

Charged with Market Abuse in the EU? The ECJ Clarifies Your Right to Remain Silent in Administrative Proceedings

February 10, 2021

On February 2, 2021, the Court of Justice of the European Union (“ECJ”) recognized the right to silence for individuals in the context of administrative market abuse proceedings.¹ The ECJ, however, made clear that this right to silence cannot justify every failure to cooperate with enforcement authorities, and does not extend to companies.

Background. In 2012, the Italian financial markets authority (the “Consob”) imposed a penalty of 300,000 EUR on an individual for an administrative offense of insider trading committed in 2009. The Consob also imposed on him a penalty of 50,000 EUR for his failure to cooperate during the investigation, as he postponed his interview with investigators several times and eventually refused to answer their questions.

That penalty was imposed on the basis of an Italian law relating to the penalties for failing to cooperate with investigations conducted by the Consob. That law implemented EU Directive No 2003/6/EC on market abuse (“MAD”) providing that “Member States shall determine the sanctions to be applied for failure to cooperate in an investigation.”² Since July 2016, EU Regulation No 596/2014 on market abuse (“MAR”) has required sanctions to be determined “for failure to cooperate or to comply with an investigation, with an inspection or with a request,” including during an interview.³

The defendant challenged the Consob’s decision before Italian courts, raising the question of his right to remain silent and to avoid self-incrimination. The Italian Constitutional Court eventually questioned the ECJ on the interpretation and validity of the above-mentioned MAD and MAR provisions. Indeed, how can they possibly be reconciled with the right to silence?

Individuals Have the Right to Remain Silent. In its judgment, the ECJ recognized the existence of a right to remain silent, protected by Articles 47 (fair trial) and 48

¹ Judgement of the Court (Grand Chamber), February 2, 2021, C-481/19, *DB v Commissione Nazionale per le Società e la Borsa*.

² Article 14(3) of Directive 2003/6/EC, dated January 28, 2003.

³ Article 30 of Regulation (EU) No 596/2014, dated April 16, 2014.

(presumption of innocence and right of defense) of the Charter of Fundamental Rights of the European Union. Referring to case law of the European Court of Human Rights, the ECJ reminded that “... the protection of the right to silence is intended to ensure that, in criminal proceedings, the prosecution establishes its case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused ... this right being infringed ... where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify.”

According to the ECJ, administrative market abuse proceedings may lead to the imposition of administrative sanctions “of a criminal nature.” The right to silence therefore precludes penalties being imposed on individuals, charged with administrative market abuse offenses (insider trading, market manipulation), who refuse to provide enforcement authorities with answers which might establish their liability.

The ECJ concluded that the MAD and MAR provisions can and must be interpreted in a way that respects that right to silence, as they “do not require penalties to be imposed on natural persons for refusing to provide ... answers which might establish their liability.”

The right to silence protection offered by the ECJ is however limited to individuals. It does not protect legal entities that would be required to provide information that may eventually be used to establish their liability. The ECJ also made it clear that this protection “cannot justify every failure to cooperate with the competent authorities, such as a refusal to appear at a hearing planned by those authorities or delaying tactics designed to postpone it.”

Implications in France. In France, this “right to silence” already applies to those suspected of crimes, including *criminal* market abuse offenses prosecuted by the National Financial Prosecutor’s Office (the “PNF”). But it will now also apply to those heard in the context of *administrative* market abuse offenses investigated by the French financial markets authority (the “AMF”), which is by and large the most favored enforcement avenue.

This protection is of course very welcome. However, as we already explained⁴, in France the right to silence does not have the scope of the Fifth Amendment in the United States. French enforcement authorities usually draw adverse inference from the defendant’s silence, including in criminal proceedings. In the specific context of an

⁴ See pages 41-42, “10 Things U.S. Criminal Defense Lawyers Should Know about Defending a Case in France,” Debevoise Guide, (May, 2019), <https://www.debevoise.com/insights/publications/2019/05/10-things-us-criminal-defense-lawyers>.

administrative proceeding for insider trading, the AMF Sanction Committee ruled that it can draw from silence “any useful consequence.”⁵ This is not going to change with the ECJ ruling. In practice, therefore, there are usually more effective ways to approach a PNF or AMF investigation than simply retreating into silence.

In addition, now that the AMF Sanction Committee can go after those who “obstruct” investigations by refusing to provide documents or information, cooperation with AMF investigators has become a hot issue in France. Three sanctions have already been imposed on that basis since 2018, including one against a defendant who provided late and incomplete information requested by the investigators. But domestic and European courts will no doubt have their own say about that issue of “obstruction” and the level of cooperation expected from the defendants.

The question of cooperation with French enforcement authorities goes beyond the sole financial markets watchdog. In the context of corruption and influence peddling, for instance, the PNF is now trying to encourage corporate wrongdoers to cooperate, and even to self-report.⁶ But in the absence of real incentives for voluntary disclosure, companies will probably continue to remain silent.

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Please do not hesitate to contact us with any questions.

PARIS



Antoine F. Kirry
akirry@debevoise.com



Alexandre Bisch
abisch@debevoise.com



Robin Lööf
rloof@debevoise.com



Aymeric D. Dumoulin
addumoulin@debevoise.com



Fanny Gauthier
fgauthier@debevoise.com



Alice Stoskopf
astoskopf@debevoise.com

⁵ AMF Sanction Committee, September 21, 2009, SAN-2009-32.

⁶ “French DPAs—First CJIP Guidelines Published,” Debevoise Update (June, 2019), <https://www.debevoise.com/insights/publications/2019/07/french-cjip-guidelines>.