1. THE POSITION OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE APPLICABILITY OF THE NE BIS IN IDEM PRINCIPLE TO THE OFFENCE OF MANIPULATION OF THE MARKET

The Italian legal system provides that whoever manipulates the market can be pursued both criminally (pursuant to art. 185 of the Italian Finance Act – “TUF”) and administratively (pursuant to art. 187 ter of TUF).

The European Court of Human Rights (“ECHR”), by decision issued on 4 March 2014, in “Grande Stevens and Others v. Italy”, has taken a stand on whether it is possible to impose double sanctions for the offence of market manipulation. It has found that the Italian legislation on market abuse, may currently, conflict with a fundamental principle set forth in Article 4 of Protocol No. 7 of the European Convention of Human Rights: the right not to be tried or punished twice (ne bis in idem).

In the abovementioned case, the relevant applicants were imposed with an administrative sanction by Consob and then underwent a criminal proceeding, where they were initially acquitted by the court of first instance but then convicted by the court of appeal.

The Strasbourg judges pointed out that, although the procedure before Consob is undoubtedly administrative, the severity of the fines imposed on the applicants meant that they were criminal in nature – both for the amount and for the ancillary sanctions – not to mention for the repercussions on the interests of the convicted persons.

Thus, if administrative sanctions are imposed, it is no longer possible to impose criminal sanctions on the same person, for the same fact, without infringing the ne bis in idem principle.

2. THE POSITION OF THE ITALIAN SUPREME COURT ON THE APPLICABILITY OF THE NE BIS IN IDEM PRINCIPLE

Two months after the issuance of the aforesaid judgement, the Italian Supreme Court, by decision n. 20266 of 15 May 2014 stated that, according to the Italian legal system, it is lawful to impose a double sanction, criminal and administrative, for the same violation. The case submitted to the Supreme Court concerned the charge of an offence of omitted payment of the withholding tax (art. 10 bis Legislative Decree n. 74/2000) and a tax-related administrative penalty (pursuant to art. 13 of Legislative Decree 471/1997).

The Supreme Court rejects, however, the argument brought forward by the defence counsel of the accused – that in this case there would also be an...
unfair imposition of two sanctions – by remarking that the relationship existing between the tax-related administrative sanction and the criminal sanction is not, in this case, a relationship of specialty. According to the Court, in fact, the principle set forth by ECHR, is applicable only in case of manipulation of the market.

3. THE STAND TAKEN SUBSEQUENTLY BY THE EUROPEAN COURT OF HUMAN RIGHTS ON THE RELATIONSHIP EXISTING BETWEEN TAX INFRINGEMENTS OF AN ADMINISTRATIVE AND CRIMINAL NATURE

Five days after the Italian Supreme Court had issued its decision, the ECHR, by decision dated 20 May 2014 in “Glantz v. Finland”, intervened on the relationship existing between tax-related administrative violations and tax offences.

In the aforesaid case, the relevant applicant, to whom the Finnish Tax Authorities had first imposed an administrative sanction and who had also underwent a criminal proceeding for the same facts, applied with the ECHR for violation of the ne bis in idem principle.

In this case, the Strasbourg Court held that although the sanction was a tax sanction, it could be criminal in nature because the purpose of the severe fines imposed were punitive and to act as a deterrent. Hence, it can be concluded that, if a particularly severe administrative sanction is imposed first, it is no longer possible to impose, for the same fact, a second and additional sanction even if it is a criminal judge who imposes it, this would amount to a violation of the ne bis in idem principle.

In light of the different stands taken by domestic and ECHR case law, we may say that the importance of the ne bis in idem principle; where domestic laws provide for the possibility to impose both administrative and criminal sanctions for identical facts, has, not yet been fully clarified. However, at least as far as Italian law is concerned, the implementation of Law 23/2014 (Delega Fiscale) will undoubtedly be a good opportunity to cast further light on this matter.
FOR FURTHER INFORMATION PLEASE CONTACT:

Raffaella Quintana  
Partner  
Rome  
Tel. +39 06 68 880 1  
raffaella.quintana@dlapiper.com

Raffaele Perfetto  
Associate  
Milan  
Tel. +39 02 80 618 1  
raffaele.perfetto@dlapiper.com

Antonio Carino  
Senior Associate  
Milan  
Tel. +39 02 80 618 1  
antonio.carino@dlapiper.com

Francesco Lalli  
Associate  
Rome  
Tel. +39 06 68 88 01  
francesco.lalli@dlapiper.com

Benedetta Cicconi  
Associate  
Rome  
Tel. +39 06 68 88 01  
benedetta.cicconi@dlapiper.com

Veronica Bertocci  
Trainee  
Milan  
Tel. +39 02 80 618 1  
veronica.bertocci@dlapiper.com

Ilaria Curti  
Associate  
Rome  
Tel. +39 06 68 88 01  
ilaria.curti@dlapiper.com

This document has been issued by DLA Piper Italy. The contents of this document must not be considered as the basis of any decision nor taken as a reference by individuals, entities or their legal counsels for purposes other than a general analysis of the matters addressed herein.

@DLA_Piper_Italy

www.dlapiper.com

DLA Piper Studio Legale Tributario Associato is part of DLA Piper, global law firm operating through various separate and distinct legal entities. Further details may be found at www.dlapiper.com

Copyright © 2014 DLA Piper. All rights reserved. | JUN14 | 2786978