Case C-151/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

27 March 2020

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

12 March 2020

Applicant and appellant:

Bundeswettbewerbsbehörde

Defendants and respondents:

1. Nordzucker AG

2. Südzucker AG

3. Agrana Zucker GmbH

Subject matter of the main proceedings

Infringement of Article 101(1) TFEU as a result of, inter alia, anti-competitive agreements in relation to the Austrian sugar market

Subject matter of the reference

Prohibition on double jeopardy where the same infringement is prosecuted by authorities of different Member States, significance of the legal interest protected

Questions referred

1. Is the third criterion established in the Court of Justice's competition case-law on the applicability of the 'ne 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 'ne 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 'ne 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)?

Provisions of EU law cited

Article 101 TFEU, Article 50 of the Charter of Fundamental Rights, Article 4 of Protocol No. 7 to the European Convention on Human Rights (Protocol No. 7 to the ECHR), Article 54 of the Schengen Implementing Convention (SIC), Article 2 of Regulation (EC) No 1184/2006, Article 2 of Regulation No 26/1962, Article 209(1) of Regulation (EU) No 1308/2013, Regulation (EC) No 318/2006, recitals 18 and 37, and Articles 5, 13(1) and (2) and 23(2) of Regulation (EC) No 1/2003

Provisions of national law cited

Paragraph 1, Paragraph 2(2), point 5, Paragraph 28(1), Paragraph 29, point 1(a) and (d), and Paragraph 36(1) of the Kartellgesetz 2005 (2005 Law on cartels), and Paragraph 9, Paragraph 87(2), and Paragraph 142, point 1(a) and (d) of the Kartellgesetz 1988 (1988 Law on cartels)

Case-law of the Court of Justice cited

Judgment of 18 June 2013, C-681/11, *Schenker & Co*; judgment of 14 February 2012, C-17/10, *Toshiba*; judgment of 15 October 2002, C-238/99 P, *Limburgse Vinyl*; judgment of 7 January 2004, C-204/00 P, *Aalborg Portland*; judgment of

29 June 2006, C-289/04 P, *Showa Denko*; judgment of 13 February 1968, 14/68, *Walt Wilhelm*; judgment of 18 May 2006, C-397/03, *Archer-Midlands*; judgment of 9 March 2006, C-436/04, *Esbroeck*; judgment of 20 March 2018, C-524/15, *Luca Menci*; judgment of 28 September 2006, C-150/05, *Van Straaten*

Summary of the facts and procedure

1 The groups of the first two defendants (Nordzucker and Südzucker) are two of Europe's leading sugar manufacturers. The third defendant (Agrana), which is controlled by Südzucker, operates two sugar factories in Austria and has further sugar factories in Eastern Europe via subsidiaries. For decades, the sugar market in Germany has been dominated by three large manufacturers, two of which are the first two defendants. For historical reasons, and due to product homogeneity and high transport costs, the German sugar market was divided into the core sales areas of the major German manufacturers ('home market principle'). This did not encompass foreign markets, including those in which, as in Austria, subsidiaries of German sugar manufacturers operated. The third defendant operates largely independently on the markets it serves and is regarded as the Austrian sugar manufacturer.

2 Due to the attempts of foreign sugar manufacturers to enter the German market, several meetings took place from no later than 2004 between the sales directors of the first and second defendants who were responsible for industrial sugar in Germany at the time. The importance of avoiding the new competitive pressure by ensuring that German companies did not compete with each other by penetrating the traditional core sales areas of the other manufacturers was stressed in those meetings. There was no mention of Austria in these talks. Nor did the third defendant participate in these talks, and its management was not informed of them.

3 The opening of the EU's eastern borders was of major importance for the Austrian sales area. Around the end of 2005 and beginning of 2006, the third defendant established that some industrial customers previously supplied exclusively by it were purchasing sugar from Slovakia, apparently from the subsidiary of the first defendant. During a telephone call of 22 February 2006 concerning other group matters, the third defendant's managing director informed the second defendant's sales director of these deliveries to Austria and asked him whether he knew anyone at the first defendant with whom he could discuss the matter. The sales director of the second defendant then called the sales director of the first defendant and complained about the deliveries to Austria. The sales director of the first defendant did not make any commitments to him, but took the risk to the 'peace from competition' on the German market seriously and provided his colleague and the Chief Executive Officer of the first defendant with a report on the conversation by email on 23 February 2006. The latter orally instructed him not to react to it. However, the sales director of the first defendant expressed to the sales manager of the Slovakian subsidiary his wish for exports not to be expanded

to Austria. The latter regarded this wish expressed by a person from group headquarters who he considered to be important as an instruction and was prepared to implement it. These internal processes within the company of the first defendant were not discernible to the third defendant. The telephone conversation of 22 June 2006 remained the only conversation between the defendants in which the Austrian market was mentioned.

4 By final administrative order imposing a fine of 18 February 2014, the German Bundeskartellamt (Federal Cartel Office) imposed a fine of EUR 195 500 000 on the second defendant as a secondary party concerned (‘Nebenbetroffene’), because several persons acting in positions of responsibility intentionally failed to comply, in the period from the end of 2001 at the latest to 26 March 2009, in various locations in the Federal Republic of Germany, with the prohibition of agreements between competing undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, or because they negligently failed to take the supervisory measures necessary to prevent that infringement of the prohibition on cartels, which would have been prevented or significantly hampered by proper supervision. This is based on the fact that persons acting in positions of responsibility for the first defendant, the second defendant and the third German undertaking participated in collusion, in respect of both industrial sugar and retail sugar, for the purpose of respecting the respective core sales areas of their competitors (‘home market principle’). In that context, the German Federal Cartel Office made findings on regular meetings held between the representatives of the first and second defendants from 2004 to 2007 and from 2004 to summer 2008, respectively. That administrative order imposing a fine, consisting of barely 22 pages, expressly reproduces the content of the above-described telephone conversation of 22 February 2006 between the sales director of the second defendant and the sales director of the first defendant concerning Austria.

5 In the present **proceedings**, the Bundeswettbewerbsbehörde (Austrian Federal Competition Authority) filed an application seeking, in respect of the first defendant, a declaratory finding that the latter had infringed Article 101 TFEU and the corresponding provisions of national cartel law and, in respect of the second defendant, the imposition of a fine of EUR 12 460 000 for the period from 1 January 2005 to 21 September 2006 and a further fine of EUR 15 390 000, for which it is jointly and severally liable together with the third defendant, for the period from 22 September 2006 to 31 October 2008.

6 The **court of first instance** refused the applications, stating that, regarding the application for a declaratory finding against the first defendant, it should be noted that the Austrian Federal Competition Authority did not have a legitimate interest in seeking a declaratory finding against an undertaking in respect of which it had refrained from applying for a fine in view of the application of the leniency programme. The sectoral exclusion for agriculture pursuant to Regulation (EU) No 1308/2013 did not apply. For the period up to February 2006, there was no

indication that Austria was involved, even 'implicitly', in the basic understanding to respect the traditional German sales areas. However, the request to that effect, made in the telephone call of 22 February 2006, to have at least a dampening effect on the deliveries made to Austria by the Slovakian subsidiary of the first defendant in 2006, and the subsequent implementation of that request constituted an agreement between the first and second defendants which infringed competition law under Article 101(1) TFEU, and the effects of that agreement had to be presumed to be appreciable. The agreement did not fall within the de minimis exception. However, the prohibition on double jeopardy was also established in competition proceedings concerning the imposition of a fine. If a certain aspect of the conduct, and thus also the wrongfulness of that conduct, was covered by a penalty already imposed by another national competition authority, a new penalty would run counter to the prohibition of double jeopardy. This was the case here with the agreement of 22 February 2006.

7 The Federal Competition Authority's appeal is directed against that decision and seeks, on the basis of the agreement made between the first and second defendants in the telephone conversation of 22 February 2006, a declaratory finding that the first defendant had infringed Article 101 TFEU and the corresponding provisions of national cartel law, and, in respect of the second defendant, the imposition of an appropriate fine for the same infringements.

Principal arguments of the parties in the main proceedings

8 The **Federal Competition Authority** takes the view that, following the telephone conversation of 22 February 2006 described above, there was a series of meetings regarding the Austrian market, which were consistent with an understanding in which the third defendant was guaranteed a territorial monopoly. The individual contacts between the cartel participants should be assessed in their entirety and in the wider context. The active participation of the third defendant could be established as from the first personal meeting on 22 September 2006. From that point until 31 October 2008, the third defendant was therefore also jointly and severally liable with the second defendant. Article 101 TFEU was applicable to the conduct in the present case. The exceptions under Article 2 of Regulation 1184/2006, or Article 2 of Regulation 26/1962, could not be relied upon. The question regarding the prohibition of double jeopardy was not relevant, because the German Federal Cartel Office had only dealt with agreements that had had an impact on the German market. Under EU law, it was permissible for the national authorities to impose penalties in parallel in the case of an infringement covering several Member States, provided that the fines were limited to the effects on the respective territories (decentralised enforcement of competition law pursuant to Regulation 1/2003). This had been the case with the decision of the German Federal Cartel Office. In the present case, by contrast, only the effects on the Austrian market were being prosecuted. The court of first instance disregarded the decision of the Court of Justice in Case C-681/11, *Schenker & Co*. The examination required by the Court of Justice as to the territories in respect of

which a fine had been imposed, taking into account the quantity of turnover, had not been carried out.

9 The **first defendant** requested that the application for a declaratory finding against it be dismissed owing to the lack of a legitimate interest. It takes the view that although Austria had always been implicitly included in the 'basic understanding', it had never been more than a 'side show' due to its low sales volumes. In the contested contacts regarding Austria, the first defendant's primary concern was therefore to prevent countermeasures and 'price wars' in the 'main theatre', Germany, as a result of conduct on the Austrian market.

10 The **second defendant** requested that the application for the imposition of a fine be dismissed. There had been a de facto division of the core sales areas due to the respective locations of the sugar factories and the high transport costs. In view of this situation, the 'basic understanding' arose naturally for commercial reasons, without the need to guarantee it by means of collusion. Moreover, even an explicit 'understanding', if one existed, did not 'implicitly' relate to Austria. No concrete agreements were made in relation to Austria. The third defendant had always independently managed the sugar business within the second defendant's group. A fine had been imposed on the second defendant by the German Federal Cartel Office's final administrative order imposing a fine of 18 February 2014. That administrative order imposing a fine was also based, inter alia, on the telephone conversation of 22 February 2006. According to the 'ne bis in idem' principle, which is also recognised in cartel law, the imposition of a further fine on the second defendant on the basis of the same facts was therefore impermissible.

11 The **third defendant** also requested that the application for the imposition of a fine be dismissed. It stated that the system of core sales areas was created for reasons of commercial logic. The third defendant did not participate in the contacts between the first and second defendants alleged by the Federal Competition Authority. It was correct that the managing director of the third defendant requested that contact be made with the first defendant, but he did not request any intervention from the first defendant, nor was he informed of any such intervention. Lastly, the agreements objected to by the Federal Competition Authority were excluded from the scope of Article 101(1) TFEU by the sectoral exclusion for agriculture pursuant to Article 209(1) of Regulation (EU) No 1308/2013.

Summary of the basis for the reference

The second defendant:

12 A fine was imposed on the second defendant in Germany, the factual background of which also covered the only relevant competition law infringement remaining here, namely the telephone conversation of 22 June 2006.

General points concerning the ‘ne bis in idem’ principle

13 In the context of competition law — particularly in the context of parallel prosecution or punishment by the Commission and the national competition authorities — the Court of Justice has taken the legal view, in settled case-law, that the ‘ne bis in idem’ principle may be applied only if three cumulative criteria (the ‘triad’) are met in relation to the ‘idem’ component, namely identity of facts, offender and the legal interest protected. To that effect, the principle must be observed in proceedings for the imposition of fines under competition law (Court of Justice, C-17/10, *Toshiba*, paragraph 94, C-238/99 P, *Limburgse Vinyl*, paragraph 59, C-204/00 P, *Aalborg Portland*, paragraphs 338 to 340, C-289/04 P, *Showa Denko*, paragraph 50) and precludes an undertaking being found liable or proceedings being brought against it afresh on the grounds of anti-competitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged (C-238/99 P, *Limburgse Vinyl*, paragraph 59).

14 In the *Aalborg Portland* (C-204/00, paragraph 338) and *Toshiba* (C-17/10, paragraph 94) decisions, the Court of Justice referred to those criteria and explained that an undertaking cannot rely on the principle of ‘ne bis in idem’ where the Commission has imposed a sanction on an undertaking for conduct different from that imputed to the same undertaking and forming the subject matter of an earlier decision of a national competition authority, including where the two decisions relate to intrinsically linked contracts and agreements.

15 The rationale underlying this line of case-law can be traced back to the judgment in Case 14/68, *Walt Wilhelm*, of 13 February 1968 and therefore came into being in the early decades of European integration. Since then, national law and EU law have become increasingly intertwined and a certain degree of tension can be felt, particularly between the third criterion of the ‘triad’, identity of legal interest, as applied in the field of competition law, and more recent acts, such as, in particular, Article 50 of the Charter of Fundamental Rights, Protocol No. 7 to the ECHR or the Schengen Implementing Convention (SIC).

16 This is because, as a matter of EU law, the sameness of an offence is determined on the basis of only a two-fold criterion: identity of facts and of offender. The legal characterisation, or the interest protected, are by contrast not determinative for the purposes of applying the principle of ‘ne bis in idem’. This approach, reflecting closely the recent case-law of the European Court of Human Rights (ECtHR), has been applied by the Court of Justice in cases concerning police and judicial cooperation in criminal matters (C-436/04, *Esbroeck*, paragraph 36; C-524/15, *Luca Menci*, paragraph 35; C-150/05, *Von Straaten*, paragraph 53; see also the Opinion of Advocate General Wahl in Case C-617/17, *Powszechny Zakład*, point 25 with further references).

17 In Case C-436/04, *Esbroeck*, paragraph 27 et seq., the Court examined at great length, in proceedings relating to Article 54 of the SIC, the objection that identity

of the acts means identity of their legal classification and of the protected legal interests. It stated that that provision uses the wording 'the same acts' and therefore refers only to the nature of the acts in dispute and not to their legal classification. In this respect, that provision differs from the terms used in other international treaties which enshrine the 'ne bis in idem' principle. For instance, Article 4 of Protocol No. 7 to the ECHR uses the term 'offence', which implies that the criterion of the legal classification of the acts is relevant as a prerequisite for the applicability of the 'ne bis in idem' principle. However, the ECtHR referred to this conceptual differentiation in a later decision, no. 14.939/03 of 10 February 2009, *Zolotukhin v. Russia*. It stated that, in the context of Article 4 of Protocol No. 7 also, the approach should focus on whether the factual circumstances that gave rise to those proceedings were essentially the same, and not on their legal classification.

The territorial aspects of 'ne bis in idem'

18 Generally speaking, 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 (Court of Justice, C-289/04 P, *Showa Denko*, paragraph 58). In that case, the Court rejected the argument that the principle of 'ne bis in idem' could be relied upon in a situation where the Commission exercises its powers under EU law after penalties have been imposed on undertakings for participation in an international cartel by the authorities of a non-Member State on the basis of infringement of competition rules applicable in that State where those authorities have intervened within their respective jurisdictions (see Opinion of Advocate General Wahl in Case C-617/17, *Powszechny Zakład*, point 35).

19 In that line of case-law pertaining to parallel prosecution or punishment by the Commission and non-Member State competition authorities, the Court has highlighted the international nature of the impugned conduct as well as the differences between the respective legal systems, including the aims and objectives of the relevant substantive rules on competition, as well as the specific legal interest protected by EU competition rules. It has also specifically pointed out that this situation, where the Commission and non-Member State authorities intervene in their respective jurisdictions, should be considered separately from the situation where anti-competitive conduct is confined exclusively to the territorial scope of application of the legal system of the EU (and its Member States) (C-289/04 P, *Showa Denko*, paragraphs 51 and 53; cf. Opinion of Advocate General Wahl in Case C-617/17, *Powszechny Zakład*, point 36).

20 The Court's decision in Case C-397/03, *Archer-Midlands*, was also based on the intervention of the Community authorities on the one hand and the authorities of a non-member country on the other hand. According to that decision, where the sanction imposed in a non-member country covers only the applications or effects of the cartel on the market of that State and the Community sanction covers only

the applications or effects of the cartel on the Community market, the facts are not identical.

21 The Court's judgment in Case C-17/10, *Toshiba*, dealt with the question of whether, on the one hand, the national (Czech) competition authorities may impose penalties under national competition law and, on the other hand, the EU authorities may impose penalties under EU law. The important factor here was the fact that the Czech authorities merely sought to penalise consequences to which a cartel gave rise on Czech territory prior to the Czech Republic's accession to the EU, whereas the decision of the Community authorities did not cover any anti-competitive consequences to which the cartel gave rise on Czech territory in the period prior to its accession to the EU (see paragraphs 99-103). The Court focused on the Commission's actual approach, such as the consequences within the Member States and EEA countries that were specifically taken into account and the methods of calculation of the fines (paragraph 101), and did not adopt the statements made by the Advocate General in her Opinion (point 131), according to which, from the outset, the 'ne bis in idem' principle does not prohibit more than one competition authority or court from penalising restrictions of competition — by object or by effect — resulting from one and the same cartel in different territories within the European Economic Area.

22 It is not clear from the Court's case-law to date whether these principles must also be applied in a case where two Member States of the European Union have to apply not only their national law but also EU competition law in proceedings under competition law concerning the same facts relating to the same person, in respect of conduct that took place during their membership of the EU.

The European Commission's Modernisation Package

23 The European Commission's Modernisation Package adopted in the related field of competence of the competition authorities does not clarify these questions either. Recital 18 of Regulation 1/2003 states, as an objective, that each case should be handled by a single authority. However, according to the judgment of the Court in Case C-17/10, *Toshiba*, paragraphs 89 and 90, this cannot be interpreted as meaning that the national authority therefore loses its power to apply national law once the Commission has itself adopted a decision. Accordingly, Article 13(1) of that regulation provides that, where competition authorities of two or more Member States are dealing with a case against the same agreement or practice, the fact that one authority is dealing with the case is sufficient grounds for the others to suspend the proceedings before them or to reject the complaint; however, that fact does not have the effect of depriving the other authorities of their competence. Pursuant to paragraph 2 of that provision, a competition authority of a Member State or the Commission may reject a complaint against an agreement, decision or practice which has already been dealt with by another competition authority.

24 In the Commission Notice on cooperation within the Network of Competition Authorities issued in that context, point 12 states that parallel action by two or three national competition authorities may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one national competition authority would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately. Each national competition authority then operates 'for its respective territory'.

25 However, as these provisions of secondary legislation primarily seek to establish a system of competence within the network of competition authorities that is as efficient and flexible as possible — without laying down any strict rules — they ultimately shed no light on the issue of the applicability of the 'ne bis in idem' principle. Regarding the situation in the present case, where two national competition authorities are taking action against the same persons for the same conduct, the Court has not clarified the issue of the applicability of the 'ne bis in idem' principle, and this is what gives rise to the first and second questions.

Relevance of consideration given to the factual situation?

26 However, it can be gathered from both the Court's case-law on non-Member States (in particular Court of Justice, C-17/10, *Toshiba*) and the last-mentioned notice of the European Commission that the decisive factor is whether the first decision imposing a penalty took the effects of the anti-competitive conduct in the other State into consideration from a factual perspective. The appellant also addresses this point in the present case and takes the view that the decision of the German Federal Cartel Office did not impose a fine for the effects of the cartel on Austria.

27 The court of first instance takes a different view of this issue, however, and refers to the findings in the German Federal Cartel Office's administrative order imposing a fine which relate to the telephone conversation between the first and second defendants on 22 June 2006, and which are of particular importance in view of the brevity of the decision (22 pages compared to the approximately 400-page 'Statement of Objections'), and emphasises the relevance of those findings to the Austrian market. Contrary to the opinion of the Vice President of the Federal Cartel Office of 28 June 2019 — which was issued after the decision of the Kartellgericht (Cartel Court) and according to which, in line with its decision-making practice, decisions of the German Federal Cartel Office punish, in principle, only the effects of anti-competitive conduct on Germany — no details on the calculation of the fine, and in particular on the underlying turnover and its origin, can be gathered from the decision of the competent decision-making division of the Federal Cartel Office itself.

28 It is therefore also questionable whether it is relevant for the applicability of the 'ne bis in idem' principle whether the effects of an infringement of European competition law in another Member State have actually been taken into account, and this forms the subject matter of the third question.

The first defendant: 'Ne bis in idem' in the case of a mere declaratory finding?

29 The first defendant was granted leniency status by the Austrian Federal Competition Authority. In its decision in Case C-681/11, *Schenker*, the Court also held that Article 101 TFEU and Articles 5 and 23(2) of Regulation 1/2003 must be interpreted as meaning that, in the event that the existence of an infringement 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. Accordingly, the Federal Competition Authority requested, in respect of the first defendant, a declaratory finding regarding anti-competitive conduct pursuant to Article 101 TFEU.

30 However, according to the case-law of the Court, the 'ne bis in idem' principle must be observed in proceedings for the imposition of fines under competition law (Court of Justice, C-17/10, *Toshiba*, paragraph 94, C-238/99 P, *Limburgse Vinyl*, paragraph 59, C-204/00 P, *Aalborg Portland*, paragraphs 338 to 340, C-289/04 P, *Showa Denko*, paragraph 50; and also, in relation to Article 54 of the SIC: C-398/12, paragraph 41). Lastly, according to the *Limburgse Vinyl* (C-238/99 P, paragraph 59) and *Toshiba* (C-17/10, paragraph 94) decisions, the 'ne bis in idem' principle does not only preclude an undertaking from being found guilty a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by an earlier decision that can no longer be challenged, it also even precludes proceedings from being brought against it.

31 The question therefore arises as to whether mere declaratory proceedings, in which, owing to the offender's participation in the national leniency programme, only his infringement of European or national competition law can be established, can still be regarded as proceedings aimed at the imposition of fines, in which the principle of 'ne bis in idem' must be applied, and whether such mere declaratory proceedings constitute proceedings impermissibly brought for a second time. This gave rise to the fourth question.