

The *ne bis in idem* Principle in Proceedings Related to Anti-Competitive Agreements in EU Competition Law

by

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Abstract

The source of the *ne bis in idem* principle in European Union law is found in both the Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) and in the legal systems of many Member States. It is enshrined in the jurisprudence of the EU courts as a general principle of EU law. Furthermore, it has also been introduced into some international agreements concluded by the Member States, i.e. the Convention on the protection of the European Communities' financial interests and the Convention on the fight against corruption, which remain an integral part of EU legislation, as well as in the Convention implementing the Schengen Agreement, which has been progressively integrated into EU legislation.

Following the entry into force of the Treaty of Lisbon, which incorporates the Charter of Fundamental Rights of the European Union (Charter) into EU primary law, the provision on the application of the *ne bis in idem* principle is now applied in the European Union in areas broader than just the scope of the three above-mentioned Conventions. The significance of this principle may also be strengthened following the accession of the EU to the Convention, as has been set forth in the new Article 6(2) TEU.

The *ne bis in idem* principle has found its own, lasting place among the rights and guarantees of undertakings in proceedings conducted by the Commission and the national competition authorities (NCAs) of the Member States aimed at prosecuting and/or sanctioning parties for agreements non-compliant with EU competition law. However, it is still not applied in proceedings against agreements having a scope which transcends EU borders, conducted by the Commission or the NCAs of Member States on the one hand, and by the competition authorities of non-member States on the other. This approach is grounded both in the provisions of the Convention and in the provisions of the Charter.

Résumé

Le principe *ne bis in idem* trouve sa source aussi bien dans le Protocole n° 7 de la Convention européenne des droits de l'homme (Convention) que dans les systèmes juridiques des États membres. Dans le droit de l'Union européenne, il est présent dans la jurisprudence en tant que règle générale du droit communautaire. Avec l'entrée en vigueur du traité de Lisbonne, qui inclut la Charte des droits fondamentaux (Charte) dans le droit primaire de l'UE, l'Union européenne s'est dotée aussi d'un texte relatif à l'application du principe *ne bis in idem* dans un champ beaucoup plus large que pour les affaires relevant des trois conventions signées dans les années 90. L'importance de ce principe peut aussi être corroborée par l'adhésion de l'UE à la Convention, ce que prévoit l'art. 6 nouveau, al. 2 du TUE.

Le principe *ne bis in idem* a trouvé sa place parmi les droits et garanties reconnus à l'entrepreneur dans le cadre des procédures menées par la Commission et les

autorités nationales de concurrence, soit la poursuite et sanction des accords non conformes au droit communautaire de la concurrence. Cependant, il n'est pas appliqué en cas de procédures relatives à des accords dont la portée dépasse le territoire de l'UE, menées par la Commission ou une autorité nationale de concurrence d'une part et les autorités de concurrence de pays tiers d'autre part. Ceci est motivé aussi bien par les dispositions de la Convention que celles de la Charte.

Classifications and key words: EU competition law; anti-competitive agreements; general principles; *ne bis in idem*.

I. Introduction

The *ne bis in idem* principle (*non bis in idem*, double jeopardy) sets forth a prohibition against being tried or punished twice for the same offence, and is applicable mainly in criminal law. It plays a major role in the system of human rights protection, which is founded in Europe on the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, the Convention)¹, signed in Rome, on 4 November 1950. It is also enshrined in Article 14(7) of the International Covenant on Civil and Political Rights². The principle is present as well in the legislation of the Member States of the European Union (EU), including Poland. In a great number of the EU Member States it has been granted the rank of a constitutional provision.

In Community law, the *ne bis in idem* principle has been recognized by the Court of Justice of the European Union (hereafter, the Court of Justice or the ECJ) as a general principle of Community law. As a statutory legal norm, it appeared in Community law in the 1990s when it was inscribed in the Convention implementing the Schengen Agreement³, the Convention on the protection of the European Communities' financial interests⁴, and the Convention on the fight against corruption⁵. Moreover, the *ne bis in idem*

¹ Journal of Laws 1993 No. 61, item 284.

² Journal of Laws 1977 No. 38, item 167.

³ Convention implementing the Schengen Agreement signed on 14 June 1985 on the gradual abolition of checks on common borders, signed on 19 June 1990, OJ [2000] L 239/1. Pursuant to the Protocol no. 2 to the Amsterdam Treaty, the Schengen *acquis* was integrated into EU legislation on 1 May 1999.

⁴ Convention on the protection of the European Communities' financial interests drawn up under Article K.3 of the Treaty on the European Union, OJ [1995] C 316/49.

⁵ Convention of 26 May 1997 drawn up on the basis of Article K.3 of the Treaty on European Union on the fight against corruption involving officials of the European Communities and officials of Member States of the European Union, OJ [1997] C 195/2.

principle found its place, among other justice-related rights, in the Charter of Fundamental Rights of the European Union (hereafter, the Charter)⁶, proclaimed in Nice, on 7 December 2000.

One may notice a growing number of cases in which the European Commission (hereafter, the Commission) and national competition authorities (hereafter, NCAs) impose financial penalties upon parties for their involvement in agreements prohibited under Article 101 of the Treaty on the Functioning of the European Union (hereafter, the TFEU). Some of these agreements cover several Member States and go beyond EU borders. The amounts of such penalties have been also on the increase. This raises the question of the possible applicability of the *ne bis in idem* principle to such cases. As a matter of fact, the principle invests undertakings with an additional protection of their rights in instances in which proceedings alleging a breach of the prohibitions contained in Article 101 or Article 102 TFEU have been initiated by more than one competition authority. This article discusses such cases, and the scope of application of the *ne bis in idem* principle for anti-competitive agreements with legal effects on EU territory.

II. The *ne bis in idem* as a general principle of EU law

Pursuant to Article 6(3) of the Treaty on European Union (hereafter, the TEU) in the wording given by the Treaty of Lisbon (signed on the 13 of December 2007 and applicable since the 1 of December 2009): ‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’. In its case-law, the ECJ has stated that, as a principle stemming from the Convention (Protocol no. 7) and from the constitutional traditions common to the Member States, ‘the principle of *non bis in idem* constitutes a fundamental principle of Community law, the observance of which is guaranteed by the judicature’⁸.

⁶ The most recent unified version of the Charter has been published in OJ [2010] C 83/389.

⁷ OJ [2007] C 306/1.

⁸ C-308/04 P *SGL Carbon v Commission*, ECR [2006] I-5977, para. 26 and the jurisprudence quoted therein.

1. The *ne bis in idem* principle in the Convention's system

The *ne bis in idem* principle is laid down in Protocol no. 7 to the Convention, which prohibits being tried or punished twice for the same offence⁹. This prohibition pertains to repeat proceedings or repeat punishment in proceedings before the court of a given State for an offence for which, in accordance with the law and penal procedure of that State, a given individual has already been convicted or acquitted by a final judgment. In order for Article 4 of Protocol no. 7 to the Convention to be applicable, a threefold requirement has to be met: identity of the facts, unity of the offender, and unity of the legal interest protected. Additionally, the proceedings and the penalty must refer to a situation existing in a given State-Party to the Convention.

In its jurisprudence, the European Court of Human Rights (hereafter, the ECtHR) has issued interpretations of the prohibition against being tried or punished twice, as laid down in Article 4 of Protocol no. 7 to the Convention. The ECtHR first recalled that the purpose of Article 4 of Protocol no. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision. It has observed that the wording of Article 4 of Protocol no. 7 does not refer to 'the same offence', but rather to being tried and punished 'again' for an offence for which the applicant has already been acquitted or convicted by a final decision¹⁰.

As far as the definition of 'criminal proceedings' is concerned, the interpretation given by the ECtHR is broad enough to allow for a wider application of the procedural guarantees enshrined in the Convention. As a result, cases examined under Article 6 of the Convention may be deemed to be criminal even if they are not considered as such under applicable national law. The accusation need only be based on a general norm of a preventive and repressive nature and of universal application¹¹. As for the definition

⁹ Journal of Laws 2003 No. 42, item 364; Article 4 of the Protocol no. 7 to the Convention:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. (...)

It should be noticed that not all Member States have ratified Protocol no. 7 to the Convention.

¹⁰ ECtHR judgment of 29 August 2001 in *Fischer v Austria* case, application no. 37950/97, §§ 22–25.

¹¹ M. Bernatt, 'Gwarancje proceduralne w sprawach z zakresu ochrony konkurencji i regulacji, mających charakter karny w świetle EKPCz – glosa do wyroku SN z 14.04.2010 r.' (2011) 6 *Europejski Przegląd Sądowy* 40.

of the term ‘offence’, the jurisprudence of the ECtHR argues for a wider interpretation, close to the scope of the term of ‘criminal charge’ within the meaning of Article 6 of the Convention¹².

When assessing whether proceedings against a party for some alleged illegal conduct should be qualified as ‘criminal’ or not, the ECtHR takes into account the three so-called ‘Engel criteria’, named after the judgment in which they were formulated for the first time¹³. These criteria include: 1) the legal qualification of the offence under the internal law of a given State; 2) the nature of the act (nature of the offence), together with the repressive and deterring character of the penalty; and 3) the type and the degree of affliction (severity) of the penalty for which a given individual is *a priori* liable. Penalties of imprisonment are essentially presumed to be of a criminal nature, a presumption which may be rebutted only in exceptional cases. It may be claimed that severe financial penalties imposed by administrative authorities, especially in those cases in which failure to pay the penalty may result in imprisonment or in entry into a penal register, or the compulsory execution into liquidation or bankruptcy of the sanctioned undertaking, are essentially tantamount to a criminal nature of proceedings¹⁴.

In the *Engel* judgment, as well as in its subsequent decisions, the ECtHR attributed a greater importance to the second and third criterion, i.e. the nature of offence and the degree of severity of penalty for which a given entity may be held liable (outweighing the first condition, i.e. the formal qualification of the act under national law). In this context, the ECtHR considers as vital whether the penalty is charged under a general principle applicable to all citizens (which testifies to its criminal nature) or to a specific group with a specific status (as in disciplinary provisions), and whether it is intended, first and foremost, either to deter the repetition of a given conduct or rather to constitute a type of compensation for damage caused¹⁵.

The ECtHR has adopted this reasoning in cases pertaining to numerous administrative penalties, including penalties imposed by national competition

¹² In its judgments of 21 February 1984 in the case *Öztürk v Germany* (application no. 8544/79, §§ 50 and 52) and of 25 August 1987 in the case *Lutz v Germany* (application no. 9912/82, § 55), the ECtHR stated that in order to apply Article 6 of the Convention in connection with the ‘accusation of criminal offence’, it suffices that such offence be ‘criminal’ in nature from the point of view of the Convention or gives way to the imposition on a party of a penalty which by its nature and by the degree of its severity belongs to the ‘criminal sphere’.

¹³ ECtHR judgment of 8 June 1976, in the case *Engel and Others v the Netherlands*, application no. 5100/71, § 82.

¹⁴ ECtHR judgment of 31 May 2011, in the case *Žugić v Croatia*, application no. 3699/08, § 68. See also the Polish Supreme Court ruling of 14 April 2010, III SK 1/10.

¹⁵ ECtHR judgment of 23 November 2006 in the case *Jussila v Finland*, application no. 73053/01, §§ 29–39.

authorities¹⁶. Considering the aim of competition law (protection of the economic public order), the nature of penalty (concurrent preventive and repressive effect, with no element of indemnification) and the severity of sanction (high financial penalties), according to the ECtHR competition proceedings should be covered by guarantees laid down in Article 6 of the Convention.

For the purpose of our further reflections, it is of a fundamental importance to take into account the position of the ECtHR declaring that the infringement of the *ne bis in idem* principle cannot be avoided by offsetting from the amount of the second penalty the amount of the first penalty imposed as a result of earlier proceedings, as the principle in question prohibits not only repeated punishment but also repeated trial for the same offence¹⁷.

2. The *ne bis in idem* principle in the constitutions of the EU Member States

Pursuant to Article 6(3) TEU, the second source of normative inspiration for the EU judiciary shall be, apart from the provisions of the Convention, the common constitutional traditions of the Member States. Thus, it is worth underlining that the *ne bis in idem* principle has been inscribed in the constitutional provisions of many EU Member States. The principle may be found, among others, in Article 103 of the German basic law, in Article 29 of the Constitution of Portugal, in Article 40 of the Charter of Fundamental Rights and Freedoms of the Czech Republic, in Article 23 of Estonian Constitution, in Article 12 of Annex D to Part II of the Constitution of Cyprus, in Article 31 of the Lithuanian Constitution, in Article 39 of the Malta Constitution, in Article 31 of the Slovenian Constitution, and in Article 50 of the Slovak Constitution¹⁸.

Even though the Spanish Constitution does not itself contain a provision explicitly stating the *ne bis in idem* principle, the Constitutional Court decided in 1981 that its binding force stemmed directly from the principle of lawfulness of criminal law¹⁹. In other Member States the principle is inscribed in legislative provisions²⁰.

¹⁶ In this context, see the following ECtHR judgments: *Melchers and Co. v Germany*, case of 9 February 1990; *Société Stenuit v France*, case of 30 May 1991; and *Lilly v France*, case of 3 December 2002.

¹⁷ ECtHR judgment in *Fischer v Austria* case, application no. 37950/97, § 30.

¹⁸ Source: http://www.europarl.europa.eu/comparl/libe/elsj/charter/art50/default_en.htm#6.

¹⁹ J. De La Cuesta, 'Concurrent national and international criminal jurisdiction and the principle 'ne bis in idem'. General report' (2002) 73(3/4) *Revue internationale de droit pénal* 707.

²⁰ See, for instance, Articles 368 and 692 of the French Code of Criminal Procedure; Article 649 of the Italian Code of Criminal Procedure. In the United Kingdom, the double

In Poland, the *ne bis in idem* principle is classified as one of the principles of criminal proceedings²¹. The Supreme Court has also held that a decision on criminal liability for committing an offence under a provision of the Polish Code of Criminal Procedure makes it impossible to subsequently initiate proceedings for a minor offence, inasmuch as ‘the wording of the provisions of Article 17 § 1, point 7 of the Code of Criminal Procedure leaves no doubt that the plea of inadmissibility is expressed by the prohibition on repeating criminal proceedings (the *ne bis in idem* principle)’²².

Simultaneously, the Polish Constitutional Court has considered the *ne bis in idem* principle to be a constitutional principle stemming from the rule of law (Article 2 of the Constitution) and from the standard of a fair trial – one of the elements of the right to be heard in court [Article 45(1) of the Constitution]²³.

III. The *ne bis in idem* principle in the Charter of Fundamental Rights

The new Article 6 TEU, in the wording given by the Treaty of Lisbon, incorporates the Charter of Fundamental Rights into EU primary law²⁴. Since the entry into force of the Treaty of Lisbon, the Charter has the same legal value as the treaties. Considering that it codifies the rights ‘as they result, in particular, from the constitutional traditions and international obligations, common to Member States (...) the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice (...) and the European Court of Human Rights’²⁵, its importance will undoubtedly increase.

jeopardy principle as a principle of public law, applicable since the 11th century, was limited by the provision of the tenth part of the Criminal Justice Act of 2003 in cases where new evidence for certain types of crimes has been revealed.

²¹ Article 17 § 1 of the Polish Code of Criminal Procedure provides that:

‘No proceedings shall be initiated, and any initiated proceedings shall be discontinued when:

[...]

7) criminal proceedings related to the same act of the same person have been legally closed or those initiated have been pending (...).’ See also Article 5 § 1 point 8 of the Polish Code of Procedure for Minor Offences, and Article 114 § 3 of the Polish Criminal Code.

²² Decision of the Polish Supreme Court of 2 February 2005, IV KK 399/04.

²³ Judgment of the Polish Constitutional Court of 15 April 2008, P 26/06.

²⁴ Article 6(1), first sentence of the TEU, in the wording given by the Treaty of Lisbon: ‘The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties’.

²⁵ Indent 5 of the Preamble to the Charter.

Pursuant to Article 51(1) of the Charter its provisions ‘are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’.

The *ne bis in idem* principle, contained in Article 50 of the Charter, covers the prohibition against trying or punishing a given individual 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. In comparison with the provisions of Article 4 of Protocol no. 7 to the Convention, the proceedings or penalties do not have to refer to a single State-Party to the Convention; the prohibition covered by the *ne bis in idem* principle, when all relevant conditions have been met, is applicable when proceedings or penalties concern any of the EU Member States. In the ‘Explanations related to the Charter of Fundamental Rights’²⁶ (hereafter, the Explanations), which are formally considered as ‘a tool of interpretation intended to clarify the provisions of the Charter’, the comment on Article 50 of the Charter underscores that such a solution not only reflects the EU *acquis* but has also been integrated into the Convention implementing the Schengen Agreement (Articles 54-58), the Convention on the protection of the European Communities’ financial interests (Article 7), and the Convention on the fight against corruption (Article 10).

Moreover, the Explanations specify that any reference to the Convention pertains also to its Protocols (thus also to its Protocol no. 7), and that the meaning and scope of rights guaranteed under the Convention are defined in both the quoted instruments as well as in the case-law of the ECtHR and the Court of Justice of the European Union.

Additionally, pursuant to Article 52(3) of the Charter, it shall contain the rights which correspond to those guaranteed by the Convention (i.e. requirement of homogeneity with the jurisprudence of the ECtHR)²⁷, which does not prevent EU law from providing a more extensive protection. The purpose of this last sentence is to allow the EU to ensure a wider territorial protection (as explicitly stems from the wording of Article 50 of the Charter), and may also serve to extend the subjective and objective protections. What is essential is that in any circumstance, the degree of protection guaranteed under the Charter may not be lower than that ensured by the Convention.

²⁶ OJ [2007] C 303/17.

²⁷ Article 6(1) and indent three of the TEU, and Article 52(3), third sentence of the Charter. See also the Court judgment of 5 October 2010 in the case C-400/10 *PPU McB* (not yet reported), para. 53, and the opinion of the Advocate General J. Kokott in C-17/10 case, *Toshiba Corporation and Others*, para. 120.

IV. The *ne bis in idem* principle in EU competition law

1. General remarks

Similarly to the ECtHR, the Community judicature has assumed that the *ne bis in idem* principle prohibits punishing the same subject twice for the same illegal act and for the same protected legal interest, while underlying that in order for the principle to be applied the three conditions must be met: identity of the facts, unity of offender, and unity of the legal interest protected²⁸.

In Community competition law, the Court of First Instance of the European Communities, operating since the entry into force of the Treaty of Lisbon as the General Court (hereafter, the General Court) has specified that the *ne bis in idem* principle forbids the Commission to sanction or to prosecute an undertaking twice for an anti-competitive conduct for which it has already been penalised or of which it has been exonerated by a previous decision of the Commission that is no longer amenable to challenge²⁹.

The General Court has also proclaimed that the principle *ne bis in idem* does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where the first decision was annulled for procedural reasons, without any ruling having been given on the substance of the facts alleged, since the annulment decision cannot in such circumstances be regarded as an ‘acquittal’ within the meaning given to that expression in penal matters. In such a case, the penalties imposed by the new decision are not added to those imposed by the annulled decision, but replace them³⁰.

Neither the TEU nor the TFEU contains a provision on the nature of penalties imposed for the infringement of EU competition law. However, Article 23 of Regulation 1/2003 (i.e., provisions of secondary legislation) specifies that the decisions on financial penalties taken pursuant to the Article

²⁸ C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission*, ECR [2004] I-123, para. 338; T-322/01 *Roquette Frères v Commission*, ECR [2006] II-3137, para. 278. The need to fulfill the third condition of identity of the legal interest protected has been questioned by Advocate General J. Kokott in her opinion submitted in the case C-17/10 *Toshiba Corporation* (see chapter III.4 of this article, below).

²⁹ T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, ECR [2003] II-2597, paras. 85 and 86, and T-236/01, T-239/01, from T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission*, ECR [2004] II-1181, paras. 130 and 131.

³⁰ General Court judgment of 1 July 2009, in the case T-24/07 *ThyssenKrupp Stainless v Commission*, para. 190 and the case-law quoted therein. For arguments in favour of using the principle *ne bis in idem* in the scope of closing proceedings with a final decision, see also the arguments of Bolloré SA in the case COMP/36.212 – *Carbonless paper*, presented in the decision of the Commission of 23 June 2010, paras. 396–400.

are not of a criminal law nature³¹. Previously, a similar provision was included in Article 15(4) of Regulation 17³². Considering the wording of both articles, one may at first doubt whether the *ne bis in idem* principle will be applicable to proceedings and penalties imposed under the provisions of Regulation 1/2003. However, in light of the ECtHR jurisprudence discussed above and of the wording of the Preamble to Regulation 1/2003, which declares that: ‘(...) this Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles’, it may be assumed that fines imposed in antitrust proceedings are of a criminal law nature in the broad sense of the term (or that they are at least of a ‘semi-criminal nature’).

Based on the ECtHR case-law, following the application of the abovementioned ‘Engel criteria’, Advocate General Sharpston clearly stated that the procedure whereby a fine is imposed for a breach of the prohibition against anti-competitive agreements set forth in Article 101(1) TFEU falls under the ‘criminal head’ of Article 6 of the Convention, as progressively defined by the European Court of Human Rights³³.

According to the AG Sharpston:

- the prohibition (against anti-competitive conduct) and the possibility of imposing a fine are enshrined in primary and secondary legislation of general application;
- the offence involves engaging in conduct which is generally regarded as underhanded, to the detriment of the public at large, a feature which it shares with criminal offences in general, and which entails a clear stigma;
- a fine of up to 10% of annual turnover is undoubtedly severe, and may even put an undertaking out of business;
- the intention of the fine is explicitly to punish and deter, and contains no element of compensation for damages (Guidelines on the methods of setting fines refer to setting the fine at a level ensuring ‘a deterrent effect’³⁴, without an element of compensation for damages).

³¹ Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

³² Council Regulation no. 17 of 6 February 1962 r – the First Regulation Implementing Articles 81 and 82 of the Treaty, OJ [1962] 13/204.

³³ Opinion of Advocate General E. Sharpston of 10 February 2011, in the case C-272/09 P *KME Germany AG, KME France SAS, KME Italy SpA v Commission*, para. 64. These comments also cover fines imposed by the Commission for the breach of the prohibition against the abuse of dominant position, set forth in Article 102 TFEU.

³⁴ Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation 1/2003, OJ [2006] C 210.

A similar position was taken by Advocate General Bot³⁵. Previously, the convergence between administrative and criminal penalties and the need to apply the *ne bis in idem* principle to penalties imposed by administrative authorities when such penalties were of a severe financial nature had been discussed by Advocate General Colomer³⁶.

Until now, neither the Court of Justice nor the General Court has confirmed *expressis verbis* the opinions expressed above concerning the ‘criminal nature’ of penalties imposed for a breach of the prohibitions of Articles 101 or 102 TFEU. However, these courts regularly examine the possibility of application of the *ne bis in idem* principle to proceedings involving the breach of competition law and for penalties imposed by the Commission in such cases³⁷.

³⁵ Opinion of the Advocate General Y. Bot of 26 October 2010, in the case C-352/09 P *ThyssenKrupp Nirosta v Commission*, paras. 48-52, and the case-law quoted therein.

³⁶ ‘Although administrative penalties are not as severe as penalties in criminal law, the same general principles are applied in both systems. (...) The rigour with which the principles are applied varies, but it is clear that principles such as the presumption of innocence, the *ne bis in idem* rule, lawfulness and culpability are legislative constructs which are applicable to both criminal law and to the penalties implemented by administrative authorities’ (opinion of Advocate General D. Ruiz-Jarabo Colomer of 24 January 2008, in the joined cases C-55/07 and C-56/07 *Othmar Michaeler Subito GmbH*, para. 56). The case concerned a penalty of EUR 233,550 imposed for the failure to declare a series of part-time employment agreements to the German Labour Inspection. By way of comparison, in her opinion of 15 December 2011, in the case C-489/10 *Bonda*, Advocate General J. Kokott excluded the criminal nature of EU-based administrative proceedings resulting in the non-payment to the farmer of ‘area payments’ considering the restricted group of addressees of that type of sanction and their lack of a repressive nature. According to the AG Kokott, this precludes the act of ‘doubling’ in collusion with criminal proceedings and with the penalty imposed on Bonda for the same offence under the Polish Criminal Code.

³⁷ The joint cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission*, ECR [2002] I-8375, para. 59, and T-322/01 *Roquette Frères v Commission*, ECR [2006] II-3137, para. 278, and the case-law quoted therein. As far as the position of national courts on this subject is concerned, the Austrian Supreme Court, for instance, in its judgment of 12 September 2007, stated that fines in antitrust proceedings are penalties of ‘a criminal law nature’ in the broad meaning of the term (case 16 OK 4/07, *Europay*). The Polish Supreme Court, in its judgment of 14 April 2010 r. (III SK 1/10) admitted that under the ECtHR jurisprudence severe financial penalties imposed on entrepreneurs by administrative authorities are sanctions of a criminal nature within the meaning of the provisions of the Convention, but upheld its previous position that the financial penalties imposed by national regulatory authorities and the antitrust body are not sanctions of criminal nature. However, it stressed that in matters in which a financial penalty is imposed on an entrepreneur, the rules of judicial verification of the legality of such a decision should be similar to those applicable for a court ruling in a criminal matter as regards the standards of protection of defendant rights applicable in criminal proceedings. It is worth underlining that in some Member States (e.g. in France, the United Kingdom, the Federal Republic of Germany, in Slovenia and in Lithuania) criminal sanctions for the involvement in an anti-competitive agreement (imprisonment or high fines) may be imposed on members of the management of undertakings who commit a given breach.

2. Role of the European Commission and of NCAs in the application of the *ne bis in idem* principle

Before the entry into force of Regulation 1/2003, penalties in proceedings for the breach of Community competition law had been imposed mainly by the Commission. However, with the entry into force of Regulation 1/2003 (in effect since 1 May 2004) this option was also granted to NCAs³⁸. Under the provisions of Regulation 17, NCAs rarely prosecuted infringements of Article 81 and 82 of the EC Treaty. This was not only due to the fact that solely in the half of Member States on average, national legislation granted those authorities the rights to implement Community law, but also because the power of the Commission to grant derogation was a discouraging factor in initiating proceedings under Article 81(1) of the EC Treaty. When a given NCA initiated proceedings for the breach of Article 81(1) of the Treaty, the undertaking could decide to notify its agreement or conduct to the Commission, which, bound to examine the notification, could be forced to initiate proceedings, thus relieving the national authority of any possibility to conduct previously initiated proceedings.

Considering that Regulation 1/2003 does not exclude the possibility that proceedings concerning a given agreement could be conducted simultaneously by the Commission and the relevant NCA, the number of cases in which it will be advisable to apply the *ne bis in idem* principle will grow both on the 'vertical' level (when proceedings are run simultaneously by the Commission and a relevant NCA) and the 'horizontal' level (when two or more NCAs have initiated proceedings against the same agreement). This is also the case because 'the aim of enforcing the competition rules on the European internal market as uniformly and effectively as possible is achieved in Regulation 1/2003 not by establishing exclusive competences for individual competition authorities, but rather by having the European Commission and the national competition authorities cooperate and coordinate their activities within a network (...) and hence coordinate their mutual actions'³⁹. These actions are coordinated principally within the European Competition Network (hereafter, the ECN)⁴⁰.

³⁸ See Chapter III.3 below. See also W.Wils 'Community report', [in:] D. Cahill, J.D. Cooke (eds.), *The Modernisation of EU Competition Law Enforcement in the EU*, FIDE 2004, Cambridge, p. 679, and E. Gippini Fournier, 'Institutional report', [in:] H.F. Koeck, M.M. Karollus (eds.), *The Modernisation of European Competition Law*, FIDE 2008, Nomos, p. 375.

³⁹ Opinion of Advocate General J. Kokott in case C-17/10 *Toshiba Corporation and Others*, para. 83.

⁴⁰ For more on this subject see: J. Bazylińska, 'Współpraca w ramach Europejskiej Sieci Konkurencji' (2007) 11 *Przegląd Ustawodawstwa Gospodarczego* 2.

3. Collusion in proceedings conducted by the Commission and by national competition authorities and in penalties in EU proceedings and in national proceedings of Member States

In the state of affairs which existed before the entry into force of Regulation 1/2003 and before the adoption of the Charter, Community jurisprudence had accepted the possibility of the collusion between the Community and national authorities in setting penalties, which was a result of the fact that two proceedings were conducted concurrently by the Commission and the NCA. In order to support such position, it was stated that each of those proceedings pursued different ends and that their mutual acceptability followed from the special system of the sharing of jurisdiction with regard to anti-competitive agreements between the Community and the Member States (i.e., lack of identity of the protected legal interest). At the same time, Community courts underlined that, taking into account the non-applicability of the *ne bis in idem* principle, general principles of equity required that, in fixing the amount of a fine, the Commission would take into consideration penalties which had already been borne by the same undertaking for the same action when penalties had been imposed for infringements of the cartel law of a Member State and, consequently, had been committed on Community territory⁴¹.

The abovementioned position was criticised as being non-compliant with the Convention, and in particular with the ECtHR judgment in the *Fischer v Austria* case, in which the Court declared that a breach of the *ne bis in idem* principle could not be avoided by offsetting from the amount of a subsequent penalty the amount of the penalty awarded in earlier proceedings⁴². Community courts motivated their decisions by the fact that the Convention explicitly refers to proceedings conducted in the same State, and that the approximation of the Member States' competition laws and Community competition law was not at a level which would allow for establishment of the identity of the legal interest protected.

This situation changed with the entry into force of Regulation 1/2003, the adoption of the Charter, and the entry into force of the Treaty of Lisbon. Pursuant to Article 3(1) of Regulation 1/2003, when NCAs of Member States or national courts thereof apply national competition law to agreements, decisions by associations of undertakings, or concerted practices which may affect trade between Member States, they shall also apply Article 101

⁴¹ 14/86 *Wilhelm and Others*, ECR [1969] 1, para. 11, and 7/72 *Boehringer v Commission*, ECR [1972] 1281, para. 3, and T-141/89 *Tréfileurope v Commission*, ECR [1995] II-791, para. 191.

⁴² For more on this subject, see E. Paulis, C. Gauer, 'Le règlement n° 1/2003 et le principe du *ne bis in idem*' (2005) 1 *Concurrences – RDLC* 1.

TFEU to such agreements, decisions, or concerted practices⁴³. Thus, on the one hand, the Commission lost its monopoly on the conduct of cases under EU competition law, and, on the other hand NCAs became bound to apply simultaneously national and EU competition law if the agreement had an EU scope. In such situations, the abovementioned obligation would also cover the need to verify whether in a specific case there exist conditions for the application of the *ne bis in idem*, i.e. ‘repeated trial’ and ‘repeated punishment’, criteria. Hence, an undertaking is granted both procedural and substantive protection of its rights in proceedings initiated alleging a breach of the prohibitions set forth in Article 101 or 102 TFEU.

As far as the first of those criteria is concerned, it should be emphasized that the aim of Regulation 1/2003 was to have each case run by a single competition authority⁴⁴. In consequence, it has become necessary to coordinate actions between the Commission and the NCAs as well as between particular NCAs. The provisions of Article 11(1) of Regulation 1/2003 stipulate that the Commission and the competition authorities of the Member States shall apply Community competition rules in close cooperation. The precedence of the Commission in conducting proceedings under Articles 101 and 102 TFEU manifests itself in the fact that the initiation by the Commission of proceedings pre-empts the competition authorities of the Member States of their competence to apply the abovementioned provisions of the Treaty in a given case. The Commission may also initiate proceedings when a given NCA has already initiated a given case, but only after consulting with such NCA⁴⁵. The Commission may also reject a request to initiate proceedings upon corroborating that a Member State NCA is already acting on a given case⁴⁶. In addition, within the framework of coordinating actions between different NCAs, Regulation 1/2003 allows for the

⁴³ Similarly, in cases in which NCAs or national courts apply national competition law against practices of abuse of dominant position which may affect trade between the Member States, they are bound to apply equally Article 102 of the TFEU.

⁴⁴ See Explanatory memorandum COM (2000) 582, p. 6, and para. 18 of the Preamble to Regulation 1/2003, which stresses that in order to ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority.

⁴⁵ Article 11(6) of Regulation 1/2003; see also paras. 51 and 53 of the Communication on the cooperation within the Network of Competition Authorities, OJ [2004] C 101/43. Pursuant to paragraph 51 of the Communication, NCAs may be relieved of their competence to apply Articles 101 and 102 of the TFEU, which means that they cannot conduct proceedings under the same legal basis. In para. 53 of the Notice, it is added that if the Commission has initiated proceedings, the NCAs can no longer start their own procedure with a view to applying Articles 101 of the TFEU and 102 of the TFEU.

⁴⁶ Article 13(1) second sentence of Regulation 1/2003.

suspension of proceedings pending before such authorities, or for the rejection of the complaint against an agreement, when the case has been already dealt with by one of the NCAs⁴⁷. Similar provisions have been adopted in the national competition laws of the Member States⁴⁸.

In the proceedings in the case C-375/09, *Tele 2*, the Polish NCA has expressly recognized the *ne bis in idem* principle within the framework of Regulation 1/2003 stating that ‘the purpose of (...) the Regulation is to prevent national competition authorities from being able to block any possibility for the Commission to establish infringements of Articles 101 TFEU or 102 TFEU by taking decisions stating that there has been no breach of those provisions, regard being had to the principle of *ne bis in idem*’⁴⁹.

As for the prohibition against repeated punishment for the conclusion and implementation of an agreement infringing upon the provisions of Article 101 TFEU, such prohibition is presumably complied with by the obligation to take into account any penalty already imposed by one of the competition authorities as well as the fact that such authority has acquitted a participant involved in such agreement. Hence, if the Commission or one of the NCAs has issued a decision imposing a financial penalty on participants involved in a given agreement, pursuant to the *ne bis in idem* principle other competition authorities (including the Commission) should refrain from imposing penalties on those participants of such agreement who have already either been fined or acquitted. This is particularly true in light of the opinion of the Advocate General J. Kokott, who stated explicitly that: ‘the prohibition under EU law against (...) punishment for the same cause of action (...) prevents more than one competition authority or court from imposing penalties for the anti-competitive consequences of one and the same cartel in relation to the same territory and the same period of time within the European Economic Area (hereafter, the EEA). On the other hand, the *ne bis in idem* principle does not in any way prohibit more than one competition authority or court from penalising restrictions of competition – by object or by effect – resulting from

⁴⁷ Article 13(1) and (2) of Regulation 1/2003.

⁴⁸ See for instance Article 87 of the Polish Act of 16 February 2007 on competition and consumer protection (Journal of Laws 2007 No. 50, item 331, as amended), which lays down that the President of the Office of Consumer and Competition Protection, pursuant to Article 11(6) of Regulation 1/2003/CE, will not initiate antitrust proceedings if the European Commission is conducting proceedings in the same case or if the case has already been settled by the Commission, and that it may not open antitrust proceedings or suspend its pending proceedings when the competent NCA of another EU Member State has already been conducting proceedings in the same case, if such has already been settled by the latter.

⁴⁹ C-375/09 *Tele 2 Polska* (not yet reported), para. 15. This position has been subsequently confirmed by Advocate General J. Mazak in para. 30 of its opinion delivered on 7 December 2010 in the same case.

one and the same cartel in different territories or during different periods of time within the EEA⁵⁰.

The way in which undertakings may practically apply the *ne bis in idem* principle to the imposition of penalties may be exemplified by the decision of the Commission issued in June 2011 on the alleged abuse by a telecommunications company, Telekomunikacja Polska (hereafter, TP) of its dominant position on the market of broadband Internet in Poland⁵¹. In the course of proceedings conducted by the Commission alleging a breach of the prohibition set forth in Article 102 TFEU, TP claimed that a number of the activities conducted, which were listed by the Commission in its statement of objections, had already been subject to sanctions imposed by national authorities and had subsequently been effectively removed. As a result, TP argued that the imposition of a separate financial penalty by the Commission for the same reasons and conduct would constitute a breach of the *ne bis in idem* principle. Despite the fact that, in the case in question, the Commission found that there existed no identity of the legal interest protected, when imposing its penalty it took into account the penalties previously imposed on TP by a legally binding decision of a national regulator for breaches which partially overlapped with the evidence described in the Commission's decision. It identified two decisions of such a nature and decided to off-set from the final amount of the fine the amount of penalties previously paid by TP, which resulted in decreasing the fine by PLN 33,000,000 (EUR 8,445,806). This example shows that it is well worth raising a breach of *ne bis in idem* principle when previous proceedings against the same alleged conduct are either pending or have been adjudicated and resulted either in the imposition of a penalty or with an acquittal by an NCA vested with the mission to protect competition on the EU market or on a part thereof.

4. Evolution in interpretation of the conditions for the application of the *ne bis in idem* principle

4.1. Identity of the legal interest protected

The EU courts have consistently asserted that in order for the *ne bis in idem* principle to be applied three conditions must be cumulatively met: identity of actual circumstances, identity of the offender, and identify of the legal interest protected⁵². The need for the third condition to be met was

⁵⁰ Opinion of Advocate General J. Kokott in the case C-17/10 *Toshiba Corporation and Others*, para. 131. AG Kokott referred to the judgment of the Court in the *Showa Denko* case, C-289/04, para. 54.

⁵¹ Decision of the Commission of 22 June 2011 in COMP/39.525 case – *Telekomunikacja Polska*.

⁵² See the case-law referred to in footnote no. 28.

questioned by AG J. Kokott in her opinion submitted in September 2011 in case C-17/10 *Toshiba Corporation*. She based her argument on the requirement of homogeneity of the EU legal order (in fact, AG Kokott pointed out that the Court does not use the condition of the identity of the legal interest protected in other types of proceedings, and even rejects such a condition⁵³), and on the requirement of the homogeneity of EU case-law with the ECtHR jurisprudence (the latter, in a 2009 judgment decided to abandon the criterion of the identity of the legal interest protected as a basis for interpretation of the *ne bis in idem* principle⁵⁴). Advocate General J. Kokott concluded that for the *idem* definition, the identity of the legally protected interest is not as essential as the identity of the factual situation, the important elements of which include a specific territory and a specific time frame for the applicability of a given anti-competitive agreement. Although the ECJ maintained recently its earlier position that all three conditions are necessary for the *ne bis in idem* principle to be applied⁵⁵ one cannot exclude that the reasoning presented by AG Kokott will be accepted by the Court in the future, especially if the ECtHR will maintain and develop its *Zolotukhin* interpretation in subsequent judgments.

Simultaneously, it should be kept in mind that the growing approximation of competition laws at the national and European levels has had the effect of bringing about the extension, via the provisions of the Charter, of the territorial scope of the *ne bis in idem* principle to proceedings conducted in any EU Member State, by granting NCAs the right – and the obligation – to apply Article 101 TFEU in situations in which they apply national competition law against agreements which may affect the trade between Member States. This natural extension is further strengthened by the mechanism, introduced by Regulation 1/2003, providing for cooperation both between the Commission and the NCAs as well as between particular NCAs. Taking all this into consideration, it may be assumed that the condition of identity of the legal interest protected will be, in general, met in the case of anti-competitive agreements which cover the entire EU territory or its major part. This will, as a rule, result in the obligatory application of the *ne bis in idem* principle to proceedings previously initiated and closed by NCAs.

⁵³ Opinion of Advocate General J. Kokott in the case C-17/10 *Toshiba Corporation and Others*, paras. 116–118 and the case-law quoted therein. When defining the criterion of the identity of event for the purpose of interpretation of Article 54 of the Convention implementing the Schengen Agreement, the Court decided that it should be understood as the existence of a whole, composed of inseparably interrelated conduct and activities, irrespective of the legal qualification of such conduct or activities or of the protected legal interest.

⁵⁴ ECtHR judgment of 10 February 2009 in the case *Zolotukhin v Russia*, application no. 14939/03, §82.

⁵⁵ C-17/10 *Toshiba Corporation and Others* (not yet reported), para. 97.

Ch. Lemaire, venturing into an assessment of the early years of the application of Regulation 1/2003, stresses that ‘beyond substantive rules, where convergence stems largely from the obligation to apply EU law and from the convergence rule, it is certainly in the area of procedural rules and penalties that developments have been most important and interesting. Such developments were not foreseen during the negotiations relating to Regulation 1/2003, since the Member States rejected the introduction of questions such as leniency or other procedural rules. The principle of institutional and procedural autonomy was intended to play a full role. And yet, apparently, a veritable convergence is taking place⁵⁶.

Finally, one should not undermine the change which has taken place in the very perception of the EU market, which, since the entry into force of the Treaty of Lisbon, is treated as an “internal market.”

4.2. Identity of events and identity of offenders

Discussion of the slippery topic of the identity of the protected legal interest as a prerequisite to the application of the *ne bis in idem* principle in EU competition law cases should not result, however, in leaving aside the two other conditions, i.e. the identity of the events underlying the relevant breach and the identity of the offender.

As regards the former, the events which give rise to proceedings conducted by various competition authorities are, in many cases, identical, as a given agreement usually pertains to a major portion of the EU territory (and often third countries as well).

As regards the identity of the offender, valuable guidelines may be found in the judgment of the General Court in the joined cases T-217/03 and T-245/03, *FNCBV v Commission*⁵⁷. This judgment arose from an anti-competitive agreement concluded in October 2001 between six French federations, some of which represented stock breeders and others slaughterhouses. In the course of the proceedings before the Court, the claimants raised the argument that by virtue of the Commission’s decision the same entities were being punished several times for the same breach, on the basis of the membership of three federations in a fourth one with a larger scope of activity.

In justifying its decision the Commission used the argument of lack of identity of the parties, arguing that separate proceedings had been properly exercised against each of the federations for their separate involvement in the breach, and that the circumstance of some of them being simultaneously

⁵⁶ Ch. Lemaire, ‘Premier bilan de l’application du règlement n° 1/2003’ (2009) 251 *Petites affiches* 38.

⁵⁷ T-217/03 and T-245/03 *FNCBV v Commission*, ECR [2006] II-4987.

members of other federations did not affect the circumstances of the involvement of each of the complainants in the said agreement.

In upholding the position of the Commission on the lack of identity of the offenders, the Court stressed that each of the federations had a separate legal personality, a separate budget, and separate statutory aims, and that each of them led their own collective actions to defend their own specific interests. In consequence, by adopting the decision in question the Commission did not impose repeated penalties on the same entities or on the same persons for the same conduct, and thus did not violate the *ne bis in idem* principle.

This judgment shows that for the condition of identity of offenders to be met, it is necessary that the underlying events pertained directly to the involvement of the same offenders in an agreement which gave rise to a specific breach. In proceedings related to anti-competitive agreements, offenders are usually entrepreneurs with a legal personality separate from their partners, or unions of such entrepreneurs.

4.3. Further evolution in interpretation of the conditions of application of the *ne bis in idem* principle

Taking into consideration the increasing role of the Charter, it is very probable that the *ne bis in idem* principle will be raised and applied more and more often in proceedings alleging breaches of Articles 101 and 102 TFEU. This may occur also due to temporal applicability of the *ne bis in idem* principle in the context of EU law as confirmed recently by the ECJ in *Toshiba* case. According to the Court the applicability of the principle depends not on the date on which the facts being prosecuted were committed, but on that on which the proceeding for the imposition of a penalty was opened⁵⁸.

Thus the efforts of the Commission and of specific NCAs should be focused on a more in-depth coordination of their actions, which will have the effect of a) reducing the risk of ‘forum shopping’, i.e. situations whereby proceedings are steered toward or taken over by a particular NCA with a view toward rendering a more advantageous decision to the participants of an agreement or imposing a lower financial penalty; and b) lowering the likelihood that sanctioned undertakings will appeal from the decisions of the Commission or NCAs on the basis of allegations of breach of the *ne bis in idem* principle.

⁵⁸ C-17/10 *Toshiba Corporation and Others* (not yet reported), para. 95.

5. Collusion in proceedings of the Commission and of national competition authorities of non-member States and in penalties in EU proceedings and in proceedings in a non-member State

In the case of cartels acting at the ‘global level’, it may happen that proceedings against them are conducted concurrently by, for example, American, Canadian or Australian competition authorities and by the Commission. In practice, the Commission may then issue a decision on the breach of Article 101 TFEU and impose financial penalties on the participants of such agreement even though they have already been sanctioned by one of those authorities. Actions undertaken by participants involved in agreements of such nature are not usually confined to one specific territory. On the contrary, they spread over the area of supervision of multiple competition authorities. In such a case, there frequently exists an identity of subjects committing a given breach and an identity of events which give rise to the proceedings conducted by various competition authorities.

Due to these dual identities (of events and entities) involved in an anti-competitive agreement, as well as a certain ‘duplication’ of high financial penalties imposed by subsequent competition authorities, the participants involved in such agreements have begun to claim that the *ne bis in idem* principle should also be applicable for proceedings conducted concurrently or over a short time frame by the Commission and by a competition authority of a third State. In the opinion of undertakings, some intervention is needed, particularly in respect of the amount of penalties imposed on the participants to an agreement, so that the penalties imposed in a third State under its competition law would be taken into consideration by the Commission in setting the amount of its fine. This would constitute a first step towards the future application of the *ne bis in idem* principle to ‘non-EU’ cases.

However, first the Commission, and then the EU courts have so far rejected such claims, stating that the exercise of rights by the competition authorities of third States, is, as far as territorial competence is concerned, subject to the requirements specific to such States.⁵⁹ According to the EU courts, elements which are part of the foundations of the legal system of other countries cover not only specific aims and assumptions, but are also intended to implement specific substantive provisions and, when the authorities of such countries have proven the existence of breaches of competition-related rules, to trigger appropriate legal effects in their administrative, criminal and civil law. When the Commission imposes a fine for the illegal conduct of an undertaking, even

⁵⁹ C-289/04 P *Showa Denko v Commission*, ECR [2006] I-5859, paras. 50–63, and C-308/04 P *SGL Carbon v Commission*, ECR [2006] I-5977, paras. 26–39.

if the source of such conduct is an international cartel, it intends to protect free competition on the EU internal market. In fact, considering the specific nature of the legal interest protected at the EU level, the assessments made by the Commission within the scope of its powers in this area may significantly diverge from those made by the authorities of third States (i.e. resulting from the lack of identity of the legal interest protected).

In response to a claim concerning the possibility of application of Article 50 of the Charter, the General Court stressed that the Charter is clearly intended to apply only within the territory of the Union and that the scope of the right laid down in Article 50 is expressly limited to cases where the first acquittal or conviction was handed down in this territory⁶⁰. This position has recently been strengthened by the argument of AG Kokott, who stressed that: ‘the EU-law principle of *ne bis in idem* certainly does not preclude an international cartel from being prosecuted, on the one hand, by authorities within the EEA and, on the other hand, by the authorities of non-member States in their respective territories. This is also indicated by the wording of Article 50 of the Charter of Fundamental Rights, which refers to persons who have already been finally acquitted or convicted ‘within the Union’⁶¹.

In considering applicable principles of international law, the EU courts have also emphasised that ‘there is no principle of public international law that prevents the public authorities, including the courts, of different States from trying and convicting the same natural or legal person on the basis of the same facts as those for which that person has already been tried in another State. In addition, there is no public international law convention under which the Commission could be obliged, upon setting a fine (...), to take account of fines imposed by the authorities of non-member States pursuant to their competition law powers’⁶².

By way of an additional comment, it is worth pointing out that there have been no cases in which the competition authorities of third States took into consideration penalties imposed by the Commission (which could contribute to a possible application of the *ne bis in idem* principle based on claims of reciprocity).

In conclusion, in accordance with the present case-law the *ne bis in idem* principle will not be applicable in cases in which the legal systems of non-member States are involved, and the competition authorities of such countries

⁶⁰ T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and Others v Commission*, ECR [2004] II-1181, para. 137.

⁶¹ Opinion in the case C-17/10 *Toshiba Corporation and Others*, para. 132. AG Kokott referred to the judgment of the Court in the case C-397/03 P *Archer Daniels Midland*, ECR [2006] I-4429, paras. 68 and 69.

⁶² C-289/04 P *Showa Denko v Commission*, ECR [2006] I-5859, para. 58.

act upon and within their own powers. Neither the Commission nor Member State NCAs are bound to take into consideration penalties paid as a result of proceedings conducted in third States. Having said that, it should be noted that if, at the end of proceedings, when setting the amount of financial penalties, they wish to consider any penalty previously imposed by the competition authority of a non-member State, they have the right to do so.⁶³ In particular this is relevant to the Agreement on the European Economic Area,⁶⁴ which is binding for the EU and for all the Member States, and especially with regard to Part IV thereof on competition, as well as the close cooperation in the competition law area between the Commission and the EFTA Supervisory Agency⁶⁵ and with competition authorities of the States which are members of the EEA but not members of the EU. In a situation in which the Commission has not conducted proceedings under Article 56 of the EEA Agreement for the whole EEA, it should take into consideration any penalties previously paid as a result of antitrust proceedings conducted in those countries by the EFTA Supervisory Agency or by national competition authorities of the EEA countries.

V. Conclusions

The source of the *ne bis in idem* principle is found in both the Convention's system and in the legal systems of many Member States. It is considered a part of European Union legislation and is enshrined in the jurisprudence of the EU courts as a general principle of EU law. Furthermore, it has been introduced to some international agreements concluded by the Member States which (as the Convention on the protection of the European Communities' financial interests and the Convention on the fight against corruption) remain an integral part of EU legislation or (as regards the Convention implementing the Schengen Agreement) have been progressively integrated into EU legislation.

Following the entry into force of the Treaty of Lisbon, which incorporates the Charter of Fundamental Rights into EU primary law, the application of the *ne bis in idem* under EU law has been extended to areas broader than the scope of the three above-mentioned conventions. The significance of this

⁶³ See T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, ECR [2003] II-2597, paras. 101 and 103.

⁶⁴ OJ [1994] L 1, p. 1.

⁶⁵ See Protocol no. 23 to the EEA Agreement, OJ [2005] L 64/62 and OJ [2008] L 100/99.

principle may also be strengthened following the projected accession of the EU to the Convention, as has been set forth in the new Article 6(2) TEU⁶⁶.

Article 4 of the Protocol no. 7 to the Convention contains the prohibition against trying or punishing an entity twice in judicial proceedings in the same State, while Article 52(3) of the Charter opens the way for granting even broader protections than those guaranteed under the Convention. This is precisely the case as regards Article 50 of the Charter, which extends the scope of application of the *ne bis in idem* principle to proceedings conducted in different Member States of the EU (territorial extension of the protection). Moreover, such extension of the protection may relate to acts which are covered under the term 'offence'. This is vital in the case of proceedings and penalties imposed under competition law, which usually proceeds under the heading of administrative law. One may predict that the criminal aspect of the conduct and proceedings and the nature of the imposed penalty will be examined in an increasingly liberal manner, and that in the future it will also cover penalties imposed in administrative proceedings without the need to corroborate, on a case-by-case basis, that such proceedings and/or penalties are similar in nature to criminal proceedings/penalties.

Simultaneously, the assertion contained in Article 23 of Regulation 1/2003 that the fines imposed under paragraphs 1 and 2 of that Article are not sanctions of a criminal nature may soon lose its *raison d'être*. First, the EU has already been granted explicit competences in some areas of criminal law harmonisation, specified in Article 83 TFEU. Moreover, the ECJ tends to more and more often opt for granting the European Union the possibility to establish criminal sanctions if they are necessary to implement legal obligations binding on the EU (e.g. penalties for environmental pollution). Further developments in EU competition law may lead, in future, to similar conclusions, especially since some Member State are already applying criminal sanctions for breaches of antitrust provisions⁶⁷.

The *ne bis in idem* principle has found its own, permanent place among rights and guarantees of undertakings in proceedings conducted by the Commission and the Member State NCAs to prosecute and impose sanctions on agreements deemed non-compliant with EU competition law. However, it is still not applied in proceedings against agreements of a scope which transcends EU borders, conducted by the Commission or Member State NCAs on the one hand, and by the competition authorities of non-member States on the other. Such approach is grounded in the provisions of the Convention,

⁶⁶ Article 6(2) of the TEU, in the wording given by the Treaty of Lisbon: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'.

⁶⁷ See the information in footnote no. 37 *in fine*.

which does not oblige its State Parties to extend the application of the *ne bis in idem* principle to third States, and in the provisions of the Charter as well. Until now, both the Commission and the EU courts, when setting and reviewing 'EU' penalties, have rejected any notion that they are obligated to take account of penalties imposed by competition authorities of non-member States. It is worth indicating however that, considering the grant of full protection on EU territory stemming from the prohibitions ingrained in the *ne bis in idem* principles, a decisive refusal on the part of the Commission to consider penalties imposed by outside bodies on the same entities for the same offences is not as manifest as it may seem to be, and warrants further discussion and debate.

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