«NEMO» TENETUR SE IPSUM ACCUSARE?

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1. Introduction

The existence of a privilege against self-incrimination is a common European idea.[1] At the same time, there is widespread disagreement among European legal orders regarding the appropriate level of protection granted by the very right. In a first step, this article explores how an interpretation of Art. 6 of the European Convention on Human Rights (ECHR)[2] uncovers a privilege against self-incrimination in general and, thereby answering the article's heading, for companies in particular. It then critically examines the relevant jurisprudence by the European Court of Human Rights (ECtHR) and the Courts of the European Union. Finally, the article ventures into an extrapolation of general inferences for the application of the privilege against self-incrimination under Art. 6 ECHR.

2. The privilege against self-incrimination in Art. 6 ECHR

2.1. The incorporation of the privilege in Art. 6 ECHR

2.1.1 The evolution

The privilege against self-incrimination is not specifically mentioned in the ECHR. However, today, the existence of such a privilege under Art. 6 ECHR may be considered to be settled case law of the ECtHR.

The privilege first appeared in a case before the European Commission of Human Rights (EComHR). Before an Austrian court, the applicant refused to give evidence as a witness in a criminal proceeding directed against the seller of drugs. The court imposed a fine and detention on the applicant even though a criminal proceeding was pending against him for buying the drugs. The EComHR found that to constitute an interference with the negative aspect of the applicant's right to freedom of expression (Art. 10 ECHR) as read "in the light of the guarantees laid down in Art. 6 ECHR".[3] It noted that "the principle of protection against self-incrimination is […] one of the most fundamental aspects of the right to a fair trial".[4]

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[1] Gollwitzer, *Menschenrechte im Strafverfahren* (Berlin, 2005), Art. 6 ECHR para. 248. Cf. also ECJ, Joined Opinion of AG Darmon, Cases C-374/87 et al., *Orkem*, [1989] ECR 3283, para. 98.

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4 November 1950 and entered into force on 3 September 1953.

[3] EComHR, Case 16002/90, *K.*, paras. 42, 46 and 53.

[4] Ibid., para. 49.

An implied privilege against self-incrimination under Art. 6 ECHR was first recognized by the ECtHR in its *Funke* judgment.[5] The judgment, however, didn't contain any reasoning on the justification for recognizing a privilege against self-incrimination. Such reasoning was first provided by the Court in its *John Murray* judgment:

> "[…] the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Art. 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Art. 6"[6]

The Court confirmed and elaborated its jurisprudence in *Saunders*. It considered the privilege against self-incrimination to be "a constituent element" of "the basic principles of a fair procedure inherent in Art. 6(1) ECHR"[7]. Furthermore, it stated that "the right is closely linked to the presumption of innocence contained in Art. 6(2) ECHR"[8].

2.1.2 The method of interpretation used by the ECtHR

The ECtHR supports it finding that Art. 6 ECHR contains a privilege against self-incrimination by a variety of interpretational methods.

First, it uses a comparative approach by citing "generally recognised international standards". While the Court misses to explain the source of these standards, it is easy to imagine that the Court is particularly referring to Art. 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR).[9] According to this provision, everyone charged in a criminal procedure is entitled "not to be compelled to testify against himself or to confess guilt". Another international legal instrument with such a guarantee is Art. 55(1)(a) Rome Statute of the International Criminal Court, but has been adopted after the ECtHR's *John Murray* and *Saunders* judgments.[10]

Above all, the Court combines elements of contextualist and teleological interpretation. The importance given to the context of Art. 6(1) ECHR is demonstrated by the mentioning of the close link to Art. 6(2) ECHR. Furthermore, one might consider the reference to the "heart of the notion of a fair procedure" as contextual; however, it is ultimately teleological: If one accepts that the privilege against self-incrimination lies at the heart of a fair procedure, it does

[5] ECtHR, Case 10828/84, *Funke*, para. 44.
[6] ECtHR, Case 18731/91, *John Murray*, para. 45; confirmed in Case 19187/91, *Saunders*, para. 68.
[7] ECtHR, Case 19187/91, *Saunders*, paras. 68 et seq., 71 and 74.
[8] ECtHR, Case 19187/91, *Saunders*, para. 68; confirmed in Case 34720/97, *Heaney and McGuiness*, para. 59.
[9] International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 19 December 1966 and entered into force on 23 March 1976.
[10] The Rome Statute of the International Criminal Court has been signed on 17 July 1998 and entered into force on 1 July 2002. Art. 55(1)(a) reads: "In respect of an investigation under this Statute, a person [s]hall not be compelled to incriminate himself or herself or to confess guilt".

so because the concept of fair trial in criminal procedures aims at safeguarding the rights of the accused and the privilege against self-incrimination is central to implement the purposed protection. The teleological approach is even clearer contained in the expression “to securing the aims”.

There is room for criticism as to the Court’s reasoning: Even if one attaches great importance to a privilege against self-incrimination, its categorizations as being “a constituent element” of “the basic principles” and lying “at the heart of the notion of fair trial” exaggerate and seem to avoid a more thorough discussion by using strong words.[11] Basically, the Court anticipates its, correct, result that the privilege against self-incrimination is implicitly contained in Art. 6 ECHR and paraphrases the term “implicit” by metaphors. The reference to the avoidance of miscarriages of justice is correct but excessive, too. Is this purpose really one of the predominant in Art. 6 ECHR? In this context, it refers to the danger of confessions by innocent suspects which is a rather antiquated rationale for a privilege against self-incrimination, rooted in the abolition of middle-age practices to determine the question of guilt.

2.1.3 The incorporation in Art. 6(1) ECHR

The fact that the EComHR originally incorporated the privilege against self-incrimination in Art. 10 ECHR may be explained by the special circumstances of the case, rooted in the position of the applicant as a witness.[12] The Commission examined if the fine imposed on the applicant was penal in character, answered in the negative and thus hold that Art. 6(1) ECHR did not apply.[13] In doing so, the Commission did not sufficiently consider the fact that the applicant faced a criminal charge in a parallel proceeding. As a result, the Commission wrongly denied the applicability of Art. 6(1) ECHR. The Commission’s assessment has been implicitly overruled in the ECtHR’s *Serves* judgment[14] dealing with a similar case involving parallel proceedings.

The ECtHR deduces the privilege against self-incrimination from Art. 6(1) ECHR. This is consistent with the Court’s view that Art. 6(2) and Art. 6(3) ECHR (merely) “represent specific applications of the general principle” of a fair trial in criminal proceedings stated in

[11] Cf. the criticism by ECtHR, Dissenting Opinion of Judge Martens, Case 19187/91, *Saunders*, para. 7.
[12] See *supra* p. 1 and EComHR, Case 16002/90, *K.*, paras. 19 et seqq.
[13] EComHR, Case 16002/90, *K.*, paras. 38 et seqq.
[14] ECtHR, Case 20225/92, *Serves*, para. 55.

Art. 6(1) ECHR.[15] Therefore, any right under Art. 6 ECHR ultimately derives from Art. 6(1) ECHR.

Against this background, an artificial extensive reading of Art. 6(2) ECHR to include the privilege against self-incrimination therein is superfluous. While the privilege is not congruent to the presumption of innocence, the ECtHR is correct in noting the close link between the privilege against self-incrimination and the presumption of innocence under Art. 6(2) ECHR.[16] It is shown in cases in which a trial court is drawing inferences from the refusal of an accused person to provide an explanation for his behaviour without having established sufficient proof independent of the will of the accused. Such a situation occurs if the court relies on an unjustified rebuttable presumption of law or fact.[17] Then the burden of proof is shifted from the prosecution to the accused. Thus, the presumption of innocence is infringed. Coincidentally, the accused *de facto* has little choice but to explain himself, thereby trying to rebut the presumption used by the trial court. His option to remain silent is still existent, but the corresponding defence strategy has been deprived of any reasonable chance of success. Consequently, the right of the accused to remain silent is completely undermined, hence infringed.

In other cases, the privilege against self-incrimination may also coincide with the rights of the defence under Art. 6(3) ECHR.[18]

2.2 The rationale of a privilege against self-incrimination

The existence of a privilege against self-incrimination is not self-evident. It is *Justitia*'s unbeloved but unrenounceable child.

Unbeloved, as its negligence would sharpen its mother's sword. The rich international case law on (infringements of) the privilege against self-incrimination can only be explained by a widespread impression among legislators, prosecutors and courts that providing for a privilege against self-incrimination would pose a hindrance to the "effectiveness" of criminal prosecution.

Unrenounceable, well, if the main purpose of legal essays was the embellishing of allegories, one would refer to the scales in *Justitia*'s other hand. Indeed, one of two lines of argument in justification of the privilege against self-incrimination roots in the rule of law (i. e. one of the meanings given to *Justitia*'s scales). This approach considers the privilege against self-

[15] ECtHR, Case 6903/75, *Deweer*, para. 56.
[16] See the references cited *supra* note 8.
[17] Cf. in particular ECtHR, Case 18731/91, *John Murray*, para. 54 (no violation of Art. 6 ECHR because of sufficient proof); Case 34720/97, *Heaney and McGuiness*, para. 59.
[18] Cf. e. g. ECtHR, Grand Chamber, Case 22978/05, *Gäfgen*, para. 169.

incrimination to express a state's basic attitude in favour of the rule of law („Ausdruck einer rechtsstaatlichen Grundhaltung").[19] The rule of law, in turn, while not mentioned explicitly in the ECHR, has been accepted by the ECtHR as a general principle immanent to the ECHR.[20] The perspective of this concept is not the individual, but the general interest: The democratic state self-restraints the exercise of its monopoly of power. The state resists to the temptation of using its power to force individuals to testify against them. In this regard, the privilege against self-incrimination may be considered an element of equality of arms[21].

The second line of argument is centred on the autonomy and dignity of the individual confronted with coercion. The autonomy and dignity are disregarded as the individual is instrumentalised against itself. The starting point of this approach is the observation of a trilemma: "Legal obligations to give information can put the obliged person in a conflict situation by having to choose to either accuse oneself of a criminal offense or to commit a new criminal offense by giving false testimony or to be exposed to measures of coercion because of one's silence."[22]

The first and the second line of argument are interwoven: The democratic state refrains from an unlimited exercise of power because it respects the dignity of the individual. Consequently, the lines of argument do not contradict but complement one another. Aside from these both, there is no lack of approaches to explain the privilege against self-incrimination.[23] Yet most of them have to resort indirectly to one of the above mentioned lines of argument. For example, the concept of presumption of innocence cannot be invoked in favour of a privilege against self-incrimination without, in turn, having identified the purposes underlying the presumption of innocence.

3. The application of the ECHR to legal persons

3.1 The application of the ECHR to legal persons in general

The ECHR – a European Convention on Corporate Rights? The title and the genesis of the ECHR leave little doubt that it has been primarily designed as a legal instrument to protect the

[19] German Federal Supreme Court, e. g. Case 2 BvR 326/92, (1996) NStZ 555.
[20] ECtHR, Case 4451/70, *Golder*, para. 34.
[21] The concept of equality of arms has been recognized by the ECtHR, see e. g. the references cited *infra* note 36.
[22] German Federal Supreme Court, Case 1 BvR 116/77, (1981) NJW 1431. Cf. also MacCulloch, "The privilege against self-incrimination in competition investigations: theoretical foundations and practical implications", 26 Legal Stud. (2006), 211, at 217; Redmayne, "Rethinking the privilege against self-incrimination", 27 Oxford J. Legal Stud. (2007), 209, at 221 et seqq.
[23] Cf. e. g. Dennis, "Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against self-incrimination", 54 CLJ (1995), 342 at 348 et seqq.

human rights of natural persons. Thus, the ECHR itself does not explicitly stipulate its application to legal persons[24].

However, the fact that at least some kind of protection is granted to individuals who are not natural persons in *stricto sensu* is suggested by the wording of Art. 34 ECHR ("The Court may receive applications from any person, non-governmental organization or group of individuals…"). Furthermore, the terms of the ECHR have to be interpreted in their context. According to Art. 31(2)(b) Vienna Convention on the Law of Treaties (VCLT)[25] the context of the ECHR as an international treaty is comprised *inter alia* by a legal instrument such as Prot. 1 to the ECHR which was made by most of the Contracting Parties in connection with the conclusion of the ECHR and accepted by the other parties as an instrument related to the ECHR.[26] Art. 1(1) Prot. 1 to the ECHR explicitly entitles "every legal person" "to the peaceful enjoyment of his possessions". On the other hand, the thought of legal persons having a right to found a family under Art. 12 ECHR is plainly ridiculous.

How may these aspects be reconciled? The general accepted criterion is that rights apply to legal persons to the extent that the nature of the rights permits.[27] Consequently, when assessing its application to legal persons, every provision of the ECHR has to be examined individually. Rights that don't apply to legal persons by their very nature are e. g. Art. 2, 3, 5 and 12 ECHR and Art. 1 Prot. 6 to the ECHR. Conversely, Art. 8, 10 and 13 ECHR apply to legal persons;[28] Art. 9 and Art. 11 ECHR at least to some. [29]

The ECtHR normally doesn't provide any particular reasoning on the applicability of a provision to legal persons. However, the Court deemed it necessary to address if companies may be awarded non pecuniary damages under Art. 41 ECHR; they may as the "Convention must be interpreted and applied in such a way as to guarantee rights that are practical and

[24] The notion "legal person" may be used in national laws for a large variety of collectives, sometimes even including churches or public authorities. Unless otherwise stated, this article, however, uses the term for non-governmental, incorporated organizations of private law with the intention of making profit. However, some of the problems described hereafter may also arise to professionals operating unincorporated businesses.

[25] Vienna Convention on the Law of Treaties adopted on 22 May 1969 and entered into force on 27 January 1980.

[26] Switzerland and Monaco have signed, but have not ratified Prot. 1 to the ECHR, hence Art. 31(2)(b) VCLT applies and Art. 31(2)(a) VCLT doesn't.

[27] Cf. e. g. Grabenwarter, *Europäische Menschenrechtskonvention*, 4th ed. (München, 2009), pp. 51 and 103.

[28] As to Art. 8 cf. ECtHR, Case 37971/97, *Colas Est*, paras. 40 et seqq.; as to Art. 10 cf. e. g. Case 6538/74, *The Sunday Times*, paras. 45 and 68; Case 10890/84, *Groppera Radio*, paras. 48 et seqq. and 55; as to Art. 13 cf. e. g. Case 28537/02, *Iza*, paras. 48 et seq.; Case 2507/03, *Amat-G*, paras. 53 et seq.

[29] Art. 9 to churches on behalf of their adherents cf. e. g. ECtHR, Case 27417/95, *Cha'are Shalom Ve Tsedek*, paras. 72 and 74; Case 45701/99, *Metropolitan Church of Bessarabia*, paras. 101 et seqq. and 130; Art. 11 to parties, labour unions, churches and advocacy groups, cf. e. g. Case 23885/94, *Freedom and Democracy Party (ÖZDEP)*, paras. 27 and 48, Case 4464/70, *National Union of Belgian Police*, para. 38, Case 18147/02, *Church of Scientology Moscow*, paras. 76 et seqq. and 98, EComHR, Case 8440/78, *Christians against Racism and Fascism*, p. 148.

effective".[30] Another case of the ECtHR including particular reasoning on the application to legal persons is *Colas Est*[31]. The applicant company contested the lawfulness under Art. 8 ECHR of searches and seizures carried out in its business premises. The Court explicitly observed that its past case law had dealt with natural persons only and held a violation of Art. 8 ECHR only after having interpreted the term "home" extensively.[32]

3.2 The application of Art. 6 ECHR to legal persons

The ECtHR has hold violations of legal persons' rights under Art. 6(1) ECHR in cases concerning

- the right to a court,[33]
- the right to an independent and impartial tribunal,[34]
- the right to a public oral hearing,[35]
- the principle of equality of arms,[36]
- the principle of legal certainty[37] and
- the length of proceedings.[38]

In sum, one can hardly imagine an aspect of the protection granted by Art. 6(1) ECHR which might not apply to legal persons. Regarding the presumption of innocence enshrined in Art. 6(2) ECHR, the Court has already implicitly acknowledged its application to legal persons.[39]

3.3 The case of the privilege against self-incrimination

3.3.1 The need for interpretation in general

The ECtHR has never ruled on the application of the privilege against self-incrimination to a legal person. However, taking the above mentioned case law into account, the assumption that the ECtHR would hold its application when confronted with a pertinent case seems to be

[30] ECtHR, Case 35382/97, *Comingersoll*, paras. 31 et seqq.
[31] ECtHR, Case 37971/97, *Colas Est*.
[32] Ibid., paras. 40 et seqq.
[33] E. g. ECtHR, Case 22774/93, *Immobiliare Saffi*, para. 74; Joined Cases 21319/93 et al., *National & Provincial Building Society*, paras. 97 et seqq.
[34] E. g. ECtHR, Case 77562/01, *San Leonard Band Club*, paras. 48 and 65 et seq.; Case 16695/04, *Gazeta Ukraina-Tsentr*, paras. 34 et seq.
[35] ECtHR, Case 10523/02, *Coorplan-Jenni*, paras. 63 et seqq.
[36] E. g. ECtHR, Case 3052/04, *Dacia*, paras. 50 and 77 et seq.; Case 36942/05, *European University Press*, paras. 26 et seqq.
[37] E. g. ECtHR, Case 3052/04, *Dacia*, paras. 50 and 77 et seq.; Case 39815/07, *Baroul Partner-A*, paras. 41 and 51.
[38] E. g. ECtHR, Case 35382/97, *Comingersoll*, para. 25; Case 46300/99, *Marpa Zeeland*, para. 64.
[39] ECtHR, Case 36985/97, *Västberga Taxi Aktiebolag*, para. 122 („the applicants' right to be presumed innocent has not been violated").

inevitable. Nevertheless, the question if the privilege against self-incrimination may be applied to a legal person in the context of Art. 6 ECHR merits a more thorough discussion. Firstly, the statement that a right is or will be applied to legal persons does not permit the inference that it *ought* to be applied.[40] Secondly, some of the explanatory models for the acknowledgment of a privilege against self-incrimination recourse to the concepts of human autonomy and human dignity which, in turn, suggest that the nature of the privilege[41] does not permit its application to legal persons.

3.3.2 The need for an extensive interpretation

Already the preamble to the ECHR demands[42] the "further realisation of human rights". Art. 6 ECHR is closely linked to Art. 13 ECHR. The very purpose of Art. 6 ECHR is to establish a procedural safeguard for the rights provided elsewhere in the ECHR: There is no justice without a judge. Furthermore, one has to take into account "the increased sensitivity of the public to the fair administration of justice"[43]. Therefore, Art. 6 ECHR basically requires an extensive interpretation. In the words of the ECtHR:

> „In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Art. 6(1) ECHR would not correspond to the aim and the purpose of that provision."[44]

Moreover, the ECtHR has already ruled on the interpretation of Art. 6 ECHR that:

> "the Convention is a living instrument which [...] must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals."[45]

Given the dominant role which legal persons play in today's economy, political life and society in general, this favours an extension of rights to them.

3.3.3 The interpretation

The starting point for interpreting Art. 6 ECHR is its wording. Art. 6 ECHR grants rights to "everyone". The natural meaning of this term doesn't preclude legal persons. Thus, a textual interpretation at least doesn't exclude a privilege against self-incrimination for companies.

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[40] Such an inference would either constitute a completely uncritical approach to the jurisprudence of the ECtHR or disregard Hume's Law.
[41] This criterion has been established at p. 6.
[42] Cf. Art. 31(2) VCLT and ECtHR, Case 4451/70, *Golder*, para. 34.
[43] ECtHR, Case 12005/86, *Borgers*, para. 24.
[44] ECtHR, Case 2689/65, *Delcourt*, para. 25. Cf. also Case 9186/80, *De Cubber*, para. 30, and Art. 31(1) VCLT. Such a reading is criticized in another context by ECtHR, Separate Opinion of Judge Sir Fitzmaurice, Case 4451/70, *Golder*, para. 32.
[45] ECtHR, Case 6289/73, *Airey*, para. 26; Case 5856/72, *Tyrer*, para. 31; Case 14038/88, *Soering*, para. 102.

A comparative approach as used by the Court when acknowledging the privilege against self-incrimination yields no definite result, too. *Inter alia* the wording[46] of the preamble to the ICCPR suggests that the protection of Art. 14(3)(g) ICCPR does not relate to legal persons.[47] Furthermore, no clear result may be obtained when analyzing the laws of a significant number of the Contracting Parties.[48]

But does the meaning and the purpose of Art. 6 ECHR demand the recognition of a privilege against self-incrimination for companies?[49] That depends on whether the rationale behind the privilege against self-incrimination[50] may be applied to companies, too.

The first line of argument based on the rule of law is valid irrespective of a person's status. It enshrines safeguards which have an objective nature. The rule of law, in turn, is closely linked to the concept of fair trial. If we accept that the privilege against self-incrimination is implicit to the notion of fair trial or even lies at its heart, this is where we return to it and hence have to acknowledge its applicability to companies.

However, the linkage to the second line of argument based on human dignity raises difficulties. This has led the German Federal Supreme Court to deny constitutional rights of legal persons against self-incrimination.[51] These difficulties may be bypassed by the following reasoning: Corporate wrongdoing ultimately follows from wrongdoings of human representatives. If a legal person wasn't protected by a privilege against self-incrimination, its representatives would frequently have to indirectly contribute to their own incrimination.[52] Consequently, even an isolated assessment on the ground of this line of argument demands at least some protection to legal persons against self-incrimination. In the sum of both lines of arguments, companies may invoke a privilege against self-incrimination. However, the greater importance of the purposes served by the privilege against self-incrimination in the context of natural persons has to be taken into account when determining the respective scope of protection by a privilege against self-incrimination.

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[46] "[R]ights of all members of the human family", "inherent dignity of the human person", "free human beings".
[47] Cf. ECJ, Joined Opinion of AG Darmon, Cases C-374/87 et al., *Orkem*, [1989] ECR 3283, para. 127; Weiß, "Haben juristische Personen ein Aussageverweigerungsrecht", (1998) JZ 289, at 291 et seq.
[48] Cf. ECJ, Joined Opinion of AG Darmon, Cases C-374/87 et al., *Orkem*, [1989] ECR 3283, paras. 99 et seqq.
[49] Cf. ECtHR, Case 2122/64, *Wemhoff*, para. 8: "it is [...] necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty".
[50] See *supra* pages 4 et seq.
[51] German Federal Supreme Court, Case 1 BvR 2172/96, (1997) NJW 1841, at 1843.
[52] Cf. Weiß, op. cit. *supra* note 47, at 296.

4. The scope of the privilege against self-incrimination in commercial contexts

4.1 ECtHR case law

4.1.1 The notion „criminal charge“

4.1.1.1 Generalities

Art. 6(1) ECHR is not applicable in every proceeding. It presupposes “the determination of […] civil rights and obligations or of any criminal charge”. As the privilege against self-incrimination is only available in criminal, not in civil proceedings[53], only the latter is of interest with regard to a privilege against self-incrimination. In contrast to natural persons whose contraventions are mostly determined in “classic” criminal procedures, legal persons are mostly exempted from such procedures, but face administrative, fiscal or similar penalties. That raises the question on how to interpret the term “criminal charge”.

The fundamental decision taken by the ECtHR in this respect is that “[t]hese expressions are to be interpreted as having an “autonomous” meaning in the context of the Convention and not on the basis of their meaning in domestic law.”[54] This interpretation prevents “differences in the scope of application of Art. 6 ECHR in the different national legal orders”[55]. In particular, it evades the possibility that Contracting Parties bypass their obligations by reclassifications under national law (e. g. for traffic offenses[56]).

4.1.1.2 The notion „criminal“

In its leading case *Engel*, the ECtHR has established three criterions to determine the “criminal” nature of a charge. While the *Engel* judgment dealt with the distinction between “criminal” and “disciplinary” charges only, the ECtHR later applied the criteria generally, e. g. to administrative contexts.[57] The *Engel* criteria are: The domestic classification of the offence, the nature of the offence and the degree of severity of the penalty.[58]

The first criterion *prima facie* seems to relativize the protection mechanism of an autonomous interpretation described above[59]. Precisely the opposite is the case. The first criterion is a one-way-street: If the offence is “criminal” under domestic law, the other criteria are left aside; if the offence is not “criminal” under domestic law, the other criteria nevertheless may induce

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[53] ECtHR, Case 39031/97, *D. C., H. S. and A. D.*, para. 1. However, “the two aspects, civil and criminal, of Art. 6(1) ECHR are [not] necessarily mutually exclusive”, Joined Cases 7299/75 et al., *Albert and Le Compte*, para. 30.

[54] ECtHR, Case 8269/78, *Adolf*, para. 30. Cf. already Case 6903/75, *Deweer*, para. 42.

[55] Van Dijk/Viering, “Right to a fair and public hearing” in van Dijk, van Hoof, van Rijin and Zwaak (Eds.), *Theory and Practice of the European Convention on Human Rights*, 4th ed. (Antwerpen, 2006), p. 539.

[56] ECtHR, Case 8544/79, *Özturk*, para. 49.

[57] Ibid., para. 48.

[58] ECtHR, Case 5100/71, *Engel*, para. 82.

[59] See *supra* p. 10.

the definition as "criminal" within the meaning of the ECHR. This approach obliges the Contracting Parties to follow their self-imposed rules and hence raises the standard of human rights protection. In contrast, the second criterion is of little use: it is indeterminate and inconsistently used by the ECtHR.[60] According to the third criterion, a penalty is sufficiently severe to establish the "criminal" nature of a charge, if the following sub-criteria are met: It is not intended as "pecuniary compensation", but is "essentially punitive and deterrent in nature".[61] Its amount is not inconsiderable.[62] Both sub-criteria depend on the potential penalty, regardless of the penalty finally imposed.[63]

What is the correlation between these criteria? As a result of the concept of an autonomous interpretation, the first criterion "has only a formal and relative value" (if the charge is not considered as "criminal" in domestic law), the second and third being "of greater importance".[64] It suffices that one of them indicates the "criminal" nature of the offence.[65] However, "this does not exclude that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge."[66]

On the basis of these criteria, the ECtHR has *inter alia* categorized fines in the following procedures[67] relevant to commercial contexts as "criminal" charges within the meaning of Art. 6(1) ECHR:

- banking supervision (fine for insufficient liquidity[68]),
- competition authority (fine for abuse of a dominant position[69] or concerted practices[70])[71],
- custom authority,[72]

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[60] Cf. Van Dijk/Viering, "Right to a fair and public hearing" in van Dijk, van Hoof, van Rijin and Zwaak, op. cit. *supra* note 55, p. 544.
[61] ECtHR, Case 12547/86, *Bendenoun*, para. 47; Case 19958/92, *A.P., M.P. et T.P.*, para. 41.
[62] ECtHR, Case 19958/92, *A.P., M.P. and T.P.*, para. 40; Case 31827/96, *J.B.*, para. 48.
[63] ECtHR, Case 5242/04, *Dubus*, para. 37.
[64] ECtHR, Joined Cases 39665/98 et al., *Ezeh and Connors*, para. 91; similar Case 27341/02, *Veyisoğlu*, para. 18.
[65] ECtHR, Joined Cases 39665/98 et al., *Ezeh and Connors*, para. 86.
[66] ECtHR, Joined Cases 39665/98 et al., *Ezeh and Connors*, para. 86. Cf. also Case 12547/86, *Bendenoun*, para. 47.
[67] Each charge has to be considered separately (see e. g. the different rulings in competition cases cited *infra* in notes 69 et seqq.); therefore the possibility of generalization is very limited.
[68] ECtHR, Case 5242/04, *Dubus*, paras. 37 et seq.
[69] Implicit in ECtHR, Case 53892/00, *Lilly France*.
[70] EComHR, Case 13258/87, *Melchers*, p. 152.
[71] However, the "criminal" nature of breaches of competition law has been denied in ECtHR, Joined Cases 69042/01 et al., *OOO Neste St. Petersburg et al.* (pecuniary compensation for violation of anti-monopoly legislation) and left undecided in ECtHR, Case 32559/96, *Fortum Corporation*, para. 40 (fine for abuse of dominant position), and EComHR, Case 11598/85, *Société Stenuit*, pp. 136 et seq. (fine for bid-rigging).
[72] ECtHR, Case 10828/84, *Funke*, para. 44.

- stock exchange regulatory authority (suspension of trading licence[73]),
- tax office (sanction for tax evasion[74]).

4.1.1.3 The notion „charge"

May companies use the privilege against self-incrimination as a defence against information requests in preliminary proceedings? This presupposes the applicability of Art. 6(1) ECHR and hence that the company has already been "charged" at this stage of the proceedings.

The ECtHR defines "charge" as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence".[75] This implies a danger of circumvention for the individual as the authority might deliberately withhold such a notification. Therefore, a suspect may rely on Art. 6(1) ECHR even if the authority hasn't served him the notification.[76] Moreover, the ECtHR equates situations in which measures were taken "which carry the implication of" an allegation that the individual has committed a criminal offense "and which likewise substantially affect the situation of the suspect" with an official notification.[77] The antonym to such a situation is a situation in which the link to a possible criminal proceeding remains remote and hypothetical.[78]

Despite of the rich case law of the ECtHR on the notion "charge", the applicability of Art. 6(1) ECHR during a preliminary investigation largely "depends on the special features of the proceedings involved and on the circumstances of the case".[79] This is a result of the indeterminate character of the criterion "substantially affected". The ECtHR is thus forced to regard "the entirety of the domestic proceedings conducted in the case"[80] to determine if the individual had been "charged".

However, as a guideline, preliminary proceedings which are essentially investigative in nature are not subject to the guaranties of Art. 6(1) ECHR – even if their purpose is "to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities" – as long as they don't adjudicate the matter either in form or in substance.[81] The Court reasons that applying Art. 6(1) ECHR to that kind of investigations would in practice

[73] ECtHR, Case 58188/00, *Didier*, para. 3.
[74] E. g. ECtHR, Case 19958/92, *A.P., M.P. and T.P.*, para. 43; Case 31827/96, *J.B.*, para. 49.
[75] ECtHR, Case 6903/75, *Deweers*, para. 46, confirmed in Case 20225/92, *Serves*, para. 42.
[76] ECtHR, Case 11840/85, *Pugliese I*, paras. 10 and 14.
[77] ECtHR, Case 8304/78, *Corigliano*, para. 34. Cf. also Case 34720/97, *Heaney and McGuinness*, para. 42.
[78] ECtHR, Case 38544/97, *Weh*, para. 56.
[79] Ibid.
[80] ECtHR, Case 13972/88, *Imbriosca*, para. 38; Case 27943/95, *Abas*.
[81] Cf. ECtHR, Case 19187/91, *Saunders*, para. 67.

"unduly hamper the effective regulation in the public interest [e. g.] of complex financial and commercial activities"[82].

4.1.2 The scope

The ECtHR distinguishes between cases in which the will of an accused person is concerned and "the use of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect".[83] The accused may claim a right to remain silent only[84] in the first case. This right is not absolute.[85]

The ECtHR determines an infringement of the privilege against self-incrimination "in the light of all the circumstances of the case" because "what constitutes a fair trial cannot be the subject of a single unvarying rule".[86] It thereby considers three criteria: "the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put"[87]. Therefore the possibility of generalization is very limited. As to the first criterion, the ECtHR even refrains from ruling that any direct compulsion would automatically result in a violation, although it has always held a violation of the privilege against self-incrimination in such cases.[88] With regard to the second criterion, as far as it is of interest for companies, the ECtHR held that the presence of a solicitor may not sufficiently remedy an otherwise compelling situation.[89] The existence of the third criterion is not free of criticism: Is has been put forward that the "very fact that" a statement is admitted in evidence against someone undermines the very essence of the right not to incriminate himself.[90]

However, already the original distinction by the ECtHR clarifies that, in general, the privilege against self-incrimination does not allow withholding existing documents. This fact is of particular importance for companies as their decision-making processes leave a paper trail.

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[82] ECtHR, Case 17101/90, *Fayed*, para. 62; Case 19187/91, *Saunders*, para. 67.
[83] ECtHR, Case 19187/91, *Saunders*, para. 69; Grand Chamber, Case 54810/00, *Jalloh*, para. 102.
[84] An exception applies to cases in "which coercion to hand over incriminatory evidence was in issue", cf. ECtHR, Grand Chamber, Joined Cases 15809/02 et al., *O'Halloran and Francis*, para. 54; Grand Chamber, Case 54810/00, *Jalloh*, paras. 113 et seqq.
[85] Cf. e. g. ECtHR, Case 18731/91, *John Murray*, para. 47; Case 34720/97, *Heaney and McGuiness*, para. 47. This is somewhat surprising, considering that the Court regards the privilege against self-incrimination as lying at the heart of the notion of fair procedure, cf. Dissenting opinion of Judge Martens, Case 19187/91, *Saunders*, paras. 7 and 11.
[86] ECtHR, Grand Chamber, Joined Cases 15809/02 et al., *O'Halloran and Francis*, para. 53. Cf. already Case 19187/91, *Saunders*, para. 69.
[87] ECtHR, Grand Chamber, Joined Cases 15809/02 et al., *O'Halloran and Francis*, para. 55; Grand Chamber, Case 54810/00, *Jalloh*, para. 117.
[88] ECtHR, Grand Chamber, Joined Cases 15809/02 et al., *O'Halloran and Francis*, para. 53.
[89] ECtHR, Case 36887/97, *Quinn*, para. 54.
[90] ECtHR, Concurring Opinion of Judge Morenilla, Case 19187/91, *Saunders*.

The ECtHR's case law is inconsistent on possible justifications of measures colliding with the privilege against self-incrimination. The main line of jurisprudence rules that such measures cannot be justified by "public interest"[91] or the "special features" of a field of law,[92] such as its complexity[93].

4.2 Courts of the European Union

4.2.1 Relevance

What may the jurisprudence of the Courts of the European Union contribute to an interpretation of Art. 6 ECHR? In contrast to the ECtHR, the Court of Justice of the European Union (ECJ) and the General Court (EGC) had to deal with companies alleging violations of the privilege against self-incrimination in a variety of cases. These cases have in common that they concern the implementation of the European Union rules on competition as laid down in Art. 101 et seq. of the Treaty on the Functioning of the European Union.

To understand these cases, one needs to know that the European Commission – as a part of its powers of investigation – "may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information."[94] The European Commission may impose fines up to "1 % of the total turnover in the preceding business year where" undertakings "supply incorrect or misleading information in response to" such a request.[95] If the information request is based on a formal decision by the European Commission, an undertaking even risks the same fine for supplying incomplete information or no pieces of information at all.[96]

It follows that there is a high interest of undertakings to being able to claim a privilege against self-incrimination in these proceedings. This becomes even clearer when one further takes into account the secret nature of cartels and the thus limited other means of competition authorities to detect them. Consequently, undertakings have claimed a privilege against self-incrimination based on Art. 6 ECHR even years before the ECtHR's first judgment in that regard.[97]

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[91] E. g. ECtHR, Grand Chamber, Case 54810/00, *Jalloh*, para. 97; Case 34720/97, *Heaney and McGuiness*, paras. 57 et seq. Implicitly different in Grand Chamber, Joined Cases 15809/02 et al., *O'Halloran and Francis*, para. 57.

[92] ECtHR, Case 10828/84, *Funke*, para. 44. Different in Grand Chamber, Joined Cases 15809/02 et al., *O'Halloran and Francis*, para. 62.

[93] ECtHR, Case 19187/91, *Saunders*, para. 74.

[94] Art. 18 Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2003, L 1/1 (Regulation 1/2003).

[95] Ibid., Art. 23(1)(a).

[96] Ibid., Art. 23(1)(b).

[97] Cf. ECJ, Joined Cases C-374/87 et al., *Orkem*, [1989] ECR 3283, para. 18.

Another point demonstrating the possible merits of analyzing the jurisprudence of the Courts of the European Union is the future accession of the European Union to the ECHR, foreseen by Art. 6(2) of the Treaty on European Union (TEU). Today, according to Art. 6(3) TEU, the fundamental rights as guaranteed by the ECHR constitute general principles of the Union's law and thereby influence the jurisprudence of the Courts of the European Union. Once the European Union has acceded to the ECHR, the jurisprudence of the ECtHR will, in turn, be more significantly influenced by the Courts of the European Union.

4.2.2 Scope of the privilege against self-incrimination

In its ground-breaking *Orkem* judgment, the ECJ ruled that

> "the Commission is entitled […] to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned. Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove."[98]

The ECJ thus draws a distinction between obligations to produce documents and obligations to provide answers. The production of documents may generally be required, even if the documents establish an infringement or were only "used in the internal processing and decision-making of an undertaking"[99].

With regard to the provision of answers, the ECJ draws a further distinction: It acknowledges a privilege against self-incrimination only for answers which "might involve an admission", but not for factual information. The ECJ follows a very restrictive approach when considering what questions involve such an admission of an infringement by ruling that questions

> "relating to meetings of producers, which are intended only to secure factual information on the circumstances in which such meetings were held and the capacity in which the participants attended them […] are not open to criticism."[100]

In contrast, the concept of factual information is wide. The EGC in one case even required the undertaking to interpret an agreement between European financial institutions.[101] Moreover, once an information request has been labelled as requesting only factual information, a disclosure is obligatory "even if such facts are identical to those on which [the European

[98] Ibid., paras. 34 et seq. This jurisprudence is now partly referred to in recital 23 of Regulation 1/2003, cited *supra* note 94.
[99] ECJ, Opinion of AG Geelhoed, Case C-301/04 P, *SGL Carbon*, [2006] ECR I-5915, para. 66.
[100] ECJ, Case 374/87, *Orkem*, [1989] ECR 3283, para. 37.
[101] Cf. EGC, Case T-34/93, *Société Générale*, [1995] ECR II-545, para. 75.

Commission's infringement] decision is based".[102] However, the privilege against self-incrimination granted by the ECJ is not (completely) toothless: Beyond the direct admission of guilt, e. g. questions "which relate to the purpose of the action taken and the objective pursued by" "measures taken in order to determine and maintain price levels satisfactory to all the participants at the meetings" don't have to be answered as involving an admission of an infringement.[103]

4.2.3 Reasoning and coherence with ECHR standards

The ECJ uses the rights of the defence – which are a fundamental principle of the European Union's legal order – to indirectly acknowledge a privilege against self-incrimination.[104]

With regard to the ECHR, the ECJ has explicitly acknowledged that Art. 6 ECHR "may be relied upon by an undertaking subject to an investigation relating to competition law".[105] This comes as a surprise: The "criminal" nature of charges in competition proceedings is far from being evident.[106] Moreover, the first *Engel* criterion is not met.[107] However, the total amount of fines imposed and their deterrent nature leaves little doubt that the third *Engel* criterion is met.[108]

Apart from that, the Courts of the European Union sometimes adopt a rather formalistic approach as to the protection granted by the ECHR/ECtHR.[109] Obviously, the Courts of the European Union are trying to avoid a close bond to the jurisprudence of the ECtHR and want to maintain an autonomous interpretation with a large margin of appreciation as well as the possibility of deviations with regard to the unpredictability of the future ECtHR case law.

The EGC considers its protection against self-incrimination to undertakings in competition law cases as "equivalent to that guaranteed by Art. 6 ECHR",[110] which is doubtful at least. However, it is difficult to assess the potential reasoning of the ECtHR if it were confronted

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[102] E. g. EGC, Case T-34/93, *Société Générale*, [1995] ECR II-545, para. 77; ECJ, Case C-301/04 P, *SGL Carbon*, [2006] ECR I-5977, para. 41 and 44.
[103] ECJ, Case 374/87, *Orkem*, [1989] ECR 3283, para. 38.
[104] Ibid., para. 32.
[105] Ibid., para. 30.
[106] See *supra* p. 11.
[107] Cf. Art. 23(5) Regulation 1/2003, cited *supra* note 94: "Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature."
[108] As to the deterrent nature cf. Guidelines of 1 September 2006 on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation, O.J. 2006, C 210/2 (Fining Guidelines), para. 30, and Forrester, "Due process in EC competition cases: A distinguished institution with flawed procedures", 34 Eur. L. Rev. (2009), 817, at 824 et seqq.
[109] Cf. e. g. ECJ, Case 374/87, *Orkem*, [1989] ECR 3283, para. 30; Joined Opinion of AG Darmon, Cases C-374/87 et al., *Orkem*, [1989] ECR 3283, paras. 132 et seqq.; Opinion of AG Geelhoed, Case C-301/04 P, *SGL Carbon*, [2006] ECR I-5915, para. 65.
[110] EGC, e. g. Case T-112/98, *Mannesmannröhren-Werke*, [2001] ECR II-729, para. 77; Case T-446/05, *Amann & Söhne* (2010), unreported, para. 328.

with factual backgrounds like those in European Union competition law. Actually, the ECtHR has already restricted the protection under Art. 6 ECHR if this were to "unduly hamper the effective regulation in the public interest of complex financial and commercial activities"[111]. This resembles the EGC's reasoning that an absolute right to silence "would constitute an unjustified hindrance to the Commission's performance of its duty".[112] One may, however, speculate that the ECtHR would grant a wider protection regarding the necessity of answers on "factual information", particularly in cases in which the company shall provide an interpretation.[113]

With regard to the ECHR, the ECJ's judgment in *LVM* (also called *PVC II*)[114] is of particular interest. It explicitly takes the ECtHR's case law into account[115] and tries to reconcile the general restrictive approach as introduced by *Orkem* with criteria related to those used by the ECtHR. It highlights that a privilege against self-incrimination requires the existence of coercion and the "establishment of the existence of an actual interference with the right".[116]
The finding that coercion was used requires "that constraint was actually exercised"; the "existence of a power of constraint" as such is insufficient.[117] With a view to the different types of information requests explained above,[118] this implies that a defence based on the privilege against self-incrimination is only available in the context of information requests which are based on a formal decision by the European Commission. This may cause a dilemma for undertakings which refuse to answer simple requests of information as a refusal to cooperate will be considered by the European Commission as an aggravating circumstance when setting a fine.[119]
The requirement of an "actual interference" suggests that a defence based on the privilege against self-incrimination is only available where undertakings may demonstrate that their answers "were in fact used to incriminate" them.[120]

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[111] ECtHR, Case 17101/90, *Fayed*, para. 62; Case 19187/91, *Saunders*, para. 67.
[112] E. g. EGC, Case T-446/05, *Amann & Söhne* (2010), unreported, para. 326; Case T-112/98, *Mannesmannröhren-Werke*, [2001] ECR II-729, para. 66.
[113] Cf. *supra* note 101 for an example of such a case.
[114] ECJ, Joined Cases C-238/99 P et al., *Limburgse Vinyl Maatschappij et al.*, [2002] ECR I-8375, paras. 274 et seqq.
[115] Ibid., para. 274.
[116] Ibid., para. 275.
[117] ECJ, Opinion of AG Mischo, Case C-244/99 P, *DSM*, [2002] ECR I-8375, para. 300.
[118] See *supra* p. 14.
[119] Fining Guidelines, cited *supra* note 108, para. 28.
[120] ECJ, Joined Cases C-238/99 P et al., *Limburgse Vinyl Maatschappij et al.*, [2002] ECR I-8375, paras. 275, 282 and in particular 289.

The ECJ's approach in *LVM* resembles the ECtHR's jurisprudence only in a superficial way (e. g. with regard to the coercion criterion). It has found only limited reverberation. The latest judgments by the EGC follow the ECJ's *Orkem* line to a great extent and deny a change in the ECJ's jurisprudence in *LVM*.[121]

5. Conclusions

The privilege against self-incrimination is firmly rooted within the ECHR. The privilege finds its justification in considerations based on the rule of law and human dignity. Notwithstanding the latter motive, the privilege against self-incrimination may be applied to legal persons. The privilege protects legal persons in a broad range of proceedings including such which are commonly regarded as administrative. However, the privilege's scope is reduced in comparison to that of natural persons. This follows from two main reasons: Firstly, the absence in corporate contexts of a need to protect human autonomy from cruel choices. Secondly, the phenomenology of the proceedings which companies are usually involved in justifies an overall approach which grants a protection that is less absolute, but balanced with the needs of public interest. In this regard, the actual scope of protection against self-incrimination for companies granted by Art. 6 ECHR resembles the protection granted by the Courts of the European Union but has to be considered as more intense in some respects.

From a more general point of view, the situation of companies in relation to the privilege against self-incrimination suggests the adoption of an approach which combines the relative nature of a privilege against self-incrimination with the concept of human dignity. One solution would be to explicitly differentiate between an inner core, an absolute right to silence, and a wider, but relative privilege against self-incrimination. In contrast, the complexity, severeness or relative triviality of a crime may not justify the relativization of the first-mentioned right. While the ECtHR rightly has upheld these principles in terrorism cases such as *Heaney and McGuiness* or *Quinn*, its judgments sometimes lack scrutiny when individuals are confronted with more indirect constraints. This is particularly true for preliminary investigations. An analysis of the applicability of Art. 6 ECHR in such contexts should primarily examine the specificity of investigation measures and only subsidiary if the individual is already "substantially affected" at that time. This approach safeguards general reporting obligations in the public interest, e. g. for taxes, but avoids situations where authorities have already targeted certain individuals and now inquire for information, the

[121] E. g. EGC, Case T-446/05, *Amann & Söhne* (2010), unreported, paras. 325 et seqq.; Joined Cases T-236/01 et al., *Tokai Carbon et al.*, paras. 402 et seqq., in particular para. 405.

usage of which in later stages of the proceedings is imminent. Compared with this, the ECtHR's *Weh* judgment demonstrates that the current approach gives suspects a fig leaf when they need a shield. Or put in other words: "the privilege against self-incrimination would be of very little use or value if a man could be compelled to tell all to the authorities before a trial."[122]

[122] ECtHR, Concurring Opinion of Judge Walsh, Case 19187/91, *Saunders*.