

ALERT MEMORANDUM

# The Italian Constitutional Court Decides When the Application of Both Administrative and Criminal Sanctions Violates the *Ne Bis in Idem* Principle

July 11, 2022

In Judgment No. 149/2022 (the “Judgment”), filed on June 17, the Constitutional Court declared for the first time the constitutional illegitimacy of Article 649 of the Italian Code of Criminal Procedure (“ICCP”), insofar as it does not prohibit the beginning or continuation of criminal proceedings against a person who has already been sanctioned with an administrative penalty for the same conduct.

The Judgment specifically concerns **Italian copyright regulations**, but it may open the door for an overall re-assessment of the so-called “dual-track” sanctioning systems (such as **market abuse** rules, which impose both administrative and criminal sanctions for the same conduct).

The Constitutional Court has declared unconstitutional Article 649 of the ICCP, insofar as it does not provide for an immediate acquittal judgment or a not-to-proceed decision to be issued when a person, charged with one of the offenses provided for in **Article 171-ter of Law No. 633 of April 22, 1941** (the “Copyright Law”), has already been subject to an administrative proceeding, definitively concluded, pursuant to **Article 174-bis** of the Copyright Law in relation to the same conduct.

The Court, therefore, urged the Italian legislature to reshape the Copyright Law and called for a “*comprehensive re-assessment of the existing dual-track sanctioning systems.*”

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors.

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MILAN

**Pietro Fioruzzi**

+39 02 7260 8214

[pfioruzzi@cgsh.com](mailto:pfioruzzi@cgsh.com)

**Giulia Checcacci**

+39 02 7260 8224

[gcheccacci@cgsh.com](mailto:gcheccacci@cgsh.com)

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ROME

**Giuseppe Scassellati Sforzolini**

+39 06 6952 2220

[gscassellati@cgsh.com](mailto:gscassellati@cgsh.com)

**Bernardo Massella Ducci Teri**

+39 06 6952 2290

[bmassella@cgsh.com](mailto:bmassella@cgsh.com)

**Paola Maria Onorato**

+39 06 6952 2654

[ponorato@cgsh.com](mailto:ponorato@cgsh.com)



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## 1. The key points of the Judgment

With Judgment No. 149/2022, the Constitutional Court has intervened on the relationship between the *ne bis in idem* principle (also known as double jeopardy), under which a person cannot be judged and punished twice for the same conduct, and the so-called “dual-track” systems (providing for the application of both administrative and criminal sanctions in relation to the same action) – albeit only in the field of copyright regulation. The Court has stated that, under the principle of *ne bis in idem*, as provided for in Article 50 of the Charter of Fundamental Rights of the European Union (hereinafter “CDFUE”) and in Article 4. Prot. 7 of the European Charter of Human Rights (hereinafter “ECHR”), **criminal proceedings may not be held against a person who has already been subject to an administrative sanctioning proceeding for the same conduct.**

The case at hand concerned a copy shop owner who was indicted under Article 171-ter of the Copyright Law for the criminal offense of illegally photocopying textbooks, after having already been sanctioned for the same conduct with a fine of nearly 6,000 euros, pursuant to Article 174-bis of the same law.

Upon request by the Court of Verona, the Constitutional Court declared unconstitutional Article 649 of the ICCP, which prohibits a second criminal proceeding for the same conduct, but does not prohibit subsequent criminal and administrative sanctioning proceedings for the same conduct. Indeed, subsequent proceedings for the same conduct is, according to the Constitutional Court, contrary to the *ne bis in idem* principle as defined by the European Court of Human Rights and the Court of Justice of the European Union, a principle that should apply in these cases.

The key points of the Judgment are the following:

- the prohibition of *bis in idem* was expressly recognized at the EU level by Article 50, CDFUE, and at an international level by Article 4(1), Prot. 7, ECHR. This was considered a protection for the defendant not only against a second penalty, but also primarily against the possibility of being subject to a second proceeding for the same conduct;
- in order for such a principle to be operative, it is necessary to ascertain the existence of **(i)** an *idem factum*<sup>1</sup>, i.e. that the facts are the same; **(ii)** a prior final judgment on the criminal liability of the defendant, whether it be an acquittal or a conviction<sup>2</sup>; **(iii)** a *bis*, i.e. a second proceeding of an essentially criminal nature for the same conduct;
- according to consistent case law from the European Court of Human Rights<sup>3</sup>, the essentially criminal nature of a proceeding must be identified by taking into account not only the legal classification of the offense under domestic law, but also the nature of the offense, as well as the nature and intensity or degree of severity of the penalty imposed on the offender;
- the beginning or continuation of a second proceeding of an essentially criminal nature against a person who has already been sanctioned in a different proceeding (again of a “criminal nature”) will not infringe the *ne bis in idem* principle if (among other things) the two proceedings are complementary and there is a “*sufficiently close connection in substance and time*” between them<sup>4</sup>;
- in light of the above, the “dual-track” sanctioning system provided by the

<sup>1</sup> As established by the judgment issued by the Grand Chamber of the European Court of Human Rights, *Zolotoukhine v. Russia* on February 10, 2009, the existence of an *idem factum* must be ascertained by taking into consideration the material conduct on which the two charges are based, regardless of their legal classification.

<sup>2</sup> See the judgment of the European Court of Human Rights, Grand Chamber, *Zolotoukhine v. Russia*, para. 107.

<sup>3</sup> These are the criteria identified by the European Court of Human Rights in the leading case *Engel and others v. Netherlands*, June 8, 1976.

<sup>4</sup> See the judgment of the European Court of Human Rights, Grand Chamber, *A and B v. Norway*, of November 15, 2016, according to which such connection can be envisaged when (i) the proceedings pursue complementary purposes and thus address different aspects of the same conduct; (ii) the duplication of proceedings is foreseeable; (iii) the proceedings are conducted so as to avoid any duplication in the collection and assessment of evidence; and (iv) it is ensured that the overall amount of penalties imposed is proportionate. Similar conclusions have also been reached by the Court of Justice of the European Union (see judgments of the Court of Justice of the European Union, Grand Chamber, *Cases C-537/16, Garlsson Real Estate SA and others, C-524/15, Menci and C-596/16 and 597/16, Di Puma and others*, of March 20, 2018).

Copyright Law is at odds with the *ne bis in idem* principle, since Articles 171-ter and 174-bis of the Copyright Law concern exactly the same conduct, and since the administrative sanctions provided by Article 174-bis have an undeniably criminal nature.

Through this reasoning, the Constitutional Court declared Article 649 of the ICCP unconstitutional insofar as it does not provide for an immediate acquittal judgment or a not-to-proceed decision to be issued when a person charged with one of the offenses provided for in Article 171-ter of the Copyright Law, has already been subject to an administrative proceeding pursuant to Article 174-bis of the Copyright Law for the same conduct.

## 2. The innovative scope of the Judgment and its request addressed to the Italian legislature

The Judgment lays the groundwork for an important shift in the interpretation of the complex relationship between the *ne bis in idem* principle and the dual-track sanctioning systems.

Since the famous 2014 *Grande Stevens* case, in which the European Court of Human Rights sanctioned the Italian state for its dual-track system governing market abuse enforcement proceedings under Italian Finance Law (Legislative Decree no. 58/1998)<sup>5</sup>, the Constitutional Court had not ruled on the alleged incompatibility between the *ne bis in idem* principle and sanctioning systems imposing both criminal and administrative sanctions for the same conduct.

This Judgment therefore marks a first decisive step forward on the issue, establishing that the duplication of sanctions – and, even before that, of proceedings – for the same copyright violation causes an unjustified duplication of suffering and costs for the person concerned. To avoid them, it is therefore necessary to dismiss criminal proceedings as soon as the administrative proceeding conducted against the same person for the same facts becomes final.

Although the Constitutional Court repeatedly highlights how the declaration of constitutional unlawfulness of Article 649 of the ICCP should be understood “with specific reference to the ‘dual-track’ sanctioning system provided by the Copyright

Law,” the arguments underlying the decision are theoretically applicable to all cases in which “two proceedings originate from the same conduct, but then proceed independently of each other, without intersecting or coordinating in any way.” On this basis, the Constitutional Court not only urged the Italian legislature to “reshape the regulation under consideration,” but also called for a “comprehensive re-assessment of the existing dual-track sanctioning systems, in light of the principles identified by the European Court of Human Rights, the Court of Justice of the European Union and this Court itself.”

It remains to be seen whether the Italian legislature will act accordingly. In any event, the legislature’s inaction may prompt the Constitutional Court to intervene in relation to other Italian dual-track sanctioning systems, such as the one that governs market abuse, finally establishing that the same conduct cannot be punished by criminal courts in case administrative fines have already been imposed by the Italian Securities Commission (and vice-versa).

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<sup>5</sup> See European Court of Human Rights, Sec. II, *Grande Stevens v. Italy*, of March 4, 2014.