



Sufficient Coordination Between Authorities as a Prerequisite for *Ne Bis In Idem* Limitations in European Union Law

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ARTICLES

ABSTRACT

The article elucidates the requirement to conduct cumulative proceedings for the same act and against the same person in a manner that is ‘sufficiently coordinated and within a proximate timeframe’, as interpreted in the case law of the Court of Justice of the European Union (CJEU). In the judgment in Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, the CJEU established that such coordination is an indispensable condition for the admissibility of cumulative criminal penalties under article 52(1) of the Charter of Fundamental Rights. However, the CJEU left numerous questions unresolved regarding the understanding of this requirement and the desired manner of its implementation. To address this research gap, the article examines whether existing CJEU jurisprudence allows one to determine the authority responsible for initiating coordination, the measures which national authorities are obligated to undertake, the objectives their coordination should serve and the consequences of non-compliance with this requirement.

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on 14 September 2023, the Court of Justice of the European Union (CJEU or the Court) delivered a judgment in Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*¹ (*Volkswagen* judgment). The *Volkswagen* judgment resulted from a preliminary question posed by an Italian national court regarding the application of the *ne bis in idem* principle or double jeopardy principle outlined in article 50 of the Charter of Fundamental Rights (the Charter or CFR).² The alleged double punishment arose from the concurrent imposition of financial penalties by the Italian Competition and Markets Authority (AGCM) and the German Public Prosecutor's Office of Brunswick (GPPO) for the same infringements committed by Volkswagen Group Italia SpA (VWGI) and Volkswagen Aktiengesellschaft (VWAG) on Italian territory.³ Despite divergent legal classifications and descriptions of the sanctioning acts, both penalties were supposedly imposed for identical circumstances: the sale and advertising of environmentally friendly Volkswagen cars that, in fact, emitted up to 40 times more environmentally harmful emissions than the manufacturer indicated.⁴ The GPPO's imposition of a EUR 1 billion fine on Volkswagen for infringements across all Member States has drawn criticism.⁵ The criticism focused primarily on the potential impact of the GPPO decision could potentially have on the capacity of other regulatory authorities to enforce VWAG infringements following its definitive 'adjudication' across all European Union (EU) Member States. As a result of a final decision on the merits (*res judicata/bis*), 'criminal conviction' in respect of the same facts in another Member State – even if that conviction is subsequent to the decision imposing the fine but became final before the decision acquired the force of *res judicata* – constitutes a violation of the *ne bis in idem* principle under article 50 CFR⁶ or necessitates the justification of additional sanctions under article 52(1) CFR (limitation clause).⁷

Despite the substantial significance of this judgment for national authorities prosecuting Volkswagen's infringements across the EU, the *Volkswagen* judgment is pivotal for two fundamental reasons: the actual function, real-time application and effectiveness of the *ne bis in idem* principle and the admissible range of its limitation under article 52(1) CFR – ie, the premises necessary to determine when, for example, two severe monetary sanctions for the

¹ Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663.

² Charter of Fundamental Rights of the European Union [2016] OJ C202/389 (CFR), art 50. Art 50 of the CFR prevents the double punishment of the same person (*idem personae*) for the same prohibited act (*idem factum*) for which they have previously been acquitted or convicted by a final judgment or punished by an administrative decision within the EU. The administrative or judicial proceedings in which the prohibited act was finally adjudicated and the merits of the case assessed (*bis*) must be characterised by a repressive purpose and a sufficient degree of severity of the sanctions imposed on the individual. The satisfaction of these criteria enables the criminal classification of the proceedings to be determined in accordance with the so-called *Engel* criteria, thereby opening the possibility of applying art 50 of the CFR. See eg Case C-27/22, *Volkswagen* (n 1) paras 43–55.

³ Case C-27/22, *Volkswagen* (n 1) paras 71–76. See more about the Dieselgate case itself in Russell Hotten, 'Volkswagen: The Scandal Explained' (BBC, 10 December 2015) <<https://www.bbc.com/news/business-34324772>> accessed 6 November 2025; MF di Rattalma (ed), *The Dieselgate – A Legal Perspective* (Springer 2017).

⁴ cf n 3.

⁵ For more on the amount and adequacy of the financial penalty imposed by the Brunswick Public Prosecutor's Office for the violations across the entire EU, see eg Marc Barennes, 'Why the CJEU should not follow the AG Opinion on the Application of *Ne Bis In Idem* in the Pending Volkswagen Case' (*European Law Blog* 18 May 2023) <<https://www.europeanlawblog.eu/pub/why-the-cjeu-should-not-follow-the-ag-opinion-on-the-application-of-ne-bis-in-idem-in-the-pending-volkswagen-case/release/1>> accessed 6 November 2025; Aart de Vries, 'The Principle of *Ne Bis In Idem* (Article 50 of the Charter) at the Cross-Border Interface of Punitive Administrative and Criminal Proceedings in the European Union' (2024) 17 *Review of European Administrative Law* 123, 133, in particular footnote 39 on engineering 'one-stop-shop solutions' to the parallel investigations in EU Member States.

⁶ Case C-27/22, *Volkswagen* (n 1) para 77.

⁷ Since the judgment in Case C-524/15, *Criminal proceedings against Luca Menci*, EU:C:2018:197, the CJEU has redefined the essence of the fundamental right outlined in art 50 CFR and has moved towards accepting double proceedings under certain conditions. The primary function of the *ne bis in idem* principle has thereby become not an absolute protection against double jeopardy, but a protection against the disproportionate and uncoordinated effects of cumulative legal responses. Far-reaching exceptions to the prohibition of cumulative criminal proceedings or sanctions became permissible under premises expressed in the general limitation clause from art 52(1) CFR. See more in Max Vetzto, 'The Past, Present and Future of the *Ne Bis In Idem* Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of *Menci*, *Garlsson* and *Di Puma*' (2018) 2 *Review of European Administrative Law* 55; Gianni Lo Schiavo, 'The Principle of *Ne Bis In Idem* and the Application of Criminal Sanctions: Of Scope and Restrictions – ECJ 20 March 2018, Case C-524/15, *Luca Menci* ECJ 20 March 2018, Case C-537/16, *Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob)* ECJ 20 March 2018, Joined Cases C-596/16 and C-597/16, *Enzo Di Puma v Consob and Consob v Antonio Zecca*' (2018) 14(3) *ECLR* 644.

same conduct, which directly violates EU regulations or directives implemented in national law, can be held lawful and legally enforceable.⁸

In that regard, the judgment provides significant research material on one of the requirements for strict necessity being used to justify limiting the principle of *ne bis in idem* based on article 52(1) CFR.⁹ The requirement in question is that the ‘sets of proceedings in question have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe’ in cross-border EU law enforcement (the requirement for coordination or coordination requirement).¹⁰ Non-compliance with the coordination requirement may render it inadmissible to restrict the prohibition against double jeopardy under article 52(1) CFR, and may thus affect the legality and enforceability of administrative decisions, which are thus considered to contravene article 50 CFR, ie a directly applicable provision of EU law.¹¹

Despite the impact of the *Volkswagen* judgment on the requirement for coordination and, consequently, on cross-border and cross-regime enforcement of EU law, only a limited number of academic articles have so far provided an in-depth analysis of those aspects of the judgment.¹² In addition, and with reference to prevailing case law, the coordination requirement has not been subjected to a thorough review or comparison.¹³ Consequently, the systemic effects of this jurisprudential requirement on the effectiveness of EU law have not been given due consideration, particularly in terms of the factual application of the *ne bis in idem* principle under this coordination requirement or on the feasibility of national administrative authorities justifying double jeopardy.

The purpose of this article is to address this research gap by providing a comprehensive analysis of the internal consistency of the Court’s position on the coordination requirement since the *Volkswagen* judgment. The article analyses the repercussions of not complying with the coordination requirement when it comes to comprehensively evaluating the restrictions on the *ne bis in idem* principle from article 52(1) CFR, as well as other fundamental objectives of EU law, such as effectiveness and loyal cooperation between Member States. For this reason, it is necessary to verify whether sufficient and coherent rules of conduct exist for the required coordination between authorities and proceedings, taking into account the *Volkswagen* judgment and the CJEU’s precedent jurisprudence. This requires an examination of several

⁸ The admissibility of accumulated fines under art 52(1) CFR is ultimately dependent on the cumulative fulfilment of the following criteria: (i) this possibility is provided for by law; (ii) the accumulation respects the essence of the fundamental right; (iii) the restriction of the fundamental right resulting from the duplication of proceedings and the accumulation of sanctions corresponds to the objective of the general interest; and (iv) the restriction is strictly necessary. For further information pertaining to the practical application of these criteria and their content, please refer to Case C-27/22, *Volkswagen* (n 1) paras 88–95; Case C-117/20, *bpost SA v Autorité belge de la concurrence*, EU:C:2022:202, paras 40–53 et seq.

⁹ Three conditions relating to the strictly necessary nature of cumulation (see n 8, no iv) must be met: (i) that such duplication does not represent an excessive burden for the person concerned, (ii) that there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to duplication, and (iii) that the sets of proceedings in question have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe – for more see Case C-27/22, *Volkswagen* (n 1) para 96.

¹⁰ Case C-27/22, *Volkswagen* (n 1) paras 95, 97 et seq.

¹¹ Case C-537/16, *Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob)*, EU:C:2018:193, paras 64–68. cf Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105, para 45; C-177/20, *‘Grossmania’ Mezőgazdasági Termelő és Szolgáltató Kft v Vas Megyei Kormányhivatal*, EU:C:2022:175, para 43; Joined Cases C-392/04 and C-422/04, *i-21 Germany GmbH and Arcor AG & Co KG v Bundesrepublik Deutschland*, EU:C:2006:586, para 69; Case C-161/06, *Skoma-Lux sro v Celní ředitelství Olomouc*, EU:C:2007:773, para 73.

¹² de Vries (n 5) 130–34.

¹³ Some of the concerns related to cross-border coordination of proceedings, which became apparent in Case C-27/22, *Volkswagen* (n 1), were accurately anticipated by Michael Luchtman, ‘Transnational Law Enforcement in the European Union and the Ne Bis In Idem Principle’ (2011) 4 Review of European Administrative Law 8, 13, 16, 28–29. For the rest, compare references on coordination, eg Max Vetzo, ‘The Past, Present and Future of the Ne Bis In Idem Dialogue’ (n 7) 73–77; Marco Cappai and Giuseppe Colangelo, ‘Applying Ne Bis In Idem in the Aftermath of bpost and Nordzucker: The Case of EU Competition Policy in Digital Markets’ (2023) 60 CMLR 431; Peter van Cleynebreugel, ‘BPost and Nordzucker: Searching for the Essence of Ne Bis In Idem in European Union Law’ (2022) 18 ECLR 357, 363–73; Kati Cseres, ‘Defending the Rule of Law Through EU Competition Law: The Case of Hungary’ (Amsterdam Law School Legal Studies Research Paper 2024) 184–95; Jasper van den Boom, ‘What Does the Digital Markets Act Harmonize? – Exploring Interactions between the DMA and National Competition Laws’ (2023) 19(1) European Competition Journal 59. More consideration on coordination schemes in general can be found in eg Sabine Gless, ‘Bird’s-Eye View and Worm’s-Eye View: Towards a Defendant-based Approach in Transnational Criminal Law’ (2015) 6(1) Transnational Legal Theory 117 or Michael Luchtman and John Vervaele, ‘Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?’ (2014) 5(2) New Journal of European Criminal Law 192.

key questions: (i) whether the CJEU has indicated what the direct or indirect objectives of coordination are, (ii) which of two or more authorities enforcing the same set of facts (*idem*) is responsible for the coordination, (iii) what triggers the obligation to coordinate and when, and (iv) what are the resultant positive and negative obligations of the coordinating bodies. In the final section, the article presents concluding remarks and offers commentary on potential advances in the coordination requirements and variations in their implementation.

2. WHY IS THE VOLKSWAGEN JUDGMENT SO SIGNIFICANT FOR THE COORDINATION REQUIREMENT?

Essentially, in the *Volkswagen* judgment the Court decided to integrally apply the conditions it developed in its previous case law concerning ‘domestic or intrastate’ proceedings to a cross-border setting.¹⁴ The Court upheld the position that article 52(1) CFR should not authorise two separate legal reactions unless they have been coordinated by investigating (leading) authorities and they aim to protect different legal interests.¹⁵ Although the coordination requirement was introduced into CJEU case law in 2018 by the set of landmark judgments in *Menci*¹⁶ and *Garlsson Real Estate*¹⁷ and considered in the later *MV-98*¹⁸ and *bpost*¹⁹ judgments, it was only with the *Volkswagen* judgment in 2023 that the Court was faced with the task of interpreting this requirement in cross-border and cross-regime circumstances,²⁰ rather than in a purely domestic legal landscape.²¹ The cross-regime context is particularly troublesome because, as in the *Volkswagen* judgment, authorities such as those responsible for consumer protection (the AGCM) and prosecutors’ offices (the GPPO) lack coordination and information-sharing mechanisms at the EU level.²² The Court was therefore faced with the question of what form of the coordination requirement would be desirable in the brand new circumstances.

The Court had three options: (i) disregard the requirement for coordination between proceedings in which a penalty is imposed, thus continuing down the route of eroding the content of article 50 CFR by broadening the derogations therefrom, (ii) render this requirement unrecognisable in practice or (iii) insist that the duplication of proceedings in which a penalty is imposed between national authorities of different Member States and with different spheres of competence is also subject to the coordination requirement.²³ The Court ultimately chose the third option, in line with the Advocate General’s (AG’s) final recommendation issued alongside his doubts.²⁴

¹⁴ de Vries (n 5) 131.

¹⁵ Case C-117/20, *bpost SA* (n 8) para 49.

¹⁶ Case C-524/15, *Menci* (n 7).

¹⁷ Case C-537/16, *Garlsson Real Estate* (n 11).

¹⁸ Case C-97/21, *MV-98 v Nachalnik na otdel ‘Operativni deynosti’ – Sofia v Glavna direksia ‘Fiskalen kontrol’ pri Tsentralno upravlenie na Natsionalna agentsia za prihodite*, EU:C:2023:371.

¹⁹ Case C-117/20, *bpost SA* (n 8).

²⁰ Cross-regime or cross-regulatory may be defined as enforcing two different legal regimes and sets of legislation stemming from EU law, ie data protection and consumer protection laws. See more in Pawel Hajduk and Paul De Hert, ‘EU Cross-regime Enforcement, Redundancy and Interdependence: Addressing Overlap of Enforcement Structures in the Digital Sphere after Meta’ [2024] *Technology and Regulation* 291. See the literature cited therein, particularly Mark Cole and Christina Etteldorf, ‘The Implementation of the GDPR in Member States’ Law and Issues of Coherence and Consistency’ in Inge Graef and Bart van der Sloot (eds), *The Legal Consistency of Technology Regulation in Europe* (Hart Publishing 2024) 131.

²¹ Case C-820/21, *Vinal’ AD v Direktor na Agentsia ‘Mitnitsi’*, EU:C:2023:667. In more recent case law (ie after the *Volkswagen* judgment), the coordination requirement has been developed in only one case, and again in purely domestic circumstances. For a detailed analysis of this issue, see Case C-205/23, *Engie Romania SA v Autoritatea Națională de Reglementare în Domeniul Energiei*, EU:C:2025:43, para 68, where the Court found that the case file contained information showing a close temporal link between the two administrative proceedings, as well as cooperation and exchange of information between the authorities concerned. The interval between the first and second decisions was approximately one month. In other post-*Volkswagen* judgments, the coordination requirement was reiterated but not elaborated upon in response to the preliminary question. See also Case C-733/23, *Beach and Bar Management EOOD v Nachalnik na otdel ‘Operativni deynosti’ – Burgas*, EU:C:2025:515.

²² Opinion of AG Sanchez-Bordona in Case C-27/22, *Volkswagen Group Italia SpA, Volkswagen Aktiengesellschaft v Autorità Garante della Concorrenza e del Mercato*, EU:C:2023:265, paras 106–107.

²³ *ibid* para 114.

²⁴ *ibid* para 115.

While concurring with the AG's assertion that the application of article 50 CFR must prevail over its restriction,²⁵ the repercussions of the *Volkswagen* judgment extend beyond ensuring effective safeguards against dual sanctions or resolving normative inadequacies in the EU coordination apparatus. Those repercussions primarily result from the nature and consequences of a breach of the coordination requirement. The CJEU has opted for an *unconditional approach* to coordination, thereby precluding any derogations, including in cross-border scenarios. This means that coordination must be conducted regardless of an authority's discretion regarding its necessity. Moreover, the CJEU does not make the coordination standard conditional upon developments in the field or on normative solutions available in national or EU law.²⁶ It is crucial whether the coordination did take place, which is a matter to assess for the national court overseeing the admissibility of cumulation.²⁷

The fact that coordination may prove more difficult in a cross-border context where the leading authorities are those of different Member States, or where there are deficiencies or a distinct lack of adequate coordination mechanisms at the EU level, does not, however, justify a failure to observe the coordination requirement.²⁸ The Court supposedly overlooked the fact that fulfilling the coordination requirement will be incomparably more challenging in areas where mutual assistance and cooperation in cross-border enforcement are less developed, not to mention between the authorities responsible for enforcing substantially different areas of EU law (cross-regime context). In fact, the absence or inadequacy of the legal framework for domestic, cross-border or cross-regime coordination – necessary to fulfil this condition – is irrelevant from the CJEU's perspective.²⁹ Consequently, only the actual coordination by the relevant authorities, regardless of normative facilitators or hindrances, will determine whether the cumulation of criminal proceedings or sanctions will ultimately be considered admissible. Inevitably, the CJEU's approach to this matter is internally inconsistent with earlier assumptions set out in the *bpost* judgment, which harmonised the general criteria for applying the *ne bis in idem* principle across different areas of EU law.³⁰ A restrictive approach to the coordination requirement fundamentally contradicts the expectation that neither the coordination requirement nor any other requirement developed under article 52(1) CFR may vary from case to case or across distinct areas of EU law.³¹

The CJEU's uncompromising stance on coordination is also reflected in its demand that, even if the cumulative sanctions appear proportionate, the absence of coordination cannot be justified under article 52(1) CFR, and in and of itself excludes the admissibility of dual sanctions.³² Therefore, a national court that is overseeing a decision contrary to article 50 CFR and thus conducting an ex post assessment of cumulation admissibility cannot be limited to verifying that the cumulative sanctions are not manifestly disproportionate and stating that coordinating these sets of proceedings was unnecessary.³³ The overarching concern now is to determine the legal options available to a national court when the coordination requirement has not been met, even when the other conditions set out in article 52(1) CFR have been satisfied.

Strict necessity requirements have a considerable impact on the overall assessment under article 52(1) CFR. This position is informed by the prevailing CJEU case law supporting the

²⁵ *ibid.*

²⁶ Case C-27/22, *Volkswagen* (n 1) para 103.

²⁷ Case C-117/20, *bpost SA* (n 8) para 55.

²⁸ Case C-27/22, *Volkswagen* (n 1) para 103.

²⁹ See Case C-27/22, *Volkswagen* (n 1) para 104: 'Such coordination of proceedings or penalties may be expressly provided for under EU law, as demonstrated by the coordination systems which were laid down by Regulation No 2006/2004 and which are now laid down by Regulation 2017/2394, even though they are limited to proceedings relating to unfair commercial practices' (emphasis added).

³⁰ cf eg Marco Cappai and Giuseppe Colangelo, 'Applying Ne Bis In Idem in the Aftermath of *bpost* and *Nordzucker*: The Case of EU Competition Policy in Digital Markets' (2023) 60 CMLR 431; Peter van Cleynebreugel, '*BPost* and *Nordzucker*: Searching for the Essence of *Ne Bis In Idem* in European Union Law' (2022) 18 ECLR 357.

³¹ Case C-27/22, *Volkswagen* (n 1) paras 95 and 102.

³² *ibid* para 103.

³³ *ibid* para 102.

conclusion that not only the strict necessity requirement, but also all conditions under article 52(1) CFR must be met cumulatively.³⁴

Several factors support that conclusion. Firstly, the CJEU sequentially verifies each condition for the admissibility of a cumulation of penalties (article 52(1) CFR). As demonstrated by the examples of *Vinal*³⁵ or *Garlsson Real Estate*,³⁶ non-compliance with even one of those conditions has led to a negative outcome of the preliminary judgment under article 50 or article 52(1) CFR.³⁷ Secondly, the CJEU's position on the function of national courts overseeing the legality of cumulation and the point at which it becomes possible to verify its admissibility also affirms the necessity of fulfilling these conditions cumulatively. It is for the national court overseeing the decision that violates the *ne bis in idem* principle to ascertain, in the light of all the circumstances, whether all the conditions of strict necessity are satisfied.³⁸ In *bpost*, the CJEU stated that a full assessment of necessity – and, consequently, the overall analysis of whether the duplicate proceedings can be justified under article 52(1) CFR – can only be undertaken in full ex post, given the nature of some of the factors to be considered.³⁹ It is evident from the Court's judgment that verification of the admissibility of cumulation depends on the capacity to collectively evaluate and analyse the conditions stipulated in article 52(1) CFR. Those statements unequivocally signify an obligation to ascertain the fulfilment of all conditions. In the *Volkswagen* judgment, the Court held that cumulations are admissible 'provided that the conditions laid down in Article 52(1) of the Charter, as defined by the case-law, are satisfied'.⁴⁰ Notably, no judgments refer to the separate, independent treatment of these requirements.

In consequence, the absence of coordination between proceedings and authorities – as one of the three conditions for declaring a cumulation to be strictly necessary – will speak in favour of a national court declaring cumulation inadmissible.⁴¹ Since the CJEU did not refer to any instrument-specific terms governing liability for non-compliance with the coordination requirement,⁴² the prevailing rules regarding unjustified restrictions on the prohibition of double punishment are applicable. As the CJEU's jurisprudence currently suggests, the consequences of not complying with the coordination requirement will therefore be borne by the decision

³⁴ An analogous statement can be found in the Opinion of AG Sánchez-Bordona in Case C-570/20, *BV v Direction départementale des finances publiques de la Haute-Savoie*, EU:C:2021:992, para 45.

³⁵ For a comprehensive analysis of this matter, see also Case C-820/21, *Vinal* (n 21) paras 63–68, wherein the three conditions stipulated in art 52(1) CFR were met. The court's reservations pertained exclusively to the question of whether the strict necessity requirement for cumulation had been fulfilled (para 79), as the regulation does not appear to permit any consideration of the severity of the initial sanction when evaluating the subsequent sanction. Furthermore, it does not enable the authority to determine whether the accumulation of these two sanctions is confined to the minimum required in each specific case. The CJEU has apparently concluded from this fact alone that art 50 may preclude the accumulation of criminal sanctions (para 80).

³⁶ See also Case C-537/16, *Garlsson Real Estate* (n 11) (paras 44, 45, 47, 50 and 53), where most of the conditions of art 52(1) CFR were met. The accumulation became inadmissible precisely because the conditions of strict necessity were not met. Importantly, the negative preliminary judgment was not changed by the fact that some of the conditions of strict necessity had been met (para 51). There is no extant information that would suggest that the Court differentiated between the significance of these conditions or allowed some of them to go unfulfilled.

³⁷ See also Case C-97/21, *MV-98* (n 18), where, due to a failure to comply with the requirement to respect the essence of a fundamental right and the inability of the assessing authority to review the proportionality of the accumulation of sanctions, the Court found the national provisions to be incompatible with art 50 CFR (paras 54 and 63). A similar situation occurred in Case C-570/20, *Criminal proceedings against BV*, EU:C:2022:348, in which the Court found that provisions which do not ensure compliance with the requirements of strict necessity of accumulation (ie that the total penalties imposed do not exceed the gravity of the offence) are incompatible with art 52(1) CFR.

³⁸ Case C-117/20, *bpost SA* (n 8) paras 54 and 51. cf Case C-537/16, *Garlsson Real Estate* (n 11) paras 46 and 61.

³⁹ Case C-117/20, *bpost SA* (n 8) paras 52 and 109. In other words, the application of the *ne bis in idem* principle stops relying on an ex-ante normatively defined test; instead, it becomes an ex post corrective test that may or may not apply, depending on the circumstances and the exact amount of sanctions imposed. That is not a protection against double jeopardy, but simply an ex-post protection against the disproportionality of combined or aggregated sanctions.

⁴⁰ Case C-27/22, *Volkswagen* (n 1) para 106.

⁴¹ cf *ibid* para 103. This will equate to an unconditional violation of art 52(1) CFR, even in instances where some requirements of strict necessity were observed, the cumulation is purposeful and the result seems to be proportional.

⁴² The CJEU did not assign the obligation to initiate or oversee the course of coordination to any specific authority (eg the one issuing the second decision on the same set of facts), nor did it make this obligation dependent on the existing time and procedural configuration of administrative decisions; the rule applies irrespective of the specific time and sequence of the decisions' issuance ('formal termination of proceedings').

that became final subsequently. Thus, it will require a justification test under article 52(1) CFR.⁴³ Despite the defects inherent in this interpretation, it does facilitate a precise determination of which court an interested party should appeal to regarding the prohibition of double punishment and the sanction to which it applies.

The failure to meet any of the conditions outlined in article 52(1) CFR, including the coordination of proceedings, will result in consequences pertaining to that second decision in terms of the sequence of '*bis*'. This is a significant development, as, in line with the *Volkswagen* judgment, any non-observance of the coordination requirement precludes justifying the legality of cumulation under EU law. In contrast to the other grounds of article 52(1) CFR, which may still be upheld by sheer luck even afterwards,⁴⁴ the coordination requires strict implementation even before the formal conclusion of the proceedings.

This prompts a rather provocative conclusion that both parallel or successively pending⁴⁵ proceedings must be conducted in a sufficiently coordinated manner and within a proximate timeframe, assuming that they concern the identical material facts, ie a set of concrete circumstances which are inextricably linked together (*idem*),⁴⁶ the sanctions (to be) imposed are of a criminal nature within the meaning of the *Engel* criteria⁴⁷ and fall within the scope of the 'implementation of EU law' (article 51 CFR).⁴⁸

Technically, however, until the *bis* premise and other conditions from article 50 CFR are met – namely, as long as there is no final judgment on those facts, followed by a determination of the merits of the case in the form of an acquittal or conviction – both sets of parallel proceedings can continue without hindrance. Only when a final decision exists does the *ne bis in idem* principle preclude criminal proceedings in respect of the same facts from being initiated or maintained.⁴⁹ Although referencing the parallel proceedings may seem unjustified given that the *bis* cannot be fulfilled at the time, this is the place where the grave inconsistencies of the *Volkswagen* judgment emerge due to the inevitable connection between the coordination requirement and the *bis* condition. Due to the abolition of absolute protection against double punishment after the *Menci* judgment, the time at which it is determined whether the maintenance of the second proceedings or sanction is inadmissible has been changed. The potential inadmissibility is identified only *post factum* once the *bis* condition has been met in one of the concurrent proceedings, rather than once any administrative decision is issued. The conditions necessary to justify a possible cumulation – such as coordination between proceedings and authorities – may therefore be impossible to fulfil once a decision has been issued and the proceedings have been formally concluded, although they have a decisive impact on the material outcome of the cumulative proceedings. The *Volkswagen* judgment is a paradigmatic example of the potential consequences of a lack of coordination behind a decision that requires justification under article 52(1) CFR and the potential to raise the objection of double jeopardy in a manner contrary to its intended function.

⁴³ The moment of a *ne bis in idem* violation thus provides an essential foundation for such an argument. The catalyst for the violation is, consequently, the decision or proceedings that exists in legal circulation at the time, subsequent to the finalisation of another decision. Nevertheless, the grounds specified in art 52(1) CFR are examined jointly in relation to all decisions and proceedings concerning the same facts.

⁴⁴ It is not unimaginable that sanctions imposed in two uncoordinated proceedings may be shown to be complementary to each other and proportionate.

⁴⁵ The term 'successive' denotes that the subsequent proceedings are initiated only after the chronologically first proceedings have ended (*bis*).

⁴⁶ Case C-27/22, *Volkswagen* (n 1) para 66.

⁴⁷ *ibid* paras 43–55; Case C-97/21, *MV-98* (n 18) paras 38–49. The *Engel* criteria are used to evaluate whether a sanction is of a criminal nature within the meaning of the CFR and for the purposes of its application. This requires an assessment of (i) the legal classification of the offence under national law, (ii) the intrinsic nature of the offence and (iii) the degree of severity of the penalty which the person concerned is liable to incur. The *Engel* criteria, established by the European Court of Human Rights in *Engel and Others v The Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72 (ECtHR, 8 June 1976) paras 80–82, were subsequently adopted and applied by the CJEU in C-489/10, *Bonda*, EU:C:2012:319, para 37.

⁴⁸ The determination of whether both sanctions and proceedings fall within the scope of EU law is pivotal in establishing the possibility of invoking any protection under the CFR. See eg Case C-701/23, *Criminal proceedings against Swiftair SA*, EU:C:2025:237, para 30. cf Case C-27/22, *Volkswagen* (n 1) paras 34–37. It is highly doubtful that the provision of German law on whose basis the penalty was imposed falls within the scope of EU law.

⁴⁹ Case C-27/22, *Volkswagen* (n 1) para 59.

3. IMPACTFUL LIAISON BETWEEN THE COORDINATION REQUIREMENT AND THE BIS PREMISE

To illustrate the crux of the problem and justify the reasoning so far, it is critical to first trace the chronology of events in the *Volkswagen* case. On 4 August 2016, the Italian AGCM imposed a fine of EUR 5 million on VWGI for unfair commercial practices against consumers in Italy (AGCM decision). VWGI appealed the relevant administrative decision to the Regional Administrative Court in Italy.⁵⁰ Before the Lazio court delivered its judgment on this appeal, the GPPO, by a decision issued on 13 June 2018, had imposed a fine of EUR 1 billion on VWAG for negligent breach of the duty of supervision in the activities of undertakings, as regards the development of software allowing the false measurement of emission levels of nitrogen oxides (NOx) and the installation of that software in 10.7 million vehicles sold worldwide, including approximately 700,000 vehicles in Italy, in accordance with the German Act on Regulatory Offences (GPPO decision).⁵¹ Since both decisions and sanctions concerned aspects of the sale of defective cars in Italy and, most likely, the other conditions for establishing the existence of *idem*⁵² had been met, the penalties restricted the fundamental right set out in article 50 CFR.

The decision of the GPPO became immediately final on 18 June 2018, as VWAG waived its right to challenge it and paid the prescribed fine. Only by a judgment of 3 April 2019 did the Italian Regional Administrative Court dismiss the action brought by VWGI and VWAG on the grounds that the principle of *ne bis in idem* does not preclude the fine at issue being maintained. VWGI and VWAG appealed that judgment to the Council of State in Italy, the referring court in the *Volkswagen* case.

Although the AGCM decision was issued first chronologically, the GPPO decision was first to become final, thus constituting the ‘first conviction’ (*bis*) and thereby triggering protection under article 50 CFR. However, considering the chronological order of decisions and the extraterritorial approach to the enforcement of the violation – without prior, explicit assurances that the relevant domestic authorities would refrain from prosecuting violations by Volkswagen companies⁵³ – the GPPO decision was the direct catalyst for the cumulation in terms of *ne bis in idem*.⁵⁴ It was issued and became immediately final one year and ten months after the AGCM decision, during the judicial review of that decision. Therefore, although the AGCM decision was issued before the GPPO decision, the latter became final before the former.

This is an important caveat insofar as the *ne bis in idem* principle is breached once one of the decisions on the same factual situation becomes final and binding.⁵⁵ While the most intuitive and typical case is that decisions become final in the order in which they were issued, there may be instances in which one authority formally terminates the substantive proceedings first, but its decision becomes final at a later date than that of another authority, which formally terminates its proceedings after the first authority (reverse *bis* order).⁵⁶

In such an order, a breach of the *ne bis in idem* principle may come to light after formal termination of one or both parallel administrative proceedings, ie during judicial review of any decision, when the authority is no longer able to change that decision or take additional procedural steps at the administrative level. Once we combine this with factors such as the limited time for conducting cumulative proceedings in parallel and the brief time for identifying whether other proceedings are pending or sanctions have been imposed, at least one authority may be unable to participate in the coordination attempt. Given the role and function of the independent judiciary, I advocate

⁵⁰ *ibid* paras 18–23.

⁵¹ *ibid* paras 16–33.

⁵² This assessment regarded the same facts concerning the same (Italian) territory – Case C-27/22, *Volkswagen* (n 1) para 74.

⁵³ Case C-27/22, *Volkswagen* (n 1) 101.

⁵⁴ In the case at hand, it is apparent that the German Public Prosecutor’s Office took into account the sale of vehicles in other Member States when calculating the disgorgement of profits, and also stated in its decision that the principle of *ne bis in idem* precluded the imposition of subsequent criminal penalties with regard to the use of the ‘defeat device’. cf Opinion of AG Sanchez-Bordona in Case-27/22, *Volkswagen* (n 22) para 77 and fn 41.

⁵⁵ Case C-27/22, *Volkswagen* (n 1) paras 57–59; Case C-524/15, *Menci* (n 7) para 35; Case C-117/20, *bpost SA* (n 8) paras 24 and 29.

⁵⁶ This can occur in cases where an individual abandons their right to challenge a second decision or one of the two sets of proceedings takes significantly longer at the administrative or judicial stage.

that coordination is permissible only at the administrative stage, not during judicial review of a contested decision. A court may only stay proceedings awaiting the decision or judgment of another court or authority that would somehow be prejudicial to its judgment. It may not – unless such an obligation is introduced expressly by EU law – engage in any ‘coordinating’ activities with other authorities or courts taking any form other than staying the proceedings.

In such circumstances, it would now be appropriate to consider which administrative authority is responsible for coordination, and for its absence or inefficient conduct. The CJEU failed to draw any further, at least straightforward, conclusions from the fact that no coordination took place between the GPPO and the AGCM.⁵⁷ Both sets of proceedings appear to have been conducted in parallel over four months, and the GPPO was aware of the AGCM’s decision when it adopted its own – chronologically second – decision.⁵⁸ No conclusions were drawn from the fact that the AGCM was competent in the first place to legally assess the offence on Italian territory, did not waive its enforcement in favour of other authorities’ enforcement and could not participate in the attempt at coordination at Eurojust initiated by the GPPO⁵⁹ – not to mention that only four European authorities refrained from initiating or pursuing proceedings against Volkswagen within Eurojust. The CJEU did not explicitly determine which of these factors alone, or indeed all of them together, were decisive for the conclusion that there was no actual coordination between authorities. Despite the apparent failure of the GPPO to comply with the coordination requirement,⁶⁰ the CJEU refrained from explicitly stating the obligations of the authorities as regards coordination, which authority was obliged to initiate and carry out the coordination, when the coordination could be considered sufficient or how this requirement should be understood in relation to the authorities carrying out the extraterritorial assessment of the infringement.

In view of this, the AGCM decision constituted a limitation on article 50 CFR and required justification, even though it was issued chronologically first and did not contravene the *ne bis in idem* principle during the administrative proceedings or during the prolonged appeal proceedings.⁶¹ Simultaneously, the responsibility for reviewing compliance with the conditions set out in article 52(1) CFR, including the actual conduct of coordination, falls upon the court reviewing a decision in violation of article 50 CFR (cf *Volkswagen* and the Italian Council of State).⁶² In principle, this will ordinarily be the court reviewing or maintaining the decision affected by the earlier final decision, which must adjudicate the second set of proceedings for the same offence and verify the conditions of the limitation clause (article 52(1) CFR).

The current legal shape of the coordination requirement⁶³ enables the invocation of the unlawfulness of a decision (unjustified violation of the prohibition of double punishment), after its issuance, solely due to circumstances that occurred on a later date. As non-compliance with the CFR may occur long after proceedings have been concluded and a decision has been issued – as in the case of the AGCM decision – I propose that such cases be defined as a *post factum* or *ex post* breach of the *ne bis in idem* principle. Thus, an individual can directly invoke an impermissible limitation of article 50 CFR once another decision has become final, thereby satisfying the *bis* condition.

4. CONSEQUENCES OF NON-OBSERVANCE OF COORDINATION

It can be deduced that the requirement of conducting proceedings in a sufficiently coordinated manner and at approximately the same time now serves a function analogous to that of an automatic ground for setting aside or annulling the decision. The risk of illegality of a non-final

⁵⁷ Case C-27/22, *Volkswagen* (n 1) para 101.

⁵⁸ *ibid* para 99.

⁵⁹ *ibid* para 101.

⁶⁰ It may seem that the subsequent GPPO proceedings concerning conduct and sales in Italy were the catalyst for the accumulation. After all, if the GPPO had not taken into account the circumstances that occurred in Italy, there would be no basis for the *ne bis in idem* considerations.

⁶¹ The infringement of *ne bis in idem* principle occurred a mere two years after the decision to impose sanctions was issued.

⁶² Case C-27/22, *Volkswagen* (n 1) paras 16–28. cf Case C-117/20, *bpost SA* (n 8) paras 8–20; Case C-524/15, *Menci* (n 7) paras 11–16; Case C-537/16, *Garlsson Real Estate* (n 11) paras 11–20; Case C-97/21, *MV-98* (n 18) paras 18–26.

⁶³ In particular, the impact of a non-observed coordination on the admissibility of the subsequent sanction in light of art 52(1) CFR and the attribution of responsibility for such non-observance to a second, non-final decision.

decision – one that violates article 50 CFR in conjunction with article 52(1) CFR – increased considerably once the CJEU explicitly rejected that the role of a court reviewing a decision in violation of article 50 CFR could be reduced to an exclusive review of whether the cumulative sanctions are materially proportionate.⁶⁴ The paradox is that if the possibility of reviewing proportionality without coordination or with insufficient coordination between authorities had been accepted, such a ‘procedurally flawed’ decision could be upheld.

In the context of recent developments, a national court that determines the absence or insufficiency of coordination is practically compelled to invalidate the decision under review under article 52(1) CFR, irrespective of actions taken by the issuing authority and the evaluation of the proportionality of the cumulative legal response. In such instances, the active role of the national court is constrained to the absolute minimum in mitigating the effects of the impermissible restriction of the *ne bis in idem* principle. The finding of a lack of coordination between proceedings requires only the annulment of the decision or judgment and precludes correcting it in any way. In another scenario, national authorities or courts are obliged to either refrain from imposing the penalty or annul the decision to that effect, at least in the part relating to the *idem*, for instance, to the same territory of the infringement. Conversely, if such a violation of article 50 CFR did not come to light until the decision was executed, it would be necessary to consider a remedy of nullity of national act(s).⁶⁵

However, the fundamental question remains as to what extent such a decision should be eliminated from legal circulation – in its entirety, or only insofar as it relates to elements of a criminal nature within the meaning of the *Engel* criteria.⁶⁶ The second concept was supported, among others, by the Italian Council of State when issuing a judgment following a preliminary judgment in the *Volkswagen* judgment.⁶⁷ The opinion is that the application of the *ne bis in idem* principle cannot affect proceedings or segments that are not of a ‘substantially’ criminal nature. Such segments may include the removal of the effects of the unfair commercial practice, the obtaining of a commitment to end the infringement, the cessation of its dissemination or the modification of it in a way that eliminates the unlawful aspects. The opinion asserts that adopting an alternative interpretation would carry the risk of entirely nullifying the system of administrative consumer protection, namely that this system would, in fact, be radically deprived of its significance if the right to impose penalties were extended beyond a solely punitive scope.⁶⁸

Adopting such an interpretation would undoubtedly mitigate the anticipated effects of non-compliance with the coordination requirement, such as establishing absolute grounds for an appeal and eliminating not only one of the penalties but also the non-punitive elements of the administrative decision. This mitigating solution would also have a positive impact on ensuring the effectiveness of EU law and restitution in relation to infringed legal interests, individuals or the state.⁶⁹

Therefore, given the unfeasibility of coordination at subsequent stages of proceedings, and the repercussions of a conflict with a directly applicable provision of the Charter, such as article 50, it is arguably problematic to avoid extending the coordination requirement to parallel proceedings and, more broadly, to ‘pre-bis’ (non-final) instances. Nevertheless, it would constitute a challenging obligation as there is no definitive nor convincing pronouncement on which authority should be generally responsible for initiating and conducting coordination and when; how to establish sufficient temporal proximity between proceedings; or which procedural steps should be followed by an authority which has already concluded proceedings⁷⁰ before a cumulation in terms of article 50 CFR became a normative fact (*bis*).

⁶⁴ Case C-27/22, *Volkswagen* (n 1) para 102.

⁶⁵ M Dougan, ‘The Primacy of Union Law over Incompatible National Measures: Beyond Disapplication and towards a Remedy of Nullity?’ (2022) 59(5) CMLR 1301.

⁶⁶ See n 47.

⁶⁷ *Volkswagen Group Italia SpA and Volkswagen AG v Autorità Garante della Concorrenza e del Mercato* (Consiglio di Stato (Italy) Sez VI, 22 March 2024) no 2791/2024 <https://www.sistemapenale.it/pdf_contenuti/1717601918_cds-2791-2024.pdf> accessed 11 November 2025.

⁶⁸ cf *ibid*, s 18.1–18.6.

⁶⁹ However, the aim of this analysis is not to comprehensively evaluate the arguments for and against the application of such a concept.

⁷⁰ Either formally by issuing the decision or definitively by the decision becoming final (*bis*).

5. RECONSTRUCTION OF THE COORDINATION REQUIREMENT IN LIGHT OF CJEU CASE LAW

The coordination requirement may have evolved into an absolute and non-derogable legal principle, yet its implementation faces significant challenges across borders and legal systems.⁷¹ This article explores whether the CJEU acknowledges these complexities and whether they are reflected in the coordination requirement itself—through explicit statements of its objectives or definitions, clear identification of the authorities responsible for its application, a well-defined set of obligations and criteria for determining when proceedings or actions are sufficiently coordinated. However, even as the CJEU adopts a strict approach to coordination, it has not provided a clear or explicit definition of what coordination entails or the specific obligations it imposes.⁷²

The requirement for coordination itself appeared in CJEU case law after the European Court of Human Rights (ECtHR) significantly amended its approach to the *ne bis in idem* principle in its judgment of 15 November 2016 in *A and B v Norway*.⁷³ The CJEU had to decide whether to adopt that new, more restrictive perspective or to retain a higher level of protection against double jeopardy. Although the concept of coordination is not explicitly mentioned in that ECtHR judgment, it is addressed in relation to whether the relevant sets of proceedings are conducted in a manner that, as far as possible, avoids duplication in the collection and assessment of evidence.⁷⁴

At that time, the CJEU did not grant a significant degree of attention to the implementation of this requirement. It implied, in turn, the sole existence of normative rules ensuring coordination and reducing ‘to what is strictly necessary the additional disadvantage associated with the duplication’ for the persons concerned.⁷⁵ In subsequent case law, this formula was slightly modified. Since then, national legislation must ‘ensure the procedures are coordinated to reduce ... the additional disadvantage associated with the duplication of proceedings of a criminal nature conducted independently’.⁷⁶ In addition to evaluating the legal standing of coordination under national law, in a limited number of cases so far, the CJEU has emphasised the need to verify the factual conduct of such coordination.⁷⁷

As literal references to the requirement of coordination and to guidelines for its interpretation are generally limited to individual points of judgments, it remains unclear whether coordination should fulfil any functions beyond ensuring that all additional disadvantages associated with duplicated and independent proceedings on the same matter are reduced to what is strictly necessary.⁷⁸ To address this discrepancy, two aspects of the coordination requirement are presented: the subject, ie who is bound by the coordination requirement and when, and the material, ie in what activities and functions is coordination expressed. The purpose of this review

⁷¹ Opinion of AG Sanchez-Bordona in Case C-27/22, *Volkswagen* (n 22) para 110. cf Opinion of AG Bobek, Case C-117/20, *bpost SA v Autorité belge de la concurrence*, EU:C:2021:680, para 115, where he predicted that ‘once the combination of the relevant proceedings involves a number of parallel administrative regimes, and more importantly, more than one Member State or the authorities of the Member States and of the European Union, then suggestions about the desirability of single-track systems might quickly leave the realm of wishful thinking and cross over into science fiction’. See para 116 of the Opinion, where he concludes that ‘it is not immediately obvious how the necessary level of coordination could reasonably be expected and achieved in various areas of law, within various bodies, and across various Member States’. As de Vries (n 5) 134 argues, however, ‘the Volkswagen case must be an incentive for the EU legislator to introduce an instrument that enables “diagonal coordination” in the context of cross-border punitive proceedings’.

⁷² As rightly stated by Enzo Marasá and Irene Picciano, ‘Ne Bis In Idem Principle: Court of Justice Clarifies that Identity of Legal Interest Pursued by Two Penalties is Not an Essential Requirement for Its Application’ (*Portolano Cavallo*, 2023) <<https://portolano.it/en/newsletter/litigation-arbitration/ne-bis-in-idem-principle-court-of-justice-legal-interest-penalties-essential-requirement-application>> accessed 4 June 2026): ‘The judgment only clarifies that the manner in which national regulatory or competition authorities in different Member States will coordinate their interventions, including the magnitude of the penalties, among and between each other and the European Commission is decisive to ensure the legality of their actions, particularly where the different sets of legislation do not provide clear rules on how such coordination should occur’.

⁷³ *A and B v Norway* App nos 24130/11 and 29758/11 (ECtHR, 15 November 2016).

⁷⁴ *ibid* para 132.

⁷⁵ Case C-524/15, *Menci* (n 7) para 53; Case C-537/16, *Garlsson Real Estate* (n 11) para 55.

⁷⁶ Case C-570/20, *BV* (n 37) para 36. Similarly, see Case C-97/21, *MV-98* (n 18) para 57.

⁷⁷ Case C-117/20, *bpost SA* (n 8) para 54.

⁷⁸ Case C-524/15, *Menci* (n 7) paras 44, 49, 53 and 55.

5.1. SUBJECTIVE SCOPE – OBLIGATED AUTHORITIES AND COURTS

Subjectively, the underlying assumption behind the requirement of coordination is that sanctions are imposed by two distinct bodies.⁷⁹ Even when the same authority conducts both proceedings independently of each other, the coordination requirement still applies.⁸⁰ Such independence between proceedings may be evidenced by the conduct of distinct internal units⁸¹ or by a differentiated procedure for challenging a single decision.⁸²

The investigating authorities must coordinate proceedings to the extent that their scope concerns a substantially identical factual situation (*idem factum*),⁸³ ie identical offences, irrespective of their formal and legal classification,⁸⁴ that involve the same offender (*idem personae*).⁸⁵ To establish the scope of identity between the two sets of proceedings in a holistic manner, the responsible authorities should verify the following: the identity of the offender,⁸⁶ the territory of the infringement,⁸⁷ the alleged infringement period,⁸⁸ the specifics of the violations,⁸⁹ the type of offence (ie single, continuous infringement or single breach)⁹⁰ and the methodology for calculating fines. This will establish whether violations on a specific territory have been assessed on their merits and whether the turnover earned in the other Member State was accounted for in the fine.⁹¹ However, authorities may circumvent the *idem* condition with ease by subdividing facts related to time, territory, market, entity, subject matter or legal qualification into several violations that can be prosecuted and punished separately.⁹² Through such a course of action, authorities may seek to demonstrate that the proceedings do not require coordination with an external authority. In light of the legal implications inherent in not

⁷⁹ Case C-524/15, *Menci* (n 7) para 55; Case C-820/21, *Vinal* (n 21) para 77; Case C-10/18 P, *MOWI ASA v European Commission*, EU:C:2020:149, para 78.

⁸⁰ Case C-97/21, *MV-98* (n 18) paras 19–20 and 57–62; Case C-820/21, *Vinal*, paras 18–23 and 73–78.

⁸¹ Case C-820/21, *Vinal* (n 21).

⁸² Case C-97/21, *MV-98* (n 18).

⁸³ *Idem* is the identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned – see eg Case C-790/19, *Parchetul de pe lângă Tribunalul Braşov v LG and MH*, EU:C:2021:661, para 78.

⁸⁴ Case C-726/21, *Criminal Proceedings against GR, HS, IT*, EU:C:2023:764, para 49.

⁸⁵ Case C-217/15, *Orsi and Baldetti v Procura della Repubblica*, EU:C:2017:264, para 26. The duplication of legal proceedings cannot be considered a violation of the principle of *ne bis in idem* if the penalties in question concern two legally distinct persons. While this verification is generally straightforward in the case of natural persons, such an analysis can be considerably more complex in the case of legal persons. Despite the fact that the CJEU has not yet provided guidance on the identity – within the meaning of *idem* – of VWAG and VWGI, the relationship between the parent company and the subsidiary may allow for arguments that penalties have been imposed on two different legal persons and that there is no accumulation. Based on these doubts, among other things, the national court’s decision, which was predicated on the CJEU’s previous judgment in Case C-27/22, *Volkswagen Group* (n 1), concluded that the *ne bis in idem* principle had not been contravened due to the lack of identity between the parent company (VWAG) and the subsidiary (VWGI) – *Volkswagen Group Italia SpA and Volkswagen AG v Autorità Garante della Concorrenza e del Mercato* (n 66).

⁸⁶ Case C-726/21, *GR, HS, IT* (n 84) para 75; Case C-365/21, *Generalstaatsanwaltschaft Bamberg*, EU:C:2023:236, para 38.

⁸⁷ Case C-857/19, *Slovak Telekom as v Protimonopolný úrad Slovenskej republiky*, EU:C:2021:139, paras 29–38.

⁸⁸ Case C-117/20, *bpost SA* (n 8) para 38; Case C-331/23, *Dranken Van Eetvelde NV v Belgische Staat*, EU:C:2024:1027, para 54.

⁸⁹ Case C-857/19, *Slovak Telekom* (n 87) paras 29–38.

⁹⁰ cf Renato Nazzini, ‘Parallel Proceedings in EU Competition Law: Ne Bis In Idem as a Limiting Principle’ in B van Bockel (ed), *Ne Bis In Idem in EU Law* (CUP 2021) 147.

⁹¹ Case C-151/20, *Bundeswettbewerbsbehörde v Nordzucker AG and Others*, EU:C:2022:203, para 44.

⁹² Nazzini (n 90) 145. See also art 83 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1, whose application may result in the absorption or accumulation of penalties by only depending on the interpretation of the term ‘same or linked processing operations’; see Waltraut Kotschy, ‘Article 83 General Conditions for Imposing Administrative Fines’ in Christopher Kuner and others (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford Academic 2020). cf Francesco Rizzuto and Monika Lynch, ‘Has the CJEU’s Slovak Telekom Judgment Declared the Principle of Ne Bis In Idem Virtually Redundant in Cases of Parallel Public Enforcement of EU Competition Law? (C-857/19 Slovak Telekom)’ (2021) 5 European Competition and Regulatory Law Review 162.

observing the obligation to coordinate, it is highly plausible that the line of argumentation will turn out valid.

Assuming that both sets of proceedings meet the conditions for the application of Article 50 CFR, the coordination requirement should apply to the authorities conducting proceedings for infringement of EU law at the administrative stage of the proceedings.⁹³ Indeed, in the current models for fining proceedings found in the relevant case law, the CJEU seems to distinguish between the nature of the coordination for authorities that are obliged to coordinate (national authorities issuing decisions and imposing criminal sanctions on entities) and authorities that are solely required to verify and assess, during appeal proceedings, whether such coordination has actually taken place (national courts deciding on the legality of the decision).⁹⁴

These remarks were formulated in response to preliminary questions raised by national courts deciding appeals against decisions that may have infringed article 50 CFR. This means that, at the time of the preliminary questions, another final decision against the same person for the same infringement (*bis*) had already been issued, and the referring courts were tasked with verifying whether the decision (penalty) in question could lawfully transgress the double jeopardy prohibition. Such a procedural situation occurred in the judgments concerning *Volkswagen*, *Menci*, *Garlsson Real Estate*, *Vinal*, *Dual Prod*⁹⁵ and *bpost*. The referring courts did not at any stage conduct proceedings on the merits. These courts merely reviewed the decisions for legality and compatibility with EU fundamental rights.

Therefore, equating the role and responsibilities of the national courts with those of national administrative authorities seems ineffective and legally unjustified, as the competent court is solely to perform an overall analysis as to whether the duplication of proceedings can be justified under article 52(1) CFR. Such assessment can only be undertaken in full *ex post*, given the nature of some of the factors – such as the conduct of coordination or the cumulative proportionality of both sanctions.⁹⁶ To ensure an internally consistent understanding of the case law, coordination is to be undertaken by the authority responsible for fulfilling other conditions of the limitation clause, eg regarding the proportionality of cumulative sanctions and verifying whether the matter is protected under article 50 CFR (ie *idem*, *bis*, implementation of EU law and the criminal character of sanctions). Typically, this responsibility is delegated to the body that initiates the proceedings, conducts the evidentiary proceedings and issues a decision, as well as determining whether the imposition of a penalty is justifiable.⁹⁷ Accordingly, the body responsible for examining the merits of the case is tasked with coordinating the proceedings, as delineated by the sequence of reaching the *bis* condition.⁹⁸

5.2. MATERIAL SCOPE OF THE COORDINATION REQUIREMENT

Beginning with the very first, landmark judgment in *Menci*, the requirement of coordination ('establishing the existence of rules ensuring coordination') was deemed to be satisfied once the national legislation allows – only for particularly serious offences – independent criminal proceedings to be brought after an administrative penalty of a criminal nature is imposed.⁹⁹ Such a normative guarantee appeared to satisfy the CJEU's vision of coordination, since a second set of proceedings could not be initiated for any fiscal violation for which a penalty had already been imposed in the first set of proceedings. Conversely, the AG held that such legislation was deficient in several respects, since it (i) did not provide for coordination between the criminal and administrative proceedings, (ii) did not require cooperation between the authorities involved in

⁹³ This is primarily applicable to the administrative–judicial model, in which the decision is issued by the national administrative authority and, following appeal, its correctness and legality are reviewed by a judicial authority.

⁹⁴ cf Case C-117/20, *bpost SA* (n 8) paras 54 and 55 and the reference therein to the separate obligations of court and authority.

⁹⁵ Case C-412/21, *Dual Prod SRL v Direcția Generală Regională a Finanțelor Publice Cluj-Napoca*, EU:C:2023:234.

⁹⁶ Case C-117/20, *bpost SA* (n 8) para 52; Case C-524/15, *Menci* (n 7) para 58.

⁹⁷ However, there may be cases where the authority simply makes a reasoned request to the court to impose a fine of a certain amount on the entity concerned.

⁹⁸ Case C-117/20, *bpost SA* (n 8) para 29; Case C-27/22, *Volkswagen Group* (n 1) para 58; Case C-412/21, *Dual Prod* (n 95) para 55.

⁹⁹ When the amount of unpaid VAT exceeds EUR 50,000, the national legislature has provided for a term of imprisonment. See more in Case C-524/15, *Menci* (n 7) para 54.

the two sets of proceedings to avoid excessive disruption to the individual concerned and (iii) did not create a mechanism for coordination or offsetting of penalties, providing only that the administrative penalties cannot be enforced until the end of the criminal proceedings.¹⁰⁰ The elements posited by the AG appeared to be fundamental to the discourse on the anticipated coordination mechanism. In turn, the approach adopted in *Menci* is at odds with the literal concept of coordination: it functions as an impediment to what the national legislature deems a superfluous replication of proceedings or unnecessary enforcement. Also, it does not appear that this form of domestic ‘coordination’ comprehensively fulfils its principal objective, namely, reducing to what is strictly necessary the additional disadvantage associated with duplication for the persons concerned. National legislation provides no guarantees for individuals who have been subjected to such duplication; such guarantees are extended only to those whose offences are considered insufficiently serious. Apparently, the CJEU’s initial reasoning behind this solution was to advocate for a considerable degree of procedural autonomy for Member States, while the ‘pain threshold’ was providing ‘coordination’, which at least limits the number of proceedings on the same matter but does not additionally serve to ensure closer cooperation between authorities or the proportionality of such cumulation. The whole structure of the necessity test supports this standpoint, as the rules guaranteeing that the severity of all the penalties imposed corresponds with the seriousness of the offence were assessed under a separate criterion within the strict-necessity test.¹⁰¹

In the *Garlsson Real Estate* judgment, the coordination was related to a clear, precise definition of the circumstances in which market manipulation may be subject to duplicate proceedings and to criminal penalties.¹⁰² Similarly to *Menci*, national law seemed to provide a clear delineation – by reference to the ‘significance of change and affection on financial instrument’ – when a prison sentence and an administrative fine of a criminal nature can be imposed concurrently.¹⁰³ In the CJEU’s view, article 187i TUF – which obliges authorities (Consob and the prosecution service) to cooperate and coordinate – is liable to reduce the disadvantages resulting from duplication.¹⁰⁴ This essentially exhausts the CJEU’s comments on this coordination, since the remainder of the examination of the strict necessity of cumulation focusses on ensuring that the severity of the combined penalties corresponds to the seriousness of the offence.¹⁰⁵

In both cases, the CJEU essentially followed a similar line of reasoning: the mere existence of mechanisms limiting the duplication of criminal proceedings to more serious offences was enough to satisfy the coordination requirement. A comparison of the two approved coordination mechanisms reveals that article 187i TUF, as established in *Garlsson Real Estate*, even exceeds the low level of expected coordination accepted in the *Menci* judgment. However, this is still surprising, given that only the normative context in *Garlsson Real Estate* meets the requirements of the judgment in *A and B v Norway*, as it appears to allow the avoidance of unnecessary duplication in the collection and assessment of evidence, notably through adequate interaction among the various competent authorities. Although *Menci* limited the possibility of duplicate proceedings, there was no guarantee of cooperation between the relevant authorities in such cases.

¹⁰⁰ Opinion of AG Sanchez-Bordona in Case C-524/15, *Luca Menci*, EU:C:2017:667, para 123.

¹⁰¹ Case C-524/15, *Menci* (n 7) para 55. See the wording of what indicates different scopes of assessment and character of the criteria for the strict necessity test.

¹⁰² cf Case C-537/16, *Garlsson Real Estate* (n 11) para 6 and art 185 TUF cited therein: ‘Any person making untrue statements or employing fictitious devices or other forms of deception which are in fact capable of bringing about a significant change in the price of financial instruments will be punished by a term of imprisonment of between one and six years and a fine of between EUR 20,000 and EUR 5,000,000’.

¹⁰³ Case C-537/16, *Garlsson Real Estate* (n 11) paras 52–53. Art 187b TUF provided the conditions under which the dissemination of untrue statements and the employment of fictitious devices capable of giving false or misleading information about financial instruments can give rise to the imposition of an administrative fine of a criminal nature. In accordance with art 187b TUF, and in the circumstances referred to in art 185 TUF, such conduct can also, where it is liable to significantly affect the value of financial instruments, be subject to a term of imprisonment and a criminal fine.

¹⁰⁴ Case C-537/16, *Garlsson Real Estate* (n 11) para 57. cf para 8 and art 187i of the TUF: ‘The president of [Consob] shall send to the prosecution service, by means of a reasoned report, the documents collected during the monitoring activity where elements are discovered allowing the existence of an offence to be presumed. The transfer of files to the prosecution service shall take place at the latest at the end of the activity leading to the establishment of the infringements referred to in the provisions provided for in Chapter III of the present Title. (3) [Consob] and the judicial authority shall cooperate with each other, including by means of information exchange, in order to facilitate establishing the existence of the infringements referred to in the present Title, including where those infringements do not constitute offences’.

¹⁰⁵ Case C-537/16, *Garlsson Real Estate* (n 11) paras 57, 58–63.

The exclusive emphasis on the normative understanding of the coordination requirement was abandoned in later case law. It was not until the *bpost* judgment in 2022 that the CJEU referred to the referring court needing to conduct a joint examination to determine whether coordination did in fact take place and whether a provision of national law may constitute an appropriate framework for ensuring coordination.¹⁰⁶

At first glance, *bpost* shows that a national law providing only for the exchange of information and documentation between the relevant authorities does not appear to be an adequate countermeasure against undue burden in all circumstances, nor against superficial cumulation, as in *Menci or Garlsson Real Estate*. Interestingly, the CJEU did not explicitly rule out that a very general provision of national law could constitute a proper framework for coordination, as it referred only to the entities with which cooperation is undertaken. It can thus be inferred, in line with *Garlsson Real Estate*, that cooperation and exchange of information may sufficiently contribute to fulfilling the coordination requirement within the meaning of article 52(1) CFR.

At the same time, the CJEU has placed additional emphasis on a framework strictly relating to coordination between authorities, rather than on the sole existence of national provisions on the penalty system or the predictability of cumulation, supposedly reflecting the revised understanding of ‘the essence of the fundamental right’ in the *bpost* and *Nordzucker* judgments.¹⁰⁷ Despite that, the Court did not provide any useful criteria that would allow for an objective assessment over the course of the coordination. In turn, the *Nordzucker* judgment did not address the coordination requirement despite the cross-border assessment of the competition law infringement, analogous to the *Volkswagen* judgment.¹⁰⁸

In the subsequent *MV-98* judgment (2023), the CJEU demonstrated more clearly how an inadequate normative framework limits coordination between parallel and independent proceedings. The case concerned a financial penalty and a measure to seal business premises for 14 days that had been imposed on a taxpayer for the same offence relating to the obligation to record the sale of a packet of cigarettes worth approximately EUR 2.60 and to issue a proper receipt relating to that sale.¹⁰⁹ In that judgment, the CJEU decided to combine assessments of the national legislation’s compliance with the coordination requirement and of the elements that are procedurally significant for ensuring that the severity of all these measures corresponds to the seriousness of the infringement in question.¹¹⁰ Nonetheless, the latter part of the strict necessity test remained distinctive and was also assessed independently.¹¹¹ In the case at hand, the national legislation did not allow the authorities to circumvent the obligation to impose either penalty or to suspend one set of proceedings until the conclusion of the other. The tax authorities were required to apply both measures systematically, as they concerned the same offence. The legislation did not allow either authority to carry out an overall assessment of the proportionality of the cumulative penalties.¹¹² Although the offender was technically allowed to have the seal removed early by voluntarily paying the financial penalty, there was no obligation on the part of the tax authority to impose the fine while the measure was in place. In this case, the financial penalty was imposed several months after the other measure was enforced, and its effects had thus been completely exhausted.¹¹³ Ultimately, the two measures could only be challenged before different courts: the district court for the financial penalty and the administrative court for the sealing measure. Thereby, no procedure ensuring the necessary coordination between those actions or between those courts was provided, leading

¹⁰⁶ Case C-117/20, *bpost SA* (n 8) para 55.

¹⁰⁷ cf n 32. Initially, compliance with the requirement to respect the essence of fundamental rights was linked to the existence of exhaustively defined conditions for accumulation in national law. cf Case C-524/15, *Menci* (n 7) para 43. Since *bpost* and *Nordzucker*, it has sufficed that the national legislation does not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective but only provides for the possibility of a duplication of proceedings and penalties under different legislation. cf Case C-117/20, *bpost SA* (n 8) para 43.

¹⁰⁸ Case C-151/20, *Nordzucker* (n 91).

¹⁰⁹ cf Case C-97/21, *MV-98* (n 18) paras 18–25.

¹¹⁰ *ibid* paras 58–59.

¹¹¹ *ibid* para 62.

¹¹² *ibid* paras 55 and 59.

¹¹³ *ibid* para 60.

each court to independently assess the proportionality of the measures referred to them.¹¹⁴ As demonstrated in *MV-98*, the automatic nature of cumulation of inherently severe sanctions, the impossibility of suspending one pending set of proceedings until the conclusion of another, the lack of time or material correlation between their imposition and the moment of invoking available legal remedies, the independent conduct of proceedings by different authorities and the contestability of sanctions before different courts without any form of coordination between them to at least assess the overall proportionality of cumulative sanctions all prevented the cumulation from being limited to what was strictly necessary and ensuring that the severity of all penalties imposed is commensurate with the seriousness of the offence.¹¹⁵

However, the CJEU has not yet provided its considered opinion on how the relevant authorities could fulfil the coordination requirements in such a scenario. The Court adopted a conservative approach, refraining from proposing any remedies to prevent non-compliance with article 50 CFR. This is a somewhat contentious omission, since the authorities will be facing a comparable predicament, especially in cases where sanctions are predetermined, ie sanctions of a specific amount or a proportion, of an automatic nature or encompassing a minimum basis of liability or no upper limit to such liability. A thorough examination of the judgments in *Menci*, *Garlsson Real Estate*, *bpost* and *MV-98* does not offer any specific guidance on how the authorities should proceed in order to fulfil the coordination requirement, nor in the event of normative obstacles to its implementation.

5.3 TIME PROXIMITY BETWEEN CONCURRENT PROCEEDINGS

At a later stage in the development of ‘justification–restriction’ case law, the CJEU directly linked the requirement of sufficient coordination with the necessity of conducting the proceedings within a proximate timeframe.¹¹⁶ Nonetheless, CJEU jurisprudence does not provide sufficient guidance on the allowable time interval between proceedings or on the substantial and procedural interdependencies between the coordination requirement and the time interval.

In ECtHR jurisprudence (article 52(3) CFR), proximity in substance and in time does not imply that the two sets of proceedings must be conducted simultaneously from beginning to end. The purpose of such a temporal connection is to protect the individual from uncertainty and delay, and from proceedings becoming protracted over time.¹¹⁷ In principle then, the CJEU does not quantify the required temporal proximity,¹¹⁸ but rather restrains itself to declaring that a case contains indications of a sufficiently close temporal connection between the two sets of proceedings.¹¹⁹ A rough guideline is that a certain margin of time between proceedings will be permissible in complex evidentiary proceedings.¹²⁰ On the other hand, the greater the time interval between proceedings, the more difficult it may be to justify such cumulation and its complementary nature.¹²¹

The interval between the cumulative proceedings is primarily examined from the perspective of the time elapsed between the end dates of the proceedings (eg the dates on which the decisions creating the cumulation were issued). It would at first appear that the period during which the proceedings were conducted in parallel would also be considered when examining the premise of ‘a proximate timeframe’. This particular set of circumstances plays a distinct role for the CJEU. The temporal parameters of two parallel sets of procedures are a salient factor in interpreting the coordination requirement, particularly in determining whether such

¹¹⁴ *ibid* para 61.

¹¹⁵ *ibid* paras 55–62.

¹¹⁶ Case C-27/22, *Volkswagen Group* (n 1) para 96; Case C-117/20, *bpost SA* (n 8) paras 51, 53 and 56. Prior to *bpost*, the time proximity had been verified in isolation from the coordination requirement, and being incorporated within the jurisprudence was a consequence of adjusting the interpretation of the *ne bis in idem* principle under the CFR to rights guaranteed by the European Convention on Human Rights, in accordance with art 52(3) CFR. cf *A and B v Norway* (n 73) para 132.

¹¹⁷ *A and B v Norway* (n 73) para 134.

¹¹⁸ Case C-27/22, *Volkswagen*, paras 96 and 106.

¹¹⁹ Case C-117/20, *bpost SA* (n 8) para 56.

¹²⁰ *ibid*.

¹²¹ *ibid* para 53. Similarly, see *A and B v Norway* (n 73) para 134.

coordination is objectively feasible. It is essential to determine whether both authorities had sufficient time to become aware of the accumulation and to take the necessary actions within that timeframe.¹²²

Moreover, one of the further assessment elements as to time proximity between proceedings, stemming from ECtHR jurisprudence, is whether the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection and assessment of the evidence, notably through adequate interaction between the various competent authorities. The objective is to ensure that the facts established in one set of proceedings are replicated in the other.¹²³ While the CJEU has not referred to these aspects – apart from an incidental and indirect comment on information exchange in the *bpost* judgment – it seems that, in addition to ensuring a temporal connection, the exchange of evidence, information and documents should be treated as a distinct objective of coordination. This appears to be internally consistent with the objective of coordination and the general function of the limitation clause. A significant challenge to coordination, in both cross-border and cross-regime contexts, is the lack of awareness of concurrent legal proceedings and the subsequent verification of whether those proceedings pertain to the same facts. This, in turn, is a primary concern in implementing article 50 CFR. To ensure a degree of uniformity in CJEU case law, certain activities naturally associated with coordination – such as determining whether *idem* exists, exchanging information¹²⁴ or requesting a decision and its justification¹²⁵ – should in fact be treated as preliminary stages of coordination. By determining whether *idem* and the other conditions for applying Article 50 CFR are satisfied the relevant authorities can determine the first aim of the requirement at issue, which is to establish whether cumulation exists and, if so, whether it necessitates coordination of proceedings.

In fact, the link between those activities and the coordination is clear, since this requirement applies only when both sets of proceedings are pending in respect of an essentially identical factual situation. It will not be generally possible to establish the identity of those circumstances without a proper analysis of the decision, evidentiary material, method of calculating the penalty imposed or additional explanations from the other authority. In the event of significant differences being identified in these factors, it would not be necessary to examine the *ne bis in idem* principle and any of the premises in article 52(1) CFR. In the event of the identity of facts being confirmed, it would be logical for the relevant authorities to approach each other to avoid any duplication of criminal proceedings¹²⁶ and to resolve the issue through a single set of proceedings. If avoiding duplication is not possible, both authorities should determine whether the cumulation may be justified under article 52(1) CFR and, if so, which further conditions must be met to justify cumulation in light of EU law at the later stages.

6. IMPACT OF THE VOLKSWAGEN JUDGMENT ON THE INTERPRETATION OF THE COORDINATION REQUIREMENT

As is apparent from the analysis of prior case law (section 5.2), the conclusions regarding the course of implementation of the coordination requirement that can be drawn from this analysis are limited. Therefore, the assumptions made in the *Volkswagen* judgment are of key importance for the practical application of the *ne bis in idem* principle in EU law.

Firstly, the *Volkswagen* judgment nullifies the dependency on whether normative coordination rules have been ensured. Concurrently, the judgment does not clarify whether this change applies only in cross-border contexts or also in purely domestic cases. At the same time, despite the greater emphasis on actual rather than normative coordination and the more complex legal context, the CJEU does not specify the authorities' obligations or coordination objectives. Surprisingly, the Court did not refer to the fundamental objective of coordination, which

¹²² However, it is worth considering whether a period of, say, four months for parallel proceedings is sufficient time to act in this respect, as can be calculated from the *Volkswagen* judgment.

¹²³ *A and B v Norway* (n 73) para 131.

¹²⁴ Case C-151/20, *Nordzucker* (n 91) paras 32 and 33.

¹²⁵ *ibid* para 42.

¹²⁶ Case C-27/22, *Volkswagen* (n 1) para 101.

was to ‘reduce to what is strictly necessary the additional disadvantage associated with the duplication of criminal proceedings conducted independently’. Nevertheless, since coordination has invariably been regarded as a strict necessity imperative, it appears implausible to assert that its primary function has changed.

The issuance of the *Volkswagen* judgment has primarily contributed to the restoration of a vague, aggregated standard by clarifying what does not constitute coordination or insufficient coordination within the meaning of article 52(1) CFR. Seemingly, coordination will not be considered sufficient when one of the relevant authorities neither participated in that coordination¹²⁷ nor refrained from initiating or pursuing proceedings in favour of another authority.¹²⁸ The CJEU did not offer any direct guidance on the authorities’ positive obligations. When allocating obligations to designated authorities, it is imperative to first consider which public authority, if any is obligated to initiate and execute the coordination process. An internally consistent interpretation of the Court’s case law requires each authority to participate. Therefore, not attributing responsibility to a specific body for initiating and carrying out the coordination may be considered a deliberate, jurisprudential omission. This would, in turn, support the conclusion that the authorities share responsibility for satisfying the coordination requirement when proceedings run in parallel, even for only a limited period. The *Volkswagen* judgment further supports this hypothesis, as the CJEU did not designate the GPPO as being directly responsible for coordinating the proceedings, despite its leading role in the emergence of cumulation (the extraterritorial assessment of the infringement). The GPPO has assessed infringements in other Member States without any legal basis in EU law, and its decision was issued almost two years after the AGCM’s decision was being judicially reviewed. This means that the AGCM was not, in principle, in a position to coordinate, even if such a coordination effort only regarded the determination of the infringement itself or the amount of the fine. However, it appears that the pivotal factor for the CJEU was that both sets of proceedings were conducted in parallel for a period (before any decision was issued).¹²⁹

From the formulations in *Peterbroeck*,¹³⁰ *Costanzo*¹³¹ or *Fransson*,¹³² for example, it is possible to deduce that the national administrative authority or the national court is obliged to act *ex officio* whenever awareness of a potential violation of the directly effective fundamental right, ie, the prohibition against double punishment is established, even if the party to the proceedings does not invoke the CFR. Therefore, any act of external knowledge, such as a press release, an allegation raised by a party to the proceedings or information received from another authority through mutual assistance mechanisms, should trigger a preliminary verification of whether article 50 CFR may become applicable on the same subject and against the same party. Consequently, it appears reasonable to suggest that responsibility for coordination should be shared, unless the relevant authorities agree otherwise or EU law requires otherwise.

This assumption is in harmony with the far-reaching implications of the *Volkswagen* judgment, most notably the gradual phasing out of the normative-centred approach to coordination. However, such a significant change was not accompanied by guidance on how to implement the requirements when authorities lack a common coordination mechanism. This omission is striking, given that similar issues have already been deliberated in response to the lack of a common mechanism for information exchange and coordination between national competition and personal data protection authorities, namely in the judgment in *Meta Platforms*.¹³³ Such an issue arose again in the *Volkswagen* judgment, this time regarding respect for fundamental

¹²⁷ Case C-27/22, *Volkswagen Group* (n 1) para 101. cf Opinion of AG Sanchez-Bordona in Case C-27/22, *Volkswagen* (n 22) paras 106–108.

¹²⁸ cf Opinion of AG Sanchez-Bordona in Case C-27/22, *Volkswagen* (n 22) para 108. At the Eurojust forum, only the authorities of Belgium, Sweden and Spain consented to refraining from prosecuting the infringement in favour of the Public Prosecutor’s office in Brunswick. Consumer protection authorities, such as the Italian AGCM, were not involved in these consultations.

¹²⁹ Opinion of AG Sánchez-Bordona in Case C-27/22, *Volkswagen* (n 22) para 65.

¹³⁰ Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State*, EU:C:1995:437, para 21.

¹³¹ Case 103/88, *Fratelli Costanzo SpA v Comune di Milano*, EU:C:1989:256.

¹³² Case C-617/10, *Åklagaren v Hans Åkerberg Fransson* (n 11) para 21.

¹³³ Case C-252/21, *Meta Platforms and Others v Bundeskartellamt*, EU:C:2023:537, paras 36–63. See also Inge Graef, ‘Meta Platforms: How the CJEU Leaves Competition and Data Protection Authorities with an Assignment’ (2023) 30(3) *Maastricht Journal of European and Comparative Law* 325.

rights by authorities with cross-regime competences, eg a consumer protection authority and a public prosecutor's office. Additionally, separate EU coordination mechanisms have been established for both types of authorities from different EU countries, as outlined in the Consumer Protection Cooperation Regulation¹³⁴ and the Eurojust Regulation.¹³⁵

The Court has overlooked the crux of the broader issue in this case. Article 52(1) CFR permits only the accumulation of proceedings pursuing distinct objectives of general interest. This scenario is particularly likely for authorities in disparate areas of EU law (eg antitrust and data protection authorities). Due to the relatively high levels of harmonisation in certain domains, such as consumer protection law, authorities across Member States will likely pursue similar objectives.¹³⁶ In such a scenario, it may be significantly easier to avoid accumulation altogether, since there are mechanisms for cooperation and coordination among authorities operating in the same area. However, when authorities pursue demonstrably distinct objectives, the situation may be considerably more nuanced.

At first glance, such a general approach to coordination in the CJEU's case law appears intended to avoid a potential collision between jurisprudential standards and existing normative mechanisms of cooperation. Conversely, the Court has established a requirement of an indeterminate nature, the implementation of which will frequently be incumbent upon authorities responsible for enforcing different areas of EU law, who lack a network of cooperation or a superior authority on which to base the coordination of their activities. Consequently, the standards of and approach to coordination objectives may vary significantly from case to case.

Based on CJEU case law, the coordination of proceedings should aim to achieve numerous objectives, such as ensuring compliance with the *ne bis in idem* principle. The first is to reduce to what is strictly necessary the additional disadvantage associated with the duplication of independent criminal proceedings (safeguarding the strict necessity of cumulation). Although the case law does not provide binding guidance on the interpretation of the term 'actual disadvantage resulting from the duplication of proceedings and sanctions', one might argue in favour of a broad interpretation. Time, costs or non-pecuniary harm – not only the amount of the penalty itself – should therefore be counted against these disadvantages and play a role in the assessment of strict necessity. Secondly, as substantiated to some extent by the *MV-98* judgment, coordination should facilitate a proportionate sanction outcome within the meaning of article 52(1) CFR. This is a guarantee that the severity of all the penalties imposed will correspond with the seriousness of the offence (proportionality of cumulation). In cases where the proceedings were not concurrent and had no overlap in time, such an objective may also entail a determination of whether another definitive sanction (*bis*) constitutes an effective, proportionate and dissuasive response to the violation under review.¹³⁷ When there is no '*bis*' at the time, they should only be obliged to consider the first of the sanctions imposed, even if it is not final.¹³⁸ The implementation of these two objectives is influenced by the third objective, which originally resulted from the horizontal interpretation of article 50 CFR and article 4 of Protocol No 7 of the European Convention on Human Rights (ECHR), namely that the relevant sets of proceedings should be conducted so as to avoid as much as possible any duplication in the collection and assessment of evidence, notably through adequate interaction between the various competent authorities to ensure that the establishment of the facts in one set of proceedings is replicated in the other (evidence collection, analysis and information exchange). Achieving this objective ensures, fourthly, that both legal responses can be conducted at approximately the same time (time proximity). It also allows the existence or potential existence of cumulation to be established, on the condition that the *idem*, *bis* and *Engel* premises are

¹³⁴ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 [2017] OJ L 345/1.

¹³⁵ Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA [2018] OJ L 295/138.

¹³⁶ Particularly regarding the implementation of the same EU legal acts, such as Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22.

¹³⁷ Case C-537/16, *Garlsson Real Estate* (n 11) para 59; Case C-117/20, *bpost SA* (n 8) para 57.

¹³⁸ Case C-412/21, *Dual Prod* (n 95) paras 56 and 68; Case C-570/20, *BV* (n 37) para 50; Case C-820/21, *Vinal* (n 21) para 76.

fulfilled (cumulation existence), and it establishes whether the accumulation of proceedings or sanctions can be avoided and, if not, whether a cumulation will be admissible in terms of the other conditions under article 52(1) CFR (cumulation admissibility) – particularly whether the general interest objectives pursued by the two bodies are distinct and complementary (complementarity of legal reactions).

7. CONCLUSIONS

The analysis leads to the conclusion that the CJEU's conception of coordination is not sufficiently and directly explained, objectified and aligned with the actual legal effects that a violation of *ne bis in idem* produces under national law. While the examination of CJEU case law identified the fundamental objectives that coordination should seek to realise, as well as the repercussions of non-coordination, the CJEU should explicitly articulate these objectives and clarify the necessary actions which would allow the coordination requirement to be considered fulfilled. Since the *Volkswagen* judgment phased out the normative-centred approach to coordination while simultaneously not attributing responsibility for initiating and carrying out the coordination to a specific body or providing useful criteria that would allow for an objective assessment over the course of the coordination. Such an approach hinders effective and Charter-compliant coordination of EU law enforcement proceedings. The CJEU's current self-restraint in adopting a definitive stance on that matter indicates a tacit acceptance of joint responsibility by all authorities concerned for the coordination, insofar as the proceedings are conducted in parallel for a stipulated period.

The vagueness of the underlying requirement is incomprehensible, given that not complying with it has far-reaching consequences for the effectiveness of EU law and the enforcement of individual claims, which requires a preliminary judicial determination of the violation and the very essence of protection against double punishment. As it now stands, the sole permissible outcome when the coordination requirement is allegedly not fulfilled may be that the second fining decision is found to be incompatible with EU law, even after the decision issuance, irrespective of its substantive conformity with EU law at the time of issuance. This means that such non-compliance may be revealed even after formal termination of proceedings, leading to the individual's complete 'criminal' and 'civil' exoneration (absolute cause of appeal). The finding of such an omission only obliges the national court to annul the decision or judgment in its entirety; they are unable to correct or justify it in any way. This, in turn, may undermine the effectiveness of EU law and the public interest when the annulled decision serves as a basis or binding predicate for subsequent individual claims arising from the same infringement (eg damages in the private enforcement of competition law).

The potential to mitigate the repercussions of this backlash against the CJEU's vision for fundamental rights protection lies in acknowledging the interpretation that a non-coordinated decision, which consequently contradicts article 50 CFR, should be set aside only in respect of its punitive elements of the decision within the meaning of the *Engel* criteria, such as an imposed financial penalty. This interpretation rationalises the requirement of coordination as a means of enhancing the standard of protection against double punishment and ensuring the effectiveness of EU law in areas where the same infringement is sanctioned. Simultaneously, for the coordination requirement to be both rationalised and enforceable, the CJEU should prioritise specifying the rules of conduct for authorities, clarifying their relationship to existing normative mechanisms and elucidating the legal bases and patterns which authorities should rely on in the absence of adequate normative coordination mechanisms. Conversely, the existing dilemmas regarding the interpretation of coordination requirements and the ambiguity surrounding their application within the parameters delineated in article 50 CFR, particularly in *pre-bis* instances, prevents the effective application of CJEU case law by national authorities and courts.

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44

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