

CJEU: Italian Legislation Combining Administrative and Criminal Sanctions Against Market Manipulation Does Not Respect EU's *ne bis in idem* Principle

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In a judgment of 20 March 2018 on the combination of administrative and criminal proceedings/penalties, the CJEU ruled that Art. 50 CFR precludes national legislation that allows an administrative proceeding imposing penalties of a criminal nature for unlawful conduct consisting in market manipulation for which the same person has already been finally convicted, provided that the conviction is capable of punishing that offence effectively, proportionately and dissuasively.

In the case at issue (*C-537/16, Garlsson Real Estate and Others*), the Italian National Companies and Stock Exchange Commission (Commissione Nazionale per le Società e la Borsa, – “Consob”) imposed an administrative fine of €10.2 million on Mr. Stefano Ricucci and other enterprises for market manipulation in 2007. In his appeal to the Court of Cassation (Corte suprema di cassazione), Mr. Ricucci stated that he had already been finally (criminally)convicted and sentenced with respect to the same act in 2008, even though the criminal penalty was later pardoned.

The Court of Cassation raised the question of whether Art. 50 CFR, read in the light of Art. 4 of Protocol No 7 annexed to the ECHR, must be interpreted as precluding national legislation that permits the possibility to bring administrative proceedings against a person for unlawful conduct consisting in market manipulation for which the same person has already been finally convicted. It also posed the question as to whether said Art. 50 CFR confers on individuals a directly applicable right in the context of a dispute such as the one at issue in the main proceedings.

As in its judgment in case *C-524/15, Luca Menci* (delivered on the same day), the CJEU affirmed first the criminal nature of the administrative proceedings and, second, an intervention in the *ne bis in idem* rule. As a third step, the Court examined a possible justification in accordance with Art. 52 CFR. In this context, the CJEU applied the proportionality test as developed in *Menci*. While it regards the protection of the integrity of the EU financial market and public confidence in the financial instruments as an objective of general interest, the CJEU denies the strict necessity for it – unlike in the *Menci* case.

The CJEU argued that the requirement of coordinating procedures to limit the disadvantages caused by the duplication of procedures and penalties to what is strictly necessary would not be respected if the criminal conviction itself is effective, proportionate, and dissuasive enough under national law. Subject to final determination by the referring Italian court, it appears in the present proceedings that the criminal conviction

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already achieves the objective of protecting markets. This means that the act of bringing administrative proceedings of a criminal nature with respect to the same acts is too excessive.

In this context, it should be noted that criminal and administrative liability for market manipulation is regulated in the same act in subsequent sections. Hence, the CJEU also observed that the relevant national rules do not deal with the duplication of an administrative fine of a criminal nature and a term of imprisonment (but only regarding to the duplication of pecuniary penalties). This is considered a further indicator that national legislation cannot guarantee that the severity of the penalties imposed is limited to what is strictly necessary in view of the seriousness of the offence concerned.

The CJEU added that this result is not altered if the person concerned was pardoned, as happened in this case, since Art. 50 CFR protects those who have already been finally acquitted or convicted. This protection also extends to those persons who were sentenced to a criminal penalty that was subsequently extinguished as a result of a pardon.

The answer to the second question is limited to the observation that, according to settled case law, Art. 50 CFR is directly applicable in such a case.

As a result, the CJEU and the Advocate General came to the same conclusion in this case, although the [AG advocated](#) a different line of argumentation (as in case C-524/15, *Menci*). By contrast to the AG, the Luxembourg judges expressly clarified that the proportionality of national legislation cannot be called into question by the mere fact that the Member State concerned chose to provide for the possibility of a duplication of administrative and criminal proceedings. The reason for this is that otherwise said Member State would be deprived of the freedom of choice afforded by EU law.

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