



The *AMF* Enforcement Committee is independent and impartial and the penalties imposed were foreseeable

In today's **Chamber** judgment¹ in the case of [X and Y v. France](#) (application no. 48158/11) the European Court of Human Rights held, unanimously, that:

The complaint under **Article 6 §1 (right to a fair trial)** of the European Convention on Human Rights was inadmissible, and that there had been

no violation of Article 7 (no punishment without law) of the European Convention.

The case concerned two complaints lodged by stock market professionals following the imposition of disciplinary sanctions on them by the Enforcement Committee of the *Autorité des marchés financiers* (*AMF* – stock market authority) for failing to comply with the rules on and the period of cover for the short selling of stocks under a capital-raising programme for the Euro Disney company. The applicants complained that the *AMF* had not complied with the impartiality requirement and had penalised them on the basis of provisions which did not satisfy the accessibility and foreseeability criteria.

The Court considered that there was no reason to doubt the Enforcement Committee's and its rapporteur's independence from the other *AMF* bodies.

The Court held that the law which was applicable at the relevant time had been sufficiently foreseeable for the applicants to have known that their professional responsibility could be engaged if they purchased stock exchange rights without reasonably foreseeable cover right up to the end of the subscription period.

Principal facts

The applicants, Mr X and Mr Y, are French nationals who live in Courbevoie (France).

At the relevant time Mr X was Deputy Managing Director of a bank in Orsay (hereafter "the bank") responsible for proprietary trading. Mr Y was an employee of the same bank working at the risk arbitration desk. In February 2005 the bank was involved in the Euro Disney company's capital-raising programme. The bank's role was, on the one hand, to purchase stock exchange rights and underwrite newly issued stocks and, on the other, to cover this transaction by selling stocks which had not yet been issued, by means of securities loans. On 5 February the bank could no longer borrow the requisite quantity of stocks to cover its position. It nonetheless continued purchasing the stocks until the end of the subscription period, which subsequently led to delays in the stock clearing and settlement system.

In March 2005 the Deputy Secretary General of the *AMF* decided to commence proceedings to verify the bank's compliance with its professional obligations in the investment sector.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

On 25 April 2006 Specialist Board No. 1 of the *Collège* (panel), the AMF prosecuting agency, ruled that the verification proceedings had established that the bank had failed to comply with several provisions of the AMF's General Regulations and the rules governing the operation of the stock market, Euronext, and the clearing houses.

On 22 May 2006 the President of the AMF sent a statement of objections to the bank, to Mr X in his capacity as Deputy Managing Director and to the two members of the arbitration risk desk, including Mr Y, who had concluded the impugned transactions.

On 17 October and 21 November 2006 the rapporteur appointed by the Chair of the AMF Enforcement Committee questioned Mr X and Mr Y and the Managing Director of the Bank. On 12 September 2007 he submitted his report, which stated that the alleged breaches had indeed been committed and proposed imposing penalties on the bank and on Mr X and Mr Y. The latter lodged their observations with the Enforcement Committee.

At its 8 November 2007 sitting the Enforcement Committee invited the rapporteur to conduct further investigative measures. The rapporteur requested observations from the bank, from Mr X and Mr Y, from the President of the AMF and from the firm LCH.Clearnet SA (a clearing house).

On 4 September 2008 the Enforcement Committee issued each of the individuals involved with a warning and imposed fines on them, to the tune of 300,000 euros (EUR) in respect of the bank, EUR 25,000 in respect of Mr X and EUR 20,000 in respect of Mr Y. The Enforcement Committee pointed out that the impugned arbitration operation had consisted in purchasing Euro Disney share subscription options in respect of stocks to be issued in February 2005 and short selling existing stocks and shares, in order to take advantage of any differences between the cost price of the shares which the bank had anticipated obtaining and the selling price of the existing shares, augmented by the cost of borrowing the securities required to meet the clearance deadline. On 5 February 2005 the bank could no longer guarantee the settlement of the shares which it would be short selling, and had nevertheless continued purchasing the stocks until the end of the subscription period, thus increasing by over 35% its position as a purchaser of stock exchange rights and its simultaneous position as a seller of existing shares. On 9 February 2005 the bank had on several occasions requested and obtained the enforcement of purchase orders which had been matched up with sales orders for the same quantities and prices. It had transmitted those orders at intervals of a few seconds to separate negotiating members, which had had the effect of disguising the three-day overshoot of the clearance deadline laid down in the central clearing house's rules of procedure, referring to the latter organisation's Instruction IV.8-1 on the setting of clearance deadlines. The Enforcement Committee considered that these breaches of professional obligations were liable to the penalties laid down in Article L 621-15 of the Monetary and Financial Code.

On 18 February 2011 the applicants' appeal against that decision was dismissed by the *Conseil d'Etat*.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial), Mr X and Mr Y submitted that their case had not been dealt with impartially by the AMF's Enforcement Committee. They also complained of a violation of the principle of legal clarity. Relying on Article 7 (no punishment without law), they complained of the absence of any offence and penalty prescribed by law.

The application was lodged with the European Court of Human Rights on 28 July 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Angelika **Nußberger** (Germany), *President*,
Khanlar **Hajiyev** (Azerbaijan),
Erik **Møse** (Norway),

André **Potocki** (France),
Yonko **Grozev** (Bulgaria),
Síofra **O’Leary** (Ireland),
Carlo **Ranzoni** (Liechtenstein),

and also Milan **Blaško**, *Deputy Section Registrar*.

Decision of the Court

Article 6 § 1

The Court reiterated that the general principles for assessing compliance with the requirement of impartiality had been summarised in the [Morice v. France](#) judgment [GC] of 11 July 2013.

As regards the subjective aspect of the impartiality of the Enforcement Committee, the Court noted that there had been no indication in the present case of any prejudice or bias on the part of the Board or of the Board member who had been appointed rapporteur. The fact that the Enforcement Committee had agreed with the President of the AMF concerning the intelligibility of the legal texts in issue did not, in itself, call his impartiality in doubt.

The Court reiterated that the concept of objective impartiality was closely linked to the notion of independence. In order to establish whether a court is independent, regard must be had to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. The Court notes that the provisions of domestic law governing the organisation of and procedure for enforcement within the *AMF* draw a very clear distinction between the supervisory, investigative and prosecuting bodies, on the one hand, and the adjudicating body, on the other. The *Collège*, which is responsible for initiating disciplinary proceedings, acts on the basis of a supervisory or investigative report prepared under the authority of the *AMF* Secretary General. The *Collège* notifies the persons involved of the grievances and forwards that notification to the Enforcement Committee, which holds exclusive jurisdiction for assessing the reality of the breaches and imposing a sanction. One of the Board members is appointed rapporteur in order to investigate the case. Membership of the Board is incompatible with membership of the *Collège*. The methods and conditions of appointment of members of the Board guarantee their independence. Its membership includes two judges from the Court of Cassation and two members of the *Conseil d’Etat*, who benefit from extensive protection under domestic law against outside pressure. The Court considered (as it had done in its decision in the case of [Messier v. France](#)) that there was no reason to doubt the Enforcement Committee’s and its rapporteur’s independence from the other *AMF* bodies.

The Court also held that the fact that the Enforcement Committee had requested further investigative measures did not affect its impartiality, given that the applicants had also been heard. Finally, the Court considered that the fact that the *Collège* was the *AMF* body primarily responsible for laying down, and conferring prescriptive force on, the regulations, the violation of which could be penalised by the Enforcement Committee, also did not undermine the impartiality of the Board, which benefited from independence and full jurisdiction in evaluating the scope of those regulations and the existence of a failure to comply with them. The same applied to the right of the Enforcement Committee and its rapporteur to be assisted by the *AMF*’s administrative services, which were statutorily placed under the authority of the *AMF* Secretary General. Consequently, noting the absence of any appearance of a violation of the impartiality principle, the Court ruled that this part of the application was manifestly ill-founded and should be rejected.

Article 7

The Court reiterated that one of the main assets of the Law of 1 August 2003 had been to unify the administrative and disciplinary sanctions system and procedure, while also introducing an overall enforcement mechanism which was also applicable to failures on the part of certain stock market professionals to honour their professional obligations laid down in the *AMF*-approved laws, regulations and rules. Although the cross-connections among the different texts in question might have created major problems of interpretation, the Court considered that the Enforcement Committee had nonetheless succeeded in legally classifying the breaches committed by the applicants. The Court reiterated in this regard that the fact that a legal issue is unprecedented does not in itself amount to an infringement of the criteria of accessibility and foreseeability of the law, provided that the approach finally adopted is one of the possible and reasonably foreseeable interpretations. The unprecedented nature of the issue raised had been largely due to the reform of the *AMF*'s disciplinary enforcement mechanism, which had been carried out less than two years before the relevant time and must have been known to the stock market professionals.

The Court found that the law applicable at the relevant time had been sufficiently foreseeable for the applicants to have known that their professional responsibility could be engaged by the fact of continuing to purchase stock exchange rights without reasonably foreseeable cover right up to the end of the subscription period.

There had therefore been no violation of Article 7.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.