Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 26 July 2017 [1]

Case C-358/16

UBS (Luxembourg) SA and Others

(Request for a preliminary ruling
from the Cour administrative (Administrative Court of Appeal, Luxembourg))

(Reference for a preliminary ruling — Directive 2004/39/EC — Article 54(1) and (3) — Access to information in judicial proceedings against a decision of the national financial supervisory authority — Professional secrecy — Exception for cases covered by criminal law — Right to good administration — Right to effective judicial protection)

I. Introduction

1. May a national financial supervisory authority refuse the person to whom a detrimental measure is addressed access to exculpatory documents concerning third parties, invoking professional secrecy under Directive 2004/39/EC on markets in financial instruments? [2] [3]

2. This question arises in this case against the background of a decision of the Luxembourg financial supervisory authority finding that Mr DV does not have the good repute necessary to assume management functions in investment firms. The reason for that decision was his role in the foundation and management of an undertaking which was involved in the Madoff financial scandal. [4]

3. This reference for a preliminary ruling from the Cour administrative (Administrative Court of Appeal, Luxembourg) sets the Court the challenge of reconciling protection of professional secrecy and protection of the rights of defence.

4. It is therefore first necessary to consider whether a situation such as that at issue is covered by the exception of professional secrecy for 'cases covered by criminal law' laid down in Article 54 of Directive 2004/39. In the light of the guarantees of a fair trial and effective remedy, it is secondly necessary to consider whether the form of the professional secrecy set out in Article 54 of the directive takes sufficient account of the right of access to the file of the addressee of a measure with the features at issue in this case.

1 Original language: German.

2 Directive of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1), as amended by Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 (OJ 2008 L 76, p. 33).

3 See also, in that regard, *Altmann and Others* (C-140/13, EU:C:2014:2362) and pending case C-15/16, *Baumeister*.

4 The investment fraud by the US citizen Bernard Lawrence Madoff caused losses of around 65 billion US dollars (USD) worldwide. In 2009 Madoff was sentenced to 150 years in prison.

II. Legal framework

A. EU law

5. The EU law framework of the present case is formed by Articles 41, 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter') and Directive 2004/39.

6. Reference must be first made to recitals 2, 44, 63 and 71 of the directive:

'(2) … it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Community, being a Single Market, on the basis of home country supervision.

(44) With the two-fold aim of protecting investors and ensuring the smooth operation of securities markets …

(63) It is necessary to reinforce provisions on exchange of information between national competent authorities and to strengthen the duties of assistance and cooperation which they owe to each other. Due to increasing cross-border activity, competent authorities should provide each other with the relevant information for the exercise of their functions, so as to ensure the effective enforcement of this Directive, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. In the exchange of information, strict professional secrecy is needed to ensure the smooth transmission of that information and the protection of particular rights.

(71) The objective of creating an integrated financial market, in which investors are effectively protected and the efficiency and integrity of the overall market are safeguarded, requires the establishment of common regulatory requirements relating to investment firms wherever they are authorised in the Community and governing the functioning of regulated markets and other trading systems so as to prevent opacity or disruption on one market from undermining the efficient operation of the European financial system as a whole. …'

7. Title II of the directive governs authorisation and operating conditions for investment firms.

8. Article 5(1) lays down the requirement for authorisation in that respect:

'Each Member State shall require that the performance of investment services or activities as a regular occupation or business on a professional basis be subject to prior authorisation in accordance with the provisions of this Chapter. … '

9. Under Article 8(c) of the directive, the competent authority may withdraw the authorisation issued to an investment firm where the investment firm 'no longer meets the conditions under which authorisation was granted'.

10. Article 9(1)(1) and (3) of the directive concerns the authorisation requirements relating to persons who direct an investment firm:

'(1) Member States shall require the persons who effectively direct the business of an investment firm to be of sufficiently good repute and sufficiently experienced as to ensure the sound and prudent management of the investment firm. …

(3) The competent authority shall refuse authorisation if it is not satisfied that the persons who will effectively direct the business of the investment firm are of sufficiently good repute or sufficiently experienced, or if there are objective and demonstrable grounds for believing that proposed changes to the management of the firm pose a threat to its sound and prudent management.'

11. Article 16(1) of the directive makes it clear that initial authorisation conditions, including Article 9(3) of the directive, must be satisfied at all times.

'Member States shall require that an investment firm authorised in their territory comply at all times with the conditions for initial authorisation established in Chapter I of this Title.'

12. Chapter I of Title IV ('Competent Authorities') of the directive contains provisions on the designation of competent authorities and their powers and on redress procedures.

13. Article 50(1) provides that the '[c]ompetent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions'. Under subparagraph 2[(l)], those powers are to include the right to 'refer matters for criminal prosecution'.

14. Article 51(1) of the regulation concerns the possible consequences of failure to comply with the provisions adopted in the implementation of the directive:

'Without prejudice to the procedures for the withdrawal of authorisation or 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.'

15. Paragraphs 1 to 3 of Article 54 of the regulation, which is entitled 'Professional Secrecy', provide as follows:

'(1) Member States shall ensure that competent authorities, all persons who work or who have worked for the competent authorities or entities to whom tasks are delegated pursuant to Article 48(2), as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy. No confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, save in summary or aggregate form such that individual investment firms, market operators, regulated markets or any other person cannot be identified, without prejudice to cases covered by criminal law or the other provisions of this Directive.

(2) Where an investment firm, market operator or regulated market has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding.

(3) Without prejudice to cases covered by criminal law, the competent authorities, bodies or natural or legal persons other than competent authorities which receive confidential information pursuant to this Directive may use it only in the performance of their duties and for the exercise of their functions, in the case of the competent authorities, within the scope of this Directive or, in the case of other authorities, bodies or natural or legal persons, for the purpose for which such information was provided to them and/or in the context of administrative or judicial proceedings specifically related to the exercise of those functions. However, where the competent authority or other authority, body or person communicating information consents thereto, the authority receiving the information may use it for other purposes.'

B. Luxembourg law

16. Article 11 of the Law of 8 June 1979[5] lays down the right of access to the file in administrative proceedings and Article 13 lays down exceptions.

17. Article 19 of the Law of 5 April 1993,[6] which was updated in the course of the implementation of Directive 2004/39, lays down a requirement relating to good repute in a similar manner to Article 9 of the directive.

18. Article 32 of the Law of 13 July 2007[7] provides for professional secrecy, implementing Article 54 of Directive 2004/39.

III. Main proceedings and procedure before the Court

19. UBS (Luxembourg) S.A.[8] ('UBS') founded the investment company LUXALPHA SICAV ('Luxalpha') with the collaboration of Mr DV, who subsequently held a management function at Luxalpha. Luxalpha was involved in the Madoff financial scandal and was wound up in 2009.

20. By decision of 4 January 2010 the Commission de Surveillance du Secteur Financier (Luxembourg financial supervisory authority, 'the CSSF') found that on account of his role in the foundation and management of Luxalpha, Mr DV was no longer trustworthy and was therefore not suitable to fulfil the role of director of an entity regulated by the CSSF or any other role subject to accreditation. He had therefore to resign from the relevant posts.

21. Mr DV brought an action against the decision of the CSSF before the Tribunal administratif (Administrative Court, Luxembourg). In those principal proceedings Mr DV asked the CSSF to send him various documents which the CSSF had obtained as part of its supervision activities relating to UBS and Luxalpha.

22. The CSSF refused to do so invoking professional secrecy and the fact that in relation to the decision of 4 January 2010 it had at no time referred to the documents requested. It had delivered to Mr DV all the documents concerning his administrative process.

23. In connection with a procedural issue relating to the main proceedings, Mr DV brought an action against the adverse decision of the CSSF before the Administrative Court, seeking delivery of the documents. He takes the view that the documents at issue are necessary for an adequate defence. They would provide information on the actual roles of the persons involved in the founding of Luxalpha. The Administrative Court granted only part of the request.

24. The Cour administrative (Administrative Court of Appeal) ruled on the appeal brought against it in its judgment of 16 December 2014. The Administrative Court of Appeal ordered the CSSF to deliver a large number of documents to Mr DV in connection with the main proceedings. UBS and the former members of the board of directors of Luxalpha, Mr Alain Hondequin and others, initiated third-party proceedings against the judgment. The parties to those proceedings consider that the delivery of the documents to Mr DV breaches the professional secrecy which is guaranteed by Article 54 of Directive 2004/39.

5 *Mémorial* A No 54 of 6 July 1979.

6 *Mémorial* A No 27 of 10 April 1993.

7 *Mémorial* A No 116 of 16 July 2007.

8 Legal successor since 1 December 2016: UBS Europe SE.

25. Against that background, the Cour administrative (Administrative Court of Appeal) has referred the following questions under Article 267 TFEU to the Court for a preliminary ruling:

'(1) Against the background in particular of Article 41 of the Charter of Fundamental Rights of the European Union (the Charter) enshrining the principle of good administration, does the exception of 'cases covered by criminal law' — found at the end of Article 54(1) of Directive 2004/39/EC and at the beginning of Article 54(3) — cover a situation concerning, according to national law, an administrative sanction, but considered from the point of view of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to be part of criminal law, such as the sanction at issue in the main proceedings, imposed by the national regulator, the national supervisory authority, and consisting in ordering a member of the national bar association to cease holding a post as director or any other post subject to accreditation in an entity supervised by that regulator and ordering him to resign from all his posts at the earliest opportunity?

(2) Inasmuch as the aforementioned administrative sanction, regarded as such under national law, stems from administrative proceedings, to what extent is the obligation of professional secrecy, which a national supervisory authority may invoke under Article 54 of Directive 2004/39/EC, subject to the requirements for a fair trial including an effective remedy as laid down in Article 47 of the Charter, examined in relation to the parallel requirements of Articles 6 and 13 ECHR relating to a fair trial and an effective remedy, which together constitute the safeguards provided for by Article 48 of the Charter, in particular as regards full access for the person on whom the administrative sanction has been imposed to the administrative file of the author of the sanction, which is also the national supervisory authority, for the purpose of protecting the interests and civil rights of the person on whom the sanction has been imposed?'

26. In the proceedings before the Court, the CSSF, UBS, Mr Hondequin and others and Mr DV and others,[9] as parties to the main proceedings, and also the Republic of Estonia, the Federal Republic of Germany, the Hellenic Republic, the Italian Republic, the Republic of Poland and the European Commission submitted written observations. In addition to the parties to the main proceedings, the Federal Republic of Germany and the European Commission were represented at the hearing on 1 June 2017.

IV. Assessment

27. This reference for a preliminary ruling concerns the provisions on professional secrecy in Article 54 of Directive 2004/39.

28. The first question referred for a preliminary ruling concerns the exception for 'cases covered by criminal law' contained in paragraphs 1 and 3. By its second question the national court seeks to ascertain whether the form of the professional secrecy in Article 54 of the directive complies with the guarantees of a fair trial and an effective remedy in relation to the right of the addressee of a measure such as that at issue to have access to the file.

29. It should first be pointed out that in order to answer the questions referred, account must be taken of the objectives pursued by Directive 2004/39 and the context of Article 54.

9 Mr EU, against whom the CSSF adopted a decision similar to that against Mr DV on 18 June 2010, is also a party to the main proceedings and the proceedings before the Court.

30. The purpose of Directive 2004/39 is to create an integrated market in financial instruments which offers investors a high level of protection and to allow investment firms to provide services throughout the European Union, on the basis of supervision in the home Member State.[10] In this respect, the function of Article 54 is to ensure the smooth flow of information necessary to that end. Since this requires that the supervised investment firms and the competent authorities can be sure that the confidential information provided will in principle also remain confidential,[11] the supervisory authorities are in principle prohibited under Article 54(1) of the directive from divulging confidential information to third parties in a non-aggregate and non-anonymised form.

A. The first question referred — 'cases covered by criminal law'

31. By its first question the national court essentially seeks to ascertain whether the exception of professional secrecy for 'cases covered by criminal law' laid down in Article 54 of Directive 2004/39 applies to a measure with the features of the CSSF decision of 4 January 2010, having regard to the right to good administration.

32. The expression appears in both paragraph 1, and the first sentence of paragraph 3 of Article 54 of the directive.

33. The last clause of Article 54(1) of the directive stipulates that the prohibition on divulging confidential information to third parties does not apply to 'cases covered by criminal law'. Article 54(3) of the directive concerns the use of confidential information by the competent authorities. It is permitted '[w]ithout prejudice to cases covered by criminal law' only for certain specified purposes.[12]

1. Independent interpretation of the exception

34. First, it must be noted that the directive contains no definition of 'cases covered by criminal law' and in this respect does not make reference to the law of the Member States.

35. Therefore, according to the settled case-law of the Court, this expression must be given an independent and uniform interpretation throughout the European Union.[13]

36. This is not precluded by the fact that the first sentence of Article 54(1) of the directive requires the Member States to ensure that professional secrecy applies, without setting out precisely the meaning thereof. That is because a possible power of the Member States, which is not at issue here,[14] to define the term 'professional secrecy', is limited by Union law, and in particular by the exceptions[15] from the prohibition on divulging confidential information exhaustively defined in Article 54 of the directive.

10 See judgment in *Altmann and Others* (C-140/13, EU:C:2014:2362, paragraph 26) and recitals 2, 31, 44 and 71 of Directive 2004/39.

11 See judgment in *Altmann and Others* (C-140/13, EU:C:2014:2362, paragraphs 31 and 32) and also judgment in *Hillenius* (110/84, EU:C:1985:495, paragraph 27), and recitals 44 and 63 of Directive 2004/39.

12 I am doubtful that the 'use' of confidential information, as referred to in Article 54(3), can also cover the 'divulging' of information within the meaning of Article 54(1) of the directive (see Opinion of Advocate General Slynn in *Hillenius* (110/84, EU:C:1985:333, p. 3950). Since both paragraphs lay down an exception for 'cases covered by criminal law' with identical wording, the answer to this question is not decisive.

13 See judgments in *Brüstle* (C-34/10, EU:C:2011:669, paragraph 25 and the case-law cited therein) and *Wathelet* (C-149/15, EU:C:2016:840, paragraph 28).

14 See, in this regard, pending case C-15/16, *Baumeister*, which concerns the interpretation of the terms 'professional secrecy' and 'confidential information'.

15 See judgment in *Altmann and Others* (C-140/13, EU:C:2014:2362, paragraph 35).

37. Furthermore, in the absence of a uniform interpretation throughout the European Union of the cases in which divulging confidential information to third parties is permitted by way of exception, the smooth flow of information between the various authorities and investment firms would be jeopardised since the parties concerned could not be sure that confidential information would in principle remain confidential. This would also be contrary to recital 2 of Directive 2004/39, according to which the purpose of this directive is precisely to provide for the degree of harmonisation needed to allow investment firms to provide services throughout the Union on the basis of home country supervision and guarantee a high level of investor protection.

2. The meaning of the exception

38. There are essentially two possible alternatives in interpreting the expression 'cases covered by criminal law'. Firstly, there is a possible 'substantive' interpretation whereby 'cases covered by criminal law' is to be construed as meaning situations involving a criminal offence or a criminal sanction. This might be so in the main proceedings as the decision of the CSSF may relate to a crime. On the other hand, a 'procedural' interpretation is proposed whereby it is permitted to divulge confidential information pursuant to this exception only where it is necessary to do so for criminal investigation or criminal proceedings under national law.

39. Which interpretation is correct must be determined by considering, inter alia, the context in which they occur and the purposes of the rules of which they form part.[16]

(a) The context of the exception in Article 54 of the directive

40. In the present case the context in which the expression 'cases covered by criminal law' is used argues against a 'substantive' interpretation of this phrase.

41. Firstly, it is apparent from the nature of the phrase to be interpreted, as an exception,[17] and the need for a 'strict professional secrecy' set out in recital 63 of the directive, that 'cases covered by criminal law' must be interpreted strictly. If the exception were applied to all situations involving a criminal offence or a criminal sanction, the basic rule of Article 54(1) of the directive, under which there is a prohibition on divulging information to third parties, would be negated.

42. It should also be noted that the wording of Article 54(1) of the directive places no further requirements on the breach of professional secrecy in cases covered by criminal law.

43. This stands in stark contrast with the exception in Article 54(2) of the directive which seeks to facilitate the divulging of confidential information 'where there has been a serious deterioration in the circumstance and the entity in question is no longer carrying on its normal activity',[18] but nevertheless imposes further requirements. For example, Article 54(2) of the directive is applicable only in certain situations (where an investment firm has been declared bankrupt or is being compulsorily wound up), limits divulgence to a particular context (in civil or commercial proceedings), and permits only the divulging of certain information (information which does not concern third parties and is necessary for carrying out the relevant proceeding).

16 See judgments in *Brüstle* (C-34/10, EU:C:2011:669, paragraph 31), *Fish Legal and Shirley* (C-279/12, EU:C:2013:853, paragraph 42), and *Saudaçor* (C-174/14, EU:C:2015:733, paragraph 52).

17 See judgments in *Commission* v *United Kingdom* (C-346/08, EU:C:2010:213, paragraph 39) and *Wucher Helicopter and Euro-Aviation Versicherung* (C-6/14, EU:C:2015:122, paragraph 24).

18 Opinion of Advocate General Jääskinen in *Altmann and Others* (C-140/13, EU:C:2014:2168, point 50).

44. This comparison between Article 54(1) and (2) of the directive shows that the expression 'cases covered by criminal law' cannot cover all situations which in substance involve criminal offences or criminal sanctions. In view of the absence of further requirements, such an interpretation would, without obvious justification, undermine the strict protection of professional secrecy which is sought by Article 54 and essential to the objectives of the directive. At the same time, the detailed restrictions in Article 54(2) would be undermined. In particular, it must be assumed that the legislature would have laid down further conditions if the phrase 'cases covered by criminal law' were also to have covered cases concerning criminal offences in securities trading or, as in the present case, the criminal nature of a measure.

(b) Purpose of the exception

45. The purpose of the expression 'cases covered by criminal law' suggests that the expression 'cases covered by criminal law' does not cover all situations which in substance involve criminal offences and criminal sanctions.

46. Article 51(1) of the directive makes it clear that '[w]ithout prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal sanctions', there is an obligation to put in place appropriate 'administrative measures … or administrative sanctions' in order to be able to respond to infringements of the directive in relation to the persons responsible.

47. In my opinion, the phrases 'without prejudice to cases covered by criminal law' in Article 54(1) and '[w]ithout prejudice to cases covered by criminal law' in Article 54(3) of the directive are to be construed as clarification in the same way as the statement that the right of the Member States to impose criminal sanctions is to remain unaffected. They make it clear that in cases where a criminal sanction is to be imposed under national law or proceedings are initiated in that regard, professional secrecy does not preclude information being divulged to the relevant authorities. In line with that, in the event that the initiative does not come from the authorities of the Member States, Article 50(2)(1) lays down the right of the competent authority to refer matters for criminal prosecution.

48. The expression 'cases covered by criminal law' is intended to avoid a conflict with the right of the Member States to impose and pursue criminal sanctions.

49. That purpose is also in keeping with *Altmann and Others*,[19] which was based on a request for information from investors affected by a fraudulent investment firm. The Court ruled that that case was not covered by criminal law since the request for information 'was submitted after the criminal convictions of [the investment firm's] executives'.[20] Neither the company's fraudulent business model nor the criminal convictions of the responsible executives meant that the case was covered by criminal law within the meaning of the directive.[21] In his Opinion Advocate General Jääskinen argued similarly that the aim of the request for information 'is not to use [it] for the purposes of criminal proceedings'.[22] The exception is intended instead 'to make criminal investigations and prosecutions possible at any time, even while the investment firm is carrying on its normal business activities, and thus to enable the supervisory authority to divulge information for the purposes of such investigations or prosecutions'.[23]

19 Judgment in *Altmann and Others* (C-140/13, EU:C:2014:2362).

20 Judgment in *Altmann and Others* (C-140/13, EU:C:2014:2362, paragraph 39).

21 Judgment in *Altmann and Others* (C-140/13, EU:C:2014:2362, paragraph 41).

22 Opinion of Advocate General Jääskinen in *Altmann and Others* (C-140/13, EU:C:2014:2168, point 28).

23 Opinion of Advocate General Jääskinen in *Altmann and Others* (C-140/13, EU:C:2014:2168, point 27).

50. Finally, in relation to identifying the purpose of the exception for 'cases covered by criminal law', reference is made to the fact that the exception lays down no further requirements. The aim of the exception for 'cases covered by criminal law' cannot have been to create the assumption that in cases relating to criminal offences and criminal sanctions, Article 54(1) of the directive allows any confidential information to be divulged in any context to any authority or person. Such an interpretation would be contrary to the fundamental aim of Article 54 of Directive 2004/39 to ensure strict professional secrecy.

(c) Other considerations

51. A 'procedural' interpretation of 'cases covered by criminal law' is also in keeping with the following considerations.

52. Firstly, this interpretation is consistent with the scheme of Directive 2004/39. In Article 51(1) the directive draws a clear distinction between measures of regulatory and administrative law, which are shaped by the directive, and the criminal sanctions of the Member States, which remain unaffected. A substantive interpretation of the exception as meaning that it depends on the criminal nature of the measure and therefore administrative measures of a criminal nature can also be classified as cases covered by criminal law would run counter to that distinction.

53. Secondly, a 'procedural' interpretation can be reconciled with the fact that the expression 'cases covered by criminal law' is used in a large number of different legal acts on finance.[24] This suggests that it is more a phrase to avoid conflicts and facilitate the exchange of information for the purposes of criminal prosecution and thus the aim is less a case-by-case analysis of the measures, which differ depending on the specific nature and subject-matter of the directive.

54. Finally, this 'procedural' approach is also confirmed by Article 76(1) of Regulation 2014/65/EU,[25] which revises Directive 2004/39. Even though Directive 2014/65, which entered into force on 2 July 2014, replaced Directive 2004/39 with effect only from 3 January 2017, the revised version can serve as an indication in interpreting cases covered by criminal law. Under Article 76(1) of Directive 2014/65, the prohibition is to be 'without prejudice to requirements of national criminal or taxation law'. Therefore, the issue is not the divulging of confidential information to the addressees of supervision measures or the criminal nature of these measures, but rather demonstrating that professional secrecy does not preclude divulgence where it is necessary for the purposes of national criminal or tax law.

55. Therefore, it must be stated, in conclusion, that the expression 'cases covered by criminal law' does not remove all situations which involve a criminal offence or criminal sanction from the scope of professional secrecy. Instead, the exception created by it is intended to enable confidential information to be divulged to the competent national authorities for criminal investigation or criminal proceedings where so required by national criminal or criminal procedural law. Therefore, situations such as that at issue do not constitute 'cases covered by criminal law'.

24 See, inter alia, the second subparagraph of Article 53(1) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338); Article 70(2) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ 2010 L 331, p. 84); and Article 24(1) of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ 2015 L 337, p. 35).

25 Directive of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349).

56. The extent to which the general principle of good administration [26] enshrined in Article 41 of the Charter, and the right of access to the file [27] guaranteed thereby are in keeping with Article 54 of the directive, must be considered in the context of the second question referred.

3. The alternative of a 'substantive' interpretation of the 'cases covered by criminal law'

57. If the Court does not follow my suggestion and rules that the expression 'cases covered by criminal law' covers situations involving criminal offences and criminal sanctions, it would be necessary to consider whether a decision such as that of the CSSF of 4 January 2010 is criminal in nature.

58. As regards the question of when a measure falls within the scope of criminal law, recourse to the understanding of 'criminal offence' and 'penalty' of the relevant Member State or an independent interpretation is possible.

59. However, the first alternative runs up against the concerns mentioned in points 34 to 37 above.

60. The term 'cases covered by criminal law' can be interpreted independently by drawing on the case-law of the Court in connection with the principle of *non bis in idem* laid down in Article 50 of the Charter. With reference to the 'Engel criteria' [28] of the European Court of Human Rights ('the ECtHR') the Court ruled that three criteria are relevant for the purpose of assessing whether a measure is criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur. [29]

61. As regards the first criterion, it must be observed that under Luxembourg law a measure such as the decision of the CSSF falls within the scope of administrative law.

62. As regards the second criterion, account must be taken of the group of persons addressed by the rule on which the measure is based, its purpose and the legal interests protected by it. [30]

63. A decision with the features at issue is not liable to be imposed on the public in a manner typical of criminal law. It can be directed only at members of a particular group, that is to say a narrow group of persons who have decided of their own free will to exercise management functions in securities trading in firms subject to authorisation.

64. As regards the purpose of the decision of the CSSF, it must be observed that, according to the first subparagraph of Article 9(1) of Directive 2004/39, the criterion relating to good repute is intended to ensure 'the sound and prudent management of the investment firm'. [31] Like the other requirements which investment firms must fulfil in order to obtain authorisation, this requirement serves to protect investors and ensure the stability of the financial system. [32] In order to ensure this protection, the suitability of the directors is reviewed not only as part of the authorisation procedure but also regularly

26 See judgment in *N.* (C-604/12, EU:C:2014:302, paragraph 49), and the Explanation relating to Article 41 (Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303, p. 17), and the case-law cited therein.

27 See judgment in *Commission and Others* v *Kadi* (C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 99) and also judgment of the General Court in *Cimenteries CBR and Others* v *Commission* (T-10/92 to T-12/92 and T-15/92, EU:T:1992:123, paragraphs 37 to 41).

28 See judgment of the ECtHR, *Engel and Others v. Netherlands* (ECLI:CE:ECHR:1976:0608JUD000510071, §§ 80-82).

29 See judgment in *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 35) with reference to *Bonda* (C-489/10, EU:C:2012:319, paragraph 37), and also my Opinion in *Bonda* (C-489/10, EU:C:2011:845, points 45 to 50 and the case-law cited therein).

30 See judgment in *Bonda* (C-489/10, EU:C:2012:319, paragraph 39) and also judgments of the ECtHR in *Öztürk v. Germany* (ECLI:CE:ECHR:1984:0221JUD000854479, § 53), *Bendenoun v, France* (ECLI:CE:ECHR:1994:0224JUD001254786, § 47), and *Benham v. United Kingdom* (ECLI:CE:ECHR:1996:0610JUD001938092, § 56).

31 If this condition is not, or is no longer, met, the competent authority can refuse the investment company authorisation (see Articles 7(1) and 9(3) of the directive) or retrospectively withdraw authorisation (see Article 8(c) of the directive).

32 See recital 17 and also recitals 2, 31, 44 and 71 of Directive 2004/39.

thereafter.[33] Therefore, the finding by the CSSF that there is no longer any trust, in the sense that Mr DV does not provide sufficient guarantees for the sound and prudent management of the investment firm, does not serve to penalise him but rather to avoid dangers to the financial system and investors. Also in so far as the decision finds that Mr DV is therefore not suitable to exercise management functions in an undertaking supervised by the CSSF, it has no punitive purpose characteristic of criminal law. Rather, this legal consequence follows directly from Directive 2004/39, under which only persons of goods repute may assume such functions. The requirement that Mr DV resign from the relevant posts is the necessary consequence in terms of effectively averting dangers and a more moderate means than withdrawing the investment firm's authorisation.

65. Nor do the legal interests protected in the present case bring the decision of the CSSF of 4 January 2010 within the scope of criminal law. Investor protection and the stability of the financial market are normally safeguarded by both criminal law and administrative law.

66. As regards the third 'Engel criterion', namely the nature and degree of severity of the measure imposed, the ECtHR takes as a basis the maximum penalty liable to be incurred in the abstract.[34] Applying this premise to the present case gives rise to difficulties since the order for reference does not make it clear that the decision is based on a rule which lays down a penal framework or places the decision in a hierarchical relationship with other measures. Instead, the decision implements the authorisation requirement laid down in the first subparagraph of Article 9(1) of the directive. The present case also differs in this respect from the ECtHR judgments on the penalties imposed by supervisory authorities with responsibility under financial market law.[35]

67. If consideration is given to the nature of the decision adopted in this case, it is at first striking that the finding of the absence of good repute and the order to cease holding a management function in an investment firm is not connected with any fine or imprisonment. Nor are these penalties typical of criminal law liable to be applied in the event of non-compliance. In addition, criminal law provides for prohibitions on carrying on certain professions. However, that does not mean that any decision which has unfavourable effects on the free choice of the professional activity of the person concerned must automatically fall within the scope of criminal law. Restrictions on the freedom to choose a profession imposed by authorisation requirements on specific individuals are also typical of administrative law and in particular law on averting danger.

68. If consideration is given to the severity of the decision adopted in this case, it must be observed that it has far-reaching consequences for the person concerned. The addressee fails to satisfy the requirement necessary to work in a management function in investment companies and must resign from the relevant posts. Consequently, that can entail financial losses and a reduction in public standing for the addressee.

69. However, it must be noted that the decision concerns only certain activities within a professional field. Mr DV is not barred from assuming other functions or practising as a lawyer. Furthermore, the financial losses would have been expected if the supervisory authority had not ordered Mr DV to resign but instead withdrawn authorisation from the investment firm. It would be entitled to do so under Article 8(c) of the directive if the investment firm continued to employ Mr DV contrary to the requirements of Directive 2004/39. Finally, it is also important that the decision of the CSSF does not exclude Mr DV from management activities for a considerable length of time or permanently. Rather, it embodies the view of the CSSF at the time of the decision. A fresh decision on the suitability of Mr DV will be taken if an investment firm applies for an authorisation with him in a management

33 See Articles 16 and 17 of Directive 2004/39.

34 See judgment of the ECtHR in *Ezeh and Connors v. United Kingdom* (ECLI:CE:ECHR:2003:1009JUD003966598, § 120).

35 See judgment of the ECtHR in *Dubus S.A. v. France* (ECLI:CE:ECHR:2009:0611JUD000524204) and *Grande Stevens v. Italy* (ECLI:CE:ECHR:2014:0304JUD001864010), which also differ from the present case in that the CSSF is not a court or tribunal.

function or an authorised firm declares its intention to employ him in such a function. It should further be borne in mind that the decision of the CSSF, as the representative of that authority confirmed at the hearing, was not published. The unfavourable effects on the standing of the addressee are thus not a direct consequence of the decision.

70. In the light of those considerations, the present case does not concern a prohibition on exercising a profession falling within the scope of criminal law. Therefore, application of the third 'Engel criterion' likewise does not mean that the decision of the CSSF of 4 January 2010 is criminal in nature.

71. In conclusion, on a 'substantive' interpretation the answer to the first question referred should thus be to the effect that the expression 'cases covered by criminal law' does not cover the present situation. A finding by the Court that the decision is criminal in nature would mean that Article 54 of Directive 2004/39 does not preclude the divulging of confidential information. Since Article 54 does not make the divulging of information in 'cases covered by criminal law' contingent on other requirements, professional secrecy would thus be virtually negated in situations of a criminal hue. Interventions in the relevant national criminal investigation or criminal proceedings would then be unavoidable. This makes it clear once again that the interpretation of 'cases covered by criminal law' in Article 54 of Directive 2004/39 must not be based on a 'substantive' understanding but rather on a 'procedural' approach.

4. Interim conclusion

72. In the light of the foregoing considerations, the answer to the first question referred should be as follows:

73. The expression 'cases covered by criminal law' in Article 54(1) and (3) of Directive 2004/39 does not cover situations where a national supervisory authority finds that a person is not trustworthy and thus not suitable to exercise a management function in an undertaking supervised by it and orders him to resign from the relevant posts.

B. The second question referred — the right to a fair trial and effective remedy

74. By its second question the national court essentially wishes to ascertain whether the form of the professional secrecy in Article 54 of the directive complies with the guarantees of a fair trial and an effective remedy under Articles 47 and 48 of the Charter and Articles 6 and 13 of the ECHR in relation to the right of the addressee of a measure such as that at issue to have access to the file.

75. First of all, it should be pointed out that the ECHR does not constitute a legal instrument which has been formally incorporated into EU law and therefore Article 54 of the directive must be interpreted solely in the light of Articles 47 and 48 of the Charter. [36]

1. Article 47 of the Charter

76. The first paragraph of Article 47 of the Charter lays down the right to an effective remedy before a court and the second the right to a fair hearing

36 See judgments in *Inuit Tapiriit Kanatami and Others* v *Commission* (C-398/13 P, EU:C:2015:535, paragraph 46), and *N.* (C-601/15 PPU, EU:C:2016:84, paragraphs 45 and 46 and the case-law cited therein).

77. The directive ensures that the requirements for an effective remedy under the first paragraph of Article 47 of the Charter are complied with. Article 52(1) of the directive provides that decisions of the competent authority are to be properly reasoned and there must be a right to apply to the courts. As regards the effectiveness of the remedy, the guarantee provided by the first paragraph of Article 47 of the Charter merely ensures that there is a right to apply to a court which is independent of the authority responsible for the detrimental decision and has jurisdiction to review the decision. The fact that these requirements are also satisfied in the present case is demonstrated by the grounds for the decision of the CSSF of 4 January 2010 and the main proceedings.

78. First, the right to a fair trial referred to in the second paragraph of Article 47 of the Charter covers the adversarial principle. It means that the parties have a right to a process of inspecting and commenting on all the evidence and observations submitted to the court.[37] However, this right is not affected in cases such as the present. The parties are not arguing about information which has been entered into the judicial proceedings. There is thus no reason to fear that the judicial decision was founded on facts and documents which one of the parties has not had an opportunity to examine.[38]

79. Second, the right to a fair trial under the second paragraph of Article 47 of the Charter covers protection of the rights of defence. This expression of the general principle of EU law has its equivalent in terms of administrative proceedings in Article 41, and in terms of criminal proceedings in Article 48(2) of the Charter. The protection of the rights of defence also covers the right of access to the file.

80. As shown by Article 41(1)(b) of the Charter, for example, this right extends to a person having access to 'his or her' file person. Firstly, it includes all the incriminating information and documents on which the authority based its decision.[39] Secondly, the right of access to the file also includes exculpatory documents[40] and those which were not used as grounds for the decision but have an objective link with them.[41] This does not depend on the file in which the information is physically placed.

81. In the view of Mr DV, the documents at issue in the present case will provide information on the 'true' allocation of roles when Luxalpha was founded. Since the CSSF bases its decision on the role of the addressee at the foundation of Luxalpha, the information sought consists of potentially exculpatory documents.

82. However, the CSSF obtained these documents in connection with its activities supervising UBS and Luxalpha. The fact that the information concerns third parties does not rule out the right of access to the file. Their fundamental rights still have to be taken into account. The right of access to the file does not apply absolutely but rather, as demonstrated by Article 41(2)(b) of the Charter, for example, is subject to respect for the legitimate interests of confidentiality and of professional and business secrecy.

83. Consequently, a balance must be struck between the right of access to the file and professional secrecy. In the case of Directive 2004/39 Article 54 is the result of the process of such a balance being struck by the European legislature. It is necessary to ascertain whether a proportionate balance between conflicting interests has been struck for the purposes of Article 52(1) of the Charter.

37 See judgments in *Varec* (C-450/06, EU:C:2008:91, paragraph 47) and *ZZ* (C-300/11, EU:C:2013:363, paragraph 55).

38 See judgment in *ZZ* (C-300/11, EU:C:2013:363, paragraph 56) and judgment in *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 52 and the case-law cited therein).

39 See judgment in *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 68).

40 See judgments in *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 68, 74 and 75) and *Solvay* v *Commission* (C-110/10 P, EU:C:2011:687, paragraph 49).

41 See judgment in *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P und C-219/00 P, EU:C:2004:6, paragraphs 125 and 126).

84. It should be noted that Article 54 of the directive does not give professional secrecy absolute priority over the right of access to the file. Although Article 54 lays down a general prohibition on divulging confidential information, it always permits divulgence in summary or aggregate form. [42] In addition, Article 54 lays down several, albeit exhaustive, exceptions from this prohibition, including the 'cases covered by criminal law' which have been considered.

85. The decision of the legislature to opt for strict professional secrecy is based on the consideration that not only are the firms directly concerned protected thereby, but the normal functioning of the markets in financial instruments of the European Union is also safeguarded. [43]

86. The quality of the information which the investment firms supply to the supervisory authorities and the exchange of information between the authorities depend on the confidence in the confidentiality of the information divulged. Consequently, without strict professional secrecy the system of supervising investment firms based on the exchange of information, and ultimately the protection sought for EU market investors, is in jeopardy.

87. In addition, the information gathered by the supervisory authorities can be of high economic value. Undermining professional secrecy could lead to the right of access to the file being abused in order to use confidential information for other purposes.

88. At the same time, it should be borne in mind that strict professional secrecy under Article 54 of the directive can result in the addressee obtaining for his defence only the information provided by the same supervisory authority which adopted the contested measure. The supervisory authority could thereby restrict the scope of the judicial rights of defence of the addressee of its measure. It would be less concerning if there were an organisational separation between the supervisory authority and the authority which adopts the detrimental measure. In the present case the CSSF is responsible for the supervision of investment firms, adopts the relevant measures, and decides on access to information. [44] Therefore, since there could be uncertainty about the impartiality of the authority at the level of administrative proceedings, there must be effective judicial control of its decisions. [45]

89. It should further be borne in mind that the competent authority is already breaching professional secrecy by divulging the incriminating information which it is using as grounds for its decision. Against that background, it would appear unacceptable for the authority to be able to refuse to divulge potentially exculpatory information relating to the decision by invoking professional secrecy in general.

90. However, I consider that Directive 2004/39 allows a proportionate balance to be stuck between the rights of defence and professional secrecy in cases such as the present. In this case the rights of defence can be protected in other ways than the addressee of the decision accessing the potentially exculpatory documents.

91. According to its wording, Article 54(1) of the directive provides that no confidential information may be divulged to 'any person or authority whatsoever'. That could be interpreted as also meaning a national court. However, this is contradicted by Article 54(3) of the directive, which stipulates that the competent authorities may use confidential information in judicial proceedings specifically related to

42 See judgment in *Hoechst* v *Commission* (T-410/03, EU:T:2008:211, paragraphs 153 and 154) in relation to the requirement concerning non-confidential versions or non-confidential summaries of documents.

43 See judgment in *Altmann and Others* (C-140/13, EU:C:2014:2362, paragraph 33).

44 The reference by Mr DV to the ECtHR judgment in *Dubus S.A. v. France* (ECLI:CE:ECHR:2009:0611JUD000524204) is misconceived as it is based on the false assumption that the CSSF is — like the Commission bancaire in that case (§§ 24 and 55 of the judgment) — a tribunal or court within the meaning of Article 6(1) of the ECHR and Articles 47 and 48 of the Charter.

45 See judgment in *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 55) and also, with regard to the requirement regarding impartiality under the second paragraph of Article 47 of the Charter, *Online Games and Others* (C-685/15, EU:C:2017:452, paragraphs 60 to 64), and, in relation to Article 41(1) of the Charter, my Opinion in *Spain* v *Council* (C-521/15, EU:C:2017:420, points 98 to 115).

the exercise of their functions. This is also suggested by Article 50(2)(l) since it contains the power to refer matters for prosecution. Consequently, the directive does not preclude the authority from making the relevant documents available to the court having jurisdiction in cases such as the present. It is then for the national court having jurisdiction to decide whether the documents produce an exculpatory effect and how they can be entered into the proceedings in accordance with national law.

92. It is true that the principle of a fair trial in principle requires that this information also be divulged to the addressee of the measure, so that he can make observations on it in judicial proceedings. However, a restriction of this right can be justified if it is merely information which could potentially exculpate him and otherwise could not be entered at all into the judicial proceedings.

93. On the one hand, the strict professional secrecy sought by the directive can be provided thus. On the other, it is ensured that the addressee of a measure such as that at issue has a fair trial.

2. Article 48 of the Charter

94. As regards Article 48 of the Charter, it should be noted that it protects the presumption of innocence and rights of the defence which must be enjoyed by a person 'who has been charged', [46] that is to say it is aimed at genuine criminal proceedings.

95. Consequently, the basic right is irrelevant to the present case. Neither the supervisory proceedings which led to the adoption of the administrative decision of the CSSF of a preventative nature, nor the administrative proceedings to review that decision, can be classified as criminal proceedings.

96. Even if there were such proceedings, Article 48 of the Charter does not preclude the form of professional secrecy in Article 54 of the directive. My proposal of a 'procedural' interpretation of 'cases covered by criminal law' within the meaning of Article 54(1) and (3) of the directive allows confidential information to be divulged to the criminal prosecution authorities. It is then for the criminal prosecution authorities to divulge to the person who has been charged the information necessary to protect his rights, in accordance with national law on criminal procedure.

3. Interim conclusion

97. In conclusion, the answer to the second question referred should thus be to the effect that the competent supervisory authority may refuse to divulge potentially exculpatory, confidential information to the addressee of a decision such as that at issue, relying on professional secrecy under Article 54(1) of the directive, where none of the exceptions laid down in Article 54 of the directive are applicable and the rights of defence of the addressee can be protected by other means.

V. Conclusion

98. In light of the foregoing, I propose that the Court's answer to the request for a preliminary ruling from the Cour administrative (Administrative Court of Appeal) should be as follows:

(1) The expression 'cases covered by criminal law' in Article 54(1) and (3) of Directive 2004/39 does not cover situations where a national supervisory authority finds that a person is not trustworthy and thus not suitable to exercise a management function in an undertaking supervised by it and orders him to resign from the relevant posts.

46 See judgment in *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 83).

(2) The competent supervisory authority may refuse to divulge potentially exculpatory, confidential information to the addressee of a decision by which it finds, in relation to him, that he is no longer trustworthy and thus not suitable to exercise a management function in an undertaking supervised by it and must therefore resign from the relevant posts, relying on professional secrecy under Article 54(1) of Directive 2004/39, where none of the exceptions laid down in Article 54 of the directive are applicable and the rights of defence of the addressee of the measure can be protected by other means.