



# HALCYON DAYS FOR THE RIGHT TO SILENCE: AG PIKAMÄE'S OPINION IN CASE *DB v. CONSOB*

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**ABSTRACT:** The case *DB v. Consob* (request lodged on 21 June 2019, case C-481/19), pending before the Court of Justice, deals with preliminary questions referred by the Italian Constitutional Court on the applicability and scope of a natural person's right to remain silent during administrative proceedings which may lead to the imposition of sanctions of a criminal nature. The case at hand concerns proceedings before Consob in the context of an investigation into infringements of insider trading and market manipulation law. This is not the first time the Court has been called upon to rule on proceedings before Consob and their compliance with the right to a fair trial. But this time, another aspect of due process, the right to silence and its corollary privilege against self-incrimination comes to the fore. The AG Pikamäe Opinion's (delivered on 27 October 2020) on added value can be summarised in the following point: The protection of the right to silence of natural persons under Art. 6 European Convention on Human Rights should be extended to their statements on facts that may have *a bearing on the conviction or penalty* imposed on them in administrative criminal proceedings. This *Insight* gives a brief account of the legal and factual background of the case, outlines the key legal considerations of the AG Opinion and proceeds with a critical reflection on some of the issues pointed out in the latter.

**KEYWORDS:** right to remain silent – administrative sanctions of a punitive nature – market abuse – Directive 2003/6/EC – Regulation (EU) No 596/2014 – supervisory authorities' investigative and sanctioning powers.

## I. INTRODUCTION

On 27<sup>th</sup> October 2020, AG Pikamäe delivered to the Court of Justice his Opinion in Grand Chamber case C-481/19, *DB v. Consob*,<sup>1</sup> concerning the applicability and scope of the right

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<sup>1</sup> The Consob (Commissione Nazionale per le Società e la Borsa) is the public authority responsible for regulating the Italian financial markets in conjunction with the Bank of Italy (Banca d' Italia) and member of the ESMA (European Securities and Markets Authority). To its main functions belongs the conduct of investigations with respect to potential infringements of insider dealing and market manipulation law



of a natural person to remain silent in administrative proceedings which may lead to the imposition of criminal sanctions (in short, punitive administrative proceedings).

The whole issue begins with the preliminary questions referred by the Italian Constitutional Court. Those concern *first*, the interpretation and validity of Arts 14, para. 3, of the market abuse Directive 2003/6/EC (MAD I)<sup>2</sup> and 30, para. 1, let. b), of the market abuse Regulation (EU) 596/2014 (MAR)<sup>3</sup> as to whether they lay down an *obligation* or a *broad discretion* to the Member States to criminalise cases of “non-cooperation” with the authorities responsible for market supervision. *Second*, the referring Court asks the Court if these secondary EU law provisions could be *interpreted consistently with the right to remain silent* as founded in Arts 47 and 48 of the Charter of Fundamental Rights of the European Union (Charter) and read in the light of Art. 6 of the European Convention on Human Rights (ECHR), as interpreted by the relevant European Court of Human Rights (ECtHR) case-law. *Third*, what would be in this case the real scope of the individual's right to silence.

The AG concludes that Member States are *not required* under these secondary EU law provisions to punish via sanctions of criminal nature (criminal penalties or punitive administrative sanctions) persons for refusing to answer to the questions of the national supervisory authorities, where such an answer may establish their liability for an administrative offence “punishable” through punitive administrative sanctions. He therefore states that the above-mentioned provisions can only be interpreted in accordance with the right to silence and their validity is out of question. And while being aware of the “delicate legal question” of the application of the right to silence in punitive administrative proceedings and the (highlighted by many) discrepancy between Court's and ECtHR's case-law on the scope of the right, he takes a very clear stance on the issue. The right of a natural person to remain silent should be applied, besides the criminal, also to the punitive administrative proceedings and should be given the same scope, as the one ascribed by the relevant ECtHR's case-law,<sup>4</sup> slightly adapted in wording by the AG in order to fit to punitive administrative proceedings: When it comes to statements on facts that have a bearing on the *conviction or penalty* at the end of those proceedings, the right of a person to remain silent is applicable.<sup>5</sup>

and the imposition of administrative sanctions. The Consob's sanctioning decision can be contested before the competent Court of Appeal.

<sup>2</sup> Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).

<sup>3</sup> Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation).

<sup>4</sup> European Court of Human Rights, judgment of 19 March 2015, nos 7494/11, 7493/11 and 7989/11, *Corbet and Others v. France*, para. 34, where the existence of an infringement of Art. 6 ECHR presupposes that those statements had “a bearing on the *guilty verdict or the penalty*”.

<sup>5</sup> See Opinion of AG Pikamäe delivered on 27 October 2020, case C-481/19, *DB v. Consob*, paras 104 and 118.

This Opinion therefore enjoys significant importance not only because it advocates for a broad protection of the right to silence of individuals in the field of competition law but also because it recalls the homogeneity clause in Art. 52, para. 3, of the Charter notwithstanding the alleged divergence of the jurisprudence of the Court and ECtHR in this field.

## II. LEGAL AND FACTUAL BACKGROUND

### II.1. EUROPEAN AND ITALIAN LEGAL FRAMEWORK

To mention the EU legal framework in a nutshell, the two most important provisions under the scrutiny of the Court are Arts 14, para. 3, of MAD I and 30, para. 1, let. b), of MAR. The common purpose of the two legal instruments is to enhance EU financial markets integrity and efficiency and investors' protection, in an attempt to combat market abuse.<sup>6</sup> In this spirit, the above-mentioned articles, similar in wording to each other, set minimum conditions for Member States to punish market abuse at national level. Member States shall provide under their national legislations for sanctions if the persons fail to cooperate in market abuse investigations by the supervisory authorities. At this point it should be mentioned that MAD I was repealed and replaced by MAR that creates jointly with Directive 2014/57/EU (MAD II)<sup>7</sup> the current EU legal framework for sanctioning market abuse.<sup>8</sup>

Italian law provides for a "dual-track" market abuse sanctioning system of administrative sanctions and criminal penalties.<sup>9</sup> In the case at hand, the relevant national provisions are Art. 187-*bis* of the Italian Consolidated Law on Financial Markets (Testo Unico della Finanza, hereinafter TUF) that provides for the administrative offence of insider dealing and Art. 187-*quinquiesdecies* TUF that ensures Consob's supervisory activities<sup>10</sup> and provides for pecuniary administrative sanctions, in case of a breach of the duty to cooperate with Consob.

### II.2. FACTS OF THE CASE

The starting point of the dispute was Consob's decision to impose several administrative sanctions on Mr DB. Among them were *financial penalties* for the administrative of-

<sup>6</sup> See Recital 2 of both MAD I and MAR.

<sup>7</sup> Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive).

<sup>8</sup> MAR provides for administrative sanctions and MAD II for criminal penalties.

<sup>9</sup> For the compliance of "double-track" enforcement systems with the *ne bis in idem* principle, see G. LASAGNI, S. MIRANDOLA, *The European ne bis in idem at the Crossroads of Administrative and Criminal Law*, in *Eucrim: the European Criminal Law Associations' Forum*, 2019, p. 126 *et seq.*

<sup>10</sup> Art. 187-*quinquiesdecies* TUF in its current version provides for both the Bank of Italy and Consob as jointly competent supervisory authorities.

fence of insider dealing and unlawful disclosure of insider information under Art. 187-*bis* TUF and a 50,000 € *financial penalty* under Art. 187-*quinquiesdecies* TUF for postponing repeatedly the date of the hearing and once attended, for refusing to answer to Consob's questions.<sup>11</sup>

Consequently, Mr DB challenged the legality of the financial penalty under Art. 187-*quinquiesdecies* TUF before the Court of Appeal of Rome requesting it to set aside Consob's decision. After the rejection of his request, he brought an appeal on a point of law before the Italian Supreme Court of Cassation. In this context the latter referred to the Italian Constitutional Court on the emerging constitutional issues.

The Italian Constitutional Court considered that Art. 187-*quinquiesdecies* TUF "drove into" national and EU fundamental rights and principles (defense rights, principle of equality of arms between the parties and right to a fair trial) and it should have therefore to review its constitutionality. But as Art. 187-*quinquiesdecies* TUF constituted in its previous version transposition of MAD I and in its current version application of MAR, a request for a preliminary ruling from the Court was deemed necessary.<sup>12</sup>

### III. KEY LEGAL CONSIDERATIONS OF THE AG OPINION

The AG proposes a reformulation of the preliminary questions and suggests that the Court answer the following: Is the right of a natural person to remain silent applicable to punitive administrative proceedings? Do the EU secondary law provisions on market abuse constitute an obligation or do they leave Member States with a mere discretion to punish such market abuse cases with punitive administrative sanctions? Which is the scope of the right to silence under the Charter?

#### III.1. ON THE APPLICABILITY OF THE RIGHT TO SILENCE IN ADMINISTRATIVE PROCEEDINGS WHICH MAY LEAD TO SANCTIONS OF CRIMINAL NATURE

As a preliminary remark, it should be recalled that the right to silence is not explicitly mentioned anywhere in the Charter or the ECHR.<sup>13</sup> However, under the established ECtHR's case-law, the right to remain silent and its corollary privilege against self-incrimination<sup>14</sup> are "generally recognised international standards which lie at the heart

<sup>11</sup> For the other sanctions (temporary loss of reputation and confiscation), see Opinion of AG Pikamäe, *DB v. Consob*, cit., para. 15.

<sup>12</sup> *Ibid.*, paras 18 and 23.

<sup>13</sup> An explicit legal basis for the right to silence provides however Art. 7 of the Directive (EU) 2016/343 on the Presumption of Innocence.

<sup>14</sup> For the relationship between right to silence and privilege against self-incrimination, see C. THEOPHILOPOULOS, *The So-Called 'Right' to Silence and the 'Privilege' Against Self-Incrimination: A Constitutional Principle in Search of Cogent Reasons*, in *South African Journal on Human Rights*, p. 505 et seq.

of the notion of a fair procedure under Art. 6 [ECHR].<sup>15</sup> Based on the “homogeneity clause” under Art. 52, para. 3, of the Charter and the Explanations on Arts 47, para. 2, and 48, para. 2, of the Charter, the same approach must be followed when it comes to the meaning and scope of the Charter rights that correspond to those guaranteed by the ECHR and the relevant guarantees afforded under Art. 47, para. 2, of the Charter and Art. 6, para. 1, ECHR. The AG consequently advises the Court to consider the ECtHR's jurisprudence on the issue of the application of the right to silence of natural persons in punitive administrative proceedings.

When the ECtHR interprets Art. 6, para. 1, ECHR in its criminal head, includes under the notion “criminal charge” also administrative sanctions, which may be characterised under the *Engel* criteria<sup>16</sup> as “essentially criminal in nature”. Those criteria are applied by the ECtHR for the establishment of the criminal nature of a sanction and include the classification of the offence in domestic law, the true nature of the offence and the degree of severity of the sanction that the person concerned risks incurring. Also the Court of Justice makes use of them, with starting point the *Bonda* case<sup>17</sup> (hereinafter, *Engel/Bonda* criteria).

The AG thus concludes that if administrative proceedings are leading to a sanction which could be characterised under the *Engel/Bonda* criteria as “criminal in nature”, then Art. 6, para. 1, ECHR under its criminal head and therefore the full range of guarantees afforded by the latter, including the right to silence, enjoy *automatic* applicability.<sup>18</sup> At this point, it should be mentioned that the AG does not carry out *de novo* a separate examination of the criminal nature of the current Consob's administrative sanctions according to the *Engel/Bonda* criteria, probably because this legal question has already been answered in the affirmative in previous decisions of both the Court<sup>19</sup> and the ECtHR<sup>20</sup>.

### III.2. ON THE COMPLIANCE OF SECONDARY EU LAW PROVISIONS WITH THE RIGHT TO SILENCE

The second reformulated question can be summarised as follows: Are the relevant provisions of MAD I and MAR imposing an *obligation* on the Member States to punish by administrative sanctions of criminal nature any person who refuses to answer to the ques-

<sup>15</sup> See, *inter alia*, European Court of Human Rights: judgment of 8 February 1996, no. 18731/91, *John Murray v. the United Kingdom* [GC], para. 45; judgment of 10 March 2009, no. 4378/02, *Bykov v. Russia* [GC], para. 92.

<sup>16</sup> European Court of Human Rights, judgment of 8 June 1976, nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, *Engel and Others v. the Netherlands*, paras 82-83.

<sup>17</sup> Court of Justice, judgment of 5 June 2012, case C-489/10, *Bonda*, para. 37.

<sup>18</sup> See Opinion of AG Pikamäe, *DB v. Consob*, cit., para. 59 with reference, *inter alia*, to European Court of Human Rights, judgment of 4 March 2014, nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, *Grande Stevens and Others v. Italy*, para. 101.

<sup>19</sup> Court of Justice: judgment of 20 March 2018, case C-537/16, *Garlsson Real Estate SA*, para. 34; judgment of 20 March 2018, joined cases C-596/16 and C-597/16, *Di Puma and Zecca*, para. 38.

<sup>20</sup> *Grande Stevens et. al. v. Italy*, cit., paras 94-101.

tions of the supervisory authority or are they leaving a *broad discretion* to Member States to decide which kind of sanctions will they impose. Because if secondary EU law obliges Member States to punish by punitive administrative sanctions such a refusal of a person to answer to national supervisory authority's questions, this would violate the right to silence as guaranteed under the Arts 47 and 48 of the Charter. The fundamental rights protection under the Charter is activated when it comes to the imposition of sanctions of criminal nature and secondary EU law should always be interpreted in compliance with the fundamental rights and in the case at hand with the right to silence.

Here it should be mentioned that this issue has already been partially dealt with by the Court in the *Spector Photo Group NV* case, where Art. 14, para.1, of MAD I was interpreted as not imposing any obligation to the Member States to provide for criminal sanctions against authors of insider dealing and merely requiring "effective, proportionate and dissuasive" administrative sanctions and measures.<sup>21</sup>

The AG invokes the *systematic interpretation* and argues in the same way as the Court in the above-mentioned case, that Art. 14 of MAD I is just granting broad discretion to the Member States to decide between a variety of measures in order to "punish" any infringement of market abuse, in a range from criminal sanctions and administrative sanctions of a criminal nature to mere administrative measures. The only obligation to the Member States is to introduce effective, proportionate and dissuasive administrative measures. Concerning the systematic interpretation of MAR, the AG concludes that even if MAR grants a limited discretion to the Member States, as they should provide in their national legislation both administrative measures and administrative sanctions, there is no obligation to do it via punitive administrative sanctions. A *historical interpretation* of both relevant articles of MAD I and MAR leads according to the Opinion to the same conclusions. The EU did not intend to criminalise by means of criminal penalties or punitive administrative sanctions market abuse violations, but merely wanted to create minimum harmonisation standards for a common system of administrative measures and sanctions.

Following a *systematic* and *historical interpretation*, the AG concludes that Arts 14, para. 1, of MAD I and 30, para. 1, let. b), of MAR *do not require* Member States to punish by criminal penalties or punitive administrative sanctions anyone for a breach to cooperate with the supervisory authorities in market abuse investigations and therefore the secondary EU law provisions should be affirmed as consistent with the right to remain silent and their validity according to Arts 47 and 48 of the Charter is confirmed.

<sup>21</sup> Court of Justice, judgment of 23 December 2009, case C-45/08, *Spector Photo Group NV and Chris Van Raemdonck*, para. 42.

### III.3. ON THE SCOPE OF THE RIGHT TO SILENCE UNDER THE CHARTER (ARTS 47 AND 48)

The AG focuses the examination of the scope of the right to silence on one aspect: Are answers to factual questions that may lead to self-incrimination covered by the right to silence? The AG clarifies *first*, why the scope of the right to silence in the present case should not correspond to the narrow one afforded to legal persons by the Court's case-law on anticompetitive conduct and *second*, why the usually broader one of the ECtHR's case-law must be favoured, considering the *Jussila* and *Menarini* cases unfortunate legal precedents.

a) The disqualification of the Court of Justice case-law on the legal persons' right to silence in competition law.

As the AG notes, when it comes to the Court's case-law on the right to silence, its few judgments concern only the field of competition law and only legal persons. In its landmark judgment *Orkem v. Commission*, which was followed by its subsequent jurisprudence,<sup>22</sup> the Court concluded: There was not [yet] a recognised right to silence in the Community legal order, legal persons were obliged to cooperate actively within the Commission's investigations on alleged breaches of competition law and the exercise of the Commission's powers finds its limits in the protection of the defense rights of the undertakings.<sup>23</sup> This latter means briefly: Answers "in fact equivalent" to an admission on the undertaking's part of the existence of an infringement, draw the red line and must be excluded. All other answers to "purely factual" questions and handing over of documents must be permitted, even if those answers may be used at a later stage to establish the liability of the undertakings for a competition law violation.<sup>24</sup> Therefore, it is obvious that, according to the Court, legal persons' right to silence is of limited scope.

Moreover, the Court favours a balance between the right to remain silent and the public interest to detect and prosecute infringements of competition law. Such a "balanced approach" denotes that no absolute right to silence exists<sup>25</sup> and as the Court underlines such a "right to remain absolutely silent" would go beyond the necessary protection of the defense rights and hamper the effectiveness of competition law.<sup>26</sup>

<sup>22</sup> For a case-law selection on the issue, see Opinion of AG Pikamäe, *DB v. Consob*, cit., para. 91 with further references to footnote 53.

<sup>23</sup> Court of Justice, judgment of 18 October 1989, case 374/87, *Orkem v. Commission*, paras 27-28 and 32.

<sup>24</sup> *Ibid.*, paras 34-35.

<sup>25</sup> To the same conclusion European Court of Human Rights: *John Murray v. the United Kingdom* [GC], cit., para. 47; judgment of 13 September 2016, nos 50541/08, 50571/08, 50573/08 and 40351/09, *Ibrahim et. al. v. the United Kingdom* [GC], para. 269.

<sup>26</sup> Court of Justice, judgment of 20 February 2001, case T-112/98, *Mannesmannröhren-Werke AG v. Commission*, para. 66.

The AG concludes that the above-mentioned Court's jurisprudence on the right to silence only refers to the field of competition law, which exclusively concerns legal persons, as those can only be subjected to competition law violations under Arts 101 and 102 TFEU and fines from the Commission. Therefore, a transposition of this case-law to natural persons would have been inconsistent.

b) The qualification of the ECtHR case-law on the natural person's right to silence. The ECtHR has a well-established case-law on the right of the natural persons to remain silent. Another reason why the Court's case-law on legal persons should not be transplanted to natural persons has to do with the very nature and *ratio* of the right to remain silent and its corollary privilege against self-incrimination, as pointed out in the ECtHR's jurisprudence. This right was historically attributed to the accused in order to protect them from the arbitrariness of the prosecuting authorities during the criminal proceedings. No evidence obtained by coercion or oppression in defiance of their will could later be used to establish their guilt.<sup>27</sup> It is a fundamental right inextricably linked to the "respect for human dignity and autonomy".<sup>28</sup> This tight link of the right to silence with the natural persons should not be overlooked, when arguing that the Court's case-law on legal persons can be applied by analogy also to the natural persons.

To delimit the scope of the right to silence and detect any infringement of Art. 6 ECHR, the steps below should be followed by means of a common reading of the AG Opinion and the ECtHR's case-law:

*First*, it should be examined whether there is use of *improper coercion* by the competent authorities. This element is established, *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".<sup>29</sup> Then the nature and degree of the coercion should be examined, which depends on the type and severity of the sanction resulting from a refusal to respond<sup>30</sup> and the existence of any relevant safeguards in the procedure.<sup>31</sup>

*Second*, a differentiation should be made between *admission and other directly self-incriminating statements* that fall within the protection of the right to silence and *prima facie not self-incriminating statements*, where the key role plays the *use* to which any material

<sup>27</sup> European Court of Human Rights, judgment of 17 December 1996, no. 19187/91, *Saunders v. the United Kingdom*, para. 68.

<sup>28</sup> Dissenting opinion of Judge Martens, joined by Judge Kūris, *Saunders v. the United Kingdom*, cit., paras 9-10.

<sup>29</sup> *Ibrahim et. al. v. the United Kingdom*, cit., para. 267. Improper compulsion includes also situations such as physical or psychological pressure to obtain real evidence or statements or use of subterfuge to elicit information.

<sup>30</sup> European Court of Human Rights, judgment of 21 December 2000, no. 34720/97, *Heaney and McGuinness v. Ireland*, para. 53.

<sup>31</sup> European Court of Human Rights, judgment of 29 June 2007, nos 15809/02 and 25624/02, *O'Halloran and Francis v. the United Kingdom*, para. 59.

obtained under compulsion is put.<sup>32</sup> Where exculpatory remarks or mere information on factual questions (*prima facie* not self-incriminating statements) may be later used in criminal proceedings in support of the prosecution<sup>33</sup> or their use can have a bearing on the guilty verdict or the penalty,<sup>34</sup> they fall under the scope of the right to silence.

The Opinion's added value can be summarised in the following point: The protection under Art. 6 ECHR should be extended to statements on facts which may have a *bearing on the conviction or penalty* imposed in the context of punitive administrative proceedings, not bound by a *stricto sensu* interpretation of "criminal matters".<sup>35</sup> In this way, due account is taken of the need to include also punitive administrative sanctions besides criminal penalties, and thus the rewording "conviction" instead of "guilty verdict".

On the issue of balancing the right to silence with the public interest in the investigation and punishment of an offence, the ECtHR does not follow a common line in its jurisprudence. In the *Saunders* case, no balancing with "the essential public interest in the prosecution and punishment of corporate fraud" is accepted. In the *Ibrahim* case, such a balanced approach with the public interest in prosecuting offences is "limited to particularly sensitive matters, such as terrorism or other serious crimes". In the *Jalloh* and *Heaney and McGuinness* cases, such a weight of the public interest in investigation and prosecution or security and public order against the individual interest, that the evidence against [the undertakings] be gathered lawfully, is promoted, unless it "extinguishes the very essence of the applicant's defense rights, including the privilege against self-incrimination".

c) The distancing from the *Jussila* and *Menarini* principles in the ECtHR jurisprudence.

Both *Jussila* and *Menarini* cases introduce a distinction regarding the proceedings under Art. 6 ECHR. In the *Jussila* case, the ECtHR distinguishes between proceedings falling within "the hard core of criminal law" and bearing a "significant stigma" for the affected persons and those that do not, such as the tax surcharges in that case. The legal consequence is that "the criminal-head guarantees" of Art. 6 ECHR "will not necessarily apply with their full stringency" to the latter.<sup>36</sup> In the *Menarini* case, the ECtHR rules that while the differences between criminal and administrative proceedings "cannot exonerate Contracting States from their obligation to respect all the guarantees offered by the criminal aspect of Art. 6 [ECHR], they may nevertheless influence the manner in which they are applied".<sup>37</sup>

<sup>32</sup> European Court of Human Rights: judgment of 11 July 2006, no. 54810/00, *Jalloh v. Germany* [GC], para. 101; *O'Halloran and Francis v. the United Kingdom* [GC], cit., para. 55; *Bykov v. Russia* [GC], cit., para. 104; *Ibrahim et. al. v. the United Kingdom* [GC], cit., para. 269.

<sup>33</sup> *Saunders v. the United Kingdom*, cit., para. 71.

<sup>34</sup> *Corbet et. al. v. France*, cit., para. 34.

<sup>35</sup> See Opinion of AG Pikamäe, *DB v. Consob*, cit., para. 104.

<sup>36</sup> European Court of Human Rights, judgment of 23 November 2006, no. 73053/01, *Jussila v. Finland* [GC], para. 43.

<sup>37</sup> European Court of Human Rights, judgment of 27 September 2011, no. 43509/08, *A. Menarini Diagnostics S.R.L. v. Italy*, para. 62.

This ECtHR's case-law is explicitly contraindicated by the AG in the current case, as it could lead to an undesirable implication: Market abuse proceedings are not belonging to the "hard core of criminal law" and therefore a "tempered" application of the right to silence is favoured. The AG therefore deters the Court from the adoption of those rulings and favours, on the contrary, the one in the *Grande Stevens et. al. v. Italy* case, where the sanctions provided under the Italian legislation, which implemented MAD I, were deemed criminal carrying "a significant degree of stigma" since they "were likely to adversely affect the professional honour and reputation of the persons concerned".<sup>38</sup>

#### IV. CRITICAL REFLECTION BY WAY OF CONCLUSION

a) On the alleged discrepancy between ECtHR and Court of Justice case-law.

When it comes to the demarcation of the scope of the right to silence, the Court had so far ruled only for legal persons in the field of competition law, while the ECtHR has a well-established case-law concerning the natural persons' right to remain silent in criminal or administrative proceedings, without having so far expressed itself respectively for the legal persons. This leads to the conclusion that no intersection points exist till now on the issue between the two EU Courts. On the contrary, there is a kind of deliberate "division of tasks", where both Courts live in a symbiotic relationship with each other, maintaining their autonomy and avoiding any conflicting judgments.<sup>39</sup>

b) On the level of protection of the right to silence between natural and legal persons.

Two hidden points in the Opinion<sup>40</sup> but of great importance in order to support the argumentation against the application of the Court's jurisprudence on the narrow scope of the legal persons' right to silence to individuals are the following. *First*, the EU legislator has recently made clear their choice not to include legal persons in the protection of the EU Directive 2016/343 on the presumption of innocence,<sup>41</sup> granting a wider scope of protection to individuals. To justify that choice, it highlights in Recital 13, the "different needs and levels of protection of certain aspects of the presumption of innocence as regards natural and legal persons". *Second*, looking at other fundamental rights, such as the right to private and family life under Art. 8, para. 2, ECHR, the ECtHR distinguishes the different levels of protection granted to natural and legal persons, underlining that

<sup>38</sup> *Grande Stevens et. al. v. Italy*, cit., paras 98-99 and 122.

<sup>39</sup> In that sense also S. LAMBERIGTS, *The Directive on the Presumption of Innocence: A Missed opportunity for Legal Persons*, in *EuCrIm: the European Criminal Law Associations' Forum*, 2016, p. 40, mentioning that the Court has not fundamentally altered its case-law in light of the European Court's case-law but it acknowledged the developments in the case-law of the latter.

<sup>40</sup> See Opinion of AG Pikamäe, *DB v. Consob*, cit., paras 97 and 99 with further references to f.n. 60 and 65.

<sup>41</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

the state's right to interfere could be justified more easily and be more far-reaching concerning legal persons.<sup>42</sup> Following these considerations and in accordance with the Opinion, a transplanted of the Court's jurisprudence on legal persons to natural persons should be considered unacceptable, as limiting the scope of fundamental rights' protection of the individuals.

c) On the level of protection of the right to silence according to the field of law.

It is crystal clear from the analysis above that the Court recognises a "tempered" protection of the right to silence in the field of competition law, where the public interest on investigation and punishment prevails. Such a distinction according to the field of law was also followed under the *Jussila* and *Menarini* principles of the ECtHR. But is the field of law a reliable criterion in order to "weight" the protection arising from the right to silence? As the ECtHR stated in other cases,<sup>43</sup> the complexity of certain types of crime or fields of law cannot extinguish the very essence of the [individual's] right to silence.<sup>44</sup>

d) On the balance between effectiveness of market abuse legislation and fundamental rights protection.

As a matter of fact, MAR grants more extensive investigative and sanctioning powers to the supervisory authorities, to tackle market abuse. If we take the example of Consob, its powers rank from less to more intrusive, reaching up to on-site inspections and seizure of property.<sup>45</sup> On the question whether it would be possible at all to entrust prosecution and punishment powers to administrative authorities during administrative proceedings, including proceedings within the field of competition law and market manipulation, the ECtHR answers in the affirmative, provided that the decisions of the latter could be subject to subsequent control by a judicial body that has full jurisdiction.<sup>46</sup> Taking into account the peculiarities of the Italian law and the fact that an appeal to Consob's decisions does not generally suspend the enforcement of the measures,<sup>47</sup> the consequences from the exercise of Consob's powers could be disproportionate for the affected persons.

In sum, the following conclusions as a commonplace for both EU Courts on the scope of the right to silence can be drawn: The right to silence comes into play either when the case concerns a sanction "criminal in nature" under the *Engel/Bonda* criteria or

<sup>42</sup> European Court of Human Rights, judgment of 16 December 1992, no. 13710/88, *Niemietz v. Germany*, para. 31.

<sup>43</sup> European Court of Human Rights, judgment of 21 April 2009, no. 19235/03, *Marttinen v. Finland*, para. 74 with further references to *Saunders v. the United Kingdom*, cit., para. 74 and judgment of 25 February 1993, Series A no. 256-A, *Funke v. France*, para. 44.

<sup>44</sup> To the same conclusion S. Lamberigts, *The Directive on the Presumption of Innocence*, cit., p. 39.

<sup>45</sup> S. ALLEGREZZA, *Italy*, in M. LUCHTMAN, J. VERVAELE (eds), *Report: Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)*, dspace.library.uu.nl, 2017, p. 148 et seq. For some of Consob's activities an authorization of the Public Prosecutor is necessary.

<sup>46</sup> *Grande Stevens et. al. v. Italy*, cit., para. 139; *A. Menarini Diagnostics S.R.L. v. Italy*, cit., para. 59.

<sup>47</sup> Art. 187-septies, para. 5, TUF.

when the relevant proceedings fall within “the hard core of criminal law”. This last criterion was inserted in the *Jussila* case of the ECtHR and followed by the Court, in order to justify the narrow scope of the right to silence in competition law proceedings. However, even if we move outside the realm of criminal law, the element of “coercion” could be the password to activate the protection deriving from the right to silence as both ECtHR<sup>48</sup> and the Court of Justice<sup>49</sup> confirm.

<sup>48</sup> European Court of Human Rights, judgment of 5 April 2012, no 11663/04, *Chambaz v. Switzerland*, paras 53-58.

<sup>49</sup> Court of Justice, judgment of 15 October 2002, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others v. Commission*, paras 274-276.