



**Natural persons who are subject to an administrative investigation for insider dealing have the right to remain silent when their answers might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability**

*However, the right to silence cannot justify every failure to cooperate with the competent authorities, such as refusing to appear at a hearing or using delaying tactics*

On 2 May 2012, the Commissione Nazionale per le Società e la Borsa (Consob) (National Companies and Stock Exchange Commission, Italy) imposed on DB penalties totalling EUR 300 000 for an administrative offence of insider dealing committed in 2009.

It also imposed on him a penalty of EUR 50 000 for failure to cooperate. DB, 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.

Following the dismissal of his appeal against those penalties, DB brought an appeal on a point of law before the Corte suprema di cassazione (Supreme Court of Cassation, Italy). On 16 February 2018, that court referred an interlocutory question of constitutionality to the Corte costituzionale (Constitutional Court, Italy) concerning the provision of Italian law <sup>1</sup> on the basis of which the penalty for failure to cooperate was imposed. 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 alleges an offence of insider dealing.

The Corte costituzionale (Constitutional Court) pointed out that, under Italian law, insider dealing constitutes both an administrative offence and a criminal offence. It then noted that the provision concerned was adopted in performance of a specific obligation under Directive 2003/6 <sup>2</sup> and now implements a provision of Regulation No 596/2014. <sup>3</sup> Next, it asked the Court whether those measures are compatible with the Charter of Fundamental Rights of the European Union ('the Charter') and, in particular, the right to remain silent.

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<sup>1</sup> Article 187*quindicies* of the 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 Law of 6 February 1996, No 52) of 24 February 1998.

<sup>2</sup> Pursuant to 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), 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 article 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.

<sup>3</sup> 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). This 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.

**The Court, sitting as the Grand Chamber, recognises the existence, for natural persons, of a right to silence, protected by the Charter,**<sup>4</sup> and holds that Directive 2003/6 and Regulation No 596/2014 allow Member States to respect that right in an investigation carried out in respect of such persons and capable of establishing their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

#### Findings of the Court

In the light of the case-law of the European Court of Human Rights on the right to a fair trial,<sup>5</sup> the Court emphasises that **the right to silence, which lies at the heart of the notion of a ‘fair trial’, precludes, inter alia, penalties being imposed on natural persons who are ‘charged’ 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.** The Court states, in that regard, that the case-law relating to the obligation on undertakings to provide, in proceedings that may lead to the imposition of penalties for anticompetitive conduct, information which may subsequently be used to establish their liability for such conduct cannot apply by analogy to establish the scope of the right to silence of natural persons charged with insider dealing. The Court adds that **the right to silence cannot, however, justify every failure to cooperate on the part of the person concerned with the competent authorities, such as refusing to appear at a hearing planned by those authorities or using delaying tactics designed to postpone it.**

Finally, the Court notes that both Directive 2003/6 and Regulation No 596/2014 lend themselves to an interpretation which is consistent with the right to silence, 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. In those circumstances, the absence of an express prohibition against the imposition of a penalty for such a refusal cannot undermine the validity of those measures. **It is for the Member States to ensure that natural persons cannot be penalised for refusing to provide such answers to the competent authority.**

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court’s decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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<sup>4</sup> Second paragraph of Article 47 and Article 48 of the Charter.

<sup>5</sup> This right to a fair trial is also enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.