NON BIS IN EUROPEAN COMPETITION LAW.

(Guidelines for conceptual unification).

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Abstract: The recent Opinions[1] presented by Advocate General Bobek in two cases being heard by the CJEU, motivate the need for a unification of the criteria followed until now to assess the prohibition of *non bis in idem* and introduce different analytical variables that focus on three essential elements: identity of the offender, identity of the facts and identity of the protected legal interest. In this paper we carry out a brief analysis of what exists, what is proposed and the changes that this entails in terms of anti-competitive practices.

Keywords: Competition, non bis in idem, fines.

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1. The fragmentation of the doctrine of *non bis in idem* in the European Union.

Recently (2/09/2021), Advocate General Bobek has proposed (Opinions in Cases C-117/20 bpost and C-151/20 Nordzucker and others) the use of a unified criterion for assessing double penalties (non bis in idem principle) within the framework of the Charter of Fundamental Rights of the European Union (art.

1 https://curia.europa.eu/juris/document/document.jsf?text=&docid=245556&pageIndex=0&doclang=ES&mode=req&dir=&occ=first&part=1&cid=7401813#Footref43

50), which would also be applicable in matters of competition law. To this end, he suggests a unified criterion for assessing this principle and replacing what is currently - he states – *'...a fragmented and partly contradictory patchwork of parallel regimes*'.

He therefore refers to certain decisions of the CJEU which establish a consolidated case-law [originating in the CJEU of 13 February 1969 (14/68, EU:C:1969:4 , but qualified in the CJEU of 14 February 2012, Toshiba Corporation and Others (C-17/10, EU:C:2012:72); and confirmed in the CJEU of 25 February 2021, Slovak Telekom (C-857/19, EU: C:2021:139)], which identifies three essential elements (which it proposes to maintain) in order to consider that we are faced with a double sanction in respect of the same conduct: identity of the offender, identity of the facts and identity of the protected legal interest.

At the same time, he considers that there is also a different regime followed by the Schengen system and the European arrest warrant based on the premise that the legal interest protected and the legal classification of the acts in question are irrelevant when assessing the applicability of the *non bis in idem* principle. It also cites the Menci doctrine of 2018 [CJEU of 20 March 2018, Menci (C 524/15, EU:C:2018:197)], in which a second criminal procedure was considered valid, even in spite of a previous one, solely on the basis of a criterion of general interest and provided that the possible sanction has, in the different procedures, a complementary purpose and is proportional when analysed as a whole. In the judgment of 10 February 2009, Sergueï Zolotukhine v. Russia (EC:ECHR:2009), the European Court of Human Rights stated that this principle applies where the facts are identical and not in the case of the same infringement (CJEU of 5 May 1966, Gutmann v Commission (18/65 and 35/65, EU:C:1966:24), and of 9 March 2006, Van Esbroeck (C-436/04, EU:C:2006:165).

As we explained in *GPS Competencia* [Tirant-2020 (Campuzano/Sanjuán, pg 519)] '*under EU law, the identity of an offence is usually determined on the basis of a double criterion: both the facts and the offender must be the same. The legal classification, or the interest protected, are not, on the other hand, decisive for the purposes of applying the principle of ne bis in idem, relating to police and judicial cooperation in criminal matters (Case C-436/04 Van Esbroeck (EU:C:2006:165), paragraph 32; Case C-467/04 Gasparini and Others (EU:C:2006:610), paragraph 32; Case C-467/04 Gasparini and Others (EU:C:2006:610), paragraph 32; Case C-467/04 Gasparini and Others (EU:C:2006:610), paragraph 32): C:2006:610), paragraph 54; of 28 September 2006, Van Straaten (C-150/05, EU:C:2006:614), paragraphs 41, 47 and 48; of 18 July 2007, Kraaijenbrink (C-367/05, EU:C:2007:444), paragraphs 26 and 28; and of 16 November 2010, Mantello (C-261/09, EU:C:2010:683), paragraph 39).*' But in the light of these conclusions, if the CJEU accepts the proposals made, the protected legal interest will become an essential element of the analysis.

The CJEU of 25 February 2021 (Case C-857/19) has clarified in this respect that '*The ne bis in idem principle, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as applying to infringements of competition law, such as the abuse of a dominant position referred to in Article 102 of the Treaty on the Functioning of the European*

Union, and prohibits an undertaking from being condemned or having penalty proceedings reopened against it for anti-competitive conduct in respect of which it has already been penalised or for which it has already been held not liable by an earlier decision which is no longer subject to appeal. On the other hand, that principle does not apply where an infringement procedure is initiated and an undertaking is sanctioned separately and independently by a competition authority of a Member State and by the Commission for infringements of Article 102 of the Treaty on the Functioning of the European Union relating to separate product or geographic markets or where a competition authority of a Member State is deprived of its competence pursuant to the first sentence of Article 11(6) of Regulation No 1/2003'. This issue is, as we shall see, disputed by the Advocate General.

2. The weight of *bis* and i*dem* in the analysis.

Starting from the same offenders in all cases, the Advocate General considers that the Latin expression *bis*, in Article 50 of the Charter, prohibits the imposition, for identical acts, of several penalties at the end of different procedures carried out for this purpose. And this is considering that the reference to the "fact" can be either to the naked fact or to the "act" dressed with the corresponding legal qualification according to the law. On the other hand, "idem" would correspond more to a reference to '*the identity of the material facts, understood as the existence of a set of specific circumstances indissolubly linked together'* [Case C-436/04 van Esbroeck (EU:C:2006:165), paragraph 36; Case C-467/04 Gasparini and Others (EU:C:2006:610), paragraph 36; Case C-467/04 Gasparini and Others (EU:C:2006:610), paragraph 36; Case C-467/04 Gasparini and Others (EU:C:2006:610), paragraph 36; and Case C-467/04 Gasparini and Others (EU:C:2006:610), paragraph 36): C:2006:610), paragraph 54; of 28 September 2006, van Straaten (C-150/05, EU:C:2006:614), paragraph 48; of 18 July 2007, Kraaijenbrink (C-367/05, EU:C:2007:444), paragraph 26; of 16 November 2010, Mantello (C-261/09, EU:C:2010:683), paragraph 39; and of 29 April 2021, (C-665/20 PPU, EU:C:2021:339), paragraph 71)]. And that relationship between them would be determined through the protected legal interest which, in competition matters, has essentially raised problems in the sanctioning relationship in European law and the law of the States, not always assessed in accordance with that triple identity. The specific question of whether EU law and national competition law protect the same legal interest - the Advocate General emphasises - was put to the Court of Justice in the Powszechny Case [CJEU of 3 April 2019 (C-617/17, EU:C:2019:283], although it did not have an answer to it precisely because it focused on the *bis* and not on the *idem*, in accordance with that analysis.

3. Analysis of the protected legal interest in the light of Regulation 1/2003.

The Advocate General went on to state, from the foregoing, that Article 3 of Regulation 1/2003 acknowledges the fact that EU law (Articles 101 and 102 TEU) and national competition law are not identical, at least not in all respects. However, this possible difference relates to the normative quality of the interest (or objective) pursued and cannot simply be based on a different geographical scope of application. In the wording of paragraph 53 it would read as follows: '*In other words, I do not believe that the mere (quantitative) difference in the territorial scope of application of the same infringement, and thus of the given rule, is in itself indicative of a (qualitative) difference in the legal interest. Whereas Union competition law covers situations where trade between Member States is affected, national competition law applies to internal situations. In my view, this difference relates to the territorial scope of the infringement, possibly linked to the seriousness of the interference with the protected legal interest, but not necessarily to the different quality of the protected legal interest'*. And this leads, as a conclusion, to the fact that we may be faced with four scenarios (paragraph 51 of the Conclusions) in the interaction between Union and national rules covered by Article 3 of Regulation No 1/2003 : *'...firstly, there is a complete substantive overlap for situations falling within the scope of Article 101 TFEU, where Member States may not adopt stricter rules. Secondly, there is a fairly extensive, but not complete, substantive overlap for situations falling within the scope of Article 102 TFEU, where Member States may adopt stricter rules. Third, there is partial harmonisation of merger control. Fourthly, and perhaps most importantly, there is a separate regulatory space reserved for Member States when it comes to their national rules which pursue objectives other than those of Articles 101 TFEU and 102 TFEU, such as, for example, national rules on unfair commercial practices*'.

For all these reasons, the analysis of the identity of the relevant facts and the legal interest protected must turn to what, in summary, is proposed:

a) If in a competition case the object or effect is to prevent, restrict or distort competition, this cannot be assessed in an abstract manner, but must always be based on a specific period of time and territory. This is where the identity of the relevant facts must be analysed in order to conclude whether or not there is an undue application of non bis in idem, [CJEU of 14 February 2012, Toshiba Corporation and Others (C-17/10, EU:C:2011:552), paragraph 99.] The prohibition of double jeopardy applies only to the extent that the temporal and geographical scope of the subject matter of both proceedings is the same.

b) The competition authorities of two Member States protect the same legal interest when they apply Article 101 TFEU and the relevant provision of national competition law. If the application starts from that scope then any parallel or subsequent proceedings may infringe *non bis in idem.* Where two national competition authorities apply the same provision of Union law, namely Article 101 TFEU, from which they cannot deviate at national level, it is clear that the specific protected legal interest pursued by both must also be identical. (paragraph 57).

c) This will also apply in cases of leniency programs even if the condition has not yet been met because the case has not yet been completed, as the *ne bis in idem* principle would not only prevent the imposition of a second fine in relation to the same case, but also double jeopardy.

4. The application from our domestic law.

In our competition law, the Judgment of the Audiencia Nacional of 19 November 2015 had stated that '*The guarantee of not being subject to bis in idem is configured as a fundamental right (STC 154/1990, of 15 October, FJ 3), which, in its material aspect, prevents sanctioning on more than one occasion the same act on the same grounds, so that the constitutionally proscribed repetition of sanctions can occur through the substantiation of a duality of sanctioning procedures, regardless of their criminal or administrative nature, or within a single procedure (for example, SSTC 159/1985, 27 November 1985, FJ 3; 94/1986, of 8 July, FJ 4; 154/1990, of 15 October, FJ 3; and 204/1996, of 16 December, FJ 2). It follows that the lack of recognition of the effect of res judicata may be the vehicle through which it is produced (STC 66/1986, FJ 2), but it is not a necessary requirement for its production (STC 154/1990, FJ 3). The material guarantee of not being subject to a bis in idem sanction, which, as we have said, is linked to the principles of typicity and legality of offences (SSTC 2/1981, FJ 4; 66/1986, FJ 4; 154/1990, FJ 3; and 204/1996, FJ 2), aims to avoid a disproportionate punitive reaction (SSTC 154/1990, of 15 October, FJ 3; 177/1999, of 11 October, FJ 3; and ATC 329/1995, 11 December 1995, FJ 2), insofar as this punitive excess violates the citizen's guarantee of foreseeability of sanctions, since the sum of the plurality of sanctions creates a sanction that is alien to the judgement of proportionality made by the legislator and materialises the imposition of a sanction that is not legally foreseen*'.

For its part, the Third Chamber of the Spanish Supreme Court in appeal 2941/2015 has stated that: '*However, the fundamental right that concerns us is at stake when a new sanctioning procedure is opened against the same subjects for the same facts and grounds prosecuted in another that has concluded with a judicial decision on the merits that produces the effect of res judicata. This is specified in Constitutional Court ruling 91/2008 and reiterated in the criminal field in the ruling of the Second Chamber of the Supreme Court 795/2016, of 25 October (cassation 86/2016), citing others. And the same is done in the contentious-administrative sphere in the judgement of the Third Chamber of 24 February 2016 (cassation 984/2014*)'. In the same sense, in the judgement corresponding to appeal 1308/2010 it was stated that the Constitutional Court has repeatedly stated that 'the right recognised in Article 25 of the Spanish Constitution in its punitive aspect does not prohibit the double afflictive reproach, but the punitive reiteration of the same facts with the same grounds suffered by the same subject. Thus, the "*non bis in idem*" principle dictates that an administrative and a criminal sanction, or two administrative sanctions, cannot be imposed for the same facts, on the same offender and on the same grounds. Accordingly, it must then be examined whether in the case in question there is identity of facts, of subjects and of the legislation infringed. But this would preclude the opening of a new procedure by requiring that the first procedure be terminated and would therefore leave out that element which, as we have seen, is also a cornerstone of the Advocate General's reasoning. On the other hand, the reference to the same or identical "grounds" must be considered in the light of the same or identical "protected legal interest", a

question more focused on the objective of protection of the rule than on the rule itself.

5. Conclusions.

In view of all of the above, we must await the ruling of the CJEU in cases C-117/20 bpost and C-151/20 Nordzucker et al. and the desire to resolve the two central questions raised by the Advocate General in his excellent conclusions: on the one hand, whether this proposed unification within EU law is necessary; and on the other, whether this triple identity is accepted, in the manner analysed, which will undoubtedly have to be accommodated in our law by accepting the protected legal interest as a determining element of the aforementioned prohibition.