Case C-302/20

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

9 July 2020

Referring court:

Cour d'appel de Paris (France)

Date of the decision to refer:

9 July 2020

Applicant:

Mr A.

Intervener:

Autorité des marchés financiers

I. Subject matter of the main proceedings

1 The case in the main proceedings concerns an action brought by Mr A., a financial journalist, against a decision of the commission des sanctions de l'Autorité des marchés financiers (Penalties Commission of the Financial Markets Authority; 'the Penalties Commission') which ordered him to pay a financial penalty of EUR 40 000 for having disclosed information relating to the forthcoming publication, in the online newspaper that employed him, of press articles relaying market rumours concerning issuers of financial instruments. The Penalties Commission took the view that the communication of that information constituted an unlawful disclosure of inside information. Mr A. is seeking the annulment of that decision. He claims, in essence, that such a classification is incompatible with the nature of the profession of financial journalist. The Financial Markets Authority ('the AMF') essentially contends that that information was not disclosed for purposes of journalism.

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

2 The cour d'appel de Paris (Court of Appeal, Paris) is of the view that, in order to be able to give a ruling on the case in the main proceedings, it must refer to the Court of Justice of the European Union ('the Court'), pursuant to Article 267 TFEU, questions of interpretation concerning (i) the notion of 'inside information' within the meaning of the first subparagraph of Article 1(1) 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), in conjunction with Article 1(1) of Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation, and (ii) the conditions for the application of Articles 10 and 21 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.

III. Questions referred for a preliminary ruling

'(1) In the first place,

(a) Is the first subparagraph of Article 1(1) 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), in conjunction with Article 1(1) of Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation, to be interpreted as meaning that information relating to the forthcoming publication of a press article relaying a market rumour about an issuer of financial instruments can satisfy the requirement of precision laid down in those articles for classification as inside information?

(b) Does the fact that the press article, the forthcoming publication of which constitutes the information at issue, mentions — as a market rumour — the price of a public takeover bid affect the assessment of the precise nature of the information at issue?

(c) Are the reputation of the journalist who authored the article and of the media outlet which published it and the genuinely significant ("*ex post*") effect of that publication on the price of the securities to which the published article relates relevant factors for the purposes of assessing the precise nature of the information at issue?

(2) In the second place, if the first question is answered to the effect that information such as that at issue can satisfy the necessary requirement of precision:

(a) Is Article 21 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 to be interpreted as meaning that the disclosure by a journalist, to one of his usual sources, of information relating to the forthcoming publication of an article authored by him relaying a market rumour is made "*for the purpose of journalism*"?

(b) Is the answer to that question dependent on, inter alia, whether or not the journalist was informed of the market rumour by that source or whether or not the disclosure of the information on the forthcoming publication of the article was expedient in order to obtain clarifications from that source with regard to the credibility of the rumour?

(3) In the third place, are Articles 10 and 21 of Regulation (EU) No 596/2014 to be interpreted as meaning that, even where inside information is disclosed by a journalist "*for the purpose of journalism*" within the meaning of Article 21, the lawful or unlawful nature of the disclosure requires an assessment of whether the disclosure was made "*in the normal exercise of ... [the] profession [of journalist]*" for the purposes of Article 10?

(4) In the fourth place, is Article 10 of Regulation (EU) No 596/2014 to be interpreted as meaning that, in order to occur in the normal exercise of the profession of journalist, the disclosure of inside information must be strictly necessary for the exercise of that profession and must comply with the principle of proportionality?'

IV. Legal context

1. Provisions of EU law

Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)

Article 1

'*For the purposes of this Directive:*

1. "inside information" shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were

made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

…'

Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation

Recital 1

'*Reasonable investors base their investment decisions on information already available to them, that is to say, on* ex ante *available information. Therefore, the question whether, in making an investment decision, a reasonable investor would be likely to take into account a particular piece of information should be appraised on the basis of the* ex ante *available information. Such an assessment has to take into consideration the anticipated impact of the information in light of the totality of the related issuer's activity, the reliability of the source of information and any other market variables likely to affect the related financial instrument or derivative financial instrument related thereto in the given circumstances.*'

Article 1

'*Inside information*

1. For the purposes of applying point 1 of Article 1 of Directive 2003/6/EC, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments.

2. For the purposes of applying point 1 of Article 1 of Directive 2003/6/EC, "information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments" shall mean information a reasonable investor would be likely to use as part of the basis of his investment decisions.'

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 **('the Market Abuse Regulation')**

Recital 77

'*This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union (Charter). Accordingly, this Regulation should be interpreted and applied in accordance with those rights and principles. In particular, when this Regulation refers to rules governing the freedom of the press and the freedom of expression in other media and the rules or codes governing the journalist profession, account should be taken of those freedoms as guaranteed in the Union and in the Member States and as recognised pursuant to Article 11 of the Charter and to other relevant provisions.*'

Article 8(4)

'*4. This Article applies to any person who possesses inside information as a result of:*

(a) being a member of the administrative, management or supervisory bodies of the issuer …;

(b) having a holding in the capital of the issuer …;

(c) having access to the information through the exercise of an employment, profession or duties; or

(d) being involved in criminal activities.

This Article also applies to any person who possesses inside information under circumstances other than those referred to in the first subparagraph where that person knows or ought to know that it is inside information.' (emphasis added by the referring court)

Article 10

'*Unlawful disclosure of inside information*

1. For the purposes of this Regulation, unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties.

This paragraph applies to any natural or legal person in the situations or circumstances referred to in Article 8(4).

…' (emphasis added by the referring court)

Article 21

'*Disclosure or dissemination of information in the media*

For the purposes of Article 10, Article 12(1)(c) and Article 20, where information is disclosed or disseminated and where recommendations are produced or disseminated for the purpose of journalism or other form of expression in the media, such disclosure or dissemination of information shall be assessed taking into account the rules governing the freedom of the press and freedom of expression in other media and the rules or codes governing the journalist profession, unless:

(a) the persons concerned, or persons closely associated with them, derive, directly or indirectly, an advantage or profits from the disclosure or the dissemination of the information in question; or

(b) the disclosure or the dissemination is made with the intention of misleading the market as to the supply of, demand for, or price of financial instruments.' (emphasis added by the referring court)

2. National provisions

Règlement général de l'AMF (General Regulation of the AMF; 'the RGAMF')

3 Article 621-1 of the RGAMF provided, in the version thereof in force at the time of the facts:

> '*Inside information is precise information which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.*
>
> *Information is to be deemed to be precise if it indicates a set of circumstances or an event which has occurred or may occur and if a conclusion may be drawn therefrom as to the possible effect of those circumstances or that event on the prices of financial instruments or related derivative financial instruments.*
>
> *Information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments is information which a reasonable investor would be likely to use as one of the bases of his investment decisions.*'

4 Those provisions transposed the first subparagraph of Article 1(1) of Directive 2003/6, as clarified by Article 1(1) and (2) of Directive 2003/124/EC, which were reproduced by Article 7(1)(a), (2) and (4) of the Market Abuse Regulation.

5 Article 622-1 of the RGAMF provided, in the version thereof in force at the time of the facts:

> '*Any person referred to in Article 622-2 must refrain from using the inside information in his possession … He must also refrain from … disclosing that information to another person outside the normal course of his employment, profession or duties or for purposes other than those for which it was disclosed to him …*'

6 That article ensured the transposition of the provisions of the first subparagraph of Article 2(1) of Directive 2003/6, which are now contained, in essence, in Article 10(1) of the Market Abuse Regulation.

7 Article 622-2 of the RGAMF provided, in the version thereof in force at the time of the facts:

> '*The obligations to refrain from use and disclosure laid down in Article 622-1 shall apply to any person who possesses inside information as a result of:*
>
> *1° his membership of the administrative, governing, management or supervisory bodies of the issuer;*
>
> *2° his holding in the capital of the issuer;*
>
> *3° his access to information by reason of his employment, profession or duties, and of his participation in the preparation or the execution of a financial operation;*
>
> *4° his activities that may be classified as indictable or serious offences.*
>
> *Those obligations to refrain from use and disclosure shall also apply to any other person who possesses inside information and who knows or ought to have known that it is inside information.*'

8 That article ensured the transposition of the provisions of Article 2(1) and of Article 4 of Directive 2003/6, which are now contained in Article 8(4) of the Market Abuse Regulation.

V. Presentation of the facts and procedure in the main proceedings

9 For a good many years, Mr A, who is now retired, worked as a journalist for several UK daily newspapers, firstly at *The Financial Times* (for nineteen years), then at *The Times* (for two years) and, finally, at the *Daily Mail* (for twenty-seven

years). As part of his work at the *Daily Mail*, for which he regularly wrote articles entitled 'Market Report' that consisted in relaying market rumours, he authored two articles relating to securities admitted to trading on compartment A of Euronext. Those two articles were published on the *Daily Mail*'s website, which is called the '*Mail Online*'.

10 The first article, published on the *Mail Online* in the evening of 8 June 2011, was entitled 'Market Report: Hermès shares back in fashion'. That article mentioned a possible bid by the company LVMH for Hermès stock at a price of EUR 350 per share, that is to say, an 86% premium as compared with the closing day price. The day after publication of that article, the share price increased from the market opening and then during the session.

11 The second article, published on the *Mail Online* in the evening of 12 June 2012, was entitled 'Market Report: Petrol rumours fuel oil trading'. That article reported that an offer might soon be made for Maurel & Prom stock at a price of around EUR 19 per share, that is to say, an 80% premium as compared with its last price. The day after publication of that article, the share price increased from the market opening and then during the session. On 14 June 2012, Maurel & Prom denied that rumour.

12 It was established that, shortly before the publication of those two articles on the *Mail Online*, buy orders had been placed for Hermès and Maurel & Prom stock.

13 After similarities had been noted between those transactions and orders made on the market for Arkéma stock shortly before the publication, on a blog of the website of the UK daily newspaper *The Financial Times*, of an article relating to market rumours regarding the company Arkéma, the Secretary General of the AMF decided to extend the investigation which he had opened on 1 June 2012 into trading in the stock of, and the financial reporting of, the company Arkéma to include trading in the stock of, and the financial reporting of, the company Maurel & Prom on 15 November 2013 and trading in the stock of Hermès on 21 January 2014.

14 The investigations undertaken revealed that several UK residents, including Messrs B, E, F, G and H, had engaged in buy transactions from the UK shortly before the publication of the abovementioned articles on the *Mail Online*, and had then closed out their positions once the articles were published.

15 In that context, on several occasions and for investigative purposes, the AMF sought the assistance of its UK counterpart, the Financial Conduct Authority ('the FCA'), referring to the provisions laid down, first, in Article 16 of Directive 2003/6 on international cooperation and, second, in several multilateral memoranda of understanding ('the MMoU') on cooperation, exchange of information and regulation, to which the AMF and the FCA are signatories.

16 The FCA provided, inter alia, Mr A's telephone records detailing all of his incoming and outgoing communications for the period from 4 July 2007 to

14 June 2013 (‘the records at issue’). The AMF included the records at issue in the case file.

17 On 23 February 2016, the AMF’s Directorate of Investigations and Inspections sent to Messrs B, C, H, E, F and G and to Mr A letters informing them, first, of the conduct in respect of which they might face charges in the light of the investigators’ findings and, second, of the option afforded to them to submit observations within a certain period. All the addresses of those letters sent observations in response, including Mr A, by letter received on 3 May 2016.

18 The investigation report was lodged on 5 July 2016. In the light of that report, a specialist panel of the AMF Board decided, on 19 July 2016, to serve statements of objections on all the individuals in question, including Mr A.

19 According to the statement of objections sent to Mr A, by letter of 7 December 2016, he was accused of having committed four infringements, consisting in having disclosed to Messrs C and B inside information relating to the forthcoming publication on the *Mail Online* of the two articles relaying rumours of the filing of public offers for Hermès and Maurel & Prom stock, in breach of Articles 622-1 and 622-2 of the RGAMF.

20 A statement of objections was likewise served on Messrs C and B. Mr C was alleged to have, in turn, disclosed that information to Mr F, against whom charges had also been directed for having used that information by making transactions relating to financial contracts linked to Hermès and Maurel & Prom shares. Mr B was alleged, inter alia, to have used that information himself.

21 In response to the statement of objections sent to him, Mr A lodged written observations on 3 July 2017.

22 The rapporteur appointed by the Chair of the Penalties Commission submitted his report on 21 June 2018, after issuing a summons to the accused to attend a hearing and hearing some of them, including Mr A, on 23 February 2018. Mr A did not submit observations in response to the report.

23 A summons was issued to the accused to attend the sitting of the Penalties Commission, which was held on 14 September 2018.

24 By Decision No 11 of 24 October 2018 (‘the contested decision’), the Penalties Commission found that information relating to the forthcoming publication of a press article relaying a market rumour could constitute inside information, and that the information at issue satisfied the conditions for classification as inside information. It then held that Mr A had disclosed the inside information relating to the Hermès stock to Messrs C and B and that concerning Maurel & Prom to Mr C alone, and ordered Mr A to pay a financial penalty of EUR 40 000.

25 With regard to the other persons in question, the Penalties Commission held that some of the infringements with which they were charged were established and

ordered that they pay financial penalties ranging from EUR 20 000 to EUR 150 000.

26 Mr A alone appealed against that decision. He is seeking, primarily, a finding *in limine litis* that the investigation process and the proceedings are flawed and, as a consequence, the annulment of the contested decision. In the alternative, he asks that that decision be set aside, in so far as it disapplied Article 21 of Regulation No 596/2014, or reversed in so far as it held that the infringements with which he was charged were established, and, as a result, that he be exonerated and it be held that there is no need to penalise him. In the further alternative, he requests that the amount of the penalty imposed be reduced. The AMF contended that the appeal should be dismissed.

VI. Matters settled by the referring court

A. Pleas in law alleging procedural flaws

27 Mr A has put forward various pleas in law alleging procedural flaws which, in his view, render the contested decision invalid. He has thus pleaded a breach [of the confidentiality] of journalistic sources, the improper conduct of certain hearings and defects in the statement of objections.

28 All of those pleas in law were rejected by the referring court.

29 With regard to the plea in law based on the breach [of the confidentiality] of journalistic sources by reason of the inclusion of the records at issue in the case file (see paragraph 16), the Court of Appeal, Paris, finds that the inclusion of those records was in fact unlawful. It takes the view that their inclusion does not meet an overriding requirement in the public interest, in particular because the infringement of the confidentiality of journalistic sources, as protected by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), went beyond what was necessary, owing to the scope of those records.

30 However, it takes the view that that flaw does not vitiate the investigative and penalty procedure in its entirety or, therefore, the contested decision. It is apparent from the investigation's timeline that the request for transmission of the connection data of Mr B and Mr C is not based on the use of the records at issue, but rather stems from other evidence gathered by the investigators, some of which was available to them even before the receipt of the records at issue and which the Penalties Commission could lawfully use. It therefore rejects this plea for annulment.

31 The Court of Appeal, Paris, also rejects Mr A's pleas in law alleging, first, that he was not heard and, second, defects in the hearing of the other accused persons in the course of the preliminary stage of the investigation period, which precedes the penalties procedure opened by the statement of objections. It takes the view that

the questionnaire provided to Mr A via the FCA and the use made of the responses supplied did not infringe the principle of fairness of the investigation or the rights of the defence. It also considers that the hearings of the other accused persons did not give rise to a breach of the principle of fairness of the investigation.

32 As for the plea in law based on defects in the statement of objections, Mr A submits that the statement of objections sent to him on 7 December 2016 should have referred to Article 21 of the Market Abuse Regulation, which had come into effect on 3 July 2016, and not to Article 622-1 of the RGAMF, which was applicable at the time of the facts but had been repealed in September 2016, following the entry into force of the Market Abuse Regulation. Mr A claims that Article 21 of the Market Abuse Regulation introduced rules more favourable to journalists in relation to the disclosure of inside information, with the establishment of that breach being made subject to the satisfaction of additional conditions, which justifies its retroactive application '*in mitius*'. Since those criteria necessary for the establishment of the alleged breach are not set out in the statement of objections, he submits that that statement is defective and that its defects render the subsequent penalties procedure and, therefore, the contested decision invalid.

33 The AMF does not contest the retroactive applicability '*in mitius*' of Article 21 of the Market Abuse Regulation, but recalls that it is sufficient, pursuant to Article 6 ECHR, as interpreted by the European Court of Human Rights, for the accused person to be informed in detail of the nature and the grounds of the charges brought against him, that is to say, the substance of the acts with which he is charged and their legal classification.

34 The Court of Appeal, Paris, finds that, notwithstanding the lack of any reference to Article 21 of the Market Abuse Regulation, which was applicable retroactively, the statement of objections sent to Mr A was sufficiently precise for the purposes of his defence. It therefore likewise rejects this plea in law.

B. Pleas in law based on the substance of the acts with which Mr A is charged

35 Mr A claims that he lacked authority to decide to publish his market reports and that he therefore did not possess the information that he is alleged to have disclosed. The Court of Appeal, Paris, finds that there is a body of strong, precise and consistent evidence unequivocally establishing that Mr A was in possession of the information relating to the forthcoming publication on the *Mail Online* of his market report of 8 June 2011 regarding Hermès at 15:06 at the latest, and of his market report of 12 June 2012 regarding Maurel & Prom at 15:36 at the latest.

36 With regard to the disclosure of the information in question, which relates to the forthcoming online publication of the market reports regarding Hermès, on the

one hand, and Maurel & Prom, on the other hand, the Court of Appeal, Paris, finds that:

– there is a strong, precise and consistent body of evidence unequivocally establishing that, in the afternoon of 8 June 2011, Mr A disclosed to Mr B the information relating to the forthcoming online publication of his market report regarding Hermès;

– the evidence brought to light is not sufficient to establish unequivocally that, on 8 June 2011, Mr A disclosed to Mr C the information relating to the forthcoming online publication of his market report regarding Hermès;

– there is a strong, precise and consistent body of evidence unequivocally establishing that, on 12 June 2012, Mr A disclosed to Mr C the information relating to the forthcoming online publication of his market report regarding Maurel & Prom.

VII. The need to refer questions to the Court of Justice for a preliminary ruling

A. The concept of 'inside information'

1. Main arguments of the parties

37 **Mr A** contests the classification of information relating to the forthcoming publication of a press article relaying market rumours as inside information.

38 In the first place, he claims that that classification is incompatible with the concept of a 'secondary insider', within the meaning of the second subparagraph of Article 622-2 of the RGAMF, since it has not been shown that Messrs B and C, who are classified as secondary insiders in the contested decision, were in any way associated with the issuer of the securities concerned or with the media outlet that published his articles and, therefore, that they knew or ought to have known that the information at issue constituted inside information.

39 In the second place, he takes the view that that classification is incompatible with the nature of the profession of financial journalist. In that regard, he observes that it is at the heart of the activity of a financial journalist to gather market rumours in order to identify potential topical issues and to discuss them both with sources and with a multitude of persons within the editorial team, with a view to an article potentially being written. In his view, the classification at issue amounts to taking the view that any financial journalist systematically generates inside information simply by virtue of the fact that he intends to publish articles on the markets, notwithstanding the absence of any association with the issuer concerned, something which — in his opinion — ultimately turns the financial press into a

'*manufacturer of inside information*' and editorial teams into '*groups of insiders*'. He notes that that classification tends to place the activity of financial journalists on the same footing as that of professionals exposed to a wealth of inside information (issuers, financial analysts, portfolio management companies, service providers who conduct market surveys, and so forth), who, on that basis, are regulated by the AMF and subject to strict obligations in relation to the detection and management of the circulation of inside information (internally and externally).

40 In the third place, Mr A claims that a publication cannot constitute inside information if its content does not mention any information of that kind. He takes the view that, in the present case, the content of the articles at issue does not meet the requirement that the information be of a precise nature, because those articles do no more than report mere market rumours. In that regard, he observes that it is generally accepted that a rumour cannot constitute inside information on account of the lack of precision as to its origin, with such imprecision giving rise to doubt about its authenticity, even if the publication of that rumour may be of interest to the market and may have an impact on the issuer's share price.

41 In the fourth place, and for the sake of completeness, Mr A submits that, in the present case, irrespective of the content of the articles at issue, the information relating to their forthcoming publication was neither precise, since it was not apparent what was going to be published, nor capable of having an impact on the prices of the shares concerned, since there was nothing capable of demonstrating his particular reputation as a financial journalist, in particular in the sectors concerned by the securities at issue (luxury goods and oil), or that of the *Mail Online*, since that media outlet does not enjoy the same authority as that enjoyed by *The Financial Times*.

42 **The AMF** contends that '*Article 621-1 of the [RGAMF] does not provide for any restriction as regards the nature, content or origin of the information that may be classified as inside information, and does not require that that information should come from an issuer but merely that it relates to that issuer, directly or indirectly, and is precise, not public and capable of having a significant impact on the price of the financial instruments concerned*'.

43 In addition, it takes the view that, in the presence case, as from the afternoon, the forthcoming publication of Mr A's articles on the *Mail Online* was likely to occur (publication in the evening), with the result that the information relating to such publication, the content of which was also sufficiently precise (because the price of possible takeover bids is mentioned) for a conclusion to be drawn from it as regards the possible effect of that publication on the prices of the shares at issue, was precise in nature as from the afternoon, at which time that information was disclosed.

44 Lastly, it states that, in the present case, the earlier publication, in other newspapers, of articles mentioning planned transactions involving Hermès and

Maurel & Prom stock did not make public the information that the *Mail Online* was shortly going to publish market reports authored by Mr A relating to the existence of a rumour of a bid for those shares at a particular price, but rather confirmed the credibility of those market reports, which stemmed not least from Mr A's reputation as a financial journalist, such that the information relating to the forthcoming publication of the articles was likely to be used by a reasonable investor gambling on that rumour coming to fruition or, at the very least, that the prices of the shares concerned would be revised upwards once those articles were published.

2. Grounds for the reference regarding the concept of 'inside information'

45 In the present case, it is for the referring court to determine whether information relating to the forthcoming publication of a press article relaying a market rumour can constitute inside information within the meaning of Article 621-1 of the RGAMF. Those provisions of the RGAMF were repealed following the entry into force of the Market Abuse Regulation.

46 Since that article transposes the first subparagraph of Article 1(1) of Directive 2003/6, as clarified by Article 1(1) and (2) of Directive 2003/124, it must be interpreted in accordance with those provisions of those directives.

47 In two judgments of 28 June 2012, *Geltl* (C-19/11, EU:C:2012:397, paragraph 25) and of 11 March 2015, *Lafonta* (C-628/13, EU:C:2015:162, paragraph 24), the Court of Justice recalled that the definition of the concept of 'inside information' resulting from the first subparagraph of Article 1(1) of Directive 2003/6 comprises four essential elements, which apply cumulatively:

– firstly, the information is of a precise nature;

– secondly, that information has not been made public;

– thirdly, it relates, directly or indirectly, to one or more financial instruments or their issuers;

– fourthly, if it were made public, that information would be likely to have a significant effect on the prices of the financial instruments concerned or on the price of related derivative financial instruments.

48 In the present case, it is not disputed that the information at issue satisfies the second criterion. The forthcoming publication of Mr A's articles on rumours relating to Hermès and Maurel & Prom had not been announced before they were published. Similarly, the market was aware of the content of those articles only once they were published, it being understood that the earlier publication of several articles did not make public the information that the *Mail Online* was shortly going to publish, on 8 June 2011 and 12 June 2012, two articles by Mr A

reporting, respectively, a rumoured bid by LVMH for Hermès shares at a price of EUR 350 and a rumoured bid for Maurel & Prom shares at a price of EUR 19.

49 It is likewise common ground that the information at issue satisfies the third criterion. That information relates to the forthcoming publication of press articles relaying market rumours about transactions concerning, respectively, Hermès and Maurel & Prom. Accordingly, that information relates, directly or indirectly, to one or more issuers of financial instruments.

50 As for the fourth criterion, Article 1(2) of Directive 2003/124 defines inside information as '*information a reasonable investor would be likely to use as part of the basis of his investment decisions*'.

51 Citing recital 1 of that directive, the referring court recalls that, in its judgment of 23 December 2009, *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraph 69), the Court of Justice explained that, '*in accordance with the purpose of Directive 2003/6, that capacity to have a significant effect on prices must be assessed, a priori, in the light of the content of the information at issue and the context in which it occurs*' and that '*it is thus not necessary, in order to determine whether information is inside information, to examine whether its disclosure actually had a significant effect on the price of the financial instruments to which it relates*'. In her Opinion in the case which gave rise to that judgment (*Spector Photo Group and Van Raemdonck*, C-45/08, EU:C:2009:534, points 96 and 97), Advocate General Kokott took the view that, although it is necessary '*[to make] an* ex ante *finding whether information is likely to have an effect on the price*', '*the extent of a price movement after the publication of … information may be an indication of the significance and the potential of* [that] *information*'.

52 In the present case, the information at issue, which concerned the forthcoming publication of Mr A's articles relaying rumoured bids for Hermès and Maurel & Prom stock at a significantly higher price than the previous day's closing price, followed on from the recent publication of press articles, in particular in *The Financial Times*, mentioning either a possible increase by the LVMH group of its stake in Hermès or potential preparations for a takeover of Maurel & Prom.

53 In that context, the information at issue was likely to be used by a reasonable investor as part of the basis of his investment decisions regarding Hermès and Maurel & Prom stock.

54 Furthermore, it should be noted that those shares experienced a significant price variation following the publication of Mr A's articles. This '*ex post*' factor confirms that the information at issue satisfies '*ex ante*' the fourth criterion for inside information.

55 It remains to be determined whether that information can satisfy the first criterion, which relates to the precise nature of the information.

56 In that regard, it is clear from Article 1(1) of Directive 2003/124 that information is to be deemed to be of a precise nature in the case where it satisfies the following two cumulative criteria:

– first, that information must indicate '*a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so*';

– second, that information must be '*specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments*'.

57 In the present case, the information at issue relates, first, to the forthcoming publication (on 8 June 2011) on the *Mail Online* of an article by Mr A relaying a rumour concerning Hermès stock and, second, to the forthcoming publication (on 12 June 2012) on the same website of an article by the same journalist relaying a rumour concerning Maurel & Prom stock.

58 In so far as they indicate an event — the forthcoming publication of a press article — that may reasonably be expected to occur, that information satisfies the first criterion required under Article 1(1) of Directive 2003/124 to be classifiable as precise.

59 By contrast, the question is raised as to whether it satisfies the second criterion.

60 In order to answer that question, it is necessary to determine whether, in order for information relating to the future publication of a press article to be specific enough, within the meaning of Article 1(1) of Directive 2003/124, the content of the article must itself be specific enough, within the meaning of the same provision.

61 In the judgment of 11 March 2015, *Lafonta* (C-628/13, EU:C:2015:162, cited above, paragraph 31), the Court of Justice clarified the meaning and the scope of that second criterion by finding that Article 1(1) of Directive 2003/124 requires that '*the information be sufficiently exact or specific to constitute a basis on which to assess whether the set of circumstances or the event in question is likely to have a significant effect on the price of the financial instruments to which it relates*', such that that article '*[excludes] from the concept of "inside information" [only] ... information that is vague or general, from which it is impossible to draw a conclusion as regards its possible effect on the prices of the financial instruments concerned*'.

62 Rumours appear, by their nature, to come within the category of '*information that is vague or general, from which it is impossible to draw a conclusion as regards its possible effect on the prices of the financial instruments concerned*'.

63 Furthermore, in [footnote 16 to] his Opinion in *Geltl* (C-19/11, EU:C:2012:153), Advocate General Mengozzi pointed out that '*information will not be precise where reason dictates that the event be regarded as impossible or improbable, the necessary element of reasonableness being absent, for example, where it is no more than rumour, or where the information is so vague as to make it impossible to draw inferences as to the possible effect on trading in the financial instruments at issue or in related derivative instruments*' (emphasis added by the Court of Appeal, Paris).

64 This therefore raises the question as to whether the fact that a press article, the forthcoming publication of which constitutes the information at issue, consists in relaying a market rumour precludes, by its nature, that information from potentially being inside information or whether, conversely, such a classification is conceivable depending on the circumstances.

65 In that regard, in the light of the specific features of the present case, the referring court is unsure whether the fact that the press article relaying a market rumour mentions the price of a possible public takeover bid has an impact on the assessment as to whether the information at issue is precise in nature.

66 It is likewise unsure whether the reputation of the journalist who authored the article or of the media outlet which published that article is capable of influencing the answer to that question.

67 Lastly, since the price of Hermès and Maurel & Prom shares varied significantly following the publication of Mr A's articles, the referring court expresses uncertainty as to whether, if it is established that a press article relaying a market rumour actually had a significant '*ex post*' effect on the price of the stock forming the subject of that rumour, account should be taken of that fact in assessing whether the information relating to the forthcoming publication of the article satisfies the requirement of precision.

68 Since the Court of Justice has not had the opportunity to rule on all of these questions, which are crucial to resolving the dispute, a request for a preliminary ruling should be made seeking the interpretation of the first subparagraph of Article 1(1) of Directive and of Article 1(1) of Directive 2003/124, as set out in the operative part of this judgment.

B. The relationship between, and the interpretation of, Articles 10 and 21 of the Market Abuse Regulation

69 The arguments which follow are submitted solely in the event that the Court of Justice should answer the abovementioned questions to the effect that information such as that at issue can satisfy the necessary requirement of precision.

1. Arguments of the parties

70 **Mr A** takes issue with the analysis conducted by the Penalties Commission, on the basis of which it disapplies Article 21 of the Market Abuse Regulation, an analysis pursuant to which, if the sole objective of the discussion between Mr A, on the one hand, and Messrs C and B, on the other, who are identified as being his sources, regarding the rumour of the submission of a bid at a certain price was the public dissemination of that rumour, such that it was for '*the purpose of journalism*' within the meaning of that provision, this was not likewise the case as regards the transmission, to those sources only and not to the public, of the inside information of the future publication on the *Mail Online* of a market report mentioning that rumour.

71 In support of the application of Article 21 of the Market Abuse Regulation to shore up his case, Mr A relies, in the first place, on the case-law of the Court of Justice interpreting Article 9 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, according to which it is necessary to give a broad interpretation to the concept of the processing of personal data '*solely for journalistic purposes*' within the meaning of that article (judgments of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraphs 56 and 61, and of 14 February 2019, *Buivids*, C-345/17, EU:C:2019:122, paragraphs 51 and 53). He states that the telephone conversations during which he may have informed his sources of the forthcoming publication of his articles were conducted in the exercise of his activity as a journalist.

72 In the second place, Mr A claims that, by limiting the application of Article 21 of the Market Abuse Regulation solely to the situation in which the information at issue is intended to be published, the AMF is not only denying the essential role of sources in the exercise of journalistic activities but, more generally, is reducing the role of a journalist to his published articles, thereby disregarding the many necessary preliminary stages before an article is published (identification of issues, cross-checks, documentation, editing, and so forth), whether that article is ultimately published or not.

73 In the third place, he submits that the interpretation of Article 21 of the Market Abuse Regulation adopted in the contested decision amounts to a denial of the existence of the preferential rules afforded to journalists by way of derogation, by applying only the rules of ordinary law laid down in Article 10 of that regulation. He explains that Article 10 of the Regulation lays down a general principle that the disclosure of inside information is lawful where that disclosure occurs '*in the normal course of the exercise of an employment, a profession or duties*' and that that condition has been interpreted strictly by the Court of Justice as requiring not only a close link between the disclosure and the exercise of the profession or duties but also the strict necessity and proportionality of the former in relation to the latter (judgment of 22 November 2005, *Grøngaard and Bang*, C-384/02,

EU:C:2005:708, paragraphs 31 and 34). He infers from that case-law that, in the present case, the interpretation of Article 21 of the Market Abuse Regulation adopted in the contested decision, in so far as it requires an assessment as to whether the disclosure at issue was necessary for the provision of information to the public by the journalist, amounts to an application of the rules of general law rather than of the specific and derogatory rules applicable to journalists.

74 Furthermore, Mr A observes that it is common ground that neither he nor any person closely associated with him has made the slightest profit from the alleged communications of information and that he cannot be alleged to have had any intention to mislead the market as regards the supply of, demand for, or price of the shares concerned. He concludes from this fact that the situation in the present dispute is not covered by the exceptions to the specific rules applicable to journalists, as contained in Article 21 of the Market Abuse Regulation.

75 He also observes that those specific rules require that the infringements at issue be examined in the light of the rules and guarantees afforded by the freedom of the press and of the English law applicable to journalists. He claims that he cannot be accused of having breached the rules governing the profession of journalist, since Article 13 of the Code of Practice of the Independent Press Standards Organisation [1] (which is the independent press regulator in the United Kingdom and of which the *Daily Mail* was a member at the time of the facts; 'the IPSO'), upon which the AMF relies, simply prohibits a journalist from passing on financial information received by him in advance of its publication, and does not govern the choice of the subject of an article, which, by definition, is not information received from a third party but comes from the journalist. Mr A concludes from the foregoing that he should be exonerated.

76 In response, **the AMF** contends that, as part of his gathering of the information in the possession of his sources (Messrs C and B), Mr A was not required to confirm to those persons that he was going to mention the rumours at issue in his articles. Accordingly, the disclosure of that information by him to his sources, that is to say, to third parties and not to the public, even though it occurred in the exercise of his activity as a journalist, was not made '*for the purpose of journalism*' within the meaning of Article 21 of the Market Abuse Regulation, with the result that that article is not applicable in the present case.

77 In the alternative, in the event that such disclosure was made '*for the purpose of journalism*', the AMF argues that Article 21 of the Market Abuse Regulation does not require that the classification of an infringement be made conditional upon the failure to comply with a professional rule; rather, it simply provides for specific procedures for assessing that infringement, with account having to be taken, in accordance with the wording of that article, of '*the rules governing the freedom of the press and freedom of expression in other media and the rules or codes governing the journalist profession*'.

[1] Note from the author of this summary: https://www.ipso.co.uk/editors-code-of-practice/

78 It points out that, in the present case, the IPSO's Code of Practice states, in Article 13 thereof, which is entitled '*Financial journalism*', in the version of that code in force at the time of the facts, that, '*even where the law does not prohibit it, journalists must not use for their own profit financial information they receive in advance of its general publication, nor should they pass such information to others*'. It contends that those provisions, in addition to those in Article 11 of the Charter of Fundamental Rights of the European Union and in Article 10 ECHR, make clear the duty of journalists not to exceed certain limits relating to, inter alia, the need to prevent the disclosure of confidential information. It argues that finding the disclosure of the information at issue to be unlawful does not constitute disproportionate interference with the right to freedom of expression. It concludes from the foregoing that, even applying Article 21 of the Market Abuse Regulation, such dissemination constitutes an infringement of the obligation laid down in Articles 622-1 and 622-2 of the RGAMF.

2. Grounds for the reference regarding the relationship between, and the interpretation of, Articles 10 and 21 of the Market Abuse Regulation

79 As stated above, Mr A is accused, according to the statement of objections sent to him, of having failed to comply with the obligation to refrain from communicating inside information, in breach of Articles 622-1 and 622-2 of the RGAMF.

80 That [first] article transposed the provisions of the first subparagraph of Article 2(1) of Directive 2003/6, which are now contained, essentially, in Article 10(1) of the Market Abuse Regulation.

81 Article 622-2 of the RGAMF transposed the provisions of Article 2(1) and Article 4 of Directive 2003/6, which are now contained in Article 8(4) of the Market Abuse Regulation.

82 The unlawful disclosure of inside information, within the meaning of Article 10(1), cited above, is prohibited by Article 14(c) of the Market Abuse Regulation, which provides: '*A person shall not ... unlawfully disclose inside information*'.

83 It is common ground that Article 21 of the Market Abuse Regulation introduces specific rules intended to reconcile the tackling of market abuse with the requirements arising from press freedom.

84 In the present case, it is also common ground that Mr A was a journalist at the time of the facts and that the situation at issue is not covered by the exceptions laid down in Article 21(a) and (b) of the Market Abuse Regulation.

85 Indeed, it is not established or even alleged that:

– Mr A or persons closely associated with him derived, directly or indirectly, an advantage or profits from the disclosure in question (situation covered by Article 21(a));

– Mr A intended, by that disclosure, to mislead the market as to the supply of, demand for, or price of financial instruments (situation covered by Article 21(b)).

86 It follows that, on the assumption that the information at issue was disclosed '*for the purpose of journalism*', Article 21 of the Market Abuse Regulation is liable to be applicable in the present case.

87 The Court of Appeal, Paris, is unsure, in the first place, as to the interpretation that should be given to the concept of disclosure '*for the purpose of journalism*' within the meaning of that article. More specifically, it is uncertain whether the disclosure by a journalist, to one of his usual sources, of information relating to the forthcoming publication of an article authored by him relaying a market rumour can be made '*for the purpose of journalism*' within the meaning of Article 21 of the Market Abuse Regulation.

88 In its judgment of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia* (C-73/07, EU:C:2008:727, cited above, paragraphs 56 and 61), the Court of Justice clarified the meaning of the similar form of words ('*solely for journalistic purposes*') contained in Article 9 of Directive 95/46. It held that activities that have as their sole purpose the disclosure to the public of information, opinions or ideas must be regarded as activities carried out '*solely for journalistic purposes*'. That definition was reproduced in the judgment of 14 February 2019, *Buivids* (C-345/17, EU:C:2019:122, cited above, paragraph 53).

89 In the judgments in *Satakunnan Markkinapörssi and Satamedia* (paragraphs 52 to 56) and in *Buivids* (paragraphs 50, 51, 63 and 64), cited above, the Court of Justice, which took as a starting point the fact that Article 9 of Directive 95/46 seeks to reconcile two fundamental rights, namely, on the one hand, the right to privacy and, on the other hand, the freedom of expression, found that, in order to take account of the importance of the freedom of expression in every democratic society, it is necessary to give a broad interpretation to the related concepts, including the concept of journalism, whilst explaining that, in order to achieve a proper balance between those two fundamental rights, the protection of the fundamental right to privacy requires that the derogations and limitations in relation to the protection of personal data provided for in, inter alia, Article 9 of Directive 95/46 must apply only in so far as is strictly necessary.

90 Article 21 of the Market Abuse Regulation seeks, in the same way, to reconcile a public-interest objective and a fundamental right, namely, on the one hand, the objective of tackling market abuse in order to protect the integrity of the EU financial markets and to enhance investor confidence in those markets (see, to that effect, with regard to the purpose of Directive 2003/6, inter alia, the

abovementioned judgments of 23 December 2009, *Spector Photo Group and Van Raemdonck*, C-45/08, EU:C:2009:806, paragraph 47, and of 11 March 2015, *Lafonta*, C-628/13, EU:C:2015:162, paragraph 21) and, on the other, the fundamental right of freedom of expression, of which the freedom of the press forms part.

91 In the light of those considerations, the Court of Appeal, Paris, asks whether the purpose of Article 21 of the Market Abuse Regulation and the importance of the freedom of the press in every democratic society require the adoption of a broad interpretation of the concept of disclosure '*for the purpose of journalism*' within the meaning of that article.

92 In that regard, the referring court asks whether the concept of disclosure '*for the purpose of journalism*', within the meaning of Article 21 of the Market Abuse Regulation, has the same scope as the concept of the dissemination of information originating from '*journalists when they act in their professional capacity*', within the meaning of Article 1(2)(c) of Directive 2003/6, notwithstanding the difference in terminology between those two articles.

93 That article had introduced specific rules, which were likewise intended to reconcile the tackling of market abuse with the requirements arising from press freedom, whilst limiting those rules to particular forms of market-manipulating conduct only, namely the dissemination of information which gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumours and false or misleading news.

94 In the light of the common purpose of Article 1(2)(c) of Directive 2003/6 and of Article 21 of the Market Abuse Regulation, the referring court asks whether it is enough for the disclosure of inside information to occur in the exercise of the activity of a journalist in order to find that that disclosure was made '*for the purpose of journalism*' within the meaning of Article 21 of the Market Abuse Regulation.

95 In addition, the Court of Appeal, Paris, asks whether the interpretation of the concept of disclosure '*for the purpose of journalism*' turns on, inter alia, the question whether or not the journalist who authored the article relaying a market rumour was informed of that rumour by one of his usual sources or whether or not the disclosure by that journalist of the information relating to the forthcoming publication of his article was expedient in order to obtain clarifications from that source about the credibility of that rumour.

96 Since the Court of Justice has never had the opportunity to rule on the interpretation of the concept of disclosure '*for the purpose of journalism*' within the meaning of Article 21 of the Market Abuse Regulation, a question should be referred to it for a preliminary ruling on this point.

97 In the second place, the referring court is unsure as to the relationship between Articles 21 and 10(1) of the Market Abuse Regulation.

98 It is clear from the wording of Article 21 of the Market Abuse Regulation that the special rules which that article lays down are laid down '*for the purposes of Article 10*' of that regulation. That express reference to Article 10 suggests that Article 21 is intended not to derogate from that first article, as Mr A alleges, but to clarify the criteria for assessment of the lawful or unlawful nature of the disclosure of inside information '*for the purpose of journalism*', in the context of the general rules defined in Article 10, which, for its part, applies regardless of the purpose of the disclosure.

99 However, that interpretation is not obvious and the Court of Justice has never had the opportunity to rule on the relationship between those two provisions.

100 A question must therefore be referred to it for a preliminary ruling on this point.

101 In the third place, assuming that Article 21 does not derogate from Article 10 of the Market Abuse Regulation, such that the latter is in any event applicable to the dispute, the Court of Appeal, Paris, expresses uncertainty anent the correct interpretation of that provision.

102 Although the Court of Justice has not yet interpreted that article, it has interpreted Article 3 of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, which is now repealed. That article, which was reproduced almost identically in Article 3 of Directive 2003/6, was in turn reproduced almost identically in Article 10 of the Market Abuse Regulation, in that it lays down a principle prohibiting the disclosure of inside information to a third party whilst pairing that principle with an exception where such disclosure occurs '*in the normal course of the exercise of [an] employment, profession or duties*'.

103 By its judgment of 22 November 2005, *Grøngaard and Bang* (C-384/02, EU:C:2005:708, cited above, paragraphs 31 and 34), the Court of Justice, in interpreting that exception strictly, explained that the application of that exception requires a close link between, on the one hand, the disclosure of the inside information at issue and, on the other hand, the exercise of the employment, profession or duties of the person making that disclosure, which means that such disclosure is justified only if it is strictly necessary for the exercise of that employment or profession or those functions and if it complies with the principle of proportionality. In that same judgment (paragraphs 39 and 40), the Court of Justice also explained that that exception must be appraised taking into account the particular features of the applicable national law and that, in the absence of harmonisation as to what comes within the normal ambit of the exercise of an employment, profession or duties, that appraisal depends to a large extent on the rules governing those questions in the various national legal systems. The fact that the disclosure at issue is allowed by the applicable national legal system does not, however, provide exemption from the obligation to satisfy the conditions of necessity and proportionality set out above.

104 Article 21 of the Market Abuse Regulation, the provisions of which are laid down '*for the purposes of Article 10*', appears to come under that approach of an assessment that turns, to a large extent, on the rules applicable in the Member States, rules which are intended to determine what comes within the normal course of the exercise of an employment, profession or duties. By referring to the '*rules governing the freedom of the press*' and to the '*rules or codes governing the journalist profession*', Article 21 thus appears to clarify or refine, in particular in the case of journalists, the criteria of assessment formulated by the Court of Justice in the judgment in *Grøngaard and Bang*, cited above, to establish whether the communication of inside information to a third party can come under the exception laid down in Article 3 of Directive 89/592 (and essentially reproduced in Article 3 of Directive 2003/6 and then in Article 10 of the Market Abuse Regulation).

105 It would be helpful if the Court of Justice could clarify whether the interpretation of Article 3 of Directive 89/592 adopted in its judgment in *Grøngaard and Bang*, cited above, must be transposed to the interpretation of Article 10 of the Market Abuse Regulation, such that the disclosure of inside information can take place '*in the normal course of the exercise of the profession*' of journalist only if it is strictly necessary for the exercise of that profession and complies with the principle of proportionality.

106 Such clarification would be useful in the present case because, contrary to what the AMF suggests, there can be no doubt that, by disclosing the information at issue, Mr A did not infringe Article 13 of the IPSO.

107 That article, which is entitled '*Financial journalism*', in the version thereof in force at the time of the facts, states:

> '*Even where the law does not prohibit it, journalists must not use for their own profit financial information they receive in advance of its general publication, nor should they pass such information to others.*'

108 As Mr A rightly explains, that article merely prohibits financial journalists from passing on financial information received by them in advance of its publication, and does not govern the choice of the subject of an article authored by a journalist, which, by definition, does not constitute information received from a third party but originates from the journalist himself. The same is thus true of information relating to the forthcoming publication of an article authored by him on that subject.

109 In addition, it has not been demonstrated that Mr A exceeded the limits of the freedom of the press, as guaranteed by Article 10 ECHR and Article 11 of the Charter, by disclosing the information at issue to Messrs B and C.

110 Since the Court of Justice has not yet had the opportunity to give a ruling on the interpretation of Article 10 of the Market Abuse Regulation, a question must be put to it in that regard.