

EXPERT ANALYSIS

Reform of French Law on Insider Trading Mandated by French Constitutional Council

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In France, it was long possible for people accused of insider trading to be prosecuted before the French Financial Markets Authority, the *Autorité des Marchés Financiers*, or AMF, and, in parallel or successively, to be subject to criminal prosecution. In a March 18 decision, the French Constitutional Council (*Conseil Constitutionnel*) held that the articles of the French Monetary and Financial Code that authorized parallel and successive prosecutions violate Article 8 of the French Declaration of the Rights of Man and of the Citizen of 1789, which codifies the constitutional principle that the law must only establish sanctions that are strictly necessary.¹

The Constitutional Council abrogated, effective Sept. 1, 2016, the provisions of the Monetary and Financial Code that allowed parallel criminal and administrative prosecution of insider trading offenses and violations.²

A public discussion is underway on how the French system of prosecuting insider trading should be reformed and, until the reform deadline, most individuals and entities who do not fall into specific categories of regulated professionals³ may be subject to prosecution for insider trading either before the AMF Enforcement Commission (*Commission des sanctions*), or the French judicial courts, but not both.

This commentary describes the context and substance of the Constitutional Council's March decision on constitutional questions posed by two groups of insider trading defendants who were facing double jeopardy in the French judicial courts following a definitive decision of the AMF Enforcement Commission.

The commentary also discusses the French institutional structures for the prosecution of market abuses that must now be reformed, the differences and similarities between the French and American systems of investigating and sanctioning market abuses, and the most prominent reform proposals that are currently being debated in France.

THE CONSTITUTIONAL COUNCIL'S DECISION

Two groups of insider trading defendants who had been definitively judged before the AMF Enforcement Commission were set to stand trial in fall 2014 in a Paris first-instance trial court on criminal charges of insider trading. The defendants made a strategic decision to challenge the constitutionality of the French law applicable to their alleged infractions, which permitted the French Constitutional Council to examine the constitutionality of the French Monetary and Financial Code articles that allowed for parallel and successive administrative and criminal prosecution of insider trading offenses.

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Both groups of insider trading defendants had endured a trial-like prosecution before the AMF after which they were either acquitted or sanctioned for an administrative insider trading violation. On the first day of their criminal trials in the Paris first-instance court, the defendants chose to use a relatively new procedure called a “priority constitutional question” to contest the constitutionality of the laws that allowed them to be thereafter subject to criminal prosecution on the same facts and charges.⁴

To reach the Constitutional Council, the defendants asked the trial court and subsequently the French Supreme Court (Cour de Cassation) to transmit their constitutional questions to it. To support this application, the defendants had to show that the constitutional issue had not been considered by the Constitutional Council in a prior decision.

However, because the Constitutional Council, in a 1989 decision, had already reviewed the sanctioning power of the AMF’s predecessor institution, and essentially ruled that there was no constitutional issue with the existence of a dual-track prosecution, the defendants needed a new approach to arguing their constitutional challenge in order to be certain that it would be transmitted to the Constitutional Council.

The constitutional questions of both groups of defendants were ultimately transmitted to the Constitutional Council, which identified them as similar and thus considered them together.

During the months leading up to both trials, the European Court of Human Rights handed down an important decision on the protection against double prosecution (in this context called the *non bis in idem* — “not twice for the same” — principle)⁵ in its March 2014 judgment in *Grande Stevens v. Italy*. In *Grande Stevens*, the Court of Human Rights held that the criminal prosecution of defendants for a market abuse offense following their administrative sanction for the same market abuse violation, when the administrative process could be qualified as criminal under criteria established by that court’s previous jurisprudence, violated the *non bis in idem* principle as codified in Article 4 of Protocol n° 7 to the European Convention on Human Rights.⁶

The Paris insider trading defendants used the *Grande Stevens* decision to support their argument that there was a “new development,” a change in circumstances, justifying that their constitutional questions be transmitted to the Constitutional Council. The defendants then argued their constitutional questions based on established French constitutional principles, including the principle of the necessity of sanctions that is codified in the French Declaration of the Rights of Man and of the Citizen of 1789.

They also used the *Grande Stevens* decision to frame an argument that the *non bis in idem* principle should be elevated into the French constitutional order. However, as it had done in the past, the Constitutional Council declined to address the *non bis in idem* question in its March 18 decision and the principle has not, to this day, been held to be a French constitutional principle.

It is likely that the Constitutional Council declined to rule on the arguments related to the *non bis in idem* principle either because such a holding might have affected other procedures related to, for example, tax or professional disciplinary issues or because the parties’ arguments on the *non bis in idem* principle related in part to a French treaty obligation.⁷

Although the Constitutional Council ultimately applied the principle of the necessity of sanctions to hold that the relevant articles of the French Monetary and Financial Code were unconstitutional, the *Grande Stevens* decision was cited in the French Supreme Court’s transmittal decisions for the constitutional questions of both groups of defendants to the Constitutional Council.⁸

While the legal analysis applicable to the *non bis in idem* principle⁹ is different from the analysis applicable to the principle of the necessity of sanctions,¹⁰ with the former analysis turning on identity of facts and the latter analysis turning on the identity of the elements of the infractions, both principles essentially prohibit double jeopardy.

A discussion is already underway in France regarding what legislative reform should take place to bring French law on insider trading into conformity with the French Constitution before the deadline of Sept. 1, 2016.

COMPARATIVE PERSPECTIVES

The upcoming reforms to the French law on insider trading and market abuse may change the scope of the AMF's authority to prosecute market abuse violations and perhaps also affect the institutional structure of the AMF's prosecutorial system. Unlike in France, in the United States, the fact that insider trading defendants may be subject to parallel criminal, civil and administrative procedures related to the same underlying facts is not a hot topic of discussion in legal reform circles. There are currently some similarities between the U.S. Securities and Exchange Commission investigation system and the investigation phase procedures of the AMF. However, there are also important differences between the powers of the SEC and the AMF.

Currently, the procedures for determining what factual circumstances related to market abuses will be investigated by the SEC in the United States and the AMF in France are similar. The AMF has authority to investigate any situation that appears to be a potential breach of its regulations, including administrative violations such as insider trading.

The SEC has similar powers and, after receiving evidence of a possible violation of federal securities laws and determining that there "is a potential to address conduct that violates the federal securities laws," the SEC Enforcement Division may commence an investigation by opening a "matter under investigation."¹¹

The most important distinguishing feature between the AMF and the SEC is that the AMF Enforcement Commission is a sanctioning body that administers a trial-like process that may result in monetary fines that are greater in magnitude than those risked during a French criminal procedure.

Following an AMF investigative process that bears a strong resemblance to the criminal investigative phase that is overseen by a French investigating magistrate, the AMF Enforcement Commission, a distinct and independent division from the AMF investigation department, conducts an adversarial trial and judges the merits of alleged market abuse violations.

The Enforcement Commission may impose fines which the Constitutional Council observed in its March decision "can be very severe and may reach ... a severity of six times those incurred before the criminal jurisdiction in an insider trading case." The current version of Article L. 621-15 of the Monetary and Financial Code provides that the fine for an administrative violation of insider trading can be a maximum of 100 million euros or 10 times the profits that are realized.

At the conclusion of an SEC investigation, the SEC may initiate a civil or administrative action. A recommendation is made as to whether an administrative enforcement action or civil case will be pursued and the SEC may authorize a civil suit in federal court or an administrative enforcement action within the SEC before an administrative law judge. Under some circumstances, the SEC pursues both civil and administrative proceedings.

The consequences of being found civilly or criminally liable for insider trading in the United States can be severe, with a criminal conviction for a natural person resulting in criminal forfeiture, up to 20 years' imprisonment, and a penalty of \$5 million or twice the gain of the offense. Moreover, a finding of civil liability can potentially result in disgorgement of profits and a penalty that may not exceed the greater of \$1 million or three times the amount of the profit gained or loss avoided.¹²

The maximum fines in an administrative enforcement action are lower but still significant. When certain aggravating circumstances are present in an administrative action, disgorgement of profits and a penalty that shall not be more than \$100,000 for a natural person or \$500,000 for any other person may be applied.¹³

The SEC's power to bring administrative enforcement actions was expanded by the Dodd-Frank Act in 2010, and the SEC may bring enforcement actions against any person rather than a previously limited subset of regulated entities such as broker-dealers or investment advisers.¹⁴

The SEC's frequent use of administrative enforcement actions has resulted in challenges to their permissibility under the U.S. Constitution which relate to, for example, the appointment process of the administrative law judges who work within the SEC.¹⁵ On June 8 the U.S. District

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Court for the Northern District of Georgia granted a preliminary injunction to enjoin an SEC administrative proceeding pending that court's consideration whether the appointment process of administrative law judges at the SEC violates the U.S. Constitution.¹⁶

There is less live controversy regarding the double jeopardy issue in the United States because the U.S. Supreme Court has deliberated whether an administrative sanction imposed as a result of an administrative action may be so "punitive" as to implicate the double-jeopardy clause in the Fifth Amendment to the U.S. Constitution, which states that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb."

This issue was resolved by the Supreme Court's 1997 decision in *Hudson v. United States*, 522 U.S. 93, 99-105, which held that the administrative procedure in question there was not "so punitive either in purpose or effect" so as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty."

This reasoning may be subject to criticism because there is a considerable difference in the burden of proof required of a proponent in an administrative (or civil) proceeding, where the SEC or a private party need only show by a "preponderance of the evidence" that the defendant violated the relevant law, and a criminal prosecution, where the facts must be proven "beyond a reasonable doubt."

Thus, some could argue that it is logically anomalous that a prior finding that a defendant was not even shown by the lesser standard to have violated the law would not be preclusive of the ability of the same sovereign (in the case of an SEC proceeding followed by a criminal prosecution) to prove guilt beyond a reasonable doubt.

The relationships between the AMF and the French public prosecutor and between the SEC and the Department of Justice have long had a comparable dynamic because both the AMF and the SEC informed the public prosecutors of their investigative progress and the public prosecutor retained the discretion to decide whether to prosecute criminally.

During the investigation phase, the SEC has similar powers to the AMF, which include the power to subpoena and question witnesses, to collect evidence, and to request (AMF) or require (SEC) the production of documents. The SEC regularly cooperates and shares the results of its investigations with the Justice Department and, like the French public prosecutor, the Justice Department may bring criminal charges based on its independent analysis of the evidence.

The Constitutional Council's March decision abrogated Article L. 621-15-1 of the French Monetary and Financial Code to the extent that it required the transmission of the AMF's investigative report to the public prosecutor if the AMF investigation had uncovered facts that arguably constituted the infraction of insider trading. As a result, the collaborative dynamic between the AMF and the French public prosecutor on market abuses is one issue that is being debated in France and may be altered through the upcoming legislative reform.

PROPOSED REFORMS

A number of reform proposals to the French system of prosecuting market abuses are currently under discussion. The AMF recently put forward a proposal that would allow it to retain clear authority to prosecute a certain statutorily defined subset of market abuse offenses but would ensure that defendants would be subject to either criminal or administrative prosecution, but not both.¹⁷

Another proposal for reform would more fundamentally change the institutional structure of administrative and criminal prosecution for market abuse offenses by creating a unified financial markets tribunal within the French judicial courts.¹⁸ Other less probable reform proposals suggest eliminating either the incrimination of market abuses or the analogous administrative violations.¹⁹ Those latter proposals are not extensively discussed here because they would arguably run afoul of European Union law, which expressly authorizes administrative and criminal prosecution of market abuse offenses with the caveat that the *non bis in idem* principle must be respected.²⁰

The AMF proposal extends to all market abuse offenses, including insider trading, diffusion of false information and market manipulation. The AMF proposes that, before either a judge or the AMF Enforcement Commission hears a market abuse case, a coordinated investigation should be conducted by the AMF and the public prosecutor that could result in a deliberate decision based on objective, statutory criteria to pursue either an AMF administrative prosecution or a criminal prosecution.²¹

Under the AMF's proposal, criminal prosecution would remain available for the most serious violations involving intentional or fraudulent acts that offend societal values and merit imprisonment.²² AMF administrative prosecution and sanction, on the other hand, would be available for lesser offenses that threaten the sound operation of the financial markets.²³

Under the AMF's proposal, the period of coordination between the AMF and the specialized financial crime public prosecutors would take place before the notification of charges to a defendant in either a potential criminal or administrative prosecution. An internal notification process would take place between the respective prosecuting authorities, and a waiting period in which discussions could take place between the AMF and the French public prosecutors would apply before the binding and preclusive action of notification of charges would be made by either an administrative or criminal authority.²⁴

This coordination between the AMF and the public prosecutor would significantly distinguish their functional relationship from the dynamic between the SEC and the Justice Department. The SEC has investigating authority yet the Justice Department retains exclusive prosecutorial discretion in criminal matters.

Alternatively, some in France have advocated for the creation of a financial markets tribunal to handle all criminal prosecutions and administrative enforcement actions related to market abuse offenses, over which it would have exclusive jurisdiction.²⁵ This independent tribunal would work closely with the AMF as well as French prosecutors, and would be composed of judges, lawyers and representatives of the financial sector. The public prosecutor would initially decide whether to bring criminal charges when an investigation revealed acts that could be subject to criminal prosecution.

If prosecutors declined to act, the AMF could elect to bring an administrative enforcement action before the same forum. Proponents claim that such a system would ensure efficient and effective resolution of matters while respecting the constitutional rights of defendants. In reality, it is unlikely that the French legislature will embrace a reform proposal that requires the creation of a specialized jurisdiction in the French judicial courts and therefore a complete overhaul of the AMF system. Amid much debate and some uncertainty regarding the future institutional structure for the prosecution of market abuse offenses and administrative violations in France, legislative reform will surely occur before Sept. 1, 2016, and that reform should comply with the Constitutional Council's March decision, the European Court of Human Rights' *Grande Stevens* decision, and the EU Directive 2014/57/EU on criminal sanctions for market abuse and EU Regulation No. 596/2014.

The French legislature may benchmark its reforms against the systems of other European countries, which must also comply with European human rights law and EU law.

If reforms similar to the AMF proposals that are outlined in this commentary are implemented by the French legislature, the French system will not allow parallel or successive administrative and criminal prosecutions for insider trading, in essence maintaining the status quo that has existed since the Constitutional Council's March decision.

In this regard, the French system has thus become and will likely remain more favorable for defendants than the U.S. system, which will continue to allow parallel and successive administrative, civil and criminal actions in insider trading cases.

As the debate on reform of the law governing the institutional structure of prosecuting market abuses continues in France, concerned international business people with roots in the United States and France should seek assistance from dually qualified counsel who can help them

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navigate the changing French landscape of investigations and prosecutions for market abuse offenses.

NOTES

¹ Article 8 of the Declaration of the Rights of Man and of the Citizen of 1789 provides that “[t]he law must only establish sanctions that are strictly and evidently necessary, and no one can be punished except in virtue of a law established and promulgated before an infraction, and legally applied.”

² Cons. const. n° 2014-453/454 QPC and 2015-462 QPC, decision of Mar. 18, 2015.

³ According to the Constitutional Council’s decision, regulated professions defined by Article L. 621-9 of the Monetary and Financial Code may be subject to both administrative and criminal prosecution for insider trading and include, for example, authorized investment service providers.

⁴ The French Constitution of Oct. 4, 1958, was amended in 2008 to include Article 61-1, which provides the following: “If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d’État or by the Cour de Cassation to the Conseil Constitutionnel which shall rule within a determined period.” Organic Law n° 2009-1523 of Dec. 10, 2009, provides the details of how defendants can implement Article 61-1 of the French Constitution, hence making it possible for a plaintiff to bring priority constitutional questions before the Constitutional Council as of March 1, 2010.

⁵ The *non bis in idem* principle is similar to but not exactly analogous to the U.S. Constitution’s prohibition on double jeopardy. See Juliette Lelieur, *Transnationalising Ne Bis In Idem: How the Rule of Ne Bis In Idem Reveals the Principle of Personal Legal Certainty*, 9 UTRICHT L. REV. 198 (2013).

⁶ *Grande Stevens and others v. Italy*, no. 18640/10, 18647/10, 18663/10, 18668/10, 18698/10, judgment of Mar. 4, 2014, § 227-228.

⁷ The Constitutional Council has expressly stated in its prior decisions that it does not control the conformity of French law with French international treaty obligations. See: Cons. Const. n° 74-54 DC of Jan. 15, 1975 (stating “it is not the Conseil Constitutionnel’s role, when it is brought into a case in application of article 61 of the Constitution, to examine the conformity of the law with the stipulations of a treaty or an international accord”).

⁸ Cass. Crim., Dec. 17, 2014, n° 14-90.043 (transmittal decision) (indicating “whereas supposing that the provisions had been integrally declared in conformity with the Constitution by the decision of the Conseil Constitutionnel n°89-260 DC of July 28, 1989, the decision of the European Court of Human Rights (*Grande Stevens and others v. Italy*) is of a nature to constitute a change in circumstances”); Cass. Crim., Jan. 28, 2015, n° 14-90.049 (transmittal decision).

⁹ *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 82-84, ECHR 2009-I (stating that Article 4 of Protocol n° 7 “must be understood as prohibiting the prosecution or trial of a second ‘offense’ in so far as it arises from identical facts or facts which are substantially the same” and specified that “[t]he Court’s inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings.”); *Grande Stevens and others v. Italy*, *supra* note 6 at § 227-228.

¹⁰ Cons. const. n° 2014-453/454 QPC and 2015-462 QPC, decision of Mar. 18, 2015 (holding that the principle of the necessity of infractions and sanctions is violated, according to the Constitutional Council, when the administrative violation and the criminal infraction at issue cannot be considered to be of a different nature because of the application of distinct rules before their proper jurisdictional order).

¹¹ Sec. & Exch. Comm’n, Enforcement Manual (Oct. 9, 2013).

¹² 15 U.S.C.A. §78ff; 15 U.S.C.A. § 78u-1.

¹³ 15 U.S.C.A. § 78u-2.

¹⁴ See David A. Wilson, *Coming to an Administrative Law Judge Near You: Insider-Trading Cases*, 20 No. 16 WESTLAW J. SEC. LITIG. & REG. 1 (Dec. 11, 2014) (describing constitutional challenges to the SEC’s expanded power to bring administrative enforcement actions).

¹⁵ See Jean Eaglesham, *Federal Judge Rules SEC In-House Judge’s Appointment ‘Likely Unconstitutional’*, WALL ST. J., June 8, 2015.

¹⁶ *Hill v. SEC*, No. 1:15-CV-1801, 2015 WL 4307088 (N.D. Ga. June 8, 2015).

¹⁷ Report of the working group of the Financial Markets Authority, Application of the principle of *non bis in idem* in the legal prohibition of market abuses – Proposition of reform 20 (May 19, 2015).

¹⁸ *Id.* at 16-18.

¹⁹ *Id.* at 14-15 (one proposal includes keeping administrative sanctions in place, but only for the regulated professions listed in Article L. 621-9 of the Monetary and Financial Code).

²⁰ Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse, OJ 2014 (L 173), p. 179-189; Regulation (EU) of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

²¹ AMF report, *supra* note 17 at 21.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 25-26.

²⁵ Anne-Valérie Le Fur & Dominique Schmidt, *Il faut un tribunal des marchés financiers*, RECUEIL DALLOZ (Oct. 23, 2014), available at <http://bit.ly/1KkKl4Q>.



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