

CJEU Delivers Landmark Judgment on Right to Silence in Administrative (Punitive) Proceedings

News

Thomas Wahl

On 2 February 2021, the CJEU, sitting in for the Grand Chamber, rendered an important [judgment](#) on the right to remain silent in administrative proceedings if the person's answers might also establish his/her punitive liability. The case is referred to as [C-481/19](#) (*DB v Commissione Nazionale per le Società e la Borsa (Consob)*).

Facts of the case

In the case at issue, Mr. *DB* was, *inter alia*, fined by the Italian National Companies and Stock Exchange Commission (Consob) in an administrative proceeding for failure to cooperate in an insider trading investigation. *DB* declined to answer questions when he appeared at a hearing before Consob, because he seemingly knew facts that alleged he had committed the administrative offence of insider dealing. Italian law penalises anyone who fails to comply with Consob's requests in a timely manner or delays the performance of the body's supervisory functions, including with regard to persons in respect of whom Consob alleges an offence of insider dealing (Art. 187 *quindecies* of the Decreto legislativo n. 58)). By means of this provision, the Italian legislator implemented EU rules on insider trading and market abuse (Directive 2003/6/EC and Regulation (EU) No 596/2014). These rules request, *inter alia*, that administrative sanctions be determined for failure to cooperate or to comply with an investigation, with an inspection, or with a specific request that includes questioning of a person with a view to obtaining information.

Question referred

The referring Constitutional Court of Italy expressed doubts as to whether this obligation is in line with the rights in Art. 47 and 48 of the Charter of Fundamental Rights of the EU, in particular with the right to remain silent and the right against self-incrimination. It therefore asked whether the corresponding EU provisions in the Directive and the Regulation might be invalid. In that event, the Italian provision cannot be applied.

Findings of the CJEU

The CJEU emphasised that rights protected by the Charter should be interpreted coherently with the corresponding rights of Art. 6 ECHR. Therefore, it referred to the principles on the right to remain silent as

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established by ECtHR case law. As a consequence, the authorities must respect the right to be silent in two situations:

- In administrative proceedings that may lead to the imposition of administrative sanctions of a criminal nature;
- In administrative proceedings if the evidence obtained in those proceedings may be used in criminal proceedings against that person in order to establish that a criminal offence was committed.

The CJEU stated, in that regard, that its case law relating to the obligation on legal persons (undertakings) to provide information in administrative cartel proceedings, which also may subsequently be used to establish their liability and lead to fines, cannot be applied by analogy to establish the right to silence of natural persons charged with insider trading.

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

Regarding the validity of the secondary EU legislation on insider dealing and market abuse, the CJEU noted that neither Directive 2003/6 nor Regulation No 596/2014 oblige Member States to establish liability for failure to cooperate if the cooperation were inconsistent with the right to silence. The absence of an express prohibition against the imposition of a penalty for such a refusal to provide the competent authority with answers which might establish liability for an offence cannot undermine the validity of the EU measures. Ultimately, it is for the Member States to ensure that natural persons cannot be penalised for refusing to provide such answers to the competent authority.

Put in focus

The Grand Chamber of the CJEU refrained from giving effect to a “diminished application” of Charter rights in punitive proceedings. It emphasised that the right to be silent is at the core of the right to a fair trial. It can be concluded from the case that the right to remain silent not only applies in oral hearings but also in the production of incriminatory documentary evidence. The judges in Luxembourg have pulled the ripcord and refused to transfer their more restrictive case-law developed in competition law (against legal entities) to natural persons. The question remains, however, whether this distinction can adequately be justified and whether there should also be a shift to a more liberal interpretation when it comes to punitive proceedings against legal entities. Another issue will be that the EU legislator must pay close attention to ensure laws are compatible with the Charter. The interpretation found by the CJEU is by no means obvious if one reads the relevant provisions in Directive 2003/6 and Regulation 596/14.

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