

**Case C-412/21**

**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:**

6 July 2021

**Referring court:**

Tribunalul Satu Mare (Romania)

**Date of the decision to refer:**

9 June 2021

**Applicant:**

Dual Prod SRL

**Defendant:**

Direcția Generală Regională a Finanțelor Publice Cluj-Napoca – Comisia regională pentru autorizarea operatorilor de produse supuse accizelor armonizate

**Subject matter of the main proceedings**

Administrative action brought before the Tribunalul Satu Mare (Regional Court, Satu Mare, Romania) by the applicant Dual Prod SRL against the defendant Direcția Generală Regională a Finanțelor Publice Cluj-Napoca – Comisia regională pentru autorizarea operatorilor de produse supuse accizelor armonizate (Regional Directorate-General of Public Finances of Cluj-Napoca – Regional authority for the authorisation of operators dealing in or producing goods subject to harmonised excise duty), seeking the annulment of certain decisions by which the applicant's authorisation as a tax warehouse-keeper was suspended pending final judgment in criminal proceedings brought against it.

## **Subject matter and legal basis of the request for a preliminary ruling**

Pursuant to Article 267 TFUE, the referring court seeks interpretation of Article 48(1) and Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') and of Article 16(1) of Directive 2008/118.

## **Questions referred for a preliminary ruling**

1. Is Article 48(1) of the Charter of Fundamental Rights of the European Union, which concerns the principle of the presumption of innocence, read in conjunction with Article 16(1) of Directive 2008/118/EC, to be interpreted as precluding a legal situation, such as that at issue in the present case, in which an administrative measure suspending an authorisation to operate as a producer of alcohol may be adopted on the basis of mere presumptions which are the subject of an ongoing criminal investigation, without any final conviction in criminal proceedings having been handed down?

2. Is Article 50 of the Charter of Fundamental Rights of the European Union, which concerns the principle *non bis in idem*, read in conjunction with Article 16(1) of Directive 2008/118/EC, to be interpreted as precluding a legal situation, such as that at issue in the present case, in which two penalties of the same nature (suspension of authorisation to operate as a producer of alcohol), differing only in [the duration of their effect], are imposed on the same person in respect of the same facts?

## **Provisions of EU law relied on**

Article 48(1) and Article 50 of the Charter

Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC; Article 16(1)

Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages

## **Provisions of national law relied on**

Legea nr. 227/2015 privind Codul fiscal (Law No 227/2015 establishing the Tax Code, 'the Tax Code'):

Article 369(3)(b) and (c), which provide that the authorisation for a tax warehouse is to be suspended for a period of between 1 and 12 months where it is established that offences referred to in Article 452(1)(i) have been committed, or until the final outcome of criminal proceedings, where a prosecution has been brought for an offence referred to in Article 364(1)(d);

Article 364(1)(d), which provides that no authorisation for a tax warehouse is to be issued if the applicant has been finally convicted of certain offences, including offences under the Tax Code;

Article 452(1)(h) and (i), according to which it is an offence for any person to hold outside a tax warehouse or to market on the territory of Romania excise goods which are subject to a marking obligation, but are not marked or are improperly marked, in quantities exceeding the thresholds expressly laid down in the Tax Code, and the use of mobile pipes and tubes, elastic hoses or other conduits of similar nature, the use of uncalibrated tanks and the placing before meters of conduits or taps by means of which quantities of alcohol or spirits may be extracted without being measured by the meter are offences.

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The applicant is authorised to operate in the sector for the production of alcohol and alcoholic beverages and thus falls within the scope of Directives 2008/118 and 92/83.
- 2 On 1 August 20[1]8, at the request of the customs control authorities, the police carried out an inspection at the applicant's premises.
- 3 In the course of the joint investigation carried out by those authorities it was found that the applicant had installed a hose through which alcohol was run into a container located near the fence surrounding the production tax warehouse. Following the inspection, two parallel sets of proceedings were initiated against the company Dual Prod SRL, both of which exclusively concerned the facts, without any formal charge being made against the possible perpetrators.
- 4 The criminal proceedings concerned two offences, namely the installation of a hose at the production plant and the holding outside the tax warehouse of more than 40 litres of ethyl alcohol having a concentration of at least 96%, which, according to the police, constitute offences under Article 452 of the Tax Code.
- 5 The following day, the customs authorities returned to the company's premises and proceeded to seal them on the ground of infringement of the special arrangements for excise goods. The tax warehouse authorisation was not suspended on that occasion. However, while it remained theoretically possible for the company to continue to operate administratively, the sealing of its premises made it impossible for it to carry on any of its activities.
- 6 The Curtea de Apel Oradea – Secția de contencios administrativ (Court of Appeal, Oradea, Romania – Division for Administrative Matters) held that the sealing of the premises had been unlawful, finding that, in the absence of a final court decision, it constituted an infringement of the presumption of innocence.

- 7 On 5 September 2018, the customs authorities officially suspended the applicant's authorisation as a tax warehouse-keeper for a period of 12 months, taking the view that the existence of evidence of criminal offences was sufficient for that administrative penalty to be imposed.
- 8 Following the applicant's appeal against that measure, the Court of Appeal, Oradea, reduced the penalty from 12 to 8 months, finding the maximum penalty to be disproportionate. The applicant fully complied with the eight-month suspension.
- 9 On 21 October 2020, the applicant was formally charged in the criminal proceedings and consequently, on 19 November 2020, the customs authorities imposed the same administrative penalty again, in respect of the same facts, suspending the applicant's authorisation as a tax warehouse-keeper for an indefinite period, pending the final outcome of the criminal proceedings.
- 10 The applicant, alleging an infringement of the presumption of innocence and of the principle *non bis in idem*, has challenged that further suspension before the referring court (the Regional Court, Satu Mare), which has decided to refer the matter to the Court of Justice for a preliminary ruling.

#### **The essential arguments of the parties in the main proceedings**

- 11 The applicant argues that although Directive 92/83 does not contain provisions concerning authorisation matters, the measures which the Member States adopt in this area must remain proportionate when aimed at preventing fraud.
- 12 Two issues arise in the present case. First, there is the question of infringement of the principle *non bis in idem*, inasmuch as two penalties of the same nature have been imposed in respect of the same facts. Secondly, there is the question of the proportionality of the penalties imposed, in that, even before the conclusion of the criminal proceedings, the penalty imposed, given its consequences — namely that it prevents the applicant company from carrying on any kind of operation — is one which may be characterised as a criminal penalty.

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

- 13 The referring court states that two issues arise in this case. The first concerns the fact that a taxable person's activities may be suspended indefinitely for the simple reason that there is evidence that it has committed a criminal offence, without any final judgment having been delivered. The second concerns a possible breach of the principle *non bis in idem* as a result of two penalties of the same nature being imposed in tax proceedings in respect of the same facts, simply because the criminal proceedings have reached a certain stage.

- 14 In the referring court's view, until such time as a national court delivers a final judgment finding Dual Prod SRL guilty of the facts of which it is accused, that company must be regarded as innocent. The decision of the national authorities, however, seems to imply that the applicant company has been found guilty.
- 15 In addition, the consequences of that decision for a taxable person operating in a sector in which excise duties apply are especially injurious, since that person will be prevented from carrying on any activity, which would be contrary to Article 48 of the Charter.
- 16 As regards breach of the principle *non bis in idem*, the referring court states that, in the present case, the two suspensions of the tax warehouse authorisation are of the same nature and were imposed in respect of the same facts. In its judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, the Court of Justice accepted a combination of tax penalties and criminal penalties, but only if the tax penalty does not take the form of a penalty that is criminal in nature.
- 17 The referring court considers that since the penalties suspending the tax warehouse authorisation are closely connected with the criminal proceedings, it is necessary to interpret the principle *non bis in idem* in relation to the application of the same type of penalty, one having the same nature, in respect of the same facts.