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Why the CJEU should not follow the AG Opinion on the application of *ne bis in idem* in the pending *Volkswagen* case

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Disclaimer: The author represents the interests of companies having suffered damages in the "Dieselgate" case. He thanks Ms Amélia Guglielmi for her research work and Prof. Maria José Azar-Baud for her valuable comments.

On 30 March 2023, Advocate General ("AG") Campos Sánchez-Bordona delivered his Opinion in C-27/22 *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*. This Opinion addresses the application of the *ne bis in idem* principle in the case of the diesel emissions scandal, better known as "*Dieselgate*". According to the *ne bis in idem* principle, a fundamental principle of criminal law enshrined, *inter alia*, in Article 50 of the Charter of Fundamental Rights, "no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

The Court's ruling is highly anticipated, both, by the authorities in the Member States which are currently prosecuting VW for offences committed on their territory in connection with the vehicles sold and used there, and by the victims – whether consumers or companies – who are seeking compensation for their losses in the context of ongoing criminal proceedings, as is the case in France, for example.

Background of the case

In 2015, the American Environmental Protection Agency made a discovery: for years, VW had been rigging the emission control systems of its diesel cars. Since then, VW has been the subject of criminal and civil proceedings around the world. After having paid more than $4.3 billion in fines in the US, VW paid, in 2018, a total of €1 billion in fines to terminate proceedings in Germany, in agreement with the Brunswick Public Prosecutor's Office. Since

then, VW has systematically invoked the *ne bis in idem* principle to request the cessation of criminal proceedings in other Member States, as well as proceedings which would lead to fines tantamount to criminal sanctions.

In the context of a €5-million fine imposed on VW by the Italian Competition Authority for unfair commercial practices, the question arose as to whether the application of the *ne bis in idem* principle precluded VW from being convicted again in Italy. In 2022, the Italian Council of State stayed its proceedings and referred this question to the Court.

The Court's preliminary ruling will be fundamental in determining the extent to which criminal proceedings and sanctions can still be taken against VW, not only in Italy, but also in other Member States where such proceedings are currently pending.

In the present case, the AG Opinion examines the *ne bis in idem* principle by considering that each of the principle's conditions, as provided for by Article 50 of the Charter, are fulfilled, and that one of the conditions for a derogation from the principle, as provided for by Article 52 of the Charter and related case law, is not met. Unfortunately, however, he fails to examine the fundamental question of whether, in the present case, the application of *ne bis in idem* is consistent with its very purpose.

The AG's examination of the conditions for the application of and derogation from *ne bis in idem*

On the application of the ne bis in idem *principle*

As the AG rightly points out, "the application of the *non bis in idem* principle is subject to a twofold condition, namely, first, that there must be a prior final decision (the *bis* condition) and, secondly, that the prior decision and the subsequent proceedings or decisions must concern the same facts (the *idem* condition)" (para 62).

First, regarding the *bis* condition, the AG argues, relying on the Court's recent *bpost* ruling: "'in order for a judicial decision to be regarded as having given a final ruling on the facts subject to a second set of proceedings, that decision must not only have become final but must also have been taken after a determination has been made as to the merits of the case'"(para 63). Here, the AG considers it sufficient to note that the *bis* condition is met insofar as "the decision of the Public Prosecutor's Office of Brunswick became final on 13 June 2018 and … was taken, stating reasons, following a determination of the merits of the case" (para 64).

Second, he recalls that the *idem* condition is based on an objective assessment of the facts in question, i.e., on their material identity, understood as a set of concrete circumstances inextricably linked together – the *idem factum* – irrespective of their legal classification, or *idem crimen* (para 67). The *idem* condition is fulfilled when, one, the circumstances, both material and temporal (objective identity) and, two, the persons concerned (subjective identity), are identical (para 71).

On subjective identity, the AG notes that the proceedings in question concern the same legal person, even though the Italian Competition Authority's decision also concerns the Italian subsidiary of VW, which the Brunswick Public Prosecutor's decision does not name (para 68). In his view, however, this does not break the subjective identity, "since the latter company belongs to the former and is under its control". He leaves it to the referring court to settle this question. Regarding the objective identity, the AG considers that, although it is for the Italian Council of State (the referring court) to determine whether the facts in the present case are identical from a material and temporal point of view to that sanctioned by the German decision, there is no doubt that they are identical (para 76).

The AG disputes the Italian Government's argument that, for the condition *idem* to be fulfilled, the facts and the protected legal interests should be the same. In his view, such an approach was superseded by the Court in *bpost* and *Nordzucker*. Furthermore, the AG makes four observations which, in his view, are likely to establish the identity of the facts. Firstly, the facts must be identical, and not merely similar. Secondly, he notes that geographic identity is not essential in the context of a cross-border duplication of procedures and sanctions. Furthermore, whilst the Brunswick Public Prosecutor's Office punished a lack of vigilance worldwide between 2007 and 2015, it considered as a relevant fact the sale in other countries of vehicles fitted with the cheating device, as well as the misleading advertising for the sale of its vehicles. Finally, in the AG's view, the link between the three findings seems clear.

He concludes that, in so far as the above conditions are met, the *ne bis in idem* principle should apply in this case, so that the Italian Competition Authority, whose administrative penalties must be treated as criminal penalties, is precluded from imposing further penalties on VW (para 116).

On the absence of a derogation from the ne bis in idem *principle*

The AG proceeds to examine whether, in accordance with Article 52 of the Charter, the four conditions for a limitation of the *ne bis in idem* principle are met (para 81).

The first condition whereby the actions of the Brunswick Public Prosecutor's Office and the Italian Competition Authority must be based in law is fulfilled, as they are provided for by the German OWiG and Article 21(1)(b), (3) and (4) and Article 23(1)(d) of the Italian Consumer Code of the Italian Consumer Code, respectively. As mentioned, the conditions for the application of *ne bis in idem* also appear to be met (para 84). The third condition whereby the procedures in question should protect complementary, but not identical, general interest objectives appears to be met as well; on the one hand, Article 130 OWiG aims to ensure that undertakings and their employees act in accordance with the law and, therefore, penalises instances of negligent breach of the duty of care in the context of commercial activities, thus meeting the general interest objective of ensuring the proper functioning of the market. On the other, the Italian Consumer Code provisions aim to ensure a high level of consumer protection whilst also contributing to the proper functioning of the internal market (para 88).

The fourth proportionality condition is, however, not met in this case. The AG submits that a derogation is only possible if three sub-conditions are met:

1. There should be clear and precise provisions allowing for the duplication of proceedings and sanctions. In this respect, the AG considers that VW could have reasonably expected sanctions in both Italy and Germany (para 96).
2. The totality of the penalties imposed should correspond to the gravity of the infringement. The AG considers that the combination of the German fine of €1 billion and the Italian fine of €5 million would not appear to be disproportionate in the light of VW's annual turnover, the seriousness of the infringement committed, and the economic advantage obtained as a result of the engine rigging (para 99).
3. The two proceedings must be linked in time and substance, and must be conducted in a sufficiently coordinated manner to reduce the additional burden caused by the duplication of independently-conducted proceedings to what is strictly necessary (para 101).

Regarding this third sub-condition, the AG notes that there was no coordination between the Italian and German procedures, while observing that "it seems unlikely that the requirement of coordination could be met in the event of a duplication of proceedings and penalties, under the responsibility of national authorities of two States with powers in different areas, for which there are no specific coordination mechanisms under EU law" (para 110). Furthermore, the AG stresses that there is a paradox in the Court's case law. Indeed, whilst cooperation mechanisms are intended to promote compliance with *ne bis in idem,* and thus to prevent the same person from being tried or punished twice for the same acts, the case law shows that the Court considers, on the contrary, that the coordination of procedures is one of criteria to which the derogation is subjected (see C-524/15 *Menci*, referred to in C-117/20 *bPost* and C-151-20 *Nordzucker*). Despite this paradox, the AG proposes that the Court maintain this case law (para 115). He thus concludes that, in the present case, the *non bis in idem* principle applies, without any derogation allowing it to be overridden.

Why upholding the *ne bis in idem* principle should not allow a Member State to favour a national champion

Irrespective of whether the AG's observations are in line with existing case law, the answer he proposes to adopt, entails, in my view, consequences which are contrary to the very purpose of the *ne bis in idem* principle.

The fundamental objective of *ne bis in idem* is to protect a person from being prosecuted or convicted for acts for which he or she has already been acquitted or convicted. However, underpinning this principle is the notion that, for true justice to be achieved, the acquittal or first conviction must match the severity of the infringement at issue, such that duplicate proceedings and subsequent sanctions would be inherently unjust. Anything to the contrary – namely an unjustified acquittal or unacceptably low sanction, which nevertheless would be sufficient to bring the principle into play – amounts to letting reprehensible

conduct go unpunished. This was never intended to be the purpose of the *ne bis in idem* principle.

The *ne bis in idem* principle must therefore be applied in a manner consistent with the principle laid down by the Court, according to which the penalties imposed by Member States for breaches of Union law must be "effective, proportionate and dissuasive" (C-68/88 *Commission v Greece*, para 24). This requirement is, moreover, in line with that of the ECtHR, according to which "effective" criminal sanctions must be imposed on private individuals for behaviour contrary to the ECHR (see *C.N. and V. v France*, para 105).

In the present case, the proposed application of the *ne bis in idem* principle both leads to a sanction of VW which is not effective, proportionate, or dissuasive, and allows a discriminatory application of sanctions by the Member States depending on the nationality of the offenders.

On the protection by a Member State of the interests of its nationals to the detriment of those of other Member States

A consequence of the solution proposed by the AG is that any Member State can protect its nationals from sanctions of other Member States, by imposing national sanctions against them which bear no relation to the actual seriousness of the offence committed.

To start, it must be noted that the fine against VW was imposed by the Brunswick Public Prosecutor's Office and not by a court. Thus, although the Court has already held that this does not preclude the application of the *ne bis in idem* principle (C-187/01 *Gözütok*, para 31), the independence and impartiality of this particular decision can be called into question. Indeed, one can wonder whether the fine was truly a result of the examination of the seriousness of the infringement, as well as its proportionality, and not instead based on the intention of the German authorities to spare VW, a national flagship. Further, the €1-billion fine, as large as it may seem, is in fact much lower than what should have been imposed considering the gravity of the infringement. Although the assessment of the gravity necessarily involves a degree of subjectivity, the following three elements are likely to show that the penalty imposed is insufficient in relation to the gravity of the infringement at hand.

First, a US federal judge imposed a fine of $4.3 billion for 500,000 VW cars impacted in the US, whereas the Brunswick Prosecutor's Office imposed a fine of € 1 billion for 10 million cars impacted in Europe. There is seemingly no justification for the difference in penalties, as the reprehensible practices are identical on both sides of the Atlantic.

Second, despite the fine set by the Public Prosecutor's Office being intrinsically high, it is not dissuasive. As the AG has rightly pointed out, the German fine consists of a punitive part of €5 million and a part intended to confiscate the economic advantage conferred on VW of €995 million (para 99). This means that the actual economic advantage that VW is supposed to have benefitted from is only €100 per car. It seems hardly believable that VW

would have elected to participate in such a large-scale fraud only to pocket an extra €100 on cars which are often sold for more than €20,000.

Even supposing that the €995-million fine eliminates the economic advantage that VW enjoyed, this amount would still not be dissuasive. Indeed, aside from the fact that this fine would likely not exceed the profits made by VW thanks to its reprehensible practices, it does not take into account the risk of not detecting other reprehensible practices (see, by analogy, competition law infringements, Combe and Monnier).

Finally, the German fine is much lower than what VW would face in other Member States. In France, the offence of aggravated deception for which VW is being investigated is punishable by a seven-year prison sentence and a fine proportionate to the seriousness of the offence, which may be as high as 10% of the average annual turnover (Article 454-3 and Article 454-4 of the Consumer Code).[1] Thus, in France, the fine would likely amount to several billions of euros (only for the cars impacted in France). The fine imposed on VW by the Brunswick Public Prosecutor's Office, although intrinsically high, can hardly be deemed sufficient in view of the seriousness of the offence and the deterrent effect of the fine.

It follows from the foregoing considerations that the decision of the Brunswick Public Prosecutor's Office to impose a fine of €1 billion is, in fact, a sanction which is, arguably, neither adopted by an independent and impartial authority, nor "effective, proportionate and dissuasive". As a result, the adoption of a new fine would not be contrary to the objective of justice underlying the *ne bis in idem* principle.

On the encroachment by a Member State on the right of another Member State to punish criminal offences

The solution proposed by the AG allows a Member State to deprive other Member States of their right to impose criminal penalties for an offence committed on its territory and affecting its population.

The fine imposed by the Brunswick Public Prosecutor's Office covers the 10 million cars sold worldwide. It is legitimate for Germany to punish an offence which affects its nationals and residents, and therefore constitutes an infringement of its public order. However, it seems more than questionable that this punishment should take the place of the authorities of other Member States to punish conduct which, in fact, affects, in financial, health and environmental terms, also their nationals and residents, and thus also infringes their public orders. This is all the more questionable, as the Court has already held that, "where a manufacturer in a Member State has unlawfully equipped its vehicles with software that manipulates data relating to exhaust gas emissions before those vehicles are purchased from a third party in another Member State, the place where the damage occurs is in that latter Member State", thus recognizing the jurisdiction of the courts of Member

States other than Germany to rule on damages claims against VW (see C-343/19 *Verein für Konsumenteninformation*).

Whilst VW was found to be at fault in Germany for having designed the vehicles there, the damage itself was suffered everywhere where the cars were sold. Following, the AG's proposed interpretation if the Brunswick Public Prosecutor had imposed a fine only on vehicles designed and used in Germany insofar as this violated the German public order, the other Member States would not be subject to the *ne bis in idem* principle, and thus would not be barred from prosecuting VW for the damage caused on their respective territories.

Despite the damage caused to the nationals of all Member States and the breach of their respective laws, only Germany (and no other Member State) has collected the fine imposed on VW. Germany alone has thus far been able to obtain public funds to repair the damage caused to its population. The application of the *ne bis in idem* principle in this case would therefore have the effect of allowing the German State alone both to punish conduct which affected the German public order as much as that of other Member States, and to collect fines from VW. It would thus be the only Member State allowed to make good the damage caused by VW to the victims located on its territory.

Conclusion

The application of the *ne bis in idem* principle, as proposed by the AG, allows a Member State to protect one of its national flagships from a punishment in other Member States proportionate to the seriousness of its offence. It also incites perpetrators to engage in forum shopping for Member States likely to give them what can only be deemed as a sanction of convenience, with other Member States being powerless to prevent it.

It now falls on the Court to ensure that the application of the *ne bis in idem* principle does not give rise to abuses.