ORDER NO. 117 YEAR 2019

**In this case, the Court heard a referral order from the Supreme Court of Cassation questioning the constitutionality of domestic legislation that did not recognise an accused's right to silence in proceedings that, although formally administrative in nature, entail the imposition of sanctions of a substantially punitive nature. The Court was of the view that the legislation could well violate Articles 24(2) and 111(2) of the Constitution, but a finding of unconstitutionality risked creating a conflict with EU law, since the legislation in question stemmed from obligations incumbent on Italy under, initially, Directive 2003/6/EC and, subsequently, Regulation (EU) No. 596/2014. The Court was however also of the opinion that the EU secondary law in question was ambiguous, and, under a certain interpretation, could even be incompatible with Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.**

**Therefore, the Court decided that before ruling on the question of constitutionality, it was necessary to request clarification from the CJEU on the exact interpretation and, possibly, also the very validity of the EU secondary law at issue. To that end, two questions were referred to the CJEU for a preliminary ruling.**

**The first question was whether the EU secondary law at issue must be interpreted as enabling Member States not to punish those who refuse to answer questions from a competent authority if that could reveal their liability for wrongdoing punished with administrative sanctions of a punitive nature. In the event of an affirmative answer to that first question, striking down the domestic legislation would not conflict with EU law. In the event of a negative answer to the first question, the second question was whether the provisions of the EU secondary law at issue were compatible with Articles 47 and 48 of the Charter of Fundamental Rights of the European Union insofar as those secondary law provisions would require sanctions to be imposed on persons who refuse to answer questions from a competent authority that could reveal their liability for wrongdoing punished with administrative sanctions of a punitive nature.**

**The proceedings before the Court were stayed pending the outcome of the request for a preliminary ruling.**

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

issues the following

ORDER

in proceedings concerning the constitutionality of Article 187-*quinquiesdecies* of Legislative Decree No. 58 of 24 February 1998 (Consolidated Law on Financial Intermediation, adopted pursuant to Articles 8 and 21 of Law No. 52 of 6 February 1996), as introduced by Article 9(2)(b) of Law No. 62 of 18 April 2005 (Provisions to implement obligations resulting from Italy's membership of the European Communities. Community Law 2004), initiated by the Supreme Court of Cassation (Second Civil Division) in the proceedings pending between Mr. D. B. and the National Commission for Companies and the Stock Exchange (CONSOB), by referral order of 16 February 2018, registered as no. 54 in the Register of Orders 2018 and published in the Official Journal of the Republic, no. 14, first special series, 2018.

Considering the entry of appearance filed by Mr. D. B. and the intervention by the President of the Council of Ministers.

Having heard the Judge Rapporteur Francesco Viganò at the public hearing of 5 March 2019.
Having heard Counsel Renzo Ristuccia for Mr. D. B. and State Counsel Giovanni Marrone for the President of the Council of Ministers.

[omitted]

*Conclusions on points of law*

1.– This Court must rule on the question raised by the Supreme Court of Cassation as to whether Article 187-*quinquesdecies* of Legislative Decree No. 58 of 1998 is unconstitutional as regards the part thereof that punishes a failure to comply as required with a request made by the National Commission for Companies and the Stock Exchange (CONSOB) or the causing of a delay in the exercise of the latter's functions, "including on the part of persons that CONSOB itself, in the exercise of its supervisory functions, charges with abuse of inside information".

As is clear from what has been stated above, the question is raised with reference to a number of provisions, some of which are of national origin (the right of defence and the principle of equality between the parties in proceedings, enshrined respectively in Articles 24(2) and 111(2) of the Constitution) while others are of international and European origin (the right to a fair trial, pursuant to Article 6 of the European Convention on Human Rights (ECHR), Article 14 of the International Covenant on Civil and Political Rights and Article 47 of the Charter of Fundamental Rights of the European Union (CFREU), the latter also capable of leading to the unconstitutionality of the contested provision under Articles 11 and 117(1) of the Constitution.

2.– With particular reference to the provisions of the CFREU, this Court has recently affirmed its jurisdiction to examine possible conflicts between provisions of national law and the Charter that the referring court sees fit to submit it.

This is because "[t]he principles and rights laid out in the Charter largely intersect with the principles and rights guaranteed by the Italian Constitution (and by other Member States' constitutions). It may therefore occur that the violation of an individual right infringes, at once, upon the guarantees enshrined in the Italian Constitution and those codified by the European Charter" (Judgment no. 269 of 2017, point 5.2 of *Conclusions on points of law*).

In such cases, this Court – which is itself a "court or tribunal" of a Member State pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU) – may assess whether the contested provision violates the safeguards enshrined in both the Constitution and the Charter, submitting a request for a preliminary ruling to the EU Court of Justice whenever that proves necessary to clarify the meaning and the effects of the Charter's rules. At the outcome of that assessment, this Court may find the contested provision to be unconstitutional, thus removing it from the national legal system with *erga omnes* effects. Naturally, "ordinary courts may refer any question they deem necessary concerning the same scheme to the Court of Justice of the European Union for a preliminary ruling" (Judgment no. 20 of 2019, point 2.3 of *Conclusions on points of law*), including upon the conclusion of the incidental proceedings concerning constitutionality. And without prejudice also to their duty – where the prerequisites are met – not to apply to the specific case before them any national provisions inconsistent with the rights laid down in the Charter (Judgment no. 63 of 2019, point 4.3 of the *Conclusions on points of law*).

Judgment no. 20 of 2019 has further clarified, in this regard, that "[i]n general, the supervening value of the guarantees set down by the CFR with respect to those of the

Italian Constitution generates more legal remedies, enriches the tools for protecting fundamental rights, and, by definition, denies any restriction". That plurality of remedies actually allows the Constitutional Court "to make its own contribution to rendering effective the possibility, discussed in Article 6 of the Treaty on European Union (TEU) [...] that the corresponding fundamental rights guaranteed by European law, and in particular by the CFR, be interpreted in harmony with the constitutional traditions common to the Member States, also mentioned by Article 52(4) of the CFR as relevant sources" (point 2.3 of the *Conclusions on points of law*).

All of this plays out, as already highlighted in Judgment no. 269 of 2017, "within a framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the ECJ (see, most recently, Order no. 24 of 2017), in order that the maximum protection of rights is assured at the system-wide level (Article 53 of the EUCFR)" (point 5.2. of the *Conclusions on points of law*).

3.– All the provisions of the Constitution, the ECHR, the International Covenant on Civil and Political Rights and the CFREU cited by the Supreme Court of Cassation recognise – expressly, in the case of Article 14 of the International Covenant and impliedly, in all other cases – the right of the person not to be compelled to testify against themselves or to confess guilt (*nemo tenetur se ipsum accusare*).

According to the Supreme Court of Cassation, this "right to silence" cannot but be extended to proceedings that, although formally administrative in nature, actually entail the imposition of sanctions of a substantially "punitive" nature, such as those under Article 187-*bis* of Legislative Decree No. 58 of 1998 (Abuse of inside information), which Mr. D. B. was found by CONSOB to have infringed following proceedings that concluded with the imposition of the sanctions mentioned above in point 2.1. of the *Facts of the case*.

4.– This Court maintains that the constitutional doubt raised essentially entails the question as to whether it is constitutional to punish someone – pursuant to Article 187-*quinquiesdecies* of Legislative Decree No. 58 of 199 – who has refused to answer questions which could reveal their liability, in the context of a hearing held by CONSOB in the exercise of its supervisory functions.

Indeed, it does not appear to this Court that the "right to silence" based on the constitutional, European and international rules invoked may in itself be legal grounds for the person's refusal to appear at the hearing scheduled by CONSOB or for any undue delay in appearing at the said hearing as long as that person's right not to answer the questions addressed to them during the hearing itself is safeguarded, unlike what transpired in the present case. However, in the case in point, Mr. D. B. was not afforded the latter right: that could be assessed by the court in the main proceedings to conclude that he could not be punished either for keeping silent at the hearing or for the delay in appearing at the hearing itself.

5.– In the version applicable *ratione temporis* to the facts at issue in the main proceedings, Article 187-*quinquiesdecies* of Legislative Decree No. 58 of 1998 provided that "[a]part from the cases provided for in Article 2638 of the Civil Code, any person who fails to comply with a request from CONSOB by the prescribed deadline or delays the performance of the latter's functions shall be punished by an administrative pecuniary fine of between fifty thousand euros and one million euros".

The functions vested in CONSOB include, in particular, pursuant to Article 187-*octies*(3)(c) of Legislative Decree No. 58 of 1998, the power to "conduct a personal hearing" against "any person who could be acquainted with the facts".
The actual wording of Article 187-*quinquiesdecies* of Legislative Decree No. 58 of 1998, as per the version in force at the time of the events, extends also to cases in which the personal hearing is ordered against any person that CONSOB has already identified, based on the information in its possession, as the possible perpetrator of an offence the establishment of which falls within its remit. In particular, the rule allows that person to be punished with a pecuniary administrative fine ranging from fifty thousand euros to one million euros for having refused to answer questions in the personal hearing ordered by CONSOB.
6.– The same conclusion must be reached today, based on the current wording of Article 187-*quinquiesdecies* of Legislative Decree No. 58 of 1998, as amended by Legislative Decree No. 129 of 2017, paragraph 1 of which provides that "[a]part from the cases provided for in Article 2638 of the Civil Code, any person who fails to comply with a request from the Bank of Italy and CONSOB by the prescribed deadline or does not cooperate with said authorities in the carrying out of the associated supervisory functions or delays the performance of the said functions shall be punished pursuant to this Article".
In fact, the new wording of Article 187-*quinquiesdecies* of Legislative Decree No. 58 of 1998 limits itself to stating that the infringement can be committed not only by whoever does not timely comply with the requests of the authorities or whoever cause delays in the exercise of the latter's functions but also – more generally – by whoever does not cooperate with the authorities themselves for the purpose of enabling them to perform their associated supervisory functions. Again on the basis of the new provision, however, no right to silence is envisaged for those who have already been identified by CONSOB as the possible perpetrators of an offence whose establishment falls within its remit.
7.– It is therefore necessary to establish whether the "right to silence" mentioned by the Supreme Court of Cassation applies not only in criminal proceedings but also in personal hearings held by CONSOB as part of its supervisory functions, which may be a prelude to the commencement of proceedings of a "punitive" nature against those identified as the perpetrators of an offence.
As the Supreme Court of Cassation observes, militating in favour of an affirmative answer to this question are arguments based both on Article 24 of the Italian Constitution and Article 6 ECHR, as interpreted by the European Court of Human Rights.
7.1.– The well-settled case law of this Court considers that the "right to silence" of the accused – although not enjoying express constitutional recognition – constitutes an "essential corollary of the inviolability of the right of defence recognised in Article 24 of the Constitution (Orders no. 202 of 2004, no. 485 of 2002 and no. 291 of 2002). This right assures that the accused cannot be compelled to give testimony and, more generally, may choose not to answer questions asked by the court or relevant investigating authorities.
To date, this Court has not been called upon to assess whether and to what extent this right – included among the inalienable human rights (Judgments no. 238 of 2014, no. 323 of 1989 and no. 18 of 1982) that characterise Italian constitutional identity – also applies in the context of administrative proceedings that serve to impose "punitive" sanctions according to the *Engel* criteria.
However, on several occasions, it has been held that individual rights recognised in the criminal arena by the ECHR and by the Italian Constitution itself extend to those types of sanctions. This has occurred, in particular, in relation to safeguards concerning the

prohibition against retroactive changes entailing a heavier sanction (Judgments no. 223 of 2018, no. 68 of 2017, no. 276 of 2016, no. 104 of 2014 and no. 196 of 2010), the sufficient precision of the provision imposing the sanction (Judgments no. 121 of 2018 and no. 78 of 1967) and the retroactivity of changes entailing a lighter sanction (Judgment no. 63 of 2019).

Furthermore, this Court has already stated on several occasions that the administrative sanctions provided for in the Italian legal order in connection with abuse of inside information constitute, due to their particular severity, "punitive" measures (Judgments no. 63 of 2019, no. 223 of 2018 and no. 68 of 2017), a view also shared by the EU Court of Justice (Grand Chamber, Judgment of 20 March 2018, in joined Cases C-596/16 and C-597/16, *Di Puma and CONSOB*, paragraph 38).

This Court has reached this conclusion by, in particular, taking into account the very severe sanctions envisaged for the abuse of inside information, punishable today with a pecuniary fine that, as regards a natural person, can be as high as five million euros, which can in turn be increased by up to three times that amount under specific circumstances or up to the higher figure of ten times the profit achieved or the losses avoided due to the infringement. These pecuniary sanctions are also accompanied by the forms of disqualification provided for under Article 187-*quater* of Legislative Decree No. 58 of 1998, which severely limit the professional options of those affected by the sanction, and are imposed jointly with confiscation, directly and by equivalent, of the profits of the offence.

In the face of such types of sanctions, the Supreme Court of Cassation states that it would seem plausible that persons accused of such offences enjoy the same rights of defence that the Italian Constitution affords to those suspected of having committed a crime, and in particular the right not to be forced – under threat of a heavy pecuniary sanction, such as that imposed on the appellant in the main proceedings – to make statements likely to be subsequently used as evidence against them.

And this also in relation to the risk that, as a result of the obligation to cooperate with supervisory authorities currently provided for in EU secondary legislation, the person suspected of having committed an administrative offence of a "punitive" nature may end up facilitating the bringing of criminal charges against themselves. In fact, in the Italian legal system, abuse of inside information is both an administrative offence (Article 187-*bis* of Legislative Decree No. 58 of 1998) and a criminal offence (Article 184 of Legislative Decree No. 58 of 1998) and the associated proceedings can be commenced and continued in parallel (as indeed happened with Mr. D. B.), to the extent that this is compatible with the principle of *ne bis in idem* (Court of Justice, Grand Chamber, Judgment of 20 May 2018 in Case C-537/16 *Garlsson Real Estate SA and others*, paragraphs 42 to 63).

In fact, although the Italian legal system does not allow the use at a criminal trial of statements made to an administrative authority in the absence of guarantees as to the right of defence, including communication of the right to remain silent, it is quite possible that such statements – obtained by the administrative authority on the basis of of a threat of punishment in the event of non-cooperation – can actually provide the authority with essential information in connection with procuring further evidence of the wrongdoing, likely to be used also in the subsequent criminal trial against the offender.

7.2.– The doubts raised by the Supreme Court of Cassation are also supported by the case law of the European Court of Human Rights concerning Article 6 ECHR.

Despite the absence of any express recognition of the right in question in the text of the Convention (unlike Article 14(3)(g) of the International Covenant on Civil and Political Rights), on multiple occasions the Strasbourg Court has stated that the "right to remain silent and not to contribute to incriminating himself" (ECtHR Judgment of 25 February 1993, *Funke v. France*, paragraph 44) is at the heart of the notion of "fair trial" proclaimed in Article 6(1) ECHR (amongst many, see ECtHR Judgment of 5 April 2012, *Chambaz v. Switzerland*, paragraph 52). Indeed, this right is designed to protect the accused from undue pressure exerted by the authorities to confess (ECtHR Judgment of 8 February 1996, *John Murray v. The United Kingdom*, paragraph 45). Furthermore, in the view of the ECtHR, the right in question is strictly connected to the presumption of innocence pursuant to Article 6(2) ECHR (Judgments of 21 December 2000, *Heaney and McGuiness v. Ireland*, paragraph 40, and 17 December 1996, *Saunders v. The United Kingdom*, paragraph 68).

The right in question was repeatedly held to have been breached in relation to persons punished by national law for not having provided answers to administrative authorities in the context of proceedings for establishing infringements of an administrative nature (ECtHR Judgments of 4 October 2005, *Shannon v. the United Kingdom*, paragraphs 38-41, and 5 April 2012, *Chambaz v. Switzerland*, paragraphs 50-58).

In particular, a breach of Article 6 ECHR was found to have occurred in a case in which a person against whom an administrative investigation was pending concerning tax crimes had repeatedly failed to respond to requests for clarification made by the authority that was conducting the investigation, and had been punished for that conduct with pecuniary sanctions (ECtHR Judgment of 3 May 2001, *JB v. Switzerland*, paragraphs 63-71). In this latter case, of decisive importance was the "punitive" nature – according to the *Engel* criteria – of the sanctions imposed by the administrative authority in respect of the tax law violations that the investigation concerned. In the Court's view, that "punitive" nature called into question the entire spectrum of safeguards afforded by the ECHR in criminal matters, including that of the "right to silence" enjoyed by those charged with an offence.

It therefore appears that likewise, according to the ECtHR, the right not to contribute to incriminating oneself and not to be compelled to make a confession, attributable to Article 6 ECHR, includes the right of anyone subjected to administrative proceedings that could lead to the imposition of "punitive" sanctions against them not to be compelled to provide the authorities, under threat of a sanction in case of non-compliance, with answers from which their own liability could be deduced.

8. – In deciding the issue of constitutionality referred to this Court, it is necessary to consider – as correctly pointed out by the Supreme Court of Cassation – that the challenged Article 187-*quinquiesdecies* of Legislative Decree No. 58 of 1998 was introduced into Italian law in order to transpose a specific obligation laid down by Directive 2003/6/EC; and that this article today reflects the precise implementation of a similar provision of Regulation (EU) No. 596/2014, which repealed the Directive in question.

8.1.– More specifically, Article 14(3) of Directive 2003/6/EC provided that "Member States shall determine the sanctions to be applied for failure to cooperate in an investigation covered by Article 12".

In turn, Article 12(2)(b) of that same Directive provided that the competent authorities were at the very least to be given the power, when conducting their supervisory and investigative functions, to "demand information from any person, including those who

are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and if necessary, to summon and hear any such person".

The combined provisions of Articles 12 and 14 of the Directive thus seemed to require Member States to administratively sanction – without prejudice to the possible imposition of criminal sanctions for the same conduct (Article 14(1) of the Directive in question) – also those who, having materially carried out the unlawful operations or having given the order to carry them out, refuse to answer the questions put to them by the supervisory authority at a hearing and which answers could reveal them to be liable for an offence whose establishment falls within the authority's remit.

8.2.– Today, Article 30(1)(b) of Regulation (EU) No. 596/2014 similarly establishes that without prejudice to any criminal sanctions and the supervisory powers of competent authorities under Article 23, Member States shall provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures in relation to a "failure to cooperate or to comply with an investigation, with an inspection or with a request as referred to in Article 23(2)".

In turn, Article 23(2)(b) of that same Regulation establishes that the competent authorities shall have the power "to require or demand information from any person, including those who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and if necessary, to summon and question any such person with a view to obtain information".

Therefore, also on the basis of the EU law currently in force there would appear to be a duty on the part of the Member States to sanction the silence maintained during a hearing by those who have carried out operations that constitute infringements punishable by the same authority or by those who gave the order to carry out the operations in question.

9.– It follows from all of the foregoing that a declaration of unconstitutionality striking down the contested part of Article 187-*quinquiesdecies* of Legislative Decree No. 58 of 1998 would run the risk of conflicting with EU law and in particular with the obligation that stems today from Article 30(1)(b) of Regulation (EU) No. 596/2014, an obligation that the abovementioned Article 187-*quinquesdecies* implements.

Moreover, there could be some doubts as to the compatibility of that obligation – as well as that which arose in the past from Article 14(3) of Directive 2003/6/EC – with Articles 47 and 48 CFREU, which also seem to recognise a fundamental right of the individual not to contribute to incriminating themselves and not to be compelled to make a confession to the same extent that can be deduced from Article 6 ECHR and Article 24 of the Italian Constitution.

9.1.– This Court is well aware of the copious case law of the EU Court of Justice on the subject of the right to silence and competition law infringements. That case law recognises in principle the need to protect the rights of defence of persons who could be charged with wrongdoing while at same time upholding the existence of an "obligation to cooperate actively" incumbent on those same persons. According to the Court of Justice those persons must not only "make available to the Commission all information relating to the subject-matter of the investigation" (Judgment of 18 October 1989 in Case C-374/87, *Orkem*, paragraph 27; in the same vein, Judgment of 29 June 2006 in Case C-301/04 P, *SGL Carbon AG*, paragraph 40) and "comply with its requests for the production of documents already in existence" but are also "obliged to answer purely factual questions put by the Commission" (Court of First Instance, Judgment of 20 February 2001 in case I-112/98, *Mannesmannröhren-Werke AG*, paragraphs 77 to 78; in

the same vein, *SGL Carbon AG*, cited above, paragraphs 44 to 49). According to that case law, the obligation to reply to questions put by the Commission does not conflict with rights of defence or the right to fair legal process since there is "nothing to prevent the addressee of such questions or requests from showing, whether later during the administrative procedure or in proceedings before the Community courts, when exercising his rights of defence, that the facts set out in his replies […] have a different meaning from that ascribed to them by the Commission" (Court of First Instance Judgment of 20 February 2001 in case I-112/98, *Mannesmannröhren-Werke AG*, paragraphs 77 to 78; in the same vein, EU Court of Justice Judgment of 29 June 2006 in Case C-301/04 P, *SGL Carbon AG*, paragraphs 44 to 49). The only limit to the duty of the undertakings concerned to answer is the prohibition for the Commission to "compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove" (Court of Justice, Judgment of 18 October 1989, in Case C-374/87, *Orkem*, paragraph 35; in the same vein, Judgment of 24 September 2009 in joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, *Erste Group Bank AG*, paragraph 271; Judgment 25 January 2007 in Case C-407/04 P, *Dalmine*, paragraph 34; Judgment of 29 June 2006, in Case C-301/04 P, *SGL Carbon AG*, paragraph 42).

In this way, the EU Court of Justice rules out that the rights of defence in the context of proceedings imposing sanctions in the field of competition law can be considered to be impaired by the obligation of an undertaking, which could subsequently be charged with the infringement, to provide information inherent to factual circumstances liable to be used as a basis for a charge that could be brought against it. According to that case law the rights of defence would be violated only where the undertaking is asked questions basically designed to obtain a confession relating to the commission of the infringement, without prejudice however to the undertaking's duty in principle to answer the Commission's questions.

9.2.– However, this case law – formed with regard to legal and not natural persons and to a large extent prior to the adoption of the CFREU and the attribution thereto of the same legal value as the treaties – appears to this Court to be difficult to reconcile with the "punitive" nature (recognised by the Court of Justice in the previously mentioned *Di Puma* case) of the administrative sanctions provided for in the Italian legal order concerning the abuse of inside information, which would seem to suggest the need to afford the offender guarantees similar to those granted in criminal matters. It is evident that considering – as is the case in the different sphere of competition law infringements – the offender to be under a duty to answer questions of mere fact, without prejudice to the possibility of subsequently demonstrating that the facts disclosed "have a different meaning" from that ascribed to them by a competent authority, gives rise to a significant limitation of the scope of the *nemo tenetur se ipsum accusare* principle, which normally implies in criminal matters the right for the persons concerned not to make any statements that could – even indirectly – contribute to incriminating them.

Furthermore, that case law does not appear to this Court to be fully in line with the previously mentioned case law of the European Court of Human Rights, which by contrast seems to recognise a far wider right to silence of the accused, including in the context of administrative proceedings entailing the imposition of sanctions of a "punitive" nature.

9.3.– On the other hand, the question of whether Articles 47 and 48 CFREU, in light of the cited case law of the European Court of Human Rights concerning Article 6 ECHR,

requires that right to apply also in administrative proceedings likely to lead to the imposition of sanctions of a "punitive" nature does not appear to have ever been addressed by the EU Court of Justice.

Neither has EU secondary law so far offered an answer to this question. On the contrary, the issue has been left open intentionally by 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 (recital 11).

10.– In the aforementioned spirit of loyal cooperation between national and European courts in establishing common levels of protection of fundamental rights (an objective of primary importance in matters subject to regulatory harmonisation such as the one under examination), this Court, before deciding on the question of constitutionality submitted to it, considers it necessary to request clarification from the EU Court of Justice on the exact interpretation and possibly also on the validity – in the light of Articles 47 and 48 CFREU – of Article 14(3) of Directive 2003/6/EC, since it is still applicable *ratione temporis*, and Article 30(1)(b) of Regulation (EU) No. 596/2014.

10.1.– First of all, it is necessary to clarify whether the aforementioned provisions of Directive 2003/6/EC and Regulation (EU) No. 596/2014 must be interpreted as enabling a Member State not to sanction those who refuse to answer questions from the competent authority that could reveal their liability for wrongdoing punished with criminal sanctions or with "punitive" administrative sanctions. This also having regard to the words "in conformity with [the] national law" of the Member States contained in Article 14(1) of the Directive and the words "in accordance with national law" contained in Article 30(1) of the Regulation, a proviso that would seem to mandate a need to respect the standards of protection of fundamental rights recognised by the laws of the Member States in the event that they were to be higher than those recognised at EU-law level.

In the case of an affirmative answer to this question, the declaration of unconstitutionality of the part of Article 187-*quinquesdecies* of Legislative Decree No. 58 of 1998 sought by the Supreme Court of Cassation – based on the fundamental right of the person not to be forced to make a confession – would not be contrary to EU law.

10.2.– In the event, on the other hand, of a negative answer by the EU Court of Justice to the first question above, that same Court is asked whether the aforementioned provisions of Directive 2003/6/EC and Regulation (EU) No. 596/2014 are compatible with Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, also in light of the case law of the European Court of Human Rights on the subject of Article 6 ECHR and of the constitutional traditions common to the Member States, insofar as those provisions require sanctions to be imposed also on persons who refuse to answer questions from the competent authority that could reveal their liability for wrongdoing punished with criminal sanctions and/or administrative sanctions of a "punitive" nature.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) *orders* that the following questions be referred for a preliminary ruling to the Court of Justice of the European Union pursuant to and for the purposes of Article 267 of the Treaty on the Functioning of the European Union (TFEU), as amended by Article 2 of the Lisbon Treaty of 13 December 2007 and ratified by Law No. 130 of 2 August 2008:

a) whether Article 14(3) of Directive 2003/6/EC, since it is still applicable *ratione temporis*, and Article 30(1)(b) of Regulation (EU) No. 596/2014 must be interpreted as enabling Member States not to sanction those who refuse to answer questions from the

competent authority if that could reveal their liability for wrongdoing punished with administrative sanctions of a "punitive" nature;

b) whether, in the event of a negative answer to the first question, the provisions of Article 14(3) of Directive 2003/6/EC, since it is still applicable *ratione temporis*, and Article 30(1)(b) of Regulation (EU) No. 596/2014 are compatible with Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, also in light of the case law of the European Court of Human Rights on the subject of Article 6 ECHR and of the constitutional traditions common to the Member States, insofar as those provisions require sanctions to be imposed also on persons who refuse to answer questions from the competent authority that could reveal their liability for wrongdoing punished with administrative sanctions of a "punitive" nature;

2) *stays* these proceedings pending the outcome of the abovementioned preliminary ruling procedure;

3) *orders* that a copy of this order together with the case file be forwarded to the registry of the Court of Justice of the European Union.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 6 March 2019.