Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

22 March 2022 *

(Reference for a preliminary ruling – Competition – Article 101 TFEU – Cartel prosecuted by two national competition authorities – Charter of Fundamental Rights of the European Union – Article 50 – *Non bis in idem* principle – Existence of the same offence – Article 52(1) – Limitations to the *non bis in idem* principle – Conditions – Pursuit of an objective of general interest – Proportionality)

In Case C-151/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 12 March 2020, received at the Court on 27 March 2020, in the proceedings

Bundeswettbewerbsbehörde

v

Nordzucker AG,

Südzucker AG,

Agrana Zucker GmbH,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, K. Jürimäe (Rapporteur), C. Lycourgos, E. Regan, N. Jääskinen, I. Ziemele and J. Passer, Presidents of Chambers, M. Ilešič, T. von Danwitz, A. Kumin and N. Wahl, Judges,

Advocate General: M. Bobek,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 22 March 2021,

after considering the observations submitted on behalf of:

– the Bundeswettbewerbsbehörde, by N. Harsdorf Enderndorf, B. Krauskopf and A. Xeniadis, acting as Agents,

* Language of the case: German.

– Südzucker AG, by C. von Köckritz, W. Bosch and A. Fritzsche, Rechtsanwälte,

– Agrana Zucker GmbH, by H. Wollmann, C. von Köckritz, W. Bosch and A. Fritzsche, Rechtsanwälte,

– the Belgian Government, by J.-C. Halleux and L. Van den Broeck, acting as Agents, and by P. Vernet and E. de Lophem, avocats,

– the German Government, initially by J. Möller and S. Heimerl, and subsequently by J. Möller, acting as Agents,

– the Greek Government, by L. Kotroni, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

– the Latvian Government, by K. Pommere, acting as Agent,

– the Polish Government, by B. Majczyna and M. Wiącek, acting as Agents,

– the European Commission, by A. Keidel, G. Meessen, P. Rossi, H. van Vliet, A. Cleenewerck de Crayencour and F. van Schaik, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between the Bundeswettbewerbsbehörde (Federal Competition Authority, Austria) ('the Austrian authority'), of the one part, and Nordzucker AG, Südzucker AG and Agrana Zucker GmbH ('Agrana'), of the other, concerning the participation of those undertakings in a practice contrary to Article 101 TFEU and the corresponding provisions of Austrian competition law.

Legal context

3 Recitals 6 and 8 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1) are worded as follows:

'(6) In order to ensure that the [EU] competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply [EU] law.

…

(8) In order to ensure the effective enforcement of the [EU] competition rules and the proper functioning of the cooperation mechanisms contained in this Regulation, it is necessary to oblige the competition authorities and courts of the Member States to also apply Articles [101] and [102 TFEU] where they apply national competition law to agreements and practices which may affect trade between Member States. In order to create a level playing field for agreements, decisions by associations of undertakings and concerted practices within the internal market, it is also necessary to determine pursuant to Article [103(2)(e) TFEU] the relationship between national laws and [EU] competition law. To that effect it is necessary to provide that the application of national competition laws to agreements, decisions or concerted practices within the meaning of Article [101(1) TFEU] may not lead to the prohibition of such agreements, decisions and concerted practices if they are not also prohibited under [EU] competition law. The notions of agreements, decisions and concerted practices are autonomous concepts of [EU] competition law covering the coordination of behaviour of undertakings on the market as interpreted by the [EU] Courts. …'

4 Article 3(1) and (2) of that regulation provides:

'1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1) TFEU] which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101 TFEU] to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102 TFEU], they shall also apply Article [102 TFEU].

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article [101(1) TFEU], or which fulfil the conditions of Article [101(3) TFEU] or which are covered by a Regulation for the application of Article [101(3) TFEU]. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.'

5 Article 5 of Regulation No 1/2003 states:

'The competition authorities of the Member States shall have the power to apply Articles [101] and [102 TFEU] in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

– requiring that an infringement be brought to an end,

– ordering interim measures,

– accepting commitments,

– imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.'

6 Article 12(1) of that regulation provides:

'For the purpose of applying Articles [101] and [102 TFEU] the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.'

7 Article 23(2) of Regulation No 1/2003 states that the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 101 TFEU or Article 102 TFEU.

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 Nordzucker, Südzucker and Südzucker's subsidiary, Agrana, are active on the market for the production and marketing of sugar intended for industry and for household consumption ('the sugar market').

9 Nordzucker and Südzucker, together with a third major producer, dominate the German sugar market. Nordzucker's factories are located in the north, and Südzucker's factories in the south, of that Member State. Owing to the location of the factories, the characteristics of sugar and transport costs, the German sugar market was traditionally divided into three main geographical areas, each dominated by one of those three major producers. That geographical division of the market did not extend to foreign markets, including those on which the subsidiaries of those three producers operated, and did not concern, in particular, the Austrian market.

10 Agrana is the main sugar producer in Austria and operates to a large extent autonomously on the markets which it serves.

11 The accession of new Member States to the European Union in 2004 caused concern among German sugar producers because of new competitive pressure from the undertakings established in those Member States. It was in that context that, from no later than 2004, several meetings took place between the sales directors of Nordzucker and Südzucker, at the end of which the latter agreed not to compete with each other by penetrating their traditional core sales areas, in order to avoid that new competitive pressure.

12 Towards the end of 2005, Agrana noticed deliveries of sugar on the Austrian market, coming in particular from a Slovak subsidiary of Nordzucker, to Austrian industrial customers which had until that point been exclusively supplied by Agrana.

13 On 22 February 2006, during a telephone conversation, Agrana's managing director informed Südzucker's sales director of the existence of those deliveries and asked him for the name of a contact person at Nordzucker.

14 Then, on the same day, Südzucker's sales director called Nordzucker's sales director to inform him of the deliveries to Austria, referring to possible consequences for the German sugar market ('the telephone conversation at issue'). It has not been established that Agrana was informed of that telephone call.

15 Following the submission of leniency applications by Nordzucker, in particular to the Bundeskartellamt (Federal Competition Authority, Germany) ('the German authority') and the Austrian authority, those authorities initiated investigation procedures at the same time.

16 Thus, in September 2010, the Austrian authority brought an action before the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), the Austrian court with jurisdiction in cartel matters, seeking a declaration that Nordzucker had infringed Article 101 TFEU and the corresponding provisions of Austrian law, and also the imposition of two fines on Südzucker, one of which to be imposed jointly and severally on Agrana. The material evidence relied on by the Austrian authority to establish that those three undertakings had participated in a cartel on the Austrian sugar market included, in particular, the telephone conversation at issue.

17 For its part, the German authority, by a decision of 18 February 2014, which has become final, found that Nordzucker, Südzucker and the third German producer referred to in paragraph 9 above had infringed Article 101 TFEU and the corresponding provisions of German competition law and, in particular, imposed a fine of EUR 195 500 000 on Südzucker ('the German authority's final decision'). According to that decision, those undertakings implemented, on the sugar market, an agreement to respect each other's core sales areas, by means of regular meetings between the representatives of Nordzucker and Südzucker during the period from 2004 to 2007, and even up to the summer of 2008. In that decision, the German authority reproduced the content of the telephone conversation at issue, during which the representatives of Nordzucker and Südzucker had discussed the Austrian market. Of all the matters of fact established by that authority, that conversation is the only one pertaining to the Austrian market.

18 By order of 15 May 2019, the Oberlandesgericht Wien (Higher Regional Court, Vienna) 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.

19 The Austrian authority lodged an appeal against that order before the Oberster Gerichtshof (Supreme Court, Austria), the referring court. It seeks, first, a declaration that, as a result of that agreement, Nordzucker infringed Article 101 TFEU and the corresponding provisions of Austrian competition law and, secondly, that Südzucker should be fined an appropriate amount for the same infringement.

20 In the first place, the referring court is unsure, having regard to the *non bis in idem* principle laid down in Article 50 of the Charter, whether the telephone conversation at issue can be taken into account, even though it was expressly mentioned in the German authority's final decision.

21 First, the referring court observes that the '*idem*' component of the *non bis in idem* principle has given rise to differing interpretations. Thus, in competition law matters, it follows, inter alia, from the judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraph 97), that that principle can be applied only if three cumulative criteria are met, namely, the facts must be the same, the offender the same and the legal interest protected the same. By contrast, in other areas of EU law, in particular in the judgments of 9 March 2006, *Van Esbroeck* (C-436/04, EU:C:2006:165, paragraph 36), and of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 35), the Court has rejected the criterion relating to the legal interest protected being the same.

22 Secondly, the referring court is unsure whether it is necessary, in the context of assessing the '*idem*' component, to take into consideration, among other factors, the territorial effects of the cartels in the territories of different Member States, by analogy with the approach adopted in the judgments of 18 May 2006, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* (C-397/03 P, EU:C:2006:328); of 29 June 2006, *Showa Denko* v *Commission* (C-289/04 P, EU:C:2006:431); and of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraphs 99 to 103).

23 As regards the main proceedings, the referring court observes that, according to the Austrian authority, the fine imposed by the German authority's final decision did not take into account the effects of the cartel in Austria. Similarly, according to an opinion of the Vice-President of the German authority, dated 28 June 2019, the decisions of that authority penalise as a rule only anticompetitive effects in Germany. However, the Oberlandesgericht Wien (Higher Regional Court, Vienna) took the opposite view because of the particular importance attached, in the German authority's final decision, to the telephone conversation at issue.

24 In the second place, as regards the application for a finding of infringement against Nordzucker, the referring court notes that the Austrian authority granted that undertaking leniency under national law. Observing that, according to the judgment of 18 June 2013, *Schenker & Co. and Others* (C-681/11, EU:C:2013:404), a national competition authority may, by way of exception, confine itself to finding an infringement without imposing a fine, the referring court is unsure whether the *non bis in idem* principle must be applied to such proceedings finding an infringement. The Court is said to have held, in particular in paragraph 94 of the judgment of 14 February 2012, *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72), that that principle must be observed only in proceedings that seek the imposition of fines.

25 In those circumstances the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer to following questions to the Court of Justice for a preliminary ruling:

'(1) Is the third criterion established in the Court of Justice's competition case-law on the applicability of the *non bis in idem* principle, namely that conduct must concern the same protected legal interest, applicable even where the competition authorities of two Member States are called upon to apply the same provisions of EU law (here: Article 101 TFEU), in addition to provisions of national law, in respect of the same facts and in relation to the same persons?

In the event that this question is answered in the affirmative:

(2) Does the same protected legal interest exist in such a case of parallel application of European and national competition law?

(3) Furthermore, is it of significance for the application of the *non bis in idem* principle whether the first decision of the competition authority of a Member State to impose a fine took account, from a factual perspective, of the effects of the competition law infringement on the other Member State whose competition authority only subsequently took a decision in the competition proceedings conducted by it?

(4) Do proceedings in which, owing to the participation of a party in the national leniency programme, only a declaratory finding of that party's infringement of competition law can be made also constitute proceedings governed by the *non bis in idem* principle, or can such a mere declaratory finding of the infringement be made irrespective of the outcome of previous proceedings concerning the imposition of a fine (in another Member State)?'

Consideration of the questions referred

The first and third questions

26 By its first and third questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 50 of the Charter must be interpreted as precluding an undertaking from having proceedings brought against it by the competition authority of a Member State and, as the case may be, fined for an infringement of Article 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, where that conduct has already been referred to, by a competition authority of another Member State, in a final decision which that authority has adopted in respect of that undertaking, following infringement proceedings under Article 101 TFEU and the corresponding provisions of the competition law of that other Member State.

27 In that context, the referring court seeks, in particular, clarification of the relevant criteria for assessing whether the two national competition authorities have ruled on the same facts.

Preliminary observations

28 It should be recalled that the *non bis in idem* principle is a fundamental principle of EU law (judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 59), which is now laid down in Article 50 of the Charter.

29 Article 50 of the Charter 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'. Therefore, the *non 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 (judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 25 and the case-law cited).

30 As regards the assessment as to whether the proceedings and penalties concerned are criminal in nature, which is a matter for the referring court, it must be noted that three criteria are relevant. The first is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty which the person concerned is liable to incur (see, to that effect, judgments of 5 June 2012, *Bonda*, C-489/10, EU:C:2012:319, paragraph 37, and of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraphs 26 and 27).

31 It should be pointed out in that regard 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 under national law to proceedings and penalties which must be considered to have a criminal nature on the basis of the two other criteria referred to in the preceding paragraph (see, to that effect, judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 30).

32 In that regard, the Court held that the *non bis in idem* principle must be observed in proceedings for the imposition of fines under competition law. That principle thus precludes, in competition law matters, an undertaking's being found liable or the bringing of proceedings against it afresh on the grounds of anticompetitive conduct for which it has been penalised or declared not to be liable by a prior decision that can no longer be challenged (judgments of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 94 and the case-law cited, and of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie*, C-617/17, EU:C:2019:283, paragraph 28).

33 It follows that the application of the *non bis in idem* principle in proceedings under competition law 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 concern the same conduct (the '*idem*' condition).

The 'bis' condition

34 As regards the '*bis*' condition, it should be borne in mind 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 (see, by analogy, judgment of 5 June 2014, *M*, C-398/12, EU:C:2014:1057, paragraphs 28 and 30).

35 In the present case, it is apparent from the findings made by the referring court that the German authority's final decision constitutes a prior final decision as provided for in the case-law referred to in the preceding paragraph.

The 'idem' condition

36 As regards the '*idem*' condition, it follows from the very wording of Article 50 of the Charter that that article prohibits the same person from being tried or punished in criminal proceedings more than once for the same offence.

37 As stated by the referring court in its request for a preliminary ruling, the different proceedings and penalties at issue in the main proceedings are directed against the same legal persons, namely Nordzucker and Südzucker.

38 According to the Court's settled case-law, the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned. Therefore, Article 50 of the Charter prohibits the imposition, with respect to identical facts, of several criminal penalties as a result of

different proceedings brought for those purposes (judgments of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 35, and of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraph 37 and the case-law cited).

39 Moreover, 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 (judgments of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 36, and of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraph 38).

40 The same is true of the application of the *non bis in idem* principle laid down in Article 50 of the Charter in the field of EU competition law, inasmuch 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 (judgment of today's date in Case C-117/20 *bpost*, paragraph 35).

41 As regards the criterion relating to the identity of the facts, 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 (see, by analogy, judgments of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 99, and of 25 February 2021, *Slovak Telekom*, C-857/19, EU:C:2021:139, paragraph 45).

42 It is for the referring court, which alone has jurisdiction to rule on the facts, to determine whether the dispute before it relates to the same facts as those which led to the adoption of the German authority's final decision, having regard to the territory, product market and period covered by that decision. It is, therefore, for that court to satisfy itself as to the scope of that decision. As the Advocate General observed in point 68 of his Opinion, under Article 12(1) of Regulation No 1/2003, it is possible for a national court, with the assistance of the national competition authority, to request access, from a competition authority of another Member State, to a decision adopted by that authority and to information concerning the content of that decision. However, the Court of Justice may provide the national court with elements of interpretation of EU law in the context of the assessment of that scope.

43 In that regard, it is apparent from the documents before the Court that the referring court's questions concern, more specifically, the fact that the proceedings in Austria are based on a factual element, namely the telephone conversation at issue in which the Austrian sugar market was discussed, which had already been referred to in the German authority's final decision. The referring court enquires whether, in view of the reference to the telephone conversation in that decision, the condition that the facts should be identical is met.

44 In this respect, having regard to the case-law set out in paragraph 41 above, it must be stated 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. It must also be ascertained whether that authority has actually ruled on that factual element in order to make out the infringement, to

establish the liability for that infringement of the person against whom proceedings were brought and, as the case may be, to impose a penalty on that person, such that the infringement is to be regarded as encompassing the territory of that other Member State (see, by analogy, judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraphs 101 and 102).

45 Accordingly, it is for the referring court to ascertain, by assessing all the relevant circumstances, whether the German authority's final decision sought to find that the cartel at issue existed, and to penalise it, inasmuch as that cartel related not only to the German market but also to the Austrian market, as a result of the cartel's anticompetitive object or effect during the period under consideration.

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).

47 If, having assessed all the relevant circumstances, the referring court were to hold that the German authority's final decision did not find that the cartel at issue in the main proceedings existed, and penalise it, on the basis of the cartel's anticompetitive object or effect in Austrian territory, that court should rule that the proceedings before it do not relate to the same facts as those giving rise to the German authority's final decision, with the result that the principle *non bis in idem*, within the meaning of Article 50 of the Charter, would not preclude new proceedings being brought and, where appropriate, new penalties being imposed (see, by analogy, judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 103).

48 If, conversely, the referring court were to hold that the German authority's final decision did find that the cartel at issue existed, and penalised it, on the basis also of the cartel's anticompetitive object or effect in Austrian territory, that court should rule that the proceedings before it do relate to the same facts as those giving rise to the German authority's final decision. Such a duplication of proceedings and, as the case may be, of penalties, would amount to a limitation of the fundamental right guaranteed in Article 50 of the Charter.

The justification for any limitation of the fundamental right guaranteed in Article 50 of the Charter

49 In order to give the referring court a complete answer, it should be added that a limitation of the fundamental right guaranteed in Article 50 of the Charter, such as that which would exist in the situation referred to in paragraph 48 above, may be justified on the basis of Article 52(1) of the Charter (judgments of 27 May 2014, *Spasic*, C-129/14 PPU, EU:C:2014:586, paragraphs 55 and 56, and of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 40).

50 In accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by that charter must be provided for by law and respect the essence of those rights and freedoms. According to the second sentence of Article 52(1) of the Charter, subject to the principle of proportionality, limitations to those rights and freedoms may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

51 As regards the conditions laid down in the second sentence of Article 52(1) of the Charter and more specifically whether the limitation of the fundamental right guaranteed in Article 50 of the Charter – resulting from a duplication of proceedings and, as the case may be, of penalties, by two national competition authorities – meets an objective of general interest, it should be pointed out that Article 101 TFEU is a provision that pertains to a matter of public policy which prohibits cartels and which pursues the objective, essential for the functioning of the internal market, of ensuring that competition is not distorted in that market (see, to that effect, judgments of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraph 36, and of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 31).

52 In the light of the importance that is given in the Court's case-law to that objective of general interest, a duplication of criminal proceedings and penalties may be justified where those proceedings and penalties pursue, for the purpose of achieving such an objective, complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue (see, to that effect, judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 44).

53 In that regard, it must be borne in mind that, with regard to the role of Member State authorities in the enforcement of EU competition law, the first sentence of Article 3(1) of Regulation No 1/2003 establishes a close link between the prohibition of the agreements set out in Article 101 TFEU and the corresponding provisions of national competition law. Where the national competition authority applies provisions of national law prohibiting cartels to an agreement of undertakings which may affect trade between Member States within the meaning of Article 101 TFEU, the first sentence of Article 3(1) requires Article 101 TFEU also to be applied to it in parallel (judgments of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 77, and of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraph 18).

54 Under the first sentence of Article 3(2) of Regulation No 1/2003, 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 Article 101(1) TFEU (judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraph 19).

55 It follows from those provisions, read in the light of recital 8 of Regulation No 1/2003, that the application of provisions of national competition law cannot lead to the prohibition of agreements, decisions and concerted practices, within the meaning of Article 101(1) TFEU, if they are not also prohibited under that 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 Article 101(1) TFEU.

56 Accordingly, 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.

57 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 within the meaning of the case-law referred to in paragraph 52 above, cannot in all events be justified under Article 52(1) of the Charter.

58 In the light of all the foregoing considerations, the answer to the first and third questions is that Article 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, as the case may be, fined for an infringement of Article 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 Article 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.

The second question

59 In view of the answer given to the first and third questions, there is no need to rule on the second question.

The fourth question

60 By its fourth question, the referring court asks, in essence, whether Article 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 programme, only a declaration of the infringement of that law can be made, are liable to be covered by the *non bis in idem* principle.

61 First, it must be recalled that, as is apparent from the case-law cited in paragraph 32 above, the *non bis in idem* principle precludes, in competition law matters, an undertaking's being found liable or the bringing of proceedings against it afresh on the grounds of anticompetitive conduct for which it has been penalised or declared not to be liable by a prior decision that can no longer be challenged.

62 The *non bis in idem* principle aims, therefore, to prevent an undertaking from 'being found liable or proceedings being brought against it afresh', which assumes that that undertaking was found liable or declared not to be liable by a prior decision that can no longer be challenged. As a corollary to the *res judicata* principle, the *non bis in idem* principle aims to ensure legal certainty and fairness; in ensuring that once the person concerned has been tried and, as the case may be, punished, that person has the certainty that he or she will not be tried again for the same offence (see, to that effect, judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie*, C-617/17, EU:C:2019:283, paragraphs 29 and 33).

63 It follows that the initiation of proceedings of a criminal nature is liable, as such, to fall within the scope of the *non bis in idem* principle, irrespective of whether those proceedings actually result in the imposition of a penalty.

64 Secondly, it should be noted that, according to the case-law of the Court, Article 101 TFEU and Articles 5 and 23(2) of Regulation No 1/2003 must be interpreted as meaning that, in the event that the existence of an infringement of Article 101 TFEU is established, the national competition authorities may, by way of exception, confine themselves to finding that infringement without imposing a fine where the undertaking concerned has participated in a

national leniency programme (judgment of 18 June 2013, *Schenker & Co. and Others*, C-681/11, EU:C:2013:404, paragraph 50). In order to ensure that not imposing a fine under a national leniency programme does not undermine the requirement of effective and uniform application of Article 101 TFEU, such treatment can be accorded in strictly exceptional situations only, such as where an undertaking's cooperation has been decisive in detecting and actually suppressing the cartel (judgment of 18 June 2013, *Schenker & Co. and Others*, C-681/11, EU:C:2013:404, paragraphs 47 and 49).

65 It follows that, as the Advocate General observed in point 92 of his Opinion, immunity from, or a reduction in, a fine is by no means automatically guaranteed to an undertaking that claims the benefit of a leniency programme.

66 In those circumstances, it must be held that, without prejudice to the answer given to the first and third questions of the referring court, the *non bis in idem* principle may apply to proceedings for the enforcement of competition law notwithstanding the fact that, because of the participation in the national leniency programme by the undertaking in question, which has already been prosecuted in the context of another set of proceedings which resulted in a final decision, those new proceedings may only lead to a declaration that that law has been infringed.

67 In the light of all the foregoing considerations, the answer to the fourth question is that Article 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 programme, only a declaration of the infringement of that law can be made, are liable to be covered by the *non bis in idem* principle.

Costs

68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding an undertaking from having proceedings brought against it by the competition authority of a Member State and, as the case may be, fined for an infringement of Article 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 Article 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.**

2. Article 50 of the Charter of Fundamental Rights of the European Union 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 programme, only a declaration of the infringement of that law can be made, are liable to be covered by the *non bis in idem* principle.

[Signatures]