France's Double-Trial System for Market Abuses May Be Headed for Reform

Skadden

January 2015

This article is from Skadden's *2015 Insights* and is available at skadden.com/insights.

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In 2015, the French double-trial system for market abuses will be referred to the Constitutional Council for an assessment of the system's constitutionality under the double jeopardy rule (or, using the Latin maxim, the *ne bis in idem* principle). Should the current system be held unconstitutional, this would mark the end of concurrent criminal and administrative sanctions against violators of financial market regulations.

France's Double-Trial System

In France, breaches of stock market regulations can be prosecuted and sanctioned by both the French Financial Market Authority (Autorité des Marchés Financiers — AMF) and criminal courts. To date, the Constitutional Council and the Supreme Court (Cour de Cassation) have held that such a double-trial system is compliant with French law, so long as the total amount of fines imposed does not exceed the maximum penalty that can be incurred under either criminal law or AMF regulation.[1]

However, in recent years, the coexistence of regulatory and criminal sanctions deriving from the same facts has been challenged by defendants increasingly, on the grounds that the dual actions breach the double jeopardy rule expressly enshrined in Article 50 of the European Charter of Human Rights[2] and Protocol No. 7 to the European Convention on Human Rights (Article 4). France, however, made an express reservation to the latter when ratifying it, stating that "only those offences which under French law fall within the jurisdiction of the French criminal courts may be regarded as offences within the meaning of Articles 2 to 4 of this Protocol."

A March 2014 decision by the European Court of Human Rights (ECHR), *Grande Stevens and Others v. Italy* (application nos 18640/10, 18647/10, 18663/10 and 18698/10), intensified the controversy. In *Grande Stevens*, the court ruled that the Italian double-trial system for market abuses, which is essentially identical to the French one, constituted a breach of Article 4.

When ratifying this protocol, Italy made a reservation akin to the one made by France, stating that "Articles 2 to 4 of the Protocol apply only to offences, procedures and decisions qualified as criminal by Italian law." However, this reservation was deemed invalid by the *Grande Stevens* decision.

Soon after the court issued its decision, defendants in several emblematic insider trading-related proceedings filed motions for priority rulings on constitutionality; these included the *EADS* and *Oberthur* cases, which are currently pending before French criminal courts after having been adjudicated by the AMF. In both matters, a number of the individuals and corporations prosecuted already have been sentenced to steep fines by the AMF, while others were found innocent. Either way, none of those sentenced nor those acquitted have agreed to be judged again on the same facts. The expected decision from the Constitutional Council is likely to have far-reaching implications, as the same legal issue is bound to arise in many other upcoming market abuse cases where criminal prosecution is yet to be launched.

French Courts' Resistance

So far, French courts have resisted complying with *Grande Stevens*. Indeed, while pursuant to Article 46 of the European Convention on Human Rights, "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties," national jurisdictions are theoretically under no obligation to comply with a decision involving another member state.

In its September 2014 judgment in *Pechiney* (*11e ch. correctionnelle 2*, No. 05158092056), the Paris criminal court (tribunal correctionnel) declined to find that criminal prosecution should be declared inadmissible on the grounds that the defendants already had been fined by the AMF. In essence, the tribunal acknowledged a significant risk that France would be condemned by the ECHR, but nonetheless insisted that the double-prosecution system was necessary to efficiently deter market abuses.

Another potential reason for French courts' resistance to the ECHR's jurisprudence is that, under French law, the double-trial principle concerns not only market abuses but also other domains, such as disciplinary laws governing attorneys' or doctors' liability. Accordingly, abandoning the principle could have a significant impact on the French legal system in general, far beyond the mere scope of securities law.

Potential Developments in 2015

Should the Constitutional Council decide that the current double-trial system breaches the French Constitution, then French criminal courts would have no choice but to declare criminal prosecution inadmissible in all cases already adjudicated by the AMF.[3] In addition, a reform would likely be introduced to repeal double prosecution in market abuse cases.

However, this is not the most likely issue. Indeed, in light of its previous decisions on this matter, it is probable that the Constitutional Council will rule that the motions filed lack merit and the current system is compliant with the French Constitution.

In such a case, the claimants' only option (once all domestic remedies have been exhausted) will be to file an application before the ECHR seeking for France to be sentenced for breaching Article 6(1). Should these claimants secure victory, which is likely but may take time, France eventually will have no choice but to introduce reform — something the Ministry of Justice and the AMF already have begun to contemplate.

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[1] CC decision No. 89-260 DC, July 28, 1989 (Fr.), Cass. crim., Jan. 22, 2014, Bull. No. 22 (Fr.).

[2] Expressly endorsed in the Treaty of Lisbon, signed on Dec. 13, 2007, which entered into force on Dec. 1, 2009.

[3] The Constitutional Council may however specify that its decision will only apply to actions commenced on or after a certain date, in order to mitigate its effects on ongoing proceedings.