Diritto Penale Contemporaneo

RIVISTA TRIMESTRALE

REVISTA TRIMESTRAL DE DERECHO PENAL

A QUARTERLY REVIEW FOR CRIMINAL JUSTICE

ISSN 2240-7618

2/2018

Editore Associazione "Progetto giustizia penale", via Altaguardia 1, Milano - c.f. 97792250157
ANNO 2018 - CODICE ISSN 2240-7618 - Registrazione presso il Tribunale di Milano, al n. 554 del 18 novembre 2011.
Impaginazione a cura di Chiara Pavesi

Insider Dealing and the Right Not to Be Tried or Punished Twice for the Same Conduct: a Comparison between the Italian and the English and Welsh Legal System

Time for Reforms?

Abuso di informazioni privilegiate e ne bis in idem*: una comparazione tra Italia e Inghilterra e Galles*

Tempo di riforme?

Abuso de información privilegiada y ne bis in idem*: una comparación entre Italia e Inglaterra y Gales*

Tiempo de reforma?

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Abusi di mercato, Ne bis in idem, Diritti fondamentali

Abuso de mercado, Ne bis in idem, Derechos fundamentales

Market Abuse, Ne bis in idem, Fundamental Rights

Abstracts

L'articolo offre un'analisi comparata dei sistemi sanzionatori adottati da Italia e da Inghilterra e Galles per la repressione delle condotte illecite di insider dealing. Alla luce della sentenza Grande Stevens e Altri c. Italia, vengono, poi, esaminati gli orientamenti giurisprudenziali e dottrinali sviluppatisi nei due ordinamenti al fine di garantire la piena tutela del fondamentale diritto dell'individuo al ne bis in idem sostanziale, nonché i poteri che i Parlamenti nazionali hanno delegato alle Autorità indipendenti per il controllo dei mercati finanziari. In chiusura vengono, infine, suggerite alcune soluzioni pragmatiche per superare le criticità relative alle ipotesi di bis in idem sostanziale e di eccesso di potere riscontrate negli ordinamenti qui in esame.

El artículo compara los sistemas sancionatorios de Italia e Inglaterra y Gales para la represión de las conductas ilícitas de insider dealing. A la luz de la sentencia Grande Stevens y otros c. Italia, se examinan los planteamientos jurisprudenciales y doctrinales en los dos ordenamientos jurídicos, a fin de garantizar la plena tutela del derecho ne bis in idem sustancial, así como los poderes y atribuciones que los Parlamentos nacionales han delegado en las respectivas autoridades para el control de los mercados financieros. En último lugar, se sugieren algunas soluciones prácticas para superar las críticas relativas a las hipótesis de bis in idem sustancial y de excesos de poder descubiertos en los ordenamientos jurídicos examinados.

This article compares the Italian and the English and Welsh systems of sanctions adopted for the suppression of insider dealing's offences. In light of the decision in Grande Stevens and Others v. Italy, this article particularly focusses on the court's compliance with the fundamental human right to the substantial ne bis in idem and on the powers that Parliaments entrusted to their national Security Exchange Commissions. Finally, by underlining pros and cons of the two legal systems, this article suggests some practical solutions to overcome the existing problems of double jeopardy and excess of powers.

* I am grateful to Professors Silvia Tordini-Cagli, Alessandro Melchionda, Giacomo Di Federico, Dr. Lorenzo Pasculli and to the anonymous referees for their careful reading and their many insightful comments and suggestions.

Sommario

1. Introduction.

In 2008, the global financial crisis broke out in the US and quickly affected the EU economies, too[1]. Thus, EU institutions issued a series of measures to stem the phenomenon. Among these were the Market Abuse Directive II[2] (MAD II) and the Market Abuse Regulation[3] (MAR), both issued in 2014. These provisions differed from previous ones because, following the entry into force in 2009 of the Treaty of Lisbon, the EU could make the adoption of criminal sanctions binding for member countries[4]. While the Market Abuse Directive I (MAD I) issued in 2003 urged Member States to adopt administrative sanctions for market abuse repression, MAD II pushed European countries towards the criminalisation of this misconduct. Indeed, a EU lawmaker observed in MAD II that: «The adoption of administrative sanctions by Member States has, to date, proven to be insufficient to ensure compliance with the rules on preventing and fighting market abuse»[5]. Thus, the «Directive should oblige Member States to provide in their national law for criminal penalties in respect of insider dealing, market manipulation and unlawful disclosure of inside information»[6].

With the emergence of MAD II and MAR, the EU countries adopted substantial systems of sanctions, whose main aim was the prohibition of market abuse, both with criminal and regulatory penalties. This model of sanctions is known as the "double-track" system[7], because for the same conduct a person can be punished twice, with a criminal and a regulatory penalty. On the one hand, criminal sanction is levied for its deterrent effect and the social stigma it entails, and its afflictive nature was deemed to be the most appropriate instrument to safeguard the integrity of financial markets, thus reassuring and bolstering investors' confidence. On the other hand, administrative sanction, with its lower burden of proof, was deemed to be more efficient and effective.

Yet, in March 2014, the European Court of Human Rights (ECtHR or the Court) deliberated in the *Grande Stevens and Others v Italy* case[8] (hereinafter *Grande Stevens and Others*) that the Italian "double-track" system for market abuse repression violates the "Right not to be tried or punished twice"[9] (art. 4, Prot. No. 7 to the European Convention on Human Rights - ECHR). Indeed, the Court found that the administrative sanctions issued by the Italian Security Exchange Commission (the Consob) in market abuse cases were criminal in nature (*Engel*'s criteria), in that the same person was tried and punished twice for the same fact. Nevertheless, Italy did not modify its legislation to conform to the ECtHR's ruling. Therefore, as ECHR's High Contracting Party, even nowadays Italy risks condemnation[10] for its default.

[1] Palmer (2017).
[2] Council Directive 2014/57/EU on criminal sanctions for market abuse (market abuse directive) [2014] OJ L173/179.
[3] Council Regulation 596/2014 on market abuse (market abuse regulation) [2014] OJ L173/1.
[4] Mitsilegas (2016), pp. 53-82.
[5] Dir 2014/57/EU (n. 6) Recital 5.
[6] ibid. Recital 14.
[7] Amati-Mazzacuva (2018), pp. 351-384.
[8] *Grande Stevens and Others v. Italy*, App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 4 March 2014).
[9] ECHR Protocol no 7 (European Treaty Series No. 117, Strasbourg, 1984) Art. 4, para 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».
[10] ECHR, Art. 46, "Binding force and execution of judgments". See also *Broniowsky v. Poland* App no 31443/96(ECtHR, 19 December 2002).

In contrast, when England and Wales approved the Financial Services and Markets Act 2000 (FSMA 2000), the problem of the possible violation of the Convention's "Right not to be tried or punished twice" was addressed. A system of sanctions was created that did not infringe on the ECHR. However, the discretion given by the English and Welsh lawmaker to the Financial Conduct Authority (FCA) to decide, case by case, whether to prosecute or impose an administrative sanction raised some controversies.

The comparison of these two legislations is interesting, as they are characterized by useful elements to improve the mutual critical aspects highlighted above.

2. Some preliminary clarification regarding the Conventional position on *ne bis in idem* between the ECtHR's established case-law and its continuously evolving rulings.

2.1. *The Conventional notion of Criminal and Idem and their reception in the Italian and the English and Welsh legal systems.*

Preliminarily, it is important to clarify what *Criminal* and *Idem* mean under the ECHR, and how the Italian and the English and Welsh legal systems deal with these concepts. Indeed, these are two key points of the Convention's Right not to be tried or punished twice for the same fact (substantial *ne bis in idem*).

With respect to the notion of *criminal*, the Italian criminal justice system relies on the constitutional principle of *Formal legality*,[11] which means only that which the lawmaker qualifies as criminal is criminal. Thus, a sanction is criminal if the Parliament qualifies the connected illegal conduct as criminal. All the other cases fall within the non-criminal area. In contrast, England and Wales, by virtue of a constant and long-lasting dialogue with the ECtHR, adopt for this purpose the substantive parameters elaborated by the Court itself[12]. In 1976, in the *Engel and Others v. The Netherlands* case[13], the ECtHR overruled its precedents by issuing three criteria (*Engel*'s criteria) for ascertaining the sanctions' real nature. By providing substantial parameters, the Court intended to guarantee the uniform application of fundamental human rights in the 47 often different legal systems of the Council of Europe's Member States. The Court sought to prohibit States from committing "a fraud of labels" by qualifying a criminal sanction as *regulatory*[14]. Because regulatory proceedings lack the safeguards required in criminal trials, a State that qualifies a penalty as regulatory rather than criminal can count on a speedier and easier execution of it. In this way, the State saves time and money, but bypasses the human rights' compliance. To check whether or not a criminal charge applies it is necessary to consider:

1. The sanction's qualification given in the domestic law (which has only a formal and relative value).
2. The very nature of the offence, ie, whether or not it refers to all people or only to a specific group of people, and the transgression's importance.
3. The nature and degree of the penalty's severity, with reference to the measure's content, and its purpose--punitive or preventive.

As far as it concerns the concept of *Idem*, in 2009 both Italy (as stated in the Constitutional Court's judgment 2016 no. 200[15]), and England and Wales (as maintained in the case *Connelly v. DPP*[16]), adopted a notion of *Idem* compliant with that of the ECHR. Furthermore, the

[11] In the Italian legal system, the term *Principle of legality* means that: «In the sources of law's hierarchy, a provision which is lower than the ordinary law cannot constitute a source of the criminal law». Pagliaro (1973).
[12] Amos (2012).
[13] *Engel and Others v The Netherlands*, App no 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 8 June 1978). Silva (2018), pp. 51-84; Mazzacuva (2017), pp. 7-74; Manes (2017).
[14] Manes (2012), *passim*.
[15] Sotis (2017); Pulitanò (2017); Lavarini (2017); Falcinelli (2017); Zirulia (2016); Vicoli (2016); Rivello (2014); Caprioli (2010).
[16] *Connelly v. DPP* [1964] AC 1254 (HL).

Court in *Zolotukhine v. Russia* clarified the concept of *same fact* (the Latin *idem factum*), that:

> The Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same… The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space…[17]

2.2. *The recent judgment in A and B v Norway: case-law revirement or continuity in the tradition?*

On 15th November 2016, two and a half years after *Grande Stevens and Others*, the ECtHR issued its judgment in *A and B v Norway*[18] (hereinafter *A and B*), finding the Norwegian "double-track" system of sanctions for the repression of tax evasion to be compatible with the conventional right not to be tried or punished twice for the same fact, in apparent contradiction of all its precedents on the substantive implementation of the *ne bis in idem* principle[19]. Indeed, the Court maintained that: «The object of Article 4 of Protocol No. 7 is to prevent the injustice of a person's being prosecuted or punished twice for the same criminalised conduct. It does not, however, outlaw legal systems which take an "integrated" approach to the social wrongdoing in question, and in particular an approach involving parallel stages of legal response to the wrongdoing by different authorities and for different purposes»[20]. On this occasion the Court made it clear that to avoid the violation of the principle of *ne bis in idem* it must also be shown that the two proceedings – the administrative and the criminal – «are sufficiently closely connected in substance and in time»[21]. It followed this with an illustrative list of criteria that must be assessed in these cases. This list includes the concrete objectives pursued by the two proceedings, the foreseeable duplication of the proceedings, and the presence of procedural and substantial mechanisms of coordination between the intervening authorities[22]. In particular, as regards this last – and fundamental – aspect, the Court stressed, on the one hand, the need to avoid procedural duplication in the collection and assessment of evidence but emphasised, on the other hand, that the sanctions issued by the first judge must also be taken into due consideration by the second judge, «so as to prevent that the individual concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate»[23].

Although the Court in the ruling at issue quoted from many of its precedents (among them *R.T. v. Switzerland*[24], *Nilsson v. Sweden*[25], *Boman v. Finland*[26] and *Nykänen v. Finland*[27]) there is no doubt that the parameter of the *sufficiently close connection in time and substance* is an absolute change in the ECtHR's legal order. Before *A and B* the Court had never in its case-law bestowed such importance on this parameter. Nevertheless, in this case the ECtHR, in contrast to its ordinary expansive attitude to fundamental human rights (what *Mireille Delmas-Marty* has described as «*le flou du droit*»[28]), did not extend the scope of an individual's right not to be tried or punished twice for the same fact, but, on the contrary, restricted it. This is quite unusual. Indeed, *A and B* clearly contradicted the core of the ECtHR's precedents (to name just a few of the most recent ones: *Grande Stevens and Others*[29], *Kapetanios and Others*[30],

[17] *Zolotukhin v. Russia*, App no 14939/03 (ECtHR, 10 February 2009).
[18] *A and B v. Norway*, App nos 24130/11, 29758/11 (ECtHR, 15 November 2016).
[19] Calzolari (2017); Viganò (2016d); Fimiani (2017); Brancaccio and Fidelbo (2017).
[20] *A and B v. Norway*, para 123.
[21] *A and B v. Norway*, para 130.
[22] ibid. para 132.
[23] ibid. para 132.
[24] *R.T. v. Switzerland*, App no 31982/96 (ECtHR, 30 May 2000).
[25] *Nilsson v. Sweden*, App no 73661/01 (ECtHR, 13 December 2005).
[26] *Boman v. Finland*, App no 41604/11 (ECtHR, 15 May 2015).
[27] *Nykänen v. Finland*, App no 11828/11 (ECtHR, 20 May 2014).
[28] Delmas-Marty (2004),pp. 365-388.
[29] *Grande Stevens and Others* (n. 7).
[30] *Kapetanios and Others v. Greece*, App nos 3453/12, 42941/12, 9028/13 (ECtHR, 30 April 2015).

Sismanidis and Sitaridis[31], *Lucky Dev*[32]), which had set a broader application of this fundamental right. This was also made very clear in the harsh dissenting opinion of Judge Pinto de Albuquerque, who reported that in *A and B* the:

> *[N]e bis in idem* loses its *pro persona* character, subverted by the Court's strict *pro auctoritate* stance. It is no longer an individual guarantee, but a tool to avoid the defendants' 'manipulation and impunity'. After turning the rationale of the *ne bis in idem* principle upside down, the present judgment opens the door to an unprecedented, Leviathan-like punitive policy based on multiple State-pursued proceedings, strategically connected and put in place in order to achieve the maximum possible repressive effect.[33]

The Court in this case operated an odd balance between individual rights and public economic interests, in a way that is usually more consistent with the ECJ's reasoning than that of the ECtHR. In the judgment the Court wrote that the criteria set out in its case-law constitute a guide «for situating the fair balance to be struck between duly safeguarding the interests of the individual protected by the *ne bis in idem* principle, on the one hand, and accommodating the particular interest of the community in being able to take a calibrated regulatory approach in the area concerned, on the other»[34]. This consideration certainly did not dispel the doubts of those who argued that with this ruling the ECtHR betrayed its fundamental role as the guardian of human rights in order to support the Member States' interests in effective deterrent systems[35].

However, I do not find that *A and B* conflicts with *Grande Stevens and Others*, as the two systems of sanctions differ in the ways and times in which they operate. On the one hand, in *A and B*, Norway successfully proved to the ECtHR that its repressive system for tax evasion actually consists of two different proceedings, both criminal in the light of the *Engel*'s criteria, but «combined in an integrated manner so as to form a coherent whole»[36]. To a large extent this implies that in every case the Norwegian deterrent system imposes proportionate and predictable sanctions on its citizens. On the other hand, Italy was not able to prove to the ECtHR that its "double-track" system of sanctions, although consisting of two different proceedings that were both criminal in nature, was so coordinated that the sanctions that were actually imposed were proportionate to the seriousness of the offences. In the end, Italy, unlike Norway, was condemned by the ECtHR because its deterrent "dual-track" system implemented disproportionate sanctions. This is why *A and B*, although establishing a significant case-law revirement of the ECtHR in relation to the substantive *ne bis in idem* principle, does not affect the scope of *Grande Stevens and Others*. Therefore, the Italian "double-track" system continues to violate the conventional *ne bis in idem* principle, even in face of the most recent ECtHR case-law[37].

3. Insider dealing in the Italian legal discipline.

The notion of market abuse includes two different crimes, market manipulation and insider dealing. As *Barry Rider* noted, «The regulation of insider dealing had and will no doubt continue to throw up a host of issues that would not ordinarily be encountered in the control of other anti-social conduct…[as] the crafting of legislation and the development of supporting regulatory mechanisms involve issues of peculiar complexity and sensitivity»[38]. Since a specific focus on insider dealing through laws' comparison would be useful, this paragraph begins an examination of Italian law on insider dealing.

[31] *Sismanidis and Sitaridis v. Greece*, App nos 66602/09, 71879/12 (ECtHR, 9 June 2016).
[32] *Lucky Dev v. Sweden*, App no 7356/10 (ECtHR, 27 November 2014).
[33] Dissenting Opinion of Judge Pinto de Albuquerque in *A and B v. Norway*, para 79.
[34] *A and B v. Norway*, para. 124.
[35] Dissenting Opinion of Judge Pinto de Albuquerque (n. 30).
[36] *A and B v. Norway*, para. 111.
[37] *Jóhannesson and Others v. Iceland*, App no 22007/11 (ECtHR, 18 May 2017). Mattarella (2017); Viganò (2017); Rudoni (2017); Tripodi (2018).
[38] Rider, Alexander, Linklater (2002), p. 3.

Italian lawmakers' interest in insider dealing arose very late compared to other countries with more advanced economies. Indeed, while the US began to prosecute insider dealing as early as the 1930s, in Italy insider dealing was not a crime until 1991. Italy's first insider dealing law only arose with the Act 1991 no. 157, containing "Rules on the use of confidential information in securities transactions". The Act was then amended with Legislative Decree 1998 no. 58, named "Testo Unico della Finanza" (Single Act on Finance, hereinafter, t.u.f.). Yet, the current set of rules on insider dealing, called "Abuse of privileged information" was redrafted by the Act 2005 no. 62, which implemented the directive 2003/6/EC on market abuse. Later, the directive 2014/57/EU strengthened insider dealing sanctions.

According to most legal academics, the Italian insider dealing law safeguards the correct operation of financial markets and consumers' confidence in financial intermediaries[39]. *Valerio Napoleoni* found that: «The criminal conduct, decreasing the volume of negotiations, negatively affects the liquidity of secondary market, and particularly the prompt convertibility in cash of financial instruments. Liquidity of secondary market is notoriously a condition of efficiency also for the primary market, which consequently gets affected too»[40]. Yet, the correctness and transparency of financial markets pursued by the incriminating rule also caused many commentators to identify *collective savings* as the constitutional value protected by the criminal law. It was noted that: «Today the protection of public savings and financial markets is expressly provided in art. 117, para. 2, sub-s (e) of the Italian Constitution. This article safeguards the interest in an optimal allocation of economic resources and the transparency and correctness of the activity of those who manage collective savings, in a general perspective of protection of investors' assets»[41].

According to art. 184, para. 1, sub-s(a), the crime of insider dealing is committed by:

> Any person who, directly or indirectly, personally or through another person, buys, sells or carries out any other transaction by profiting of privileged information, related to securities or derivatives. The crime is committed in the place and at the time in which the operation is concluded, following the related civil law provisions. The crime occurs even if the insider does not make any profit or even if the operation has opposite effects to the ones pursued.

Two other cases of insider dealing are specified in art. 184, para. 1, sub-ss(b) and (c) t.u.f. The first is *tipping*. It occurs when privileged information is leaked in contravention of the ordinary duties associated with a job, a profession or an office. The second one called *tuyautage*, which occurs when a person, on the basis of privileged information, suggests or induces another subject to carry out one of the operations described in sub-s(a), para. 1 of art. 184 t.u.f. If the recipient of the information does not observe due diligence, he will be considered as guilty as the insider. A crime does not take place if the aforementioned operations are deemed to be ordinary tasks of a specific job, profession or office. As for the mens rea, insider dealing is generally indictable only when the person knows he is abusing of privileged information.

Insider dealing occurs with (a) the completion of a financial transaction or (b) with the disclosure of privileged information or (c) by recommending or inducing another person to do the abovementioned operations. For the crime to be found, the profit potentially achieved by the offender is not relevant and the judge is not required to ascertain the offence's effects.

With respect to the sanctions' penalties, insider dealing is a criminal offence that carries a sentence of imprisonment between two and twelve years, with fine of twenty thousand to three million Euros. The judge can treble the fine, or increase it to the greater amount of ten times the product or the profit achieved by the crime, in light of the significance of the offence and the personal qualities of the offender when the ordinary maximum fine seems inadequate. The custodial sentence is followed by interdiction from public offices, professions and the management of legal entities and companies, as well as from the ability to negotiate with the public administration for a period of time ranging from six months to two years. The sentence must be published in at least two national newspapers.

[39] D'Andrea (2017); Giavazzi (2016); Zanchetti (2013).
[40] Napoleoni (2008), p. 657-658.
[41] Miedico (2017), p. 307.

Along with criminal sanction, the law also provides for administrative offence (art. 187-*bis* t.u.f.), which has the same contents and structure of the criminal provision. Thus, in a single event, the same conduct is tried or punished twice. This also appears in the opening clause of art. 187-*bis* t.u.f., and in some provisions[42] that refer to the relationship between the two parallel proceedings. However, in the opinion of the majority of domestic legal academics[43] the two provisions mainly differ because the administrative offence is punishable for negligence, too (following art. 3, Act 689/81[44]).

The administrative offence is punishable by a fine of twenty-thousand to three-million Euros. Here too, the judge can increase the fine up to three times, or to the greater amount of ten times the product or the profit achieved by the crime, when the personal qualities of the offender or the product or profit derived by the crime make the ordinary maximum fine seem inadequate. By now it is clear that the Italian sanctioning regime on insider dealing was correctly defined "draconian"[45]. The lawmaker himself, by providing the "double-track" system of sanctions, was inspired by the rationale that «By putting criminal and administrative sanctions in competition, at least one of them should get to the finish line»[46].

4. The Italian legal system and its response to the ECtHR Grande Stevens judgment.

For years, Italian legal academics unanimously denounced[47] the structural deficiencies of the "double-track" system of sanctions, which was deemed to be a "hyper-muscular and super-efficient" repressive apparatus[48]. It was no surprise, then, when the Strasbourg Court issued the *Grande Stevens and Others* judgment, since it was the widely expected implementation of the *Engel's criteria*. Yet, the Italian lawmaker, stuck in the «stratified jumble»[49] of sanctions he himself had created, remained inert to that decision. Consequently, legal academics and courts suggested alternative operations to adapt the national legislation to the ruling at issue.

4.1. *The Italian lawmaker response to the Grande Stevens decision.*

In *Grande Stevens and Others,* the Strasbourg Court held that Italy had to close, as soon as possible and without damaging consequences for applicants, the criminal trials pending at the time of ruling. The Court also added that, «If the Italian legislature is up to this challenge, its work could provide an example of cross-fertilization to other legislatures which are faced with a similar systemic problem»[50]. Therefore, after the abovementioned epilogue before the ECtHR and the harsh words of disapproval pronounced by the Strasbourg judges, the expectations for a systemic and structural reform in Italy were objectively valid. Instead, the verdict's purpose was irresponsibly "downplayed" by the Italian lawmaker. Indeed, while waiting for the grounds' lodging of the decision, the Supreme Court of *Cassazione* declared that the crime's statute of limitations had tolled and closed the case[51]. This allowed the Italian government to argue that the obligations arising from the *Grande Stevens* decision were fulfilled, leaving the applicants undermined[52] and the situation unresolved. Thus, the Italian lawmaker failed to

[42] Art. 187-*duodecies* and 187-*terdecies* t.u.f.
[43] Tripodi (2013).
[44] Act 1989 no. 689, art. 3: «In violations in which an administrative sanction applies, everyone is responsible for his own actions or omissions, whether he acted negligently or fraudulently».
[45] D'Alessandro (2014).
[46] Alessandri *(*2005), p. 555.
[47] Paliero (2006); Vizzardi (2006); Lunghini (2007). Later on: Ventoruzzo (2014); D'Alessandro (2014); Mucciarelli (2015).
[48] Flick and Napoleoni (2015).
[49] Palazzo (2014).
[50] *Grande Stevens and Others v. Italy* (n. 10), para. 33.
[51] Cass. Pen., Sez. I, no. 19915/2014.
[52] «A judgment, which states the occurence of the crime's statute limitation, is not equivalent to an acquittal verdict. Indeed, the first one does not clarify the facts charged to the defendants». Flick and Napoleoni (2014).

build a coherent, effective system of punishment that was respectful of human rights, and once again abdicated its functions to the judiciary[53].

4.2. *Court's and legal academics' opinions to overcome double jeopardy in market abuse…*

In order to overcome double jeopardy in market abuse cases, *Francesco Viganò*[54] suggested that courts of first instance, which became «upstanding king's men and indomitable battering rams»[55] of the EU law, could set aside the domestic law, implementing the provisions of the Charter of Fundamental Rights of the European Union (CFREU), which today has the same value as the Treaties of the European Union (TEU). This is possible pursuant to art. 6, para. 3 of the TEU, which establishes the principle of the *primauté* of EU law on national laws. In the event of conflict between national and supranational laws, first instance judges must implement the supranational law, thus making it prevailing on domestic laws. It could be called for art. 50 of the CFREU, entitled "Right not to be tried or punished twice" for the same fact[56], or by relying on art. 4 to Prot. No. 7 of ECHR[57], through the implementation of art. 52 para 3 CFREU. Furthermore, art. 51, CFREU states that fundamental rights, as parameters of Justice and Freedom, are binding on Member States and European institutions within the scope of EU law.

The ECJ recently intervened on the point by issuing two judgments (in the *Di Puma*[58] and *Garlsson Real Estate*[59] cases) with which it answered some preliminary questions on the scope of Art 50 of the CFREU[60]. In particular, the Court, in its conclusions in the *Garlsson Real Estate* case, clarified, with specific reference to the Italian legal framework on market abuse, that Art. 50 precludes there being national legislation that permits the possibility of administrative proceedings being brought against a person in respect of unlawful conduct consisting of market manipulation for which that same person has already been finally convicted. The Court also specified on this occasion that the *ne bis in idem* principle, guaranteed by Art. 50, confers on individuals a right that is directly applicable in the context of a dispute.

That said, many academics, including *Alberto Alessandri*, have argued that such a solution would be «obligatory but episodic, remitted to the will and interpretation of a single judge. They would be ways out that would increase rather than attenuate the rate of disorder and uncertainty in the system… [I]ndeed, the Italian system has no room for adaptation, being "rigidity" one of its distinctive features»[61]. I agree with this last opinion, believing that this is not the best solution for overcoming the violation of the conventional *ne bis in idem* principle in the Italian legal regime on market abuse.

Some Italian legal academics also argued that a query of constitutional legitimacy referred to art. 649 of the Code of Criminal Procedure (c.c.p.)--entitled *Ban of retrial*--can be raised in violations of art. 117 para. 1 Const.[62] and art. 112 Const.[63] Indeed, art. 649 c.c.p. establishes that if the defendant is definitively acquitted or convicted he cannot be retried for the same fact. In this case, the Constitutional Court could carry out what is said to be a *manipulative operation*[64]. Thus, the Court could interpret art. 649 c.c.p. in the manner in which it includes the conventional concept of *criminal subject*, thus allowing criminal courts to hold off on starting a second trial when an administrative proceeding for the imposition of sanctions, criminal in nature, has already begun. Yet, the Constitutional Court in the ruling 2012 no. 230 objected

[53] Basile (2017a), Id. (2017b).
[54] Viganò (2014), Id. (2016b), Salcuni (2016), Napoleoni (2017); Bindi and Pisaneschi (2018).
[55] Conti (2013).
[56] Amalfitano and D'Ambrosio (2017).
[57] Mancuso and Viganò (2016).
[58] ECJ, Cases 596/16 and 597/16, *Di Puma v Commissione Nazionale per le Società e la Borsa (Consob)* [2018], available at curia.europa.eu.
[59] ECJ, Case 537/16, *Garlsson Real Estate SA, Stefano Ricucci, Magiste International SA v Commissione Nazionale per le Società e la Borsa (Consob)* [2018], available at curia.europa.eu.
[60] Galluccio (2018).
[61] Alessandri (2014); Cassibba (2017).
[62] Bigiarini (2016); Vinciguerra (2015); Scoletta (2014); Manacorda (2013).
[63] De Amicis (2014).
[64] Zagrebelsky (1987): «It deals with decision-making techniques which were called manipulative to emphasize that their purpose is the transformation of the law's meaning, and not its elimination or its mere interpretation in compliance with the Italian Constitution».

on this point that:

> In the interpretation offered by the Strasbourg Court the conventional principle of the *Legality in criminal law* (Legalità penale) is less comprehensive than the one provided by the Italian Constitution (and in general in continental legal orders). Indeed, the ECHR legal system does not include the principle--of central importance, conversely, in the domestic law--of the Rule of Law in criminal matters (Riserva di legge in materia penale), as expressed in the art. 25, para. 2, of the Italian Constitution; a principle that, as already pointed out repeatedly by this Court, demands the power to make criminal laws--which are able to affect people's fundamental rights and in particular the personal freedom--to the institution which is the highest expression of political representation: the Parliament, which is elected by universal suffrage and by the whole nation[65].

Others[66] called for an interpretation pursuant to the Convention of art. 649 c.c.p. by the Supreme Court of *Cassazione,* in the sense that, after a definitive administrative or criminal sanction occurred, it is no longer possible to start a criminal trial or an administrative proceeding for an *idem factum* (same event). Furthermore, when one of the issued sanctions (criminal or administrative) becomes definitive, the parallel trial or the proceeding still in progress must be interrupted. This theory was not exempt from criticism. Indeed, it was noted that «This solution is inconceivable, given the incontestable content of the law»[67]. According to others:

> [T]he extension of the preclusive effects ensured by art 649 c.c.p. in case of sanctions issued by the administrative authority weaken and does not raise the level of guarantees provided by the criminal law and therefore it contradicts the art. 53 of the ECHR and the undisputed case-law of the Strasbourg Court… it allows that the rights, which the criminal law and procedure guarantee to people, can depend in concrete by unquestionable choices of the authorities[68].

A query of constitutional legitimacy also could be raised in relation to art. 187-*bis* t.u.f.[69], so that the Constitutional Court could replace the periphrasis «Except for criminal sanctions» with «Except when the fact constitutes a crime». Indeed, while the first clause allows the accumulation of criminal and administrative sanctions, the second one establishes that when a criminal offence occurs, the parallel administrative sanction cannot be implemented, thus preventing double punishments. Recently, however, the Italian Constitutional Court, in judgment 2016 no. 102[70], ruled out its authority to amend, with a manipulative operation, the "double-track" system of sanction on market abuse, as long as «[i]t is clear that it is primarily up to the lawmaker to establish which solutions must be adopted to remedy those frictions that this system generates between the national and the ECHR legal order».

Finally, it was also suggested[71] that there be an interpretation pursuant to the Convention of art. 187-*bis* t.u.f. by the Supreme Court of *Cassazione,* specifically taking into account the *Principle of Specialty*, outlined in art. 15 of the Italian Criminal Code (c.c.)[72], and in art. 9 of Act 1991 no. 689. These provisions establish that «the law with more specializing elements prevails». In effect, in cases where two laws (criminal and administrative) apply, the presence of a crime excludes the occurrence of an administrative offence[73]. This interpretation would result in a scale of sanctions, ranging from the most serious forms of market abuse, punishable by criminal sanctions, to less relevant cases, sanctioned administratively (*weaken double track system*[74] of sanctions). Nevertheless, as *Alberto Alessandri* wrote: «It seems certainly improper to confuse the principle of specialty with the *ne bis in idem* principle, in the arguments put

[65] See also: Lavarini (2016).
[66] Viganò (2016a); Galantini (2015); Fidelbo (2014); Tripodi (2014).
[67] Ruggiero (2017).
[68] Di Bitonto (2016); Id. (2015).
[69] De Amicis and Gaeta (2017).
[70] Bindi (2016); Tripodi (2016); Rudoni (2016).
[71] Di Bitonto (2016).
[72] Vallini (2018); Sorbello (2015).
[73] Paliero (2005).
[74] (Ord.), Cass. Civ., Sez. Trib., n. 95/2015.

forward, in their practical conclusions, as well as from a theoretical point of view: they are principles which have distant and completely different rationales and equally radically distinct contents»[75]. On the one hand, the principle of specialty is correctly implemented when two provisions are compared and it is possible to determine whether or not one of them is *special* in relation to the other one, or if both of them are mutually special. Therefore, the principle of specialty applies only if at least one of the laws or both of the laws at issue are different. On the other hand, to verify if there is a *bis in idem*, it is not the law, but the events that have occurred, that are compared to determine that they are, in fact, substantially the same. Given the aforementioned considerations, the principle of specialty as a solution to the problem at issue does not appear persuasive.

4.3. … and tax offences cases.

Similar hermeneutical problems also arose in relation to the Italian system of sanctions for the repression of tax offences, as well as market abuse. Indeed, the domestic lawmakers adopted a "double-track" system of sanctions in the tax offences sector[76]. Particularly, this system punishes the same person for the same conduct with multiple sanctions, which, in light of the *Engel*'s criteria, can be considered "criminal in substance". Therefore, the same individual is punished twice for the same fact, in violation of the conventional *ne bis in idem*[77].

Significant in this sense are the offences provided in Articles 10*bis* (*Omitted payment of due or certified deduction*) and 10*ter* (*Omitted payment of VAT*) pursuant to Legislative Decree (hereinafter L.D.) 74/2000 (*Law on Tax Crimes*). These respectively punish anyone who does not pay, within the deadline for the presentation of the annual declaration of the tax substitute, certified deductions for an amount exceeding 50,000 Euros; or anyone who does not pay the value added tax due, for the same amount, within the deadline for the advance payment related to the following tax period. These crimes are punishable with imprisonment for a term of six months to two years. Along with criminal offences, the law also establishes administrative sanctions in art. 13 (*Delayed or omitted direct payments and other offences with regard to compensation*) of L.D. 471/1997. These sanctions apply when the tax payer recognises he did not pay taxes in compliance with the declarative obligations. The unpaid taxes, which determine the imposition of the administrative sanctions, also contribute to exceeding the punishment threshold established for the occurrence of the criminal offences referred to in Articles 10*bis* and 10*ter* of L.D. 74/2000. These offences are sanctioned with a surcharge of 30% of the unpaid amounts, as happens in the Finnish, Norwegian, and Icelandic tax systems, which were recently examined by the ECtHR and deemed "criminal in substance"[78].

Unlike the field of market abuse, however, the Italian lawmakers who drafted the tax offences legislation intended to avoid any duplication of sanctions by explicitly providing the principle of specialty[79], meaning that when more offences occur it must always apply the one with more specialising elements (*lex specialis derogat generali*)[80]. In general, the criminal provision is considered *special* in comparison with administrative penalties, since it requires further contents (i.e. punishment threshold), and as for the means rea, the element of fraud. The principle of specialty was repeatedly reaffirmed by Italian lawmakers, who provided for it in: the criminal code art. 15; the law on decriminalisation art. 9, l. 689/1981; and with specific reference to the tax sector in L.D. 74/2000 art. 19. Article 19 indeed states that when the same fact is punished by a criminal and an administrative penalty, only the special provision applies.

Nevertheless, the case-law of the Supreme Court of Cassazione consistently has affirmed that the principle of specialty does not apply in these cases. On the contrary, between the two offences there is a structural relationship of *criminal progression*, meaning that in

[75] Alessandri, *Cit.* (n. 48).
[76] Articles 20 and 21, para. 1, L.D. 74/2000 explicitly sanction the autonomy of criminal and administrative proceedings, thus legitimizing their coexistence.
[77] Rivello (2018); Tysserand (2017); Corso (2017); Ciraulo (2015); Amatucci (2015); Podigghe (2014); Giovannini (2014); Cesari (2014); Boffelli (2014); Flick (2014).
[78] To name but a few: *Kiiveri v. Finland*, App no 53753/12 (ECtHR, 10 February 2015), *A and B v. Norway* (n. 18), *Jóhannesson and Others v. Iceland* (n. 37). Viganò (2017); Gallo (2017); Dova (2015).
[79] Russo (2017); Borrelli et al. (2016), pp. 487-500; Bontempelli (2015); Giacometti (2015).
[80] Carinci (2015); Pierro (2014); Marello (2013).

minor cases only the administrative penalty is applied, while in the most serious cases both administrative and criminal sanctions are applied.

> [T]he criminal offence, indeed, constitutes a much more serious violation. Although it necessarily "contains" the administrative offence, it also enriches it with essential elements which are not altogether attributable to the paradigm of specialty, as it requires decisive behavioral segments … which are temporally placed at a moment after the fulfillment of the administrative offence. Consequently criminal and administrative offence coexist and they both shall be applied. (Cass.pen., SS.UU., 37424, 37425/2013[81] and Cass. pen., Sez. III, 40526/2014).

Qualified in this way, the relationship between the provisions at issue and considering that both criminal and administrative sanctions apply, the Supreme Court of *Cassazione* faced the question on compliance with the double-track system of sanctions under the Italian tax law with the conventional *ne bis in idem*. The Supreme Court, with the aforementioned judgments, held that even if the formal administrative sanctions were deemed criminal in substance according to the ECtHR's criteria, the Italian double-track system of sanctions adopted for the repression of tax offences under no circumstances violates the ban established by art. 4 of Prot. No. 7 to the ECHR because criminal offences, compared with administrative ones, concern different behaviours and require different elements. The Court further clarified that, although part of the requirements and conducts are common to both offences, their constituent elements diverge in terms of some essential components. This is why the relationship between their structures must be considered in terms of criminal progression and not of specialty. However, the interpretation given by the Supreme Court of *Cassazione* leaves many doubts. Since the judgment *Zolotukhin v. Russia*, recently recalled in *Lucky Dev v. Sweden* and *Jóhannesson and Others v. Iceland*, the ECtHR clarified that with regard to *ne bis in idem* it matters that the identity of the facts, naturalistically understood, go beyond any possible diversity that may exist between other constitutive elements of the criminal and administrative offences[82]. Therefore, according to this approach, the offences at issue punish the same conduct: the omitted payment of the deduction or tax due.

In light of these observations, among legal academics and courts there were many[83] who, in order to resolve this situation of possible contrast between the Italian legal framework and the ECHR, suggested a conventionally oriented interpretation by the Constitutional Court of art. 649 of the Italian Code of Criminal Procedure. Once the tax procedure or the criminal trial becomes definitive, the possibility of continuing the parallel procedure/trial is precluded. This interpretation would inevitably imply that through the use of more or less dilatory strategies the final choice on which sanction to adopt would be left to the arbitrary will of the defendant or, even worse, the tax administration. Others[84] suggested enhancing and underlining the implementation of the principle of specialty, pursuant to the structural relationship which would exist between the criminal and administrative provisions, recognising the prevalence of the first one in cases of the two offences' coexistence. This interpretation was also supported on the basis that lawmakers repeatedly provided for application of this principle, in art. 15 criminal code, in art. 9 l. 689/1981, and again in art. 19 L.D. 74/2000. However, this hermeneutical operation is precluded by the systematic reading carried out by the Supreme Court of Cassazione, which believes that due to the current formulation of the laws concerning tax offences, the simultaneous occurrence of multiple sanctions is inevitable[85].

Finally, some[86] have suggested that these cases should directly apply art. 50 of the Charter of Fundamental Rights of the European Union (CFREU). As mentioned in the previous paragraph, indeed, after the entry into force of the Treaty of Lisbon, the rights enshrined in the CFREU directly affect the Member States' legislation. Therefore, if a person is accused twice under the same facts, when one of the two proceedings becomes definitive the first-instance judge, pursuant to art. 50 CFREU, must interrupt the ongoing proceeding; or, if

[81] Valsecchi (2013); Albano (2014).
[82] See: n. 15.
[83] Flora (2016); Caianiello (2015); Lavarini (2014).
[84] Maiello (2017); Bolis (2017); Colaianni and Monza (2017); Dova (2016).
[85] *Ex pluribus:* Cass. pen., Sez. III, n. 25815/2016. Mazza (2015).
[86] Viganò (2016c); Wattel (2018); Villani (2016).

both proceedings become definitive, it must invalidate the last issued sanction. The argument of the direct applicability of art. 50 CFREU was recently confirmed by the CJEU regarding a reference for a preliminary ruling raised by an Italian court (*Menci* case[87]).

Yet, in *Menci*, the Court, referring to the Italian legal framework on the repression of tax evasion, restricted the scope of Art. 50, pointing out that it does not preclude national legislation under which criminal proceedings may be brought against a person even though that person has already been made subject, in relation to the same facts, to a final administrative penalty of a criminal nature, provided that the legislation: 1) pursues an objective of general interest that is such as to justify such a duplication of proceedings and penalties; 2) contains rules ensuring coordination that limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from the duplication of proceedings; and 3) provides for rules making it possible to ensure that the severity of all the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned[88].

In the end, although this ruling clarified some aspects related to the direct applicability of art. 50 CFREU and affirmed States' legitimacy in adopting double-track systems of sanctions, serious doubts still remain on the constitutionality of this "derivation discipline", which conflicts with the main principles of the Italian legal order, such as the Rule of Law in criminal matters, established by art. 25 of the Italian Constitution. The inadequacy of these "legal orthopedics" operations supported by Italian legal academics and upper courts, once again, urgently call Italian lawmakers to their own unavoidable responsibility in establishing systems of sanctions that are effective, but also respectful of fundamental human rights.

Pressured by the *Euro-conventional* case-law, the Italian lawmakers have approved in the last years some amendments to the L.D. 74/2000 in order to mitigate the afflictive effects caused by the dual-track system of sanctions in the tax offence sector[89]. However, such measures have proved insufficient to fully prevent cases of overlapping between administrative and criminal sanctions issued against the same person for the same fact. Therefore, alternative solutions still need to be found.

5. Insider dealing in England and Wales legal discipline.

In the 1970s, the UK sought to discipline insider dealing cases through regulatory sanctions issued by the authorities responsible for overseeing English financial markets, namely the City Panel on Takeovers and Mergers and the London Stock Exchange[90]. This system proved to be absolutely ineffective because these bodies did not properly enforce these measures. Thereafter, in 1980, the UK amended the Companies Act to make insider dealing a criminal offence. From that time to the present day, many amendments have been made to insider trading law. Among the most important reforms were the Companies Act 1985, the Criminal Justice Act 1993 (CJA 1993), the Financial Markets and Services Act 2000 (FSMA 2000) and finally, the Financial Services Act 2012.

The first classification of insider dealing, which is also the broadest, is provided by s. 52, para. 1, part. V, CJA 1993. An insider dealer can be only a physical person, not a legal person. The section provides that «an individual who has information as an insider is guilty of insider dealing if he deals in securities that are price-affected securities in relation to the information». Insider dealing occurs only if the acquisition or disposal takes place on a regulated market, or the dealer relies on a professional intermediary or acts as a professional intermediary.

The second and third classifications are provided in s. 52, para. 2, CJA 1993. Specifically, an

[87] ECJ, Case 524/15, *Luca Menci* [2018], available at curia.europa.eu.
[88] Consulich (2018); Consulich and Genoni (2018); Corso (2018); De Franceschi (2018).
[89] Tripodi (2017); Giarda and Alloisio (2016); Ingrassia (2016), pp. 3-44. Particularly, see in these sense Article 13 (*Cause of non punishability - Payment of tax debt*), para. 1, L.D. 74/2000, which establishes that: «*The offenses provided in articles 10bis, 10ter and 10quater, paragraph 1, are not punishable if, before the declaration of the first-instance trial's opening, the tax debts, including the administrative sanctions and interests, have been extinguished by the full payment of the due amounts, also as a result of special conciliatory procedures and agreement with tax assessment established by the tax laws, as well as of active amendment*»; or article 13*bis*, para. 1, L.D. 74/2000, which provides for a mitigating circumstance, establishing that: «*Except for non-punishment cases, the penalties for the crimes provided in this Decree shall be decreased up to half and the accessory penalties indicated in article 12 will not apply if, before the declaration of first-instance trial's opening, the tax debts, including administrative sanctions and interests, have been extinguished by the full payment of the due amounts, also as a result of special conciliatory procedures and of agreement with the tax assessment established by the tax laws*».
[90] Davies (2015).

individual who has information as an insider is also guilty of insider dealing if:

1. He encourages another person, witting or unwitting, to deal in securities that are price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the circumstances mentioned in s. 52, para. 3, CJA 1993 (*tipping*).
2. He discloses the information in a manner outside the proper performance of the functions of his employment, office or profession, to another person (*tuyautage*).
3. In the end, it is important to recall the *R. v. McQuoid* case. In this judgment, the Lord Chief Justice, top figure of the UK judiciary, maintained that insider dealing is not a victimless crime and:

> Those who involve themselves in insider dealing are criminals: no more and no less… The message must be clear: when it is done deliberately, insider dealing is a species of fraud; it is cheating. Prosecution in open and public court will often, and perhaps much more so now than in the past, be appropriate. Although those who perpetrate the offence may hope, if caught, to escape with regulatory proceedings, they can have no legitimate expectation of avoiding prosecution and sentence[91].

With regard to sanctioning, the crime of insider dealing is punished in the UK with a maximum sentence of seven years imprisonment, jointly or alternatively with a fine of an amount at the discretion of the proceeding court. In case of summary conviction, the maximum sentence can be six months of detention, or a fine, or both.

The insider dealing regulatory scheme is contained in part. VIII of the FSMA 2000, particularly from section 118 to 131a. This regulatory complex entrusts the FCA with the power to issue financial penalty and to apply to the High Court in England (or to the Court of Session in Scotland) for injunctions, restitution orders and debarment provisions. In particular, there are three types of regulatory offences which are connected to insider dealing conducts:

1. The first type of behaviour is where an insider deals, or attempts to deal, in a qualifying investment or related investment on the basis of inside information relating to the investment in question.
2. The second is where an insider discloses inside information to another person, in a manner other than in the proper course of the exercise of his employment, profession or duties.
3. The third is where the behaviour: (a) is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would be, or would be likely to be, regarded by him as relevant when deciding the terms on which transactions in qualifying investments should be affected, and (b) is likely to be regarded by a regular user of the market as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the market.

Therefore, it is evident that regulatory and criminal provisions are very similar, if not identical in their contents, thus creating in the abstract the risk of double jeopardy[92]. This is why the UK lawmaker delegated to the FCA the task of identifying in detail criteria that would avoid double jeopardy issues. On the one hand, after consulting companies' and consumers' representatives, the Authority established in the FCA Handbook the parameters by which graduated fines could be issued. In this way, the FCA can adjust regulatory sanctions to the offence committed so that they have restorative and not punitive purposes. On the other hand, the FCA established the criteria by which one could decide whether to issue regulatory measures or start a prosecution. Chapter 2, para. 6, General Principles, of The Code for Crown Prosecutors is particularly important for the *ne bis in idem* compliance in insider dealing cases, which applies also to FCA officers. It establishes that: «Prosecutors must apply the principles of the European Convention on Human Rights, in accordance with the Human Rights Act

[91] *R. v. McQuoid* [2009] EWCA Crim 1301, [2009] 4 All ER 388.
[92] Walters and Hopper (2001); Beazley (2001).

1998, at each stage of a case».

6. England and Wales and the right not to be punished twice for the same fact.

6.1. *England and Wales, the ECHR and the Human Rights Act 1998.*

Even before the promulgation of the Human Rights Act 1998, the Highest Courts in the UK ensured the respect of fundamental human rights through an interpretation pursuant to the Convention of the domestic law. Indeed, if the law appeared in contrast with the ECHR and left room for interpretation, the Courts were entitled to adjust it in this way. Conversely, when the law was clear, even if it was in contrast with Convention's principles, the Courts were bound to let domestic law prevail, pursuant to the constitutional principle of the supremacy of parliamentary Acts. Thus, in a case of contrast between national and international law, a person could only hope for a legislative amendment, as a lawmaker called to honor the international commitments he made. Otherwise, if an individual considered his fundamental rights harmed by UK law, once the domestic remedies were exhausted, he could obtain justice by turning his case to the ECtHR. However, this *status quo* generated two orders of difficulty. On the one hand, the UK compliance with the ECHR was slow and cumbersome. On the other hand, the entry of human rights through ECtHR judgments (without the ability to distinguish whether they had *erga omnes*, or only *inter partes*, effects) entailed serious inefficiencies. This not only exposed the UK to general embarrassment with the other contracting States, but it also did not permit the Parliament to have control over the existing laws in the country. Thus, the Labor government, chaired at the time by Tony Blaire, and inkeeping with its electoral promises, did a "transplantation" of the ECHR into the national legislation through a parliamentary Act called the Human Rights Act 1998 (HRA 1998). While HRA 1998 granted prompt and effective protection of fundamental human rights in the UK, it left the parliamentary supremacy on international legal sources unchanged. In this way, the UK lawmaker hindered the process of homogenization of the minimum standards' protections of human rights pursued by the ECtHR. Even today, when it is impossible to interpret domestic law in conformity with the ECHR in a concrete case, the Highest Courts cannot autonomously disregard the national law; at best, they can issue a decree of incompatibility (s. 4, para. 4 and 6, HRA 1998), through which the government is informed of the existing contrast between ordinary law and human rights.

It bears noting that, despite the fact that UK implementing procedures are often partially different from those adopted in continental legal orders, both ECHR's case-law and fundamental rights find full citizenship and total respect in the UK, even with respect to sensitive sectors such as the regulation of financial markets.

6.2. *Double jeopardy and the notion of Criminal charge according to the ECHR in England and Wales.*

The art. 4 of Protocol no. 7 to the ECHR instructs the "Right not to be tried or punished twice" for the same fact. In Common Law countries, this principle is better known as *ban on double jeopardy* or *autrefois rule*. Even if the UK did not ratify this protocol, the principle has long been rooted in the UK legal culture. Indeed, the *autrefois rule* has been applied in English Common Law since the seventeenth century. On this point, the Lord Justice Auld explained in the Law Commission's 2001 Report that:

> Like many of our principles of criminal law, it (autrefois rule) has its origin in harsher times when trials were crude affairs affording accused persons little effective means of defending themselves or of appeal, and when the consequence of conviction was often death. Thus, in Hawkins' Pleas of the Crown it is said that it is founded on the

maxim '*that a man shall not be brought into danger of his life for one and the same offence more than once*'.

On the *autrefois rule*, the Law Commission wrote, in its 2001 Report entitled "Double jeopardy and prosecution appeals," that:

> The doctrines of autrefois acquit or autrefois convict state that no one may be put in peril twice for the same offence. Accordingly, where a person has previously been acquitted or convicted (or could, by an alternative verdict, have been convicted) of an offence and is later charged on indictment with the same offence, a plea of autrefois will bar the prosecution. An analogous rule applies in summary trials.

Connelly v. DPP is the leading case in the UK on the *autrefois rule*. In the judgment it says that:

1. A man cannot be tried for a crime in respect of which he has previously been acquitted or convicted. This legal principle was subsequently reaffirmed also in *R. v. Thomas Sim Beedie* and in *DPP v. Alexander*.
2. The word *offence* embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply, it must be the same offence both in fact and in law.
3. Outside the boundaries of the *autrefois rule*, protection against double jeopardy is provided by the implementation of the *abuse of process* law.

In the end, it must be underscored that over the past twenty years the UK legal system has not been impervious to ECtHR case law. Thus, thanks to a long dialogue with the ECtHR, principles such as the "Right to a fair trial" (art. 6 ECHR), the "No punishment without law" (art. 7 ECHR), and the "Right not to be tried or punished twice" merged in the UK legal system.

6.3. *FSMA 2000, FCA and the ECHR.*

In 1999, the Joint Committee on Financial Services and Markets was called on by the House of Parliament to analyze and discuss the Draft on Financial Services and Markets Bill. The Committee quickly expressed its concerns. The Committee emphasised that the lawmaker, through this Act, intended to concentrate in a single regulatory authority, namely the FCA, many different and pervasive powers (both to issue regulatory sanctions and to prosecute criminal offences). This issue created serious concerns within the Committee, particularly with regard to the respect of fundamental human rights. In the Annex C to the First Report of April 29th 1999, the Committee pointed out that:

> The Bill will be in violation of that Article to the extent that it allows 'dual prosecution' of a person for breach of the criminal law (for insider dealing or breach of s. 47 of the FSA 1986) and for breach of the market abuse rules… The fact that the Bill describes the fines as 'civil' is, for the reason we have explained above, no more than a starting point in the analysis. In our view, a consideration of each of the second and third criteria referred to above point strongly to the conclusion that at least some if not all of the disciplinary offences under the Bill are criminal in character.

In May 1999, the Government in the Memorandum from HM Treasury maintained that as these sanctions are applied to specific categories of subjects, inkeeping with the ECtHR case-law policy, they must be correctly qualified as regulatory. Furthermore, if the purpose of the sanctions is to protect values, such as consumer savings, it is irrelevant if the fines issued are high. Finally, the Government claims that in market abuse punishment, no custodial measure is provided, even in the case of non-payment of fines. Therefore, there is no doubt that these sanctions are regulatory in nature. Additionally, the Government ensures, through its desire to avoid conflict with the ECHR, that minimum guarantees will be raised in these cases.

Then, on June 2nd, 1999, the Committee formulated its Second Report, as a rejoinder to the Government's Memorandum. In this Report, Lord Lester affirms that, «The Government's approach is 'too sweeping', and leaves scope for considerable legal uncertainty and a real risk of a successful legal challenge in a particular case».

From 1999, onwards, despite the approval of important acts like the Financial Services Act 2012 (FSA 2012), Parliament and the Higher Courts no longer raised doubts about compliance with the guarantees provided by art. 6 ECHR and related respect for the conventional *ne bis in idem* principle. Legal academics also endorsed the Committee's conclusions denouncing the risk for market abuse punishment to violate the ECHR.

7. Conclusion.

In conclusion, and with reference to the last clarifications made by the Court, Italy should adopt a deterrent mechanism based on increasing sanctions, ranging from administrative penalties for less damaging behaviours, to criminal sanctions for the most serious cases. The parameter through which sanctions should be graduated is the *proportionality* occurring between the offence's entity and the protection of the legal values at stake, as currently happens in the UK. In this way, the Consob can serve as the financial markets' "sentinel", relying on specialized employees who can focus on suspicious fluctuations in share values. Should the Consob find financial anomalies, it can report them to the public prosecutor's office, and if it wants to be the plaintiff in the suit, no one could object on the basis of conflict of interest. Moreover, prosecutors will be able to focus on offenders' prosecution, without wasting time on the complicated monitoring of markets, which often falls outside of their expertise. Administrative sanctions should be relegated to minor cases, which better fits with non-jurisdictional proceedings. Finally, in order to preserve the rule of law it is important to eliminate law-creating judgments, insofar as the lawmaker should be the only entity entitled to write the new legal discipline of insider dealing.

With respect to the UK legal system, there should be a better distinction between the legislature and the executive. Indeed, the criteria used to decide whether to issue a certain type of sanction or another should be established by the Parliament and not by the FCA itself. In the end, providing the UK with a system of increasing sanctions would improve the uniformity of the laws against insider dealing among the member countries of the Council of Europe, thus facilitating judicial cooperation among them.

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