

Case C-481/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

21 June 2019

Referring court:

Corte costituzionale (Italy)

Date of the decision to refer:

6 March 2019

Appellant on a point of law:

D.B.

Respondent in the appeal on a point of law:

Commissione Nazionale per le Società e la Borsa (Consob)

Subject matter of the main proceedings

Interlocutory proceedings for the review of the constitutionality of Article 187n of decreto legislativo 24 febbraio 1998, n. 58 (Legislative Decree No 58 of 24 February 1998), instituted by the Corte di cassazione (Court of Cassation, Italy) in the context of an appeal on a point of law brought by Mr D.B. (D.B.) against the Commissione nazionale per le società e la borsa (National commission for companies and the stock exchange; ‘Consob’).

More specifically, D.B. has brought an appeal before the Corte di cassazione against the judgment of the Corte d’appello di Roma (Court of Appeal, Rome, Italy), handed down on 20 November 2013, by which that court dismissed D.B.’s appeal against Consob’s decision of 2 May 2012 imposing certain administrative sanctions on him in connection with the administrative offences provided for in Article 187a(1)(a) and (c) and Article 187n of Legislative Decree No 58/1998, in the version in force at the relevant time.

Subject matter and legal basis of the request for a preliminary ruling

The precise interpretation and the validity of Article 14(3) of Directive 2003/6/EC, in so far as it continues to apply *ratione temporis*, and of Article 30(1)(b) of Regulation (EU) No 596/2014. In particular, whether those provisions are 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 criminal sanctions or administrative sanctions of a ‘punitive’ nature, and, if the answer to that question is in the negative, whether those provisions are consistent with Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (‘the Charter’), including in light of the case-law of the European Court of Human Rights (‘the ECtHR’) on Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the ECHR’) and the constitutional traditions common to the Member States.

The legal basis of the referral is Article 267 TFEU.

Questions referred

‘1. Are Article 14(3) of Directive 2003/6/EC, in so far as it continues to apply *ratione temporis*, and Article 30(1)(b) of Regulation (EU) 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/EC, in so far as it continues to apply *ratione temporis*, and Article 30(1)(b) of Regulation (EU) No 596/2014 compatible with Articles 47 and 48 of the Charter of Fundamental Rights of the European Union — including in the light of the case-law of the European Court of Human Rights 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?’

Provisions of EU law cited

Article 14(1) and (3) of Directive 2003/6/EC

Article 12(2)(b) of Directive 2003/6/EC

Article 23(2)(b) of Regulation (EU) No 596/2014

Article 30(1)(b) of Regulation (EU) No 596/2014

Articles 47, 48 and 52(3) of the Charter

Provisions of national law cited

Article 187n of Legislative Decree No 58/1998, which concerns the protection of the supervisory tasks of the Bank of Italy and Consob. Of particular relevance is the version which applies to the facts of the case in the main proceedings, and which provided: ‘Except in the cases referred to in Article 2638 of the Civil Code, an administrative fine of between EUR 50 000 and EUR 1 000 000 shall be imposed on any person who fails to comply with a request from Consob within the specified time limit or delays the performance of Consob’s duties’ and which provided for an administrative fine of between EUR 50 000 and EUR 1 000 000 for failure to give answers at a personal hearing organised by Consob. Also of relevance is the version of that provision as amended by Decreto Legislativo n. 129/2017 (Legislative Decree No 129/2017), paragraph 1 of which provides: ‘Except in the cases referred to in Article 2638 of the Civil Code, the sanctions provided for in this article shall be imposed on any person who fails to comply within the specified time limit with a request from the Bank of Italy or Consob or who fails to cooperate with those authorities in the performance of their supervisory duties or delays the performance of those duties.’

Article 187g(3)(c) of Legislative Decree No 58/1998, which concerns the duties conferred on Consob, which include the power to ‘conduct a personal hearing’ of ‘any person who may have information regarding the facts’.

Article 187a(1)(a) and (c) of Legislative Decree No 58/1998, which provides for the administrative offence of insider dealing.

Article 184 of Legislative Decree No 58/1998, which provides for the criminal offence of insider dealing.

The Constitution of the Italian Republic, in particular: the second paragraph of Article 24, the second paragraph of Article 111, which enshrines the entitlement of parties to adversarial proceedings to equal conditions; the first paragraph of Article 117, which provides that ‘legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations’; and Article 11, which authorises ‘limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations’.

Outline of the facts and the main proceedings

- 1 On the conclusion of proceedings commenced against D.B., Consob imposed, by decision of 2 May 2012, certain administrative sanctions on D.B., in accordance

with Legislative Decree No 58/1998, in particular, under Article 187a(1)(a) and (c) of the legislative decree, which concerns insider dealing, and under Article 187n thereof for having repeatedly postponed the date of the hearing to which he had been summoned and for having refused, once he finally appeared before Consob, to answer the questions put to him. Article 187n of Legislative Decree No 58/1998 provides that ‘any person who fails to comply with a request from Consob within the specified time limit or delays the performance of Consob’s duties’ is liable to a penalty. That provision was introduced by the Italian legislature in implementation of the general duty to cooperate with the supervisory authorities referred to in Article 14(3) of Directive 2003/6/EC.

- 2 In separate criminal proceedings, D.B. was accused of the crime of insider dealing provided for in Article 184 of Legislative Decree No 58/1998. In respect of that offence, D.B. agreed with the Public Prosecutor to a conditionally suspended sentence of eleven months’ imprisonment and a fine of EUR 300 000. That sentence was handed down by the *Giudice per le indagini preliminari del Tribunale di Milano* (Judge in charge of preliminary investigations at the District Court, Milan, Italy) on 18 December 2013.
- 3 D.B. brought an appeal against Consob’s decision of 2 May 2012 before the *Corte d’appello di Roma*, arguing, amongst other things, that the penalty imposed on him pursuant to Article 187n of Legislative Decree No 58/1998 was unlawful. By judgment of 20 November 2013, the *Corte d’appello di Roma* dismissed his appeal.
- 4 D.B. brought an appeal on a point of law against that judgment before the *Corte di cassazione*. By Order No 54 of 2018, that court raised a number of questions on constitutionality before the *Corte costituzionale* (Constitutional Court, Italy) with reference to Article 187n of Legislative Decree No 58/1998.

The main arguments put forward by the Corte di Cassazione on raising the questions on constitutionality

- 5 The *Corte di cassazione* raises the question not only of the possible inconsistency of Article 187n with national constitutional laws, namely, Article 11, the second paragraph of Article 24, the second paragraph of Article 111 and the first paragraph of Article 117 of the Italian Constitution, but also its possible incompatibility with the ECHR, the International Covenant on Civil and Political Rights (‘the International Covenant’) and the Charter.
- 6 First, the *Corte di cassazione* states that Article 187n, introduced by the Italian legislature in implementation of the duty to cooperate with the supervisory authorities provided for in EU secondary legislation, specifically, Articles 12(b) and 14(3) of Directive 2003/6/EC, might be unconstitutional in so far as it penalises failure to comply, within the specified time limit, with requests made by Consob and penalises the causing of delay in the performance of Consob’s duties, including where the person in question is someone whom Consob is investigating

in connection with the possible commission of an offence that is punishable by essentially criminal sanctions.

- 7 In addition, the Corte di cassazione is uncertain whether the abovementioned duty of cooperation — in so far as it is deemed to apply to persons who are the subject of an investigation — is compatible with the second paragraph of Article 47 of the Charter, Article 6 ECHR and Article 14 of the International Covenant. In that connection, that court points out, first, that the ECHR and the International Covenant respectively recognise, implicitly and expressly, the right of every individual not to incriminate himself and the right to remain silent even in administrative proceedings for the imposition of sanctions of an essentially ‘punitive’ nature, such as the proceedings which Consob commenced against D.B. Furthermore, the Corte di cassazione points out that the entire scheme of rules laid down in Legislative Decree No 58/1998 falls within the scope of EU law, for the purposes of Article 51 of the Charter, and that the wording of the second paragraph of Article 47 of the Charter is substantially the same as that of Article 6(1) ECHR. Thus, Article 47 must be interpreted — in accordance with Article 52(3) of the Charter — in a manner consistent with the ECtHR’s interpretation of Article 6 ECHR.
- 8 In particular, according to the Corte di cassazione, the ‘right to remain silent’ and, more generally, the rights of the defence, should apply not only in criminal proceedings, but also in personal hearings conducted by Consob in the course of its supervisory activities, which may precede the initiation of proceedings for the imposition of ‘punitive’ sanctions upon persons identified as the author of an offence. Indeed, that court considers that any person accused of the offence of insider trading should have the right not to be constrained, under threat of a heavy fine (as was imposed on D.B.), to make statements which might subsequently be used as evidence against him.
- 9 In support of that interpretation, the Corte di cassazione refers not only to Article 24 of the Italian Constitution, but also to Article 6 ECHR, as interpreted by the ECtHR, and the case-law of the Court of Justice of the European Union (‘the Court of Justice’) on the protection of competition, which gives rise to the principle that the European Commission cannot compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement, it being for the Commission to prove such an infringement.

Succinct presentation of the reasons for the request for a preliminary ruling

- 10 The Corte costituzionale considers that the issue of constitutionality raised by the Corte di cassazione consists, in essence, in an examination of whether it is constitutional to penalise, under Article 187n, any individual who refuses to answer questions which might establish his liability in the course of a hearing conducted by Consob in the performance of its supervisory duties and, in particular, in determining whether the ‘right to remain silent’ to which the Corte di

cassazione (Court of Cassation) alludes applies not only in criminal proceedings, but also in the abovementioned personal hearings conducted by Consob.

- 11 First and foremost, the Corte costituzionale observes that, in the Italian legal system, the scope of Article 187n has been extended, by Legislative Decree No 129/2017, so that sanctions will apply not only to individuals who fail to comply with requests from the authorities or who delay the performance of the authorities' duties, but also, more generally, to individuals who do not cooperate with the authorities in the performance of their supervisory duties. One of Consob's supervisory duties is, in accordance with Article 187g(3)(c) of Legislative Decree No 58/1998, the power to 'conduct a personal hearing' of 'any person who may have information regarding the facts'. However, no right to refrain from answering is established for the benefit of individuals who have already been identified by Consob as the possible authors of an offence in relation to which it has jurisdiction and which may be punished with an administrative sanction that is 'essentially punitive'.
- 12 The Corte costituzionale points out that, on the one hand, a declaration that Article 187n — introduced into Italian law to implement a specific obligation under EU secondary law — is unlawful could be at odds with EU law itself and, in particular, inconsistent with the obligation which currently arises under Article 30(1)(b) of Regulation (EU) No 596/2014, which repealed and replaced Directive 2003/6/EC. On the other hand, that obligation, laid down by EU secondary law, could be incompatible with Articles 47 and 48 of the Charter, which apparently recognise the fundamental right of individuals not to incriminate themselves and their right not to be constrained to make statements which amount to a confession, within the same limits as may be inferred from Article 6 ECHR and Article 24 of the Italian Constitution.
- 13 With reference to those provisions of the Charter, and in the spirit of sincere cooperation between national courts and European courts in the definition of common levels of protection of fundamental rights — which is an objective of primary importance in a field, such as that under consideration, which is the subject of harmonisation — the Corte costituzionale regards it as necessary, before deciding the question of constitutionality that has been put to it, to ask the Court of Justice about the precise interpretation, and possibly also the validity, in the light of Articles 47 and 48 of the Charter, of Article 14(3) of Directive 2003/6/EC, in so far as it continues to apply *ratione temporis*, and of Article 30(1)(b) of Regulation (EU) No 596/2014.
- 14 In support of its reference for a preliminary ruling, the Corte costituzionale notes first of all that all the rules of the Italian Constitution, of the ECHR, of the International Covenant and of the Charter which the Corte di cassazione has cited all point to the recognition of the right of individuals not to incriminate themselves and of their right not to be constrained to make statements which amount to a confession (*nemo tenetur se ipsum accusare*). However, in the view of the Corte costituzionale, those rights cannot in themselves justify an

individual's refusal to attend, or undue delay in attending a hearing organised by Consob, provided that he is guaranteed — which was not the case in the proceedings against D.B. — the right not to answer the questions put to him at that hearing.

- 15 The Corte costituzionale also points to its own settled case-law on the accused's 'right to remain silent', in which that right, while not expressly recognised in the Constitution, is held to be 'an essential corollary of the inviolability of the rights of the defence' and guarantees the accused the option of refusing to submit to examination as a witness and, more generally, to avail himself of the option of not answering questions put by the court or by the competent investigating authority. The Corte costituzionale states, in particular, that it has not yet been called upon to assess whether and, if so, to what extent the right to remain silent, which is one of the inalienable human rights that characterise the Italian Constitution, also applies in the context of administrative proceedings for the imposition of 'punitive' sanctions, according to the Engel criteria. However, it has on numerous occasions stated that individual guarantees which the ECHR and the Italian Constitution provide in criminal matters also extend to 'punitive' administrative sanctions and that, in particular, the administrative sanctions provided for in Italian law in the field of insider dealing constitute, by reason of their particular severity, measures of a 'punitive' nature, as the Court of Justice has itself moreover acknowledged (see the judgment of 20 March 2018 C-596/16 and C-597/16, *Di Puma v Consob*, paragraph 38).
- 16 The Corte costituzionale then takes up the argument of the Corte di cassazione that it would appear to be reasonable to acknowledge that a person accused of the offence of insider dealing enjoys the same rights of defence as the Italian Constitution confers on persons suspected of having committed a criminal offence. According to the Corte costituzionale, that is all the more true given the risk that a person suspected of having committed that administrative offence, being required by both Italian law and EU secondary law to cooperate with the supervisory authority, might in fact assist in the formulation of a criminal charge against himself.
- 17 The Corte costituzionale reiterates in that connection that, under Italian law, insider dealing is both an administrative offence (under Article 187a of Legislative Decree No 58/1998) and a criminal offence (under Article 184 of that legislative decree) and that respective sets of proceedings may be initiated and conducted in parallel, as happened in the case of D.B., in so far as that is consistent with the principle *non bis in idem* (see the judgment of the Court of Justice of 20 March 2018, C-537/16, *Garlsson Real Estate SA and Others*, paragraphs 42 to 63). Consequently, while it is not permissible to make use in criminal proceedings of statements made to an administrative authority without the guarantees of the rights of the defence — which include informing the accused of his right to remain silent — it is quite possible that such statements, obtained by the supervisory authority with the threat of sanctions for failure to cooperate, could actually provide the authority with information that is indispensable to

obtaining further evidence of unlawful conduct that may be used in subsequent criminal proceedings against the person who adopted the conduct in question.

- 18 The Corte costituzionale goes on to state that the concerns raised by the Corte di cassazione are borne out by the case-law of the ECtHR on Article 6 ECHR, according to which the privilege against self-incrimination and the right to abstain from making statements that amount to a confession encompass the right of any person who is the subject of administrative proceedings that could result in the imposition of ‘punitive sanctions’ not to be constrained, under threat of sanctions for failure to comply, to give the authority answers which could establish his own liability (see the judgments of 4 October 2005, *Shannon v. United Kingdom*, paragraphs 38 to 41, and of 5 April 2012, *Chambaz v. Switzerland*, paragraphs 50 to 58). The Corte costituzionale mentions, in particular, the judgment of the ECtHR in the case of *J.B. v. Switzerland*, in which the court held that all the guarantees offered by the ECHR in criminal matters, and the ‘right to remain silent’ in particular, must necessarily be afforded to a person who is the subject of an administrative investigation for tax offences and on whom ‘punitive’ fines have been imposed for repeated failure to answer requests for clarification put to him by the competent investigating authority.
- 19 The Corte costituzionale also points to the case-law of the Court of Justice on the right to remain silent and on anti-competitive actions, according to which undertakings are required to make available to the Commission all information relating to the subject matter of the investigation, to comply with its requests for production of pre-existing documents and to answer its questions of a purely factual nature, and according to which the rights of the defence are infringed only if the undertaking is asked questions that are essentially aimed at obtaining an admission of an infringement, it being for the Commission to prove the infringement (see the judgments of 18 October 1989, C-374/87, *Orkem*, paragraph 27, of 29 June 2006, C-301/04 P, *SGL Carbon AG*, paragraphs 40 and 44 to 49, and of 20 February 2001, T-112/98, *Mannesmannröhren-Werke AG*, paragraphs 77 and 78). In particular, according to that case-law, the obligation to answer the Commission’s questions is contrary neither to the rights of the defence nor to the right to a fair legal process: ‘There is nothing to prevent the addressee of such questions or requests from showing, whether later during the administrative procedure or in proceedings before the Community courts, when exercising his rights of defence, that the facts set out in his replies ... have a different meaning from that ascribed to them by the Commission’ (see the judgments of 20 February 2001, T-112/98, paragraphs 77 and 78, and of 29 June 2006, C-301/04 P, paragraphs 44 to 49).
- 20 Nevertheless, the Corte costituzionale states that that case-law of the Court of Justice addresses the situation of legal persons, not natural persons, and largely pre-dates the adoption of the Charter and the ascribing to the Charter of the same value as the treaties. In addition, it would appear difficult to reconcile that case-law with the ‘punitive’ nature of the administrative sanctions provided for in Italian law for insider dealing and it also appears to be at odds with that case-law

of the ECtHR, which apparently ascribes a much broader scope to the accused's right to remain silent, even in administrative proceedings for the imposition of 'punitive' sanctions.

- 21 Similarly, the Corte costituzionale observes that it appears that the Court of Justice has never addressed the question of whether Articles 47 and 48 of the Charter require, in light of the ECtHR's case-law on Article 6 ECHR, mentioned above, that the accused's right to remain silent should also extend to administrative proceedings that may result in the imposition of 'punitive' sanctions. EU secondary law has not yet provided an answer to that question either, and it has in fact been intentionally left open in Directive (EU) 2016/343 of the European Parliament and of the Council (see recital 11).
- 22 In that context, the Corte costituzionale finds it necessary to clarify whether Article 14(3) of Directive 2003/6/EC and Article 30(1)(b) of Regulation (EU) No 596/2014 must 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 criminal sanctions or administrative sanctions of a 'punitive' nature. In that regard, it mentions in particular the words 'in conformity with [the] national law' of the Member States, appearing in Article 14(1) of the directive, and the words 'in accordance with national law', appearing in Article 30(1) of the regulation, which appear to address the need to maintain, in any event, the standards of protection of fundamental rights afforded by the legal systems of the Member States, where they are higher than those under EU law.

WORKING DRAFT