Recent Developments Concerning the Right to Silence and Privilege Against Self-Incrimination Under the Charter of Fundamental Rights of the EU – A Critical Reflection on Case C-481/19 *DB v Consob*

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Abstract

In February 2021, the Grand Chamber of the Court of Justice gave its highly anticipated ruling in Case C-481/19 DB v Consob. In its judgement, the Court recognised that the natural person who risks self-incrimination has the right to remain silent during proceedings which can lead to the imposition of administrative penalties of a criminal nature. The Court of Justice did not adhere to its 'own' approach concerning the right to silence of undertakings in competition matters as established in Case C-374/87 Orkem v Commission, but aligned its judgement with the case-law of the European Court of Human Rights instead. Although Case C-481/19 DB v Consob constitutes an important ruling which provides much needed clarity on scope of the right to silence of natural persons under the Charter, some important aspects of the right to silence and self-incrimination remain unaddressed and new questions surface.

1. Introduction

In February 2021, the Grand Chamber of the Court of Justice gave its highly anticipated ruling in *DB v Consob*.[1] In its judgement, the Court of Justice recognised that the natural person who risks self-incrimination has the right to remain silent during proceedings which can lead to the imposition of administrative penalties of a criminal nature. The Court did not adhere to its 'own' approach concerning the right to silence of undertakings in competition matters as established in *Orkem v Commission*, but aligned its judgement with

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1 Case C-481/19 *DB v Consob* [2021] ECLI:EU:C:2021:84.

the case-law of the European Court of Human Rights (hereinafter: ECtHR) instead.[2] Although *DB v Consob* constitutes an important judgement which provides much needed clarity on the scope of the right to silence of natural persons under the Charter, some important aspects of the right to silence and privilege against self-incrimination remain unaddressed and new questions surface.

In this contribution, I will discuss the judgement of the Court of Justice in Case C-481/19 *DB v Consob*. To that end, I will address the facts of the case and the preliminary questions which were referred to the Court in Section 2. In Section 3, the Opinion of AG Pikamäe and the judgement of the Grand Chamber of the Court of Justice are elaborated upon. Lastly, I will reflect on the case in Section 4 and discuss several aspects of the right to silence and privilege against self-incrimination which – in my view – could have received more attention in the Opinion and the judgement of the Court.

2. Background – Facts of the Case and Preliminary Questions

In May 2012, the Italian financial supervisory authority – the Commissione Nazionale per le Società e la Borsa (hereinafter: Consob) – imposed upon Mr DB two administrative fines for insider trading, confiscation of illegally obtained assets, and the (non-punitive) measure of temporary loss of reputation. The financial supervisory authority also imposed an additional administrative fine on the ground that DB had, after applying for postponement of the hearing on several occasions, declined to answer questions which were put to him during that hearing.[3] Mr DB appealed the penalties and the case was eventually referred to the Italian Constitutional Court. In short, the main issue before the Constitutional Court was whether the national provision which constituted the legal basis to impose the administrative fine for the refusal to answer questions upon Mr DB was compatible with the Italian Constitution as well as international and EU law.

According to the Constitutional Court, the right to remain silent and the privilege against self-incrimination as guaranteed by the Italian Constitution as well as EU and international law could not justify that the person concerned refuses to appear at or delays his hearing, provided that he has the right not to answer questions which are put to him. However, no such guarantee was in place in the case at hand.[4] The Constitutional Court observed that the person

2 Case C-374/87 *Orkem v Commission* [1989] ECLI:EU:C:1989:387; Case C-238/99 *Limburgse Vinyl Maatschappij* [2002] ECLI:EU:C:2002:582.

3 *DB v Consob* (n 1) para 15.

4 ibid paras 20-22.

concerned could contribute to the substantiation of a criminal charge against him, because he was under the administrative obligation to cooperate with Consob and answer the questions which were put to him. Additionally, the Constitutional Court pointed out that the case-law of the ECtHR establishes that the right to silence is infringed upon if administrative penalties of a criminal nature are imposed upon the person who is under investigation, because he refuses to cooperate with the authorities.

The Constitutional Court observed that the Italian provision which was relied upon to fine Mr DB for his refusal to answer questions had been introduced into national law to implement legal obligations from secondary Union law. The Market Abuse Directive (hereinafter: MAD) prescribed that national financial supervisory authorities should have the investigative power to question any person, and that national law provided 'effective and dissuasive penalties' in case the demand to cooperate with the authorities was refused; no exception was created for the person who was himself under investigation.[5] In 2016, the MAD was replaced by the new Market Abuse Regulation (hereinafter: MAR) which featured the same obligations as its predecessor.[6] If the MAD and MAR required that any person who refuses to answer questions is fined the declaration that the Italian provision in question is unconstitutional would conflict with EU law.[7] However, the Constitutional Court questioned whether such an interpretation of secondary Union law was compatible with Articles 47 and 48 of the Charter. In that context, the Constitutional Court observed that the Court of Justice had only elaborated on the right to silence of legal persons in competition matters, and that this case-law offered less protection compared to the right to silence of natural persons as recognised by the ECtHR.

In light of this potential dual conflict between Italian law and secondary Union law on the one hand, and the right to silence as elaborated in the context of EU competition law and under Article 6 ECHR on the other, the Italian Constitutional Court refers the case to the Court of Justice for a preliminary ruling. In essence, its question aims to achieve clarification on the scope of the right to silence and privilege against self-incrimination under the Charter and, in its wake, whether a Member State can refrain from imposing administrative penalties of a criminal nature upon the person who refuses to answer questions which might incriminate himself.

5 ibid para 23. See also Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L 96, 16-25.

6 See Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) [2014] OJ L 173, 1-61.

7 *DB v Consob* (n 1) para 23.

3. Opinion of the Advocate-General and Judgement of the Court

In his Opinion, AG Pikamäe assesses if the right to silence applies during administrative proceedings which can lead to the imposition of penalties of a criminal nature. The AG acknowledges that neither Articles 47 and 48 of the Charter nor Article 6 of the ECHR explicitly feature the right to silence, but also observes that the right has been accepted by the ECtHR as being 'a generally recognised international standard which lies at the heart of the notion of a fair trial'.[8] The right to silence can be called upon whenever penalties are considered to be criminal in nature within the meaning of the Charter. The AG considers that the wording of the MAD and MAR seemingly require that even accused persons are subjected to penalties if they refuse to answer questions; after all, the instruments establish that information can be demanded from 'any person' and that Member States must ensure that national authorities must have the power to take appropriate sanctions for, *inter alia*, the refusal to cooperate with the authorities. However, this obligation from secondary Union legislation must be interpreted in accordance with the right to silence.[9] In that light, the main question is whether the right to silence of natural persons under the Charter should be given the same scope as that accorded by the Court of Justice in *Orkem v Commission* and subsequent judgements, or whether the case-law of the ECtHR on the right to silence must be followed instead.

The AG reiterates that the Court of Justice has decided in *Orkem v Commission* that undertakings which were subjected to an investigation concerning infringements of competition rules had an obligation to cooperate actively with the Commission. Undertakings can be forced to provide all necessary information concerning the infringement of competition law and disclose all relevant documents even if the latter may establish anti-competitive conduct committed by that undertaking. While questions of fact must be answered by the undertaking, it cannot be compelled to provide answers which might involve the admission of the existence of an infringement of competition rules or an answer which is in fact equivalent to such an admission. The AG concludes that this 'limited' scope of the right to silence of undertakings in competition matters cannot apply *mutatis mutandis* to natural persons.[10] Instead, regard must be had to the case-law of the ECtHR.

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8 Case C-481/19 *DB v Consob* [2021] ECLI:EU:C:2021:84, Opinion of AG Pikamäe, para 51.

9 ibid para 84. The AG provides an elaborate assessment on the option to interpret national and secondary Union legislation in accordance with the right to silence as guaranteed by the Charter. The considerations are insightful, but are not directly relevant for my reflections on the case. Therefore, I have opted not to elaborate them and only mention the conclusion of the AG: the obligation from the MAD and MAR must be interpreted in accordance with the right to silence as guaranteed by the Charter.

10 ibid paras 95-96.

According to the ECtHR, the right to remain silent seeks to protect persons against whom a criminal charge has been brought against 'improper coercion' by the authorities. To that avail, it must be assessed whether there has been an established use of coercion and, secondly, whether that coercion must be regarded as improper. The AG acknowledges that the ECtHR has identified a number of situations which raise concerns of 'improper coercion', most notably where a suspect is held to testify under threat of sanctions and either makes a statement or is sanctioned for his refusal to do so. To assess whether the concern of improper coercion has actually materialised the ECtHR considers several factors: the nature and degree of compulsion as revealed by the type and severity of the sanction which is imposed for the refusal to make a statement, the existence of relevant safeguards in the proceedings, and the use to which the evidence which was obtained under coercion is put.[11] The latter factor allows for the identification of improper compulsion even in situations where the authorities put factual questions to the person concerned if such statements are used against him during subsequent proceedings to impose penalties of a criminal nature.[12]

In his Opinion, the AG rejects the argument which is put forward by the Commission under reference to the judgement of the ECtHR in *Jussila v Finland*.[13] In that case, the ECtHR has ruled that the procedural guarantees under Article 6 ECHR will not necessarily apply with their full stringency outside the 'hard core' of criminal law. The Commission had argued that the right to silence – being one of such aforementioned procedural guarantees – could be 'tempered' in the substantive field of market abuse so that it would have the same scope as in competition matters, but the AG does not agree. He considers that the rule from *Jussila v Finland* cannot apply in an identical way to all safeguards and observes that the right to silence is at the heart of the notion of a fair trial.[14]

The Court of Justice generally follows the Opinion of the AG, but its judgement is less elaborate. The Court observes that Article 52 (3) of the Charter establishes that rights which are contained in the Charter and correspond to rights guaranteed by the ECHR must have the same meaning and scope as those laid down in the ECHR.[15] Therefore, regard must be had to the rights as guaranteed by Article 6 ECHR, including the relevant case-law of the ECtHR. The ECtHR has recognised that while the right to silence is not explicitly mentioned in Article 6 of the ECHR, the right constitutes a generally recognised international standard which lies at the heart of the notion of a fair trial. The right to silence provides the accused with protection against improper coercion and contributes

11 ibid para 101.
12 ibid para 103.
13 *Jussila v Finland* App no 73053/01 (ECtHR, 23 November 2006).
14 Pikamäe (n 8) paras 110-114.
15 *DB v Consob* (n 1) para 36.

to avoiding miscarriages of justice and securing the aims of Article 6 ECHR.[16] Under reference to case-law of the ECtHR, the Court of Justice considers:

'Since protection of the right to silence is intended to ensure that, in criminal proceedings, the prosecution establishes its case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused this right is infringed, inter alia, where a suspect is obliged to testify under threat of sanctions and either testifies in consequence or is sanctioned for refusing to testify. The right to silence cannot reasonably be confined to statements of admission of wrongdoing or to remarks which directly incriminate the person questioned, but rather also covers information on questions of fact which may subsequently be used in support of the prosecution and may thus have a bearing on the conviction or the penalty imposed on that person'.[17]

In turn, the right to silence cannot justify every failure to cooperate with the competent authorities, such as the refusal to attend a hearing altogether. The Court of Justice emphasises that while the right to silence is intended to apply in the context of proceedings which may lead to the imposition of administrative sanctions of a criminal nature,

'[...] the need to respect the right to silence could also stem from the fact, noted by the referring court, that, in accordance with national legislation, the evidence obtained in those proceedings [which are not criminal in nature] may be used in criminal proceedings against the person in order to establish that a criminal offence was committed'.[18]

Based on these considerations, the Court of Justice concludes that the Charter guarantees the right to silence of natural persons who are 'charged' in the context of administrative proceedings which may lead to the imposition of sanctions of a criminal nature. The right to silence precludes, *inter alia*, that administrative penalties of a criminal nature are imposed upon the natural person who refuses to answer questions which might establish his liability for punitive administrative or criminal offences. According to the Court of Justice, this conclusion is not altered in light of its case-law on the right to silence of undertakings in competition matters.[19] In this regard, the Court presents the same arguments as AG Pikamäe. It recognises that it has held that an undertaking may be compelled to provide all necessary information concerning the infringement of competition law and disclose all relevant documents even if the latter may establish anti-competitive conduct committed by that undertaking.

16 ibid para 38.

17 ibid paras 39-40, with reference to *Saunders v UK* App no 19187/91 (ECtHR, 17 December 1996); *Ibrahim and Others v UK* App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 13 September 2016); and *Corbet and Others v France* App nos 7494/11, 7493/11 and 7989/11 (ECtHR, 15 March 2015).

18 ibid para 44.

19 ibid paras 46-48.

However, it has also acknowledged that an undertaking cannot be compelled to provide answers which might involve the admission of the existence of an infringement of competition rules. Moreover, the case-law on the right to silence in competition matters concerns undertakings and cannot be applied to natural persons by analogy.

4. Reflections on Case C-481/19 *DB v Consob*

The judgement of the Court of Justice in *DB v Consob* is important. Not only has the Court clarified that the right to silence and privilege against self-incrimination of natural persons has the same scope under the Charter as under the ECHR, but the Court of Justice has also explicitly recognised that those defence rights apply in full during administrative proceedings which lead to penalties of a criminal nature. Nevertheless, the judgement does not provide an exhaustive description or analysis of the right to silence and the privilege against self-incrimination, and several important aspects, which – in my view – could have received (more) attention and analysis from the Court of Justice, are left unaddressed. In my reflections on *DB v Consob*, I will focus on these 'missing pieces' and assess (i) the implementation of the right to silence during punitive and non-punitive administrative proceedings, (ii) the scope of the right to silence and privilege against self-incrimination and documentary evidence, and (iii) the relevance of *DB v Consob* for the right to silence and privilege against self-incrimination of undertakings and legal persons.

4.1. The right to silence in 'punitive' and 'non-punitive' administrative proceedings

In *DB v Consob*, the Court of Justice recognises that the right to remain silent and privilege against self-incrimination apply during administrative proceedings that lead to penalties of a 'criminal nature'. The Court rightly leaves the decisive assessment of the administrative fines which were imposed by Consob to the Italian national courts, but I would submit that there can be little doubt that the administrative proceedings are 'punitive'. After all, both the ECtHR and Court of Justice have recognised in earlier case-law that the administrative fines which are imposed by Consob are, as a rule, criminal in nature.[20]

[20] *Grande Stevens and Others v Italy* App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 4 March 2014), paras 94-101; Case C-524/15 *Menci* ECLI:EU:C:2018:197, para 33; Case C-596/16 *Di Puma* ECLI:EU:C:2018:192, para 38; Case C-537/16 *Garlsson Real Estate and Others* ECLI:EU:C:2018:193, para 35. See also *Öztürk v Germany* App no 8544/79 (ECtHR, 21 February 1984); *Janosevic v Sweden* App no 34619/97 (ECtHR, 23 July 2002).

During punitive administrative proceedings, the right to silence and privilege against self-incrimination constitute important procedural guarantees to ensure the overall fairness of the procedure, but neither have an absolute character nor establish the general right to refuse any cooperation with the authorities. The fact than an accused has the *right* to remain silent signals that he may freely decide to make a statement on his guilt, and the right to silence can, *inter alia*, not be invoked to refuse to attend the hearing and undergo an interrogation.[21] The right to silence and privilege against self-incrimination only protect against 'improper coercion' which destroys the very essence of the notion that a person cannot be forced to contribute to his own conviction through his statement.[22] To assess whether coercion has been 'improper' regard must be had to three factors: the nature and degree of compulsion, the availability of procedural safeguards, and the use to which the evidence which has been obtained is put.[23] These factors should be assessed together to establish whether the very essence of right to silence and privilege against self-incrimination has been violated; the facts and circumstances of the case will often decide how the factors are balanced.

The nature and degree of compulsion raise concerns of 'improper coercion' if, among other things, the person concerned is obliged to make a statement under threat of a sanction and either makes an incriminating statement under coercion or refuses to testify and is sanctioned as a result.[24] The character of the statement can lead to a nuanced outcome here as the ECtHR has recognised that a limited enquiry which only requires the suspect to state a simple fact is, in principle, not at odds with the privilege against self-incrimination, but it has also acknowledged that factual statements can raise issues if they are used against the accused.[25] The procedural safeguards which could be taken in account have not been exhaustively listed by the ECtHR, but it has held that access to a lawyer during questioning constitutes an important safeguard against coercion.[26] Lastly, the use to which the evidence is put entails an assessment of how the evidence is used. In that regard, it is not only relevant whether the evidence is used, but, if so, which role it has in the prosecution as well. If evidence which has been provided by the accused is used to prove his guilt or discredit him – in other words, if it is used *against* him – the right to silence and privilege against

21 *DB v Consob* (n 1) para 41. See also *Ibrahim and Others v UK* (n 17) para 267.
22 *DB v Consob* (n 1) paras 38-39. See also *Ibrahim and Others v UK* (n 17) para 267.
23 *Ibrahim and Others v UK* (n 17) paras 267-269; *Saunders v UK* (n 17) para 69.
24 *DB v Consob* (n 1) para 39. See also *Saunders v UK* (n 17) para 70.
25 *O'Halloran and Francis v UK* App nos 15809/02 and 25624/02 (ECtHR, 29 June 2007), para 58. See also *Weh v Austria* App no 38544/97 (ECtHR, 8 April 2004).
26 *Ibrahim and Others v UK* (n 17) para 255; *O'Halloran and Francis v UK* (n 26) para 59.

self-incrimination can be infringed upon, even if the statements only concern facts.[27]

An interesting consideration by the Court of Justice with regard to the last criterion concerns the recognition that, even if the administrative penalties which were imposed upon Mr DB by Consob are *not* criminal in nature, the need to respect the right to silence could also stem from the fact that, in accordance with national legislation, the evidence which was obtained during the administrative proceedings may be *used* against the person concerned to establish that a criminal offence was committed.[28] Similarly, AG Pikamäe recognises that the *use* to which a statement is put during criminal proceedings is often crucial to assess whether coercion was improper, regardless of whether the statement has been obtained '*inside* or *outside* those [criminal] proceedings'.[29] These considerations must be understood in light of the Italian dual enforcement regime in the field of market abuse which was explicitly mentioned by the referring court in its preliminary question: insider dealing constitutes an administrative as well as a criminal offence under Italian law, and proceedings relating to both offences can be brought and prosecuted in parallel.[30] The fact that findings and evidence could be shared between the administrative and criminal proceedings meant that it could not be excluded that Consob would communicate the self-incriminating statement of Mr DB to the Italian judicial authorities and that it would subsequently be used to impose criminal sanctions sensu stricto. Even if the Italian courts would find that the administrative proceedings would *not* lead to 'penalties of a criminal nature' there could be no doubt that the penalties during criminal proceedings *were* 'criminal'.

While the Court of Justice and its AG refer only to 'criminal law' and 'criminal proceedings' I would argue that the rationale of their considerations is relevant for the broader distinction between non-punitive and punitive proceedings. In principle, the right to silence and privilege against self-incrimination need not be taken into account during non-punitive proceedings. Instead, the duty to cooperate with the authorities applies in full, and the person concerned must provide all required information and answer the questions which are put to him. Obligations to provide the authorities with information are common across the legal orders of the EU Member States and are essential to ensure effective enforcement of substantive policies; unsurprisingly, such obligations also feature often in secondary Union legislation. The fact that the person concerned may be required to give evidence against himself during non-punitive proceedings is, in itself, not at odds with the right to silence and privilege against self-incrim-

27 *DB v Consob* (n 1) para 40. See also *Corbet and Others v France* (n 17) paras 33-34; *Saunders v UK* (n 17) para 71.
28 *DB v Consob* (n 1) para 44.
29 Pikamäe (n 8) para 102.
30 *DB v Consob* (n 1) para 21.

ination. However, evidence that is relevant for non-punitive purposes will often also be of use to impose punitive sanctions, and duties to exchange information facilitate that evidence is shared with the competent (administrative or judicial) authorities in that regard.[31]

If authorities want to *use* the self-incriminating statement which was obtained under compulsion during non-punitive proceedings to impose penalties of a criminal nature, the right to silence which must be respected in the punitive context will have a 'reflex effect' on the non-punitive proceedings. At the intersection of non-punitive and punitive proceedings, the right to silence and privilege against self-incrimination can be respected in different ways. In short, it is possible to make an overarching distinction between proactive and reactive approaches. The proactive approach entails that authorities take the right to silence into account *during* non-punitive proceedings in order to safeguard the (possible) use of self-incriminating statements to impose penalties of a criminal nature. This could mean that the person concerned is informed that he can remain silent if he risks self-incrimination, but also implies that authorities must not resort to coercion to enforce the duty to cooperate if the person concerned argues that he will incriminate himself through the statement which he is required to make.[32] In turn, the reactive approach to respect the right to silence entails that authorities cannot use the self-incriminating statement as evidence to impose penalties of a criminal nature after it has been obtained under coercion in the non-punitive proceedings. In that regard, it is possible to uphold the right to silence via a restriction on the use of statements that takes effect *ex post* when the statement which has been obtained under coercion is found to be self-incriminating, but exclusion of self-incriminating statements from the evidence also constitutes an option to respect the right to silence.

4.2. The privilege against self-incrimination and documentary evidence

In the case of *DB v Consob*, neither the AG nor the Court of Justice elaborate on the nuance between the right to silence and the privilege against self-incrimination, and its relevance with regard to their respective

31 In this context, see also M Luchtman, *European cooperation between financial supervisory authorities, tax authorities and judicial authorities* (Intersentia 2008).

32 *Saunders v UK* (n 17) para 70. *Marttinen v Finland* App no 19235/03 (ECtHR, 21 April 2009), paras 62-65. In *Marttinen v Finland* the applicant was forced to make a statement on his assets in the (non-punitive) civil procedure concerning the settlements of his debts, but he was also under investigation for debt fraud. Mr Marttinen refused to make a statement, because he could not exclude that the information would also be used in the punitive proceedings. He was fined for this refusal to cooperate. As the parallel civil and criminal proceedings concerned the same assets the ECtHR argued that the defence rights of the applicant had 'reflex effect' on the civil proceedings, and ruled that Article 6 ECHR had been violated through the imposition of fines.

scope. While the right to silence and privilege against self-incrimination are closely connected and overlap considerably they are not the same and must be distinguished. It follows from the case-law of the ECtHR that the right to silence guarantees that the person who is charged has the right to remain silent during an interrogation and, thus, aims to ensure that the prosecution establishes its case without resorting to the use of statements obtained through methods of coercion or oppression in defiance of the will of the accused.[33] In turn, the privilege against self-incrimination protects the accused against improper coercion, and contributes to the avoidance of miscarriages of justice and the overall fairness of the proceedings.[34]

At face value, the privilege against self-incrimination has a broader scope than the right to silence, because its rationale allows that evidence other than statements is brought under its protection; after all, documentary evidence can also be self-incriminating. However, in the case of *Saunders v UK* the ECtHR has ruled that the privilege of self-incrimination is primarily concerned with respecting the right to remain silent of the accused and does not extend to 'evidence which has an existence independent of the will' such as documents acquired pursuant to a warrant or blood and urine samples.[35] In spite of this seemingly absolute exclusion of all 'evidence which has an existence independent of the will' it must be observed that the ECtHR has recognised violations of the *privilege against self-incrimination* in cases which concern such evidence. The casuistic nature of the judgements and the fact that the ECtHR does not always explicitly mention specific criteria make it difficult to distil an overarching approach from the relevant case-law, but, at its core, the ECtHR will still determine whether there has been 'improper coercion' to obtain the evidence which has an existence independent of the will through an assessment of the nature and degree of compulsion, the availability of procedural safeguards, and the use to which material is put.[36]

In respect of *DB v Consob*, three judgements of the ECtHR merit focus, because they specifically concern the tension between the duty to cooperate with the authorities and provide *documentary evidence*, and the privilege against self-incrimination. In *Funke v France*, French customs authorities attempted to obtain documents from Mr Funke, but the authorities neither specified which documents they required nor seemed to know whether those documents existed at all ('fishing expedition'). When Funke refused to comply with these demands he was fined. Because the authorities were unable or unwilling to procure the

33 *Ibrahim and Others v UK* (n 17) para 266.

34 *DB v Consob* (n 1) para 39. See also *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 100; *Saunders v UK* (n 17) para 68.

35 *Saunders v UK* (n 17) para 69. See also S Lamberigts, 'The Privilege against Self-Incrimination of Corporations' in K Ligeti and S Tosza (eds), *White Collar Crime* (Hart Publishing 2019) 313.

36 *Jalloh v Germany* (n 35) para 117.

documents and attempted instead to compel the applicant to provide evidence of offences he had allegedly committed, the ECtHR ruled that the privilege against self-incrimination had been violated.[37] The applicant in *J.B. v Switzerland* was required to surrender documentary evidence to the tax authorities while he was also the suspect in a parallel criminal investigation into tax fraud. He refused to provide the required information as he could not exclude that it would later be used against him in the criminal proceedings; several punitive sanctions were imposed to compel the applicant to surrender the documents.[38] The ECtHR ruled that the privilege against self-incrimination had been violated, because the authorities had attempted to obtain the evidence through coercion and in defiance of the will of the accused. Lastly, in *Chambaz v Switzerland* tax authorities required information from Mr Chambaz in the fiscal procedure, but he refused and was fined. While the tax proceedings were ongoing, a criminal investigation into fraud was also opened against the applicant. The ECtHR decided that fines were imposed in violation of the privilege against self-incrimination: the applicant had been forced to provide information while it could not be excluded that it would later be used against him in criminal proceedings concerning the same facts, although those proceedings had not yet been instigated when the demand to surrender information was made.[39]

Of course, it is not surprising that neither the Court of Justice nor its AG have elaborated on the distinction between the right to silence and privilege against self-incrimination and the aforementioned case-law of the ECtHR. The preliminary question which was referred to the Court of Justice required it to focus solely on statements, and the right to silence and privilege against self-incrimination are often equated in that context. Nevertheless, the Court of Justice could – in my view – have clarified, in an *obiter dictum* perhaps, whether it will follow the same approach to evidence which has existence independent of the will of the accused as the ECtHR. In practice, documents constitute an important category of evidence for the enforcement of (Union) financial-economic policies.[40] Specific considerations for the EU context would be especially welcome in light of the fact that the scope of fundamental rights as guaranteed by the ECHR constitutes only the *minimum* level of protection under the Charter.[41] Thus, the Court of Justice could also opt for a more 'generous' stance compared to the ECtHR and bring documentary evidence under the scope of privilege against self-incrimination in accordance with the Charter. The likelihood that such an alternative approach is indeed adopted by the Court must

37 *Funke v France* App no 10828/84 (ECtHR, 25 February 1993), para 44.
38 *J.B. v Switzerland* App no 31827/96 (ECtHR, 3 May 2001), paras 66-68.
39 *Chambaz v Switzerland* App no 11663/04 (ECtHR, 5 April 2012), para 55.
40 See S Lamberigts (n 36) 312.
41 See also J Jans, S Prechal and R Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 155.

not be overestimated. The explicit reference to Article 52 (3) of the Charter and the wording of *DB v Consob* – which equates the right to silence and privilege against self-incrimination – suggest that the Court of Justice will also adhere to the distinction between statements and 'evidence which has an existence independent of the will'. In that regard, it also merits attention that most Member States do not extend the protection of the privilege against self-incrimination to documentary evidence.[42] Hopefully the Court will have an opportunity to provide more clarity concerning this aspect in the future.

4.3. The right to silence and privilege against self-incrimination of undertakings and legal persons

While the Court of Justice has clarified that the scope of the right to silence and privilege against self-incrimination as established in *Orkem v Commission* cannot apply *mutatis mutandis* to natural persons, it has not elaborated how its judgement in *DB v Consob* affects the approach concerning undertakings in competition matters or what its ruling means for the right to silence and privilege against self-incrimination of legal persons in other substantive policy fields. This raises several important questions which must be addressed by the Court of Justice – or the ECtHR – in future judgements.

Recent case-law from competition matters suggests that the scope of the right to silence in that substantive field will not be altered. In *Qualcomm v Commission* – which was issued only days before the judgement in *DB v Consob* – the Court of Justice confirmed the well-established scope of the right to silence as elaborated in *Orkem v Commission* and subsequent case-law: undertakings can be required to provide information even if it is incriminating, but cannot be compelled to make a statement which involves an admission of guilt on their part.[43] It must be observed that undertakings are, as a rule, companies, but natural persons may also qualify as an undertaking under EU competition law.[44] To my knowledge, punitive proceedings by the Commission have only targeted

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42 For instance, in the Netherlands and France the highest (administrative) courts have ruled that the privilege against self-incrimination is not concerned with 'evidence which has an existence independent of the will of the accused, see eg Hoge Raad 12 July 2013, ECLI:NL:HR:2013:BZ3640 and Afdeling bestuursrechtspraak Raad van State 8 April 2020, ECLI:NL:RVS:2020:1011 (Netherlands); Conseil constitutionnel 2 March 2004, n° 2004-492 DC and Cour de cassation (crim) 6 January 2015, n° 13-87.652 (France). In Germany – where documents are sometimes brought under the protection of the privilege against self-incrimination on the basis of statutory provisions – the Bundesverfassungsgericht has also recognised that the right to silence is the *primary* implementation of the privilege against self-incrimination, see BVerfG Decision of 13 January 1981 [1981] *Neue Juristische Wochenschrift*, 1431.

43 Case C-466/19 P *Qualcomm v Commission* [2021] ECLI:EU:C:2021:76, para 147.

44 See M Veenbrink, 'The Freedom from Self-Incrimination – A Strasbourg-Proof Approach? Cases C-466/19 P *Qualcomm* and C-481/19 P *DB v Consob*' (2021) *Journal of European Competition Law & Practice* 3.

companies so far, but it cannot be ruled out that proceedings are instigated against natural persons in the future. In that case, it will be unclear whether the scope from *Orkem v Commission* or *DB v Consob* applies.

The application of the right to silence and privilege against self-incrimination to legal persons and its scope is even more opaque in the context of other substantive EU policy fields. In his Opinion, AG Pikamäe rightly observes that the ECtHR has never ruled on the right to silence and privilege against self-incrimination of legal persons. The AG concludes that it does not appear possible to apply the available case-law concerning natural persons by analogy to legal persons as the rationale of the right to silence and privilege against self-incrimination is found in respecting human dignity and autonomy.[45] Nevertheless, other rationales which *can* apply to legal persons – most notably, the need to guarantee the right to a fair trial – are mentioned in the case-law of the ECtHR as well. Therefore, the main issue is not whether the right to silence and privilege against self-incrimination applies to legal persons, but what the application to legal persons will mean for their scope. It is not uncommon that the scope of procedural safeguards and defence rights differs between natural and legal persons, and both the ECtHR and Court of Justice have been willing to accept more 'limited' protection for the latter.[46] Thus, it is plausible that the scope as elaborated in *Orkem v Commission* is accepted for legal persons in general by the ECtHR and the Court of Justice.[47]

45 Pikamäe (n 8) paras 98-99. For an in-depth analysis and discussion on the rationales of the privilege against self-incrimination of legal persons, see S Lamberigts (n 36) 308-312.

46 The classic example is the scope of the right to privacy from Article 8 ECHR. While legal persons can call upon the right to privacy its scope is generally more limited compared to natural persons, see *Niemitz v Germany* App No 13710/88 (ECtHR, 16 December 1992); Case C-583/13 P *Deutsche Bahn and Others v Commission* ECLI:EU:C:2015:404. See also Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] *OJ* L 65, 1-11. In recital 13 of Directive (EU) 2016/343 it is stipulated that '[...] it acknowledges the *different* needs and levels of protection of certain aspects of the presumption of innocence as regards natural and legal persons [...]' and that the Court of Justice has '[...] recognised that the rights flowing from the presumption of innocence do not accrue to legal persons *in the same way* as they do to natural persons' (my italics).

47 In this context, see *Sa-Capital Oy v Finland* App No 5556/10 (ECtHR, 14 February 2019). In this case, the ECtHR has shown to be 'mindful' that fines in competition law proceedings were generally imposed upon corporate entities instead of natural persons. This factor was taken into account to assess compliance with the 'criminal limb' of Article 6 ECHR.