



Double prosecution and double conviction on the same market manipulation charges: violation of the Convention

In today's **Chamber** judgment¹ in the case of **Nodet v. France** (application no. 47342/14) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 4 of Protocol No. 7 (right not to be tried or punished twice) of the European Convention on Human Rights.

The case concerned the right not to be tried or punished twice (*ne bis in idem*). The applicant, a financial analyst, was fined by the financial markets regulator, the AMF, for manipulation of a share price, and subsequently by criminal courts for the offence of obstructing the proper operation of the stock market by the same action. He complained that he had been punished twice for the same offence.

The Court observed, first, that there was no sufficiently close connection in substance between the two sets of proceedings, of the AMF and of the criminal courts, in view of the purposes pursued and given, to some extent, the repetition in the gathering of evidence by various investigators; secondly, and above all, there was no sufficiently close connection in time for the proceedings to be considered part of an integrated mechanism of sanctions prescribed by French law.

It concluded that Mr Nodet had sustained disproportionate damage on account of his double prosecution and the double conviction, by the AMF and the criminal courts, for the same facts.

Principal facts

The applicant, Antoine Nodet, is a French national who was born in 1956 and lives in Paris.

In early 2005 the stock-market price of shares in Fromageries Paul Renard (FPR), a subsidiary of SAS Bongrain Europe, was about 149 euros (EUR) before shooting up to EUR 4,225 on 30 March 2006. Mr Nodet, a financial analyst, traded in FPR shares using four bank accounts that he had authority to operate, in order to secure a substantial capital gain.

On 21 June 2006 the Secretary General of the financial markets regulator, the AMF, initiated an investigation into trading in FPR shares on the stock market from 1 January 2006 onwards. On 26 February 2006, the AMF's department of investigations and market surveillance filed its investigation report, which showed that Mr Nodet's trading in FPR shares could be characterised as market manipulation. The report noted, in particular, the high level of Mr Nodet's trading in FPR shares, in view of the number of orders made and cancelled, and the completed transactions, including 25 back-to-back transactions between the four accounts under his control. The AMF report found that his activity had had the effect of triggering a rise in the share price and had led to an increase in price limits.

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 20 December 2007 the AMF's Enforcement Committee imposed a fine of EUR 250,000 on Mr Nodet, in addition to ordering the publication of the decision. The Paris Court of Appeal dismissed Mr Nodet's appeal and the Court of Cassation rejected his appeal on points of law.

On 11 September 2007 the public prosecutor, informed of the facts by the President of the AMF, asked the fraud squad to carry out a preliminary investigation. On 8 April 2009, when the appeal on points of law against the AMF's sanction was pending, Mr Nodet was summoned to appear before the Paris Criminal Court to stand trial for the offence of obstructing the proper operation of the stock market. Mr Nodet, taking the view that the summons reproduced word-for-word the same charges as those for which he had been fined by the AMF, filed pleadings to show that there had been a breach of the *ne bis in idem* principle protected by Article 4 of Protocol No. 7 to the Convention. The Criminal Court dismissed his submissions and convicted him on the charges, sentencing him to a suspended term of 8 months' imprisonment. The Court of Appeal upheld the judgment, reducing the sentence to 3 months. The Court of Cassation rejected Mr Nodet's appeal.

Complaints, procedure and composition of the Court

Relying on Article 4 of Protocol No. 7 (right not to be tried or punished twice), the applicant alleged that there had been a breach of the *ne bis in idem* principle on account of the criminal proceedings against him and his conviction, in spite of a decision of the AMF concerning exactly the same charges which had become final on 10 November 2009.

The application was lodged with the European Court of Human Rights on 25 June 2014.

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

Yonko **Grozev** (Bulgaria), *President*,
André **Potocki** (France),
Síofra **O'Leary** (Ireland),
Mārtiņš **Mits** (Latvia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),

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

Decision of the Court

Article 4 of Protocol No. 7

The Court found that the fine imposed by the AMF was undoubtedly criminal in nature. It reiterated that Article 4 of Protocol No. 7 was to be construed as prohibiting the prosecution or trial of an individual for a second offence in so far as it was based on identical facts or facts which were substantially the same. In the present case it found that the accusations were identical in both sets of proceedings.

The Court further reiterated that the respondent State had to demonstrate convincingly that the dual proceedings in question had been "sufficiently closely connected in substance and in time", in other words that the proceedings before the AMF and before the criminal courts were combined in an integrated manner so as to form a coherent whole. Failing that there would be a violation of the Convention.

First, as to the existence of a sufficiently close "connection in substance" between the two sets of proceedings, it observed that the duality of proceedings concerned was certainly a foreseeable consequence, in law and in practice, of the same misconduct of which Mr Nodet stood accused.

The Court further noted, in considering whether or not there had been complementary purposes, that in a decision of 18 March 2015 the Constitutional Court had taken the view that the legislative provisions penalising the offence of insider trading and insider misconduct were directed against the same acts, that they defined and characterised them in the same manner, protected the same social interests and, lastly, that they were capable of giving rise to sanctions which were not different in nature. In the circumstances of the case – an offence of manipulation, within the meaning of Article L. 465-2 of the Monetary and Finance Code – the identical purposes pursued by the AMF and the criminal courts, which concerned identical aspects of the harmful act, excluded the complementarity required for a finding that there was a sufficiently close link in substantive terms between the two sets of proceedings. The Court found, when examining the question of the gathering of evidence, that the Criminal Court had referred at length to the various findings of the AMF, while the Court of Appeal had based its decision on the work both of the AMF’s investigators and of the fraud squad. It also observed that the fraud investigators had been asked on 11 September 2007 to carry out their own investigations whereas the report of the AMF’s investigations and market surveillance unit had been filed over a year before. There had thus been a repetition in the gathering of evidence. Lastly, as to the taking into account of the sanction imposed by the AMF in the context of the second set of proceedings before the criminal courts, the Court found that while the Criminal Court had expressly considered the fine decided by the AMF’s Enforcement Committee, that was not the case of the Court of Appeal.

Secondly, the Court pointed out that, even where the substantive link between the two sets of proceedings was sufficiently sound, the condition of the “connection in time” remained and still had to be satisfied. On that point the Court observed that the proceedings had begun with the AMF investigation, launched on 21 June 2006, and had ended with the Court of Cassation’s judgment of 22 January 2014 concerning the criminal proceedings. They had thus lasted overall for more than seven and a half years. During that period they had partly run in parallel. Nevertheless, after the Court of Cassation’s judgment of 10 November 2009 putting an end to the AMF proceedings, the criminal proceedings had lasted until 22 January 2014, thus for another four years and over two months.

In conclusion, the Court thus took the view that there was no sufficiently close substantive link between the two sets of proceedings, of the AMF and of the criminal courts, in view of the purposes pursued and given, to some extent, the repetition in the gathering of evidence by various investigators. Furthermore, and above all, there was no sufficiently close temporal link for the proceedings to be considered part of an integrated mechanism of sanctions prescribed by French law.

It accordingly found that Mr Nodet had sustained disproportionate damage as a result of his double prosecution and double conviction, by the AMF and by the criminal courts, for the same facts. It followed that there had been a violation of Article 4 of Protocol No. 7.

Just satisfaction (Article 41)

The Court held that France was to pay the applicant 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 20,000 in respect of costs and expenses.

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.