

# **Administrative and criminal sanctions and ne bis in idem: how to reconcile the views of the CJEU, the ECHR and of national Constitutional Courts?**

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Bologna 17.9.2016 EBI, EALE and University of Bologna  
Reflections on the design and implementation of the European Banking Union

# ECHR POSITION

## **Protocol 7 ARTICLE 4**

### **Right not to be tried or punished twice**

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

# The three Engel criteria

- Engel criteria (Decision of ECHR of 8 June 1976) about meaning of «criminal charge» and «penalty» used by the Convention
- 1. Qualification by national law
- 2. The very nature of the offence (the protected interest)
- 3. Nature and degree of severity of the penalty
- *Zolotoukhine c. Russie* (10 février 2009) confirms the position and clarifies the substantial approach to « same facts »

The Grande Stevens case *Grande Stevens c. Italie* –  
4.3.2014

- Confirmation of a longstanding position
- Application to a market abuse case
- Proceedings about market manipulation (based on information lack of disclosure):
  - administrative sanctions (monetary and “disqualification”) issued by Consob and confirmed by Courts (Turin Court of Appeal and Supreme Court – Cassazione Sezioni Unite, analyzing also the bis in idem problem)
  - criminal proceeding for the same facts in course – After deleted in force of statute of limitations rule

# Administrative versus criminal sanctions

- The Grande Stevens decision concerns two main topics: the right to a fair trial in administrative/criminal sanctioning proceedings and the Bis in Idem prohibition
- Both the topics are founded on the same basic question: Are the administrative sanctions on market manipulation (market abuse) criminal?

# CJEU 2009 Spector case on market abuse - The “rationale” of administrative sanctions

- The European Court of Justice (CJEU or ECJ) in the *Spector Group* judgment (December 2009) said that “**Article 14(1) of Directive 2003/6** must be interpreted as meaning that, if, in addition to **the administrative sanctions laid down in that provision**, a Member State has introduced the possibility of imposing a criminal financial sanction, it is not necessary, for the purposes of assessing whether the administrative sanction is effective, proportionate and dissuasive, to take account of the possibility and/or the level of a criminal sanction which may subsequently be imposed” (§ 77).
- And “The fact that Article 2(1) of Directive 2003/6 does not expressly provide for a mental element among the constituent elements of insider dealing can be explained, second, by the purpose of Directive 2003/6, which, as is pointed out, *inter alia*, in the second and twelfth recitals in the preamble thereto, is to ensure the integrity of Community financial markets and to enhance investor confidence in those markets. The Community legislature opted for a preventative mechanism and for administrative sanctions for insider dealing, the effectiveness of which would be weakened if made subject to a systematic analysis of the existence of a mental element ... The effective implementation of the prohibition on market transactions is thus based on a simple structure in which subjective grounds of defence are limited, not only to enable sanctions to be imposed but also to prevent effectively infringements of that prohibition”: § 37)

## The Art. 50 of the Charter of Fundamental Rights of the European Union and differences between ECHR and ECJ positions

- Art. 50 of the Charter of Fundamental Rights of the European Union recognises the right not to be tried or punished twice in criminal proceedings for the same criminal offence
- The CJEU endorses the Engel criteria in order to establish what is a “criminal offence” BUT, e.g. recently in the *Aklagaren* Judgement (26.2.2013), stated that art. 50 cannot be interpreted exclusively in the light of ECHR three criteria.
- The effectiveness of integration policies must be guaranteed and the **National judge** can find a violation of “ne bis in idem” principle only if “the remaining penalties are effective, proportionate and dissuasive”

Longstanding position: e.g. *Commission/Grèce*, [68/88, Rec. p. 2965], 24; 10.7.1990, *Hansen*, C-326/88, Rec. p. I-2911, 17; 30.9.2003, *Inspire Art*, C-167/01, Rec. p. I-10155, 62; 15.1.2004, *Penycoed*, C-230/01, Rec. p. I-937, 36.

## Problems arising from the “three criteria” of ECHR and the CJEU jurisprudence

- Applying the three criteria - established by ECHR to qualify sanctions as criminal and confirmed by ECJ as useful in the application of article 50 of the Charter of Fundamental Rights - we risk considering all administrative sanctions as criminal
- Second («the very nature of the offence») and third («nature and degree of severity of the penalty») criteria are difficult to apply in a context where the European legislators ask for effectiveness of punishment and ability to prevent offences
- Not only in the market abuse field (e.g. MIFID 2) and not only in the financial market regulation (banks, fiscal, international trade, immigration (?))

# The substantial approach of the CJEU

- Are administrative sanctions always «criminal»? And are criminal sanctions always «criminal» following second and third criteria of ECHR?
- The ECJ position seems to impose always a substantial approach, avoiding the risk that ECHR position is used as a new «formal» boundary to effective punishment

# The European legal background on market abuse sanctions - MAD1

- EU legislation (MAD1 – Directive 2003/6; now MAR Regulation 596/2014) requires that Member States adopt "*effective, proportionate and dissuasive*" administrative sanctions, without prejudice to their faculty to decide whether to also impose criminal sanctions ("double track system") (Article 14 of MAD1)

# MAD1 and MAR administrative sanctions

The directive 2003/6/EC set forth and took for granted the existence of a legal framework based on mandatory administrative sanctions, as the most efficient, timely and prompt system *in subiecta materia*

The new Regulation confirms the importance of administrative sanctions as an essential point of the regulatory framework

## The new Market Abuse Regulation - Regulation n. 596/2014 of 16 april 2014

- Recital 71 MAR

“A set of administrative sanctions and measures should be provided for to ensure a common approach in Member States and to enhance their deterrent effect. The possibility of a ban from exercising management functions within investment firms should be available to the competent authority. Sanctions imposed in specific cases should be determined taking into account where appropriate factors such as the disgorgement of any identified financial benefit, the gravity and duration of the infringement, any aggravating or mitigating factors, the need for fines to have a deterrent effect and, where appropriate, include a discount for cooperation with the competent authority”

# The new Market Abuse Regulation (2)

- Recital 72 MAR
- Even though nothing prevents Member States from laying down rules for administrative as well as criminal sanctions for the same infringements, they should not be required to lay down rules for administrative sanctions for infringements of this Regulation which are already subject to national criminal law by 3 July 2016. In accordance with national law, Member States are not obliged to impose both administrative and criminal sanctions for the same offence, **but they can do so if their national law so permits.**
- However, maintenance of criminal sanctions rather than administrative sanctions for infringements of this Regulation or of Directive 2014/57/EU **should not reduce or otherwise affect the ability of competent authorities to cooperate and access and exchange information in a timely manner with competent authorities in other Member States for the purposes of this Regulation**, including after any referral of the relevant infringements to the competent judicial authorities for criminal prosecution

# The new Market Abuse Regulation (3)

## *Article 30*

### **Administrative sanctions and other administrative measures**

1. Without prejudice to any criminal sanctions and without prejudice to the supervisory powers of competent authorities under Article 23, Member States shall, in accordance with national law, provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures in relation to at least the following infringements:

...

Member States may decide not to lay down rules for administrative sanctions as referred to in the first subparagraph where the infringements referred to in point (a) or point (b) of that subparagraph are already subject to criminal sanctions in their national law by 3 July 2016. Where they so decide, Member States shall notify, in detail, to the Commission and to ESMA, the relevant parts of their criminal law.

# The new MAD2

- Recital 23 of MAD 2

“The scope of this Directive is determined in such a way as to complement, and ensure the effective implementation of, Regulation (EU) No 596/2014. Whereas offences should be punishable under this Directive when committed intentionally and at least in serious cases, sanctions for breaches of Regulation (EU) No 596/2014 do not require that intent is proven or that they are qualified as serious. In the application of national law transposing this Directive, Member States should ensure that the imposition of criminal sanctions for offences in accordance with this Directive and of administrative sanctions in accordance with the Regulation (EU) No 596/2014 does not lead to a breach of the principle of ne bis in idem”

# Nature and purpose of administrative sanctions provided by European law

- The nature of the administrative measures: fines; confiscation of assets for a value corresponding to that "used" by the transgressor plus the profit obtained; disqualification for offices or to practice activities in the financial markets sector;
- The purpose of the measures seems to be mainly that of restoring confidence in the markets, affecting the factors (the economic resources and the professional employment or position held by the offender in financial market sector) which such offences normally make possible, thus stimulating honest investors to operate, guaranteeing public confidence in the markets and in the correct trading on those markets
- There is no question of recovering damages

# French «Conseil Constitutionnel» on insider trading cases

- Decision no. 2014-453/454 QPC and 2015-462 QPC of 18 March 2015 - Mr John L. and others - [Cumulative prosecutions for the offence of insider dealing and prosecutions for insider misconduct]
- After have applied the criteria arising from the Human Rights Declaration of 1789 finds a violation of ne bis idem principle
- Analyze other interesting aspects which can help to find coordination between administrative and criminal sanctions

# Central findings of the French Constitutional Court

- “These two punishments consequently protect the same social interests” represented by “the protection of savings invested in financial instruments”
- “Penalties may not differ in nature” – Same degree of severity
- Any natural person can be prosecuted and sanctioned
- Same jurisdiction
- Unconstitutionality ascertained

**But the Conseil Constitutionnel goes beyond the ECHR position because considers against the ne bis in idem principle the parallel proceedings also when none of them is definitively closed (see ahead CONS. 36)**

## COORDINATION OF PENALTIES

The principle of the necessity of offences and punishments does not prevent the same acts committed by the same person from being subject to different prosecutions for the purposes of administrative or criminal sanctions in accordance with distinct bodies of rules before different courts; that, if the possibility that two procedures are initiated may result in cumulative penalties, the proportionality principle implies that the overall amount of any penalties imposed may not under any circumstances exceed the maximum tariff for any of the penalties imposed (CONS. 19 OF THE DECISION)

# Role of the national legislators

(From CONS. 35) Considering that ... the Constitutional Council does not dispose of a general power of appreciation and decision making of the same nature as that of Parliament ... that it does not fall to it to indicate the amendments that should be adopted in order for a situation of unconstitutionality to be remedied ... there are grounds to defer the repeal (1.9.2016)

# Exception concerning professional rules and jurisdiction

(From Cons 36) Considering on the other hand that, in order to put an end to the unconstitutional situation established from the date of publication of this decision, no prosecutions may be initiated or continued on the basis of Article L. 621-15 of the Monetary and Financial Code against any person **other than those mentioned in paragraph II of Article L. 621-9 of that Code** where a prosecution has already been launched in relation to the same conduct and against the same person before the ordinary criminal courts on the basis of Article L. 465-1 of the Code or where such a court has already made a definitive ruling on a prosecution in relation to the same conduct and against the same person; that, in the same way, no prosecutions may be initiated or continued on the basis of Article L. 465-1 of the Monetary and Financial Code where a prosecution has already been launched in relation to the same conduct and against the same person before the Enforcement Commission of the Autorité des Marchés Financiers on the basis of the contested provisions from Article L. 621-15 of the Code or where the Board has already made a definitive ruling on a prosecution in relation to the same conduct and against the same person,

## Art. L 621- 9, Paragraph II, CMF

- A list of entities supervised by AMF

II.-L'Autorité des marchés financiers veille également au respect des obligations professionnelles auxquelles sont astreintes, en vertu des dispositions législatives et réglementaires, les entités ou personnes suivantes ainsi que les personnes physiques placées sous leur autorité ou agissant pour leur compte

e.g. Investment firms (MIFID authorized) ; central depositaries ; market management companies; investment funds and fund management companies, etc.

# The Italian cases leading to the Corte Costituzionale decision of 2016

- In Italy the Supreme Court referred two times to the Constitutional Court: one criminal section (the administrative fine was definitive) and one civil section (the criminal penalty was definitive by mean of an agreement with the Public Prosecutor)
- The latter case presented serious doubts on the affliction realized by the applied criminal sanction (there was the effect of a general pardon law) and its effectiveness, considered that the administrative fine was 5 millions Euros

# Italian Corte Costituzionale – Decision n. 102/8.3.2016

- Declared not admissible the two questions deferred by the Supreme Court (Corte di Cassazione) concerning bis in idem in market abuse (one case of market manipulation and one case of communication of insider information)
- Found some problem of uncertainty in the Supreme Court deferral decision
- Especially found not acceptable violation of important constitutional principles in the legal system that could be established by the acceptance of the position of the deferring judges
- Emphasized the role of national legislator but also of national judges

# Main aspects of the Italian Corte Costituzionale decision

- The “first closing proceeding is the winner” system has been considered unconstitutional: uncertainty of the punitive answer – possibility of discretionary choices by the accused person
- The position of the CJUE has been well considered and consequently the case judge is asked (before deferring to the Constitutional Court) of a deepen analysis on the effective existence of the “idem factum” and on the conformity of the whole punitive answer with the European Union principles (effectiveness, dissuasivity, proportionality)
- In Italy the respect of European Union legislation has more constitutional importance than the respect of ECHR decision (which are binding for Italian judges only if not contrasting with other constitutional principles)
- The legislator is considered the best actor to resolve problems of possible compromise between different interests of constitutional importance

**It is difficult to find a solution but  
there are some interesting ways to  
follow**

# The fairness of administrative proceedings

In Italy as in all European Union countries

The administrative sanctioning proceedings are based on the “adversarial system” principle (“*diritto al contraddittorio*”).

Compliance with the above principle is ensured

- by providing supposed offenders with a prior notice of the alleged infringement (the facts are established at the beginning)
- by granting them the possibility to submit statements of defence and evidence , which must be evaluated by the Authority
- by granting them the right to examine, and have access to, the documents that form part of the proceedings

In Italy the offenders can, if sanctioned, bring an action before the Court of Appeal (*i.e.*, in a judicial body that has “*full jurisdiction*” within the meaning of the ECHR case-law), and to further submit a claim before the Italian Supreme Court (*Corte di Cassazione*)

# The possible “fair trial”

- Administrative sanctions must be issued at the end of a «fair trial» without attention to their non criminal nature
- Presumptions are possible but founded on effective factual basis – Substantial approach – as in the International Accounting Standards e.g.
- A «real» defense must be guaranteed
- The bigger problem is the distinction between inquiring and decision making functions within an administrative body
- Only (fast) judicial review can ensure an effective distinction

# The “fair” judicial control

The proceedings before the Court of Appeal:

- are held by means of **public hearings**,
- are concluded with judgments adopted and published “*in the name of the Italian people*”, and have fully guaranteed the right of defence to the parties, in both oral and written form; this was the case also in IFIL/EXOR/Gande Stevens case;
- allow a **full re-examination of the merits** of the case by Judges (endowed with a *plena causae cognitio*), extended to all the many questions of fact and of law raised by the applicants;
- allow a **full review**, by the Court, **of the evidence** collected by the Consob, or submitted by the applicants;
- lead the Judges to **take the place of the administrative Authority**, in exercising *ex novo* full decision-making power, in certain cases by amending and modifying the degree of sanctions first applied by the Consob, in order to make them proportionate to the gravity of the offences

## Instruments to avoid “double jeopardy”: coordination of penalties (1)

On the criminal side the criminal courts have the power to take into account, by whatever means, the prior existence of an administrative sanction for the purposes of mitigating the criminal penalty

In this way, National law should ensure that the final outcome reached is not disproportionate and does not, in any event, infringe on the principle of the prohibition of arbitrariness inherent in the rule of law

In the same sense the above cited CONS, of French decision

## Instruments to avoid “double jeopardy”: coordination of penalties (2)

The criminal Court can

- **deduct** the pecuniary administrative sanction from the amount of the criminal penalty (Art. 187-*terdecies*, d.lgs. 58/98);
- **prevent** the confiscation of assets that have been already confiscated within the administrative proceedings
- It could be useful to give the same possibility to the administrative Authority and civil or administrative judges

## Instruments to avoid “double jeopardy”: difference of material element in market manipulation

- At the moment in Italy: In the criminal material element there is an actual “risk of harm” offence (“*reato di pericolo concreto*”), which means that it has to be ascertained whether the dissemination of false information (or the execution of a transaction involving fictitious devices) has caused an actual risk that the price of the specific financial instrument is altered, whereas no actual impact on the price of that financial instrument is required for the offence to be committed

## Instruments to avoid “double jeopardy”: difference of material and mental element in market manipulation

- The structure of the administrative offence also includes the case of "potential risk" (*“pericolo astratto”*). Such conclusion derives from the wording "*which provide or are subject to providing false or misleading indications regarding financial instruments*";
- The provision concerning the administrative sanction, unlike the one relating to the criminal offence, makes no reference to a significant impact on the price of the financial instrument and the actual capability of the conduct to alter said price;
- As to the mental element, in compliance with the provisions contained in the MAD, evidence of negligence is sufficient for the administrative offences to occur
- Probably too much complex

# MAD 2 indications

- Intent
- Serious violations
- Offences “committed intentionally and at least in serious cases”
- The unified use of the two elements can help to find a specific area for criminal law in financial markets regulation
- The “professional rules” must be considered always as not criminal (as suggested by French Court)
- The punitive answer must be (or try to be) certain and effective, without prejudice of European and National different general principles (as suggested by CJEU and Italian Court)

Thank you