Eur Bus Org Law Rev (2015) 16:145–165
DOI 10.1007/s40804-015-0002-2

ARTICLE

When Market Abuse Rules Violate Human Rights: *Grande Stevens* v. *Italy* and the Different Approaches to Double Jeopardy in Europe and the US

Marco Ventoruzzo

Published online: 18 March 2015
© T.M.C. Asser Press 2015

Abstract The 2014 decision of the European Court of Human Rights in the case *Grande Stevens and Others* v. *Italy* raises numerous complex issues concerning the regulation of market abuse in Italy and Europe, as well as in other systems. The broad questions that the Strasbourg Court addresses, specifically concerning the nature of administrative sanctions and civil penalties, due process in administrative sanctioning procedures, and double jeopardy issues when both criminal and civil sanctions can be imposed, not only are extremely practically relevant for the current and future regulation of insider trading and market manipulation, but also open a more theoretical discussion on the relationships between the only apparently unrelated fields of human rights and enforcement in financial markets. This article offers an analysis of the decision, also in the light of future developments due to the recent reform of European law on market abuse, and compares this landmark European decision with corresponding US case law.

Keywords Market abuse · Insider trading · Market manipulation · European Convention on Human Rights · Due process · Double jeopardy

1 Introduction

On 4 March 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.

M. Ventoruzzo (✉)
Ordinario di Diritto commerciale, Dipartimento di Studi Giuridici "Angelo Sraffa", Università Bocconi Palazzo Grafton, Stanza 8-E2-1, Via Roentgen, 1, 20136 Milan, Italy
e-mail: marco.ventoruzzo@unibocconi.itemail

Springer ASSER PRESS

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 the accused's right to a full defence. 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 in the European Convention on Human Rights. This decision, obviously, has very important practical implications not only for Italy, but for all the signatories to the Convention. In several European countries, the regulation of market abuse shares significant similarities with the Italian approach, also because, like in Italy, it is modelled on European legislation.

This article offers a discussion of the *Grande Stevens* decision, which is also an intriguing corporate law story. The article is organised as follows: first, we examine the underlying facts and the procedural history of the litigation; second, the Italian regulatory framework applicable at the time of the dispute is briefly explained; third, we 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 as 'administrative' by the Italian legislature; the violations of due process; and the violation of the double jeopardy principle. The following section discusses the possible implications of the decision vis-à-vis the recent reform of the Market Abuse Directive. After that, we take a comparative perspective considering how the US Supreme Court, confronted with a fairly similar issue, decided it in two opposing decisions in the 1980s and 1990s. Finally, we conclude by suggesting how the Italian legislature (and possibly other legislatures) could respond to the issues raised by the ECHR.

2 Facts and Procedural History

The facts that led to the *Grande Stevens* litigation are fairly complex, but for our purposes they can be summarised 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 mature in 2005 and, if Fiat would not repay it at that date, it would be converted into Fiat common shares. The banks receiving the

[1] *Grande Stevens and others* v. *Italy* (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 G. Rossi and M. Ventoruzzo: http://blogs.law.harvard.edu/corpgov/. In Italian newspapers, the decision was briefly discussed by Castellaneta (2014), at p. 21; by Clarich (2014), at p. 21; and more recently by Rossi (2014), at p. 1. The President of Consob, the Italian Securities and Exchange Commission, explicitly referred to this case in his annual address to the financial markets, 'Discorso del Presidente al mercato finanziario', Speech, 5 May 2014, at p. 17, available at: http://www.consob.it.

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

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 be higher than the market price. The consequence could be a dilution of the participation of Ifil, the controlling shareholder of Fiat, which could be reduced by approximately 7 % in September 2005. In fact, if the shares were to be offered to the existing outstanding shareholders at a fair price, and most of them were to purchase the securities, the ownership structure would remain more or less the same; on the other hand, if the banks were to be unable to distribute the shares proportionally among shareholders, the banks themselves could remain in possession of a large percentage of shares, or a third party could obtain 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 took the form of an equity swap agreement with the investment bank Merrill Lynch, according to which – depending on the price of Fiat's shares – the bank could be 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 deliver Fiat shares ('physical settlement'), thus avoiding dilution. The exact moment when the contract was amended, and whether the amendment should have been disclosed to the market, is a contentious issue in the ensuing litigation.[3]

More precisely, in the summer of 2005, the market price of Fiat shares increased. Three possible reasons could explain 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 not be repaid, which might lead 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 in share prices and, in particular, to indicate its possible causes. Both Fiat and other group corporations, in July and August, denied they had any specific information that could explain the phenomenon, confirming, however, that Ifil intended to remain in control of Fiat.

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

A few months later, in February 2006, Consob's Insider Trading Office notified the corporations involved – and several individuals, including Mr Grande Stevens – that a sanctioning proceeding would be initiated for the alleged violation of market manipulation provisions, in particular Article 187-*ter* of the Italian Consolidated Law on Financial Markets (*Testo Unico della Finanza*, hereinafter also 'TUF'). The thrust of the Insider Trading Office's argument was that the equity swap agreement and the physical settlement provision had already been executed before the communications were made to the market in August 2005, and that therefore those communications, not giving full disclosure of the agreement, amounted to market

[3] On the precise moment at which material corporate information should be disclosed under Italian law, see the concise but clear discussion in Montalenti (2011), at p. 22.

manipulation. Pursuant to the applicable administrative rules, the accused filed their defensive briefs with Consob, but the Commission accepted the conclusions of the Insider Trading Office and approved pecuniary sanctions for the corporations and individuals involved, varying from 500,000 to 5 million euros. Two individuals received administrative sanctions equal to 5 and 3 million euros, respectively; and several individuals were also temporarily barred from serving as director or executive of listed corporations.

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

As is discussed more extensively below, market manipulation (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 brought criminal proceedings against the individuals that had already received an administrative sanction. The trial court acquitted the defendants, 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. The statute of limitations expired in 2013, while the case was pending in the Supreme Court, 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 limitations, a fact that might raise concerns in terms of criminal enforcement, but which should also be considered in the light of the sometimes extreme length of court proceedings). In the meantime, the defendants had also initiated proceedings before the European Court of Human Rights, which issued its decision – on which we focus here – on 4 March 2014.[4]

3 Market Abuse Regulation at the Time of the Events

Before examining the decision of the Strasbourg Court, it is useful to briefly discuss the regulatory structure regarding market abuse under Italian law at the time of the alleged violations – a structure derived from Directive 2003/6/EC –, and the sanctioning procedure followed by Consob.[5]

Directive 2003/6/EC (which, as we will see, has been recently reformed), required Member States to prohibit insider trading and market manipulation and to provide for adequate administrative sanctions. Article 14 of the Directive stated, however, quite ambiguously:

> 'Without prejudice to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the

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

[5] For an overview of the European regulatory framework, see Avgouleas (2005), in particular Chapter 6, for a historical perspective. A discussion of the Italian system at the time of the events can be found in Annunziata (2006), at p. 3 ff.; Ferrarini (2004); Comporti (2005); Saponaro (2004). The first attempts to regulate the matter at European level are discussed in Hopt (1990).

> 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 authorises 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 is 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 authorised, 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 interpretation. In addition, when Directive 2003/6/CE was enacted, the Lisbon Treaty of 2007 (applicable since 2009) had not been approved yet. It is this Treaty that has authorised the enactment of criminal provisions in European law (the new European rules on market abuse, adopted in 2014, rely on this possibility). It should follow that in 2003 the European Union could not impose or authorise criminal sanctions.[6]

Let us take a look at the national rules prohibiting market manipulation that were invoked in the *Grande Stevens* litigation (for the sake of brevity, the regulation of insider trading is not discussed here).[7] As mentioned before, the administrative violation is regulated by Article 187-*ter* TUF, which punishes two types of conduct: 'informational' and 'operative' manipulation. The former involves the dissemination of false or misleading information, rumours 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 range from 100,000 to 25 million euros; in addition, temporary occupational debarment is possible.

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

---

[6] The author specifically thanks Renzo Ristuccia for suggesting this argument.

[7] For a comparative analysis of insider trading regulation in Europe and the US, see Ventoruzzo (2014).

First of all, 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 are not unanimous on this issue. A second, and possibly more important difference between the administrative and the criminal provision 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 of the actual effect of the abuse on market prices. This distinction might be subtle and difficult to pin-point, but it is very important and, in fact, it was on this basis that the Turin Tribunal 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 of one to twelve years, to a monetary fine in the same range as set forth in the administrative provision, and to temporary occupational debarment.[8]

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, thus 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, if the administrative sanction is set at 500,000 euros and the criminal one at 800,000 euros, the criminal sanction should be reduced to 300,000 euros. This provision as well as the facts of the case that we are considering confirm that, before the ECHR's decision, under Italian law, administrative and civil penalties could be cumulated. In fact, several Italian criminal law scholars criticised this circumstance. In 2010, Alberto Alessandri, a prominent Italian criminal law scholar and 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'.[9]

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 regarding administrative sanctions in the area of securities regulation. Consob was

[8] Italian contributions on these provisions abound. Some of the most relevant issues for the *Grande Stevens* decision are discussed, in Italian, in Consulich (2011), Crespi (2010), Lunghini (2005), Miedico (2007), Mucciarelli (2005), *idem* (2006), *idem* (2012), Paliero (2005). Seminara (2006), Vizzardi (2006).

[9] Alessandri (2010), at p. 683 (trans).

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 abuse 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 many jurisdictions, that it has a rationale in terms of effective and efficient enforcement, and that interested parties can challenge Consob's determinations 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 on the finer details of the internal procedure.[10] 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 by notifying the interested parties. After an exchange of information and documents between the Office and the interested parties, the Office would transmit its conclusions to the Administrative Sanctions Office, which – also on the basis of the defence 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 to be heard by the Commission before the final decision. Another 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 Consob.

Even though this somewhat deficient procedure has been criticised in Italy, Italian case law has traditionally not considered it a due process violation, 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* case, Consob partially amended its sanctioning procedure; the new 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 defence to the Commission, the adjudicatory body.[11]

---

[10] A critical examination of this procedure is offered in Troise Mangoni (2012), at p. 120; see also Rordorf (2005).

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

5 The ECHR's Decision: 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 ECHR's decision. It 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 Strasbourg Court's reasoning is the qualification of the sanction that the Italian legislature defines as 'administrative' as an *accusation en matière pénale* or 'criminal accusation' (the ECHR's operative language is French). This preliminary step is pivotal because even though 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.[12]

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 Strasbourg Court has, at least since the 1970s, 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'.[13] According to the Court, the nature of the violation and of the penalty must be considered, and in particular the latter's 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 (like sanctions for lawyers imposed by their bar association), the widespread social perception of the violation, the possibility that the sanction limits personal freedom, as well as – and in particular – the measure of pecuniary sanctions.[14]

The Court applies fairly flexible criteria to decide when an administrative monetary sanction should, in fact, be considered criminal, sometimes also taking into account the defendant's overall economic situation and income.[15] The courts of some Member States have bowed to this position of the ECHR: for example, in 1996, the French *Cour de Cassation* struck down administrative sanctions inflicted by the *Commission des opérations de bourse* in an insider trading case, arguing a due process defect for lack of sufficient separation between accuser and

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

[13] 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 fundamental 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'].

[14] See Waters and Hopper (2001).

[15] 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.

adjudicator.[16] The ECHR, on the other hand, has recently affirmed the criminal nature of monetary antitrust sanctions, in another leading case involving Italy, *Menarini* v. *Italy*, even though on that occasion, no violation of due process was found in the light of the defendant's possibility to challenge the fines in a court of full jurisdiction.

On these bases, the ECHR has no 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, i.e., 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 mentioned, can reach several million euros, and the fact that professional debarment can be imposed also lead the Court to conclude that the provisions are of a criminal nature. In this perspective, the Court underlines that what is relevant is the measure of the sanction that could hypothetically be imposed, not the sanction actually inflicted in the specific case.[17]

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.[18] In this perspective, with respect to the Consob sanctioning procedure, the Court acknowledges that the accused can present their defences to the Insider Trading Office, but criticises the fact that they do not receive a copy of the final report of the Administrative Sanctions Office, which is transmitted to the Commission for final determination, as well as the fact that defendants are not entitled to a hearing before the adjudicating body, or to interrogate witnesses, which could have been particularly relevant in the case at hand, in which some facts were disputed (when the final version of the equity swap agreement was executed and when it was to be disclosed to the market). The judges in Strasbourg therefore conclude 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 though the Court recognises a certain degree of independence of the Insider Trading Office, it finds more relevant the fact that the Office and the Commission are both parts of the same agency, acting under the supervision of the Chairman of Consob.[19] In this respect, the analysis of the Court is very brief: the

[16] Cour de Cassation, Chambre commerciale, April 9 1996, *Haddad v. Agent judiciaire du Trésor*, *Recueil Dalloz* (1998) p. 65.

[17] *Grande Stevens and others* (2014) ECHR, 22.

[18] Article 6 of the Convention states: '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'.

[19] *Grande Stevens and others* (2014) ECHR, 31.

role of the Chairman within the Commission and, more generally, Consob, would have deserved a more extensive discussion. For example, it might be argued that the other four commissioners stand on equal grounds with the Chairman, and they can be considered independent of him/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 that respects all procedural safeguards, in front of a truly independent and impartial adjudicator. This was, for example, the Court's conclusion in *Menarini*.[20] We should therefore shift our attention to the judicial proceedings that ensued the decision.

Consob's decision was challenged in the competent Court of Appeals (in this case, the Turin Court), whose decision was later appealed in the Italian Supreme Court. The ECHR considers, therefore, whether 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 review the facts, it is not an organ of full jurisdiction. The matter rests with 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 before the Turin Court of Appeals fully respected the defendants' procedural right to a fair adjudication. The contentious issue, on which the parties advanced opposing views, is whether a public hearing – which is 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. However, the defendants retorted, based on an affidavit by the administrative director of the same court, that the hearings had been held in the chambers of the judges and had not been 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 had been held. For this reason, the majority of the Strasbourg Court concludes that Italy did not respect the due process requirements of the Convention.[21]

In this respect it is interesting to note that the minority concurring decision signed by judges Karakaş and Pinto de Albuquerque is significantly more rigorous on this issue. They observe that the defendants' rights have been violated not only because of the rather formalistic absence of a public hearing, as the majority held, but also 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

[20] On the *Menarini* decision, see Siragusa and Rizza (2013). 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*, argued in a minority opinion that adjudication by administrative judges would not have satisfied the right to a fair trial.

[21] *Grande Stevens and others* (2014) ECHR, 36.

contractual relationship with Merrill Lynch in August 2005.[22] 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 public hearing requirement established by the ECHR, simply open the doors of the judges' chambers and inform people standing nearby that they can attend… .

In fact, we should mention that a very recent decision of the *Consiglio di Stato* (the supreme administrative law court in Italy) has taken the ECHR's position very seriously. This court has granted a temporary injunction in favour of a defendant in a Consob sanctioning procedure, observing that the *Grande Stevens* decision requires the procedure to ensure a fair and public adjudication.[23] Since the decision involves a preliminary injunction, the motivations are just briefly outlined and it is not possible for the author, at this point, to fully comment on the court's reasoning; from informal information in Italian legal circles it seems, however, that the *Consiglio di Stato*'s decision is also based on the tension between the sanctioning procedure as regulated by Consob itself and statutory principles of Italian law; in other words, the decision also rests on domestic legal issues.

In concluding these remarks on due process, mention should also be made of the evolution following the ECHR's decision, even if not relevant at the time of the litigation. In short, until 2010, as mentioned, 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 returned the jurisdiction to the 'ordinary' judges (Courts of Appeals and Supreme Court), basically holding that the latter have a fuller jurisdiction to decide on factual and legal issues, even though they can only reduce or strike down the sanction, not impose a heavier one. In other words, the current situation, after the Constitutional Court's intervention, has gone full circle back to the situation existing at the time of the *Grande Stevens* litigation, thus 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 in Article 4 of Protocol 7 of the European Convention on Human Rights.[24]

The Italian government claimed there was no double jeopardy, using different arguments. On the one hand, it reiterated the idea that the nature of the sanctions

[22] *Grande Stevens and others* (2014) ECHR, 63.

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

[24] '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'.

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 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 prices, while for the administrative violation the mere possibility of an effect is sufficient. In addition, the Italian government pointed out that the court of appeal in the criminal proceedings inflicted a lower criminal sanction, also in the light of the administrative one already determined.[25]

The ECHR does not accept these arguments. First, it clarifies that the fact that some elements describing the violations differ is irrelevant, since both provisions punish the same conducts, and there is no doubt that the conducts leading to the prosecution were the same. The fact that the judges took into account the administrative sanction in determining the criminal one is also 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 go through a second procedure for the same conducts.[26]

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

As mentioned earlier, this decision is consistent with many precedents of the ECHR. In addition, the Advocate General of the European Court of Justice, in cases dealing with the interpretation of the European market abuse regime, has also hinted that imposing criminal sanctions after administrative ones have already been imposed 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, Advocate General Kokott observed – without elaborating too much – that '[t]he 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*'.[27]

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

In 2014, the European legal framework governing market abuses was profoundly altered.[28] Two new pieces of legislation introduced new principles and rules in this

[25] *Grande Stevens and others* (2014) ECHR, 49.

[26] *Grande Stevens and others* (2014) ECHR, 50 ff.

[27] Case C-45/08. For a different perspective on double jeopardy issues in a tax law case, see, however, the *Åkerberg Fransson* decision (Case C-617/20 of 26 February 2013).

[28] For a first overview of the new rules, see Ventoruzzo (2014).

area: EU Regulation No 596/2014 on market abuse and Directive 2014/57/EU on criminal sanctions for 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 manipulation rules also to financial instruments traded on a multilateral trading facility (MTF) or an organised trading facility (OTF), and to manipulation of benchmarks. 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 differentiates between the definition of inside information relevant for disclosure obligations and the one relating to insider trading violations, the latter being broader, with the consequence that, for example, 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 pertinent to our discussion is the fact that both the Regulation and the new Directive aim at harmonising 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 their impact 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 will punish insider trading or market manipulation with both an administrative and a criminal sanction. Recital 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 seems to also allow combining administrative and criminal sanctions. A few paragraphs further down, however, the Directive mandates that Member States, in implementing the European rules, respect fundamental rights and observe the principles recognised 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 defence (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 non-criminal, it could be possible – pursuant to the Directive – to receive both types of sanctions. It is still to be seen to what extent the necessity to respect the principles of the Charter of Fundamental Rights will lead to a regulatory framework that is fully compliant with the *Grande Stevens* decision.

Another twist on the horizon, which might further shuffle the cards and augment the protection 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 that of the ECHR, issues that cannot be entertained in this Article.[29] 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.[30]

7 Comparative Perspective: US 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 conduct, has a long and noble tradition in both common law and US constitutional law. The Fifth Amendment to the US Constitution, in characteristically 18th-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 take us too far from the core issue of this article.[31] In particular, the issue has been discussed in the US following the Insider Trading Sanctions Act of 1984 (ITSA), which allowed the SEC to impose a civil sanction up to three times the amount of profit or loss in case of insider trading, and the first commentators of

[29] For an interesting discussion of the many issues raised by the accession, see Tulkens (2012), available at: http://www.ejtn.eu. In the text of her lecture, Mrs Tulkens, a former Judge and Vice-President of the European Court of Human Rights, very effectively illustrates this complex development and its legal implications.

[30] A very interesting question that I had the opportunity to discuss at the conference in Vienna mentioned in the first footnote is whether the double jeopardy principle applies not only within a single state, but *also* among different states: for example, if someone has been prosecuted and/or sanctioned in Germany, can this circumstance prevent prosecution and/or sanctioning in France? The European Convention on Human Rights, and more precisely Article 4 of Protocol 7, seems to contain a command that is only addressed at a single state and only concerns double jeopardy within one national jurisdiction; Article 54 of the Schengen Convention, however, with respect to criminal prosecutions, clearly has a broader scope and explicitly applies to prosecutions in different states.

[31] An excellent overview of the Fifth Amendment, in a historical perspective, can be found in Rudstein (2005).

these then new provisions were divided on whether combining this treble penalty and these criminal sanctions would violate the double jeopardy clause.[32]

Almost the exact same question as addressed in the *Grande Stevens* decision was decided by the US Supreme Court in two cases in the 1980s and 1990s, with opposite outcomes: *United States* v. *Halper*[33] and *Hudson* v. *United States*.[34] 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 double jeopardy.[35]

Mr Halper was a manager of a corporation that provided medical services to 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, totalling $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, and therefore the civil penalty was not remedial but punitive, and its imposition violated the double jeopardy provision, sanctioning Halper twice for the same conduct. The language of the US Supreme Court echoes the recent opinion of the Strasbourg 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 not simply compensates the damages suffered by the government, but 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.[36]

As mentioned, however, less than ten years later, *Halper* was overruled by *Hudson*.[37] This second case dealt with bank officers who had received monetary

[32] See Blumberg (1984), at p. 157, concluding that '[t]he double jeopardy clause will protect an insider from the combination of an SEC treble penalty action and a criminal prosecution'; and – for a different opinion – Silver 1984, at pp. 1012–1017, where it is argued that ITSA sanctions are civil and not criminal and cannot violate the prohibition of double jeopardy.

[33] 490 U.S. 435 (1989).

[34] 522 U.S. 93 (1997).

[35] For a discussion of the correlation between the 'political ideology' of Supreme Court justices and their voting patterns in financial regulation cases, see Fedderke and Ventoruzzo (2015).

[36] For a brief but effective discussion of *Halper* and its possible consequences, see Novak (1991).

[37] On this case, see Casenote (1998) A second look at double jeopardy: Hudson v. United States. Am J Criminal Law 25:631; Note (1998) The Supreme Court's decision in Hudson v. United States: one step up and two steps back for multiple punishment protection under the double jeopardy clause. Wake Forest Law Rev 33:432.

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, in 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 that therefore the first inquiry should be one of statutory construction. The court recognised, 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 into 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 to 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 'non-punitive' sanctions that is very difficult to draw, depending also on the sanction actually imposed, 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 Eighth Amendment prohibits excessive civil fines.

With *Hudson*, the US 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 grants 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.[38]

In this respect, the American system, as well as most common law systems also raise another fascinating question, which is brought up provocatively here. What about punitive damages in civil cases?[39] To be sure, the question is much broader than might appear with respect to insider trading cases but, also in this area, is not irrelevant. In fact, even if punitive damages are not available under Rule 10b-5, several courts have concluded that they can be awarded pursuant to a pendent state

[38] For applications of *Hudson* to bans on trading, revocations of registrations and similar measures, considered remedial and not punitive, and therefore not protected by the double jeopardy clause, see, for example, *Ryan* v. *CFTC*, 145 F.3d 910, 916-917 (7th Cir. 1998), and *United States* v. *Merriam*, 108 F.3d 1162 (9th Cir.), cert. denied, 522 U.S. 818 (1997).

[39] On punitive damages generally, see Polinsky and Shavell (1998), discussing punitive damages from a law and economics perspective; and Sebok (2003), for a historical perspective.

law claim when state law so allows.[40] In addition, the disgorgement of profits under Sect. 16(b) of the Exchange Act, a prophylactic provision designed to deter insider trading, due to the particular formula used to calculate the ill-gotten gains of insiders, can easily exceed both the actual profits of the insiders and the actual damages suffered by the corporation or other investors. This might indicate the punitive measure of the possible award, even if courts in the US have often concluded that disgorgement of profits is not a penalty even when it exceeds what is necessary for restitution.[41]

Courts have been quite adamant in denying that punitive damages could violate double jeopardy principles: even in *Halper*, the US 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.'[42] 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 mere formalistic 'label'? Are Tweedledum and Tweedledee so different?[43]

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 already given by many criminal defence attorneys: 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 to have

[40] Fed. Sec. L. Rep. P 22785.45 (C.C.H.), 2009 WL 2116535.

[41] For a brief overview of Sect. 16(b), see Ventoruzzo (2014).

[42] 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 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.

[43] This idea is of course not entirely new. In fact, the question of constitutional limitations on punitive damages based on the Eighth or Fourteenth Amendment has been discussed by several American writers. See, for example, Massey (1987); Wheeler (1983); Volz and Fayz (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 imposed. As mentioned in the text, courts tend to dismiss double jeopardy concerns; however, the argument is commonly based on the alleged 'civil' nature of punitive damages, without much discussion. See Kemp (1994); and Stein (1997–2008), §4:12. A discussion of the implications of *Hudson* for civil monetary penalties can be read in Sardegna (1998); and Note (1999) Double jeopardy and the civil monetary penalties dilemma: is Hudson the cure for health care fraud and abuse? Adm Law Rev 51:283.

the sanction imposed 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 ECHR's criticism regarding the Consob proceedings is important, also in the light of the important and recent decision of the *Consiglio di Stato* cited above.[44] The fact that the same authority investigates the facts and decides on the sanction might not be ideal, but corresponds to a model adopted in most jurisdictions and in many different areas of the law, a model that is important for effective deterrence of insider trading and market manipulation. One option would obviously be to create a strong separation between the different functions and grant full independence to the 'accusers' within the hierarchical structure of the authority. In addition, at least according to the ECHR, the problems concerning the separation between accuser and judge could be cured by the right to challenge the sanctions in court. What is essential, in this respect, is obviously to grant a full trial, including a complete examination of the facts and public hearings.

The *ne bis in idem* issue is probably more delicate and complex. In this respect, on the one hand, double jeopardy could be avoided by simply not prosecuting the same facts administratively and criminally; but, on the other hand, solely relying on the coordination of administrative agencies and prosecutors might be problematic and not sufficient to fully respect the Convention.[45] It would be preferable for the legislature to clearly distinguish between conduct that is criminal and conduct that can only lead to administrative sanctions.

A first option, in this perspective, would be to limit criminal sanctions to intentional violations and only impose administrative sanctions for negligent violations. This approach, however, would make administrative sanctions almost irrelevant, since negligent insider trading or market manipulation are very rare and difficult to prove. Another option would be to reserve criminal violations to conduct that *actually* has a significant impact on market prices. In Italy, this would constitute 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. In this respect, it would be interesting to consider if modern statistical techniques, such as event studies, could be helpful. Finally, a third alternative could be to simply reduce the administrative sanctions to a level that could not be considered 'criminal' under the Convention on Human Rights. Even assuming that one of these distinctions between criminal and administrative violation could be adopted, however, a pernicious 'race to the courthouse' could still develop between prosecutors (in charge of criminal violations) and regulatory agencies (in charge of civil penalties).

[44] See *supra* n. 23 and corresponding text.

[45] The problem of coordination between prosecutors, securities agencies and court proceedings is also noted, with respect to the consequences of the *Grande Stevens* decision in France, by Bonneau (2014).

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 principle of modern financial markets, one should not forget that the over-criminalisation of corporate activities and not entirely transparent administrative sanctioning procedures can also be very disruptive of economic life.[46]

To conclude, we should point out that the *ne bis in idem* principle 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, and traditionally Italian courts define a sanction as 'administrative' simply based on the 'label' that the legislature has given it. For this reason Mr Grande Stevens and the other defendants felt they could find more receptive ears in Strasbourg, and, in fact, the re-qualification of the sanctions as criminal by the ECHR resulted in stronger protections for the accused. In addition, a result similar to that obtained at the ECHR could probably also have been reached by 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. From this perspective, it might be argued that the double prosecution 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 during the criminal trial at the Tribunal of Turin, but the judge decided, somewhat surprisingly, that the argument was unfounded.[47]

Acknowledgments For discussions of the topic of this work and comments I wish to thank Alberto Alessandri, Miriam Allena, Stephen M. Bainbridge, Thierry Bonneau, Alessandro Chieffi, Susan Emmenegger, Ignacio Farrando, Kit Kinports, Rainer Kulms, Melissa Miedico, Paolo Montalenti, Francesco Mucciarelli, Peter Mülbert, Renzo Ristuccia, Marco Saverio Spolidoro, Mario Stella Richter Jr, Wladimiro Troise Mangoni, Guido Rossi, Wolfgang Schön, Vasilios Tountopoulos and William K. Wang. For comments and observations I would also like to thank participants in a workshop at Notre Dame Law School, held on 10 October 2014 and sponsored by the Notre Dame Journal of International and Comparative Law and by the Helen Kellogg Institute for International Studies, and particularly Felicia P. Caponigri for organising the workshop; and participants in the European Forum of Securities Regulation, held at the Vienna University of Business and Economics on 5 December 2014. Excellent research assistance was provided by Elizabeth Robinson.

[46] Two interesting articles on this problem were published in The Economist in August 2014: 'Corporate Justice', *The Economist*, 30 August – 5 September 2014, p. 9, and 'Criminalizing the American Company', ibid., p. 21.

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

References

Alessandri A (2010) Delitti e pene nello scenario della crisi. Giurisprudenza Commerciale I:671
Annunziata F (2006) Abusi di mercato e tutela del risparmio. Torino, Giappichelli
Avgouleas EE (2005) The mechanics and regulation of market abuse. In: A legal and economic analysis Oxford University Press, Oxford
Blumberg JA (1985) Comment: implications of the 1984 Insider Trading Sanction Act: collateral estoppel and double jeopardy. North Carolina Law Rev 64:117
Bonneau T (2014) Quel avenir pour la double repression penale et administrative des abus de marché? Revue de Droit Bancaire et Financier, p 4
Castellaneta M (2014) Consob-tribunali, niente cumulo. Il Sole 24 Ore
Clarich M (2014) Il sistema italiano difetta di garantismo. Il Sole 24 Ore
Comporti C (2005) La nuova disciplina degli abusi di mercato: una prima ricognizione. Diritto della banca e del mercato finanziario II:62
Consulich F (2011) Manipolazione del mercato e disorientamenti dogmatici: tra eventi di pericolo e pericolo di eventi. Note to Turin Tribunal, 21 December 2010. Società, p 823
Crespi A (2010) Le difficili intese sull'aggiotaggio informativo. Banca Borsa I:247
Fedderke JW, Ventoruzzo M (2015) Do conservative justices favor Wall Street? Ideology and the Supreme Court's securities regulation decisions. Florida Law Rev (forthcoming). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404247
Ferrarini G (2004) La nuova disciplina europea dell'abuso di mercato. Rivista delle società, p 43
Hopt KJ (1990) The European Insider Dealing Directive. Common Market Law Rev 27:51
Kemp J (1994) The continuing appeal of punitive damages: an analysis of constitutional and other challenges to punitive damages. Post-Haslip and Moriel. Texas Tech Law Rev 26:1
Lunghini G (2005) La manipolazione del mercato. Diritto penale e procedura, p 1474
Massey CR (1987) The excessive fines clause and punitive damages: some lessons from history. Vanderbilt Law Rev 40:1233
Miedico M (2007) La manipolazione del mercato: illecito penale o illecito amministrativo? Note to Cass. Penale, 3 May 2006, n. 15199. Società, p 623
Montalenti P (2011) Società per azioni corporate governance e mercati finanziari. Giuffrè Editore, Milan
Mucciarelli F (2005) L'abuso di informazioni privilegiate: delitto e illecito amministrativo. Diritto penale e procedura, p 1465
Mucciarelli (2006) Primato della giurisdizione e diritto economico sanzionatorio: a proposito di market abuse. Diritto penale e procedura, p 137
Mucciarelli (2012) Manipolazione del mercato. In: Fratini M, Gasparri G (eds) Il testo unico della finanza III. Torino, Giappichelli, p 2378
Novak EF (1991) Parallel proceedings and double jeopardy implications. Arizona Attorney 28:21
Paliero CE (2005) 'Market Abuse' e legislazione penale: un connubio tormentato. Corriere merito, p 809
Polinsky AM, Shavell S (1998) Punitive damages: an economic analysis. Harvard Law Rev 111:869
Rordorf R (2005) Ruolo e poteri della Consob nella nuova disciplina del *market abuse*. Società, p 981
Rossi G (2014) Ci sarà pure un giudice a Berlino. Il Sole 24 Ore
Rudstein DS (2005) A brief history of the Fifth Amendment guarantee against double jeopardy. William and Mary Bill Rights J 14:193
Saponaro A (2004) Market abuse: disciplina a tutela dei mercati finanziari. Società, p 767
Sardegna RW (1998) No longer in jeopardy: the impact of Hudson v. United States on the constitutional validity of civil money penalties for violations of securities laws under the double jeopardy clause. Valparaiso Law Rev 33:115
Sebok AJ (2003) What did punitive damages do? Why misunderstanding the history of punitive damages matters today. Chicago-Kent Law Rev 78:163
Seminara S (2006) Disposizioni comuni agli illeciti di abuso di informazioni privilegiate e di manipolazione del mercato. Diritto penale e procedura, p 9
Silver CB (1985) Penalizing Insider Trading: a critical assessment of the Insider Trading Sanctions Act of 1984. Duke Law J, p 960
Siragusa M, Rizza C (2013) 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, Giurisprudenza commerciale I:408

Stein J (1997–2008) Stein on personal injury damages—Treatise, vol 1, 3rd edn. Clark Boardman Callaghan

Troise Mangoni W (2012) Il potere sanzionatorio della Consob. Milan, Giuffrè, p 120

Tulkens F (2012) EU Accession to the European Convention on Human Rights. Speech, 9 October 2012. http://www.ejtn.eu

Ventoruzzo M (2014) Comparing insider trading in the United States and in the European Union: history and recent developments. Eur Company Financ Law Rev (forthcoming). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2442049

Vizzardi M (2006) Manipolazione del mercato: un 'doppio binario' da ripensare? Rivista italiana diritto procedura penale, p 704

Volz WH, Fayz MC (1992) Punitive damages and the due process clause: the search for constitutional standards. Univ Detroit Mercy Law Rev 69:459

Waters DF, Hopper M (2001) Regulatory discipline and the European Convention on Human Rights. A reality check. In: Ferran E, Goodhart CAE (eds) Regulating financial services and markets in the 21st century. Oxford Hart, Oxford, p 95

Wheeler ME (1983) The constitutional case for reforming punitive damages procedures. Virginia Law Rev 69:269

Marco Ventoruzzo is 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. LLM, Yale Law School; PhD, Università degli Studi of Brescia, Brescia, Italy; J.D., Università degli Studi di Milano, Milan, Italy; BA in Economics and Business Administration, Bocconi University, Milan, Italy.