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Human Rights in the context of Financial Market Abuse

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Abstract: *In this article, the author reviews the European Union law regarding market abuse from a human rights perspective. Setting the foundation for the discussion from a historical perspective on the different legislative approaches on the issue of market abuse, the article continues with the ECHR's and CJEU's relevant case-law on the subject. Mainly, the right to a fair trial and the ne bis in idem rule are the fundamental rights that should be looked at closely when placing the market abuse regulations under scrutiny. Certain irregularities of the legislation are outlined. Also, the article tries to point out on which aspects improvements should be pursued.*

Key words: *human rights, market abuse, fair trial, ne bis in idem, administrative authority, insider dealing, market manipulation.*

Drepturile omului în contextul abuzului de piață financiară

Rezumat: *În acest articol autorul analizează dreptul Uniunii Europene în materia abuzului de piață financiară din perspectiva drepturilor omului. Stabilind bazele studiului pe o abordare din punct de vedere istoric a diferitelor reglementări în materia abuzului de piață financiară, articolul continuă cu analiza jurisprudenței relevante a Curții Europene a Drepturilor Omului și a Curții de Justiție a Uniunii Europene în domeniu. În principal, dreptul la un proces echitabil și principiul ne bis in idem sunt drepturile fundamentale care trebuie luate în considerare în demersul de analiză a reglementărilor în materia abuzului de piață financiară. Articolul scoate în evidență anumite neregularități ale legislației din acest punct de vedere. De asemenea, autorul încearcă să indice acele aspecte în legătură cu care sunt necesare îmbunătățiri.*

Cuvinte cheie: *drepturile omului, abuz de piață, proces echitabil, ne bis in idem, autoritate administrativă, utilizare abuzivă a informațiilor confidențiale, manipularea pieței.*

I. INTRODUCTION

At first glance, the connection between financial markets and the field of human rights may not seem so obvious. On the contrary, one may ask whether fundamental rights that are prescribed for in the European Convention on Human Rights (hereinafter "the Convention") or in the Charter of Fundamental Rights of the European Union (hereinafter "the Charter") are actually applicable on matters regarding activity on the financial markets.

As already pointed in the title of this article, the author will focus on what legislation, case-law and doctrine conceived under the term "market abuse". Particularly, this article will focus on the relation between human rights and conducts that are categorized as market abuses and may be deemed as having a criminal nature.

The analysis that will follow is not limited from a territorial point of view to the legislation of certain domestic systems. On the contrary, we will pursue an approach that considers common views of legal systems that belong to the European Union. Helpful to this end is the fact that regulations against market abuse practices are already implemented at a European level. As we will note in the second chapter of this article, current national provisions against market abuses are based on Regulations and Directives of the European Union. However, such legislation must be placed under scrutiny from a human rights perspective. As such, after a historical overview of said law, in the third chapter we will focus on the European Court of Human Rights' (hereinafter "the ECHR") takes on investigating, prosecuting and punishing conducts that constitute market abuses. Potential limitations of judicial practices that go against such abuse were also noted in the case-law of the Court of Justice of the European Union (hereinafter "the CJEU"). This court's practice on the matter at hand will be reviewed in the fourth chapter.

Based on the guidelines extracted from case-law, but also adding supplementary arguments, the fifth chapter will emphasize potential irregularities of the law on market abuse from a human rights perspective. Finally, we will try to draw conclusions and anticipate future developments that should better accommodate fundamental rights and the need to prevent and deter abusive practices on the financial markets.

II. A HISTORICAL OVERVIEW ON PROVISIONS REGARDING MARKET ABUSE AT THE EUROPEAN LEVEL

European Union rules regarding market abuse practices have a rather rich history. The first important act is Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing[1]. At that point, the need for harmonization between national legislations was stringent. One of the most important recitals of Council Directive 89/592/EEC takes into account that "*in some Member States there are no rules or regulations prohibiting insider dealing*" and "*the rules or regulations that do exist differ considerably from one Member State to another*". Consequently, art. 2 of Council Directive 89/592/EEC provides that "*each Member State shall prohibit any person who:*

by virtue of his membership of the administrative, management or supervisory bodies of the issuer,

- *by virtue of his holding in the capital of the issuer, or*

[1] OJ L 334, 18.11.1989.

- *because he has access to such information by virtue of the exercise of his employment, profession or duties,*

possesses inside information from taking advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer or issuers to which that information relates". On a more practical note, the same Directive, in Article 8 para. 1, states that "*Each Member State shall designate the administrative authority or authorities competent, if necessary in collaboration with other authorities to ensure that the provisions adopted pursuant to this Directive are applied*". Also, Article 8 para. 2 asks for the Member States to give the competent authorities "*all supervisory and investigatory powers that are necessary for the exercise of their functions, where appropriate in collaboration with other authorities*".

The provisions of Council Directive 89/592/EEC were an important and necessary first step in drafting European Union law regarding market abuse. However, one may note certain deficiencies at these early stages. *Exempli gratia*, the Directive focused only on insider dealing[2] and its wording is a rather general one, without detailed obligations directed towards the Member States.

As years passed and activity on financial markets rose to higher levels, the need for improved legislation became imperative. The 11 May 1999 Communication from the Commission of the European Communities, entitled "Implementing the framework for financial markets: action plan", proposes as a main goal the drafting of a new directive that should address also market manipulation.

Such requests were answered in 2003 when Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)[3] was passed. This new directive was a much more comprehensive one when compared with previous legislation. Recital 13 reads: "*Given the changes in financial markets and in Community legislation since the adoption of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, that directive should now be replaced, to ensure consistency with legislation against market manipulation. A new Directive is also needed to avoid loopholes in Community legislation which could be used for wrongful conduct and which would undermine public confidence and therefore prejudice the smooth functioning of the markets*". For brevity's sake, we will not provide full quotations of the definitions that are provided in Directive 2003/6/EC regarding insider information, insider dealing and market manipulation. It is not this article's goal to focus on dissecting the elements of these unlawful practices. Of course, we will only point that extensive regulations on these matters are to be found in Articles 1-9[4].

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[2] Disregarding, for example, market manipulation.

[3] OJ L 96, 12.4.2003.

[4] Given that a shorter definition of insider dealing has been previously quoted from Council Directive 89/592/EEC, we shall only rephrase the extensive definition of market manipulation, given that this conduct has not been addressed by the previous Directive. Market manipulation refers to transactions or orders to trade which may give false or misleading signals as to the supply, demand for or price of a financial instrument. It also refers to the act of securing the price of one or several financial instruments at an abnormal or artificial level. Transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance also fall within the market manipulation boundaries. Finally, it refers to the dissemination of information through any means which gives false or misleading signals as to financial instruments.

However, it is noteworthy that Directive 2003/6/EC provided for detailed obligations of Member States on empowering administrative authorities which should be competent to ensure that the provisions of the Directive are applied[5].

After only 11 years, the Union rules on safeguarding market integrity and investor protection were again modernized and strengthened. Directive 2014/57/EU of the European Parliament and of the Council on criminal sanctions for market abuse (market abuse directive)[6] was adopted on 16 April 2014. Also, 2014 marks the entry into force of Regulation (EU) no. 596/2014 of the European Parliament and of the Council on market abuse (market abuse regulation)[7]. As Article 1 of Regulation no. 596/2014 states, its purpose is to establish "*a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation (market abuse) as well as measures to prevent market abuse to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets*". The Regulation follows on the steps of Directive 2003/6/EC and provides even more extensive definitions of the unlawful conducts on financial markets. It also provides for even more powers and duties of the relevant administrative authorities of each Member State and of the European Securities and Markets Authority (ESMA). An important addition is the fact that the Regulation, in Article 30, also provides for a list of certain infringements that should be appropriately sanctioned and for a list of minimum administrative measures that should be imposed in the event of said infringements[8]. Notwithstanding its thoroughly detailed provisions, given its nature, the Regulation still falls short of referring to the potential criminal nature of the market abuse conducts and to the potential measures to be taken from a criminal law perspective. But this is the point where the new Directive comes into play.

Directive 2014/57/EU was adopted under Article 83 para. 2 of the Treaty on the Functioning of the European Union, according to which "*directives may establish minimum rules with regard to the definition of criminal offences and sanctions*", if "*the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures*".

The Directive ensures that the most serious offences against the Regulation are criminalised and it introduces minimum rules for criminal sanctions with regard to insider dealing, unlawful disclosure of inside information and market manipulation.

III. ECHR'S VIEW ON THE APPLICATION OF HUMAN RIGHTS IN MARKET ABUSE CASES AS PER THE GRANDE STEVENS JUDGEMENT

Cases originating in market abuse allegations are not numerous in the ECHR's jurisprudence. However, one certain judgement made headlines when the Court assessed on

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[5] For a detailed analysis on the provisions of Directive 2003/6/EC see *E. Avgouleas*, The Mechanics and Regulation of Market Abuse. A Legal and Economic Analysis, Oxford University Press, 2005, p. 250-294.

[6] OJ L 173, 12.6.2014.

[7] OJ L 173, 12.6.2014.

[8] Interestingly, art. 30 para. 2 points (i) and (j) also imposes that Member States provide for maximum administrative pecuniary sanctions of at least the amounts set by the Regulation at the European Union level.

the application of art. 6 and art. 4 of Protocol no. 7 in a case concerning accusations of market manipulation. It is the judgement in the case of Grande Stevens v. Italy[9].

The facts that lead to the ECHR's judgement are rather complex. For the purposes of this article, we will try to present them in a shorter form. In 2002, Fiat, the Italian car manufacturer, signed a financing agreement with eight banks. The contract stipulated that, should Fiat fail to reimburse the loan by September 2005, the banks could offset their claim by subscribing to an increase in the company's capital. The banks would have obtained 28% of Fiat's share capital, while the holdings of IFIL Investments, the controlling shareholder of Fiat, would have decreased by approximately 7%. In the spring of 2005, directors of Fiat started discussing ways to ensure that IFIL remained the controlling shareholder. To this end they contacted a lawyer specializing in company swap, Mr. Grande Stevens. As a solution, an equity swap agreement with the investment bank Merrill Lynch was identified. According to the contract, the bank could have been required to pay a certain sum to IFIL. It was later modified to provide that the bank, instead of a sum of money, would have to deliver Fiat shares. As such, IFIL's stake percentage would remain at the same levels.

In the summer of 2005, the market price of Fiat shares increased. On 23 August 2005, CONSOB (Commissione Nazionale per le Societa e la Borsa – the authority tasked with protecting investors and ensuring the transparency and development of the stock markets) asked IFIL to issue a press release providing information on any initiative taken in the light of the forthcoming expiry of the financing agreement with the eight banks and any new event that might explain the market fluctuation in Fiat shares. The press release, which was confirmed by Mr. Grande Stevens, merely indicated that IFIL intended to remain in control of Fiat, but it did not provide any information regarding the renegotiation of the equity swap contract with Merrill Lynch.

On 20 September 2005, Fiat increased its share capital. The new shares were acquired by the eight banks in compensation for the sums owed to them. On the same date the equity swap contract took effect. As a consequence, IFIL continued to hold the same percentage of shares, maintaining its position as controlling shareholder.

In February 2006 the Insider Trading Office of CONSOB accused the applicants of conducts amounting to market manipulation. The essence of the IT Office's claims was that before the press release of 24 August 2005, the agreement to amend the equity swap has already been concluded or was in the process of being concluded. The omission to include such relevant information in the press release amounts to market manipulation. The IT Office submitted a report with the CONSOB's Administrative Sanctions Directorate. This report was then communicated to the applicants inviting them to submit their defence. After a supplementary note of the IT Office was also submitted to the Directorate, the applicants were again invited to present their arguments in writing.

However, in the end, the Directorate presented its final report to the Commission, the body responsible for deciding on possible penalties, without communicating said report to the applicants. By a resolution of 9 February 2007, the CONSOB imposed administrative fines on three natural persons amounting to a total of EUR 8,500,000 and on two legal persons amounting to a total of EUR 7,500,000. Also, three individuals (including Mr. Grande Stevens) were temporarily banned from administering, managing or supervising listed companies.

[9] Judgement of 4 March 2014 in Application no. 18640/10.

The applicants appealed this decision with the Turin Court of Appeal. The Court upheld CONSOB's decision on its merits, but it reduced the administrative fines in respect of certain applicants.

One of the arguments presented by the applicants with the Turin Court of Appeal concerns the fact that according to Italian legislation, market manipulation can be subject to both administrative (art. 187-ter of the Testo Unico della Finanza) and criminal sanctions (art. 185 of the Testo Unico della Finanza). The issue was not only a theoretical one, but rather a practical one since CONSOB not only imposed administrative fines, but it also reported the case to the prosecuting authorities, alleging that the criminal offence described in art. 185 had been committed. The Turin Court of Appeal dismissed this argument based on a rationale of the Italian Constitutional Court which previously has indicated that "*it was open to the legislature to punish illegal conduct both by a pecuniary administrative sanction and by criminal penalties*". In addition, the Court of Appeal based its decision on art. 14 of Directive 2003/6/EC which invited the Member States of the European Union to apply administrative sanctions against persons responsible for market manipulation, but it also contained the phrase "*without prejudice to the right of Member States to impose criminal sanctions*".

In the criminal proceedings, even though the first court acquitted the defendants, the appeal court quashed this decision and convicted Mr. Grande Stevens and one other individual on the offence of market manipulation provided for in art. 185 of the Testo Unico della Finanza).

Mr. Grande Stevens lodged an application with the ECHR complaining that the Italian authorities violated art. 6 para. 1 in regard to the administrative fines imposed on him and art. 4 of Protocol no. 7 in regard to the duality of proceedings concerning the same facts.

On the applicability of art. 6 of the Convention in its criminal head, the Court first assessed whether there exists a "criminal charge" in the proceedings concerning CONSOB and the fines imposed by this administrative body. The ECHR applied the well-established Engel criteria[10] having regard to three factors: the legal classification of the measure in question in national law, the very nature of the measure and the nature and degree of severity of the penalty. It determined that, irrespective of the legal classification as non-criminal of the measure in Italian law, the other two factors are satisfactory enough to conclude that the penalties in question were criminal in nature.

Regarding merits on whether the proceedings before the CONSOB were fair, the Court found certain irregularities:

- the report containing the Directorate's conclusions was not communicated to the applicants, who were unable to defend themselves in relation to the document which was used as the basis for the Commission's decision;
- the applicants did not have an opportunity to question or have questioned those persons who may have been heard by the IT Office;
- the applicants were unable to take part in the only meeting held by the Commission, to which they were not invited;
- the IT Office, the Directorate and the Commission are branches of the same administrative body whereas in criminal matters such a combination of functions is not compatible with the requirements of impartiality set out in art. 6 para. 1 of the Convention.

[10] See Engel and others v. the Netherlands, 8 June 1976.

However, these were not the grounds on which the Court found that art. 6 of the Convention was violated. It noted that, indeed, the proceedings in front of CONSOB did not follow the rules set out in art. 6 but the Court also stated that such findings are not sufficient to warrant the conclusion that there has been an actual violation of art. 6 of the Convention. The key element that must be placed under scrutiny in each case is whether the person concerned had the opportunity to challenge de decision made by a body such as CONSOB before a tribunal which offers the guarantees of art. 6.

The Court found that the independence and impartiality of the Turin Court of Appeal is not debatable. Also, it found that its jurisdiction was not confined to reviewing the case solely on points of law. However, the ECHR noted that the judgements delivered by the court of appeal indicate that it met in private or that the parties had been summoned to deliberations held in private. As such, the only ground on which the Court held that there has been a violation of art. 6 of the Convention was that the applicants did not benefit from a public hearing before the Turin Court of Appeal[11].

Regarding the applicability and violation of art. 4 of Protocol no. 7, the Court's assessment is much more concise. If finds that the proceedings before CONSOB and before criminal judicial bodies concerned the same conduct by the same persons on the same date. However, one particular paragraph from the Court's judgement should be emphasized: "*Moreover, in so far as the Government submit that European Union law has explicitly authorized the use of a double penalty (administrative and criminal) in the context of combatting unlawful conduct on the financial markets, the Court, while specifying that its task is not to interpret the case-law of the ECJ, notes that in its judgement of 23 December 2009 in the case of Spector Photo Group, the ECJ indicated that Article 14 of Directive no. 2003/6 does not oblige the Member States to provide for criminal sanctions against authors of insider dealing, but merely states that those States are required to ensure that administrative sanctions are imposed against the persons responsible where there has been a failure to comply with the provisions adopted in implementation of that directive. It also drew the States' attention to the fact that such administrative sanctions may, for the purposes of the application of the Convention, be qualified as criminal sanctions. Further, in its Aklagaren v. Hans Akerberg Fransson judgement, on the subject of value-added tax, the ECJ stated that, under the* ne bis in idem *principle, a State can only impose a double penalty (fiscal and criminal) in respect of the same facts if the first penalty is not criminal in nature*"[12].

IV. CJEU'S VIEW ON THE COMPATIBILITY OF MARKET ABUSE PROVISIONS WITH THE PROTECTION OF HUMAN RIGHTS

Two judgements of the CJEU are particularly important in the matter of market abuse provisions as they should be interpreted considering human rights regulations. Chronologically, the first one is the judgement mentioned by the ECHR in the previously quoted paragraph from the Grande Stevens judgement, namely the Judgement of 23 December 2009 in the Case C-45/08 (hereinafter "Spector Photo Group judgement"). The

[11] For a comprehensive study on the Grande Stevens judgement see *M. Ventoruzzo*, Do Market Abuse Rules Violate Human Rights? The Grande Stevens v. Italy Case, ECGI, Law Working Paper no. 269/2014, October 2014

[12] Grande Stevens v. Italy, Judgement of 4 March 2014, para. 229.

second one is the Judgement of 2 February 2021 in the Case C-481/19 (hereinafter "Consob judgement"). Both judgements were passed in preliminary ruling proceedings.

In the Spector Photo Group case, the national court referred the following questions to the Court for a preliminary ruling:

1. Do the provisions of [Directive 2003/6], and especially Article 2 thereof, call for full harmonisation, with the exception of those provisions which explicitly permit the Member States to interpret measures as they wish, or do they, in their entirety, concern a minimum of harmonisation?
2. Should Article 2(1) of [Directive 2003/6] be interpreted as meaning that the mere fact that a person as referred to in [the first paragraph of] Article 2(1) of that directive [who] possesses inside information and acquires or disposes of, or tries to acquire or dispose of, for his own account or for the account of a third party, financial instruments to which that inside information relates, signifies in itself that he makes use of [that] inside information?
3. If the answer to the second question is in the negative, must it then be assumed that application of Article 2 of [Directive 2003/6] presupposes that a deliberate decision has been taken to use inside information? If such a decision may also be unwritten, is it then required that the decision to use inside information be evident from circumstances susceptible to no other interpretation, or is it sufficient that those circumstances could be so interpreted?
4. If in the determination of the proportionate nature of an administrative sanction, as referred to in Article 14 of [Directive 2003/6], account must be taken of the gains realised, should it be assumed that the publication of information to be designated as inside information has in fact had a significant effect on the price of the financial instrument? If so, what minimum level of price movement must have occurred for it to be possible to regard it as significant?
5. Whether or not the price movement after the publication of information must be significant, what period should be taken into account after the publication of the information for the determination of the scale of the price movement, and what date should be taken as the basis for gauging the financial advantage gained in the determination of the appropriate sanction?
6. In the light of the determination of the proportionate nature of the sanction, should Article 14 of [Directive 2003/6] be interpreted as meaning that, if a Member State has introduced the option of a criminal sanction, combined with an administrative sanction, account must be taken of the option and level of a criminal financial penalty in the consideration of its proportionality?'

As it may be noted, the questions concerned a series of issues, most of them with the aim of clarifying the elements of the offences as they were prescribed for in the Directive. As far as it concerns the scope of the present article, question no. 6 is the most relevant one. In order to clarify the meaning of the question posed, contents of Article 14 para. 1 of Directive 2003/6/EC should be quoted. It states: "*Without prejudice to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive*".

In response to this last question, the judgement reads as follows: "*Article 14(1) of Directive 2003/6 must be interpreted as meaning that, if, in addition to the administrative sanctions laid down in that provision, a Member State has introduced the possibility of imposing a criminal financial sanction, it is not necessary, for the purposes of assessing whether the administrative sanction is effective, proportionate and dissuasive, to take account of the possibility and/or the level of a criminal sanction which may subsequently be imposed*".

More recently, the Consob judgement[13] delivered a more detailed assessment on the relation between market abuse provisions and human rights. The facts from which the dispute originated are the following. By decision of 2 May 2012, Consob imposed on DB two financial penalties of EUR 200 000 and EUR 100 000 respectively, for an administrative offence of insider trading. It also imposed a financial penalty of EUR 50 000 for another administrative offence, on the ground that the person concerned, after applying on several occasions for postponement of the date of the hearing to which he had been summoned in his capacity as a person aware of the facts, had declined to answer the questions put to him when he appeared at that hearing. DB brought an appeal against those penalties before the Rome Court of Appeal, which dismissed them. He brought an appeal on a point of law against that court's decision before the Supreme Court of Cassation. By order of 16 February 2018, that court referred an interlocutory question of constitutionality to the Constitutional Court.

That question concerns the Italian law provision that penalises anyone who fails to comply with Consob's requests in a timely manner or delays the performance of that body's supervisory functions, including with regard to the person in respect of whom Consob, in the performance of those duties, alleges an offence of insider dealing. The Constitutional Court observed that this question was raised by reference to a number of rights and principles, certain of which are established in national law, namely the rights of the defence and the principle of equality of the parties in the proceedings, provided for by the Italian Constitution, and others in international and EU law. In that court's view, the right to remain silent and to avoid self-incrimination, based on the provisions of the Constitution, of EU law and of international law relied on, cannot justify a refusal by the person concerned to appear at the hearing ordered by Consob nor delay on the part of that person in appearing at that hearing, provided that the latter's right not to answer the questions put to him or her at that hearing is guaranteed.

According to the referring court, since the law provision was introduced into the Italian legal system in performance of a specific obligation under Article 14 para. 3 of Directive 2003/6 and at the time of the referral it implements Article 30 para. 1 point b) of Regulation no 596/2014, a declaration of unconstitutionality would likely conflict with EU law, if those provisions of secondary EU law were to be understood as requiring Member States to penalise the silence, at a hearing before the competent authority, of a person suspected of insider dealing.

Under these circumstances, the Constitutional Court decided to refer the following questions to the CJEU for a preliminary ruling:

[13] For a detailed analysis of the Consob judgement, see *L. Lonardo*, The Veiled Irreverence of the Italian Constitutional Court and the Contours of the Right to Silence for Natural Persons in Administrative Proceedings: Judgement of the Court (Grand Chamber) 2 February 2021, Case C-481/19, DB v Consob, European Constitutional Law Review, volume 17, issue 4, 2021, p. 707-723.

1. Are Article 14(3) of Directive 2003/6, in so far as it continues to apply *ratione temporis*, and Article 30(1)(b) of Regulation No 596/2014 to be interpreted as permitting Member States to refrain from penalising individuals who refuse to answer questions put to them by the competent authorities and which might establish their liability for an offence that is punishable by administrative sanctions of a "punitive" nature?
2. If the answer to the first question is in the negative, are Article 14(3) of Directive 2003/6, in so far as it continues to apply *ratione temporis*, and Article 30(1)(b) of Regulation No 596/2014 compatible with Articles 47 and 48 of the [Charter] – including in the light of the case-law of the European Court of Human Rights on Article 6 of the 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?

The CJEU preliminary ruling noted that "*whilst the ECHR does not constitute, for as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into the EU legal order, it must nevertheless be recalled that, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of EU law. Furthermore, Article 52(3) of the Charter, which provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR, is intended to ensure the necessary consistency between those respective rights without adversely affecting the autonomy of EU law and that of the Court of Justice*". The Court went on stating that "*since 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 is infringed, inter alia, where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify*".

As such, the judgement notes that "*the safeguards afforded by the second paragraph of Article 47 and Article 48 of the Charter, with which EU institutions as well as Member States must comply when they implement EU law, include, inter alia, the right to silence of natural persons who are 'charged' within the meaning of the second of those provisions. That right precludes, inter alia, penalties being imposed on such persons for refusing to provide the competent authority under Directive 2003/6 or Regulation No 596/2014 with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability*".

Under these circumstances, one may presume that the sole conclusion should be that Article 14 para. 3 of Directive 2003/6/EC and Article 30 para. 1 point b) of Regulation no. 596/2014 are inconsistent with Articles 47 and 48 of the Charter. However, in a rather confusing argumentation, the CJEU "saved" the applicability of said provisions, drawing an interpretation which may seem consistent with the provisions of the Charter. The judgement states the following: "*it should be noted at the outset that, in accordance with a general principle of interpretation, the wording of secondary EU legislation must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter. Thus, if such wording is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with primary law rather than to the interpretation which leads to its*

being incompatible with primary law (…). As regards, first of all, Article 14(3) of Directive 2003/6, that provision provides that Member States are to determine the sanctions to be applied for failure to cooperate in an investigation covered by Article 12 of that directive. The latter states that, in that context, the competent authority must be able to demand information from any person and, if necessary, to summon and hear any such person. While the wording of those two provisions does not explicitly rule out the possibility that the Member States' obligation to determine the penalties to be applied in such a case also applies to the situation where a person so heard refuses to provide the said authority with answers that are capable of establishing that person's liability for an offence that is punishable by administrative sanctions of a criminal nature, or that person's criminal liability, neither is there anything in the wording of Article 14(3) of Directive 2003/6 that precludes an interpretation of that provision to the effect that that obligation does not apply in such a case.

As regards, next, Article 30(1)(b) of Regulation No 596/2014, that provision requires that administrative sanctions be determined for failure to cooperate or to comply with an investigation, with inspection or with a request as referred to in Article 23(2) of that regulation, subparagraph (b) of which specifies that this includes questioning a person with a view to obtaining information. It must nevertheless be observed that, although Article 30(1) of Regulation No 596/2014 requires Member States to ensure that the competent authorities have the power to take appropriate sanctions and other measures, inter alia in the situations referred to in point (b) of that provision, it does not require those Member States to provide for the application of such sanctions or measures to natural persons who, in an investigation concerning an offence that is punishable by administrative sanctions of a criminal nature, refuse to provide the competent authority with answers which might establish their liability for such an offence, or their criminal liability.

It follows that both Article 14(3) of Directive 2003/6 and Article 30(1)(b) of Regulation No 596/2014 lend themselves to an interpretation which is consistent with Articles 47 and 48 of the Charter, in that they do not require penalties to be imposed on natural persons for refusing to provide the competent authority with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability. Interpreted in this way, the validity of those provisions of secondary EU legislation cannot be undermined, having regard to Articles 47 and 48 of the Charter, on the ground that they do not explicitly rule out the imposition of a penalty for such a refusal".

We opted for a lengthy quotation of the Court's reasoning in order to base our previous characterization of it as being rather confusing. Article 30 para. 1 point b) of Regulation no. 596/2014 clearly states that Member States shall provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures in relation to the failure to cooperate or to comply with an investigation, with an inspection or with a request as referred to in Article 23 para. 2. This provision states that the competent authorities shall have, amongst others, the power to summon and question any person with a view to obtain information (point b). Even though the wording of the Regulation is quite clear, the Consob judgement states that actually it does not require the Member States to provide for the application of sanctions or measures to natural persons who refuse to provide the competent authority with answers which might establish their liability for such an offence, or their criminal liability. This conclusion may only be drawn from the provisions of the Charter which supersede the provisions of the Regulation. However, it is our view that if it weren't for the Charter, the wording of the Regulation would have not permitted such an interpretation.

V. POTENTIAL IRREGULARITIES DERIVED FROM THE EXAMINATION OF EUROPEAN UNION LAW MARKET ABUSE PROVISIONS' COMPLIANCE WITH HUMAN RIGHTS STANDARDS

As it was very well established in the Grande Stevens judgement, there are two issues on which market abuse provisions may collide with human rights standards: the right to a fair trial and the *ne bis in idem* rule. Unfortunately, the legislation is perfectible on these two issues.

Regarding the matter of compliance with the right to a fair trial, inconsistencies may arise either from the EU law level, either from the manner in which his law is implemented on the national level. The latter perspective is notable because even though the current Regulation no. 596/2014 is the most detailed act so far passed at the European level on the subject of market abuse. It still cannot provide for every small procedural step that national administrative authorities will take in order to fulfill their duties. Indeed, it does impose that States empower these authorities with certain rights and it does provide for infringements and sanctions, but it cannot state, for example, on the practical means by which an authority summons persons or by which an authority actually and practically accesses documents and information. These details fall on the shoulders of national legislators.

As seen in the Grande Stevens judgement of the ECHR, administrative investigations may raise many questions on the observance of art. 6 of the Convention. Indeed, the national legislator may feel comfortable shielding under the possibility that any person concerned may have to appeal a decision of the administrative authority before a court. But such shielding may prove ineffective in certain situations.

The European Union level provisions are themselves perfectible from a human rights perspective. First of all, future legislation should avoid imposing sanctions for the failure of the concerned persons to comply with the requests of the administrative authority. Indeed, so far only the issue of questioning investigated persons arose in jurisprudence. However, imposing sanctions for general lack of compliance with requests for information, documents or other kind of data is debatable. Of course, in case of lack of compliance, provisions granting the authority the right to obtain that information or those documents using coercion are necessary and do comply with human rights standards.

Second of all, unfortunately, consecutive rules of the European Union on the matter of market abuse maintained confusing provisions regarding double jeopardy. The CJEU was not yet directly faced with this issue. However, the ECHR did state on the violation of art. 4 of Protocol no. 7 in the Grande Stevens judgement. Since then, legislation has not improved as much as it would have been expected. The risk of double jeopardy still arises from present legislation[14]. Future developments should focus on drawing a clear line between administrative unlawful conduct and criminal conduct, with appropriate sanctions for each kind of illegal activities[15].

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[14] See also *M. Cerizza*, The New Market Abuse Directive, Eucrim, Issue 3/2014 Focus: Threats to the EU's Internal Market, p. 85-89.

[15] See also *F. Stasiak*, "Non bis in idem" et droit pénal boursier, in B. Deffains (eds.), L'analyse économique du droit dans les pays de droit civil, Dalloz, Paris, 2002, p. 342

CONCLUSION

Certainly, financial markets will only develop more and more in the future. One may think that legislation does not keep pace with the speed with which such developments occur. Indeed, unlawful activities in relation with financial markets may benefit from more attention from legal doctrine in the near future.

Any type of new provisions should not ignore its compatibility with human rights standards. The unfortunate consequence of disregarding these standards is that the goal of the legislation, namely to prevent and fight unlawful conduct in financial market, may be compromised. The main actor in securing the compatibility with human rights standards should be the European legislator. However, national legislations should not implement European Union law only by copying it, disregarding the need to complement these provisions with the practical means also established in observance of fundamental rights.