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Market Abuse Evolution after the MAD II and the MAR: how Italy Amended its Legislation in Light of the Regulation (EU) 596/2014

Francesco Mucciarelli | Enrico Basile

Le modifiche alla disciplina italiana degli abusi di mercato in attuazione del Reg. (UE) 596/2014 si innestano in un settore travagliato e al centro del recente dibattito dottrinale e giurisprudenziale, che ha coinvolto anche le Corti europee. Le soluzioni adottate dal d. lgs. 107/2018 non risultano convincenti, né risolutive delle numerose problematiche che affliggono il comparto del market abuse

The 2014 EU instruments on market abuse are a milestone: for the first time a directive (2014/57/EU, so-called MAD II) and a regulation ((EU) 596/2014, so-called MAR) provide for a comprehensive legal framework including minimum rules with regard to the definition of criminal offences and sanctions, having the MAD II been enacted under article 83 (2) TFEU. Insider trading and market manipulation – jointly referred to as market abuse – are, after all, authentic 'Euro-crimes' introduced in most of the EU Member States by virtue of supranational acts. The domestic lawmakers, indeed, implemented over the time measures issued by the then European (Economic) Community from the Directive 89/552/EEC to the Directive 2003/6/CE (so-called MAD I).

The latest EU provisions concerning market abuse not only require criminalisation of the most serious misconduct, but they also introduce standard definitions of key-concepts in the relevant area. To the latter respect, being the MAR a regulation, the uniformity of the rules comes from its direct applicability in the MS legal systems. Domestic legislators, in turn, have the power (and, now, the obligation) to criminalise certain misbehaviour and they were supposed to implement MAD II within 3 July 2016 – i.e. two years after its enactment in the first half of 2014 – being the MAR entry into force deferred to the very same date.

The Italian case seems noteworthy because in this legal system the implementation of MAD I back in 2005 was used as a tool to introduce harsh administrative sanctions in addition to the pre-existing criminal penalties (then increased to a draconian level) for identical facts of market manipulation and insider trading, to be so punished twice. The punitive measures labelled as administrative consisted of fines (up to tens of millions euro) plus disqualification from doing business in the financial markets sector and confiscation of the outcome deriving from the infringement, as well as the instruments used to misbehave or the tantamount thereto (e.g. the shares deployed in a market manipulation scheme or the money in play for insider trading transactions). The criminal law side of the coin, in turn, (still) includes imprisonment up to twelve years, fines up to several million euros and, again, the same very broad confiscation measure that was previously in place with the 'administrative' label (whose scope is now narrower: see below).

At first glance, Italy has a matter of overspill in terms of punishment, given that criminal/administrative sanctions are cumulative rather than alternative, not to mention the inherent inconsistency and the economic inefficiency of two separate/consecutive proceedings (one managed by the financial markets supervisor –Consob–, the other filed by the Public

Prosecutor usually at a later stage). Such a regime quite evidently results into a breach of the fundamental safeguard enshrined by article 4 protocol 7 ECHR, known as *ne bis in idem* principle (including the prohibition of double jeopardy). Irrespective of the fair labelling by the domestic legal system, indeed, it is crucial assessing the punishment for 'administrative' offences in light of the so-called *Engel criteria* (i.e. those outlined by the Strasbourg Court to assess if a sanction falls within the scope of "criminal matter"/"*matière pénale*" for ECHR purposes). The European Court of Human Rights actually conducted the fair labelling test and in 2014 found that the Italian cumulative sanctioning system on market abuse amounts to a violation of the *ne bis in idem* principle, precisely because the 'administrative' part belongs to the notion of *matière pénale*. In recent years, however, the Strasbourg Court has examined further sets of cumulative sanctions imposed by domestic bodies (administrative agencies and the judiciary) of the States Parties to the ECHR, mainly with regard to tax issues. Differently from the Italian case on market abuse, the ECtHR Grand Chamber eventually adopted a more cautious approach, focusing on the overall proportionality of the sanction(s) and the foreseeability of the punishment for the offender, where the two sets of proceedings intend to pursue a common goal of deterrence and retributive purposes.

Following the said conclusions by the ECtHR, an endless debate started in Italy among scholars and domestic judges (including the Constitutional Court), to find out a way for reforming the current legislation on market abuse in order to avoid multiple sanctions (and multiple proceedings) for the very same misconduct. Requests for preliminary rulings were also addressed from Italian judges to the Court of Justice of the European Union, provided that article 50 EUCFR enshrines a safeguard consistent with the idea of *ne bis in idem* as intended under the ECHR and the ECtHR case-law (which is binding in the EU also by virtue of article 52 (3) EUCFR). In March 2018 the Luxembourg Court shared the very same attitude of its Strasbourg counterpart, affirming that the *ne bis in idem* principle must be intended and construed in light of proportionality and foreseeability, so that a cumulative sanctioning system is admissible to the extent that the overall punishment is proportionate and foreseeable for the offender.

In addition to the *ne bis in idem* issues on market abuse, it is worth pointing out that the MAD II is expressly grounded on the assumption that the "adoption of administrative sanctions by Member States has, to date, proven to be insufficient to ensure compliance with the rules on preventing and fighting market abuse" (MAD II, Whereas (5)). In other words, with a U-turn on the path previously crossed by the MAD I (i.e. preferring administrative sanctions over criminal ones), the EU lawmaker – thanks to the new legal tools of the Lisbon treaty – now requires criminalisation and leaves to MS the option of administrative punishment for MAR violations only, avoiding at any event the "breach of the principle of ne bis in idem" (MAD II, Whereas (23)).

The supranational scenario at EU level, as well as the aftermath of the 2014 ECtHR and the 2018 EUCJ judgments on the Italian market abuse regime (case C-537/16 and the joined cases C-596/16 and C-597/16), would have required a careful intervention by the domestic lawmaker to implement MAD II, reforming the current cumulative punishment system. Quite surprisingly, nevertheless, since 2014 the executive branch of the government sustained in official documents that Italy had no need to reshape its (criminal/administrative) sanctioning regime, because the MAD II criminalisation requirements were already met.

The Italian Parliament in 2015, anyway, expressed a different view and vested the executive branch with the power to enact a law implementing MAD II in the following 18 months: the said deadline, however, expired without the enactment of any piece of legislation on market abuse crimes.

In 2017, the executive branch of government presented a new draft bill on the implementation of various EU measures, stating again that Italy is compliant with the MAD II for criminal law purposes, albeit the MAR implied the need of changing the domestic legislation in order to be consistent with the EU regulation at issue. The Parliament eventually granted the power to adopt the requested acts and the Legislative Decree no. 107 of 2018 came into force on 29 September 2018.

The recalled piece of legislation amends the Consolidated Law on Finance (Legislative Decree no. 58 of 1998), including the criminal offences of market abuse. The amendments often consist of replacing the pre-existing domestic provision (e.g. the definition of inside information) with a blanket clause referring to the MAR, while in other cases some words are inserted in the legal text to reflect the content of the regulation (EU) 596/2014. In both cases the overall wording of the law is quite obscure, even when it states that certain activities are lawful (for example market sounding, under article 11 MAR).

Further changes specifically concern insider trading, by extending the scope of such a crime to securities and financial instruments exchanged over the counter (OTC) or on other trading facilities (OTF), as expressly requested by the MAD II and the MAR. In the lack of the power to redraft in full the criminal provisions, however, the executive branch could criminalise the said misconduct only as a minor offence punished with imprisonment up to three years and a fine not exceeding one hundred thousand euro, while the same course of action perpetrated with respect to financial instruments exchanged on a regulated market is (still) punished with imprisonment up to twelve years and fines ranging between tens of thousands and several millions euro. It is paradoxical, then, a so different level of sanctions notwithstanding both the MAD II and the MAR clearly require equalising punishment of all and every misbehaviour of the same kind, irrespective of the underlying securities and the venue thereto. Furthermore, the Italian provisions against insider trading since 2005 do not criminalise (anymore) the so-called secondary insider, who can be sanctioned only under an administrative offence, in spite of the MAD II request to consider a crime the misconduct of a person (not being a 'primary insider') who knows or should have known to be in possession of inside information. On the other hand – according to the new EU provisions on market abuse – the unlawful disclosure of inside information should be considered as a less serious offence and punished less seriously than trading or inciting another party to trade without disclosing the inside information (so-called *tuyautage*). The current Italian criminal provisions do not reflect at all the recalled approach on the unlawful disclosure of inside information, whose punishment is (still) the same provided for the other forms of insider trading.

As to market manipulation, the relevant criminal offence has now a broader scope in order to include derivative financial instruments as well as 'green certificates' and benchmarks, whose value/performance can be altered through fraudulent manoeuvres. Again, however, the law does not simply extend the most serious crime (punished with imprisonment up to twelve years and a fine ranging from tens of thousands to several millions euro), while the new criminalisation consists of a minor criminal offence with the same lower penalties provided for 'minor' insider trading (see above).

Some other amendments concern the 'administrative' punishment by reducing the fines thereto (both in their minimum (now twenty thousand euro) and in their maximum amount (five million euro)), as well as adding further blanket clauses and references to the MAR, without any change in the overlapping of two separate sets of proceedings and sanctions for the very same misconduct. A difference between criminal and non-criminal consequences of market abuse in Italy can nowadays be found in the rules on confiscation, which has a narrower scope on the administrative side (not including anymore the 'means' used to misbehave).

The only new norm aimed to mitigate the overall punishment deriving from the cumulative sanctioning system on market abuse merely requires to "take into account" the penalties already imposed on the offender in inflicting a further (criminal or administrative) sanction, in particular by deducting the amount of previous fines to avoid a double payment. The recalled provision looks insufficient to preserve the *ne bis in idem* principle, not only because of its narrow wording, but mainly because it does not address at all the issue of double jeopardy. Although not sanctioned in full for the same misconduct, the offender is indeed tried twice, not to mention the related evidentiary issues (nowadays it is allowed to present as a piece of evidence before a Criminal Court the outcome of administrative investigations carried out by the Consob, often without a full compliance with the ECHR and its fundamental safeguards like the right to remain silent and a fair trial for the accused person).

In conclusion, the recent Legislative Decree no. 107 of 2018 has given rise to new matters on the Italian market abuse regime, instead of solving the old ones and it is unclear if the MAD II will ever be implemented in Italy, at least to prevent the European Commission from taking legal action – an infringement procedure – against the MS failing to fulfil its obligation under EU law.