[94]–[95] and [106]). The A.G. further observed that it is often not open to the copyright owner to adopt anti-framing measures, for example because the sharing platform used does not provide that option, so that the use of such measures cannot be taken to reflect his or her intention (at [125]–[126]). Finally, requiring the use of such measures for protection against unauthorised framing would contradict the prohibition of formalities which forms one of the basic principles of copyright law (at [130]).

The A.G.'s approach is appealing: it seems fair to distinguish disguising the source of (and therefore misappropriating) embedded objects from links that redirect the user back to the original website. Yet this solution does not map well onto the EU copyright framework. As the court observed in *Renckhoff*, while the right-holder has no control over unauthorised uploads, this is not true of embedded objects, since the removal of the work from the original site will render any link to it obsolete (at [44]). Uploads also involve infringement of the reproduction right, while embeds do not – a fact which the similarities in user experience cannot justify ignoring any more than they can justify treating the two in the same way under the communication right. Further, in most browsers, the difference between "clickable" and "automatic" links is often nothing more than the difference between a left click and a right click: the content's source is usually easy for the user to uncover.

From this perspective, the one-size-fits-all approach preferred by the court respects not only previous case law, but the nature of the public web: both "clickable" and "automatic" links are links to content which the right-holder made publicly available for others to access online. To the extent that the reframing of the presentation of a work is problematic, arguably this is the domain of moral, not economic, rights. In light of the objections against interpreting the right-holder's intention through the use of technological measures against framing, an even better approach might have left their circumvention to the para-copyright rules targeted at such activities (art. 6 InfoSoc Directive).

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THE RIGHT TO REMAIN SILENT IN EU LAW

DB v Commissione Nazionale per le Società e la Borsa (Consob), Case C-481/19, EU:C:2021:84, is a landmark ruling on the right to silence in EU law. The Grand Chamber decision of the Court of Justice of the EU (CJEU) is the first ruling on the right to silence outside of competition law and in relation to natural – as opposed to legal – persons.

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The facts of *Consob* are quite simple. In 2012, Consob (the National Companies and Stock Exchange Commission of Italy) imposed financial penalties on DB (a natural person) for insider dealing. In addition, Consob imposed a further financial penalty on DB for failing to cooperate with the investigation; when summoned by Consob to answer questions, DB had repeatedly postponed the date of the hearing and had refused to answer questions.

DB challenged the additional financial penalty. The case made its way to the Italian Constitutional Court which took the view that the national rules penalising obstructive behaviour were incompatible with: (1) the rights of defence and the principle of equality of arms in the Italian Constitution; (2) the right to a fair trial and the presumption of innocence in Articles 47 and 48 of the Charter of Fundamental Rights (CFR); and (3) the right to a fair trial in Article 6 ECHR.

Mandating a reference to the CJEU, the impugned Italian law had been adopted in implementation of EU measures on insider dealing: the Market Abuse Directive (Directive No 2003/6 (OJ L 96 p.16)), which by the time of the reference had been repealed and replaced by a similar provision in the Market Abuse Regulation (Regulation (EU) No 596/2014 (OJ L 173, p.1)). The Italian Constitutional Court asked the CJEU whether there had been an infringement of DB's right to remain silent. If so, the Constitutional Court asked whether the Market Abuse Directive and the Market Abuse Regulation *required* the imposition of sanctions (suggesting the measures were invalid), or whether the relevant provisions could instead be interpreted compatibly with the Charter.

The CJEU began by clarifying the scope of the right to remain silent under Articles 47 and 48 CFR. According to the CJEU, the right to remain silent "is a generally recognised international standard which lies at the heart of the notion of a fair trial" (at [38]) and is infringed when "a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify" (at [39]). Notably, the right to remain silent extends not only to admissions of wrongdoing or to directly incriminatory remarks but also to "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" (at [40]). However, given that DB's uncooperative conduct extended beyond a refusal to answer questions, the CJEU confirmed that the right to silence does not extend to "every failure to cooperate with the competent authorities, such as a refusal to appear at a hearing planned by those authorities or delaying tactics designed to postpone it" (at [41]).

This interpretation marks a break from earlier CJEU case law on the right to silence in competition proceedings. In the competition case law, the right to silence only extends to directly incriminating statements. An undertaking may be compelled to provide factual information and to disclose relevant

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documents even when this information may later be used to establish anti-competitive conduct (*Orkem v Commission*, Case 374/87, EU: C:1989:387). In *Consob*, the CJEU distinguished this line of case law on the grounds that the competition cases concerned the right to silence of "undertakings and associations of undertakings" and not "natural persons" (at [48]).

Doubts may be raised over whether the competition case law complies with the ECHR since companies can benefit from other rights found in Article 6 ECHR (see e.g. *Menarini* (Application no. 43509/08), Judgment of 27 September 2011)). While the CJEU did not consider this point, the Advocate General offered further discussion. He noted that the European Court of Human Rights (ECtHR) has not yet ruled on the right to silence of legal persons (at [97]) and emphasised the close connection in ECtHR case law between the right to silence and respect for human dignity (at [99]). According to the Advocate General, the right to silence forms part of "respect for the person and his freedom of determination, by preventing coercion by the public authorities in the formation of his will" (at [99]); a rationale which does not easily extend to legal persons.

After defining the kinds of statements covered by the right to silence, the CJEU turned to consider when the right to silence is engaged. There is no right to remain silent in all proceedings, but only in proceedings leading to sanctions of a criminal nature. Although *Consob* concerned administrative proceedings, the CJEU concluded that the relevant sanctions (the financial penalty for insider dealing) met this threshold. A factual test is used to establish the criminal nature of administrative penalties and the CJEU outlined three non-cumulative criteria: "the legal classification of the offence under national law, . . . the intrinsic nature of the offence, and . . . the degree of severity of the penalty" (at [42]).

In addition, the CJEU held that the right to silence extends to all proceedings where "the evidence obtained . . . may be used in criminal proceedings against that person in order to establish that a criminal offence was committed" (at [44]). This latter clarification is important for actions that are both administrative and criminal offences and where "twin track" investigations are carried out. Thus, although the CJEU maintains a distinct approach for legal persons in the field of competition law, the right to silence is likely to apply in national competition law proceedings in which sanctions of a criminal nature can be imposed upon both individuals and undertakings.

Having set out the scope of the right, the CJEU turned to the compatibility of the Market Abuse Directive and the Market Abuse Regulation with Articles 47 and 48 CFR. Both measures are broadly framed and oblige Member States to grant sanctioning powers to the relevant body. According to Article 14(3) of the Directive, "Member States shall determine the sanctions to be applied for failure to cooperate in an investigation". Similarly, Article 30(1) of the Regulation specifies that "Member

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States shall … provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures in relation to … failure to cooperate or to comply with an investigation". Due to the wide range of conduct that can amount to failure to cooperate and the possibility to impose "administrative measures", the CJEU held that nothing in the Directive or the Regulation *required* the Member States to impose sanctions for failure to answer questions (at [55]). Member States must instead exercise the discretion accorded to them compatibly with the Charter. This means Member States can still grant investigatory bodies the power to penalise delaying tactics or non-attendance at hearings.

Taking a step back from the detail, the decision is noteworthy from the perspective of the multi-level nature of rights protection in the EU legal space. National constitutional courts, the ECtHR and the CJEU each have overlapping responsibilities to uphold fundamental rights within their jurisdiction. In *Consob*, the CJEU deliberately aligned its interpretation of Articles 47 and 48 CFR with ECtHR case law on Article 6 ECHR. Although Article 52(3) CFR indirectly imports the ECHR as a minimum standard for corresponding Charter rights, the CJEU does not always consistently refer to or systematically engage with ECtHR case law. Although the CJEU does not discuss ECtHR case law in depth in *Consob*, the decision marks a positive development and suggests the court is taking seriously the position of the ECHR as a floor for rights contained in the Charter.

Consob also suggests a model for constructive engagement between national constitutional courts when compared with the rather more hostile approach of the German Constitutional Court (as seen most recently in its "explosive" decision concerning the European Central Bank's Public Sector Purchase Programme (2 BvR 859/15, of 5 May 2020)). *Consob* does not come long after the *Taricco II* ruling (*M.A.S. and M.B.*, Case C-42/17, EU:C:2017:936) in which a reference from the Italian Constitutional Court, led the CJEU to revise earlier case law on the disapplication of national limitation periods (*Tarico I*, Case C-105/14, EU:C:2015:555) in light of the principle of legality. *Consob* follows a similar pattern; the Italian Constitutional Court framed its question in an open-ended and non-confrontational manner, setting out its own understanding of the fundamental right in question. Without wanting to draw too strong a conclusion, the Italian Constitutional Court's approach appears successful; the CJEU in both *Taricco II* and *Consob* engages with and seems to take on board its interpretation of fundamental rights.

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