ECLI:EU:C:2021:84

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

2 February 2021 (*)

(Reference for a preliminary ruling – Approximation of laws – Directive 2003/6/EC – Article 14(3) – Regulation (EU) No 596/2014 – Article 30(1)(b) – Market abuse – Administrative sanctions of a criminal nature – Failure to cooperate with the competent authorities – Articles 47 and 48 of the Charter of Fundamental Rights of the European Union – Right to remain silent and to avoid self-incrimination)

In Case C-481/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte costituzionale (Constitutional Court, Italy), made by decision of 6 March 2019, received at the Court on 21 June 2019, in the proceedings

DB

v

Commissione Nazionale per le Società e la Borsa (Consob),

intervening parties:

Presidente del Consiglio dei ministri,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan, M. Ilešič, L. Bay Larsen, A. Kumin and N. Wahl, Presidents of Chambers, T. von Danwitz, M. Safjan (Rapporteur), F. Biltgen, K. Jürimäe, I. Jarukaitis and N. Jääskinen, Judges,

Advocate General: P. Pikamäe,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 13 July 2020,

after considering the observations submitted on behalf of:

– DB, by R. Ristuccia and A. Saitta, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili and P.G. Marrone, avvocati dello Stato,

– the Spanish Government, initially by A. Rubio González, and subsequently by L. Aguilera Ruiz, acting as Agents,

– the European Parliament, by L. Visaggio, C. Biz and L. Stefani, acting as Agents,

– the Council of the European Union, by M. Chavrier, E. Rebasti, I. Gurov and E. Sitbon, acting as Agents,

– the European Commission, by V. Di Bucci, P. Rossi, T. Scharf and P.J.O. Van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 October 2020,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter') as well as the interpretation and validity of Article 14(3) 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), and Article 30(1)(b) 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 and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1).

2 The request has been made in proceedings between DB and the Commissione Nazionale per le Società e la Borsa (Consob) (National Companies and Stock Exchange Commission, Italy) concerning the lawfulness of penalties imposed on DB for offences of insider dealing and failure to cooperate in the context of an investigation conducted by Consob.

Legal context

EU law

Directive 2003/6

3 Recitals 37, 38 and 44 of Directive 2003/6 are worded as follows:

'(37) A common minimum set of effective tools and powers for the competent authority of each Member State will guarantee supervisory effectiveness. Market undertakings and all economic actors should also contribute at their level to market integrity. …

(38) In order to ensure that a Community framework against market abuse is sufficient, any infringement of the prohibitions or requirements laid down pursuant to this Directive will have to be promptly detected and sanctioned. To this end, sanctions should be sufficiently dissuasive and proportionate to the gravity of the infringement and to the gains realised and should be consistently applied.

…

(44) This Directive respects the fundamental rights and observes the principles recognised in particular by the [Charter] and in particular by Article 11 thereof and Article 10 of the European Convention [for the Protection of] Human Rights [and Fundamental Freedoms]. …'

4 Article 12 of that directive provides:

'1. The competent authority shall be given all supervisory and investigatory powers that are necessary for the exercise of its functions. …

2. Without prejudice to Article 6(7), the powers referred to in paragraph 1 of this Article shall be exercised in conformity with national law and shall include at least the right to:

(a) have access to any document in any form whatsoever, and to receive a copy of it;

(b) demand information from any person, including those who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and if necessary, to summon and hear any such person;

…

3. This Article shall be without prejudice to national legal provisions on professional secrecy.'

5 As set out in Article 14 of the directive:

'1. Without prejudice to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.

2. In accordance with the procedure laid down in Article 17(2), the Commission shall, for information, draw up a list of the administrative measures and sanctions referred to in paragraph 1.

3. Member States shall determine the sanctions to be applied for failure to cooperate in an investigation covered by Article 12.

…'

Regulation No 596/2014

6 Recitals 62, 63, 66 and 77 of Regulation No 596/2014, which repealed and replaced Directive 2003/6 with effect from 3 July 2016, are worded as follows:

‘(62) A set of effective tools and powers and resources for the competent authority of each Member State guarantees supervisory effectiveness. Accordingly, this Regulation, in particular, provides for a minimum set of supervisory and investigative powers competent authorities of Member States should be entrusted with under national law. …

(63) Market undertakings and all economic actors should also contribute to market integrity. …

…

(66) While this Regulation specifies a minimum set of powers competent authorities should have, those powers are to be exercised within a complete system of national law which guarantees the respect for fundamental rights, including the right to privacy. …

…

(77) This Regulation respects the fundamental rights and observes the principles recognised in the [Charter]. Accordingly, this Regulation should be interpreted and applied in accordance with those rights and principles. …’

7 Under Article 14 of that regulation, headed ‘Prohibition of insider dealing and of unlawful disclosure of inside information’:

‘A person shall not:

(a) engage or attempt to engage in insider dealing;

(b) recommend that another person engage in insider dealing or induce another person to engage in insider dealing; or

(c) unlawfully disclose inside information.’

8 Article 23 of that regulation, headed ‘Powers of competent authorities’, provides in paragraphs 2 and 3 thereof:

‘2. In order to fulfil their duties under this Regulation, competent authorities shall have, in accordance with national law, at least the following supervisory and investigatory powers:

(a) to access any document and data in any form, and to receive or take a copy thereof;

(b) to require or demand information from any person, including those who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and if necessary, to summon and question any such person with a view to obtain information;

…

3. Member States shall ensure that appropriate measures are in place so that competent authorities have all the supervisory and investigatory powers that are necessary to fulfil their duties.

…’

9 Article 30 of that regulation, headed ‘Administrative sanctions and other administrative measures’, provides:

‘1. Without prejudice to any criminal sanctions and without prejudice to the supervisory powers of competent authorities under Article 23, Member States shall, in accordance with national law, provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures in relation to at least the following infringements:

(a) infringements of Articles 14 and 15 … and

(b) failure to cooperate or to comply with an investigation, with an inspection or with a request as referred to in Article 23(2).

Member States may decide not to lay down rules for administrative sanctions as referred to in the first subparagraph where the infringements referred to in point (a) or point (b) of that subparagraph are already subject to criminal sanctions in their national law by 3 July 2016. Where they so decide, Member States shall notify, in detail, to the Commission and to [the European Securities and Markets Authority (ESMA)], the relevant parts of their criminal law.

…

2. Member States shall, in accordance with national law, ensure that competent authorities have the power to impose at least the following administrative sanctions and to take at least the following administrative measures in the event of the infringements referred to in point (a) of the first subparagraph of paragraph 1:

(a) an order requiring the person responsible for the infringement to cease the conduct and to desist from a repetition of that conduct;

(b) the disgorgement of the profits gained or losses avoided due to the infringement insofar as they can be determined;

(c) a public warning which indicates the person responsible for the infringement and the nature of the infringement;

(d) withdrawal or suspension of the authorisation of an investment firm;

(e) a temporary ban of a person discharging managerial responsibilities within an investment firm or any other natural person, who is held responsible for the infringement, from exercising management functions in investment firms;

(f) in the event of repeated infringements of Article 14 or 15, a permanent ban of any person discharging managerial responsibilities within an investment firm or any other natural person who is held responsible for the infringement, from exercising management functions in investment firms;

(g) a temporary ban of a person discharging managerial responsibilities within an investment firm or another natural person who is held responsible for the infringement, from dealing on own account;

(h) maximum administrative pecuniary sanctions of at least three times the amount of the profits gained or losses avoided because of the infringement, where those can be determined;

(i) in respect of a natural person, maximum administrative pecuniary sanctions of at least:

(i) for infringements of Articles 14 and 15, EUR 5 000 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014;

…

References to the competent authority in this paragraph are without prejudice to the ability of the competent authority to exercise its functions in any ways referred to in Article 23(1).

…

3. Member States may provide that competent authorities have powers in addition to those referred to in paragraph 2 and may provide for higher levels of sanctions than those established in that paragraph.'

Italian law

10 The Italian Republic transposed Directive 2003/6 by means of Article 9 of legge n. 62 – Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee – Legge comunitaria 2004 (Law No 62 laying down provisions to implement obligations resulting from Italy's membership of the European Communities, Community law of 2004) of 18 April 2005 (Ordinary Supplement to GURI No 76 of 27 April 2005). That article incorporated in decreto legislativo n. 58 – Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52 (Legislative Decree No 58 consolidating all provisions in the field of financial intermediation, within the meaning of Articles 8 and 21 of the Law of 6 February 1996, No 52) of 24 February 1998 ('the consolidated text'), numerous provisions, including Article 187*bis* of that consolidated text, relating to the administrative offence of insider dealing and Article 187*quindecies* of that consolidated text, relating to the penalties for failing to cooperate with an investigation conducted by Consob.

11 Article 187*bis* of the consolidated text, headed 'Insider dealing', was, in the version in force at the material time, worded as follows:

'1. Without prejudice to criminal sanctions where the act constitutes an offence, any person who, being in possession of inside information by virtue of his or her membership of the administrative, management or supervisory bodies of the issuer, by virtue of his or her holding in the capital of the issuer, or by virtue of the exercise of his or her employment, profession, office, including public office, or duties:

(a) acquires, sells or performs other transactions involving financial instruments, directly or indirectly, for his or her own account or for the account of a third party, using that information;

(b) discloses such information to other persons unless such disclosure is made in the normal course of the exercise of his or her employment, profession, office or duties;

(c) recommends or induces others, on the basis of such information, to carry out any of the transactions referred to in subparagraph (a)

shall be liable to an administrative financial penalty of between EUR 20 000 and EUR 3 000 000.

2. The penalty referred to in paragraph 1 shall also apply to any person who, being in possession of inside information by virtue of the preparation or perpetration of criminal acts, carries out any of the acts referred to in paragraph 1.

3. For the purposes of this Article, "financial instruments" shall also mean the financial instruments referred to in Article 1(2) whose value depends on a financial instrument referred to in Article 180(1)(a).

4. The penalty provided for in paragraph 1 shall also apply to anyone who, being in possession of inside information and, exercising ordinary care, knows, or is in a position to know, that it is inside information, commits one of the acts referred to in paragraph 1.

5. The administrative financial penalties provided for in paragraphs 1, 2 and 4 shall be increased by up to 3 times their amount or up to a greater amount equivalent to 10 times the proceeds or profit derived from the offence where, owing to the perpetrator's identity or the amount of proceeds or profit derived from the offence, those penalties appear inadequate even where the maximum amount is applied.

6. For the cases referred to in this article, attempt shall be treated in the same way as perpetration.'

12 In the version in force at the material time, Article 187*quindecies* of the consolidated text was headed 'Protection of Consob's supervisory activities' and provided:

'1. Apart from the cases provided for in Article 2638 of the Codice civile [(Italian Civil Code)], anyone who fails to comply with Consob's requests within the time limits or who delays Consob in the performance of its functions shall be liable to an administrative financial penalty of between EUR 10 000 and EUR 200 000.'

13 Article 187*quindecie*s was amended by decreto legislativo n. 129 del 2017 (Legislative Decree No 129 of 2017). In the version currently in force, Article 187*quindecies*, headed 'Protection of the supervisory activity of the Banca d'Italia [(Bank of Italy)] and Consob', is worded as follows:

'1. Apart from in the cases provided for in Article 2638 of the Civil Code, anyone who fails to comply with requests of the Bank of Italy or Consob within the time limits, or who does not cooperate with those authorities in the exercise of their supervisory functions, or who delays the exercise of those functions, shall be punished in accordance with this article.

1*bis*. If the offence is committed by a natural person, that person shall be liable to an administrative financial penalty of between EUR 10 000 and EUR 5 000 000.

…'

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

14 By decision of 2 May 2012, Consob, on the basis of Article 187*bis* of the consolidated text, imposed on DB two financial penalties of EUR 200 000 and EUR 100 000 respectively, for an

administrative offence of insider trading committed between 19 February and 26 February 2009, under two heads, namely insider dealing and the unlawful disclosure of inside information.

15 It also imposed on him a financial penalty of EUR 50 000 for the administrative offence referred to in Article 187*quindecies* of the consolidated text, on the ground that the person concerned, after applying on several occasions for postponement of the date of the hearing to which he had been summoned in his capacity as a person aware of the facts, had declined to answer the questions put to him when he appeared at that hearing.

16 In addition, Consob imposed the ancillary penalty of temporary loss of fit and proper person status provided for in Article 187*quater*(1) of the consolidated text for a period of 18 months and ordered confiscation of assets of equivalent value to the profit or the means employed to obtain it under Article 187*sexies* of the consolidated text.

17 DB brought an appeal against those penalties before the Corte d'appello di Roma (Court of Appeal, Rome, Italy), which dismissed them. He brought an appeal on a point of law against that court's decision before the Corte suprema di cassazione (Supreme Court of Cassation, Italy). By order of 16 February 2018, that court referred two interlocutory questions of constitutionality to the Corte costituzionale (Constitutional Court, Italy), of which only the first is relevant in the context of the present reference for a preliminary ruling.

18 That question concerns Article 187*quindecies* of the consolidated text, in so far as that provision penalises anyone who fails to comply with Consob's requests in a timely manner or delays the performance of that body's supervisory functions, including with regard to the person in respect of whom Consob, in the performance of those duties, alleges an offence of insider dealing.

19 In its order for reference, the Corte costituzionale (Constitutional Court) observes that the question of the constitutionality of Article 187*quindecies* of the consolidated text is raised by reference to a number of rights and principles, certain of which are established in national law, namely the rights of the defence and the principle of equality of the parties in the proceedings, provided for by the Italian Constitution, and others in international and EU law.

20 In that court's view, the right to remain silent and to avoid self-incrimination (hereinafter 'the right to silence'), based on the provisions of the Constitution, of EU law and of international law relied on, cannot justify a refusal by the person concerned to appear at the hearing ordered by Consob nor delay on the part of that person in appearing at that hearing, provided that the latter's right not to answer the questions put to him or her at that hearing is guaranteed. However, there was said to be no such guarantee in the present case.

21 According to the referring court, it is necessary, first, to take into consideration the risk that, as a result of the obligation to cooperate with the competent authority, the suspected perpetrator of an administrative offence liable to be the subject of a penalty of a criminal nature could, as a matter of fact, contribute to the substantiation of a criminal charge against him or her. The referring court notes, in that regard, that, under Italian law, the insider dealing alleged against DB constitutes both an administrative offence and a criminal offence, and that proceedings relating to both may be brought and prosecuted in parallel, in so far as compatible with the *ne bis in idem* principle enshrined in Article 50 of the Charter (judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraphs 42 to 63).

22 However, the referring court points out that, according to the case-law of the European Court of Human Rights, the right to silence arising from Article 6 of the European Convention for the

Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), is infringed where persons are penalised under national law for failing to answer questions put by administrative authorities in proceedings seeking to ascertain whether an administrative offence that is punishable by penalties of a criminal nature has been committed (ECtHR, 3 May 2001, *J.B. v. Switzerland*, CE:ECHR:2001:0503JUD003182796, §§ 63 to 71; 4 October 2005, *Shannon v. the United Kingdom*, CE:ECHR:2005:1004JUD000656303, §§ 38 to 41; and 5 April 2012, *Chambaz v. Switzerland*, CE:ECHR:2012:0405JUD001166304, §§ 50 to 58).

23 According to the referring court, since Article 187*quindecies* of the consolidated text was introduced into the Italian legal system in performance of a specific obligation under Article 14(3) of Directive 2003/6 and now implements Article 30(1)(b) of Regulation No 596/2014, a declaration that Article 187*quindecies* is unconstitutional would be likely to conflict with EU law, if those provisions of secondary EU legislation were to be understood as requiring Member States to penalise the silence, at a hearing before the competent authority, of a person suspected of insider dealing. In its view, it is questionable whether those provisions, understood in this way, are compatible with Articles 47 and 48 of the Charter, which also seem to recognise the right to silence within the same limits as those resulting from Article 6 of the ECHR and the Italian Constitution.

24 The referring court further notes that the case-law of the Court of Justice according to which a person who is the subject of an investigation in proceedings for infringement of EU competition rules is obliged to answer purely factual questions, nevertheless amounts to a significant limitation on the scope of that person's right not to self-incriminate by his or her statements, even indirectly.

25 That case-law, which was established in relation to legal persons and not natural persons, and to a large extent before the adoption of the Charter, seems difficult to reconcile with the criminal nature, acknowledged by the Court of Justice in the judgment of 20 March 2018, *Di Puma and Zecca* (C-596/16 and C-597/16, EU:C:2018:192), of the administrative sanctions laid down in the Italian legal system in respect of insider dealing.

26 Since the question of whether Articles 47 and 48 of the Charter require, in the light of the case-law of the European Court of Human Rights concerning Article 6 of the ECHR, compliance with the right to silence in administrative proceedings which may lead to the imposition of a penalty of a criminal nature has not yet been addressed by the Court or by the EU legislature, the referring court considers it necessary, before it rules on the question of constitutionality that has been submitted to it, to refer the matter to the Court for interpretation and, as the case may be, an assessment of the validity, in view of Articles 47 and 48 of the Charter, of Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014.

27 In those circumstances, the Corte costituzionale (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are Article 14(3) of Directive 2003/6, in so far as it continues to apply *ratione temporis*, and Article 30(1)(b) of Regulation No 596/2014 to be interpreted as permitting Member States to refrain from penalising individuals who refuse to answer questions put to them by the competent authorities and which might establish their liability for an offence that is punishable by administrative sanctions of a "punitive" nature?

(2) If the answer to the first question is in the negative, are Article 14(3) of Directive 2003/6, in so far as it continues to apply *ratione temporis*, and Article 30(1)(b) of Regulation No 596/2014 compatible with Articles 47 and 48 of the [Charter] – including in the light of the case-law of the European Court of Human Rights on Article 6 of the ECHR and the constitutional traditions

common to the Member States – in so far as they require sanctions to be applied even to individuals who refuse to answer questions put to them by the competent authorities and which might establish their liability for an offence that is punishable by administrative sanctions of a "punitive" nature?'

Admissibility of the questions referred

28 In its written observations, the Council of the European Union questions the relevance, for the purposes of giving a decision in the main proceedings, of Regulation No 596/2014, which, in the light of the date of its entry into force, is not applicable to the facts in the main proceedings.

29 According to the Court's settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law or the assessment of its validity that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it and to understand the reasons for the referring court's view that it needs answers to those questions in order to rule in the dispute before it (see, to that effect, judgments of 19 November 2009, *Filipiak*, C-314/08, EU:C:2009:719, paragraphs 40 to 42, and of 12 December 2019, *Slovenské elektrárne*, C-376/18, EU:C:2019:1068, paragraph 24).

30 In the present case, the Corte costituzionale (Constitutional Court) considers that it must rule on the constitutionality of Article 187*quindecies* of the consolidated text not only in the version in force at the material time, which transposed Article 14(3) of Directive 2003/6, but also in the version currently in force, which implements Article 30(1)(b) of Regulation No 596/2014. It refers, in that regard, to the consistency and relationship of continuity between the provisions of Directive 2003/6 and those of Regulation No 596/2014, which justify an overall examination of the analogous provisions of Article 14(3) of the directive and Article 30(1)(b) of the regulation.

31 Furthermore, as is apparent from the file submitted to the Court, a declaration that Article 187*quindecies* of the consolidated text is unconstitutional would also have an impact on the version currently in force of that article, which implements Article 30(1)(b) of Regulation No 596/2014.

32 In that context, it is not obvious that the interpretation of the latter provision that is sought bears no relation to the actual facts of the main action or its purpose.

33 Consequently, the questions as referred must be declared admissible.

Consideration of the questions referred

34 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014, read in the light of Articles 47 and 48 of the Charter, must be interpreted as allowing Member States not to penalise natural persons who, in the context of an investigation carried out in respect of them by the competent authority under that directive or that regulation, refuse to provide that authority with answers that are capable of establishing their liability for an offence that is punishable by administrative sanctions of a criminal nature.

35 In that regard, it should be recalled, as a preliminary point, that, according to Article 51(1) of the Charter, the provisions of the Charter are addressed to the EU institutions and to the Member States when they are implementing EU law.

36 Furthermore, while the questions referred mention Articles 47 and 48 of the Charter, which enshrine, inter alia, the right to a fair trial and the presumption of innocence, the request for a preliminary ruling also refers to the rights guaranteed in Article 6 of the ECHR. Whilst the ECHR does not constitute, for as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into the EU legal order, it must nevertheless be recalled that, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of EU law. Furthermore, Article 52(3) of the Charter, which provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR, is intended to ensure the necessary consistency between those respective rights without adversely affecting the autonomy of EU law and that of the Court of Justice (see, to that effect, judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraphs 24 and 25).

37 According to the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR and Article 48 of the Charter is 'the same' as Article 6(2) and (3) of the ECHR. When interpreting the rights guaranteed by the second paragraph of Article 47 and of Article 48 of the Charter, the Court must, therefore, take account of the corresponding rights guaranteed by Article 6 of the ECHR, as interpreted by the European Court of Human Rights, as the minimum threshold of protection (see, to that effect, judgments of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraph 72; of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 124; and of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, paragraph 56).

38 In that regard, the European Court of Human Rights has observed that, even though Article 6 of the ECHR does not explicitly mention the right to silence, that right is a generally recognised international standard which lies at the heart of the notion of a fair trial. By providing the accused with protection against improper coercion by the authorities, that right contributes to avoiding miscarriages of justice and to securing the aims of Article 6 ECHR (see, to that effect, ECtHR, 8 February 1996, *John Murray v. the United Kingdom*, CE:ECHR:1996:0208JUD001873191, § 45).

39 Since protection of the right to silence is intended to ensure that, in criminal proceedings, the prosecution establishes its case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, to that effect, ECtHR, 17 December 1996, *Saunders v. the United Kingdom*, CE:ECHR:1996:1217JUD001918791, § 68), this right is infringed, inter alia, where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify (see, to that effect, ECtHR, 13 September 2016, *Ibrahim and Others v. the United Kingdom*, CE:ECHR:2016:0913JUD005054108, § 267).

40 The right to silence cannot reasonably be confined to statements of admission of wrongdoing or to remarks which directly incriminate the person questioned, but rather also covers information on questions of fact which may subsequently be used in support of the prosecution and may thus have a bearing on the conviction or the penalty imposed on that person (see, to that effect, ECtHR, 17 December 1996, *Saunders v. United Kingdom*, CE:ECHR:1996:1217JUD001918791, § 71, and 19 March 2015, *Corbet and Others v. France*, CE:ECHR:2015:0319JUD000749411, § 34).

41 That said, the right to silence cannot justify every failure to cooperate with the competent authorities, such as a refusal to appear at a hearing planned by those authorities or delaying tactics designed to postpone it.

42 As regards the conditions under which that right must also be respected in proceedings seeking to ascertain whether an administrative offence has been committed, it must be pointed out that that right is intended to apply in the context of proceedings which may lead to the imposition of administrative sanctions of a criminal nature. Three criteria are relevant to assess whether penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty that the person concerned is liable to incur (judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraph 28).

43 While it is for the referring court to assess, in the light of those criteria, whether the administrative sanctions at issue in the main proceedings are criminal in nature, that court nevertheless rightly points out that, according to the case-law of the Court of Justice, some of the administrative sanctions imposed by Consob appear to pursue a punitive purpose and to present a high degree of severity such that they are liable to be regarded as being criminal in nature (see, to that effect, judgments of 20 March 2018, *Di Puma and Zecca*, C-596/16 and C-597/16, EU:C:2018:192, paragraph 38, and of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraphs 34 and 35). The European Court of Human Rights, for its part, reached, in essence, the same conclusion (ECtHR, 4 March 2014, *Grande Stevens and Others v. Italy*, CE:ECHR:2014:0304JUD001864010, § 101).

44 Furthermore, even if, in the present case, the penalties imposed on DB by the supervisory authority at issue in the main proceedings were not to be criminal in nature, the need to respect the right to silence in an investigation procedure conducted by that authority could also stem from the fact, noted by the referring court, that, in accordance with national legislation, the evidence obtained in those proceedings may be used in criminal proceedings against that person in order to establish that a criminal offence was committed.

45 In the light of the considerations set out in paragraphs 35 to 44 above, it must be held that the safeguards afforded by the second paragraph of Article 47 and Article 48 of the Charter, with which EU institutions as well as Member States must comply when they implement EU law, include, inter alia, the right to silence of natural persons who are ‘charged’ within the meaning of the second of those provisions. That right precludes, inter alia, penalties being imposed on such persons for refusing to provide the competent authority under Directive 2003/6 or Regulation No 596/2014 with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

46 That analysis is not called into question by the case-law of the Court of Justice on the EU competition rules, from which it is apparent, in essence, that, in proceedings seeking to establish an infringement of those rules, the undertaking concerned may be compelled to provide all necessary information concerning such facts as may be known to it and to disclose, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, inter alia in its regard, the existence of anti-competitive conduct (see, to that effect, judgments of 18 October 1989, *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraph 34; of 29 June 2006, *Commission* v *SGL Carbon*, C-301/04 P, EU:C:2006:432, paragraph 41; and of 25 January 2007, *Dalmine* v *Commission*, C-407/04 P, EU:C:2007:53, paragraph 34).

47 First, the Court has further held, in this context, that that undertaking cannot be compelled to provide answers which might involve an admission on its part of the existence of such an infringement (see, to that effect, judgments of 18 October 1989, *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraph 35, and of 29 June 2006, *Commission* v *SGL Carbon*, C-301/04 P, EU:C:2006:432, paragraph 42).

48 Second, as the referring court itself states, the case-law referred to in the two preceding paragraphs above concerns procedures that may lead to the imposition of penalties on undertakings and associations of undertakings. It cannot apply by analogy when determining the scope of the right to silence of natural persons who, like DB, are the subject of proceedings for an offence of insider dealing.

49 In the light of the doubts expressed by the referring court as to the validity, in the light of the right to silence enshrined in the second paragraph of Article 47 and in Article 48 of the Charter, of Article 14(3) of Directive 2003/6 and of Article 30(1)(b) of Regulation No 596/2014, it is necessary further to ascertain whether those provisions of secondary EU legislation lend themselves to an interpretation which is consistent with that right to silence, in that they do not require penalties to be imposed on natural persons for refusing to provide the competent authority under that directive or that regulation with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

50 In that regard, it should be noted at the outset that, in accordance with a general principle of interpretation, the wording of secondary EU legislation must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter. Thus, if such wording is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with primary law rather than to the interpretation which leads to its being incompatible with primary law (judgment of 14 May 2019, *M and Others (Revocation of refugee status)*, C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 77). Both recital 44 of Directive 2003/6 and recital 77 of Regulation No 596/2014 emphasise, moreover, that those two acts respect the fundamental rights and observe the principles recognised in the Charter.

51 As regards, first of all, Article 14(3) of Directive 2003/6, that provision provides that Member States are to determine the sanctions to be applied for failure to cooperate in an investigation covered by Article 12 of that directive. The latter states that, in that context, the competent authority must be able to demand information from any person and, if necessary, to summon and hear any such person.

52 While the wording of those two provisions does not explicitly rule out the possibility that the Member States' obligation to determine the penalties to be applied in such a case also applies to the situation where a person so heard refuses to provide the said authority with answers that are capable of establishing that person's liability for an offence that is punishable by administrative sanctions of a criminal nature, or that person's criminal liability, neither is there anything in the wording of Article 14(3) of Directive 2003/6 that precludes an interpretation of that provision to the effect that that obligation does not apply in such a case.

53 As regards, next, Article 30(1)(b) of Regulation No 596/2014, that provision requires that administrative sanctions be determined for failure to cooperate or to comply with an investigation, with inspection or with a request as referred to in Article 23(2) of that regulation, subparagraph (b) of which specifies that this includes questioning a person with a view to obtaining information.

54 It must nevertheless be observed that, although Article 30(1) of Regulation No 596/2014 requires Member States to ensure that the competent authorities have the power to take appropriate sanctions and other measures, inter alia in the situations referred to in point (b) of that provision, it does not require those Member States to provide for the application of such sanctions or measures to natural persons who, in an investigation concerning an offence that is punishable by administrative sanctions of a criminal nature, refuse to provide the competent authority with answers which might establish their liability for such an offence, or their criminal liability.

55 It follows that both Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014 lend themselves to an interpretation which is consistent with Articles 47 and 48 of the Charter, in that they do not require penalties to be imposed on natural persons for refusing to provide the competent authority with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

56 Interpreted in this way, the validity of those provisions of secondary EU legislation cannot be undermined, having regard to Articles 47 and 48 of the Charter, on the ground that they do not explicitly rule out the imposition of a penalty for such a refusal.

57 Finally, it must be borne in mind, in that context, that Member States must use the discretion afforded to them by an instrument of secondary EU legislation in a manner that is consistent with fundamental rights (see, to that effect, judgment of 13 March 2019, *E.*, C-635/17, EU:C:2019:192, paragraphs 53 and 54). In the context of the implementation of obligations stemming from Directive 2003/6 or Regulation No 596/2014, it is therefore for them to ensure, as has been pointed out in paragraph 45 above, that, in accordance with the right to silence guaranteed by Articles 47 and 48 of the Charter, the competent authority cannot impose penalties on natural persons for refusing to provide that authority with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

58 In the light of all of the foregoing, the answer to the questions referred is that Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014, read in the light of Articles 47 and 48 of the Charter, must be interpreted as allowing Member States not to penalise natural persons who, in an investigation carried out in respect of them by the competent authority under that directive or that regulation, refuse to provide that authority with answers that are capable of establishing their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

Costs

59 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:

Article 14(3) 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) and Article 30(1)(b) 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 and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, read in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, must be interpreted as allowing Member States not to penalise natural persons who, in an

investigation carried out in respect of them by the competent authority under that directive or that regulation, refuse to provide that authority with answers that are capable of establishing their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

[Signatures]

---

* Language of the case: Italian.