

CONSOB'S SANCTIONS REGIME – OBLIGATION TO BE INTERVIEWED VS THE RIGHT TO SILENCE AND THE RIGHT AGAINST SELF-INCRIMINATION: A QUESTION UNDER SCRUTINY BY THE CONSTITUTIONAL COURT

Is it possible to require a person under investigation by CONSOB in relation to the administrative wrongdoing of insider trading and market manipulation to be interviewed by their accuser? Can this person (under investigation in relation to administrative wrongdoing) be forced to choose whether to follow the order to be interviewed (art. 187 *octies* paragraph c) the Consolidated Financial Intermediation Law) or exercise their inviolable right of defence (the right to remain silent and the right against self-incrimination being laid down in the constitution and treaties) and risk being subject to further administrative sanctions provided for in the case of failure to comply with a request from the Regulator or its delayed performance (art. 187 *quinquiesdecies* Consolidated Financial Intermediation Law) or, even worse, to further criminal sanction for obstructing the Regulator (art. 170 *bis* of the Consolidated Financial Intermediation Law)?

These are, in short, the questions put by the Supreme Court to the Constitutional Court when it sought a declaration that the law also imposes an administrative sanction for non-compliance with a request from the CONSOB or a delayed performance of its functions on a person that CONSOB, when exercising its functions, alleges to have committed the administrative wrongs of insider trading and market manipulation.

THE STATUTORY FRAMEWORK

Italian lawmakers decided to punish by way of punitive administrative sanctions both insider trading and market manipulation (in short, market abuse).

The European Court of Human Rights in the well-known *Grande Stevens* judgment however assigned to the administrative sanctions set out in the Consolidated Financial Intermediation Law regarding market abuses a criminal character and nature when applying the so-called *Engel* criteria i.e. (in addition to the legal-formal qualification of the wrongdoing assigned under national law):

1. the nature of the wrongdoing, in its turn determined on the basis of two sub-criteria relating to the scope of application of the law that provides for it and the purpose of the sanction. In particular, in order to qualify it as

The content of the order

- The Supreme Court has raised the question of the constitutionality of art. 187 *quinquiesdecies* of the Consolidated Financial Intermediation Law where the law punishes the person under investigation by CONSOB in cases of refusal or delay in providing answers in relation to abuse of inside information
- The query draws attention to the extension of the right to remain silent and the right against self-incrimination to administrative proceedings before the Regulator
- By way of the same order the Supreme Court raises another question relating to constitutionality: in case of purchase of shares using inside information, may confiscation, including confiscation of a sum of money or property of equivalent value, extend to the entire value of the shares acquired (therefore including the assets used for the purchase), or, in compliance with the principles of reasonableness and proportion, be limited to the profit (the major earning obtained from the financial transaction)?

criminal in nature, the scope of application of the law must be general, in other words must not target a specific group of persons whilst the purpose of the penalty must be punitive and be a deterrent; or,

2. the nature or the seriousness (or degree of seriousness) of the sanction issued.

In this way lawmakers imposed the application of and compliance with the rights and guarantees regarding fair trial set out in art. 6 of the European Convention of Human Rights as interpreted by the European Court of Human Rights and art. 14 of the International Covenant on Civil and Political Rights, including in relation to the wrongdoing involving market abuse and the related penalties which are formally administrative but substantially criminal.

In this way the European Court enshrined and imposed (given its well-known binding nature for the national courts) the application of and compliance with the guarantees of the criminal trial laid down in treaties (so-called right to a fair trial), including in relation to the criminal proceedings concerning wrongdoing such as market abuse punished with a sanction that is apparently administrative but in reality criminal.

THE CONTENT OF THE ORDER

The case brought before the Supreme Court lies within this statutory framework and involves a natural person to whom CONSOB issued two different penalties:

- ✓ One is due to insider trading as both a primary insider (having acquired 30.000 FMR Art'è shares on the basis of inside information relating to the imminent launch of a tender offer for the delisting of the company) and as a secondary insider (having induced a third party to buy shares from the same company);
- ✓ the other is due to failure to comply with a request from CONSOB or in any case its delayed performance in the investigation launched by CONSOB in order to investigate the first wrongdoing: specifically, the Regulator objected that during the investigations the person subject to administrative proceedings presented himself with a delay of around five months after a call to appear before CONSOB in order to undergo a personal interview and during the interview did not make any statements.

The applicant raised issues of constitutionality in relation to art. 187 *quinquiesdecies* of the Consolidated Financial Intermediation Law where the law provides for an administrative penalty - punished with a minimum fine of between Euro 50,000 and Euro 1,000,000 (!) – including in relation to the person under investigation by CONSOB who delays or refuses to provide answers that may be used in criminal proceedings or in the same ongoing administrative proceedings; this was for the following reasons:

- ✓ the wording of the law in question – in particular, the use of the pronoun "whoever" in the identification of the persons potentially responsible for the wrongdoing – leads to the conclusion that it is also applicable to the person that engages in behavior that does not comply with the request of the Regulator or the delay in the connected exercise of the supervisory authority functions in relation to market abuse alleged in the administrative proceedings;

- ✓ the imposition of a cooperation obligation upon the person under investigation which appears to contravene the **inviolable right to a fair trial and the effective exercise of the right of defence** safeguarded in the Constitution (articles 24 and 111) and the treaty level (art. 6 European Convention on Human Rights and art. 14 International Covenant on Civil and Political Rights; **right to a fair trial and the effective exercise of the right of defence** which entails also:
 - the right to remain silent which comprises the decision to reply or not both in general and in particular to each of the questions;
 - the right against self-incrimination – specifically the right not to make statements which could give rise to one's own liability and which could be a confession or simply facilitate and support the accusation made. It may be exercised through silence;
- ✓ the exercise of the right to a fair trial and the effective right of defence must also **be applied in the investigations conducted by CONSOB to find administrative breaches in relation to market abuse** for two types of reasons:
 - the finding of administrative breaches in relation to market abuse is potentially preliminary to the bringing of criminal proceedings: the President of CONSOB will send to the Public Prosecutor, together with a grounded report, the documents gathered in the investigation in the event that evidence emerges which leads to a presumption of the existence of an offence such as insider trading by so-called primary insiders and market manipulation (art. 187 *decies* of the Consolidated Financial Intermediation Law);
 - the penalties provided for market abuse in respect of which CONSOB brings action, although formally qualified as administrative, are so punitive that they are substantially criminal as laid down in detail by the European Court of Human Rights in the Grande Stevens judgment;

the imposition of the duty to cooperate with the Regulator functions of CONSOB (entailing compliance in good time with the requests of the Authority or not delaying their performance) incumbent also upon the person to which CONSOB ascribed the administrative wrongdoing of market abuse appears to contravene the principle, also constitutionally safeguarded (art.111), of equality of arms between defence and prosecution in relation to the jurisdictional phase of appealing the court order issuing the sanction.

OPEN QUESTIONS

The order under examination has the obvious merit of drawing attention to issues that are of considerable interest such as the need to extend the right to remain silent and the right against self-incrimination also to proceedings brought within the investigations conducted by CONSOB in order to establish whether administrative breaches relating to market abuse were committed. In light of the considerations set forth by the Supreme Court there are certain aspects which, albeit extraneous to the specific question of constitutionality, are worthy of reflection.

a) Extension of the procedural rules in relation to hearings and witness statements provided during a criminal trial also to hearing before the Regulator

One initial aspect relates to the methods of conducting the interviews before the Regulator. In particular, the Consolidated Financial Intermediation Law does not provide for advanced protection in respect of the right to remain silent and right against self-incrimination analogous to those provided for by the Code of Criminal Procedure in relation to interviews and witness statements produced in criminal proceedings (art. 63-65 of the Code of Criminal Procedure). In particular:

- if a person who is not a defendant or a person not under investigation makes statements which provide *indicia* against him before the Public Prosecutor or the Police, they are required to terminate the interview and warn the person that following these statements investigations may be conducted against him and invites him to appoint a defence counsel;
- before the interview has begun, the person under investigation must be warned that:
 - his statements may always be used against him;
 - he has the option of not answering any question, unless it relates to his personal identity and that in any case the proceedings will take their course;
- statements made without complying with the guarantees above cannot be used.

A full and clear application of the guarantees of a fair criminal trial also to CONSOB's sanction procedure for market abuse required by the recognised criminal nature of these administrative sanctions should entail the introduction of a set of rules equivalent to those described above in order to protect *ex ante*, the position of the person under investigation for administrative wrongdoing in the relations with the Regulator. This solution appears to be in line with the art. 220 of the Code of Criminal Procedure where it provides that "when during inspections or regulatory activities required by law or decrees *indicia* of offences emerge which the actions required to safeguard the evidence and gather anything else that may be useful for the application of criminal law shall be carried out in compliance with the provisions of the Code".

a) What rights for the body?

A second aspect relates to the extension of the right to remain silent and the right against self-incrimination also to the corporate entity. Indeed, it is frequent if not customary practice for the Regulator to submit requests for cooperation (such as the delivery of documents and the sharing of information (possibly acquired following internal investigations) not to the natural persons alleged to have committed the administrative wrongdoing of market abuse but to the bodies at which they perform their professional services and within the scope of which the wrongdoing is considered to have occurred.

The corporate entity required to meet these requests, under penalty of sanctions for non-compliance with a request from the Regulator or its delayed performance (articles 187 *quinquiesdecies* of the Consolidated Financial Intermediation Law) would be exposed to the risk of producing self-incriminating information. Market abuse committed in the interest or to the benefit of the corporate entity by persons who hold functions of representation, administration or management or persons subject to the management or supervision by them incur liability for the corporate entity itself.

Specifically, in case of wrongdoing involving inside information (as primary insider) or market manipulation, the body could be held liable under Law 231/2001 and be fined up to Euro 1,549,000.00 or up to ten times the product or profit obtained. This sanction is issued by the criminal court with jurisdiction over the offences alleged to have been committed by the natural persons from which the wrongdoing of the offence arose. This lays down the clear will of the lawmakers to facilitate the unitary treatment of the two acts of wrongdoing, including in view of the close link of dependence between them. Further, for the purpose of ensuring that the natural person effectively participates in the criminal proceedings, the legislation provides that the procedural provisions relating to the defendant must be applied to it to the extent compatible, including the rights and defensive guarantees.

In the administrative proceedings too the corporate entity is potentially exposed to sanctions in addition to those issued to the natural persons, in particular:

- where the wrongdoing was made possible by the corporate entity's non-compliance with the obligations of management and supervision a sum will be paid equal to the administrative sanction issued to the natural person (art. 187 *quinquies*);
- where the corporate entity is issued the administrative sanction referred to above, we also deem confiscation of the product or the profit of the wrongdoing or the assets used to commit the wrongdoing to be applicable to the body (art. 187 *quinquies* of the Consolidated Financial Intermediation Law). A sum of money or property of equivalent value may also be confiscated. This confiscation – which is substantially **criminal** (see Constitutional Court no. 68/2017) – has itself been subject of questions regarding its constitutionality where it extends to the entire value of the shares acquired and not only to the product or profit obtained.

Whilst we await the interpretation of the Constitutional Court, it is to be hoped that the decision of the Supreme Court will open the road to a much-needed rethink of the dialogue between the Regulator and the regulated bodies that will ensure that civil rights are safeguarded.

CONTACTS

Antonio Golino
Partner

T +39 02 80634 1
E Antonio.Golino
@CliffordChance.com

Jean-Paule Castagno
Counsel

T +39 02 80634 1
E Jean-Paule.Castagno
@CliffordChance.com

Andrea Stigliano
Associate

T +39 02 80634 1
E Andrea.Stigliano
@CliffordChance.com

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www.cliffordchance.com

Clifford Chance Studio Legale Associato,
Piazzetta M. Bossi, 3, 20121 Milan, Italy

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