/19, EU:C:2021:504, paragraph 89).

53. Subject to the referring court's final assessment, I am not convinced by the Italian Government's arguments on this point. My view, by contrast, is that the pecuniary penalty under Article 27(9) of the Consumer Code is punitive in nature: its main purpose is not to make good damage suffered by third parties as a result of the offence, but to penalise unlawful conduct. [26]

54. That article does not contain any indication as to whether the penalty is in the nature of reparation and the amount of that penalty does not depend on the effects of the offence on third parties.

55. Finally, it is irrelevant for the present purposes that the penalty has both a punitive purpose and a preventive intention, namely to deter undertakings from engaging in unfair commercial practices.

3. Degree of severity of the penalty

56. The upper limit of the penalty provided for in Article 27(9) of the Consumer Code is EUR 5 million, which is a considerable amount, indicative of its severity. [27]

57. It is true that a penalty of EUR 5 million may not be particularly burdensome for a multinational undertaking with a high turnover, like VWAG. [28]

58. That, however, does not call into question the highly punitive nature of the penalty provided for by the law. At most, it could serve as an incentive for the legislature to increase fines for unfair commercial practices by replacing the fixed amount with an amount proportional to turnover. [29]

59. Moreover, the degree of severity of the penalty must be assessed in the light of its objective characteristics and not its impact, in particular, on a specific penalised undertaking.

60. In short, I consider that an administrative penalty such as the one at issue here, which may be as high as EUR 5 million, for having engaged in unfair commercial practices, is of a substantively criminal nature for the purposes of Article 50 of the Charter.

D. Second question referred

61. The Consiglio di Stato (Council of State) enquires whether Article 50 of the Charter must be interpreted as precluding 'a national provision that makes it possible to uphold in court proceedings and make final a criminal administrative pecuniary penalty against a legal person in respect of unlawful conduct in the form of unfair commercial practices, for which a final criminal

[26] I refer to my Opinion in *Menci* (C-524/15, EU:C:2017:667). In that Opinion, I maintained that '… since administrative and criminal penalties are a reflection of the State's right to punish, I cannot see how (other than by means of an artificial, merely doctrinal construction) it is possible to deny that the former have a dual aim of deterrence and punishment, leading them to resemble provisions of a strictly criminal nature. … all penalties have a punitive element and their preventive or deterrent effect is derived specifically from the punishment they involve' (point 113).

[27] That same limit (EUR 5 million) applied to the penalty provided for in Article 187b of the applicable law, which the Court held to be an administrative penalty of a criminal nature in its judgment in *Garlsson Real Estate*, although other factors were at play in that case.

[28] The AGCM points out that the penalty accounts for only 0.0068% of VWAG's turnover in 2015 (EUR 73.510 million) and 0.12% of VWGI's turnover, and that, if a fine had been imposed for breach of the competition rules, that figure would have increased to 10% of turnover.

[29] As I have already stated, following the adoption of Directive 2019/2161, the maximum fine amount is to be 'at least 4% of the trader's annual turnover in the Member State or Member States concerned'. It will thus be possible to impose far higher fines for unfair commercial practices than was hitherto the case where national or multinational undertakings with high turnovers are involved.

conviction has been handed down against that person in the meantime in a different Member State, where the latter criminal conviction became final before the decision in the judicial proceedings challenging the former criminal administrative pecuniary penalty became *res judicata*'.

62. According to the Court, 'the application of the *non bis in idem* principle is subject to a twofold condition, namely, first, that there must be a prior final decision (the "*bis*" condition) and, secondly, that the prior decision and the subsequent proceedings or decisions must concern the same facts (the "*idem*" condition)'. [30]

1. The 'bis' condition

63. 'In order for a judicial decision to be regarded as having given a final ruling on the facts subject to a second set of proceedings, that decision must not only have become final but must also have been taken after a determination has been made as to the merits of the case'. [31]

64. It follows from the documents before the Court that the decision of the Public Prosecutor's Office of Brunswick became final on 13 June 2018 and that it was taken, stating reasons, following a determination of the merits of the case. On that date, the administrative proceedings for the imposition of a penalty in Italy had already been initiated but not completed: the AGCM's decision of 4 August 2016 was subject to appeal and was not yet (and is still not) final.

65. Although both sets of proceedings were conducted partly in parallel over time (they overlapped for four months, according to the information provided at the hearing), the penalty imposed by the Public Prosecutor's Office of Brunswick became final before the Italian authorities gave a final ruling on the same facts and undertakings. It is irrelevant, in that regard, that the final nature of the German decision is the result of the fact that VWAG did not appeal against it. [32]

66. There is, therefore, a duplication of proceedings for the imposition of a penalty, one of which resulted in a penalty that has become final, making it necessary to determine whether or not both sets of proceedings concerned the same facts and were directed against the same person.

2. The 'idem' condition

67. The prevailing view in the case-law of the Court is that the prohibition of double punishment refers to the same material acts (*idem factum*), understood as a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them (*idem crimen*).

[30] Judgment in *bpost*, paragraph 28.

[31] Judgment in *bpost*, paragraph 29.

[32] It is mere conjecture to assume that the undertaking's decision not to appeal against the German penalty is part of its strategy, underpinned by the principle *ne bis in idem*, to halt or deactivate proceedings for the imposition of a penalty initiated against VWAG in other Member States. The Commission submits that there is a risk of encouraging forum shopping by multinationals which, on the basis of Article 50 of the Charter, could seek a penalty in the Member State with the most lenient rules and thus avoid penalties for the same facts in other Member States. At the hearing, the AGCM stated that there was nothing to suggest that VWAG's strategy pursued that objective, which that undertaking confirmed, arguing that it would be illogical to accept a pecuniary penalty as severe as that imposed in Germany in order to avoid another, much lower one.

68. As the referring court points out, the two sets of proceedings at issue in this case were directed against the same legal person (VWAG). It is true that the Italian decision also concerned VWGI, but that is not necessarily at odds with the requirement that the *parties to the proceedings must be the same*, since VWGI belongs to VWAG and is under its control.

69. In any event, in response to the objections raised in that regard by the AGCM, it will be for the Consiglio di Stato (Council of State) to decide whether the undertakings concerned are one and the same.

70. As regards the requirement that the *subject matter of the proceedings must be the same*, 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. [33]

71. It is therefore not sufficient for the facts to be similar; they must be identical. The identity of the material acts must be understood to mean a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space. [34]

72. Once it has been determined that the facts are identical, their legal classification under national law becomes a secondary issue. Also of secondary importance is the dissimilarity of the legal interests protected in the different Member States for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another. [35]

73. In its judgments in *bpost* and in *Nordzucker*, the Court confirmed that factual identity (*idem factum*) takes precedence over legal identity (*idem crimen*). It took that view in the context of the rules on free competition, modifying its previous case-law on the subject. [36]

74. At the hearing, [37] the Italian Government proposed that, where coordination between national authorities is impracticable, the general interests protected by the rules of the two Member States concerned should be taken into account in determining whether the facts are identical.

75. If I have understood the Italian Government correctly, that would involve a return to the case-law of the Court on the application of *ne bis in idem* in the field of the rules on competition, which required the facts and the protected legal interests to be the same in order to establish the existence of *idem*. My view, however, is that that position was superseded by the judgments in *bpost* and in *Nordzucker*.

76. It is for the Consiglio di Stato (Council of State) to determine whether, in the present case, the facts are identical in substance and time. In the order for reference, it mentions 'the similar, if not identical nature' of the facts penalised, before drawing attention to the 'homogeneity of the

[33] Judgments in *Menci*, paragraph 35; in *Garlsson Real Estate*, paragraph 37; and in *bpost*, paragraph 33.

[34] 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 to 52, to which paragraphs 36 and 37 of the judgment in *bpost* refers.

[35] Judgments in *Menci*, paragraph 36; in *Garlsson Real Estate*, paragraph 38; and in *bpost*, paragraph 34.

[36] See Van Cleynenbreugel, P., 'BPost and Nordzücker: Searching for the essence of the *ne bis in idem* in European Union Law', *European Constitutional Law Review*, 2022, No 3, pp. 361 and 362.

[37] The AGCM also drew attention at the hearing to the dissimilarity between the general interests protected by the German provision and those safeguarded by the Italian provision to cast doubt on the existence of *idem*.

conduct', in that both sets of proceedings penalised conduct relating to the placing on the market of vehicles fitted with rigged devices and to advertising those vehicles' compliance with environmental legislation. [38]

77. The Court is nonetheless able to provide the referring court with some points for consideration in that regard.

– The detailed and specific analysis of the penalised conduct must conclude with an assessment of whether that conduct is identical, not merely similar.

– In the case of cross-border duplication of proceedings and penalties, geographical identity is not essential, although it may serve other purposes. [39] It makes it possible to dispel suspicions of a 'self-interested choice' on the part of the competent penalty authority. [40]

– Although it stresses that the offences committed by VWAG across the world between 2007 and 2015 were the result of a lack of supervision, the Public Prosecutor's Office of Brunswick has regard to, as relevant facts, the placing on the market in other countries (including Italy) of vehicles fitted with the computerised cheat system and the misleading advertising for sales of those cars. [41]

– The link between those three elements seems clear, although the referring court will have to decide whether it is sufficient to conclude that the facts are identical. The Public Prosecutor's Office of Brunswick specifically states that, by virtue of the principle *ne bis in idem*, its decision precludes the adoption of penalties in other States against VWAG for the same conduct. [42]

78. Should the referring court consider, in the light of those considerations, that *idem factum* exists, the duplication of proceedings would constitute, in principle and subject to the analysis set out below, an infringement of the fundamental right guaranteed by Article 50 of the Charter. [43]

E. Third question referred

79. The Consiglio di Stato (Council of State) enquires whether Directive 2005/29 (particularly Article 3(4) and Article 13(2)(e) thereof) may 'justify a derogation from the principle of *ne bis in idem* established by Article 50 of the Charter'.

38 Order for reference, paragraphs 1.7 and 1.8.

39 The greatest difficulty in assessing identity in such cases is expressed in the judgment in *Nordzucker*, paragraph 46: 'In the context of that assessment, it is important, in particular, to consider whether the legal assessments made by the German authority on the basis of the facts established in its final decision related exclusively to the German sugar market or also to the Austrian sugar market. It is also relevant whether, in order to calculate the fine on the basis of the turnover achieved in the market affected by the infringement, the German authority took as the basis for its calculation only the turnover achieved in Germany (see, by analogy, judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 101)'.

40 See footnote 32 above.

41 It expressly states that the sale of vehicles with rigged engines in other States, including Italy, was taken into account when the penalty was imposed on VWAG.

42 The referring court must bear in mind that '… the mere fact that an authority of a Member State refers – in a decision finding an infringement of EU competition law and of the corresponding provisions of the law of that Member State, to a factual element relating to the territory of another Member State – is insufficient to support the inference that that factual element gave rise to the proceedings or was found by that authority to be one of the constituent elements of that infringement' (judgment in *Nordzucker*, paragraph 44).

43 Judgment in *bpost*, paragraphs 38 and 39.

80. I have already set out [44] the reasons for my view that Article 3(4) and Article 13(2)(e) of Directive 2005/29 do not apply here. As a result, I will refer only to Article 50 of the Charter and to the possibilities for allowing such a derogation under the first sentence of Article 52(1) thereof.

81. According to the settled case-law of the Court, a limitation of the fundamental right guaranteed by Article 50 of the Charter may be justified on the basis of Article 52(1) [45] thereof, subject to certain conditions: (i) the limitation must have a legal basis; (ii) the essence of the right must be respected; (iii) there must be a reason relating to the general interest or the need to protect a fundamental right; and (iv) the limitation must respect the principles of necessity and proportionality.

1. Legal basis

82. It is for the referring court to ascertain whether, as appears to be the case from its order, the actions of the Public Prosecutor's Office of Brunswick and the AGCM in Italy have a basis in law.

83. There does not appear to be much doubt in that regard, as the AGCM applied the Consumer Code and the Public Prosecutor's Office of Brunswick the OWiG.

2. Respect for the essence of the principle ne bis in idem

84. The referring court also does not appear to have any doubt that this condition is met in the dispute before it.

3. Protection of general interest objectives

85. The derogation, under Article 52(1) of the Charter, from the prohibition of being tried or punished twice for the same acts must meet one or more general interest objectives recognised by the European Union or the need to protect the rights and freedoms of others.

86. As indicated above, whether or not the legal interests protected by the rules under which the two penalties are imposed are the same is no longer relevant for the classification of the *idem*. [46]

87. However, since the judgment in *Menci*, those same legal interests may be relevant for the purposes of applying the derogations based on Article 52 of the Charter. The rules must protect general interests that are complementary, but not identical. If the objective of the two sets of

[44] See points 36 to 39 of this Opinion.

[45] Judgments of 27 May 2014, *Spasic* (C-129/14 PPU, EU:C:2014:586, paragraphs 55 and 56); in *Menci*, paragraph 40; in *bpost*, paragraph 41; and in *Nordzucker*, paragraph 49.

[46] Judgment in *bpost*, paragraph 34: 'it is apparent from the case-law of the Court that the legal classification under national law of the facts *and the legal interest protected* are not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another'. Emphasis added.

national proceedings was to protect the same general interest, there would be no complementarity and the duplication of those proceedings could not be justified under Article 52 of the Charter. [47]

88. In the present case, the German legislation and the Italian legislation appear to pursue objectives which are not identical but complementary.

– Article 130 of the OWiG seeks to ensure that undertakings and their employees act in accordance with the law and, therefore, penalises negligent breach of the duty of supervision in the course of business. It meets the general interest objective of ensuring the proper functioning of the market, which is similar to objectives that the Court has upheld in its judgments. [48]

– The rules of the Consumer Code applied by the AGCM transpose Directive 2005/29. The aim of that directive, according to Article 1 thereof, is to ensure a high level of consumer protection while contributing to the proper functioning of the internal market.

89. These are therefore objectives that complement each other: compliance with the duty of supervision of undertakings promotes protection of the rights of consumers who buy their products. Both objectives, I repeat, are general interest objectives, as the Court has already confirmed. [49]

4. Proportionality and necessity of the limitation

90. The limitation of the principle *ne bis in idem* under Article 52(1) of the Charter must also be proportionate and necessary.

91. The Court has delivered a number of important judgments on the proportionality and necessity of the limitation at issue here, the most salient points of which are reproduced below.

– Compliance with the principle of *proportionality* 'requires that the duplication of proceedings and penalties provided for by national legislation … does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, it being understood 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'. [50]

– '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

[47] One such example can be found in the judgment in *Nordzucker*: 'if two national competition authorities were to take proceedings against and penalise the same facts in order to ensure compliance with the prohibition on cartels under Article 101 TFEU and the corresponding provisions of their respective national law, those two authorities would pursue the same objective of general interest of ensuring that competition in the internal market is not distorted by agreements, decisions of associations of undertakings or anticompetitive concerted practices' (paragraph 56). 'In those circumstances, it must be held that a duplication of proceedings and penalties, where those proceedings and penalties do not pursue complementary aims relating to different aspects of the same conduct …, cannot in all events be justified under Article 52(1) of the Charter' (paragraph 57).

[48] In its judgment in *bpost*, paragraphs 45 to 47, the Court considered liberalising the internal market for postal services and protecting free competition to be general interest objectives. In its judgment of 20 March 2018, *Di Puma and Zecca* (C-596/16 and C-597/16, EU:C:2018:192, paragraph 42), the Court refers to protecting the integrity of financial markets and public confidence in financial instruments as objectives of general interest.

[49] The judgments in *bpost*, paragraph 27, and in *Nordzucker*, paragraphs 51 and 52, confirm that consumer protection is a general interest objective. That is also supported by Articles 12, 114 and 169 TFEU and Article 38 of the Charter.

[50] Judgments in *Menci*, paragraph 46; in *bpost*, paragraph 48; and of 5 May 2022, *BV* (C-570/20, EU:C:2022:348, paragraph 34).

address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned … Consequently, 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'. [51]

– With regard to the strict *necessity* of duplication, '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, meaning that 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'. [52]

– 'Reliance on such justification requires that it be established that the duplication of the proceedings … was strictly necessary, taking account in that context, in essence, of the existence of a sufficiently close connection in substance and time between the two sets of proceedings involved …'. [53]

92. In short, the Court requires an analysis of whether the following three criteria are met:

– clarity and precision of the rules giving rise to the duplication of proceedings and penalties;

– coordination of proceedings in which a penalty is imposed, which must have a sufficiently close connection in substance and time so as to reduce to what is strictly necessary the additional burden associated with the duplication of proceedings of a criminal nature conducted independently;

– an assurance that the seriousness of the overall penalties imposed corresponds to the seriousness of the offence.

93. Once again, it is for the referring court to determine, in the light of all the circumstances, whether those three criteria are met in the main proceedings. However, in order to provide the referring court with a useful answer, the Court may provide it with the following guidance.

[51] Judgment in *bpost*, paragraph 49. In that passage, the Court cites ECtHR, 15 November 2016, *A and B v. Norway* (CE:ECHR:2016:1115JUD002413011), §§ 121 and 132. However, the Court did not follow the reasoning set out in that judgment to the letter: the ECtHR considers that, in the case of two sets of closely connected criminal proceedings, there is no infringement of the principle *ne bis in idem*, while the Court takes the view that such an infringement exists but may be justified under Article 52 of the Charter.

[52] Judgments in *Menci*, paragraphs 49, 52, 53, 55 and 58; in *bpost*, paragraph 51; and ECtHR, 15 November 2016, *A and B v. Norway* (CE:ECHR:2016:1115JUD002413011), §§ 130 to 132. For a detailed critique of the judgment in *Menci*, see Opinions of Advocate General Bobek in *bpost* (EU:C:2021:680) and in *Nordzucker* (EU:C:2021:681), particularly points 101 to 117 of the former.

[53] Judgments in *Menci*, paragraph 61; in *bpost*, paragraph 53; and, by analogy, ECtHR, 15 November 2016, *A and B v. Norway* (CE:ECHR:2016:1115JUD002413011), § 130.

(a) Clarity and precision of the rules on duplication of proceedings and penalties

94. The order for reference does not set out the national – Italian or German – rules which specifically provide for the possibility of (and lay down the conditions for) initiating simultaneous proceedings and imposing independent penalties for the same facts where those proceedings are conducted in two Member States.

95. The fact that both the OWiG and the provisions of the Italian Consumer Code on unfair commercial practices constitute sound legal bases for the conduct of proceedings and the imposition of penalties is an altogether different matter. As I have already explained, the clarity and precision of those rules do not appear to be in doubt.

96. From that perspective, VWAG could foresee and expect that it would receive a penalty in both Member States (and in others) for its practices in connection with engine rigging, the sale of cars fitted with those engines and the dissemination of advertising concealing such rigging.

(b) Seriousness of the overall penalties imposed

97. It is apparent from the documents before the Court that the addition of the Italian penalty to the German penalty is not disproportionate to the punished conduct, in the light of VWAG's turnover and the economic advantage obtained by that multinational as a result of engine rigging (estimated at EUR 995 million).

98. The German authority imposed a penalty of EUR 1 000 million and the Italian authority a penalty of EUR 5 million. The sum of those penalties does not therefore appear to be excessive for the purposes of punishing the conduct at issue.

99. It is true that the German penalty incorporates a strictly 'punitive' element as well as an element cancelling out the gains made by VWAG. That does not, however, prevent the penalty from being, in itself, a very heavy one. The penalty imposed by the AGCM is similar, in so far as it is the highest that could be imposed under the Italian legislation transposing Directive 2005/29.

100. In any event, and I repeat, the duplication of penalties does not appear to be disproportionate in the light of the seriousness of the offence committed and the gains made by VWAG.

(c) Coordination of proceedings

101. There are considerable doubts in this case as to whether or not there was coordination between the German and Italian proceedings for the imposition of a penalty and a sufficiently close connection between them in substance and time.

102. I will pay particular attention to this matter because – and I will say this straightaway – my understanding is that there was no coordination between the two sets of proceedings conducted by the Public Prosecutor's Office of Brunswick and the AGCM in Italy, unless the referring court has additional information suggesting otherwise.

103. At most, it could be said that there was a material link between both sets of proceedings and that they were conducted within a proximate timeframe, but, I repeat, the requirement of coordination was not satisfied.

104. Some areas of EU law have mechanisms for the coordination of national authorities (with each other and with the Commission or another EU body) in order to facilitate cooperation, mutual assistance and the exchange of information, particularly as regards the conduct of proceedings in which a penalty is imposed:

– in the field of competition law, within the framework of the European Network of Competition Authorities; [54]

– in the field of judicial cooperation in criminal matters, through the involvement of Eurojust. [55]

105. Those mechanisms facilitate the application of the principle *ne bis in idem* by preventing the duplication of proceedings in which a penalty is imposed for the same facts in cross-border disputes involving several Member States. [56]

106. By contrast, in the present case, there was no specific coordination mechanism available to national authorities with heterogeneous powers.

107. It is true that Regulation (EU) No 2006/2004, [57] which was applicable at the material time and was subsequently replaced by Regulation 2017/2394, establishes a channel for cooperation and coordination between national authorities responsible for the enforcement of consumer protection laws. The AGCM is one of those authorities and may have recourse to that instrument, unlike the Public Prosecutor's Office of Brunswick. [58]

108. In reply to questions put to them by the Court, the parties provided the following information at the hearing.

– The Public Prosecutor's Office of Brunswick tried, through Eurojust, to prevent the duplication of criminal proceedings against VWAG in a number of Member States. Following a coordination meeting at Eurojust's headquarters in The Hague on 10 March 2016, only the authorities of Belgium, Sweden and Spain, [59] but not Italy, agreed to waive prosecution in favour of the Public Prosecutor's Office of Brunswick. The AGCM was not involved in that attempt to coordinate prosecutions against VWAG.

– On 9 August 2016, the Public Prosecutor's Office of Brunswick learned of the existence of the AGCM's decision imposing a penalty on VWAG and VWGI, which had been adopted on 4 August 2016. The Public Prosecutor's Office had initiated proceedings against VWAG for the imposition of a penalty on 14 April 2016. The German and Italian proceedings for the imposition of a penalty were therefore conducted in parallel for less than four months.

– There was no coordination between the Public Prosecutor's Office of Brunswick and the AGCM.

[54] See the Commission Notice on Cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43).

[55] Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA (OJ 2018 L 295, p. 138).

[56] The case giving rise to the judgment in *Nordzucker* is a good example of this.

[57] Regulation of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) (OJ 2004 L 364, p. 1).

[58] The list of those authorities is available at the following address: https://commission.europa.eu/system/files/2021-01/designated_bodies_18jan2021.pdf.

[59] As evidenced by the judgment of the Tribunal Supremo (Supreme Court, Spain) of 20 September 2021 (ES:TS:2021:3449).

109. Be that as it may, what this reference for a preliminary ruling reveals, in my view, is the difficulty in applying the case-law of the Court allowing limitations to be placed on Article 50 of the Charter, based on Article 52 thereof, to cases such as the one at hand.

110. In particular, it seems unlikely that the requirement of coordination could be met in the event of a duplication of proceedings and penalties, under the responsibility of national authorities of two States with powers in different areas, for which there are no specific coordination mechanisms under EU law. [60]

111. Moreover, the case-law of the Court on the requirement for coordination between authorities where there is a duplication of proceedings and penalties could, in such cases, have a paradoxical effect:

– the coordination mechanisms established by EU law are intended to promote the principle *ne bis in idem*, namely to prevent the same person from being tried or punished twice in criminal proceedings for the same acts;

– on the other hand, the case-law of the Court embraces the criterion of coordination of proceedings in which a penalty is imposed, which must have a sufficiently close connection in substance and time, in order to allow derogations from the exercise of the fundamental right protected by Article 50 of the Charter.

112. It was perhaps for those or similar reasons that, at the hearing, the Italian Government suggested, in the alternative, [61] that the coordination test should not be applied, requiring only that the proportionality of the duplication of penalties be verified. For its part, the Commission contended that the coordination requirement should be *interpreted broadly*, going so far as to state that the coordination criterion would not be necessary in cases like the present one. [62]

[60] Advocate General Bobek flagged up that difficulty in his Opinion in *bpost* (EU:C:2021:680, point 115): '… once the combination of the relevant proceedings involves a number of parallel administrative regimes, and more importantly, more than one Member State or the authorities of the Member States and of the European Union, then suggestions about the desirability of single-track systems might quickly leave the realm of wishful thinking and cross over into science fiction'. After referring to the existence of networks of national and EU administrative authorities and the coordination difficulties which nevertheless exist, he stated (in point 116 of his Opinion) that 'if that is the current state of affairs within dedicated and expressly regulated networks across the European Union, it is not immediately obvious how the necessary level of coordination could reasonably be expected and achieved in various areas of law, within various bodies, and across various Member States'.

[61] The Italian Government's main argument is that, since there was no infringement of Article 50 of the Charter, there is no need to have recourse to Article 52 thereof.

[62] The Commission proposed, in short, that the test should be applied depending on whether or not there are mechanisms for coordination or the exchange of information. If there are no such mechanisms, a derogation from the principle *ne bis in idem* should be allowed.

113. I, for one, do not hold out much hope of the Court reversing its case-law on this matter. Since the Court did not endorse the position I defended in my Opinion in *Menci*[63] or heed Advocate General Bobek's subsequent criticism[64] of the criterion laid down in the judgment in *Menci* (subsequently repeated in the judgments in *bpost* and in *Nordzucker*), it is unlikely to do so now.

114. The Court therefore has three options open to it:

– to disregard, in cases like the present one, the requirement for coordination between proceedings in which a penalty is imposed, thus continuing down the route of eroding the content of Article 50 of the Charter by broadening the scope of the derogations therefrom; or

– to qualify that requirement, along the lines advocated by the Commission, rendering it, in practice, unrecognisable; or

– to insist that the duplication of proceedings in which a penalty is imposed between national authorities of different Member States and with different spheres of competence is also subject to the coordination requirement, as a means of justifying the limitation on the principle *ne bis in idem* on the basis of Article 52(1) of the Charter.

115. To my mind, consistency with the Court's previous decisions militates in favour of the third approach. It is both for that reason and because, in my view, the application of Article 50 of the Charter takes precedence and Article 52(1) of the Charter does not cover the duplication of proceedings conducted and penalties imposed by national authorities in different fields in respect of the same person for identical facts, where sufficient coordination between those authorities' actions does not exist, that I propose the third approach in this case.

V. Conclusion

116. In the light of the foregoing, I propose that the Court's answer to the request for a preliminary ruling submitted by the Consiglio di Stato (Council of State, Italy) should be as follows:

Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that:

– an administrative pecuniary penalty, imposed by the competent national consumer protection authority on a legal person having engaged in unfair commercial practices, in the amount of EUR 5 million, is of a substantively criminal nature for the purposes of that provision;

63 Point 72: 'since the case-law of the Court has consolidated a statement of the law to the effect that two parallel or consecutive sets of proceedings, which lead to two substantively criminal penalties in respect of the same acts, continue to be two sets of proceedings (*bis*) and not one, I can find no sound reasons for abandoning it'. In point 73 I added that 'the introduction into EU law of a criterion for interpretation of Article 50 of the Charter which rests on the degree of the substantive and temporal connection between one type of proceedings (criminal proceedings) and another (administrative proceedings in which a penalty is imposed) would add significant uncertainty and complexity to the right of individuals not to be tried or punished twice for the same acts. The fundamental rights recognised in the Charter must be easily understood by all and the exercise of those rights calls for a foreseeability and certainty which, in my view, are not compatible with that criterion'.

64 In point 109 of his Opinion in *bpost*, Advocate General Bobek states that 'the application of the principle *ne bis in idem* stops relying on an *ex ante normatively* defined test. Instead, it becomes an *ex post corrective* test that may or may not apply depending on the circumstances and the exact amount of sanctions imposed'. In point 111, he observes that 'criteria of a test that is not designed for an *ex ante* protection, but rather for an *ex post* correction, are bound to be *circumstantial*'.

– an administrative pecuniary penalty of a substantively criminal nature, imposed on a legal person having engaged in unfair commercial practices, infringes, in principle, Article 50 of the Charter where, with respect to identical facts, that legal person has already been the subject of a prior criminal conviction in another Member State which has become final;

– no limitation may be placed on the right not to be tried or punished twice for the same criminal offence, on the basis of Article 52(1) of the Charter, where the concurrent duplication of proceedings conducted and penalties imposed by national authorities of two or more Member States, with competence in different fields, has taken place without sufficient coordination.