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

Press Release
issued by the Registrar of the Court

ECHR 005 (2026)
08.01.2026

Reconsideration, in civil compensation proceedings, of corrupt judge's decision undermined neither *res judicata* principle nor presumption of innocence

The case of **Finanziaria D'Investimento Fininvest S.P.A. and Berlusconi v. Italy** (applications nos. 23538/14 and 23554/14) concerned civil proceedings brought in the Italian courts by the company CIR S.p.A. against the applicant company, which was chaired by Silvio Berlusconi at the relevant time. The civil action was aimed at securing compensation for damage sustained by CIR as a result of the bribing of a judge who had taken part in handing down a judicial decision ("the 1991 judgment") in a previous dispute between the two companies.

In today's **Chamber** judgment[1] in this case the European Court of Human Rights held, unanimously, that there had been:

No violation of Article 6 § 1 (right to a fair hearing / right of access to a court) of the Convention regarding respect for the *res judicata* principle and the right to a tribunal established by law. The Court found that the reconsideration of the solution given in the 1991 judgment – in which the corrupt judge had taken part – during the compensation proceedings brought by the victim of the act of bribery had not been in breach of the *res judicata* principle, noting that it had been justified by compelling reasons, that it had been in accordance with domestic law and that it had struck a fair balance between the interests of the individual and the need to ensure the proper administration of justice. In addition, it considered that domestic courts had not overstepped their jurisdiction *ratione materiae* in the compensation proceedings.

No violation of Article of Article 1 of Protocol No. 1 (protection of property) regarding an order to pay compensation in the context of a dispute between private parties. The Court noted that the domestic decisions, which had been based, *inter alia*, on an expert report, had been duly reasoned and were by no means arbitrary. It observed that the amount of compensation had been determined on the basis of an assessment of the damage sustained by CIR as a result of the unlawful act attributed to the applicant company, finding that its impact on that company's financial situation was irrelevant.

A violation of Article 6 § 1 (right to a fair hearing) concerning the Court of Cassation's failure to give reasons for its award of procedural costs. The Court took the view that the Court of Cassation's judgment was not sufficiently reasoned on that point.

The Court also held, by majority (6 votes to 1), that there had been **no violation of Article 6 § 2 (presumption of innocence) in respect of Mr Berlusconi.** It noted that, while examining the same facts as those at issue in the criminal proceedings that had resulted in a decision to dismiss the charges as time-barred, the domestic courts had been careful to point out on several occasions that their analysis was aimed solely at establishing civil liability. It concluded that the domestic decisions had not imputed criminal liability to Mr Berlusconi.

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.

Principal facts

The applicants are Finanziaria d'investimento Fininvest S.p.A. ("the applicant company"), a company incorporated under Italian law with its registered office in Rome, and Silvio Berlusconi, an Italian national who was chair of the applicant company's board of directors and its legal representative until 1994.

The case originated in a conflict that arose in the late 1980s over control of the Mondadori group, one of the main Italian publishing houses.

At the relevant time, the Mondadori group was controlled by the holding company "AMEF[2]", the main shareholders of which included the applicant company, CIR S.p.A.[3] ("CIR") and the F. family.

The applicant company and CIR wished to gain control of AMEF, in particular through the acquisition of shares held by the F. family.

In 1988 the F. family entered into an agreement with CIR ("the 1988 agreement") whereby they undertook to transfer their shares in AMEF to CIR.

The F. family subsequently refused to honour that agreement, having meanwhile negotiated the sale of the same shares to the applicant company. As a result, CIR resorted to arbitration.

In 1990 the arbitrators made an arbitral award upholding the validity of the 1988 agreement and concluded that the F. family were to transfer their shares to CIR pursuant to that agreement. The F. family refused to comply with this decision, which they challenged before the Rome Court of Appeal.

In 1991 the Rome Court of Appeal set aside the arbitral award ("the 1991 judgment"), holding that the 1988 agreement was invalid and that the F. family were not bound to honour it. Among the three judges sitting in the case was Judge V.M., who also acted as reporting judge.

That same year, while an appeal on points of law was pending, the shareholders of AMEF reached a friendly settlement ("the 1991 agreement") whereby the applicant company acquired control of the Mondadori group. As a result of that agreement CIR withdrew its appeal on points of law.

Subsequently, in 1999, the Milan public prosecutor's office instituted criminal proceedings against Mr Berlusconi, Judge V.M., the lawyer C.P. and other co-defendants on charges of judicial corruption, accusing them of having set up a bribery scheme in order to have Judge V.M. decide the Mondadori case in the applicant company's favour.

Specifically, Mr Berlusconi was accused of having paid a sum of approximately 1.5 million euros (EUR) from the applicant company's current accounts to the lawyer C.P., who had then used part of that sum to bribe Judge V.M.

In 2001 the Milan Court of Appeal found that the charges against Mr Berlusconi were time-barred and dismissed them.

Subsequently, in 2007, the Milan Court of Appeal convicted Judge V.M., the lawyer C.P. and the other co-defendants of judicial bribery.

In the meantime, CIR had brought a civil action for damages against the applicant company in 2004, arguing that, at the time when the 1991 agreement had been negotiated, its bargaining position had been significantly weakened by the fact that the 1991 judgment had been handed down by a corrupt judge (V.M.).

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[2] Arnoldo Mondadori Editore Finanziaria S.p.A.

[3] CIR S.p.A. (Compagnie Industriali Riunite) was a third party to the proceedings in the present case.

In 2009 the Milan District Court found in favour of CIR, awarding it approximately EUR 750 million in respect of pecuniary damage and some EUR 2 million in court fees. The applicant company appealed.

In 2011 the Court of Appeal upheld the judgment against the applicant company but reduced the sum awarded in compensation. The applicant company was thus ordered to pay CIR approximately EUR 540 million in respect of pecuniary damage and EUR 8 million for the costs incurred before the two levels of jurisdiction. It appealed on points of law.

In 2013 the Court of Cassation dismissed the applicant company's appeal on points of law on all but one ground of appeal concerning the amount awarded in compensation, which it reduced by 15%. It ordered the applicant company to pay EUR 900,000 in costs and EUR 200 in expenses.

Complaints

Relying on Article 6 (right to a fair hearing / right of access to a court) of the Convention, the applicant company (application no. 23538/14) complained of the civil proceedings brought against it by CIR. In particular, it complained that the reconsideration of the 1991 judgment had been in breach of the *res judicata* principle; that the case had been assigned to a court which, in its view, had not been established by law; and that the Court of Cassation had failed to give reasons for its award of procedural costs.

Relying on Article 1 of Protocol No. 1 (protection of property) and on Article 13 (right to an effective remedy) of the Convention, it complained that the compensation it had been ordered to pay, which it regarded as arbitrary and disproportionate, had infringed its right to peaceful enjoyment of its possessions.

Under Article 6 (presumption of innocence), Mr Berlusconi (application no. 23554/14) complained that his right to be presumed innocent had been infringed, alleging that liability for bribery had been imputed to him by the civil courts, even though the criminal charges against him had been dismissed.

Procedure and composition of the Court

The applications were lodged with the European Court of Human Rights on 12 and 13 March 2014.

CIR was granted leave to join the proceedings before the Court as a third party.

The Court took note of Mr Berlusconi's death in 2023 and of his successors' wish to pursue application no. 23554/14. Having regard to their family ties to Mr Berlusconi, the Court found that they had a legitimate interest in pursuing the proceedings.

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

Ivana **Jelić** (Montenegro), *President*,
Erik **Wennerström** (Sweden),
Raffaele **Sabato** (Italy),
Frédéric **Krenc** (Belgium),
Davor **Derenčinović** (Croatia),
Alain **Chablais** (Liechtenstein),
Anna **Adamska-Gallant** (Poland),

and also Ilse **Freiwirth**, *Section Registrar.*

Decision of the Court

Article 6 (right to a fair trial / *res judicata* principle: complaint raised by applicant company)

The Court considered that the bribing of a judge who had taken part in delivering a final decision constituted a compelling circumstance which justified calling that decision into question, even where only one member of a bench had been bribed.

In the present case, the bribing of even one judge had deprived CIR of the possibility of obtaining a fair hearing of the case by an impartial tribunal. The reconsideration of the solution to the dispute in the 1991 judgment had not been based on mere differences of view but on a compelling ground justifying a departure from the *res judicata* principle.

Furthermore, the Court considered that the reconsideration of the solution to the dispute had been in accordance with domestic procedural law. In this connection, the applicant company had relied on an alleged breach of domestic law, since CIR had not lodged an application to reopen the proceedings but had brought an action for damages in the context of which the merits of the 1991 judgment had been re-examined in passing in order to determine whether CIR had sustained damage as a result of the judge's deceitful conduct.

It was not disputed that in bringing the action for damages CIR had complied with the applicable procedural rules in matters of civil liability. It had not chosen to pursue that remedy in order to have the 1991 judgment quashed without reopening the proceedings but to obtain compensation for the damage it had sustained, which was the specific purpose of the remedy in question.

Contrary to the applicant company's allegations, what was at issue was therefore not the creation of a new remedy but the use of a general remedy that was provided for in the domestic legal system, even if that remedy had been used in a novel situation.

In this context, the question before the Court was whether the reconsideration, in passing, of the ruling made in the 1991 judgment, without first seeking the reopening of the proceedings, had been in breach of domestic law. That question had never arisen before the domestic courts prior to the present case.

In this connection, the Court noted that the Court of Cassation had clearly explained why CIR had not been required to lodge a prior application to reopen the proceedings: faced with a novel situation, it had adopted an interpretation of domestic law aimed at ensuring effective protection of CIR's material interests. The applicant company had essentially proposed an alternative interpretation of domestic law; however, as the interpretation given by the Court of Cassation was neither arbitrary nor manifestly erroneous, it was not for the Court to question it.

The Court further found that a fair balance had been struck between the applicant company's interests, those of CIR and the need to ensure the proper administration of justice.

To the extent that the applicant company had suffered significant financial consequences, therefore, they had been the result of a flawed decision for which that company had been held responsible. In the Court's view, the ruling given by the domestic courts had been aimed at ensuring effective protection of CIR's rights without requiring the company to bring proceedings deemed ineffective or unnecessarily onerous. That ruling had neither restricted the applicant company's access to the domestic courts nor impeded its participation in the proceedings.

The Court thus found that the reconsideration, in the compensation proceedings, of the solution given in the 1991 judgment had not undermined the principle of legal certainty.

There had therefore been no violation of Article 6 § 1 of the Convention in that regard.

Article 6 (right of access to a tribunal established by law: complaint raised by applicant company)

The Court noted that the Milan District Court had had jurisdiction to examine the action for damages brought by CIR. The applicant company had submitted that in reconsidering the 1991 judgment the domestic courts had overstepped their jurisdiction *ratione materiae* and had, for all intents and purposes, ruled on an application to reopen the proceedings.

The Court did not share this view. It noted that the domestic courts had not ordered the quashing of the 1991 judgment but had examined its content, in passing, in order to determine the issue submitted to them in the compensation proceedings. It considered that they had not overstepped their jurisdiction *ratione materiae* and found no flagrant breach of the domestic rules on jurisdiction.

There had therefore been no violation of Article 6 of the Convention in that regard.

Article 6 (failure to give reasons for award of procedural costs in Court of Cassation proceedings: complaint raised by applicant company)

The Court had previously held that the obligation to give reasons for judicial decisions also applied to orders in respect of costs and expenses.

In the present case, the Court of Cassation had provided no explanation as to how it had proceeded in determining the amount of the costs awarded against the applicant company for the proceedings before it. However, the legislation at the time provided that in cases with amounts at stake in excess of EUR 1.5 million, the courts were to take into account the statutory amount of costs for the lower bracket and, as appropriate, increase that amount in the light of the sum in dispute, together with the stakes and complexity of the case.

In the Court's view, it had been for the Court of Cassation to explain on the basis of what parameters it had arrived at the sum of EUR 900,200. Such a failure to give reasons made it impossible to ascertain whether the Court of Cassation had reasonably determined the amount of the costs in question, particularly in view of the fact that this amount far exceeded the one fixed for the lower bracket.

The Court concluded that the judgment of the Court of Cassation had not given sufficient reasons on this point.

There had therefore been a violation of Article 6 § 1 in respect of the determination of the costs of the proceedings.

Article 1 of Protocol No. 1 (protection of property: complaint raised by applicant company)

The Court referred to its finding that in the present case the domestic courts had acted in accordance with domestic law in justifying their decisions. Their assessment had therefore not been flawed by arbitrariness or otherwise manifestly unreasonable in breach of Article 1 of Protocol No. 1.

It pointed out that the only violation found under Article 6 § 1 of the Convention concerned the failure to give reasons as to the determination of the costs of the proceedings. That breach did not go to the merits of the case and therefore had not had a direct impact on the financial situation created by the 1991 agreement, a circumstance of which the applicant company had complained under Article 1 of Protocol No. 1. Moreover, the breach of Article 6 § 1 was not sufficient to conclude that the outcome of the case had been arbitrary or that the State had failed to fulfil its positive obligation to safeguard the applicant company's enjoyment of its possessions.

Lastly, with regard to the applicant company's allegations as to the quantum of the award, the Court noted that the domestic decisions, which were based, *inter alia*, on an expert report, had been duly reasoned on this point and were by no means arbitrary. Moreover, it observed that the amount in question had been determined on the basis of an assessment of the damage sustained by CIR as a

result of the unlawful act imputed to the applicant company and therefore found that its impact on that company's financial situation was irrelevant.

Accordingly, the Court could not conclude that the State had failed in its obligation to protect the applicant company's possessions or that it had delivered arbitrary or manifestly unreasonable decisions against it.

There had therefore been no violation of Article 1 of Protocol No. 1 to the Convention.

Article 6 (presumption of innocence: complaint raised by Mr Berlusconi)

Mr Berlusconi had complained that liability for bribery had been imputed to him by the civil courts, even though the criminal charges against him had been dismissed.

The Court noted that the proceedings in issue were compensation proceedings aimed at establishing the applicant company's liability under civil law, not criminal law. Furthermore, the civil courts' references to the criminal courts' decisions to dismiss the charges had not clearly reflected the view that the applicant had been criminally liable.

The civil nature of the proceedings in question was apparent from the fact that the domestic courts, and in particular the Court of Cassation, had applied the substantive and procedural rules governing civil liability. They had thus established the constituent elements of civil liability, which differed in part from those of criminal liability, and had used the standard of proof of "the balance of probabilities".

As to the language used by the domestic courts, the Court noted that most of the expressions with which the applicant had taken issue were used indiscriminately in the areas of civil and criminal liability alike. Furthermore, the domestic courts had been careful to point out on several occasions that their analysis was aimed solely at establishing civil liability. Where domestic decisions did not contain an unequivocal statement of criminal liability but merely some unfortunate language which could be misunderstood, clarifications as to the nature and purpose of the proceedings could help to dispel any doubt.

The Court concluded that the domestic decisions had not imputed criminal liability to the applicant such as to suggest that the outcome of the criminal proceedings should have been different.

There had accordingly been no violation of Article 6 § 2 of the Convention.

Just satisfaction (Article 41)

The Court made no award in respect of just satisfaction, as no claim had been submitted under this head by the applicant company.

Separate opinion

Judge Adamska-Gallant expressed a partly dissenting opinion, which is annexed to the judgment.

The judgment is available only in French.

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