Case C-521/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

19 October 2020

Referring court:

Landesverwaltungsgericht Oberösterreich (Austria)

Date of the decision to refer:

15 October 2020

Complainant:

J.P., B. X, X N.

Defendant authority:

B.d.S.L.,

N. R., H. X, X. L.

Subject matter of the main proceedings

Possible infringement of the prohibition of multiple prosecution and punishment enshrined in Article 50 of the Charter of Fundamental Rights of the European Union – Automatic toll collection on Austrian motorways – National provisions adopted in implementation of EU law – Requirement of cumulation of penalties in Austrian administrative-penalty proceedings – Eleven administrative-penalty orders of various authorities cumulatively imposing, for administrative offences committed within a period of one month, fines exceeding the maximum amount because the driver of a heavy goods vehicle had not noticed that the battery of his toll collection device had run out of power

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

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Question referred

Is Article 50 of the Charter of Fundamental Rights of the European Union (in particular in conjunction with the Eurovignette Directive 1999/62/EC) to be interpreted as meaning that the combination of national rules which – as in the case of Paragraph 20(2) of the BStMG in conjunction with Paragraph 22(2) of the VStG – requires the cumulative prosecution and punishment of serial breaches of the obligation to pay tolls committed on separate stretches of road is contrary to the prohibition of multiple prosecution and punishment if there is not simultaneously, at the legislative level, both an obligation of coordination for all the authorities and courts competent to conduct such proceedings and an explicit obligation to apply the principle of proportionality effectively in relation to the amount of the overall penalty?

Provisions of EU law and international law cited

Charter of Fundamental Rights of the European Union, Articles 50 to 53

Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures [Eurovignette Directive], Article 7a, Article 7j(2), Article 8a, Article 9a

Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 4, cited in both the English and French original versions

Provisions of national law cited

Bundesstraßenmautgesetz (Law on tolls on federal roads; 'the BStMG'), Paragraphs 6, 7 and 20:

'Paragraph 6 ('Toll obligation'): 'The use of stretches of toll road by multi-track motor vehicles with a maximum permissible total weight exceeding 3.5 tonnes is subject to a distance-dependent toll.' …'

Paragraph 7 ('Toll payment'): '1. The toll shall be paid by the use of approved devices for electronic payment of the toll via the debiting of toll credit or approved settlement in arrears. It must be ensured that drivers of motor vehicles are able to equip their vehicles with these devices before using stretches of toll road. …'

Paragraph 20 ('Toll evasion'), subparagraph 2: 'Drivers of motor vehicles who use stretches of toll road without having duly paid the distance-dependent toll due under Paragraph 6 commit an administrative offence and are liable to punishment by means of a fine of between EUR 300 and EUR 3 000.'

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Mautordnung für die Autobahnen und Schnellstraßen Österreichs (Tolling Regulation for Austrian motorways and expressways, Version 58 (MautO-V58)

Verwaltungsstrafgesetz (Law on administrative offences; 'the VStG'), Paragraph 22(2): 'Where a person has committed several administrative offences by way of several independent acts, or where one act comes under several penalties that are not mutually exclusive, the penalties shall be imposed side by side. The same shall apply in the case of a concurrence of administrative offences and other criminal acts punishable by an administrative authority.'

Summary of the facts and procedure

1 All in all, the complainant was accused of a total of 11 breaches of Paragraph 20(3) of the BStMG during the period between 27 December 2019 and 30 January 2020 – that is to say, little more than one month – for one and the same reason (failure to debit a toll credit), for which fines totalling EUR 3 300 were imposed on him (or, alternatively, a total term of imprisonment of 370 hours in the event of failure to pay [that is to say, more than two weeks]), without it being apparent that the authorities concerned had in any way taken account of the fact that there was an obvious factual, temporal and geographical connection between all of those procedures. Seven administrative-penalty orders were issued by Authority B. between 2 and 4 September 2020 and four were issued by Authority B. K. on 18 August 2020, all concerning offences committed on different days.

2 The specific case in the main proceedings: By an administrative-penalty order of B. ('the defendant authority') of 4 September 2020, a fine of EUR 300 (or, alternatively, imprisonment of 34 hours in the event of failure to pay) was imposed on the complainant because, allegedly, he had used a motorway with a motor vehicle having a total weight exceeding 3.5 tonnes without having duly paid the distance-dependent toll prescribed for that vehicle, as no toll payments had been collected on the GO-Box of that heavy goods vehicle.

3 As a result, according to that defendant authority, he had committed an infringement of Paragraph 20(2), in conjunction with Paragraph 6, Paragraph 7(1) and Paragraph 8(2), of the BStMG, and therefore had to be punished under the first-mentioned provision.

4 The complainant's previous good character was to be regarded as a mitigating factor in the assessment of the penalty, albeit that only the minimum penalty provided for by law had been imposed in any event.

5 The appeal lodged within the prescribed time limit with the Verwaltungsgericht des Landes Oberösterreich (Regional Administrative Court of the Province of Upper Austria; 'the LVwG OÖ'), the referring court, on 22 September 2020 is directed against that administrative-penalty order.

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Principal arguments of the parties to the main proceedings

6 The complainant essentially submits that he had not noticed over a long period of time that the battery in the GO-Box had already run out of power and was therefore no longer functional. Moreover, he argues, it is incomprehensible why ASFINAG (Autobahnen- und Schnellstraßen-Finanzierungs-Aktiengesellschaft – the public corporation responsible for planning, financing, building, maintaining and operating motorways and expressways in Austria) did not immediately draw his attention to the fact that the amounts had not been collected, but did so only after a three-month delay. Aside from that, viewed as a whole, a so-called 'fortgesetztes Delikt' (continuing offence) had been committed in any event, with the result that only one overall penalty ought to have been imposed instead of several individual penalties.

7 The defendant authority refrained from issuing a preliminary appeal decision and therefore did not add anything to the grounds for the administrative penal order.

Brief summary of the grounds for the reference

8 According to the judgment of 26 February 2013, *Åklagaren* v *Hans Åkerberg Fransson* (C-617/10, EU:C:2013:105), and the now settled case-law of the Court of Justice, the concept of 'implementing Union law' within the meaning of Article 51(1) of the Charter is to be understood as covering all situations in which a provision of EU law applies. In particular, this is also true where the **purpose** of the national legislation used by the national bodies is (also) to **transpose** EU **directives** into national law (see paragraphs 16 to 31 of that judgment).

9 Viewed as a whole, the **BStMG** serves the **main objective** of an **efficient implementation** of the '**Eurovignette Directive 1999/62/EC**', **in particular Article 7a** (proportionality of the amount of user charges), **Article 7j** (free flow of traffic), **Article 8a** (monitoring of functionality) and **Article 9a** (appropriate controls and proportionate penalties).

10 The **enforcement of the BStMG** therefore constitutes – at least so far as heavy goods traffic on the road is concerned – an **implementation of EU law** within the meaning of Article 51(1) of the Charter, with the importance attached to that provision by the Court of Justice in its settled case-law. The guarantees under Articles 50 to 53 of the Charter are therefore also applicable in this context, with the result that the present request for a preliminary ruling should certainly be recognised as being admissible – subject to the further condition that the LVwG OÖ is recognised as having the status of a 'court or tribunal' within the meaning of Article 267 TFEU (see, in this regard, the proceedings currently pending before the Court of Justice in Case **C-293/20**).

11 According to **Part B** of the '**Tolling Regulation for Austrian motorways and expressways**', **Version 58**, which is relevant in the present case, the **distance-dependent toll** for lorries and trucks with a total weight of more than 3.5 tonnes

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('heavy goods vehicles') was (and is) collected by means of a fully electronic toll system. To this end, the entire road network subject to tolls was (is) initially divided into individual **toll sections**, whereby the **toll rate** was (is) calculated in such a way that, depending on the emission class to which the toll-subject heavy goods vehicle belongs, **a corresponding amount in euros** was (is) payable **for each kilometre travelled** and the toll rate was (is) **collected separately for each of those individual toll sections**.

12 A prerequisite for the proper payment of the toll was (is) the carrying of an approved and correctly functioning on-board unit (usually a so-called '**GO-Box**') properly installed in the heavy goods vehicle on a permanent basis. When passing through a toll collection point, the GO-Box connected (connects) to the roadside antennas of the toll collection point using microwave technology, thereby generating a **toll collection for the toll section in question**.

13 Registration for the toll system was (is) carried out via a GO sales point, whereby payment of the toll was (is) possible either by means of settlement in arrears or – **as was (is) generally the case** – via the debiting of toll credit acquired in advance (**pre-pay procedure**). For motor vehicles duly registered for the toll system and equipped with an approved on-board unit, there was (is) the possibility of paying the toll in arrears in specific cases (technical defect of the on-board unit or toll system, pre-pay account balance too low, etc.) and under special conditions. In the event of non-payment of the toll, the driver could (can) be requested to pay the substitute toll charge ('Ersatzmaut') by means of a subsequent written demand, and only if the substitute toll charge was (is) not duly paid was (is) a report issued to the district administrative authority (or the Magistrat (municipal authority)) and an administrative penalty procedure carried out by that authority.

14 If the driver of the motor vehicle has opted for the 'pre-pay procedure' and the GO-Box has **no credit or too little credit**, it is no longer possible for the toll to be paid correctly. From that point in time, the **criteria constituting the offence under Paragraph 20(2) of the BStMG are therefore met**. However, this applies not only to the **toll section currently being driven through**, but also to **all subsequent sections**. Pursuant to the '**Kumulationsprinzip**' (cumulation principle) in Paragraph 22(2) of the VStG, such penalties are to be imposed 'side by side' – that is to say, in a **purely additive manner**.

15 It is often the case that after the toll credit has been used up, several toll sections are passed through in immediate succession within a relatively short period of time without it being possible to acquire the required toll credit at a GO sales point during that phase (there are **only twenty GO sales points** for the entire territory of the province of Upper Austria, for example).

16 Even if the same stretch of road is used several times after a short interruption on each occasion (as, for example, in the case of daily deliveries), a failure to debit toll charges, for example due to a defective GO-Box, may in practice go unnoticed by the HGV driver for a relatively long period of time in cases where ASFINAG's

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request for payment of the substitute toll charge due is not received until weeks or months later.

17 The territorial competence of the district administrative authorities is limited by their respective administrative boundaries, with the result that, even if the distance travelled on a motorway is relatively short, it is conceivable that **several district administrative authorities** (and possibly also different federal provinces) will have **parallel** competence under administrative criminal law.

18 It is true that if – and because – even in such situations several penalties are (must be) imposed on the HGV driver under Paragraph 22(2) of the VStG, the **individual amounts** of those penalties can be kept as low as possible by using various **penalty assessment instruments** in order thereby to keep the overall amount of the penalty within **reasonably acceptable limits**; these include, for instance, the imposition of only the **minimum penalty** prescribed in Paragraph 20(2) of the BStMG for each individual offence (a practice used by some authorities as a purely preventive measure even if the corresponding **statutory requirements** are **not actually met**) and/or a **reduction of up to half of that minimum penalty** (although the **requirements prescribed** for this are generally **not met**) or the assumption of the existence of a **continuing offence**, with the consequence that only one overall penalty is to be imposed instead of several individual penalties, although this **is at variance with the case-law pronounced at the highest judicial level by the Verwaltungsgerichtshof (Austrian Supreme Administrative Court)**.

19 There is **no rule** in the Austrian legal system which requires a **general application of the principle of proportionality** in administrative proceedings, and, **similarly, there is no legal provision** which imposes an obligation on each authority – at least in respect of situations in which parallel proceedings are obvious or almost inevitably foreseeable – **to coordinate such proceedings with one another**.

20 The LVwG OÖ proceeds on the assumption that the Court of Justice has clarified, in particular by its judgment of 12 September 2019, *Maksimovic*, (C-64/18, EU:C:2019:723), that a cumulation principle provided for in national law does not infringe EU law per se, provided that, **on the one hand**, it is **ensured** that, viewed as a whole, the cumulation of penalties is managed in an effectively proportionate manner and, **on the other hand**, there is also a guarantee that the prohibition of **multiple prosecution and punishment** (Article 50 of the Charter) in the form in which it has been developed by the case-law of the ECtHR on Article 4 of Protocol No 7 to the ECHR is complied with in a manner that is actually effective.

21 In essence, this primarily means – as also summarised recently in the judgment of the ECtHR of 8 October 2020, Application No 67334/13, ***Bajčić***, with further references – that if several sets of criminal proceedings which relate to a **delictual event that is inextricably linked together in substance, space and time** are conducted against an accused person, there will be no breach of the prohibition of

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multiple prosecution and punishment only if each of those sets of proceedings addresses, not only ***in abstracto*** but also ***in concreto***, different yet **complementary aspects** of social misconduct, the conduct of several sets of proceedings is both **well founded in law** and **foreseeable** for the defendant according to established **practice**, if the relevant sets of proceedings are *de facto* conducted in such a manner as to avoid as far as possible any **disadvantage** to the defendant and in particular in the **collection** and **assessment** of the evidence, and, **above all, only if** the **sanctions** imposed in one of those sets of proceedings which have already **become final** are then **appropriately taken into account** in the other proceedings; this can be best achieved by **establishing by law** an offsetting mechanism that ensures that the overall amount of the individual penalties is proportionate (see § 39 of that judgment).

22 The Court of Justice had already previously held, in its judgment of 20 March 2018, *Criminal proceedings against Luca Menci* (C-524/15, EU:C:2018:197), that duplication restricting the prohibition of multiple prosecution and punishment under Article 50 of the Charter must satisfy the following conditions in particular: the duplication must be **provided for by the law** (paragraph 42) and must not affect the **essential content** of the guarantee conferred by Article 50 of the Charter (paragraph 43); the individual procedures must pursue – both per se and viewed as a whole – **recognised objectives of general interest** (paragraphs 44 and 45); and, viewed **overall**, the principle of **proportionality** must be complied with (paragraph 46 et seq.).

23 In addition, the national legislation must, first of all, provide for clear and precise definitions allowing individuals to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties (paragraph 49) and must also ensure that the disadvantages resulting, for the persons concerned, from such a duplication are limited to what is strictly necessary in order to achieve the objective (paragraph 52). This implies, on the one hand, the existence of rules ensuring coordination so as to reduce to what is strictly necessary the additional disadvantage associated with the duplication for the persons concerned (paragraph 53) and, on the other hand, rules making it possible to guarantee that the severity of all of the penalties imposed corresponds with the seriousness of the offence concerned, that is to say, **rules** which **oblige** the competent **authorities**, in the event of the imposition of a second penalty, to ensure effectively that the severity of all of the penalties imposed does not exceed the seriousness of the offence identified (paragraphs 55 and 58).

24 With regard to the case giving rise to the present request for a preliminary ruling, it can be deduced from this mutual referencing between Court of Justice and ECtHR case-law, as a **common guideline**, that the institutionalisation of a duplication system as a **minimum prerequisite** simultaneously requires **both** the **legal** anchoring of a **coordination requirement and** the application of the **principle of proportionality**.

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25 It is clearly necessary that – in accordance with the principle of legality under Article 49 of the Charter – such a requirement of coordination and proportionality has **already** been provided for **at the legislative level** – and therefore in a generally binding manner that is foreseeable and predictable for everyone.

26 As already mentioned above, it is true that there is a statutory requirement for the cumulation of penalties in the Austrian law on administrative-penalty procedures in the form of Paragraph 22(2) of the VStG; however, there is no obligation directly connected with this (or anything else) laid down at the legislative level, either in the specific substantive law (the **BStMG**) or (as would be most appropriate) in the general rules governing procedure (the **VStG**), requiring mutual coordination between the authorities and courts or compliance with the principle of proportionality, and such an obligation cannot be indirectly derived from the statute law either.

27 Overall, there is therefore a concern that penalties imposed in a cumulative manner under Paragraph 20(2) of the BStMG, in conjunction with Paragraph 22(2) of the VStG, **infringe Article 50 of the Charter in large numbers due, more or less, to the system currently in place**.

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