



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF GHERARDI MARTIRI v. SAN MARINO

(Application no. 35511/20)

JUDGMENT

Art 1 P1 • Positive obligations • Peaceful enjoyment of possessions • Adequate criminal and civil remedies at applicant's disposal for the protection of her property rights in relation to organised fraud suffered at the hands of a bank and third persons
Art 6 § 1 (civil) • Reasonable time • Excessive length of ongoing civil proceedings

STRASBOURG

15 December 2022

FINAL

15/03/2023

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Gherardi Martiri v. San Marino,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President*,

Péter Paczolay,

Krzysztof Wojtyczek,

Alena Poláčková,

Ivana Jelić,

Gilberto Felici,

Raffaele Sabato, *judges*,

and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 35511/20) against the Republic of San Marino lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Ms Maria Cristina Gherardi Martiri (“the applicant”), on 5 August 2020;

the decision to give notice to the San Marinese Government (“the Government”) of the complaints concerning Article 1 of Protocol No. 1 and Article 6 § 1 (in relation to the civil proceedings) and to declare inadmissible the remainder of the application;

the decision of the Government of Italy not to make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention);

the parties’ observations;

Having deliberated in private on 22 November 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the State’s positive obligations under Article 1 of Protocol No. 1 to the Convention in relation to an organised fraud suffered by the applicant at the hands of a bank and third persons, and delays in the proceedings under Article 6 § 1 of the Convention.

THE FACTS

2. The applicant was born in 1952 and lives in Montelibretti, Italy. The application was lodged by Mr. Stefano Davidson (hereinafter S.D.), a journalist, on behalf of the applicant. The applicant was eventually legally represented before the Court by Mr R. Pierro, a lawyer practising in Rome.

3. The Government were represented by their then Agent, Mr L. Daniele.

4. The facts of the case may be summarised as follows.

I. BACKGROUND TO THE CASE

5. In around 2009 the applicant became aware that she had been defrauded by Banca Commerciale San Marinense S.p.A., (hereinafter ‘the bank’), some of its employees, and other persons.

6. By means of a registered letter, in July 2011, supplemented by a complaint of 3 August 2011, the applicant, through S.D., her trusted person, reported the matter to the supervising authority for the banking and financial industry in San Marino (*Vigilanza di Banca Centrale della Repubblica di San Marino* – hereinafter ‘BA’, whose supervisory role was previously covered by the Office of Banking Supervision ‘OBS’).

7. According to the Government, following the complaints which had been received, the BA invited the reporting person (S.D.) (with notes dated 21 July and 5 September 2011) to adopt any useful initiative for the protection of the applicant’s interests, specifying that, pursuant to Article 68 of Law no. 165 of 2015 and *Banca Centrale della Repubblica di San Marino* Regulation 1/2007, the BA would acquire from the bank all information and observations on the facts reported, in order to assess their relevance in relation to its tasks and supervisory powers. A request to this effect was made by the BA to the bank on 5 September 2011.

8. In the same above-mentioned notes, the BA also specified that the power to settle any disputes between supervised parties and their customers was not part of the aforesaid supervisory tasks, since this power fell within the competence of the Judicial Authority.

9. On 28 October 2011 the bank was put under extraordinary administration by the BA (Article 78 of Law no. 165 of 2005, see paragraph 61 below).

10. On 24 February 2012 the bank ceded its relevant branch including its juridical rights and obligations to Asset Banca S.p.a. (hereinafter A.B. S.p.a.). P.D., the deputy director of the bank, was nominated director of A.B. S.p.a.

11. According to the applicant, in a reply of 21 January 2013 the BA “washed its hands” of her complaint.

II. THE CRIMINAL PROCEEDINGS

12. On 20 March 2012 criminal proceedings no. 193/RNR/2012 were initiated in San Marino following a complaint lodged by the applicant against the bank, C.G., M.R. and P.D. for fraud (under Article 204 of the Criminal Code), as well as for any other criminal offence emerging from the investigations, also with reference to Article 66 (Rules of Conduct of Licensed Authorities) of Law no. 165 of 2005 and subsequent amendments.

A. The applicant's criminal complaint

13. According to the complaint lodged by the applicant on 13 March 2012, the applicant had suffered economic damage as a result of the actions of the bank, its director and deputy director (C.G. and P.D), and M.R. and considered that she had been the victim of fraud. Her complaint explained as follows.

14. On 21 March 2005 the applicant had entered into a promise of sale with a certain P.M.L to sell an immovable property she owned in Rimini. During the negotiations, P.M.L set the opening of a current account with the bank as a condition for the purchase since the immovable property had to be acquired by a certain company Z., which had already opened a current account with the same bank.

15. M.R. (the director of company Z.) who was a well-known person with the bank and its director (C.G.), had been entrusted with the opening of the current account and the payment of the agreed amount for the real estate transaction.

16. The current account (no. xxx 6 02) was opened on 10 May 2005 with the simultaneous payment of 200,000 euros (EUR) constituting the advance payment received at the time of the promise of sale contract. It appears from the documents submitted by the Government that on the same day a document was signed to the effect that the bank should hold all correspondence related to the account, that it would be considered received on the date received by the bank, and that the latter was not liable to take any action or responsible for any damage in this connection.

17. On 21 July 2005, namely the date on which the public deed for the sale of the property was signed, the remaining part of the price agreed, amounting to EUR 1,300,000, was paid by company Z. to the applicant.

18. On 22 July 2005 the applicant went to the bank in order to issue a personal guarantee for the opening of a current account of a friend of hers who wished to take out a loan of EUR 100,000. In order to grant the afore-mentioned credit, the bank required the applicant to open a joint current account and a securities deposit account (no. xxx 40) as a guarantee for the credit. On the same occasion, after receiving brief explanations from the director of the bank, she signed the documents submitted to her.

19. On 18 December 2009 she received a registered letter by which the bank asked her to review a credit of EUR 100,000 because its validity had expired. She considered that the credit had been granted to her, without her knowledge, when she opened the current account. Indeed, she had not needed any loans given the substantial amount of money she held at the bank.

20. Following the verifications carried out by S.D., the applicant, who had been abroad at that time, learnt from P.D., the deputy director of the bank, that the balance of the current account (no. xxx 6 02) - on which she believed

there were approximately EUR 800,000 - was equal to zero and that EUR 80,000 of the credit mentioned above had been used.

21. From the examination of the relevant bank documents, it emerged that, starting from 2005, a series of investments had been made by M.R. by virtue of a power of attorney issued by the applicant.

22. The applicant denied ever having given such mandate consciously, noting that it had given nearly unlimited powers to a person she had only just met. Moreover, she noted that the mandate, relied on by the bank, was undated, made no reference to a bank account, was not signed by any bank employee nor stamped by the bank and solely consisted of a pre-established form containing a scribbled signature of the applicant whose authenticity she contested.

23. In confirmation of the fact that the transactions had been carried out without her knowledge, the applicant pointed out to the fact that the securities related to the investments – consisting of very high-risk investments – had inexplicably been purchased by M.R. on a day on which she was at the bank's premises and could therefore have done so on her own, had she actually intended to do so. In particular, on 22 July 2005, date when she had been to the bank with her friend, M.R. and the bank management had proceeded to three high risk investments for a total amount of EUR 1,100,000.

24. The applicant further reported that M.R. had carried out other operations, which had been authorised by the deputy director (P.D.), in particular the transfer of shares from a securities portfolio in her name, both to a person unknown to her, namely S.G. (who subsequently turned out to have relations with M.R.), and to S.D. (her trusted person). Lastly, she pointed out that EUR 73,001.42 had been transferred, without her prior authorisation, from the current account in her name to the account jointly held with her friend in order to close it, even though her friend had already proceeded to such payment. She noted further that M.R. had made some payments into the account in 2007 and 2008, presumably to ensure that the account would not be empty and that the bank would not contact her in that regard.

25. Referring to the numerous alleged misconducts and irregularities committed by the bank and its management, she nevertheless wished to settle the matter amicably, thus, before lodging the criminal complaint, she had instructed her lawyers to enter into negotiations with the above-mentioned bank. Such attempt was unsuccessful as she had been unsatisfied with the only offer made by the bank.

26. The applicant reserved her right to join the criminal proceedings as a civil party and requested to be informed if the proceedings were to be discontinued.

B. The investigation

27. Following the complaint lodged by the applicant, a judicial notice was forwarded to M.R. pursuant to Article 4 of Law no. 93 of 2008 for fraud.

28. By means of a decree dated 5 September 2014, the Investigating Judge ordered the discontinuation of the proceedings. He pointed out that the investigations had brought to light the fact that the sale and purchase of securities had taken place between 9 August 2005 and 14 September 2005, for a total amount of EUR 1,100,679.41, and that, following the sale of such securities, a sum of EUR 397,877.06 had been collected, thus causing the applicant to lose approximately EUR 700,000. It also appeared that M.R. had repaid to the applicant the sum of EUR 40,300 through transfers in several instalments made between 13 September 2006 and 29 November 2007.

29. According to the Investigating Judge, the loss of the applicant's money was due to the bad outcome of high-risk investments that the person apparently delegated to operate on the current account, namely M.R., had made without her consent. The inquiry found that there had been no mandate for such risky investments, and it was likely that M.R. had willingly hidden the nature of such dealings, signalling that the undertaking of such dealings had not been agreed upon. It emerged from the relevant elements that his conduct had been negligent as well as that, although indirectly, of the bank. However, the overall investigations had not fully proven neither the profit obtained by M.R. nor the wilful intent of the conduct; for this reason, the Investigating Judge considered that the case could only be assessed in civil proceedings, where both of them could be held liable. Moreover, the Investigating Judge found that the statute of limitations for the offence of fraud had already expired before the complaint was lodged, since the conduct of the defendant M.R. had lasted until 14 September 2005.

30. The applicant appealed under Article 135 of the Criminal Code. She asked for additional investigations to be carried out through the hearing of witnesses and the acquisition of bank documents. She was of the view that the elements constituting the alleged criminal offence existed.

31. On 7 November 2014, the Judge of Appeals upheld the appeal and ordered the reopening of the investigations considering that the investigation was incomplete and deficient as it had not focused on the bank, nor on the persons who allowed M.R. to act without a mandate, nor the relationship between all the persons involved. Moreover, that decision was contradictory in so far as, on the one hand, it found that M.R.'s conduct had been abusive, and, on the other hand, it found that it had been due to negligence (*colpa*). The Judge of Appeals considered that if it had to be established, as appeared probable from the inquiry, that the mandate had been irregular and obtained by deception, then the profit did exist (in so far as M.R. used that money) as well as the malicious intent (*dolo*) as nothing indicated that the resulting situation was due to recklessness or inexperience. A more detailed inquiry

was therefore necessary, including, *inter alia*, an examination of relevant bank documents by the supervising authority [BA] and investigations concerning the relations between M.R. and the directors of the bank and the other persons involved. It was further considered that the expiry of the statute of limitations could be established only once the necessary investigations were carried out, since the latter could reveal more serious criminal offences than the one alleged or since the alleged offence could acquire a different legal nature.

32. The Investigating Judge, to whom the case file had been assigned following the reopening of the investigations, carried out further investigations in accordance with the indications given by the Judge of Appeals and, on 7 March 2017, ordered the discontinuation of the proceedings.

33. In the decree, the Investigating Judge described the investigation activities carried out after the reopening of the investigations, consisting of examinations of witnesses and activities delegated to the BA. In particular, having acquired relevant documentation, it noted that M.R. had acted on all the transactions despite not having a regular mandate. Indeed, the bank's information system had not registered any such mandate. The transactions carried out, without the applicant's knowledge, by M.R., had concerned at least a part of her economic resources but it could not be excluded that, for the remaining part, the operations of M.R. had generated profits to the benefit of related parties such as R.R. (the applicant's former spouse) and S.D. (her trusted person), although the latter persons were not indicated among the people allegedly responsible for such conduct.

34. Recalling the outcome of the verifications carried out on company Z., which had purchased the immovable property in question, the Investigating Judge pointed out that M.R., company Z., P.M.L. and the bank were all closely connected in the operations for the payment of the immovable property sold by the applicant, and such operations had been coordinated by M.R. However, the investigations carried out had not revealed any issues concerning the nature of the sums used for the purchase, despite them having passed through P.M.L.'s bank account in cash. The investigations had also revealed the existence of a collaboration between M.R. and the bank whose officials were supposed to be aware of the type of operations the former had carried out. Notwithstanding the obvious irregularities, the bank had not objected to M.R.'s high-risk investment transactions on behalf of the applicant.

35. On the basis of the foregoing findings, the Investigating Judge considered credible the allegation that M.R. had gained the applicant's trust by means of deception and devices aimed, at least, at failing to inform the applicant in good time about his activities and, presumably, at operating outside the scope of the mandates legitimately conferred on him, thereby deriving direct and indirect profits from the availability of sums to be used in

financial investments. In particular, it was pointed out that the lack of timely information about the use of the funds in high-risk transactions was due to the trust placed in M.R. At the time he had included the applicant among the bank's "high standing" customers, thus providing a further advantage both to M.R. and the bank.

36. Since no more serious offences than the offence of fraud had emerged the Investigating Judge confirmed the original decision to discontinue the case since the offence was time-barred.

III. THE (PARALLEL) CIVIL PROCEEDINGS

A. The ordinary civil action (no. 235/2015)

37. In the meantime, pending further criminal investigations, by application for summons dated 16 April 2015, the applicant sued M.R. as the author of the investments, G.C., P.D., S.B. – in their capacity as officials employed by the bank – as well as the bank and A.B. S.p.a., who had taken over the bank's legal relationships *en bloc* (see paragraph 9 above). She asked the court to ascertain their liability for the unauthorised use and misappropriation of the sums on the bank accounts in her name and, consequently, that they be ordered jointly and severally to reimburse such sums and pay compensation for any further damage suffered by her, including non-pecuniary damage. Based on the considerations made by the first Investigating Judge in the decision of 5 September 2014, she complained of the defaulting and negligent conduct of the accused banks and therefore their liability for all the damage she suffered as a result of the disappearance of the sums of money belonging to her. She also specified that the banks were to be held vicariously liable as employers of the bank officials, who were also sued.

38. All the defendants appeared before the judge with the exception of M.R. (who was imputed in the criminal proceedings). In their defence the defendants relied on the alleged mandate. The applicant contested such mandate noting the findings of the Investigating Judge in the criminal proceedings, as well as the expert report drawn up by the BA showing that on the bank's information system no such mandate had been recorded.

39. According to the Government, during these proceedings, the applicant had brought interlocutory proceedings on 13 October 2016 - *actio ad exhibendum* - in order to obtain some documents held by A.B. S.p.a. to be used as evidence. The latter proceedings were inexplicably waived on 6 April 2017. The applicant had also submitted a request for the admission of a court-appointed technical consultant, which was found to be manifestly inadmissible due to the fact that the questions raised related to matters naturally falling within the jurisdiction of the Judge and not of the technical consultant.

40. By means of a decree dated 4 July 2018, the Judge (*Commissario della Legge*), to whom the case had been assigned, acknowledged the revocation of the licence to operate in the financial sector and the administrative compulsory winding up of A.B. S.p.a. adopted on 12 June 2017 by the BA (see paragraph 41 below). In consequence, he declared the inadmissibility (*improcedibilita'*) of the action against A.B. S.p.a., which had been placed in administrative compulsory winding up. According to Article 85 *et seq.* of Law no. 165 of 2005, from the date of establishment of the bodies responsible for the administrative compulsory winding up, no proceedings concerning the company's assets could be initiated or continued, since all matters relating to the company's assets and liabilities had to be dealt with together before the same judge. He also found that it was impossible to continue the proceedings against the other parties, since the applicant had claimed that all the defendants were jointly and severally liable.

B. The liquidation proceedings before judge X

41. In the meantime, by decision of 12 June 2017, A.B. S.p.a.'s license to operate was revoked and it was put in administrative compulsory winding up (Article 85 of Law no. 165 of 2005, see paragraph 62 below). According to the Government, this decision had wide media coverage given the adoption of several urgent regulatory measures aimed at containing its effects on the financial sector.

42. On 2 February 2018 the liquidators of A.B. S.p.a. submitted to the domestic courts the statement of liabilities (*stato passivo* – a published list of debts pertaining to a company in liquidation) of A.B. S.p.a. as stood on 12 June 2017. The applicant was not included in that list.

43. By a registered letter of 26 April 2018, the applicant asked to be included as creditor in the statement of liabilities of A.B. S.p.a.

44. On 2 May 2018 the liquidators refused her request noting that the statement of liabilities had already been published in the official bulletin of 8 February 2018.

45. According to the applicant, the official bulletin updated on 29 March 2018 still did not show the statement of liabilities of A.B. S.p.a., therefore she was still in time to register her credit.

46. No details were submitted as to the continuation of these proceedings. However, in view of the decision of 23 February 2022 (see paragraph 52 below) it can be presumed that these proceedings were or will be struck out.

C. The objection to the statement of liabilities (no. 254/2018) (*opposizione allo stato passivo*)

47. On 10 May 2018 the applicant, considering that she was owed EUR 7,496,285, brought an action against A.B. S.p.a. represented by its

liquidators. She asked the court to order the inclusion of that sum in the statement of liabilities compiled and filed by the liquidators of A.B. S.p.a., since the latter, on 2 February 2018, had failed to include her as a creditor of the aforementioned bank. She argued that the liquidators should have put her on the list even if only in a precautionary manner. Indeed, there had been no legal impediment as the statement of liabilities of A.B. S.p.a. as stood on 12 June 2017, had not yet been published. She thus asked the court to order her insertion in the list pending a final finding on the validity of her credit.

48. During the proceedings, the applicant further claimed that the official bulletin published by the BA had been tampered with. In particular, the bulletin exhibited by the defendants showed the date of the statement of liabilities of A.B. S.p.a. as being 29 March 2018, while that published on the relevant website showed the date as being 18 May 2018. Furthermore, the deposit of the statement of liabilities, released by the BA in terms of Article 90 of Law no. 165 of 2005 (see paragraph 65 above), was dated 8 February 2018.

49. On 4 December 2019, Judge Y (*Commissario della Legge*) to whom the case file had been assigned, upheld the defendants' objection and held that the court lacked competence to give a decision on the matter. Indeed, the assignment of the case file had taken place in violation of Article 91 (3) of Law no. 165 of 2005, according to which only one judge has jurisdiction over cases relating to the administrative compulsory winding up of a company. However, since this violation was not attributable to the plaintiff, the Judge also ordered that the declaration of lack of competence be followed by the reopening of the proceedings, by the plaintiff, before Judge X.

50. According to the Government, following the reopening of the proceedings before the competent judge, the proceedings were continued and were at the date of their observations (28 February 2022) still pending and awaiting a decision with regard to the preliminary admissibility issues raised.

D. Extraordinary action before the Magistrate

51. In 2021 the applicant lodged a request to continue the proceedings no. 235/2015 (set out at paragraph 37 *et seq.* above), given that in the meantime the administrative compulsory winding up of A.B. S.p.a. had been declared illegal on 17 February 2021 (see paragraph 52 below). However, the Magistrate (*Uditore Commissariale*) confirmed the inadmissibility of the applicant's civil action since, as things stood then, the administrative compulsory winding up procedure was still alive and listed on the public registers given that an appeal against the judgment declaring the illegitimacy of the administrative compulsory winding up had been lodged and was still pending.

IV. OTHER PROCEEDINGS

52. On a request by A.B. S.p.a., by a final appeal judgment of 23 February 2022, confirming a first-instance judgment of 17 February 2021, the compulsory administrative winding up of A.B. S.p.a. was found to be illegal by the domestic courts. However, according to the applicant A.B. S.p.a. remains inoperative, and reimbursement of funds remains impossible.

RELEVANT LEGAL FRAMEWORK

I. CONSTITUTIONAL LAW

53. According to Article 10 of the Declaration on the Citizen's Rights and Fundamental Principles of the San Marino Constitutional Order private property and entrepreneurship shall be secured. Limitations shall be determined by law for the purpose of protecting the general interest.

II. CRIMINAL LAW

54. Article 54 of the Criminal Code, in so far as relevant, reads as follows:

“An offence is time-barred:....

2) after three years, if the offence is punished with second degree imprisonment, third or fourth degree disqualification, a fine [in lira], alone, combined with each other or any other punishment.”

55. Article 204 of the Criminal Code reads as follows:

“Anyone who, deceiving another by means of a trick or artifice, secures an unjust profit for himself or for a third party is punished by terms of second-degree imprisonment, as well as a second-degree daily fine or disqualification.

The punishments indicated in the above paragraph also apply to anyone who, imposing on a physically or mentally disabled or minor person, has such person perform acts detrimental to himself or to another.

The punishments indicated above are increased by one degree;

1) if the conduct occurred to the detriment of the Republic of San Marino or public bodies;

2) if the conduct occurred to secure the price of insurance or induce someone to purchase an insurance policy;

3) if the conduct occurred by influence peddling involving a public official or power of the Republic of San Marino.

Where the conduct under the first paragraph occurred dissimulating a state of insolvency, the offender is punished, following action brought by the offended, by terms of first degree imprisonment or a daily fine.

In the event envisaged in the preceding paragraph, fulfilment of the obligation by the offender, before a first-degree judgment is rendered, extinguishes the offence.”

III. LAW NO. 96 OF 2005

56. The relevant provisions of Law No. 96 of 2005 read as follows:

Article 30 (Powers of the Central Bank)

“In order to achieve the objectives and carry out the functions it is assigned by the present Law, the Central Bank, through its organs and in its respective areas of competence, may adopt measures, to include those in the form of regulations, orders, circulars, standard letters, recommendations and instructions, which will, besides being of a cogent nature in dealings with supervised parties, also perform the function of explaining and interpreting the tasks assigned to the Central Bank by law.

The Central Bank will, adopting the methods regarded as most appropriate, make public the measures referred to in the previous paragraph if they are of general relevance and addressed to the public.

Central Bank instruments pertaining to matters of supervision and anti-money laundering unit, as resolved by the Supervision Committee, will be issued by the Director General.”

Article 33 (Supervision and investor protection functions)

“For the attainment of its objectives, the Central Bank will be assigned the functions of:

- a. regulation, monitoring and supervision of intermediaries and their activities and services and of financial, banking and insurance instruments;
- b. management, regulation and administration of the systems of guarantee to protect depositors;
- c. custody and administration of deposits in securities and in cash in respect of the compulsory reserve by banks in escrow;
- d. granting of credit to supervised parties operating in the territory of the Republic provided that it has adequate backing in the form of guarantees;
- e. anti-money laundering unit.”

Article 35 (Notification of serious irregularities)

“The Supervision Committee of the Central Bank, in the person of the Director General, will forward, on a confidential basis, the information and data acquired in the exercise of its supervision function and pertaining to ascertained serious irregularities to the Congress of State, through the Credit and Savings Committee.

The information and data referred to in paragraph 1 will also be forwarded to the judicial authority in those cases specified by law. The exhibits in proceedings brought further to that notification will be treated as strictly confidential.”

IV. LAW NO. 165 OF 2005

57. Law no. 165 of 2005 concerns companies as well as banking, financial and insurance services. It sets out the duties and powers of the BA as supervisory authority which have been strengthened by means of this law. It

further sets out relevant procedures, including those related to winding up. The law has been amended repeatedly since 2005¹.

58. In particular, the most relevant articles are the following.

59. Its Article 37, concerning supervision, reads as follows:

“1. In exercising its supervisory function, the supervisory authority shall pursue the following objectives:

a) The stability of the financial system of the Republic, the protection of savings and investors, as well as the adequate protection of the insured and those entitled to insurance benefits, including through the supervision of the sound and prudent management of authorised parties;

b) The transparency and correctness of the conduct of authorised parties;

c) The fight against financial crime in cooperation with other competent authorities;

d) The protection of the image and reputation of and of confidence in the San Marino financial system.

1-bis. Supervision shall be based on a prospective and risk-based approach and shall include the verification on a continuous basis of the proper operation of reserve activities and of compliance with supervisory provisions.

1-ter. In carrying out its tasks, the supervisory authority shall take into account the convergence of supervisory instruments and practices recommended by the competent institutions and bodies of the European Union.”

60. Its Article 41 and 42 concern its powers to request information and undertake investigations.

61. Its Article 78, concerning extraordinary administration, reads as follows:

“1. By means of a decision adopted by the Supervision Committee, the bodies with governing and control functions may be dissolved when one or more of the following situations occur:

a) There are serious irregularities in the administration or serious breaches of the sound and prudent management of the authorised party or of the legislative, administrative or statutory provisions or measures of the supervisory authority governing its activities;

b) Serious losses of the company’s assets are expected;

c) There is a serious and persistent lack of liquidity;

d) There are false statements or serious omissions in record keeping or alterations of accounting documents;

e) Dissolution is invoked by means of a reasoned request by the governing bodies or by an extraordinary shareholders’ meeting.

¹<https://www.bcs.sm/site/home/normativa/leggi-e-decreti/articolo107.html#:~:text=Legge%2017%20novembre%202005%20n,della%20Repubblica%20di%20San%20Marino>
(last accessed 28 June 2022)

2. The supervisory authority shall be responsible for managing the extraordinary administration procedure.

3. The decision referred to in the first paragraph shall suspend all functions of the shareholders' meetings.

4. An abstract of the decision referred to in the first paragraph shall be published in the Official Bulletin.

5. The decision referred to in the first paragraph shall be communicated by the extraordinary administrators to the persons concerned, who so request, only after they take office pursuant to Article 81.

6. Extraordinary administration shall last for one year unless a shorter period is specified in the decision referred to in the first paragraph. Only in exceptional and duly motivated cases may the supervisory authority extend extraordinary administration for a further period of six months."

62. Its Article 85, concerning administrative compulsory winding up, reads as follows:

"1. By decision of the Supervision Committee, even when an extraordinary administration or ordinary winding-up procedure is in progress, it shall be possible to order the revocation of the authorisation to carry out reserved activities and the administrative compulsory winding-up of the authorised parties, if the facts referred to in Article 78, paragraph 1, are exceptionally serious.

2. Administrative compulsory winding-up may be ordered, through the same procedure indicated in paragraph 1 of this Article, on the basis of a reasoned request by the governing bodies or by an extraordinary shareholders' meeting of the authorised party, as well as by the administrators or liquidators.

3. The decision of the Supervision Committee shall be notified by the liquidators to the persons concerned, who so request, only after they take office pursuant to Article 89.

4. An abstract of the decision referred to in paragraph 1 above shall be published in the Official Bulletin.

5. From the date on which the decision referred to in paragraph 1 is issued, the functions of the governing and control bodies, shareholders' meetings and any other body of the authorised party shall cease.

6. For all matters not expressly governed by this Chapter, the provisions in force on bankruptcy matters shall apply, if compatible."

63. Its Article 87, concerning the effects of the decision declaring the administrative compulsory winding-up procedure, reads as follows:

"1. From the date of establishment of the competent bodies, the payment of liabilities of any kind and the return of assets to third parties shall be suspended.

2. After the date indicated in paragraph 1 of this Article, no proceedings concerning the company's assets shall be initiated or carried on against the authorised party subject to compulsory administrative winding-up and without prejudice to the provisions of Articles 91 and 96, paragraph 3, below. Similarly, no enforcement acts or precautionary measures shall be initiated or carried on. The other rules in force on bankruptcy matters governing the divestment of assets, the nullity or ineffectiveness of the disposals affecting creditors, the maturity of all debts and the suspension of interest during the

procedure, the setting-off and ranking of credits, privileges, pending contracts, and any other rules of a non-procedural nature insofar as compatible shall apply.”

64. Its Article 88, concerning the powers and functioning of the bodies responsible for the administrative compulsory winding-up procedure, reads as follows:

“1. Liquidators shall have the legal representation of the authorised party subject to administrative compulsory winding up, shall exercise all actions that should be carried out by the authorised party and shall conduct winding-up operations. Liquidators shall be public officials in the performance of their duties.

2. The oversight committee shall assist the liquidators in the performance of their duties, monitor their actions and give opinions on the cases provided for in this Chapter or in the measures of the supervisory authority.

3. The supervisory authority may issue measures for the conduct of the administrative compulsory winding-up procedure and may also establish that certain categories of transactions or actions be authorised by the supervisory authority and a preliminary opinion of the oversight committee be obtained thereon. The members of the winding-up bodies shall be personally liable for non-compliance with the measures issued by the supervisory authority; such measures shall not be enforceable against third parties who have no knowledge thereof.

4. Within 180 days of their appointment, liquidators shall submit to the supervisory authority a report on the accounting situation and the assets and liabilities of the authorised party and on the development of the administrative compulsory winding up, accompanied by a report drafted by the oversight committee. The supervisory authority shall lay down the terms and conditions of the report on the developments of the procedure, which the administrators shall provide to creditors on a regular basis,

5. Any liability action against the members of the bodies of the authorised party undergoing administrative compulsory winding up shall be brought by the liquidators, after consulting the oversight committee and subject to the prior authorisation of the supervisory authority. [...]”

65. Its Article 90, concerning the assessment of liabilities, reads as follows:

“1. Within two months of taking office, the liquidators shall notify the creditors, by registered letter with acknowledgement of receipt, of the sums due to each of them, based on the records and documents of the authorised party subject to administrative compulsory winding up.

2. A similar notification shall be sent to those who are holders of rights in rem over the assets and financial instruments held by the authorised party subject to administrative compulsory winding up, as well as to customers entitled to be returned such financial instruments.

3. The supervisory authority may establish further forms of publicity with a view to disclosing the expiry of the deadline for filing claims under paragraph 5 of this Article.

4. Within fifteen days of receipt of the registered letter referred to in paragraphs 1 and 2, the creditors and holders of the rights mentioned above may submit or send, by registered letter with acknowledgement of receipt, their claims to the liquidators, attaching supporting documentation. Failure to exercise the above option shall not affect the right to object to the statement of liabilities provided for in Article 91.

5. Within sixty days of publication of the decision providing for the administrative compulsory winding up in the Official Bulletin, the creditors and holders indicated in paragraph 2, who have not received the notification referred to in paragraphs 1 and 2, shall request the liquidators, by registered letter with acknowledgement of receipt, to recognise their credits and return their assets, submitting documents proving the existence, type and extent of their rights.

6. After the expiry of the deadline provided for in paragraph 5 above and no later than thirty days thereafter, the liquidators shall submit to the supervisory authority, after hearing the authorised party's removed directors, the list of admitted creditors and the sums granted to each of them, indicating their pre-emptive rights and their ranking, as well as the lists of the holders of the rights indicated in paragraph 2 of this Article and of those whose claims have been rejected. Customers entitled to the return of financial instruments shall be recorded in a specific and separate section of the liabilities.

7. Within the same deadlines provided for in paragraph 6 above, the liquidators shall deposit with the Single Court, at the disposal of the persons entitled thereto, the lists preferential creditors, the holders of the rights indicated in paragraph 2 of this Article as well as the parties belonging to the same categories, whose claims have been rejected.

8. Subsequently, by registered letter with acknowledgement of receipt, the liquidators shall inform, without delay, those whose claims have been rejected, in whole or in part, of the decision taken in their regard. Notice of filing of the statement of liabilities shall be published in the Official Bulletin.

9. Once the requirements provided for in paragraphs 6 and 7 above have been fulfilled, the statement of liabilities shall become enforceable."

66. Its Article 91, concerning the objection to the statement of liabilities, reads as follows:

"1. The parties whose claims have not been accepted, in whole or in part, may lodge an objection to the statement of liabilities in respect of their position and against the recognition of rights in favour of the persons included in the lists referred to in Article 90, paragraph 7, within fifteen days of receipt of the registered letter referred to in Article 90, paragraph 8. Such objection may also be lodged by the parties admitted within the same period running from the date of publication of the notice referred to in Article 90, paragraph 8.

2. The objection shall be lodged with the Single Court (*Tribunale Unico*).

3. A single Law Commissioner (*Commissario della Legge*) shall have jurisdiction over all cases relating to the administrative compulsory winding-up procedure."

THE LAW

I. PRELIMINARY OBJECTIONS

A. The parties' submissions

67. The Government submitted that the application should be declared inadmissible for abuse of the right of petition. They noted that S.D. who had written the application on the applicant's behalf had therein written:

"I would like to point out that I, as a journalist, am forced to draft this complaint because the victim's San Marino lawyers refuse to do so (...). This will also help the

Court to understand the lack of democracy characterising that enclave, irrespective of any Convention signed with the EU [European Union] or ECB [European Central Bank], and the kind of harassment (persecutory acts) systematically suffered by Ms. Gherardi Martiri for at least ten years, with the obvious connivance of all local institutions, apparently also assisted by someone in Italy, and nevertheless they [San Marino] are knocking on the doors of the EU.”

68. In their view this was an excessive and contemptuous affirmation against San Marino, amounting to a “gratuitous attack”. The same kind of disrespectful language, which had exceeded the bounds of normal, civil, and legitimate criticism, had appeared in numerous articles published on the internet (submitted to the Court) targeting various representatives of the institutions and particularly the Government Agent.

69. Further, the Government referred to the obligation to keep friendly settlement negotiations confidential, which is imposed on the parties by Article 39 § 2 of the Convention and Rule 62 § 2 of the Rules of Court, and which, if not respected, could also lead to inadmissibility for abuse of petition. They noted that several articles had provided some details of the exchanges of correspondence between the Government and the Court. Although no specific information on possible settlements had been published, the Government considered that these publications were intended to put pressure on the Government to obtain the desired settlement proposal.

70. In particular, in a statement to the press, the applicant’s lawyer in the domestic proceedings, had stated:

“This application has now been declared admissible for violation of Article 1 of Protocol 1 concerning private property and Article 6 concerning the length of proceedings, and the Court has expressly asked the State of San Marino to express its opinion on a possible settlement in order to avoid an ECtHR decision on this case. Despite express verbal and written reminders, Ms. Gherardi Martiri has been waiting for an answer from the competent authorities for over a month. The case is still being downplayed, not only by the Institutions involved, but also by the press, which, despite being informed, has reported nothing on the matter.”

71. *Inter alia*, it was also reported in the press that the journalist S.D., who wrote the application on behalf of the applicant, appeared on a television programme to talk “about the proceedings before the Court of Human Rights against San Marino for violation of private property and abuse of proceedings”. According to the report, on that occasion, he showed some:

“documents that are embarrassing for Italy and that incriminate the Republic of San Marino, its Central Bank [BA], as well as 2 Congresses, besides revealing, also on television, what had been censored by the local and neighbouring press. Anyone who has or has had unsuccessful financial or business relations with the Republic of San Marino will thus have the information they need to act as they see fit.”

72. This programme was then broadcast regularly at the established date and time. The Government noted that all the articles were published on the blog “TitanPost”, and although they were unsigned, they contained information that – given the confidentiality requirement imposed on the

parties during the negotiations aimed at an amicable settlement of the application – only the applicant or the person who wrote the application could have known. In addition, numerous videos could be found on YouTube by typing in the name S.D. where the latter presented himself as a journalist and carried out a tendentious reconstruction of the facts in the present case.

73. The applicant submitted that the conclusions of the criminal proceedings clearly underlined that the applicant’s money had been unlawfully used by the bank and the intermediary, and that it was not unusual that news events find space in the press, even more when they concerned “tax havens” with effects on neighbouring countries. It was further submitted that the applicant had never given interviews or statements, nor had her legal representative before the Court done so. Moreover, San Marino had not entered into any friendly settlement negotiations with the applicant and thus there had been nothing to divulge, and any documents submitted to the press had not been confidential.

B. The Court’s assessment

1. General principles

74. The notion of abuse of the right of application is not limited to situations relating to conduct which prevents the Court from ruling on the matter in full knowledge of the facts and, in general, any conduct by an applicant that is manifestly contrary to the purpose of the right of individual application as provided for in the Convention and which impedes the proper functioning of the Court or the proper conduct of the proceedings before it constitutes an abuse of the right of application (see *Miroļubovs and Others v. Latvia*, no. 798/05, §§ 62 and 65, 15 September 2009, and *Podeschi v. San Marino*, no. 66357/14, §§ 85-86, 13 April 2017). The Court reiterates that it cannot be its task to deal with manifestly abusive conduct by applicants or their authorised representatives, which creates gratuitous work for the Court, incompatible with its real functions under the Convention (see *ibid.* § 87, and *Petrović v. Serbia* (dec.), no. 56551/11 and 10 others, 18 October 2011).

75. An application may be regarded as an abuse of the right of application where the applicant, in his or her correspondence, uses particularly vexatious, insulting, threatening or provocative language – whether this be against the respondent Government, its Agent, the authorities of the respondent State, the Court itself, its judges, its Registry or members thereof. Nevertheless, it is not sufficient for the applicant’s language to be merely cutting, polemical or sarcastic; it must exceed “the bounds of normal, civil and legitimate criticism” in order to be regarded as abusive. In that connection, the legal professionals representing applicants before the Court must also ensure compliance with the procedural and ethical rules, including the use of appropriate language (see *X and Others v. Bulgaria* [GC], no. 22457/16, § 146, 2 February 2021, and the case-law cited therein).

76. However, an application is not an abuse merely because of the fact that it is motivated by the desire for publicity or propaganda, nor can an applicant be said to have flouted the right of individual petition for having used exaggerations or provocative expressions when discussing the Court proceedings, unless such statements are made regularly and either call into question the impartiality of the Court, constitute a gratuitous attack upon the Government agency responding in the proceedings or otherwise make it intolerable for the Court to handle his or her application (see *Georgian Labour Party v. Georgia*, (dec.), no. 9103/04, 22 May 2007, and the case-law cited therein).

77. The Court further recalls that, according to Article 39 § 2 of the Convention, friendly-settlement negotiations are confidential and that Rule 62 § 2 of the Rules of Court further stipulates that no written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in contentious proceedings. The Court reiterates the importance of the principle that friendly settlement negotiations are confidential and that communications made by the parties within the context of such negotiations are not to be relied upon in contentious proceedings (see *Popov v. Moldova* (no. 1), no. 74153/01, § 48, 18 January 2005, and *Hadrabova v. the Czech Republic* (dec.), no. 42165/02 and 1 other, 25 September 2007). An intentional breach of the rule of confidentiality, may, in certain circumstances, constitute an abuse of the right of application, resulting in declaring the application inadmissible pursuant to Article 35 § 3 of the Convention (compare *Miroļubovs and Others*, cited above, § 66; *Mandil v. France* (dec.), no. 67037/09, 13 December 2011; and *Ausad Valimised Mti v. Estonia* (dec.), no 40631/14, § 18, 27 September 2016).

78. The rule of confidentiality serves to protect both the parties and the Court from any attempt to exert political or any other kind of pressure (see *Miroļubovs and Others*, cited above, § 66; *Mandil*, cited above; and *Abbasov and Others v. Azerbaijan* (dec.), no. 36609/08, § 29, 28 May 2013). Thus, it aims to facilitate a friendly settlement by safeguarding that the information provided in the course of negotiations are not revealed and made public. At the same time, Rule 62 § 2 *in fine* also protects the Court and its own impartiality, by ensuring that should the friendly-settlement negotiations fail, their content will not prejudice the outcome of the contentious proceedings (see *Heldenburg v. the Czech Republic* (just satisfaction), no. 65546/09, § 25, 9 February 2017, and *Ramkovski v. the former Yugoslav Republic of Macedonia*, no. 33566/11, § 42, 8 February 2018).

79. While the Court has previously stated that the rule of confidentiality is absolute and does not allow for individual assessment of how much detail has been disclosed (see *Abbasov and Others*, cited above, § 28; *Balenović v. Croatia* (dec.), no. 28369/07, 30 September 2010; *Lesnina Veletrgovina d.o.o. v. the former Yugoslav Republic of Macedonia* (dec.), no. 37619/04,

2 March 2010; and, more recently, *Ramkovski*, cited above, § 41, and *Mătăsarv v. Moldova*, (dec.), no. 44743/08, 12 January 2020), having in mind the above-mentioned general purpose, the Court has also already stressed that it is always left to its discretion to assess whether disclosing of particular details from the friendly-settlement negotiations to the Court or any other third person constitutes, in the particular circumstances of a case, a breach of confidentiality resulting in declaring the application inadmissible as an abuse of the right of petition (see *Stoilkovska v. the former Yugoslav Republic of Macedonia*, no. 29784/07, § 31, 18 July 2013; *Lesnina Veletrgovina d.o.o.*, cited above; and *Miroļubovs and Others*, cited above, § 68).

80. Article 39 § 2 of the Convention and Rule 62 § 2 of the Rules of Court prohibit the parties from making public information concerning the friendly-settlement negotiations, be it through the media, by a letter likely to be read by a significant number of people, or by any other means (see, for example, *Ausad Valimised MTÜ*, cited above, § 19). Indeed, the Court has rejected applications as abusive in numerous cases where the applicants or their representatives had intentionally disclosed to the media details from the friendly-settlement negotiations (see *Gorgadze v. Georgia* (dec.), no. 57990/10, § 21, 2 September 2014; *Ausad Valimised MTÜ*, cited above, § 10; and *Tsonev v. Bulgaria* (dec.), no. 44885/10, § 27, 8 December 2015). In order to be regarded as an abuse of application, the disclosure of confidential information must be intentional and the direct responsibility of the applicant in the disclosure must be established with sufficient certainty (see *Arsovski v. the former Yugoslav Republic of Macedonia*, no. 30206/06, § 40, 15 January 2013, and *Gorgadze*, cited above, § 19).

2. Application of the above principles to the present case

81. Turning to the present case, firstly the Court observes that the articles, indicated by the Government, are signed by the editorial team of a news portal. While the applicant claimed that it was not her, nor her legal representative before the Court, who gave statements or interviews, no submissions were made as to the role of S.D. in such press coverage. Indeed, in at least two of those articles it was stated that S.D. would be giving a TV interview to speak about the case and show relevant documentation concerning the case. There is therefore little doubt as to the source of disclosure to the media (compare *Mătăsarv*, cited above, § 37). However, having in mind the general purpose of the rule of confidentiality, the Court considers that it does not need to resolve this matter in the present case.

82. This is so because, even assuming that the applicant was responsible for such articles, while the intention to exert pressure cannot be excluded, as admitted by the Government no specific information on any possible settlement was published. The information disclosed to the press contained very little other than that which was, in any event, already publicly available and, in particular, did not reveal any details of any friendly-settlement

negotiations, such as the amount involved, or any offers or concessions made therein, so as to be capable of prejudicing in any way the proceedings before the Court. In such circumstances, the Court considers that a decision to declare the application inadmissible as an abuse of the right of petition on this ground would not be justified (compare *Lesnina Veletrgovina d.o.o.*, cited above, and *Ramkovski*, cited above, § 44).

83. Furthermore, the Court observes that there is no doubt that the articles submitted to the Court by the Government contained provocative expressions when discussing the present case. They further contained attacks against the State and its institutions; however, they related to the latter's actions which are subject of these proceedings (compare, *Georgian Labour Party*, cited above), and those remarks do not overstep acceptable limits to an extent that would justify rejecting the application on that ground. The articles also contained misleading information about these proceedings, but this could be the result of inadvertence or inexperience of court proceedings by the sources of the information (compare *Podeschi*, cited above, § 88, and *Balsamo v. San Marino*, nos. 20319/17 and 21414/17, § 48, 8 October 2019).

84. Lastly, the articles also contained uncalled for statements relating to the State Agent's actions before the Court, including that he was acting "in abuse of process". However, the Court notes that, while they may have been misunderstood or taken out of context, the strict facts related by the press in relation to the Agent's correspondence with the Court had not been untrue. It would also be inconsistent with the spirit of equality of the parties to consider an allegation that the State Agent is acting in abuse of process as gratuitous, given that States have the possibility, without restriction, to argue that an application is inadmissible because an applicant has abused the right of individual petition. Thus, the comments made, and tactics of sensationalism used, in relation to the then Government Agent do not surpass the degree of tolerance applicable in such cases.

85. In view of the foregoing, the Government's objection must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

86. The applicant complained that the Respondent State had failed to conform to its positive obligation to ensure in its domestic legal system that the applicant's property rights were sufficiently protected by law and that adequate remedies were provided whereby the applicant could vindicate her rights as provided in Article 1 of Protocol No.1 of the Convention, which reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Admissibility

87. In their observations on admissibility, the Government submitted that the complaint was premature since the proceedings were ongoing and therefore the applicant had not yet achieved a property right as she had no legitimate expectation to obtain compensation.

88. The applicant made no submissions on this point.

89. The Court notes that the possessions at issue in the present case, which the applicant claims the State had failed to protect, relate to the applicant’s assets held in the bank, of which she had allegedly been defrauded, and not any undecided claim for compensation as argued by the Government (compare, *Blumberga v. Latvia*, no. 70930/01, § 68, 14 October 2008). Thus, Article 1 of Protocol No. 1 applies in the present case.

90. As to whether the complaint is premature given that the civil proceedings lodged by the applicant were still pending, the Court observes that neither in their observations of 28 February 2022, nor in their observations of 25 May 2022, did the Government elaborate on the final judgment of 23 February 2022, despite the applicant’s reliance on the latter in her submissions on the merits of her complaint. Nor did the parties inform the Court at any point after the observation phase about any further developments in the proceedings. In the Court’s view that judgment will inevitably lead to the liquidation proceedings and ancillary claims being struck out, since A.B. S.p.a. is no longer in liquidation. In consequence, in the light of that unusual supervening circumstance, even assuming that those proceedings are at the moment still alive, they certainly cannot in themselves provide any prospects of success in the specific circumstances of the case. The Government’s objection must therefore be dismissed. The Government has not raised any further arguments in relation to exhaustion, it is thus not for the Court to do so at this stage (see, for general principles, *Mifsud and Others v. Malta*, no. 38770/17, § 87, 13 October 2020, and the case-law cited therein).

91. The Court considers that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' observations

(a) The applicant

92. The applicant submitted that she suffered the loss of her assets as a result of unlawful conduct which remained unpunished due to the incapacity of the mediaeval legal system of the Republic of San Marino to protect her right of property. Indeed, the facts had taken place in a period of little fiscal and banking transparency in San Marino when the neighbouring State, the Italian Republic, classified it as a non-cooperative country and worthy of mention as “Black list” precisely because of the total absence of banking and tax supervision. The inefficiency of the control system of the BA had allowed the applicant to be plundered by the bank (later A.B. S.p.a) and in eleven years of proceedings, delays and negligence, the applicant’s right of property continued to be violated.

93. She considered that the Republic of San Marino was directly responsible for the inefficiency of its legal system as well as that of the BA. The latter had allowed A.B. S.p.a to take over the bank and then placed it in compulsory winding up unlawfully, with the result that today they were again revived. She submitted that the officials involved in the A.B. S.p.a. affair had committed deviant and unlawful acts with the clear aim of damaging the creditors of the same bank. Relying on newspaper articles she also highlighted that various member of the BA had been found guilty of various crimes, including abuse of office and unfaithful administration.

94. In practice, following the dismissal of her civil claim in line with the relevant provision of law (namely, Article 87 of law no. 165 of 2005 whose compatibility with the Convention she considered questionable), until the date of observations, there had been no procedure to make A.B. S.p.a. operational and creditors could not assert their claims because the liquidators were devoid of powers. Creditors had also been damaged as a result of the incident concerning the official bulletin which, it was suspected, had been altered by the BA (see paragraph 48 above). This led to people, including the applicant, being denied the possibility of asserting their claims within the specified time-limit for the purposes of the statement of liabilities.

95. In relation to the criminal proceedings, she highlighted that she was a resident of Italy and had been kept in the dark, through misrepresentation, until the accidental discovery in 2009 that the money had disappeared. Thus, she could have taken no action earlier, and no negligence could be attributable to her. The findings of the criminal proceedings, albeit discontinued, in her view because of the delay of the authorities, clearly showed that there had been illegal conduct, which the applicant considered was due to a lack of State supervision.

(b) The Government

96. The Government submitted that the relevant national legislation applied by the competent authorities ensured adequate protective measures, both of a preventive and restorative nature, for the purpose of enforcing citizens' claims against credit institutions. They referred to various provisions of law (see paragraph 56 *et seq.* above), with particular reference to Law no. 165 of 2005. Its Articles 37 *et seq.* defined in detail the functions of the BA, attributing to it the task of issuing authorisations, adopting regulations, obtaining news and information from the supervised parties, starting inspections against them, and finally adopting possible measures, including sanctions. In order to make the control and supervisory function even more effective its Article 68 allowed the customers of authorised [licensed] parties to submit complaints to the BA according to the procedure provided, and to report on the conduct of authorised parties, in order to highlight any alleged failure to comply with the law or measures issued by the BA. By reforming the previous legislation, this law had regulated in a detailed manner, the extraordinary procedures and guarantees protecting the stability of the banking system, and therefore of savers, in the event that supervised parties (banking and financial institutions) committed serious administrative irregularities, and/or serious violations of regulations and legislation and/or of the instructions issued by the BA. In the event of serious losses of assets and persistent lack of liquidity, extraordinary administration could ensue and, if the violations were exceptionally serious, compulsory administrative liquidation could ensue.

97. The same law regulated in a precise manner the powers of extraordinary administrators and liquidators, by outlining the steps of these procedures to achieve their objectives, namely the possible debt relief for the supervised party, where the conditions exist, or liquidation thereof. In addition, the creditors of said banking institutions are entitled to pursue their claims both in the purely administrative phase and in the judicial one. These measures, governed by sector-specific regulations, implemented the procedural instruments for the enforcement of contractual and non-contractual liability already existing in the San Marino legal system.

98. As to the relevant supervision, the Government considered it relevant to rebut the comments made in relation to the conduct of the BA following the report of the facts by S.D. First of all, they noted that, despite their alleged seriousness, the applicant had decided to report the facts informally, through S.D., to the BA only on 19 July 2011 and subsequently, officially, on 3 August 2011 (see paragraph 6 above). In this connection, it was to be noted that the applicant declared that she had become aware of the investment transactions causing, according to her, the loss of funds dating back to 2005 only in December 2009 following a communication from the bank. In this regard, the Government noted that an examination of the bank documents attached to civil proceedings no. 235/2015 showed that the applicant had

authorised the bank to hold the correspondence relating to the relationship (see paragraph 16 above). Following the complaints received, the BA had taken action (see paragraph 7 above). Thus, contrary to what was stated by the applicant, her complaint had actually been assessed in line with the supervisory purposes set forth in Article 68 of Law no. 165 of 2005, given that a few months later (on 28 October 2011) the bank was placed under extraordinary administration pursuant to Article 78 of Law no. 165 of 2005, following the overall inspection activity carried out by the BA. This measure had been triggered by the serious irregularities found in the administration of the bank, by serious violations of the principle of sound and prudent management and of regulatory and statutory provisions, as well as by serious losses of assets.

99. As to the available remedies, the Government submitted that the remedies provided for by the legal system were adequate for the protection of the right to property under Article 1 of Protocol No. 1. However, with reference to the present case, the applicant had not promptly brought any of the relevant proceedings.

100. The applicant had had the opportunity to file a criminal complaint, however she had done so too late. As a result, the proceedings were discontinued, the offence having become time-barred three years after the impugned acts of alleged fraud. Indeed, she had preferred to initially carry out, in a very peculiar manner, out-of-court negotiations with the bank of which she was a customer. The negotiations had lasted for about two years, and she subsequently filed a criminal complaint when the limitation period had irremediably expired. In the Government's view, these initial strategies were debatable in view of the huge losses allegedly suffered by the applicant and the seriousness of the accusations made against the bank's officials.

101. The applicant had also lodged civil proceedings against the alleged perpetrators but the action against A.B. S.p.a. had to be discontinued (according to Article 87 of Law no. 165 of 2005, see paragraph 63 above) the latter having been placed in administrative compulsory winding up. The Government considered that, had the applicant brought her civil action in a timely manner, she could have obtained a ruling on her claims prior to the winding-up decision. They further noted that proceedings against the other defendants were also discontinued as a consequence of the fact that the applicant had requested the assessment of the joint and several liability of all defendants. The Government explained that, according to domestic case-law, the non-contractual liability proceedings as the ones brought by the applicant (no. 235/2015) were aimed at obtaining the full and complete assessment of the claims on the merits, including the payment, if this is provided for by law, of compensation commensurate with the damage established (judgment of the Judge (*Commissario della Legge*) dated 9 December 2013 in civil proceedings no. 334/2006).

102. She subsequently lodged further civil proceedings asking to be listed as creditor of A.B. S.p.a. and those proceedings were at the date of observations still pending and awaiting a decision on the admissibility of the request. According to the Government, the latter proceedings were necessary because the applicant had failed to list herself as a creditor within the required time-limit as per Article 90 (5) of Law no. 165/2005 (see paragraph 65 above). The instrument of objection to the statement of liabilities, governed by Article 91 of Law no. 165 of 2005 (see paragraph 66 above), could also be considered an adequate and effective remedy in relation to the aim pursued. Indeed, by means of this instrument it was possible to obtain a ruling which would allow for one's inclusion among the creditors of the entity under compulsory administrative liquidation, in order to participate in the distribution of assets.

2. *The Court's assessment*

(a) **General principles**

103. The Court has repeatedly held that Article 1 of Protocol No. 1 also establishes some positive obligations (see *Kotov v. Russia* [GC], no. 54522/00, § 109 and 111, 3 April 2012). In certain circumstances Article 1 of Protocol No. 1 may require “measures which are necessary to protect the right of property ..., even in cases involving litigation between individuals or companies” (see *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96, ECHR 2002-VII, and *Antonopoulou v. Greece* (dec.), no. 46505/19, § 55, 19 January 2021).

104. The nature and extent of the State's positive obligations vary depending on the circumstances and where the case concerns ordinary economic relations between private parties such positive obligations are much more limited (see *Kotov*, cited above, § 111). Thus, the Court has stressed on many occasions that Article 1 of Protocol No. 1 to the Convention cannot be interpreted as imposing any general obligation on the Contracting States to cover the debts of private entities (*ibid.*).

105. However, when an interference with the right to peaceful enjoyment of possessions is perpetrated by a private individual, a positive obligation arises for the State to ensure in its domestic legal system that property rights are sufficiently protected by law and that adequate remedies are provided whereby the victim of an interference can seek to vindicate his rights, including, where appropriate, by claiming damages in respect of any loss sustained (see *Blumberga*, cited above, § 67; *Dabić v. Croatia*, no. 49001/14, § 52, 18 March 2021; and *Saraç and Others v. Turkey*, no. 23189/09, § 77, 30 March 2021). It follows that the measures which the State can be required to take in such a context can be preventive or remedial (see *Kotov*, cited above, § 113, and *Kurşun v. Turkey*, no. 22677/10, § 114, 30 October 2018).

106. As to the remedial measures which the State can be required to provide in certain circumstances, the Court has held, in particular, that States were under an obligation to afford judicial procedures that offered the necessary procedural guarantees and therefore enabled the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons (see, *mutatis mutandis*, *Kotov*, cited above, § 117; *Sovtransavto Holding*, cited above, § 96; *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 83, ECHR 2007-I; *Freitag v. Germany*, no. 71440/01, § 54, 19 July 2007; *Kanevska v Ukraine*, (dec.), no. 73944/11, § 45, 17 November 2020; and *Antonopoulou*, cited above, § 57). In ascertaining whether those requirements have been satisfied, the Court must take a comprehensive view of the applicable procedures (see *Shesti Mai Engineering OOD and Others v. Bulgaria*, no. 17854/04, § 79, 20 September 2011).

107. An additional positive obligation arises for the State under Article 1 of Protocol No. 1 to the Convention where the interference with the property rights perpetrated by private individuals is of a criminal nature. In particular: this obligation will in addition require that the authorities conduct an effective criminal investigation and, if appropriate, prosecution. In that respect, it is clear that the obligation is one of means and not one of result; in other words, the obligation on the authorities to investigate and prosecute such acts cannot be absolute, as it is evident that many crimes remain unresolved or unpunished notwithstanding the reasonable efforts of the State authorities. Rather, the obligation incumbent on the State is to ensure that a proper and adequate criminal investigation is carried out and that the authorities involved act in a competent and efficient manner. Moreover, the Court is sensitive to the practical difficulties which the authorities may face in investigating crime and to the need to make operational choices and prioritise the investigation of the most serious crimes. Consequently, the obligation to investigate is less exacting with regard to less serious crimes, such as those involving property, than with regard to more serious ones, such as violent crimes, and in particular those which would fall within the scope of Articles 2 and 3 of the Convention. Thus, in cases involving less serious crimes the State will only fail to fulfil its positive obligation in that respect where flagrant and serious deficiencies in the criminal investigation or prosecution can be identified (see *Blumberga*, cited above, § 67, and *Zagrebačka banka d.d. v. Croatia*, no. 39544/05, § 276, 12 December 2013).

108. Furthermore, the possibility of bringing civil proceedings against the alleged perpetrators of a crime against property may provide the victim with a viable alternative means of securing the protection of his rights, even if criminal proceedings have not been brought to a successful conclusion, provided that a civil action has reasonable prospects of success. While the outcome of criminal proceedings may have a significant or even decisive effect on the prospects of a civil claim, whether lodged in the context of the criminal proceedings or brought in separate civil proceedings, the State

cannot be held responsible for the lack of prospects of such a claim simply because a criminal investigation has not ultimately led to a conviction. Rather, the State will only fail to fulfil its positive obligations under Article 1 of Protocol No. 1 if the lack of prospects of success of civil proceedings is the direct consequence of exceptionally serious and flagrant deficiencies in the conduct of criminal proceedings arising out of the same set of facts, as outlined in the preceding paragraph (*ibid.*, and *Blumberga*, cited above, § 68)

(b) Application of the general principles to the present case

109. The Court observes at the outset that the applicant suffered significant losses as a result of the actions of the bank, its employees and third persons. This was confirmed by the San Marino investigating judges. The Court, however, reiterates that States cannot be held directly responsible for the debts of private companies, or the faults committed by their managers or insolvency liquidators (see *Kotov*, cited above, § 116). In the present case, by depositing her money with a private bank, the applicant assumed certain risks, including those related to mismanagement and even fraud (*ibid.*). Hence, it was not for the State to bear civil liability for the unlawful actions committed by third parties (see, *mutatis mutandis*, *Kotov*, cited above, § 116). Nevertheless, according to the above-mentioned general principles, it was for the State to ensure that the applicant's property rights were duly protected by law and that adequate remedies were available to her, including an effective criminal investigation and, if appropriate, prosecution, given the criminal element in the present case.

110. The Court observes that while the applicant's complaint appears to refer also to a lack of preventive legal framework, save for an unsubstantiated remark concerning Article 87 of Law no. 165 of 2005 which sets out rules related to judicial proceedings, she has not indicated any specific failures in the laws in place at the relevant time. In such circumstances, the Court thus does not consider it necessary to assess the legislative framework relied on by the Government.

111. As to any further preventive action, the Court cannot but note that while the BA may have had the relevant powers in law, it appears from the limited information available that in practice, as supervisory authority, it left much to be desired in relation to its actions in the present case. However, since none of the parties have submitted sufficient detail in this connection (for instance, the judgment of 23 February 2022), the Court will not speculate about the reasons behind the peculiar sequence of events in the present case, nor about the alleged tampering with the Official Bulletin and the consequences that might have had on creditors including the applicant.

112. It remains to be determined whether the applicant had any remedial action to protect her property rights.

113. The Court observes that it had been open to the applicant to file a criminal complaint by which she would seek to have opened criminal

proceedings against the alleged perpetrators. She did pursue that avenue which led to conclusions by the judge on the merits of the case although it was dismissed as being time-barred (see paragraphs 28 and 29 above). Furthermore, despite the expiry of the time-limit and a first decision to discontinue the case, the investigations were reopened, the appeal judge having considered that more thorough investigations were necessary and that more serious crimes with a longer prescriptive period might come to light (see paragraph 31 above). Subsequent relevant investigative steps had been taken and the Investigating Judge's conclusions provided serious indications that a crime had been committed (see paragraph 33 *et seq.* above). However, as the crime related solely to fraud, which had a statutory prescriptive period of three years, the criminal action had been time-barred (see paragraph 36 above).

114. Under Article 1 of Protocol No.1 of the Convention, the Court has previously held that the fact that an applicant's claims are subject to a limitation period does not by itself raise any issue under the Convention. Limitation periods are a common feature of the domestic legal systems of the Contracting States, designed to ensure legal certainty and finality and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past (see, for example, *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 68, ECHR 2007-III; *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 51, *Reports of Judgments and Decisions* 1996-IV; and *Zolotas v. Greece (no. 2)*, no. 66610/09, § 43, ECHR 2013 (extracts); also contrast, in the context of Article 2 and 3, the case law set out in the *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, § 65, 26 April 2022).

115. Given that in the present case the criminal proceedings lodged by the applicant were discontinued only because she herself had lodged the complaint once the time-limit had expired, it cannot be said that the failure to bring those proceedings to a successful conclusion was the result of flagrant and serious deficiencies in the authorities' conduct (see, *mutatis mutandis*, *Blumberga*, § 71, and *Zagrebačka banka d.d.*, § 277, both cited above). Moreover, the Court cannot but note the lack of diligence on the part of the applicant. Indeed, even accepting that the applicant only became aware of the impugned conduct in 2009 she had waited until 2012 to lodge her criminal complaint.

116. Furthermore, since the domestic law in such cases does not require a final conviction in criminal proceedings in order to claim damages in civil proceedings, the applicant was able to pursue her pecuniary claim by bringing a civil action for damages against the bank and others involved. It is true that for reasons beyond her control, namely the winding up of A.B. S.p.a which

had intervened in the meantime, her claim against it became unactionable before the civil courts (Article 87 of Law no. 165 of 2005, see paragraph 63 above). However, had her claim not been proposed seeking joint liability, she would have been able to pursue it in respect of the other individual defendants. Moreover, it has not been argued that after the decision of 23 February 2022 the applicant would be unable to lodge fresh proceedings against all the defendants. Indeed, it has not been submitted that such proceedings would be time-barred. In this connection, the Court observes that the applicant's attempt in 2021 to continue the proceedings no. 235/2015 on this ground (see paragraph 51 above), had only been rejected because the applicant made such request on the basis of a first-instance judgment, and therefore when the annulment of the winding up was not yet final.

117. In addition, the applicant had been able to intervene in the liquidation proceedings, ask for her dues to be listed in the statement of liabilities and challenge that refusal by means of an objection. It is not for the Court to determine whether she had done so in a timely manner, given the allegations related to a manipulation of the publications of the Official Bulletin. It suffices to note that those arguments could have been (and were) made before the court in the proceedings concerning the objections to the statement of liabilities and that those proceedings could have satisfied her claims (see paragraphs above 47 and 48). It is true that those proceedings have now come to naught given that the decision to put A.B. S.p.a. in compulsory winding up has been annulled. However, as mentioned above, this means that the applicant can once again institute civil proceedings against the latter.

118. In these circumstances, the Court finds that it cannot be established that a civil action for damages did not (had it been lodged otherwise) and would not (if it were to be re lodged or re-opened) constitute an appropriate means whereby the State could fulfil its positive obligations under Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Blumberga* § 72, and *Zagrebačka banka d.d.*, § 277, both cited above).

119. Despite the unfortunate circumstances of the present case, the Court is satisfied that, given the criminal and civil avenues which were or still are open to the applicant, the State discharged its positive obligations under Article 1 of Protocol No. 1 to the Convention. There has therefore been no violation of that provision.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

120. The applicant complained that the civil proceedings in the present case had been too lengthy contrary to that provided in Article 6 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ...”

A. Admissibility

121. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

122. The applicant made no submissions in her observations on this complaint.

123. The Government submitted that the proceedings no. 235/2015 and no. 254/2018 had not been too lengthy given the complexity of the case. The first civil proceedings had been affected by the compulsory administrative liquidation of a banking institution and, therefore, by an event having a systemic impact on the economy and the banking and financial sector – which led to a whole procedure in itself. Various issues of law had also come to play and in any event the first civil proceedings could not lead to tangible results for the applicant given the laws in place in relation to entities put into compulsory liquidation. Thus, any decision adopted at the end of the proceedings would have been useless, since it could not even be enforced. Moreover, the applicant's conduct had not been marked by the required expedition and diligence. *Inter alia*, the proceedings (no. 235/2015) had been brought six years after the impugned facts, and she had taken various actions during the proceedings which led to inevitable delays (see paragraph 39 above).

2. The Court's assessment

124. The Court reiterates that the relevant period to take into account in the assessment of the length of proceedings normally covers the whole of the proceedings in question, including appeal proceedings (see *König v. Germany*, 28 June 1978, § 98 *in fine*, Series A no. 27) and extends right up to the decision which disposes of the dispute (see *Poiss v. Austria*, 23 April 1987, § 50, Series A no. 117).

125. According to its case-law on Article 6 § 1 of the Convention, the “reasonableness” of the length of proceedings must be assessed in light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities, and what is at stake for the applicant in the dispute (see, among other authorities, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 143, 29 November 2016; *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII; *Comingersoll S.A. v. Portugal* [GC],

no. 35382/97, § 19, ECHR 2000-IV; and *Sürmeli v. Germany* [GC], no. 75529/01, § 128, ECHR 2006-VII).

126. The Court considers that proceedings no. 235/2015 must be considered as being strictly concomitant to proceedings no. 254/2018. In particular, the Court observes that the proceedings no. 235/2015 came to an end primarily because, while they were pending, A.B. S.p.a. went into compulsory winding up and domestic law did not allow for a civil action to continue in such circumstances. In that light, the only way for the applicant to safeguard her claim against A.B. S.p.a. was to register her credit, which was refused and this in turn led her to lodge proceedings objecting to the statement of liabilities. In consequence, following the dead-end reached in proceedings no. 235/2015, both the administrative procedure by which the applicant had to make her request to the liquidators as well as the pursuit of judicial proceedings no. 254/2018 (compare *Cipolletta v. Italy*, no. 38259/09, § 43, 11 January 2018), were necessary for her to obtain a determination of her dispute, which she had originally brought forward in proceedings no. 235/2015. It follows that the length of the proceedings must be seen as a whole (compare *Poiss*, cited above § 50, and, albeit in different circumstances, *Omdahl v. Norway*, no. 46371/18, § 54, 22 April 2021).

127. Thus, the proceedings which started on 16 April 2015, and are presumably still pending, or were in any event still pending in May 2022 (date of the last observations) lasted at least seven years, at two levels of jurisdiction and have, to date, not led to any determination of her claims.

128. The Court observes that the cases were of a certain complexity and that, in so far as proceedings no. 235/2015 are concerned, no specific slowness or inactivity has been brought to the Court's attention in regard to that period. The Court notes that the decision to dismiss the case on the basis that A.B. S.p.a. had been placed under compulsory winding up was issued a full year after the BA's decision, but it is unclear when the domestic judge had been made aware of that fact and by whom. It is therefore not for this Court to speculate on who was responsible for that delay. Moreover, during such time, the administrative procedure went on in parallel with no particular delays.

129. However, once proceedings no. 254/2018 were lodged, an initial delay occurred because the case which had been properly lodged by the applicant with the Single Court (*Tribunale Unico*), as required by domestic law, was assigned to the wrong judge. As accepted by the domestic court, this error had not been attributable to the applicant, and therefore the same holds for the consequent delay of one and a half years. Once proceedings had been reopened, it does not appear that they were pursued diligently. Indeed, as admitted by the Government, in 2022, these proceedings were still pending a decision with regard to the preliminary admissibility issues raised (see paragraph 50 above). It follows that in around four years, no progress whatsoever has been reached in the case, a situation which does not seem to

be related to the usual complexity of liquidation proceedings (see, as an example of the latter, *Cipolletta*, cited above, § 44), nor to the applicant's conduct.

130. There has accordingly been a violation of Article 6 § 1 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

131. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

132. The applicant made no articulated quantified claims in respect of any of her complaints. She simply limited herself to attaching a copious expert report estimating damage resulting from her situation, at approximately 10 million euros (EUR), of which EUR 1,200,000 are estimated for the violations of Article 1 of Protocol No. 1 to the Convention and Article 6 § 1 of the Convention.

133. The Government submitted that the applicant's claim was excessive and not based on any evidence but rather assumptions and hypothetical loss of opportunities.

134. The Court notes that it has only found a violation of Article 6 § 1, and thus awards the applicant EUR 4,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

135. The applicant did not articulate a quantified claim for costs and expenses, limiting herself to attaching two quotations for the expert report submitted.

136. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, none of this has been shown, thus the Court rejects the claim.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 1 of Protocol No. 1 to the Convention;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amount:
EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 December 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Marko Bošnjak
President