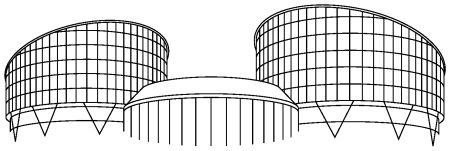

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF GRANDE STEVENS v. ITALY

(Application no. 18640/10)

JUDGMENT
(Merits)

STRASBOURG

4 March 2014

FINAL

07/07/2014

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

In the case of Grande Stevens v. Italy,

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

Işıl Karakaş, *President,*
Guido Raimondi,
Peer Lorenzen,
Dragoljub Popović,
András Sajó,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 28 January 2013,

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

PROCEDURE

1. The case originated in five applications (nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10) against the Republic of Italy lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Italian nationals and two companies registered in Italy, Mr Franzo Grande Stevens, Mr Gianluigi Gabetti, Mr Virgilio Marrone, Exor S.p.a. and Giovanni Agnelli & C. S.a.s. ("the applicants"), on 27 March 2010.

2. The applicants were represented by Mr A. Bozzo and Mr G. Bozzi, lawyers practising in Milan and Rome respectively. Mr Grande Stevens was also represented by Mr N. Irti, a lawyer practising in Milan. The Italian Government ("the Government") were represented by their Agent, Ms E. Spatafora, and their co-Agent, Ms P. Accardo.

3. The applicants alleged, in particular, that the judicial proceedings brought against them had not been fair and had not been conducted before an independent and impartial "tribunal", that there had been a breach of their right to peaceful enjoyment of their possessions and that there had been a violation of the *ne bis in idem* principle in their respect.

4. On 15 January 2013 the applications were declared partly inadmissible and the complaints under Article 6 of the Convention, Article 1 of Protocol No. 1 and Article 4 of Protocol No. 7 were communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. A list of the applicant parties is appended.

A. The context of the case

6. At the relevant time Mr Gianluigi Gabetti was the chairman of the two applicant companies and Mr Virgilio Marrone was the authorised representative (*procuratore*) of the applicant company Giovanni Agnelli & C. s.a.a.

7. On 26 July 2002 the public limited company FIAT (*Fabbrica Italiana Automobili Torino*) signed a financing agreement (*prestito convertendo*) with eight banks. That contract was due to expire on 20 September 2005 and stipulated that, should FIAT fail to reimburse the loan, the banks could offset their claim by subscribing to an increase in the company's capital. Thus, the banks would have obtained 28% of FIAT's share capital, while the holdings of the public limited company IFIL Investments (which subsequently, on 20 February 2009, became Exor s.p.a., the name by which it will be referred to hereafter) would have decreased from 30.06% to about 22%.

8. Mr Gabetti wished to obtain legal advice on the best way to ensure that Exor remained the controlling shareholder in FIAT, and to this end he contacted a lawyer specialising in company law, Mr Grande Stevens. He considered that one possibility would be to renegotiate an equity swap (that is, a contract allowing a share's performance to be exchanged against an interest rate, without having to advance money), dated 26 April 2005 and based on approximately 90 million FIAT shares, concluded by Exor with an English merchant bank, Merrill Lynch International Ltd, which was due to expire on 26 December 2006. In Mr Grande Stevens's opinion, this would be one way to prevent the launch of a takeover bid with regard to the FIAT shares.

9. Without mentioning Merrill Lynch International Ltd for fear of breaching his duty of confidentiality, on 12 August 2005 Mr Grande Stevens asked the National Companies and Stock Exchange Commission (*Commissione Nazionale per le Società e la Borsa* – "the CONSOB", which in the Italian legal system, has the task, *inter alia*, of protecting investors and ensuring the transparency and development of the stock markets) whether, in the scenario he envisaged, a takeover bid could be avoided. At the same time Mr Grande Stevens began making enquires with Merrill Lynch International Ltd about the possibility of amending the equity swap contract.

10. On 23 August 2005 the CONSOB asked Exor and Giovanni Agnelli to issue a press release providing information on any initiative taken in the light of the forthcoming expiry of the financing agreement with the banks, any new fact concerning FIAT and anything that might explain the market fluctuations in FIAT shares.

11. Mr Marrone alleges that he was on leave on that date. He had informed Mr Grande Stevens of the CONSOB's request and had sent him a copy of it. Mr Marrone submits that he was not involved in drafting the press releases described in paragraphs 13 and 14 below.

12. Mr Gabetti submits that on 23 August 2005 he was in hospital in the United States. He had received a draft press release and had contacted Mr Grande Stevens by telephone; the lawyer had confirmed to him that, given the significant number of elements that remained uncertain, renegotiation of the equity swap contract could not be considered as a relevant and currently available option. In those circumstances, Mr Gabetti approved the draft press release.

13. The press release issued in response [to the CONSOB's query], approved by Mr Grande Stevens, merely indicated that Exor had "neither instituted nor examined initiatives with regard to the expiry of the financing contract" and that it wished "to remain FIAT's reference shareholder". No mention was made of the possible renegotiation of the equity swap contract with Merrill Lynch International Ltd, which, in the absence of a clear factual and legal basis, the applicants considered merely as one possible future scenario.

14. The Giovanni Agnelli Company confirmed Exor's press release.

15. From 30 August to 15 September 2005 Mr Grande Stevens continued his negotiations with Merrill Lynch International Ltd, exploring the options for amending the equity swap contract.

16. On 14 September 2005, in the course of an Agnelli family meeting, it was decided that the draft text being studied by Mr Grande Stevens ought to be submitted for approval by the Exor board of management. On the same day, the CONSOB received a copy of the equity swap contract and was informed of the negotiations under way with a view to using that contract to enable Exor to acquire FIAT shares.

17. On 15 September 2005, in execution of the decisions taken by their respective boards of management, Exor and Merrill Lynch International Ltd concluded the agreement on amending the equity swap contract.

18. On 17 September 2005, in response to the question posed to it by Mr Grande Stevens on 12 August 2005 (see paragraph 9 above), the CONSOB indicated that, in the scenario envisaged, there was no obligation to launch a takeover bid.

19. On 20 September 2005 FIAT increased its share capital; the new shares were acquired by the eight banks in compensation for the sums owed

to them. On the same date the agreement amending the equity swap contract took effect. In consequence, Exor continued to hold a 30% stake in FIAT.

B. The proceedings before the CONSOB

20. On 20 February 2006 the CONSOB's Markets and Economic Opinions Division – Insider Trading Office (*Divisione mercati e consulenza economica – ufficio Insider Trading* – hereafter the "IT Office") accused the applicants of breaching Article 187 *ter* § 1 of Legislative Decree no. 58 of 24 February 1998. That article, entitled "Market Manipulation", provides:

> "Without prejudice to criminal penalties where the conduct amounts to an offence, any person who, through means of information, including Internet or any other means, disseminates false or misleading information, news or rumours of a kind to provide false or misleading indications concerning financial instruments shall be liable to an administrative penalty ranging from 20,000 to 5,000,000 euros (EUR)."[1]

21. According to the IT Office, the agreement to amend the equity swap had been concluded or was in the process of being concluded before the press releases of 24 August 2005 were issued, and accordingly it was abnormal that they had contained no mention of it. The applicants were invited to submit their defence.

22. The IT Office then transmitted the file to the CONSOB's Administrative Sanctions Directorate (*ufficio sanzioni amministrative* – hereafter, "the Directorate"), accompanied by a report (*relazione istruttoria*) dated 13 September 2006, which set out the evidence against the accused and their arguments in reply. According to that report, the arguments submitted in their defence by the applicants were not such as to enable the file to be closed.

23. The Directorate communicated this report to the applicants and invited them to submit in writing, within a thirty-day period that would expire on 23 October 2006, those arguments that they considered necessary for their defence. In the meantime, the IT Office continued to examine the applicants' case, by obtaining oral statements and analysing the documents received on 7 July 2006 from Merrill Lynch International Ltd. On 19 October 2006 it transmitted a "supplementary note" to the Directorate in which it stated that the new documents examined by it were not such as to alter its conclusions. On 26 October 2006 the applicants received a copy of the supplementary note of 19 October 2006 and its appendices; they were given a further thirty-day deadline within which to submit any comments.

24. Without communicating it to the applicants, the Directorate presented its report (dated 19 January 2007 and containing its conclusions)

1. The amount of this penalty was multiplied by five by section 39 § 3 of Law no. 262 of 28 December 2005, which entered into force after the impugned press releases had been issued.

to the Commission – the CONSOB proper –, that is, to the body responsible for deciding on possible penalties. At the relevant time the Commission was made up of a chairman and four members, appointed by the President of the Republic on a proposal (*su proposta*) from the President of the Council of Ministers. Their term of office was for five years and could be renewed only once.

25. By resolution no. 15760 of 9 February 2007, the CONSOB imposed the following administrative fines on the applicants:

- EUR 5,000,000 in respect of Mr Gabetti,
- EUR 3,000,000 in respect of Mr Grande Stevens,
- EUR 500,000 in respect of Mr Marrone,
- EUR 4,500,000 in respect of the company Exor,
- EUR 3,000,000 in respect of the company Giovanni Agnelli.

26. Mr Gabetti, Mr Grande Stevens and Mr Marrone were banned from administering, managing or supervising listed companies for periods of six, four and two months respectively.

27. The CONSOB held, in particular, that the file showed that on 24 August 2005, date of the impugned press releases, the plans to maintain a 30% stake in FIAT's capital on the basis of renegotiation of the equity swap contract with Merrill Lynch International Ltd had already been studied and were being put in place. It followed that the press releases falsely represented (*rappresentazione falsa*) the situation at the time. The CONSOB also emphasised the positions held by the persons concerned, the "objective gravity" of the offence and the existence of malicious intent.

C. Application to the appeal court to have the penalties set aside

28. The applicants applied to the Turin Court of Appeal seeking to have these penalties set aside. They alleged, *inter alia*, that the CONSOB's rules were illegal, since, contrary to the requirements of Article 187 *septies* of Legislative Decree no. 58 of 1998 (see paragraph 57 below), they did not comply with the principle of an adversarial examination of the case.

29. Mr Grande Stevens further noted that the CONSOB had accused and punished him for being involved in publication of the press release of 24 August 2005 as the executive director of Exor. Before the CONSOB, he had argued unsuccessfully that he did not have that role and that he was merely a lawyer and consultant for the Agnelli group. Before the appeal court, Mr Grande Stevens maintained that, since he was not an executive director, he could not have taken part in the decision to publish the impugned press release. In pleadings of 25 September 2007, Mr Grande Stevens requested that, should the appeal court consider the documents placed in the case file to be insufficient or unusable, it summon witnesses for questioning "on the facts set out in the above-mentioned documents". He did not indicate clearly in those pleadings either the names of those

witnesses or the circumstances in respect of which they were to give evidence. In pleadings of the same date, Mr Marrone named two witnesses whose statements would prove that he had not taken part in drafting the press releases, and stated that the appeal court could, if necessary (*ove occorresse*), question them.

30. In judgments deposited with the registry on 23 January 2008, the Turin Court of Appeal reduced the administrative fines imposed by the CONSOB in respect of certain of the applicants, as follows:

- EUR 600,000 in respect of Giovanni Agnelli s.a.a.;
- EUR 1,000,000 in respect of Exor s.p.a.;
- EUR 1,200,000 in respect of Mr Gabetti.

The heading of the judgments delivered in respect of Mr Gabetti, Mr Marrone and Exor S.p.a. indicated that the court of appeal had met in private (*riunita in camera di consiglio*). The "procedure" part of the judgments issued in respect of Mr Grande Stevens and Giovanni Agnelli & C. S.a.s. mentioned that the parties had been summoned to the deliberations (*disposta la comparizione delle parti in camera di consiglio*).

31. The length of the ban on assuming responsibility for the administration, management or supervision of companies listed on the stock exchange was reduced from six to four months in respect of Mr Gabetti.

32. The court of appeal dismissed the applicants' other complaints in their entirety. It noted, *inter alia*, that even after the file had been transmitted to the Directorate, the IT Office had been entitled to continue its investigative activities, as the 210-day deadline provided for the CONSOB's deliberations had not been binding. Furthermore, the adversarial principle was complied with if, as in the present case, those charged had been informed of the new evidence obtained by the IT Office and had had an opportunity to submit their replies.

33. The court of appeal also noted that it was true that the CONSOB had both imposed the penalties provided for by Article 187 *ter* of Legislative Decree no. 58 of 1998 and reported the case to the prosecuting authorities, alleging that the criminal offence described in Article 185 § 1 of the same decree had been committed. Under the terms of this provision,

> "Anyone who disseminates false information, carries out simulated transactions or uses other ploys (*artifizi*) which are objectively capable of triggering a significant change in the value of financial instruments shall be punishable by between one and six years' imprisonment and a fine of 20,000 to 5,000,000 euros."

34. According to the court of appeal, those two provisions had as their subject-matter the same conduct (the "dissemination of false information") and pursued the same aim (to prevent market manipulation), but differed with regard to the situation of risk alleged to have been generated by this conduct: in respect of Article 187 *ter*, it was sufficient in itself to have given false or misleading indications concerning financial instruments, while Article 185 further required that that information had been such as to trigger

a significant change in the price of the instruments in question. As the Constitutional Court had indicated in its order no. 409 of 12 November 1991, it was open to the legislature to punish illegal conduct both by a pecuniary administrative sanction and by criminal penalties. In addition, Article 14 of Directive 2003/6/EC **(see paragraph 60 below), which invited the member States of the European Union to apply administrative** sanctions against persons responsible for manipulating the market, contained in turn the phrase "without prejudice to the right of Member States to impose criminal sanctions".

35. On the merits, the court of appeal observed that it was clear from the case file that the renegotiation of the equity swap had been examined in minute detail at the relevant date and that the conclusion reached by the CONSOB (namely, that this plan already existed one month prior to 24 August 2005) had been reasonable in the light of the established facts and the conduct of the persons concerned.

36. As to Mr Grande Stevens, it was true that he was not an executive director of Exor s.p.a. Nonetheless, the administrative offence punishable under Article 187 *ter* of Legislative Decree no. 58 of 1998 could be committed by "anyone", and therefore by a person in any capacity whatsoever; Mr Grande Stevens had indeed participated in the decision-making process which had led to publication of the press release in his capacity as a lawyer consulted by the applicant companies.

D. Appeal on points of law

37. The applicants appealed on points of law. In the third and fourth grounds of their points of appeal, they alleged, *inter alia*, that there had been a breach of the principles of a fair hearing, enshrined in Article 111 of the Constitution, because, in particular: the investigative phase of the CONSOB proceedings had not been adversarial in nature; there had been a failure to transmit the Directorate's report to the accused; in the applicants' view, it had been impossible to file pleadings with or be heard in person by the Commission; the IT Office had continued its investigation and transmitted a supplementary note after expiry of the time-limit set for that purpose.

38. By judgments of 23 June 2009, the text of which was deposited with the registry on 30 September 2009, the Court of Cassation dismissed their appeals on points of law. It considered, in particular, that the principle of an adversarial examination of the case had been complied with in the proceedings before the CONSOB, noting that the latter had indicated to the applicants the acts with which they were charged and taken account of their respective defence submissions. The fact that the applicants had not been questioned and that they had not received the Directorate's conclusions had not been in breach of that principle, since the constitutional provisions

regarding a fair hearing and the right of defence were applicable only to judicial proceedings, and not to proceedings to impose administrative sanctions.

E. The criminal proceedings against the applicants

39. Under Legislative Decree no. 58 of 1998, the applicants' impugned conduct could be the subject-matter not only of an administrative sanction, imposed by the CONSOB, but also of the criminal penalties provided for in Article 185 § 1, cited in paragraph 33 above.

40. On 7 November 2008 the applicants were committed for trial before the Turin District Court. They were accused of having stated, in the press releases of 24 August 2005, that Exor wished to remain FIAT's reference shareholder and that it had neither initiated nor examined initiatives with regard to the expiry of the financing contract, although the agreement amending the equity swap had already been examined and concluded, information that had been withheld in order to avoid a probable fall in the FIAT share price.

41. CONSOB applied to be joined to the proceedings as a civil party, a possibility open to it under Article 187 *undecies* of Legislative Decree no. 58 of 1998.

42. After 30 September 2009, the date on which the judgment dismissing the applicants' appeal on points of law against the penalties imposed by the CONSOB was deposited with the registry (see paragraph 38 above), the applicants requested that the criminal proceedings against them be discontinued, by virtue of the *non bis in idem* rule. In particular, at the hearing of 7 January 2010, they argued that the relevant provisions of Legislative Decree no. 58 of 1998 and Article 649 of the Code of Criminal Procedure ("the CCP" - see paragraph 59 below) were unconstitutional, on account of their alleged incompatibility with Article 4 of Protocol No. 7.

43. The representative of the prosecuting authorities opposed this objection, alleging that "double proceedings" (administrative and criminal) were imposed by Article 14 of Directive 2003/6/EC of 28 January 2003 (see paragraph 60 below), which the Italian legislature had transposed by enacting Articles 185 and 187*ter* of Legislative Decree no. 58 of 1998.

44. The Turin District Court did not immediately rule on the ancillary question of constitutionality raised by the defence. It ordered an expert report describing the fluctuations in FIAT shares between December 2004 and April 2005 and evaluating the effects of the press releases of 24 August 2005 and the information made public on 15 September 2005.

45. By a judgment of 21 December 2010, the text of which was deposited with the registry on 18 March 2011, the Turin District Court acquitted Mr Marrone on the ground that he had not been involved in the publication of the press releases, and also acquitted the other applicants on

the ground that it had not been proven that their conduct had been such as to trigger a significant change in the financial markets. It noted that the fact that the press releases contained false information had already been punished by the administrative body. In the court's view, the applicants' impugned conduct had, probably, been aimed at concealing the renegotiation of the equity swap contract from the CONSOB, and not at increasing FIAT's share price.

46. The court held that the ancillary question of constitutionality raised by the applicants was manifestly ill-founded. It noted that Italian law (section 9 of Law no. 689 of 1981) prohibited "double proceedings" (*doppio giudizio*), criminal and administrative, in respect of the "same act". However, Articles 185 and 187 *ter* of Legislative Decree no. 58 of 1998 did not punish the same act: only the criminal provision (Article 185) required that the conduct be such as to cause a significant change in the value of financial instruments (it referred to judgment no. 15199 of the Court of Cassation (Sixth Section), of 16 March 2006). In addition, application of the criminal provision required the existence of malicious intent, while the administrative provision was applicable as soon as culpable conduct was established. Moreover, the criminal proceedings which had followed the imposition of the financial penalty provided for by Article 187 *ter* of Legislative Decree no. 58 of 1998 were authorised by Article 14 of Directive 2003/6/EC.

47. As to the case-law of the Court cited by the applicants (*Gradinger v. Austria* (23 October 1995, Series A no. 328-C), *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, ECHR 2009), *Maresti v. Croatia* (no. 55759/07, 25 June 2009) and *Ruotsalainen v. Finland* (no. 13079/03, 16 June 2009)), it was not relevant to this case, since it concerned cases where a single act had been punished by criminal and administrative penalties and where the latter had a punitive element and could include a custodial sentence or (as in the *Ruotsalainen* case) were for a sum higher than the criminal fine.

48. The public prosecutor's office appealed on points of law, alleging that the offence with which the applicants had been charged was one "of danger" (*reato di pericolo*) and not "of damage" (*reato di danno*). It could therefore be committed even in the absence of damage having been sustained by the shareholders.

49. On 20 June 2012 the Court of Cassation allowed in part the prosecuting authorities' appeal on points of law and quashed the acquittal of the companies Giovanni Agnelli and Exor, and those of Mr Grande Stevens and Mr Gabetti. However, it upheld the acquittal of Mr Marrone, given that he had not taken part in the impugned conduct.

50. By a judgment of 28 February 2013, the Turin Court of Appeal convicted Mr Gabetti and Mr Grande Stevens of the offence set out in Article 185 § 1 of Legislative Decree no. 58 of 1998, considering it highly

probable that, had the false information included in the press release of 24 August 2005 not been issued, the value of FIAT's shares would have fallen much more sharply. However, it acquitted the companies Exor and Giovanni Agnelli, holding that no criminal acts could be imputed to them.

51. The court of appeal held that there was no appearance of a violation of the *ne bis in idem* principle, thus endorsing the main thrust of the Turin District Court's reasoning.

52. According to the information provided by the Government on 7 June 2013, Mr Gabetti and Mr Grande Stevens appealed on points of law against that judgment, and the proceedings were still pending at that date. In their appeals, these two applicants relied on a violation of the *ne bis in idem* principle and asked that an ancillary question of constitutionality be raised in respect of Article 649 of the Code of Criminal Procedure.

...

THE LAW

...

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

87. The applicants alleged that the proceedings before the CONSOB had not been fair, and complained that that body lacked impartiality and independence.

They relied on Article 6 of the Convention, the relevant parts of which read:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

..."

88. The Government contested the applicants' position.

A. Admissibility

1. Whether Article 6 of the Convention applies in its criminal head

(a) The parties' submissions

i. The Government

89. The Government contended that the proceedings before the CONSOB did not relate to a "criminal charge" against the applicants. They noted that the offence prescribed by Article 187 *ter* of Legislative Decree no. 58 of 1998 was clearly classified as "administrative" under both domestic and European law; [the corresponding penalty] could be imposed by an administrative body at the close of administrative proceedings.

90. As to the nature of the offence, it included any conduct, even that of mere negligence, which was likely to provide erroneous signals or information to investors, without it being necessary that this be likely to trigger a significant change in the financial markets. It protected investors against any potential risk that might influence their choices and thus referred to interests other than those usually protected by criminal law. Finally, the sanctions that could be imposed affected only the assets of the person concerned and/or his ability to exercise managerial functions, and under no circumstances could they lead to a custodial sentence, even in the event of non-payment. They were not mentioned in an individual's criminal record and usually concerned professional operators in the financial system rather than the population as a whole.

91. Moreover, the amount of the fines had been proportionate to the guilty party's resources and financial strength; the present case concerned a financial operation which was aimed at gaining control of one of the largest vehicle manufactures in the world, and had cost more than EUR 500,000,000. In addition, the fines, the possible confiscation of the assets used to commit the office and the prohibition on exercising managerial functions were essentially intended to restore market confidence and reassure investors, by targeting the elements which had made it possible for the administrative offence to be committed (on this point, they also referred to the aims pursued by Directive 2003/6/EC). They were intended

to make reparation and compensate for financial damage, and to prevent the guilty party from benefiting from the illegal activities. Furthermore, in the case of *Spector Photo Group* (*Spector Photo Group NV v Commissie voor het Bank, Financie-en Assurantiewezen*, C-45/08., 23 December 2009), the European Court of Justice (ECJ) had accepted the coexistence, in this sector, of administrative and criminal sanctions.

ii. The applicants

92. The applicants considered that although they were classified as "administrative" in domestic law, the sanctions imposed by the CONSOB ought to be considered as "criminal", in the autonomous meaning of this concept in the Court's case-law. The ECJ's judgment in the case of *Spector Photo Group*, cited by the Government, did not take the opposite line, but merely stated that if a Member State had introduced the possibility of a criminal financial sanction, it was not necessary, for the purposes of assessing whether the administrative sanction was effective, proportionate and dissuasive, to take account of the level of that sanction. Moreover, in its judgment of 26 February 2013 in case C-617/10 (*Åklagaren v. Hans Åkerberg Fransson*), the ECJ had confirmed the following principles: (a) the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter; (b) Article 50 of the Charter (guaranteeing *the ne bis in idem* principle) presupposes that the measures which are adopted against a defendant are of a criminal nature; (c) for the purpose of assessing whether tax penalties are criminal in nature, it is necessary to consider the legal classification of the offence under national law, the very nature of the offence, and the degree of severity of the penalty that the person concerned is liable to incur.

93. In the present case, the seriousness of the sanctions was clear, since the maximum sum that could be imposed was EUR 5,000,000. This primary sanction was supplemented by secondary penalties, such as temporary loss of entitlement (of up to three years) to hold administrative, managerial or supervisory roles in listed companies, temporary suspension (of up to three years) from professional bodies, and confiscation of the proceeds of the office and the assets used to commit it. Referring to the Court's case-law in this area (in particular *Dubus S.A. v. France*, no. 5242/04, 11 June 2009; *Messier v. France*, no. 25041/07, 30 June 2001; and *Menarini Diagnostics S.r.l. v. Italy*, no. 43509/08, 27 September 2011), the applicants concluded that Article 6 was applicable in its criminal limb.

(b) The Court's assessment

94. The Court reiterates its established case-law that, in determining the existence of a "criminal charge", it is necessary to have regard to three factors: the legal classification of the measure in question in national law, the very nature of the measure, and the nature and degree of severity of the

"penalty" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22). Furthermore, these criteria are alternative and not cumulative ones: for Article 6 to apply in respect of the words "criminal charge", it suffices that the offence in question should by its nature be "criminal" from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by virtue of its nature and degree of severity, belongs in general to the "criminal" sphere. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a "criminal charge" (see *Jussila v. Finland* [GC], no. 73053/01, §§ 30 and 31, ECHR 2006-XIII, and *Zaicevs v. Latvia*, no. 65022/01, § 31, ECHR 2007-IX (extracts)).

95. In the present case, the Court first observes that the market manipulations with which the applicants were accused did not constitute a criminal offence in Italian law. Such conduct was in effect punished by a penalty which was classified as "administrative" by Article 187 *ter* § 1 of Legislative Decree no. 58 of 1998 (see paragraph 20 above). However, this was not decisive for the purposes of the applicability of Article 6 of the Convention in its criminal head, as the indications furnished by the domestic law have only a relative value (see *Öztürk v. Germany*, 21 February 1984, § 52, Series A no. 73, and *Menarini Diagnostics S.r.l.*, cited above, § 39).

96. As to the nature of the offence, it appears that the provisions which the applicants were accused of breaching were intended to guarantee the integrity of the financial markets and to maintain public confidence in the security of transactions. The Court reiterates that the CONSOB, an independent administrative body, has the task of protecting investors and ensuring the effectiveness, transparency and development of the stock markets (see paragraph 9 above). These are general interests of society, usually protected by criminal law (see, *mutatis mutandis*, *Menarini Diagnostics S.r.l.*, cited above, § 40; see also *Société Stenuit v. France*, report of the European Commission of Human Rights, 30 May 1991, § 62, Series A no. 232-A). In addition, the Court considers that the fines imposed were essentially intended to punish, in order to prevent repeat offending. They had therefore been based on rules whose purpose was both deterrent, namely to dissuade the applicants from resuming the activity in question, and punitive, since they punished unlawful conduct (see, *mutatis mutandis*, *Jussila*, cited above, § 38). Thus, they were not solely intended, as the Government claimed (see paragraph 91 above), to repair damage of a financial nature. In this respect, it should be noted that the penalties were imposed by the CONSOB on the basis of the gravity of the impugned conduct, and not of the harm caused to investors.

97. As to the nature and severity of the penalty which was "likely to be imposed" on the applicants (see *Ezeh and Connors v. the United*

Kingdom [GC], nos. 39665/98 and 40086/98, § 120, ECHR 2003-X), the Court, like the Government (see paragraph 90 above), notes that the fines in question could not be replaced by a custodial sentence in the event of non-payment (see, *a contrario*, *Anghel v. Romania*, no. 28183/03, § 52, 4 October 2007). However, the fine which the CONSOB was entitled to impose could go up to EUR 5,000,000 (see paragraph 20 above), and this ordinary maximum amount could, in certain circumstances, be tripled or fixed at ten times the proceeds or profit obtained through the unlawful conduct (see paragraph 53 above). Imposition of the above-mentioned pecuniary administrative sanctions entails the temporary loss of their honour for the representatives of the companies involved, and, if the latter are listed on the stock exchange, their representatives are temporarily forbidden from administering, managing or supervising listed companies for periods ranging from two months to three years. The CONSOB may also prohibit listed companies, management companies and auditing companies from engaging the services of the offender, for a maximum period of three years, and request professional associations to suspend, on a temporary basis, the individual's right to carry out his or her professional activity (see paragraph 54 above). Lastly, the imposition of financial administrative sanctions entails confiscation of the proceeds or profits of the unlawful conduct and of the assets which made it possible (see paragraph 56 above).

98. It is true that in the present case the maximum penalties were not imposed, the Turin Court of Appeal having reduced some of the fines imposed by the CONSOB (see paragraph 30 above), and no confiscations having been ordered. However, the criminal connotation of proceedings depends on the degree of severity of the penalty to which the person concerned is *a priori* liable (see *Engel and Others*, cited above, § 82), and not the severity of the penalty ultimately imposed (see *Dubus S.A.*, cited above, § 37). Furthermore, in the present case the applicants had ultimately received fines ranging from EUR 500,000 to 3,000,000, and Mr Gabetti, Mr Grande Stevens and Mr Marrone had been prohibited from administering, managing or supervising listed companies for periods ranging from two to four months (see paragraphs 25-26 and 30-31 above). This last penalty was such as to compromise the integrity of the persons concerned (see, *mutatis mutandis*, *Dubus S.A.*, *loc. ult. cit.*), and, given their amount, the fines were of undeniable severity and had significant financial implications for the applicants.

99. In the light of the above, and taking account of the severity of the fines imposed and of those to which the applicants were liable, the Court considers that the penalties in question, though their severity, were criminal in nature (see, *mutatis mutandis*, *Öztürk*, cited above, § 54, and, *a contrario*, *Inocêncio v. Portugal* (dec.), no. 43862/98, ECHR 2001-I).

100. Moreover, the Court also reiterates that, with regard to certain French administrative authorities which have jurisdiction in economic and

financial law and enjoy sentencing powers, it has held that the criminal limb of Article 6 applied, in particular, with regard to the Disciplinary Offences (Budget and Finance) Court (*Guisset v. France*, no. 33933/96, § 59, ECHR 2000-IX), the Financial Markets Board (*Didier v. France* (dec.), no. 58188/00, 27 August 2002), the Competition Commission (*Lilly France S.A. v. France* (dec.), no. 53892/00, 3 December 2002), the sanctions committee of the financial market supervisory authorities (*Messier v. France* (dec.), no. 25041/07, 19 May 2009), and the Banking Commission (*Dubus S.A.*, cited above, § 38). The same finding was made in respect of the Italian regulatory authority responsible for competition and the market (the AGCM – *Autorità Garante della Concorrenza e del Mercato*; see *Menarini Diagnostics S.r.l.*, cited above, § 44).

101. After noting and giving due weight to the various aspects of the case, the Court considers that the fines imposed on the applicants were criminal in nature, with the result that Article 6 § 1 is applicable in this case under its criminal head (see, *mutatis mutandis*, *Menarini Diagnostics S.r.l.*, *loc. ult. cit.*).

...

B. Merits

1. Whether the proceedings before the CONSOB were fair

(a) The parties' submissions

i. The applicants

106. The applicants alleged that the proceedings before the CONSOB had been essentially in written form, that no public hearing had been scheduled and that the rights of the defence were not respected. The Court of Cassation itself had acknowledged that the guarantees of a fair trial and protection of the rights of the defence (Articles 111 and 24 of the Constitution) did not apply to administrative proceedings (see paragraph 38 above).

107. The applicants submitted that CONSOB Resolutions no. 12697 of 2 August 2000 and no. 15086 of 21 June 2005 had *de facto* eliminated the principle of adversarial proceedings, which was, however, a requirement under Article187 *septies* of Legislative Decree no. 58 of 1998... As in the present case, those resolutions permitted non-communication to the defendant of the Directorate's conclusions, which then formed the basis of the decision taken by the Commission; in addition, the latter did not receive the pleadings submitted by the defendants during the investigation phase. Furthermore, the Commission ruled without hearing the defendants and without a public hearing, a fact which, in the present case, had prevented the applicants from addressing the Commission directly and from defending

themselves in relation to the Directorate's findings. Those findings had been important evidence, and familiarity with them would have enabled the applicants to detect inconsistencies in the investigation or to obtain relevant information for their defence. The Commission held only an internal meeting, in the course of which the sole individual questioned had been a civil servant from the IT Office (that is, from the body responsible for the "charge"). The applicants were not invited to the meeting and had not even been able to obtain a copy of its minutes.

108. The applicants also claimed that they had not been informed in good time of the new documents on which the IT Office's supplementary note had been based (see paragraph 23 above) and had not had the time and facilities necessary to defend themselves in relation to it. Those documents were allegedly brought to their attention at a late stage.

109. The applicants considered that the proceedings before the CONSOB did not guarantee a real separation between the investigative and decision-making phases, which, they alleged, was in breach of the principle of equality of arms. The investigation was indeed entirely subject to the power to give instructions enjoyed by the CONSOB's chairman, who had responsibility for a large number of investigative measures, including the wording of the accusation or accusations.

110. They submitted that, in the present case, the investigative activity had been unilateral and based on witness statements made in the absence of the accused or their counsel, who had not had an opportunity to question those witnesses or to be present when the various investigative measures were carried out. The applicants had been able to submit their respective pleadings only in writing.

ii. The Government

111. The Government argued that the CONSOB's IT Office had appended to its report all of the documents from the investigation, and thus also the defence pleadings submitted by the applicants. They also emphasised that the applicants had been given a thirty-day period in which to submit any observations on the IT Office's supplementary note of 19 October 2006, and that the applicants had submitted those observations on 24 November 2006 without making any complaint as to the limited time available to them. Furthermore, the applicants had never requested that witnesses be summoned and questioned; in the normal course of events, their presence served no purpose in the proceedings before the CONSOB, these being based on the acquisition of technical information and data. The technical nature of the offences justified the decision to resort to essentially written proceedings.

112. Bearing in mind the "administrative" nature of the proceedings before the CONSOB, the Government argued that their fairness could not be challenged on the sole ground that they had been conducted entirely in

writing. As administrative proceedings were not referred to in Article 6 of the Convention, the principles of a fair hearing could only be applied to them *mutatis mutandis*. The impugned proceedings had indeed been promoted by a concern to ensure respect for the rights of the defence, the adversarial principle and the principle that the accusation should correspond to the act that is punished. The applicants had had access to the investigation file, and the investigation and the decision-making process had been separated – the first stage had been under the jurisdiction of the IT Office and the Administrative Sanctions Directorate, while the second stage had been entrusted to the CONSOB's Commission.

113. In this connection, the Government emphasised that the letter accusing the applicants of a violation of Article 187 *ter* § 1 of Legislative Decree no. 58 of 1998 had not been signed by the CONSOB's chairman, but by the head of the markets and economic opinions division and by the director-general of institutional activities.

114. Once proceedings in respect of an offence had been opened, the persons concerned could exercise their defence rights by presenting written observations or by asking to be heard, first by the relevant office then by the Administrative Sanctions Directorate. Thus, as in the present case, such persons had an opportunity to submit observations concerning the elements constituting the offence and any other relevant circumstance, prior to examination of their case. The investigation took place in two stages (the first before the IT Office, the other before the Directorate), and the Office's report was transmitted not only to the Directorate, but also to the defendants, who could then submit to the Directorate their defence in relation to its content. The fact that the latter's conclusions had not been transmitted to the accused and that they were not heard in person by the Commission had no effect on the fairness of the proceedings.

115. The Government pointed out that even in judicial proceedings the accused was not entitled to discuss the penalty during the decision-making phase. Moreover, the maximum severity of those penalties was determined by the law, which also indicted the criteria to be respected in order to ensure that they were proportionate to the severity of the offences committed. Lastly, as the combined divisions of the Court of Cassation had acknowledged in judgment no. 20935 of 2009, Article 187 *septies* of Legislative Decree no. 58 of 1998 (governing the rights of the defence in the context of proceedings before the CONSOB) had been introduced into the Italian legal system specifically to ensure compliance with the requirements of the Convention.

(b) The Court's assessment

116. The Court is prepared to accept that, as the Government have emphasised, the proceedings before the CONSOB provided the accused with an opportunity to submit evidence in their defence. The accusation

drawn up by the IT Office was indeed communicated to the applicants, who were invited to defend themselves (see paragraphs 20 and 21 above). The applicants were also informed of the IT Office's report and supplementary note, and were given thirty days to submit any observations concerning the latter document (see paragraph 23 above). This deadline does not seem patently insufficient and the applicants did not ask for it to be extended.

117. Nonetheless, as the Government have acknowledged (see paragraph 114 above), the report containing the Directorate's conclusions, which was then to be used as the basis for the Commission's decision, was not communicated to the applicants, who were therefore unable to defend themselves in relation to the document ultimately submitted by the CONSOB's investigative bodies to the body responsible for ruling on the merits of the accusations. Further, the applicants did not have an opportunity to question or have questioned those persons who may have been heard by the IT Office.

118. The Court also notes that the proceedings before the CONSOB were essentially written and that the applicants were unable to take part in the only meeting held by the commission, to which they were not invited. This is not disputed by the Government. In this connection, the Court reiterates that an oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1 (see *Jussila*, cited above, § 40).

119. However, the obligation to hold a hearing is admittedly not absolute (see *Håkansson and Sturesson v. Sweden*, 21 February 1990, § 66, Series A no. 171-A) and there may be proceedings in which an oral hearing may not be required, for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials (see, for example, *Döry v. Sweden*, no. 28394/95, § 37, 12 November 2002; *Pursiheimo v. Finland* (dec.), no. 57795/00, 25 November 2003; *Jussila*, cited above, § 41; and *Suhadolc v. Slovenia* (dec.), no. 57655/08, 17 May 2011, in which the Court held that the lack of a public oral hearing created no appearance of a violation of Article 6 of the Convention, in a case concerning driving in excess of the speed limit and driving under the influence of alcohol, where the evidence against the accused had been obtained using technical devices).

120. While the requirements of a fair hearing are the strictest in the sphere of criminal law, the Court would not exclude that in the criminal sphere the nature of the issues to be dealt with before the tribunal or court may not require an oral hearing. Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight (see *Jussila*, cited above, § 43).

121. It must also be said that the fact that proceedings are of considerable personal significance to the applicant is not decisive for the necessity of a hearing (see *Pirinen v. Finland* (dec.), no. 32447/02, 16 May 2006). Nevertheless, refusing to hold an oral hearing may be justified only in rare cases (see *Miller v. Sweden*, no. 55853/00, § 29, 8 February 2005, and *Jussila*, cited above, § 42).

122. As to the present case, the Court considers that a public hearing, open and accessible to the applicants, was necessary. In this connection, the Court notes that the facts were contested, especially with regard to the state of progress in the negotiations with Merrill Lynch International Ltd, and that, quite apart from their financial severity, the penalties which some of the applicants were liable to incur carried, as previously noted (see paragraphs ..., 97 and 98 above), a significant degree of stigma, and were likely to adversely affect the professional honour and reputation of the persons concerned.

123. In the light of the foregoing, the Court considers that the proceedings before the CONSOB did not satisfy all of the requirements of Article 6 of the Convention, 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.

2. Whether the CONSOB was an independent and impartial tribunal

(a) The parties' submissions

i. The applicants

124. The applicants alleged that, on account of its structure and the powers enjoyed by its chairman, the CONSOB was not an "independent and impartial tribunal" within the meaning of Article 6 § 1 of the Convention.

125. They emphasised that the investigation phase in their case was carried out by the IT Office and by the Administrative Sanctions Directorate. Yet the CONSOB's chairman was called upon to supervise that phase before chairing the Commission proper, in other words the body responsible for imposing the penalties. There was therefore no clear separation between the investigation and the decision-making stages, and this dual role fulfilled by the chairman could create objectively justified doubts as to his impartiality. The same was true with regard to the other members of the Commission, who had learned of the facts only through the chairman and solely on the basis of the version given by the Directorate, to which the defence pleadings submitted by the accused had not been joined. Lastly, the bodies responsible for the investigation had not been independent in relation to the CONSOB's senior hierarchy.

126. Under CONSOB Resolution no. 15087 of 21 June 2005, the chairman was at the summit of the Commission: he applied penalties,

supervised the preliminary investigation and authorised the use of investigative powers. He could order inspections or other investigative measures, and in consequence he could not be considered as a "neutral" and impartial judge.

ii. The Government

127. The Government noted that the CONSOB was made up of a chairman and four members, selected from independent persons who had specific skills and appropriate moral qualities. At the relevant time its members were elected for a period of five years and their term of office could be renewed only once. During their term of office, those members were not permitted to exercise any other professional or business activities or to hold any other public office.

128. The CONSOB was independent from any other authority and, in particular, from the executive. It could use its budget autonomously and adopt resolutions concerning the career and conditions of employment of its staff. The decision-making body (the Commission) was separate from the investigative bodies (the Office and the Directorate).

129. Although he was responsible for supervising the various offices and had certain powers of initiative during the investigation (in particular he could authorise inspections and ask that various investigative measures be carried out, such as obtaining data on telephone communications and seizing property), the CONSOB's chairman could never interfere in the investigations concerning a given case, which were carried out by the relevant office and by the Directorate. Nor, conversely, did the department and the Directorate play any role in adoption of the final decision. The CONSOB's chairman was responsible for supervising the general criteria which the offices had to comply with in carrying out investigations. He could not take part in assessing the merits of a case on the basis of the evidence obtained, or influence the results of the investigation. His or her duties were comparable to that of the president of a court.

130. The power to open misconduct proceedings and to bring charges lay exclusively with the head of the relevant division, who acted in complete independence and with full discretion. As to the inspections, these were investigative measures intended to obtain information. They were assessed in turn by the relevant offices. Indeed, in the present case, the chairman of the CONSOB had neither authorised the inspections nor asked that investigative measures be taken. The final decision on a seizure of property – which had not been ordered in the present case – lay with the Commission, and required a favourable opinion from the prosecutor's office, issued at the request of the CONSOB's chairman. In any event, it was an interim measure aimed at guaranteeing the solvency of defendants or depriving them of assets used to commit offences. The decision on seizure of property in no way prejudged the decisions concerning the merits of the

accusations or the penalties. Even in the context of judicial proceedings, it was accepted that a procedural decision which did not imply any judgment on a suspect's guilt or innocence (such as, for example, an order to remand a person in custody) did not amount to a ground for subsequent doubts as to the impartiality of the court which had issued it.

131. Lastly, the Government noted that in the present case, there had been no conflict of interests between the CONSOB's staff, the members of the Commission and the applicants.

(b) The Court's assessment

132. The Court reiterates its well-established case-law to the effect that, in order to establish whether a tribunal can be considered "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 190, ECHR 2003-VI).

133. Having regard to the manner and conditions of appointment of the members of the CONSOB, and in the absence of any indication of a lack of sufficient and adequate safeguards against possible extraneous pressure, Court considers that there is no reason to doubt the CONSOB's independence with regard to any other power or authority, and especially with regard to the executive. In this respect, it endorses the Government's observations regarding the CONSOB's autonomy and the safeguards surrounding the appointment of its members (see paragraphs 127 and 128 above).

134. The Court further reiterates the general principles governing the steps to assess the impartiality of a "tribunal", which are set out, *inter alia*, in the following judgments: *Padovani v. Italy*, 26 February 1993, § 20, Series A no. 257-B; *Thomann v. Switzerland*, 10 June 1996, § 30, *Reports of Judgments and Decisions* 1996-III; *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 58, *Reports* 1996-III; *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports* 1998-VIII; *Wettstein v. Switzerland*, no. 33958/96, § 44, ECHR 2000-XII; *Morel v. France*, no. 34130/96, § 42, ECHR 2000-VI; and *Cianetti v. Italy*, no. 55634/00, § 37, 22 April 2004.

135. As regards the subjective aspect of the CONSOB's impartiality, the Court notes that nothing in the present case pointed to any prejudice or bias on the part of its members. The mere fact that they took decisions against the applicants cannot in itself cast doubt on their impartiality (see, *mutatis mutandis*, *Previti v. Italy* (dec.), no. 1845/08, § 53, 12 February 2013). It follows that the Court cannot but presume the personal impartiality of the CONSOB's members, including its chairman.

136. As to the objective impartiality, the Court notes that the CONSOB's regulations provide for a certain separation between the

investigative entities and the entity with responsibility for determining whether an offence had been committed and imposing penalties. In particular, the accusation is drawn up by the IT Office, which also carries out the investigations; the results are then summarised in the Directorate's report, which contains conclusions and proposed penalties. The final decision on imposing penalties lies solely with the Commission.

137. It is nevertheless the case that the IT Office, the Directorate and the Commission are merely branches of the same administrative body, acting under the authority and supervision of a single chairman. In the Court's opinion, this amounts to the consecutive exercise of investigative and judicial functions within one body; in criminal matters such a combination of functions is not compatible with the requirements of impartiality set out in Article 6 § 1 of the Convention (see, in particular and *mutatis mutandis*, *Piersack v. Belgium*, 1 October 1982, §§ 30-32, Series A no. 53, and *De Cubber v. Belgium*, 26 October 1984, §§ 24-30, Series A no. 86, in which the Court concluded that the "tribunal" had lacked objective impartiality, in the first case on the ground that an assize court had been presided over by a judge who had previously acted as head of the section of the Brussels public prosecutor's department which had been responsible for dealing with the accused's case; and, in the second, on account of the successive exercise of the functions of investigating judge and trial judge by one and the same person in one and the same case).

3. Whether the applicants had had access to a court with full jurisdiction

138. The above findings concerning the CONSOB's lack of objective impartiality and the fact that the proceedings before it did not comply with the principles of a fair hearing are not, however, sufficient to warrant the conclusion that there has been a violation of Article 6 in this case. In this connection, the Court observes that the penalties complained of by the applicants were not imposed by a court at the close of adversarial judicial proceedings, but by an administrative authority, namely the CONSOB. While entrusting the prosecution and punishment of similar minor offences to such authorities is not inconsistent with the Convention, the person concerned must have an opportunity to challenge any decision made against him or her before a tribunal which offers the guarantees of Article 6 (see *Kadubec v. Slovakia*, 2 September 1998, § 57, *Reports* 1998-VI; *Čanády v. Slovakia*, no. 53371/99, § 31, 16 November 2004; and *Menarini Diagnostics S.r.l.*, cited above, § 58).

139. Therefore, in administrative proceedings, the obligation to comply with Article 6 of the Convention does not preclude a "penalty" being imposed by an administrative authority in the first instance. For this to be possible, however, decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6 § 1 of the Convention

must be subject to subsequent control by a judicial body that has full jurisdiction (see *Schmautzer, Umlauft, Gradinger, Pramstaller, Palaoro and Pfarrmeier v. Austria*, judgments of 23 October 1995, §§ 34, 37, 42 and 39, 41 and 38 respectively, Series A nos. 328 A-C and 329 A-C). The characteristics of a judicial body with full jurisdiction include the power to quash in all respects, on questions of fact and law, the decision of the body below. It must have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see *Chevrol v. France*, no. 49636/99, § 77, ECHR 2003-III; *Silvester's Horeca Service v. Belgium*, no. 47650/99, § 27, 4 March 2004; and *Menarini Diagnostics S.r.l.*, cited above, § 59).

140. In the present case, the applicants had the possibility, which they used, of challenging the penalties imposed by the CONSOB before the Turin Court of Appeal and then to appeal on points of law against the judgments delivered by the latter court. It remains to be established whether those two courts were "judicial bodies with full jurisdiction" within the meaning of the Court's case-law.

(a) The parties' submissions

i. The applicants

141. According to the applicants, the subsequent proceedings before the Turin Court of Appeal and the Court of Cassation had not remedied the shortcomings in the proceedings before the CONSOB. Although the court of appeal could be considered a judicial body with full jurisdiction, the fact remained that its hearings had not been held in public. Yet a derogation from the principle that hearings should be held in public could be considered justifiable only in exceptional circumstances (they referred, in particular, to *Vernes v. France*, no. 30183/06, § 30, 20 January 2011).

142. The applicants contended, in particular, that the proceedings before the court of appeal had not been ordinary proceedings, but special proceedings in which the hearing had taken place in private. In support of their claims, they submitted declarations signed by the administrative director of the Registry of the First Civil Division of the Turin Court of Appeal, stating that the hearings in their case had been held in private. During those hearings, only the counsel for the accused had been present; the applicants had not been summoned, and the court of appeal had questioned neither the accused nor any witnesses. It had carried out no investigations, and had merely endorsed the evidence gathered by the CONSOB. Admittedly, the Government had submitted statements from the President of the First Section of the Court of Appeal, claiming that the hearings in question had in reality indeed been held in public (see paragraph 145 below). It was nonetheless the case that those statements could not contradict the content of public documents, such as the judgments delivered by the court of appeal, which indicated that the parties had been

summoned to a private hearing and which attested the facts which they recorded until forgery was proved. Yet the Government had not brought proceedings for forgery and, in any event, the President of the First Section of the Court of Appeal had merely passed on the content of statements made by others, without recounting any event of which he had had direct knowledge.

143. It was true that a public hearing had been held before the Court of Cassation. However, the latter was not a body with full jurisdiction, since it did not deal with the merits of the case and was not called upon to express an opinion on the merits of the accusation or the relevance and cogency of the evidence. It had therefore dismissed all of the arguments submitted by the applicants in order to challenge the manner in which the CONSOB or the court of appeal had assessed the evidence.

ii. The Government

144. The Government noted that the applicants had had access to oral and public proceedings before the Turin Court of Appeal, which had re-examined on the merits all of the evidence and information gathered by the CONSOB with regard to the particular circumstances of the impugned conduct, thus enabling it to assess the proportionality of the penalties. The court of appeal enjoyed very wide powers with regard to the taking of evidence, even of its own motion, and could have set aside or amended the CONSOB's decision. The applicants could have requested that witnesses be questioned, or could have asked to be heard in person; yet they had submitted no requests to that effect. At the close of the judicial proceedings, the court of appeal had altered the CONSOB's assessment, and had reduced the penalties imposed on three of the five applicants.

145. The Government submitted that the applicants' claim that their case had not been examined in a public hearing before the Turin Court of Appeal was false. Pursuant to section 23 of Law no. 689 of 1981, all of the hearings held before that court were open to the public. As to the statements signed by the Administrative Director of the Registry of the First Section of the Court of Appeal and submitted by the applicants (see paragraph 142 above), the Government argued that they did not reflect the reality of the situation. In counter-argument, they produced five statements signed by the President of the First Section of the Turin Court of Appeal and by the Administrative Director of the same Section, stating that, in the five sets of proceedings concerning the applicants and challenging the penalties imposed by the CONSOB, only the hearings concerning the urgent measures (*sub procedimento cautelare*) had been held in private, all of the other hearings having been public. In those statements, dated 6 September 2013, the President of the First Section of the Court of Appeal indicated that, at the relevant time, he had not been assigned to that body (he had taken up his duties on 1 March 2013), but that he had been able to reconstitute the

sequence of events by examining the registers and case files, and on the basis of information provided directly by the staff of the registry and by the judges who had dealt with the cases in question. In particular, the applicants' cases had been added to the list of non-contentious cases (*registro volontaria giurisdizione*). Further, Law no. 62 of 18 April 2005 stated that proceedings in respect of Article 187 of Legislative Decree no. 58 of 1998 were to be held in accordance with the conditions laid down in section 23 of Law no. 689 of 1981 (which did not provide for the holding of a hearing in private). Although the applicants' cases had remained on the list of non-contentious cases, the procedure followed had been that required by Law no. 62 of 2005.

146. On the basis of those statements, the Government claimed that on 6 March 2007 the applicants had requested that execution of the CONSOB's decision be stayed (Article 187 *septies* § 5 of Legislative Decree no. 58 of 1998). In the context of these sub-proceedings for the application of urgent measures, a hearing had been held on 28 March 2007; it had been held in private, as provided for by Articles 283 and 351 of the Code of Civil Procedure. A hearing on the merits had subsequently been held on 11 July 2007; in accordance with section 23 of Law no. 689 of 1981, that hearing was held in public. Furthermore, two of the judgments issued by the court of appeal (specifically those against Mr Marrone and the company Giovanni Agnelli S.a.s.) referred to "the public hearing" set for 11 July 2007. The following hearings on the merits of the cases (namely those of 7 November and 5 December 2007) were also public.

147. The Government also emphasised that the applicants had had the opportunity to appeal on points of law, and that the case was then referred to the combined divisions. Before those divisions, there was an oral and public procedure, which fully complied with the rights of the defence, and which concerned both the interpretation and application of the substantive and procedural law (*errores in iudicando and in procedendo*) and the coherence and adequacy of the reasons put forward by the court of appeal. The Government referred, in particular, to the case of *Menarini Diagnostics S.r.l.* (judgment cited above), in which the Court concluded that there had been no violation of Article 6 § 1 of the Convention, noting that the review of the contested administrative penalty by the administrative court and the *Consiglio di Stato* had indeed been conducted by courts with full jurisdiction to examine all aspects of the case. In the Government's opinion, there was all the more reason to reach the same conclusion in the present case, where the powers of the court of appeal had been wider than those of the administrative court and the *Consiglio di Stato*.

(b) The Court's assessment

148. The Court notes at the outset that there is nothing in the present case to cast doubt on the independence and impartiality of the Turin Court of Appeal. Indeed, the applicants do not contest it.

149. The Court further observes that the court of appeal had jurisdiction to rule, in respect of both law and fact, on whether the offence set out in Article 187 *ter* of Legislative Decree no. 58 of 1998 had been committed, and was authorised to set aside the decision taken by the CONSOB. It was also called upon to assess the proportionality of the imposed penalties to the seriousness of the alleged conduct. In fact, it reduced the amount of the fines and the length of the ban on exercising their profession imposed on certain of the applicants (see paragraphs 30 and 31 above) and examined their various factual or legal allegations (see paragraphs 32-36 above). Thus, its jurisdiction was not merely confined to reviewing lawfulness.

150. It is true that the applicants complained about the fact that the court of appeal did not question witnesses (see paragraph 142 above). However, they did not indicate any procedural rule which would have prevented such questioning. In addition, the request for questioning of witnesses, made by Mr Grande Stevens in his pleadings of 25 September 2007, did not indicate either the names of the persons whom he wished to have summoned, or the events about which they were to provide evidence. In addition, that request was made on a purely hypothetical basis, for examination only if the court of appeal held that the documents already included in the case file were insufficient or unusable. This also holds in respect of the request made by Mr Marrone, who raised the possibility of questioning the witnesses from whose statements he quoted only "if necessary" (see paragraph 29 above). In any event, before the Court the applicants have not identified the witnesses whom the court of appeal allegedly refused to question and the reasons why their evidence would have been decisive for the outcome of the case. They have not therefore substantiated their complaint under Article 6 § 3 (d) of the Convention**.**

151. In the light of the above considerations, the Court considers that the Turin Court of Appeal was indeed a "body with full jurisdiction" within the meaning of its case-law (see, *mutatis mutandis*, *Menarini Diagnostics S.r.l.*, cited above, §§ 60-67). The applicants themselves do not seem to contest this (see paragraph 141 above).

152. It remains to be established whether the hearings on the merits held before the Turin Court of Appeal were public, a factual matter on which the parties' submissions differ (see paragraphs 142 and 145-146 above). In this connection, the Court cannot but reiterate its conclusions concerning the necessity, in the present case, of a public hearing (see paragraph 122 above).

153. The Court notes that the parties submitted contradictory documents with regard to the manner in which the disputed hearings were conducted; according to the written statements from the Administrative Director of the

Registry of the Turin Court of Appeal, submitted by the applicants, those hearings were held in private, although – according to the written statements of the President of the Court of Appeal, submitted by the Government – only the hearings which concerned the urgent measures were held in private, all of the other hearings having been public. The Court is hardly in a position to state which of these two versions is correct. Whatever the case, faced with these two versions, both of which are plausible and which come from competent but opposing sources, the Court considers that it should not depart from the content of the official documents in the proceedings. As the applicants have righty emphasised (see paragraph 142 above), the judgments delivered by the court of appeal indicate that it met in private or that the parties had been summoned to deliberations held in private (see paragraph 30 *in fine* above).

154. On the basis of these references, the Court accordingly concludes that no public hearing was held before the Turin Court of Appeal.

155. It is true that a public hearing was held before the Court of Cassation. However, the latter did not have jurisdiction to examine the merits of the case, to establish the facts and to assess the evidence; indeed, the Government do no contest this. It could not therefore be considered as a court with full jurisdiction within the meaning of the Court's case-law.

4. The applicants' other allegations

156. The applicants also claimed that the press releases of 24 August 2005 contained truthful information and that their conviction in spite of the defence evidence included in the file resulted from a "presumption of guilt" against them. In their opinion, they had been under no obligation in those press releases to describe mere plans or hypothetical agreements which had not yet been finalised. Moreover, the CONSOB's published instructions specified that information for possible dissemination to the public ought to be tied to real circumstances or a specific event, and not to mere hypotheses as to future and possible actions, which were not of interest for the markets. Yet, at the date on which the press releases were disseminated, no tangible initiative had been undertaken by the applicant companies in relation to expiry of the convertible loan. At the relevant time the envisaged scenario was uncertain, since it was still subject to approval by Merrill Lynch International Ltd and the possibility that there would be no obligation to launch a takeover bid. A CONSOB official had participated in drawing up one of the press releases, and the text in question had received the CONSOB's prior agreement.

157. Despite that, the applicants considered that the CONSOB had drawn up its accusations on the basis of the arbitrary presumption that the agreement amending the equity swap contract had been concluded prior to 24August 2005, in spite of the absence of any written or oral evidence to

corroborate that presumption. According to the applicants, they had been convicted without any evidence to that effect.

158. The Court reiterates that it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V), and that, as a rule, it is for the national courts to assess the evidence before them (see *Pacifico v. Italy* (dec.), no. 17995/08, § 62, 20 November 2012). Yet the Court has examined the decisions of the national courts that are contested by the applicants without discerning any signs of arbitrariness that would reveal a denial of justice or a manifest abuse (see, *a contrario*, *De Moor v. Belgium*, 23 June 1994, § 55 *in fine*, Series A no. 292-A, and *Barać and Others v. Montenegro*, no. 47974/06, § 32, 13 December 2011).

159. The Court also reiterates that the principle of the presumption of innocence requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him (see, *inter alia*, *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 77, Series A no. 146; *John Murray v. the United Kingdom*, 8 February 1996, § 54, *Reports* 1996-I; and *Telfner v. Austria*, no. 33501/96, § 15, 20 March 2001).

160. In the present case, the judgment convicting the applicants was delivered on the basis of inferences held to be strong, clear and concordant, submitted by the IT Office, and which indicated that at the time of issuing the press releases of 24 August 2005, the agreement amending the equity swap had been concluded or was about to be concluded. In these circumstances, no appearance of a violation of the principle of the presumption of innocence can be found (see, *mutatis mutandis*, *Previti v. Italy* (dec.), no. 45291/06, § 250, 8 December 2009).

6. Conclusion

161. In the light of the above considerations, the Court considers that, although the proceedings before the CONSOB did not met the requirements of fairness and objective impartiality set out in Article 6 of the Convention, the applicants' case was subsequently reviewed by an independent and impartial body with full powers, specifically the Turin Court of Appeal. However, the latter did not hold a public hearing, which, in the present case, amounted to a violation of Article 6 § 1 of the Convention.

...

V. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 7

202. The applicants submitted that there had been a violation of the *ne bis in idem* principle, as guaranteed by Article 4 of Protocol No. 7.

That provision reads as follows:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
>
> 3. No derogation from this Article shall be made under Article 15 of the Convention."

203. The Government contested that argument.

A. Admissibility

1. Reservation by Italy in respect of Article 4 of Protocol No. 7

204. The Government noted that Italy had made a declaration to the effect that Articles 2 to 4 of Protocol No. 7 applied only to offences, procedures and decisions classified as criminal under Italian law. Yet Italian law did not classify the offences penalised by the CONSOB as criminal in nature. Furthermore, Italy's declaration was similar to those made by other States (in particular, Germany, France and Portugal).

205. The applicants responded that Article 4 of Protocol No. 7, to which no derogation is permitted under Article 15 of the Convention, concerned a right falling within European public order. In their opinion, the declaration made by Italy when depositing the instrument of ratification of Protocol No. 7 did not have the scope of a reservation within the meaning of Article 57 of the Convention, which did not permit reservations of a general character. In addition, the declaration in question was not attached to "a law" in force at the time it was prepared and did not contain "a brief statement" of that law. The declaration did therefore have any impact on Italy's obligations.

206. The Court observes that the Government have alleged that a reservation has been made regarding the application of Articles 2 to 4 of Protocol No. 7 (see paragraph 204 above). Apart from the applicability of the reservation, the Court has to examine its validity. In other words, it must determine whether the reservation satisfies the requirements of Article 57 of the Convention (see *Eisenstecken v. Austria*, no. 29477/95, § 28, ECHR 2000-X).

That provision reads as follows:

> "1. Any State may, when signing [the] Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
>
> 2. Any reservation made under this article shall contain a brief statement of the law concerned."

207. The Court reiterates that, in order to be valid, a reservation must satisfy the following conditions: (1) it must be made at the time the Convention is signed or ratified; (2) it must relate to specific laws in force at the time of ratification; (3) it must not be a reservation of a general character; (4) it must contain a brief statement of the law concerned (see *Põder and Others v. Estonia* (dec.), no. 67723/01, ECHR 2005-VIII, and *Liepājnieks v. Latvia* (dec.), no. 37586/06, § 45, 2 November 2010).

208. The Court has had occasion to specific that Article 57 § 1 of the Convention requires "precision and clarity" from the Contracting States, and that in requiring that a reservation is to contain a brief statement of the law concerned, this provision is not a "purely formal requirement" but sets out "a condition of substance which constitutes an evidential factor and contributes to legal certainty" (see *Belilos v. Switzerland*, 29 April 1988, §§ 55 and 59, Series A no. 132; *Weber v. Switzerland*, 22 May 1990, § 38, Series A no. 177; and *Eisenstecken*, cited above, § 24).

209. By "reservation of a general character" in Article 57 is meant, in particular, a reservation couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope. The wording of the declaration must enable the scope of the Contracting State's undertaking to be ascertained, in particular as to which categories of dispute are included, and must not lend itself to different interpretations (see *Belilos*, cited above, § 55).

210. In the present case, the Court notes that the reservation in question does not contain a "brief statement" of the law or laws which were allegedly incompatible with Article 4 of Protocol No. 7. It can be inferred from the wording of the reservation that Italy intended to exclude from the scope of that provision all offences and proceedings which were not classified as "criminal" under Italian law. However, a reservation which does not refer to or mention those specific provision of the Italian legal order which exclude offences or proceedings from the scope of Article 4 of Protocol No. 7 does not afford to a sufficient degree a guarantee that [it] does not go beyond the provision expressly excluded by the Contracting State (see, *mutatis mutandis*, *Chorherr v. Austria*, 25 August 1993, § 20, Series A no. 266-B; *Gradinger v. Austria*, 23 October 1995, § 51, Series A no. 328-C; and *Eisenstecken*, cited above, § 29; see also, in contrast, *Kozlova and Smirnova v. Latvia* (dec.), no. 57381/00, ECHR 2001-XI). In this respect, the Court

reiterates that even significant practical difficulties in indicating and describing all of the provisions concerned by the reservation cannot justify a failure to comply with the conditions set out in Article 57 of the Convention (see *Liepājnieks*, decision cited above, § 54).

211. Consequently, the reservation relied on by Italy does not meet the requirements of Article 57 § 2 of the Convention. This conclusion is a sufficient basis for finding the reservation invalid, without it being necessary to examine further whether there has been compliance with the other requirements of Article 57 (see, *mutatis mutandis*, *Eisenstecken*, cited above, § 30).

...

B. Merits

1. The parties' submissions

(a) The applicants

213. The applicants pointed out that they had been subjected to a criminal penalty following the proceedings before the CONSOB, and that they had been subjected to criminal proceedings for the same facts.

214. As to the issue of whether the proceedings before the CONSOB and the criminal proceedings concerned the same "offence", the applicants pointed to the principles laid down by the Grand Chamber in the case of *Sergey Zolotukhin v. Russia* ([GC], no. 14939/03, 10 February 2009), in which the Court concluded that it is prohibited to prosecute a person for a second "offence" in so far as it arose from identical facts or facts which were substantially the same. In their opinion, this had clearly been the case in their respect.

In this connection, the applicants stated that although the ECJ had admittedly specified that Article 50 of the Charter of Fundamental Rights did not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value-added tax, a tax penalty and a criminal penalty, this was on condition that the first penalty was not criminal in nature (see *Åklagaren v. Hans Åkerberg Fransson*, judgment cited above, point 1 of the operative provisions); in their opinion, however, this condition was absent in the present case, since, whatever their formal classification in Italian law, the penalties imposed by the CONSOB were indeed criminal in nature within the meaning of the Court's case-law.

(b) The Government

215. Referring to the arguments developed under Article 6 of the Convention, the Government submitted, firstly, that the proceedings before

the CONSOB did not concern a "criminal charge" and that the CONSOB's decision had not been "criminal" in nature.

216. Moreover, European Union law had explicitly authorised the use of a double penalty (administrative and criminal) in the context of the fight against illegal conduct on the financial markets. Such use was part of the constitutional traditions common to the Member States, particularly in areas such as taxation, environmental policies and public safety. In the light of this, and of the fact that some States had not ratified Protocol No. 7 or had made declarations in respect of it, it was possible to affirm that the Convention did not guarantee the principle of *ne bis in idem* in the same manner as was the case for other fundamental principles. Accordingly, it was not correct to consider that the imposition of a final administrative penalty prevented the bringing of a criminal prosecution. In this connection, the Government referred to the opinion expressed before the ECJ by the Advocate General in his conclusions of 12 June 2012 in the above-cited case of *Åklagaren v. Hans Åkerberg Fransson*.

217. In any event, the pending criminal proceedings against the applicants did not concern the same offence as that which had been punished by the CONSOB. There was a clear distinction between the offences set out in Articles 187 *ter* and 185 respectively of Legislative Decree no. 58 of 1998, since only the second required the existence of malicious intent (mere negligence not being sufficient) and of the possibility that the false or misleading information disseminated could trigger a significant shift in the financial markets. Moreover, only the criminal procedure could result in the imposition of punishments involving a custodial sentence. The Government referred to the case of *R.T. v. Switzerland* ((dec.), no. 31982/96, 30 May 2000), in which the Court stated that the imposition of penalties by two different bodies (one administrative, the other criminal) had not been incompatible with Article 4 of Protocol No. 7. In this regard, the fact that one and the same conduct could breach both Article 187 *ter* and Article 185 of Legislative Decree no. 58 of 1998 was not relevant, since the case concerned a typical example of a single act constituting various offences, the characteristic feature of this notion being that a single criminal act was split up into two separate offences (they referred to *Oliveira v. Switzerland*, no. 25711/94, § 26, 30 July 1998; *Goktan v. France*, no. 33402/96, § 50, 2 July 2002; *Gauthier v. France* (dec.), no. 61178/00, 24 June 2003; and *Ongun v. Turkey* (dec.), no. 15737/02, 10 October 2006).

218. Lastly, it was to be noted that, in order to ensure the proportionality of the penalty to the accusations, the criminal court was able to take into account the prior imposition of an administrative penalty and to reduce the criminal penalty. In particular, the amount of the administrative fine was deducted from the criminal financial penalty (Article 187 *terdecies* of

Legislative Decree no. 58 of 1998) and assets already seized in the context of the administrative proceedings could not be confiscated.

2. The Court's assessment

219. The Court reiterates that in the case of *Sergey Zolotukhin* (cited above, § 82), the Grand Chamber specified that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from facts which are substantially the same.

220. The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*. At this juncture the available material will necessarily comprise the decision by which the first "penal procedure" was concluded and the list of accusations levelled against the applicant in the new proceedings. Normally these documents would contain a statement of facts concerning both the offence for which the applicant has already been tried and the offence of which he or she stands accused. In the Court's view, such statements of fact are an appropriate starting point for its determination of the issue whether the facts in both proceedings were identical or substantially the same.

It is irrelevant which parts of the new accusations are eventually upheld or dismissed in the subsequent proceedings, because Article 4 of Protocol No. 7 contains a safeguard against being tried or being liable to be tried again in new proceedings rather than a prohibition on a second conviction or acquittal (see *Sergey Zolotukhin*, cited above, § 83).

221. The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings (see *Sergey Zolotukhin*, cited above, § 84).

222. Applying those principles to the case at hand, the Court notes, firstly, that it has just concluded, under Article 6 of the Convention, that there existed valid grounds for considering that the procedure before the CONSOB involved a "criminal charge" against the applicants (see paragraph 101 above) and also observes that the sentences imposed by the CONSOB and partly reduced by the court of appeal constituted *res judicata* on 23 June 2009, when the judgments of the Court of Cassation were delivered (see paragraph 38 above). From that date, the applicants ought therefore to be considered as having been "already finally convicted of an offence" for the purposes of Article 4 of Protocol No. 7.

223. Despite this, the new set of criminal proceedings which had been brought against them in the meantime (see paragraphs 39-40 above) were not closed and resulted in judgments being delivered at first and second instance.

224. It remains to be ascertained whether those new proceedings were based on facts which were substantially the same as those which had been the subject of the final conviction. In this regard, the Court notes that, contrary to what the Government seem to be asserting (see paragraph 217 above), it follows from the principles set out in the case of *Sergey Zolotukhin*, cited above, that the question to be answered is not whether or not the elements of the offences set out in Articles 187 *ter* and 185 § 1 of Legislative Decree No. 58 of 1998 are identical, but whether the offences with which the applicants were charged before the CONSOB and before the criminal courts concerned the same conduct.

225. Before the CONSOB, the applicants were essentially accused of having failed to mention in the press releases of 24 August 2005 the plan to renegotiate the equity swap contract with Merrill Lynch International Ltd, although that plan already existed and was at an advanced stage of preparation (see paragraphs 20 and 21 above). They were subsequently punished for this by the CONSOB and by the Turin Court of Appeal (see paragraphs 27 and 35 above).

226. Before the criminal courts, the applicants were accused of having stated, in those same press releases, that Exor had neither instituted nor examined initiatives concerning the expiry of the financing agreement, although the agreement amending the equity swap had already been examined and concluded, information that was kept secret in order to avoid a probable fall in the FIAT share price (see paragraph 40 above).

227. In the Court's opinion, these proceedings clearly concerned the same conduct by the same persons on the same date. Moreover, the Turin Court of Appeal itself, in its judgments of 23 January 2008, admitted that Articles 187 *ter* and 185 § 1 of Legislative Decree No. 58 of 1998 concerned the same conduct, namely the dissemination of false information (see paragraph 34 above). It follows that the new set of proceedings concerned a second "offence" originating in identical acts to those which had been the subject-matter of the first, and final, conviction.

228. This finding is sufficient to conclude that there has been a breach of Article 4 of Protocol No. 7.

229. Moreover, in so far as the Government submit that European Union law has explicitly authorised the use of a double penalty (administrative and criminal) in the context of combatting unlawful conduct on the financial markets (see paragraph 216 above), the Court, while specifying that its task is not to interpret the case-law of the ECJ, notes that in its judgment of 23 December 2009 in the case of *Spector Photo Group*, the ECJ indicated that Article 14 of Directive no. 2003/6 does not oblige the Member States to provide for criminal sanctions against authors of insider dealing, but merely states that those States are required to ensure that administrative sanctions are imposed against the persons responsible where there has been a failure to comply with the provisions adopted in implementation of that directive. It

also drew the States' attention to the fact that such administrative sanctions may, for the purposes of the application of the Convention, be qualified as criminal sanctions (see paragraph 61 above). Further, in its *Åklagaren v. Hans Åkerberg Fransson* judgment, on the subject of value-added tax, the ECJ stated that, under the *ne bis in idem* principle, a State can only impose a double penalty (fiscal and criminal) in respect of the same facts if the first penalty is not criminal in nature (see paragraph 92 above).

VI. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

230. 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."

231. The relevant parts of Article 46 of the Convention read as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution...

A. Indication of general and individual measures

1. General principles

232. Any judgment in which the Court finds a breach imposes on the respondent State a legal obligation under Article 46 of the Convention to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order (see *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; *Assanidze v. Georgia* [GC], no. 71503/01, § 198, ECHR 2004-II; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 487, ECHR 2004-VII).

233. The Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose,

subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, *inter alia*, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; and *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV). This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (see *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B).

234. However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a systemic situation it has found to exist. In such circumstances, it may propose various options and leave the choice of measure and its implementation to the discretion of the State concerned (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V). In certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate a specific measure (see, for example, *Assanidze*, cited above, §§ 202 and 203; *Alexanian v. Russia*, no. 46468/06, § 240, 22 December 2008; *Fatullayev v. Azerbaijan*, no. 40984/07, §§ 176 and 177, 22 April 2010; and *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 208, 9 January 2013).

2. Application of these principles in the present case

235. In the particular circumstances of the present case, the Court does not consider it necessary to indicate general measures that the State ought to adopt for the execution of the present judgment.

236. In contrast, as regards individual measures, the Court considers that in the present case the nature of the violation found is such as to leave no real choice as to the measures required to remedy it.

237. In these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Article 4 of Protocol No. 7 (see paragraph 228 above), the Court considers that the respondent State must ensure that the new set of criminal proceedings brought against the applicants in violation of that provision and which, according to the most recent information received, are still pending, are closed as rapidly as possible and without adverse consequences for the applicants (see, *mutatis mutandis*, *Assanidze*, cited above, § 203, and *Oleksandr Volkov*, cited above, § 208).

...

FOR THESE REASONS, THE COURT

...

2. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention;

...

5. *Holds*, unanimously, that there has been a violation of Article 4 of Protocol No. 7;

6. *Holds*, unanimously, that the respondent State must ensure that the new criminal proceedings, opened against the applicants in violation of Article 4 of Protocol No. 7 and which, according to the most recent information received, are still pending in respect of Mr Gabetti and Mr Grande Stevens, are closed as rapidly as possible (see paragraph 237 above);

...

Done in French, and notified in writing on 4 March 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Işıl Karakaş
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly concurring and partly dissenting opinion of Judges Karakaş and Pinto de Albuquerque is annexed to the present judgment.

A.I.K.
S.H.N.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGES KARAKAŞ AND PINTO DE ALBUQUERQUE

1. In the Grande Stevens and Others case the Court is again confronted with the major problem of the judicial review of pecuniary and non-pecuniary administrative sanctions imposed by Italian administrative authorities[1]. The importance of the case derives not only from the complex nature of the various procedural shortcomings that plagued both the administrative and judicial proceedings, leading to the imposition of clearly disproportionate administrative sanctions, but also from the subsequent prosecution and punishment of certain of the applicants in new criminal proceedings in respect of the same facts that had been the subject matter of the previous administrative proceedings. Given that several other European jurisdictions face similar problems, the repercussions of this case go far beyond the limits of the Italian legal system.

2. We concur with the majority in finding that Article 6 in its penal limb is applicable both to the administrative proceedings and the judicial procedure established in Article 187 septis of the TUF (the Consolidated Finance Act, referred to in the judgment as Legislative Decree no. 58 of 24 February 1998) and section 23 of Law no. 689 of 24 November 1981, as well as to the ensuing penalties imposed on the applicants under Article 187 ter of the TUF, that the administrative proceedings before the Commissione Nazionale per la Società e la Borsa (the CONSOB) were not fair, and that the subsequent proceedings before the court of appeal and the Court of Cassation did not remedy this unfairness. In our view, the finding that no effective remedy was made available by the domestic courts is not due solely to the lack of a public hearing at the court of appeal, as the majority claim. We submit that the core of the breach of Article 6 lies in the lack of an adversarial examination of the disputed testimonial evidence and the failure to question the applicants in a hearing before a court of law.

3. We further dissent from the majority with regard to the legality and proportionality of the penalties imposed by the court of appeal and confirmed by the Court of Cassation, and with regard to the amount of the just satisfaction awarded by the European Court of Human Rights (the Court). Lastly, Judge Pinto de Albuquerque also considers that the Turin Court of Appeal's change to the accusation was not compatible with the Convention.

1. See *Menarini Diagnostics SRL v. Italy*, no. 43509/08, 27 September 2011, on the penalties applied by the *Autorità Garante della Concorrenza e del Mercato*.

The unfairness of the proceedings before the CONSOB

4. The applicants were found guilty of the administrative offence of market manipulation, provided for by Article 187 *ter* of the TUF and punished under a procedure set out in Article 187 *septis* of the TUF in conjunction with section 23 of Law no. 689 of 24 November 1981. The procedure before the CONSOB is not fair in the light of the standards laid down by Article 6 of the Convention[2].

5. Under Article 2 of CONSOB Resolution no. 15086 of 21 June 2005, the punitive proceedings start with the formal notice of the alleged infringement (*la formale contestazione degli addebiti*), drawn up on the basis of evidence gathered in the course of that body's supervisory activity. Either *ex officio* or following a communication from another national or foreign public authority or a denunciation from a private party, the CONSOB may start a secret, pre-investigative proceeding (*fase pre-istruttoria*), during which the supervised person may be submitted to the powers set out in Article 187-*octies* of the TUF. Since this pre-investigative stage has no time-limit, no clear line is drawn between the CONSOB's general supervisory function and its punitive function, with the risk that the blurring of these functions may be instrumentalised to take advantage of the supervised person's legal obligations to inform, communicate documents and cooperate with CONSOB's supervisory activities. Within the punitive proceedings, there is a formal and organic separation between the *Ufficio Insider Trading* (Insider Trading Office, or ITO), which is responsible for bringing charges against the suspected person and assessing their written defence, the *Ufficio Sanzioni Amministrative* (Administrative Sanctions Division, or ASD), which is responsible for the inquiry and the final report containing the formal accusation and the proposed level of sanctions to be imposed, and the CONSOB as a Commission, which is responsible for the final administrative decision. However, this formal and organic separation does not guarantee an effective separation between prosecutorial and adjudicatory functions, as required by Article 187 *septies* no. 2 of the TUF itself. There are four reasons to support this conclusion. First, the CONSOB's chairman has the tasks of supervising the preliminary investigation and giving instructions about the functioning of the divisions and directives for their coordination[3]. Second, the CONSOB's chairman is directly involved in the exercise of the most important inspection powers and other investigative powers attributed to the CONSOB by Articles 115 and 187 *octies* of the TUF, upon proposal of the competent directorates[4].

2. The applicability of Article 6 to the administrative procedure before Consob and the ensuing penalties is convincingly affirmed by the majority.

3. Section 1, para. 6, and 18 of Law no. 216 of 7 June 1974, and Article 5 (1) al. b) and e) of CONSOB Resolution no. 8674 of 17 November 1994.

4. Resolution no. 15087 of 21 June 2005.

Third, the CONSOB as a Commission may exercise extremely intrusive investigative powers, such as the power to seize property[5]. Fourth, the CONSOB's decision may be motivated *per relationem*, with reference to the preceding procedural acts[6], and may even be taken by tacit consent of the members of the Commission[7]. All things considered, the CONSOB as a Commission is very far from being an impartial body *vis-à-vis* the investigatory and prosecutorial bodies of the ITO and ASD. This basic systemic failure of the administrative proceedings is compounded by the grave inequality between the parties.

6. It is true that the ITO expressed its views in a report (*relazione istruttoria*) of 13 September 2006 and a complementary note of 19 October 2006, both of which were notified to the applicants, and that the 30-day time-limit to submit comments on the complementary note is reasonable. However, the fact remains that there was no cross-examination of the witnesses heard by the ITO. There was no questioning of the applicants either, with the exception of the applicant Grande Stevens. The ASD's final accusation was adopted on 19 January 2007, but it was not notified to the applicants[8]. The CONSOB's decision was adopted on 9 February 2007; the applicants were notified of the deliberations, but they could not present submissions to the CONSOB. Moreover, the CONSOB's decision was adopted after a closed meeting with an ASD employee, but the applicants could neither be present at that meeting nor obtain a copy of its minutes. The prosecution had the sole and final say before the CONSOB, not the applicants[9].

7. The reason for this inquisitorial and unequal procedure is the following: according to the Court of Cassation, Articles 24 (*diritto di difesa*) and 111 (*giusto processo*) of the Italian Constitution do not apply to the administrative stage of punitive proceedings, and the "right to discuss during the proceedings does not apply to the sanction or its qualification

5. The CONSOB Resolutions no. 15086 of 21 June 2005, no.15131 of 5 August 2005, and no. 16483 of 20 May 2008. The Government, in their submissions of 7 June 2013, acknowledged this, but argued that "none of the above indicated powers have been exercised" in this particular case by the CONSOB's chairman in the investigation phase. That argument is not pertinent. The mere fact that the chairman of the adjudicatory body can intervene in the pre-trial phase jeopardises that body's objective impartiality and independence.

6. Court of Cassation's judgments no. 10757 of 24 April 2008, and no. 389 of 11 January 2006,

7. Article 18 of CONSOB Resolution no. 8674/1994 of 17 November 1994.

8. This lack of notification was found to be in breach of the principle of adversarial proceedings, particularly with regard to the quantification of the penalty which is usually based on facts not communicated to the suspected person (judgment no. 51 of the Genoa Court of Appeal of 24 January - 21 February 2008).

9. This fact has already been found inadmissible in the light of the principle of impartiality (see the Lazio Regional Administrative Court's judgment no. 3070 of 10 April 2002).

criteria"[10]. Hence, the CONSOB's Resolutions no. 12697 of 2 August 2000 and no. 15086 of 21 June 2005 do not comply with those constitutional guarantees and particularly with the constitutional guarantees of cross-examination of prosecution witnesses before a court and the presentation of defence witnesses in the same conditions as those of the prosecution. In sum, the laudable intentions of the Italian legislature when it introduced the new version of Article 187-*septies* no. 2 of the TUF in 2005 has been thwarted in practice, both by case-law and by administrative rulings. The succession of two stages of written defence submissions before the ITO and the ASD, which brings no real added value to the proceedings, does not compensate for the lack of a true adversarial presentation and examination of the evidence and for the inequality of arms between the parties.

The lack of an effective judicial review of the CONSOB's decision

8. The judicial review of the CONSOB's decisions to apply administrative sanctions consisted in an appeal to the Court of Appeal based on Article 187 *septies* no. 6 of the TUF and section 23 of Law no. 689/1981 and an appeal to the Court of Cassation based on Article 360 of the Code of Civil Procedure (CPC). Those articles were revoked by the new *Codice del Processo Amministrativo* (Code of Administrative Procedure, or CPA) approved by Legislative Decree No. 104 (*Decreto legislative*) of 2 July 2010: the new Article 133 (1) l of the CPA gave the administrative judge exclusive jurisdiction (*giurisdizione esclusiva*) over "punitive proceedings" (*provvedimenti sanzionatori*) of the CONSOB and the new Article 134 (1) c, of the same CPA includes disputes over pecuniary sanctions (*sanzioni pecuniarie*) in the ambit of exclusive jurisdiction with a review extended to the merits (*cognizione estesa al merito*), which refers not only to the legality of the administrative action, but also to its expediency, convenience, utility and equity (*opportunità, convenienza, utilità ed equità*). The Constitutional Court's judgment no. 162 of 27 June 2012 declared unconstitutional the contested provisions of the *Decreto legislativo* 104/2010, and the competence of the civil judge (*giudice ordinario*), i.e., of the court of appeal, has been reinstated in the CONSOB's punitive proceedings[11].

9. Under Article 187 *septies* no. 6 of TUF in conjunction with section 23 of Law no. 689/1981, which were applicable to the case at hand, the court of appeal has the power, including on its own motion, to identify the evidence

10. See, for example, the Court of Cassation's judgment of 23 June 2009, page 38. This case-law has not been uncontested (for instance, the *Consiglio di Stato*, in its opinion no. 485 of 13 April 1999, supported the opposite view).

11. In this sense, see, for instance, judgment no. 6211 by the Lazio Regional Administrative Court (Section I) of 20 June 2013. Thus, the present case is of additional interest, in that the provisions applicable in it are still in force.

that it deems necessary and to summon witnesses; to set aside, in whole or in part, or to amend the decision under appeal, even with exclusive reference to the amount of the sanctions; and to hear the appellant in person in an oral hearing. In clear terms, the court of appeal has the power not only to review the appealed decision, but to re-examine the case *tota re perspecta*, i.e. the whole subject matter being regarded, in the light of the legal and factual questions raised by the appellants[12].

10. In performing its review powers in accordance with Article 187 *septies* no. 6 of the TUF and section 23 of Law no. 689/1981, the court of appeal has only one limit: the prohibition of the *reformatio in pejus*[13]. Moreover, the CONSOB's pecuniary and non-pecuniary administrative sanctions must be applied on the basis of the "gravity of the offence" (*gravità della violazione*) and taking into account the "possible recidivism" (*eventuale recidiva*) of the offenders and thus on the basis of *criteria* which cannot be considered as an expression of administrative discretion[14]. Those same *criteria* are binding for the appellate court in performing its review of the CONSOB's decisions to apply administrative sanctions.

11. That being said, the fact is that the court of appeal renounced its powers of re-examination in this case. That is very clear from an attentive reading of the file and particularly of the court of appeal's five judgments. As a matter of fact, the court of appeal rejected the appeals on the basis of the prosecutorial evidence collected by the administrative body, in spite of the circumstance that it had been collected in secret, without an adversarial confrontation of the witnesses, and was disputed both in its material and its subjective relevance. The court of appeal satisfied itself with the appellants' written submissions and the written evidence of the prosecution. And that was all! It heard no witnesses, it questioned none of the applicants and it collected no expert opinions. Instead, the court of appeal relied on, and even transcribed word for word in its judgments, the testimonies given by the witnesses Claudio Salini, responsible for the Markets Division, and Antonio Rosati, director general of the CONSOB, as the main items of evidence on which to ground the conviction[15]. To put it in legal jargon, the court of

12. Thus, this judicial review is different from the "weak" judicial review (*sindacato giurisdizionale 'debole'*) of administrative sanctions applied by the *Autorità Garante della Concorrenza e del Mercato*, exercised by the administrative judge before the new CPA entered into force (see the opinion of Judge Pinto de Albuquerque joined to the *Menarini Diagnostics* case).

13. See the Court of Cassation's judgments no. 23930 of 9 November 2006 and no. 1761 of 27 January 2006.

14. Court of Cassation judgments no. 13703 of 22 July 2004; no. 1992 of 11 February 2003; and no. 9383 of 11 July 2001.

15. See pages 27, 32, 33, 38 and 39 of the court of appeal's judgment on Mr Grande Stevens's appeal of 5 December 2007, deposited on 23 January 2008. There are eight references to the testimonies of these two witnesses, in some cases with long citations. The same thing occurs on pages 28, 29, 38, 39, 40, 41 of the court of appeal's judgment on

appeal performed nothing more than a mere review (*reformatio*) of the logical consistency of the appealed decision, avoiding a genuine re-examination (*revisio*) of the case.

12. Yet the appellants had requested that their case be fully re-examined and the applicants Grande Stevens and Marrone had even requested that the court of appeal hear evidence from clearly identified witnesses on the facts of the case[16]. It is obvious that the facts in respect of which the testimony of these witnesses was requested were those referred to in their previous written depositions, collected during the non-judicial stage of the proceedings. It is even more evident that the applicants expected that the witnesses be summoned by the court of appeal, as it could have done using its powers under the law, either at the appellants' request or of its own motion, even without specifying the arguments to be proved. The fact that the requests for the production of testimonial evidence were made on condition that the court found it "necessary" (*ove occorresse*) or that the documentary evidence was considered "possibly insufficient or unusable" (*eventuale insufficienza o inutilizzabilità dei documenti*), clearly does not change the appellants' intention or the nature of their request. In fact, the applicants simply referred, in their requests for *istanze istruttorie*, to the terms of the law itself, according to which it was up to the judge to identify the evidence that he or she deemed "necessary" for the purposes of adjudicating the case and testing the version of the facts as alleged by the appellants[17].

13. Cross-examination of the witnesses before a court of law was essential, since there were grave contradictions between the witnesses as to how events developed from April to August 2005. Court questioning of the applicants was also crucial, given that their individual and allegedly

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Mr Gabetti's appeal and pages 38, 47, 48 and 49 of the court of appeal's judgment on the appeal by IFIL Investments s.p.a. (subsequently Exor s.p.a.). The two other judgments repeat in substance the same arguments. In fact, two out of the three judges of the court of appeal were the same in all five judgments.

16. Pages 81 and 82 of Mr Grande Stevens' submissions of 25 September 2007 to the court of appeal and pages 64 and 65 of Mr Marrone's submissions of 25 September 2007 to the court of appeal. Applicant Grande Stevens requested that the witnesses be questioned by the court of appeal "on the facts referred to in the documents above" (*sui fatti riferiti dai documenti medesimi*). He presented the following list of witnesses: Enrico Chiapparoli, Maurizio Tamagnini, John Winteler, Virgilio Marrone, Alistair Featherstone, Stephen Woodhead, Michael O'Donnell, Sergio Marchionne, Lupo Rattazi, Teodorani Fabbri, Antonio Marroco, Claudio Salini and Antonio Rosati. Applicant Marrone was also very explicit, requesting that the witnesses Andrea Griva and John Winteler be heard on the facts that they had described in their previous written testimonies and reserving the right to request further evidentiary acts in the light of CONSOB's future submissions (*riserva di ulteriore istanze istruttorie*).

17. Paragraph 6 of section 23 of Law no. 689/1981.

deceitful *mens rea* was in dispute[18]. It other words, it was of paramount importance to assess whether the CONSOB was aware of the legal solution conceived by Mr Grande Stevens and found it unnecessary to make that solution public, in view of its incipient, uncertain and conditional nature and in order to avoid an artificial impact on the market, which was already very unstable. Were this version of the facts to have been confirmed, the CONSOB's conduct would have been shown to have created the circumstances for the offence itself to be committed, thus entrapping the applicants and subsequently punishing them for what it knew to have still been a mere intention at the material time (*Cogitatio poenam nemo patitur*). It is not the mere lack of a formality (namely, a public audience) that is striking in this case, as the majority seems to state. It is much more than that. The truly shocking aspect is the total lack of an adversarial examination of the disputed evidence with regard to crucial facts in a hearing before a court of law. The court of appeal unreservedly accepted and endorsed the testimonial evidence collected by the prosecutorial body without giving the applicants an opportunity to conduct an effective cross-examination of the witnesses on the facts of the case[19]. Although these shortcomings were challenged before the Court of Cassation, it did not repair them, rejecting the procedural complaints as belated, and in any case maintaining that the entire procedure as governed by CONSOB Resolution no. 15608 was entirely capable of ensuring compliance with the principles of a fair trial.

14. The importance of the cross-examination of testimonial evidence before a court of law cannot be, and should not have been, underestimated in punitive proceedings which are capable of leading to pecuniary penalties of millions of euros and non-pecuniary penalties which may cause permanent prejudice to, and sometimes definitively ruin, the professional careers of those convicted. Indeed, the Court has pointed out in much less

18. It is incomprehensible that the court of appeal decided on the general issue of Mr Grande Stevens' *dolus malus* and in particular whether his alleged error of law was caused by the CONSOB without even interrogating him and on the exclusive basis of the testimonies given by the prosecution witnesses, Mr Salini and Mr Rosati (pages 38 and 39 of the court of appeal's judgment). It was extremely important to have confronted these witnesses with Mr Grande Stevens, in order to assert the mental element of the latter's alleged offence, and the representatives of Merrill Lynch, namely Mr Enrico Chiapparoli and Mr Maurizio Tamagnini, in order to assert the existence of false information (see also the statements by witnesses Lupo Ratazzi, Pio Fabbri and Antonio Marocco, which contradict the CONSOB's thesis). It is thus inadmissible to argue, as the Government did, in their submissions of 7 June 2013, pages 58 and 59, that "the particular nature and level of sophistication of market abuse offences does not lend itself to an "oral" procedure, making necessary … an essentially oral procedure."

19. The applicants repeatedly presented this exact complaint to the Court in their applications and in the later submissions. Thus, the last sentence of paragraph 150 of the judgment is simply not correct, and indeed contradictory to the statements made in paragraphs 110 and 117, last sentence, of the judgment.

serious cases the necessity of testing, in second-instance courts, the strength of the prosecutorial and defence evidence in a public debate before the judge[20]. *A fortiori*, the same is valid for the questioning of appellants, the necessity of which the Court has confirmed, even in second-instance courts, particularly when the subjective element of the offence is at issue [21]. The domestic courts ignored these standards laid down by the Court.

The court of appeal's amendment of the accusation, to the detriment of the appellant[22]

15. The applicant Grande Stevens complains about the Turin Court of Appeal's change to the accusation against him. He is right. In order to accuse someone under Article 187 *ter* of the TUF (the administrative offence of market manipulation), it is not enough to allege in general terms that the offender participated in the dissemination of false information. That would amount to a simple repetition of the literal wording of the legal provision. The accusation must indicate the facts that correspond to this wording. To put it in technical terms, the accusation must describe, with the necessary degree of exactitude, how, when, where and using what means the offender participated in the offence. In the present case, the CONSOB accused the applicant Grande Stevens of having participated in the decision-making process concerning dissemination of the allegedly false information in his capacity as an "administrator of IFIL", which proved to be false. To avoid an acquittal, the court of appeal changed the subject-matter of the accusation, imputing to the appellant a different fact: that he had participated in the offence in his capacity as a lawyer carrying out his

20. The leading case is *Ekbatani v. Sweden (Plenary)*, no. 10563/83, 26 May 1988. In paragraphs 32 and 33 of that judgment, a violation of Article 6 is established specifically on account of the lack of a hearing for the applicant and the complainant in a case where a re-examination of law and facts by the second-instance court was called for. It should be underlined that a violation was found in spite of the fact that the first-instance court had determined the criminal charges brought against the applicant after it had held a public hearing at which the applicant appeared, gave evidence and argued his case. In the present case, the Turin Court of Appeal acted as the first judicial instance, which made cross-examination of the witnesses and questioning of the appellants in a public hearing before the court all the more necessary.

21. In *Tierce and Others v. San Marino*, nos. 24954/94, 24971/94 and 24972/94, 25 July 2000, the applicants were denied a public hearing on appeal at which they could have been present and given evidence in person. Like Mr Grande Stevens, Mr Tierce argued precisely that the subjective element (that of intention to deceive) of the offence was not shown. In another case, the Court went even further and concluded that not even the presence of confidential information in a case file automatically implies a need to close a trial to the public, without balancing openness with national security concerns (*Belashev v. Russia*, no. 28617/03, 4 December 2008).

22. Judge Karakaş does not disagree with the majority as regards the lawfulness of the court of appeal's change to the accusation.

consultancy activity. This change of the subject-matter of the accusation by the court of appeal, to the appellant's detriment, is inadmissible.

16. According to section 23 of Law no. 689/1981, the court of appeal has the power to amend the appealed decision, both in its legal and factual aspects. However, this power has clear inherent limits.

In view of the applicable principle of the prohibition of *reformatio in pejus*, judicial review is established in favour of the appellant, and cannot be misused to his or her detriment. Furthermore, if the overarching principles of the "correspondence between the accusation and the conviction" (*corrispondenza tra contestazione e condanna*)[23] and of separation of prosecutorial and adjudicatory functions[24] are valid in respect of the administrative proceedings, they are also and *a fortiori* valid in respect of the judicial proceedings before the court of appeal. A court of appeal would take upon itself the role of a prosecutorial body were it to include in the accusation new facts which are detrimental to the applicant. Yet this is exactly what the court of appeal did in the present case.

17. One final counter-argument must be considered. The argument that the new fact is "a legally irrelevant quality", and therefore could be added to the accusation, is flawed and can be discarded for three reasons. Firstly, the CONSOB decision itself took into consideration Mr Grande Stevens' activity as an administrator (*amministratore*) of IFIL Investments s.p.a. in order to aggravate his penalty[25]. Secondly, the legal quality in which Mr Grande Stevens acted makes all the difference, since it is crucial in order to qualify his conduct as a principal offender who had the power to take the decision to disseminate the information, rather than as a mere accessory offender, who had power only to give a legal opinion to those in charge of taking the above-mentioned decision. By changing this quality, the court of appeal changed an essential fact of the accusation, which is obviously relevant for the assessment of the objective wrongfulness and the subjective guilt of Mr Grande Stevens's conduct, and did so without the consent of the appellant[26]. Thirdly, the new fact was also relevant from the perspective of the liability of the legal persons involved in the proceedings, since the

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23. According to section 14 of Law no. 689/1981, a suspect may not be convicted for facts which were not imputed to him or her in the indictment (Court of Cassation judgments no. 10145 of 2 May 2006 and no. 9528 of 8 September 1999).

24. Article 187 *septies* no. 2 of the TUF.

25. See page 137 of the CONSOB's decision of 9 February 2007.

26. This is true even with regard to offences which are not *illecito proprio*, i.e. an offence that can only be committed by certain categories of persons. Even if the imputed administrative offence of market manipulation set out in Article 187 *ter* of the TUF is not an *illecito proprio*, that does not absolve the prosecutorial body from the obligation to describe in the accusation the main features of the offender's conduct as relevant for the purpose of imputation, and a fact pertaining to the nature of the defendant's participation in the offence is certainly a main feature which must be set out in the accusation.

charging of Mr Grande Stevens as an "administrator" of IFIL Investments s.p.a. engaged the latter's liability under Article 187 *quinquies* of the TUF.

The illegality and disproportionality of the pecuniary and non-pecuniary sanctions

18. The applicants complain about the legality and proportionality of pecuniary and non-pecuniary penalties. According to Article 187 *ter* of the TUF, the pecuniary sanctions applicable to the administrative offence of market manipulation could reach five million euros[27], and be increased up to three times or even ten times the proceeds of the offence or the profit therefrom, taking into consideration the personal situation of the guilty party, the scale of the proceeds of the offence or the profit therefrom, or the effects on the market. While the punishment of administrative offences on the basis of the proceeds of the offence or the profit therefrom, without any fixed upper limit for the pecuniary sanction, raises *per se* an issue under Article 7 of the Convention in its limb of the principle of *nullum poena sine legge stricta*, the extremely wide range of the increased pecuniary penalty foreseen by Article 187 *ter* no. 5 of the TUF is even more problematic[28]. Be that as it may, the concrete sanctions imposed are neither lawful nor proportionate.

19. The sanctions imposed on the applicants are not lawful in so far as they are "tainted" by the very grave procedural shortcomings of the administrative and judicial proceedings from which they ensued. To pretend that these shortcomings did not cause effective prejudice *ab imo* to the exercise of the applicants' defence rights and to assume that no procedural shortcomings could have affected the decision on sanctions, insofar as the said decision was a necessary consequence of the establishment of the offence, is a serious *petitio principii*, based on the unacceptable presumption that a fair procedure would not have had a different result and ultimately that a conviction can be established on the basis of inquisitorial and unequal proceedings.

20. Moreover, the pecuniary sanctions imposed by the court of appeal are disproportionate, since Mr Gabetti, President of the commercial enterprises IFIL Investments s.p.a. and Giovanni Agnelli & Co., who took

27. Section 39 (3) of Law no. 262 of 28 December 2005 raised the upper limit to 25 million euros.

28. This rule goes much further than that set out in section 17 (4) of the German *Ordnungswidrigkeitengesetz* (Contravention of Regulations Act, OWiG), which allows for a pecuniary penalty that is equivalent to the amount of the profit of the offence, even when this is higher than the statutory upper limit of the penalty, and even further than that of Article 18 (2) of the Portuguese *Regime Geral das Contra-Ordenações* (General Regime on the Contravention of Regulations, RGCO), which provides for the same rule, but with the limit that the increase of the penalty equivalent to the profit of the offence cannot exceed one third of the statutory upper limit of the penalty.

the decision to disseminate the press releases, was punished by a lesser penalty than Mr Grande Stevens, a lawyer who had no decision-making power, but acted only as a consultant[29]. In fact, according to the court of appeal's judgment, the administrator who took the decision was fined 1,200,000 euros (1,000,000 euros for his conduct on behalf of IFIL Investments s.p.a. and 200,000 euros for his conduct on behalf of Giovanni Agnelli & Co.) and the lawyer who had only an advisory role, and whose opinion could be set aside by the administrator, was ordered to pay more than twice as much, namely 3,000,000 euros. In other words, the accessory offender was punished with a much heavier pecuniary penalty than the principal offender!

21. The same critique applies to the non-pecuniary penalties. Mr Grande Stevens was punished with a four-month prohibition on professional activity and Mr Gabetti was sanctioned with the same penalty. The accessory offender who gave a non-binding opinion and the principal offender who took the decision were sentenced to the same non-pecuniary sanctions, as if their professional responsibilities were placed at the same level!

22. The disproportionality of the penalties imposed on applicants Gabetti and Grande Stevens by the court of appeal is not merely apparent when they are compared to each other. It is also incomprehensible that the same penalty of 3,000,000 euros was applied to appellant Grande Stevens by the CONSOB and the court of appeal, in spite of the fact that the CONSOB considered Mr Grande Stevens as an administrator of IFIL Investments s.p.a. and the court of appeal considered him as a lawyer without executive powers. Although the court of appeal downgraded Mr Grande Stevens' liability from a principal offender to an accessory offender, it maintained the exact same penalty as applied to him by the CONSOB. In substance, this corresponds to a disguised form of *reformatio in pejus* by the court of appeal, to the detriment of the appellant. No plausible reasons were given for this severity.

23. The penalties applied to Mr Marrone are also groundless, since he did not even participate in the incriminated procedure of disseminating

29. Like section 14 of the German OWiG and Article 16 of the Portuguese RGCO, which both establish the so-called "unified concept of offender" (*Einheitstäter begriff*), section 5 of Italian Law no. 689/1981 does not formally distinguish between principal offenders and accomplices and does not provide for distinctive penal upper limits for the punishment of principal offenders and accomplices in the event of offences committed by various persons. Nonetheless, the punishment of each offender involved in committing one and the same offence must be proportionate to the objective gravity of his or her individual conduct and his or her own personal subjective guilt (see, for example, Article 187 *ter* no. 5 of the TUF, referring to the "personal situation of the guilty party", and Article 187 *quarter* no. 3 of the same TUF, referring to the "seriousness of the violation" and the "degree of fault"). As shown in footnote 14 above, the case-law of the Court of Cassation is sensitive to the need for a careful weighing up of these circumstances when setting the administrative sanctions. That is exactly what did not occur in the present case.

allegedly false information, as the Court of Cassation established in a final judgment of 20 June 2012.

24. Finally, IFIL Investments was punished 1,000,000 euros in relation to the offence committed by Mr Gabetti and Giovanni Agnelli & Co. was fined 600,000 euros, corresponding to the offences committed by Mr Gabetti and Mr Marrone. According to Article 187-*quinquies* of the TUF, the legal person's administrative liability does not have a fixed upper limit, since it depends on the number of natural persons who committed the offence on behalf of the legal person. However, it is hard to understand how a penalty based on conduct consisting in disseminating allegedly false information by a single natural person can be almost double a penalty based on conduct consisting in disseminating the same information by that same person, but with the participation of another natural person. In addition, the CONSOB ordered, and the court of appeal upheld the order, that the two companies were to pay the penalties imposed on the persons employed by them, as a jointly liable entity, pursuant to section 6 (3) of Law no. 689/1981. According to the established case-law of the Court of Cassation, Article 187-*quinquies* of the TUF and section 6 of Law no. 689/1981 may be applied to the same legal person for the same facts, since the first regards the "direct administrative liability of the legal person" while the second is a "special case of debt without responsibility, as the entity is liable for the breach committed by one of its internal bodies and it is directly liable as an *adiectus solutionis causa*". Furthermore, the two companies were also charged with an additional "administrative" offence under Article 25-*sixies* of Legislative Decree no. 231 of 8 June 2001. In practical terms, the two companies could have had to pay three different pecuniary penalties of enormous proportions for the same fact. Already in its conceptual structure, this punitive system calls into question the rights of legal persons under both Article 1 of Protocol No. 1 and Article 7 of the Convention. For the purpose of this opinion, it is sufficient to consider that IFIL Investments s.p.a. and Giovanni Agnelli & Co. were acquitted by the court of appeal's judgment of 28 February 2013 and this judgment is final in this part. The court of appeal concluded that no illegal conduct, let alone any "administrative" offence, could be imputed to these commercial enterprises. In the light of Article 187-*quinquies* no. 4 of the TUF, the defences of IFIL Investments s.p.a. and Giovanni Agnelli & C., which were sufficient to negate their "administrative" liability under Article 6 of Legislative Decree no. 231 of 8 June 2001, should also be considered sufficient to exclude the "administrative" liability of the same legal persons under Article 187-*quinquies* of the TUF.

The limited *ne bis in idem* effect of a final conviction on an administrative sanction

24. The Market Abuse Directive 2003/6/EC introduced a comprehensive framework to prohibit and punish insider trading and market manipulation. Member States were required to provide for mandatory administrative sanctions, without prejudice to their right to impose additional criminal sanctions[30].

25. The Directive was implemented in Italy by the provisions contained in Title I-*bis* of Part V of the TUF. Articles 185, 187 *ter* and 187 *duodecies* of the TUF set out a "double-track system" (*doppio binario*) for the punishment of natural persons, which provides for criminal proceedings in accumulation with administrative proceedings for the "same facts". Indeed, administrative sanctions are established "without prejudice to the penal sanctions applicable when the action constitutes a criminal offence" (*Salve le sanzioni penali quando il fatto costituisce reato*). Furthermore, administrative proceedings and the judicial review proceedings relating thereto are not suspended when criminal proceedings are pending "in relation to the same facts or facts on which the definition of the case depends" (*avente ad oggetto i medesimi fatti o fatti dal cui accertamento dipende la relative definizione*). The "double-track system" was also introduced for legal persons, which can be sentenced to administrative sanctions under Article 187-*quinquies* of the TUF and under Article 25-*sexies* of Legislative Decree no. 231 of 8 June 2001 for the same facts[31]. This punitive system of *doppio binario* breaches the principle of *ne bis in idem*, both in its dogmatic conception and current practice[32].

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30. This understanding was confirmed by paragraph 77 of the *Spector Photo Group NV* judgment of the ECJ of 23 December 2009, case C-45/08. Since the level of administrative sanctions varied widely among Member States, the existing divergent sanctioning administrative regimes promoted regulatory arbitrage. Moreover, four Member States did not criminalise market manipulation and the definition of the criminal offence and the applicable penalties diverged considerably among those which did. The recent approval by the European Parliament of the new Directive dealing with criminal sanctions against market abuse and the EP's political endorsement of the political agreement on a future Regulation dealing with administrative measures against such abuse will change the scenario in the European Union. Member States will have to ensure that imposition of criminal sanctions on the basis of offences foreseen by the new Directive and of administrative sanctions in accordance with the future Regulation does not lead to the breach of the principle of *ne bis in idem*.

31. As explicitly acknowledged in the Court of Cassation judgments of 30 September 2009, delivered in the present case. The Government in their submissions of 7 June 2013, page 23, recognise that the liability under Article 25-*sexies* of Decree no. 231/2001 "[has] all the features of 'criminal' liability".

32. It cannot be disputed that the Italian reservation to Article 4 of Protocol No. 7 does not comply with the strict standards of the Court's case-law, because it is too broad in its scope. Since the reservation does not apply, the said provision is fully binding for the Respondent State.

26. According to the Court of Cassation, Article 185 refers to a "conduct-based offence" (*illecito di mera condotta*), assessed through an *ex ante* evaluation of the possible consequences that the dissemination of accurate information would have caused on the market, and not to an "event-based offence" (*illecito di evento*), assessed on the basis of an *ex post* evaluation of the real market situation after dissemination of the press releases[33]. The Government have further elaborated on this interpretation by the Court of Cassation, adding that the criminal offence of Article 185 of the TUF is a "concrete risk of harm offence" (*reato di pericolo concreto*), which means that it has to be established that the dissemination of false information caused an actual risk that the price of the specific financial instrument would be altered, whereas no actual impact on the price of that financial instrument is required for the offence to be committed, and the administrative offence of Article 187 *ter* of the TUF is an "abstract risk of harm offence" (*reato di pericolo astratto*), thus including any conduct which can theoretically influence investors' choices, regardless of whether false or misleading news has actually led to investment choices which otherwise would not have been taken.

27. To avoid punishing the same fact twice (*bis in idem*), the Italian system has two guarantees: the "principle of speciality" (*principio di specialità*), foreseen in section 9 of Law no. 689/1981[34], and the principle of deduction of the administrative penalty in the criminal penalty, established in Article 187 *terdecies* of the TUF. These two guarantees are not enough, as the present case proves. Although the criminal and administrative proceedings had as their subject matter exactly the same factual situation, the Court of Cassation and the Turin Court of Appeal repeatedly, but unconvincingly, stated that the principle of speciality did not apply to them. Both the criminal offence of Article 185 and the administrative offence of Article 187 *ter* are conduct-based offences which protect the same "legal interest" (*bene giuridico*), namely the transparency of the market, the difference between them being that the former is a "concrete risk of harm offence" and the latter an "abstract risk of harm offence". Thus, it is obvious that the principle of speciality applied, since the provision of concrete risk of harm is special in relation to the provision of abstract risk of harm concerning the same "legal interest", and therefore criminal proceedings should prevail over, and exclude, administrative proceedings. The material accumulation of criminal and administrative sanctions not only overburdens the State with two autonomous investigations, with the risk of different

33. Court of Cassation judgment no. 40393 of 15 October 2012.

34. According to the Government's submissions of 7 June 2013, page 8, the principle of speciality applies when two offences share the same basic constituent elements, but one of them has a more circumscribed scope, on account of a specification or addition to the facts of the offence. In this case, the special offence prevails.

pronouncements on the same facts, but also clearly frustrates the principle of speciality.

28. Even assuming, for the sake of argument, that the principle of speciality did not apply, the fact is that the Italian system of *doppio binario* does not prohibit the commencement of criminal proceedings *in idem* after a final decision of conviction for administrative offences has been reached by the competent court of review. Article 2 of Protocol No. 7 also prohibits the "double prosecution" of the same *idem*. Hence, criminal proceedings may not be opened for the same *idem* where the administrative decision has been definitely confirmed by the courts and become *res judicata*. The Italian system does not provide in legislation, and did not provide in the applicants' concrete case, for such a guarantee[35].

The insufficient just satisfaction by the Court

29. The above-mentioned serious shortcomings in the administrative and judicial procedures and the consequent unlawful and disproportionate sanctions applied to the applicants require full and urgent redress. How can such enormous penalties of millions of euros be maintained in spite of such gross violations of the applicants' procedural and substantive rights? There should be a retrial in accordance with section 23 of Law no. 689/1981, assuming that the administrative offences are not already time-barred.

30. In addition, justice warrants compensation in the case. The applicants have been severely prejudiced, both financially and morally, because they have already paid huge pecuniary penalties and they have been hindered from performing their professional activities for considerable periods of time. The compensation established by this Court is clearly insufficient to attain that purpose. At the least, the pecuniary penalties should have been restored to the applicants.

31. In any event, the criminal proceedings still pending should be terminated immediately, and the defendants Mr Gabetti and Mr Grande Stevens relieved of any criminal liability. In the particular circumstances of this case, no other measure can avoid the injustice committed against the applicants with regard to the bringing of criminal proceedings on top of an unfair and excessive administrative punishment.

Conclusion

32. European States are confronted with a dilemma. In order to ensure the integrity of European markets and to enhance investor confidence in those markets, States have created very broad administrative conduct-based

35. The Italian legal system does not contain a provision similar to section 84 of the German *OWiG* or Article 79 of the Portuguese RGCO.

offences, which punish the abstract risk of harm to the market with severe, undetermined pecuniary and non-pecuniary penalties, which are classified as administrative sanctions and applied by "independent" administrative authorities in inquisitorial, unequal and prompt proceedings. These authorities combine punitive and prosecutorial powers with a broad power of supervision over a particular sector of the market, and exercise the latter in such a way as to pursue the former, sometimes imposing on the supervised/suspected person an obligation to cooperate in the bringing of charges against him or her. The succession of three, or even four, stages of written defence pleadings – twice before the administrative authority, once before the court of appeal and again before the Court of Cassation – is an elusive guarantee which does not compensate for the intrinsic unfairness of the proceedings. The temptation has clearly been to outsource conduct which cannot be dealt with through the classical instruments of criminal law and procedure to these "novel" administrative proceedings. Nevertheless, market pressure cannot prevail over the international human rights obligations of the States bound by the Convention. The punitive nature of the offences and the severity of the punishment cannot be eluded, and clearly call for the protection afforded by the procedural guarantees of Article 6 and the substantive guarantees of Article 7 of the Convention.

33. We consider that the applicants were treated unfairly by the CONSOB and the domestic courts, and that this Court has done them only "half justice". This is the reason why we follow the majority only in part. We expect that this judgment will provide the domestic courts with an opportunity to deliver full justice to the applicants, and the Italian legislature with the incentive to remedy the structural deficiencies in the administrative and judicial procedure for the application and review of administrative sanctions by the CONSOB. If the Italian legislature is up to this challenge, its work could provide an example of cross-fertilization to other legislatures which are faced with a similar systemic problem.

ANNEX

No.	Application No.	Lodged on:	Applicant Date of birth Place of residence	Represented by:
1.	18640/10	27/03/2010	**Franzo GRANDE STEVENS** 13/09/1928 Turin	Aldo BOZZI, of the Milan Bar, Giuseppe BOZZI, of the Rome Bar, and Natalino IRTI, of the Milan Bar
2.	18647/10	27/03/2010	**Gianluigi GABETTI** 29/08/1924 Turin	Aldo BOZZI, of the Milan Bar, and Giuseppe BOZZI, of the Rome Bar
3.	18663/10	27/03/2010	**Virgilio MARRONE** 02/08/1946 Turin	Aldo BOZZI, of the Milan Bar, and Giuseppe BOZZI, of the Rome Bar
4.	18668/10	27/03/2010	**EXOR S.P.A.** Public company whose registered office is in Turin	Aldo BOZZI, of the Milan Bar, and Giuseppe BOZZI, of the Rome Bar
5.	18698/10	27/03/2010	**GIOVANNI AGNELLI & C. s.a.a.** Limited shareholding partnership whose registered office is in Turin	Aldo BOZZI, of the Milan Bar, and Giuseppe BOZZI, of the Rome Bar