GIR

Exercising right to silence “easier” for individuals after ECJ insider trading ruling

Sam Fry
10 February 2021

Credit: iStock.com/carterdayne

Related Topics

Data collection Data sharing Due process Enforcement policy Judicial review
Professional secrecy Voluntary disclosure Europe France Germany Italy
Capital markets & securities Financial services misconduct investigations Insider trading
Investigations Legal privilege and professional secrecy

Sam Fry

Author
Samuel.Fry@globalinvestigationsreview.com

View full biography

Lawyers across the EU have welcomed a European court ruling that clarifies an individual’s right to silence in regulatory market abuse investigations.

Defence practitioners in France and Italy told GIR that a **2 February ruling** by the European Court of Justice (ECJ) has limited the ways that market regulators in EU countries can use their powers to compel evidence during probes into insider trading and other kinds of market abuse.

French and Italian lawyers said the ruling makes clear that regulators cannot use their statutory powers to compel testimony from an individual if doing so could violate the person’s right to avoid incriminating themselves.

The court’s ruling dealt with a long-running insider trading case where Italy’s Securities and Exchange Commission (Consob) fined an individual – identified in the ruling as ‘DB’ – €300,000 in 2012 for insider trading offences, and a further €50,000 for not cooperating with its investigation by postponing meetings with investigators and declining to answer questions during an interview.

Consob alleged that DB committed an administrative offence by not cooperating with the agency’s investigation. DB’s lawyers challenged this part of the fine, arguing that the law obliging cooperation with Consob violated their client’s constitutional right against self-incrimination in a matter that could be pursued by criminal authorities as well. Italy’s Constitutional Court asked the ECJ to clarify the circumstances where the EU’s market abuse directive guarantees an individual’s right to silence to help the Italian court reach a ruling in the matter.

The ECJ said that the directive prevents member states from punishing individuals who refuse to answer questions during an administrative probe where they could face liability in a subsequent criminal investigation. The judgment notes, however, that the right to silence does not cover conduct such as a refusal to appear for an interview or “delaying tactics designed to postpone [an interview]”. How the ECJ’s ruling will apply in DB’s case must now be decided by the Italian court.

Consob’s powers restricted

The right to remain silent has been a thorny issue in Italian regulatory proceedings, where statements made during Consob interviews **can also be used** in criminal proceedings. Consob can fine individuals up to €3 million for failing to cooperate with its investigations – a power that practitioners say it has used on more than one occasion to punish individuals who decline to answer its questions for fear of incriminating themselves.

Consob’s powers are especially “bothersome” in cases of suspected insider trading, said Bruno Cova at Studio Legale Delfino e Associati Willkie Farr & Gallagher in Milan, because it can be investigated by administrative and criminal authorities in Italy.

New grounds to push back during AMF interviews

Defendants in such cases have previously fought against being pursued twice for the same alleged misconduct, and the European Court of Human Rights ruled in 2014 that where Consob’s penalties are severe enough to equate to criminal fines, any criminal prosecution should be dropped.

“When you start off with Consob [investigating suspected market abuse] you aren’t sure if this will evolve into something of a criminal nature,” said Cova.

He said the ECJ’s ruling weakens Consob’s investigative powers by clarifying that the regulator cannot force individuals in market abuse investigations to answer its questions.

“Without the risk of being sanctioned for not providing information, I think more people will elect to simply stay silent and not respond,” Cova said.

Consob declined to comment on the ECJ’s ruling. A lawyer for DB, Renzo Ristuccia at Ristuccia Tufarelli & Partners in Rome, said in an emailed statement: “I hope that in the future Consob will not only abstain from sanctioning the silence, but will also alert any person of his right to remain silent.”

Practitioners said the ruling provided similar clarity over the way the French market regulator can use a law prohibiting non-cooperation with its investigations to compel testimony in regulatory market abuse investigations.

They said the ruling clarifies that remaining silent during an interview with the Financial Markets Authority (AMF) cannot be treated as a violation of France’s Monetary and Financial Code which makes it a criminal offence to obstruct an AMF investigation by not disclosing any information that it requests, punishable by up to two years in prison and a €300,000 fine.

Lawyers said that, in practice, the AMF has never attempted to punish an individual for remaining silent during an interview, but said that the agency does not always remind interviewees of their rights to do so at the start of interviews either. Jean-Charles Jaïs at Linklaters in Paris said the new ruling could cause the regulator to remind individuals of their right to silence at the start of every interview.

“The question is whether the AMF will think it’s good practice to actually notify the individual of this right,” he said.

Jaïs said the ECJ ruling will also make it easier for defence lawyers to push back against AMF investigators who pose questions that could cause the individual to incriminate themselves.

“It makes it easier to say to the AMF: ‘please rephrase the question because it’s not properly put’,” Jaïs said.

French practitioners pointed out that advising a client to remain silent during an AMF interview is not a risk-free strategy. The AMF itself said in a 2009 ruling that its investigators have the right to draw an adverse inference from the individual’s silence.

“It’s something that you don’t take lightly, you have to weigh very carefully, said David Père at Addleshaw Goddard in Paris. “When you do use it, it may put the spotlight on a particular question you look to avoid.”

The AMF and Consob did not respond to a request for comment.

No changes for German regulatory investigations

The ECJ ruling is of little consequence in Germany. There, the law that hands the Federal Financial Supervisory Authority (BaFin) the power to compel testimony from individuals during regulatory market abuse investigations states that individuals have the right to remain silent and must be advised by investigators before the start of an interview.

“From a German perspective, it’s not a big deal,” said Robert Henrici at Covington & Burling in Frankfurt. He added that German legislators had done a good job of making sure that BaFin’s regulatory powers couldn’t infringe an individual’s right to avoid self-incrimination.