Op-Ed: “The right to good administration remains in the shadow (C-412/21, Dual Prod)”

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Although EU law started out as administrative law, it has diversified spectacularly during the European integration process spanning already more than sixty decades. Nowadays EU criminal law is drawing a lot of attention (with good reason), to the point that it sometimes overshadows important questions of administrative procedural law (which is unfortunate). In its judgment of 23 March 2023, *Dual Prod* (C-412/21), the Court of Justice recalls the criteria for identifying a criminal penalty (even if decided in the course of administrative proceedings) and triggering the applicability of Articles 48(1) and 50 of the Charter, related to the fundamental rights to the presumption of innocence and to not be punished twice for the same offence. The judgment also suggests that an administrative suspension of an authorisation to operate a tax warehouse is *not* a criminal sanction, and therefore, that the abovementioned fundamental rights are not relevant for approaching such an administrative measure. But perhaps the most important lesson of *Dual Prod* is to be read between the lines: the judgment is an indirect invitation to consider the relevance of the general principle of good administration for administrative proceedings conducted by Member State authorities implementing EU law.

The preliminary ruling focuses on Article 16(1) of Directive 2008/118/EC concerning the general arrangements for excise duty, and Articles 48(1) and 50 of the Charter. Dual Prod SRL is a Romanian-based company operating in the field of the production of alcoholic beverages subject to excise duty. Following a search at the premises of the company, criminal proceedings are initiated against it by the authorities. Meanwhile, the authorities also issue an administrative decision suspending Dual Prod’s authorisation to operate as a tax warehouse for products subject to excise duty. The suspension period expires and with a second administrative decision, the suspension is renewed pending the outcome of the criminal proceedings – which have been ongoing for three years when the case reaches the Court of Justice. The Romanian court reviewing the legality of the suspension asks whether those administrative measures qualify as ‘criminal’ penalties and should therefore be controlled by reference to the presumption of innocence and the *ne bis in idem* principle.

The notion of a criminal penalty: nothing new under the sun

The Court recalls the three criteria relevant for identifying a ‘criminal’ sanction, the legality of which should then be assessed in the light of Articles 48 and 50 of the Charter. The first criterion is the legal classification of the offence under national law, but this is not decisive and a measure may still be considered ‘criminal’ even if it is not categorised as such under national law. The second criterion is the intrinsic nature of the offence, and the third criterion is the degree of severity of the penalty that the person concerned is liable to incur. This is basically a revision of the case law allowing to distinguish between the administrative and the criminal nature of penalties (especially cases C-489/10 *Bonda* and C-117/20 *bpost*).

As regards the second criterion, the Court expresses doubts as to the punitive nature of the measure (paras 30 to 36). The suspension of the authorisation in a case where Member States are required under EU law to control the activities of tax warehouses, appears to be

'more characteristic of a preventive or precautionary measure than of a punitive measure' (para 36). As for the third criterion, the degree of severity of the penalty, the Court indicates that it is 'in principle' 'not reached' by precautionary or preventive measures if those allow the company to pursue its other economic activities. Although the assessment is for the national court to perform, the reader is left seriously doubting the criminal nature of suspensions measures. Nevertheless, the Court of Justice addresses the questions of the referring court, i.e. what would the presumption of innocence and the *ne bis in idem* principle entail if the suspension measures were found to be 'criminal'.

Applying the presumption of innocence and *ne bis in idem* in administrative proceedings entailing a criminal penalty

As regards the presumption of innocence: if the measure under consideration is a 'criminal' penalty, it simply cannot be decided until Dual Prod has been declared guilty of a precise offense. As the Court of Justice emphasises, this is required not only by Article 48(1) but also by Article 47 of the Charter according to which, especially for addressees of an administrative penalty of a criminal nature, judicial review must include whether the principle of presumption of innocence has been infringed (see case C-501/11, *Schlindler Holding*).

As regards *ne bis in idem:* we are reminded of the twofold condition for applying this principle: a prior final decision (*bis*), and the same facts (*idem*), as per the *bpost* case law. In the case at hand, for *ne bis in idem* to be relevant, the successive suspensions of the authorization would have to both be of a criminal nature; then the resulting limitation to Article 50 would still have to be scrutinised through the lens of the proportionality principle. In fact, the Court takes the precaution to mention that, even if at least one of the suspension measures is not of a criminal nature – which would exclude the applicability of Article 50 – it should still comply with the principle of proportionality as a general principle of EU law (para 70).

Somewhere outside the spotlight, the right to good administration awaits

Since the Court repeatedly suggests that the decisions at issue are probably not criminal, it is worth considering them from another perspective and here, another general principle of EU law, although not expressly mentioned by the Court, deserves attention: that is, the general principle of good administration.

From the Opinion of Advocate General Collins, we know that during the proceedings before the Court of Justice, the European Commission pointed out that the right to good administration would be relevant for assessing whether the suspensions, considered cumulatively, complied with the right to good administration, in particular the right of a person to have his or her affairs handled within a reasonable period of time (point 14). The Advocate General himself also referred twice to the right to good administration – as a general principle of EU law applicable to the Member States (point 37 of the Opinion) and Article 41 of the Charter (point 40 of the Opinion).

The right to good administration is enshrined at Article 41 of the Charter, building on established case law having consecrated *inter alia*, the right to a decision within a reasonable time period, the right to be heard before an adverse decision is made, or the right to be given reasons for a decision. A peculiarity of Article 41 is that it is expressly addressed only to the EU institutions, bodies etc, and is therefore not applicable to national administrations of the Member States (see e.g. Case C-482/10 *Cicala,* para 28; or more recently C-113/19, *Luxaviation,* para 47). However, the Court of Justice has made clear that Article 41 of the Charter reflects a general principle of EU law, which applies not only to interactions between individuals and EU-level administration, but also to interactions between individuals and the administrative authorities of

the Member States when they are applying EU law. This allows for the components of the right to good administration to be applied in proceedings before national administrations – in particular, the obligation to give reasons for administrative decisions (C-225/19 and C-226/19, *Minister van Buitenlandse Zaken*, para 34 and C-230/18 *PI v Landespolizeidirektion Tirol,* para 57). *Dual Prod* could have been an opportunity to shed light on other the components of good administration, especially the right to have one’s affairs handled within a reasonable period of time. This could have been really interesting given that the authorisation was being suspended pending the conclusion of a very lengthy criminal investigation.

Dual Prod serves as a reminder of how to identify a criminal sanction and how to review it under the right to the presumption of innocence and the *ne bis in idem* principle, which is of course useful. It also reminds us that so much of EU law (whether it regulates the exercise of fundamental freedoms, or competition, or immigration) is still administrative law, and that procedural rights under EU law very often can and should be approached from an administrative law perspective. Of course, the Court of Justice can rephrase or refocus only to a certain point the questions asked by domestic courts. So perhaps this post can be a small contribution in drawing the attention of litigators and national courts on the existing Court’s case law on the general principle of good administration: it can find multiple applications in procedures conducted by Member State administrations.

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