



PRESS RELEASE No 139/23

Luxembourg, 14 September 2023

Judgment of the Court in Case C-27/22 | Volkswagen Group Italia and Volkswagen Aktiengesellschaft

The principle *ne bis in idem* applies to penalties, imposed for unfair commercial practices, that are classified as administrative penalties of a criminal nature

That principle precludes criminal proceedings in respect of the same facts from being initiated or maintained where there is a final decision, even if that decision is issued subsequently

On 4 August 2016, the Autorità Garante della Concorrenza e del Mercato (AGCM) imposed a fine of € 5 million on Volkswagen Group Italia SpA (VWGI) and Volkswagen Aktiengesellschaft (VWAG) for unfair commercial practices against consumers. Those practices concerned, first, the marketing of diesel vehicles in Italy, from 2009, which contained software allowing the measurement of emission levels of nitrogen oxides (NOx) to be distorted during pollutant emissions inspection tests 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 that decision before the Regional Administrative Court, Lazio (Italy). In the meantime, the Public Prosecutor's Office of Braunschweig (Germany) imposed a fine of € 1 billion on VWAG on the ground that that company had infringed the provisions of the Law on administrative offences which penalise negligent breach of the duty of supervision in the activities of undertakings, as regards the development of that software and its installation in 10.7 million diesel vehicles marketed worldwide (700 000 of which were sold in Italy). The German decision became final on 13 June 2018, after VWAG paid the fine and formally waived its right to challenge that decision. VWGI and VWAG alleged that the Italian decision had subsequently become unlawful due to an **infringement of the principle *ne bis in idem***. That principle prohibits a duplication both of proceedings and of penalties of a criminal nature for the same acts and against the same person. It is enshrined in Article 50 of the Charter of Fundamental Rights of the European Union.

The Italian Council of State, before which an appeal was brought following the dismissal of the action at first instance, **asked the Court of Justice whether the principle *ne bis in idem* applies in the present case.**

By its judgment delivered today, **the Court answers in the affirmative the question whether penalties imposed for unfair commercial practices can be classified as administrative penalties of a criminal nature.** The Court points out that three criteria are relevant in assessing whether the proceedings and penalties at issue are criminal in nature:

- as regards the first criterion, relating to the legal classification of the offence under national law, the Court notes that the application of Article 50 of the Charter of Fundamental Rights is not limited to proceedings and penalties which are classified as 'criminal' under national law, but extends, irrespective of such a classification under domestic law, to proceedings and penalties which must be considered to be of a criminal nature;

- as regards the second criterion, relating to the intrinsic nature of the offence, the Court states that it requires ascertaining whether the penalty at issue has, inter alia, a punitive purpose;
- as for the third criterion, relating to the degree of severity of the penalty to which the person concerned may be subject, the Court notes that it is determined by reference to the maximum potential penalty for which the relevant provisions provide.

In the light of those three criteria, **the Court concludes that, although classified as an administrative penalty under national legislation, a fine imposed on a company by the competent national consumer protection authority in order to punish unfair commercial practices constitutes a criminal penalty where it has a punitive purpose and has a high degree of severity.**

Next, **the Court answers in the affirmative the question whether the principle *ne bis in idem* precludes national legislation which allows a criminal fine imposed on a legal person for unfair commercial practices to be maintained where that person has been the subject of a criminal conviction in respect of the same facts in another Member State, even if that conviction is subsequent to the date of the decision imposing that fine but became final before the judgment in the judicial proceedings brought against that decision acquired the force of *res judicata*.** Where a final decision exists, the principle *ne bis in idem* precludes criminal proceedings in respect of the same facts from being initiated or maintained; that principle applies once a criminal decision has become final, irrespective of the manner in which that decision has become final. However, it may apply only where the facts to which the two sets of proceedings or the two penalties at issue relate are identical; it is therefore not sufficient that those facts be merely similar.

Lastly, the Court clarifies the conditions under which limitations of the application of the principle *ne bis in idem* may be justified. **The Court considers that the limitation of the application of the principle *ne bis in idem* is allowed, so as to permit a duplication of proceedings or penalties in respect of the same facts, where three conditions are satisfied:** such duplication must not represent an excessive burden for the person concerned; clear and precise rules must make it possible to predict which acts or omissions are liable to be subject to a duplication; and, lastly, the sets of proceedings in question must have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text and, as the case may be, the résumé](#) of the judgment is published on the CURIA website on the day of delivery.

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