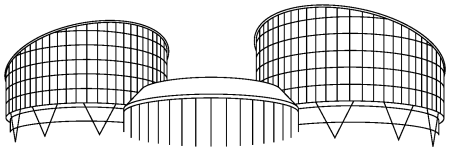

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF M.N. AND OTHERS v. SAN MARINO

(Application no. 28005/12)

JUDGMENT

STRASBOURG

7 July 2015

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M.N. and Others v. San Marino,

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

Josep Casadevall, *President,*
Luis López Guerra,
Ján Šikuta,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 16 June 2015,

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

PROCEDURE

1. The case originated in an application (no. 28005/12) against the Republic of San Marino lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Italian nationals, S.G, M.N, C.R. and I.R. ("the applicants"), on 26 April 2012. The President of the Section acceded to the applicants' request not to have their names disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicants were represented by Mr A. Saccucci and Mr L. Molinaro, lawyers practising in Rome. The San Marinese Government ("the Government") were represented by their Agent, Mr Lucio L. Daniele and their Co-Agent Mr Guido Bellatti Ceccoli.

3. The applicants alleged that they had been denied access to court to challenge a decision affecting their private life and correspondence, in violation of Articles 6, 8 and 13 of the Convention.

4. On 15 October 2013 the application was communicated to the Government.

5. The Italian Government, which had been informed of their right, under Article 36 § 1 of the Convention, to intervene in the proceedings, gave no indication that they wished to do so.

6. The applicants requested that an oral hearing be held in the case. On 16 June 2015, the Court considered this request. It decided that having regard to the materials before it, an oral hearing was not necessary.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

7. In or before the year 2009 criminal proceedings were instituted in Italy against named individuals (not including the applicants) who were charged, *inter alia*, of conspiracy, money laundering, abuse of a position of influence in financial trading, embezzlement, tax evasion and fraud. In particular it was suspected that Mr EMP organised, financed and managed, directly or indirectly a network of companies situated in various states (San Marino, Italy, Malta, Portugal (Madeira) and Vanuatu) which were all traceable to one source namely, San Marino Investimenti S.A. (hereinafter "S.M.I."). According to the applicants, Mr EMP owned S.M.I.'s entire capital stock which was instrumental to the accomplishment of a series of investment and fiduciary operations (*operazioni fiduciarie*) the aim of which was to allow a number of Italian clients to launder money coming from illicit sources (by impeding the identification of the real source of the money entrusted to it by means of a double system of fiduciary mandates (*mandati fiduciari*)). The group of co-accused were suspected of having, through such network, abusively supplied investment services contrary to the legal requirements as provided in the relevant Italian law (*Testo Unico Della Finanza*) and of having abusively carried out financial activities without being in possession of the necessary economic and financial requisites and the relevant registration as required by Italian law (*Testo Unico Bancario*).

8. In the context of these proceedings, by means of a letter rogatory received by the San Marino judicial authorities on 8 May 2009, the Public Prosecutor's office (of the Rome Tribunal) asked the San Marino authorities for assistance in obtaining documentation and carrying out searches in various banks, fiduciary institutes and trust companies (*banche, fiduciare e societa' trust*) in San Marino, in accordance with Article 29 of the Bilateral Convention on Friendship and Good Neighbourhood between Italy and San Marino of 1939.

9. By a decision of 27 November 2009 (hereinafter also referred to as the *exequatur* decision), the ordinary first-instance tribunal (*Commissario della Legge*, hereinafter the *Commissario*), accepted the request in conjunction with the crimes of conspiracy, money laundering, aggravated fraud and embezzlement with the aim of fraud, considering that the relevant requirements for the execution of the request were fulfilled. In particular the *Commissario* considered that those crimes were also punishable under San Marino law. It therefore ordered, *inter alia*, an investigation in respect of all

banks, fiduciary institutes and trust companies in San Marino. The purpose was to acquire information and banking documents (*inter alia*, copies of statements showing transactions and movements, cheques, fiduciary dispositions (*disposizioni fiduciarie*) and emails) related to a number of named current accounts in specified institutes as well as any other current account which could be traced back (*riferibile*) to S.M.I, held by all banks and fiduciary institutes in San Marino, which were directly or indirectly involved with the company or physical persons mentioned in this decision. In reaching that decision the *Commissario* bore in mind the relevant articles of the Bilateral Convention on Friendship and Good Neighbourhood between Italy and San Marino of 1939, law no. 104/2009, the European Convention on Mutual Assistance in Criminal Matters, and San Marino's commitment to international organs such as the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) as well as Article 36 of law no. 165/05 which provides that banking secrecy cannot be held against the criminal justice authorities and Article 13 of law no. 104/2009 according to which the act of acquiring copies of documentation amounts to seizure.

It gave further details as to the search and seizure operation, *inter alia*, that copies should be made of the documentation, that in the event that the investigation was successful the directors of the credit institute were to submit the relevant documents within twenty days to the Agency for financial investigations, who in turn would immediately transfer it, indicating the names of those involved (directly or indirectly), to enable notification. It further ordered that where data was held on electronic storage devices (*supporti informatici*), the collection of data from these devices should be supervised by appointed experts; and that clone copies were to be made of these storage devices, as well as back-up copies. Any means of information technology seized had to be sealed and kept in custody in appropriate places, and the removal of such seals had to be notified to the interested persons to enable them (or their lawyers) to be present. It ordered the judicial police to serve the decision upon the directors of all the banks and trust companies, to the legal representatives of the physical persons, to the directly interested persons, and to persons who were in possession, under whatever title, of the those places. It also warned that documentation obtained and forwarded could not to be used for purposes other than those linked to the criminal proceedings mentioned in the decree accepting the request made in the letter rogatory, unless the court decided otherwise following a further assessment.

10. By a note of 26 April 2010 the *Commissario* ordered that Italian citizens who had entered into fiduciary agreements (*aperto posizioni fiduciarie*) with S.M.I. (1452 in all) should be notified of the decision. It was noted that any information referring to the said citizens and transmitted to the judicial authority of the requesting state could not be used for the

purposes other than the prosecution of the criminal offences mentioned in the *exequatur* decision (*non potra essere utilizzata per fini diversi dal perseguimento degli illeciti penali di cui alle norme di legge indicate nel provvedimento di amissione della rogatoria*), unless the court decided otherwise following a new assessment.

11. Following the investigation and implementation of the *exequatur* decision, in consequence of the last-mentioned order of the *Commissario*, the applicants were served with the relevant notification (M.N. on 24 January 2011, S.G. on 16 June 2011 and C.R. and I.R. on 4 February 2011).

B. Proceedings brought by the applicants

12. On an unspecified date the applicants lodged a complaint (Article 30 of law no. 104/2009) before the judge of criminal appeals (*Giudice delle Appellazioni Penali*) against the *Commissario*'s decision concerning the seizure of documents related to them on the basis that they were not persons charged with the criminal offences at issue. They alleged a violation of the principles contained in the San Marino Declaration on Citizens' Rights and Fundamental Principles (hereinafter "the declaration"). In particular they contended that the principle that crimes had to be punishable under the law of the requested state had not been respected, that there had been a violation of both Italian and San Marino law, and they noted the absence of the *fumus delicti* and of any link between the crimes at issue and the position of the applicants. Moreover, given that many such complaints by persons in similar situations had already been declared inadmissible by the domestic courts for lack of standing - them not being the persons charged and therefore not the direct victims of the seizure - the applicants further complained that Article 30 (3) of law no. 104/2009 was not compatible with the principles laid down in the Declaration, in so far as it had been interpreted as not protecting or recognising the right to lodge a complaint by anyone who was subject to coercive measures of seizure of documents (related to their interests) as a result of an *exequatur* decision.

13. By decisions of 25 February 2011 in respect of S.G., C.R. and I.R., and of 30 June 2011 in respect of M.N., the judge of criminal appeals declared the complaints inadmissible. The court noted that the applicants had been served with a notice of the *exequatur* order and had exhausted pleas available in law in that respect (*hanno esperito le impugnazioni previste dalla legge*). It further noted that an *exequatur* decision may only be challenged by a person who is involved in the investigation being carried out by the requested authority, or by a third party who is not investigated but who has been subjected to the measure. A person, who, in consequence of the investigation, is involved in any way with the activity undertaken, may not be considered as an interested person since any breach of the rights

or interests of such persons, resulting from the execution of the *exequatur* decision, must be raised in the ambit of the Italian jurisdictions. The court considered that as established by domestic case-law it was only after the finding of admissibility of the application that a judge had to set a time-limit for submissions. For the purposes of admissibility one had to verify, amongst other things, the juridical interest of the appellant. Moreover, any constitutional complaints could give rise to an assessment of such question by the competent court (*Collegio Garante*), following a referral, only if the original proceedings were properly instituted, and not where, because of a lack of juridical interest of the appellant, the application was inadmissible. In the present case the appellants were not interested parties in relation to the *exequatur* decision, but may only have an eventual interest in the effects of such execution, and thus they did not have juridical interest to challenge the said decision.

14. In relation to the complaint of incompatibility with the Declaration, the court of criminal appeals only pronounced itself on the request made by C.R.: on 29 April 2011 it declared the complaint inadmissible as on that date no proceedings appeared to be pending.

15. The applicants appealed to the third instance criminal judge (*Terza Istanza Penale*) reiterating their complaints and invoking the European Convention on Human Rights and Fundamental Freedoms. In particular they noted that the *Commissario's exequatur* decision had ordered the seizure of documents related to them, despite them not being linked to any of the activities mentioned in that decision or them having ever had relations with the Italian companies. Moreover, the seized documents were irrelevant for the purposes of ascertaining the existence of the crimes attributed to the accused, thus, the only purpose behind the seizure was to name the Italians who had had dealings with S.M.I. irrespective of any involvement they had had with the facts object of the letter rogatory. They further challenged the appeal decisions in so far as they were issued in breach of the rights of the defence, in particular as they were not allowed to present submissions as provided for in law, neither in respect of the challenge nor in respect of the constitutional complaint. Furthermore, the decisions had lacked reasons and made no reference to the actual position of the applicants and a lack of reasoning in respect of the rejection of the constitutional complaint was particularly detrimental as it did not allow a proper examination of the matter by the third-instance judge.

16. By decisions of 29 July 2011 filed in the registry on the same day and served on 3 August 2011 in respect of S.G., I.R and C.R., and of 27 October 2011 filed in the registry on the same day and served on 10 November 2011 in respect of M.N., the third-instance criminal judge confirmed the appeal decision in that the appellants lacked juridical interest. In consequence the appeal was inadmissible and in any event there appeared to be no violation of law tainting the impugned decision. The question of

constitutional legitimacy of law no. 104/2009 was also rejected on the same ground as that put forward by the appeal court.

C. Parallel proceedings

17. In the meantime, the applicants (except for M.N.) had lodged an objection requesting the revocation of the *exequatur* decision in their respect, on the basis that the documents related to them were of no relevance to the investigation.

18. By a decision of 7 September 2011, served on their lawyer on an unspecified date, the *Commissario* held that the objection was to be discontinued (*non luogo a procedere*) in view of the findings of the third-instance criminal judge. The *Commissario* noted that the authorities were not limited to carrying out the actions requested by the letters rogatory only in respect of persons formally charged, but could also extend such acts to third persons who were not so charged.

19. The applicants lodged a further objection requesting the *Commissario* to restrict the use of the seized documents. By decisions filed in the relevant registry on 19 September 2011 the *Commissario* held that its *exequatur* decision of 27 November 2009 had already applied such a limitation, indeed that decision had clearly stated that such documentation was not to be used for purposes other than those linked to the criminal proceedings mentioned in the letters rogatory, unless the court decided otherwise following a further assessment.

II. RELEVANT DOMESTIC LAW

20. Article 29 of the Bilateral Convention on Friendship and Good Neighbourhood between Italy and San Marino of 1939, reads as follows:

> "The judicial authority of each contracting State, shall, following a request from the other contracting State, proceed to notify acts, execute acts in conjunction with preliminary investigations, including seizure of objects constituting the *corpus delicti*, and carry out any other act related to criminal proceedings under way before the abovementioned authorities.
>
> In relation to the matter mentioned in the above sub-paragraph the judicial authorities of the two states must correspond directly between them. In the event that the requested authority is not competent, it will, of its own motion, forward the letter rogatory to the state having competence in the matter according to the latter's law.
>
> The execution of a letter rogatory may be refused only in the event that it does not fall within the competence of the judicial authorities of the requesting state."

21. In so far as relevant Articles 2, 13 and 30 of law no. 104/2009 read as follows:

Article 2

"1. The present law applies solely to proceedings concerning crimes, the repression of which, at the moment of the request for assistance, is within the competence of the judicial authorities.

2. Requests relative to criminal proceedings whose object is to take preliminary actions or transmit evidence, files or documents, may be subject to letters rogatory under the present law."

Article 13

"2. Acquiring a copy of documents amounts to seizure."

Article 30

"1. The decrees of notification in relation to the *exequatur* proceedings cannot be challenged.

2. *Exequatur* decrees which do not concern coercive measures and which are not referred to in sub paragraph one may be challenged by the Attorney General (*Procuratore del Fisco*), on the basis of its legitimacy, by means of a written application before the judge of criminal appeals, within ten days from the date of the notification of the *exequatur* decree.

3. An *exequatur* decree providing for coercive measures may be challenged by any means available in the domestic system. Interested persons, through a qualified lawyer, and the Attorney General may lodge a written application before the judge of criminal appeals, regarding the existence of the requisites of Title I and II of Chapter one of this Law, within ten days from the date of the notification of the *exequatur* decree.

4. The lodging of the above-mentioned applications suspends the execution of the rogatory request.

5. The Attorney General for the purposes of sub article two above, and the Attorney General and interested parties for the purposes of sub-article 3 above, may view the letter rogatory or such parts which are not expressly reserved within ten days of the application. At the end of such time limit the *Commissario* transmits the file to the competent judge.

22. The relevant articles of the Code of Criminal Procedure read as follows:

Article 56

"Orders providing for coercive measures, whether personal or patrimonial, namely seizures or their subsequent validation (*convalida*), may be challenged by the accused or the Attorney General within ten days of their notification or execution.

Civil parties may also challenge orders for coercive measures of a patrimonial nature, namely seizures or their subsequent validation."

Article 186

"All judgments are appealable, and an appeal must be lodged before the appeal judge"

Article 187

"An accused may appeal a judgment finding him or her guilty as well as one in which his or her culpability was not sufficiently established.

The Attorney General may appeal against all judgments be they of conviction or an acquittal.

The civil party may appeal against the operative parts of a judgment which concern his or her civil interests, when the accused has been found guilty, and against an order in his or her respect to pay costs and damages (...) when the accused is acquitted.

In any case, in order to lodge an appeal, interest is required"

23. In so far as relevant Article 36 of law no. 165/2005 regarding the obligation of banking secrecy reads as follows:

"1. Banking secrecy means that authorized individuals, are prohibited from divulging to third parties data and information obtained in the exercise of their specified functions.

5. Banking secrecy cannot be invoked against:

a) the criminal justice authorities. In such cases the acts of the judicial proceedings in the inquiry stage must be maintained rigorously secret.

b) the surveillance authorities (*autorita' di vigilanza*) in the exercise of their functions of surveillance and the fight against terrorism and money laundering."

THE LAW

I. THE ALLEGED VIOLATION OF ARTICLES 6 § 1, 8 ALONE AND IN CONJUNCTION WITH 13 OF THE CONVENTION

24. The applicants complained under Article 6 § 1 of the Convention that they did not have effective access to court to complain about the *exequatur* decision ordering the search and seizure of banking documents referring to them. They further complained under Article 8 that the measure had interfered with their private life and correspondence, it had not been in accordance with the law, nor proportionate, and it had failed to provide relevant procedural safeguards. Lastly, they complained that they had been denied an effective remedy for the purposes of their Article 8 complaint, in breach of Article 13 of the Convention.

25. The Court considers that the applicants' complaints principally concern Article 8 of the Convention and it is therefore appropriate to examine the case under that provision (see, *mutatis mutandis*, *Xavier Da Silveira v. France*, no. 43757/05, § 21, 21 January 2010), which reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Exhaustion of domestic remedies

(a) The Government

26. The Government submitted that the applicants had failed to exhaust domestic remedies, as they failed to institute civil proceedings before the ordinary judge in civil matters, against the HE Chamber (*Eccelentissima Camera*) of the Republic of San Marino (in charge of the patrimony of the State), challenging the seizure in their respect and requesting compensation for any resulting damage. They highlighted that in the San Marino domestic legal system, the ordinary judge in civil matters was the only judge having jurisdiction to assess disputes concerning the right to respect for private life and correspondence as well as that of property.

27. The Government further submitted that in so far as the applicants "were indirectly involved by the effects that the evidence collected through the enforcement of the *exequatur* decision could possibly have within the legal system of the Italian state", their action should have been addressed against the requesting state, namely Italy, which is the only authority entitled to use the information obtained following the letters rogatory.

(b) The applicants

28. Referring to the Court's case-law the applicants submitted that the adequacy and effectiveness of a remedy related to its ability to remove the detrimental act or to afford redress for any effects in contrast with the rights protected by the Convention. Only remedies that allowed an individual to raise the alleged violation and could afford, to the person concerned, the opportunity to put an end to the breach, to prevent the possible adverse effects or, as appropriate, to obtain adequate redress in a specific form or by equivalent, had to be exhausted. Thus, the adequacy and effectiveness of a remedy (for the purposes of exhaustion) was inextricably linked to the correlative power, in the hands of the court hearing the case, to take preventive measures or, as appropriate, measures of restoration of the established violations. They considered that the civil remedy invoked by the Government could not be considered effective in their case, as it could not prevent the harmful consequences complained of nor put an end to the alleged violation. They further noted that even assuming they could obtain compensation for damage resulting from a violation of their Article 8 rights

– an improbable scenario, given that the measure appeared to have been legitimately adopted on the basis of the laws in force and was considered valid and productive of effects by the domestic courts - they were also complaining that they had no access to a court to challenge the lawfulness of the *exequatur* decision affecting their rights. However, the civil judge who could at most award compensation for the breach of Article 8, had no competence to assess the lawfulness of the *exequatur* decision and order a relevant action of redress, thus, leaving them devoid of any judicial protection in that respect.

29. In so far as the Government mentioned unspecified remedies in the Italian legal system, the applicants noted that they were only obliged to exhaust remedies in the State against which they were complaining, and therefore in this case San Marino. While in the present case the coercive action was required by the Italian authorities, the measure was adopted and materially performed within the exclusive jurisdiction of San Marino.

(c) The Court's assessment

30. The Court considers that this matter is closely related to the merits of the complaint. Accordingly, it joins the issue to the merits.

31. However, in relation to the subsidiary argument raised by the Government, the Court notes that the complaint lodged before this Court is against San Marino, and it is therefore only the actions of that State which are at issue in the present case, and therefore it is only remedies in that State that are required to be exhausted.

2. *Significant disadvantage*

(a) The Government

32. The Government noted that banking documents related to the applicants had not been seized. The documents had solely been copied and the originals returned after they were submitted by SMI upon court order. The documents were obtained for information purposes and the applicants had not been deprived of a right *in rem*. The Government noted that banking documents are owned by the bank or the company or financial institution preparing them, and not by the individuals or legal persons that have contractual relationships with them. This had been established in local criminal case-law (namely, judgment of the Highest Judge of Appeal in criminal matters dated 2 March 2011 in case no. 85/2009 following an international letter rogatory). Therefore, considering the way in which the preventive measure was applied, it was not clear what damage was suffered by the applicants, since they were not prevented from carrying out any subsequent movement and/or financial transaction.

33. The Government accepted that under the criteria set by the Court, the assets involved in the case were not the only element establishing whether

or not there had been a significant prejudice. However, the applicants had not indicated the existence of any other significant prejudice. The Government noted that as expressly specified in the order of 26 April 2010 any information referring to the mentioned citizens and transmitted to the judicial authority of the requesting State could not be used for purposes other than the prosecution of criminal offences referred to in the laws mentioned in the decision accepting the international letter rogatory (see paragraph 9, *in fine*, above). In the Government's view by means of this clause, the *Commissario* balanced the requesting authority's need to determine criminal liability and the need to restrict the use of such information, thus preventing the possibility of the information transmitted being detrimental to third parties not involved in the offence, such as the applicants. The fact that the latter did not suffer any objectively appreciable damage was further highlighted by the fact that the applicants did not institute proceedings to protect their own interests before any judicial authority of the requesting State.

(b) The applicants

34. The applicants submitted that the application of the *exequatur* decision had had very serious repercussions on their reputation and honour in that they were made to appear to be somehow involved in the on-going criminal investigation. This was exacerbated by the fact that the ongoing criminal proceedings had been given wide media coverage both in San Marino and Italy, and the applicants' names had even appeared in some articles in national newspapers. For this reason they had had interest in challenging the *exequatur* decision, a procedure of which they had been arbitrarily deprived. They further noted that the judge's purported balancing exercise limiting, at the time, the use of the data collected, which was mentioned by the Government, had no relevance for the assessment of the prejudice suffered and that instruction could in any event change if the courts deemed otherwise.

35. The applicants further noted that they were unaware that the documents had been solely copied and not also seized, since they had been prevented from having access to any form of effective judicial review on the lawfulness of the measure and its enforcement. In any event they noted that the argument concerning the ownership of documents was devoid of any Convention support. Indeed the Convention organs had never denied the protection of Article 8 to personal information contained in documents "formally" owned by other persons, two such examples where medical data and security camera imaging. They referred respectively to *I. v. Finland* (no. 20511/03, 17 July 2008) and *Perry v. the United Kingdom* (no. 63737/00, ECHR 2003-IX (extracts)). More importantly, in their view, what had to be considered was that the information contained in those

documents formed part of the applicants' private life, which the State had failed to respect.

(c) The Court's assessment

36. Article 35 of the Convention, as amended by Protocol No. 14 which entered into force on 1 June 2010, added a new admissibility requirement to Article 35 which, in so far as relevant, provides as follows:

> "3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
>
> ...
>
> (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

37. The main element contained in the new admissibility criterion is the question of whether the applicant has suffered a "significant disadvantage". Inspired by the general principle *de minimis non curat praetor*, this criterion hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court (see *Korolev v. Russia* (dec.), no. 25551/05, 1 July 2010). The assessment of this minimum level is relative and depends on all the circumstances of the case (see *Korolev*, cited above, and *Gagliano Giorgi v. Italy*, no. 23563/07, § 55, ECHR 2012 (extracts)). The severity of a violation should be assessed taking account of both the applicant's subjective perceptions and what is objectively at stake in a particular case (see *Korolev,* cited above). Thus, the absence of any such disadvantage can be based on criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant (see *Adrian Mihai Ionescu v. Romania* (dec.) no. 36659/04, § 34, 1 June 2010, *Rinck v. France* (dec.) no. 18774/09, 19 October 2010; and *Kiousi v. Greece* (dec.) no. 52036/09, 20 September 2011). However, a violation of the Convention may concern important questions of principle and thus cause a significant disadvantage without affecting pecuniary interests (see *Korolev*, cited above).

38. However, even should the Court find that the applicant has suffered no significant disadvantage, it may not declare an application inadmissible if respect for human rights, as defined in the Convention and the Protocols thereto, requires an examination on the merits, or if the matter has not been "duly considered" by a domestic tribunal (*Juhas Đurić v. Serbia*, no. 48155/06, § 55, 7 June 2011).

39. The Court considers that, in the circumstances of the present case, the impact on the applicants of the situation complained of was of importance to their personal life. Furthermore, the nature of the issues raised

is not trivial, and may have an impact both at the domestic level as well as at the Conventional one. Thus, the Court does not find it appropriate to dismiss the complaint with reference to Article 35 § 3 (b) of the Convention (see, *mutatis mutandis*, *Berladir and Others v. Russia*, no. 34202/06, § 34, 10 July 2012; and *Eon v. France*, no. 26118/10, § 35, 14 March 2013; see also *Zborovský v. Slovakia*, no. 14325/08, §§ 39-40, 23 October 2012; and *Antofie v. Romania*, no. 7969/06, § 17, 25 March 2014 where the Court found that complaints of access to court under Article 6 of the Convention required an assessment on the merits) and it is therefore not necessary to consider whether the third criterion, namely that the case has been "duly considered" by a domestic tribunal, is met.

40. It follows that the Government's objection is dismissed.

3. Six months

(a) The Government

41. The Government submitted that the application introduced by S.G, C.R and I.R was inadmissible since it was lodged after six months from the date of the decision by the highest judge of appeal in criminal matters. Given that the domestic decision was notified to them on 3 August 2011, the final deadline for the application was 3 February 2012, while the application was lodged only on 26 April 2012.

42. The Government submitted that the argument made by these applicants that the six-month time-limit referred to in Article 35 § 1, might run, for all applicants, from the date of notification of the last decision adopted by the highest judge of appeal in criminal matters which only concerned M.N. (10 November 2011) was legally wrong. Decisions are effective only with respect to the proceedings from which they originate and *vis-á-vis* the people having instituted them. It followed that the decision in respect of M.N. could not have any effect on third parties.

(b) The applicants

43. The applicants contended that the six months' time-limit for the lodging of applications, in respect of the four applicants, should be calculated from the date of the final domestic decision that was given in respect of M.N. filed on 27 October 2011 and served on the latter applicant's lawyer on 10 November 2011, irrespective of the fact that the decisions in respect of the other three applicants had been antecedent to that. They argued that had M.N.'s claim been successful, the measure would have been annulled and the effects of such an annulment would extend to the other applicants, who would have then lost their victim status in respect of the alleged violations.

(c) The Court's assessment

44. The Court reiterates that, pursuant to Article 35 § 1 of the Convention, it may only deal with a matter within a period of six months from the final decision in the process of exhaustion of domestic remedies. If no remedies are available or if they are judged to be ineffective, the six-month period in principle runs from the date of the act complained of (see *Hazar and Others v. Turkey* (dec.), nos. 62566/00 et seq., 10 January 2002).

45. The Court observes that it has joined to the merits the question of whether the applicants had exhausted domestic remedies (see paragraph 30 above). In the event that the Government's objection to that effect were to be upheld the application would be inadmissible in respect of all the applicants. However, given that it may be dismissed, there is room for assessing this objection in relation to S.G., I.R and C.R.

46. Assuming that there were no further remedies to be exhausted, the Court observes that S.G., I.R and C.R. became aware that they had no access to court or no procedural safeguards in respect of the measure complained of by means of the decision of the third-instance criminal judge of which the applicants complained (see paragraph 16 above). Thus, the six months must be taken to run from that final decision which rejected the applicants' claim on the basis of a lack of *locus standi*. That decision was filed in the registry on 29 July 2011 and served on 3 August 2011 in respect of S.G., I.R and C.R. and it was from that moment that the six months in their respect started to run. It is not for the Court to speculate on whether a different decision by the third-instance criminal judge in respect of other parties would have had any impact on the three mentioned applicants.

47. It follows that the Government's objection is upheld and the above mentioned complaints lodged by S.G., I.R and C.R. on 26 April 2012 are inadmissible, if not for non-exhaustion of domestic remedies, for non-compliance with the six-month rule set out in Article 35 § 1 of the Convention, and are rejected pursuant to Article 35 § 4.

4. Applicability of Article 8

(a) The Government

48. The Government contested the applicability of Article 8 in the present case. They submitted that no documents had been seized but that they had been solely submitted, copied and returned. No searches had taken place in the applicant's private homes or work places and the documents, copied for information purposes, could not be defined as of a personal or intimate nature. Thus, in the Government's view Article 8 was not applicable given the lack of connection with the applicant's private life. They noted that to date Article 8 did not appear to protect the confidentiality of documents concerning banking and fiduciary relationships. They

considered that there was no evidence of how the seizure of such documents may affect the social identity of the applicant, also because only the latter considered such documents as "confidential" and, as such, exclusively related to the relationship with the credit institutions in question and with the parties directly involved in the banking and/or financial activities.

(b) The applicant

49. According to the applicant the provision applied in the present case under both the notions of "private life" and "correspondence". Despite the absence of any precedent by the Court on this point, it followed logically that since Article 8 encompassed a plurality of personal information, it also included documents related to banking and trust relationships. He further noted that the definition of "personal information" contained in law no. 70 of 23 May 1995, regarding the protection of personal data in San Marino, read "any information relating to natural or legal persons identified or otherwise clearly identifiable".

50. According to the applicant it was also irrelevant that the documents were not formally owned by the applicants but by the bank, since the seizure concerned communications (letters and emails) exchanged between the applicant and a group of companies, and the use (seizure or simple copying) of correspondence, which was kept in the bank's custody on the basis of a specific contractual relationship allowing for a right to privacy under domestic law. It was, thus, also undisputable that the applicant had suffered interference.

(c) The Court's assessment

51. The Court considers that information retrieved from banking documents undoubtedly amounts to personal data concerning an individual, irrespective of it being sensitive information or not. Moreover, such information may also concern professional dealings and there is no reason of principle to justify excluding activities of a professional or business nature from the notion of "private life" (see *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II). It follows that the notion of "private life" applies in the present case.

52. Furthermore, it has not been disputed that the measure affected also the applicant's correspondence and material that could properly be regarded as such for the purposes of Article 8. Indeed, Article 8 protects the confidentiality of all the exchanges in which individuals may engage for the purposes of communication (see *Michaud v. France*, no. 12323/11, § 90, ECHR 2012). Moreover, emails clearly fall under the concept of correspondence (see *Copland v. the United Kingdom*, no. 62617/00, § 41, ECHR 2007-I).

53. The Court notes that the applicability of Article 8, under the notion of "private life", to seizures of professional documents and personal data

continues to be reaffirmed (see *Niemietz v. Germany*, 16 December 1992, Series A no. 251-B; *Crémieux v. France,* no. 11471/85, 25 February 1993; *Greuter v. the Netherlands,* (dec.), no. 40045/98, 19 March 2002 and the more recent *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, 14 March 2013). It further notes that the storing of data relating to the "private life" of an individual constitutes interference for the purposes of Article 8 (see *Amann*, cited above) irrespective of who is the owner of the medium on which the information is held (see, *mutatis mutandis*, *Lambert v. France*, 24 August 1998, § 21, *Reports of Judgments and Decisions* 1998-V, and *Valentino Acatrinei v. Romania*, no. 18540/04, § 53, 25 June 2013). In particular, both the storing and the release of information related to private life, coupled with a refusal to allow an opportunity to refute it, amounts to an interference under Article 8 (see *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116; see also *I. v. Finland*, cited above, concerning the disclosure and processing of information relating to "private life", examined under positive obligations).

54. It follows that the applicant (M.N.) has suffered an interference with his right to respect for his private life and correspondence in the present case. The Court considers that mere fact that under San Marino law, the term seizure may refer to the mere copying of data does not alter this conclusion. It is undeniable that copying constitutes a way of acquiring and therefore seizing data irrespective of the fact that the original medium may have remained in place. Furthermore, the copying in the present case entailed the immediate and independent storage, by the authorities, of the data at issue.

55. In conclusion, in the present case, the seizure in the sense of copying of banking data (retrieved from bank statements, cheques, fiduciary dispositions and emails), which the Court considers as falling under the notion of both "private life" and "correspondence", and the subsequent storage by the authorities of such data, amounts to interference for the purposes of Article 8. The provision is therefore applicable to the instant case.

5. Conclusion as to the admissibility of M.N's complaint

56. Bearing in mind that the question of exhaustion of domestic remedies has been joined to the merits (see paragraph 30 above), the Court considers that this complaint raises complex issues of fact and law which cannot be resolved at this stage in the examination of the complaint but require examination on the merits. Accordingly, the complaint cannot be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. The Court further finds that there are no other grounds at this stage for declaring this complaint inadmissible in respect of M.N. and therefore declares it admissible.

B. Merits

1. The parties' submissions

(a) The applicant

57. The applicant (M.N.) noted that San Marino law provided specifically for the right to privacy over documentation held by the bank as a result of contractual relations. Thus, the measure applied had contravened that law. Moreover, given the vagueness and width of the *exequatur* decision it could not be said that the measure was precise and foreseeable, and in any event it had not been proportionate and had not pursued a legitimate aim. Moreover, for the reasons mentioned below, argued in the light of Article 6, it had lacked any procedural safeguards, and to date the applicant was unaware of which documents had been acquired by the judicial authorities of San Marino and handed over to the Italian authorities.

58. The applicant noted that the *exequatur* decision given by the *Commissario*, entrusted the investigating authorities with a virtually unlimited discretion in order to identify which documents should be seized, regardless of an assessment about the real need to acquire these documents for investigative purposes in connection with the request made. He referred specifically to the wording of the order considering it particularly unlimited and extensive (see paragraph 9 above) and thus not foreseeable, especially in the light of his right under domestic law to the protection of the confidentiality of banking documents. This was more so in the absence of his prior consent and the absolute lack of procedural safeguards resulting from the refusal by the domestic courts to assess his claim for lack of standing (as further explained below).

59. The applicant considered that the interference had not been proportionate as there was no pressing need of general interest to justify the seizure. He considered that a generic need of cooperating with the Italian authorities could not justify an extensive seizure which went beyond the investigations against named persons. Likewise, a generic need to prosecute crime did not render the measure legitimate in relation to persons who were not involved in the offences which were being investigated and which concerned documents totally irrelevant to demonstrating whether the charges against those actually subject to an investigation were well-founded. As a result of the measure and the publication of his name in the press, the applicant alleged that he suffered serious repercussions on his reputation and image.

60. The applicant contended that the domestic courts' decisions concerning his challenges to the *exequatur* decision were too formalistic and denied him access to court. He noted that Article 30 of law no. 104/09 recognised the right of each person served with the decision of *exequatur* ordering coercive measures, to lodge an appeal with the criminal

jurisdictions. Nevertheless, the domestic courts held that the applicant had no standing to do so despite his relation to the activity performed, as he was not an "interested person". They noted that the Government shared the domestic courts' interpretation of the law, on the basis of the argument that to allow such access would put in jeopardy the effectiveness of letters rogatory. It followed that on the Government's admission there was a total ban on challenging the *exequatur* for the applicant and persons in his position. He noted that the Court had already denied in principle the compatibility of a general exclusion of the court's competence to hear certain disputes. He referred to *Paroisse Greek Catholic Sâmbata Bihor v. Romania* (no. 48107/99, 12 January 2010) and *Vasilescu v. Romania* (22 May 1998, *Reports* 1998-III). The applicant highlighted that, in the present case, the ban had been total as the judges' interpretation had not allowed for any assessment concerning the extent of the impact of the measure on the applicant's (or any other person's) individual position, notwithstanding that the order affected different documents for different persons.

61. The applicant noted that, even assuming the interpretation of domestic law by the domestic courts was correct, such a restriction on his right to a court could not be considered proportionate and it lacked a legitimate aim. He noted that there were no overriding reasons of general interest since even the need not to unduly obstruct or delay the execution of the letters rogatory (raised by the Government) could not justify an absolute and unconditional restriction of the right to complain of those persons who were also suffering the effects of the coercive measure imposed. This was even more so given that persons who were actually accused in the criminal proceedings had the right to challenge such an order.

62. In relation to the civil remedy referred to by the Government, the applicant submitted that the civil judge had no competence to assess the lawfulness of the *exequatur* decision and order a relevant action of redress, thus, leaving him devoid of any judicial protection in that respect (refer to paragraph 28 above).

(b) The Government

63. The Government submitted that the confidentiality of banking and fiduciary relationships (Article 36 (5) (a) of law no. 165/2005) could not be invoked in the present case as banking secrecy (understood as the bank's obligation of confidentiality, made binding by a practice constantly followed in relationships with customers) did not apply as against a judicial authority, namely an investigating magistrate in criminal proceedings, given the interests in repressing crime. The latter interests allowed for wide investigating powers and a limited application of secrecy.

64. The Government submitted that the measure applied to the applicant had been in accordance with the law, namely Article 2 (2) of law no. 104/09

which provided that requests concerning criminal proceedings aimed at enforcing investigative measure or transmitting evidence, files or documents may be the subject of letters rogatory. Domestic case-law (order of the Judge of Appeals of 3 June 1988, proceedings no. 392/1998) also provided that the forced collection of evidence through search and seizure could also be ordered in respect of parties not subject to investigation, who even if innocent are subject to *servitutes justitiae*, where the goods relate to investigation or charges concerning others. According to the above, a connection must be established between the offence and the thing, but not with the person, since the identification of the offender was not fundamental for the adoption of the measure.

65. The Government noted that seizure for evidentiary purposes was a regular measure of inquiry, provided for by law, frequently used, and communicated by means of substantiated notifications.

66. They considered that such measures were intended to prosecute crimes causing socially disrupting phenomena, with special reference to money laundering and conspiracy. Such measures were thus necessary to guarantee the economic well-being of the country and prevent disorder and crime, as well as to protect the rights and freedoms of others.

67. The Government further noted that generally, for the requested State, the execution of letters rogatory is in most cases compulsory. The powers of the judge of the requested State, in this case, San Marino, were more limited than those of the requesting authority, since the former may only ascertain that the conditions provided for by law were fulfilled. Moreover, the requested State's judge is not responsible for ascertaining the conditions within which the seized documents may be used in the criminal proceedings in the requesting State and the applicants would have had to challenge any such use before the courts of the requesting State. However, the Government noted that in adopting the order, the *Commissario* had limited the use of the documents seized - by stating that the information could not be used for purposes other than the prosecution of criminal offences referred to in the law provisions indicated in the decision admitting the letters rogatory - thus, preventing prejudice to third parties not connected with the offences.

68. They noted that the remedies pursued by the applicant were not the appropriate remedies according to domestic law, which was why they had been rightly rejected by the courts. However, the applicant could adequately present his views to affirm his rights and thus the right to access to court had not been violated. They noted that the domestic courts' decisions were not based on a restrictive interpretation of the law or procedural rules in force. On the contrary, such decisions were based on a consistent and reasonable interpretation of the reference rules, namely law no. 104/2009 and Articles 187 and 56 of the Code of Criminal Procedure. Criminal case-law had interpreted the latter as allowing only the accused persons, the

prosecutor, namely the Attorney General (*Procuratore del Fisco*) and the civil party, to appeal and with specific reference to seizures also the third party subject to a precautionary measure (sic.). Pointing to Article 30 (3) of law no. 104/2009 on international letters rogatory - which provided that any complaint envisaged by domestic law against *exequatur* orders establishing coercive measures were to be admitted - the Government noted that the term "interested persons" had necessarily to be interpreted as "parties involved under the legislation on complaints envisaged by domestic law" and they stressed that the special legislation on letters rogatory did not introduce any particular and special remedies regulated by specific rules. On the contrary, that legislation established that existing remedies should be used for that purpose and it described the specific rules of procedure to be applied for such remedies. The Government submitted two domestic judgments in the same context and concerning the same letters rogatory delivered in 2011 (judgments of the third-instance criminal judge of 2 March 2011 and 5 July 2011) which confirmed that law no. 104/09 was not intended to introduce a system of *ad hoc* remedies in relation to coercive measures in the ambit of letters rogatory, but simply referred to the system of remedies already envisaged in the Code of Criminal Procedure, which were available only to the parties involved.

69. The Government explained that the law provided access to court (by means of the proceedings instituted by the applicant) to the persons affected, meaning the persons being investigated as well as the owners of the assets. They were of the view that to extend the use of such a remedy to third parties, such as the applicant, would undermine the process of letters rogatory, as it would complicate proceedings which were meant to be rapid. It followed that any such restriction, which did not allow the applicant to undertake this specific type of procedure, pursued a legitimate aim, namely the need to proceed rapidly for the proper administration of justice, and it was proportionate given the aim pursued, namely the prosecution of serious crime.

70. The Government further submitted that the applicant could have instituted civil proceedings before the ordinary judge in civil matters, challenging the seizure in his respect, and requesting compensation for any resulting damage (see paragraph 26 above).

2. The Court's assessment

(a) General principles

71. The Court reiterates that an interference breaches Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is, in addition, "necessary in a democratic society" to achieve those aims (see *Amann*, cited above, § 71).

72. The Court draws attention to its established case-law, according to which the expression "in accordance with the law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see *Amann*, cited above, § 50).

73. The Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the need for an interference, but it goes hand in hand with European supervision. The exceptions provided for in Article 8 § 2 are to be interpreted narrowly and the need for them in a given case must be convincingly established (see *Crémieux,* cited above, § 38 and *Xavier Da Silveira*, cited above, § 34). Moreover, when considering the necessity of interference, the Court must be satisfied that that there existed sufficient and adequate guarantees against arbitrariness (*ibid*, and *Matheron v. France*, no. 57752/00, § 35, 29 March 2005), including the possibility of an effective control of the measure at issue (see *mutatis mutandis*, *Lambert,* cited above, § 34, *Xavier Da Silveira*, cited above, § 43 and *Klass and Others v. Germany*, 6 September 1978, §§ 50, 54 and 55, Series A no. 28).

(b) Application to the present case

74. The Court considers that the interference in the present case was prescribed by law, namely Article 29 of the Bilateral Convention on Friendship and Good Neighbourhood between Italy and San Marino of 1939, and law no. 104/2009, read in conjunction with Article 36 of law no. 165/05, which provided for an exception to the right of banking secrecy precisely in the context of measures taken by judicial authorities in criminal proceedings. The fact that such measures could be applied to third parties not party to criminal proceedings was also evident from the relevant articles of the Code of Criminal Procedure (see paragraph 22 above) as also confirmed by domestic case-law as early as 1988, more than two decades before the applicant was affected by such a measure, and in that light it cannot be said that the law and its application had not been foreseeable. As to the extent of the order, the Court considers that this matter is more appropriately dealt with in its assessment of the necessity of the measure.

75. The Court further considers that the measure pursued various legitimate aims, namely, the prevention of crime, the protection of the rights and freedoms of others, and also the economic well-being of the country.

76. It remains to be determined whether the measure, as applied to the applicant, was necessary in a democratic society and in particular whether it was accompanied by the relevant procedural safeguards.

77. The Court firstly notes the wide extent of the *exequatur* order of the *Commissario*, which also affected the applicant, an individual not subject to the ongoing investigation in relation to which the letters rogatory were

made, and in respect of whom no clear suspicions had been advanced (see, *mutatis mutandis*, *Xavier Da Silveira*, cited above, § 43). The Court notes that albeit decided by a judicial authority, the Government admitted that the *Commissario* had limited powers in making the order. Indeed, the *Commissario* could not, or in any event, had failed to make any assessment as to the need for such a wide ranging order, or its impact on the multiple third parties, including the applicant, who was extraneous to the criminal proceedings.

78. The Court must further assess whether an "effective control" was available to the applicant to challenge the measure to which he had been subjected (see *mutatis mutandis*, *Lambert*, cited above, § 34), and therefore whether subsequent to the implementation of that order the applicant had available any means for reviewing it, in his regard (see also, *mutatis mutandis*, *Xavier Da Silveira*, cited above, § 43 and *Klass and Others* cited above, §§ 50, 54 and 55, Series A no. 28).

79. The Court notes that the applicant, like other persons in his position, only became officially aware of the *exequatur* decision and its implementation following a notification which was ordered on 26 April 2010 (see paragraph 10 above) and which was served on him only on 24 January 2011, that is, more than a year after the measure was ordered. Subsequently, the applicant instituted proceedings challenging the *exequatur* decision. These proceedings were not however examined on the merits, the domestic courts having considered that the applicant had no standing to impugn the measure as he was not an "interested person".

80. The Court observes that there is no immediate reason why the term "interested persons" in Article 30.3 of Law no. 104/2009 should be interpreted as referring solely to persons affected by the order such as the persons charged and the owners or possessors of the banking and fiduciary institutes/establishments but not to the applicant, who was also affected by the measure. However, the Court would recall that it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see *Anghel v. Italy*, no. 5968/09, § 82, 25 June 2013). The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see, in the context of Article 6, *inter alia*, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I and *Sâmbata Bihor Greco-Catholic Parish v. Romania*, no. 48107/99, § 64, 12 January 2010). The Court notes that the Government supported the interpretation of the domestic courts. It follows that it is not disputed that the procedure attempted by the applicant was not in fact available to him. It is also noted that the applicant's claims as to the constitutional legitimacy of such a finding were also rejected for lack of standing. The Court reiterates that the institution of proceedings does not, in itself, satisfy all the access to court requirements of Article 6 § 1 (see, for

example, *Sukhorubchenko v. Russia*, no. 69315/01, § 43, 10 February 2005), it follows from this that, contrary to what was submitted by the Government, the mere fact that the applicant instituted those proceedings, which were then rejected for lack of standing, does not in itself satisfy the requirement of effective control under Article 8.

81. In so far as the Government suggested that the applicant could have pursued an ordinary civil remedy, the Court observes that the Government have not shown, by means of examples or effective and substantiated argumentation, that such a remedy could have examined the applicant's challenges to the *exequatur* decision in a timely procedure, or that it could have, if necessary, annulled the said order or its consequences in respect of the applicant. Similarly, while the Convention is incorporated in San Marino law and is directly applicable in San Marino, the Government have not furnished any example of a litigant having successfully relied on the Convention to apply to a domestic authority in order to obtain redress in similar circumstances. Moreover, it is unclear – and the Government have not explained – what procedure would have been followed and what would have been the legal effect of such a complaint (see also, *Rachevi v. Bulgaria*, no. 47877/99, § 64, 23 September 2004). The Court considers that the Government should normally be able to illustrate the practical effectiveness of a remedy with examples of domestic case-law, but it is ready to accept that this may be more difficult in smaller jurisdictions, such as in the present case, where the number of cases of a specific kind may be fewer than in the larger jurisdictions (see *Aden Ahmed v. Malta*, no. 55352/12, § 63, 23 July 2013). However, in the present case the *exequatur* decision affected more than a thousand persons (see paragraph 10 above) and the Government have not demonstrated at least one example of such a remedy being undertaken by any of the affected persons in the applicant's position. In any event, the Court has already held that a claim for damages against the State in an action before the ordinary courts is clearly distinct from – and should not be confused with – an application for judicial review. Accordingly, it would not have been a remedy capable of achieving the aim sought by the applicant of having the impugned search and seizure, or its consequences, annulled and could therefore not be regarded as an "effective review" for the purposes of Article 8 (see, *mutatis mutandis*, *Xavier Da Silveira*, cited above, § 48; and *Pruteanu v. Romania*, no. 30181/05, § 55, 3 February 2015).

82. The Court further observes that no other procedure appears to have been available to the applicant. The domestic courts did not direct him to another legal avenue, and indeed the judge of criminal appeals stated that pleas available in law had been exhausted (see paragraph 13 above).

83. Finally, the Court underlines that in the circumstances of the present case, the applicant, who was not an accused person in the original criminal procedure, was at a significant disadvantage in the protection of his rights

compared to an accused person, or the possessor of the banking or fiduciary institute, subject to the *exequatur* decision (and who were entitled to challenge it), with the result that the applicant did not enjoy the effective protection of national law. Thus, the Court finds that, despite the wide extent of the measure which had been applied extensively and across to all banking and fiduciary institutes in San Marino, the applicant did not have available to him the "effective control" to which citizens are entitled under the rule of law and which would have been capable of restricting the interference in question to what was "necessary in a democratic society".

84. In view of the above, the Court considers that no distinct matters arise under Articles 6 and 13 of the Convention in relation to this complaint, which has been examined under Article 8 (see, for example, *Xavier Da Silveira*, cited above, § 50).

85. There has accordingly been a violation of Article 8 of the Convention and the Government's objection as to non-exhaustion of domestic remedies is dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

86. The applicants also complained that the domestic courts' failure to assess their complaints regarding the legitimacy of the interpretation given to the law with the rights enshrined in the San Marino declaration and the European Convention, again denied them access to a court. They relied on Article 6 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The parties' submissions

87. The applicants argued that the domestic courts' arbitrary decisions not to deal with their complaint regarding the constitutional legitimacy of the law (on the basis that for a constitutional issue to be raised in the course of pending proceedings, the original proceedings would have had to have been validly initiated), was comparable to a decision by the domestic court not to refer such matter to another court, a matter which according to Convention case-law raised an issue under the Convention in the event that such decision was arbitrary or unreasonable. This in their view resulted in yet another denial of access to court in relation to this matter. They also considered that no sufficient reasons had been given for this denial, thus they were arbitrary and not fully motivated, unlike the situation in the case of *Năstase-Silivestru v. Romania* (no. 74785/01, 4 October 2007). They further argued that the appeal judge had not even authorised the twenty day time-limit for the applicants to make submissions on the matter as provided for by law (Article 13 (4) of law no. 55/2003) having found that no such

referral was possible in the absence of on-going proceedings - a finding which the applicants considered inappropriate given that the complaint was precisely the lack of access to court as a result of the interpretation of laws the constitutional legitimacy of which was being questioned. A decision on the constitutional legitimacy was even more relevant given that it did not appear that the matter had ever been examined by the constitutional jurisdiction (namely, *il Collegio Garante della Costituzionalita` delle Norme*) or the third-instance criminal judge.

88. The Government submitted that these complaints had been submitted out of time by S.G., I.R and C.R.

89. As to the merits, they submitted that in relation to M.N.'s claims about constitutional legitimacy, the decisions by the domestic courts rejecting the relevant requests for assessment had to be deemed to be fully justified given the context in which they were submitted. According to the Government's interpretation of the Court's case-law, the assessment during proceedings concerning constitutional legitimacy is not absolutely necessary, save in exceptional circumstances, for instance where an arbitrary refusal would make the main proceedings unfair. However, in this case, the refusal to start the procedure for the assessment of the constitutional legitimacy cannot be considered as arbitrary, as it was justified on the basis of the applicant's lack of entitlement to bring an action in the proceedings *a quo*. They considered that the denial by the San Marino criminal judges, based on such overriding considerations, was also in line with the relevant case-law, as well as with the judgments mentioned by the applicants since the latter referred to national proceedings in which there were no doubts as to the entitlement of the applicant with respect to the main proceedings.

90. Lastly, the Government disagreed with the applicant's arguments, as they considered that the State was entitled to limit the possibility of constitutional assessments by rejecting clearly unfounded, unusual or inadmissible claims.

B. The Court's assessment

91. The Court notes that it has not been disputed that there was no further remedy available in the context of this complaint.

92. It further notes that S.G., I.R and C.R. became aware that they had no access to court to raise their constitutional claims by means of the decision of the third-instance criminal judge rejecting their request for a verification of the constitutional legitimacy of law no. 104/2009 as interpreted by the domestic courts (see paragraph 16 above). Thus, the six months period referred to in Article 35 § 1 of the Convention must be taken to run from that decision which was filed in the registry on 29 July 2011 and served on 3 August 2011 in respect of S.G., I.R and C.R.

93. It follows that the Government's objection in relation to S.G., I.R. and C.R.'s complaint concerning access to court to raise their constitutional claims is upheld; therefore those complaints lodged by S.G., I.R. and C.R. on 26 April 2012 are inadmissible, for non-compliance with the six-month rule set out in Article 35 § 1 of the Convention, and are rejected pursuant to Article 35 § 4.

94. As concerns the complaint lodged by M.N, the Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

95. Having regard to the finding relating to Article 8 concerning the lack of procedural safeguards to contest the measure at issue (see paragraph 85 above), the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 6 § 1 concerning access to court to raise the issue of constitutional legitimacy.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

96. Lastly, the applicants also complained under Article 6 § 1 read in conjunction with Article 6 § 3 (b) that they did not have a fair trial, they having been denied standing in the proceedings to contest the order of the *Commissario*. They considered that Article 6 in its criminal head should also apply to the present case as the Court's case law had established that Article 6 started to apply from the moment an individual's position was affected. That criterion had been fulfilled in their case given that they were affected by the measure despite not yet being under investigation. They contended that the act itself was aimed at naming persons involved with S.M.I, irrespective of their involvement with the facts object of the letters rogatory. Indeed the *Commissario*'s decision had clearly stated that SMI's dealings suggested that the persons involved (the applicants took this to refer also to them) sought to escape anti-laundering verifications, a signal of the doubtful origins of legal titles (*titoli*). Similarly, the *Commissario*'s subsequent decision had stated that the investigation could affect third parties who were not charged. The applicants therefore contended that the *Commissario* had aimed at obtaining coercively the information related to them, thus by-passing banking secrecy, with the aim of eventually charging other individuals. They claimed that the possibility under San Marino law for the judge to authorise the use of such documentation for purposes not related to the object of the letters rogatory, meant that proceedings against the applicants could be initiated on the basis of those documents, contrary to their right to the presumption of innocence and the right not to incriminate oneself, them being denied any procedural guarantees. They referred to *Funke v. France* (25 February 1993, Series A no. 256-A) and *J.B. v. Switzerland* (no. 31827/96, ECHR 2001-III).

97. The Court notes that under its criminal head Article 6 starts to apply from the moment the person is affected by the investigation, however, the question whether or not court proceedings satisfy the requirements of Article 6 § 1 of the Convention can only be determined by examining the proceedings as a whole, i.e. once they have been concluded (see, for example, *Arrigo and Vella v. Malta* (dec.), no. 6569/04, 10 May 2005).

98. In the present case, to date, there is no suggestion that criminal proceedings have been initiated, or are even being considered, against the applicants in San Marino. The complaint is, thus premature and, is therefore, inadmissible for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. 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."

A. Damage

100. The applicants claim one million euros (EUR) in respect of non-pecuniary damage on account of the continuing anxiety, stress, helplessness and deep frustration he was undergoing given that he was still unaware of what sensitive data had been acquired by the San Marino authorities and what use would be made of that data. He also referred to the repercussions the situation had had on his personal life and business activity.

101. The Government submitted that any violation in the present case did not cause tangible damage. They noted that the domestic courts had limited the use of such documents which had only been copied and, in the absence of any particularly invasive action against the victims, a finding of a violation should suffice as just satisfaction. It was also clear that the claim made by the applicants was not only unreasonable, unjustified and unsubstantiated but also exorbitant in the light of the Court's awards.

102. The Court notes that it has solely found a violation of Article 8 in respect of M.N. Deciding in equity, it awards the applicant, M.N., EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

103. The applicants collectively claimed EUR 63,992.40 for the costs and expenses incurred before the domestic courts, namely EUR 60,902.40 including VAT and CPA, paid to Mr L. Molinaro and EUR 3,090 paid to

another lawyer for representation before the domestic courts (as per invoices submitted). The applicants further claimed EUR 304,764.06 in legal fees for representation before this Court, representing EUR 120,099.33 to each of the two lawyers representing them, plus CPA and VAT. They submitted that the sums had been calculated on the basis of the tariff provided in Table A of Ministerial Decree no. 55 of 10 March 2014. Of these sums the applicants had already paid Mr A. Saccucci the preliminary sum of EUR 24,000 plus VAT and CPA amounting to EUR 30,284.80.

104. The Government submitted that only expenses actually incurred were to be awarded, the documents supplied by the applicants only indicated that a relevantly small part had been paid up and nothing showed that the applicants were bound by a contractual obligation to pay any further sums. Neither had an invoice been submitted concerning the third lawyer, the applicants having solely provided a copy of a cheque paid out to him. More importantly the bills issued by the legal representatives did not indicate in any precise or detailed manner in what way expenses were incurred. Lastly, the fees claimed were not reasonable and were doubled due to the fact that two separate lawyers invoiced the identical professional service without any justification or explanation for do doing.

105. The Court first notes that the application in respect of S.G, C.R and I.R was declared inadmissible, it is therefore only the costs in relation to M.N. which are payable. Moreover, in this respect it is noted that only one of M.N.'s complaints has resulted in a violation, the remainder of the application having been declared inadmissible.

106. The Court notes that the invoices submitted in relation to the domestic proceedings do not reflect the sums claimed. In any case given that the award is solely in respect of M.N. the Court observes that there is only one invoice submitted in his name, in the sum of EUR 10,225.60 including tax. As to the Court proceedings, the Court notes that the invoices concerning preliminary payments due in the name of M.N. amount to EUR 15,121.60 including tax (EUR 10,067.20 + 2,516.80 + 2,537.60). In both cases no evidence of payment was submitted. The Court further observes that the lawyers' fees have been calculated on the basis of a case value ranging from EUR 4,000,000 to 8,000,000, based on an inflated claim for non-pecuniary damage.

107. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the above mentioned considerations, the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 15,000 covering costs under all heads.

C. Default interest

108. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join to the merits the Government's objection of non-exhaustion of domestic remedies and *rejects* it;

2. *Declares* the complaints lodged by M.N. under Articles 6 § 1, 8 alone and in conjunction with 13 of the Convention in connection with the impugned measure and Article 6 § 1 of the Convention concerning access to court to examine the constitutional legitimacy of the interpretation of the law applied in his case, admissible, and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 8 of the Convention in respect of M.N. and that no separate issue arises under Articles 6 § 1 and 13 of the Convention in this connection;

4. *Holds* that there is no need to examine the complaint under Article 6 § 1 of the Convention in respect of M.N. regarding access to court concerning the constitutional legitimacy of the interpretation given to the law;

5. *Holds*
   (a) that the respondent State is to pay the applicant, M.N., within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the claim for just satisfaction.

Done in English, and notified in writing on 7 July 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President