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Do Market Abuse Rules Violate Human Rights? The Grande Stevens v. Italy Case

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Marco Ventoruzzo
Pennsylvania State University,
Bocconi University and ECGI

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Keywords: market abuse, insider trading, market manipulations, European Convention on Human Rights, due process, double jeopardy

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Marco Ventoruzzo*
Professor of Law
Pennsylvania State University,
Dickinson School of Law
113 Beam Building
University Park, PA 16802, United States
phone: +1 814-865-8957
e-mail: mxv23@dsl.psu.edu

*Corresponding Author

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Marco Ventoruzzo[*]

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[*] Professor of Law, Pennsylvania State University, Dickinson School of Law, University Park, PA, USA; Professor of Law, Bocconi University Law School, Milan, Italy; External Scientific Member, Max Planck Institute, Luxembourg; Vice-Director, Paolo Baffi Center on International Markets, Money and Regulation; Research Associate, ECGI, Brussels, Belgium; Affiliate Professor, Pennsylvania State University School of International Affairs. LL.M., Yale Law School; Ph.D., Università degli Studi of Brescia, Brescia, Italy; J.D., Università degli Studi di Milano, Milano, Italy; B.A. in Economics and Business Administration, Bocconi University, Milan, Italy. For discussions on the topic of this work and comments I wish to thank Alberto Alessandri, Miriam Allena, Thierry Bonneau, Alessandro Chieffi, Ignacio Farrando, Kit Kinports, Rainer Kulms, Melissa Miedico, Paolo Montalenti, Francesco Mucciarelli, Peter Muelbert, Marco Saverio Spolidoro, Mario Stella Richter jr., Wladimiro Troise Mangoni, and Guido Rossi. I also wish to thank participants in a workshop at Notre Dame Law School sponsored by the *Notre Dame Journal of International and Comparative Law* and by the *Helen Kellogg Institute for International Studies* on October 10, 2014 for their comments, and in particular Felicia P. Caponigri for organizing the workshop. Excellent research assistance was provided by Elizabeth Robinson.

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1. Introduction

On March 4, 2014, the European Court of Human Rights ("ECHR") handed down a decision in line with the Court's precedents, but with new potential significant effects on the regulation of market abuse in Europe. This decision raises interesting questions from a theoretical, practical, and comparative perspective.

The case, *Grande Stevens and Others v. Italy*, is well-known in financial and legal circles and has stirred a lively debate, attracting the attention of the media.[1] In short, the Strasbourg Court held that the administrative procedure followed by Consob – the Italian Securities and Exchange Commission – violates the due process requirements of the European Convention on Human Rights, in particular with respect to the separation between prosecution and adjudication and right to a full defense of the accused. In addition, the ECHR concluded that the possibility to cumulate "administrative" pecuniary sanctions (or "civil penalties") and criminal sanctions is contrary to the prohibition against double jeopardy, or *ne bis in idem*, also set forth by the European Convention on Human Rights. This decision, obviously, has very important practical implications not only for Italy, but for all the signatories of the Convention. In several European countries, the regulation of market abuses shares significant similarities with the Italian approach, also because, like in Italy, it is modeled on European legislation.

This Article offers a discussion of the *Grande Stevens* decision, which is also an intriguing corporate law story. The Article is organized as follows: first, we will examine the underlying facts and the procedural history of the litigation; second, we will briefly explain the Italian regulatory framework applicable at the time of the dispute; third, we will dissect the reasoning of the ECHR focusing on three issues: the "criminal" nature of the sanctions that, in the opinion of the Court, are only formally defined "administrative" by the Italian legislature; the violations of due process; and the violation of the double jeopardy principle. A following paragraph will discuss the possible implications of the decision vis-à-vis the recent reform of the Market Abuse

[1] *Grande Stevens et autres c. Italie* (App No. 18640/10, 18647/10, 18663/10, 18668/10) (2014) ECHR 4 March 2014, the French text is available on the website of the Court, *http://www.echr.coe.int/Pages/home.aspx?p=home*; the decision has been mentioned on the Harvard Law School Forum on Corporate Governance by Guido Rossi and Marco Ventoruzzo, *http://blogs.law.harvard.edu/corpgov/*. In Italian newspapers, the decision has been briefly discussed by M. Castellaneta, 'Consob-tribunali, niente cumulo' *Il Sole 24 Ore* (March 5 2014) 21; M. Clarich, 'Il sistema italiano difetta di garantismo' *Il Sole 24 Ore* (March 5 2014) 21; and more recently by G. Rossi, 'Ci sarà pure un giudice a Berlino' *Il Sole 24 Ore* (March 30 2014) 1. The President of Consob, the Italian Securities and Exchange Commission, explicitly referred to this case in his annual address to financial markets, *Discorso del Presidente al mercato finanziario*, (Speech May 5 2014) 17 <www.consob.it>.

Directive. After that we will take a comparative perspective considering how the U.S. Supreme Court, confronted with a fairly similar issue, has decided it in two opposing decisions in the 1980s and 1990s. Finally, we will conclude by suggesting how the Italian (and possibly others) legislature could respond to the issues raised by the ECHR.

2. FACTS AND PROCEDURAL HISTORY

The facts that lead to the *Grande Stevens* litigation are fairly complex, but for our purposes they can be summarized as follows.[2] In 2002, the Italian listed car manufacturer Fiat obtained a convertible loan of approximately three billion euros from a pool of banks. The loan would have expired in 2005 and, if Fiat would have not reimbursed it at that date, it would have been converted in Fiat common shares. The banks receiving the shares had the obligation to offer them pro-rata to existing shareholders (so-called "indirect pre-emptive rights"). In 2005 it became clear that the price at which the shares had to be offered to the shareholders, determined pursuant to the contract, would have been higher than the market price. The consequence could have been a dilution of the participation of Ifil, the controlling shareholder of Fiat, which could have been reduced by approximately 7% in September 2005. In fact, if the shares would have been offered to the existing outstanding shareholders at a fair price, and most of them would have purchased the securities, the ownership structure would have remained more or less the same; on the other hand, if the banks would have been unable to distribute the shares proportionally among shareholders, the banks themselves could have remained in possession of a large percentage of shares, or a third party could have obtained it.

In the spring of 2005, several corporations of the Fiat group and some of their directors and consultants started discussing ways to avoid this possible outcome. The solution was identified in an equity swap agreement with the investment bank Merrill Lynch, according to which — depending on the price of Fiat's shares — the bank could have been required to pay a certain sum ("cash settlement") to Exor, a corporation of the Fiat group. The contract was later modified to provide that Merrill Lynch, rather than paying a sum of money, would have delivered Fiat shares ("physical settlement"), therefore avoiding the dilution. The exact moment when the contract had been amended, and whether the amendment should have been disclosed to the market, is one of the contentious issues in the ensuing litigation.[3]

More precisely, in the summer of 2005 the market price of Fiat shares increased. Three possible reasons could have explained this appreciation: the purchase of Fiat shares by Merrill Lynch, which had to deliver shares pursuant to the equity swap agreement; the fact that Fiat disclosed that the 2002 loan would have not been repaid, which might have led to a takeover due to the dilution of the controlling shareholder; and the announcement of good managerial results. Consob asked Fiat to comment on the jump of the share prices, and in particular to indicate its possible causes. Both Fiat and other group corporations, in July and August, denied to possess any specific information that could explain the phenomenon, confirming, however, that Ifil intended to remain in control of Fiat.

[2] The facts are primarily taken from the decision of the Turin Tribunal, December 21 2010.

[3] On the precise moment at which material corporate information should be disclosed under Italian law see the concise but clear discussion in P. Montalenti, *Società per azioni corporate governance e mercati finanziari* (Giuffre Editore, Milano 2011) 22.

In September of 2005, Fiat disclosed the final version of the equity swap agreement, including the physical settlement provision, and as envisioned in the contract the controlling shareholders were able to maintain their majority stake in the corporation.

A few months later, in February 2006, the Insider Trading Office of Consob notified to the corporations involved — and several individuals, among which was Mr. Grande Stevens —the initiation of a sanctioning proceeding for the alleged violation of market manipulation provisions, and in particular Article 187-*ter* of the Italian Consolidated Law on Financial Markets ("Testo Unico della Finanza", hereinafter also "TUF"). The thrust of the argument of the Insider Trading Office was that the equity swap agreement and the physical settlement provision had already been executed before the communications made to the market in August of 2005, and therefore that those communications, not giving full disclosure to the agreement, amounted to market manipulation. Pursuant to the applicable administrative rules, the accused filed their defensive briefs with the Consob, but the Commission accepted the conclusions of the Insider Trading Office and approved pecuniary sanctions to the corporations and the individuals involved varying from 500,000 euro to 5 million euro. Two individuals received, respectively, administrative sanctions equal to 5 and 3 million euro; and several individuals also received a temporary bar from serving as director or executive of listed corporations.

The decision of the Commission was appealed in the Court of Appeals of Turin. The court substantially upheld the decision of the Consob, and the Supreme Court (*Corte di Cassazione*) confirmed in 2009.

As we will discuss more extensively below, market manipulations (and insider trading) in Italy, as well as in many other systems, not only in Europe, can be subject to both administrative (Article 187-*ter* TUF) and criminal sanctions (Article 185 TUF). In 2008, the Turin prosecutors sued the individuals that had already received an administrative sanction. The trial court acquitted the defendant, holding in particular that the relevant conducts did not have a potential significant impact on market prices. On appeal, however, some of the defendants were found guilty, and they appealed to the Italian Supreme Court (*Corte di Cassazione*). While the case was pending in the Supreme Court, the statute of limitations expired in 2013, and the defendants were acquitted (it should be noted that under Italian law, differently from several other systems, legal procedures do not interrupt the running of the statute of limitation, a solution that raises concerns in terms of criminal enforcement, but that should also be considered in the light of the sometimes extreme length of court proceedings). In the meanwhile, the defendants had also initiated the proceedings in the European Court of Human Rights, which issued its decision —on which we focus here— on March 4, 2014.[4]

3. MARKET ABUSE REGULATION AT THE TIME OF THE EVENTS

Before examining the decision of the Strasbourg court, it is useful to spend some words on the regulatory structure of market abuse under Italian law at the time of the alleged violations – a

[4] The description of the procedural history is primarily taken from the decision of the ECHR itself.

structure derived from the implementation of Directive 2003/6/CE –, and on the sanctioning procedure followed by Consob.[5]

Directive 2003/6/CE (as we will see, recently reformed), required Member States to prohibit insider trading and market manipulation and to provide for adequate administrative sanctions. Article 14 of the directive, however, in a quite ambiguous way, stated that:

> "Without prejudice to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive. "

It is not entirely clear if this provision should be interpreted as specifically allowing parallel proceedings and cumulative criminal and administrative sanctions; or rather as simply saying that Member States must – at a minimum – provide for appropriate administrative sanctions, but that they can *alternatively* opt for criminal sanctions. In other words, it is questionable if the directive itself authorizes double jeopardy or not. The question is relevant because, in the first case, complex issues concerning the hierarchy between the European Convention on Human Rights and European Union law could be raised. The ECHR however simply focused on whether Italian law violated the Convention. In any case, it's worth mentioning that the second interpretation is more convincing: the European legislature has simply indicated that criminal *or* administrative sanctions can be imposed in case of market abuse, but has not required, or authorized, a *bis in idem* sanctioning structure. The reference to the "proportionality" of the sanctions, in the last sentence of the provision, seems to confirm this reading.

Let's take a look at the national rules prohibiting market manipulations that were invoked in the *Grande Stevens* litigation (in the sake of brevity, we do not discuss the regulation of insider trading).[6] As mentioned before, the administrative violation is regulated by Article 187-*ter* TUF, which punishes two types of conducts, "informational" and "operative" manipulation. The former consists of the dissemination of false or misleading information, rumors or news with respect to securities traded on regulated markets or multilateral exchange facilities. The Fiat group and its executives and consultants were accused of violating this provision by not properly and timely disclosing the equity swap agreement, an accusation which also raises the question of the relevance of omissions. Operative manipulation, on the other hand, concerns artificial transactions which alter the regular functioning of the market. The administrative pecuniary sanctions are particularly harsh, especially after the enactment of Law No. 262 of 2005, and

[5] For an overview of the European regulatory framework, see E. E. Avogouelas, *The Mechanics and Regulation of Market Abuse. A Legal and Economic Analysis* (Oxford 2005) part. Cap. 6 for an historical perspective. A discussion of the Italian system at the time of the events can be found in F. Annunziata, *Abusi di mercato e tutela del risparmio* (Torino 2006) 3 ff.; G. Ferrarini, *La nuova disciplina europea dell'abuso di mercato*, in *Rivista delle società* (2004) 43 ff.; C. Comporti, *La nuova disciplina degli abusi di mercato: una prima ricognizione*, in *Dir. banc.*(2005)II, 62 ff.; A. Saponaro, *Market abuse: disciplina a tutela dei mercati finanziari*, in *Società(* 2004) 767 ff. The first attempts to regulate the matter at the European level are discussed in K. J. Hopt, *The European Insider Dealing Directive*, in *Common Market L. Rev.*(1990) 51 ff.

[6] For a comparative analysis of insider trading regulation in Europe and in the U.S., see Marco Ventoruzzo, *Comparing Insider Trading in the United States and in the European Union: History and Recent Developments*, forthcoming in *European Company and Financial Law Review (ECFR)*, 2014, and available on *www.ssrn*.com.

range from 100,000 euro to 25 million euro; in addition temporary occupational debarments are possible.

While with respect to insider trading the conducts relevant for the administrative and the criminal violations are identical (the only difference concerning intent), the conducts relevant for the administrative and criminal violations for market manipulations differ.

First of all, in fact, Article 185 TUF, regulating the criminal violation, seems to exclude the dissemination of false or misleading *opinions*, which are clearly relevant for the administrative violation. This distinction is obviously not clear-cut, since the line separating facts from opinions is often blurred (for example, is the fact that the CEO believes that a merger is in the best interest of the shareholders and fair a "fact" or an "opinion"?), and scholars do not have a unanimous position on this issue. A second, and possibly more important difference between the administrative and the criminal provisions, is the fact that the latter is applicable only when the false or misleading information is *actually* capable of altering market prices; the administrative sanction, on the other hand, can be imposed independently from the actual effect of the abuse on market prices. This distinction might be subtle and difficult to draw, but it is very important and, in fact, it was on this basis that the Tribunal of Turin acquitted the defendants. One last difference concerns culpability: to impose the administrative sanction, according to the prevailing view, negligence is sufficient; while to impose the criminal sanction, the defendant must be proved to have acted intentionally.

In terms of punishment, a violation of Article 185 TUF might lead to a prison term from one to twelve years, a monetary fine in the same range set forth by the administrative provision, and temporary occupational debarments.[7]

In theory, it could be argued that since the criminal provision is narrower, when the elements of the criminal violation are present, only Article 185 TUF can be applied, therefore avoiding a potential violation of the *ne bis in idem* principle. However, this solution is ruled out by Article 187-*terdecies* TUF, which, when coordinating the administrative and criminal provisions states that when the same fact is punished both with an administrative and a criminal monetary sanction, the latter is reduced to take into account the former. For example, is the administrative sanction is determined in 500,000 euro, and the criminal one in 800,000 euro, the criminal sanction should be reduced to 300,000. This provision, as well as the facts of the case we are considering, confirms that before the decision of the ECHR, under Italian law, administrative and civil penalties could be cumulated. In fact, several Italian criminal law scholars had criticized this circumstance. In 2010 Alberto Alessandri, a prominent Italian criminal law scholar and

[7] Italian contributions on these provisions abound. Some of the most relevant issues for the *Grande Stevens* decision are discussed, in Italian, in F. Consulich, *Manipolazione del mercato e disorientamenti dogmatici: tra eventi di pericolo e pericolo di eventi*, nota a Trib. Torino, 21 dicembre 2010, in *Società* (2011) 823; A. Crespi, *Le difficili intese sull'aggiotaggio informativo*, in *Banca borsa* (2010) I, 247 ff.; G. Lunghini, *La manipolazione del mercato*, in *Dir. pen. e proc.* (2005) 1474 ff.; M. Miedico, *La manipolazione del mercato: illecito penale o illecito amministrativo?*, commento a Cass. Penale, 3 maggio 2006, n. 15199, in *Società*, 623 ff.; F. Mucciarelli, *L'abuso di informazioni privilegiate: delitto e illecito amministrativo* in *Dir. pen. e proc.* (2005) 1465 ff.; Id., *Primato della giurisdizione e diritto economico sanzionatorio: a proposito di market abuse*, in *Dir. pen. e proc*. (2006) 137 ff.; Id., *Manipolazione del mercato*, in *Il testo unico della finanza* a cura di M. Fratini – G. Gasparri, Torino (2012) III, 2378; C. E. Paliero, *«Market Abuse» e legislazione penale: un connubio tormentato*, in *Corr. mer.*, 2005, 809 ff. S. Seminara, *Disposizioni comuni agli illeciti di abuso di informazioni privilegiate e di manipolazione del mercato*, in *Dir. pen. e proc.* (2006) 9 ff.; M. Vizzardi, *Manipolazione del mercato: un «doppio binario» da ripensare?*, in *Riv. it. dir. proc. pen.*(2006) 704 ff., e in *Diritto penale dell'impresa. Materiali per lo studio* (Torino 2007) 580 ff.

attorney, condemned the "duplication of administrative and criminal liability, in clear conflict with the principle of *ne bis in idem*, for example in the area of market abuse."[8]

4. ADMINISTRATIVE PROCEDURE FOR MARKET ABUSE SANCTIONS

In order to complete the background in which the ECHR's decision should be framed, a few observations about the sanctioning procedures involved are in order. Until 2005, Italian law provided for a clear distinction between accuser and judge for administrative sanctions in the area of securities regulation. Consob was responsible for investigating the alleged violation and proposing a sanction, on which the Minister of the Treasury had the authority to decide. The same law that implemented in Italy the European regulation of market abuses, modified this approach by providing that Consob itself (more precisely, different divisions within Consob) would investigate violations, propose penalties, and decide on their infliction. Of course the new rules immediately raised a due process problem with respect to the separation between accuser and judge but, as we will see below, it should also be mentioned that this regulatory model is followed in lots of jurisdictions, it has a rationale in terms of effective and efficient enforcement, and that interested parties can challenge the determinations of the Consob in court.

Article 195 TUF, as modified in 2005, establishes some general principles that the sanctioning procedure must follow, among which the right of the accused to be heard and to have full access to the accusing documents, and the separation between accuser and judge. Pursuant to these principles, Consob regulated its sanctioning procedure in 2005.

It is not necessary here to dwell into the nitty-gritty details of the internal procedure.[9] For our purposes, suffice it to say that a specific office in charge of investigating market abuse violation, the "Insider Trading Office," could initiate the procedure notifying the interested parties. After an exchange of information and documents between the Insider Trading Office and the interested parties, the Office would transmit its conclusions to the "Administrative Sanctions Office," which – also on the basis of the defense briefs filed – could formulate its recommendation for the infliction of a sanction, on which the members of the Commission (the hierarchical apex of Consob) would decide. The interested parties, however, did not have to be informed of the recommendation of the Administrative Sanctions Office, and did not have the right to file briefs or be heard by the Commission before the final decision. A second problem with this procedure, obviously, is the fact that the accusers (the Insider Trading Office and the Administrative Sanctions Office) are branches of the same agency that decides on the sanction, and are hierarchically subordinated to the Chairman of the Consob.

Even if this somehow deficient procedure has been the object of criticism in Italy, Italian case law has traditionally not considered it in violation of due process, essentially because the final decision of the Commission could (and can) be challenged in court. As we will see, the ECHR has determined that this possibility is not sufficient to cure the due process violation unless certain conditions are met. It should also be pointed out that in 2013, also as a consequence of the *Grande Stevens* affaire, Consob has partially amended its sanctioning procedure; the new

[8] Alberto Alessandri, *Delitti e pene nello scenario della crisi*, in *Giur. comm.*(2010) I, 671 ff., 683 (trans).

[9] A critical examination of this procedure is offered in W. Troise Mangoni, *Il potere sanzionatorio della Consob* (Milano 2012) 120 s.; see also R. Rordorf, *Ruolo e poteri della Consob nella nuova disciplina del* market abuse, in *Società* (2005) 981 ff.

rules do not, however, change either the fact that accuser and judge are not truly separated, or the fact that the accused do not have access to the recommendation of the Administrative Sanctions Office and cannot present their defense to the Commission, the adjudicatory body.[10]

5. THE DECISION OF THE ECHR: CRIMINAL NATURE OF THE "ADMINISTRATIVE" SANCTIONS

Having now described, even if briefly, the underlying substantive and procedural Italian rules (which are not unique to Italy), we can focus on the decision of the ECHR. The decision is long and complex, raises several issues, and includes an important minority concurring opinion. Let's consider the crucial passages of this *arrêt*.

The starting point of the reasoning of the Strasbourg court is the qualification of the sanction defined as "administrative" under Italian law as "*accusation en matière pénale*" or "criminal accusations" (the operative language of the ECHR is French). This preliminary step is pivotal because even if the Convention also provides for certain protections in civil matters, obviously the due process and double jeopardy protections are significantly more extensive in case of criminal sanctions, including in particular the right to a fair trial pursuant to Article 6 of the Convention.[11]

Coherently with its own precedents in other areas, The ECHR disregards the formalistic distinction used by the Italian (and many other) legislatures between administrative and criminal sanctions based on the name attached to the sanction and the authority responsible for inflicting it. The jurisprudence of the Strasburg Court, at least since the 1970s, has focused on the substantive goals and effects of the sanction to classify it as criminal, considering the formal criteria adopted by some States a veritable "fraud of labels."[12] According to the Court, the nature of the violation and of the penalty must be considered, and in particular its retributive and deterrent character, and its punitive effect. More specifically, the criminal nature of the sanction depends on elements such as not being limited to a specific class of people (such as sanctions for lawyers inflicted by their bar association), the widespread social perception of the violation, the possibility that the sanction limits personal freedom, and also – and in particular – the measure of pecuniary sanctions.[13]

The Court applies fairly flexible criteria to decide when an administrative monetary sanction should be, in fact, considered criminal, also taking into account the overall economic situation

[10] On this reform, it is interesting to read some of the responses to the public consultation, available on www.consob.it. In particular, see the responses by Assonime; L. Enriques - M. Gargantini; and W. Troise Mangoni.

[11] An analytical discussion of this issue can be read in M. Allena, *Art. 6 CEDU. Procedimento e processo amministrativo*, Napoli (2012) where an extensive bibliography can also be found.

[12] See *Engel and Others v. The Netherlands* (App no 5100/71, 5101/71, 5102/71) (1976) ECHR, where the court states that 'Si les États contractant pouvaient à leur guise qualifier une infraction de disciplinaire plutôt que de pénale […] le jeu des clauses fondamentales des articles 6 et 7 se trouverait subordonné à leur volonté souveraine. Une latitude aussi étendue risquerait de conduire à des résultats incompatibles avec le but et l'objet de la Convention' ['If the contracting States could freely qualify a violation as civil or criminal […] the effect of the foundamental principles established by Articles 6 and 7 [of the Convention] would be subordinated to the sovereign will of the States. Such a broad latitude would risk outcomes that are incompatible with the goal and the object of the Convention'].

[13] See D. F. Waters and M. Hopper, *Regulatory Discipline and the European Convention on Human Rights. A Reality Check*, in *Regulating Financial Services and Markets in the 21st Century* (E. Ferran - C. A. E. Goodhart (eds) Oxford 2001) 95 ff.

and income of the defendant, and in several occasions has classified as criminal sanctions that, in absolute terms, might not appear particularly severe.[14] The Courts of some Member States have bowed to this position of the ECHR: for example the French *Cour de Cassation*, in 1996, has struck down administrative sanctions inflicted by the *Commission des operations de bourse* in an insider trading case, arguing a due process defect for lack of sufficient separation between accuser and adjudicator.[15] The ECHR, on the other hand, has had the occasion to affirm the criminal nature of antitrust monetary sanctions, recently in another leading case involving Italy, *Menarini c. Italy*, even if in that occasion, no violation of due process was found in the light of the possibility of the defendant to challenge the fines in a court of full jurisdiction.

On these bases, the ECHR has not difficulty in classifying the "administrative" sanctions in the *Grande Stevens* case as criminal for the purposes of the European Convention on Human Rights. The Court observes, first of all, that the rules are designed to protect the integrity of financial markets and the trust of investors, general interests typically protected by criminal law provisions. In addition, the Court holds that the main function of the administrative sanctions is deterrence and punishment, because they are proportional to the seriousness of the conducts, not to the damage caused to investors. The measure of the applicable fines, which as we mentioned can reach several million euros, and the fact that professional debarments can be inflicted, also lead, in the opinion of the Court, to conclude for the criminal nature of the provisions. In this perspective, the Court underlines how what is relevant is the measure of the sanction that could be inflicted in the abstract, not the sanction actually inflicted in the specific case.[16]

5.1 Due Process Issues

The European Convention on Human Rights establishes the right of defendants accused of a criminal violation to a fair trial and to an independent and impartial tribunal.[17] In this perspective, with respect to the Consob sanctioning procedure, the Court acknowledges that the accused can present their defenses to the Insider Trading Office, but stigmatizes that they do not receive a copy of the final report of the Administrative Sanctions Office, which is transmitted to the Commission for its final determination, and also the fact that defendants are not entitled to a hearing in front of the adjudicating body, or to interrogate witnesses, which are necessary especially because, in the case at hand, there are disputed facts (when the final version of the equity swap agreement had been executed and when it had to be disclosed to the market). The judges in Strasbourg conclude therefore that Consob's sanctioning procedure violates due process requirements.

With respect to the independence and impartiality of the Commission, the Court is not persuaded that a sufficient separation between accuser and adjudicator is respected. Even if the Court recognizes a certain degree of independence of the Insider Trading Office, it finds more relevant

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[14] In this perspective, two very interesting cases are *Ziliberger v. Moldova* (App no 61821/00) (2005) ECHR, and *Varuzza v.* Italy (App no 35260/97) (1999) ECHR.

[15] Cour de Cassation, Chambre commerciale, April 9 1996, Haddad c. Agent judiciaire du Trésor, in *Recueil Dalloz*, 1998, 65 ff.

[16] (2014) ECHR, 22.

[17] Article 6 of the Convention provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. "

the fact that the Office and the Commission are both parts of the same agency, acting under the supervision of the Chairman of Consob.[18] In this respect, the analysis of the Court is very brief: it could have been worth a more extensive discussion of the role of the Chairman vis-à-vis the Commission, since it could be argued that the other four commissioners stand on equal grounds with the Chairman, and they can be considered independent from him or her.

In any case, based on these arguments, the ECHR concludes that the Consob procedure violated both the right to a fair trial and the requirement of an independent adjudicator. It does not, however, automatically follow from this that Italian law is not compliant with the due process provisions of the European Convention on Human Rights. The possibility to challenge Consob's decision in a court of law could "cure" the deficiencies of the administrative procedure, provided that the defendants are entitled to a fair trial respectful of all procedural safeguards, in front of a truly independent and impartial adjudicator. This was, for example, the Court's conclusion in *Menarini*.[19] Our attention should therefore shift to the following judicial proceedings.

The decision of Consob was challenged in the competent Court of Appeals (in this case, the one in Turin), and its decision was later appealed in the Italian Supreme Court. The ECHR considers, therefore, if those two adjudicators could be deemed "organs of full jurisdiction" pursuant to the Convention. The answer is easy with respect to the Supreme Court: since this court is competent only for legal issues, and does not decide on or reviews the facts, it is not an organ of full jurisdiction. The matter rests on the Court of Appeals: while this court can, at least in principle, decide both factual and legal issues, the crucial question is whether the trial in front of the Court of Appeals of Turin fully respected the procedural right to a fair adjudication of the defendants. The contentious issue, on which the parties advance opposing views, is if a public hearing – considered an indispensable protection of the accused – was held. The Italian government presented an affidavit by the President of the Court of Appeals stating that only the hearings concerning injunctions were not public, while the other hearings were public. The defendants however retorted, based on an affidavit by the administrative director of the same court, that the hearings were held in the chambers of the judges, and were not open to the public.

Faced with these contradictory reconstructions, the ECHR relied on the official documents of the trial, which appeared to indicate that no public hearing was held. For this reason, the majority of the Strasbourg Court concludes that Italy did not respect the due process requirements of the Convention.[20]

It is interesting, in this respect, to note that the minority concurring decision signed by judges Karakaş and Pinto de Albuquerque is significantly more rigorous on this issue. They observe how the rights of the defendants have not only been violated because of the rather formalistic issue concerning the absence of a public hearing, as the majority held, but for the more substantive reason that the Court of Appeal did not conduct a full adjudication on factual issues, in particular with respect to the state of the contractual relationships with Merrill Lynch in

[18] (2014) ECHR, 31 s.

[19] On the *Menarini* decision, see M. Siragusa and C. Rizza, 'Violazione delle norme antitrust, sindacato giurisdizionale sull'esercizio del potere sanzionatorio da parte dell'Autorità di concorrenza e diritto fondamentale a un equo processo: lo "stato dell'arte" dopo le sentenze Menarini, KME e Posten Norge' (2013)*Giur. comm.*I, 408 ff. It should be pointed out that in the *Menarini* case, judge Pinto de Albuquerque, one of the two judges who also signed a concurring opinion in *Grande Stevens*, in a minority opinion argued that adjudication by administrative judges would not have satisfied the right to a fair trial.

[20] (2014) ECHR, 36 s.

August 2005.[21] If some of the anecdotes heard after the decision are true, this concern of the minority might not be unfounded: apparently some courts, in Italy, in order to comply with the requirement of the public hearing established by the ECHR, simply open the doors of the chambers of the judges and inform people standing nearby the chambers that they can attend...

In fact, we must mention that a very recent decision of the Consiglio di Stato (the supreme administrative law court in Italy) has taken the position of the ECHR very seriously. The court has granted a temporary injunction in favor of a defendant in a Consob sanctioning procedure, observing that the *Grande Stevens* decision requires the procedure to ensure a fair and public adjudication.[22] Since the decision involved a preliminary injunction, the motivations are just sketched and it is not easy to fully understand the reasoning of the court; from informal information in Italian legal circles it seems, however, that the decision of the Consiglio di Stato is primarily based on the tension between the sanctioning procedure as regulated by the Consob itself and statutory principles of Italian law; in other words, on a domestic legal issue. What would be more difficult to reconcile with the principles set forth by the *Grande Stevens* decision, in terms of international law, is the fact, as mentioned above, the jurisprudence of the ECHR had established that a full adjudication in front of an independent judge after an administrative sanctioning procedure can cure due process deficiencies in the latter.

In concluding these remarks on due process, it is also necessary to mention the evolution following the ECHR's decision, even if not relevant at the time of the litigation. In short, until 2010, as mentioned, the administrative sanctions based on market abuse violations could be challenged in the Court of Appeals and in the Supreme Court. The Code of the Administrative Process, adopted with Legislative Decree No. 104 of 2010, entrusted the exclusive jurisdiction to decide these cases to administrative judges (more specifically, the so-called "Tribunali Amministrativi Regionali"). In 2012, however, a decision of the Italian Constitutional Court gave back the jurisdiction to the "ordinary" judges (Courts of Appeals and Supreme Court), basically holding that the latter have a more full jurisdiction to decide on factual and legal issues, even if they can only reduce or strike down the sanction, not impose a heavier one. In other words, the current situation, after the intervention of the Constitutional Court, has gone full circle back to the situation existing at the time of the *Grande Stevens* litigation, therefore making our case even more practically relevant.

5.2 DOUBLE JEOPARDY ISSUES

The second part of the *Grande Stevens* decision, probably even more interesting from a systematic and comparative perspective, deals with the fact that Articles 187-*ter* and 185 TUF, respectively sanctioning administratively and criminally the same conducts, violate the prohibition against *ne bis in idem* (or double jeopardy) set forth by Article 4 of Protocol 7 of the European Convention on Human Rights.[23]

[21] (2014) ECHR, 63 s.

[22] *See* Consiglio di Stato (ordinanza), No. 04491/2014 and 07566/2014, October 2, 2014.

[23] "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 Italian government claimed that there was no double jeopardy based on different arguments. On the one hand, it reiterated the idea that the nature of the sanctions was administrative, and not criminal, a perspective rejected by the Court applying the substantive standards discussed above. Probably the most compelling argument of the Italian government was that the two rules did not sanction the same violation because, as we mentioned above, the crime requires intentionality while the administrative violation only requires negligence; and because the crime requires that the false or misleading information is actually able to influence market price, while for the administrative violation the mere possibility of an effect is sufficient. In addition the Italian government pointed out how the court decided to inflict a lower criminal sanction, also in the light of the administrative one already determined.[24]

The ECHR does not accept these arguments. First, it clarifies that the fact that some elements of the violations differ is irrelevant, since both provisions punish the same conducts, and there is no doubt that the conducts that lead to the prosecution were the same. Also the fact that the judges took into account the administrative sanction in determining the criminal one is considered irrelevant (and in a way, one might argue, confirms the existence of *bis in idem*): what counts for double jeopardy purposes, according to the Court, is simply the risk of having to undergo a second procedure for the same conducts.[25]

For all these reasons the sanctioning system set forth by the Italian legislature for market abuses is considered contrary to the *ne bis in idem* prohibition of the European Convention on Human Rights.

As mentioned before, not only this decision is consistent with many precedents of the ECHR, but also the European Court of Justice, in cases dealing with the interpretation of the European regime of market abuse, has hinted that imposing criminal sanctions after administrative ones had already been inflicted might be a double jeopardy violation. For example, in *Spector Photo Group v. Commissie voor het Bank-, Financie- en Assurantiewezen*, a 2009 leading case on the concept of "use" of information for insider trading purposes, the European Court of Justice observed –without elaborating too much, but referring to the jurisprudence of the Strasbourg court– that "The question whether account should be taken of a previously imposed administrative sanction in subsequent criminal proceedings is possibly relevant not only in relation to the proportionality of the sanction, but also on account of the prohibition of *ne bis in idem*."[26]

6. Future Developments: The Evolution of the European Regulation of Market Abuse

In 2014, the European legal framework governing market abuses has been profoundly altered.[27] Two new pieces of legislation have introduced new principles and rules in this area: EU Regulation No. 596/2014 on market abuse, and Directive 2014/57/EU on criminal sanctions for

[24] (2014) ECHR, 49.
[25] (2014) ECHR, 50 ff.
[26] Case C‑45/08.
[27] For a first overview of the new rules, see MarcoVentoruzzo, *Comparing Insider Trading in the United States and in the European Union: History and Recent Developments*, forthcoming in *European Company and Financial Law Review*, 2014, available on www.ssrn.com.

market abuse. A detailed discussion of the many innovations introduced is not necessary for the purposes of this Article. With respect to the Regulation, which sets forth the framework of market abuse rules, it is sufficient to point out that it broadens the scope of application of insider trading and market manipulations also to financial instruments traded on a multilateral trading facility (MTF), or an organized trading facility (OTF), and manipulation of benchmarks is also covered. New rules are also aimed at preventing market manipulation through high frequency trading. Another important innovation is that, differently from Directive 2003/6/CE, the new Regulation will differentiate the notions of inside information relevant for disclosure obligations and for insider trading violations, the latter being broader, with the consequence, for example, that contractual negotiations might be relevant for insider trading purposes even before they must be disclosed to the market. Specific and more extensive investigative powers are attributed to national supervisory authorities, which are required to exchange information and cooperate with the European Securities and Markets Authority (ESMA).

More relevant for our discussion here is the fact that both the Regulation and the new Directive aim at harmonizing the sanctioning regimes of the different Member States. Directive 2014/57/UE, in particular, requires Member States to provide that "serious cases of insider dealing, market manipulation and unlawful disclosure of inside information" (essentially defined based on the impact of the conduct on the market) "constitute criminal offences when committed with intent." The European legislature has not, however, fully addressed the due process and double jeopardy issues raised by the ECHR. On the one hand, Directive 2014/57/EU appears to contemplate the possibility that a State would punish insider trading or market manipulation with both an administrative and a criminal sanction. "Whereas (22)" of the Directive reads:

> "The obligations in this Directive to provide for penalties on natural persons and sanctions on legal persons in their national law do not exempt Member States from the obligation to provide in national law for administrative sanctions and other measures for breaches provided for in Regulation (EU) No 596/2014 unless Member States have decided, in accordance with Regulation (EU) No 596/2014, to provide only for criminal sanctions for such breaches in their national law."

The provision seems to acknowledge that States can provide *only* for criminal liability, but not to rule out the possibility of double punishment. A few paragraphs below, however, the Directive mandates that Member States, in implementing the European rules, respect fundamental rights and observe the principles recognized in the Charter of Fundamental Rights of the European Union, among which the right to an effective remedy and to a fair trial (Article 47), the presumption of innocence and right of defense (Article 48), the principles of legality and proportionality of criminal offences and penalties (Article 49), and the right not to be tried or punished twice in criminal proceedings for the same offence (Article 50). If sanctions and procedures formally defined by Member States as administrative can be considered not criminal, differently from what the ECHR has concluded, it could still be possible – pursuant to the Directive – to receive both types of sanctions. The extent to which the necessity to respect the principles of the Charter of Fundamental Rights will lead to a regulatory framework fully compliant with the *Grande Stevens* decision is still to be seen.

Another twist on the horizon, which might further shuffle the cards and augment the protections for defendants subject to parallel civil and criminal actions, is the impending accession of the European Union to the European Convention on Human Rights. The accession, which has been discussed since at least the 1970s, is still quite controversial and raises complex issues of

European and international law, and of coordination between the jurisprudence of the European Court of Justice and the ECHR, issues that cannot be entertained in this Article.[28] At the risk of oversimplifying, however, clearly the accession will reinforce the due process and double jeopardy principles enshrined in the European Convention of Human Rights – and strongly affirmed in the *Grande Stevens* decision – not only vis-à-vis single states, but also with respect to European Union legislation and practices.

7. COMPARATIVE PERSPECTIVE: U.S. CASE LAW

Leaving aside for a moment due process problems, it is interesting to focus on how the question of double jeopardy, in similar cases, has been treated or could be treated in the United States. Double jeopardy, or the prohibition of a second prosecution for the same conducts, has a long and noble tradition in both the common law and in U.S. constitutional law. The V Amendment to the U.S. Constitution, in characteristically XVIII century jargon, notoriously states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

The literature and case law on double jeopardy is so vast that even a superficial discussion would lead us too far from the core issue of this Article.[29] We must however mention that almost the exact same question addressed in the *Grande Stevens* decision was decided by the Supreme Court in two cases in the 1980s and 1990s, with opposite outcomes: United States v. Halper[30] and Hudson v. United States.[31] In short, in the first decision, a more liberal Court broadened the possible scope of double jeopardy in cases of parallel civil and criminal proceedings; while in the second decision, a more conservative Court, overruled *Halper* and embraced a narrower interpretation of the protection against dual jeopardy.[32]

Mr. Halper was a manager of a corporation that provided medical services for patients eligible for federal Medicare benefits. He was convicted under the federal criminal false claims statute for submitting dozens of false claims for Government reimbursement, and sentenced to a prison term and a $5,000 fine. Based on the criminal conviction, the Government also obtained summary judgment against him under the federal civil false claims Act. This Act provided a civil penalty of $2,000 for each false claim, totaling $130,000, plus double the Government's actual damages and litigation costs. The actual damages suffered by the Government, however, were less than $600. As a consequence, the Court held that the civil penalty had no rational relationship with the damages suffered, therefore the civil penalty was not remedial but punitive, and its imposition violated the double jeopardy provision, sanctioning Halper twice for the same conducts. The language of the U.S. Supreme Court echoes the recent opinion of the Strasbourg

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[28] For an interesting discussion of the many issues raised by the accession, see Françoise Tulkens, 'EU Accession to the European Convention on Human Rights' (Speech, YEAR) <http://www.ejtn.eu>. In the text of his lecture Mr. Tulkens, a former judge and vice-president of the European Court of Human Rights, illustrates very effectively this complex development and its legal implications.

[29] An excellent overview of the V Amendment, in a historical perspective, can be found in David S. Rudstain, 'A Brief History of the Fifth Amendment Guarantee against Double Jeopardy'(2005) 14 Wm. & Mary Bill Rts. J. 193 .

[30] 490 U.S. 435 (1989).

[31] 522 U.S. 93 (1997).

[32] For a discussion of the correlation between the "political ideology" of Supreme Court justices and their voting patterns in financial regulation cases, see Johannes W. Fedderke and Marco Ventoruzzo, 'Do Conservative Justices Favor Wall Street? Ideology and the Supreme Court's Securities Regulation Decisions',Florida Law Review 2015 (forthcoming) available on www.ssrn.com.

judges. Justice Blackmun, writing for a unanimous court, argued how "the labels "criminal" and "civil" are not of paramount importance." In order to establish compliance with the double jeopardy requirement, the opinion continues, an analysis of the "punitive" nature of the sanction should be considered: a civil penalty that does not simply compensate the damages suffered by the Government, but that has a punitive effect, cannot be cumulated with a criminal sanction. Of course this decision could be distinguished from *Grande Stevens* because the federal civil false claims Act was supposed to pursue primarily a remedial goal, and the civil penalty could be considered a sort of "liquidated damages" provision, but still the reasoning of the Court strikes a stark resemblance with the rationale of the *Grande Stevens* decision.[33]

As mentioned, however, less than ten years after *Halper* was overruled by *Hudson*. This second case dealt with bank officers who had received monetary penalties and occupational debarment sanctions from the Officer of the Comptroller of the Currency (OCC) for misapplication of bank funds – a sanction qualified as administrative by the legislature –, and were later prosecuted criminally for the same facts. Chief Justice Rehnquist, signing an opinion with several concurrences, held that the statutory scheme made clear the intent of Congress that the sanctions inflicted by the OCC were civil penalties, and as such not subject to double jeopardy protections; in addition he wrote that substantively the monetary sanctions and debarment were not so punitive to be considered criminal in nature for double jeopardy purposes, even if they also had deterrence goals. More specifically, the Court observed that the question of the criminal or civil nature of a sanction depends, initially, on legislative intent, and therefore that the first inquiry should be one of statutory construction. The Court recognized, also referring to its precedents before *Halper*, that a further analysis might establish that, notwithstanding Congressional intent to qualify a sanction as civil, its purpose or effect is so punitive to transform it in a criminal penalty, subject to double jeopardy. But the Court thinks that the analysis to determine the nature of the sanction should be broader than the one adopted in *Halper*, which focuses on the disproportion of the civil penalty with the damages suffered, and should instead take into account a more complex list of factors, including for example whether the penalty causes an affirmative disability or restraint, how it has been historically regarded, whether it pursues retribution and deterrence goals, and so on. The Court also points out that the holding of *Halper* is unworkable, because it requires a distinction between "punitive" and "not punitive" sanctions that is very difficult to drawn, depending also on the sanction actually inflicted, while double jeopardy prohibits the very attempt of the Government to punish twice. In addition, other constitutional provisions, such as the due process and equal protection clauses, protect against irrational sanctions, and the VIII amendment prohibits excessive civil fines.

With *Hudson* the U.S. Supreme Court does not rule out the possibility that a criminal sanction combined with a civil or administrative one might violate double jeopardy, but it adopts a quite narrow test that tributes a certain degree of deference to the intent of the legislature. In this perspective, it seems fair to conclude that the current position of the ECHR is more similar, in its broad and substantive approach to the definition of criminal sanction, to the spirit of the *Halper* decision.

The American system, as well as most common law systems, also raises in this respect another fascinating question, which here I just want to hint provocatively. What about punitive damages

[33] For a brief but effective discussion of *Halper* and its possible consequences, see Edward F. Novak, 'Parallel Proceedings and Double Jeopardy Implications' (1991) 28-NOV Ariz. Att'y 21.

in civil cases?[34] Courts have been quite adamant in denying that punitive damages could violate double jeopardy principles: even in *Halper* the U.S. Supreme Court clearly stated that "nothing in today's opinion precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment. The protections of the Double Jeopardy Clause are not triggered by litigation between private parties."[35] At a substantive level, however, if it is true that punitive damages do not serve to make the plaintiff whole, but have a specific deterrence and retributive goal – as, even linguistically, the expression "private attorney general" suggests – why should it be taboo to consider them relevant in terms of double jeopardy? Is the simple fact that a private party, rather than the Government, pockets the monetary award sufficient to distinguish the situation, or is this another formalistic mere "label"? Are Tweedledum and Tweedledee so different?[36]

8. CONCLUSIONS

What are the immediate implications of the *Grande Stevens* decision for the Italian and other European legal systems in countries that have ratified the Convention on Human Rights? A first partially tongue-in-cheek response is what many criminal defense attorneys are already saying: if you have a client who might receive an administrative sanction for market abuse, and who might also face criminal prosecution, welcome the administrative sanction, do not fight it, and actually do whatever you can do to have the sanction inflicted as quickly as possible, so that you can raise the double jeopardy argument in subsequent proceedings!

More seriously, from the point of view of legislatures and regulatory agencies, a first consequence concerns due process. Needless to say, the criticism of Consob by the ECHR proceedings is important, but it probably raises less serious concerns, notwithstanding the important and recent decision of the Consiglio di Stato cited above.[37] The fact that the same authority investigates the facts and decides on the sanction might not be ideal, but frankly

[34] On punitive damages generally, see A. Mitchell Polinsky and Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998), discussing punitive damages from a law and economics perspective; and Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 Chi.-Kent L. Rev. 163 (2003) for an historical perspective.

[35] 490 U.S. 435 (1989), at 451. It should be mentioned that courts exclude double jeopardy protections both in litigation between private parties, and in state actions that are civil in nature. If, however, we can accept that it can be questioned when a state action is actually "civil" in nature, going beyond the formal language of statutes, it does not seem so much of a stretch to also argue that private actions that have a uniquely or predominantly punitive goal might lead to a duplication of punishment.

[36] This idea is of course not entirely new. In fact, the question of constitutional limitations on punitive damages based on the Eight or Fourteenth Amendments has been discussed by several American writers. See, for example, Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233 (1987); Malcom E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983); William H. Volza and Michael C. Fayzaa, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 U. Det. Mercy L. Rev. 459 (1992). Less has been written, to the best of my knowledge, specifically on the issue of double jeopardy when both a criminal sanction and punitive damages are inflicted. As mentioned in the text, courts tend to exclude double jeopardy concerns; however the argument is commonly based on the alleged "civil" nature of punitive damages, without much discussion. *See* Janice Kemp, *The Continuing Appeal of Punitive Damages: An Analysis of Constitutional and Other Challenges to Punitive Damages, post-Haslip and Moriel*, 26 Tex. Tech. L. Rev. 1 (1994); and 1 Stein on Personal Injury Damages Treatise § 4:12 (3d ed.)

[37] *See* above, footnote 22 and corresponding text.

corresponds to a model adopted in most jurisdictions and in many different areas of the law, which is important for effective deterrence of insider trading and market manipulations. The problems with respect to separation between accuser and judge can be cured by the right to challenge the sanctions in court. What is important, in this respect, is obviously to grant a full trial, including a complete examination of the facts and public hearings, something that probably can be accomplished without legislative or regulatory reforms.

The *ne bis in idem* issue is more delicate. In this respect, on the one hand, double jeopardy could be avoided by simply not prosecuting the same facts administratively and criminally, but to solely rely on the coordination of administrative agencies and prosecutors might be problematic, and not sufficient to fully respect the Convention.[38] It would be preferable a clear legislative distinction between conducts that are criminally relevant, and conducts that can only lead to administrative sanctions.

A first option, in this perspective, would be to limit criminal sanctions to intentional violations, and only inflict administrative sanctions for negligent violations. This approach, however, would make administrative sanctions almost irrelevant, since negligent insider trading or market manipulations are very rare and difficult to prove. Another option would be to reserve criminal violations to conducts that *actually* determine a significant impact on market prices. In Italy, this would be a return of the past, since the 1889 Italian criminal law code, the so-called "Zanardelli code," provided exactly that. The problem, of course, is that to demonstrate that false or misleading information, or trading activities, altered market prices might be extremely difficult, and might result in under-enforcement. It would be interesting, in this respect, to consider if modern statistical techniques, such as event studies, could be helpful.

The balance between the paramount goal of protecting investors and ensuring the integrity of the markets, and the equally important need to respect the rights of the accused is not easy to draw, and the implementation of the new market abuse directive offers, also in the light of this decision, a unique occasion to rethink this balance. If the repression of insider trading and market abuse violations is a founding principles of modern financial markets, one should not forget that the over criminalization of corporate activities, and administrative procedures not always entirely transparent can also be very disruptive of economic life.[39]

To conclude, we should point out that the prohibition against *ne bis in idem* is certainly not unknown in the Italian legal system. Article 649 of the Italian Code of Criminal Procedure sets forth this pillar of the criminal justice system; the problem however is that this statutory provision, according to the prevailing views, does not apply to administrative sanctions: hence Mr. Grande Stevens and the other defendants felt that they could find more receptive ears in Strasbourg. In addition, a result similar to the one obtained in the ECHR could have probably also been reached applying Italian constitutional law principles. Article 117 of the Italian Constitution provides that the legislature must comply with the obligations arising from European law and international treaties, including the European Convention on Human Rights.

[38] The problem of the coordination between prosecutors, securities agencies and court proceedings is noted, with respect to the consequences in France of the *Grande Stevens* decision, also by Thyerry Bonneau, *Quel Avenir pour la Double Répression Pénale et Administrative des abus de marché?*, Rev. Droit Banc. et Finan. 4 (Julliet-août 2014).

[39] Two interesting recent articles on this problem were published on The Economist in August 2014: 'Corporate Justice' *The Economist* (August 30th-September 5th 2014) 9; and 'Criminalizing the American Company" *The Economist* (August 30th-September 5th 2014) 21.

In this perspective, it might be argued that the double prosecutions in the *Grande Stevens* case, violating the double jeopardy provision of the Convention, conflicted with Article 117 of the Constitution. In fact this constitutional law argument was raised in the criminal trial in front of the Tribunal of Turin, but the judge, somehow surprisingly, decided that the argument was unfounded.[40]

[40] The Italian Constitutional Court, in one instance, held that the European Convention on Human Rights binds (obviously) Italy, but that its provisions are not directly applicable (Corte cost., October 24 2007, No. 348). According to more recent decisions, however, the Lisbon treaty, which entered into force on December 1 2009, has made Articles 6 and 13 of the Convention directly applicable (Cons. Stato, March 2 2010, No. 1220).

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