

# AG: Volkswagen Cannot Be Penalised in Italy for “Dieselgate”

Thomas Wahl

## News

Advocate General *Campos Sánchez-Bordona* gave his opinion on the double jeopardy ban in connection with the sanctioning of Volkswagen (VW) due to the diesel scandal by the Italian authorities. On 30 March 2023, he delivered his [opinion](#) in Case [C-27/22](#) (*Volkswagen Group Italia S.p.A. and Volkswagen Aktiengesellschaft*). The Italian Council of State (*Consiglio di Stato*) had asked whether a fine imposed on VW by the Italian competition and market surveillance authority, which had initially not become final, violated the prohibition of double punishment under Art. 50 of the EU Charter of Fundamental Rights (CFR), since VW had in the meantime received a penalty order from the public prosecutor's office in Brunswick (Germany) in the same context, which became final through payment of the fine.

Due to the repressive purpose and the severity of the fine, the AG assumed the criminal nature of the Italian sanction in the case, even though it is classified as an administrative penalty under Italian law. The criminal nature is also true for the fine imposed in Germany. As a result, Art. 50 CFR was applicable. Furthermore, the fine imposed by the Italian authority and the German proceedings concerned the same legal person and the facts were identical in substance and in time, so that a violation of the prohibition of double punishment was to be affirmed in principle.

Therefore, the decisive question is whether an exception to the *ne bis in idem* principle could be justified in a constellation of cumulative sanction proceedings. Such exception must meet the requirements of Art. 52(1) CFR. According to the AG, the proportionality and necessity of the limitation are particularly problematic in the case. It can be inferred from the ECJ's case law that the following three criteria must be met:

- Clarity and precision of the rules giving rise to the duplication of proceedings and penalties;
- Coordination of proceedings in which a penalty is imposed, which must have a sufficiently close connection in substance and time so as to reduce to what is strictly necessary the additional burden associated with the duplication of proceedings of a criminal nature conducted independently;
- An assurance that the seriousness of the overall penalties imposed corresponds to the seriousness of the offence.

The AG observes that there has obviously not been a coordination between the Italian market surveillance authority and the German prosecution service of Brunswick. Hence, the AG doubts as to whether “it is possible (and realistic) to insist on that requirement in the event of the duplication of proceedings in which a penalty is imposed in two Member States, conducted by competent authorities in different sectors of activity, where there is no legal mechanism for coordinating those authorities' actions.” However, the AG does not believe that the ECJ will reverse its previous case-law.

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The AG concludes that the prohibition of double punishment could not be permissibly restricted pursuant to Art. 52(1) CFR, because the coordination of measures between the authorities of the Member States, which is necessary to justify such a restriction, had not taken place.

*Put in focus:* Case C-27/22 was subject to a detailed analysis by *Laura Neumann* in her [eucrim article of 27 March 2023](#). She came to the same result as the AG but with a different argumentation. It is now up to the judges in Luxemburg whether they will apply their previous case law, particularly developed in *Menci* (→ [eucrim 1/2018, 24-25](#)), *bpost* and *Nordzucker* (both at → [eucrim 2/2022, 116-118](#)). By contrast to the other cases, the VW Dieseldate scandal case involves a duplication of proceedings between an administrative and a criminal law enforcement authority with a transnational dimension.

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