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NE BIS IN IDEM IN LIGHT OF THE *RES JUDICATA* PRINCIPLE: PROCEDURAL GUARANTEE OR FIRST COME FIRST SERVED RULE*?*

Il ne bis in idem *alla luce del principio della* res judicata*: garanzia procedurale o* first come first served rule*?*

Ne bis in idem *à la lumière du principe de l'autorité de la chose jugée : garantie procédurale ou first come first served rule?*

Court of Justice, Judgment of 14 September 2023,
Case C-27/22, *Volkswagen Group Italia e Volkswagen Aktiengesellschaft*

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On 14 September 2023, the Court of Justice delivered its ruling in Case C-27/22 providing further clarifications on the application of the *ne bis in idem* principle in transnational disputes and its relation with the *res judicata* principle. The preliminary reference originated from a proceeding involving Volkswagen Group Italia S.p.A. ("VWGI") and Volkswagen Aktiengesellschaft ("VWAG").

On 4 August 2016, the Italian Competition Authority ("ICA") imposed a fine of EUR 5 million on VWGI and VWAG for an unfair commercial practice consisting of the marketing and dissemination of misleading advertising of vehicles fitted with an illegal defeat in Italy ("contested decision"). The vehicles were indeed equipped with systems designed to alter the measurement of pollutant emissions for their approval under Regulation (EC) No 715/2007. The ICA's decision was challenged before the Italian Regional Administrative Court ("TAR").

On 13 June 2018, the German Public Prosecutor's Office of Brunswick ("GPPO") imposed a fine of EUR 1 billion on VWAG based on the circumvention of emissions requirements. VWAG decided not to appeal the GPPO's decision, which therefore became final. Crucially, in the meanwhile, the contested decision was still pending before the TAR. Based on the final decision of GPPO, VWGI and VWAG invoked art. 50 of the Charter of the Fundamental Rights of the European Union

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("CFREU") before the TAR, claiming that the contested decision had become unlawful and breached the *ne bis in idem* principle, *i. e.*, the right not to be tried or punished twice for the same offence in one or, as in the present case, in different EU member States.

The dispute reached the Italian Supreme Administrative Court, which requested a preliminary ruling to the Court of Justice ("Court") under art. 267 TFEU posing the following questions: I) whether the fine imposed by the ICA was criminal in nature; II) whether art. 50 CFREU precludes proceedings and the imposition of a final administrative sanction in respect of unlawful conducts, for which a final criminal conviction has been handed down in the meantime in a different Member State, where the latter criminal conviction became final before the former administrative penalty became *res judicata*; III) whether a limitation of the *ne bis in idem* principle under art. 52 CFREU is possible in circumstances as those of the present case.

In his opinion, Advocate General (AG) Campos Sanchez-Bordona claims that the *ne bis in idem* principle should apply. After finding that the questions are admissible as the ICA's decision is based on Italian legislation (Legislative Decree No 206 of 6 September 2005) transposing Directive 2005/29/EC, the Advocate General considers the various conditions required for the application of the *ne bis in idem* principle. Based on the previous case law of the Court, the fine imposed by the ICA is found to be criminal in nature in light of its purpose, which is to penalize an unlawful conduct rather than to make good damage suffered by consumers, and in light of the severity of the penalty, which may be as high as EUR 5 million.

As the ICA's decision falls within the scope *ratione meateriae* of art. 50 CFREU, the AG considers whether a final decision was issued and whether the two proceedings refer to the same facts (*bis* and *idem* conditions). Concerning the first condition of *bis*, the German decision became final while the Italian proceedings were still pending. The fact that the Italian decision was issued before the German one and that the final nature of the latter was due to the waiver of the right to appeal is not found to be relevant. As to the *idem* condition, AG Campos refers to the settled case law of the Court requiring the facts referred to in the two proceedings to be identical ("same material acts") and not merely similar. The AG concludes that the referring Court must establish whether there is a coincidence in the facts of the two proceedings. However, the fact that the GPPO considered the effects of the unlawful conduct in Italy to determine the fine could suggest that the *idem* condition is met.

Finally, AG Campos analyses the applicability of art. 52(1) CFREU (the so-called *limitation of rights clause*) to the present case. As established by

the Grand Chamber of the Court in the *bpost* and *Norzucker* cases, a derogation from art. 50 CFREU may be provided if three cumulative conditions are met: i) the duplication of proceedings should not constitute an excessive burden, ii) the provisions have to be sufficiently clear and precise to enable the prediction of possible duplication, and iii) there must be coordination between the national authorities of the Member States where the proceedings are pending. While the first two conditions seem to be met in the present case, the AG finds the third condition more problematic. This is due to the lack of coordination between the ICA and the GPPO. Even though the AG acknowledges the difficulties in coordinating the proceedings in transnational disputes involving authorities with different powers and duties, he finally concludes that the lack of coordination in the two proceedings shall exclude the applicability of art. 52(1) CFREU and the *ne bis in idem* principle should apply.

The ruling delivered by the Court of Justice substantially follows the Advocate General's opinion, thus confirming its previous case law. Interestingly, while suggesting that the *ne bis in idem* principle is (abstractly) applicable to the dispute in the main proceedings, the Court stresses two important aspects. First, the *bis* condition under art. 50 CFREU requires a prior final decision (*res judicata*). Such a decision must, in line with the *Nordzucker* case law, entail a real assessment of the factual elements that form the object of the pending proceedings, a mere reference to those facts not being sufficient. Second, the Court confirms its previous case law and highlights the necessity to guarantee a uniform application of the *ne bis in idem* principle. Despite the difficulties underlying the lack of *ad hoc* coordination systems, the transnational character of a dispute cannot justify a derogation from requirements laid down in art. 52(1) CFREU.

The judgment does not diverge from the previous case law of the Court concerning the conditions to apply the *ne bis in idem* principle and the limitation of rights clause as established in *bpost* and *Nordzucker*. However, it offers an interesting clarification on the relation between the *res judicata* and *ne bis in idem* principles. First, it is worth recalling that EU law does not recognize a *substantial ne bis in idem* principle, *i.e.*, the prohibition to impose sanctions based on different legal norms within the same proceedings. This was recently confirmed by the Court of Justice in *Marine Harvest v Commission* – in line with the case law of the European Court of Human Rights (see, *e.g.*, *Oliveira v. Switzerland*). art. 50 CFREU can only be invoked in proceedings when a previous decision concerning the same (and identical) facts has already become a *res judicata* (*procedural ne bis in idem*). A *res judicata* is therefore a *condicio sine qua non* for the application of the *ne bis in idem* principle as enshrined in the CFREU and interpreted by the Court of Justice. This is even more evident in the present judgment,

where the fact that the ICA was the first authority to initiate the proceedings bears no relevance. At the same time, the *ne bis in idem* can be said to operationalize the *res judicata* principle, providing individuals with an effective legal instrument against the risk of several prosecutions. This seems to confirm the view of the Court and of AG Wahl in the *Powszechny* case in which the *ne bis in idem* was found to be a corollary of the *res judicata* principle.

The second relevant issue addressed in the judgment is the coordination requirement under art. 52(1) CFREU. By confirming the *bpost* and *Nordzucker* case law, the Court rejects the claim of the Italian Government calling for the non-application of the coordination requirement. This approach is definitely welcome as it shows that after a first heterogenous application of the principle, initiated with *Aalborg Portland*, the Court seems finally willing to guarantee a uniform interpretation of art. 50 CFREU. However, this judgment also shows how the coordination requirement could be hardly met in circumstances such as those described in the present case and that too strict an interpretation of the *bpost* and *Nordzucker* formula should not be adopted as a general rule outside the competition law field. While coordination between certain authorities has been institutionalized at EU level with, among others, the European Competition Network and Eurojust, the achievement of a sufficient standard of cooperation poses serious problems in the case of national authorities having different powers and duties in transnational disputes. When it comes to the cooperation between the criminal and administrative authorities of different Member States, as in the case in comment, the lack of a coordination system and a strict interpretation of art. 52(1) CFREU could pose a risk of forum shopping and lead to jeopardize the effectiveness of the administrative and criminal law enforcement. Thus, companies might seek to obtain a criminal conviction in one Member State to benefit from protection against proceedings and penalties relating to the same facts in another Member State. At the same time, national authorities shall suspend the investigations before notifying a decision to seek coordination and avoid overlaps with other national authorities. This could be problematic concerning the respect of time limits provided by national law in the preliminary investigation phase, which also embodies an aspect of the principle of due process.

From a more general perspective, it could be argued that translating the *reductio ad unum* operated by the *Engel* case law in procedural terms – namely treating certain administrative fines as criminal in nature not only from a substantial but also from a procedural perspective – may be anything but straightforward. As stated by AG Bobek in his opinion in the *bpost* case: «once the combination of the relevant proceedings involves

a number of parallel administrative regimes, and more importantly, more than one Member State or the authorities of the Member States and the European Union, then suggestions about the desirability of single-track systems might quickly leave the realm of wishful thinking and cross over into science fiction» (para. 115). While the Court correctly found that none of the three conditions laid down in art. 52(1) CFREU can be disregarded, a possible mitigation of the aforementioned issues could be provided through a broad interpretation of the cooperation requirement. Even though such a requirement has to be respected for art. 52(1) CFREU to apply, in those cases in which an *ad hoc* cooperation mechanism is not yet provided by EU law, national courts and, ultimately, the Court of Justice could be willing to adopt a lower standard respectively to consider that the cooperation requirement has been met and to assess the respect of the time limits provided by national law in the preliminary investigation phase.