Limitations of the Transnational ne bis in idem Principle in EU Law

Remarks on the ECJ's Diesel Scandal Volkswagen Case

Laura Neumann

27.03.2023 doi: 10.17176/20230327-195215-0

No-one shall be tried or punished twice for the same offence. This principle, *ne bis in idem* in Latin, is part of the fundamental law protection in the EU (Art. 50 CFR, Art. 54 CISA), but can be limited under certain conditions (see Art. 52 para. 1 CFR). In Case C-365/21, decided on 23 March 2023, the ECJ has confirmed the validity of Art. 55 para. 1 lit. b) CISA which constitutes an important limitation of the transnational *ne bis in idem* guarantee. Another case which arose in the context of the Diesel scandal involving German automobile producer Volkswagen and is still pending before the European Court of Justice gives the Court a new opportunity to set new standards regarding limitations of the *ne bis in idem* principle in cases involving different Member States and to strengthen this principle which is of great importance for the completion of a genuine area of freedom, security and justice. In particular, the Volkswagen case offers the ECJ a chance to provide guidance on the question under which conditions a limitation of the *ne bis in idem* principle can be regarded to be "provided for by law". Furthermore, it gives the Court the opportunity to clarify whether all of the specifications of the criteria for limitations of the *ne bis in idem* guarantee that have been developed by the ECJ with regard to cases involving only one Member State do also apply when different Member States want to prosecute and punish a person for the same offence.

In short, the Volkswagen case is based on the following facts: The Italian Antitrust Authority had imposed a fine on Volkswagen AG and Volkswagen Group Italy for an infringement of the Italian Consumer Code. Another administrative fine was imposed after on Volkswagen AG on the basis of the German Act on Regulatory Offenses (*Ordnungswidrigkeitengesetz*) for basically the same facts as the Italian fine. After the German fine had become final, the Italian Consiglio di Stato referred to the ECJ for a preliminary ruling (Case C-27/22), asking, inter alia, about possible limitations of the transnational double jeopardy prohibition: Can the provisions laid down in Art. 3 para. 4 and Art. 13 para. 2 lit. e) of Directive 2005/29/EC justify a derogation from the *ne bis in idem* principle established by Art. 50 CFR and Art. 54 CISA?

Requirements for Limitations of the ne bis in idem Principle and Specifications in Intra-State Cases

Any limitation of the *ne bis in idem* guarantee established by Art. 50 CFR and Art. 54 CISA has to comply with Art. 52 para. 1 CFR. That provision may be broken down into five criteria. In the relevant ECJ case law regarding a duplication of proceedings and penalties within one and the same Member State (*Menci* and *Garlsson Real Estate*, refinements in *BV* and *bpost*), these criteria have been specified by the ECJ as follows:

(1) A limitation must be provided for by law. This requires rules that are sufficiently clear and precise to allow individuals to predict which acts or omissions could give rise to a duplication of proceedings and penalties.

(2) The respective legislation must respect the essence of the rights and freedoms it limits. To ensure such respect, it must exhaustively define the conditions for a duplication of proceedings and penalties.

(3) The limitation has to meet an objective of general interest. In this regard, the Court specified in

Menci and *Garlsson Real Estate*that, in order to justify the doubled burden for the person concerned, the different proceedings and penalties must pursue complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue.

(4) Further, the limitation must comply with the principle of proportionality.

(5) Finally, any limitation has to be strictly necessary in order to achieve the objective of general interest it serves. According to *Menci* and *Garlsson Real Estate*and the subsequent ECJ case law (see for instance *BV* and *bpost*), this presupposes the effective application of rules which are clear and precise, ensure coordination between the different authorities, and oblige these authorities to take into account, in the assessment of the second penalty, the first penalty already imposed.

Application of the Criteria at Inter-State Level: The Volkswagen Case

Does the Volkswagen Case meet these five criteria? And, with a view to the fact that this case concerns a duplication of proceedings and penalties in different Member States (Italy and Germany), to which extent is it suitable to apply to this case the specifications that have been developed by the ECJ with regard to situations involving only one Member State? These questions will have to be analysed now by the ECJ.

Notably, the respective discussion might be cut short. In fact, it seems doubtful whether the very first criterion, stipulating that the limitation of the *ne bis in idem* guarantee must be provided for by law, is met in the present case. Indeed, the referring court identifies Art. 3 para. 4 and Art. 13 para. 2 lit. e) of Directive 2005/29/EC on unfair commercial practices as possible legal bases for such limitations. Art. 3 para. 4 Directive 2005/29/EC does, however, not even make any reference to *ne bis in idem* constellations. Art. 13 para. 2 lit. e) Directive 2005/29/EC at least establishes that Member States, when imposing penalties for infringements of national provisions adopted in application of the directive, shall take into account inter alia whether penalties have been imposed on the trader for the same infringement in other Member States where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394. In view of this wording, it seems, at first sight, plausible to assume that Art. 13 para. 2 lit. e) Directive 2005/29/EC envisages situations principally incompatible with the *ne bis in idem* principle and, therewith, implicitly establishes an exception to it. However, this is not supported by the recitals of Regulation (EU) 2017/2394 and of Directive (EU) 2019/2161, introducing Art. 13 para. 2 lit. e) into Directive 2005/29/EC. Those recitals make the application of the sentencing criteria set out by Art. 13 para. 2 Directive 2005/29/EC dependent on due respect of the *ne bis in idem* principle (see Recital 29 Regulation (EU) 2017/2394 and Recital 8 Directive (EU) 2019/2161). In light of this, Art. 13 para. 2 lit. e) Directive 2005/29/EC should be understood as only allowing for a duplication of penalties falling outside the scope of application of the *ne bis in idem* guarantee.

Notwithstanding the above, Art. 13 para. 2 lit. e) Directive 2005/29/EC should at least not be taken as a guarantor for the essence of Art. 50 CFR being duly respected (criterion 2). At the very minimum, it does not clearly and exhaustively define the conditions for a limitation of the *ne bis in idem* principle. To the contrary, it forms part of a list of “non-exhaustive” and only “indicative” criteria that shall be taken into account in the imposition of penalties only “where appropriate”.

As even the first and most basic criteria for limitations of the *ne bis in idem* guarantee do not seem to be met in the Volkswagen case, this case does not directly call for an analysis of the remaining criteria. Nonetheless, given the utmost importance of the question of justifiability of limitations to the transnational *ne bis in idem* principle as an enabler of a single area of freedom, security, and justice, the chance should be taken to at least briefly comment on the question of whether the specifications relevant to these remaining criteria developed by the ECJ for cases involving only one Member State should likewise be applied when a duplication of proceedings and penalties in different Member States is at issue.

This question should be denied with regard to the "complementary aims" criterion that legitimately specifies, at intra-state level, the third criterion calling for an objective of general interest to be pursued by the limitation at issue. Indeed, what aim is pursued by a proceeding or a penalty in relation to a specific conduct depends on the legal classification of that conduct by the respective Member State. Given the still rather rudimentary degree of harmonisation of Member States' criminal laws, one and the same conduct will frequently be subsumed under differing provisions in different states, making it usually more than easy to argue that "complementary aims" are pursued by the respective proceedings and penalties. Thus, at inter-state level, the "complementary aims" criterion loses its limiting potential. Furthermore, it would even run counter the purely factual – instead of legal – conception of the notion of the same offence in the sense of Art. 50 CFR and Art. 54 CISA (see the standing case law of the ECJ since *Van Esbroek*).

To the contrary, the specifications developed by the Court regarding the fifth criterion of strict necessity seem suitable in a transnational setting as well. In particular, effective and close coordination of the different proceedings is essential also in an inter-state context. Waiving this requirement would result in a double burden for the suspect and could eventually lead to the imposition of penalties not taking into account other penalties already imposed in another Member State for the same offense, thus exceeding what would be proportionate.

Conclusion

It has been demonstrated that it seems suitable to apply nearly all specifications established by the ECJ with regard to a duplication of proceedings and penalties within one and the same Member State also to cases involving different Member States. This complies with the idea of the EU as a single area of freedom, security and justice. As long as harmonisation of criminal laws is only purely advanced, an exception is, however, to be made for the "complementary aims" criterion.

In the Volkswagen case, already the first criterion for a justification of limitations to the transnational *ne bis in idem* guarantee cannot be regarded to be met because no legal basis for such limitation can be identified. The ECJ should make it clear that it is not possible to more or less arbitrarily look out for EU legislation that, with a lot of good will, could perhaps be interpreted to have the possibility of double jeopardy in mind. This would endanger the idea of a single area of freedom, security and justice, and, therewith, lastly the right to free movement of the persons concerned. Therefore, the third question referred to the Court in Case C-27/22 will have to be answered in the negative: The provisions laid down in Art. 3 para. 4 and Art. 13 para. 2 lit. e) of Directive EU/2005/29 do not justify a derogation from the *ne bis in idem* principle.

ABOUT THE AUTHOR

Laura Neumann

PD Dr. Laura Katharina Sophia Neumann is an interim professor of penal law at the Viadrina University of Frankfurt/Oder.

SUGGESTED CITATION

Neumann, Laura: Limitations of the Transnational ne bis in idem Principle in EU Law: Remarks on the ECJ's Diesel Scandal Volkswagen Case, Verfassungsblog, 27.03.2023, doi: 10.17176/20230327-195215-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20230327-195215-0.