Case C-27/22

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:

11 January 2022

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

7 January 2022

Applicants and appellants:

Volkswagen Group Italia SpA

Volkswagen Aktiengesellschaft

Defendant and respondent:

Autorità Garante della Concorrenza e del Mercato

Subject matter of the main proceedings

Action brought by Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft ('VWGI' and 'VWAG', respectively) seeking the reversal of judgment No 6920/2019 of the First Chamber of the Tribunale Amministrativo Regionale per il Lazio, Roma (Lazio Regional Administrative Court, Rome, Italy), by which the action at first instance, brought by VWGI and VWAG against Decision No 26137 of the Autorità garante della concorrenza e del mercato (the Italian competition authority; 'the AGCM') of 4 August 2016, had been dismissed. By that decision, the AGCM imposed a fine of EUR 5 million jointly and severally on VWGI and VWAG, it having been found that those companies had engaged in an unfair commercial practice within the meaning of decreto legislativo 6 settembre 2005 n. 206 (Legislative Decree No 206 of 6 September 2005; 'the Consumer Code').

Subject matter and legal basis of the request

Article 267 TFEU; interpretation of Directive 2005/29/EC to establish whether the penalties imposed for unfair commercial practices under Italian law can be classified as criminal administrative penalties (question 1); interpretation of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') to establish whether an appeal against a criminal administrative penalty imposed for unfair commercial practices can conclude with that penalty being upheld in the case that a criminal conviction has already been handed down in another Member State in relation to the same acts and against the same party to which that administrative penalty applies, where that conviction has become final in the course of that appeal (question 2); interpretation of Articles 3 and 13 of Directive 2005/29/EC, and of Article 50 of the Charter of Fundamental Rights of the European Union and Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 ('the Schengen Convention') to establish whether the rules laid down in that directive may justify derogations from the principle of *ne bis in idem* (question 3);

Questions referred for a preliminary ruling

1. Can the penalties imposed for unfair commercial practices under national legislation implementing Directive 2005/29/EC be classified as criminal administrative penalties?

2. Must Article 50 of the Charter of Fundamental Rights of the European Union be interpreted as precluding a national provision that makes it possible to uphold in court proceedings and make final a criminal administrative penalty against a legal person in respect of unlawful conduct in the form of unfair commercial practices, for which a final criminal conviction has been handed down against that person in the meantime in a different Member State, where the latter criminal conviction became final before the legal challenge to the former criminal administrative penalty became *res judicata*?

3. Can the provisions laid down in Directive 2005/29, with particular reference to Articles 3(4) and 13(2)(e), justify a derogation from the principle of *ne bis in idem* established by Article 50 of the Charter of Fundamental Rights of the European Union (subsequently incorporated into the Treaty on European Union by Article 6 TEU) and by Article 54 of the Schengen Convention?

Provisions of European Union law and case-law relied on

Articles 6 and 267 TFEU;

The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic

Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, in particular Article 54;

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), in particular Articles 3(4) and 13(2)(e);

Charter of Fundamental Rights of the European Union, in particular Articles 50 and 52;

Judgments of the Court of Justice of the European Union in Cases C-561/19; C-122/10; C-537/16; C-857/19; C-10/18; C-124/15; C-617/17.

Provisions of national law relied on

Legislative Decree No 206 of 6 September 2005 (the Consumer Code), in particular Articles 20, 21 and 23.

Article 20 lays down the definition of unfair commercial practice, while Articles 21 and 23 relate to the definition of misleading commercial practices.

In particular, the referring court explains the national legislation currently in force as follows:

'"Commercial practices" … means any conduct by traders that is objectively "related" to the "promotion, sale or supply" of goods or services to consumers and that takes place before, at the same time as or after a contractual relationship has been established. The trader's conduct may consist of statements, material acts or even mere omissions.

As regards the criteria for determining whether or not a given commercial practice is "unfair", Article 20(2) of the Consumer Code lays down in general terms that a commercial practice is unfair if it "is contrary to professional diligence" and "it distorts or is likely to distort to an appreciable extent the economic behaviour, as regards the product, of the average consumer that it concerns or to whom it is addressed, or of the average member of the group when the commercial practice is directed to a particular group of consumers."'

Two different categories of unfair practices are identified: misleading practices (Articles 21 and 22) and aggressive practices (Articles 24 and 25).

'Whether or not a commercial practice is misleading depends on whether the practice is untruthful in so far as it contains false information or information

which, in principle, will mislead or might mislead the average consumer, in particular, in so far as concerns the nature or principal characteristics of goods or services and which is thus likely to induce the consumer to take a commercial decision which he would not have taken in the absence of the practice in question When these characteristics occur together, the practice is considered misleading and must therefore be prohibited.

…

In all situations in which the commercial practice constitutes an "invitation to purchase" – a term that includes commercial communications – the information relating to the "main characteristics of the product" must always be considered "relevant" (Article 22(4)[(a)]… If such information is missing, an invitation to purchase will thus be considered misleading.'

National case-law has established the criminal nature of penalties imposed for breaches of consumer protection rules.

International law and case-law relied on

Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 4 of Protocol No 7;

Judgments of the European Court of Human Rights (27 February 1980, *Deweer v. Belgium* (CE:ECHR:1980:0227JUD000690375); 27 November 2014, *Lucky dev v. Sweden* (CE:ECHR:2014:1127JUD000735610)).

Succinct presentation of the facts and procedure in the main proceedings

1 By measure No 26137 of 4 August 2016, the AGCM imposed a fine of EUR 5 million on VWGI and VWAG on the ground that they had infringed the Consumer Code.

2 Those infringements concerned, on the one hand, the marketing in Italy by VWGI and VWAG of vehicles equipped with systems designed to alter the measurement of pollutant emissions for the purposes of type-approval and, on the other, the dissemination of advertisements that, notwithstanding the alteration of the measurements of emissions, emphasised the compliance of those vehicles with the environmental regulatory criteria.

3 VWGI and VWAG appealed against measure No 26137/2016 in an action before the Lazio Regional Administrative Court ('the Lazio TAR').

4 In 2018, after the adoption of the abovementioned Decision No 26137/2016 but before judgment was handed down by the Lazio TAR on the appeal referred to in the preceding paragraph, the public prosecutor's office in Brunswick, Germany, served VWAG with an administrative order, by which it imposed on VWAG, in

accordance with the Gesetz über Ordnungswidrigkeiten (German Law on Regulatory Offences, 'the OWiG'), a penalty of EUR 1 billion for breach of its obligation to supervise activities and undertakings. That penalty related, inter alia, to the global marketing (including on the Italian market) of vehicles equipped with systems designed to alter the measurement of pollutant emissions for the purposes of type-approval, and to the dissemination of advertisements that, notwithstanding the alteration of the measurements of emissions, showed that those vehicles were particularly environmentally friendly.

5 The administrative order became final in June 2018, since VWAG waived its right to appeal and also paid the fine.

6 In 2019 the Lazio TAR, by judgment No 6920/2019, dismissed the action brought by VWGI and VWAG, even though the applicants at first instance had invoked the fact that an administrative order had been issued by the public prosecutor's office in Brunswick. Notably, the applicants at first instance had referred to judgments of the courts in other Member States, by which it had been decided to put an end to national proceedings concerning the alteration of emission readings on the grounds that those situations had already been sanctioned in Germany. The Lazio TAR did not accept that argument, stating that the penalty imposed by the AGCM was based on a different legal basis compared to the penalty applied in Germany.

7 VWGI and VWAG appealed against the above judgment No 6920/2019 before the Consiglio di Stato (Council of State, Italy; 'the referring court'), which refers the questions as set out above for a preliminary ruling.

The essential arguments of the parties in the main proceedings

8 The first four grounds of appeal raised by the appellant companies concern alleged breaches of national law that are not relevant to the questions referred for a preliminary ruling.

9 By their fifth ground, the appellants allege that the Lazio TAR infringed the principle of *ne bis in idem*, enshrined in Article 50 of the Charter and Article 54 of the Schengen Convention. Specifically, they submit that the court of first instance erred in ruling out the possibility that the decision of a foreign court could interfere with an earlier decision of the AGCM. In this regard, they suggest the possibility of making a reference for a preliminary ruling under Article 267 TFEU with regard to the following questions:

(a) For the purposes of ensuring compliance with the principle of *ne bis in idem* enshrined in Article 50 of the Charter and Article 54 of the Schengen Convention, must an administrative order, adopted before the conclusion of criminal proceedings opened in relation to the same acts and against the same party in another Member State, be annulled if it is appealed before a national court and, in the course of that appeal, the abovementioned criminal proceedings conclude with

a fine being imposed, where that fine has become final and been paid by the party concerned?

(b) Does Article 3(4) of Directive 2005/29 permit the application of the provisions of that directive in relation to unfair commercial practices even as a derogation from the abovementioned principle of *ne bis in idem*?

Succinct presentation of the reasoning in the request for a preliminary ruling

10 The referring court finds that the acts penalised by the German administrative order are the same as those penalised by the AGCM's decision and that the party penalised – namely VWAG – is also (in part) identical. In support of that conclusion the referring court notes that Italian law also provides for the liability of legal persons. Furthermore, according to Italian criminal case-law, in EU law, for the purposes of the principle of *ne bis in idem*, it is not the legal classification of the acts that is relevant, but the existence of an inseparable link between them.

11 With regard to the admissibility of this reference for a preliminary ruling, according to the referring court, the questions referred are relevant because, first, all the other grounds of appeal, which relate to aspects of national law unrelated to those questions, appear to be unfounded and, second, if the principle of *ne bis in idem* were to be held applicable in the present case, the AGCM's penalty measure could not become final.

12 In addition, the referring court notes that, first, although the Court of Justice has already ruled on the provisions referred to by the appellants on the principle of *ne bis in idem*, in particular in the field of competition, it has not yet examined those provisions in the context of sanctions imposed for unfair commercial practices and, second, there is a risk that different interpretations will emerge in the case of unlawful acts affecting the whole of the European market.

13 The referring court points out that, according to the case-law of the Court of Justice, on the basis of Article 50 of the Charter, where a person has already received a final criminal conviction for unlawful acts relating to market manipulation, that person cannot be the subject of proceedings intended to impose an administrative fine of a criminal nature for the same acts, provided that that criminal conviction ensures the effective, proportionate and dissuasive punishment of the offence, having regard to the social damage it has caused. The same case-law has also shown that Article 50 of the Charter confers on individuals a directly applicable right in a dispute such as the one at issue in the main proceedings.

14 The referring court categorises the penalty imposed in Germany in the present case as an administrative fine of a criminal nature relating to market manipulation, since its purpose is not only to compensate the damage caused by the unlawful act, but also to act as a deterrent. According to the referring court, sanctions relating to unfair commercial practices would also fall within that scope, having

regard to the conclusions already reached by the Court of Justice in relation to sanctions in the field of competition.

15 The referring court doubts, however, that the questions raised in that appeal concerning the interpretation of EU law can be resolved by the simple application of the case-law of the Court of Justice relating to the principle of *ne bis in idem* in the field of competition sanctions, given that, in the present case, the sanctions imposed in Germany and Italy are different and the relevant markets are only identical in part.

16 The referring court points out that the present dispute is characterised by the fact that, on the one hand, the Italian administrative penalty was imposed before the German penalty and, on the other hand, the latter became definitive before the Italian penalty. In that regard, the court points out that, according to the case-law of the European Court of Human Rights, Article 4 of Protocol No 7 to the European Convention on Human Rights permits the simultaneous conduct of more than one proceeding, it being understood that one of those proceedings may not continue when the other has been concluded by a final decision.

17 The referring court also questions whether the penalty imposed in Germany is capable of also effectively, proportionately and dissuasively punishing the unlawful acts that are the subject of the AGCM's decision. In that regard, it refers to the case-law of the Court of Justice concerning the interpretation of Article 50 of the Charter in the light of Article 4 of Protocol No 7 to the European Convention on Human Rights. The Court has held that the principle of *ne bis in idem* allows national legislation, such as the Italian legislation, under which a person may be subject to criminal proceedings for failure to pay value added tax, even if that person has already been subject, in relation to the same acts, to a final administrative penalty classified as of a criminal nature for the purposes of Article 50 of the Charter. According to the Court, the combination of proceedings and sanctions described above is permitted if it serves a public-interest purpose and provided that the severity of the sanctions as a whole is not excessive in relation to the seriousness of the acts sanctioned. The Court has also held that a national competition authority may, in a single measure, impose a penalty on the same person for an infringement of national and EU law without infringing the principle of *ne bis in idem*. The referring court states that, in the present case, first, two different authorities belonging to two different States have imposed two different penalties and, second, the acts that are the subject of both measures are inextricably linked.

18 According to the referring court, it was established in the judgment at first instance that the national legislation allows a person to be subject to the proceedings for the imposition of an administrative financial penalty that is of a criminal nature for the purposes of Article 50 of the Charter even if that person has already been given a final criminal conviction for the same acts. The referring court adds that it has been observed in the case-law of the Court of Justice that, in the light of Article 52(1) of the Charter, the *ne bis in idem* principle may be

subject to limitations where these are necessary and serve a public-interest purpose or meet the need to protect the rights or freedoms of others. In that regard, the case-law of the Court states that such limitations must be laid down by clear and precise rules and must guarantee that the proceedings are coordinated in order to comply with the principle of proportionality of the penalty.

19 The referring court observes that, in the present case, a public-interest purpose of protecting European consumers exists, whereas there is a lack of clear and precise rules on the possibility of combining proceedings and sanctions and doubts arise as to the proportionality of the sanctions imposed in Italy and Germany, given that both were applied to the maximum extent. The referring court goes on to state that the application of the principle of *ne bis in idem* concerns only the part of the AGCM's decision that contains the criminal financial penalty.