JUDGMENT NO. 223 YEAR 2018

In this case, the Court joined proceedings arising from seven different referral orders filed by the Supreme Court of Cassation, all concerning a legal provision de-criminalizing the offence of unlawful disclosure of inside information by secondary insiders and making it an administrative offense. The challenged provision called for the retrospective application of the new penalty scheme, which *inter alia* envisaged – for the first time – the value confiscation of the convict's assets, whereas the old provision only allowed the confiscation of profits and proceeds of the crime.

The Supreme Court of Cassation challenged this retrospective application, on the grounds that it conflicted with the principle of non-retroactive application of punishments (*nulla poena sine lege praevia*) under both Article 25(2) of the Constitution and international human rights law (Article 25(2) of the Italian Constitution, as well as Articles 7 ECHR, 49(1) CFREU and 15(2) ICCR), which is binding on the Italian legal system according to Article 117(1) of the Constitution.

The Constitutional Court agreed, ruling that this principle also applies to administrative sanctions that are "punitive" in nature, such as the one at issue.

The Court conceded that, when a criminal offence is transformed into an administrative offence, the new penalty scheme can ordinarily be presumed to be more lenient, and may – therefore – be retrospectively applied to a conduct that used to be criminal, and now constitute a mere administrative offence. Such a presumption, however, is always rebuttable. Here, the Court undertook a comparative analysis of the two penalty schemes and concluded that, although the new provision does not envisage any custodial sanction, the combination of a fine, disqualification measures, confiscation of gains and proceeds of the offence *and* the wholly new sanction of the value confiscation makes the new scheme actually harsher than the one which was in force under the repealed criminal law statute.

As a consequence, the challenged provision – requiring retrospective application of this new administrative sanction – was incompatible with the Constitution and, therefore, null and void *in parte qua*.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 9(6) of Law No. 62 of 18 April 2005 (Provisions for the fulfillment of obligations arising from Italy's membership of the European Communities. European Community Law 2004), initiated by the Supreme Court of Cassation with referral orders of 9 October, 2 and 3 November, and 29 December 2017, registered, respectively, as No. 188-193 of the 2017 Register of Referral Orders and as No. 33 of the 2018 Register of Referral Orders, and published in the *Official Journal* of the Italian Republic no. 2 and 9, first special series, of 2018.

Having regard to the entries of appearance filed by R.L., O.S., M.G., O.P., A.C., E.B., and E.L., and to the statement in intervention filed by the President of the Council of Ministers;

after hearing Judge Rapporteur Francesco Viganò during the public hearing of 23 October 2018;

after hearing Counsel Giovanni Arieta and Achille Chiappetti for R.L., O.S., M.G., A.C., E.B., and O.P., as well as Massimo Bonvicini for O.P., Luigi Medugno on behalf of E.L., and State Counsel Paolo Gentili for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– The Second Civil Division of the Supreme Court of Cassation, with seven referral orders similar in content, raises questions as to the constitutionality of Article 9(6) of Law No. 62 of 18 April 2005 (Provisions for the fulfillment of obligations arising from Italy's membership of the European Communities. European Community Law 2004), in reference to Articles 3, 25(2), and 117(1) of the Constitution – the last-mentioned in relation to Article 7 of the European Convention for Human Rights (ECHR).

The referring court challenges Article 9(6) of Law No. 62 of 18 April 2005 insofar as it provides that the value confiscation provided for by Article 187-*sexies* of Legislative Decree No. 58 of 24 February 1998 (Consolidated law on financial intermediation, pursuant to Articles 8 and 21 of Law no. 52 of 6 February 1996), whenever criminal proceedings have not yet been completed, also applies to offenses committed prior to the date of the entry into force of the same Law No. 62 of 2005, "even when the overall punishment scheme created by the decriminalization is, actually, less favorable than the one applicable under the law in force at the moment the act was committed."

1.1.– In light of the identity of the questions brought before this Court, the cases must be joined and decided in a single judgment.

2.– The referring court is hearing seven appeals against judgments in which the Brescia Court of Appeal upheld the imposition by the *Commissione Nazionale per le Società e la Borsa* (National Companies and Exchange Commission, CONSOB) of administrative fines, disqualification measures and value confiscation against the appellants, who had been found responsible of unlawful disclosure of inside information.

The facts at issue were committed when they amounted to a crime provided for under Article 180(2) of Legislative Decree No. 58 of 1998. Conduct amounting to unlawful disclosure of inside information was later de-criminalized and transformed into a merely administrative offense under new Article 187-*bis* of Law No. 62 of 2005.

As a consequence, the criminal penalty originally provided for secondary insiders (imprisonment up to two years and a fine of between 20 and 600 million lire, in addition to direct confiscation of the property used to commit the crime and the profits thereof) was repealed and replaced with an administrative fine of between 20,000 and 3,000,000 euro. The new Article 187-*sexies* of Legislative Decree No. 58 of 1998, in the original version introduced by Law No. 62 of 2005, also provides for the administrative confiscation of the property used to commit the offence, as well as of the proceeds and profits thereof. In addition to all this, the new law envisages the administrative confiscation of an amount of money, property, or other assets, the value of which corresponds to the property used to commit the offence or the profits and proceeds thereof, in the event it is impossible to confiscate the latter.

Article 9(6) of Law No. 62 of 2005, challenged here, provides that the administrative sanctions envisaged for the new administrative offense also apply to offences committed prior to the date of the entry into force of the new law, if the corresponding criminal proceedings is not yet completed.

The referring court argues that the retrospective application of a measure that is "punitive" in nature breaches the constitutional provisions mentioned above.

[…]

6.– The constitutional challenges based on Articles 25(2) and 117(1) of the Constitution, the latter in relation to Article 7 ECHR, are well-founded.

6.1.– It is generally recognized that a twofold prohibition arises from Article 25(2) of the Constitution ("No one may be punished except on the basis of a law in force at the time the offence was committed"): (i) the prohibition of retroactive application of a law criminalizing conduct that previously carried no criminal weight, and (ii) the prohibition of retroactive application of a law attaching a harsher punishment to already criminalized conduct. The latter prohibition is, moreover, spelled out in the parallel provisions of international human rights charters, particularly in Article 7(1), second sentence, ECHR ("Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed"), Article 15(1), second sentence, of the International Covenant on Civil and Political Rights, signed at New York on 16 December 1966, ratified and implemented in Italy by Law No. 881 of 25 October 1977 (International Covenant on Civil and Political Rights), ("Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed"), and Article 49(1), second clause, of the Charter of Fundamental Rights of the European Union (CFREU), which adopts the same wording as the ECHR.

Both prohibitions also apply to administrative penalties, which are, as this Court has repeatedly held (see Judgments No. 276 of 2016 and No. 104 of 2014), covered by the fundamental guarantee of non-retroactivity enshrined in Article 25(2) of the Constitution, interpreted in light of international human rights law as stated, in particular, by the case law of the European Court of Human Rights [ECtHR] on Article 7 ECHR. Indeed, when it comes to administrative penalties that are punitive in nature, there is the same need – which lies at the very core of that prohibition enshrined in the Constitution and in international human rights – of protecting the individual against penalties that were not foreseeable at the time the offense was committed.

6.2.– An issue that deserves special consideration arises – however – when a certain act, which originally amounted to a crime, is later converted into a merely administrative offense.

In formal terms, the new administrative penalties, which are provided in lieu of the criminal ones that were previously in force, are "new" sanctions, which should apply only to future acts under Article 11 of the Preliminary Provisions of the Civil Code. Nonetheless, laws of this kind (the so called "de-criminalization laws") usually provide, via specific *interim* rules, for the retroactive application of the new administrative penalties to acts committed prior to their entry into force. This is due to the twofold premise that, first, the acts were already unlawful at the time they were committed and that, second, the criminal punishment provided for at that time was harsher than the administrative penalties introduced by the law decriminalizing the conduct.

As a general matter, such a legislative technique is not incompatible with the Constitution. The retroactive application of the new administrative penalties – despite being fundamentally punitive in nature and, as such, encompassed by the scope of the guarantee provided in Article 25(2) of the Constitution – is ordinarily compatible with this constitutional provision, in so far as it does not entail the retroactive application of a *harsher* penalty scheme than the one in place at the time the act was committed, but leads instead to the retroactive application of *more lenient* penalty scheme.

Nevertheless, as Judgment No. 68 of 2017 underscored, the fact that penalty schemes that are formally administrative are, *usually*, to be more lenient than those provided for crimes does not mean that this is *always* true.
Admittedly, criminal punishment is invariably characterized by its – actual or potential – impact on personal liberty, since even a criminal fine may be converted, in case of a failure to comply, into a punishment that limits personal liberty. On the contrary, there is never such an impact when it comes to administrative penalties. Moreover, criminal punishment has the unique feature of stigmatizing the unlawful conduct at an ethical and social level – something that is lacking in administrative penalties.
Nevertheless, the impact of administrative penalties on the fundamental rights of the person cannot be underestimated. Quite the contrary, their impact is increasing in recent legislation.
Penalty schemes like the ones at issue in the main proceedings are a quintessential example of the extremely harsh impact of such administrative penalties. Following the amendments enacted throughby Legislative Decree No. 107 of 2018, the administrative offense currently renamed "Abuse and illegal transfer of inside information" under Article 187-*bis* of Legislative Decree No. 58 of 1998 carries an administrative penalty that may reach, in application to a physical person, the sum of 5,000,000 euro, which may be increased in accordance with Article 187-*bis*, paragraph 5, up to triple that amount (that is, up to 15,000,000 euro), or up to a maximum amount of ten times the profits gained or the losses avoided as a result of the offense. These fines are, moreover, accompanied by disqualification measures, provided under Article 187-*quater* of Legislative Decree no. 58 of 1998. These latter penalties severely limit the professional options (and, therefore, the right to work) of the individuals affected, and are intended to be applied, under the provision challenged in the present case, together with the confiscation of the proceeds and the profits of the offense, or their respective value. All of these penalties are also to be published, at least as a general rule, "without delay and in abridged form" on the websites of the Bank of Italy and the CONSOB (Article 195-*bis* of Legislative Decree no. 58 of 1998), with a significant stigmatizing effect for affected individuals. Another remarkable feature is that none of these penalties may be conditionally suspended, unlike criminal punishments.
Against this background, one must acknowledge (as Judgment No. 68 of 2017 did) that the presumption that an administrative penalty scheme is more lenient than the criminal one that was previously in force must be understood as merely rebuttable. It should always be possible to show, on a case-by-case basis, that the new administrative penalty scheme provided by the decriminalization law is actually harsher than the previous one, and therefore cannot be applied to past conduct without infringing Article 25(2) of the Constitution.
6.3.– In the present case, the referring Division has thoroughly and plausibly explained […] why the new penalty scheme amounts to a harsher punishment for the appellants in the main proceedings […]..
In brief, the referring court has highlighted that the previous scheme imposed: a prison term of up to two years; a fine of between 20,000,000 and 600,000,000 lire (a sum that could be raised to up to three times that amount under certain circumstances); several ancillary penalties, together with publication of the judgment in at least two daily newspapers; and the confiscation of the property used to commit the offense as well as the profits and proceeds thereof. On the other hand, conditional suspension of the penalty would have allowed the perpetrator to avoid all the punishments in question,

apart from confiscation. In any case, *ratione temporis*, the partial amnesty provided for under Law No. 241 of 2006 would have also applied.
The supervening scheme brought about by Law No. 62 of 2005 instead provides for: an administrative fine of between 20,000 and 3,000,000 euro (a sum that may be raised up to three times that amount or up to a maximum amount of 10 times the product or profits conferred by the offense under certain circumstances); the ancillary administrative penalties provided for under Article 187-*quater* of Legislative Decree No. 58 of 1998; administrative confiscation of the proceeds or profits of the offense and of the property used to commit it, or the administrative confiscation of money, property, or other assets of equivalent value. On the other hand, none of these administrative penalties could be suspended, nor could the partial amnesty provided for by aforementioned Law No. 241 of 2006 apply to administrative penalties.
That the new scheme is actually harsher is demonstrated by what happened to the primary insider who passed the confidential information to the appellants in the main proceedings: as laid out in the referral orders, he was ultimately punished with a simple fine of 10,000 euro, and enjoyed the aforementioned partial amnesty as far as any other penalty was concerned.
These considerations show that, contrary to the position of the State Counsel's Office, a comparison between the harshness of the two penalty schemes (criminal and administrative) is not only feasible, but necessary, in order to avoid retroactively subjecting the perpetrator of an offense to a penalty scheme that is harsher (regardless of how it is formally categorized) than the one in place at the time the offense was committed, in contravention of the constitutional principle at issue here […].
6.4.– It follows that the provision being challenged here infringes Articles 25(2) and 117(1) of the Constitution, the latter in relation to Article 7 ECHR, insofar as it requires application of the new penalty scheme even where it is, in actuality, harsher than the one previously in force.
The referring court limited its request to the applicability of the sole value confiscation, thus limiting the power of this Court under Article 27(1) of Law No. 87 of 11 March 1953 (see, among many, Judgments No. 276 and No. 203 of 2016), based on the argument that the harsher nature of the new penalty scheme only depends on the applicability of this new form of confiscation to the new administrative offense. As a result, challenged Article 9(6) of Law No. 62 of 2005 must be declared unconstitutional insofar as it provides that the value confiscation provided by Article 187-*sexies* of Legislative Decree No. 58 of 1998 applies, whenever criminal proceedings have not yet been completed, even to offenses committed prior to the date of Law no. 62 of 2005's entry into force, when the overall penalty scheme created by decriminalization is actually harsher than the one that applied under the previous scheme.
[…]

[omitted]

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the proceedings,
declares Article 9(6) of Law no. 62 of 18 April 2005 […] unconstitutional, insofar as it provides that the value confiscation measure provided for under Article 187-*sexies* of Legislative Decree No. 58 of 24 February 1998 […] also apply, whenever criminal proceedings have not been completed, to offenses committed prior to the date of the entry into force of Law No. 62 of 2005, when the overall penalty scheme resulting from

the decriminalization measure is actually harsher than the one that applied under the previous scheme.
Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 25 October 2018.

Signed by:
Giorgio LATTANZI, President
Francesco VIGANÒ, Author of the Judgment