

## The ECJ affirms the right to remain silent for individuals



**Mrs. Vanessa Marquette**

Partner

[vanessa.marquette@loyensloeff.com](mailto:vanessa.marquette@loyensloeff.com)



**Mrs. Clémence Van Muylder**

Senior Associate

[clemence.van.muylder@loyensloeff.com](mailto:clemence.van.muylder@loyensloeff.com)

In a recent decision, the ECJ affirms the right to remain silent for individuals prosecuted for administrative offence of a criminal nature and denies to member states the possibility to impose sanctions for failure to cooperate to the investigation. Such protection is however not recognised to legal persons.

### Factual and procedural background

The Italian market surveillance authority (the “Consob”) fined an individual a total amount of 300,000 EUR for administrative offences of insider dealing and unlawful disclosure of inside information. It also fined him an additional amount of 50,000 EUR on the ground that he postponed the hearing several times and that – when he finally appeared – he refused to answer questions. Such behaviour was considered a failure to cooperate to the investigation, which is an administrative offence under the Italian law implementing the so-called “MAD” and “MAR” Regulations.

The Italian Constitutional court requested a preliminary ruling from the ECJ on the compatibility of such administrative sanction with the right to silence.

### Findings of the Court

The Grand Chamber of the European Court of Justice first considered that the right to remain silent is enshrined in Articles 47 (right to a fair trial) and 48 (presumption of innocence) of the EU Charter of Fundamental Rights (the Charter) which are equivalent to Article 6 of the European Convention on Human Rights providing for a right to a fair trial. The Court of Justice finds that the Charter must be construed accordingly to Article 6 and that the right to silence has long been recognized by the ECHR case law.

The Court of Justice then considers that (i) the right to silence is infringed where a suspect is

obliged to testify under the threat of criminal sanctions and that (ii) administrative market abuse proceedings may lead to the imposition of administrative sanctions that are criminal in nature. The right to silence therefore applies and precludes penalties being imposed on individuals 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. The Court however pointed out that the right to silence “cannot justify every failure to cooperate with the competent authorities, such as a refusal to appear at a hearing planned by the authorities or delaying tactics designed to postpone it.”

### **A broad protection for individuals**

Interestingly, the Court of Justice defines the scope of the right to silence that benefits to individuals in a broad way. It indeed states that this protection “cannot reasonably be confined to statements of admission of wrongdoing or to remarks which directly incriminate the person questioned, but rather also covers information on questions of fact which may subsequently be used in support of the prosecution and may thus have a bearing on the conviction or the penalty imposed on that person”.

Also, the findings made by the ECJ are not limited to cases of insider dealing but apply to any type of proceedings where sanctions of criminal nature may be imposed on an individual.

### **A not so broad protection for legal persons**

It must be noted that the Court does not recognize such broad protection to legal persons. Here again, the Court aligns its judgement on the case law of the ECHR who considers that the rights flowing from the presumption of innocence do not accrue to legal persons in the same way as they do to natural persons. The Court distinguishes the case at hand (relating to a natural person) from EU case law (under EU competition rules) dealing with protection against self-incrimination for legal persons. According to that case law, a legal person cannot be forced to provide “answers” that may imply recognition of an anti-competitive conduct, but can well be compelled to provide information on facts and documents even if they could be used to establish anticompetitive conduct.

### **Consequences**

At the EU level, the Court of Justice judgement implies that the right to silence must be recognized to individuals in all administrative procedure which may result in the application of sanctions of a criminal nature and cannot be jeopardised by the threat of sanctions for failure to cooperate with authorities.

At the Belgian level, this judgement of the Court of Justice could lead to a broadening of the protection of the right to silence as currently recognized by the Brussels Court of Appeal and by the FSMA.

In a case submitted to the Brussels Court of Appeal, an accused person invoked a violation of his right to silence because he felt threatened by the application of Article 87 § 1 of the Law of 2 August 2002, which sanctions those who obstruct the FSMA's investigations. On that ground, the defendant requested that the proceedings be dismissed. The Brussels Court of Appeal had then ruled that "the mere fact that the plaintiff made statements when he became aware of the existence of the aforementioned legal provision does not mean that those statements cannot be taken into account by virtue of a violation of his right to silence".

While at the time this position seemed justified by Article 30 of MAR (which requires Member States to ensure that supervisory authorities established on their territory may impose administrative sanctions and take other administrative measures against any person who fails to cooperate in an investigation concerning market abuse), it now appears questionable whether a person who self-incriminates out of fear of being sanctioned has been able to benefit from a proper application of the right to silence.

Same is true regarding the FSMA's position. It used to consider that a person has an interest in complaining about a breach of his right to silence only if it appears that statements made in defiance of his will, as a result of coercion or pressure, are held against him in order to establish his guilt. In view of the broad right to silence protection recognized by the ECJ to individuals, it declarations made by a natural person by mere fear to be fined for failure to cooperate should be discarded.

Although this judgement of the Court of Justice is welcome, the right to silence should be used carefully, since Belgian (and European) enforcement authorities tend to draw adverse inferences from the defendant's silence, including in criminal proceedings.