Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

13 September 2018 (*)

(Reference for a preliminary ruling — Approximation of laws — Directive 2004/39/EC — Article 54(1) and (3) — Scope of the obligation of professional secrecy on national financial supervisory authorities — Finding of the absence of good repute — Cases covered by criminal law — Charter of Fundamental Rights of the European Union — Articles 47 and 48 — Rights of the defence — Access to the file)

In Case C-358/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour administrative (Higher Administrative Court, Luxembourg), made by decision of 21 June 2016, received at the Court on 24 June 2016, in the proceedings

UBS Europe SE, formerly UBS (Luxembourg) SA,

Mr Alain Hondequin and Others

other parties to the proceedings:

DV,

EU,

Commission de surveillance du secteur financier (CSSF),

Ordre des avocats du barreau de Luxembourg,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, A. Tizzano, Vice-President of the Court, E. Levits, M. Berger and F. Biltgen, Judges,

Advocate General: J. Kokott,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 1 June 2017,

after considering the observations submitted on behalf of

– UBS Europe SE, the legal successor to UBS (Luxembourg) SA, by M. Elvinger and L. Arpetti, avocats,

– Mr Hondequin and Others, by V. Hoffeld and P. Urbany, avocats, and by E. Fronczak, advocate,

– DV and EU, by J.-P. Noesen, avocat,

– the Commission de surveillance du secteur financier (CSSF), by A. Rodesch and P. Sondhi, avocats,

– the German Government, by T. Henze, J. Möller and D. Klebs, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the Greek Government, by K. Georgiadis and Z. Chatzipavlou, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by V. Di Bucci, J. Rius and I.V. Rogalski, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 July 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 54(1) and (3) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1), read in conjunction with Articles 41, 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in third-party proceedings brought by UBS Europe SE, formerly UBS (Luxembourg) SA ('UBS'), and Mr Alain Hondequin and Others against the judgment of 16 December 2014 of the Cour administrative (Higher Administrative Court, Luxembourg) ruling on the appeal brought by Mr DV and Mr EU against the judgment of 5 June 2014 of the tribunal administratif (Administrative Court, Luxembourg), concerning the refusal of the Commission de surveillance du secteur financier (Luxembourg financial supervisory authority, 'the CSSF') to disclose certain documents in proceedings between Mr DV and the CSSF further to its finding of the loss of Mr DV's good repute.

Legal context

EU law

3 Recitals 2 and 63 of Directive 2004/39 state:

'(2) ... it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Community, being a Single Market, on the basis of home country supervision. ...

...

(63) ... Due to increasing cross-border activity, competent authorities should provide each other with the relevant information for the exercise of their functions, so as to ensure the effective enforcement of this Directive, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. In the exchange of information, strict professional secrecy is needed to ensure the smooth transmission of that information and the protection of particular rights.'

4 In Title II of Directive 2004/39, concerning ‘Authorisation and operating conditions for investment firms’, Article 8 of the directive, entitled ‘Withdrawal of authorisations’, provides, in subparagraph (c), that the competent authority may withdraw the authorisation issued to an investment firm that no longer meets the conditions under which authorisation was granted.

5 In the same title, Article 9 of the directive, entitled ‘Persons who effectively direct the business’, provides:

‘1. Member States shall require the persons who effectively direct the business of an investment firm to be of sufficiently good repute and sufficiently experienced as to ensure the sound and prudent management of the investment firm.

...

3. The competent authority shall refuse authorisation if it is not satisfied that the persons who will effectively direct the business of the investment firm are of sufficiently good repute or sufficiently experienced, or if there are objective and demonstrable grounds for believing that proposed changes to the management of the firm pose a threat to its sound and prudent management.

...’

6 Article 17 of the directive, entitled ‘General obligation in respect of on-going supervision’, provides in paragraph 1:

‘Member States shall ensure that the competent authorities monitor the activities of investment firms so as to assess compliance with the operating conditions provided for in this Directive. Member States shall ensure that the appropriate measures are in place to enable the competent authorities to obtain the information needed to assess the compliance of investment firms with those obligations.’

7 Article 50 of Directive 2004/39, entitled ‘Powers to be made available to competent authorities’, provides:

‘1. Competent authorities shall be given all supervisory and investigatory powers that are necessary for the exercise of their functions.

...

2. The powers referred to in paragraph 1 shall be exercised in conformity with national law and shall include, at least, the rights to:

(a) have access to any document in any form whatsoever and to receive a copy of it;

(b) demand information from any person and if necessary to summon and question a person with a view to obtaining information;

...

(l) refer matters for criminal prosecution;

...’

8 Article 51 of that directive, entitled ‘Administrative sanctions’, provides in paragraph 1:

‘Without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been

complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.'

9 Article 52 of that directive, entitled 'Right of appeal', provides in paragraph 1:

'Member States shall ensure that any decision taken under laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned and is subject to the right to apply to the courts. ...'

10 Article 54 of Directive 2004/39, entitled 'Professional secrecy', is worded as follows:

'1. Member States shall ensure that competent authorities, all persons who work or who have worked for the competent authorities or entities to whom tasks are delegated pursuant to Article 48(2), as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy. No confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, save in summary or aggregate form such that individual investment firms, market operators, regulated markets or any other person cannot be identified, without prejudice to cases covered by criminal law or the other provisions of this Directive.

2. Where an investment firm, market operator or regulated market has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding.

3. Without prejudice to cases covered by criminal law, the competent authorities, bodies or natural or legal persons other than competent authorities which receive confidential information pursuant to this Directive may use it only in the performance of their duties and for the exercise of their functions, in the case of the competent authorities, within the scope of this Directive or, in the case of other authorities, bodies or natural or legal persons, for the purpose for which such information was provided to them and/or in the context of administrative or judicial proceedings specifically related to the exercise of those functions. However, where the competent authority or other authority, body or person communicating information consents thereto, the authority receiving the information may use it for other purposes.

4. Any confidential information received, exchanged or transmitted pursuant to this Directive shall be subject to the conditions of professional secrecy laid down in this Article. Nevertheless, this Article shall not prevent the competent authorities from exchanging or transmitting confidential information in accordance with this Directive and with other Directives applicable to investment firms, credit institutions, pension funds, [undertakings for collective investment in transferable securities (UCITS)], insurance and reinsurance intermediaries, insurance undertakings[,] regulated markets or market operators or otherwise with the consent of the competent authority or other authority or body or natural or legal person that communicated the information.

5. This Article shall not prevent the competent authorities from exchanging or transmitting in accordance with national law, confidential information that has not been received from a competent authority of another Member State.'

11 Article 56(1) of Directive 2004/39, that article being headed 'Obligation to cooperate', provides:

'Competent authorities of different Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties under this Directive, making use of their powers whether set out in this Directive or in national law.

Competent authorities shall render assistance to competent authorities of the other Member States. In particular, they shall exchange information and cooperate in any investigation or supervisory activities.

...'

Luxembourg law

12 Article 19 of the Law of 5 April 1993 on the financial sector (*Mémorial* A No 27, p. 462), entitled 'Professional reputation and experience', provides in paragraph 1:

'In order to obtain authorisation, natural persons and, in the case of legal persons, the members of the administrative, management and supervisory bodies and the shareholders or members referred to in the previous article, must prove their good repute. Good repute shall be assessed on the basis of police records and any evidence that is likely to establish that the persons concerned are of good repute and display every guarantee that their conduct is beyond reproach.'

13 Article 32 of the Law of 13 July 2007 on markets in financial instruments and transposing, inter alia, Directive 2004/39 (*Mémorial* A No 116, p. 2076), entitled 'Professional secrecy of the CSSF', provides:

'(1) All persons working or who have worked for the [CSSF], as well as accredited auditors or experts acting on behalf of the [CSSF], shall be bound by the obligation of professional secrecy laid down in Article 16 of the amended Law of 23 December 1998 establishing a financial supervisory authority. This means that no confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, except in summary or collective form, such that no market operator, regulated market, [multilateral trading facility (MTF)] or any other relevant person or system can be identified, without prejudice to cases covered by criminal law or the other provisions of this title.

...

(3) Without prejudice to cases covered by criminal law, the [CSSF] may use the confidential information received pursuant to this title only for the exercise of the functions conferred upon it by the present title or in the context of administrative or judicial proceedings specifically relating to the exercise of those functions.

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 It is apparent from the order for reference that, by decision of 4 January 2010, the CSSF ordered Mr DV to resign from all his posts at the earliest opportunity on the ground that he was no longer trustworthy and was, therefore, no longer suitable to be a director of an entity regulated by the CSSF or to fulfil any other role subject to accreditation. The CSSF based its decision, inter alia, on the role played by Mr DV in the setting-up and operation of the company Luxalpha Sicav ('Luxalpha').

15 By applications lodged on 26 February and 31 March 2010 before the tribunal administratif (Administrative Court, Luxembourg), Mr DV brought an action for variation or, failing that, annulment of the decision of the CSSF referred to above.

16 On 11 November 2010, Mr DV requested the CSSF, in the context of those currently pending actions, to forward him a copy of a letter of 27 January 2009 sent to the CSSF by UBS in response to the CSSF's request for information of 31 December 2008 in the context of the 'Madoff case'. By decision of 13 December 2010, the CSSF denied that request. On 10 January 2011, Mr DV brought an action for variation or, failing that, annulment of the CSSF's decision. On 15 December 2011, the Administrative Court ordered the CSSF to send that letter to Mr DV. By judgment of 18 July 2012, the tribunal administratif (Administrative Court) ruled that the action brought by Mr DV was founded in part and therefore annulled the CSSF's decision of 13 December 2010 refusing to forward Mr DV the letter of 27 January 2009 referred to above, with the exception of certain pieces of information.

17 On 26 February 2013, Mr DV requested the CSSF, also in the context of the main sets of proceedings, to send him a number of documents, including 'the CSSF's letter of 31 December 2008 to [UBS] and the accompanying questionnaire' and 'all the investigations and/or inquiries conducted by the CSSF in connection with the Madoff case, with reference to Luxalpha, and all the documents received by the CSSF at that time'. According to Mr DV, those documents shed light on the role played by UBS in the establishment and setting-up of Luxalpha, and are as a result necessary in order to understand the roles of the various persons involved in the setting-up of that company.

18 By decision of 9 April 2013, the CSSF refused to forward the requested documents to Mr DV on the ground, inter alia, that they were not in the administrative file concerning Mr DV, that they were covered by its obligation of professional secrecy, that it had not referred to the documents requested at any point during the administrative procedure against Mr DV, and that Mr DV's request was not sufficiently specific.

19 On 5 June 2013, Mr DV brought an action seeking, principally, the annulment and, in the alternative, the variation of the CSSF's decision referred to above. By application lodged on 7 June 2013 before the tribunal administratif (Administrative Court), Mr EU stated that he wished to intervene voluntarily in the case on the ground that, like Mr DV, he had been the subject of an administrative procedure sanctioning him for, inter alia, his role in the setting-up and operation of Luxalpha. Mr EU also explained that he had brought court proceedings against the CSSF's finding of absence of good repute on his part and that he required, in the context of those proceedings, various documents that the CSSF allegedly refused to send him.

20 By judgment of 5 June 2014, the tribunal administratif (Administrative Court), after having granted Mr EU's voluntary application to intervene in the case, ordered the CSSF to forward him the letter sent on 31 December 2008 to UBS in the context of the 'Madoff case' and dismissed Mr DV's application for annulment as to the remainder.

21 By application lodged on 26 June 2014, Mr DV and Mr EU brought an appeal against the judgment of the tribunal administratif (Administrative Court) before the Cour administrative (Administrative Court of Appeal).

22 By judgment of 16 December 2014, the Cour administrative (Higher Administrative Court) ruled that the appeal brought by Mr DV and Mr EU was well-founded in part and ordered the CSSF to submit, in the context of the main sets of proceedings, all the investigations or inquiries conducted by the CSSF in connection with the 'Madoff case', more specifically with reference to Luxalpha, and all the documents received by the CSSF at that time.

23 In that judgment, the Cour administrative (Higher Administrative Court) observed, in particular, that, in a procedure concerning an administrative sanction, especially when it amounts to a criminal procedure in the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (the 'ECHR'), such as the procedure in question in the present case, no secrecy may in principle be relied on against a person who defends himself against the charge or brings an action against the sanction imposed on him. Thus, if the administration based its argument on a document which also concerned a third party, it could invoke professional secrecy against the person on whom a sanction had been imposed only within very strict limits, lest it infringe that person's rights of defence. The Cour administrative (Higher Administrative Court) went on to observe that it is for the administration — which must, in principle, place in the case file lodged with it the complete administrative file containing all the evidence relating to the contested measure — to set out the grounds on which a document requested by the defence is not relevant. In the present case, the CSSF had merely invoked professional secrecy without explaining, in detail, the reasons which allegedly prevented it from disclosing to Mr DV all of the documents that appeared, on the face of it, to be relevant to his defence against the sanction imposed on him.

24 By applications lodged on 23 October 2015 and 3 March 2016 before the Cour administrative (Higher Administrative Court), respectively, UBS and Mr Alain Hondequin and Others, acting as former members

of the board of directors of Luxalpha, brought third-party proceedings against that judgment. UBS submits, in essence, that the Cour administrative (Higher Administrative Court) failed to have regard to Article 54 of Directive 2004/39.

25 In that regard, the referring court considers that it is faced with two types of questions concerning the interpretation of Article 54 of Directive 2004/39. In the first place, it is uncertain as to the scope, in the light of Article 41 of the Charter, of the exception of 'cases covered by criminal law' referred to in Article 54(1) and (3). In the second place, it asks how the requirements and guarantees deriving from Articles 47 and 48 of the Charter and from Articles 6 and 13 ECHR should be reconciled with the obligation to maintain professional secrecy enshrined in Article 54 of the directive.

26 In those circumstances, the Cour administrative (Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Against the background in particular of Article 41 of the Charter enshrining the principle of good administration, does the exception of 'cases covered by criminal law' — found at the end of Article 54(1) of Directive 2004/39 and at the beginning of Article 54(3) — cover a situation concerning, according to national law, an administrative sanction, but considered from the point of view of the ECHR to be part of criminal law, such as the sanction at issue in the main proceedings, imposed by the national regulator, the national supervisory authority, and consisting in ordering a member of the national bar association to cease holding a post as director or any other post subject to accreditation in an entity supervised by that regulator and ordering him to resign from all his posts at the earliest opportunity?

(2) Inasmuch as the aforementioned administrative sanction, regarded as such under national law, stems from administrative proceedings, to what extent is the obligation of professional secrecy, which a national supervisory authority may invoke under Article 54 of Directive 2004/39, subject to the requirements for a fair trial including an effective remedy as laid down in Article 47 of the Charter, examined in relation to the parallel requirements of Articles 6 and 13 ECHR relating to a fair trial and an effective remedy, [as well as] the safeguards provided for by Article 48 of the Charter, in particular as regards full access for the person on whom the administrative sanction has been imposed to the administrative file of the author of the sanction, which is also the national supervisory authority, for the purpose of protecting the interests and civil rights of the person on whom the sanction has been imposed?'

Consideration of the questions referred

27 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 54(1) and (3) of Directive 2004/39, read in conjunction with Article 41 of the Charter, should be interpreted as meaning that the exception to the obligation of professional secrecy laid down in that provision and relating to 'cases covered by criminal law' applies to a situation in which the authorities established by the Member States for the purpose of fulfilling the functions set out in that directive ('the competent authorities') adopt a measure or a sanction covered by national administrative law. If this should not be the case, it seeks to ascertain to what extent that obligation of professional secrecy is in any event restricted by the right to an effective remedy and a fair trial and by the respect for the rights of the defence enshrined in Articles 47 and 48 of the Charter, read in the light of Articles 6 and 13 ECHR.

28 In the first place, with regard to the situations referred to by the phrase 'cases covered by criminal law' within the meaning of Article 54(1) and (3) of Directive 2004/39, read in conjunction with Article 41 of the Charter, it should be noted that it is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (judgments of 17 December 2015, *WebMindLicenses*, C−419/14, EU:C:2015:832, paragraph 83 and of 9 March 2017, *Doux*, C−141/15, EU:C:2017:188, paragraph 60). It follows that Article 41 of the Charter is irrelevant to the case in the main proceedings.

29 It should also be pointed out that neither Article 54 of Directive 2004/39 nor any other provision of that directive contains a definition of the phrase ‘cases covered by criminal law’ found in Article 54(1) and (3).

30 Account should therefore be taken, in accordance with well-established case-law, of the context of Article 54 of Directive 2004/39 and the objectives pursued by that directive (see, to that effect, judgment of 22 April 2015, *Drukarnia Multipress*, C−357/13, EU:C:2015:253, paragraph 22 and the case-law cited).

31 It should be borne in mind that it is apparent from recital 2 of the directive that its purpose is to provide for the degree of harmonisation required to offer investors a high level of protection and to allow investment firms to provide services throughout the European Union on the basis of home country supervision (judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 26).

32 It is also apparent from the second sentence of recital 63 of Directive 2004/39 that, due to increasing cross-border activity, competent authorities of the various Member States should provide each other with the information that is necessary for the exercise of their functions, so as to ensure the effective enforcement of that directive (judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 27).

33 Thus, under Article 17(1) of Directive 2004/39, the Member States must ensure that the competent authorities continuously monitor the activities of investment firms so as to assess compliance with their obligations (judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 28).

34 Article 50(1) and (2) of that directive provide that the competent authorities must have all supervisory and investigatory powers that are necessary for the exercise of their functions, including the rights to have access to any document and to demand information from any person (judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 29).

35 Further, Article 56(1) of Directive 2004/39 states that competent authorities are to render assistance to competent authorities of the other Member States. In particular, they must exchange information and cooperate in any investigation or supervisory activities (judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 30).

36 The effective monitoring of the activities of investment firms, through supervision within a Member State and the exchanging of information by the competent authorities of several Member States, as briefly described in the preceding paragraphs, requires that both the supervised entities and the competent authorities can have confidence that the confidential information provided will, in principle, remain confidential (judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 31).

37 As is clear from, in particular, the last sentence of recital 63 of Directive 2004/39, the absence of such confidence is liable to compromise the smooth transmission of the confidential information that is necessary for monitoring (judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 32).

38 Therefore, in order to protect not only the specific interests of the firms directly concerned, but also the public interest in the normal functioning of the markets in financial instruments of the European Union, Article 54(1) of Directive 2004/39 imposes, as a general rule, the obligation of professional secrecy (judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 33).

39 In that regard, the Court has stated that Article 54 of Directive 2004/39 establishes the general rule that disclosure of confidential information held by the competent authorities is prohibited and lists exhaustively the specific cases where, exceptionally, that general prohibition does not preclude their communication or use (judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 38).

40 In the present case, it should be noted that Article 54(1) and (3) of Directive 2004/39 provides that the obligation of professional secrecy on the competent authorities is applicable ‘without prejudice to cases

covered by criminal law'.

41 As the phrase 'cases covered by criminal law', used in Article 54(1) and (3) of Directive 2004/39, is an exception to the general rule that disclosure of confidential information held by the competent authorities is prohibited, it must be interpreted strictly (see, to that effect, judgment of 22 April 2010, *Commission* v *United Kingdom*, C-346/08, EU:C:2010:213, paragraph 39 and the case-law cited).

42 In that regard, it should be borne in mind that, pursuant to Article 50(2)(l) of Directive 2004/39, the competent authorities must have the right to refer matters for criminal prosecution.

43 In addition, Article 51(1) of the directive provides that, without prejudice to the procedures for the withdrawal of authorisation or to the right of Member States to impose criminal sanctions, Member States are to ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of the directive have not been complied with.

44 In those circumstances, it must be held, as observed in essence by the Advocate General in points 47 and 48 of her Opinion, that Article 54(1) and (3) of Directive 2004/39, when it provides that the obligation of professional secrecy may exceptionally be disregarded in 'cases covered by criminal law', covers the communication or use of confidential information for the purpose of conducting proceedings or imposing sanctions in accordance with national criminal law.

45 Moreover, that interpretation is borne out by Article 76(1) and (3) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349), which recast Directive 2004/39, where it is now specified that the obligation of professional secrecy is applicable 'without prejudice to requirements of national criminal ... law'.

46 It should also be noted that, irrespective of how they are classified under national law — to which the referring court refers — the steps that must be taken by the competent authorities further to a finding that a person no longer satisfies the requirement of good repute laid down in Article 9 of Directive 2004/39 are part of the 'procedures for the withdrawal of authorisation' referred to in Article 51(1) of the directive; they do not, however, constitute sanctions within the meaning of that provision and their application is not related to cases covered by criminal law within the meaning of Article 54(1) and (3) of the directive.

47 Consequently, the Court finds that the exception to the general rule prohibiting disclosure of confidential information held by the competent authorities, which relates to 'cases covered by criminal law', does not apply in circumstances such as those of the main proceedings.

48 It is nonetheless appropriate to examine, in the second place, to what extent the obligation of professional secrecy provided for in Article 54(1) of Directive 2004/39 is in any event restricted by the right to an effective remedy and a fair trial and by the respect for the rights of the defence enshrined in Articles 47 and 48 of the Charter, read in the light of Articles 6 and 13 ECHR.

49 As a preliminary point, in so far as the referring court also refers to Articles 6 and 13 ECHR, it should be recalled that, whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of EU law and whilst Article 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law (judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraph 24 and the case-law cited).

50 The explanations relating to the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 47), make clear that

Articles 47 and 48 of the Charter ensure that the protection conferred by Articles 6 and 13 ECHR is safeguarded under EU law. It is therefore appropriate to refer to those articles of the Charter alone.

51 Furthermore, it should be borne in mind that the Court has consistently held that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law and that the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter (judgment of 16 May 2017, *Berlioz Investment Fund*, C−682/15, EU:C:2017:373, paragraph 49 and the case-law cited).

52 In the case in the main proceedings, it appears from the evidence submitted to the Court that the decisions of the CSSF at issue are based on national provisions designed to implement EU law within the meaning of Article 51(1) of the Charter. It follows that the provisions of the Charter are applicable in this case.

53 What is more, it should also be borne in mind that, in accordance with a general principle of interpretation, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter (judgment of 15 February 2016, *N.*, C−601/15 PPU, EU:C:2016:84, paragraph 48).

54 In that regard, as concerns, first, the right to an effective remedy, the first paragraph of Article 47 of the Charter provides that everyone whose rights and freedoms guaranteed by EU law are infringed has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.

55 In order to ensure the observance of that fundamental right within the European Union, the second subparagraph of Article 19(1) TEU lays down that Member States are to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law (judgment of 26 September 2013, *Texdata Software*, C−418/11, EU:C:2013:588, paragraph 78).

56 As regards, specifically, the existence of a right guaranteed by EU law within the meaning of the first paragraph of Article 47 of the Charter, it should be borne in mind that, according to settled case-law, protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any natural or legal person constitutes a general principle of EU law. That protection may be invoked by a relevant person in respect of a measure adversely affecting him (see, to that effect, judgment of 16 May 2017, *Berlioz Investment Fund*, C−682/15, EU:C:2017:373, paragraphs 51 and 52).

57 Moreover, it must be noted that the right to an effective remedy is reaffirmed by Directive 2004/39 itself, the first sentence of Article 52(1) of which provides that ‘Member States shall ensure that any decision taken under laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned and is subject to the right to apply to the courts’.

58 The Court also observes that, in the case in the main proceedings, the decisions of the CSSF at issue were the subject of an application to the courts in order to examine the lawfulness of those decisions.

59 Secondly, as regards the right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter, it is important to note that respect for the rights of the defence is a particular aspect of the right to a fair trial (see, to that effect, ECtHR, 1 June 2010, *Gäfgen v. Germany*, ECLI:CE:ECHR:2010:0601JUD002297805, § 169, and judgment of 6 November 2012, *Otis and Others*, C−199/11, EU:C:2012:684, paragraph 48). Respect for the rights of the defence is also enshrined in Article 48(2) of the Charter.

60 The Court has emphasised that the rights of the defence must be observed in all proceedings initiated against a person which may well culminate in a measure adversely affecting that person (see, to that effect, judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraph 9; of 2 October 2003, *ARBED* v *Commission*, C−176/99 P, EU:C:2003:524, paragraph 19, and of 26 September 2013, *Texdata Software*, C−418/11, EU:C:2013:588, paragraph 83).

61 The right of access to the file is, in turn, the necessary corollary of the effective exercise of the rights of the defence (see, to that effect, judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, C−238/99 P, C−244/99 P, C−245/99 P, C−247/99 P, C−250/99 P to C−252/99 P and C−254/99 P, EU:C:2002:582, paragraph 316, and of 1 July 2010, *Knauf Gips* v *Commission*, C−407/08 P, EU:C:2010:389, paragraph 22).

62 However, it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, in the light of the objectives pursued, a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed (judgments of 18 March 2010, *Alassini and Others*, C−317/08 to C−320/08, EU:C:2010:146, paragraph 63, and of 26 September 2013, *Texdata Software*, C−418/11, EU:C:2013:588, paragraph 84).

63 Such restrictions may, in particular, be designed to protect requirements of confidentiality or professional secrecy, which are liable to be infringed by access to certain information and certain documents (see, to that effect, judgment of 9 November 2017, *Ispas*, C−298/16, EU:C:2017:843, paragraph 36).

64 In that regard, in respect, specifically, of the obligation of professional secrecy on the competent authorities under Article 54(1) of Directive 2004/39, it should be borne in mind, as stated in paragraph 38 of this judgment, that that obligation is designed to protect not only the specific interests of the firms directly concerned but also the public interest in the normal functioning of the markets in financial instruments of the European Union.

65 In that connection, the Court has ruled that the general prohibition on the disclosure of confidential information laid down in Article 54(1) of Directive 2004/39 applies to information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of investment firms that the EU legislature established in adopting Directive 2004/39 (judgment of 19 June 2018, *Baumeister*, C−15/16, EU:C:2018:464, paragraph 35).

66 Moreover, as concerns the right of access to the file specifically, it is well-established case-law that it means that the person who is the subject of a measure adversely affecting him must have the opportunity to examine all of the documents in the investigation that might be relevant for his defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets concerning other persons, internal documents of the authority that adopted the measure and other confidential information (see, to that effect, judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C−204/00 P, C−205/00 P, C−211/00 P, C−213/00 P, C−217/00 P and C−219/00 P, EU:C:2004:6, paragraph 68, and of 25 October 2011, *Solvay* v *Commission*, C−110/10 P, EU:C:2011:687, paragraph 49).

67 As for the documents that must be included in the investigation file, it must be noted that it is also apparent from the Court's case-law that although it cannot be solely for the authority who notifies any objections and adopts the decision imposing a penalty to determine the documents of use in the defence of the person concerned, it is however allowed to exclude from the administrative procedure evidence which has no relation to the allegations of fact and of law in the statement of objections and which therefore has no relevance to the investigation (see, to that effect, judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C−204/00 P, C−205/00 P, C−211/00 P, C−213/00 P, C−217/00 P and C−219/00 P, EU:C:2004:6, paragraph 126 and the case-law cited).

68 It follows from the foregoing considerations that the right to disclosure of the documents relevant to the defence is not unlimited and unfettered. On the contrary, as observed by the Advocate General in essence in point 90 of her Opinion, the protection of the confidentiality of the information covered by the obligation of professional secrecy on the competent authorities in accordance with Article 54(1) of Directive 2004/39 must be guaranteed and implemented in such a way as to reconcile it with the rights of the defence.

69 Accordingly, in the event of a conflict of, on the one hand, the interest of the person who is the subject of a measure adversely affecting him in having access to the information necessary for him to be in a position to exercise fully his rights of defence and, on the other hand, the interests in connection with maintaining the confidentiality of the information covered by the obligation of professional secrecy, it is for the competent authorities or courts to seek to strike a balance between these opposing interests in the light of the circumstances of each case (see, to that effect, judgment of 14 February 2008, *Varec*, C−450/06, EU:C:2008:91, paragraphs 51 and 52 and the case-law cited).

70 As a result, in circumstances such as those of the case in the main proceedings, if a competent authority invokes the obligation of professional secrecy provided for in Article 54(1) of Directive 2004/39 in order to refuse to disclose documents in its possession that are not in the file concerning the person who is the subject of a measure adversely affecting him, it is for the competent national court to ascertain whether that information is objectively connected to the complaints upheld against him and, if this should be the case, to weigh up the interests set out in the previous paragraph of this judgment, before taking a decision whether to communicate each of the requested pieces of information.

71 In the light of all the foregoing, the answer to the questions referred is that Article 54 of Directive 2004/39 must be interpreted as meaning that:

– the phrase ‘cases covered by criminal law’ in paragraphs 1 and 3 of that article do not cover the situation in which the competent authorities adopt a measure, such as that at issue in the main proceedings, consisting in prohibiting a person from holding a post as director or any other post subject to accreditation in an undertaking supervised by that regulator and ordering him to resign from all related posts at the earliest opportunity, on the ground that that person no longer fulfils the requirement of good repute provided for in Article 9 of that directive, which is part of the measures that the competent authorities are required to take when exercising the powers attributed to them under Title II of that directive. That provision, in providing that the obligation of professional secrecy may exceptionally be disregarded in such cases, covers the communication or use of confidential information for the purpose of conducting proceedings or imposing sanctions in accordance with national criminal law;

– the obligation of professional secrecy provided for in paragraph 1 of that article, read in conjunction with Articles 47 and 48 of the Charter, must be guaranteed and implemented in such a way as to reconcile it with the rights of the defence. Accordingly, it is for the competent national court, when a competent authority invokes that obligation in order to refuse to disclose documents in its possession that are not in the file concerning the person who is the subject of a measure adversely affecting him, to ascertain whether that information is objectively connected to the complaints upheld against him and, if this should be the case, to weigh up the interest of the person in question in having access to the information necessary for him to be in a position to exercise fully his rights of defence and the interests in connection with maintaining the confidentiality of the information covered by the obligation of professional secrecy, before taking a decision whether to communicate each of the requested pieces of information.

Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 54 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and

Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC must be interpreted as meaning that

– **the phrase 'cases covered by criminal law' in paragraphs 1 and 3 of that article does not cover the situation in which the authorities established by the Member States for the purpose of fulfilling the functions set out in that directive adopt a measure, such as that at issue in the main proceedings, consisting in prohibiting a person from holding a post as director or any other post subject to accreditation in an undertaking supervised by that regulator and ordering him to resign from all related posts at the earliest opportunity, on the ground that that person no longer fulfils the requirement of good repute provided for in Article 9 of that directive, which is part of the measures that the competent authorities are required to take when exercising the powers attributed to them under Title II of that directive. That provision, in providing that the obligation of professional secrecy may exceptionally be disregarded in such cases, covers the communication or use of confidential information for the purpose of conducting proceedings or imposing sanctions in accordance with national criminal law;**

– **the obligation of professional secrecy provided for in paragraph 1 of that article, read in conjunction with Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, must be guaranteed and implemented in such a way as to reconcile it with the rights of the defence. Accordingly, it is for the competent national court, when a competent authority invokes that obligation in order to refuse to disclose documents in its possession that are not in the file concerning the person who is the subject of a measure adversely affecting him, to ascertain whether that information is objectively connected to the complaints upheld against him and, if this should be the case, to weigh up the interest of the person in question in having access to the information necessary for him to be in a position to exercise fully his rights of defence and the interests in connection with maintaining the confidentiality of the information covered by the obligation of professional secrecy, before taking a decision whether to communicate each of the requested pieces of information.**

[Signatures]

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* Language of the case: French.