



The “Ne Bis in Idem” Principle among International Treaties and Domestic Rules: The Recent Case Law of the European Court of Human Rights on Italy

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I. Introduction

In its decision of 4 March 2014 (*Grande Stevens and Others v. Italy*)¹ the European Court of Human Rights had the chance to clarify some controversial issues regarding the application of the “*ne bis in idem*” principle embodied in Article 4 of Protocol No. 7 of the European Convention on Human Rights.

The case concerned an appeal against the administrative penalty imposed on the applicants by Consob, the Italian Companies and Stock Exchange Commission, and the concurrent criminal proceedings to which the applicants were subject after having been accused of market manipulation in the context of a financial operation involving the car manufacturer FIAT.

According to the Court, the criminal proceedings against the applicants concerned offences involving facts which were identical to those for which the applicants had been finally considered liable by Consob. More importantly the Court ruled that the administrative penalties imposed by Consob may be considered, for the purposes of the European Convention on Human Rights, as criminal sanctions. The Court ruled that beginning a criminal proceeding for an abusive behaviour that has already been subject to Consob’s penalties constituted “*bis in idem*”, as no legal action can be instituted twice for the same cause of action.

The ruling of the Court² enhances compliance with the “*ne bis in idem*” principle within each Member State by extending its scope of action to include also sanctions that are essentially criminal in nature even though they are formally classified as non-criminal in domestic law. In doing so, the Court referred to its own established case-law which sets out the criteria to be considered in determining whether or not there was a criminal charge.

II. “Ne Bis in Idem” and Double Jeopardy

The “*ne bis in idem*” principle, also known as double jeopardy in common law jurisdictions, has the purpose to prevent a person from being tried or punished twice for the same offence. It may operate both externally (i.e., in an international context, when a person has been finally convicted or acquitted by a court in another State), and internally (i.e., in a domestic context).

This principle is fully recognized and internationally protected³ and is embodied in the constitutions and/or in the domestic legislation of many countries; as for Italy, it is recognized at an internal level in the Code of Criminal Procedure.⁴

The External Ne Bis in Idem

At an international/external level, the "*ne bis in idem*" principle indicates the prohibition to expose an individual to trial a second time for the same conduct in two different States.

Although this is a very controversial matter, affected by the lack of harmonization among the various national criminal laws, external "*ne bis in idem*" has been fully recognized by the Charter of Fundamental Rights of the European Union, which expands the scope of application of the principle to the entire territorial area of the European Union.⁵ After the Treaty of Lisbon,⁶ this Charter has become directly and immediately applicable in each Member State, and, consequently, most jurisdictions now consider also the external "*ne bis in idem*" principle as mandatory and as a right that cannot be waived by any means by the States.⁷

The lack of certainty as to the application of the international "*ne bis in idem*" is evidenced in the Schengen Agreement.⁸ After stating that a final judgment of acquittal or conviction delivered by the authority of a Member State produces a preclusive effect similar to that which a judgment issued by a national court can produce⁹ — recognizing therefore that the external "*ne bis in idem*" applies between States — it subsequently lists specific instances¹⁰ in which States are allowed to opt out of this provision and therefore are not bound by the effectiveness of the principle of "*ne bis in idem*".

The Internal Ne Bis in Idem

The European Convention on Human Rights¹¹ and the International Covenant on Civil and Political Rights¹² are two examples of treaties containing solely an explicit reference to criminal proceedings pending under the jurisdiction of the "same State". This means that a State will not consider the trial of a person for a particular criminal offence in another State as a bar on prosecuting the person for the same offence in that State. Therefore the application of the "*ne bis in idem*" is limited to a national level, being confined to the jurisdiction of the same State.

The preclusion applies only after the person has been finally acquitted or convicted in accordance with the law and criminal procedure of the State concerned. This means that there must have been a final decision. The assessment on when a decision can be considered final depends on the criminal procedure rules of each State, particularly whether the law provides for prosecutorial appeals of final judgments or whether it allows retrials. Once the accused has exhausted his appeal options, "*ne bis in idem*" starts to apply simply after his acquittal or conviction — in jurisdictions where the prosecutor has no right to appeal — or when all appeals have been exhausted or when the time limit for appeals has expired — in jurisdictions where the prosecutor may appeal an acquittal on an error of law or fact and where a retrial can be ordered.

Case law of both the European Court of Human Rights¹³ and the Italian Supreme Court¹⁴ can be taken into consideration to further clarify the meaning of "final judgment", preclusive of a new trial or a new conviction. Any decision by a criminal judge of one of the Member States that has acquired the power of final decision (*res judicata*), regardless of its *nomen juris* has to be included in the principle's scope of action. Therefore, any judgment that can be considered equivalent to a final judgment in any way is comprised.

Numerous leading decisions of the European Court of Justice¹⁵ have designed the limits of European "*ne bis in idem*" establishing that this principle also applies to procedures for discharge of the criminal action (i.e., following plea bargain on an agreement with the Public Prosecutor) by

which the Public Prosecutor of a Member State closes, without a judge's intervention or the involvement of a court, a criminal proceeding after the accused has fulfilled certain obligations (i.e., paid a sum of money determined by the Public Prosecutor).

Furthermore, "*ne bis in idem*" also applies to all decisions — issued by individuals with the authority to administer national criminal justice — which can be considered as "final judgments" and which affect the unlawful conduct with which the accused is charged, even if they are not issued by a judge or in a form other than a judgment.

III. The Case of Grande Stevens and Others v. Italy

The applicants were two Italian companies, Exor S.p.A. (the majority shareholder of Fiat S.p.A.) and Giovanni Agnelli & C. S.a.s., their chairman, the authorized representative of Giovanni Agnelli, and the Agnelli group's lawyer.

In 2005 Consob¹⁶ asked Exor and Giovanni Agnelli to issue a press release providing information concerning any initiative taken in view of the expiry of a 2002 loan, of any new fact concerning Fiat and of any information that could explain the fluctuation of Fiat shares on the market.

The applicants issued a press release indicating that no initiatives had been examined or instituted in relation to the expiry of the financing contract, although negotiations with one bank were at an advanced stage. Soon thereafter, the bank finalized an agreement amending the 2002 contract with Exor, thus enabling the Italian company to preserve its initial holding in Fiat.

Pursuant to the Italian Financial Act,¹⁷ Consob accused the applicants of the offence of "disseminating information (...) capable of providing false or misleading information concerning financial instruments".¹⁸ In February 2007, Consob then imposed administrative sanctions on the applicants. The fines imposed by Consob — and partly reduced by the Turin Court of Appeal — became final in June 2009. Ultimately, the fines imposed on Giovanni Agnelli, Exor and one of the individuals amounted to € 600,000, € 1,000,000 and € 1,200,000, while the other individuals involved were banned from administering, managing and controlling companies listed on the Italian stock exchange for periods ranging from two to four months.

Under the Italian Financial Act, the applicants' conduct triggered ill pending.

The applicants recurred to the Court complaining, among other things, that the criminal proceeding brought against them was based on the same events for which they had already been sanctioned with an administrative penalty by Consob.

An important issue that the European Court had to analyze, in order to decide if there had been a violation of Article 4 of Protocol No. 7, concerned the reservation that the Italian Government made with regard to the application of Articles 2 to 4 of Protocol No. 7.¹⁹ In this declaration, Italy stated that these articles applied only to offences classified as "criminal" by the Italian law, which was not the case of the offences proscribed by Consob. The general principle, embodied in Article 4 of Protocol No. 7 of the European Convention on Human Rights,²⁰ is that since the "*ne bis in idem*" scope of action covers only trials and convictions of a person in criminal proceedings, it does not prevent him/her from being made subject, for the same act, to action of a different character (for example, civil proceedings, disciplinary action in the case of an official).²¹

The Court noted, however, that the reservation in question did not respect the parameters prescribed by the Convention,²² because it did not contain a "brief statement of the law concerned". The reservation was considered of a general nature and was accordingly considered invalid, since it did not refer to, nor mention, those specific provisions of the domestic legal order which exclude offences or procedures from the scope of Article 4 Protocol No. 7.

Having established that the reservation was invalid, to determine whether there had been an actual breach of the “*ne bis in idem*” principle, the Court had to decide on another critical point regarding the scope of action of Article 4 Protocol No. 7, i.e., it had to ascertain whether the procedure before Consob concerned the “determination of a criminal charge”.

The Court stated that in order to determine whether it was a matter of criminal charge or not, three criteria had to be taken into consideration: (i) the legal qualification of the matter within the system of the relevant State; (ii) the nature of the matter itself; (iii) the nature and the severity of sanctions.²³ The Court also pointed out that these three criteria are alternative and not cumulative, but they could be cumulated when the analysis of each criterion is not enough to conduct to a certain statement on the application of the “*ne bis in idem*” principle.

The conclusion of the Court was that although the sanction was described as “administrative” in Italian law, the severity of the fines imposed by Consob on the applicants meant that they were criminal in nature. There were indeed grounds for considering that the procedure before Consob concerned a “criminal charge” and that consequently Article 4 of Protocol No. 7 was applicable.

As a result, the applicants ought to have been considered as having already been convicted by a final judgment under the scope of Article 4 Protocol No. 7. The criminal proceedings which had been brought and maintained against them in the meantime clearly concerned the same conduct, by the same persons and on the same date:

In the Court’s opinion (...) the new proceedings concerning a second “offence” originated in identical events to those which had been the subject-matter of the first and final conviction, which in itself amounted to a violation of Article 4 of Protocol No. 7. It followed therefore that Italy was to ensure that the new criminal proceedings brought against the applicants in violation of this provision, and which were still pending, against Mr. Gabetti and Mr. Grande Stevens, were closed as rapidly as possible and without adverse consequences for the applicants.²⁴

IV. Conclusions

The “*ne bis in idem*” principle is a well-established principle in most countries; however, at the same time, as we have analyzed throughout this article, it also creates several issues which national and international courts are trying to resolve.

In its 4th of March decision, the European Court of Human Rights held that a State cannot use national/internal classifications of sanctions to avoid application of this principle in its jurisdiction. In other words, States cannot arbitrarily classify sanctions as administrative rather than criminal to leave them out of the scope of action of the “*ne bis in idem*” principle.



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- ¹ Available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-141370#{\"itemid\":\[\"001-141370\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-141370#{\)
- ² Under Articles 43 and 44 of the Convention, the judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.
- ³ For example, Article 14 § 7 of the International Covenant on Civil and Political Rights; Article 4 § 1 of Protocol 7 to the European Convention on Human Rights and Fundamental Freedoms; and Article 8 § 4 of the American Convention on Human Rights.
- ⁴ Italian Code of Criminal Procedure, Article 649.
- ⁵ Charter of Fundamental Rights of the European Union, Article 50 [Right not to be tried or punished twice in criminal proceedings for the same criminal offence]: *“No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.”*
- ⁶ According to the Treaty of Lisbon, the rights, freedoms and principles sanctioned therein have *“the same legal value as the Treaties”*.
- ⁷ Court of Milan, Office of Preliminary Investigations, 6 July 2011, Walz Gordon. See also D. Vozza *“Verso un nuovo “volto” del ne bis in idem internazionale nell’Unione europea?”* in <http://www.penalecontemporaneo.it/upload/1336026245Vozza%20ne%20bis%20in%20idem.pdf> and F. M. Ferrari *“Bis in idem internazionale: quando la fiducia paneuropea prevale sulla territorialità dello ius puniendi”* in www.europeanrights.eu.
- ⁸ Convention implementing the Schengen Agreement of 14 June 1985 and entered into force 28 September 1995, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:239:0001:0473:EN:PDF>; Chapter 3 [Application of the Ne Bis In Idem Principle], Articles from 54 to 58. With the Treaty of Amsterdam — and the “Protocol integrating the Schengen acquis into the framework of the European Union” — the Agreement is now an integral part of the law of the European Union.
- ⁹ Convention implementing the Schengen Agreement of 14 June 1985, Article 54: *“A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts (offences) provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.”* This rule, which operates only following a criminal final judgment, does not prevent the same party from being subject simultaneously to two or more pending criminal proceedings, to the extent that the facts constitute an offence.
- ¹⁰ Convention implementing the Schengen Agreement of 14 June 1985, Article 55: *“A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases: (a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered; (b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party; (c) where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office.”*
- ¹¹ Article 4 of Protocol No. 7.
- ¹² Article 14 § 7.
- ¹³ European Court of Human Rights, 20 July 2004, *Nikitin v. Russia*; European Court of Human Rights, 2 July 2002, *Goktan v. France*.
- ¹⁴ Supreme Court, Criminal Section I, Decision No. 10426, 2 February 2005, *Boheim*; Supreme Court, Criminal Section VI, Decision No. 5617, 15 February 2004.
- ¹⁵ European Court of Justice, 11 February 2003, C-187 + 385/01, *Gözütök and Brügge*; European Court of Justice, 10 March 2005, C-469/03, *Miraglia*; European Court of Justice, 9 March 2006, C-436/04, *Van Esbroeck*; European Court of Justice, 28 September 2006, C-150/05, *Van Straaten*; European Court of Justice, 28 September 2006, C-467/04, *Gasparini*; European Court of Justice, 18 July 2007, C-288/05, *Kretzinger*; European Court of Justice, 18 July 2007, C-367/05, *Kraaijenbrink*; European Court of Justice, 11 December 2008, C-297/07, *Bourquain*; European Court of Justice, 22 December 2008, C-491/07, *Turansky*; European Court of Justice, 16 November 2010, C-261/09, *Mantello*. In http://www.ejtn.eu/PageFiles/3103/ne_bis_in_idem.pdf; <http://curia.europa.eu/juris/recherche.jsf?language=en>.

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- ¹⁶ Consob is the Commission charged, among other powers, with protecting investors and ensuring the transparency and development of the stock markets.
- ¹⁷ Italian Legislative Decree No. 58 of 24 February 1998.
- ¹⁸ Italian Financial Act, Article 187*ter* § 1.
- ¹⁹ Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, List of declarations made with respect to treaty No. 117, Status as of: 11/3/2014, Italy: Declaration contained in a letter, dated 7 November 1991, handed to the Secretary General at the time of deposit of the instrument of ratification, on 7 November 1991 — Or. Fr. — “The Italian Republic declares that Articles 2 to 4 of the Protocol apply only to offences, procedures and decisions qualified as criminal by Italian law.” The preceding statement concerns Article(s): 2, 3, 4; Period covered: from 1/2/1992. <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=117&CM=7&DF=11/03/2014&CL=ENG&VL=1>
- ²⁰ Protocol No. 7 to the European Convention on Human Rights, Article 4 [Right not to be tried or punished twice]: “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”.
- ²¹ European Court of Human Rights “Commentary on the provisions of the Protocol from the Explanatory report of the Treaty Office”, Article 4; in <http://conventions.coe.int/Treaty/en/Reports/Html/117.htm>.
- ²² European Convention on Human Rights, Article 57 [Reservations]: “1. Any State may, when signing this 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”. http://www.echr.coe.int/Documents/Convention_ENG.pdf.
- ²³ Decision, page 19.
- ²⁴ European Court of Human Rights, Press Release, 4 March 2014, ECHR 062 (2014).