ECLI:EU:C:2022:190

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

15 March 2022 (*)

(Reference for a preliminary ruling – Single Market for financial services – Market abuse – Directives 2003/6/EC and 2003/124/EC – 'Inside information' – Concept – Information 'of a precise nature' – Information relating to the forthcoming publication of a press article reporting a market rumour about an issuer of financial instruments – Unlawfulness of the disclosure of inside information – Exceptions – Regulation (EU) No 596/2014 – Article 10 – Disclosure of inside information in the normal exercise of a profession – Article 21 – Disclosure of inside information for the purpose of journalism – Freedom of the press and freedom of expression – Disclosure by a journalist, to a usual source, of information relating to the forthcoming publication of a press article)

In Case C-302/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d'appel de Paris (Court of Appeal, Paris, France), made by decision of 9 July 2020, received at the Court on the same day, in the proceedings

Mr A

v

Autorité des marchés financiers (AMF)

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, A. Prechal, K. Jürimäe, C. Lycourgos, N. Jääskinen, I. Ziemele, J. Passer, Presidents of Chambers, J.-C. Bonichot, T. von Danwitz, M. Safjan, F. Biltgen (Rapporteur), A. Kumin and N. Wahl, Judges,

Advocate General: J. Kokott,

Registrar: V. Giacobbo, Administrator,

having regard to the written procedure and further to the hearing on 22 June 2021,

after considering the observations submitted on behalf of:

– Mr A, by G. Roch and S. Poisson, avocates,

– Autorité des marchés financiers (AMF), by M. Delorme and A. du Passage, acting as Agents,

– the French Government, by E. de Moustier, A.-L. Desjonquères and E. Leclerc, acting as Agents,

– the Spanish Government, by L. Aguilera Ruiz and J. Rodríguez de la Rúa Puig, acting as Agents,

– the Swedish Government, by O. Simonsson, J. Lundberg, C. Meyer-Seitz, A. Runeskjöld, M. Salborn Hodgson, H. Shev, H. Eklinder and R. Shahsavan Eriksson, acting as Agents,

– the European Commission, by D. Tryantafyllou, T. Scharf and J. Rius, acting as Agents,

– the Norwegian Government, by T.M. Tobiassen, K.K. Næss, P. Wennerås and T.H. Aarthun, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16), Article 1(1) of Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6 of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation (OJ 2003 L 339, p. 70) and Articles 10 and 21 of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6 of the European Parliament and of the Council and Commission Directives 2003/124, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1).

2 The request has been made in proceedings between Mr A and the Autorité des marchés financiers (AMF) (Financial Markets Authority, France) concerning the latter's decision to impose a financial penalty on Mr A for disclosing information relating to the forthcoming publication of press articles reporting market rumours about the launch of takeover bids on companies listed on stock exchanges.

Legal context

European Union law

Directive 2003/6

3 Recitals 1, 2 and 12 of Directive 2003/6 stated:

‘(1) A genuine Single Market for financial services is crucial for economic growth and job creation in the [European Union].

(2) An integrated and efficient financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives.

…

(12) Market abuse consists of insider dealing and market manipulation. The objective of legislation against insider dealing is the same as that of legislation against market manipulation: to ensure the integrity of [European Union] financial markets and to enhance investor confidence in those markets. …’

4 Under the first subparagraph of Article 1(1) of that directive:

‘For the purposes of this Directive:

1. “Inside information” shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.’

5 Article 2(1) of that directive provided:

‘Member States shall prohibit any person referred to in the second subparagraph who possesses inside information from using that information by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates.

The first subparagraph shall apply to any person who possesses that information:

…

(c) by virtue of his having access to the information through the exercise of his employment, profession or duties …

…’

6 Article 3 of that directive stated:

‘Member States shall prohibit any person subject to the prohibition laid down in Article 2 from:

(a) disclosing inside information to any other person unless such disclosure is made in the normal course of the exercise of his employment, profession or duties;

…’

Directive 2003/124

7 Recitals 1 to 3 of Directive 2003/124 read as follows:

'(1) Reasonable investors base their investment decisions on information already available to them, that is to say, on *ex ante* available information. Therefore, the question whether, in making an investment decision, a reasonable investor would be likely to take into account a particular piece of information should be appraised on the basis of the *ex ante* available information. Such an assessment has to take into consideration the anticipated impact of the information in light of the totality of the related issuer's activity, the reliability of the source of information and any other market variables likely to affect the related financial instrument or derivative financial instrument related thereto in the given circumstances.

(2) *Ex post* information may be used to check the presumption that the *ex ante* information was price sensitive, but should not be used to take action against someone who drew reasonable conclusions from *ex ante* information available to him.

(3) Legal certainty for market participants should be enhanced through a closer definition of two of the elements essential to the definition of inside information, namely the precise nature of that information and the significance of its potential effect on the prices of financial instruments or related derivative financial instruments.'

8 Article 1 of that directive, entitled 'Inside information', provided:

'1. For the purposes of applying point 1 of Article 1 of Directive [2003/6], information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments.

2. For the purposes of applying point 1 of Article 1 of Directive [2003/6], "information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments" shall mean information a reasonable investor would be likely to use as part of the basis of his investment decisions.'

Regulation No 596/2014

9 Directives 2003/6 and 2003/124 were repealed by Regulation No 596/2014 with effect from 3 July 2016.

10 According to recitals 2, 7 and 77 of Regulation 596/2014:

'(2) An integrated, efficient and transparent financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives.

…

(7) Market abuse is a concept that encompasses unlawful behaviour in the financial markets and, for the purposes of this Regulation, it should be understood to consist of insider dealing, unlawful disclosure of inside information and market manipulation. Such behaviour prevents full and proper

market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets.

…

(77) This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union … Accordingly, this Regulation should be interpreted and applied in accordance with those rights and principles. In particular, when this Regulation refers to rules governing the freedom of the press and freedom of expression in other media and the rules or codes governing the journalist profession, account should be taken of those freedoms as guaranteed in the Union and in the Member States and as recognised pursuant to Article 11 of the Charter [of Fundamental Rights of the European Union] and to other relevant provisions.'

11 Article 8 of that regulation, entitled 'Insider dealing', states in paragraph 4:

'This Article applies to any person who possesses inside information as a result of:

…

(c) having access to the information through the exercise of an employment, profession or duties …

…'

12 Article 10 of that regulation, entitled 'Unlawful disclosure of inside information', provides in paragraph 1:

'For the purposes of this Regulation, unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties.

This paragraph applies to any natural or legal person in the situations or circumstances referred to in Article 8(4).'

13 Article 14(c) of that regulation stipulates that a person must not unlawfully disclose inside information.

14 Article 21 of Regulation No 596/2014, entitled 'Disclosure or dissemination of information in the media', is worded as follows:

'For the purposes of Article 10, Article 12(1)(c) and Article 20, where information is disclosed or disseminated and where recommendations are produced or disseminated for the purpose of journalism or other form of expression in the media, such disclosure or dissemination of information shall be assessed taking into account the rules governing the freedom of the press and freedom of expression in other media and the rules or codes governing the journalist profession, unless:

(a) the persons concerned, or persons closely associated with them, derive, directly or indirectly, an advantage or profits from the disclosure or the dissemination of the information in question; or

(b) the disclosure or the dissemination is made with the intention of misleading the market as to the supply of, demand for, or price of financial instruments.'

French law

15 Article 621-1 of the règlement général de l'Autorité des marchés financiers (General Regulation of the Financial Markets Authority), in the version applicable to the dispute in the main proceedings ('the RGAMF'), provides:

'Inside information is precise information which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related financial instruments.

Information is to be deemed to be precise if it indicates a set of circumstances or an event which has occurred or may occur and if a conclusion may be drawn therefrom as to the possible effect of those circumstances or that event on the prices of financial instruments or related financial instruments.

Information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments is information which a reasonable investor would be likely to use as one of the bases of his or her investment decisions.'

16 Article 622-1 of the RGAMF is worded as follows:

'Any person referred to in Article 622-2 must refrain from using the inside information in his or her possession …

He or she must also refrain from …

1° disclosing that information to another person outside the normal course of his or her employment, profession or duties or for purposes other than those for which it was disclosed to him or her;

…'

17 Article 622-2 of the RGAMF provides:

'The obligations to refrain from use and disclosure laid down in Article 622-1 shall apply to any person who possesses inside information as a result of:

…

3° his or her access to information by reason of his or her employment, profession or duties, and of his or her participation in the preparation or the execution of a financial operation;

…

Those obligations to refrain from use and disclosure shall also apply to any other person who possesses inside information and who knows or ought to have known that it is inside information.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 For many years, Mr A worked as a journalist for various British daily newspapers, most recently the *Daily Mail*. As part of his work for the latter, he wrote articles under the heading 'Market Report', reporting market rumours. Mr A authored, inter alia, two articles relating to securities admitted to trading on Euronext, which were published on *Mail Online*, the *Daily Mail*'s website.

19 The first of those articles, published on 8 June 2011, mentioned a possible takeover bid by the company LVMH for the shares of the company Hermès at a price of EUR 350 per share, which represented an 86% premium as compared with the closing price of those shares on the day of publication of that article. The day after that publication, that price increased by 0.64% at the opening of the trading session and then by 4.55% during the course of that session.

20 The second of those articles, published on 12 June 2012, indicated that the shares of the company Maurel & Prom could be the subject of a takeover bid, with a proposed purchase price of approximately EUR 19 per share, which represented a premium of 80% as compared with the last closing price of those shares. The day after that article was published, the price of those shares had increased by 17.69% at the close of the stock exchange. On 14 June 2012, the company Maurel & Prom denied that rumour.

21 In the course of an investigation carried out by the AMF, it was revealed that, shortly before the publication of those two articles, purchase orders were made for shares of the companies Hermès and Maurel & Prom, respectively, by British residents who sold their shares once that publication took place.

22 By letter of 23 February 2016, the Investigation and Inspections Directorate of the AMF informed all the persons in question, including Mr A, of the inculpatory facts which might be imputed to them in the light of the findings of the investigators of that directorate. In view of the investigation report drawn up by that directorate, it was decided, on 19 July 2016, to notify the objections against them.

23 Accordingly, by letter of 7 December 2016, the AMF sent Mr A a statement of objections in which it accused him of having, in breach of Articles 622-1 and 622-2 of the RGAMF, disclosed to two persons, Mr B and Mr C, inside information relating to the forthcoming publication of two articles reporting rumours concerning the launch of takeover bids for the shares of the companies Hermès and Maurel & Prom.

24 By decision of 24 October 2018, the Penalties Commission of the AMF upheld certain of the objections against Mr A and imposed a financial penalty of EUR 40 000 on him. It considered, inter alia, that the information at issue in the main proceedings, relating to the forthcoming publication of press articles reporting on rumours about transactions concerning listed securities, satisfied the conditions to be classified as 'inside information' and found that Mr A had disclosed that inside information relating to the securities of the company Hermès to Mr B and Mr C and the inside information relating to the securities of the company Maurel & Prom to Mr C.

25 Hearing the action brought against that decision, the referring court questions, in the first place, whether information relating to the forthcoming publication of a press article reporting a market rumour about an issuer of financial instruments constitutes 'inside information' within the meaning of Article 1(1) of Directive 2003/6, in particular whether, in the present case, the

information at issue in the main proceedings is ‘of a precise nature’, within the meaning of the definition of ‘inside information’.

26 Referring to the definition of information ‘of a precise nature’ set out in Article 1(1) of Directive 2003/124, the referring court has doubts as to whether the information at issue in the main proceedings is specific enough to enable a conclusion to be drawn as to its possible effect on the prices of financial instruments, within the meaning of that provision.

27 In that regard, the referring court questions whether, in order for the information relating to the forthcoming publication of a press article to be regarded as ‘specific enough’, the content of the article itself must be ‘specific enough’ and, if so, whether, as Mr A maintains, the very nature of a market rumour precludes that rumour from having the requisite precision.

28 In the light of the particular circumstances of the case in the main proceedings, the referring court also has doubts as to the effect, as regards the assessment of the precise nature of the information at issue, first, of the reference to the proposed price in the context of a possible takeover bid for the shares of the issuers of financial instruments concerned, secondly, of the reputation of the journalist who authored the press articles reporting the rumours and the reputation of the media organisation which published those articles and, thirdly, of the fact that those articles actually had a significant effect on the prices of the securities which were the subject of those rumours.

29 In the second place, in the event that the information at issue in the main proceedings is classified as inside information, the referring court questions whether the disclosure of such information by a journalist, to one of his or her usual sources of information, may be regarded as having been made ‘for the purpose of journalism’ within the meaning of Article 21 of Regulation No 596/2014. Since that provision has no equivalent in Directive 2003/6, the referring court considers that it can be applied retroactively to the facts in the main proceedings as a more lenient provision than those of that directive.

30 In addition, the referring court raises the question of the relationship between Article 21 of Regulation No 596/2014 and Article 10 thereof, to which Article 21 refers and under which the disclosure of inside information is unlawful except where it is made in the normal exercise of an employment, a profession or duties. In the event that Article 10 is applicable to the disclosure of the information at issue in the main proceedings, the referring court asks whether, in accordance with the judgment of 22 November 2005, *Grøngaard and Bang* (C-384/02, EU:C:2005:708), that disclosure is justified only if it is strictly necessary for the exercise of the profession of journalist and complies with the principle of proportionality.

31 In those circumstances, the cour d’appel de Paris (Court of Appeal, Paris, France) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) (a) Is the first subparagraph of Article 1(1) of [Directive 2003/6] in conjunction with Article 1(1) of [Directive 2003/124] to be interpreted as meaning that information relating to the forthcoming publication of a press article reporting a market rumour about an issuer of financial instruments can satisfy the requirement of precision laid down in those articles for classification as inside information?

(b) Does the fact that the press article, whose forthcoming publication constitutes the information at issue, mentions – as a market rumour – the price of a public takeover bid affect the assessment of the precise nature of the information at issue?

(c) Are the reputation of the journalist who authored the article and of the media outlet which published it and the genuinely significant ("*ex post*") effect of that publication on the price of the securities to which the published article relates relevant factors for the purposes of assessing the precise nature of the information at issue?

(2) [If] the information … at issue can satisfy the necessary requirement of precision:

(a) Is Article 21 of [Regulation No 596/2014] to be interpreted as meaning that the disclosure by a journalist, to one of his or her usual sources [of information], of information relating to the forthcoming publication of an article authored by him or her reporting a market rumour is made "for the purpose of journalism"?

(b) Is the answer to that question dependent on, inter alia, whether or not the journalist was informed of the market rumour by that source or whether or not the disclosure of the information on the forthcoming publication of the article was expedient in order to obtain clarifications from that source with regard to the credibility of the rumour?

(3) … Are Articles 10 and 21 of [Regulation No 596/2014] to be interpreted as meaning that, even where inside information is disclosed by a journalist "for the purpose of journalism" within the meaning of Article 21 [thereof], the lawful or unlawful nature of the disclosure requires an assessment of whether the disclosure was made "in the normal exercise of … [the] profession [of journalist]" for the purposes of Article 10?

(4) … Is Article 10 of [Regulation No 596/2014] to be interpreted as meaning that, in order for it to occur in the normal exercise of the profession of journalist, the disclosure of inside information must be strictly necessary for the exercise of that profession and must comply with the principle of proportionality?'

Consideration of the questions referred

The first question

32 By its first question, the referring court asks, in essence, whether Article 1(1) of Directive 2003/6 must be interpreted as meaning that, for the purposes of classification as inside information, information relating to the forthcoming publication of a press article reporting a market rumour about an issuer of financial instruments is capable of constituting information 'of a precise nature', within the meaning of that provision and that of Article 1(1) of Directive 2003/124, and whether the reference in that article to the price at which the securities of that issuer would be purchased in the context of a possible takeover bid, the identity of the journalist who authored that article and of the media organisation that published it and the actual influence of that publication on the prices of those securities are relevant factors for the purpose of assessing that precise nature.

33 It should be borne in mind that the definition of 'inside information' under Article 1(1) of Directive 2003/6 comprises four essential elements: (i) the information must be of a precise nature; (ii) the information must not have been made public; (iii) it must relate, directly or indirectly, to one or more financial instruments or their issuers; and (iv) it must be information which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on

the price of related derivative financial instruments (judgment of 11 March 2015, *Lafonta*, C‑628/13, EU:C:2015:162, paragraph 24 and the case-law cited).

34 In the present case, the information at issue in the main proceedings, which concerns the forthcoming publication of press articles reporting market rumours about the launch of takeover bids for the shares of listed companies, was disclosed by the author of those articles to two of his usual sources of information. According to the referring court, that information satisfies the second to fourth elements of the definition of the concept of 'inside information', as referred to in the preceding paragraph. As regards the fourth element, it bases that finding, first, on the consideration that, since it fuelled existing speculation relating to the securities concerned, that information was likely to be used by a reasonable investor as part of the basis of his or her investment decisions in relation to those securities and, secondly, on the fluctuations in the prices of those securities which occurred after the publication of the articles in question. It expresses doubts, however, as to whether the first element of that definition, relating to the precise nature of that information, is satisfied in the present case.

35 It should be noted that, as can be seen from recital 3 thereof, Directive 2003/124 was intended to clarify, inter alia, that first element, in order to enhance legal certainty for market participants.

36 Accordingly, under Article 1(1) of that directive, information is to be deemed to be of a 'precise nature' if it satisfies two cumulative conditions: (i) it must indicate a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so; and (ii) it must be specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments.

37 In the present case, the referring court considers that the first condition referred to in the preceding paragraph is satisfied, since the information at issue in the main proceedings refers to an event, namely the imminent publication of press articles, which may reasonably be expected to occur. It has doubts, however, as to whether the second condition mentioned in the preceding paragraph is satisfied in the present case. In particular, it asks whether, in order for the information relating to the forthcoming publication of a press article and setting out the main elements of that article to be regarded as 'specific enough', within the meaning of that second condition, the content of that article must also be 'specific enough'.

38 As regards that second condition, it follows from the Court's case-law that, according to the meaning generally given to the terms used in Article 1(1) of Directive 2003/124, the information must be sufficiently exact or specific to constitute a basis on which to assess whether the set of circumstances or the event mentioned in that information, as described in paragraph 36 above, is likely to have an effect on the price of the financial instruments to which it relates. Consequently, according to the Court, the only information excluded from the concept of 'inside information' by virtue of that provision is 'information that is vague or general, from which it is impossible to draw a conclusion as regards its possible effect on the prices of the financial instruments concerned' (judgment of 11 March 2015, *Lafonta*, C‑628/13, EU:C:2015:162, paragraph 31).

39 In that regard, the referring court asks whether, by its very nature, a rumour falls within the category of 'vague or general' information, within the meaning of that case-law, such that information relating to the forthcoming publication of a press article reporting a rumour cannot be classified as 'inside information'.

40 It should be noted at the outset that the information at issue in the main proceedings, relating to the publication of articles reporting market rumours about allegedly envisaged takeover bids, concerns two distinct types of future events, namely, in the first place, the publication of the articles and, in the second place, the takeover bids referred to in those articles. As is apparent from paragraph 37 above, the referring court relies on the high probability that the events of the first type will occur in order to find that the first condition referred to in paragraph 36 above for information to be deemed to be of a precise nature, within the meaning of Article 1(1) of Directive 2003/6 and Article 1(1) of Directive 2003/124, is satisfied. However, as regards the second condition mentioned in paragraph 36 above, the referring court has doubts as to whether the sufficient precision found to exist under the first condition in relation to the forthcoming publication of press articles makes it possible, in itself, to establish that that circumstance is capable of having an effect on the prices of the financial instruments concerned by that information, with the result that that second condition is also satisfied, or whether the content of the articles in question must also satisfy that requirement of precision, which in the present case concerns market rumours about a possible occurrence of events of the second type, namely the launch of the envisaged bids.

41 It must be held that the precise nature, within the meaning of those provisions, of information relating to the forthcoming publication of a press article is closely linked to that of the information forming the subject matter of that article. Were the information to be published not to have any degree of precision, the information relating to that publication would not enable any conclusions to be drawn as to the possible effect of that publication on the prices of the financial instruments concerned in accordance with Article 1(1) of Directive 2003/124.

42 That point having been clarified, it follows, in the first place, from the very wording of Article 1(1) of Directive 2003/124 – according to which information is to be deemed to be 'of a precise nature' if, inter alia, it refers to an event which may reasonably be expected to occur and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that event on the prices of financial instruments – that a case-by-case examination is necessary. Accordingly, it cannot be ruled out on principle that information may be regarded as being of a precise nature merely because it falls within a particular category of information such as information relating to the forthcoming publication of articles reporting market rumours about the possible launch of a takeover bid.

43 To do so would, moreover, be contrary to the objective of Directive 2003/6, which is, as is apparent from recitals 2 and 12 thereof, to protect the integrity of EU financial markets and to enhance investor confidence in those markets, a confidence which depends, inter alia, on investors being placed on an equal footing and being protected against the improper use of inside information (judgment of 11 March 2015, *Lafonta*, C-628/13, EU:C:2015:162, paragraph 21 and the case-law cited). Thus, the purpose of the prohibition laid down by Article 2(1) of Directive 2003/6 is to ensure equality between the contracting parties in stock-market transactions by preventing one of them who possesses inside information and who is, therefore, in an advantageous position vis-à-vis other investors, from profiting from that information, to the detriment of those who are unaware of it (judgment of 23 December 2009, *Spector Photo Group and Van Raemdonck*, C-45/08, EU:C:2009:806, paragraph 48 and the case-law cited).

44 As the Advocate General observed, in essence, in point 49 of her Opinion, the fact that an investor is aware of the forthcoming publication of a rumour may, in certain circumstances, be sufficient to give him or her an advantage over other investors.

45 Accordingly, if it were to be considered that information should not be regarded as 'inside information', within the meaning of Article 1(1) of Directive 2003/6, merely because it concerns the

publication of a rumour, much information likely to have an effect on the price of the financial instruments concerned would fall outside the scope of that directive and could therefore be used by participants in the financial markets who possess it to their profit and to the detriment of those who are unaware of it (see, to that effect, judgment of 28 June 2012, *Geltl*, C-19/11, EU:C:2012:397, paragraph 36 and the case-law cited).

46 It follows from those considerations that it cannot be ruled out that information may be deemed to be of a precise nature, within the meaning of Article 1(1) of Directive 2003/6 and Article 1(1) of Directive 2003/124, merely because it concerns the forthcoming publication of an article relating to a market rumour.

47 That being said, it is necessary, in the second place, to examine the degree of precision of the rumour about the possible launch of a takeover bid, in order to assess whether the information relating to the publication of an article reporting such a rumour actually does fulfil the second condition referred to in that paragraph, concerning the possible effect of the publication in question on the prices of the financial instruments concerned or related derivative financial instruments. However, that assessment must not disregard the fact that the precise nature of the rumours is taken into account not in order to determine whether they are specific enough, as such, to enable a conclusion to be drawn as to the effect on the prices of the instruments in question, but in order to determine whether information relating to the forthcoming publication of an article concerning those rumours is specific enough to enable a conclusion to be drawn as to the effect on the prices which that publication is likely to produce.

48 It is true that, as Mr A submits, a rumour is characterised by a degree of uncertainty. However, reliability is a factor which must be determined on a case-by-case basis. Since the credibility of a rumour is relevant in assessing whether information relating to the forthcoming publication of an article concerning that rumour is specific enough to enable a conclusion to be drawn as to the effect on the prices which that publication is likely to produce, it is necessary, inter alia, to take into account, for that purpose, the degree of precision of the content of that rumour and the reliability of the source reporting it.

49 In that regard, information containing elements such as those set out in the rumours mentioned in the press articles at issue in the main proceedings, which indicate both the name of the issuer of the financial instruments concerned and the conditions of the expected takeover bid, cannot be described as 'information that is vague or general, from which it is impossible to draw a conclusion as regards its possible effect on the prices of the financial instruments concerned', within the meaning of the case-law cited in paragraph 38 above.

50 In that context, a reference – as part of a rumour about a takeover bid relating to the securities of an issuer of financial instruments – to the proposed price for the purchase of those securities is likely to have an impact on the assessment of the precise nature of the information concerned. However, such a reference is not essential in order for information relating to that rumour to be classified as 'precise' if that information includes other elements relating to that takeover bid. As the Advocate General observed in point 51 of her Opinion, such a bid generally includes a takeover premium on the share price, which enables the market to estimate the possible effect on that price.

51 In addition to the content of the press article concerned, other factors are also capable of contributing to the precise nature of information relating to the forthcoming publication of that article for the purpose of assessing the possible effect on the prices of the financial instruments concerned or related derivative financial instruments. In that regard, the reputation of the journalist who authored the press articles and that of the media organisation which published those articles

may be regarded as decisive, depending on the circumstances of the case, in so far those factors make it possible to assess the credibility of the rumours concerned, since investors may, as the case may be, be led to presume that they come from sources considered to be reliable by that journalist and that media organisation.

52 It follows that, where certain persons are informed that a forthcoming press article will contain the information referred to in paragraph 50 above and, as the case may be, of the identity of the author of that article and of the media organisation which will publish it, such information, in so far it strengthens the credibility of the rumour which will be reported in a press article, is relevant for the purposes of assessing whether the information relating to the forthcoming publication of that article is specific enough to enable a conclusion to be drawn as to the effect on the prices that that publication is likely to produce.

53 In addition, the referring court asks whether the significant effect that a publication actually has (*ex post*) on the price of the securities to which that publication relates is a relevant factor for the purposes of assessing the precise nature of the information relating to that publication.

54 In that regard, it should be borne in mind that, as regards the fourth element of the definition of 'inside information', as set out in Article 1(1) of Directive 2003/6, namely that that information, if it were made public, would be likely to have a significant effect on the prices of the financial instruments concerned, recital 2 of Directive 2003/124 states that *ex post* information may be used to check the presumption that the *ex ante* information was price sensitive, but should not be used to take action against someone who drew reasonable conclusions from *ex ante* information available to him or her.

55 Information which, if it were made public, would be likely to have a significant effect on the prices of the securities concerned must be regarded, as a general rule, as satisfying the first element of that definition, namely that the information is of a precise nature since, in principle, the publication of information cannot have such an effect if that information is not in itself of such a nature.

56 Consequently, the actual effect of a publication on the price of the securities referred to in that publication may constitute *ex post* evidence of the precise nature of the information relating to that publication. However, it is not sufficient, in itself, to establish that precise nature, in the absence of an examination of other factors known or disclosed prior to that publication.

57 It follows from the foregoing considerations that the answer to the first question is that Article 1(1) of Directive 2003/6 must be interpreted as meaning that, for the purposes of classification as inside information, information relating to the forthcoming publication of a press article reporting a market rumour about an issuer of financial instruments is capable of constituting information 'of a precise nature', within the meaning of that provision and of Article 1(1) of Directive 2003/124, and that the fact that that press article mentions the price at which the securities of that issuer would be purchased in the context of a possible takeover bid and the identity of the journalist who authored that article and of the media organisation that published it are relevant factors for the purpose of assessing that precise nature, in so far as they were disclosed before that publication. As regards the actual effect of that publication on the prices of the securities to which it relates, while it may constitute *ex post* evidence of the precise nature of that information, it is not sufficient, in itself, in the absence of an examination of other factors known or disclosed prior to that publication, to establish that precise nature.

The second to fourth questions referred

Preliminary observations

58 The second to fourth questions concern the interpretation of Articles 10 and 21 of Regulation No 596/2014, which was adopted after the events at issue in the main proceedings. The referring court takes the view that Article 21 nevertheless contains more lenient provisions than those of Directive 2003/6, which was in force at the material time, and that it should therefore apply retroactively to those facts. According to that court, that article introduces a specific regime, not provided for in Directive 2003/6, which is intended, inter alia, to restrict the characterisation of the infringement constituted by the unlawful disclosure of inside information where the disclosure at issue is made for the purpose of journalism.

59 In that regard, as the Advocate General noted in point 68 of her Opinion, the question whether the provisions of Article 21 of Regulation No 596/2014 are more lenient, in the domain in question, than those of Directive 2003/6, with the result that they are indeed applicable to the dispute in the main proceedings (see, to that effect, judgment of 6 October 2015, *Delvigne*, C-650/13, EU:C:2015:648, point 53), depends on the interpretation of that article. Furthermore, although Article 10 of that regulation corresponds to Article 3(a) of Directive 2003/6 and cannot therefore be regarded in itself as laying down a more lenient rule than that laid down in the latter provision, it follows from the reference to that Article 10 in Article 21 of that regulation that the provisions of those articles are closely linked and that they cannot be applied separately. Accordingly, it cannot be concluded from the outset that Article 10 of Regulation No 596/2014 and Article 3 of Directive 2003/6 have exactly the same meaning and scope as regards the disclosure of inside information by a journalist.

60 In those circumstances, the question whether Articles 10 and 21 of Regulation No 596/2014 are applicable to the case in the main proceedings forms part of the examination of the substance of the second to fourth questions (see, by analogy, judgment of 28 October 2021, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo*, C-319/19, EU:C:2021:883, paragraph 25 and the case-law cited).

Substance

– *The second question*

61 By its second question, the referring court asks, in essence, whether Article 21 of Regulation No 596/2014 must be interpreted as meaning that the disclosure by a journalist, to one of his or her usual sources of information, of information relating to the forthcoming publication of an article authored by him or her reporting a market rumour is made 'for the purpose of journalism', within the meaning of that provision.

62 It is apparent from Article 21 of Regulation No 596/2014 that, for the purposes of, inter alia, Article 10 of that regulation concerning the unlawful disclosure of inside information, where information is disclosed for the purpose of journalism or other form of expression in the media, such disclosure is to be assessed taking into account the rules governing the freedom of the press and freedom of expression in other media and the rules or codes governing the journalist profession, unless the person who makes that disclosure, or persons closely associated with him or her profit, directly or indirectly, from that disclosure or that disclosure is made with the intention of misleading the market.

63 In order to determine whether disclosure 'for the purpose of journalism' within the meaning of Article 21, covers the disclosure, by a journalist, of information to one of his or her usual sources

of information or concerns only a communication to the public, whether in the press or in other media, it must be borne in mind that the interpretation of a provision of EU law requires account to be taken not only of its wording, but also of its context, and the objectives and purpose pursued by the act of which it forms part.

64 As regards the wording of Article 21 of Regulation No 596/2014, it should be noted that the words 'for the purpose of journalism' refer to the disclosure of information the purpose of which is the activity of journalism and, accordingly, not necessarily just to disclosures of information consisting in the publication of information as such but also to disclosures of information which form part of the process leading to that publication.

65 As regards the context and the objectives pursued by Regulation No 596/2014, it follows from recital 2 thereof that that regulation seeks to ensure the integrity of financial markets by prohibiting market abuse, such as insider dealing and the unlawful disclosure of inside information. It is also apparent from recital 77of that regulation that that objective is to be pursued in compliance with the fundamental rights and principles enshrined in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the freedom of the press and the freedom of expression in other media, as guaranteed in the European Union and in the Member States and enshrined in Article 11 of the Charter and referred to, moreover, in Article 21 of Regulation No 596/2014.

66 In order to take account of the importance of those fundamental freedoms in every democratic society, it is necessary to interpret broadly concepts relating to those freedoms, such as that of 'the purpose of journalism' (see, by analogy, judgment of 14 February 2019, *Buivids*, C-345/17, EU:C:2019:122, paragraph 51 and the case-law cited).

67 Moreover, in interpreting Article 11 of the Charter, it is necessary to take into account, pursuant to Article 52(3) thereof, the case-law of the European Court of Human Rights in relation to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (see, to that effect, judgment of 14 February 2019, *Buivids*, C-345/17, EU:C:2019:122, paragraph 65 and the case-law cited).

68 It follows from that case-law that not only publications but also the preparatory steps to a publication, such as the gathering of information and the research and investigative activities of a journalist are inherent components of the freedom of the press, as enshrined in Article 10 of that Convention, and are, as such, protected (see to that effect, ECtHR, 25 April 2006, *Dammann v. Switzerland*, CE:ECHR:2006:0425JUD007755101, § 52, and ECtHR, 27 June 2017, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, CE:ECHR:2017:0627JUD000093113, § 128).

69 Consequently, although the ultimate objective of the journalistic activity is to communicate information to the public, it must be held that a disclosure of information for the purpose of carrying out that activity, including in the context of a journalist's investigative work in preparation for publication, may constitute a disclosure of information for the purpose of journalism, within the meaning of Article 21 of Regulation No 596/2014.

70 As regards the case in the main proceedings, that could be the case, inter alia, of the scenario, raised by the referring court, in which the disclosure of the information relating to the forthcoming publication of an article is intended to verify or obtain clarification about the rumour forming the subject matter of that article, whether or not the addressee of that disclosure is the source of that rumour. It is for that court to assess whether that was in fact the case here.

71 In the light of the foregoing, the answer to the second question is that Article 21 of Regulation No 596/2014 must be interpreted as meaning that the disclosure by a journalist, to one of his or her usual sources of information, of information relating to the forthcoming publication of a press article authored by him or her reporting a market rumour is made ‘for the purpose of journalism’, within the meaning of that provision, where that disclosure is necessary for the purpose of carrying out a journalistic activity, which includes investigative work in preparation for publication.

– *The third and fourth questions*

72 By its third and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 10 and 21 of Regulation No 596/2014 must be interpreted as meaning that the lawful or unlawful nature of the disclosure of inside information by a journalist for the purpose of journalism depends on whether it was made in the normal exercise of the profession of journalist.

73 Article 10(1) of Regulation No 596/2014 provides that the unlawful disclosure of inside information, prohibited under Article 14(c) of that regulation, arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties.

74 Since that definition of the unlawful disclosure of inside information is set out in Article 10 of Regulation No 596/2014 ‘for the purposes of [that] Regulation’, it must be regarded as applicable to the situations referred to in Article 21 of that regulation. That is confirmed by the wording of the latter provision, which concerns the assessment, for the purposes inter alia of Article 10 of that regulation, of the disclosure of inside information for the purpose of journalism.

75 It follows that Article 21 of Regulation No 596/2014 does not constitute an independent basis, derogating from Article 10 of that regulation, for determining whether the disclosure of inside information for the purpose of journalism is lawful or unlawful. Such a determination must be based on Article 10, while taking account of the further specifications set out in Article 21.

76 In that regard, it should be noted that Article 10(1) of Regulation No 596/2014, read in conjunction with Article 14(c) of that regulation, essentially corresponds to Article 3(a) of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing (OJ 1989 L 334, p. 30) and Article 3(a) of Directive 2003/6, which provisions required the Member States to prohibit the disclosure of inside information. In particular, in providing that the disclosure of inside information is not unlawful where it is made in the normal exercise of an employment, a profession or duties, Article 10 of Regulation No 596/2014 contains the same exception to the prohibition on disclosure of inside information as those provisions of those directives.

77 In addition, as can be seen, in particular, from recital 2 thereof, Regulation No 596/2014 is intended inter alia, like the directives which preceded it, to protect the integrity of the financial markets and to enhance investor confidence, a confidence which depends, inter alia, on investors being placed on an equal footing and protected against the improper use of inside information (see, to that effect, judgment of 23 December 2009, *Spector Photo Group and Van Raemdonck*, C-45/08, EU:C:2009:806, paragraph 47 and the case-law cited).

78 Accordingly, the exception set out in Article 10(1) of Regulation No 596/2014, like that referred to in Article 3(a) of Directive 89/592, lays down the condition of a close link between the disclosure of inside information and the exercise of an employment, a profession or duties in order

to justify that disclosure. It must, in principle, be interpreted strictly, the disclosure of inside information being lawful only if it is strictly necessary for that exercise and complies with the principle of proportionality, as the Court stated in the judgment of 22 November 2005, *Grøngaard and Bang* (C-384/02, EU:C:2005:708, paragraphs 31 and 34).

79 That being said, it must be borne in mind that, in the case which gave rise to that judgment, the persons who disclosed the inside information in question were, respectively, an employees' representative on a company's board of directors, who was also a member of the liaison committee of a group of undertakings, and the General Secretary of a trade union.

80 Where a journalist discloses inside information 'for the purpose of journalism', within the meaning of Article 21 of Regulation No 596/2014, that exception must be interpreted, as noted, in essence, in paragraphs 65 and 66 above, in such a way as to safeguard the effectiveness of that provision in the light of its purpose, as also referred to in recital 77 of that regulation, namely the observance of the freedom of the press and the freedom of expression in other media as guaranteed, in particular, by Article 11 of the Charter (see, by analogy, judgment of 29 July 2019, *Spiegel Online*, C-516/17, EU:C:2019:625, paragraph 55).

81 Thus, the requirement, arising from Article 10 of Regulation No 596/2014, that such disclosure be necessary for the exercise of the profession of journalist, as well as the proportionality of that disclosure, must be assessed in the light of the fact that that provision, since it constitutes a restriction on the fundamental right guaranteed by Article 11 of the Charter, has to be interpreted in accordance with the requirements imposed by Article 52(1) thereof.

82 Accordingly, as regards, in the first place, the requirement that such disclosure must be necessary for the performance of a journalistic activity, which includes, as stated in paragraph 71 above, investigative work in preparation for publication, account must be taken, in particular, of the need for the journalist to verify the information of which he or she has become aware.

83 Consequently, as the Advocate General noted, in essence, in point 97 of her Opinion, if a disclosure such as that at issue in the main proceedings has been made for the purpose of the publication of a press article, it is necessary to examine whether that disclosure went beyond what was necessary in order to verify the information contained in that article. In particular, as regards the verification of information relating to a market rumour, it must be examined, where relevant, whether it was necessary for the journalist to disclose to a third party, in addition to the content of the rumour itself, the specific information relating to the forthcoming publication of an article reporting that rumour.

84 In the second place, in order to determine whether such a disclosure is proportionate, within the meaning of Article 10 of Regulation No 596/2014, it is necessary to examine whether the restriction on the freedom of the press entailed by the prohibition of such a disclosure would be excessive in relation to the harm which such a disclosure risks causing to the integrity of the financial markets.

85 Among the factors to be taken into consideration in carrying out that assessment, account must be taken, first, of the potentially dissuasive effect of such a prohibition on the exercise of journalistic activity, including preparatory investigations.

86 Secondly, it must also be ascertained whether, in making the disclosure concerned, the journalist acted in compliance with the rules and codes governing his or her profession, as referred to in Article 21 of Regulation No 596/2014. However, as the Advocate General observed in

point 103 of her Opinion, compliance with those rules and codes does not, in itself, lead to the conclusion that the disclosure of inside information was proportionate within the meaning of Article 10 of Regulation No 569/2014.

87 Thirdly, as the Advocate General observed in point 100 of her Opinion, it is also necessary to take into consideration the negative effects of the disclosure of the inside information in question on the integrity of the financial markets. In particular, in so far as insider dealing occurred following that disclosure, that insider dealing is liable to lead to financial losses for other investors and, in the medium term, to a loss of confidence in the financial markets.

88 It follows that the disclosure of inside information undermines not only the private interests of certain investors but also, more generally, the public interest in ensuring full and adequate transparency of the market, in order to protect its integrity and to ensure the confidence of all investors, as noted in paragraph 77 above. Accordingly, it is also for the referring court to take into account the fact that the public interest which may have been pursued by that disclosure is in opposition, not only to private interests, by also to a public interest (see, by analogy, ECtHR, 10 December 2007, *Stoll v. Switzerland*, CE:ECHR:2007:1210JUD006969801, § 116).

89 In the light of all the foregoing considerations, the answer to the third and fourth questions is that Articles 10 and 21 of Regulation No 596/2014 must be interpreted as meaning that a disclosure of inside information by a journalist is lawful where it must be regarded as being necessary for the exercise of his or her profession and as complying with the principle of proportionality.

Costs

90 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 1(1) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) must be interpreted as meaning that, for the purposes of classification as inside information, information relating to the forthcoming publication of a press article reporting a market rumour about an issuer of financial instruments is capable of constituting information 'of a precise nature', within the meaning of that provision and of Article 1(1) of Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6 of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation, and that the fact that that press article mentions the price at which the securities of that issuer would be purchased in the context of a possible takeover bid and the identity of the journalist who authored that article and of the media organisation that published it are relevant factors for the purpose of assessing that precise nature, in so far as they were disclosed before that publication. As regards the actual effect of that publication on the prices of the securities to which it relates, while it may constitute *ex post* evidence of the precise nature of that information, it is not sufficient, in itself, in the absence of an examination of other factors known or disclosed prior to that publication, to establish that precise nature.**

2. **Article 21 of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive**

2003/6 of the European Parliament and of the Council and Commission Directives 2003/124, 2003/125/EC and 2004/72/EC must be interpreted as meaning that the disclosure by a journalist, to one of his or her usual sources of information, of information relating to the forthcoming publication of a press article authored by him or her reporting a market rumour is made 'for the purpose of journalism', within the meaning of that provision, where that disclosure is necessary for the purpose of carrying out a journalistic activity, which includes investigative work in preparation for publication.

3. **Articles 10 and 21 of Regulation No 596/2014 must be interpreted as meaning that a disclosure of inside information by a journalist is lawful where it must be regarded as being necessary for the exercise of his or her profession and as complying with the principle of proportionality.**

[Signatures]

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* Language of the case: French.