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

Press Release
issued by the Registrar of the Court

ECHR 062 (2014)
04.03.2014

Persons responsible for market manipulation ought not to have been deprived of a public hearing or prosecuted twice for the same offence

In today's Chamber judgment in the case of **Grande Stevens and Others v. Italy** (application nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10), which is not final[1], the European Court of Human Rights held:

Unanimously, that there had been **a violation of Article 6 § 1 (right to a fair hearing within a reasonable time)** of the European Convention on Human Rights;

by six votes to one, that there had been **no violation of Article 6 § 3 (a) (right to be informed promptly of the accusation) and (c) (right to the assistance of a lawyer)** in respect of Mr Grande Stevens,

by five votes to two, **that there** had been **no violation of Article 1 of Protocol No. 1 (protection of property);**

unanimously, **that there** had been **a violation of Article 4 of Protocol No. 7 (right not to be tried or punished twice);**

unanimously, that the respondent State was to ensure that the new criminal proceedings brought against the applicants, in violation of Article 4 of Protocol No. 7, which, according to the most recent information received, were still pending in respect of Mr Gabietti and Mr Grande Stevens, were closed as rapidly as possible.

The case concerned the applicants' appeal against the administrative penalty imposed on them by the Italian Companies and Stock Exchange Commission (hereafter "Consob[2]") and the criminal proceedings to which they are currently subject after having been accused of market manipulation in the context of a financial operation involving the car manufacturer FIAT.

According to the Court, although the procedure before Consob had not fully satisfied the requirements of fairness and impartiality, the applicants had nonetheless benefited from subsequent review by a judicial body with full jurisdiction. However, the latter court had not held a public hearing, which would have been necessary in this case. For his part, Mr Grande Stevens had been informed in good time of the accusation against him and had had adequate time to prepare his own defence or to be represented by a lawyer of his own choosing. Moreover, although they were severe, the sanctions imposed on the applicants pursued an aim that was in the general interest – namely guaranteeing the integrity of the financial markets and maintaining public confidence in the security of transactions – and did not appear disproportionate to the conduct with which they were charged. However, the new criminal proceedings against Mr Gabietti and Mr Grande Stevens

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

2 "Consob" is a Commission charged, in particular, with protecting investors and ensuring the transparency and development of the stock markets.

concerned offences involving identical facts to those for which they had been finally convicted, and ought consequently to be closed as rapidly as possible.

Principal facts

The applicants were two Italian companies, Exor s.p.a. (hereafter "Exor") and Giovanni Agnelli & C. s.a.s. (hereafter "Giovanni Agnelli"), their chairman, Gianluigi Gabetti, the authorised representative of Giovanni Agnelli, Virgilio Marrone, and the Agnelli group's lawyer, Franzo Grande Stevens.

In 2002 the company FIAT, in which Exor was the majority shareholder, signed a financial agreement with eight banks. That agreement was due to expire on 20 September 2005 and stipulated that, should FIAT fail to repay the loan, the banks could set off their claim by subscribing to an increase in FIAT's share capital. They would thus acquire 28% of the capital and become the majority shareholder, while Exor s.p.a.'s holding would fall from about 30% to 22%. Mr Gabetti contacted a lawyer specialising in company law, Mr Grande Stevens, in an attempt to find a way of maintaining control of FIAT. Mr Grande Stevens suggested that one possible approach would be to renegotiate a contract which Exor had concluded with an English merchant bank, Merrill Lynch International Ltd. In preparation for such an operation, Mr Grande Stevens contacted Consob to submit a technical question regarding the arrangements for renegotiating the contract. At the same time, he entered negotiations with Merrill Lynch International Ltd.

On 23 August 2005 Consob asked Exor and Giovanni Agnelli to issue a press release, providing information, among other things, on any initiative taken in view of expiry of the financial agreement with the banks. The press release issued on the following day in response to that request, and approved by Mr Grande Stevens, merely indicated that Exor had "neither instituted nor examined initiatives concerning the expiry of the financial agreement" and that it wished "to remain FIAT's reference shareholder". No mention was made of a possible renegotiation of the contract with Merrill Lynch International Ltd. Giovanni Agnelli confirmed Exor's press release, and Mr Grande Stevens continued the negotiations with the English merchant bank.

On 14 September 2005 Consob was informed of the ongoing negotiations. The following day, Merrill Lynch International Ltd finalised an agreement amending the previous contract with Exor, thus enabling the Italian company to preserve its 30% holding in FIAT. In February 2006 Consob's Insider Trading Office (hereafter the "IT Office") accused the applicants of having breached Legislative Decree no. 58 of 24 February 1998, entitled "market manipulation". Under that Decree, the fact, *inter alia*, of "disseminating information ... capable of providing false or misleading information concerning financial instruments" was considered an offence. According to the IT Office, the agreement amending the contract between Merrill Lynch International Ltd and Exor had been reached or was in the process of being reached before the press releases were issued. Thus, it appeared that those issuing the press releases had knowingly omitted to mention that fact, in order to present a false picture of the situation at the relevant time.

The IT Office then transmitted the file to Consob's directorate of administrative sanctions (hereafter "the directorate"), together with a report concluding that the arguments put forward by the applicants did not permit the case to be closed. The directorate communicated this report to the applicants, inviting them to submit, in writing and within thirty days, the arguments necessary for their defence. On 19 October 2006 the IT Office transmitted to the directorate an additional memorandum, in which it claimed that new documents examined by it in the course of the procedure were not such as to alter its conclusions. On 26 October 2006 the applicants received a copy of this additional memorandum. A new thirty-day deadline was granted for submitting their observations. Without communicating it to the applicants, the directorate then sent its report to the Commission – in other words, to Consob proper –, that is, to the body responsible for deciding on possible penalties. At the relevant time Consob was composed of a chairperson and four members,

who were appointed for a five-year term, renewable once, by the President of the Republic on a proposal by the Prime Minister.

In February 2007 Consob imposed administrative sanctions on the applicants, ranging from 3,000,000 to 5,000,000 euros (EUR). Mr Gabetti, Mr Grande Stevens and Mr Marrone were also banned from administering, managing or controlling companies listed on the stock exchange for periods of six, four and two months respectively. They filed objections to these penalties before the Turin Court of Appeal. By judgments of January 2008, that court reduced the fines imposed on Giovanni Agnelli, Exor and Mr Gabetti to EUR 600,000, EUR 1,000,000 and EUR 1,200,000. The duration of Mr Gabetti's ban was also reduced from six to four months. In June 2009 an appeal on points of law by the applicants was dismissed.

In the meantime, in November 2008 the applicants had been committed for trial before the Turin District Court – under Legislative Decree no. 58, their conduct was open not only to administrative sanctions, imposed by Consob, but was also liable to criminal sanctions. In December 2010 the Turin District Court acquitted all of the applicants. In June 2012 an appeal on points of law by the prosecution service was partially upheld by the Court of Cassation, which quashed the acquittal of the companies Giovanni Agnelli and Exor, and those of Mr Grande Stevens and Mr Gabetti. On the other hand, it upheld the acquittal of Mr Maronne. In February 2013 the Turin Court of Appeal convicted Mr Gabetti and Mr Grande Stevens of the offence set out in Legislative Decree no. 58, and acquitted Exor and Giovanni Agnelli. Mr Gabetti and Mr Grande Stevens appealed on points of law. According to the latest information provided to the Court, those proceedings were still pending.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair hearing), the applicants complained of the unfair nature of the procedure before Consob and that body's lack of impartiality and independence. Relying on Article 6 § 3 (a) (right to be informed promptly of the accusation) and (c) (right to be assisted by a lawyer), Mr Grande Stevens alleged that there had been a change, without his knowledge, to the criminal accusation brought against him. He complained about the fact that Consob had initially accused him of having acted in his capacity as Exor's director and that the Turin Court of Appeal, while acknowledging that he did not have that capacity, had nonetheless upheld his conviction. Relying on Article 1 of Protocol No. 1 (protection of property), the applicants also alleged that there had been a breach of their right to peaceful enjoyment of their possessions. Finally, on the basis of Article 4 of Protocol No. 7 (right not to be tried or punished twice), the applicants complained that criminal proceedings had been brought against them in respect of events for which they had already received an administrative penalty.

The application was lodged with the European Court of Human Rights on 27 March 2010.

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

Işıl **Karakaş** (Turkey), *President*,
Guido **Raimondi** (Italy),
Peer **Lorenzen** (Denmark),
Dragoljub **Popović** (Serbia),
András **Sajó** (Hungary),
Paulo **Pinto de Albuquerque** (Portugal),
Helen **Keller** (Switzerland),

and also Stanley **Naismith**, *Section Registrar.*

Decision of the Court

Article 6 § 1 (right to a fair hearing)

The Court first dismissed the Government's objection of inadmissibility to the effect that the procedure before Consob did not concern the "determination of a criminal charge". It considered that although the sanction was described as "administrative" in Italian law, the severity of the fines imposed on the applicants meant that they were criminal in nature.

The Court accepted that the defendants had had the possibility to submit evidence in their defence. The IT Office's accusation had been communicated to them and they had been invited to defend themselves. They had also been informed of the IT Office's report and additional memorandum, and had thirty days in which to present any observations on this subject. That deadline did not appear manifestly inadequate, and the applicants had not asked for it to be extended. However, the report containing the directorate's conclusions, which were subsequently to be used by the Commission in reaching its decision, had not been communicated to the applicants, who had not therefore had an opportunity to defend themselves in relation to the document ultimately submitted to the body responsible for ruling on the merits of the accusations. In addition, the applicants had not had an opportunity to question or have questioned any individuals who could have been interviewed by the IT Office.

The Court also noted that the procedure before Consob had essentially been a written one, and that the applicants had not had an opportunity to attend a single meeting held by the Commission. Yet, although the obligation to hold a public hearing was not absolute, it nonetheless remained the case that the dismissal of a request to that end could be justified only rarely. In the present case, a public hearing that was oral and accessible to the applicants would have been necessary. Indeed, there was a factual dispute, specifically with regard to the state of progress of the negotiations with Merrill Lynch International Ltd. In addition, beyond their financial severity, the sanctions that certain of the applicants were liable to incur had been stigmatising, in that they were likely to compromise their integrity and their professional standing. It followed that the procedure before Consob had not satisfied all the requirements of Article 6, particularly with regard to equality of arms between the prosecution and the defence and the holding of a public hearing, which would have allowed for an oral confrontation.

Further, having regard in particular to the arrangements and criteria for appointment of its members, there were no grounds for doubting Consob's independence in relation to any other body or authority, especially in relation to the executive. In addition, there was nothing to indicate any bias on the part of its members in this case. However, although Consob's rules provided for a certain separation between the bodies responsible for the investigation and the body responsible for deciding whether an offence had been committed and applying sanctions, those different bodies had operated under the authority and supervision of the same president. This amounted to the consecutive exercise of the functions of investigation and judgment within a single institution, which, in criminal matters, was not compatible with the requirement of impartiality laid down in Article 6 § 1.

In addition, the applicants had been able to challenge the sanctions imposed by Consob before the Turin Court of Appeal, and had appealed on points of law against the latter's judgments. There was no reason to doubt the independence and impartiality of the Turin Court of Appeal, which had had jurisdiction to rule on whether the offence defined in Legislative Decree no. 58 had been committed and had had power to overturn Consob's decision. It had also been required to assess the proportionality of the sanctions imposed in relation to the seriousness of the alleged misconduct. In that respect, it had, in particular, reduced the amount of the fines and the length of the ban imposed on certain applicants, and had ruled on their various factual or legal allegations. Consequently, the Turin Court of Appeal was indeed a "judicial body with full jurisdiction". However, no public hearing

had taken place before it. Yet, although a public hearing had been held before the Court of Cassation, that court had not been competent to examine the merits of the case, examine the facts or assess the evidence, and could not therefore be regarded as a body with full jurisdiction.

In conclusion, although the procedure before Consob had not fully satisfied the requirements of fairness and objective impartiality, the applicants had nonetheless had access to subsequent review by a judicial body with full jurisdiction. However, the latter had not held a public hearing, which, in the present case, represented a violation of Article 6 § 1.

Article 6 § 3 (a) and (c) (right to be informed promptly of the accusation/right to assistance by a lawyer)

The Court noted that the fact of being a director of a company listed on the stock market was not an element of the offence with which Mr Grande Stevens had been charged. In fact, Legislative Decree no. 58 made "any person" who disseminated false or misleading information with regard to financial instruments liable to punishment. The issue to be decided was not therefore whether the applicant had been one of Exor's directors, but whether he had taken part in the decision-making process which resulted in publication of the impugned press release. Thus, the fact of being a director of Exor was not part of the "accusation" served on Mr Grande Stevens, and nor was it an intrinsic element of the initial accusation which he ought to have been aware of from the outset of the procedure.

Moreover, even supposing that the fact of being a director of Exor had been one of the elements used by the domestic authorities in assessing whether Mr Grande Stevens had committed the alleged office, he had been informed in good time of the fact that that status had been attributed to him and could have argued that point, both before Consob and before the court of appeal – moreover, the latter had ultimately acknowledged that he did not have that status. In consequence, the Court found no breach of the right, guaranteed by Article 6 § 3 (a) and (b), to be informed of the nature and cause of the accusation against him and to have adequate time and facilities for the preparation of his defence.

Finally, in so far as Mr Grande Stevens relied on sub-paragraph (c) of Article 6 § 3, the Court did not discern in what way the applicant had been deprived of his right to defend himself in person or through legal assistance of his own choosing. It followed that there had been no violation of Article 6 § 3 (a) and (c).

Article 1 of Protocol No. 1 (protection of property)

The Court observed that the applicants had been ordered by Consob and the Turin Court of Appeal to pay heavy fines, which amounted to interference in their right to peaceful enjoyment of their possessions.

The Court further noted that those fines had a clear and accessible basis in Italian law, namely Legislative Decree no. 58. In addition, the fines in question had been imposed by Consob at the close of a procedure in which the applicants had been able to present arguments in their defence. Even if the procedure before Consob had not satisfied all the requirements of Article 6, the applicants had subsequently had access to the Turin Court of Appeal. In addition, they had been able to appeal on points of law. Although the Court had just found a violation of Article 6 § 1 on account of the lack of a hearing before the Turin Court of Appeal, this circumstance in itself did not amount to a failure to fulfil the obligations arising from Article 1 of Protocol No. 1. Consequently, it could not be concluded that the applicants had not enjoyed adequate procedural guarantees against arbitrariness or that they had been unable to challenge the measures which affected their right to peaceful enjoyment of their possessions.

The Court also observed that the prohibition on disseminating false or misleading information with regard to financial instruments was intended to guarantee the integrity of the financial markets and

to maintain public confidence in the security of transactions, which undeniably amounted to an aim that was in the public interest.

Finally, by concluding the agreement amending the contract with Merrill Lynch International Ltd, Exor had preserved its 30% stake in FIAT's capital, thus ruling out the prospect of an acquisition of 28% of the company's capital by the banks and the consequences that such an acquisition could have had for control of FIAT. These were issues which, at the relevant time, were of crucial importance to investors, and the fact that false or misleading information had been disseminated on this point was undoubtedly serious. Accordingly, the fines imposed on the applicants, while severe, did not appear disproportionate in view of the conduct with which they had been charged.

In conclusion, the sanctions imposed on the applicants had been "lawful" within the meaning of Article 1 of Protocol No. 1 and amounted to necessary measures to ensure the payment of fines. It followed that there had been no violation of Article 1 of Protocol No. 1.

Article 4 of Protocol No. 7 (right not to be tried or punished twice)

The Government alleged that it had made a reservation with regard to the application of Articles 2 to 4 of Protocol No. 7. Italy had indeed made a declaration stating that Articles 2 to 4 of Protocol No. 7 applied only to offences ... classified as "criminal" by Italian law, which was not the case for the offences proscribed by Consob. The Court noted, however, that the reservation in question did not contain "a brief statement of the law concerned", contrary to the requirements of Article 57 of the Convention. A reservation which did not refer to, or mention, those specific provisions of the domestic legal order which exclude offences or procedures from the scope of Article 4 of Protocol No. 7 did not afford to a sufficient degree the guarantee that they did not go beyond the provision expressly excluded by the contracting State. Consequently, the reservation relied upon by Italy did not meet the requirements of Article 57 and was accordingly invalid.

In the present case the Court had concluded, under Article 6, that there were indeed grounds for considering that the procedure before Consob concerned "a criminal charge". Equally, the sentences imposed by Consob and partly reduced by the court of appeal had become final in June 2009, when the Court of Cassation had delivered its judgments. Accordingly, the applicants ought to have been considered as having already been convicted by a final judgment. In spite of that, the new criminal proceedings which had been brought against them in the meantime were maintained, and resulted in judgments at first and second instance.

In addition, before Consob, the applicants had been essentially accused of having failed to mention in their press releases the plan to renegotiate the contract with Merrill Lynch International Ltd, although that plan already existed and was at an advanced stage. They had been subsequently punished for this by Consob and by the Turin Court of Appeal. Before the criminal courts, the applicants had been accused of having stated, in those same press releases, that Exor had neither instituted nor examined initiatives concerning expiry of the financial agreement, although the agreement amending the contract with Merrill Lynch International Ltd had already been examined and concluded, with a view to avoiding a fall in the FIAT share price.

In the Court's opinion, this clearly concerned the same conduct, by the same persons and on the same date. It followed that the new proceedings concerning a second "offence" originated in identical events to those which had been the subject-matter of the first and final conviction, which in itself amounted to a violation of Article 4 of Protocol No. 7. It followed therefore that Italy was to ensure that the new criminal proceedings brought against the applicants in violation of this provision, and which were still pending, according to the most recent information received, against Mr Gabetti and Mr Grande Stevens, were closed as rapidly as possible and without adverse consequences for the applicants.

Just satisfaction (Article 41)

The Court held that Italy was to pay each applicant 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 40,000 jointly in respect of costs and expenses.

Separate opinion

Judges Karakaş and Pinto de Albuquerque expressed a joint partly dissenting opinion, which is annexed to the judgment.

The judgment is available only in French.

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