ECJ: Art. 50 of the Charter Protects Volkswagen from Further Administrative Penalties in Italy

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The Italian competition and market supervisory authority can no longer impose an administrative fine on Volkswagen (VW) for the installation of inadmissible defeat devices in their diesel vehicles after VW had received and paid a fine from the public prosecutor's office in Germany in the meantime and in the same context. This was decided by the ECJ in Case C-27/22 on 14 September 2023, following Advocate General *Sanchez-Bodona's* opinion of 30 March 2023 (→ eucrim 1/2023, 35-36).

Facts of the case

In August 2016, the Italian competition and market authority (AGCM) imposed a fine of €5 million on Volkswagen Group Italia SpA (VWGI) and Volkswagen Aktiengesellschaft (VWAG) for unfair commercial practices against consumers. The infringements in question concerned, first, the marketing in Italy, from 2009, of diesel vehicles equipped with systems intended to distort the measurement of pollutant emissions and, second, the dissemination of advertising messages which emphasised the compliance of those vehicles with the criteria provided for under environmental legislation. VWGI and VWAG challenged the decision of the Italian competition authority before the Regional Administrative Court, Lazio, Italy.

In June 2018, before that Lazio court delivered its judgment, the public prosecutor's office of Brunswick, before which the case had been brought in Germany, imposed a fine of €1 billion on VWAG, in accordance with the Act on Regulatory Offences (*Ordnungswidrigkeitengesetz*). That fine penalised negligent breach of the duty of supervision in the activities of undertaking, in particular as regards the development of the software for the illegal defeat device and its installation in 10.7 million diesel vehicles marketed worldwide (700,000 of which were sold in Italy).

The decision of that German public prosecutor's office became final on 13 June 2018, since VWAG waived its right to challenge it and, moreover, paid the fine prescribed therein. VWGI and VWAG argued before the Italian court that they do no longer need to pay the fine imposed by AGCM because the principle *ne bis in idem* applies.

Questions raised

The Italian Council of State (*Consiglio di Stato*), before which an appeal was brought following the dismissal of the action at first instance, asked the ECJ whether the principle *ne bis in idem* applies in the case at issue.

That principle, enshrined in Art. 50 of the Charter of Fundamental Rights of the European Union, prohibits a duplication both of proceedings and of penalties of a criminal nature for the same acts and against the same person. The referring court raised three question in this regard:

- Does the fine by the AGCM, which is classified as an administrative penalty under Italian legislation, constitute a criminal penalty which would trigger Art. 50 CFR?
- Does Art. 50 CFR apply when a second decision imposed a fine criminal in nature and became final during the ongoing judicial proceedings brought against the first decision?
- May limitations of the application of the principle *ne bis in idem* be justified?

ECJ on criminal nature of administrative fines

The judges in Luxembourg reiterate that the assessment of whether proceedings or penalties are criminal in nature rely on three criteria: (1) legal classification of the offence under national law; (2) intrinsic nature of the offence; (3) degree of severity of the penalty which the person concerned is liable to incur.

The judges in Luxembourg first clarify with regard to the first criterion that the classification under domestic law is not decisive and Art. 50 CFR also extends to proceedings and penalties that have a "criminal nature".

As regards, in particular, the second criterion, the ECJ stressed that even if the penalty at issue has also a preventive (deterrent) purpose, this does not exclude it from being classified as criminal. A further argument in favour of a classification of the administrative penalty in Italy as "criminal" is the fact that the fine varies according to the gravity and duration of the infringement in question and that it can even exceed the amount of the unfair competitive advantage.

Looking at the third criterion, the ECJ observed that the financial administrative penalty, which is capable of reaching an amount of €5 million as a maximum, has a high degree of severity.

In sum, the judges in Luxembourg affirm that the penalties imposed for unfair commercial practices can be classified as administrative penalties of a criminal nature, which makes Art. 50 CFR applicable.

ECJ on ne bis in idem conditions

The ECJ first provides clarification regarding the "*bis*" condition. It recalls that a decision on the case must not only have become final but must also have been taken after a determination as to the merits of the case. In view of the subsequent *res iudicata* effect in question, the ECJ clarified that the principle *ne bis in idem* applies once a criminal decision has become final, irrespective of the manner in which that decision became final. As a result, Art. 50 CFR does not preclude subsequent (final) decisions (here: the fine imposed by the German prosecutor) that were adopted after a prior decision (here: the fine imposed by the Italian market authority).

Secondly, the judges in Luxembourg emphasise that the referring court must be sure whether the "*idem*" condition is fulfilled. As consistently stated in previous case law, the two sets of proceedings or the two penalties at issue must relate to an identity of the material facts; mere similarity of facts is not sufficient. The ECJ clarifies several aspects in the present case that the referring court should take into account when it assesses the "*idem*" criterion.

ECJ on the limitations of the principle *ne bis in idem*

The ECJ reiterates its previous case law that, in accordance with Art. 52(1) CFR, limitations on the principle *ne bis in idem* are justified in so far as the limitation is provided for by law and respects the essence of Art.

50 CFR as well as the principle of proportionality. Accordingly, the following issues do not contradict with the essence of the fundamental right and the proportionality:

- Possibility of a duplication of proceedings and penalties under different legislation;
- Authorities can legitimately choose complementary legal responses to certain conduct that is harmful to society, thus they can also pursue distinct objectives of general interest in parallel.

However, it must be ensured that the necessity *stricto sensu* is observed. For this, the following requirements must be fulfilled:

- It must be ensured that the duplication does not represent a burden for the person concerned;
- There are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication;
- The sets of proceedings in question have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe.

The ECJ affirms for the case at issue that VWAG could have predicted that its conduct was liable to give rise to proceedings and penalties in at least two Member States which followed distinct objectives (unfair commercial practices and administrative offence due to lack of supervision), but - and this is critical - no coordination took place between the German and Italian authorities. This was the case even though the sets of proceedings in question appear to have been conducted in parallel for some months and the German prosecutor had knowledge of the decision at issue at the time when he adopted its own decision. According to the ECJ, difficulties in carrying out a true coordination between authorities being placed in different Member States and working in different branches (administration v law enforcement) does not justify for qualifying or disregarding the coordination requirement. As a result, a legitimate duplication of proceedings and penalties is not possible in the present case.

Put in focus

The ECJ comes to the same result as AG *Sanchez Bordona* in its opinion for the case (→ eucrim 1/2023, 35-36). Even though the AG recommended that removal of the coordination criterion should be considered, the ECJ maintained it and thus continues its case law on the duplication of administrative and criminal proceedings as established by the three judgments of 2018 in *Menci, Garlsson* and *Di Puma and Zecca* (→ eucrim 1/2018, 24-27). It could also have been argued that even a legal basis for the duplication for the two proceedings in questions was not provided and that the essence of Art. 50 CFR has not been ensured (cf. the legal analysis of the case by L. Neumann, eucrim 1/2023, 99-105).

As a result, although the Volkswagen Group has paid the significantly higher fine in Germany, it will likely be spared further sanctions based on the same allegations in the future following the ECJ ruling. The judges in Luxembourg only left one backdoor: it may be doubted that the "idem" requirement (the same facts) was met. This does not seem to be as crystal clear as it appears at first glance. Even the referring court referred to a "similarity" and "homogeneity" of the facts in question. The ECJ indicated that the referring court must verify this issue more clearly by taking into account in its final decision, for instance, that the relaxation of supervision of the activities in Germany is distinct from the marketing and dissemination of misleading advertisement in Italy. It must also be ascertained whether the German prosecutor actually also ruled on the factual elements that gave rise to infringements in Italy; the mere reference to factual elements relating to the territory of another Member States would be insufficient. In this sense, the decision is not yet a complete *carte blanche* for Volkswagen.

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