Filed on **23 March** 2021

To the Presiding Judge and Judges of Division 5 – Chamber 7 of the Paris Court of Appeal

DECLARATION OF SUPPORT

of Bloomberg LP in the context of its appeal against the decision of the Enforcement Committee of the *Autorité des Marchés Financiers* dated 11 December 2019 (Decision No. 18)

The Reporters Committee for Freedom of the Press (RCFP), an association founded in 1970, duly constituted, and declared in the District of Columbia, acting through its executive director, electing domicile through Geoffroy Barthet at 23 rue de l'Université, 75007, Paris.

hereinafter, 'RCFP'

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DECLARES ITS SUPPORT

FOR:

Bloomberg, a Delaware limited partnership with its principal place of business at 731 Lexington Avenue, New York, NY 10022 (United-States), acting through Bloomberg Inc., its general partner, which itself acts through its board of directors, which is domiciled in such capacity at Bloomberg LP registered office.

hereinafter, 'Bloomberg'

AGAINST:

The **Autorité des marchés financiers** acting through its President.

hereinafter: 'AMF' or 'Autorité des marchés financiers'

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1. Factual background

1. On 22 November 2016, fraudsters launched an attack on Vinci by sending to several journalists and press agencies a forged press release containing false information about Vinci.

2. As noted by the AMF itself, the press release was skilfully forged.[1]

3. Just to name a few examples, it includes the names of the actual Head of Media Relations at Vinci, Paul-Alexis Bouquet, the Executive Vice-President and Chief Financial Officer of Vinci, Christian Labeyrie or Vinci's auditors. A hyperlink to unsubscribe from the distribution list of Vinci is also provided in the forged press release as well as the genuine contact details of the CNIL officer at Vinci, not to forget, the relevant French provision under the French Data Protection Law of 6 January 1978. Strikingly, a false website (www. vinci.group) was set up and mirrors down to the slightest detail the actual website (official Facebook and Twitter accounts, etc.).

4. Journalists at Bloomberg and other reputable news organizations relayed parts of such false information, before Bloomberg issued a denial seven minutes later, the first journalist body to publish that the press release was a forgery.

5. The AMF then instigated proceedings against Bloomberg alone. The fraudsters were, for their part, never prosecuted or even identified.

6. On 11 December 2019, the Enforcement Committee found that Bloomberg–whose good faith in this matter has however been acknowledged by the AMF–had allegedly breached its obligation to refrain from disseminating false information on the basis of Articles 12, 15 and 21 of the Market Abuse Regulation (hereinafter, the "**MAR**") and imposed on Bloomberg a fine of five million euros (**Exhibit No. 1**).

7. For the reasons set out hereunder, this decision raises serious concerns for the freedom of the press in France and, more globally, in Europe. In fact, upholding the AMF decision based on such a misinterpretation of the freedom of the press will undermine one of the fundamental principles of the French Republic.

8. This worrying weakening of such a fundamental right is of grave concern to the Reporters Committee for Freedom of the Press (hereinafter, the "**RCFP**") as well as to many other bodies and associations whose goal is to protect the interests of the press, who confirmed to the RCFP that they entirely share its concerns and views as expressed in the present letter, a copy of which they saw. This concerns in particular the following bodies: Advance Publications, Inc., ALM Media, LLC, The Associated Press, The Atlantic Monthly Group LLC, BuzzFeed, The Center for Investigative Reporting (d/b/a Reveal), Committee to Protect Journalists, Dow Jones & Company, Inc., The E.W. Scripps Company, First Look Institute, Inc., Gannett Co., Inc., Hearst Corporation, International Documentary Assn., The Media Institute, Media Law Resource Center, Media Defence, National Journal Group LLC,

[1] L'Obs, Chute boursière de Vinci : récit d'une incroyable manipulation, 23 novembre 2016, the AMF points out that it is : « *une opération bien ficelée, bien préparée, crédible au premier abord et inquiétante* » (**Exhibit No. 2**); L'Express, Vinci: « une malveillance pareille », du jamais-vu à la Bourse de Paris, 23 novembre 2016, the AMF highlights the unprecedented nature of this hoax: « *en la matière, l'imagination est sans limite. Je n'ai pas mémoire d'un tel épisode* » (**Exhibit No. 3**).

National Press Photographers Association, The New York Times Company, The News Leaders Association, News Media Alliance, Online News Association, Radio Television Digital News Association, Reuters News & Media Inc., Society of Professional Journalists, TIME USA, LLC, and The Washington Post.

9. In the past, the RCFP had the opportunity to intervene and plead in the interest of journalism and the open flow of information to the public before the Conseil d'État[2] and the Court of Justice in the case *Google v CNIL*.[3]

10. Like the *CNIL* case, this dispute also raises the question of the exercise of the freedom of the press, which once restricted, has consequences for all the journalists in France and in Europe as well as for an informed public.[4]

11. In the case at hand, the way the AMF Enforcement Committee seeks to interpret the principle of freedom of the press, as highlighted in Article 21 of the MAR, turns it into a legal burden rather than a protective right. It puts at risk the freedom of speech and inherently promotes the unfortunate notion that the victims of an illegal act, rather than the perpetrators, are the ones who should be punished.

12. In view of the seriousness of the issues at stake, the RCFP did not neglect to inform the main interested party, Bloomberg, of this.

2. On the substance

13. Understanding the importance of freedom of the press in the legal framework at hand is a prerequisite to grasp the seriousness of what the AMF decision entails. The RCFP will provide detailed explanations regarding definition of this fundamental "*precious right*"[5] and will set forth the implications of the AMF's decision (**3.1.1.**).

14. In fact, the interpretation of Article 21 of MAR pushed forward by the AMF is *contra legem*. It has no roots in the actual legal text or its *ratio legis* (**3.1.2.**). Besides, it converts what was once a protective right into a legal burden. Furthermore, the case-law of the Court of Justice requires intent to find a market abuse, a condition which is omitted in the AMF decision (**3.1.3.**).

15. To the extent that the Court would not rule the AMF's extraordinary interpretation of the freedom of the press unlawful, the RCFP submits that the AMF, an administrative independent authority regulating financial markets, also directly infringed the freedom of the press by defining on its own initiative and without any legal mandate how media should exercise its press activities. Thus, the AMF also exceeded its prerogatives (**3.1.4.**).

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2 Conseil d'État, 10ème - 9ème chambres réunies, 19 July 2017, no. 399922.

3 Judgment of the Court of 24 September 2019, Case C-507/17, *Google v CNIL*, ECLI:EU:C:2019:772. RCFP has also previously filed written submissions before the European Court of Human Rights (e.g. European Court of Human Rights, *Biancardi v. Italy*, 28 December 2020, application no. 77419/16).

4 See, for example, Cour d'appel de Paris, chambre 1, section A, 13 March 1996, whereby this Court held that the dispute raises a question of principle whose solution is of interest not only to the publishing industry but also to the press as a whole, since it involves prohibiting the publication of a book that would violate medical confidentiality.

5 Article 11 of the Declaration of the Rights of Man and Citizens dated 1789.

16. In the alternative, the AMF decision infringes the *nulla poena sine lege* principle, Article 11 of the Declaration of the Rights of Man and Citizens dated 1789, the Charter of Fundamental Rights of the European Union (hereinafter, the "**Charter**") and Article 10 of the European Convention on Human Rights (hereinafter, the "**ECHR**") (**3.2.**). In case of doubt and in order to establish a strong legal precedent restoring press freedom against dangerous interpretations such as the one put forward by the AMF, the RCFP respectfully suggests that the Court should make a request for a preliminary ruling before the Court of Justice (**3.3.**). In the hypothesis whereby the Court would decide not to refer questions to the Court of Justice, and, in the further alternative, it will be demonstrated that the sanction is disproportionate (**3.4.**). Finally, a word shall be said about the serious infringement of the journalists' right to privacy which is yet another illustration of the dangerous path the AMF is on (**3.5.**).

3.1. On the serious infringement of the freedom of the press

3.1.1. Legal background of the freedom of the press in France

17. The degree of respect for the freedom of the press often mirrors the actual strength of a democracy, while a vibrant free press ensures vigorous public debate, which keeps democratic societies alive and relevant.

18. France can pride itself of an ancient journalistic tradition that goes back to Richelieu. From the Revolution emerge the principle of the freedom of the press enshrined in Article 11 of the Declaration of the Rights of Man and Citizens dated 1789: '*the free communication of thoughts and opinions is one of the most precious human rights; every citizen can therefore speak, write and print freely, unless he is answerable for the abuse of this freedom in cases determined by the law'*. Principle which is recognised as a fundamental freedom and plays a pivotal role in alerting citizens.[6]

19. Subsequently, the Law of 29 July 1881 on the freedom of the press defines very clearly what constitutes a press offence and makes the finding of any press offence subject to strict rules and provides for (lesser) sanctions which derogate from the ordinary law (shorter statute of limitations periods, strict formalities in terms of summoning of parties, etc.). This procedural framework, which is favourable to the persons being prosecuted and seeks specifically to protect freedom of expression and to limit restrictions thereon, is justified by the particular importance ascribed to the freedom of the press in a democratic society.

20. As notably ruled by the European Court of Human Rights (hereinafter, "**ECtHR**"), "*freedom of expression constitutes one of the essential foundations of a democratic society, as one of the basic conditions for that society's progress and development*",[7] and the press plays in a democratic society the "*vital role of public watchdog.*"[8] In fact, according to the ECtHR, "*the media play a fundamental role in a democracy by facilitating and promoting the rights of the public to receive and impart information and ideas.*"[9] It is incumbent

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6 Conseil constitutionnel, 11 octobre 1984, n° 84-181 DC*, Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse*, considérant 39.

7 ECtHR, 26 April 1979, *Sunday Times v United Kingdom*, no. 13166/87.

8 *Ibid.*

9 ECtHR, 20 May 1999, *Bladet Tromso and Stensaas v. Norway*, no. 21980/93.

upon the press to impart information and ideas on political issues and on other matters of general interest.[10]

21. In this respect, the step taken by the AMF does not serve French society.

22. First of all, the enforcements choice made by the AMF is striking. What the AMF is trying to establish is a new societal system of values, whereby the victim of a lie, i.e. the journalists, is the main if not the only culprit. This compares unfavorably with the Report on the proposal for the Market Abuse Directive[11] dated 27 February 2002, which was drafted by the Committee on Economic and Monetary Affairs of the European Parliament, and which found that "*if a journalist nevertheless allows himself to be manipulated in connection with insider dealing or a market abuse, it must be the perpetrators of the offence who are prosecuted, not its unwitting messenger*".[12]

23. Remarkably, the actual perpetrators in this case have not been prosecuted. Further, the investigation against the actual perpetrators was dropped rather quickly, after less than two years, while Bloomberg was still being investigated.

24. This complete reversal of values is not acceptable. Instead of expending its resources to identify and punish the persons who intentionally acted to mislead the market and likely benefitted from their misdeed, the AMF instead chose to target only a press body and hold it as the sole party responsible for what happened. It is hard to conceive what public good is served by such a strange choice, except, one guesses the AMF can boast that it has imposed a five million euros fine on *somebody*.

25. It may perhaps be instructive to contrast the AMF's attitude with that of one the World's oldest securities market regulators, the U.S. Securities and Exchange Commission (hereinafter, the "**SEC**"), established by President Roosevelt in 1934 and which has deservedly the reputation of a very strict and active enforcer. When confronted with the issue of fraudulent press releases and other market manipulation tools, the SEC has focused its investigations on the authors the press releases, and not the news organisations that are the first victims of their hoaxes.[13] While, in some cases, law enforcement agencies have been unsuccessful in identifying or locating the fraudsters themselves, enforcing the MAR against news organisations who are victims of sophisticated hoaxes could both lead to self-censorship by such organisations and do little to deter actual fraud.[14]

26. Vinci, the other victim, which could indeed have a potential personal interest in bringing proceedings against Bloomberg and/or the journalists, did not do so. It appears that the only current 'plaintiff' is not a victim but a public body which appears determined to regulate the journalist profession, despite this not being the task it has been entrusted with by the Legislator.

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10 ECtHR, 25 June 2002, *Colombani and Others v. France*, No. 51279/99, paragraph 55; see also ECtHR, 25 November 1996, *Wingrove v. United Kingdom*, paragraph 58.

11 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).

12 Extract from the Report of Robert Goebbels dated du 27 February 2002 on the proposal of Directive by the European Commission.

13 See, e.g., SEC, *SEC Charges: False Tweets Sent Two Stocks Reeling in Market Manipulation* (Nov. 5, 2015), available at: https://perma.cc/8H3N-ASCK (charging the author of two false tweets with market manipulation); *Dow Jones, SEC Sues Man It Claims Posted Fake Press Release on the Internet*, Wall St. J. (Jan. 3, 2002), available at: https://perma.cc/H6N2-5PSP.

14 See, e.g., Alexandre Neyret, *Stock Market Cybercrime: Definitions, Cases and Perspectives*, AMF Report (Jan. 28, 2020), page 41.

27. Second, this choice carries the profound risk of selective enforcement made by an administrative authority and thus the most extreme form of censorship. Insidiously, the lack of limiting principles in the Enforcement Committee's legal analysis, which is based on the AMF's unilateral determination that Bloomberg ought to have known the press release was part of hoax, will expose both premier French and global news outlets to the potential for erratic and irrational regulatory decisions leading to less valuable and comprehensive information about financial markets reaching the public. Coverage that merely rubs an agency the wrong way cannot lead to €5 million fines but under the AMF ruling such scenarios could become commonplace.

28. Third, the imposition of such a sanction on a media outlet, in the normal course of its business, but on a basis other than the laws governing the press, is likely to undermine the protections enjoyed by journalists and the freedom of the press in the context of matters relating to the financial markets. In this regard, this Court does not ignore that in the financial world, celerity is key and entails, in the interest of French market players, the ability to spread as quickly as possible a piece of information.

29. In that regard, the imposition of an exorbitant fine under the MAR (compared to the fine that could have been imposed following normal proceedings under the applicable press laws) on a media outlet acting in the normal course of its business raises concerns that a dual legal regime may ultimately be applicable to the press: one regime would apply where the media deal with market information (which would expose them to the risk of very high fines following a *sui generis* procedures under the MAR), and another regime–which would apply where the media deal with general information–under the ordinary press law, which is particularly protective of freedom of the press. Yet the press laws do not provide for such a dual-track, and do not distinguish between different types of press content and information.

30. Such an imbalance in the protection of the rights of the medias, depending on the nature of the information reported, could result in having financial information being viewed by media outlets as much more sensitive and thus being allocated lesser coverage–thereby impairing the right of French citizens to receive information of an economic nature. The colossal fine imposed on Bloomberg is particularly worrying insofar as fines of this size are capable of smothering media outlets or even resulting in the disappearance of the smallest/weakest among them (e.g. free-lance journalists, small online players), thereby seriously affecting France's constitutional objective of media pluralism.[15]

3.1.2. The interpretation made by the AMF is *contra legem*

31. In the case at hand, the journalists and the media outlet concerned acted only within the course of their professional duties and activities as journalists. They did not benefit in any way from the alleged market manipulation, and even the AMF concedes that this was never

[15] Conseil constitutionnel, 11 octobre 1984, n° 84-181 DC*, Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse*, considérant 38 : « *Considérant que le pluralisme des quotidiens d'information politique et générale auquel sont consacrées les dispositions du titre II de la loi est en lui-même un objectif de valeur constitutionnelle ; qu'en effet la libre communication des pensées et des opinions, garantie par l'article 11 de la Déclaration des droits de l'homme et du citoyen de 1789, ne serait pas effective si le public auquel s'adressent ces quotidiens n'était pas à même de disposer d'un nombre suffisant de publications de tendances et de caractères différents* ».

their intent. On the contrary, the fact that they were, if only for a few minutes deceived by the particularly devious fake press release has affected their professional reputation.

32. Being mindful of this, reviewing the actual text of the MAR will shed some light on why the AMF's reading does not and cannot make any sense.

33. The objective of the provision of the MAR in relation to journalists is crystal clear: guaranteeing the freedom of expression and the freedom of press. In particular, the MAR shall not restrict the journalists in performing their activity. This is in line with the objectives of the Market Abuse Directive of 2002 whose wording was replicated in the MAR.

a) The legislative history of Article 21 of the MAR

34. It is well-settled case-law that wording, context, and objectives must all be taken into account for the interpretation of a provision of EU law.[16] This includes recourse to the preparatory work (*travaux préparatoires*). Recent examples such as *easyCar*,[17] where the Court looked, albeit unsuccessfully, to the *travaux préparatoires* for the interpretation of a provision of Directive 97/7/EC on the protection of consumers in respect of distance contracts,[18] illustrate that point.

35. In the case at hand, the European legislator has put in place a regime aimed at protecting journalists acting in the normal course of their professional activity. In fact, the regime introduced by Article 21 of the MAR already existed in a similar form under Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 ("**MAD**"), which was replaced by the Regulation on 3 July 2016. This Directive underwent several revisions to ensure that the final version provided robust protections for journalists.

36. During the drafting process of that Directive, the necessity of having a dedicated regime to protect journalists was flagged at an early stage.

37. In this context, the Report on the proposal for the Directive drafted by the Committee on Economic and Monetary Affairs of the European Parliament provided reassurance on the matter by explaining as follows:

> If a journalist nevertheless allows himself to be manipulated in connection with insider dealing or a market abuse, it must be the perpetrators of the offence who are prosecuted, not its unwitting messenger. (Unless of course the latter were to have profited personally from the manipulation).[19]

38. On 29 April 2002, the European Council proposed, within the Directive, a specific regime for journalists:

> In respect of journalists when they act in their professional capacity such dissemination of information is to be assessed, without prejudice to Article 11,

16 Case C-280/04, *Jyske Finans A/S v. Skatteministeriet*, 2005 ECR. 1-10683, paragraph 34.

17 Case C-336/03, *easyCar (UK) Ltd. v. Office of Fair Trading*, 2005 ECR. 1-1947, paragraph 20.

18 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1) - Statement by the Commission re Article 3 (1), first indent, OJ L 144, 4.6.1997, p. 19–27.

19 Extract from the Report of Robert Goebbels dated du 27 February 2002 on the proposal of Directive by the European Commission.

taking into account the rules governing their profession, unless those persons derive, directly or indirectly, an advantage or profits from the dissemination of the information in question.[20]

39. On 24 October 2002, the European Parliament approved this new version of the Directive. These journalism related objectives were expressly formulated in a press release issued by the European Commission:

> [t]he Directive will not in any way handicap journalists […] Journalists who in good faith receive and pass on inaccurate information will not risk any punitive measures under the Directive. […] In other words, only those who deliberately or negligently pass on false information and then profit financially or otherwise from having done so will be covered by the Directive.[21]

40. On 3 December 2002, at the time of the definitive adoption of the Directive, the European Commission repeated again that "*only journalists who deliberately or negligently pass on false information and then profit financially or otherwise from having done so will be covered by the Directive*".[22]

41. In 2014, the Regulation maintained this exclusion of journalists acting within the course of their profession and/or in good faith from the scope of the market abuse offence. Under Article 1(2)(c) of the Directive, in respect of journalists "*when they act in their professional capacity such dissemination of information is to be assessed* […] *taking into account the rules governing their profession*". The new Article 21 of the MAR has almost the same wording and specifies that "*where information is disclosed* […] *for the purpose of journalism*", it shall be assessed "*taking into account the rules governing the freedom of the press*" and "*the rules or codes governing the journalist profession*". No change in this state of play appears throughout the legislative process.

42. In that regard, EU institutions and the press seem to have boiled down the notion of the normal context of its professional activity to its substance through the simpler notion of good faith.

43. Besides, it is indeed easy to equate good faith with the exemption provided for a journalist acting in the normal course of her professional activity. The abnormal course, i.e. bad faith, being when a journalist acts out of her professional activity, i.e. under Article 1(2)(c) of the MAD, when the journalists *"derive, directly or indirectly, an advantage or profits from the dissemination of the information in question*" or, under Article 21 of the MAR when they "*derive, directly or indirectly, an advantage or profits from the disclosure or the dissemination of the information in question*" or "*the disclosure or the dissemination is made with the intention of misleading the market*". In both instances, they easily overlap with the notion of bad faith inasmuch as it is impossible to see any link with the fulfilment of their professional duty under the employment contract (*a contrario*, to the notion of *bona fides* under e.g. Article 1104 of the Civil Code or the repealed Article 1134 of that same Code). In any case, whether the criterion used is "*good faith*" or "*the normal course*

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20 Draft Directive proposed by the Council on 29 April 2002, p. 3.

21 European Commission, Securities markets: Commission welcomes European Parliament approval of proposed Market Abuse Directive, Brussels, 24th October 2002, IP/02/1547.

22 Final version of the Directive adopted by the Council on 3 December 2002 and signed by the Presidents of the European Parliament and the European Council on 23 January 2003.

of its professional activity", it boils down for the RCFP to *mutatis mutandis* the very same assessment.

44. A journalist of bad faith who benefits from a market manipulation should be sanctioned for it. Such a bad faith might result from a journalist's deliberate omission of certain details including declarations of personal interest or deliberately as part of a strategy to profit from price fluctuations. In that case and pursuant to Article 21 of the MAR, the journalist deserves to be sanctioned, like any other citizen.

45. In view of the above, the AMF decision goes against the letter, the spirit and the objectives of both MAD and MAR. It was never the intent of the European institutions to allow financial regulators to interfere with and restrict the freedom of the press and punish journalists acting within the scope of their duties. On the contrary, ensuring that journalists can carry on their work of informing the public without unwarranted fear was, at a very early stage in the legislative process, raised as a paramount feature of both MAD and then MAR.

b) A dedicated regime protecting the freedom of the press

46. As already stated, Article 11 of the Declaration of the Rights of Man and Citizens dated 1789 enshrined the major role of the freedom of the press. Furthermore, Article 19 of the Universal Declaration of Human Rights as well as Article 19 of the International Covenant on Civil and Political Rights recognise freedom of expression and freedom of information as fundamental Human rights. Article 10(1) of the ECHR also provides that: "*everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*".

47. These principles are reflected in EU law: under Article 10(1) of the Charter provides "*everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*".

48. Freedom of expression is not an absolute right, meaning it can be restricted if there are other competing fundamental rights or legitimate objectives necessary for democratic society. These might be, in appropriate circumstances, data protection, the right to privacy, reputation or criminal justice.[23] However, such restriction needs to be proportionate to the achievement of the competing objective. Any restriction to the freedom of the press must meet very high requirements before being implemented by the public authorities. As noted by the ECtHR, "[f]*reedom of expression constitutes one of the essential foundations of a democratic society*" and exceptions "*must be narrowly interpreted and the necessity for any restrictions must be convincingly established.*"[24]

49. Under Article 52 of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if

[23] The EU's commitment to a free press – even in the face of significant policy objectives – is also enshrined in Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("**GDPR**"). See GDPR, Article 85: "*Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.*"

[24] ECtHR, *Observer and Guardian v. United Kingdom* (Appl. No. 13585/88), judgment of 26 November 1991, Ser. A, No. 216, para. 59(a).

they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

50. Article 21 of the MAR is to be understood as an exemption or a protective regime for journalism and strikes the balance between the aim of protecting financial markets and freedom of the press in favour of that freedom It may interest the Court to know that an exemption also applies in the U.S. where the Supreme Court has recognised exemptions from securities law for publishers of financial news. In *Lowe v. SEC*, the Court considered whether a financial newsletter publisher violated the Investment Advisers Act of 1940 (the "**Act**") by "*publishing, for paid subscribers, purportedly semi-monthly newsletters containing investment advice and commentary*," when it was not registered under the Act (US Supreme Court, *Lowe v. SEC*, 472 U.S. 181, 210 (1985)). Lowe argued that the Act did not apply because his publications were covered by "*the exclusion in § 202(a)(11)(D) of the Act*" for "*the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation*" (*Id.*, para181). The Court, after an analysis of the Act's legislative history, found that "*Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of nonpersonalized publishing activities*" (*Id.,* para 204). Therefore, the publications were exempt from the Act (*Id.*, para 210: "*As long as the communications between petitioners and their subscribers remain entirely impersonal and do not develop into the kind of fiduciary, person-to-person relationships that were discussed at length in the legislative history of the Act and that are characteristic of investment adviser-client relationships, we believe the publications are, at least presumptively, within the exclusion and thus not subject to registration under the Act*"). Therefore, the Act's exception for journalism is analogous to the European Commission's protections for journalism in the MAR and its predecessor, the Directive.

51. In Europe, no Member State's financial regulator had ever in the past fined journalists for a mere mistake that was immediately corrected, and which did not result from any intent to mislead the market or aim to benefit therefrom. To give more context, in 2019, out of 279 decisions in Europe based on the MAR, only the AMF has fined journalists acting in the course of their professional activities.[25] As noted above, across the Atlantic, the U.S.'s Securities and Exchange Commission has never punished a news organisation for disseminating financial news as a result of a hoax.

52. The AMF is the first regulator to step in the press sphere to impose additional obligation on journalists, subject to heavy fines. In the case at hand, the AMF fined Bloomberg for a limited disclosure of incorrect market information originating from a third party, for a very short period of time without any profit or benefits for the persons concerned nor any attempt to show they intended to mislead the market. All these factors were acknowledged by the AMF.[26] Bloomberg, as acknowledged by the AMF itself, was acting in good faith and ended up being a victim of a sophisticated fraudulent scheme whereby it suffered reputational and financial damages.

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[25] See Report: Administrative and criminal sanctions and other administrative measures imposed under the Market Abuse Regulation in 2019, European Securities and Market Authority (Dec. 16, 2020), available at https://perma.cc/76RA-UGJU.

[26] E.g. as regards the absence of benefit or profit for Bloomberg see para. 67 of the AMF decision.

53. First, the AMF does not contest the retroactive applicability *in mitius* of Article 21 of the MAR.[27] Uncontestably, Article 21 introduces a favorable regime. The Court of Justice has confirmed that freedom of the press must be interpreted extensively to ensure maximum protection, in *Satakunnan Markkinapörssi* and *Satamedia*. The Court held that in order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary, first, to interpret notions relating to that freedom, such as journalism, broadly. Hence, it is necessary to give a broad interpretation to the concept of the processing of personal data '*solely for journalistic purposes'* within the meaning of Article 9 of Directive 95/46[28] and, second, any restriction must apply only in so far as is "*strictly necessary*".[29]

54. In the contested decision, the AMF's interpretation of the relevant provisions of the MAR is not "*broadly*" favorable or "*strictly necessary*" to say the least. It is erroneous and infringes the freedom of press. The AMF has derived an additional strict obligation from a text that was aiming at protecting journalists from legal issues in the event of a potential honest mistake they could make. An obligation, as the one that the AMF created, which amounts to a restriction on freedom of the press must be clear from the outset. That is not the case from the text of the MAR.

55. On the contrary, the reference made to "*rules*" or "*codes*" governing the press in Article 21 of the MAR is only a statement which aims at encompassing the specificities of what is the normal course of a journalist's professional activity within the specific framework of each Member State. Hence, it protects the freedom of the press and only punishes activities carried out outside the scope of their normal professional duties.

56. Second, it is only after examining the normative context in which the EU law provision in question is placed that one may choose the best interpretation of that provision. In that regard, the AMF's reading of Article 21 turns being journalist into a burden. As explained above, the aim of Article 21 is to give more protection to journalists than to any other profession. In that case, why should journalists be sanctioned when acting in the context of their normal activity, when Article 10 of the MAR, applicable *erga omnes*, specifies that:

> unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties.

57. The same holds true for Articles 9(2), 11(1a), 11(4) or 17(8) of the MAR which provide an exemption when the conduct is made in the normal course of the exercise of an employment, profession or duties. Can journalists be therefore sanctioned when acting in the course of their profession while a trader should not be?

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27 Cour d'appel de Paris, 9 juillet 2020, M. A c. Autorité des marchés financiers, paragraphe 111 : « *L'AMF ne conteste pas l'applicabilité rétroactive « in mitius » de l'article 21 du règlement MA*R ».

28 Judgments of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraphs 56 and 61, and of 14 February 2019, *Buivids*, C-345/17, EU:C:2019:122, paragraphs 51 and 53.

29 Judgments of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraphs 56; see also, Article 52(1) of the Charter.

58. From this point of view, the reference to a benefit or intention as conditions for a finding of infringement ensures that journalists are not exempted when acting outside the normal course of the exercise of their profession.

59. The relevant provisions of the MAR mentioned by the AMF aim at protecting journalists. However, the AMF's decision adopts an opposite approach. With its decision the AMF disregards the objective of Article 21 of the MAR and adds unnecessary requirements. The administrative authority has prosecuted and sanctioned journalists acting within the realm of their activities.

60. Further, states are required to create a favourable environment for public debate and for the expression of opinions and ideas without fear.[30] Despite this, journalists engaged in newsgathering or reporting on matters of public interest within the territory of the Council of Europe are faced with an increase in the use or threat of criminal sanctions, and many state authorities have failed to maintain an effective framework of protections for media freedom.[31]

3.1.3. The AMF is ignoring the requirement to show intent

61. The lightened burden of proof for market manipulation was adopted with the purpose of helping judges and regulators to punish complex criminal activities undertaken by white-collar criminals, and not to fine potential victims of such activities. In the present case, the two Bloomberg's journalists and Bloomberg are victims since they did not earn a single cent and have suffered reputational damage.

62. In that regard, it should be noted at the outset that, in accordance with a general principle of interpretation, the wording of secondary EU legislation must be interpreted, as far as possible, in such a way as not to affect its validity and in any event must be in line with primary law and, in particular, with the provisions of the Charter. Thus, if wording is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with primary law rather than to the interpretation which leads to its being incompatible with primary law.[32] Both recital 44 of Directive 2003/6 and recital 77 of Regulation No 596/2014 emphasise, moreover, that those two acts respect fundamental rights and observe the principles recognised in the Charter.

63. As noted by the Court of Justice, for the purposes of the application of the ECHR, the administrative sanctions flowing from an infringement of the MAR may, in the light of the

[30] ECtHR, Dink v Turkey, nos. 2668/07 and 4 others 14 September 2010, §137; See also, Committee of Ministers, Recommendation CM/Rec (2016) 4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors (13 April 2016), §2: "Member States should put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear"; Parliamentary Assembly of the Council of Europe, Resolutions 2137 (2020) Threats to media freedom and journalists' security in Europe (28 January 2020), §6: "The Assembly calls on member States to create an enabling and favourable media environment and review to this end their legislation, seeking to prevent any misuse of different laws or provisions which may impact on media freedom – such as those on defamation, anti-terrorism, national security, public order, hate speech, blasphemy or memory laws – which are too often applied to intimidate and silence journalists").

[31] Council of Europe, Hands Off Press Freedom: Attacks on Media in Europe Must Not Become a New Normal, Annual Report by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists (April 2020).

[32] Judgment of 14 May 2019, *M and Others* (Revocation of refugee status), C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 77; 64.66; see, to that effect, judgments of 20 March 2018, *Di Puma and Zecca*, C-596/16 and C-597/16, EU:C:2018:192, paragraph 38, and of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraphs 34 and 35)

nature of the infringements at issue and the degree of severity of the sanctions which may be imposed, be qualified as criminal sanctions.[33]

64. According to the case-law of the ECtHR, presumptions of fact or of law operate in every legal system and the ECHR does not prohibit such presumptions in principle. It does, however, require the Contracting States to act within certain limits in this respect, in particular where such presumptions are used to find a violation of criminal law. Thus, presumptions of fact or of law provided for in the criminal law must respect the principle of the presumption of innocence, laid down in Article 6(2) of the ECHR. This principle requires States to confine presumptions within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[34]

65. Following the reasoning laid down in *Spector* with respect to the MAD, the Court of Justice considers that the principle of the presumption of innocence does not preclude the presumption in Article 2(1) of the MAD I, today Article 12 of the MAR, that the intention of the author of market manipulation can be inferred implicitly from the material elements of that infringement, provided that that presumption is open to rebuttal and the rights of the defence are guaranteed.[35]

66. Under Articles 12 and 15 of the MAR, the *mens rea* (criminal intent) is presumed–unlike in the MAD II–only because it is a rebuttable presumption.[36] Any contrary reading would also be at odds with the principle of individual nature of penalties.[37]

67. The MAR gives a list of practices which are defined as being market manipulations. From a teleological perspective, each of the listed practices is based on the idea that the infringer is in fact a market player and, as such, may benefit directly or indirectly from the market abuse.

68. This explains why the material elements of the infringement can be inferred, insofar as when acting in the relevant market, there is by nature a potential link between the infringement and the market player's behaviour. In that regard, the Court of Justice has highlighted the fact that these rules were created to encourage compliance with the rules by all "*market actors*".[38] In Recital 47 of the MAR, when describing market manipulation and specifically, the spreading of false or misleading information, it is noted: "*It is therefore appropriate not to allow* ***those active in the financial markets*** *to freely express information contrary to their own opinion or better judgement, which they know or should know to be false or misleading, to the detriment of investors and issuers*" (emphasis added).

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33 Judgment of the Court of 23 December 2009. Spector, Case C-45/08, ECLI:EU:C:2009:806, paragraph 42; see, by analogy, Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraph 150; Eur. Court H. R., *Engel and Others v the Netherlands*, judgment of 8 June 1976, Series A no. 22, paragraph 82.

34 ECtHR, *Salabiaku v France*, judgment of 7 October 1988, Series A no. 141, paragraph 28, and *Pham Hoang v France*, judgment of 25 September 1992, Series A no. 243, paragraph 33

35 Judgment of the Court of 23 December 2009, *Spector*, Case C-45/08, ECLI:EU:C:2009:806, paragraph 38: "*it is thus possible to assume an intenton*".

36 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse.

37 Articles 8 and 9 of the Déclaration des droits de l'homme et du citoyen de 1789 ; Conseil constitutionnel, décision n° 99-411 DC du 16 juin 1999, *Loi portant diverses mesures relatives à la sécurité routière et aux infractions sur les agents des exploitants de réseau de transport public de voyageurs*, considérant 7.

38 Judgment of the Court of 23 December 2009. Spector, Case C-45/08, ECLI:EU:C:2009:806, para 37:

69. This explains the two exceptions set forth in Article 21 of the MAR. In those cases, a journalist acts as a market actor rather than a reporter[39] and thus, the intent or advantage elements suffice to justify a reasonable presumption. In that case, some constitutive elements of the infringement are directly proven, explaining, for example, why the presumption can come into play when the advantage criterion is fulfilled.

70. That is not the case here. As admitted by the AMF, the journalists' behaviour does not meet any of the two exceptions of Article 21 of the MAR.[40] Therefore, the AMF itself rebutted the presumption that Bloomberg or its journalists had a criminal intent when disseminating the information in question. Furthermore, the reasoning of the AMF is inconsistent. The AMF recognises that Bloomberg's journalists had no bad intention: *« aucune pièce du dossier de la procédure ne tend à démontrer que Bloomberg aurait bénéficié d'un avantage en contrepartie de la diffusion de ces informations ni qu'elle y aurait procédé dans le dessein de tromper le marché* ». However, they want to use the legal standard of *bona fides* to punish the journalists,[41] i.e. a standard that ontologically encapsulates the notion of intent within it.[42] The RCFP hardly sees how someone can act in bad faith without any intention to do so.[43]

71. Two solutions can be envisaged.

72. First, if the AMF's reading of Article 21 of the MAR is held to be correct, then Article 21 *per se* directly infringes the presumption of innocence, the principle of personal liability and the freedom of expression (which includes the freedom of the press). This means that Article 21 does not correctly balance the necessity to deter market abuses through criminal sanctions with the fundamental rights at stake. Therefore, the EU legislator would have infringed the Charter and the ECHR. As explained in *Spector*, this article is therefore unlawful and cannot be relied upon to sustain a conviction.

73. Second, the reading of the AMF is wrong, and, in the present case, the journalists cannot have infringed Article 21 of the MAR.[44]

74. It results from the above that the AMF imposed a heavy penalty on journalists with a standard of liability which is lower than the traditional liability standard. As discussed, the AMF has ignored the requirement for any offence to establish a criminal intent.

75. Interestingly, in the United States, in a civil damages claim, Hart v. Internet Wire, both the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit, two courts with vast experience in regulation of the securities markets, expressly rejected plaintiffs' claims that "*red flags*" in a hoax press release

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39 By the same token, the MAR provides an exemption if a disclosure is made in the normal exercise of employment, a profession or duties. In that case, despite having all the material elements, the behaviour lacks *mens rea* (criminal intent).

40 AMF decision, paragraph 67.

41 AMF decision, paragraph 69.

42 For example, in the Digest (L.3, paragraph 3, D. XVII, 2), it is noted "*quia fides bona contraria est fraudi et dolo*".

43 Furthermore, under French law, the *bona fides* is presumed: Cour de cassation, civ. 1re, 4 avril 1991, no 90-04.008 and no 90-04.042, Bull. civ. I, nos 123 et 124; D. 1991. 30; Cour de cassation, com. 29 mars 1994, no 91-21.309 , D. 1995. Somm. 20; Cour de cassation, soc. 11 mai 2005, no 03-43.040 , JCP 2005. II. 10177.

44 In that regard, according to a general principle of interpretation, a provision must be interpreted, as far as possible, in such way as not to detract from its validity (See Case C-403/99, *Italy v Commission* [2001] ECR I-6897, paragraph 37; Case C-361/06, *Feinchemie Schwebda and Bayer CropScience* [2008] ECR I-3865, paragraph 49; Case C-149/10, *Chatzi* [2010] ECR I-8489, paragraph 43, and Case C-12/11, *McDonagh*, judgment of 31 January 2013, ECLI:EU:C:2013:43, paragraph 44)

should have put the defendants on notice that the press release was fake: "[A]*n allegation that a defendant 'ought to have known' is not sufficient to allege recklessness* [...] *None of the red flags suffice to show a plausive motive or intent to defraud investors.*"[45]

76. In the present case, the AMF would erect a standard for quasi-criminal liability that can be met more easily than the standard for civil liability in *Hart*. The AMF has simply found that for seven minutes Bloomberg was deceived into relaying an incorrect information via its Speed Desk. An information which was almost immediately corrected. This cannot suffice to find a violation of the MAR.

77. This means that the challenged decision essentially establishes a standard of strict quasi-criminal liability, without there being a need to show criminal intent, while it was recalled in paras 55 and 56 above that the MAR, and in particular Article 21, seeks to the contrary to establish a standard of heightened protection for journalists, who should not be sanctioned when they act within the normal course of their profession. To be clear, it is widely accepted that journalists, at times, will make mistakes, but that those mistakes must not result in liability, not civil and certainly not criminal. Were the law to the contrary, the chilling effect on a reporter trying to do their best would be absolute and render them wholly unable to do their job. In violation of the applicable provisions and the clear intent of the EU Legislator, the AMF ends up erecting a standard of strict liability applicable to the press only. This position is all the more open to criticism that, as will be seen in section 3.1.4 below, the AMF bases this strict liability on the breach of rules governing the journalist profession that it itself "discovered" to suit its purposes in this case.

3.1.4. The AMF exceeds its legal prerogatives by unilaterally defining the rules regulating the press

78. The AMF found in its decision that Article 21 of the MAR allows to impose a penalty on a press body acting in good faith to the extent that such body infringes "*rules or codes governing the journalist profession*".

79. However, there are no rules or codes governing the journalist profession in France. The principles followed by journalists in France are not compiled anywhere or stated in any form of code or written binding rules. It goes without saying that internal codes of conduct made by private parties, including the Bloomberg Way, are not, in *Etat de droit*, to be regarded as law justifying a derogation to freedom of the press.

80. Therefore, imposing a penalty under the alleged justification that journalists would have breached the rules governing their profession that the AMF means to derive from its conception of the rules of conduct that journalists should abide by, literally amounts to the AMF deciding what rules should govern the profession of journalists.

81. The AMF grants to itself the right to decide whether journalists have acted to the professional standard that it itself determined.[46] This is contrary to MAR. The EU legislator never intended

[45] See *Hart v. Internet Wire*, 163 F. Supp. 2d 316, 318 (S.D.N.Y. 2001), aff'd, 50 F. App'x 464 (2d Cir. 2002), para 321.

[46] See paragraph 82 of the AMF decision

to grant the financial regulators of each Member States the power to define the ambit of the rules governing the press.

82. Further, the AMF went on to comment on Bloomberg's internal procedures to check information as well as the Bloomberg's *internal* code of conduct.[47] This is all the more surprising since there are no regulatory or statutory obligations imposing to implement such internal procedures or to have such a code, nor can the violation of internal rules be criminally sanctioned without a clear legal basis. And yet, the AMF based the penalty it has imposed on its own consideration of the appropriateness of the implementation of Bloomberg's internal procedures in relation to the checking of information. However, the AMF does not have the power to transform non-legally binding rules into hard law.

83. On the one hand, according to Article L621-1 of the Monetary and Financial Code, the role of the AMF is to regulate the financial markets, not to set the rules to be followed by journalists. This remains true when journalists are reporting information in relation to financial markets. If there is no legal power, there can be no legal act. The authority who is not regularly vested with a task has no legal power and, *ipso facto*, exceeds its legal prerogatives when it unilaterally decides to assume this task.

84. On the other hand, media performs an important role of informing the public. They should not be supervised and sanctioned by an administrative authority for doing their work. Any intervention from the Executive in the activities of journalists must be assessed with the utmost care and must be strictly and clearly circumscribed by law. Journalists must remain able to publish information "*that offend*[s], *shock*[s] *or disturb*[s] *the State or any sector of the population*"[48] and media outlets must remain master of their own editorial policy, the tone of their reporting, the matters they elect to cover or not cover and the manner of such coverage, including speed of reporting, without interference or instruction from the public authorities. Allowing the public authorities, let alone an administrative regulator acting without an express mandate from the Legislator, to define the "*rules or codes governing the journalist profession*" opens the door to media outlets receiving instructions from the public authorities, including the risk of imposition of arbitrary administrative restrictions on the freedom of the press. It is also a matter of credibility for media and journalists. The public would lose confidence in journalists and media if the information they want to publish was scrutinised and controlled by an administrative authority vested with powers to penalise them.

85. The journalists' working approach and their ability to perform their work by collecting and obtaining information must remain free of any hurdles and, at the very least, should not be subject to control by an administrative authority, without violation of the ECHR as well as the Charter. Under Article 34 of the Constitution and as confirmed by the Conseil Constitutionnel, it is the sole competence of the legislator.[49]

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47 See paragraph 70 et seq. of the AMF decision.

48 Cour EDH, *Handyside c. Royaume Uni*, 7 décembre 1976 n°5493/72, paragraphe 49.

49 Conseil constitutionnel., 11 octobre 1984, *Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse*, décision n° 84-181, considérant 37 : « *Considérant que, cependant, s'agissant d'une liberté fondamentale, d'autant plus précieuse que son exercice est l'une des garanties essentielles du respect des autres droits et libertés et de la souveraineté nationale, la loi ne peut en réglementer l'exercice qu'en vue de le rendre plus effectif ou de le concilier avec celui d'autres règles ou principes de valeur constitutionnelle* ».

86. The AMF was never given the power to enact legal obligations for journalists and the French legislator never considered granting the AMF such an antidemocratic and dangerous role. In that regard, the lack of competence *ratione materiae* of the author of this decision is manifest. By the same token, this encroachment on the legislative branch violates the principle of the separation of powers as outlined in Article 16 of the Declaration of the Rights of Man and Citizens.[50] Under Articles 47 and 52(3) of the Charter, Article 6 of the ECHR and Articles 2 and 6(1) of the Treaty on European Union, the right to a fair trial can only be ensured if the judiciary, let alone an independent administrative authority operating with little to no democratic control–does not encroach on the legislative, insofar as it is a clear evidence of a serious breach of the rule of law.[51]

87. Control of the conditions in which the journalist profession is or should be exercised (either by way of the pre-conditions which must be satisfied in order to gain entry to a journalism school, the pre-conditions which must be satisfied in order to obtain press accreditation or readiness to dictate professional rules applicable to journalists, salary levels, the pressure of external investigations, etc.) can become the primary tool of controlling information. It is tantamount to instilling fear, explicitly or implicitly, in the mind of journalists and opposite voices in the media.

88. In this case, the AMF infringed the right to freedom of expression and information by imposing a sanction on journalists for simply disseminating information without the intention of misleading the market or profiting from that dissemination and did so based on press rules that it came up with. The AMF does not act within the scope of its remit when it imposes, without any legal mandate, such a burden. The AMF has granted itself the power to interfere, as a public authority, in the publication of information when it does not have jurisdiction to do so under French law.

89. Therefore, the AMF has exceeded its powers and acted *ultra vires* by unilaterally defining the rules applicable to journalists in the performance of their crucial work and sanctioning the alleged infringement of such rules. It is not for the AMF to establish the rules or codes governing the journalist profession, but, under Articles 3 and 34 of the Constitution, to the legislator only.

3.2. In the alternative, a manifest violation of Article 11 of the Declaration of the Rights of Man and Citizens, of the *nulla poena sine lege* principle, of the ECHR and of the Charter

90. First of all, the AMF has imposed a heavy fine on a press body based on the breach of rules that are non-existent, let alone set in a clear body of binding, written rules. Such penalty was

50 See, also, to that effect, judgment of 19 November 2019, *A. K. and Others*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 124; and judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 35.

51 The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see, to that effect, judgments of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraph 37, and of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraphs 29 to 33). The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law (see, to that effect, judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 73 and the case-law cited).

not foreseen under French law. Under Article 11 of the Declaration of the Rights of Man and Citizens of 1789, an abuse of the right of free communication of thoughts and of opinions may only be punished "*in the cases determined by the law*". It is for the legislator under Article 34 of the Constitution to « *fixe les règles concernant* […] *les droits civiques et les garanties fondamentales accordées aux citoyens pour l'exercice des libertés publiques* ».[52]

91. As explained above, in the present case, French law is silent on any potential abuse of free communication in the context of the dissemination of financial information, except under the conditions laid down in Article 21 of the MAR, which have been disregarded by the AMF. No rules are provided in France about the journalist profession. The legislator has never enacted any rules in that regard.

92. Furthermore, the Conseil Constitutionnel clearly asserted its determination to protect the freedom of the press in the decision handed down on 28 February 2012. The text that was censured intended to insert an Article 24 ter into the 1881 Law punishing those who, regardless of the means of public expression or communication used, have disputed or overly minimized the existence of one or more crimes of genocide "*defined in Article 211-1 of the criminal code and recognised as such by French law*". According to Article 11 of the Declaration of the Rights of Man and Citizens, abuses of freedom of expression must be provided for by the "*loi*", in accordance with criminal legality. Here, however, there is a lack of legality. It is, in fact, an offence by referral since it punishes the contestation of crimes against humanity "*recognised as such by French law*". However, as the Conseil Constitutionnel explained, a text with such a purpose "*cannot, in itself, have the normative scope that applies to the law*". In the absence of a reference to a specific normative text, the incrimination is not complete. The abuse in question is not fully described in the text given that it includes a generic reference to the term "*law".*

93. The only defence put forward by the AMF is that Article 10 of the ECHR provides that any limit to the freedom of the press must be enacted by a law. This requirement would be met, according to the AMF, since the legal basis of its decision is Article 21 of the MAR. However, again, Article 21 is based on the existence of specific rules or law which must define the scope of what is permissible or not, in line with the requirements set by the Conseil Constitutionnel. These rules do not exist in France and the AMF has been unable to identify in what text the obligations it alleges in its decision are to be located.[53] Thus, by fining a press outlet for an infringement consisting of an abuse of the freedom of speech which is not provided by law, the AMF has also infringed the principles laid down in Articles 11 of the Declaration of the Rights of Man and Citizens as well as in Articles 10 of the Charter and the ECHR. Its decision is therefore unconstitutional.

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[52] Conseil constitutionnel., 28 février 2012, décision n°2012-647 DC, considérant n° 5.

[53] Décision de l'AMF, paragraphe 30 : « *Ainsi, la liberté des journalistes de recevoir ou de communiquer des informations ou des idées bénéficie d'une protection très étendue mais comporte également des devoirs et des responsabilités, au premier rang desquels figure l'obligation de s'assurer de l'authenticité des informations destinées à être publiées* ». De même, l'AMF déclare sans aucun fondement au paragraphe 69 : « *comme il a été dit ci-dessus, le droit des organes de presse de communiquer des informations au public est protégé à la condition qu'ils agissent de bonne foi, sur la base de faits exacts, et fournissent des informations fiables et précises dans le respect de la déontologie journalistique, au titre de laquelle s'impose, au premier chef, la vérification de l'authenticité des informations préalablement à leur publication* ».

94. Secondly and this is interrelated, the sanctions in the present case — albeit administrative in form — are criminal in substance.[54] This entails the applicability of fundamental principles governing criminal law.

95. Under French law, there cannot be any crime, offence or infringement if these are not defined in the law ("*nullum crimen, nulla poena sine lege*" or principe de légalité des délits et des peines). This fundamental principle is enshrined in the Criminal Code (Articles 111-2 and 111-3), in the Constitution (Articles 34 and 37), the Charter (Article 49) and the ECHR (Article 7). This is also a general legal principle underlying the constitutional traditions common to the Member States.[55]

96. It is a corollary to the general principle of legal certainty, which is a fundamental principle of European law, that requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly (*nulla poena sine lege certa*).[56]

97. Nonetheless, the AMF has fined Bloomberg for an alleged infringement that is not foreseen under French law. In its decision, the AMF has held that Bloomberg's journalists did not comply with unknown rules and codes governing the profession of journalist and imposed on that basis a penalty on Bloomberg. It did so while disregarding the criteria laid down in Article 21 of the MAR. The AMF itself has in the past recognised the importance of legal certainty:

> Considérant cependant que cette communication n'a pas de valeur règlementaire faute de constituer une norme d'exercice professionnel homologuée par arrêtée du Garde des sceaux, Ministre de la Justice ; que la lettre de fin de travaux, si elle citée au paragraphe 1.2 de la note d'opération intitulé « Déclaration de la personne responsable », n'a fait l'objet d'aucune communication au public. Considérant qu'en conséquence, le grief tiré de la diffusion d'une fausse information n'est pas constitué.[57]

98. There is no provision under French law defining what the alleged breach of rules or codes of conduct governing the profession of journalist is. Besides, even international or national charters such as the Munich Charter and the Ethics Charter of the Syndicat National des Journalistes are not by nature binding texts.[58] In accordance with Article 21 of the MAR, the only possibility to punish an alleged market manipulation by a journalist is the dissemination or disclosure of false information when that journalist does derive a benefit or a profit from

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54 ECtHR, *Grande Stevens and Others v. Italy*, 4 March 2014, 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10; ECtHR, *Engel and Others v. the Netherlands*, 8 June 1976, No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

55 See, e.g., Joined Cases C-74/95 and C-129/95, *X* [1996] ECR I-6609, paragraph 25, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 *P, Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraphs 215-219; Case C-303/05, *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 49, and Case C-308/06, *Intertanko and Others* [2008] ECR I-4057, paragraph 70.

56 See Case C-110/03 Belgium v Commission [2005] ECR I-2801, paragraph 30, and IATA and ELFAA, paragraph 68; ECtHR, *Streletz e.a. c. Allemagne,* 22 mars 2001, n° 34044/96 e.a., Recueil des arrêts et décisions, 2001-II, paragraphe 50, et la jurisprudence qui y est citée

57 AMF, Décision de la Commission des sanctions à l'égard des sociétés Tekka Group et Bryan Garnier and Co Limited, de Mm. B, C et A, 30 mai 2012, SAN-2015-10, page 10.

58 The Ministre de la Culture et de la Communication has furthermore explicitly recalled that : « *Ces chartes n'ont pas de caractère contraignant et chacun est libre d'y adhérer* » (réponse publiée au JO le 09/11/2010, page 12215).

it or had the intention to mislead the market. This is a clear but necessarily limited exception to the principle that a journalist is exempted when it acts in the normal course of its professional activity, i.e. "*for the purpose of journalism*". The further reference to rules governing the journalist profession can only, at the very least, makes sense in Member States that have actually enacted such rules–which concurs with Recital 77 of the MAR.[59]

99. The RCFP hardly sees how a court could find any infringement and the proportionality of the sanction, if the obligations whose violation is being sanctioned by the regulator are non-existent in the legal order at hand.[60]

100. From the journalists' standpoint, the "*intention*" and "*advantage*" requirements give clear-cut conditions of what is out of the realm of the normal course of their professional activity and therefore what their criminal risk is. By contrast, the alleged professional rules invoked by the AMF do not allow journalists to identify with precision what obligations rest upon them under the MAR. The substance of their alleged duties is deprived of any legal certainty and foreseeability.

101. Furthermore, the interpretation of the 'ought to have known' condition as interpreted by the AMF without any real elaboration or explanation is vitiated by the same illegality as no specific journalistic legal rules exist in France. The Enforcement Committee's finding here amounts to an ipse dixit–Bloomberg "*ought to have known*" that the press release was a fake because the Enforcement Committee said so. And, in making this determination, the Enforcement Committee replaced Bloomberg's editorial judgment with its own.

102. In other words, the alleged breach of completely unknown rules governing the profession of journalist cannot constitute an offence that allows the imposition of a penalty for an alleged market manipulation.

103. Lastly, pursuant to the Law of 11 July 1979, the AMF decision being an individual decision detrimental to Bloomberg, it has to state the reasons underlying such decision.[61] Such statement of reasons must be provided at the same time as the act is adopted, *i.e.* the reasons must be stated in the body of that act.[62] In that regard, under Article 41(2)(c) of the Charter,

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59 Recital 71 of the MAR: "*when this Regulation refers to rules governing the freedom of the press and the freedom of expression in other media and the rules or codes governing the journalist profession, account should be taken of those freedoms as guaranteed in the Union and in the Member States and as recognised pursuant to Article 11 of the Charter and to other relevant provisions*."

60 Conseil d'Etat, 9 octobre 1996, *Sté Prigest*, n° 170363 : « *Le principe de légalité des délits et des peines* [...] *s'applique aux sanctions administratives au même titre qu'aux sanctions pénales et* [...] *implique que les éléments constitutifs des infractions soient définis de façon précise et complète* ».

61 Law n°79-587 of 11 July 1979 (as amended) on the obligation to state reasons for administrative acts and the improvement of the relations between the administration and the public.

62 Conseil d'Etat, 9 nov. 1984, Comité dauphinois d'hygiène industrielle : Rec. CE 1984, p. 355. Except in the cases expressly provided for by the Law of 1979, a delayed statement of reasons is unlawful (Conseil d'Etat, 30 juin 1982, *Malley*: Rec. CE 1982, tables, p. 504).

the principles of a fair trial[63] or *audi alteram partem*,[64] an explanation provided at the stage of the judicial proceedings cannot be taken into account for the purposes of assessing whether an administrative authority has complied with its obligation to state reasons.[65]

3.3. In the further alternative, on the necessity of a preliminary ruling from the Court of Justice

104. Under the discretionary reference provided for in Article 267(2) TFEU, a national "*court or tribunal*" may ask the Court of Justice to give a preliminary ruling if it considers that a decision on the question is "*necessary*" to enable it to give a judgment in a particular case.

105. In the present case, the validity of Articles 12, 15 and 21 of MAR ("**the disputed provisions**") is questionable. However, the national courts cannot themselves declare an act invalid. The Court of Justice has exclusive jurisdiction to do so. Therefore, any doubt on the validity of EU law before the national courts should be subject to a request for a preliminary ruling to clear these doubts. In the matter at hand, the Paris Court of Appeal should refer the questions stated below to the Court of Justice.

106. Articles 12, 15 and 21 of MAR as interpreted by the AMF appear to be contrary to the principle of legality of criminal offences and penalties given that their wording lacks clarity and foreseeability.

107. As stated, the reference to "*the rules or codes governing the journalist profession*" is unclear, since there are no such rules in France, and does not fulfil the aim of harmonizing different national rules at a European level

108. Article 49(1) of the Charter provides that: "*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law*". The Charter has the same legal values of treaty. Therefore, the provisions of the MAR should all comply with the principles set out in Article 49(1) of the EU Charter, which is not the case here because journalists in France are not able to foresee the possible offences, nor their consequences, in relation to the dissemination of information regarding financial markets.

109. As demonstrated by the AMF's decision, the absence of clear rules gives the financial regulator an excessive power to arbitrarily decide what rules should apply to the profession

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63 See Cour d'appel de Paris, 19 avril 2005, n° 04/22691 ; Cour d'appel de Paris, 13 décembre 2005, n° 05/13646 ; Conseil constitutionnel, décision n°98-408 DC du 22 janvier 1999, *Traité portant statut de la Cour pénale internationale*, considérant 22. It corresponds to the fundamental right to obtain a reasoning of decisions, enshrined in Article 41(2)(c) of the Charter, and indirectly protects the right to effective legal protection and a fair trial under Article 47 of the Charter.

64 A general principle of EU law to the effect that the right to good administration encompasses the obligation of the administration to give reasons for its decisions (see, to that effect, judgment of 17 July 2014, *YS and Others*, C-141/12 and C-372/12, EU:C:2014:2081, paragraph 68). The obligation of the administration to state reasons for a decision which are sufficiently specific and concrete to allow the person concerned to understand the grounds of the individual measure adversely affecting him is thus a corollary of the principle of respect for the rights of the defence, which is a general principle of EU law (see, to that effect, judgments of 22 November 2012, *M.*, C-277/11, EU:C:2012:744, paragraph 88, and of 11 December 2014, *Boudjlida*, C-249/13, EU:C:2014:2431, paragraph 38).

65 See Case C-39/18, *Commission v ICAP*, para. 41; if the AMF was allowed to state reasons before the present Court, this would amount to giving a right for any administrative authority to *not* state the reasons underlying their acts when they adopt it. It would then be allowed to delay its statement of reasons until a dispute arises, which cannot be accepted (see in that regard AG Pikamäe opinion in Case C-114/19 P, *Commission v Danilo Di Bernardo*, para. 94)

of journalists and then fine press bodies. This is manifestly the case since the AMF is commenting on Bloomberg's internal procedures.[66] By setting out itself the rules governing the journalist profession, the AMF decision also escapes the control of legality by the appealing/reviewing court.

110. The uncertainty resulting from the vague wording "*rules or codes governing the journalist profession*" does not allow to foresee in a clear manner what are the criteria to be taken into account to avoid committing a market manipulation or to establish such an infringement. The AMF itself did not take the trouble of indicating how this concept applies to the present case in the absence of national rules. It briefly discussed Bloomberg's internal procedures, without further identifying the rules that would have been breached. In the meantime, neither the sophistication of the forged press release nor the context in which the information was received are addressed in the AMF decision.

111. It results from the above that the disputed provisions grant such a broad discretion for the AMF, that the latter can decide whether an infringement has been made based on criteria it defined itself. This amounts to creating unilaterally, retroactively and without democratic control, a legal framework allowing significant sanctions against journalists. Therefore, the provisions at stake, as interpreted by the AMF, go against the principle of legality of criminal offences and penalties as enshrined in the Charter and in Article 7 of the ECHR.

112. Finally, the disputed provisions of the MAR, as interpreted by the AMF, would constitute a significant and disproportionate restriction to the freedom of the press.

113. Article 52(1) of the Charter provides that any restriction to such freedom must be necessary and genuinely meet the objectives of general interest recognized by the EU or the need to protect the rights and freedoms of others.

114. In the present case, the amount of the fine will discourage most financial journalists from reporting quickly on any information regarding financial markets, despite the public's need for rapid information. Even after thorough verifications, the sophistication of a hoax can mislead journalists who will then be heavily fined.[67] They will take the blame instead of the actual perpetrators that cannot be found. This blame shifting to journalists who already suffered a reputational harm, will entirely fail to deter the perpetrators of the manipulation. A five million euros fine is therefore disproportionate.

115. The AMF's interpretation of the MAR must therefore be firmly rejected. Should the Court harbor any doubts as the above, it should refer questions on the interpretation of the MAR to the Court of Justice in accordance with the latter's exclusive competence to adjudicate on such matters.

116. It follows that the RCFP respectfully request the Paris Court of Appeal to refer to the Court of Justice the following question:

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66 See e.g. paras 70-72 of the AMF decision.

67 Fraudsters can be highly sophisticated. For example, in 2017, an engineer tricked the SEC's filing system, EDGAR, and successfully filed a fraudulent tender offer (SEC, *SEC Charges Fake Filer With Manipulating Fitbit Stock* (May 19, 2017), https://perma.cc/X5KJ-853Y).

1. Taking into account the key Human Right of freedom of the press enshrined in Article 11 of the Charter of Fundamental Rights, the principles of legal certainty, legality and proportionality of criminal offences and sanctions enshrined in Article 49 of the Charter, the preparatory works for Directive 2003/6/EC of the European Parliament and of the Council and the Market Abuse Regulation itself, as well as the diverging interpretations of such provisions adopted in the different Member States, should Articles 12, 15 and 21 of the Market Abuse Regulation (EU) No 596/2014 be interpreted as applying exclusively to the dissemination of inaccurate information by journalists or press organizations that may have derived an advantage or profits from such dissemination or that may have had the intention to mislead the market within the meaning of Article 21(a) and (b)? Should such provisions be interpreted as meaning that penalties may not be imposed under the regulation where dissemination of information was done in the normal course of a journalist activity and where no intentional element falling within the scope of the behaviors covered by the Regulation is established? Should such provisions be interpreted as meaning that the sanctions imposed under such Regulation are not applicable to the dissemination in the normal context of a journalist activity of information in the absence of any intent revealed by the conduct covered by the Regulation?

2. If the answer to Questions 1 is no, taking into account press freedom and the principle of separation of powers stemming from Article 47 of the Charter, Article 6 of the ECHR and Article 2 of the Treaty on European Union, can Article 21 of the Market Abuse Regulation be interpreted as empowering the Member State's competent authority under the Regulation, while prosecuting an alleged offender, to define, unilaterally and in the silence of national law, what are the rules of conduct applicable to journalists and then find an offence under Article 21 on the basis that said rules would have been breached ?

3. If the answer to Question 1 is no, under Article 11 of the Charter of Fundamental Rights and in accordance with the principle of proportionality, what parameters should be taken into account to determine whether a financial sanction is required and what its amount should be. In particular, is it relevant that the press agency concerned had established reliable internal guidelines for the verification of the accuracy of information, where journalists of that agency disseminated in good faith inaccurate information following fraudulent actions of a cybercriminal nature and rectified such inaccurate information within a particularly brief period of time?

3.4. In the furthest alternative, a seriously disproportionate sanction

117. The five million euro fine imposed on Bloomberg for merely relaying an information, which looked like legitimate official information, is beyond disproportionate. This is all the truer given that, as explained above, the journalists did not have any intent to mislead the market or to obtain a profit from it.

118. First, such a massive fine constitutes an interference with the freedom of expression and the freedom of the press, inasmuch as it tries to redefine the legal boundaries of journalistic work and constitutes a threat for exercising the journalist profession. Under the case-law of the

ECtHR any interference with the freedom of expression is subject to a "*necessity of the interference in a democratic society*" test. Unsurprisingly, the Conseil constitutionnel applies the same legal test: « *les atteintes portées à l'exercice de cette liberté doivent être nécessaires, adaptées et proportionnées à l'objectif poursuivi* ».[68]

119. Freedom of expression is such a fundamental right that the Court of Justice and ECtHR have repeated that, when causing an interference with it, the least restrictive measure should be adopted. In order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned.[69] Thus, in its analysis of proportionality, the Court attached importance to the fact that the national judge chose the least restrictive of several possible measures.[70]

120. A fine of five million euros for the mere exercise of the freedom of expression in the context of the journalist profession does not meet that standard.

121. In addition, the ECtHR considers the interference complained of in light of the entire circumstances of the case, including the tenor of the applicant's remarks and the context in which they were made, and determines whether it "*correspond*[ed] *to a pressing social need*", was "*proportionate to the legitimate aim pursued*" and whether the reasons adduced by the national authorities to justify it are "*relevant and sufficient*" .[71]

122. Imposing such a heavy fine cannot serve any legitimate purpose and does not correspond to any pressing social need, it just reveals the AMF's wish to set any example it could find in the light of its inability to find and punish the true perpetrators of the crime, to the detriment of the freedom of the press and of expression. It does not restore any confidence in the market or bring journalists to carry out more due diligence than they already do. The AMF does not reason adequately why such an excessive fine should be justified, *inter alia* since this decision has no deterrent effect towards future fraudsters. The fine issued by the AMF is an unacceptable interference with the freedom of the press.

123. Further, news organizations already have an abiding incentive to avoid being the victim of hoaxes, which can create tremendous reputational harm. This is especially so in the realm of financial reporting, where consumers of such news seek the most trustworthy sources, knowing that decisions based on fraudulent information could result in financial losses. Financial news organizations, in particular, hold their journalists to high ethical standards.

124. The AMF also ignored Bloomberg's remarks that the information appeared to be legitimate and should be seen in the context of reporting financial information in a timely manner while fraudsters were actively trying to deceive the journalists.

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68 Conseil constitutionnel, 20 mai 2011, *Mme Térésa C. et autre*, décision n° 2011-131 QPC, considérant n° 3.

69 ECtHR, *Glor v. Switzerland*, 30 April 2009, 13444/04, paragraph 94; judgments of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraphs 56.

70 ECtHR, *Axel Springer SE and RTL Television GmbH v. Germany*, 21 September 2017, n° 51405/12, paragraph 56; ECtHR, *Perinçek v. Switzerland*, 15 October 2015, n° 27510/08, paragraph 273; ECtHR, *Tagiyev and Huseynov v. Azerbaijan*, 5 December 2019, n° 13274/08, paragraph 49.

71 ECtHR, *Amihalachioaie v. Moldova*, 20 April 2004, n° 35207/03, paragraph 30.

125. Therefore, the AMF infringed Article 6(3) of the Treaty on European Union,[72] Article 10 of the ECHR, Article 52 of the Charter as well as the principles established by the ECtHR and the Court of Justice which require that any interference with the freedom of the press and the freedom of expression shall be proportionate.

126. Second, a five million euros fine is capable of having a chilling effect on journalists who often have to report important information to the public. Indeed, a disproportionate fine may have a chilling effect for the profession as a whole (see e.g. *Pais Pires de Lima v. Portugal* as regards the legal profession).[73] Even large and respected news organisations such as Bloomberg struggle to identify on the spot every fraudulent press release, despite robust internal procedures to do so. The AMF's decision to fine Bloomberg €5 million – and the threat of fines of up to €100 million for other news organisations victimised by fraudsters – will, if left undisturbed, inhibit news reporting. News organisations are likely to either constrain or outright halt their coverage of French financial markets out of fear that they would be targeted by similar hoaxes and subject to similarly large fines, even if they make significant efforts to avoid publishing false information, as Bloomberg does. This chilling effect would be strongest among small news organisations who cannot afford the dual burdens of expensive fraud-detecting technology and significant regulatory fines.

127. As a matter of fact, according to a study conducted by Price Waterhouse Coopers in September 2020, newspapers were forecast to experience an $8 billion decline in advertising revenue during the year 2020.[74] This precarious financial landscape makes a chilling effect even more likely in that smaller and start-up news organisations, wary of financial risks, will limit the breadth of their reporting.

128. Third, Bloomberg's journalists merely acted in the normal course of their profession. This evidences once more that a five million euros fine is manifestly disproportionate.

129. Fourth, Article 49(3) of the Charter also sets out that penalties must not be disproportionate to the offence. In the present case, the AMF failed to take into account the absence of participation of Bloomberg and its journalists in the production of the incorrect information at stake, as well as the absence of any intent to commit any wrongdoing. Thus, the AMF decision also breached Article 49(3) of the Charter.

130. Finally, in the absence of any drastic consequences regarding Vinci's stock price, a five million euros fine appears all the more disproportionate. While Vinci's stock price started to decrease, Bloomberg almost immediately issued a statement that the information just relayed was not correct. This extremely quick reaction considerably minimised the consequences of the first publication and allowed a quick rebound of stock price. Indeed, Vinci's stock price actually fully recovered the same day as the rectification issued by Bloomberg.[75] The excessive amount

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[72] "*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*".

[73] ECtHR, *Pais Pires de Lima v. Portugal*, 12 February 2019, n° 70465/12, paragraph 67.

[74] See Freddy Mayhew, Report predicts five years of steep global decline for newspaper industry revenue (print and online), Press Gazette (Sept. 14, 2020), available at: https://perma.cc/NYS8-3NNB.

[75] Alexandre Neyret, La cybercriminalité boursière : Définitions, cas et perspectives, Rapport de l'AMF (28 janvier 2020), page 40 : « Le démenti de

Bloomberg à 16h14:11 permettra au titre de recouvrer quasiment toute sa valeur aussi vite qu'il l'avait perdue ».

of the fine is not justified by the consequences suffered by Vinci or any investors which in turn strikes the RCFP as disproportionate.

131. For all the reasons set out above, RCFP submits that the AMF has infringed the principle of proportionality of the sanction as established in the ECHR and the Charter.

3.5. In any case, the serious infringement of the journalists' right to privacy

132. Under Art. L. 621-15, III ter of the Monetary and Financial Code:

> Dans la mise en œuvre des sanctions mentionnées au III et III bis, il est tenu compte notamment : - de la gravité et de la durée du manquement ; - de la qualité et du degré d'implication de la personne en cause ; - de la situation et de la capacité financières de la personne en cause, au vu notamment de son patrimoine et, s'agissant d'une personne physique de ses revenus annuels, s'agissant d'une personne morale de son chiffre d'affaires total […]

133. In paragraph 81 of its decision, the AMF held:

> The two journalists' disregard of the internal procedures invoked by Bloomberg must be put into perspective in the light of the modest nature of the sanctions imposed on them, as their variable remuneration for the year in question amounted to 3,000 euros and 2,000 euros respectively, instead of the 4,500 euros and 3,000 euros initially declared, and for one of them, his fixed salary had increased by 2.4%.

134. However, the obligation to take into account the financial capacity of the person concerned by a decision does not authorise the AMF to breach the right to privacy of the two accused journalists, especially when the Enforcement Committee could set such information as confidential.

135. According to Article 8 of the Charter and Article 16 of the TFEU, everyone has the right to the protection of personal data concerning him or her.

136. Pursuant to settled case-law, wages and perks of journalists are personal data.[76] In the present case, the co-workers of the aforementioned journalists can easily identify the latter and are in position to know their wages. Thus, such personal information can be linked to an identified or identifiable natural person. Strikingly, the AMF has, for example, kept such information confidential in other decisions.[77]

137. The inclusion of that information in the AMF decision is therefore unlawful. It does not meet an overriding requirement in the public interest, in particular because the infringement of the privacy went beyond what was necessary.

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[76] Judgelent of the Court of 20 May 2003, C-139/01, *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 64.

[77] See for example, Commission des sanctions, décision de la Commission des sanctions du 13 novembre 2020 à l'égard de MM. Gérard Monnet, Michael Aubourg, Davide Blei, Cyril de Bournet et Marco Perelli-Cippo, SAN-2020-11.

The **23rd** of March 2021,

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Me Geoffroy Barthet Me Édouard Bruc

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Me Frédéric Louis

Table of Annexes

No. of the Annex	Description of the document
Exhibit no. 1	Enforcement Committee, decision against Bloomberg, 11 December 2019
Exhibit no. 2	L'Obs, Chute boursière de Vinci : récit d'une incroyable manipulation, 23 novembre 2016
Exhibit no. 3	L'Express, Vinci: « une malveillance pareille », du jamais-vu à la Bourse de Paris, 23 novembre 2016