Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 10 July 2025 [1]

Case C-229/24 [Brännelius] [i]

TK,
OP
v
Riksåklagaren

(Request for a preliminary ruling from the Högsta domstolen (Supreme Court, Sweden))

(Reference for a preliminary ruling – Approximation of laws – Single market for financial services – Regulation (EU) No 596/2014 – Market abuse – Article 7(1)(a) – Concept of 'inside information' – Information not made public – Article 17 – Public disclosure of inside information by an issuer – Decision of a contracting authority not to award a public contract – Notification of tenderers by email – Early sale of shares of a tenderer – Insider dealing – Inside information – Public disclosure of information)

I. Introduction

1. The Högsta domstolen (Supreme Court, Sweden) is called upon to rule on the appeals of two persons convicted, at first instance and on appeal, of selling financial instruments on the Swedish stock exchange for which they were accused of having held inside information.

2. That information concerns the decision of a municipal contracting authority not to award a public contract to a listed company. Shortly before that company issued a press release on the subject, the abovementioned two persons became aware of that fact by means of an email sent by the contracting authority and sold their shares to avoid stock market losses. The dispute in the main proceedings concerns the question whether the information that those two persons used for their own gain can be characterised as inside information, since, at the time of the sale of the shares, the decision not to award the contract had already been notified to a small group of recipients.

3. In that context, the referring court refers two questions to the Court of Justice in order for it to interpret the concept of 'inside information', in particular the criterion that the information must not have been 'made public' within the meaning of Article 7(1)(a) of Regulation (EU)

[1] Original language: French.

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any of the parties to the proceedings.

No 596/2014.[2] The Court has already ruled on several of the constituent elements of that concept.[3] However, it has not yet done so as regards the lack of public disclosure of the information in question, as a criterion for it to be deemed inside information, a condition whose exact scope is vigorously debated in the legal literature.[4] This concerns inter alia the question of to which group of persons must that information have been disclosed or to what extent and under which conditions must it be accessible in order for it to cease being inside information.

II. Legal framework

A. European Union law

1. Regulation No 596/2014

4. Recitals 14, 23, 24 and 28 of Regulation No 596/2014 state:

‘(14) Reasonable investors base their investment decisions on information already available to them, that is to say, on *ex ante* available information. Therefore, the question whether, in making an investment decision, a reasonable investor would be likely to take into account a particular piece of information should be appraised on the basis of the *ex ante* available information. Such an assessment has to take into consideration the anticipated impact of the information in light of the totality of the related issuer’s activity, the reliability of the source of information and any other market variables likely to affect the financial instruments, … in the given circumstances.

…

(23) The essential characteristic of insider dealing consists in an unfair advantage being obtained from inside information to the detriment of third parties who are unaware of such information and, consequently, the undermining of the integrity of financial markets and investor confidence. Consequently, the prohibition against insider dealing should apply where a person who is in possession of inside information takes unfair advantage of the benefit gained from that information by entering into market transactions in accordance with that information by acquiring or disposing of, by attempting to acquire or dispose of,

[2] Regulation of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1, and corrigendum OJ 2016 L 287, p. 320), as last amended by Regulation (EU) 2024/2809 of the European Parliament and of the Council of 23 October 2024 amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises (OJ L, 2024/2809).

[3] See judgments of 23 December 2009, *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806); of 7 July 2011, *IMC Securities* (C-445/09, EU:C:2011:459); of 28 June 2012, *Geltl* (C-19/11, EU:C:2012:397); of 11 March 2015, *Lafonta* (C-628/13, EU:C:2015:162); and of 15 March 2022, *Autorité des marchés financiers* (C-302/20, EU:C:2022:190).

[4] See, in particular, Hansen, J.L., ‘MAD in a hurry: The swift and promising adoption of the EU Market Abuse Directive’, *European Business Law Review*, 2004, p. 183 et seq.; Gilotta, S., ‘The regulation of outsider trading in the EU and the US’, *European Company and Financial Law Review*, 2016, p. 631 et seq.; Klöhn, L., ‘Wann ist eine Information öffentlich bekannt i.S.v. Art. 7 MAR?’, *Zeitschrift für das gesamte Handels-und Wirtschaftsrecht*, 2016, p. 707 et seq.; Juan y Mateu, F., ‘La difusión pública de información privilegiada en los mercados de valores’, *Revista de Derecho Mercantil*, 2017, No 304, p. 113 et seq.; Hössl-Neumann, M., *Informationsregulierung durch Insiderrecht*, 2020, p. 53 et seq.; Hössl-Neumann, M. and Torggler, U., ‘Inside information’, in Kalls, S., Oppitz, M., Torggler, U and Winner, M. (ed.), *EU Market Abuse Regulation*, Elgar, Cheltenham, 2021, p. 55 et seq.; and Veil, R., ‘Insider dealing’, in Veil, R. (ed.), *European Capital Markets Law*, Hart Publishing, Oxford, 3rd edition, 2022, § 14, p. 189 et seq.

by cancelling or amending, or by attempting to cancel or amend, an order to acquire or dispose of, for his own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. …

(24) Where a legal or natural person in possession of inside information acquires or disposes of, or attempts to acquire or dispose of, for his own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates, it should be implied that that person has used that information. That presumption is without prejudice to the rights of the defence. The question whether a person has infringed the prohibition on insider dealing or has attempted to commit insider dealing should be analysed in the light of the purpose of this Regulation, which is to protect the integrity of the financial market and to enhance investor confidence, which is based, in turn, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information.

…

(28) Research and estimates based on publicly available data, should not per se be regarded as inside information and the mere fact that a transaction is carried out on the basis of research or estimates should not … be deemed to constitute use of inside information. However, for example, where the publication or distribution of information is routinely expected by the market and where such publication or distribution contributes to the price-formation process of financial instruments, or the information provides views from a recognised market commentator or institution which may inform the prices of related financial instruments, the information may constitute inside information. Market actors must therefore consider the extent to which the information is non-public and the possible effect on financial instruments traded in advance of its publication or distribution, to establish whether they would be trading on the basis of inside information.'

5. Article 7 of that regulation, entitled 'Inside information', provides, in paragraphs 1 and 4 thereof:

'1. For the purposes of this Regulation, inside information shall comprise the following types of information:

(a) information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments;

…

4. For the purposes of paragraph 1, information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments, derivative financial instruments, related spot commodity contracts, or auctioned products based on emission allowances shall mean information a reasonable investor would be likely to use as part of the basis of his or her investment decisions.

…'

6. Article 8 of that regulation, entitled 'Insider dealing', provides, inter alia:

'1. For the purposes of this Regulation, insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. …

…

4. This Article applies to any person who possesses inside information as a result of:

(a) being a member of the administrative, management or supervisory bodies of the issuer …;

(b) having a holding in the capital of the issuer …;

(c) having access to the information through the exercise of an employment, profession or duties; …

…

This Article also applies to any person who possesses inside information under circumstances other than those referred to in the first subparagraph where that person knows or ought to know that it is inside information.

…'

7. According to points (a) and (c) of Article 14 of the same regulation, entitled 'Prohibition of insider dealing and of unlawful disclosure of inside information', persons must not 'engage or attempt to engage in insider dealing' and 'unlawfully disclose inside information'.

8. Paragraph 1 of Article 17 of that regulation, entitled 'Public disclosure of inside information', is worded, inter alia, as follows:

'An issuer shall inform the public as soon as possible of inside information which directly concerns that issuer.

The issuer shall ensure that the inside information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public and, where applicable, in the officially appointed mechanism referred to in Article 21 of Directive 2004/109/EC of the European Parliament and the Council [of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ 2004 L 390, p. 38)]. The issuer shall not combine the disclosure of inside information to the public with the marketing of its activities. The issuer shall post and maintain on its website for a period of at least five years, all inside information it is required to disclose publicly.

This Article shall apply to issuers who have requested or approved admission of their financial instruments to trading on a regulated market in a Member State …'

9. Paragraph 1 of Article 30 of the same regulation, headed 'Administrative sanctions and other administrative measures', provides:

'Without prejudice to any criminal sanctions and without prejudice to the supervisory powers of competent authorities under Article 23, Member States shall, in accordance with national law, provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures in relation to at least the following infringements:

(a) infringements of Articles 14 and 15 …'.

2. Implementing Regulation (EU) 2016/1055

10. Pursuant to paragraph 1 of Article 2 of Implementing Regulation (EU) 2016/1055,[5] under the heading 'Means for public disclosure of inside information', inter alia:

'Issuers and emission allowance market participants shall disclose inside information using technical means that ensure:

(a) inside information is disseminated:

(i) to as wide a public as possible on a non-discriminatory basis;

(ii) free of charge;

(iii) simultaneously throughout the Union.

…'

B. Swedish law

1. The TF

11. Article 1 of Chapter 2 of the tryckfrihetsförordningen (1949:105) (Constitutional Law No 105 of 1949 on freedom of the press) of 5 April 1949 ('the TF'), provides:

'Everyone shall be entitled to have free access to public documents, in order to encourage the free exchange of opinion, the availability of comprehensive information and freedom of artistic creation.'

12. According to Article 2 of Chapter 2 of the TF, the right of access to public documents may be restricted only where that is necessary to safeguard certain public interests which are specified therein.

[5] Commission Implementing Regulation of 29 June 2016 laying down implementing technical standards with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council (OJ 2016 L 173, p. 47).

13. Article 4 of Chapter 2 of the TF provides:

'A document is public if it is held by a public authority, and if it can be deemed under Article 9 or Article 10 to have been received or drawn up by such an authority.'

14. According to Article 10 of Chapter 2 of the TF, a document is deemed to have been drawn up by an authority when it has been made available to its recipient.

2. The Law on public access to information and on confidentiality

15. More detailed provisions on the procedure applied by national authorities in relation to the disclosure of public documents and restrictions on the right of access to such documents are contained in the offentlighets- och sekretesslagen (2009:400) (Law No 400 of 2009 on public access to information and on the confidentiality of public documents (2009:400)) ('the Law on public access to information and on confidentiality').

16. Article 3 of Chapter 2 of that law provides:

'The provisions of the [TF] relating to the right of access to public documents held by the authorities are also applicable, in so far as relevant, to the documents of public limited companies, partnerships, economic associations and foundations in which municipalities or regions have a legally decisive influence. For the purposes of this Law, such companies, associations and foundations shall be treated as authorities.'

17. Article 4 of Chapter 6 of the said law provides:

'At the request of an individual, an authority shall disclose the information contained in a public document that it keeps provided that the information is not confidential or that the disclosure is not likely to interfere with the proper functioning of the authority.'

18. The second paragraph of Article 3 of Chapter 19 of the same law provides that, with regard to a tender procedure, information relating, inter alia, to tenders or equivalent bids may not be disclosed to anyone other than the tenderer or the person who submitted the bid before the publication of all tenders or bids, the adoption of the award decision or the closure of the tender procedure.

19. In accordance with Article 16 of Chapter 31 of the same law, the rules on confidentiality are applicable to information relating to an individual's commercial or operational situation when that individual has a commercial relationship with a public authority if, for particular reasons, it can be assumed that that individual would be harmed by the disclosure of information.

3. Law No 1145 of 2016 on public procurement

20. Pursuant to the first sentence of the first paragraph of Article 12 of Chapter 12 of the lagen (2016:1145) om offentlig upphandling (Law No 1145 of 2016 on public procurement), the contracting authority must notify candidates and tenderers in writing as soon as possible of decisions taken regarding the award of a contract or the conclusion of a framework agreement.

21. In accordance with the first paragraph of Article 7 of Chapter 19 of that law, any contracting authority that has awarded a contract or concluded a framework agreement must publish, no later than 30 days after the conclusion of the contract or framework agreement, a notice announcing the outcome of the tender procedure.

4. Law No 1307 of 2016 on sanctions in case of market abuse on the securities market

22. The lag (2016:1307) om straff för marknadsmissbruk på värdepappersmarknaden (Law No 1307 of 2016 on sanctions in case of market abuse on the securities market) transposes Directive 2014/57/EU[6] into Swedish law.

23. Pursuant to point 1 of the first subparagraph of Article 1(1) of Chapter 2 of that law, any person who holds inside information and makes use of it by acquiring or disposing of, on the securities markets, for his or her own account or for the account of a third party, financial instruments to which such information relates is guilty of insider dealing.

III. The dispute in the main proceedings, the questions referred and the procedure before the Court

24. In the spring of 2018, Umeå kommunföretag AB ('the municipal company'), a public limited company governed by Swedish law which the Umeå kommun (Municipality of Umeå, Sweden) has the legal power to direct, launched a call for tenders for the purchase of electric buses and charging stations.

25. Two companies submitted bids, one of which was Hybricon Bus Systems AB ('Hybricon'), a public limited company governed by Swedish law. Three other companies had expressed an interest in participating in the contract concerned, but they were not admitted to submit their bids.

26. By a decision of 14 May 2018 adopted by the municipal company, the contract was awarded not to Hybricon, but to the other tenderer. By an email sent by the municipal company at 14:34 on the same day, the five interested companies were informed of the outcome of the call for tenders.[7]

27. That email was received at Hybricon by an operating officer who had main responsibility for contacts with the municipal company in connection with the public contract in question. Shortly thereafter, that person sent a message to OP, an appellant in the main proceedings, urging him to sell his shares in Hybricon. OP in turn passed on the same information to TK, another appellant in the main proceedings, who also owned shares in the company.

[6] Directive of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) (OJ 2014 L 173, p. 179).

[7] It is apparent from the written observations of the appellants in the main proceedings that the decision to award the contract was sent not only to those five companies, but also to 22 email addresses of persons who had declared their interest in following the tender procedure without participating in it. The identity of those persons and their role in that procedure, however, remains unknown. Indeed, according to the clarification provided by the referring court, it is not established that the information in question was actually notified to those persons. Furthermore, at the hearing, none of the parties was able to confirm the parallel dispatch of the award decision to the 22 other recipients.

28. Thus, at 14:37 on 14 May 2018, TK placed an order on the Swedish stock exchange to sell 73 000 shares in Hybricon. A few minutes later, at 14:40, OP also sold 31 000 shares in that company.

29. A Hybricon press release announcing that it had been unsuccessful in the tender procedure in question was issued at 15:22 on the same day. The publication of that information caused Hybricon's share price to fall sharply. OP and TK, for their part, had limited their losses following the sale of the shares they held in the company.

30. Because of those transactions, OP and TK were prosecuted for insider dealing, prohibited under Law No 1307 of 2016 on sanctions in case of market abuse on the securities market, and they were convicted of non-minor insider dealing by the tingsrätt (District Court, Sweden) and given a suspended custodial sentence, and were sentenced to community service. The amounts of 51 508 kronor (SEK) [8] and SEK 146 536, [9] representing the proceeds of the offences, were confiscated from the property of OP and TK, respectively. According to the tingsrätt (District Court), the information according to which Hybricon had been unsuccessful in the tender procedure constituted inside information in view of its precise nature relating directly to that company and was likely to have an effect on its share price. The tingsrätt (District Court) found that that information could not be considered to have been made public before Hybricon's press release had been issued.

31. Hearing the case on appeal, the hovrätt (Court of Appeal, Sweden) reached the same conclusion as the tingsrätt (District Court) and only altered the sentence handed down by that court by imposing on OP and TK a suspended sentence in conjunction with 150 day-fines instead of a sentence of community service.

32. OP and TK lodged an appeal before the Högsta domstolen (Supreme Court) against the appeal judgment handed down by the hovrätt (Court of Appeal). By their appeals, they request their acquittal, arguing that the information relating to the non-award of the contract in question to Hybricon ceased to be inside information owing to the sending of the decision to award the contract by its author – the municipal company in this case – to the recipients concerned. As a result, it had become a public document not covered by confidentiality on account inter alia of the fact that, under Swedish law, it was publicly accessible at the request of any interested party.

33. By contrast, the Riksåklagaren (Public Prosecutor, Kingdom of Sweden) concluded that the decision of the hovrätt (Court of Appeal) ought to be upheld. The Public Prosecutor took the view that, although the decision to award the contract became a public document from the moment it was sent to the recipients concerned, that decision could nevertheless be covered by confidentiality under the national legislation. Thus, it remained inside information until Hybricon issued its press release.

34. The Högsta domstolen (Supreme Court) granted the appellants leave to appeal.

35. According to that court, it cannot be inferred from Article 7(1)(a) of Regulation No 596/2014 that all information which has not been disclosed publicly in the manner prescribed by Article 17 of that regulation must be considered not to have been made public. In particular, according to the statements of the European Securities and Markets Authority (ESMA), inside information can be made public by means other than public disclosure within the meaning of that Article 17,

[8] Approximately EUR 4 720.

[9] Approximately EUR 13 425.

including by the effect of measures taken by third parties. In addition, the Court has not yet provided guidance as to the requirements that must be met for information no longer to be considered inside information.

36. In that context, being of the view that its decision depends on the interpretation of the provisions of Article 7(1)(a) and Article 17 of Regulation No 596/2014, the Högsta domstolen (Supreme Court) decided to stay the proceedings and to refer to the Court of Justice for a preliminary ruling the following questions, registered at the Registry of the Court of Justice on 26 March 2024:

'(1) Is it necessary for public disclosure to have taken place in the manner referred to in Article 17 of [Regulation No 596/2014] in order for information to be considered to have been made public in accordance with Article 7(1)(a) of the regulation?

(2) If public disclosure can take place in another manner, what circumstances should be taken into account in determining whether information should be considered to have been made public within the meaning of Article 7(1)(a) of the regulation?'

37. In the proceedings before the Court, OP, TK, the Greek, Norwegian and Polish Governments as well as the European Commission submitted written observations. Under Article 101(1) of its Rules of Procedure, the Court requested certain clarifications from the referring court, [10] which it provided. At the hearing of 3 April 2025, OP, TK, the Greek and Norwegian Governments and the Commission were heard and answered the Court's written and oral questions.

IV. Assessment

38. The two questions referred for a preliminary ruling are interconnected in so far they principally concern the interpretation of the criterion of information 'made public' within the meaning of Article 7(1)(a) of Regulation No 596/2014.

A. The first question

39. By its first question, the referring court asks, in essence, whether, in order for information to be considered to have been 'made public' within the meaning of Article 7(1)(a) of Regulation No 596/2014, it must have been publicly disclosed within the meaning of Article 17 of that regulation.

40. It is therefore necessary to examine the relationship between Article 7(1)(a) and Article 17(1) of Regulation No 596/2014 and, in particular, the scope of the concept of 'public disclosure' which underlies those provisions. [11]

[10] The clarifications concerned, first, the possibility, suggested by OP and TK, that the contracting authority sent the decision awarding the call for tenders to the email addresses of the persons who had expressed an interest in that call for tenders; second, the identity of those persons and the reasons for their interest in that call for tenders; and, third, the publicity generated by Hybricon's press release, as well as the possible publication of a press release following the call for tenders by the contracting authority and, if so, when it occurred (see also footnote 7 to the present Opinion).

[11] This is the subject of a highly contentious debate in the legal literature. See Hansen, footnote 4 to the present Opinion, pp. 194 and 195; Gilotta, footnote 4 to the present Opinion, p. 634 et seq.; Klöhn, footnote 4 to the present Opinion, pp. 714 to 719; Juan y Mateu, footnote 4 to the present Opinion, p. 117 et seq.; Hössl-Neumann, footnote 4 to the present Opinion, pp. 53 to 58; Hössl-Neumann and Torggler, footnote 4 to the present Opinion, pp. 62 to 65; and Veil, footnote 4 to the present Opinion, p. 201.

41. On the one hand, Article 17(1) of Regulation No 596/2014 requires any issuer to 'make public', as soon as possible, inside information which directly concerns that issuer so as to enable fast access to that information and a complete, correct and timely assessment of it by the 'public'. To that end, that provision, read in conjunction with Article 2(1) of Implementing Regulation 2016/1055, determines the means for such public disclosure.

42. On the other hand, the condition of information 'which has not been made public' is the second of four conditions set out in Article 7(1)(a) of Regulation No 596/2014 which must cumulatively be met for such information to be classified as 'inside information'. To that end, that information must also be of a 'precise nature', relate, 'directly or indirectly, to one or more issuers or to one or more financial instruments', and, 'if it were made public', be 'likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments'. Such inside information is likely to be the subject of 'insider dealing' within the meaning of Article 8 of that regulation, prohibited by Article 14(a) of the said regulation, and subject to an administrative sanction under Article 30(1)(a) of that regulation, or even to a criminal sanction under the national provisions transposing Directive 2014/57.

43. As all of the parties acknowledge, the concept of information 'made public' does not refer to the law of the Member States. It thus constitutes an autonomous concept of EU law which must be interpreted uniformly in all Member States. [12]

44. Article 7(1)(a) neither makes express reference to Article 17(1) of Regulation No 596/2014 nor specifies how the information may be 'made public' to remove its 'inside' character. That in itself indicates that the special manner of public disclosure of inside information by the issuer of financial instruments, as provided for in Article 17(1) of the regulation, is not the only way to make the information in question public.

45. Similarly, the mere fact that the abovementioned provisions refer, respectively, to information 'made public' as well as to the obligation and the means for any issuer to 'make public' (inside) information is not sufficient to consider that those provisions must be interpreted in the same way. On the contrary, whereas, in Article 7(1)(a) of Regulation No 596/2014, the fact that information is not public *constitutes* the existence of 'inside' information, Article 17(1) of that regulation presupposes that the information to be disclosed is *already* 'inside' information. It follows that, in the context of those provisions, the concept of 'public disclosure' does not necessarily have the same meaning.

46. That assessment is confirmed by a literal, linguistic, contextual and teleological interpretation of Article 7(1)(a) and of Article 17 of Regulation No 596/2014.

47. In the first place, even though some language versions of those provisions have a certain similarity in that respect, [13] that is not the case in several other language versions, including the Swedish-language version. The latter language versions make a clearer distinction between

[12] See, inter alia, judgment of 15 November 2022, *Senatsverwaltung für Inneres und Sport* (C-646/20, EU:C:2022:879, paragraph 40 and the case-law cited), according to which 'it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union, having regard not only to the wording of that provision but also to the context of the provision and the objective pursued by the legislation of which it forms part'.

[13] See the French-language version ('*rendu publique*' and '*rend publiques*') and the Spanish-language version ('*no se haya hecho pública*' and '*hará pública*').

information that *is not (yet) public*, within the meaning of Article 7(1)(a) of Regulation No 596/2014, on the one hand, and the *(specific) act of disclosure* of inside information by the issuer, as required by Article 17 of that regulation, on the other hand. [14]

48. The wording used in one language version of a provision of EU law cannot, however, serve as the sole basis for the interpretation of that provision or be given priority over the other language versions in that regard. It is apparent from settled case-law that provisions of EU law must be interpreted and applied uniformly, in the light of the versions existing in all the languages of the European Union. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. [15]

49. In the second place, as recitals 23 and 24 indicate, the objective of Regulation No 596/2014 is to protect the integrity of the financial markets and to enhance *investor confidence*, which is based, in turn, on the assurance that those investors will be placed on an equal footing and protected from the misuse of 'inside information'. [16]

50. To that end, Regulation No 596/2014 essentially provides for two complementary instruments. On the one hand, by virtue of its *punitive aspect*, enshrined in its second chapter on 'Inside information, insider dealing, unlawful disclosure of inside information and market manipulation', which includes Article 7(1)(a) thereof, certain unlawful practices, characterised as 'market abuse', are punishable by an administrative or criminal sanction. On the other hand, the *deterrent aspect* of the regulation, contained in its third chapter on 'Disclosure obligations', provides, inter alia, for disclosure and reporting obligations incumbent on the issuer of securities, including the requirement set out in Article 17(1) thereof to ensure, inter alia, 'fast' access by the 'public' to 'inside information'.

51. Accordingly, the obligation for the issuer, under Article 17(1) of Regulation No 596/2014, to disclose such information is not part of the punitive aspect, but pursues an exclusively deterrent purpose. Specifically, that provision governs in detail, in conjunction with the requirements of Article 2(1) of Implementing Regulation 2016/1055, the disclosure procedures to be followed by issuers, in order to allow 'as wide a public as possible' [17] to have easy access to the information in question, precisely because of its 'inside' nature prior to that disclosure.

52. Conversely, in accordance with recital 23 of Regulation No 596/2014, the punitive aspect seeks to sanction the 'unfair advantage being obtained from inside information to the detriment of third parties who are unaware of such information and, consequently, the undermining of the integrity of financial markets and *investor confidence*'. [18] In other words, that unfair advantage lies

[14] For example, the Swedish-language version refers to '*Information … som inte har offentliggjorts*' and '*informera allmänheten*'. The same is true, inter alia, of the German-language version ('*nicht öffentlich bekannte Informationen*' and '*gibt der Öffentlichkeit … unverzüglich bekannt*'), the English-language version ('information … which has not been made public' and 'inform the public'), the Italian-language version ('*che non è stata resa pubblica*' and '*comunica al pubblico*'), and the Portuguese-language version ('*não tenha sido tornada pública*' and '*informa o público*').

[15] See judgments of 1 March 2016, *Alo and Osso* (C-443/14 and C-444/14, EU:C:2016:127, paragraph 27), and of 21 July 2016, *EUIPO* v *Grau Ferrer* (C-597/14 P, EU:C:2016:579, paragraph 24 and the case-law cited). See also, to that effect, judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraph 46 and the case-law cited, according to which 'every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied').

[16] See, to that effect, my Opinion in *Autorité des marchés financiers* (C-302/20, EU:C:2021:747, point 1).

[17] See Article 2(1)(a)(i) of Implementing Regulation 2016/1055; see also Klöhn, footnote 4 to the present Opinion, p. 707.

[18] Emphasis added.

in the fact that the insider has relevant information to make investment decisions which is not available to others, including potential investors who are not or cannot be aware of that information. [19]

53. I conclude from this that the group of persons referred to respectively in Article 7(1)(a) and in Article 17 of Regulation No 596/2014 is not necessarily the same. Indeed, while the latter provision, read in conjunction with Article 2(1) of Implementing Regulation 2016/1055, refers to the disclosure of (undoubtedly) inside information to *as wide a public as possible*, the former provision is intended to determine the existence of such inside information in order to assess the liability – criminal or otherwise – of a person accused of 'insider dealing', within the meaning of Article 8(1) and Article 14(a) of that regulation, that is to say, an offence which undermines investor confidence.

54. In the third place, in view of the punitive purpose of Article 7(1)(a) of Regulation No 596/2014, I take the view that the concept of information 'made public', which removes the 'inside' nature of the information in question, must be interpreted strictly, taking into account the objectives pursued by that regulation and by its punitive aspect in particular.

55. In that respect, I recall that both a sanction formally criminal, such as that imposed in the present case, [20] and an administrative sanction of a punitive nature, the maximum amount of which has a certain degree of severity, must be classified as criminal within the meaning of Articles 48 to 50 of the Charter of Fundamental Rights of the European Union ('the Charter'). Indeed, the maximum amount of the administrative sanction to be imposed on natural or legal persons for having infringed the prohibition of insider dealing, under Article 14(a) of Regulation No 596/2014, as well as the requirement that that amount must be 'at least three times the amount of the profits gained or losses avoided because of the infringement', [21] are sufficient to characterise such sanctions as criminal. [22] Those are therefore intended not only to repair damage, but also to punish certain conduct. [23] Consequently, the principle of the legality of offences and penalties, enshrined in the first sentence of Article 49(1) of the Charter, also applies. That principle requires that legislation must clearly define offences and the penalties which they attract, so that the individual concerned is in a position, on the basis of the wording of the relevant provision and, if necessary, with the help of the interpretation made by the courts, to know which acts or omissions will make him or her criminally liable. [24]

56. In that context, it is necessary to take into account the fact that, in accordance with recitals 23 and 24 of Regulation No 596/2014, the public protected by its punitive aspect differs from that covered by its deterrent aspect. While the deterrent aspect is aimed at the general public in order

[19] See, to that effect, my Opinion in *Autorité des marchés financiers* (C-302/20, EU:C:2021:747, point 1). See also, regarding the regulation that preceded Regulation No 596/2014, judgments of 10 May 2007, *Georgakis* (C-391/04, EU:C:2007:272, paragraph 38), and of 23 December 2009, *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraphs 47 and 48).

[20] Within the meaning of Article 1(1) of Directive 2014/57 (see footnote 6 above).

[21] See Article 30(2)(h) to (j) of Regulation No 596/2014.

[22] See, inter alia, by analogy, judgment of 14 September 2023, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft* (C-27/22, EU:C:2023:663, paragraph 45 et seq.).

[23] See, to that effect, judgments of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)* (C-439/19, EU:C:2021:504, paragraph 89); of 4 May 2023, *MV – 98* (C-97/21, EU:C:2023:371, paragraph 42); and of 14 September 2023, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft* (C-27/22, EU:C:2023:663, paragraph 49).

[24] See, to that effect, judgments of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 162 and the case-law cited); of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 56); and of 9 September 2021, *Ministère public (Extraterritorial penalties)* (C-906/19, EU:C:2021:715, paragraph 46 and the case-law cited).

to inform them of the existence of information (already characterised as) 'inside', the punitive aspect is intended to sanction insider dealing undermining *investor confidence* (see points 49 and 52 of the present Opinion).

57. The specific objective of protecting investor confidence finds support inter alia in Article 7(4) of Regulation No 596/2014, which specifies the fourth constitutive criterion of the concept of inside information, namely its likelihood of having 'a significant effect on the prices of financial instruments'. Such a likelihood is present only where 'a *reasonable* investor would be likely to use [such information] as part of the basis of his or her investment decisions'.[25] Recital 14 of that regulation specifies in that regard, inter alia, that '*reasonable* investors base their investment decisions on information already available to them, that is to say, on *ex ante* available information'.[26] Furthermore, according to the same recital, the reasonableness of such an investment decision is to be assessed in the light of 'the anticipated impact of the information in light of the totality of the related issuer's activity, the reliability of the source of information and any other market variables likely to affect the financial instruments, … in the given circumstances'.

58. Consequently, if the characterisation of inside information depends on a *reasonable* hypothetical investment decision that can be taken on that basis, it may be inferred that the public protected by the punitive aspect of Regulation No 596/2014 is that of *reasonable* investors.

59. The objective of Article 7(1)(a) of Regulation No 596/2014 is therefore to combat asymmetric access to information by various *reasonable* investors.[27] Conversely, that objective is not intended to protect unreasonable investors, namely those who do not behave or inform themselves as diligently as a reasonable investor would, having regard to the criteria referred to in point 56 of the present Opinion.

60. In those circumstances, there appears to me to be no justification in making responsibility, whether criminal or otherwise, for having engaged in 'insider dealing' contingent on the broad concept of public disclosure of the information in question, within the meaning of Article 17(1) of Regulation No 596/2014. The latter provision, read in conjunction with Article 2(1) of Implementing Regulation 2016/1055, refers, unlike Article 7(1)(a) of that regulation, which moreover adopts a negative concept of public disclosure ('has not been made public'), to as wide a public as possible. Furthermore, Article 17(1) of that regulation does not address the question of whether the members of that wide public demonstrate certain qualities or a sufficient degree of diligence to enable them actually to have access to that information. To my mind, an extensive approach, based on that broad concept of public disclosure, would be in line neither with the need for a strict interpretation of the concept of information (not) 'made public' within the meaning of Article 7(1)(a) of the same regulation, nor with the legal certainty required by the principle of the legality of offences and penalties (see point 54 of the present Opinion).

61. It follows that information must be considered to have been 'made public', within the meaning of Article 7(1)(a) of Regulation No 596/2014, where it is known by or accessible to a *reasonable* investor, acting with the necessary diligence, even if no disclosure to a wider public, within the meaning of Article 17 of that regulation, has yet taken place.

[25] Emphasis added. See also, inter alia, the French-language version ('*un investisseur raisonnable serait susceptible d'utiliser [une telle information] comme faisant partie des fondements de ses décisions d'investissement*') and the German-language version ('*Informationen …, die ein verständiger Anleger wahrscheinlich als Teil der Grundlage seiner Anlageentscheidungen nutzen würde*').

[26] Emphasis added.

[27] See also, to that effect, Hansen, footnote 4 to the present Opinion, p. 195.

62. I conclude from this that the first question must be answered in the negative. The concept of information not 'made public' referred to in Article 7(1)(a) of Regulation No 596/2014 is not defined solely by the absence of public disclosure within the meaning of Article 17 of that regulation, but that disclosure may occur in other ways. [28]

63. That leads me to the second question.

B. The second question

1. Preliminary observations

64. Assuming that the information can be made public in a form other than that provided for in Article 17 of Regulation No 596/2014, the referring court wishes to know what circumstances must be taken into account to assess whether the information in question can be considered to have been 'made public' within the meaning of Article 7(1)(a) of Regulation No 596/2014.

65. I believe that question should be answered in two stages.

66. In the first stage, it is necessary to determine the degree of public disclosure or accessibility required, from the point of view of the recipients concerned, so that information may be considered to have been 'made public' within the meaning of Article 7(1)(a) of Regulation No 596/2014 (see Section 2).

67. In the second stage, having regard to the facts which gave rise to the dispute in the main proceedings, it is necessary to specify under what conditions that disclosure, or accessibility, can be inferred from the circumstances of the case (see Section 3).

2. The degree of public disclosure or accessibility required from investors' point of view to consider that information has been 'made public'

68. To determine the degree of public disclosure or accessibility required from the point of view of the recipients concerned, I consider it necessary to re-examine, inter alia, the objectives pursued by the EU legislature and the relevant regulatory context.

69. In the first place, I recall the considerations set out in point 50 et seq. of the present Opinion according to which information that is liable to be known or discovered by a *reasonable* investor must be considered to have been 'made public' within the meaning of Article 7(1)(a) of Regulation No 596/2014. The question whether a potential investor is actually able to have access to the information in question depends on the more precise characterisation of its qualities, as has been described in points 56 to 58 of the present Opinion. In that regard, investors who do not possess those qualities and who do not demonstrate the required degree of diligence do not seem, in my view, to merit protection having regard to the objective of equal access to information to ensure a level playing field between investors in financial markets. [29]

[28] See also, to that effect, ESMA, *Questions and Answers on the Market Abuse Regulation*, 17th edition, updated on 15 November 2022, p. 21, A5.10.

[29] See also, to that effect, Hansen, footnote 4 to the present Opinion, p. 195.

70. In the second place, that assessment is confirmed by recital 28 of Regulation No 596/2014. It is apparent from that recital, inter alia, that 'research and estimates based on publicly available data' should not be regarded as inside information. Similarly, 'the mere fact that a transaction is carried out on the basis of research or estimates' should also not be deemed to constitute a use of inside information. Conversely, where 'the publication or distribution of information is *routinely* expected by the market and where such publication or distribution contributes to the price-formation process of financial instruments, or the information provides views from a recognised market commentator or institution which may inform the prices of related financial instruments, the information may constitute inside information'. In the said recital, it is concluded that 'market actors *must … consider* the extent to which the information is non-public *and* the possible effect on financial instruments traded in advance of its publication or distribution, *to establish* whether they would be trading on the basis of inside information'. [30]

71. Thus, the EU legislature considers that, on the one hand, information that can be discovered by searching public data must not, in principle, be classified as inside information and, on the other hand, it is for market participants to examine – with all due diligence – the scope of that information as well as its impact, if any, on the financial instruments traded. It follows that, conversely, the mere fact that the information is accessible only through a certain effort or searching on the part of the person concerned is not such as to exclude the 'public' nature of the information within the meaning of Article 7(1)(a) of Regulation No 596/2014. On the contrary, determining whether such information is public or not seems to me to depend on whether, and under what conditions, the interested party, as a reasonable and normally diligent market participant, is *actually* able to access it in order to overcome a possible asymmetry of information of potential investors that Regulation No 596/2014 seeks to avoid.

72. In the third and final place, the idea that the concept of investor who merits protection within the meaning of Regulation No 596/2014, in particular of its punitive aspect, is that of a reasonable and normally diligent investor and not the public at large, is indirectly confirmed by the scope *ratione personae* of Article 8(4) of Regulation No 596/2014. That provision distinguishes between different types of insiders, namely persons who have inside information liable to be the subject of insider dealing, within the meaning of paragraph 1 thereof.

73. The group of persons possessing inside information and able to carry out such (prohibited) insider dealing, as referred to in points (a) to (d) of the first subparagraph of Article 8(4) of Regulation No 596/2014, [31] or so-called 'primary' insiders, is widened by its second subparagraph to include any person who possesses inside information '*where that person knows or ought to know that it is inside information*', or so-called 'secondary' insiders. [32] Thus, while 'primary' insiders possess inside information on account of a particular activity or behaviour that distinguishes them from other investors, 'secondary' insiders acquire that insider status only in the event of their proven knowledge of the existence of inside information or lack of blameworthy knowledge of that existence, which is thus due to non-diligent behaviour.

30 Emphasis added.

31 Namely, any person who is 'a member of the administrative, management or supervisory bodies of the issuer', has 'a holding in the capital of the issuer', has 'access to the information through the exercise of an employment, profession or duties' or who is 'involved in criminal activities'.

32 Emphasis added. The distinction between 'primary insiders' and 'secondary insiders' has become commonplace in legal literature; see, in particular, Hössl-Neumann, footnote 4 to the present Opinion, p. 51, and Veil, footnote 4 to the present Opinion, p. 215, paragraph 78.

74. I conclude from this that the degree of public disclosure or accessibility necessary to establish that information has been 'made public', within the meaning of Article 7(1)(a) of Regulation No 596/2014, depends on the perspective of a reasonable and normally diligent investor.

3. The criteria and circumstances of the case to take into consideration in assessing whether information has been 'made public'

75. The conditions in which the abovementioned criteria may be used to establish the public nature of allegedly inside information must be assessed in the light of the circumstances underlying the dispute in the main proceedings, the examination of which comes under the authority and the responsibility of the referring court. In my view, for the sake of protecting legal certainty and the presumption of innocence, given the severe consequences of the finding of the existence of insider dealing, the fulfilment of those criteria must be easily verifiable both by the interested parties and by the authorities and courts. To that end, as I have set out in points 68 to 74 of the present Opinion, EU law calls for drawing on the perspective of a reasonable and normally diligent investor. However, the question whether those criteria are fulfilled in a given case is essentially a matter for the national authorities and courts.

76. In that regard, contrary to what TK and OP argue, I consider that the simple ability of any investor to obtain information that is formally classified as 'public' by national freedom of information legislation, such as the TF or the Law on public access to information and on confidentiality, on the ground that it is held by the public authorities and accessible on request, is not sufficient to recognise the 'public' nature of such information within the meaning of Article 7(1)(a) of Regulation No 596/2014. Just like the right of access to documents under Regulation (EC) No 1049/2001,[33] first, the exercise of that right of access requires, pursuant to Article 4 of Chapter 6 of the TF, a specific request to be made to those authorities and, second, that request may be subject to exceptions, such as the restrictions and criteria falling under the rules on confidentiality provided for in Article 2 of Chapter 2 of the TF as well as in the second paragraph of Article 3 of Chapter 19 and in Article 16 of Chapter 31 of the Law on public access to information and on confidentiality. Those restrictions and criteria, however, seem to me to be likely to come up against both the concept of 'public disclosure' provided for in Article 7(1)(a) of that regulation and the objective of its punitive aspect which seeks to protect investor confidence.

77. In addition, consideration should be given to the particularities of the context in which disclosure of the relevant information is likely to take place, as in the present case, that of the adoption and publication of a decision to award a public contract, under Law No 1145 of 2016 on public procurement. In such a situation, all of the participants in the tender procedure and persons who have registered or are preparing to register an interest in knowing its outcome constitute a limited relevant public, which may be presumed to comprise reasonable potential investors acting with due diligence. Those participants or persons are particularly likely to make investments depending on the outcome of such a procedure.

78. The relevant Swedish legislation seems to be based on that understanding, in so far as it provides for disclosure to interested market operators in two stages. Thus, first, according to the first sentence of the first paragraph of Article 12 of Chapter 12 of Law No 1145 of 2016 on public procurement, the contracting authority must notify the candidates and tenderers in writing, as soon as possible, of the decisions taken regarding the award of a contract or the conclusion of a

[33] Regulation of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

framework agreement. Second, according to the first paragraph of Article 7 of Chapter 19 of that law, such a decision must be published in a notice announcing the outcome of the tender procedure, no later than 30 days after the conclusion of the contract or framework agreement in question.

79. To my mind, however, limited disclosure, such as that provided for in the first sentence of the first paragraph of Article 12 of Chapter 12 of Law No 1145 of 2016 on public procurement, to candidates, tenderers and, as the case may be, other persons who have expressed an interest in the tender procedure is, in principle, insufficient to 'make public' the information in question, within the meaning of Article 7(1)(a) of Regulation No 596/2014. As follows from the first paragraph of Article 7 of Chapter 19 of that law, the Swedish legislature itself seems to consider there to be other interested parties, including those who follow the notices announcing the outcome of the tender procedure. In such conditions, the group of persons immediately notified of the decision to award the contract prior to the publication of such a notice could even be characterised as 'secondary' insiders, under the second subparagraph of Article 8(4) of that regulation, liable to (attempt to) engage in prohibited insider dealing or unlawfully to disclose inside information, within the meaning of Article 14(a) or (c) of the regulation. Accordingly, even if, at the same time as its dispatch to the five tendering companies, the award decision had been notified to the 22 other persons who had declared their interest in following the tender procedure, which is not established according to the information provided by the referring court and by the parties, the concept of 'public disclosure', within the meaning of Article 7(1)(a) of the same regulation would not necessarily be fulfilled.

80. On the other hand, the publication of the outcome of the tender procedure by a notice pursuant to the first paragraph of Article 7 of Chapter 19 of Law No 1145 of 2016 on public procurement seems to me to be largely sufficient to inform any reasonable and normally diligent potential investor. After all, such an interested investor can be expected to follow such publications regularly, which may influence his or her investment decisions. Such an approach is, in my view, compatible with the rights of the defence and the presumption of innocence enshrined in Article 48 of the Charter, since it allows both the authorities and courts and the interested parties who could potentially face prosecution – criminal, as the case may be[34] – to determine whether the act of disclosure in question has attained the requisite degree of publicity.

81. That assessment is without prejudice to the question of whether and to what extent the publication of such a notice also satisfies the conditions for public disclosure under Article 17(1) of Regulation No 596/2014, attributable to the issuer, in particular that of fast access to information, a question which need not be decided here. The same applies to the question of whether Hybricon's press release of 14 May 2018, subsequent to the alleged insider dealing, satisfies those conditions or whether, at the very least, it had the effect of causing the information disclosed to lose its 'inside' character within the meaning of Article 7(1)(a) of the regulation. The fact remains, however, that public disclosure within the meaning of Article 17(1) of the said regulation is sufficient to satisfy the disclosure condition required by Article 7(1)(a) of the same regulation.

82. In any event, it is for the referring court to ascertain, in the light of the circumstances of the case, whether, at the time of the alleged insider dealing, the requisite degree of public disclosure, from the point of view of a reasonable and normally diligent potential investor, within the meaning of Article 7(1)(a) of Regulation No 596/2014, was attained.

[34] See, to that effect, judgment of 23 December 2009, *Spector Photo Group and Van Raemdonck* (C-45/08, EU:C:2009:806, paragraph 43 et seq. and the case-law cited).

V. Conclusion

83. In light of the foregoing considerations, I propose that the Court of Justice respond to the Högsta domstolen (Supreme Court, Sweden) in the following manner:

Article 7(1)(a) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC

must be interpreted as meaning that:

(1) In order to consider information to have been 'made public', it is not essential for it to have been disclosed in accordance with Article 17 of that regulation.

(2) Information is deemed to be 'made public' where it is known by or accessible to a reasonable and normally diligent investor, taking into account the circumstances of the case and the relevant rules governing its disclosure, such as those applicable to public procurement. The circumstances in which the existence of such knowledge or accessibility must be recognised in a given case are at the discretion of the national authorities and courts.