# Insider Dealing in Italy and the UK

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**23rd February 2015**

## Abstract

This paper firstly analyses the 2003 Directive of the European Community, detailing what all member states have to integrate. Afterwards, both the national legislation of Italy and the United Kingdom are examined, detailing the essential requirements of inside information, the insider and the criminal behaviour. Finally, an Italian insider dealing case is analysed, including its most recent development involving the European Court of Justice.

## The 2003/6/EC Directive

The year 2003 was a milestone for the regulation of market abuse, as the first usage of the Lamfalussy procedure[1] marked also the beginning for the update of European regulations in order to adjust to the new Stock market operation possibilities and to prompt a reform in national legislations.

The 2003/6/EC Directive, therefore, marked a final separation between the old and the current legislation, as it did not mention the principles of parity of information and market equity, which were the basis of the previous law. The new purpose was to protect the wholeness of stock market operations and reinforce the trust of stock market operators hurt by all kinds of market abuse. However, this time a certain asymmetry of information was contemplated by the directive: those individuals who perform research and gather significant data, or who are able to access data because of their position[2] (such as financial advisers) should be able to take advantage of any information they lawfully know (unlike insiders, who merely exploit unlawfully said information).
Paragraph 12 is especially clear; it assigns the same label to insider trading and stock market manipulation.

It could be said that this is the end of an era: European regulation has understood that pursuing the ideal of perfect symmetry of information for the entirety of stock market operators is impossible.
On the usage of the reasonable man criteria there is an important paragraph of Directive 2003/124/EC: "*the question whether, in making an investment decision, a reasonable investor would be likely to take into account a particular piece of information should be appraised on the basis of the ex ante available information. Such an assessment has to take into consideration the anticipated impact of the information in light of the totality of the related issuer's activity, the reliability of the source of information and any other market variables likely to affect the related financial instrument or derivative financial instrument related thereto in the given circumstances*".

1 It consists of a two-part procedure: firstly an indication from the European Parliament and Council which could establish the basic principles, and secondly the actual directive from the European Commission, which contained the necessary regulations for the national legislator in order to implement the directive correctly.

2 Galli, S., *La Disciplina Italiana in Tema di Abusi di Mercato*, p. 142.

Art. 4 of the Directive states that Member States are responsible for the application of art. 2 and 3 to every subject that meets the liability requirements, considering the "whereas" paragraphs 14 and 17 of the Directive show that the initial *ratio* was to create a law capable of countering terrorism, but the wide formula that was used allows in fact to extend it to the majority of crimes.

**Law 62/2005: Italian legislation born anew**

The national discipline on insider trading (and stock market manipulation in general) provided by the Testo Unico della Finanza (TUF) was completely overhauled with the approval of law no. 62/2005, which completely reformed the TUF Sections related to market abuse. It was not an easy operation: Directive 2003/6/EC should have been incorporated into the Italian legal system no later than October 2004 (as foreseen in the 2003 European Law), as an answer to stakeholders – regarding the Cirio and Parmalat crises, but the actual approval of the law got "mired" in Parliament. In order to reach an acceptable deadline a procedure shorter than normal was used to approve the integration of the Directive, which happened on April 18, 2005.

The revised article 180 (*Definitions*) works as an introduction for the whole law (not limited to insider trading regulation), as it explains how fundamental terms have to be interpreted for a correct application of the law.

Article 181 renews the definition of privileged information as precise, not public, directly or indirectly concerning securities and, if divulged, capable of altering the economic value of said securities; therefore, the requirements of "precision of information" and capability of altering the stock market flow (price sensitivity) are arguably the most important aspects.

Paragraph 2 extends this definition to information related to commodity derivatives.

Paragraph 3 explains the "precision of information" requirement as follows: the event must have recently happened or reasonably be expected to happen in the near future, and the information must be specific enough to be able to lead to conclusions on the possible effect of information on financial instruments. Therefore it highlights how the information must concern facts which have already happened or will soon occur according to a reasonable foresight (excluding purely hypothetical information and wild predictions).

Paragraph 4 explains the "price sensitivity" criteria: the information, if published should allow for a relevant shift of monetary value of affected securities, as it should cause investors to rethink their decisions. This is a quasi-literal integration of the definition straight from the Directive itself, but it is important to highlight that privileged information has to be one crucial element of the investor's decision-making progress, but not the only reason, thus providing a broader scope of liability.

Arguably, paragraphs 3 and 4 are the most controversial ones in the new legislation. The "reasonable foresight" definition of paragraph 3 has met predictable hostility from the establishment[3], as it is considered too uncertain of a criterion, to be applied with purpose.

And while the "precision of information" requirement effectively de-criminalized unverified rumours, the price-alteration requirement could cause a great deal of confusion if read with paragraph 4's "price sensitivity" requirement. In turn, paragraph 4 was criticized[4] because of the notion of "reasonable investor": not only because of, yet again, uncertainty, but also because nowadays the Stock market is accessible almost freely by non-specialized[5] individuals, and thus any standard of "reasonable" behaviour is far more difficult to identify.

The last paragraph of article 181 states that all individuals who operate in the field of securities are forbidden from exploiting the information shared by their clients (information that must comply to the requirements stated before). This last provision criminalizes *front running*[6] behaviour, which the establishment deemed unnecessary[7]. It can be said that the intention of the legislator was an explicit prohibition of all kinds of market abuse conduct[8].

Article 182 regulates the territorial application of the law, and it is worth pointing out that under particular conditions[9] criminal conduct occurred outside Italian jurisdiction are targeted.

Article 183 regulates exemptions from criminal responsibility for certain conduct, mirroring the previous regulations: the first paragraph obviously mentions national public entities[10], and it extends the exemptions to the BCE, European Member States and their main banks and their direct emissaries for any kind of operation related to monetary policy or debt management. The second paragraph provides exemption for economic operations executed on one's own stocks in particular cases (the so-called *Safe Harbour* operations[11]), and clarifies that outside the aforementioned criteria (regulated by the CONSOB) any stock operation on proprietary stocks is considered[12] market abuse.

But perhaps the most important innovation lies in the long-waited differentiation of punishment for primary and secondary insiders: the former subject to criminal law, the latter – to administrative and civil punishments.

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3 Galli, S., *La Disciplina Italiana in Tema di Abusi di Mercato*, p. 43.

4 Seminara, S., *Informazione finanziaria e diritto penale*, Convegno De Nicola, Milano, 2008, p. 205-208.

5 Sgubbi, F., *Il risparmio come oggetto di tutela penale*, "Giurisprudenza Commerciale", 2005, p. 340-349.

6 It consists in the illegal activity of a financial intermediary who, after having received an order capable of altering stocks, acts independently in order to anticipate and exploit said effects.

7 It was said that, via extensive interpretation of the law, the previous discipline could be applied for the same effectiveness.

8 Again, this shows how much the Italian legislator tried to comply with the European Directive, sometimes resulting in disposition of a severity exceeding the intent of the European legislator.

9 Art.182: "[…] anche se commessi all'estero, qualora attengano a strumenti finanziari ammessi o per i quali e' stata presentata una richiesta di ammissione alla negoziazione in un mercato regolamentato italiano o in un sistema multilaterale di negoziazione italiano."

10 Mirroring previous legislation, and expanding it.

11 2273/2003 CE Regulation, which expands and clarifies said operations.

12 Grande Stevens, F., S*TUDI in memoria di Franco Piga - Vol.II : Diritto civile, commerciale economia e finanza, varie*, Giuffrè, Milano, 1992, p. 1006.

The first paragraph of article 184, in fact, identifies the perpetrator of insider trading with the following criteria: the primary insider, possessing privileged information by virtue of position (such as CEO, administrative or surveillance duties for the company); and the secondary insider, who has access to information by virtue of profession (both public and private). There is now a greater differentiation: there are "primary" insiders, always privy to privileged information by virtue of their position; and "temporary" insiders, who are treated differently. The law also specifies how, in order to configure insider trading, eventual corporate associates (even in positions of control) have to be associated to "the" particular corporation to which privileged information applies, in contrast with the previous legislation, which had a greater degree of uncertainty. Therefore, the position of mere business partners has been decriminalized[13] (but is still subject to administrative punishments), while institutional corporate associates (who acquire privileged information by virtue of their position) can be included in the "temporary insider" category.

Article 184's second paragraph delineates an entirely new criminal case: the "criminal"[14] insider, those who have knowledge of privileged information due to criminal activity[15], according to art. 2.1/d of the 2003/6/EC Directive (aimed also[16] at targeting insider trading linked to terrorist[17] phenomena).

The insider trading criminal case is characterized by the behaviours of trading, *tipping* and *tayautage*. A requirement which the new law highlights is the necessity of exploitation of privileged information, in direct contrast with the 1991 law, therefore not criminalising the mere knowledge of privileged information. On the other hand, the mere sharing of privileged information and *tayautage* (thus no exploitation via stock market operations needed) are behaviours still punished. The new law specifically requires[18] that the criminalisation is applied only when conduct is "out of bounds", outside the "by virtue of profession" requirement. This new formula is more adherent to the Communitarian[19] legislation, which has always emphasized the aforementioned requirement.

Article 184 then defines the various applicable punishments for the primary insider: the first paragraph defines the minimum and maximum values of both imprisonment[20] and fine[21].

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13 Cassazione Penale, sez. V, February 9th, 2006, no. 9391

14 "La stessa pena di cui al comma 1 si applica a chiunque essendo in possesso di informazion privilegiate a motivo della preparazione o esecuzione di attività delittuose compie taluna delle azioni di cui al medesimo comma 1."

15 The Italian legislator underlines how any kind of criminal activity – including preparatory activity - is susceptible of configuring a criminal case, perhaps exceeding the expectations of the European directive.

16 Paragraph 17 2003/6/CE: "Per quanto riguarda l'abuso di informazioni privilegiate, si dovrebbe tener conto dei casi in cui la fonte di tali informazioni non è legata a una professione o a una funzione ma allo svolgimento di attività criminali, la cui preparazione o esecuzione potrebbe influire in modo sensibile sui prezzi di uno o più strumenti finanziari o sulla formazione dei prezzi del mercato regolamentato in quanto tale."

17 Paragraph 14 2003/6/CE: "La presente direttiva dà riscontro alle preoccupazioni espresse dagli Stati membri in seguito agli attacchi terroristici dell'11 settembre 2001 per quanto riguarda la lotta al finanziamento delle attività terroristiche."

18 Art. 184 paragraph b): "al di fuori del normale esercizio del lavoro, della professione, della funzione o dell'ufficio;"

19 European Court of Justice, 22-11.2005

20 From one to six years.

21 From 20,000 up to three million Euro.

Law no. 262/2005[22] doubled those values, which now range from two to twelve years of imprisonment and up to six million Euro fines. Additionally, paragraph 3 further aggravates the economic punishment, as it allows the judge to raise the fine up to three times[23] the maximum prescribed by law. But, more importantly, it provides the following alternative[24]: to set the amount of the fine as a multiple of the profit gained through insider trading, up to ten times, if one particular condition[25] of article 183 is met. It is relevant to point out that only *stricto sensu* profit is considered a valid parameter, while any eventual loss avoided due to criminal conduct is not.

The secondary insider law, on the other hand, is regulated by article 187-bis. He/she is only susceptible of administrative (non-criminal) punishment. The first paragraph defines a fine which can be cumulated with the aforementioned criminal sanctions (if both cases are perpetrated by the same person), up to five million Euro. Paragraph 4[26] further clarifies the criminal case, highlighting how *tippees* are now considered as primary insiders, expanding the scope of forbidden behaviours also to mere communication.

But, in fact, what is really relevant is that the requirements in order to be qualified as a secondary insider are now redefined, in more psychological terms: now the main condition is the knowledge of the information of being privileged, mirroring the 2003 Directive (which in turn, however, is different from Directive 89/592/EEC, which required no knowledge about the nature of information, but about the source of said information being a primary insider). This new definition seems broader and easier to apply, inspired yet again by the principle of parity of information, and therefore targeting whoever conducts stock market operations in violation of this principle. This is highlighted by the punishment of *tipping* behaviour, which happens even if no negotiation/exploitation was performed, for both primary and secondary insiders.

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22 Art. 39 paragraph 1: "Le pene previste dal testo unico di cui al decreto legislativo 1° settembre 1993, n. 385, dal testo unico di cui al decreto legislativo 24 febbraio 1998, n. 58, dalla legge 12 agosto 1982, n. 576, **(( . . . ))**, sono raddoppiate entro i limiti posti per ciascun tipo di pena dal libro I, titolo II, capo II, del codice penale."

23 Again, mirroring previous legislation.

24 "Il giudice puo' aumentare la multa fino al triplo o fino al maggiore importo di dieci volte il prodotto o il profitto conseguito dal reato quando, per la rilevante offensivita' del fatto, per le qualita' personali del colpevole o per l'entita' del prodotto o del profitto conseguito dal reato, essa appare inadeguata anche se applicata nel massimo."

25 Either the profit is so considerable that the fine would be ineffective, the author of the crime is of particular importance (such as a public official), or the crime itself is a relevant offense.

26 "La sanzione prevista al comma 1 si applica anche a chiunque, in possesso di informazioni privilegiate, conoscendo o potendo conoscere in base ad ordinaria diligenza il carattere privilegiato delle stesse, compie taluno dei fatti ivi descritti."

The new legislation has kept the possibility of seizure, regulated by article 187[27]: this particular regulation is different from the standard one provided by the Criminal Code, as it is engineered to work much better as a punitive[28] tool[29], rather than a deterrent. It is possible to have confiscation for both insider trading and stock market manipulation, and also for the minor[30] cases, regulated only by administrative law. This time, however, confiscation is mandatory (rather than freely applicable) and it covers any profit, tool or product[31] consequential from the criminal conduct, expanding on the 1998 legislation. An extremely important addition, however, is reported in paragraph 2 of both the previously mentioned articles, as they introduce what is known as "confiscation by equivalence": whenever it is not possible to execute a proper confiscation on the profit, tool or product of the crime, it is possible to seize whatever goods belong to the criminal until a sum equivalent to the judicial rule is reached. What was stated before is proven true now, the Italian Courts consider[32] confiscation a punitive tool more than a preventive tool, regarding those criminal cases. It is still possible to settle[33], and it is no longer explicitly compared to an unfavourable court ruling. However, confiscation is not forbidden even in the case of settlement, according to paragraph 3[34] of article 187, which extends the general law to the aforementioned criminal cases.

Article 184 of the TUF defines three different cases of criminally liable behaviour. It is necessary to clarify now that, in order to configure liability, there is no need for profit (for the insider or others) to have occurred, nor is it necessary for the securities to have experienced a shift in their monetary value. Therefore, insider trading can be considered a "behaviour crime", in the sense that it does not require an actual consequence[35]. According to the legislator's choice in disciplining the issue, the first typical case is identified as *stricto sensu* "trading": the acquisition, the sale or the perpetrating of other operations, directly or indirectly, for one's benefit or the benefit of others, through the exploitation of privileged information.

This first hypothesis can be considered as the paradigm case of insider trading and, in fact, in order to discipline it, the legislator has chosen a very broad definition, with the purpose to include all the behaviours which can be perpetrated via the exploitation of any informative asymmetry benefiting the insider.

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27 "In caso di condanna per uno dei reati previsti dal presente capo e' disposta la confisca del prodotto o del profitto conseguito dal reato e dei beni utilizzati per commetterlo. 2. Qualora non sia possibile eseguire la confisca a norma del comma 1, la stessa puo' avere ad oggetto una somma di denaro o beni di valore equivalente. 3. Per quanto non stabilito nei commi 1 e 2 si applicano le disposizioni dell'articolo 240 del codice penale."

28 Cassazione Penale, Sezioni Unite, n.10280/2008.

29 Because of the way in which the law is structured, this new disposition shows how much the purpose of the legislator has shifted: seizure is now considered to be much more effective after the crime has been perpetrated. The previous legislation, instead, saw it more as a preventive tool.

30 Art. 187: "L'applicazione delle sanzioni amministrative pecuniarie previste dal presente capo importa sempre la confisca del prodotto o del profitto dell'illecito e dei beni utilizzati per commetterlo.
2. Qualora non sia possibile eseguire la confisca a norma del comma 1, la stessa puo' avere ad oggetto somme di denaro, beni o altre utilita' di valore equivalente.
3. In nessun caso puo' essere disposta la confisca di beni che non appartengono ad una delle persone cui e' applicata la sanzione amministrativa pecuniaria."

31 Juridical term, which indicates any material thing obtained through criminal conduct.

32 Cassazione Penale, Sezioni Unite, n. 26654/2008

33 Again, a juridical term, which means: limited to certain cases by criminal law.

34 "Per quanto non stabilito nei commi 1 e 2 si applicano le disposizioni dell'articolo 240 del codice penale."

35 Costi, R., *Il Mercato Mobiliare*, Giappichelli, Torino, 2010, p. 107. According to the author "l'*insider* è punito indipendentemente dal fatto che le operazioni vietate, e dallo stesso compiute, abbiano effettivamente inciso sul prezzo dei titoli; siamo infatti in presenza di un reato di pericolo".

The choice of the word *utilizzando* used in sub-section a) of paragraph 1 article 184 TUF is very important, as it underlines the opinion of major scholars, who believe that in order to configure a criminal case of abuse of privileged information it is necessary to exploit directly said information, excluding, therefore, the case in which an insider, possessing privileged information, decides not to use it (insider non-trading)[36].

Additionally, the formulation *direttamente o indirettamente, per conto proprio o di terzi*[37] introduced by the current law clarifies, if compared to the legislation preceding the introduction of the European Directive, which extended the prohibition even to operations completed through nominees, that there is insider trading both when the economic effect affects only the actual insider, and when, due to the operation perpetrated by the insider the actual economic effects fall on an individual not subject to the prohibitions stated by article 184 TUF.

The second typical criminal case provided by article 184 (paragraph b) encompasses the communication of privileged information to others, outside of any professional relationship, or in general any case of "virtue of profession". This behaviour is known as "tipping". In this case the legislator, with the purpose of overcoming the previous law (which simply punished any kind of communication happened without justification), has explained in a clearer way the limits within which communication can be considered justified and legal, even if some doubts remain concerning the definition of "normalità" when it refers to various cases covered by the "virtue of profession" parameter[38]. It is also necessary to mention that, considering the crime examined is a "conduct crime", there is no need for the *tippee*, the individual who receives the privileged information, to actually exploit the information[39], as the communication alone will be
enough to cause criminal liability for the insider.

The last criminal behaviour is identified by sub-section c) of article 184, first paragraph of the TUF, which prohibits the recommending or advising to others, according to the knowledge of privileged information, to perform any kind of operation described by sub-section a), which is known as
tayautage). The wording used by the legislator is a direct import of the European Directive (article 3, paragraph 1, sub-section b)[40]). The words "raccomandare" and "indurre"[41] appear to define an actual intention to persuade to accomplish an operation concerning securities. The formula used
appears to be more precise if compared to previous legislation, which limited itself to a general behaviour of advising. Therefore it appears to confirm the exclusion of criminal liability concerning an insider who recommends not undertaking operations concerning securities, as such interpretation would be against constitutional rules.

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36 Sandrelli, G. G., *I reati di market abuse*, in *La responsabilità amministrativa degli enti* I, 2006, pag. 63.

37 *"a) acquista, vende o compie altre operazioni, direttamente o indirettamente, per conto* proprio o per conto di terzi, su strumenti finanziari utilizzando le informazioni medesime;"

38 Mucciarelli, *L'abuso di informazioni privilegiate: delitto e illecito amministrativo,* cit., explains that the modification of the law, compared to the previous law,has had the consequence of causing a change in the essential elements of the criminal case, "posto che in precedenza ad essere riportabile al modello legale era qualunque comunicazione a terzi di informazioni privilegiate, salva la non antigiuridicità di quelle effettuate per "giustificato motivo"".

39 In this case, the *tippee*'s behaviour will satisfy the case stated by art. 187-bis of the TUF.

40 *"b) recommending or inducing another person, on the basis of inside information, to acquire or* dispose of financial instruments to which that information relates."

41 *"c) raccomanda o induce altri, sulla base di esse, al compimento di taluna delle operazioni* indicate nella lettera a)."

### The Criminal Justice Act of 1993, Part V (Insider Dealing)

In order to remedy the shortcomings of the previous legislation, and to better comply with the European Directives, the Criminal Justice Act of 1993 was enacted. The definitions of this new Act are simpler and broader, so they can be applied also[42] to corporate securities, contracts for differences, depository receipts, debt securities, options, warrants and futures. The new Act also constitutes a departure from the principles of fiduciary duty, eliminating the need for a link between the insider and the source of inside information. This was a necessary change, for even overseas scholars considered insider dealing as "difficult to define"[43].

As with the Italian experience, in the British Act, the definitions of "insider dealing[44]", "insiders"[45] and "inside information"[46] are key factors in order to identify the actual criminal conduct. There are, in fact, three[47] different behaviours which are now criminalized, according to Section 52: *stricto sensu* insider dealing[48], insider encouragement[49] and insider disclosure[50].

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42 Criminal Justice Act 1993, Section 54.

43 Bainbridge, S., *A Critique of the Insider Trading Sanctions Act of 1984*, Virginia Law Review 71, 1985, p. 1.

44 Section 52 "The offence": (1) An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in subsection (3), he deals in securities that are price-affected securities in relation to the information.
(2) An individual who has information as an insider is also guilty of insider dealing if (a) he encourages another person to deal in securities that are (whether or not that other knows it) price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the circumstances mentioned in subsection (3); or (b) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.
(3) The circumstances referred to above are that the acquisition or disposal in question occurs on a regulated market, or that the person dealing relies on a professional intermediary or is himself acting as a professional intermediary.
(4) This section has effect subject to section 53 "Defences".

45 Section 57 "Insiders": (1) For the purposes of this Part, a person has information as an insider if and only if (a) it is, and he knows that it is, inside information, and (b) he has it, and knows that he has it, from an inside source. (2) For the purposes of subsection (1), a person has information from an inside source if and only if (a) he has it through (i) being a director, employee or shareholder of an issuer of securities; or (ii) having access to the information by virtue of his employment, office or profession; or (b) the direct or indirect source of his information is a person within paragraph (a).

46 Section 56 "Inside information": (1) For the purposes of this section and section 57, "inside information" means information which (a) relates to particular securities or to a particular issuer of securities or to particular issuers of securities and not to securities generally or to issuers of securities generally; (b) is specific or precise; (c) has not been made public; and (d) if it were made public would be likely to have a significant effect on the price of any securities.
(2) For the purposes of this Part, securities are "price-affected securities" in relation to inside information, and inside information is "price-sensitive information" in relation to securities, if and only if the information would, if made public, be likely to have a significant effect on the price of the securities.
(3) For the purposes of this section "price" includes value.

47 This is similar to the Italian law, which is split between **proper** insider trading, *tipping* and *tayautage*.

48 An individual who knows price sensitivity information and deals with price-sensitive stocks related to that information.

49 An individual who knows price sensitivity information and encourages another one to deal with price-sensitive stocks related to that information.

50 An individual who knows price sensitivity information and discloses it to another one in a way inappropriate due to its profession, position or

Section 55[51] defines the kind of behaviour which is liable, with regard to actual stock operations (what the law defines as "securities"): agreeing or entering a contract, as principal or agent, to acquire or dispose of securities; or procuring an acquisition or disposal by another person, directly or indirectly.

Section 56 defines inside information[52] itself, by stating its four basic requirements. First of all, the information must detail particular securities or a particular issuer of securities. Therefore, it does not target the whole stock market indiscriminately. Secondly, it must be specific and precise information. Just as with the Italian law, there is no crime in the case of rumours or unspecified information. Thirdly, said information must not have been published. This concept is explained by Section 58[53] which defines as "public" any kind of communication that would enable the public or a specialized part of the public to acquire it, even by exercising diligence and expertise, or a communication which is obvious (which can be acquired simply through observation). In addition to that, if the information has been published (so far) only outside the United Kingdom it is still considered to be publicly available. The last requirement is the price sensitivity of the information itself. If the information is public, it must have an impact on the economic value of securities. Therefore, no information can be considered relevant for insider dealing if it has no impact on securities. In addition to that, the information has to come from an "inside source", as defined[54] by Section 57.

In fact, part of the law states that, of all the confidential information held by a company, inside information can be identified as "a substantial amount of information [which] will be generated within a company and be available to its directors, employees, and advisers. Much of this information will be confidential, and may have some impact on share prices"[55].

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51 "(1)For the purposes of this Part, a person deals in securities if (a)he acquires or disposes of the securities (whether as principal or agent); or (b)he procures, directly or indirectly, an acquisition or disposal of the securities by any other person.
(2)For the purposes of this Part, "acquire", in relation to a security, includes (a)agreeing to acquire the security; and (b)entering into a contract which creates the security.
(3)For the purposes of this Part, "dispose", in relation to a security, includes (a)agreeing to dispose of the security; and (b)bringing to an end a contract which created the security.
(4)For the purposes of subsection (1), a person procures an acquisition or disposal of a security if the security is acquired or disposed of by a person who is (a)his agent, (b)his nominee, or (c)a person who is acting at his direction, in relation to the acquisition or disposal.
(5)Subsection (4) is not exhaustive as to the circumstances in which one person may be regarded as procuring an acquisition or disposal of securities by another."

52 This is another name for "privileged information".

53 Information "made public": "(1) For the purposes of section 56, "made public", in relation to information, shall be construed in accordance with the following provisions of this section; but those provisions are not exhaustive as to the meaning of that expression.
(2) Information is made public if (a) it is published in accordance with the rules of a regulated market for the purpose of informing investors and their professional advisers; (b) it is contained in records which by virtue of any enactment are open to inspection by the public; (c) it can be readily acquired by those likely to deal in any securities (i) to which the information relates, or (ii) of an issuer to which the information relates; or (d) it is derived from information which has been made public. (3) Information may be treated as made public even though (a) it can be acquired only by persons exercising diligence or expertise; (b) it is communicated to a section of the public and not to the public at large; (c) it can be acquired only by observation; (d) it is communicated only on payment of a fee; or (e) it is published only outside the United Kingdom."

54 A person holder of information, aware that it is inside information, such as director or issuer of securities, or a person who knows information by virtue of profession, similarly to the Italian experience.

55 Kern, A., *Insider Dealing and Market Abuse: The Financial Services and Markets Act 2000*, p. 6, ESRC Centre for Business Research, Cambridge, 2001.

It is also important to point out that, according to the law, the insider has to be a physical person, not a legal one such as a company. Unfortunately, this oversight of the legislator allows big companies to continue to perpetrate insider dealing and never be punished by exploiting the system through a "Chinese wall", which makes it impossible to trace the author of an insider dealing crime[56]. This is also reflected in the punitive[57] system, aimed only at individuals and thus inapplicable to non-physical persons (not to mention that prosecuting is only possible with the consent of the Director of Public Prosecution, the highest authority related to prosecution in the United Kingdom).

Let us now consider this law for dealing with insider dealing in the United Kingdom. Firstly, it is important to point out that a significant part of the British legislation[58] criticized the approach of the legislator to insider dealing. The burden of proof is considered almost impossible to bear for the offended part, as English law requires proof "beyond reasonable doubt". Therefore, since such evaluations when confronting insider dealing are considered to be impossible, the inevitable result would be a large number of acquittals.

Secondly, there has been significant criticism concerning the decision of regulating insider dealing only via criminal law. The doctrine argued that the line between "licit" and "illicit" insider dealing is thin, and therefore the exemptions and safe-harbour conducts introduced by the legislator were considered necessary in order to avoid deterring legitimate stock market activities. And yet, the measures defined by the legislator, joined with an actual inadequate legal definition made it impossible to actually allow victims to reach a legal burden of proof. This is why many scholars of the United Kingdom pressed for an additional civil or administrative system of control: not only the burden of proof would be easier to manage, but also punishments could be issued to non-individual subjects[59].

In fact, those faults of the system were a symptom of the inadequacy in regulating insider dealing. Inadequacy that can be traced up to the roots of the system of criminal justice, incapable of efficiently persecuting financial crime (and thus failing the challenge against insider dealing), possibly also because of the rejection, by the government, of a proposal which wanted to institute a central body for persecuting financial crimes.

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56 Supposedly a tool to avoid conflicts of interests, it can be described as "an information barrier implemented within a firm to separate and isolate persons who make investment decisions from persons who are privy to undisclosed material information which may influence those decisions".

57 Section 61: "(1)An individual guilty of insider dealing shall be liable (a)on summary conviction, to a fine not exceeding the statutory maximum or imprisonment for a term not exceeding six months or to both; or (b)on conviction on indictment, to a fine or imprisonment for a term not exceeding seven years or to both.
(2)Proceedings for offences under this Part shall not be instituted in England and Wales except by or with the consent of (a)the Secretary of State; or (b)the Director of Public Prosecutions.
(3)In relation to proceedings in Northern Ireland for offences under this Part, subsection (2) shall have effect as if the reference to the Director of Public Prosecutions were a reference to the Director of Public Prosecutions for Northern Ireland."

58 By quoting the words of an Economic Secretary of a Standing Committee: "there is a gap in the protections. The criminal law covers all market participants, but only a narrow range of serious criminal offences. The regulatory regime is capable of dealing with a wider range of damaging behaviours, but applies only to the regulated community". This was said referring to the ability of an outsider to undermine a market even if not part of said market (for example, the effect Sumitomo Bank had on the London Metal Exchange). Found in Economic Secretary in Standing Committee A, November 2, 1999.

59 Alcock, A., *Insider Dealing - How Did We Get Here?*, p. 67-72, Company Lawyer 67, 1994

However, the main point, as stated before, is the standard of proof which has to be beyond reasonable doubt accordingly to the law. The legal requirement itself would make it very difficult for the victim to obtain justice, or even to present an insider dealing case before a jury[60].

The case law history details great difficulties in proving *mens rea* (demonstrating either that the primary insider is aware of the information being "inside information", or the knowledge of the secondary insider of information coming from a relevant inside source[61]). Providing relevant case law examples will help in conceptualizing this principle more clearly.

The first case to analyse is *R v Holyoak, Hill and Morl*[62]. The three defendants were employees of an accountancy company which worked as an advisor for a takeover deal. By virtue of their profession, the defendants had access to inside information related to the bid used for the takeover. Seven minutes before the bid was disclosed, they acquired securities belonging to the target company. The day after, they sold the securities and secured themselves a profit around £13,000. When brought before a court, their defence was the belief that the takeover had already been made "public information" when they acquired the securities. Even with the actual computerized trace of their operations as circumstantial evidence, the prosecution failed to demonstrate their mens rea, their knowledge of the status of the information.

The second relevant case to analyse is particularly interesting, as it is a rare example of a court obtaining a conviction under the 1985 Act. In addition to that, it is a case decided by the High Court of Scotland, adjudicated under British Law, in 1993: *Mackie v HM Advocate*[63]. Mr. Mackie was an economic analyst who, after having spoken with the CEO of a company[64], advised his clients according to the inside information he had obtained at the meeting[65]. He was firstly convicted under the 1985 Act because his counselling was contrary to the law: therefore integrating the forbidden behaviour. But, on appeal, the conviction was quashed because no one could prove exactly what was discussed at the meeting with the CEO, and therefore the "beyond reasonable doubt" standard of proof was not met: even if the CEO himself testified that he had warned Mackie about possible profits, the final verdict would state a conflict of evidence, and classify the existing one as insufficient.

Case law shows how the legal requirements[66] for insider dealing conduct were purposely difficult to satisfy in order to safeguard individuals truly unaware of the information being inside information from criminal penalties, and this could only be accomplished by introducing more exemptions from criminal liability. However, this legislation has been criticized since its approval, highlighting its overall inefficiency and how it would lead to many unjustified acquittals[67].

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60 Cole, M., *Insider Dealing in the City*. Speech by Margaret Cole, FSA London School of Economics, 2007

61 Defined by Section 57 of the Criminal Justice Act, as mentioned before.

62 No citation is provided for this case, as it is unreported in official case law databases. It was quoted, however, in Mayfield, J., *The FSA's Approach to Insider Dealing*, New Law Journal, 2009.

63 *Mackie (Thorold) v HM Advocate*, High Court of Justice, 16 February 1994. Found in Walker, C., Starmer, K., M*iscarriages of Justice*, p.334, Oxford University Press, Oxford, 1999

64 And obviously receiving information about possible profits in the stock market before any official communication had been provided.

65 Therefore, by virtue of profession.

66 Standard of proof and knowledge of inside source.

67 Darling, A., House of Commons Standing Committee B, Fifth Sitting, London, 1993, accessed via the UK Parliament website.

Not unlike the Italian experience, then, the insider dealing discipline of the United Kingdom was insufficient, up to the year 1993. In its current form, neither the stock market integrity nor the prevention of insider dealing could be successfully accomplished. Criminal law was considered inadequate and too static to effectively discipline something as dynamic as insider dealing (and market abuse in general), and only the most serious cases would be targeted. But the introduction of civil remedies was delayed for a long time, as (again, similarly to the Italian criminal law principles) it was believed that, with insider dealing being a "public offence", it should be regulated by criminal law only.

The aforementioned "central body"[68] proposal for enforcing criminal and civil prosecution (and imposition of penalties) of insider dealing was reiterated[69], reinforced by the positive results of the creation of the Securities and Exchange Commission[70] in the United States. Therefore, the standard of proof and other self-regulations contained in the 1993 Act have been proven as unfit to prosecute insider dealing. Consequently, the number of prosecutions was low, and the percentage of successful convictions – even lower, because any conviction would collapse if the state of mind could not be proven beyond reasonable doubt.

### The Financial Services and Markets Act of 2000

In order to correct the shortcomings of the 1993 Act, the United Kingdom Government made a series of proposals which were supposed to lead to both an improved prosecution system against insider dealing and better civil sanctions. The product of these intentions was the Financial Services and Markets Bill[71]. In order to address the major shortcomings of both a too high standard of proof and a legislation which did not cover all the possible market abuse cases, the idea was to introduce civil prosecutions (which require only a balance of probabilities as standard of proof)[72]. The solution adopted was a regime of "market abuse", which also empowered[73] the Financial Services Authority for prosecuting Stock market manipulation[74] and misuse of information. When it comes to regulating insider dealing, it is impossible not to consider the impact on the Stock market.

[68] An institution that can impose civil fines in order to prevent insider dealing.
[69] White, M., *The Implications For Securities Regulation Of New Insider Dealing Provisions In The Criminal Justice Act*, p. 170, Company Lawyer 163, 1995.
[70] Relevant because the SEC has civil enforcement powers, used to effectively prevent insider dealing.
[71] Abrams, C., Davies, G., *The Financial Services and Markets Bill* in *Standing Committee: The Story So Far*, Journal of International Financial Markets 276, 1999, p. 1.
[72] Filby, M., *Financial Services and Markets Act: Filling Insider Dealing's Regulatory Gaps*, Company Lawyer 334, 2003, p. 363.
[73] Financial Services and Markets Act 2000, s.118.
[74] Another similarity with the Italian experience

And yet, the 1993 Act did fail in this very regard[75]. The 2000 Act, instead, emphasises the actual harm to the stock market as a prioritized target, and thus protects the UK's own market against intrusions, and safeguards its reputation as a "fair and clean place"[76] to have business within. Therefore, the provisions of the 2000 Act were born not to overwrite the 1993 legislation, but to complement[77] it. The new, broader[78] powers of the Financial Services Authority, also for prosecuting insider dealing[79], illustrate this. Not to mention, the power to prosecute market abuse proper. Therefore, the Financial Services Authority has the following options[80] when dealing with criminal activity: initiate a criminal prosecution against the offenders; impose a penalty; make a public statement or take disciplinary action accordingly to the new law[81]; or take a regulatory action[82] (which is often a consequence of applying to a court).

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[75] Because of the way in which the law was structured, it failed to target the effects of insider trading on the stock market.

[76] FSA, *Market Abuse: A Draft Code of Market Conduct*, Consultation Paper No. 59, 2000.

[77] However, a comparison of the two laws highlights a level of contradiction, especially if one considers that both Acts aim to regulate insider dealing independently. A possible answer is that the Acts deal with different provisions, and that dispositions about insider dealing are meant to expand on the existing rules, rather than contradict them. Also, that the real difference lies at the core of the acts, which deal with similar but different criminal cases.

[78] Section 401: "(1)In this section "offence" means an offence under this Act or subordinate legislation made under this Act.
(2)Proceedings for an offence may be instituted in England and Wales only (a)by the Authority or the Secretary of State; or (b)by or with the consent of the Director of Public Prosecutions.
(3)Proceedings for an offence may be instituted in Northern Ireland only (a)by the Authority or the Secretary of State; or (b)by or with the consent of the Director of Public Prosecutions for Northern Ireland.
(4)Except in Scotland, proceedings for an offence under section 203 may also be instituted by the Office of Fair Trading.
(5)In exercising its power to institute proceedings for an offence, the Authority must comply with any conditions or restrictions imposed in writing by the Treasury.
(6)Conditions or restrictions may be imposed under subsection (5) in relation to (a)proceedings generally; or (b)such proceedings, or categories of proceedings, as the Treasury may direct."

[79] Section 402: "Except in Scotland, the Authority may institute proceedings for an offence under (a)Part V of the Criminal Justice Act 1993 (insider dealing); (b)prescribed regulations relating to money laundering, or (c)Schedule 7 to the Counter-Terrorism Act 2008 (terrorist financing or money laundering).
(2)In exercising its power to institute proceedings for any such offence, the Authority must comply with any conditions or restrictions imposed in writing by the Treasury.
(3)Conditions or restrictions may be imposed under subsection (2) in relation to (a)proceedings generally; or (b)such proceedings, or categories of proceedings, as the Treasury may direct."

[80] FSA, *The Enforcement Guide*, 2013.

[81] Section 123: "If the Authority is satisfied that a person ("A")(a)is or has engaged in market abuse, or (b)by taking or refraining from taking any action has required or encouraged another person or persons to engage in behaviour which, if engaged in by A, would amount to market abuse, it may impose on him a penalty of such amount as it considers appropriate.
(2)But the Authority may not impose a penalty on a person if, having considered any representations made to it in response to a warning notice, there are reasonable grounds for it to be satisfied that (a)he believed, on reasonable grounds, that his behaviour did not fall within paragraph (a) or (b) of subsection (1), or (b)he took all reasonable precautions and exercised all due diligence to avoid behaving in a way which fell within paragraph (a) or (b) of that subsection.
(3)If the Authority is entitled to impose a penalty on a person under this section it may, instead of imposing a penalty on him, publish a statement to the effect that he has engaged in market abuse."

[82] An example of this would be a restitution order.

Obviously, the 2000 Act defined insider dealing using the old Section 118[83].

However, that definition was overwritten by the necessity of implementing the Market Abuse Directive of 2003, and this caused a radical change of attitude which determined the approval of the Financial Services and Markets Act 2000 (Market Abuse) Regulation 2005[84].

The aim of the reform was to create an advanced regime for regulating market abuse, and apparently it succeeded. But, a significant number of scholars have stated that the results were more confusing than before, as provisions under the 2005 Act were supposed to work jointly with the complex provisions of the 2000 legislation[85], and this confusion was criticised by the participants to the market itself. Therefore, in order to maintain a more streamlined legislation, the individual offences of misuse and distortion of information were both abolished in July 2008, in order to be integrated in the new market abuse crime.

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[83] "For the purposes of this Act, market abuse is behaviour (whether by one person alone or by two or more persons jointly or in concert) (a) which occurs in relation to qualifying investments traded on a market to which this section applies; (b) which satisfies any one or more of the conditions set out in subsection (2); and (c) which is likely to be regarded by a regular user of that market who is aware of the behaviour as a failure on the part of the person or persons concerned to observe the standard of behaviour reasonably expected of a person in his or their position in relation to the market. (2) The conditions are that (a) the behaviour is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected; b) the behaviour is likely to give a regular user of the market a false or misleading impression as to the supply of, or demand for, or as to the price or value of, investments of the kind in question; (c) a regular user of the market would, or would be likely to, regard the behaviour as behaviour which would, or would be likely to, distort the market in investments of the kind in question. "market, (ii) qualifying investments in respect of which a request for admission to trading on such a market has been made, or (iii) in the case of subsection (2) or (3) behaviour, investments which are related investments in relation to such qualifying investments, and (b) falls within any one or more of the types of behaviour set out in subsections (2) to (8).
(2) The first type of behaviour is where an insider deals, or attempts to deal, in a qualifying investment or related investment on the basis of inside information relating to the investment in question.
(3) The second is where an insider discloses inside information to another person, otherwise than in the proper course of the exercise of his employment, profession or duties.
(4) The third is where the behaviour (not falling within subsection (2) or (3)): (a) is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would be, or would be likely to be, regarded by him as relevant when deciding the terms on which transactions in qualifying investments should be effected and (b) is likely to be regarded by a regular user of the market as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the market.
(5) The fourth is where the behaviour consists of effecting transactions or orders to trade (otherwise than for legitimate reasons and in conformity with accepted market practices on the relevant market) which: (a) give, or are likely to give, a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more qualifying investments; or (b) secure the price of one or more such investments at an abnormal or artificial level.
(6) The fifth is where the behaviour consists of effecting transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance.
(7) The sixth is where the behaviour consists of the dissemination of information by any means which gives, or is likely to give, a false or misleading impression as to a qualifying investment by a person who knew or could reasonably be expected to have known that the information was false or misleading.
(8) The seventh is where the behaviour (not falling within subsection (5), (6) or (7)): (a) is likely to give a regular user of the market a false or misleading impression as to the supply of, demand for or price or value of, qualifying investments; or (b) would be, or would be likely to be, regarded by a regular user of the market as behaviour that would distort, or would be likely to distort, the market in such an investment, and the behaviour is likely to be regarded by a regular user of the market as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the market.
(9) Subsections (4) and (8) and the definition of "regular user" in section 130A(3) cease to have effect on 30 June 2008 and subsection (1)(b) is then to be read as no longer referring to those subsections."

[84] Common law, contrary to Civil law, focuses on updating existing law, rather than substituting it with new one.

[85] Avgouleas, E., *The Mechanics and Regulation of Market Abuse*, Oxford University Press, Oxford, 2005, p. 312.

The main points of the 2005 reform dealt with extending the existing provisions on insider dealing and market abuse to the following aspects[86]. First of all, it extended the scope of liability to both authorized and unauthorized persons. Therefore, the scope of liability is wider (and different from the Criminal Justice Act of 1993) as it extends to a wider variety of people, including those who partake with operations being conducted in the so-called "prescribed markets"[87].

The second important point is that the 1993 Act had a narrower scope, as it could only be applied to corporate securities and derivatives based on said securities. This new Act, therefore, is also applicable to futures and commodity derivatives, expanding the possibilities of prosecution by covering a wider range of actions.

On a general note, it can be said that this new Act is satisfactory: it seems wide enough to cover all the areas it is supposed to prohibit. The only real criticism that can be made is that the offence of insider dealing still requires intent as standard of proof, a weak link in the chain of criminal prosecution; and that the implementation of the Act is confusing and somewhat contrary to what the European Directive states[88]: "Given the changes in financial markets and in Community legislation since the adoption of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, that directive should now be replaced to ensure consistency with legislation against market manipulation. A new directive is also needed to avoid loopholes in Community legislation which could be used for wrongful conduct and which would undermine public confidence and therefore prejudice the smooth functioning of the markets". In fact, it can be said that two Directives, which were supposedly incompatible, in fact co-exist in the United Kingdom, and that criminal law provisions are based on the older, inappropriate one. A good solution would have been a complete amendment of the 1993 Act in order to substitute it with an entirely new one.

It is now important to consider what the British legislation considers to be market abuse.

There is abuse of the market when a user is put, directly or indirectly[89], at unreasonable disadvantage, by one or more people[90], in the market itself. It identifies three main types of market abuse behaviour: using information not generally available for their own benefit, creating false or misleading impressions or distorting the market in such investments. All three behaviours are not only cause of inefficiency and incompetence, but they also cause participants to lose confidence in the market[91].

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86 Kern, A., Linklater L., Rider B., *Market Abuse and Insider Dealing*, Butterworths, London, 2002, p. 48.

87 Those determined under the Prescribed Markets and Qualifying Investments Order 2001, or those operated by the seven UK recognised investment exchanges.

88 Directive 2003/6/EC, OJL 96/16.

89 Consultant Paper 59, FSA Market abuse: A draft Code of Market Conduct, s.1.1.

90 Financial Services and Markets Act 2000, s.118

91 Pratt, R., *Economic Crime-the Financial System as a Victim*, p. 66-68, Journal of Financial Crime 12, 2004.

Secondly, is it fundamental to understand who the regular user is: a good definition for them is "a hypothetical reasonable person; who regularly deals on the market in question; in investments of the kind in question"[92]. According to Section 119, the Financial Services Authority "must prepare and issue a code containing such provisions as the Authority considers will give appropriate guidance to those determining whether or not behaviour amounts to market abuse", but in fact the document produced (the Financial Services Code) not only defined criminal cases, but it also covered the kind of behaviour can be considered a safe harbour (not criminally responsible).

The Code lists various behaviours in a non-peremptory way, but the core of the document (and the important legal development that it brings) is that it looks at each specific behaviour and determines when there is market abuse by analysing the various factors and allowing a comparison with the actual fact. If the combination of actual behaviour and fact is not considered by the Code to amount to market abuse, then it is not.

**A prime Italian example: the trial of Grande Stevens & al.**

This case is an extremely important example of how the Italian law is structured and how it is going to evolve later on. It is the decision of the ECHR, sect. II, in the case Grande Stevens and others c. Italy (18640, 18647, 18663, 18668 and 18698/10), on the 4th March 2014. The meeting of these appeals had been established by the decision of the Court of 15/01/13 (available in Italian on the website of the Ministry of Justice).

Gabetti and Marrone were the director of the two companies involved in the case (Giovanni Agnelli & C. SpA) and a subcontractor, respectively. According to agreements with eight banks (whose names were not disclosed), for the execution of the financing plan of the company, Fiat risked losing the majority needed to control the company and, to avoid this, on the advice of Grande Stevens, an authority on company law and on corporate and white collar crime, it was decided to buy back their shares through the financial subsidiary Exor.

Simultaneously, Fiat started an *equity swap* renegotiation with Merrill Lynch.
In the press release, required by the CONSOB (the Italian entity regulating these matters) to publicize the initiatives taken for the return of the loan, any information on this negotiation was omitted, as it was considered not to be relevant. Consob, with the provision n. 15760 /07, applied the discipline of the Stock market Manipulation Act (article 187-ter TUF). Gabetti, Marrone and Grande Stevens were therefore forbidden from assuming any administrative, management and control duties in the listed companies. The proceedings were also transmitted to the General Prosecutor of Italy. The defendants challenged the choice because there had been no significant change in the monetary value of involved financial instruments, a requirement necessary for the offence to exist (Cass. Pen. 15199/06). This dual process on the same transgression has caused the condemnation of Italy.

[92] Swan, E. J., *Market Abuse Regulation and Energy Trading*, p. 91-100, International Energy Law and Taxation Review, 2004.

The criminal trial led to the acquittal of some of the defendants and the conviction of the others was quashed and sent back to the Court of Appeal of Turin (Cass. Pen., Sec. V, 40393/12) according to this principle: it is mandatory to disclose truthful reporting, as the contested crime is a “conduct-only” crime. The conviction of Grande Stevens was confirmed in 2013.

The S.C. makes clear, then, the peculiar joinder between Stevens, Marrone and Gabetti: the individual actions were illegal autonomously, but they were aimed at achieving the same objective; therefore, they were tried jointly. So Grande Stevens, although not an officer of the holding company, was rightly tried together with companies and executives: he drafted the press release and recommended the conduct that was later recognized as illegal. Note that the Constitutional Court, with Act 409/91, excluded in these cases, the violation of the *double jeopardy* principle.

Article 3 Decree No. 58/98 authorizes Consob to establish the terms and procedures for the adoption of acts within its jurisdiction including the proceeding in question (187 ter et seq). It provides ancillary measures, related to the loss of the requirements about morality and professionalism due to a conviction for insider trading, as the interdiction of the above, the suspension by professional bodies and confiscation for equivalent. Law no. 689/81, however, excludes the double criminal and administrative proceedings.

The ECHR, however, denied that the cases cited to substantiate such a derogation should not be taken into consideration, as the combined provision of Decree No. 58/98 and article 649 of the Penal Procedure Code, was unenforceable because it referred to cases in which the same offence was punishable by criminal and administrative sentences, including deprivation of freedom or (as stated in *Ruotsalainen v. Finland*, 16/06/09) greater than fines.

Directive 2003/6 / EC provides that those responsible for this offense can be punished with an administrative and a criminal sentence. The Directive does not preclude the adoption of criminal penalties to administrative contexts, provided the presumption of innocence is maintained, that the spirit of the trial is the protection of the operations in the stock market, and that the guilt of the offender is obtainable by presumptions of fact and law (ECHR *Soros v. France* of 16/10/11 which ruled in a similar case a violation of Article 7 ECHR).

The ECHR found that, although the process before the Consob is of an administrative nature, the sentences imposed are to be considered as belonging to Criminal Law. In fact, the case law of the ECJ (C-617/10, *Åklagaren v. Åkerberg Hans Fransson*, of 02/26/13) states "article 50 of the Charter of Fundamental Rights involves their protection when applied to the right EU”, that the guarantee of the *ne bis in idem* (*double jeopardy*) principle requires that the measures taken against the accused are criminal in nature and that "to appreciate the criminal nature of tax penalties, you must consider the qualifications of the penalty in the law, the nature of the offense and the degree of severity of the punishment as the risk of the person concerned”. For the ECHR, then, there is “an indictment in criminal matters 'if used interchangeably three criteria: legal classification of the contested measure into national law, its nature, that the sanction and its degree of severity”(*Engel and others v. Netherlands* 8/6/76).

The sanctions imposed by Consob may, therefore, be considered in all respects as fully criminal, rather than administrative, and show the excessive severity of both the level of the sanctions and their impact on the interests of the offender. They transcend the purpose of deterrence (*Menarini Diagnostic srlc Italy* of 9/27/11).

The ECHR clearly states that the proceedings before the Consob are not fair and impartial. The President of the CONSOB is called upon to supervise the first phase of chairing the commission itself, for example the body in charge of pronouncing sanctions. There is therefore a clear separation between the investigative phase and the decision-making, and this dualistic position of president would lead to doubts as to his impartiality. That is confirmed by the hierarchical link of the various bodies involved in the definition of judgment and because individual States have only the information reported by the President, so as to affect the hearing.

The ECHR noted that Consob is lacking objective impartiality, since the organs, investigators and judges (with relative confusion between criminal and administrative) are subjected to its President's authority. It is written in a process where the parties are protected and have exhausted all domestic remedies, holding the administrative sanction in a civil court and exercising full defence in a criminal court at all times.

Despite being a fundamental principle protected also by article 6, a full, oral and public Court session is not absolutely mandatory: the courts involved may, in fact, legitimately decide the dispute on the basis of documents and communications from Parties and / or in a file (*Jussila v. Finland 2006, Suhadolc* c. Slovenia 17 / 5/11). In this case, however, the public hearing was necessary to protect the applicants given the serious repercussions of the sentence pursuant to Legislative Decree 58/98. There was a significant imbalance between state and citizen, to the detriment of the latter. The aforementioned article 6 is, therefore, breached.

The final point tackled by the ECHR is the issue of double jeopardy. The ECHR noted that "a reserve to be valid must be marked at the time of signature or ratification of the law, the protocol or agreement to which it refers, must be based on certain laws and valid at the time of ratification, cannot have general application and must include a brief presentation of the act on which it is affixed." In short, it cannot be formulated in vague terms because it has to be clear on its meaning and its scope. All that is lacking in this case, even though the same facts were the subject of both the judgement of the administrative provisions which criminal.

The State may not impose administrative and criminal penalties for the same offence. It is known that the concerns anyone who has already had a final judgement (acquittal or conviction), to a new trial for the same reasons in terms of form or content. It is clear that the dual penalty system is based on the same unlawful conduct (market manipulation), therefore it violates this principle as confirmed from the judgements of the ECJ. Since the effects of the decisions taken in its violation cannot be remedied, adequate compensation has been deemed as necessary.

## Conclusions

To summarize, it can be said that the Italian legislation, compared to the British one, was excessively severe and unforgiving, without at the same time being effective in imposing deterrence. After the ECHR's decision, the system appears to move towards a less punishing goal, but a new law will be required in order to fill the legislative gap left by the ruling, and another role for the Consob itself, which will be severely diminished after this decision.

The British legislation, on the other hand, works well in its deterrence purpose, especially after years of legislative void and unpunished behaviour. However, the law could still use a unification between the statutes, as the current fragmentation complicates unnecessarily the work of the judge, and it could also be reworked with a bit more lax implementation concerning the *mens rea*, as its current formulation could possibly lead to the conviction of individuals who actually access the information by virtue of profession, but that lack any criminal intent whatsoever.