

Hellenic Association of European Law

European Association of Banking and Financial Law (AEDBF)

# Sanctions and Measures in Banking and Capital Markets Law

Italian Country Report

STUDIO LEGALE BONORA E ASSOCIATI





# 1. Sanctions and Measures



# Italian Implementing Provisions

EU Directive	Italian Implementing Provisions
MIFID (2004/39/EC)	Legislative Decree No. 164 of 17 September 2007
Prospectus Directive (2003/71/EC)	Law No. 51 of 28 March 2007
Transparency Directive (2004/109/EC)	Legislative Decree No. 195 of 6 November 2007
Market Abuse Directive (2003/6/EC)	Law No. 62 of 18 April 2005
UCITS Directive (85/611/EEC)	Legislative Decree No. 2074 of 1 August 2003



# Legal Nature of Sanctions

Criminal Sanctions (Imprisonment and Pecuniary Penalties)

Accessory Criminal Penalties

Administrative Sanctions

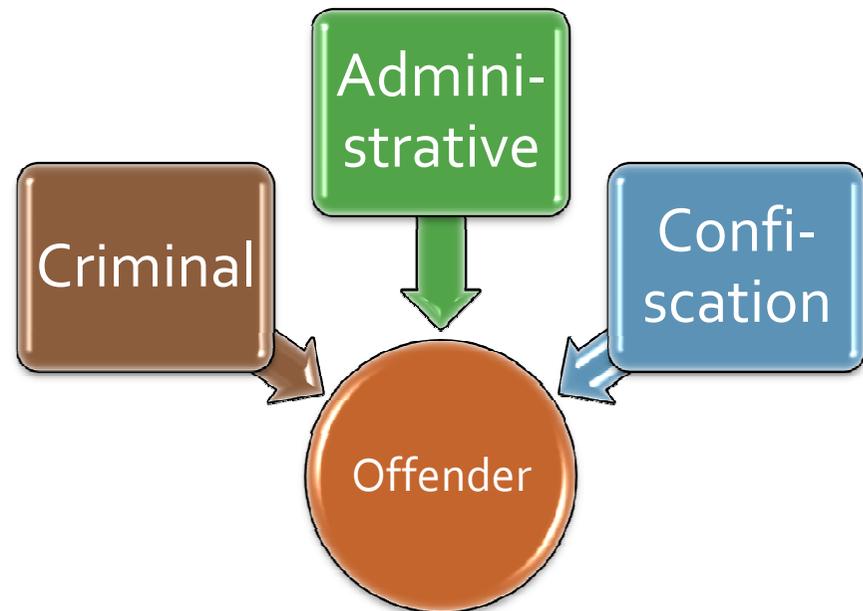
Accessory Administrative Sanctions

Administrative (Criminal?) Liability for Companies

Confiscation

# Legal Nature of Sanctions (cont'd)

- In principle, criminal sanctions, accessories sanctions (having criminal nature), administrative sanctions and confiscation may be cumulated insofar there is ground for their respective imposition





## Legal Nature of Sanctions (cont'd)

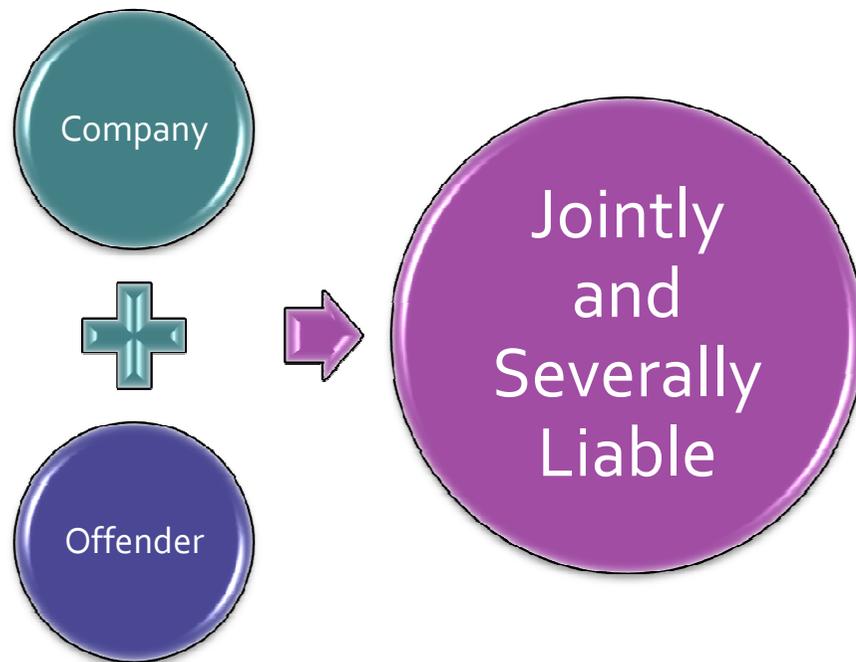
On the other hand – and with specific reference to market manipulation and insider trading offences – the law clarifies that, when a pecuniary administrative sanction has been imposed on the offender or the entity for the same facts, the collection of the pecuniary penalty deriving from the crime shall be limited to the portion thereof exceeding what the administrative authority has already collected

# Sources of Law and Beneficiary

- Sanctions are provided for by state laws (i.e. legislative decrees approved by the Government upon delegation by the Parliament and laws directly approved by the Parliament)
- The beneficiary of the payment of criminal and administrative fines and of confiscation of the product of the crime, any profit therefrom and the property used to commit it is the State



# Joint and Several Liability



- Companies and entities with which offenders are connected shall be jointly and severally liable with them for payment of sanctions and the publicity expenses
- They shall also be held to the exercise of the right of recourse against those responsible for the offences

# Objective Liability?

- The Law no. 689 of 1981 on administrative sanctions states that "*everybody is responsible for its own action or omission, conscious or voluntary, either intentional or negligent*"
- This would imply a liability for fault rather than an objective liability
- Some court decisions take this approach
- On the other hand, regulators seem to focus their attention on circumstances of fact rather than on giving evidence of the fault





# Competences

## Public Prosecutor / Criminal Courts

- Criminal sanctions (imprisonment and criminal fines)
- “Administrative” fines and other accessory measures for companies
- Confiscation
- Criminal proceedings are governed by the general rules provided for by the Criminal Procedure Code
- *Ex officio* criminal prosecution

## Consob / Bank of Italy

- Have both:
  - Investigatory power and
  - Adjudicatory power (i.e. power to impose administrative sanctions)
- Formerly (i.e. before the Law no. 262 of 2005 on protection of investors), they only had the power to propose the adoption of measures to the Ministry of economy and finance



## Competences (cont'd)

- Bank of Italy or Consob have the power to impose sanctions to the extent of their respective duties:
  - Bank of Italy is responsible for risk containment, asset stability and sound and prudent management of intermediaries (banks and investment firms)
  - It is also responsible for transparency and correctness of conduct in the banking field
  - Consob is responsible for the transparency and correctness of conduct as long as the provision of investment services is concerned

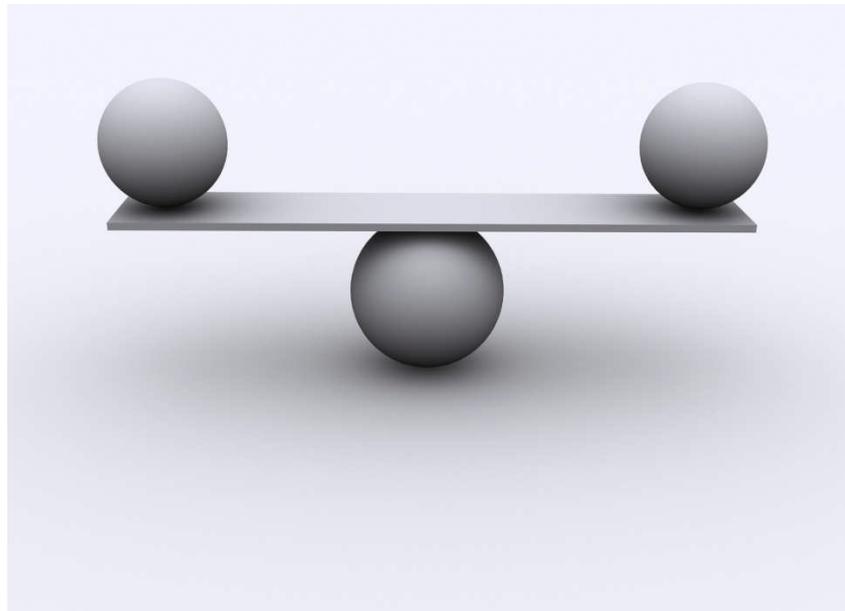


## Competences (cont'd)

- As a general rule, bodies having investigatory powers and those having adjudicatory powers must be kept separate
- Thus, Consob's internal policies specify that investigatory powers are exercised by operating departments, whereas only the Commission itself has the power to impose sanctions
- Interpretative issue: the Law no. 216 of 1974 establishing Consob states that the Chairman of the Commission has the ultimate responsibility for investigatory activities
- Similar internal policies exist at the Bank of Italy



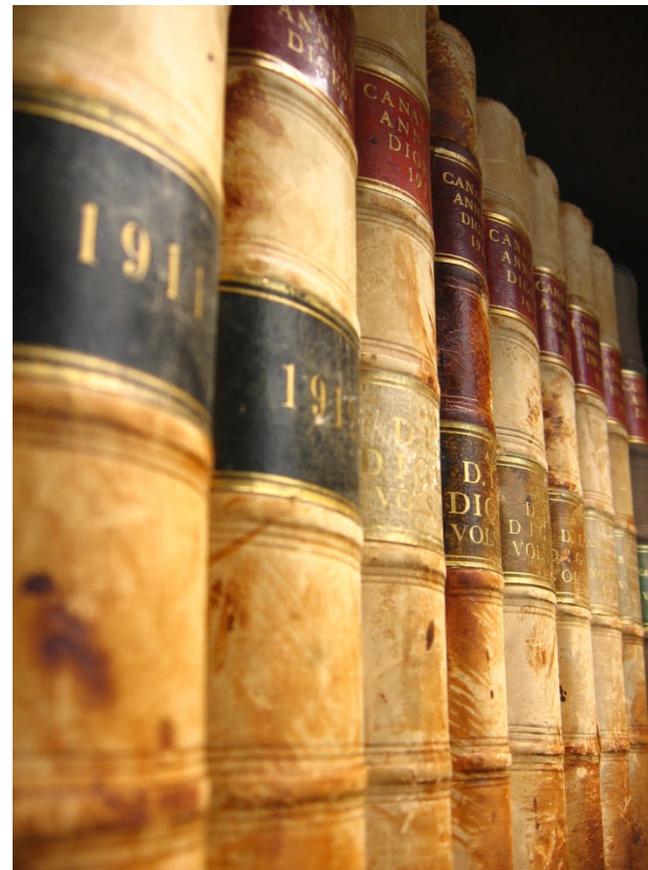
# Sanction Procedures



- The imposition of sanctions must be preceded by notification to the interested parties and evaluation of the submissions they present within the following thirty days
- Within the same time-limit, those parties may also request to be heard in person
- Proceeding shall afford all parties the opportunity to state their case and have access to the investigation file

## Sanction Procedures (cont'd)

- Transcripts shall be taken of the proceedings
- Administrative sanctions must be imposed by Consob (or Bank of Italy) with a measure stating the grounds for decision and to be implemented within 180 days from the investigation or within 360 days if the interested party resides or is headquartered abroad



# Publication of Measures

- Measures imposing sanctions shall be published in abridged form in Consob's (or Bank of Italy's) Bulletin
- Taking into account the nature of the violation and the interests involved, regulators may establish further methods for publicizing them
- Regulators may also exclude publication of the measure where such publication may place markets at risk or cause disproportionate damage to the parties involved





# Relationship Between Proceedings (Market Abuse Only)

- Consob and the judicial authorities shall cooperate with each other, including through the exchange of information, in order to facilitate the investigation of violations, including in cases where such do not constitute crimes
- To this end Consob may utilize the documents, data and information obtained by the Finance Police



## Relationship Between Proceedings (Market Abuse Only) (cont'd)

- In proceedings for market manipulation and insider trading crimes, Consob may exercise the rights and powers granted by the Criminal Procedure Code to the bodies and associations representing the interests injured by the crime
- Consob may also intervene as a civil claimant and request, by way of compensation for the loss occasioned to the integrity of the market by the crime, damages in an amount to be assessed by the court, including equitably, taking account of the seriousness of the crime, the personal situation of the guilty party or the amount of the proceeds of the crime or the profit therefrom

## 2. Right to Appeal





# Appeal

- Measures imposing sanctions may be appealed within 60 days of the notification thereof to the court of appeal of the place of the appellant's registered office or residence
- Where this criterion is not applicable, the Court of Appeal of the place where the violation was committed shall have jurisdiction
- Appeals must be served on the competent regulator and filed with the clerk of the Court of Appeal within 30 days of service



## Appeal (cont'd)

- An appeal shall not automatically suspend enforcement of the measure, but where serious grounds exist, the court of appeal may order its suspension
- At the request of the parties, the court of appeal may establish time limits for the presentation of submissions and documents and may grant a hearing with or without the personal appearance of the parties
- The court of appeal shall decide on the appeal in camera, having heard the public prosecutor
- The court may either annul the measure or reduce the amount of the sanction
- A copy of the court's ruling shall be sent by the clerk of the court of appeal to the authority that adopted the measure for publication in abridged form in its Bulletin

# Relationship Between Proceedings

With specific reference to market manipulation and insider trading offences:

- The administrative and appeal proceedings referred to earlier may not be suspended on the grounds that criminal proceedings are pending covering the same facts or facts on which the definition of the case depends



# Legitimitas ad Processum

- Some court decisions state that only companies and entities with which offenders are connected are entitled to appeal as far as only the company has been fined
- Doubts have been raised as to the consistency of this approach with the right of defense provided for by the Constitution, taking into account the interest of the directors to the annulment of the measure



### 3. Some Statistics

The background image shows a document with various tables and text. The text is mostly illegible due to blurring, but some words like 'Gospic', 'Gosten', 'Gostinopolje', and 'Gravesend' are visible. There are also some numbers and symbols scattered throughout the document.



# Comparison between 2006 and 2007

	2006	2007
Total amount of administrative sanctions	€ 8 million	€ 43.7 million
Total number of measures	116	227 (of which approx. 200 confirmed by courts)

(Source: Consob Annual Report for 2007)





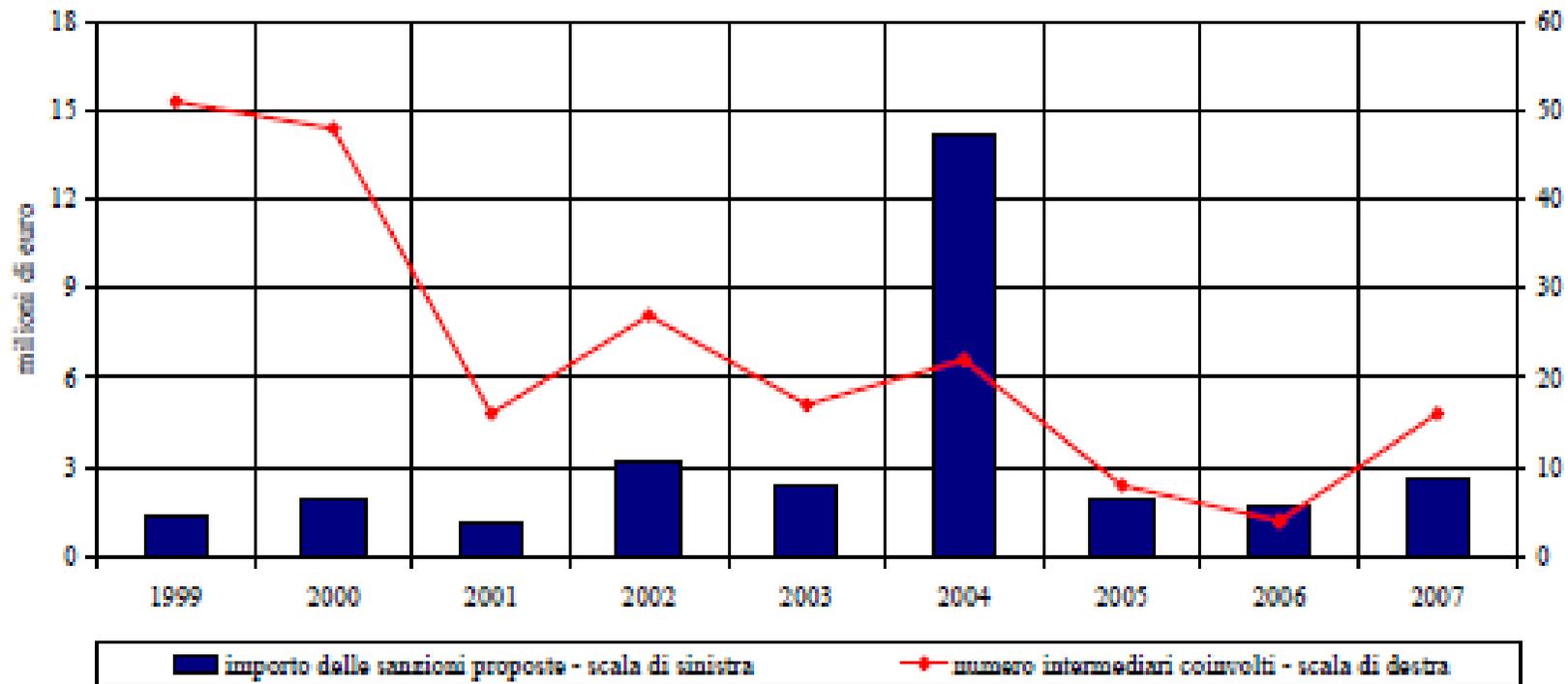
# Sanctions Against Intermediaries (1999 / 2007)

**Sanzioni pecuniarie proposte al Ministero dell'economia e delle finanze o irrogate direttamente dalla Consob nei confronti di intermediari mobiliari<sup>1</sup>**  
(valori monetari in migliaia di euro)

	Numero intermediari coinvolti					Numero esponenti sanzionati					Importo delle sanzioni <sup>2</sup>				
	Banche	Sim	Agenti di cambio	Sgr	Totale	Banche	Sim	Agenti di cambio	Sgr	Totale	Banche	Sim	Agenti di cambio	Sgr	Totale
1999	23	25	3	--	51	71	71	3	--	145	647	566	120	--	1.333
2000	13	21	14	--	48	71	88	14	--	48	986	901	100	--	1.987
2001	5	10	1	--	16	31	52	1	--	84	252	860	39	--	1.151
2002	5	12	5	5	27	90	161	6	61	318	557	1.319	136	1.147	3.159
2003	7	3	1	6	17	114	25	3	73	215	1.847	172	54	369	2.441
2004	18	3	1	--	22	504	11	1	--	516	14.087	108	55	--	14.250
2005	7	1	--	--	8	126	11	--	--	137	1.849	61	--	--	1.910
2006	1	1	--	2	4	32	16	--	48	96	680	296	--	787	1.763
2007	6	7	--	3	16	79	62	--	55	196	1.035	814	--	809	2.659

(Source: Consob Annual Report for 2007)

## Sanctions Against Intermediaries (1999 / 2007) (cont'd)



(Source: Consob Annual Report for 2007)



# Court Decisions

**Ricorsi contro atti adottati o proposti dall'Istituto<sup>1</sup>**  
(esiti al 31 dicembre 2007)

	Giudice amministrativo <sup>2</sup>						Giudice ordinario <sup>3</sup>					
	Accolti <sup>4</sup>	Respinti <sup>5</sup>	In corso	di cui:		Totale ricorsi	Accolti <sup>4</sup>	Respinti <sup>5</sup>	In corso	di cui:		Totale ricorsi
				Accolta sospensiva	Respinta sospensiva					Accolta sospensiva	Respinta sospensiva	
2004	1	18	12	-	4	31	19	42	-	-	-	61
2005	2	15	9	-	1	26	30	108	-	-	-	138
2006	1	1	9	-	3	11	3	26	1	-	-	30
2007	-	6	3	-	1	9	4	13	57	-	-	74

(Source: Consob Annual Report for 2007)



## A Little Quote at the End

*"...But the following year, on the 12<sup>th</sup> of April, this same Signor, perceiving that this city was completely full of the said 'bravoes', returned to live as they had lived before, their customs wholly unchanged, and their numbers undiminished, issues another hue and cry, **more vigorous and marked...**"*

(Alessandro Manzoni, *I Promessi Sposi*, or *The Betrothed*, Milan, 1842)