



PRESS RELEASE No 56/23

Luxembourg, 30 March 2023

Advocate General's Opinion in Case C-27/22 | Volkswagen Group Italia and Volkswagen Aktiengesellschaft

According to Advocate General Campos Sánchez-Bordona, Volkswagen cannot be penalised in Italy for 'Dieselgate', after having been penalised in Germany, if there has not been sufficient coordination between the penalty proceedings of both States

The penalty imposed by the Italian authorities could be of a criminal nature and, if the facts were found to be identical to those already tried in Germany, would infringe the right not to be punished twice for the same offence

The principle of *ne bis in idem* prohibits the duplication of criminal proceedings or penalties for the same acts against the same person. This principle is enshrined in Article 50 of the Charter of Fundamental Rights of the European Union ('The Charter').

The Volkswagen group placed on the worldwide market ten million seven hundred thousand diesel vehicles that were equipped with devices that altered the measurement of pollutant emissions. Seven hundred thousand of those vehicles were sold in Italy.

On 4 August 2016, the Italian competition authority fined Volkswagen and its Italian subsidiary € 5 million on the ground that the sale of those vehicles and the misleading advertising relating to them – emphasising their compliance with environmental legislation – constituted unfair trade practices. Volkswagen challenged the fine, which was the highest fine for such an offence, before the Italian courts.

In 2018, the Public Prosecutor's Office of Brunswick, which had instituted criminal proceedings in Germany against Volkswagen, notified Volkswagen that it had been ordered to pay a penalty of € 1 000 million for placing those vehicles on the worldwide market and for the advertising relating to them. Volkswagen did not contest the penalty and paid the fine on 18 June 2018.

On 3 April 2019, an Italian court dismissed Volkswagen's action in the first instance, even though a final order had been made against Volkswagen to pay the penalty in Germany. That court considered that the penalty imposed by the Italian competition authority had a different legal basis, so that the *ne bis in idem* principle did not prevent the company from being penalised in Italy.

Volkswagen appealed against that judgment before the Italian Council of State, which has referred several questions relating to the application of the *ne bis in idem* principle to the Court of Justice for a preliminary ruling.

First, the Council of State wishes to know whether administrative penalties such as those imposed on Volkswagen in Italy are criminal in nature and fall within the scope of Article 50 of the Charter.

In his Opinion presented today, Advocate General Manuel Campos Sánchez-Bordona clarifies that **it is up to the Council of State to determine the criminal nature of the proceedings and the penalties**, taking into account (i) the legal classification of the offence under national law; (ii) the nature of the penalty; and (iii) the severity of the penalty. The Advocate General considers that the penalty imposed in Germany is of a criminal nature, and that the same is true for the one imposed in Italy. The latter, although classified as an administrative penalty under Italian law, **is also of a criminal nature, due to its punitive purpose and its severity.**

Secondly, the Advocate General considers that **a penalty such as the one imposed by the Italian competition authority on a legal person (Volkswagen) that has engaged in unfair commercial practices infringes, in principle, the right not to be tried or punished twice for the same offence (Article 50 of the Charter) if that legal person has already received a final criminal conviction in another Member State (Germany) with respect to identical facts.**

The Advocate General argues that in this case there is a **duplication of proceedings in which a penalty is imposed**, the German proceedings having ended with a **final penalty**, so that it must be determined whether or not both proceedings related to the same facts (objective identity) and were directed against the same person (subjective identity).

Although the Advocate General considers that it is for the Council of State to determine this, he takes the view that **the two proceedings relate to the same legal person (Volkswagen), and that the facts penalised are identical** in substance and time. **If so, an infringement of the fundamental right guaranteed by Article 50 of the Charter may have been committed.**

Thirdly, **the Council of State wishes to know whether an exception to the *ne bis in idem* principle could be justified in this case.**

Mr. Campos Sanchez-Bordona points out that **limitations to this fundamental right are subject to certain conditions:** (i) the duplication of penalties must be provided for by law; (ii) the essence of the right must be respected; (iii) there must be a reason relating to the general interest; and (iv) the limitation must respect the principles of necessity and proportionality.

According to the Advocate General, in this case the problems arise regarding the requirement of proportionality and the need to limit the fundamental right. One of the elements that the Council of State will have to take into account to assess both requirements is, precisely, **the coordination of proceedings in which a penalty is imposed and proof of a sufficiently close connection in substance and time between them. Such coordination does not appear to have existed in this case.**

Although some areas of EU law have coordination procedures, there was no specific coordination mechanism that national authorities could use in this matter. The Advocate General highlights, in this regard, **the difficulty of applying the coordination requirement when there is duplication of proceedings in which a penalty is imposed in two Member States, conducted by competent authorities in different sectors of activity, and where there is no mechanism for coordinating those actions.**

Mr. Campos Sánchez-Bordona therefore proposes to answer the Council of State that **no limitation may be placed on the right not to be tried or punished twice for the same criminal offence where the concurrent duplication of proceedings conducted and penalties imposed by national authorities of two or more Member States, with competence in different fields, has taken place without sufficient coordination.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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.

Unofficial document for media use, not binding on the Court of Justice.

The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355

Stay Connected!

