Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 27 October 2020[1]

Case C-481/19

DB
v
Commissione Nazionale per le Società e la Borsa (Consob),
Intervener in the main proceedings
Presidenza dei Consiglio dei Ministri

(Request for a preliminary ruling
from the Corte costituzionale (Constitutional Court, Italy))

(Reference for a preliminary ruling – Approximation of legislation – Market abuse – Directive 2003/6/EC – Article 14(3) – Regulation (EU) No 596/2014 – Article 30(1)(b) – Failure to cooperate with the competent authorities – Administrative penalties and/or other administrative measures – Interpretation consistent with fundamental rights – Articles 47 and 48 of the Charter of Fundamental Rights of the European Union – Right to remain silent – Scope)

1. In this case, the Court has been requested by the Corte costituzionale (Constitutional Court, Italy) to give a preliminary ruling concerning 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)[2] 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/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC[3] which require Member States to penalise breaches of the obligation to cooperate with the authority responsible for market supervision ('the supervisory authority').

2. In particular, the Corte costituzionale (Constitutional Court) asks the Court whether those provisions may be interpreted in a manner consistent with the right to remain silent (*nemo tenetur se detegere*) as deriving from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter') and, if so, what scope should be accorded to that right.

3. In short, the Court's forthcoming judgment will afford it the opportunity to rule on a number of delicate legal questions, including the application of the right to remain silent in administrative proceedings which may lead to the imposition of a criminal penalty, and also the exact scope of that right, which is difficult to determine owing to an alleged discrepancy in this respect between the relevant case-law of the European Court of Human Rights ('the ECtHR') and that of the Court of Justice.

1 Original language: French.

2 OJ 2003 L 96, p. 16.

3 OJ 2014 L 173, p. 1.

I. Legal framework

A. The ECHR

4. Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ('the ECHR') provides:

'1. In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

…

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

…'

B. EU law

1. The Charter

5. Paragraph 2 of Article 47 of the Charter reads:

'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. …'

6. Under Article 48(1) of the Charter:

'Everyone who has been charged shall be presumed innocent until proved guilty according to law.'

2. Directive 2003/6

7. Article 12 of Directive 2003/6 provides:

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

(a) directly; or

(b) in collaboration with other authorities or market undertakings; or

(c) under its responsibility by delegation to such authorities or to the market undertakings; or

(d) by application to the competent judicial authorities.

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:

…

(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;

…'

8. Article 14 of that directive provides:

'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.

4. Member States shall provide that the competent authority may disclose to the public every measure or sanction that will be imposed for infringement of the provisions adopted in the implementation of this Directive, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.'

3. Regulation No 596/2014

9. Article 23 of Regulation No 596/2014, entitled 'Powers of competent authorities', states:

'1. Competent authorities shall exercise their functions and powers in any of the following ways:

(a) directly;

(b) in collaboration with other authorities or with the market undertakings;

(c) under their responsibility by delegation to such authorities or to market undertakings;

(d) by application to the competent judicial authorities.

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:

…

(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;

…'

10. Article 30 of that regulation, entitled '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:

…

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

…'

C. Italian law

11. 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, provisions aimed at discharging the obligations derived from Italy's membership of the European Community, Community law of 2004) of 18 April 2005 (GURI No 96 of 27 April 2005, Ordinary Supplement to GURI No 76). Article 9 incorporated many provisions, including Article 187*bis* on the administrative offence of insider dealing and Article 187 *quinquiesdecies* on penalties for failing to cooperate with an investigation, into the Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge n. 52 (Consolidated text of provisions on financial intermediation in implementation of Articles 8 and 21 of Law No 52) of 6 February 1996 ('the consolidated text'), which is part of decreto legislativo n. 58 (Legislative Decree No 58) of 24 February 1998, (Ordinary Supplement to GURI No 71 of 26 March 1998).

12. In the version in force at the material time, Article 187*bis* of the consolidated text was entitled 'The offence of insider dealing' and read:

'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 membership of the administrative, management or supervisory bodies of the issuer, by virtue of his holding in the capital of the issuer, or by virtue of the exercise of his employment, profession, office, including public office, or duties:

(a) acquires, sells or performs other transactions involving financial instruments, directly or indirectly, for his 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 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.

…

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 three 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.

…'

13. In the version in force at the material time, Article 187*quinquiesdecies* of the consolidated text was entitled '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.'

14. In the version currently in force, Article 187*quinquiesdecies* of the consolidated text, entitled 'Protection of the Bank of Italy and Consob's supervisory activities', provides:

'1. Apart from in the cases provided for in Article 2638 of the Civil Code, anyone who fails to comply with requests of the Banca d'Italia [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.

1*ter*. If the offence is committed by an undertaking or institution, that undertaking or institution shall be liable to an administrative financial penalty of between EUR 10 000 and EUR 5 000 000 or of up to 10% of turnover where that amount is greater than EUR 5 000 000 and turnover may be determined pursuant to Article 195(1*bis*). Without prejudice to the provisions laid down for undertakings and institutions in respect of which infringements are established, the administrative financial penalty referred to in paragraph 1*bis* shall apply to the representatives and staff of the undertaking or institution in the cases provided for in Article 190*bis*(1)(a).

1*quater*. If the benefit derived by the perpetrator following the offence exceeds the limits laid down in this article, the administrative financial penalty shall be increased to twice the amount of the benefit derived, provided that it is possible to determine that amount.'

II. The facts giving rise to the dispute, the main proceedings and the questions referred

15. By Decision No 18199 of 18 May 2012, the Commissione Nazionale per le Società e la Borsa (Consob) (National Companies and Stock Exchange Commission, Italy) imposed financial penalties on DB for the administrative offence of insider dealing under two heads: insider dealing and the unlawful disclosure of insider information, committed between 19 and 26 February 2009. It also issued him with a financial penalty of EUR 50 000 for the administrative offence referred to in Article 187 *quinquiesdecies* of the consolidated text for having repeatedly postponed the date of the hearing to

which he had been summoned in his capacity as a person aware of the facts and for having declined to answer the questions put to him once he had attended. In addition, Consob handed down the penalty of temporary loss of reputation 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.

16. In the main proceedings which gave rise to the present reference, DB first filed an application with the Corte d'appello di Roma (Court of Appeal, Rome, Italy) to set aside Consob's decision, submitting, inter alia, that the penalty with which he had been issued pursuant to Article 187*quinquiesdecies* of Legislative Decree No 58 of 24 February 1998 was illegal. After that application was dismissed, DB brought an appeal on a point of law. By order of 16 February 2018, the Corte suprema di cassazione (Supreme Court of Cassation, Italy) raised two interlocutory questions regarding constitutionality to be examined by the Corte costituzionale (Constitutional Court).

17. The first of those questions concerns Article 187*quinquiesdecies* of the consolidated text, as inserted by Article 9 of Law No 62 of 18 April 2005, in so far as that provision penalises anyone who fails to comply with Consob's requests in a timely manner or delays Consob's performance of its functions, including anyone whom Consob, in the exercise of its supervisory functions, accuses of insider dealing.

18. In its order for reference, the Corte costituzionale (Constitutional Court) points out that Article 187*quinquiesdecies* conflicts with several principles, some of which are established in national law (the right of defence and the principle of equality of the parties in the proceedings, provided for in the second paragraph of Article 24 and the second paragraph of Article 111 of the Italian Constitution, respectively) and others in international and EU law (the right to a fair trial, laid down in Article 6 ECHR, Article 14 of the International Covenant on Civil and Political Rights and Article 47 of the Charter), and that failure to comply with those principles is liable to render the provision concerned unconstitutional pursuant to Article 11 and the first paragraph of Article 117 of the Italian Constitution.

19. According to the Corte costituzionale (Constitutional Court), it does not appear that the 'right to remain silent', founded on the aforementioned provisions of the Constitution, EU law and international law, can in itself justify a refusal by a person to attend a hearing ordered by Consob or his delay in attending that hearing, provided that his right not to answer the questions put to him at that hearing is guaranteed, unlike in the present case.

20. According to the Corte costituzionale (Constitutional Court), the wording of Article 187 *quinquiesdecies* of the consolidated text, in both the version in force at the material time and the version currently in force, also covers a situation in which Consob orders a personal hearing of a person whom it has already identified, on the basis of information in its possession, as the possible perpetrator of an offence the existence of which Consob has the authority to establish. It must therefore be determined whether the right to remain silent applies not only in criminal proceedings but also in hearings ordered by Consob in the course of its supervisory activities. The arguments based on Article 24 of the Italian Constitution and Article 6 ECHR, as interpreted by the ECtHR, suggest that the answer to that question should be that it does.

21. The Corte costituzionale (Constitutional Court) submits that to reach the opposite conclusion would entail the risk that, owing to the obligation to cooperate with the supervisory authority, the suspected perpetrator of an administrative offence liable to lead to a 'punitive' penalty could also, in reality, contribute to having a criminal charge brought against him. This is so because under Italian law, insider dealing constitutes both an administrative offence (Article 187*bis* of the consolidated text) and a criminal offence (Article 184 of the consolidated text). The applicable proceedings could be initiated and conducted in parallel (as was, in fact, the case of DB), provided that this is compatible

with the principle *ne bis in idem*.[4]

22. Furthermore, the Corte costituzionale (Constitutional Court) submits that the doubts thus raised are also borne out by the case-law of the ECtHR on Article 6 ECHR.

23. According to the Corte costituzionale (Constitutional Court), a declaration that Article 187 *quinquiesdecies* of the consolidated text is unconstitutional is likely to conflict with EU law since that provision was introduced into the Italian legal system in performance of a specific obligation under Article 14(3) of Directive 2003/6 and now faithfully implements Article 30(1)(b) of Regulation No 596/2014 and since those two provisions also seem to place the supervisory authorities of Member States under a duty to penalise the silence at a hearing of a person who has carried out transactions which constitute offences falling within the purview of those authorities. Thus, it is questionable whether such an obligation to hand down a penalty is compatible with Articles 47 and 48 of the Charter, which also appear to recognise the individual's fundamental right not to contribute towards incriminating himself and not to be compelled to make statements in the nature of a confession, within the same limits as those resulting from Article 6 ECHR and Article 24 of the Italian Constitution.

24. In that regard, the Corte costituzionale (Constitutional Court) states that it is aware of the case-law of the Court of Justice of the European Union on the right to remain silent in the field of anticompetitive conduct which, by obliging the perpetrator to answer purely factual questions, significantly limits the scope of the principle *nemo tenetur se detegere*, in so far as that principle entails, in criminal cases, the right of the person concerned not to self-incriminate by his statements, even indirectly. It points out that that case-law – which was established in relation to legal and non-natural persons and to a large extent before the adoption of the Charter and the attribution to it of the same legal value as the Treaties – seems difficult to reconcile with the 'punitive' nature, acknowledged by the Court itself in *Di Puma and Zecca*,[5] of the administrative penalties laid down in the Italian legal system for insider dealing. According to that court, that nature appears to suggest that there is a need to grant the presumed perpetrator of the offence a guarantee similar to that which he is recognised as having in criminal matters.

25. In addition, the Corte costituzionale (Constitutional Court) considers that the case-law of the Court is not fully consistent with the case-law of the ECtHR, which, by contrast, seems to ascribe a broader scope to the accused's right to remain silent, including in administrative proceedings which seek to impose 'punitive' penalties.

26. Since the Court and the EU legislature have not so far addressed the question of whether, having regard to the case-law of the ECtHR concerning Article 6 ECHR, Articles 47 and 48 of the Charter require that right to be recognised also in administrative proceedings which may lead to the imposition of 'punitive' penalties, the referring court considers it necessary, before it rules on the question of constitutionality that has been submitted to it, to request the Court to shed light, in view of Articles 47 and 48 of the Charter, on the interpretation and, as the case may be, the validity of Article 14(3) of Directive 2003/6 as applicable *ratione temporis* and Article 30(1)(b) of Regulation No 596/2014. In particular, clarification is needed as to whether those provisions allow a Member State to refrain from penalising persons who refuse to answer questions put to them by the supervisory authority which might establish their liability for an offence that is punishable by criminal penalties or by administrative penalties of a 'punitive' nature.

4 See, in that regard, judgment of 20 March 2018, *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193, paragraphs 42 to 63).

5 Judgment of 20 March 2018 (C-596/16 and C-597/16, EU:C:2018:192).

27. Against that background, the Corte costituzionale (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court of Justice 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 ECtHR on Article 6 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?'

III. Procedure before the Court of Justice

28. Written observations on those questions were submitted by DB, the Italian Government, the Spanish Government, the Council of the European Union, the European Parliament and the European Commission.

29. Those same interested parties presented oral arguments at the hearing on 13 July 2020.

IV. Analysis

A. Admissibility of the questions referred

30. In its written pleadings, the Council observes that the Corte costituzionale (Constitutional Court) itself states in the order for reference that only Directive 2003/6 applies *ratione temporis* to the facts at issue in the main proceedings, whereas Regulation No 596/2014, which repealed and replaced that directive, currently governs the matter without being otherwise linked to the situation giving rise to the national proceedings at issue.

31. According to the Council, by stating that the only provision relevant to the main proceedings is Article 14(3) of Directive 2003/6, the Corte costituzionale (Constitutional Court) appears to acknowledge implicitly that the answers to its questions concerning the interpretation and validity of Article 30(1)(b) of Regulation No 596/2014 are not necessary in order to resolve the dispute giving rise to the case, but that they are essentially intended to clarify the legal situation for the future.

32. The question therefore arises, as a preliminary point, of whether Article 30(1)(b) of Regulation No 596/2014 is also relevant in enabling the Corte costituzionale (Constitutional Court) to rule on the reference from the Corte suprema di cassazione (Supreme Court of Cassation).

33. To that end, I would point out first of all that, according to 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. That presumption may be dismissed only in exceptional cases, where it is quite obvious that the interpretation of EU law that is sought or the assessment of validity bear 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 or to enable it to understand the reasons why the national court considers that it needs the answers to those questions in order to decide the dispute pending before it.[6]

34. In the present case, it seems to me that the Council's argument is based on the view that the order for reference does not satisfy the requirement laid down in Article 94(c) of the Rules of Procedure of the Court of Justice in that, first, the order does not set out the reasons which persuaded the Corte costituzionale (Constitutional Court) to enquire as to the interpretation and validity of Regulation No 596/2014 and, second, it does not establish a link between that regulation and the legislation applicable to the main proceedings. According to the Council, those shortcomings will result in the Court delivering an advisory opinion on hypothetical questions and they thus render the present reference for a preliminary ruling partly inadmissible.

35. I cannot agree with that view for the following reasons.

36. As regards the first head of the requirement laid down in Article 94(c) of the Rules of Procedure, I note that, in the order for reference, the Corte costituzionale (Constitutional Court) clearly states that the interpretation sought is justified by the fact that a declaration that Article 187*quinquiesdecies* of the consolidated text is unconstitutional is also likely to conflict with the obligation to impose a penalty which currently arises under Article 30(1)(b) of Regulation No 596/2014. In that statement, the Corte costituzionale (Constitutional Court) seems to me to acknowledge implicitly that its decision will relate not only to Article 187 *quinquiesdecies* of the consolidated text in the version in force at the material time, but also to the same provision in the version currently in force. As the Commission notes in its written observations, Article 27 of legge n. 87 – Norme sulla costituzione e sul funzionamento della Corte costituzionale (Law No 87 laying down provisions on the Constitution and the functioning of the Constitutional Court) of 11 March 1953 (GURI No 62 of 14 March 1953) that, when granting an application or appeal concerning the constitutionality of a law or an instrument having the force of law, the Corte costituzionale (Constitutional Court) shall, within the bounds of the subject matter of the action, declare not only which legislative provisions are unconstitutional but also *which become unconstitutional as a result of the decision adopted*. However, the absence of an explicit reference in the order for reference to that provision, which delimits the scope of decisions granting applications or appeals on constitutionality in a way that is certainly not alien to those of other constitutional courts in the European Union, hardly appears sufficient to merit a finding that the first head of that requirement is not met.

37. As regards the second head, it suffices to note that, in the order for reference, the Corte costituzionale (Constitutional Court) states that the national provision at issue, namely Article 187 *quinquiesdecies* of the consolidated text, transposed Article 14(3) of Directive 2003/6 at the time of the facts in the main proceedings and now transposes Article 30(1)(b) of Regulation No 596/2014. Although it is true that the 'legislation applicable to the main proceedings' is Article 187 *quinquiesdecies* of the consolidated text in the version which transposed Directive 2003/6, it is also true that, in view of the consistency between the provisions of Directive 2003/6 and those of Regulation No 596/2014, the link between that regulation and the legislation applicable to the main proceedings must, in my view, be regarded as established.

38. Consequently, I propose that the Court declare the questions admissible.

6 See, *ex multis*, judgment of 12 December 2019, *Slovenské elektrárne* (C-376/18, EU:C:2019:1068, paragraph 24 and the case-law cited).

B. Substance

1. Reformulation of the questions referred

39. It is apparent from the order for reference that the Corte costituzionale (Constitutional Court) is seeking, inter alia, clarification as to the scope which it is required to afford the right of natural persons to remain silent owing to the alleged divergence on that point between the case-law of the ECtHR and the case-law of the Court of Justice. [7]

40. In view of the wording of the questions referred for a preliminary ruling and the relationship of dependence between the answer to the first question and the assessment required by the second, there is, in my view, a risk that that issue will remain outside the scope of the Court's assessment in its forthcoming judgment.

41. I therefore deem it necessary to reformulate the questions which the national court has referred so that the Court provides the latter court with a meaningful answer that enables it to shape the substance of its judgment concerning the constitutionality of the provision in question.

42. In that regard, it should be borne in mind that, in the context of the procedure laid down by Article 267 TFEU for cooperation between national courts and the Court of Justice, the Court's power to reformulate questions referred to it finds its justification in the Court's duty to give the national court an answer that will be of use to it and enable it to decide the case before it. [8]

43. However, I would point out that the reformulation of preliminary questions seems to me generally a delicate exercise requiring great circumspection if the Court is to avoid encroaching on the jurisdiction of the referring court, which alone is responsible for assessing the relevance of the questions of law raised by the dispute before it and the need for a preliminary ruling to enable it to deliver judgment. [9]

44. In this case, some interested parties have proposed that the first question be reformulated so that it seeks to ascertain, 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*, are to be interpreted as meaning that they allow Member States to refrain from penalising anyone who refuses to answer questions put by the supervisory authority which might establish his liability for an offence that is punishable by administrative sanctions of a criminal nature.

45. In my view, such a reformulation distorts the subject matter of the first question, which concerns the existence of an *actual possibility* for Member States to interpret those provisions in compliance with the right to remain silent when they adopt transposition or implementing measures, and, in effect, circumvents the issue of the validity of the provisions at issue, which is the subject of the second question.

46. In order to avoid such an outcome, I consider that the reformulation must address the question of whether, in the light of the wording of Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014, those provisions *may* be interpreted in compliance with fundamental rights and, in particular, the right to remain silent, as derived from Articles 47 and 48 of the Charter, or

7 See paragraph 9.2 of the decision to refer.

8 See judgment of 14 May 2020, *T-Systems Magyarország* (C-263/19, EU:C:2020:373, paragraph 45 and the case-law cited).

9 See judgment of 22 February 2018, *Kubota (UK) and EP Barrus* (C-545/16, EU:C:2018:101, paragraph 18 and the case-law cited).

whether such an interpretation would, by contrast, be *contra legem*. It is clear that, if the answer is in the affirmative, no doubt will remain as to the validity of those provisions in the light of those articles of the Charter. Moreover, the reformulation must give the Court the opportunity to rule on the exact scope of the right to remain silent, as set out in point 39 of this Opinion.

47. In the light of those considerations, I propose that the Court reformulate the two questions submitted by the referring court as follows:

'What scope should be given to the right of natural persons to remain silent, as derived from Articles 47 and 48 of the Charter, having regard to the case-law of the ECtHR and the case-law of the Court of Justice on anticompetitive conduct, in the event that the wording of Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014 permit them to be interpreted in accordance with that right?'

2. Consideration of the reformulated question

48. In line with the internal logic of the reformulated question, I shall consider whether, in view of the wording of the articles in question, an interpretation consistent with the right to remain silent is possible, in which case the validity of those provisions cannot be called into question. This depends on whether those provisions must be understood as meaning that they do not require the Member States to penalise persons who refuse to answer questions put by the supervisory authority which may establish their liability for an offence punishable by administrative sanctions of a criminal nature [10] (Section (b)). It should be noted, however, that this question assumes that an affirmative answer is given to the question of whether the right to remain silent is applicable not only in criminal proceedings but also in administrative proceedings which may lead to the imposition of such sanctions. Although it puts forward a number of arguments in support of such an answer, the referring court appears to request the Court to dispel any residual doubt on that point. I shall therefore address that point first (Section (a)). Finally, I shall express a view on the scope to be given in this context to the right to remain silent, as derived from Articles 47 and 48 of the Charter (Section (c)).

(a) Recognition of the right to remain silent in administrative proceedings which may lead to the imposition of penalties of a criminal nature

49. First of all, it should be observed that neither the second paragraph of Article 47 (right to a fair trial) nor Article 48(2) (presumption of innocence) of the Charter expressly lays down a right to remain silent.

50. However, in accordance with the 'homogeneity clause' in Article 52(3) of the Charter, according to which the meaning and scope of the rights set out in the Charter that correspond to rights guaranteed by the ECHR must be 'the same as those laid down' by the correlating article of the ECHR, the Explanations relating to the Charter state with regard to the second paragraph of Article 47 thereof that the guarantees afforded by Article 6(1) ECHR 'apply in a similar way to the Union' and, with regard to Article 48(2) of the Charter, that that right has 'the same meaning and scope' as the right guaranteed by Article 6(2) ECHR. [11]

10 I have replaced the expression 'punitive', which is used by the question referred, with the expression 'of a criminal nature', since it is evident from the order for reference that the former term is regarded as reflecting the fact that the criteria laid down in the judgment of 5 June 2012, *Bonda* (C-489/10, EU:C:2012:319) are met.

11 OJ 2007 C 303, p. 17.

51. While it is true that the wording of Article 6 ECHR does not contain any reference to the right to remain silent either, it should be recalled that the ECtHR has repeatedly held that, despite the absence of such explicit recognition, the right to remain silent and the right not to contribute to incriminating oneself, as an element of the right to remain silent, are 'generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 ECHR'. [12]

52. With regard to the material scope of Article 6 ECHR, its wording makes plain that the criminal head of that provision applies whenever there is a 'criminal charge'.

53. The concept of 'criminal matters' is known to have been broadly interpreted by the ECtHR to cover not only procedures which may lead to the imposition of penalties classified as criminal by the national legislature, but also sanctions which, though categorised by that legislature as administrative, fiscal or disciplinary, are essentially criminal in nature. That autonomous interpretation is based on the criteria established in *Engel*, [13] which were subsequently adopted by the Court in *Bonda*, [14] namely classification of the offence under national law, the nature of that offence and the degree of severity of the penalty that the person concerned is liable to incur ('the *Bonda* criteria').

54. It is useful to review those criteria briefly as they are established in the case-law of the ECtHR. [15]

55. The first criterion, namely the classification of the offence under national law, is irrelevant in the case of a penalty classified as administrative. [16] In such a case, it is necessary to proceed to consider the two other criteria.

56. The second criterion, which seeks to grasp the true nature of the offence, is assessed on the basis of a number of factors, it being understood that an offence will be criminal, in particular, where the penalty provided for by national law is directed towards the general public and not a clearly defined group of individuals, [17] where the offence is established with the aim of punishment and deterrence [18] instead of seeking only compensation for pecuniary damage [19] and where the national provision imposing a penalty safeguards a legal interest which is normally protected by criminal law. [20]

57. The third criterion relates, in particular, to the degree of severity of the penalty that the person concerned is liable to incur, which is determined by reference to the penalty to which the person concerned is a priori liable and not to that actually imposed. [21] Custodial sentences are, by definition, criminal, [22] as are financial penalties which may result in an alternative punishment of imprisonment in the event of default or which are entered into the criminal record. [23]

58. The second and third criteria are, as a rule, alternative. However, a cumulative approach may be taken where a separate analysis of each criterion does not enable a clear conclusion to be reached as to whether a charge is criminal. [24]

12 See, ECtHR, 25 February 1993, *Funke v. France* (CE:ECHR:1993:0225JUD001082884, § 44); and ECtHR, 28 October 1994, *Murray v. the United Kingdom* (CE:ECHR:1996:0208JUD001873191, § 45).

13 ECtHR, 8 June 1976, *Engel and Others v. the Netherlands* (EC:EHCR:1976:0608JUD000510071, § 82).

14 Judgment of 5 June 2012 (C-489/10, EU:C:2012:319, paragraphs 37 to 43). See also judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 35).

15 For a detailed discussion of those tests, see Opinion of Advocate General Kokott in *Bonda* (C-489/10, EU:C:2011:845, points 47 to 50); and Opinion of Advocate General Campos Sánchez-Bordona in *Menci* (C-524/15, EU:C:2017:667, points 44 to 48).

16 ECtHR, 8 June 1976, *Engel and Others v. the Netherlands* (EC:EHCR:1976:0608JUD000510071, § 82).

17 ECtHR, 2 September 1998, *Lauko v. Slovakia* (CE:ECHR:1998:0902JUD002613895, § 58).

18 ECtHR, 25 June 2009, *Maresti v. Croatia* (CE:ECHR:2009:0625JUD005575907, § 59).

19 ECtHR, 23 November 2006, *Jussila v. Finland* (CE:ECHR:2006:1123JUD007305301, § 38).

20 ECtHR, 4 March 2014, *Grande Stevens and Others v. Italy* (CE:ECHR:2014:0304JUD001864010, § 90).

21 ECtHR, 4 March 2014, *Grande Stevens and Others v. Italy* (CE:ECHR:2014:0304JUD001864010, § 98).

22 ECtHR, 8 June 1976, *Engel and Others v. the Netherlands* (EC:EHCR:1976:0608JUD000510071, § 82).

23 ECtHR, 31 May 2011, *Žugić v. Croatia* (CE:ECHR:2011:0531JUD000369908, § 68).

24 ECtHR, 23 November 2006, *Jussila v. Finland* (CE:ECHR:2006:1123JUD007305301, §§ 30 and 31).

59. Where the assessment based on those criteria shows that the administrative procedure in question is liable to lead to a penalty falling within the 'criminal sphere', the *full range* of guarantees under the criminal head of Article 6 ECHR applies, including the right to silence. Where the ECtHR establishes that the penalty which may be imposed at the conclusion of the procedure under consideration is criminal in nature, it does not ask any additional questions concerning the applicability of the specific right at issue, since that applicability inevitably flows from that classification of the penalty. [25]

60. In any event, it must be pointed out that, as the referring court rightly observes, it has been acknowledged on numerous occasions that persons who have not answered questions put by administrative authorities in proceedings seeking to ascertain whether an administrative offence has been committed have the right to silence. On those occasions, the ECtHR considered decisive the criminal nature of the penalties that could be imposed by the administrative authority for the offences which are the subject of the investigation which that authority is conducting. [26]

61. In the light of the foregoing, it must be concluded that, where the penalties examined are classified as criminal in the light of the *Bonda* criteria, the right to remain silent is recognised automatically.

(b) Can the provisions at issue be construed in compliance with the right to silence?

62. At this stage, it must be determined whether, having regard to the wording of Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014, it is possible to interpret those provisions in a manner consistent with the right to remain silent, that is to say, as not requiring Member States to penalise any person who refuses to answer questions put by the supervisory authority which might establish their liability for an offence punishable by administrative penalties of a criminal nature. It is only if that possibility is confirmed that the question of the validity of those provisions in the light of Articles 47 and 48 of the Charter will have to be answered in the affirmative.

63. To that end, it is necessary, at the outset, to define briefly the legal context in which the provisions which are the subject of that question are situated.

64. Directive 2003/6 seeks to combat market abuse. As stated in recitals 2 and 12, it prohibits insider dealing and market manipulation with the aim of protecting the integrity of financial markets and enhancing investor confidence, a confidence which depends, inter alia, on investors being placed on an equal footing and protected against the improper use of inside information. [27]

65. In order to ensure that legal framework is adequate, any infringement of the prohibitions laid down pursuant to Directive 2003/6 must be promptly detected and sanctioned. [28] With that in mind, Article 14 of that directive sets out the requirements with which the national sanction regimes of Member States are expected to comply.

25 See, inter alia, ECtHR, 4 March 2014, *Grande Stevens and Others v. Italy* (CE:ECHR:2014:0304JUD001864010, § 101), in which the ECtHR finished its assessment of the applicability of Article 6 ECHR as follows: 'The Court considers that the fines imposed on the applicants were criminal in nature, *with the result* that Article 6 § 1 is applicable in this case under its criminal head' (emphasis added).

26 See ECtHR, 3 May 2001, *J.B. v. Switzerland* (CE:EHCR:2001:0503JUD003182796) (investigative proceedings for tax evasion); ECtHR, 4 October 2005, *Shannon v. the United Kingdom* (CE:EHCR:2005:1004JUD000656303) (proceedings for false accounting and conspiracy to defraud); and ECtHR, 5 April 2012, *Chambaz v. Switzerland* (CE:EHCR:2012:0405JUD001166304) (investigative proceedings for tax evasion).

27 Judgments of 23 December 2009, *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraph 47); of 7 July 2011, *IMC Securities* (C-445/09, EU:C:2011:459, paragraph 27); of 28 June 2012, *Geltl* (C-19/11, EU:C:2012:397, paragraph 33); and of 11 March 2015, *Lafonta* (C-628/13, EU:C:2015:162, paragraph 21).

28 See recital 38 of Directive 2003/6.

66. While pursuing the same objectives as Directive 2003/6,[29] Regulation No 596/2014 seeks to establish a more uniform and stronger legal framework, in particular by strengthening the supervisory authority's powers of supervision, investigation and sanction.[30] Article 30 of that regulation extends the range of requirements with which the national regimes of Member States must comply.

67. As regards the provisions which the Court is invited to interpret in this case, it should be noted that Article 14(3) of Directive 2003/6 states that Member States are to determine the administrative sanctions to be applied for failure to cooperate with an investigation conducted by the supervisory authority. The express reference in that article to Article 12 of the directive requires a combined reading of the provision at issue and Article 12 which, as regards the minimum content of the supervisory authority's powers, provides, in paragraph 2(b), that those powers must include the right to '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'.[31] In other words, Article 12 of Directive 2003/6 states that the scope of the category of persons in respect of whom the supervisory authority may exercise that right is, as a general rule, uncircumscribed.

68. As regards Article 30(1)(b) of Regulation No 596/2014, it provides, in essence, that the Member States must ensure that the supervisory authority has the power to impose administrative penalties and measures for 'failure to cooperate or to comply with an investigation, with an inspection or with a request'. Since Article 30 of Regulation No 596/2014 refers expressly to Article 23 of that regulation, it necessarily requires a combined reading with the latter provision, which, in paragraph 2, determines the minimum content of the supervisory and investigatory powers of the supervisory authority in that those powers are to include, inter alia, the power 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'.[32]

69. In its written observations, the Italian Government expresses the view that the semantic force of the adjective 'any', combined with the lack of an express prohibition preventing Member States from imposing penalties on persons whose answers might establish their liability for an offence falling within the supervisory authority's competence, may justify an interpretation of Article 14(3) of Directive 2003/6, and of Article 30(1)(b) of Regulation No 596/2014, according to which Member States are also required to impose administrative penalties on those persons.

70. I am, however, persuaded that that conclusion is incorrect.

71. In this regard, I would point out, first, that the adjective 'any' in the two legislative acts in question refers to persons from whom the supervisory authority is entitled to request or demand information or whom that authority may summon for questioning, and not directly to persons whom it is required to punish for failure to cooperate with that authority's investigation, which has a certain bearing on the soundness of that literal interpretation. Second and above all, I consider that an interpretation according to which the absence of an express prohibition against penalising persons whose answers could establish their liability for the offence falling within the competence of the supervisory authority necessarily follows from the premiss that both Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014 require the Member States to ensure that a breach of the obligation to cooperate with that authority's investigation is punishable by *administrative penalties of a criminal nature*. As illustrated above, the right to remain silent applies only in criminal proceedings or administrative proceedings which may give rise to the imposition of penalties of that nature.

29 See recital 24 of Regulation No 596/2014.

30 See recital 4 of Regulation No 596/2014.

31 Emphasis added.

32 Emphasis added.

72. I would state here that the Court's use of other traditional methods of construction, such as the schematic and historical interpretation of the provisions at issue, clearly indicates, in my view, that that reading of the provisions at issue is incorrect.

73. A systematic interpretation of Article 14(3) of Directive 2003/6 involves, first of all, taking into account paragraph 1 thereof, which states that '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'. That paragraph makes plain that Member States enjoy *broad discretion* when enacting measures to punish infringements of national provisions transposing Directive 2003/6. In general, not only are they not expressly required to adopt, in addition to any criminal penalties, administrative penalties of a criminal nature, but they are even entitled to choose to impose mere 'appropriate administrative measures' instead of administrative penalties in the strict sense. Furthermore, even if Member States decide to introduce 'administrative sanctions' into their national legislation, their discretion as to the scope of those penalties is limited only by the obligation to ensure that they are 'effective, proportionate and dissuasive'.[33] That obligation does not necessarily imply, in my view, that Member States must introduce penalties of a criminal nature, since non-criminal penalties may, in principle, also be effective, proportionate and dissuasive.[34] I do not see why a penalty which does not satisfy the second *Bonda* criterion because of its solely preventive or compensatory aim or the third *Bonda* criterion because of its low amount could not have those characteristics.

74. That reading appears to me to concur with a passage of the Opinion of Advocate General Kokott in *Spector Photo Group and Van Raemdonck*.[35] Having pointed out that Article 14 of Directive 2003/6 is one of the provisions of that directive to lay down 'minimum prescriptions' and that 'the Member States are authorised to take more far-reaching measures', the Advocate General states that that article 'merely provides that the Member States must take effective and dissuasive administrative measures' and that, consequently, as regards the manner in which sanctions are imposed, Directive 2003/6 introduces only 'minimum harmonisation'.[36]

75. As regards the systematic interpretation of Article 30(1)(b) of Regulation No 596/2014, I do not consider that it supports the conclusion that that provision must be construed as requiring Member States to establish a system of administrative penalties of a criminal nature either. Admittedly, Article 30(1) of that regulation limits the discretion of Member States in that it provides, in essence, that they are required to introduce *both* administrative measures *and* administrative penalties for the purpose of penalising infringements of its provisions, without leaving them the choice between those two punitive mechanisms. However, it must be observed that the breach of the obligation to

33 A few small clarifications concerning the delineation of that limit are to be found in the last sentence of recital 38 of Directive 2003/6, according to which 'sanctions should be sufficiently dissuasive and proportionate to the gravity of the infringement and to the gains realised and should be consistently applied'.

34 However, those penalties may be classified as criminal on the basis of criteria laid down by national legislation to determine how effective, proportionate and dissuasive they are. See, in that regard, judgment of 23 December 2009, *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraph 71), in which the Court states that 'Article 14(1) of Directive 2003/6 does not establish any criteria for assessing how effective, proportionate and dissuasive a sanction is. It is for national legislation to define those criteria'.

35 C-45/08, EU:C:2009:534.

36 Opinion of Advocate General Kokott in *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:534, point 77.

cooperate falls outside the scope of Article 30(2) of that regulation, which includes, among the administrative measures and penalties which the supervisory authorities must at least be empowered to impose in addition to criminal penalties, certain penalties which are very likely to be of a criminal nature according to the *Bonda* criteria.[37]

76. I consider that the criteria which the supervisory authority must apply, in accordance with national law, to determine the type and level of the penalty, within the limits laid down in Article 31(1)(a) to (g) of Regulation No 596/2014,[38] and the different weight which, under national law, the supervisory authority must give to these criteria, are decisive in determining whether a sanction is criminal in nature.

77. A historical interpretation of Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014 also shows, in my view, that in adopting those two legislative acts, the EU legislature did not wish to place the Member States under a duty to punish failure to comply with the measures transposing Directive 2003/6 or the provisions of Regulation No 596/2014 by means of criminal sanctions or administrative sanctions of a criminal nature, since that directive and that regulation were intended merely to achieve *minimum harmonisation* of national sanctions regimes. As regards Directive 2003/6, that is abundantly clear from the proposal for a directive in which the Commission stated that '[the rules on sanctions] themselves remain within the competence of Member States' and that 'the sanctions must be effective, proportionate and dissuasive. However, each Member State may decide for itself the sanctions to be applied for infringement of these measures, or for failure to cooperate in an investigation subject to Article 12 of this Directive'.[39] As regards Regulation No 596/2014, the intention to pursue the same level of harmonisation is equally evident in the passage from the proposal for a regulation in which the Commission states that 'this Regulation introduces minimum rules for administrative measures, sanctions and fines. This does not prevent individual Member States from fixing higher standards'.[40]

78. In view of the broad discretion accorded to Member States when it comes to implementing their obligations under Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014 in the a minimum degree of harmonisation, it is not surprising, in my view, that the EU legislature did not concern itself with specifying that, if administrative penalties of a criminal nature are adopted at national level, they cannot be applied to persons who, in the course of an investigation into an infringement subject to such sanctions, refuse to answer questions put by the supervisory authority which might establish their liability for the infringement in question. By leaving Member States free to determine the nature and scope of the penalties to be introduced for breaches of the obligation to cooperate with the supervisory authority, the legislature has necessarily accepted, in my opinion, that it may not be possible to impose a penalty as a consequence of the recognition of the fundamental rights which the Charter associates with penalties of a criminal nature. In other words, as the Council

37 See, to that effect, Opinion of Advocate General Campos Sánchez-Bordona in *Garlsson Real Estate and Others* (C-537/16, EU:C:2017:668, point 46). Like the Advocate General, I refer in particular to the following administrative penalties: withdrawal or suspension of the authorisation of an investment firm; a temporary or permanent ban of a person discharging managerial responsibilities within an investment firm; a temporary ban on dealing on own account; 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; administrative pecuniary sanctions that may be up to EUR 5 000 000 for natural persons and EUR 15 000 000 for legal persons. It must be observed, in any event, that, in addition to those penalties, the list in Article 30(2) of Regulation No 596/2014 also includes mere administrative measures (an order requiring the person responsible for the infringement to cease the conduct and to desist from a repetition of that conduct, and a public warning which indicates the person responsible for the infringement and the nature of the infringement) and a penalty whose purely administrative nature cannot, in my view, be disputed (the disgorgement of the profits gained or losses avoided due to the infringement in so far as they can be determined).

38 These are the gravity and duration of the infringement and a series of other circumstances linked to the person responsible for the infringement, namely the degree of that person's responsibility, his financial strength, the importance of the profits he has gained or the losses he has avoided in so far as they can be determined, the level of his cooperation with the supervisory authority, the infringements which that person has previously committed and the measures he has taken to prevent the repetition of the infringement.

39 Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (COM(2001) 281 final – 2001/0118 (COD)) (OJ 2001 C 240E, p. 265).

40 Proposal for a regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (COM(2011) 651 final – 2011/0295 (COD)).

submits in its written observations, the fact that both Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014 are drafted in general and unconditional terms does not mean that exceptions made with a view to respecting a fundamental right cannot be introduced by way of interpretation.

79. In that regard, it should be noted that recital 44 of Directive 2003/6[41] and recital 77 of Regulation No 596/2014[42] codify the principle that the provisions of secondary EU legislation must be interpreted in a manner consistent with fundamental rights.[43] In the case at hand, that principle makes it imperative to construe the obligation to punish failure to cooperate with the supervisory authority in compliance with the right to remain silent, as derived from Articles 47 and 48 of the Charter, which must be recognised in proceedings that may lead to the imposition of penalties of a criminal nature.

80. However, it should be pointed out that, contrary to what the national court seems to expect, the abovementioned principle does not require, when interpreting the obligation to impose penalties for failure to cooperate with the supervisory authority, account to be taken of the need to comply with the standards of protection of fundamental rights laid down *by the laws of Member States* where those standards are higher than those provided by EU law.

81. First of all, that interpretation is not supported, as the referring court appears to claim, by the words 'in conformity with [national] law' and 'in accordance with national law' in Article 14(1) of Directive 2003/6 and Article 30(1) of Regulation No 596/2014 respectively, which relate to Member States' obligation to impose a penalty. In my opinion, those words were inserted merely to highlight that sanctions regimes are to be implemented by national legislatures.[44]

82. In any event, such a reading has already been generally refuted by the Court in *Melloni*.[45] In the case which gave rise to that judgment, the third question referred for a preliminary ruling by the Tribunal Constitucional (Constitutional Court, Spain) asked whether Article 53 of the Charter[46] authorises a Member State to apply a higher level of protection of fundamental rights, guaranteed by its constitution. The Grand Chamber of the Court answered that it did not, since such an interpretation of Article 53 would undermine the primacy, uniformity and effectiveness of EU law.[47]

83. Similarly, that reading would undermine, in this case, the principle of the primacy of EU law, in as much as it would allow a Member State to disapply provisions of EU law which are fully in compliance with the Charter, namely Article 14(3) of Directive 2003/6 and Article 30(1) of Regulation No 596/2014, on the sole ground that they infringe the fundamental rights guaranteed by that State's constitution. Furthermore, it would undermine the uniform and effective application of EU law, in so far as it would compromise the uniform level of protection of the right to silence when sanctioning failure to cooperate with the supervisory authority, and would be likely to impede the harmonisation of the supervisory authorities' powers to sanction such failure.

41 That recital reads: 'This Directive respects the fundamental rights and observes the principles recognised in particular by the [Charter].'

42 Under that recital: '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 …'

43 See, *ex multis*, judgment of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716, paragraph 48 and the case-law cited).

44 On that point, regard must also be had to Article 14 of the Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (COM(2001) 281 final – 2001/0118 (COD)) (OJ 2001 C 240E, p. 265), in which, at a time when the Charter had not yet been adopted, the Commission stated that 'when determining the sanctions and organising a sanctioning procedure, Member States will have to comply with the principles of the [ECHR]', without mentioning rights as laid down at national level.

45 Judgment of 26 February 2013 (C-399/11, EU:C:2013:107, paragraphs 56 to 64).

46 Article 53 of the Charter provides: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and *by the Member States' constitutions*' (emphasis added).

47 See also judgments of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 29); of 11 September 2014, *A* (C-112/13, EU:C:2014:2195, paragraph 44); of 29 July 2019, *Pelham and Others* (C-476/17, EU:C:2019:624, paragraph 80); and of 29 July 2019, *Spiegel Online* (C-516/17, EU:C:2019:625, paragraph 19).

84. In the light of the foregoing considerations, I consider that the wording of Article 14(1) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014 permit those provisions to be interpreted in a manner consistent with the right to remain silent, as derived from Articles 47 and 48 of the Charter, and that their validity with regard to those articles of the Charter cannot therefore be impugned. It is therefore possible to address the scope of the right in question.

(c) Scope of the right to remain silent for the purposes of Articles 47 and 48 of the Charter

85. As stated in point 39 of this Opinion, the referring court also asks the Court about the scope to be ascribed to the right of natural persons to remain silent, as derived from Articles 47 and 48 of the Charter, in administrative proceedings conducted with a view to imposing penalties of a criminal nature, such as those provided for by national legislation to punish market abuse.[48] The referring court submits that the case-law of the ECtHR on Article 6 ECHR appears to grant that right a broader scope than it is afforded under the case-law of the Court of Justice on anticompetitive conduct.

86. That issue will be examined below. In particular, I shall address the question of whether the right to remain silent, as derived from Articles 47 and 48 of the Charter, should be given the same scope in this case as that accorded by the Court's case-law, and I shall answer that it should not (Section 1). I shall then endeavour, in accordance with the homogeneity clause in Article 52(3) of the Charter and the explanations relating to it,[49] to delineate the scope of that right in this case by reference to the case-law of the ECtHR on Article 6 ECHR (Section 2).

87. A clarification is needed before proceeding to that analysis. The referring court has already ruled out, rightly in my view, the interpretation that the right to remain silent can in itself justify a person's refusal to attend a hearing ordered by the supervisory authority or his undue delay in attending such a hearing, without prejudice to that court's right to assess whether and to what extent that refusal may be warranted by a failure to guarantee to the person concerned that his right to remain silent will be respected. That is why my analysis will focus solely on the factual premiss of a refusal to answer the supervisory authority's questions.

(1) The right to remain silent in the case-law of the Court

88. To my knowledge, the Court has ruled on the scope of the right to remain silent only in the field of competition law.

89. The landmark ruling *Orkem* v *Commission* is the starting point for any consideration of that case-law.[50]

90. In the case which gave rise to that judgment, the applicant company had entered a plea based on the argument that the request for information sent to it by the Commission following an investigation by the latter into possible participation by that company in agreements or concerted practices had the effect of compelling it to incriminate itself by confessing that it had infringed competition rules. In response to that argument, the Court pointed out that there was no such right in the Community legal order and that undertakings subject to an investigation seeking to ascertain whether they had breached competition law had an 'obligation to cooperate actively'. Next, the Court held that certain

48 The referring court and several interested parties rightly state that the Court has already answered in the affirmative the question of whether the proceedings to which the applicant in the main proceedings is subject and the penalty he incurs for infringement of Article 187*bis* of the consolidated text are criminal within the meaning of the *Bonda* case-law. See judgment of 20 March 2018, *Di Puma and Zecca* (C-596/16 and C-597/16, EU:C:2018:192, paragraph 38).

49 See point 50 of this Opinion.

50 Judgment of 18 October 1989 (374/87, EU:C:1989:387).

limitations on the Commission's powers of investigation were nevertheless implied by the need to safeguard the rights of defence of undertakings, in order to prevent those rights from being irremediably impaired during preliminary inquiry procedures which could be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings.[51] The Court defined those limitations as follows: 'Whilst the Commission is entitled … to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anticompetitive conduct, it may not … compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.'[52]

91. It is apparent from subsequent judgments, as the referring court suggests, that the demarcation of those limitations has not been substantially altered by the Court.[53] On the contrary, the Court has considered that the scope thus afforded to the right to remain silent is consistent with Articles 47 and 48 of the Charter because the requirement to ensure the effectiveness of competition law requires a balance to be struck between the right to remain silent and the public interest underlying the prosecution of infringements of competition law.[54] To acknowledge a right to remain silent which would also cover each and every purely factual question ('the right to remain absolutely silent') would, according to that case-law, go beyond what is necessary to safeguard the rights of defence of undertakings and would constitute an unjustified hindrance to the Commission's performance of its task of ensuring compliance with competition rules in the internal market. Also according to that case-law, there is nothing to prevent an undertaking which has answered purely factual questions from showing, whether later during the administrative procedure or in proceedings before the EU Courts, that the facts set out in its replies have a meaning other than that ascribed to them by the Commission.

92. In summary, according to the Court, the right to remain silent does not cover answers to questions relating to facts, unless their purpose is to obtain an admission from the undertaking concerned that it has committed the infringement investigated by the Commission. In other words, as the Court stated in *Limburgse Vinyl Maatschappij and Others* v *Commission*, the protection guaranteed by that right means that it must be determined whether an answer from the undertaking to which those questions are addressed is *in fact equivalent* to the admission of an infringement.[55]

93. If that is not so, the question is considered to be 'purely factual'[56] or 'of a purely factual nature'[57] and, accordingly, it does not fall within the scope of the right to remain silent, even if the answer given by the undertaking concerned *may be used to establish that it has infringed competition law*.

51 Judgment of 18 October 1989, *Orkem* v *Commission* (374/87, EU:C:1989:387, paragraphs 27 to 33).

52 Judgment of 18 October 1989, *Orkem* v *Commission* (374/87, EU:C:1989:387, paragraphs 34 and 35).

53 See, inter alia, judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 273); of 29 June 2006, *Commission* v *SGL Carbon* (C-301/04 P, EU:C:2006:432, paragraph 41); of 24 September 2009, *Erste Group Bank and Others* v *Commission* (C-125/07 P, C-133/07 P and C-137/07 P, EU:C:2009:576, paragraph 271); of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53, paragraph 34); and of 20 February 2001, *Mannesmannröhren-Werke* v *Commission* (T-112/98, EU:T:2001:61, paragraph 65).

54 See, inter alia, judgments of 29 June 2006, *Commission* v *SGL Carbon* (C-301/04 P, EU:C:2006:432, paragraph 49); of 28 April 2010, *Amann Söhne and Cousin Filterie* v *Commission* (T-446/05, EU:T:2010:165, paragraphs 326 and 328); of 20 February 2001, *Mannesmannröhren-Werke* v *Commission* (T-112/98, EU:T:2001:61, paragraphs 66 and 78); and of 14 March 2014, *Buzzi Unicem* v *Commission* (T-297/11, EU:T:2014:122, paragraphs 60 and 62).

55 Judgment of 15 October 2002 (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 273). See, in that regard, Opinion of Advocate General Wahl in *HeidelbergCement* v *Commission* (C-247/14 P, EU:C:2015:694, point 154).

56 Judgment of 14 December 2006, *Raiffeisen Zentralbank Österreich and Others v Commission* (T-259/02 to T-264/02 and T-271/02, EU:T:2006:396, paragraph 539),.

57 Judgment of 20 February 2001, *Mannesmannröhren-Werke* v *Commission* (T-112/98, EU:T:2001:61, paragraph 77).

94. In its written observations, the Italian Government argues, in essence, that that case-law can be applied by analogy when establishing the scope of the right of natural persons to remain silent in administrative procedures for detecting market abuse. More specifically, given the need to ensure the effectiveness of secondary law provisions requiring such abuse to be punished, such as Article 14 of Directive 2003/6 and Article 30 of Regulation No 596/2014, the scope of the right to remain silent must, in that government's view, be determined by weighing it against the public interest in ensuring the integrity of financial markets and enhancing investor confidence in those markets. [58]

95. I cannot agree.

96. That case-law, which was developed by reference to undertakings subject to investigations into infringements of competition law, clearly concerns only *legal persons*, as, in fact, the referring court observes. Undertakings and associations of undertakings are the only entities subject to EU competition law, and the only entities on which the Commission may impose fines for infringing Articles 101 and 102 TFEU. [59] By contrast, the scope of the right of natural persons to remain silent does not seem to me to have been considered by the Court thus far.

(2) The right to remain silent in the case-law of the ECtHR

97. Unless I am mistaken, the ECtHR has never, unlike the Court of Justice, ruled on whether a legal person may rely on the right to remain silent in criminal or administrative proceedings brought against it that seek to impose a penalty of a criminal nature. In other words, the scope of that right, as defined in broad terms in the following paragraphs, has hitherto been granted only to *natural persons*. [60]

98. That is made patently clear by the way in which the ECtHR has defined the rationale underpinning the right to remain silent and the right not to incriminate oneself, the latter being a component of the former. According to the ECtHR, that rationale lies in the protection of persons who are the subject of a 'criminal charge' against improper coercion on the part of the authorities. In that court's view, such protection is intended to avoid miscarriages of justice and to secure the aims of Article 6 ECHR, [61] and, more specifically, to ensure that, in criminal proceedings, the prosecution seek to prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. The latter consideration is reinforced by the clarification that the right not to incriminate oneself 'is primarily concerned … with respecting the will of an accused person to remain silent'. [62]

99. In other words, as well put by the Commission in its written observations, respect for the person and his freedom of determination, by preventing coercion by the public authorities in the formation of his will, lies at the heart of the purpose of the right to remain silent as envisaged by the ECtHR. Thus, the right in question is understood by the ECtHR as a component of human dignity, as Judge Martens rightly observed in his dissenting opinion annexed to *Saunders v. the United Kingdom*, which

58 See recital 2 of Directive 2003/6 and to Regulation No 596/2014.

59 See the Opinion of Advocate General Geelhoed in *Commission* v *SGL Carbon* (C-301/04 P, EU:C:2006:53, point 63).

60 See, to that effect, Wils, W., 'Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis', *World Competition*: *Law and Economics Review* vol. 26, No 4, 2003, p. 577; and Oliver, P., 'Companies and their Fundamental Rights: a Comparative Perspective', *International and Comparative Law Quarterly*, Wolters Kluwer, vol. 64, No 3, 2015, p. 686. As pointed out by several interested parties in this case, the same construction was given by the EU legislature in Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on strengthening certain aspects of the presumption of innocence and the right to be present at one's trial in criminal proceedings (OJ 2016 L 65, p. 1), Article 7 of which protects the 'right to remain silent' and the 'right not to incriminate oneself'. See, in particular, recital 13 thereof, according to which 'this Directive acknowledges the different needs and levels of protection of certain aspects of the presumption of innocence as regards natural and legal persons. As regards natural persons, such protection is reflected in well-established case-law of the ECtHR. The Court of Justice has, however, recognised that the rights flowing from the presumption of innocence do not accrue to legal persons in the same way as they do to natural persons'.

61 ECtHR, 8 February 1996, *Murray v. the United Kingdom* (CE:ECHR:1996:0208JUD001873191, § 45).

62 ECtHR, 17 December 1996, *Saunders v. the United Kingdom* (CE:ECHR:1996:1217JUD001918791, § 69).

states that the ECtHR appears to have embraced the view that '*respect for human dignity and autonomy* requires that every suspect should be completely free to decide which attitude he will adopt with respect to the criminal charges against him'.[63][64] Against this backdrop, it does not appear possible to transpose that case-law, as it stands, to legal persons.[65]

100. As regards the scope which the ECtHR ascribes to the right of natural persons to remain silent, it must first of all be borne in mind that, according to that court, that right seeks to protect persons against whom criminal charges have been brought against *improper coercion* on the part of the authorities.

101. Consequently, when determining whether Article 6 ECHR has been infringed, the ECtHR asks, first of all, whether there has been an established use of coercion in obtaining evidence and then decides whether that coercion must be regarded as improper. In its case-law, it has identified a number of situations which give rise to concerns as to improper coercion, the first being 'where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify'.[66] When ascertaining whether those concerns have materialised, the ECtHR considers the nature and degree of compulsion, as revealed by the type and severity of the sanction resulting from a refusal to respond,[67] and the existence of relevant safeguards in the procedure in question.[68]

102. Nevertheless, the ECtHR has stated on numerous occasions that not all forms of direct compulsion brought to bear against an accused person to induce him to make incriminating statements against his will are such as to breach Article 6 ECHR. Since the right to remain silent is not, in its view, absolute,[69] the degree of coercion exercised by the authorities is incompatible with that provision if it has the effect of destroying the very essence of that privilege.[70] According to the ECtHR, what is crucial in such an assessment is the *use* to which evidence obtained under compulsion is put in the course of the criminal proceedings,[71] whether it has been obtained inside or outside those proceedings.[72]

103. This last test makes it possible, in particular, to identify potentially improper compulsion where the questions put to the accused person concern *facts*. The ECtHR addressed that issue for the first time in *Saunders v. the United Kingdom*. In response to the United Kingdom Government's argument that the right not to contribute to incriminating oneself was not applicable in the circumstances of that case because the applicant had not been required to provide answers that were self-incriminating, the ECtHR stated at the outset that the right to remain silent 'cannot reasonably be confined to

63 ECtHR, 17 December 1996, *Saunders v. the United Kingdom* (CE:ECHR:1996:1217JUD001918791), §§ 9 and 10 of the dissenting opinion of Judge Martens, joined by Judge Kūris.

64 Emphasis added.

65 Moreover, it can be inferred from its case-law on other fundamental rights that the ECtHR sometimes distinguishes between the level of protection granted to natural persons and that afforded to legal persons. The classic example is *Niemietz v. Germany* (ECtHR, 16 December 1992, CE:ECHR:1992:1216JUD001371088), in which the ECtHR held that a search by the police at the office of an independent lawyer where he lived constituted a violation of his 'home'. However, it stated that the State's right to 'interfere' under Article 8(2) ECHR could be more far-reaching 'where professional or business activities or premises were involved than would otherwise be the case' (§ 31). It should be noted that, in the judgment of 18 June 2015, *Deutsche Bahn and Others* v *Commission* (C-583/13 P, EU:C:2015:404), the Court relied on that case-law and upheld the General Court's finding that the lack of prior judicial authorisation was not capable, in itself, of rendering unlawful an inspection measure decided on by the Commission by virtue of its powers of investigation in competition cases (paragraphs 20 to 25).

66 ECtHR, 13 September 2016, *Ibrahim and Others v. the United Kingdom* (CE:ECHR:2016:0913JUD005054108, § 267).

67 ECtHR, 21 December 2000, *Heaney and McGuinness v. Ireland* (CE:ECHR:2000:1221JUD003472097, § 53) (sentence of six months' imprisonment).

68 ECtHR, 29 June 2007, *O'Halloran and Francis v. the United Kingdom* (CE:ECHR:2007:0629JUD001580902, § 59).

69 See, inter alia, ECtHR, 21 December 2000, *Heaney and McGuinness v. Ireland* (CE:ECHR:2000:1221JUD003472097, § 47).

70 ECtHR, 8 February 1996, *Murray v. the United Kingdom* (CE:ECHR:1996:0208JUD001873191, § 49).

71 ECtHR, 17 December 1996, *Saunders v. the United Kingdom* (CE:ECHR:1996:1217JUD001918791, § 71).

72 ECtHR, 8 April 2004, *Weh v. Austria* (CE:ECHR:2004:0408JUD003854497, §§ 42 to 44).

statements of admission of wrongdoing or to remarks which are directly incriminating'. It then stated that 'testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or *mere information on questions of fact* – may later be deployed in criminal proceedings in support of the prosecution case'.[73] [74]

104. Essential clarifications were subsequently made in that regard in *Corbet v. France*. Having found there was coercion and that the statements made by the accused were not self-incriminating, the ECtHR held, in respect of the use of statements regarding the facts that had been obtained under compulsion, that the existence of an infringement of Article 6 ECHR presupposes that those statements had 'a bearing on the guilty verdict or the penalty'.[75] It seems to me that, since the language specific to criminal matters in the narrow sense is warranted solely by the particular nature of the factual context of such cases, that principle must be regarded as likewise applicable where those statements have had a bearing on a *conviction or penalty imposed* at the end of administrative proceedings that fall under the criminal head of Article 6 ECHR.

105. In addition, the ECtHR has stated that the scope of the right to remain silent cannot be diminished by balancing it against a public interest. That approach has been followed since *Sanders v. the United Kingdom*, in which the ECtHR rejected the government's argument that the essential public interest in the prosecution of corporate fraud and the punishment of the persons responsible could justify the denial to the accused of the right not to incriminate oneself.[76]

106. Accordingly, the scope of the right of natural persons to remain silent in administrative proceedings which may lead to the imposition of a penalty of a criminal nature, such as those in the main proceedings, also covers answers to questions of fact which do not necessarily imply a confession of guilt, provided that they have had a bearing on the statement of reasons underlying the decision adopted or the penalty imposed at the close of those proceedings. The public interest in the prosecution of the infringement in question is irrelevant in determining that scope.

107. In that regard, a view needs to be taken as to the argument put forward by the Commission, in its written observations and during the hearing, that the principle established in the *Jussila v. Finland* ('*Jussila*') judgment of the Grand Chamber of the ECtHR,[77] [78] which the General Court of the European Union applied in *Schindler Holding and Others* v *Commission*,[79] allows a 'tempered' application of the right to remain silent in areas such as that involving the punishment of market abuse, with the result that this right is as reduced in scope as that granted to legal persons in the Court of Justice's case-law on anticompetitive conduct.

108. It should be borne in mind that, in that case, the ECtHR had to consider whether the lack of a hearing in appeal proceedings concerning a tax increase introduced by the Finnish tax authorities was compatible with Article 6 ECHR. On that occasion, the ECtHR reinforced the principle that, among all the proceedings leading to the application of penalties to be classified as criminal for the purposes of Article 6 ECHR, a distinction must be drawn between proceedings and penalties which fall within the 'hard core of criminal law', which carry 'significant stigma' for those affected by them, and those that

73 ECtHR, 17 December 1996, *Saunders v. the United Kingdom* (CE:ECHR:1996:1217JUD001918791, § 71).

74 Emphasis added.

75 ECtHR, 19 March 2015, *Corbet and Others v. France* (CE:ECHR:2015:0319JUD000749411, § 34).

76 ECtHR, 17 December 1996, *Saunders v. the United Kingdom* (CE:ECHR:1996:1217JUD001918791, § 74). While it is true that the ECtHR seems to endorse such a balancing exercise in the judgment of 11 July 2006, *Jalloh v. Germany* (CE:ECHR:2006:0711JUD005481000, § 117), it is equally true that the judgment of 13 September 2016, *Ibrahim and Others v. the United Kingdom* (CE:ECHR:2016:0913JUD005054108, § 252) limits the circumstances that allow account to be taken of the public interest in prosecuting offences to those which relate to particularly sensitive matters, such as terrorism or other serious crimes.

77 ECtHR, 23 November 2006, *Jussila v. Finland*, (CE:ECHR:2006:1123JUD007305301).

78 It appears from the Commission's written observations that it advances that argument in the context of a proposed interpretation according to which the case-law of the ECtHR on the right to remain silent applies to natural persons, while that of the Court of Justice applies only to legal persons. In my opinion, that argument merits separate consideration.

79 Judgment of 13 July 2011 (T-138/07, EU:T:2011:362, paragraph 52).

fall outside that category. Having pointed out that the autonomous interpretation of the concept of 'criminal charges' adopted by the ECtHR had led to a gradual broadening of the criminal head of Article 6 ECHR to cases not strictly belonging to the traditional categories of the criminal law, that court stated that, as regards categories which do not form part of the 'hard core' of criminal law, that the criminal-head guarantees deriving from Article 6 ECHR 'will not necessarily apply with their full stringency'. [80]

109. Since the right to remain silent is one of those guarantees, it may be argued that the scope conferred by the ECtHR on that right depends on whether the area in which Article 6 ECHR is applied falls within the hard core of criminal law, and, if not, that scope must accordingly be regarded as narrower and thus correspond to that afforded by the Court in its case-law on anticompetitive conduct.

110. In my view, that argument cannot succeed in this case, as the ECtHR has already taken the view, in *Grande Stevens and Others v. Italy*, that the penalties introduced by the Italian legislature to transpose Directive 2003/6 did fall within the hard core of criminal law, since they were likely to adversely affect the professional honour and reputation of the persons concerned. [81]

111. In any event, I have doubts as to whether the principle established in *Jussila* may even be relied on to justify a stricter interpretation of the scope of the right to remain silent.

112. First of all, it should be pointed out that, although the General Court has, in fact, applied that principle on a number of occasions, [82] the Court of Justice has never made use of it, even though it has been called upon to do so by its Advocates General on three occasions. [83]

113. In addition, it must not be forgotten that its application is circumscribed in two respects. First, while it is true that paragraph 43 of that judgment refers generically to 'the criminal-head guarantees of Article 6', it should also be noted that subsequent case-law of the ECtHR has plainly suggested that that less stringent application concerns only *some* of those guarantees. By way of illustration, in *Kammerer v. Austria*, that court held that the approach adopted in *Jussila* is 'not limited to the issue of the lack of an oral hearing but *may be extended* to other procedural issues covered by Article 6, such as, in the present case, the presence of the accused at a hearing'. [84] [85] In the light of that consideration, I doubt whether a less stringent application of a guarantee such as the right to remain silent – which, according to the case-law of the ECtHR, lies 'at the heart of the concept of a fair trial' – could possibly be accepted. Second, I fully concur with the interpretation that the principle laid down in *Jussila* does not entail the abolition or a limitation of the scope of the guarantee in question, but merely that it must be *replaced* by alternative means of protecting the right to a fair trial. [86] [87] *Jussila* concluded that there was no infringement of Article 6 ECHR following a *contextual* assessment as to whether the legal issues before the court were such as exceptionally to allow the national authorities to dismiss the request for a hearing.

80 ECtHR, 23 November 2006, *Jussila v. Finland* (CE:ECHR:2006:1123JUD007305301, § 43).

81 ECtHR, 4 March 2014, *Grande Stevens and Others v. Italy* (CE:ECHR:2014:0304JUD001864010, § 122).

82 In addition to the judgment cited in point 107 of this Opinion, judgments of 13 September 2013, *Total* v *Commission* (T-548/08, not published, EU:T:2013:434, paragraphs 183 to 185), and of 11 July 2014, *Sasol and Others* v *Commission* (T-541/08, EU:T:2014:628, paragraphs 206 to 208).

83 Opinions of Advocate General Sharpston in *KME Germany and Others* v *Commission* (C-272/09 P, EU:C:2011:63, point 67); of Advocate General Mengozzi in *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:89, points 30 and 31); and of Advocate General Kokott in *Schindler Holding and Others* v *Commission* (C-501/11 P, EU:C:2013:248, points 25 to 27).

84 ECtHR, 12 May 2010, *Kammerer v. Austria* (CE:ECHR:2010:0512JUD003243506, § 27). See also, to that effect, ECtHR, 10 July 2014, *Marčan v. Croatia* (CE:ECHR:2014:0710JUD004082012, § 35).

85 Emphasis added.

86 See, Smits, C., and Waelbroeck, D., 'When the Judge Prosecutes, Power Prevails Over Law', in Govaere, I., Quick, R., and Bronckers, M., (eds), *Trade and Competition Law in the EU and Beyond*, Edward Elgar Publishing, 2011, p. 452.

87 That seems to me to be summarised by the last sentence of paragraph 42 of the judgment, which reads: 'The overarching principle of fairness embodied in Article 6 is … the key consideration …'.

114. It follows that, under the principle established in *Jussila*, it is justifiable for answers to questions put by the supervisory authority concerning facts that serve to establish an infringement not to be covered by the right to remain silent only if alternative means for protecting the right to a fair trial are applicable in such a case, which should be verified by means of a contextual assessment.

115. In my view, that second consideration also renders irrelevant *A. Menarini Diagnostics s.r.l. v. Italy* (‘*Menarini*’),[88] to which the Commission also refers in that context because of the related principle set out in that judgment, according to which ‘although these differences [between administrative proceedings and criminal proceedings in the strict sense] do not release the Contracting States from their obligation to comply with all the guarantees afforded by the criminal limb of Article 6, they may nevertheless have a bearing on the manner in which they are applied’.[89] In that judgment, the ECtHR’s decision not to find an infringement of the right of everyone to a fair hearing by a tribunal with full jurisdiction during a review by an Italian administrative court of decisions adopted by the national competition authority was based, in essence, on the fact that, although Italian law and case-law dispose administrative courts to carry out merely a review of legality, the Consiglio di Stato (Council of State, Italy) had, *in the circumstances of the case*, undertaken a full judicial review.[90]

116. I am therefore persuaded that neither the principle laid down in *Jussila* nor that established in *Menarini* can be put forward in support of the argument that the scope of the right of natural persons to remain silent in administrative proceedings which may lead to the imposition of a penalty of a criminal nature must be as limited as when it is accorded to a legal person under the Court’s case-law on anticompetitive conduct.

117. In conclusion, I consider that, having regard to the homogeneity clause in Article 52(3) of the Charter, the scope to be given to the right of natural persons to remain silent, as derived from Articles 47 and 48 of the Charter, in the context of administrative proceedings which may lead to the imposition of a penalty of a criminal nature, must correspond to that determined in the relevant case-law of the ECtHR and, in particular, as regards answers to questions concerning facts, in *Corbet and Others v. France*.[91]

V. Conclusion

118. In the light of the foregoing considerations, I propose that the Court should answer as follows the two questions referred for a preliminary ruling by the Corte costituzionale (Constitutional Court, Italy), as reformulated:

The wording 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) 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/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC permit those articles to be interpreted in a manner consistent with the right to remain silent, as derived from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, since those articles must be understood as meaning that Member States are not required to punish persons who refuse to answer questions put by the supervisory authority which could establish their responsibility for an offence liable to incur administrative sanctions of a criminal nature. The

88 ECtHR, 27 September 2011, *A. Menarini Diagnostics s.r.l. v. Italy* (CE:ECHR:2011:0927JUD004350908).

89 ECtHR, 27 September 2011, *A. Menarini Diagnostics s.r.l. v. Italy* (CE:ECHR:2011:0927JUD004350908, §62).

90 ECtHR, 27 September 2011, *A. Menarini Diagnostics s.r.l. v. Italy* (CE:ECHR:2011:0927JUD004350908), concurring opinion of Judge Sajó. See, in that regard, Muguet-Poullennec, G., and Domenicucci, D.P., ‘Amende infligée par une autorité de concurrence et droit à une protection juridictionnelle effective: les enseignements de l’arrêt Menarini de la CEDH’, *Revue Lamy de la concurrence*, No 30, 1 January 2012.

91 ECtHR, 19 March 2015, *Corbet and Others v. France* (CE:ECHR:2015:0319JUD000749411).

scope which should be afforded to the right of natural persons to remain silent in administrative proceedings which may result in the imposition of a penalty of a criminal nature is, pursuant to the homogeneity clause in Article 52(3) of the Charter of Fundamental Rights, the scope conferred under the relevant case-law of the European Court of Human Rights, according to which that right covers, inter alia, answers to questions concerning facts provided that they have a bearing on the conviction or the penalty imposed at the close of those proceedings.