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# Duties to cooperate and their limits under the case law of the ECtHR and the ECJ**

**ABSTRACT:** Economic regulation and supervision mechanisms habitually include duties to cooperate which require individuals and legal persons to document their activities and disclose information about their actions if they come under investigation. These duties are often backed up by sanctions, forcing the addressee to decide whether to hand over information or face adverse consequences. Such pressure could violate the privilege against self-incrimination and other fundamental rights guarantees. The article reviews the case law of the ECtHR and the ECJ and summarizes the present state of European human rights law. It will show that the current situation is unsatisfying as it leaves crucial questions unanswered. Most importantly, the article will shine a light on the lack of reliable precedent regarding the right to remain silent of legal persons.

**KEYWORDS:** duty to cooperate, nemo tenetur, right to remain silent, privilege against self-incrimination, attorney-client-privilege, confidentiality, business secrets, privacy, legal persons, ECJ, ECtHR.

## 1. Background and practical relevance

Economic regulation and supervision nowadays entail numerous documentation, information and disclosure obligations. They represent standardised building blocks of regulatory and supervisory law in regulated industries, but also form part of the general legal framework in other economic sectors. Natural and legal persons thus might be subjected to such strictures either as a precondition for being admitted participating in a certain market or because of their regular economic activities, should the general legal requirements contain such obligations. Such information and

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disclosure obligations become particularly relevant in connection with the investigation of alleged infringements by administrative authorities. To facilitate effective investigations, cooperation and correct, prompt information are existential from the authorities' point of view and companies are obliged to cooperate accordingly. The effective functioning of these mechanisms is often secured by the threat of sanctions in the event of refusals or sketchy reporting. Such obligations to cooperate, if backed up with sanctions, can easily come into conflict with the rights of the natural and legal persons concerned. They can violate attorney-client privilege and trade secrets, and most importantly, freedom from self-incrimination (nemo tenetur). The article will first provide a brief overview of these limits to the freedom of cooperation but will then confine itself to the nemo tenetur principle.

## 2. Limitations of obligations to cooperate at a glance

To safeguard the rights of defence and to protect the legal work and advise of attorneys, communication between lawyers and clients is protected by the so-called legal professional privilege (which is recognised as a general legal principle of EU law and protected in Article 6 paragraph 1 and 3 lit. c, Article 8 ECHR, Article 41 paragraph 2, Article 47 paragraph 2, Article 48 paragraph 2 in connection with Article 52 paragraph 3 CFR).[1] State investigations must respect this sphere of trust. Documents to which the attorney-client privilege extends need not be communicated upon request[2] nor need requests for information on their contents be answered.[3] The privilege encompasses all communication that took place within the framework of a client-lawyer relationship and in connection with the client's right of defence.[4] The decisive factor is the existence of a functional link to criminal proceedings. It is therefore irrelevant whether correspondence concerning the allegations dates from the time before investigations were opened. Internal records of communication with defence counsel or

[1] *AM v. S* - Case 155/79 - 18 May 1982, para. 18; *Hilti v. Commission* - Case T-30/89 – 4 April 1990, para. 13; *Akzo/Akcros v. Commission* - Case T-125/03 and others – 17 September 2007, para. 76; *S. v. SUI* App. No. 12629/87 and 13965/88, 28 November 1991, para. 48; *Campbell v. UK* App. No. 13590/88, 25 March 1992, para. 48; *Foxley v. UK* App. No. 33274/96, 20 June 2000, para. 44; Schubert, 2009.
[2] Lubig, 2008, p. 110.
[3] Lubig, 2008, p. 111.
[4] *AM v. S* - Case 155/79 - 18 May 1982, para. 21.

appointed lawyers[5] or preparatory (defence) documents (for the subsequent exercise of the rights to an effective defence) are equally privileged.[6] In contrast, in-house advice on the allegations is not protected, nor are compliance documents or advice and information gathered in internal investigations, because such legal practices are not essential activities of attorneys as they do not involve giving independent legal advice and representing clients in legal cases.

Further limitations that restrict access of state authorities to (existing) documents and information may result from the freedom to exercise one's profession.[7] However, as rules on the exercise of a profession, duties to cooperate and produce information will quite likely be predominantly proportionate. The ECHR does not protect the freedom to exercise one's profession directly and in absolute terms, but only under special conditions as an aspect of the right to private life in Article 8 ECHR, which is why it is already questionable that these duties fall into the substantive scope of protection of this freedom. The legal situation might be different where requests concern business or other protected secrets.

Finally, the principle of nemo tenetur generally protects the accused from undue coercion to incriminate themselves.[8] The accused therefore enjoys both a comprehensive right to silence and freedom of cooperation vis-à-vis prosecuting authorities, which may not be undermined by force, threats, sanctions, or deceptions tantamount to coercion. This privilege seems hard to square with duties to provide information, as such duties might require actively editing evidence or handing over documents. That said, suspects must nonetheless tolerate search and seizures of pre-existing evidence (evidence that exists independently of the will of the suspect) in the course of lawful coercive measures.[9]

## 3. Nemo tenetur se ipsum accusare

The privilege against self-incrimination is not mentioned in either the ECHR or the CFR. However, it is unanimously recognised as a fundamental

[5] *Hilti v. Commission* - Case T-30/89 – 4 April 1990, para. 16 et seq.
[6] *Akzo/Akcros v. Commission* - Case T-125/03 and others – 17 September 2007, para. 123.
[7] Art. 15 and 16 of CFR.
[8] Lamberigts, 2019, pp. 307-308; Ott, 2012, p. 68; Meyer, 2022, para. 140.
[9] Meyer, 2022, p. 146; *Saunders v. UK* App. No. 19187/91, 17 December 1996, para. 71; *J.B. v. SUI* App. No. 31827/96, 3 May 2001; *Funke v. FRA* App. No. 10828/84, 25 February 1993.

right and as such derived from Article 6 paragraph 1 and paragraph 2 ECHR or from Article 47 and Article 48 paragraph 2 CFR by the ECtHR and the ECJ respectively. Accordingly, the nemo tenetur principle forms part of the essence of a fair trial. Advocate General Pikamäe recently argued that nemo tenetur is also enshrined in human dignity.[10] This view has far-reaching consequences for the protection of this fundamental right, because only natural persons could invoke and benefit from its full protection if this were true.

In contrast, the ECtHR has so far given theoretical priority to the idea that nemo tenetur protects the will against compulsory cooperation,[11] but does not substantively establish this idea as a degrading encroachment on Article 3 ECHR or as an impairment of personality rights covered by Article 8 ECHR. The court, indeed, emphasises the procedural dimension. Coercion to testify and cooperate undermines the proceedings and prevents them from being perceived as fair.[12]

### *3.1. Existence of criminal proceedings*

The applicability of nemo tenetur presupposes the existence of criminal proceedings. Whether proceedings are of a criminal nature is assessed by the ECtHR in accordance with the so-called *Engel*-test, which comprises three criteria. The decisive factors are the classification of a legal offence as a criminal offence *under* national law *(classification of the offence under national law)*, the nature of the offence and the nature and *degree* of severity of the *penalty.* [13]The ECJ follows this approach and declares the three-step test to be the decisive yardstick in Union law as well,[14] with both courts striving for consistency in the application of the law[15].

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[10] *DB v. Consob* - Case C-481/19 - 27 October 2020, AG Pikamäe Opinion, para. 99.

[11] *Heaney and McGuinness v. IRL* App. No. 34720/97, 21 December 2000, para. 40; *Saunders v. UK* App. No. 19187/91, 17 December 1996, para. 68.

[12] Art. 6(1) of ECHR.

[13] *Engel and Others v. NL* App. No. 5100/71, 8 June 1976, paras. 80 ff.; more recently ECtHR, *Kadubec v. SK* App. No. 27061/95, 2 September 1998, paras. 50 ff.; ECtHR (GC), *Jussila v. FIN* App. No. 73053/01, 23 November 2006, paras. 30 f.

[14] *Bonda* - Case C-489/10 – 5 June 2012, para. 37; *Menci* - Case C-524/15 – 20 March 2018, para. 26; *DB v. Consob* - Case C-481/19 - 2 February 2021, para. 42; The administrative sanctions imposed by Consob were deemed to be criminal in nature due to their repressive objective and the high degree of severity, para. 43; see also *Garlsson Real Estate and Others* - Case C-537/16 – 20 March 2018, para 28.

[15] See *DB v. Consob* - Case C-481/19 - 2 February 2021, para. 43 refers to the same assessment of the procedural character by the ECtHR in the "Grande Stevens"-case.

Thus, a large number of proceedings, which know obligations to provide information and to cooperate, fall within the factual scope of protection of Article 6 paragraphs 1-3 ECHR, most importantly tax proceedings,[16] customs proceedings,[17] competition or antitrust proceedings,[18] supervisory proceedings under capital market law,[19] as well as other administrative sanction proceedings, [20] insofar as these provide for the punishment of legal transgressions with repressive sanctions. In these so-called quasi-criminal proceedings, which are not part of the hard core of criminal law, the ECtHR accepts a reduced scope of protection ("not necessarily with full stringency") to enable member states to cope with the side-effects of the extensive interpretation of "criminal proceedings". For nemo tenetur, however, the ECtHR has not yet decided this intricate question.

### *3.2. Personal scope*

As regards the personal scope of application, the legal situation is not entirely clear. The case law of the ECtHR and the ECJ is not consistent and serious uncertainties surrounding the level and kind of protection afforded to legal entities persists.

#### 3.2.1. ECHR

The ECtHR protects natural persons but has not yet decided whether legal persons also enjoy full nemo tenetur-protection. However, a conclusive landmark decision of the ECtHR on the validity of nemo tenetur for legal persons is still lacking. The development of the ECtHR's case law has been

[16] *J.B. v. SUI* App. No. 31827/96, 3 May 2001, paras. 44 ff.; *Jussila v. FIN* App. No. 73053/01, 23 November 2006, para. 38; If penalty surcharges do not serve the sole purpose of collecting tax arrears and interest but have an additional and substantial punitive and deterrent character; *Bendenoun v. FRA* App. No. 12547/86, 24 Fabruary 1994.

[17] *Salabiaku v. AUT* App. No. 10519/83, 7 October 1988.

[18] *Société Stenuit v. FRA* App. No. 11598/85, 11 July 1989, para. 62; *Menarini v. ITA* App. No. 43509/08, 27 September 2011, para. 40; *Carrefour France v. FRA* App. No. 37858/14, 1 October 2019.

[19] *Grande Stevens and Others v. ITA* App. No.18640/10 et seq., 4 March 2014, paras. 94 ff.

[20] *Lauko v. SK* App. No. 26138/95, 2 September 1998, paras. 57 ff.; *Guisset v. FRA* App. No. 33933/96, 26 September 2000, para. 59: disciplinary proceedings in the civil service for breach of budgetary and financial regulations; 3.12.2002, *Lilly France SA v. FRA* App. No. 53892/00, 2 December 2002: Competition and Consumer Protection Authority for abuse of a dominant position.

driven by investigative measures against natural persons and is characterised by the conflict between state and citizen. The ECtHR has not yet had to pronounce itself on the applicability to legal persons. Since the aforementioned obligations to provide information and to cooperate primarily affect companies, the practical relevance of nemo tenetur thus critically depends on its applicability to legal persons. Since companies are in the same position of being endangered by fundamental rights, their inclusion in the scope of protection seems obvious; especially since the ECtHR has declared a number of other Article 6 rights to be applicable to companies.[21] This view is shared by the legal literature.[22] The scope of personal protection has been confirmed in relation to the right of access to the court,[23] the independence and impartiality of the court,[24] the right to a public hearing,[25] equality of arms[26] and protection against excessively long proceedings.[27] These are important aspects of the fair trial guarantee, compliance with which appears to be central to the creation of procedural legitimacy. Regarding this procedural legitimation element, an extension appears to be indicated, since the freedom from compulsory participation appears to be even more elementary for the guarantee of an effective defence and its internal and external legitimation effect than in the cases already decided.

If one zooms in on the essence of the presumption of innocence as the second pillar of justification for the privilege against self-incrimination no other picture emerges. According to the presumption of innocence no one

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[21] Fura-Sandström, 2007, p. 162; *Teltronic-CATV v. Poland* App. No. 48140/99, 10 January 2006, paras. 52 et seq.: Granting legal aid; for Art. 47 para. 3 CFR on legal aid also *Trade Agency Ltd v. Seramico Investments Ltd* - Case C-619/10 - 6 September 2012, paras. 37 ff, 59 f.

[22] Esser, 2017, para. 882; Meyer, 2019, p. 182; Dannecker, 2016, p. 1006; Eser and Kubiciel, 2019, para. 13; Jarass, 2021, Art. 48 para. 12.

[23] *Immobiliare Saffi v. ITA* App. No. 22774/93, 28 July 1999, para. 74; *National & Provincial Building Society v. UK* App. No. 21319/93 and Others, 23 October 1997, para. 97 ff.: civil proceedings.

[24] *San Leonard Band Club v. MLTA* App. No. 77562/01, 29 July 2004, para. 47: civil; *Gazeta Ukraina-Tsentr v. UKR* App. No. 16695/04, 15 October 2007, para. 34: civil.

[25] *Coorplan-Jenni GESMBH and Others v. AUT* App. No. 10523/02, 27 July 2006, para. 63: right of residence.

[26] *Dacia S.R.L. v. MDA* App. No. 3052/04, 18 March 2008, paras. 50, 77 ff.: criminal; *Baroul Partner-A v. MDA* App. No. 39815/07, 16 July 2009, para. 41: criminal.

[27] *Comingersoll S.A. v. POR* App. No. 35382/97, 6 April 2000, para. 25; *Marpa Zeeland v. NL* App. No. 46300/99, 9 November 2004, para. 64: in criminal proceedings.

must be treated as guilty before proved guilty according to the law for which the burden is on the prosecuting authorities. Forcing defendants to provide this proof themselves undermines the foundation of this pillar.

### 3.2.2. EU law

The ECJ also fully protects natural persons. The court has not given in to the demands of national authorities to reduce the scope of protection for cases in which the effectiveness of Union law is at stake.[28] The intended preservation of the viability of multi-track or multi-level supervisory and sanctioning procedures thus has limits. Public interest in protecting the integrity of the financial markets cannot justify drastic reductions of individual rights. Antitrust law thus does not provide a template for the enforcement of EU economic law against natural persons in that regard. The decisive argument for the ECJ was above all that antitrust proceedings are directed exclusively against companies and therefore structurally different. Such fundamental differences rule out an analogy.

For legal persons, by contrast, the Court of Justice considers this level of nemo tenetur-protection to be inapplicable in antitrust law. In its ground-breaking and much criticised "Orkem"-decision, the Court of Justice held that companies may not refuse to hand over and provide information on the grounds that they would force them to incriminate themselves.[29] The ECJ has not departed from this line ever since.[30] It merely affords undertakings a hollow out right to refuse to provide information which would require them to admit the existence of an infringement, even though the Commission bears the burden of proof in this respect.[31] Undertakings should not be

[28] *DB v. Consob* - Case C-481/19 - 2 February 2021. As a follow-up question, the ECJ had to decide whether the national laws implementing EU regulations are amenable to an interpretation in conformity with fundamental rights that preserves its validity or becomes inapplicable altogether due to the conflict with CFR requirements, cf. para. 49.

[29] *Orkem* v. *Commission* - Case 374/87 – 18 October 1989; *SGL Carbon and others v. Commission* - Case C-301/04 P -29 June 2006, para. 48.

[30] *Orkem* v. *Commission* - Case 374/87 – 18 October 1989; *Limburgse Vinyl Maatschappij and Others v. Commission* – Joint Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, Cases. C-250/99 P-C-252/99 P, Rs. C-254/99 P - 15 October 2002, para. 273; *SGL Carbon and others v. Commission* - Case C-301/04 P -29 June 2006, paras. 42 ff.; *Dalmine v. Commission* - Case C-407/04 –P – 25 January 2007, para. 34.

[31] *Orkem* v. *Commission* - Case 374/87 – 18 October 1989, para. 35; *Tokai Carbon Co. Ltd and Others v. Commission* - Case T-236/01 and others – 29 April 2004, para. 402.

forced to admit their own responsibility, either explicitly or implicitly.[32] In practice, however, it is quite unclear and difficult to discern what exactly enjoys protection pursuant to the "Orkem"-doctrine.

For other sanctioning mechanisms against corporations or other legal entities, the applicability of nemo tenetur-protection remains unsettled. It is against this background that the landmark decision DB v. Consob offers some highly interesting insights in this respect which invite speculations about the future course of the ECJ. The ECJ's reasoning underlines that in EU law relevant case regarding legal persons law exists only in antitrust law. In the much larger and growing other areas of EU enforcement law and especially in Union criminal law, secondary harmonisation steps have been refrained from. There is no leading decision of the ECJ on the multitude of Union legal acts that require both corporate liability and effective sanctioning in order to enforce EU law effectively.[33]

However, both the Advocate General's Opinion and the reasoning of the ECJ can be interpreted as meaning that an analogous application of antitrust standards is considered plausible, if not conclusive. At least where the effective enforcement of Union law appears to be dependent on the cooperation of undertakings, this greatly reduced defence protection without freedom from self-incrimination is, according to the idea, probably also to be applied in other areas.[34] While the ECJ's explanations of the factual reasons for the difference in the legal treatment of natural as opposed to legal persons remain relatively pale, AG Pikamäe is more explicit. AG Pikamäe concludes from his erroneous premise (see III.) that the right to remain silent is closely linked to the protection of human dignity that the case law on the right to remain silent of natural persons cannot be transposed unmodified to legal persons.[35] In the not too distant future, the

[32] Kindhäuser and Meyer, 2020, para. 228; *DB v. Consob* - Case C-481/19 - 2 February 2021, para. 47.

[33] Union criminal law is at best indifferent when it comes to legal persons. Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and presence at trial explicitly excludes legal persons from its scope of application. Recital 13 indicates that legal entities the latter were not considered to be equally in need of protection, since "the rights deriving from the presumption of innocence do not apply in the same way to legal persons as to natural persons". The aspect of comparable vulnerability was thus dealt with in a very sweeping manner. Already back then, there were first indications that the ECJ's antitrust standards could become the dominant EU-wide standard for legal persons.

[34] *DB v. Consob* - Case C-481/19 - 27 October 2020, AG Pikamäe Opinion, para. 99.

[35] Ibid.

"Orkem" line might find itself upgraded from a special antitrust doctrine to a Union-wide yardstick for association proceedings, if one assumes that necessity and legal impact of duties to cooperate are more or less the same in all of these areas. This would have far-reaching consequences, as their contents deviate considerably from the ECHR standards.

#### 3.2.3. Evaluation

The downscaling of fundamental safeguards for legal persons across the board would be hard to defend under fair trial-considerations. It appears justifiable only if one were to implicitly acknowledge that the protection of the natural will of an accused is at the heart of the guarantee and hence essential to its interpretation. As the use of coercion against legal persons would not entail a comparable humiliating or degrading personal depth it could not affect human dignity and trigger procedural rights specifically associated with safeguarding the core of human personality. Based on this premise and to this extent alone, a comparable vulnerability of natural and legal persons could be denied. Even if one followed this view, however, it would still not be established that non-personal fair trial considerations are not already sufficient to demand full protection against compulsory cooperation (as a precondition of procedural legitimacy). In any case, it is highly questionable whether such a dignity-inspired reading of nemo tenetur can be reconciled with the line of the ECtHR. If, by contrast, it is sufficient for a fair trial violation to threaten a defendant with sanctions if he refuses to testify or cooperate,[36] companies could be affected in the same way as individuals. Furthermore, should the coercion directed against an individual actually reach the degree of a violation of dignity, Article 3 ECHR should be invoked in addition to Article 6 ECHR. This would clarify the scope of dignity-related protection and forestall argumentations a contrario seeking to reason lower standards for legal persons.

## 4. Material scope

### *4.1. ECHR*

According to ECtHR case law, accused persons enjoy a comprehensive right to remain silent and freedom from compulsory cooperation vis-à-vis prosecuting authorities. They may be forced to cooperate by force, threat,

[36] *Ibrahim and Others v. UK* App. No. 50541/08 and Others, 13 September 2016, para. 267.

legal sanctions, or deception if amounting to coercion. There is also no obligation to actively disclose evidence or hand over documents.

The protective effect of nemo tenetur, in general, applies to statements and the surrender of evidence. It sets in at an early stage, that is, the moment when persons concerned are instructed, interrogated, or implicitly treated as suspects in a material sense. From this point on, nemo tenetur excludes obligations to provide information and to produce evidence, which can lead to self-incrimination in criminal proceedings. Citizens may not be forced to provide information or produce documents if this would lead to an infringement of the right to remain silent.[37] In particular, the threat of sanctioning a refusal to provide information violates the right not to incriminate oneself.[38]

The right to refuse sharing information goes far beyond admissions of wrongdoing or directly incriminating statements. It includes any information on issues of fact or even allegedly exculpatory statements that may potentially have an impact on a later conviction of that person (in particular by substantiating the allegations) or the choice and assessment of the sanction imposed on him or her in criminal or quasi-criminal proceedings.[39]

Nemo tenetur, on the other hand, does not give the accused the right to unilaterally stay away from interrogations or otherwise obstruct the investigation through delaying tactics.[40] Nemo tenetur also does not protect against the taking of investigative measures as such.

This also applies to the surrender of documents. Official requests to actively hand over or produce documents would be permissible but not enforceable by coercion or sanctions. However, obligations to tolerate coercive measures to seize documents and data sources (servers, hard drives, etc.) that already exist (regardless of the will of the data subjects) are deemed compatible with nemo tenetur since the persons concerned are not compelled to actively hand over information for proceedings or even to create it in the first place. This is not seen as a violation of the freedom of

[37] *Funke v. FRA* App. No. 10828/84, 25 February 1993, paras. 42 ff.; *J.B. v. SUI* App. No. 31827/96, 3 May 2001, paras. 64 ff.; *Marttinen v. FIN* App. No. 19235/03, 21 April 2009, paras. 67 ff.

[38] *J.B. v. SUI* App. No. 31827/96, 3 May 2001, paras. 63 ff; *Funke v. FRA* App. No. 10828/84, 25 February 1993,

[39] *Saunders v. UK* App. No. 19187/91, 17 December 1996, para. 71; *Corbet and Others v. FRA* App. No. 7494/11, 19 March 2015, para. 34; also *DB v. Consob* - Case C-481/19 – 2 February 2021, para. 40.

[40] *DB v. Consob* - Case C-481/19 - 27 October 2020, AG Pikamäe Opinion, para. 87.

self-incrimination as the suspect is not forced to contribute actively to the prosecution.[41] This differentiation, which has developed with a view to biological or physiological evidence such as DNA, blood, urine, loses its persuasiveness, once one considers that the existence of (extracorporeal) business information and documents is not based on natural processes, but rather the result of extensive regulatory documentation obligations which are, among other things, meant to ensure the verifiability of lawful and professional conduct.[42] In these cases of access to existing documents nemo tenetur, hence, offers little protection. Limits or bans on seizing and using them may still arise from other fundamental rights. The protection of communication with defence counsel, business secrets, but also privacy may block state access to these sources.

Finally, nemo tenetur also affects duties to cooperate in non-criminal proceedings. If a risk materializes, that information or documents to be produced over the course of these proceedings may end up as evidence in a criminal case because criminal proceedings are running in parallel or are foreseeable, the ECtHR is of the view that nemo tenetur has ramifications for non-criminal cases too. Potential suspects are exempt from duties to cooperate in non-criminal proceedings to protect the privilege against self-incrimination from being undermined.[43]

### *4.2. Union law*

For natural persons there are not many discrepancies. The legal situation could be best described as one of far-reaching parallelism engineered through Article 52 paragraph 3 CFR. Recently, the ECJ has expressly clarified that natural persons are guaranteed the same level of protection against coercion to cooperate under the CFR as under the ECHR. With respect to legal persons, the scope of protection is uncertain. It is currently primarily modelled on antitrust law for lack of alternatives and precedent. In antitrust law, a general duty to cooperate applies which turns nemo tenetur on its head. Yet, the principle of personal responsibility applies in antitrust law as well, which requires that defendant legal entities must be granted a right to effective defence. This is a "fundamental principle of the

[41] Meyer, 2019, p. 193.
[42] Meyer, 2020, pp. 333-353.
[43] *Chambaz v. SUI* App. No. 11663/04, 5 April 2012, para. 43.

Community order".[44] That principle of respect for the rights of the defence, which the ECJ derives from personal responsibility, does not, however, imply any restrictions on the general duty to testify or produce documents relating to the subject-matter of the investigation, even if those documents may be used by the Commission as evidence of the existence of a horizontal cartel.[45] Of course, these duties are not limitless. The ECJ has identified several exceptions. First, duties to cooperate cannot go beyond what is actually and legally possible *(ad impossibilia nemo tenetur),* irrespective of the content of the information.[46] Thus, there is no obligation to obtain documents not in one's own possession, e.g., from other undertakings and persons involved in the infringement.

Secondly, the ECJ has invented a "right to refuse to confess"/"privilege against compelled confessions"[47] as an outflow of the specific right to an effective defence in competition cases. This protection against compulsory cooperation shields companies against being forced to admit their personal responsibility through the requested cooperation or sharing of information. This is not more than a minimum quantum of fair trial. Ultimately, the ECJ only allows as much effective defence as it believes to be absolutely necessary for the legitimisation of its procedural practice in antitrust cases.

This possibility of refusing to confess is not a stringently derived right of defence. The doctrinal ambiguities become abundantly clear above all at the level of practical application. The demarcation between implicit compulsion to concede responsibility and compulsion to cooperate, which is permissible under the ECJ, can be difficult in practice. Neither the ECJ nor the General Court have succeeded in substantiating the "Orkem" doctrine sufficiently. Thus, it remains unclear which types of conduct are covered by the exception and whose perspective determines the assessment in individual cases. It must be clarified in each case in which editions, documents, or other information to be provided an admission of guilt could

[44] *Orkem* v. *Commission* - Case 374/87 – 18 October 1989*;* earlier indicated in *Michelin* - Case 322/81 – 9 November 1983.

[45] *SGL Carbon and others v. Commission* - Case C-301/04 P -29 June 2006, para. 44.

[46] *Buzzi Unicem SpA v. Commission* - Case C-267/14 P – 15 October 2015, AG Wahl opinion, para. 70.

[47] Hennig, 2019, para. 27; Schwarze, 2009, pp. 171-191; *Orkem* v. *Commission* - Case 374/87 – 18 October 1989.

be said to be implicit. The ECJ merely states that the answer must at least be equivalent to an admission of an infringement.[48]

## 5. Outlook

In terms of the scope of protection and despite far-reaching convergence, considerable differences between the ECtHR and the ECJ could still arise. The ECtHR has so far granted full protection against any compulsion to cooperate. The ECJ differentiates between natural or legal persons. Only natural persons are fully protected as under the CFR. For legal persons, antitrust law allows requiring them to provide information and to surrender information. Sanctions may be imposed in case of refusal. Only coercion to (implicitly) admit one's own responsibility was held impermissible. In practice, the line between permissible and impermissible coercion proves to be very difficult to draw. For other sanctioning proceedings against companies in other areas of EU law, the risk of an analogous adoption of antitrust standards is looming on the horizon, because various national and EU institutions see substantial differences between proceedings against natural persons and proceedings against legal persons which would supposedly militate in favour of less stringent standards for legal persons. Whether the ECJ and the EU's legislative bodies will continue along this path or whether antitrust law will remain a singular sui generis phenomenon remains to be seen and tracked closely. And even though no comparable expansion tendencies are discernible for the ECHR at the time of writing, a downward harmonisation of the level of protection in EU law for all sanctioning proceedings against legal entities might put the ECtHR under pressure not to question its conformity with fundamental rights.

[48] *Limburgse Vinyl Maatschappij and Others v. Commission* – Joint Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, Cases. C-250/99 P-C-252/99 P, Rs. C-254/99 P - 15 October 2002, para. 273.

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