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Provisional text

JUDGMENT OF THE COURT (First Chamber)
14 September 2023 (*)

(Reference for a preliminary ruling – Article 50 of the Charter of Fundamental Rights of the European Union – Principle ne bis in idem – Penalty imposed concerning unfair commercial practices – Criminal nature of the penalty – Criminal penalty imposed in a Member State after the adoption of a penalty concerning unfair commercial practices in another Member State but which became final before the latter penalty – Article 52(1) – Limitations to the principle ne bis in idem – Conditions – Coordination of proceedings and penalties)

In Case C-27/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 7 January 2022, received at the Court on 11 January 2022, in the proceedings

Volkswagen Group Italia SpA,
Volkswagen Aktiengesellschaft

v

Autorità Garante della Concorrenza e del Mercato,

other parties:

Associazione Cittadinanza Attiva Onlus,
Coordinamento delle associazioni per la tutela dell'ambiente e dei diritti degli utenti e consumatori (Codacons),

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, P.G. Xuereb (Rapporteur), T. von Danwitz, A. Kumin and I. Ziemele, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 19 January 2023,

after considering the observations submitted on behalf of:

Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft, by T. Salonico, avvocato, and O.W. Brouwer, advocaat,

the Autorità Garante della Concorrenza e del Mercato, by F. Sclafani, avvocato dello Stato,

the Coordinamento delle associazioni per la tutela dell'ambiente e dei diritti degli utenti e consumatori (Codacons), by G. Giuliano and C. Rienzi, avvocati,

the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,

the Netherlands Government, by M.K. Bulterman, M.A.M. de Ree and J.M. Hoogveld, acting as Agents,

the European Commission, by N. Ruiz García and A. Spina, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 March 2023,

gives the following

Judgment

This request for a preliminary ruling concerns the interpretation of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), of Article 54 of the 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, signed in Schengen on 19 June 1990 and which entered into force on 26 March 1995 (OJ 2000 L 239, p. 19; 'the CISA'), and of Article 3(4) and Article 13(2)(e) of 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 (OJ 2005 L 149, p. 22).

The request has been made in proceedings between Volkswagen Group Italia SpA ('VWGI') and Volkswagen Aktiengesellschaft ('VWAG'), on the one hand, and the Autorità Garante della Concorrenza e del Mercato (Competition and Markets Authority, Italy; 'the AGCM'), on the other, concerning the decision of that authority to impose a fine on those companies for unfair commercial practices.

Legal context

European Union law

The CISA

The CISA was concluded in order to ensure the application of the Agreement 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, signed in Schengen on 14 June 1985 (OJ 2000 L 239, p. 13).

Article 54 of the CISA, which is in Chapter 3, entitled 'Application of the *ne bis in idem* principle', of Title III of that agreement, which is entitled 'Police and security', states:

'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

Directive 2005/29

Recital 10 of Directive 2005/29 states:

'It is necessary to ensure that the relationship between this Directive and existing Community law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. … This Directive accordingly applies only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. It provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products. This is particularly important for complex products with high levels of risk to consumers, such as certain financial services products. This Directive consequently complements the Community *acquis*, which is applicable to commercial practices harming consumers' economic interests.'

Article 1 of that directive provides:

'The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.'

Article 3 of Directive 2005/29, entitled 'Scope', provides, in paragraph 4 of that article:

'In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.'

Article 13 of that directive, entitled 'Penalties', provides:

'Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.'

Directive (EU) 2019/2161

Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ 2019 L 328, p. 7) amended, with effect from 28 May 2022, Article 13 of Directive 2005/29 as follows:

'1. Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

2. Member States shall ensure that the following non-exhaustive and indicative criteria are taken into account for the imposition of penalties, where appropriate:

the nature, gravity, scale and duration of the infringement;

any action taken by the trader to mitigate or remedy the damage suffered by consumers;

any previous infringements by the trader;

the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available;

penalties imposed on the trader for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council [of 12 December 2017 on cooperation between national authorities

responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (OJ 2017 L 345, p. 1)];

any other aggravating or mitigating factors applicable to the circumstances of the case.

3. Member States shall ensure that when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4% of the trader's annual turnover in the Member State or Member States concerned. …

…'

Italian law

Article 20(1) of decreto legislativo n. 206 – Codice del consumo, a norma dell'articolo 7 della legge 29 luglio 2003, n^{o} 229 (Legislative Decree No 206 on the Consumer Code under Article 7 of Law No 229 of 29 July 2003), of 6 September 2005 (Ordinary Supplement to GURI No 235 of 8 October 2005), in the version applicable to the dispute in the main proceedings ('the Consumer Code'), provides that unfair commercial practices are to be prohibited.

Article 20(2) of the Consumer Code provides:

'A commercial practice shall be unfair if it is contrary to professional diligence and distorts or is likely to distort to an appreciable extent the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.'

According to Article 20(4) of that code, unfair commercial practices consist, inter alia, of misleading practices, as referred to in Articles 21 to 23 of the abovementioned code, and aggressive practices, as referred to in Articles 24 to 26 of that code.

Article 21(1) of the Consumer Code provides:

'A commercial practice shall be regarded as misleading if it contains information which does not correspond to reality or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to any or more of the following elements, and in either case causes or is likely to cause him or her to take a transactional decision that he or she would not have taken otherwise:

…

the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;

…'

Article 23(1)(d) of that code is worded as follows:

'The following commercial practices shall in all circumstances be regarded as misleading:

…

(d) claiming, contrary to the facts, that a trader, his or her commercial practices or any of his or her products have been approved, endorsed or authorised by a public or private body or that the terms of the approval, endorsement or authorisation have been complied with'.

Article 27(9) of the Consumer Code provides:

'By the measure prohibiting the unfair commercial practice, the [AGCM] shall also impose an administrative fine of between EUR 5 000 and EUR 5 000 000, according to the gravity and duration of the infringement. In the case of unfair commercial practices within the meaning of Article 21(3) and (4), the penalty may not be lower than EUR 50 000.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

By decision of 4 August 2016 ('the decision at issue'), the AGCM imposed a fine of EUR 5 million on VWGI and VWAG jointly and severally for having implemented unfair commercial practices for the purposes of Article 20(2), Article 21(1)(b) and Article 23(1)(d) of the Consumer Code.

Those unfair commercial practices concerned the marketing in Italy, from 2009, of diesel vehicles in which software had been installed allowing the measurement of emission levels of nitrogen oxides (NOx) from those vehicles to be distorted during pollutant emissions inspection tests in the context of the 'type approval' procedure whereby an approval authority certifies that a type of vehicle satisfies the relevant administrative provisions and technical requirements. In addition, VWGI and VWAG were accused of having disseminated promotional messages which, notwithstanding the installation of the abovementioned software, contained information relating, first, to the attention allegedly paid by those companies to the level of pollutant emissions and, second, to the alleged compliance of the vehicles in question with the statutory provisions on emissions.

VWGI and VWAG brought an action against the decision at issue before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).

While that action was pending before that court, the Public Prosecutor's Office of Braunschweig (Germany) ('the German Public Prosecutor's Office'), by decision of 13 June 2018 ('the German decision'), imposed a fine of EUR 1 billion on VWAG on the basis of proceedings concerning the manipulation of exhaust gas from certain diesel engines of the Volkswagen group, in respect of which investigations had shown that the emissions requirements had been circumvented. That decision stated that part of that amount, corresponding to a sum of EUR 5 million, penalised the conduct referred to in the abovementioned decision and that the remainder of that amount was intended to deprive VWAG of the economic advantage which it had derived from the installation of the software referred to in paragraph 17 above.

The German decision was based on the finding that VWAG had infringed the provisions of the Ordnungswidrigkeitengesetz (Law on administrative offences) which penalise negligent breach of the duty of supervision in the activities of undertakings, as regards the development of the software referred to in paragraph 17 above and the installation of that software in 10.7 million vehicles sold worldwide, including approximately 700 000 vehicles in Italy, and that that software must be regarded as constituting a defeat device prohibited by Article 5(2) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1).

It is apparent from that decision that the German Public Prosecutor's Office also found that the lack of supervision of the development and installation of the abovementioned software was one of the causes which contributed to other infringements committed at global level by VWAG between 2007 and 2015, as regards the application for type approval, the promotion of the vehicles and their retail sale, on account, inter alia, of the fact that those vehicles, notwithstanding the presence of that prohibited software within them, had been presented to the public as vehicles equipped with environmentally friendly diesel technology, that is to say, as vehicles with particularly low emissions.

The German decision became final on 13 June 2018, since VWAG paid the fine prescribed therein and formally waived its right to bring an action against that decision.

In the proceedings pending before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio), VWGI and VWAG alleged, inter alia, that the decision at issue had subsequently become unlawful on the ground of infringement of the principle *ne bis in idem* referred to in Article 50 of the Charter and in Article 54 of the CISA.

By judgment of 3 April 2019, that court dismissed the action brought by VWGI and VWAG on the ground, inter alia, that the principle *ne bis in idem* does not preclude the fine prescribed by the decision at issue from being maintained.

VWGI and VWAG brought an appeal against that judgment before the Consiglio di Stato (Council of State, Italy), the referring court.

The referring court considers that the question whether the principle *ne bis in idem* applies in the present case must be resolved at the outset.

In that regard, it notes that it is apparent from the case-law of the Court, in particular from its judgment of 20 March 2018, *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193, paragraph 63), that Article 50 of the Charter must be interpreted as precluding national legislation which permits the possibility of bringing proceedings for an administrative fine of a criminal nature against a person in respect of unlawful conduct consisting in market manipulation for which the same person has already received a final criminal conviction, in so far as that conviction is, given the harm caused to society by the offence committed, such as to punish that offence in an effective, proportionate and dissuasive manner.

Regarding, in the first place, the penalty imposed by the decision at issue, the referring court is unsure as to its classification. It considers that that penalty can be classified as a financial administrative penalty of a criminal nature. In its view, it is apparent from the case-law of the Court that an administrative penalty is of such a nature where, as is the case in this instance, it not only is intended to repair the harm caused by the offence but also has a punitive purpose.

In the second place, having noted the Court's case-law relating to the principle *ne bis in idem*, the referring court states that that principle aims to prevent an undertaking from again being found liable or having proceedings being brought against it, which presupposes that that undertaking was found liable or declared not liable by a prior decision that can no longer be challenged. In that respect, as regards the question whether the decision at issue and the German decision concern the same facts, the referring court refers to the 'similarity, if not identity', and the 'homogeneity', of the conduct to which those two decisions relate.

The referring court also points out that account must be taken of the fact that, although the penalty prescribed by

the decision at issue was imposed before the penalty prescribed by the German decision, the latter became final before the former.

In the third and last place, the referring court notes that it is apparent from the case-law of the Court that a limitation of the application of the principle *ne bis in idem* guaranteed by Article 50 of the Charter may be justified on the basis of Article 52(1) thereof. It therefore considers that the question also arises as to whether the provisions of the Consumer Code applied in the decision at issue, which transpose Directive 2005/29 and are aimed at protecting the consumer, may be relevant in the light of Article 52 of the Charter.

The referring court notes in that regard that, according to that case-law, any limitations of Article 50 of the Charter are permitted only where they satisfy a certain number of conditions. In particular, it states that such limitations must be based on an objective of general interest which would justify the duplication of penalties, be laid down by clear and precise rules, ensure coordination of proceedings and comply with the principle of proportionality of the penalty. However, in the referring court's view, it appears, in the present case, that there is no clear and precise rule which would enable the duplication of penalties to be predicted, that no coordination has been provided for in respect of the sets of proceedings at issue, and that the maximum penalty was imposed in the context of those sets of proceedings.

In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

Must Article 50 of the [Charter] be interpreted as precluding a national provision that makes it possible to uphold in court proceedings and make final a criminal [financial] 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 [decision in the judicial proceedings brought against] the former criminal [financial] administrative penalty became *res judicata*?

Can the provisions laid down in Directive 2005/29, with particular reference to [Article] 3(4) and [Article] 13(2)(e) [of that directive], justify a derogation from the principle … *ne bis in idem* established by Article 50 of the [Charter] and by Article 54 of the [CISA]?'

The jurisdiction of the Court and the admissibility of the questions referred for a preliminary ruling

The AGCM contends that the questions referred should be dismissed as inadmissible since they are not relevant for the purposes of resolving the dispute in the main proceedings. First, it argues that Article 50 of the Charter and Article 54 of the CISA are not applicable in the present case since the German legislation relating to liability of legal persons, on the basis of which the German decision was adopted, does not arise from EU law. Second, it contends that, whereas the principle *ne bis in idem* prohibits the duplication of proceedings and penalties in respect of the same facts, there is no identity of the facts in the present case, given that the decision at issue and the German decision relate to different persons and conduct. According to the AGCM, Article 3(4) of Directive 2005/29 in any event precludes such identity.

As regards the first of those arguments, which, in actual fact, relates to the jurisdiction of the Court to rule on the request for a preliminary ruling, it should be noted that it is clear from Article 19(3)(b) TEU and the first paragraph of Article 267 TFEU that the Court has jurisdiction to give preliminary rulings on the interpretation of EU law or the validity of acts of the EU institutions (judgment of 10 March 2021, *Konsul Rzeczypospolitej Polskiej w N.*, C-949/19, EU:C:2021:186, paragraph 23).

As regards, first, the interpretation of Article 50 of the Charter, it should be noted that the scope of that charter, in so far as the action of the Member States is concerned, is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing EU law. That provision confirms the Court's settled case-law, which states that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations (judgment of 23 March 2023, *Dual Prod*, C-412/21, EU:C:2023:234, paragraph 22 and the case-law cited). Where, on the other hand, a legal situation does not come within the scope of EU law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 22).

In the present case, it is apparent from the explanations provided by the referring court that the decision at issue was adopted on the basis of Italian legislation transposing Directive 2005/29 and therefore constitutes an implementation of EU law for the purposes of Article 51(1) of the Charter. It follows that the Charter is applicable to the dispute in the main proceedings.

Second, as regards the interpretation of Article 54 of the CISA, it should be borne in mind that the CISA forms an integral part of EU law by virtue of the Protocol (No 19) on the Schengen *acquis* integrated into the framework of

the European Union, annexed to the Treaty of Lisbon (OJ 2010 C 83, p. 290) (judgment of 10 March 2021, *Konsul Rzeczypospolitej Polskiej w N.*, C-949/19, EU:C:2021:186, paragraph 24).

In those circumstances, the Court has jurisdiction to rule on the request for a preliminary ruling.

As regards the second of the arguments referred to in paragraph 34 above, it should be borne in mind that it is settled case-law that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 6 October 2022, *Contship Italia*, C-433/21 and C-434/21, EU:C:2022:760, paragraph 24 and the case-law cited).

In the present case, the AGCM has not demonstrated that the interpretation of EU law that is sought by the referring court, in the context of the questions referred by it for a preliminary ruling, bears no relation to the actual facts of the main action or its purpose, or that it concerns a problem which is hypothetical. It is true that it is for that court to determine whether the decision at issue and the German decision concern the same facts and the same persons. That being so, as is apparent from paragraph 29 above, the referring court considers that there is 'similarity, if not identity' in the conduct to which the decision at issue and the German decision relate. In addition, that court, by its second question, refers to a situation in which a legal person is the subject of penalties of a criminal nature in respect of the same facts in the context of two distinct sets of proceedings. Thus, it appears that the referring court takes the view that, in the present case, that person is being tried and punished for the same offence.

In those circumstances, the questions referred must be held to be admissible.

Consideration of the questions referred

The first question

By its first question, the referring court asks, in essence, whether Article 50 of the Charter is to be interpreted as meaning that an administrative fine provided for under national legislation, which is imposed on a company by the competent national consumer protection authority for unfair commercial practices, although classified as an administrative penalty under that legislation, constitutes a criminal penalty for the purposes of that provision.

Article 50 of the Charter provides that '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'. Therefore, the principle *ne bis in idem* prohibits a duplication both of proceedings and of penalties of a criminal nature, for the purposes of that article, for the same acts and against the same person (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 24 and the case-law cited).

As regards the assessment as to whether the proceedings and penalties at issue in the main proceedings are criminal in nature, it is apparent from the case-law that three criteria are relevant in the context of that assessment. The first is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty which the person concerned is liable to incur (judgment of 4 May 2023, *MV – 98*, C-97/21, EU:C:2023:371, paragraph 38 and the case-law cited).

Although it is for the referring court to assess, in the light of those criteria, whether the criminal and administrative proceedings and penalties at issue in the main proceedings are criminal in nature for the purposes of Article 50 of the Charter, the Court, when giving a preliminary ruling, may nevertheless provide clarification designed to give the national court guidance in its assessment (judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraph 29 and the case-law cited).

In the present case, as regards the first criterion, it is apparent from the order for reference that, by virtue of Article 27(9) of the Consumer Code, the penalty and the proceedings leading to the imposition of such a penalty are classified as administrative.

Nevertheless, the application of Article 50 of the Charter is not limited to proceedings and penalties which are classified as 'criminal' by national law, but extends, irrespective of such a classification under domestic law, to proceedings and penalties which must be considered to have a criminal nature on the basis of the two other criteria referred to in paragraph 45 above (judgment of 4 May 2023, *MV – 98*, C-97/21, EU:C:2023:371, paragraph 41 and the case-law cited).

As regards the second criterion, relating to the intrinsic nature of the offence, it must be ascertained whether the penalty at issue has, inter alia, a punitive purpose, without regard to the fact that it also pursues a deterrent purpose. It is of the very nature of criminal penalties that they seek both to punish and to deter unlawful conduct. By contrast, a measure which merely repairs the damage caused by the offence at issue is not criminal in nature (judgment of 4 May 2023, *MV – 98*, C-97/21, EU:C:2023:371, paragraph 42).

In the present case, it appears from the wording of Article 27(9) of the Consumer Code that the penalty provided

for under that provision is a mandatory penalty that is additional to other measures which the AGCM may take in respect of unfair commercial practices and which include, inter alia, as the Italian Government submitted in its written observations, a prohibition on continuing or repeating the practices in question.

Although, in its written observations, that government contends that the punishment of unfair commercial practices is ensured by that prohibition, and that, as a result, the penalty provided for in Article 27(9) of the Consumer Code is intended not to punish unlawful conduct but to deprive the relevant undertaking of the unfair competitive advantage which it acquired due to its wrongful conduct vis-à-vis consumers, it should be noted that the provision in question contains no reference whatsoever to that potential objective.

Furthermore, if the objective of that provision was to deprive the relevant undertaking of the unfair competitive advantage, the fact remains that the fine varies according to the gravity and duration of the infringement in question, which demonstrates a certain gradation and progressiveness in the determination of the penalties which may be imposed. In addition, if that was the objective of that provision, the fact that it appears to provide that the fine may reach a maximum amount of EUR 5 million would be likely to result in that objective not being achieved where the unfair competitive advantage exceeds that amount. Conversely, the fact that it appears that, according to the second sentence of Article 27(9) of the Consumer Code, the amount of the fine may not be lower than EUR 50 000 with regard to certain unfair commercial practices, would mean that the fine is, in respect of those practices, capable of exceeding the amount of the unfair competitive advantage.

As regards the third criterion, namely the degree of severity of the measures at issue in the main proceedings, it should be borne in mind that the degree of severity is determined by reference to the maximum potential penalty for which the relevant provisions provide (judgment of 4 May 2023, *MV – 98*, C-97/21, EU:C:2023:371, paragraph 46).

In that regard, it suffices to note that a financial administrative penalty capable of reaching an amount of EUR 5 million has a high degree of severity, which is liable to support the view that that penalty is criminal in nature for the purposes of Article 50 of the Charter.

In the light of the foregoing considerations, the answer to the first question is that Article 50 of the Charter must be interpreted as meaning that an administrative fine provided for under national legislation, which is imposed on a company by the competent national consumer protection authority for unfair commercial practices, although classified as an administrative penalty under national legislation, constitutes a criminal penalty, for the purposes of that provision, where it has a punitive purpose and has a high degree of severity.

The second question

By its second question, the referring court asks, in essence, whether the principle *ne bis in idem* enshrined in Article 50 of the Charter is to be interpreted as precluding national legislation which allows a fine of a criminal nature imposed on a legal person for unfair commercial practices to be maintained where that person has been the subject of a criminal conviction in respect of the same facts in another Member State, even if that conviction is subsequent to the date of the decision imposing that fine but became final before the judgment in the judicial proceedings brought against that decision acquired the force of *res judicata*.

It is apparent from the case-law that the application of the principle *ne bis in idem* is subject to a twofold condition, namely, first, that there must be a prior final decision (the 'bis' condition) and, second, that the prior decision and the subsequent proceedings or decisions must concern the same facts (the 'idem' condition) (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 28).

The 'bis' condition

As regards the 'bis' condition, 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 (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 29).

While it is true that the application of the principle *ne bis in idem* presupposes the existence of a prior final decision, it does not necessarily follow that the subsequent decisions precluded by that principle can only be those which were adopted after that prior final decision. Where a final decision exists, that principle precludes criminal proceedings in respect of the same facts from being initiated or maintained.

In this instance, it is apparent from the information provided by the referring court that the German decision became final on 13 June 2018, that is to say, after the decision at issue. Although the German decision could not be relied upon in order to preclude, in the light of the principle *ne bis in idem*, the proceedings conducted by the AGCM and the decision at issue for as long as it had not become final, that was not the case once the German decision became final at a time when the decision at issue was not yet final.

Contrary to what the AGCM contends in its written observations, the fact that the German decision became final after VWAG paid the fine prescribed by that decision and waived its right to challenge it cannot call that finding into question. The principle *ne bis in idem* enshrined in Article 50 of the Charter applies once a decision of a criminal

nature has become final, irrespective of the manner in which that decision has become final.

Moreover, it appears, subject to determination by the referring court, that the German decision was taken after a determination had been made as to the merits of the case.

In those circumstances and subject to determination by the referring court, it thus appears that the proceedings which led to the adoption of the German decision were disposed of by a final decision, for the purposes of the case-law referred to in paragraph 58 above.

The 'idem' condition

As regards the 'idem' condition, it follows from the very wording of Article 50 of the Charter that that provision prohibits the same person from being tried or punished in criminal proceedings more than once for the same offence (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 31).

As the referring court states in its request for a preliminary ruling, both the decision at issue and the German decision are directed against the same legal person, namely VWAG. The fact that the decision at issue also concerns VWGI cannot call that finding into question.

According to settled case-law, the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned. Therefore, Article 50 of the Charter prohibits the imposition, with respect to identical facts, of several criminal penalties as a result of different proceedings brought for those purposes (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 33 and the case-law cited).

Moreover, it is apparent from the case-law of the Court that the legal classification under national law of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 34 and the case-law cited).

In the present case, and as has already been noted in paragraph 41 above, the referring court, by its second question, refers to a situation in which a legal person is the subject of penalties of a criminal nature in respect of the same facts in the context of two distinct sets of proceedings. Accordingly, that court appears to take the view that, as regards the dispute in the main proceedings, the 'idem' condition is satisfied.

However, as is apparent from the order for reference, and as has been noted in paragraph 29 above, the referring court also refers to the 'similarity' and 'homogeneity' of the facts in question.

In that regard, it should be noted, as is apparent from paragraph 66 above, that the principle *ne bis in idem* referred to in Article 50 of the Charter may apply only where the facts to which the two sets of proceedings or the two penalties at issue relate are identical. It is therefore not sufficient that the facts be merely similar (see, to that effect, judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 36).

Although it is for the referring court to assess, in the light of paragraph 66 above, whether the proceedings conducted by the German Public Prosecutor's Office and by the AGCM as well as the penalties imposed on VWAG in the German decision and in the decision at issue concern the same facts and, accordingly, the same offence, the Court, when giving a preliminary ruling, may nevertheless provide clarification designed to give the national court guidance in its assessment.

In that respect, it should be borne in mind, first, as the Netherlands Government stated in its written observations, that the relaxation of supervision of the activities of an organisation established in Germany, to which the German decision relates, is conduct that is distinct from the marketing in Italy of vehicles fitted with an illegal defeat device for the purposes of Regulation No 715/2007 and from the dissemination of misleading advertising in that Member State, to which the decision at issue relates.

Second, in so far as the German decision refers to the marketing of vehicles fitted with such an illegal defeat device, including in Italy, and to the dissemination of incorrect promotional messages concerning the sales of those vehicles, it should be noted that the mere fact that an authority of a Member State refers – in a decision finding an infringement of EU law and of the corresponding provisions of the law of that Member State – to a factual element relating to the territory of another Member State is insufficient to support the inference that that factual element gave rise to the proceedings or was found by that authority to be one of the constituent elements of that infringement. It must also be ascertained whether that authority has actually ruled on that factual element in order to make out the infringement, to establish the liability for that infringement of the person against whom proceedings were brought and, as the case may be, to impose a penalty on that person, such that the infringement is to be regarded as encompassing the territory of that other Member State (see, to that effect, judgment of 22 March 2022, *Nordzucker and Others*, C-151/20, EU:C:2022:203, paragraph 44).

Third, it is nonetheless apparent from the German decision that the sales of such vehicles in other Member States, including the Italian Republic, were taken into account by the German Public Prosecutor's Office when calculating the sum of EUR 995 million, imposed on VWAG as a levy on the economic advantage derived from its unlawful

conduct.

Fourth, the German Public Prosecutor's Office expressly stated, in the German decision, that the principle *ne bis in idem*, as enshrined in the German Constitution, precludes the imposition of subsequent criminal penalties on the Volkswagen group in Germany with regard to the defeat device in question and its use. Indeed, according to that public prosecutor's office, the facts to which that decision relates are the same facts as those concerned by the decision at issue, for the purposes of the case-law of the Court, since the installation of the abovementioned device, the obtaining of type approval and the promotion and sale of the relevant vehicles constitute a set of concrete circumstances which are inextricably linked together.

Should the referring court find that the facts which are the subject of the two sets of proceedings at issue in the main action are identical, the duplication of penalties imposed on VWAG would constitute a limitation of the application of the principle *ne bis in idem* enshrined in Article 50 of the Charter.

In the light of the foregoing considerations, the answer to the second question is that the principle *ne bis in idem* enshrined in Article 50 of the Charter must be interpreted as precluding national legislation which allows a fine of a criminal nature imposed on a legal person for unfair commercial practices to be maintained where that person has been the subject of a criminal conviction in respect of the same facts in another Member State, even if that conviction is subsequent to the date of the decision imposing that fine but became final before the judgment in the judicial proceedings brought against that decision acquired the force of *res judicata*.

The third question

By its third question, the referring court asks the Court to interpret Article 3(4) and Article 13(2)(e) of Directive 2005/29 as well as Article 50 of the Charter and Article 54 of the CISA in order to clarify the conditions under which limitations of the application of the principle *ne bis in idem* may be justified.

In that regard, it should be borne in mind that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court, it is for the latter to provide the national court with an answer which will be of use to it and will enable the national court to determine the case before it. To that end, the Court may have to reformulate the questions referred to it (judgment of 21 December 2021, *Randstad Italia*, C-497/20, EU:C:2021:1037, paragraph 42 and the case-law cited).

In the present case, it must be stated that Article 54 of the CISA and Article 3(4) and Article 13(2)(e) of Directive 2005/29, which are expressly referred to in the third question, are irrelevant for the purposes of resolving the dispute in the main proceedings.

In the first place, it is apparent from the case-law that Article 54 of the CISA aims to ensure that a person, once he or she has been found guilty and served his or her sentence, or, as the case may be, been acquitted by a final judgment in a Member State, may travel within the Schengen area without fear of being prosecuted in another Member State for the same acts (see, to that effect, judgments of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraph 45, and of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem*)*, C-435/22 PPU, EU:C:2022:852, paragraph 78).

However, since that possibility of travelling freely is not at issue in the case in the main proceedings, given that it concerns two undertakings established in Germany and in Italy respectively, an interpretation of Article 54 of the CISA is not necessary for the purposes of resolving the dispute in the main proceedings.

In the second place, Article 3(4) of Directive 2005/29 provides that, in the case of conflict between the provisions of that directive and other EU rules regulating specific aspects of unfair commercial practices, the latter are to prevail and apply to those specific aspects. It follows from the very wording of that provision, as well as from recital 10 of Directive 2005/29, that that directive applies only when there are no specific EU provisions regulating specific aspects of unfair commercial practices and, moreover, that that provision expressly refers to conflicts between EU rules and not between national rules (see, to that effect, judgment of 13 September 2018, *Wind Tre and Vodafone Italia*, C-54/17 and C-55/17, EU:C:2018:710, paragraphs 58 and 59 and the case-law cited).

However, it is not apparent from the order for reference that there is, in the present case, a conflict between EU rules. In any event, since Article 3(4) of Directive 2005/29 is specifically intended to avoid a duplication of proceedings and penalties, that provision is irrelevant for the purposes of answering the question concerning the circumstances in which derogations from the principle *ne bis in idem* are possible.

In the third place, Article 13(2)(e) of that directive is not applicable *ratione temporis* to the dispute in the main proceedings, since that provision was inserted into Directive 2005/29 by Directive 2019/2161 and is applicable only from 28 May 2022.

Accordingly, it must be held that, by its third question, the referring court asks, in essence, under which conditions limitations of the application of the principle *ne bis in idem*, enshrined in Article 50 of the Charter, may be justified.

A limitation of the application of that principle may be justified on the basis of Article 52(1) of the Charter (see, to that effect, judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 40 and the case-law cited).

In accordance with the first sentence of Article 52(1) of the Charter, any limitation on the exercise of the rights and

freedoms recognised by that charter must be provided for by law and respect the essence of those rights and freedoms. According to the second sentence of Article 52(1) of the Charter, subject to the principle of proportionality, limitations of those rights and freedoms may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

In the present case, it is for the referring court to verify whether, as it appears from the information in the file available to the Court, the involvement of each of the national authorities concerned, which, it is claimed, gave rise to a duplication of proceedings and penalties, was provided for by law.

Such a possibility of a duplication of proceedings and penalties respects the essence of Article 50 of the Charter, provided that the pieces of national legislation concerned do not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provide only for the possibility of a duplication of proceedings and penalties under different legislation (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 43).

As regards the question whether the limitation of the application of the principle *ne bis in idem* meets an objective of general interest, it should be noted that the two pieces of national legislation at issue in the main proceedings pursue distinct legitimate objectives.

As noted by the Advocate General in point 88 of his Opinion, the national provision on the basis of which the German decision was adopted seeks to ensure that undertakings and their employees act in accordance with the law and, accordingly, penalises negligent breach of the duty of supervision in the course of business, whereas the provisions of the Consumer Code applied by the AGCM transpose Directive 2005/29, their aim being to ensure a high level of consumer protection, in accordance with Article 1 of that directive, while contributing to the proper functioning of the internal market.

As regards compliance with the principle of proportionality, it requires that the duplication of proceedings and penalties provided for by the national legislation does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, it being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 48 and the case-law cited).

In that regard, it must be stated that public authorities can legitimately choose complementary legal responses to certain conduct that is harmful to society through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the person concerned. Consequently, the fact that two sets of proceedings are pursuing distinct objectives of general interest which it is legitimate to protect cumulatively can be taken into account, in an analysis of the proportionality of the duplication of proceedings and penalties, as a factor that would justify that duplication, provided that those proceedings are complementary and that the additional burden which that duplication represents can accordingly be justified by the two objectives pursued (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 49).

With regard to the strict necessity of such duplication of proceedings and penalties, it is necessary to assess whether there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the different authorities, whether the two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe and whether any penalty that may have been imposed in the proceedings that were first in time was taken into account in the assessment of the second penalty, meaning that the resulting burden, for the persons concerned, of such duplication is limited to what is strictly necessary and the overall penalties imposed correspond to the seriousness of the offences committed (judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 51 and the case-law cited).

It follows that a duplication of proceedings and penalties in respect of the same facts must, in order to be regarded as justified, inter alia, satisfy three conditions, namely (i) that such duplication does not represent an excessive burden for the person concerned, (ii) that there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication, and (iii) that the sets of proceedings in question have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe.

First, as regards the first of those conditions, it should be noted that the decision at issue prescribes a fine of EUR 5 million which is in addition to the fine of EUR 1 billion imposed on VWAG by the German decision. Having regard to the fact that VWAG accepted the latter fine, it does not appear that the fine imposed by the decision at issue, the amount of which corresponds to only 0.5% of the fine prescribed by the German decision, had the consequence that the duplication of those penalties represents an excessive burden for that company. Accordingly, the fact that, according to the referring court, the maximum penalty provided for by the relevant legislation was

imposed is irrelevant.

Second, as regards the second condition, although the referring court has not indicated any German or Italian provisions which provide specifically for the possibility that conduct such as that referred to in the decision at issue and the German decision, assuming that it relates to the same conduct, may be subject to a duplication of proceedings and penalties in different Member States, there is nothing to support a finding that VWAG could not have predicted that that conduct was liable to give rise to proceedings and penalties in at least two Member States, which would be based either on the rules applicable to unfair commercial practices or on other rules, such as those laid down by the Law on administrative offences; the respective clarity and precision of those rules, moreover, do not appear to have been called into question.

As regards, third, the condition relating to the coordination of proceedings, referred to in paragraph 96 above, it appears, having regard also to the information which was provided by VWAG at the hearing before the Court, that no coordination took place between the German Public Prosecutor's Office and the AGCM, even though the sets of proceedings in question appear to have been conducted in parallel for some months and that, according to that information, the German Public Prosecutor's Office had knowledge of the decision at issue at the time when it adopted its own decision.

In that regard, it should be borne in mind, as was noted by the Advocate General in point 107 of his Opinion, that, although Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) (OJ 2004 L 364, p. 1), which was replaced by Regulation 2017/2394, established a channel for cooperation and coordination between national authorities responsible for the enforcement of consumer protection laws, the German Public Prosecutor's Office, unlike the AGCM, was not one of those authorities.

Moreover, although, as is apparent from the information which was provided by VWAG at the hearing before the Court, the German Public Prosecutor's Office appears to have approached the European Union Agency for Criminal Justice Cooperation (Eurojust), for the purposes of avoiding a duplication of criminal proceedings against VWAG in several Member States as regards the facts to which the German decision relates, it follows from that information that the Italian authorities did not waive criminal proceedings against that company and that the AGCM did not participate in that attempt at coordination within the Eurojust framework.

Since the Italian Government states, in essence, that, in a situation such as that at issue in the main proceedings, it is necessary, in order to regard a duplication of proceedings and penalties in respect of the same facts as justified, only to verify that the principle *ne bis in idem* has been observed in its 'substantive dimension', in the words used by that government, namely to verify that the overall penalty resulting from the two sets of proceedings at issue is not manifestly disproportionate, without coordination of those sets of proceedings being necessary, it should be noted that the conditions, as laid down by the case-law referred to in paragraph 95 above, under which such a duplication may be regarded as justified, govern the possibility of limiting the application of the abovementioned principle. Consequently, those conditions may not vary from case to case.

It is true that the coordination of proceedings or penalties concerning the same facts may prove more difficult where the authorities in question are those of different Member States, as is the case in this instance. While it is necessary to take into account the practical constraints inherent in such a cross-border context, those constraints cannot provide justification for qualifying or disregarding the abovementioned requirement, as was noted by the Advocate General in points 114 and 115 of his Opinion.

Such coordination of proceedings or penalties may be expressly provided for under EU law, as demonstrated by the coordination systems which were laid down by Regulation No 2006/2004 and which are now laid down by Regulation 2017/2394, even though they are limited to proceedings relating to unfair commercial practices.

With regard to the risk, referred to by the European Commission in its written observations and at the hearing, that a person might seek to obtain a criminal conviction in one Member State for the sole purpose of securing protection against proceedings and penalties relating to the same facts in another Member State, nothing in the file before the Court suggests that such a risk could materialise in the context of the dispute in the main proceedings. In particular, the circumstances referred to in paragraph 97 above do not support such a contention.

In the light of the foregoing considerations, the answer to the third question is that Article 52(1) of the Charter must be interpreted as authorising the limitation of the application of the principle *ne bis in idem*, enshrined in Article 50 of the Charter, so as to permit a duplication of proceedings or penalties in respect of the same facts, provided that the conditions laid down in Article 52(1) of the Charter, as defined by the case-law, are satisfied, namely (i) that such duplication does not represent an excessive burden for the person concerned, (ii) that there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication, and (iii) that the sets of proceedings in question have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe.

Costs

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that an administrative fine provided for under national legislation, which is imposed on a company by the competent national consumer protection authority for unfair commercial practices, although classified as an administrative penalty under national legislation, constitutes a criminal penalty, for the purposes of that provision, where it has a punitive purpose and has a high degree of severity.

The principle *ne bis in idem* enshrined in Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation which allows a fine of a criminal nature imposed on a legal person for unfair commercial practices to be maintained where that person has been the subject of a criminal conviction in respect of the same facts in another Member State, even if that conviction is subsequent to the date of the decision imposing that fine but became final before the judgment in the judicial proceedings brought against that decision acquired the force of *res judicata*.

Article 52(1) of the Charter of Fundamental Rights of the European Union must be interpreted as authorising the limitation of the application of the principle *ne bis in idem*, enshrined in Article 50 of that charter, so as to permit a duplication of proceedings or penalties in respect of the same facts, provided that the conditions laid down in Article 52(1) of the abovementioned charter, as defined by the case-law, are satisfied, namely (i) that such duplication does not represent an excessive burden for the person concerned, (ii) that there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication, and (iii) that the sets of proceedings in question have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe.

[Signatures]

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* Language of the case: Italian.