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Stocktaking on the principle of *nemo tenetur* in the case law of the ECtHR and CJEU

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1. Introduction

As an initial approximation, the principle of *nemo tenetur se detegere* can be defined as the right not to cooperate with public authorities whenever such a cooperation may entail a prejudice to one's judicial position. In other words, it means that the individual is granted the right to remain silent and not to contribute to incriminating oneself. Such a prerogative, however, is far from clear in its content. Indeed, within the *brocarda* "*nemo tenetur se detegere*" or "*nemo tenetur se ipsum accusare*" it is possible to detect different

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concurring rights.[1] As clarified in the next §§, while, among these rights, the *ius tacendi* (or right to remain silent) is the most prominent expression of the *nemo tenetur se detegere*, the latter principle also encompasses the right not to give evidence, the right not to be questioned[2] and the right to lie, i.e., the so-called *ius mentiendi*.

The relevance of *nemo tenetur se detegere* is universally recognised. The European Court of Human Rights (ECtHR) has ruled, for instance, that this right is "the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6"[3]. Similarly, beyond the European landscape, the U.S. Supreme Court has stated that the right not to self-incriminate "marks an important advance in the development of our freedom, one of the great milestones in humanity's struggle to make itself civilized"[4]. The principle has been defined as one of the most complex guarantees of the entire body of fundamental rights applicable in the context of criminal proceedings and, for that reason, continues to be a source of considerable debate from two viewpoints mainly, i.e., the reconstruction of its historical origins and its underpinning rationale and purpose.

From the standpoint of historical reconstruction, *nemo tenetur se detegere* has been the subject of extensive research, especially in Anglo-American legal doctrine and common-law countries.[5] In this respect, although the literature traces the earliest evidence of the principle back to canon law[6], it is precisely in English-speaking legal systems that it was not only first recognised but also took root within the set of guarantees that ensure a fair trial. Against this background, legal historians detect two moments when the right to silence was greatly developed: the birth of the U.S. Constitution and the period after World War II. As to the first, the Fifth Amendment of the U.S. Constitution strengthened the perception of its close inherence in the protection of civil rights and its primary role in the framework of the individual's rights to liberty[7]. Specifically, the Fifth Amendment provides that no one shall "be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law". This is a fundamental defence guarantee that defines the whole trial system of the U.S.[8] As to the

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[1] See D. TASSINARI, *Nemo tenetur se detegere. La libertà dalle autoincriminazioni nella struttura del reato*, Bologna, 2013, pp. 274-275.

[2] See E. AMATI, *Dinamiche evolutive del diritto al silenzio. Riflessi sul diritto punitive e sugli obblighi di collaborazione con le autorità ispettive e di vigilanza*, Torino, 2022, p. 2.

[3] See ECtHR, 17 December 1996, case no. 19187/91, *Sounders v. United Kingdom*, ECLI:CE:ECHR:1994:0510, para. 68.

[4] See J. ESCOBAR VEAS, *A Comparative Analysis of the Case Law of the European Court of Human Rights on the Rights against Self-Incrimination*, in *Revista Brasileira de Direito Processual Penal*, 2022, p. 869 ss., in particular p. 870. See US Supreme Court, 25 March 1956, case no. 58, *Ullmann v United State of America*, 350 U.S. 422.

[5] See D. TASSINARI, *Nemo Tenetur Se Detegere. La libertà dalle autoincriminazioni nella struttura del reato*, *op. cit*., p. 15 and the references cited therein: J. H. WIGMORE, *Nemo tenetur seipsum prodere*, in *Harvard law review*, 1891, p. 71 ss.; G. HOROWITZ, *The privilege against self-incrimination. How did it originate?*, in *Temple Law Quarterly*, 1958, p. 123 ss.; L.W. LEVY, *The right against self-incrimination*, New York, 1968. See also H. STEWART, *The privilege against self-incrimination: reconsidering Redmayne's rethinking*, in *The International Journal of Evidence & Proof*, 2016, p. 95 ss.; O. S. KERR, *Compelled decryption and the privilege against self-incrimination*, in *Texas Law Review*, 2018, pp. 767-799.

[6] See D. TASSINARI, *Nemo Tenetur Se Detegere. La libertà dalle autoincriminazioni nella struttura del reato*, *op. cit*., p. 22.

[7] Ibidem, p. 7.

[8] See V. GREVI, *Nemo Tenetur se detegere. Interrogatorio dell'imputato e diritto al silenzio nel processo penale italiano*, Milano, 1972, p. 83. See also A. G. GLESS, *Self-incrimination privilege development in the*

post-World War II era, the principle of *nemo tenetur se detegere* has become entrenched within European constitutions[9] risen from the ashes of authoritarian regimes, in supranational sources, as well as in the jurisprudence of constitutional courts, the ECtHR and the Court of Justice of the European Union (CJEU).

From the perspective of the rationale and purpose of the *nemo tenetur se detegere* principle, two narratives can be highlighted. First, it is argued that *nemo tenetur se detegere* aims to protect innocent people by hindering authorities from abusing their prerogatives during criminal proceedings. One of the possible abuses would be the exercise of coercion on the accused to confess or cooperate with the investigation. From this point of view, the principle would stand as a limit to the power of the State, prohibiting any use of coercion against the accused, thus preventing possible forced confessions[10]. Namely, when coercion is used to obtain a confession from a suspect, there is no guarantee that the latter is testifying truthfully based on his knowledge and not falsely out of fear of his accuser.[11] A second narrative holds that the purpose of *nemo tenetur se detegere* is not exclusively about protecting the innocent from conviction but rather about safeguarding the integrity of the justice system, since even the guilty cannot be forced to incriminate himself. In fact, a justice system allowing authorities to force people to incriminate themselves would infringe the principle of due process and the rule of law.[12] Furthermore, the right against self-incrimination aims to prevent the authority from placing the accused in the cruel dilemma of choosing between contributing to his own conviction, and lying, which in some legal systems means committing perjury or remaining silent.[13]

It can be inferred from the above that, for quite some time, *nemo tenetur se detegere* has been associated with the guarantees that ensure the protection of the accused in criminal proceedings. However, the U.S. Supreme Court was the first to rule that the right to silence has a broader personal scope. On the contrary, the right in question shall be granted regardless of whether the person concerned is the accused in the context of a criminal investigation/procedure.[14] Therefore, the key matter is not related to the specific type of proceeding in which the evidence was obtained through coercion, but its criminal

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nineteenth-century federal courts: questions of procedure, privilege, production, immunity and compulsion, in *American journal of legal history*, 2001, pp. 391-467.

[9] Within the Italian Constitution, the principle of *nemo tenetur se detegere* emerges from the following norms: namely, the presumption of innocence in Art. 27, co. 2, Const. ita.; the right of defense in Art. 24, co. 2, Const. ita.; and the principle of due process in Art. 111 Const. ita. Other key provisions of the Italian legal system are Article 51 of the Criminal Code and Article 384 of the Criminal Code. See E. INFANTE, *Nemo Tenetur se detegere in ambito sostanziale: fondamento e natura giuridica*, in *Rivista trimestrale di Diritto penale dell'economia*, 2001, pp. 831-855, p. 847.

[10] See J. ESCOBAR VEAS, *A Comparative Analysis of the Case Law of the European Court of Human Rights on the Rights against Self-Incrimination*, *op. cit.*, p. 876; E. N. GRISWOLD, *The Fifth Amendment Today*, in Harvard, 1995, pp. 10-19.

[11] See C. G. GEYH, *The testimonial component of the right against self-incrimination*, in *Catholic University Law Review*, 1987, pp. 611-642, p. 616.

[12] See J. ESCOBAR VEAS, *A Comparative Analysis of the Case Law of the European Court of Human Rights on the Rights against Self-Incrimination*, *op. cit.*, p. 876. See US Supreme Court, 19 January 1966, no. 52, *Tehan c. Schott*, 382 U.S. 406, 415.

[13] Ibidem, p. 617. See US Supreme Court, 15 June 1964, no. 138, *Murphy c. Waterfront Comm'n*, 378 U.S. 52, 55.

[14] See J. ESCOBAR VEAS, *A Comparative Analysis of the Case Law of the European Court of Human Rights on the Rights against Self-Incrimination*, *op. cit.*, p. 879. See C. E. MOYLAND, J. SOSTENSTENG, *Privilege against Compelled Self-incrimination*, in *William Mitchell Law Review*, 1990, pp. 249-303, p. 279. See US Supreme Court, 11 January 1892, *Counselman c. Hitchcok*, 142 U.S. 562.

relevance. This is the assessment that shall be undertaken by courts confronted with the admissibility of the right not to self-incriminate. Accordingly, a person called to testify in a civil, labour or administrative proceeding may refuse to answer a question asked in that proceeding if the answer to it would lead to self-incrimination.[15] The above interpretation is reasonable since, otherwise, the authority could circumvent the right not to self-incriminate simply by forcing individuals to testify in civil or administrative proceedings and then using the information thus obtained in subsequent criminal proceedings against them.[16]

In the light of the reflections above, the paper will examine the development of *nemo tenetur se detegere* in the European multilevel legal system. In particular, it will deal with the evolution of the principle in the jurisprudence of both the ECtHR and the CJEU and, in so doing, it will outline the similarities and differences between the two strands of jurisprudence.

2. The principle of *nemo tenetur se detegere* as an extension of due process guarantees according to the ECtHR

The UN International Covenant on Civil and Political Rights, in Article 14(3)(g), provides that "in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality [...] not to be compelled to give evidence against himself or to confess guilt".

Instead, the European Convention on Human Rights (ECHR) does not include explicitly in any of its provisions neither the right not to self-incriminate[17] nor the right to silence. Such rights have been recognised, nevertheless, by the Court of Strasbourg[18], according to which "anyone charged with a criminal offence, within the autonomous meaning of this expression in Article 6 (art. 6), [has the right] to remain silent and not to contribute to incriminating himself".[19] The ECtHR drew these rights from the notion of fair trial in Article 6(1) ECHR, protecting the applicant from abusive coercion by the authority, also to avoid possible miscarriages of justice.[20] In this way, the ECtHR was

[15] See J. ESCOBAR VEAS, *A Comparative Analysis of the Case Law of the European Court of Human Rights on the Rights against Self-Incrimination*, *op. cit.*, p. 879.
[16] Ibidem, p. 880.
[17] See A. BALSAMO, *The Content of Fundamental Rights*, in R. E. KOSTORIS (ed), *Handbook of European Criminal Procedure*, Cham, 2018, pp. 99- 170, p. 117.
[18] For an in-depth discussion of *nemo tenetur se detegere* in the ECtHR case law see M. REDMAYNE, *Rethinking the privilege against self-incrimination*, in *Oxford Journal of Legal Studies*, 2007, pp. 209-232, p. 214-215; G. CANESCHI, *Il diritto a un equo processo*, in S. LONATE, M. CERESA GASTALDO, *Profili di procedura penale europea*, Milano, 2021, pp. 125-224, p. 186-188.
[19] See ECtHR, 25 February 1993, case n. 10588/83, *Funke v France*, ECLI: CE: ECHR:1993:0225, para. 44. See also ECtHR, 29 June 2007, case n. 15809/02 and 25624/02, *O'Halloran and Francis v United Kingdom*, ECLI: CE: ECHR:2005:1025, para. 45; ECtHR, 8 February 1996, case n. 18731/91, *Murray v United Kingdom*, ECLI: CE: ECHR:1996:0208, para. 45. See Opinion of A.G. Pikamae, 27 October 2020, C-481/19, *D.B. c. CONSOB*, ECLI:EU:C:2020:861, para. 53. This Advocate General, in para. 53, recalls three criteria were, subsequently, adopted by the CJEU in Case C-489/10, *Bonda*, EU:C:2012:319: "the qualification of the offence in national law, the nature of the offence, and the degree of severity of the penalty in which the person concerned is likely to face".
[20] See ECtHR, *Funke v France*, cit. para. 44. In particular, in para. 44 of *Funke* it is affirmed that: "the Court notes that the customs secured Mr Funke's conviction to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences

able to develop a jurisprudence that prevented authorities from using evidence obtained by coercion in criminal proceedings, thus safeguarding the interests of both defendants and witnesses. This strand of rulings allowed the Strasbourg Court to balance the different prerogatives at stake. Indeed, the Court recognised that *nemo tenetur se detegere* prevents the State from coercing a person into self-incrimination. On the other hand, the enforcement of such principle does not preclude the State from gathering or obtaining real evidence.[21]

The principle not to incriminate oneself applies to criminal proceedings for all types of crimes, from the most intrusive to the least intrusive for the individual. Indeed, the ECtHR, in the *Saunders* case, affirms that "the general requirements of fairness contained in Article 6 (art. 6), including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction from the simplest to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings. It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the Serious Fraud Office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover, the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right".[22] The common thread is the protection of persons facing criminal charges against abusive coercion by the authorities. Accordingly, as part of the examination to determine whether Article 6 ECHR has been violated, the ECtHR first assesses whether coercion has been exercised to obtain evidence and then verifies whether such coercion should be deemed as unlawful. Hence, *nemo tenetur se detegere* is applicable at the stage of police questioning, during which every accused has the right to be informed of the right not to testify against himself or herself[23]. Moreover, the right not to contribute to one's own incrimination is closely related to the presumption of innocence: it would be contradictory to demand an evidential element from a person presumed to be not involved in the act for which is being prosecuted. In this way, the jurisprudence of the ECtHR shields the individual from abusive coercion committed by the authorities, helping to avoid errors of justice and ensure the fair enforcement of Article 6 ECHR.[24] Along these lines, the principle of *nemo tenetur se detegere* implies that, in a

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he had allegedly committed. The special features of customs law […] cannot justify such an infringement of the right of anyone "charged with a criminal offence", within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself. There has accordingly been a breach of Article 6 para. 1 a)". See, Trechsel S., *Human Rights in Criminal Proceedings*, Oxford, 2005, p. 340; Berger M., *Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence*, in *European Human Rights Law Review*, 2007, pp. 514-533, p. 516.

[21] See J. ESCOBAR VEAS, *A Comparative Analysis of the Case Law of the European Court of Human Rights on the Rights against Self-Incrimination*, cit., p. 894.

[22] See ECtHR, 17 December 1996, case no. 19187/91, *Saunders v United Kingdome*, ECLI: CE: ECHR:1994:0510, para. 74.

[23] See ECtHR, 13 September 2016, joined case no. 50541/08, 50571/08, 50573/08, 40351/09, *Ibrahim et altri v United Kingdom*, ECLI: CE: ECHR:2016:0913J, para. 272.

[24] See ECtHR, *John Murray v United Kingdom*, cit. para. 45. Indeed, in the *Murray case*, at para. 45, the Court affirms that "although not specifically mentioned in Article 6 (art. 6) of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6) (see the Funke judgment cited above, loc. cit.). By providing the accused with protection

given criminal case, the prosecution shall seek to ground its arguments without resorting to evidence obtained by coercion or pressure, i.e., regardless of the defendant's will.[25] As a matter of fact, coercion is incompatible with the dictates of Article 6 ECHR when it has the effect of depriving the right to silence of its very substance[26]. According to the ECtHR, the decisive aspect in the context of this assessment is the use that is made during criminal proceedings of the elements obtained under threat. In the *Saunders* case, the Court observes that "testimony obtained under compulsion which appears on its face to be of a non-incriminating nature - such as exculpatory remarks or mere information on questions of fact - may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury the use of such testimony may be especially harmful. It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is put during the criminal trial".[27] In other words, in the opinion of the ECtHR, the key aspect in the context of this assessment is the use that is made during criminal proceedings of the elements obtained under duress in the context of such proceedings and outside them.[28]

The Court of Strasbourg has distinguished three types of situations that may give rise to abusive coercion contrary to Article 6 ECHR. First, the accused's right to silence is breached if the investigating authorities threaten the individual with sanctions if he or she does not testify or testifies[29] or if they punish him for refusing to do so.[30] The second situation of violation occurs when physical or psychological pressure, often in the form of treatment inadmissible according to Article 3 ECHR, is exerted to obtain confessions or material evidence.[31] Namely, the interpretation provided by the ECtHR prevents the use of statements extracted using torture or inhuman/degrading treatment contrary to Article 3 ECHR. However, automatic unfairness of the proceedings does not follow from this because the Strasbourg Court reserves the right to examine whether the confession

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against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6 (art. 6)".

[25] See ECtHR, Sounders *v United Kingdom*, cit. para. 68. See ECtHR, 10 March 2009, case no. 4378/02, *Bykov c. Russia*, ECLI: CE: ECHR:2009:0310, para. 92.

[26] See ECtHR, *Murray v United Kingdom*, cit., para. 49.

[27] See ECtHR, *Saunders v United Kingdom*, cit., para. 71.

[28] See ECtHR, 8 Avril 2004, case no. 38544/97, *Weh v Austria*, ECLI: CE:ECHR:2004:0408, paras. from 42 to 44. See also CJEU, 2 February 2021, Case C-481/19P, *DB* v. *Consob*, ECLI:EU:C:2020:861, para. 102.

[29] See ECtHR, 14 October 2010, case no. 1466/07, *Brusco v France*, ECLI: CE: ECHR:2010:1014, para. 54.

[30] See ECtHR, 21 December 2000, case no. 34720/97, *Heaney and McGuinness v Ireland*, ECLI: CE: ECHR:2000:1221, para. 40. In particular, it is affirmed therein: "The Court recalls its established case-law to the effect that, although not specifically mentioned in Article 6 of the Convention, the rights relied on by the applicants, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right in question is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention".

[31] See ECtHR, 11 July 2006, case no. 54810/00, *Jalloh v Germany*, ECLI: CE: ECHR:2006:0711, para. 96; 1° June 2010, case no. 22978/05, *Gäfgen v Germany*, ECLI: CE: ECHR:2010:0601, para. 164.

had a unique and determinate influence in the judgement.[32] The third concerns the authorities' use of subterfuge to extort information that they failed to obtain by questioning.[33] Freedom of choice is compromised when the authorities use a stratagem to get confessions or other incriminating statements from the suspect who has chosen to remain silent during interrogation and when confessions or statements thus gathered are produced as evidence at trial.[34]

Furthermore, testimony achieved under coercion that initially appears to lack incriminating character, such as declarations exonerating their author or mere information on matters of fact, may later be used in a criminal case to support the prosecution's case, for example, to contradict or discredit other statements made by the accused or his testimony at the trial stage, or even to undermine his reliability.[35]

The right to silence can also be invoked in situations in which the incriminating evidence is derived from contributions other than declaratory ones, that is, when it involves the trial use of elements that can be obtained by the accused using coercive powers, but which are beyond his or her control (e.g., taking of biological material with a view to DNA testing). Although a violation of procedural fairness cannot be ruled out in these cases, in its assessment the ECtHR takes into consideration the degree and nature of coercion endured, the existence of safeguards in the way the elements were obtained, and their evidentiary weight.[36] The Strasbourg Court, therefore, does not consider the taking of biological samples to violate *nemo tenetur se detegere*, if it does not involve treatment contrary to respect for human dignity and the right to health.

According to the ECtHR, the right to silence is not absolute.[37]To ascertain whether a particular procedure has deprived the right not to contribute to its own incrimination of its own substance, the Court must examine the nature and degree of coercion, the existence of appropriate safeguards in the procedure, and the use that is made of the evidence thus obtained.[38] On the one hand, a conviction should not be based exclusively or primarily on the defendant's silence or his refusal to answer certain questions or to testify. On the other hand, the right not to answer does not preclude taking into

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[32] See ECtHR, 26 June 2021, joined case no. 73313/17, 20143/19, *Zličić v Serbia*, ECLI: CE: ECHR:2021:0126, paras. 119 e 120. Furthermore, in *Gäfgen v. Germany*, cit., para. 179, it is stated that the appellant had benefited from a fair trial, as the judgment had been based on the new confession made at trial and some material evidence unrelated to the statements extracted during interrogation. See ECtHR, 19 February 2015, case no. 57980/11, *Zhyzitskyy v Ucraina*, ECLI: CE:ECHR:2015:0219, paras. 64 e 66, the ECtHR conversely that the violation involves a violation of procedural fairness, without the need to verify the evidentiary weight of the coerced confession.

[33]See ECtHR, 5 November 2002, case no. 48539/99, *Allan v United Kingdom*, ECLI: CE:ECHR:2002:1105, para. 49.

[34] Ibidem, para. 50, where the Court affirms that the right to silence "serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit, from the suspect, confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial".

[35] See ECtHR, *Ibrahim and others v United Kingdom*, cit. para. 268.

[36] See ECtHR, *Jalloh v Germany*, cit., para. 101, the Court affirmed the violation of Article 6 ECHR. To the contrary, see ECtHR, 25 September 2001, case no. 44787/98, *P.G. and J.H. v United Kingdom*, ECLI:CE:ECHR:2001:0925, para. 80.

[37] See ECtHR, *John Murray v United Kingdom*, cit., para. 47. Indeed, the Court affirms: "the right to silence that the question whether the right is absolute must be answered in the negative".

[38] See ECtHR, *Jalloh v Germany*, cit., para. 101; *O'Halloran and Francis v United Kingdom*, cit., para. 55; *Bykov c. Russia*, cit., para. 104; *Ibrahim and others v United Kingdom*, cit., para. 269.

consideration the person's silence in situations that certainly require an explanation on his part to assess the strength of the evidence against him. Therefore, it cannot be said that a defendant's decision not to answer throughout the criminal proceedings must necessarily be without consequences.[39] Although a conviction may not be based exclusively or predominantly on a refusal to answer, it is not against the dictate of the ECHR to use silence for assessing the persuasive force of other inculpatory evidence, provided that additional safeguards are in place such as the notice to the accused of the consequences that may result from a refusal to answer, as well as the right to confer with his or her defence attorney.[40]

3. The ECtHR and the application of the principle of *nemo tenetur se detegere* to administrative proceedings

The ECtHR has recognised the existence of *nemo tenetur se detegere* outside criminal proceedings.[41] It did so about investigations formally qualified as administrative under domestic law but ascribed to criminal law by the Strasbourg Court.[42]

Regarding the material scope of Article 6 of the ECHR, as known, the notion of penalty of a "criminal nature" has been the subject of an expansive interpretation by the ECtHR to include not only proceedings that may result in the imposition of criminal offences pursuant to national law, but also those which, although qualified by the latter as administrative, fiscal, or disciplinary, are "criminal" in substantive terms. Such an autonomous interpretation, and the related departure from domestic legal orders, for ascertaining whether Article 6 shall apply, is based on the criteria developed since the *Engel* judgment[43]. These criteria are: *i*) the qualification of the offense in national law; *ii*) the nature of the offense; *iii*) and the nature and degree of severity of the penalty.

As to the first condition, regarding the qualification of the infringement under national law, it is not relevant where the sanction is qualified as administrative. In the *Engel* case it is stated that "it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law,

[39] See ECtHR *Jonh Murray v United Kingdom*, cit., para 47.

[40] Ibidem, para. 66. Moreover, to ascertain whether drawing conclusions unfavorable to the accused from his silence violates Article 6, one must consider all the circumstances, considering in particular the weight the domestic courts have given to them in assessing the evidence and the degree of coercion inherent in the situation (see ECtHR, *Jonh Murray v. United Kingdom*, cit., para. 47). In other words, adequate safeguards must be put in place so that there is no adverse finding beyond what Article 6 ECHR allows. In the jury trial, the instructions given to the jury by the judge regarding adverse inferences are particularly relevant in this regard. See also ECtHR, 7 Avril 2015, case no. 16667/10, *O'Donnell v United Kingdom*, ECLI:CE:ECHR:2015:0407, para. 51.

[41] See J. ESCOBAR VEAS, *A Comparative Analysis of the Case Law of the European Court of Human Rights on the Rights against Self-Incrimination*, *op. cit.*, p. 883; L. BACHMAIER, *New Crime Control Scenarios and the Guarantees in Non-Criminal Sanctions: Presumption of Innocence, Fair Trial Rights, and the Protection of Property*, in U. SIEBER, *Prevention, Investigation, and Sanctioning of Economic Crime. Alternative Control Regimes and Human Rights Limitations*, Maklu, 2019, pp. 299-334, p. 307; G. LASAGNI, *Prendendo sul serio il diritto al silenzio: commento a Corte costituzionale, ordinanza 10 maggio 2019*, n. 117, in *Diritto Penale Contemporaneo*, 2020, pp. 135-162, p. 136-137.

[42] See L. BACHMAIER WINTER, *The shift from criminal to administrative sanctions: the quest for fair trial rights in new crime control scenarios in the ECthHR case law*, in M. DONINI, L FOFFANI (a cura di), *La "materia penale" tra diritto nazionale ed europeo*, Torino, 2018, pp. 37-62.

[43] See ECtHR, 8 June 1976, case no. 5100/71, 5101/71; 5102/71; 5354/72; 5370/72, *Engel et a. v Nederland*, ECLI:CE:ECHR:1976:0608, para. 82.

disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States".[44]

For what concerns the second condition, a tort will generally be recognised as criminal law related if three cumulative requirements are met: a) where the sanction under national law affects the general public and not a well-defined target group[45]; b) where the definition of such a sanction obeys the purpose of prevention and repression[46], instead of aiming solely at the repair of property damage[47]; c) and where the national penalty provision safeguards a legal interest whose protection is normally guaranteed by criminal law[48].

As to the third condition[49], deprivation of liberty penalties are, by definition, criminal penalties[50], like those financial penalties that may result in an accessory prison sentence in the event of default or resulting in a criminal record entry[51].

The second and third conditions are, in principle, alternatives. However, a different approach may be adopted if a separate analysis of each criterion does not allow for a clear conclusion as to the existence of a criminal charge.[52] In other words, if the assessment regarding the criteria above shows that the administrative proceedings at issue may give rise to a sanction of a criminal nature, it is the full set of guarantees related to the criminal law dimension underpinning Article 6 ECHR, including *nemo tenetur se detegere*, that applies. Indeed, when the ECtHR finds that the sanction is criminal in nature, no doubts arise on the applicability of the right to silence to the proceedings at hand since such right is an inescapable consequence of the qualification of a sanction as a penalty belonging to criminal law.[53] In any case, as CJEU Advocate General Priit Pikamäe also recently pointed out, in the dialogue, carried out often in implicit terms, between the two European

[44] Ibidem, para. 82.
[45] See ECtHR, 2 September 1998, case a no. 26138/95, *Lauko v Slovakia*, ECLI:CE:ECHR:1998:0902, para. 58.
[46] See ECtHR, 25 June 2009, case no. 55759/07, *Maresti v Croatia*, ECLI:CE:ECHR:2009:0625, para. 59.
[47] See ECtHR, 23 November 2006, case no. 73053/01, *Jussila v Finland*, ECLI: CE:ECHR:2006:1123, para. 38.
[48] See ECtHR, 4 March 2014, case no. 18640/10, *Grande Stevens and others v Italy*, ECLI: CE:ECHR:2014:0304, para. 90.
[49] Ibidem, para. 98.
[50] See ECtHR, *Engel and others v Nederland*, cit., para. 82.
[51] See ECtHR, 31 May 2011, case no. 3699/08, *Žugić v Croatia*, ECLI: CE: ECHR:2011:0531, para. 68.
[52] See ECtHR, *Jussila v Finland*, cit., paras. 30 and 31. In particular, in the *Jussila* case it is observed, at para. 31, that "the second and third criteria are alternative and not necessarily cumulative. It is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere (ECtHR, 15 July 2002, cases no. 39665/98, and 40086/98, *Ezeh and Connors v the United Kingdom*, ECLI:CE:ECHR:2002:0715, para. 86). The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character (ECtHR, 21 February 1984, case no. 8544/79, *Öztürk v. Germany*, ECLI: CE:ECHR:1984:0221,para. 54). This does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (ECtHR *Ezeh and Connors*, cit., para. 86)".
[53] See ECtHR, *Grande Stevens and others v Italy*, cit., para. 101, in which the ECtHR concludes its assessment regarding the applicability of Article 6 ECHR as follows: "The Court considers that the fines imposed on the plaintiffs are criminal in nature, so that Article 6, para. 1, applies in this case from its criminal aspect".

courts[54], the right to silence has been recognised several times for persons who had failed to answer questions from administrative authorities in proceedings concerning administrative offenses.[55]

In the light of the *Engel* criteria, therefore, it is possible to conclude that when the penalties are qualified as criminal, the recognition of the right to silence is automatic[56], and the same holds true for the right to not self-incriminate. In addition, the ECtHR has been called upon to rule on the compatibility with the ECHR of proceedings not respecting the guarantees recognised by Article 6 ECHR which are criminal in nature. Hence, due process guarantees, including the principle of nemo *nemo tenetur se detegere*, have been extended to administrative sanction proceedings, mostly related to tax or market abuse proceedings, which are imbued with criminal law facets. Most notably, the Court found a violation of Article 6 ECHR in a case in which a person, against whom an administrative investigation relating to tax offenses was pending, had repeatedly failed to respond to requests for clarification made by the authority that was conducting the investigation and had been punished for this conduct with fines[57]. In this regard, the ECtHR emphasized the punitive nature of penalties applicable by the administrative authority to tax violations under investigation. According to the Strasbourg Court, the right to silence and not self-incriminate, traceable to Article 6 ECHR, includes the right of anyone subjected to an administrative procedure that could result in the imposition of sanctions of a punitive nature against him, not to be compelled to provide answers from which his responsibility could arise, under threat of sanction in case of non-compliance[58]. Moreover, the ECtHR has based its approach on the assumption that the principle of *nemo tenetur se detegere*, while not amounting to a total immunity for conduct motivated by a desire to avoid criminal investigations against oneself, is not compatible with the provision of sanctions for refusing to answer questions formulated by administrative bodies in the context of parallel or pre-trial criminal proceedings if those statements are likely to be used in the criminal trial as evidence[59].

4. CJEU and the *nemo tenetur se detegere* principle

The design of the right not to incriminate oneself and—more specifically—of the right to remain silent within the framework of the EU legal system is inextricably linked to the ECtHR case law. Although not explicitly mentioned in the Charter of Fundamental Rights, the *nemo tenetur se detegere* can undoubtedly be included among the guarantees that Articles 47(2) and 48(2) of the CFREU provide for fair trial and presumption of

[54] See Opinion of A.G. Pikamäe, *DB v CONSOB*, cit., para. 60. See E. HANCOX, *The Right to Remain Silent in EU Law*, in *Cambridge Law Journal*, 2021, pp. 228-231, p. 231.
[55] See ECtHR, 4 October 2005, case no. 6563/03, *Shannon v United Kingdom*, ECLI:CE:ECHR:2005:1004.
[56] See Opinion of A.G. Pikamäe in *DB v CONSOB*, cit., para. 61.
[57] See ECtHR, 3 May 2001, case no. 54273/00, *J. B. v Switzerland*, ECLI:CE:ECHR:2001:0802, paras. from 63 to 71.
[58] See C. BONZANO, *Nemo tenetur se detegere e procedimento amministrativo per la Consulta, la sanzione punitiva impone il due process of law*, in *Processo penale e giustizia*, 2019, pp. 1448-1459, p. 1452-1453.
[59] See ECtHR, 27 Avril 2004, case no. 55721/07, *Kensal v United Kingdom*, ECLI:CE:ECHR:2004:0427, para. 29.

innocence, following a reconstruction grounded in the so-called homogeneity clause set forth in Article 52(3) of the Charter.[60]

As known, Article 52(3) prescribes that where the rights enshrined in the CFREU correspond to those recognised by the ECHR, the former are to be regarded as having the same scope and meaning of those conferred by the Convention. And this is precisely the case with Articles 47(2) and 48(2) of the Charter, whose counterparts are the first and second paragraphs, respectively, of Article 6 ECHR. What has been said, then, is further reflected in the explanations regarding the Charter, which, as far as the right to a fair trial is concerned, clarify that in the EU legal system the protections of article 6(1) ECHR are fully applicable, while with regard to the presumption of innocence, they go so far as to specify that it has "identical meaning and scope" to the equivalent conventional provision.[61]

Once established such connection between the provisions of the Charter and those of the ECHR, it is then possible to take up what was said *supra* (para. 2): despite the wording of Article 6(1)(2) does not expressly mention the *nemo tenetur* principle, the jurisprudence of the Strasbourg Court has repeatedly considered this principle crucial to the notion of a fair trial in Article 6 ECHR and, by that means, it can certainly be brought under the provisions of Articles 47(2) and 48(2) of the Charter.

The reconstruction of the normative coordinates relating to the principle of *nemo tenetur se detegere* in primary law is not sufficient, however, to grasp its actual scope, which can in fact be fully appreciated only by considering its concrete manifestation in the case law of the CJEU. Unlike the ECtHR, however, the Luxembourg judges, for years, have only been concerned with one of the rights encompassed in the principle in consideration, and with exclusive reference to competition law: the right to silence[62]. It is just in more recent times, namely with the *D.B. v Consob* of 2021,[63] that one may witness the recognition of *ius tacendi* also in administrative proceedings that lead to the imposition of sanctions which are criminal in nature.

4.1. Origins

[60] Extremely effective on this point is the reconstruction made by A.G. Pikamäe in his opinion regarding *DB v Consob,* cit. It is worth noting that in Case C-660/21, *K.B. e F.S.*, ECLI:EU:C:2023:498, the CJEU has highlighted the relevance of both articles 47 and 48 of the CFREU in the protection of the right to remain silent.

[61] See Opinion of A.G. Pikamäe *DB v Consob*, cit., para. 50.

[62] For an overview on the right to silence in this field see M. VEENBRINK, *The Privilege against Self-incrimination in EU competition law: a deafening silence?*, in *Legal Issue of Economic Integration*, 2015, pp. 119-142.

[63] See CJEU, 2 February 2021, Case C-481/19P, *DB v Consob*, ECLI:EU:C:2021:84. Among the first commentaries to the judgement see: M. BONNEURE, *Arrêt « Consob »: délit d'initié et droit au silence des personnes physiques et morales (CJUE, 2 février 2021, aff. C-481/19)* in *Journal de droit européem*, 2021, pp. 387-389; G. HARDY, *Le droit de ne pas s'auto incriminer versus l'obligation de coopérer avec les autorités publiques: des questions toujours en suspens après l'arrêt Consob, CJUE, 2 février 2021, Consob, aff. C 481/19,* in *Revue des Affaires européennes*, 2021, pp. 205-215. See also M. SAFJAN, *Derecho a guardar silencio de una persona física sometida a una investigación administrativa por uso de información privilegiada por una infracción que conlleve sanciones administrativas de carácter penal*, in *La Ley Uniòn Europea*, 2021, pp. 11-34; L. MARIN, *Tradizioni Costituzionali comuni costruite dal basso: la sentenza D.B. c. Consob sul diritto al silenzio* in *Quaderni Costituzionali*, 2021, pp. 227-230.

The right to silence is affirmed by the CJEU for the first time in the *Orkem v Commission* judgment[64] of the late 1980s. The dispute stemmed from an appeal of a Commission decision under then Article 173 EEC (now Article 263 TFEU), in support of which it was—among other grounds—alleged that the applicant's rights of defence had been violated on the assumption that the Commission had required the latter to testify against itself in an investigation on the existence of agreements or concerted practices contrary to competition rules.[65] In more detail, Orkem argued that it had been forced by the Commission to incriminate itself, thus violating the "general principle that no one may be compelled to give evidence against himself, which forms part of Community law in so far as it is a principle upheld by the laws of the Member States, by the European Convention for the Protection of Human Rights and Fundamental Freedoms […] and by the International Covenant on Civil and Political Rights".[66]

After noting that Regulation EEC no. 17/1962[67] did not explicitly mention the right to silence among the guarantees accorded to companies subject to investigations—who rather appeared to be burdened with an obligation to cooperate actively—, the Court proceeded to assess whether the general principles of Community law, more specifically fundamental rights, required the recognition of a right not to incriminate oneself in proceedings aimed at establishing the existence of infringements of competition rules.[68] In making such assessment, the CJEU noted that from the perspective of national legal systems, the right not to incriminate oneself was recognised only for defendants in criminal proceedings, thus excluding that it could be considered a principle common to the legal traditions of Member States when legal persons were taken into consideration, especially for offenses of an economic nature. Moreover, the CJEU pointed out that neither a literal interpretation of the ECHR nor the jurisprudence of the ECtHR could serve as a means to infer the existence of a right not to testify against oneself in respect to undertakings involved in competition law matters. Finally, also Article 14 of the ICCPR was not considered relevant, since it only related "to [natural] persons accused of a criminal offence in court proceedings".[69]

At the outcome of this *pars destruens*, in which it was established that the right to silence does not apply in administrative proceedings relating to competition law, the Court proceeded to elaborate a *pars costruens* in its reasoning and, for that matter, identified several guarantees implied in the right of defence. Moving from the case law,[70] the CJEU reaffirmed that even in proceedings that were not of a sanctioning nature, and thus in hypotheses such as competition investigations, certain rights of defence had to be respected.[71] From this, in particular, also followed the prohibition for the Commission "to 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

[64] See CJEU, 18 October 1989, Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387. For a specific focus on the relevance of *Consob* judgement in the field of market abuse, see: H. ANDERSSON, *Fighting insider dealing at all costs? – due process aspects on the EU market abuse regime*, in *Capital Markets Law Journal*, 2022, pp. 196 – 211, in particular from p. 206 onward.
[65] Ibidem, para. 1-3.
[66] Ibidem, para. 18.
[67] Council Regulation 17/1962, *First Regulation implementing Articles 85 and 86 of the EEC Treaty*.
[68] See CJEU, *Orkem*, cit., para. 26-28.
[69] Ibidem, para. 29-31.
[70] See CJEU, Joined Cases C-46/87 and C-227/88, *Hoechst AG v Commission*. ECLI:EU:C:1989:337.
[71] See CJEU, *Orkem*, cit., para. 33-34.

to prove".[72] In the *Orkem* judgment's reasoning, the CJEU, on one hand, upheld the obligation of cooperation of the undertaking subject to an investigation to "provide all necessary information concerning such facts as may be known to it" and to disclose all the relevant documents in its possession, even when these latter are suitable for establishing a possible anti-competitive conduct.[73] On the other hand, the Court tempered such approach by affirming a *narrow* right to remain silent inasmuch as it applied only with regard to questions that could lead straightforwardly to self-incrimination.

Now, while such a reconstruction had the merit of recognizing the existence of this guarantee in competition law, hitherto untrodden by the ECtHR case law, it also gave rise, in practice, to a minor right to silence,[74] partly limited in its scope and not fully comparable to the guarantees associated to criminal law[75]. This would also be confirmed in the case law post-1989 judgment, again pertaining to competition matters. Indeed, those rulings, including the recent *Qualcomm* case[76], are rooted in the reasoning outlined in the *Orkem* judgment.

As it had already been the case in *Orkem*, the starting point of this strand of judgments is the recognition of the European Commission's power to request to an enterprise the disclosure of all facts of which it is aware, followed by the imposition of an obligation to answer all questions concerning merely factual aspects and communicate any relevant document in its possession.[77] At the same time, however, it was also stated that the Commission, in the exercise of its duties, had to "ensure that the rights of the defence are not impaired" in investigative proceedings likely to lead to evidence proving the illegality of an enterprise's conduct and thus its liability.[78] Among these rights of defence it was to be included also the right to refrain from providing answers that would result in an admission of liability by the enterprise subject to the investigation,[79] as already clarified in the *Orkem* judgment.

The outcome of this line of reasoning, sometimes made explicit by the CJEU[80], other times only referred to in a concise manner, was the consistent reaffirmation in almost identical terms of the principle whereby "the Commission is entitled, if necessary by adopting a decision, to compel an undertaking to provide all necessary information concerning such facts as may be known to it but 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".[81]

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[72] Ibidem, para. 35.
[73] Ibidem, para. 34.
[74] See S. CONFALONIERI, *Il nemo tenetur se detegere nel labirinto delle fonti*, in *Diritto Penale Contemporaneo*, 2020, pp. 108-141, p. 114 evokes a kind of minor character of the right to silence outlined by the jurisprudence of the Court of Justice since the *Orkem* case.
[75] See also *infra*, para. 5. As it will be seen below, the scope of the right to silence in criminal proceedings is broader than the *ius tacendi* recognised by the CJEU in the field of competition law. This latter, indeed, only covers answers amounting to a self-incrimination.
[76] Indeed, the latest ruling in chronological order confirming *Orkem*'s principles is CJEU, 28 January 2021, Case C-466/19 P, *Qualcomm v Commission*, ECLI:EU:C:2021:76.
[77] See CJEU, 7 January 2004, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission*, ECLI:EU:C:2004:6, para. 61-62.
[78] Ibidem, para. 63.
[79] Ibidem, para. 65
[80] Such as in the *Aalborg* case mentioned above.
[81] See CJEU, 25 January 2007, Case C-407/04 P, *Dalmine SpA v Commission*, ECLI:EU:C:2007:53, para. 34. In similar terms see CJEU, 29 June 2026, Case C-301/04 P, *Commission v SGL Carbon AG*,

It is worth nothing, therefore, that also the case law after the *Orkem* ruling confirmed the absence of a full right to remain silent, with the consequence that the company under investigation, if questioned on purely factual issues, would still have to provide its answers. This was, however, without prejudice to the possibility of then clarifying that the information gathered regarding the facts was to be interpreted differently by the Commission.[82] In other words, as long as the investigated company is asked for information concerning facts known to it, or for the disclosure of documents at its disposal, it could not remain silent.[83] Silence, in fact, can be opposed only where the response would result in an admission of liability.

In essence, the protection afforded by the Court appears almost confined to a kind of peculiar distribution of the burden of proof, in which the Commission must prove the infringement, but on the basis of facts also communicated by the investigated company itself, which far from being able to remain silent can then contest their relevance or their aptitude to prove its own liability.

Thus defined, the perimeter of the right to silence drawn by the CJEU in competition matters appears somewhat limited in its scope.[84] Moreover, in no way the guarantees accorded to the enterprises under investigation seem to coincide with the broader principle of *nemo tenetur se detegere*, which also encompasses the right to remain silent[85]. On the one hand, indeed, the enterprise cannot decide to remain completely silent without consequences. On the other hand, moreover, it is also obliged to cooperate actively, having to communicate any documents in its possession, even if they are suitable for later forming the basis of a liability assessment.

Despite the fact that the features described so far made it different, at least partially, from the model of protection endorsed in the ECtHR jurisprudence, the EU General Court (GC) had the occasion to clarify that the right to silence in competition matters was in no way in conflict with Articles 47 (2) and 48 (2) of the Charter "which offer, in the specific field of competition law, protection equivalent to that guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms".[86] Indeed, the undertaking to which a request for information is addressed could well—in any subsequent proceedings or trial—prove that "the facts set out in its replies or the documents produced by it have a different meaning from that ascribed to them by the Commission",[87] without having the power to evade the requests to flaunt documents by objecting that "by complying with them it would be required to give evidence against itself". It follows that "it is only if a question cannot be classified as purely factual" that it necessary to ascertain whether its answer might lead the undertaking to admit "the

ECLI:EU:C:2006:432, para. 41-42 and 48; 14 July 2005, Joined Cases C-65/02 P and C-73/02 P, *ThyssenKrupp v Commission*, ECLI:EU:C:2005:454, para. 48-49; *Aalborg*, cit. para. 61-65.

[82] See CJEU, 20 February 2001, Case T-112/98, *Mannesmannröhren-Werke AG v Commission*, ECLI:EU:T:2001:61, para. 78.

[83] See Case T-297/11, *Buzzi v Commission*, ECLI:EU:T:2014:122, para. 62.

[84] See Opinions of A.G. Pikamäe, *DB v Consob*, para. 109.

[85] See *supra*, para. 1.

[86] See *Buzzi*, (n. 86), para. 62. Critical on this point is L. LONARDO, *The Veiled Irreverence of the Italian Constitutional Court and the Countours of the Right to Silence for Natural Persons in Administrative Proceedings*, in *European Constitutional Law Review*, 2021, pp. 707-723, p. 723.

[87] Ibidem and case 28 April 2010, T-446/05, *Amann & Söhne GmbH & Co. KG v Commission*, ECLI:EU:T:2010:65, para. 328.

existence of an infringement", the proof of which is instead up to the Commission.[88] Outside these hypotheses, the right to silence cannot come into play.

4.2. Broadening the *ius tacendi*: D.B. v. Consob

The stance by the CJEU on the right to silence and on the *nemo tenetur se detegere* described so far has experienced a turning point in the recent *Consob* judgement of 2021, delivered shortly after the aforementioned *Qualcomm* case. The question referred to the Luxembourg judges by the Italian Constitutional Court[89] dealt with the interpretation (and also the validity) of Article 14(3) of Directive 2003/6/EC and Article 30(1) of Regulation (EU) 596/2014, in respect to market abuse and insider dealing, asking in essence whether these should be interpreted as allowing "Member States not to sanction a natural person who, in the context of an investigation carried out against him by the competent authority [...] refuses to provide that authority with answers which may give rise to his liability for an offence punishable by administrative sanctions of a criminal nature".[90]

A simple reading of the preliminary reference illustrates what is the core of the question asked to the CJEU: is the level of protection offered with regard to administrative sanctions which are criminal in nature to be considered equivalent to that accorded to legal persons in competition law[91] or should it be considered comparable to that guaranteed to natural persons by the ECtHR in its case law according to the so-called *Engel* criteria?[92]

In this regard, A.G. Pikamäe ruled out the possibility of adopting a "tempered application of the right to remain silent in areas such as that involving the punishment of market abuse" for natural persons similar to that provided for legal persons.[93] And this is because the sanctions resulting from the implementation of Directive 2003/6 are now unequivocally qualified as criminal in nature, and therefore subject to the core of guarantees that the ECHR itself ensures in such cases. Even in the light of the homogeneity clause in 52(3) ECHR, then, for the Advocate General, the protection of the right to silence in administrative sanction proceedings had to "correspond to that determined in the relevant case law of the ECtHR and, in particular, as regards answers to questions concerning facts, in Corbet and Others v. France".[94]

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[88] See Trib., *Buzzi*, (n. 86), para. 63.

[89] It is worth mentioning D. SARMIENTO, *The Consob Way – OR how the Corte Costituzionale Taught Europe (once again) a Masterclass in Constitutional Dispute Settlement*, in *EU Law Live*, 54/2021, pp. 5-7, according to whom the Italian Constitutional Court followed a strategy based on "seduction" to guide the CJEU where desired (in the case at stake, to affirm the right to remain silent).

[90] See CJEU, *DB* v. *Consob*, cit., para. 34.

[91] The reference is-as seen *above-to* sanctions that although formally qualified as administrative, in substance are equated with criminal ones and therefore subject to the relevant statute of guarantees. See also V. MITSILEGAS, *EU Criminal Law*, London, 2022, p. 121.

[92] The right to remain silent, as recognised by the ECtHR is indeed broader than that acknowledged to legal persons by the CJEU in the *Orkem* case law. This latter, indeed, only covers those answers that would lead directly to an incrimination. The *ius tacendi* in the Strasbourg's jurisprudence (as seen above), instead, tends to cover any behaviour that could somehow imply a recognition of responsibility.

[93] See Opinion of A.G. Pikamäe, *DB v Consob*, cit., para. 107. This point is highlighted by A. SAKELLARAKI, *Halcyon Days for the Right to Silence: AG Pikamäe's Opinion in Case DB v Consob*, in *European Papers*, 5/2020, pp. 1543-1554, p. 1549.

[94] Ibidem, para. 117. The A.G. refers to ECtHR, judgement of the 19 March 2015, R. n. 7494/11, 7493/11 and 7989/11, *Corbet and Others v France*, ECLI:CE:ECHR:2015:0319. More in detail, according to the Strasbourg's judges, a breach of art. 6 (1) and (2) ECHR may occur only if the information obtained by

For its part, the Grand Chamber, after reaffirming the belonging of the right to silence to that group of guarantees tracing back to the broader concept of "fair trial" in Article 6 ECHR, and thus to Articles 47 and 48 CDFUE[95], first pointed out that the "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", and then stated *claris verbis* that "the right to silence cannot reasonably be confined to statements of admission of wrongdoing or remarks which directly incriminate the person questioned, both 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 penalty imposed on that person".[96]

At the same time, however, the EU judges made it clear that the right to silence cannot justify "every failure to cooperate with the competent authorities, such as a refusal to appear at a hearing planned by those authorities or delaying tactics designed to postpone it". A right attributable, therefore, to a defence *in the* proceedings, but not *from the* proceedings[97].

Having thus defined the content of this guarantee, the Court then addressed the question of the extension of its scope, clarifying that this right precludes penalties being imposed on such persons for refusing to provide the competent authority "with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability".[98]

A statement, that of the Grand Chamber, which in essence aligned the Union's jurisprudence with that of the ECtHR, clearing the field from possible misunderstandings on the existence of a "minor" right to silence in proceedings which are criminal in nature.

More specifically, the Luxembourg's judges clarified that the principles stated in the February 2021 judgment were not to be considered as being contrary to what had been affirmed in the past, including in the *Orkem* case. On the one hand, in fact, even then the CJEU had already recognised to companies involved in proceedings concerning the violation of competition law the right not to be "compelled to provide answers which might involve an admission on their part of the existence of such an infringement".[99] On the other hand, that same case law had until then dealt exclusively with "procedures that may lead to the imposition of penalties on undertakings and associations of undertakings", and was therefore unsuitable to be used in defining "the scope of the right to silence of natural persons".[100]

5. A dual consistency of the right to silence?

compelling the accused have an influence on the condemnation of the latter. See para. 30-38 of the judgement.

[95] See *supra* par. 2 and 4.

[96] See CJEU, *DB v Consob*, cit., para. 39-40.

[97] The implications of this statement will be examined infra.

[98] Ibidem, para. 45.

[99] While affirming, as seen above, that in any case these were obliged to provide information regarding the facts of which they had knowledge and to provide relevant documents in their possession, when even from these it could then be shown that conduct contrary to the competition rules had taken place. See *DB* v. *Consob*, cit., para. 46-47.

[100] Ibidem, para. 48.

In the aftermath of the 2021 ruling, the CJEU's case law appears to draw a scenario in which the right to silence has a dual consistency.[101]

In the first place, in fact, the *ius tacendi* can be recognised—according to the well-established case law dating back to the *Orkem* judgment—upon legal persons who are involved in proceedings relating to competition law, and who are "suspected" of having incurred a violation of those provisions. For such companies, the rule is that they are obliged to provide answers regarding facts of which they have knowledge, and also to hand over any documents in their possession, with the only—relevant—limitation that they cannot be forced to admit liability for an infringement of competition law.[102]

On the other hand, as far as individuals are concerned, the right to silence goes beyond the mere prohibition to confess the committed wrongdoing, as it is also extended to all information, including factual ones, that might later be placed (also in another proceeding) at the basis of the imposition of a sanction, either formally criminal or criminal in nature.[103]

Overall, the guarantees implied in the right to silence certainly appear to be narrower for legal persons than they are for natural persons, who must only abide by the *caveat*[104] of not invoking the *ius tacendi* to justify any failure to cooperate with the authorities, such as not appearing at a hearing or using expedients to delay the latter.[105] As a matter of fact, they may choose to remain silent whenever the elements that would be gathered could be used against them, also in a different proceeding falling within the scope of the *matière pénale.*[106]

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[101] According to R. ALONSO GARCÌA, *La puesta en pràtica por la Corte Costituzionale de la protecciòn multinivel de derechos en la UE – Parte II: Asunto Consob*, in *WP IDEIR*, 38/2021, pp. 1-14, p. 10, the CJEU is currently willing to confirm such a differentiation.

[102] See *supra*, para. 4.

[103] According to M. MARTINS PEREIRA, Consob *and the lessons learnt from the "*Taricco saga*"*, in *EU Law Live*, 54/2021, p. 11, the statement of the Court goes beyond the *matière pènale* and acknowledges the right to remain silent also in purely administrative proceedings. Such a statement appears to be disagreeable: the *ius tacendi* can indeed be invoked during any proceeding, but still with the perspective of avoiding a future criminal (*la to sensu*) sanction.

[104] Of *caveats*, L. Lonardo, *The Veiled Irreverence*, *op. cit*., p. 715, speaks effectively verbatim.

[105] The importance of this statement of the Court, and its relevance for lawyers is stressed by L. LONARDO, *DB v Consob: the scope of right to silence under EU law*, in *EU law live*, 5 February 2021, online. It is also interesting to note that in *K.B. e F.S.*, the CJEU, while dealing with an issue related to the possibility for judges to rise *ex officio* a violation of the obligation to promptly inform suspects or accused persons of their right to remain silent, has somehow admitted that also in the field of procedural law the *ius tacendi* is not completely unlimited. Indeed, according to the Grand Chamber "Articles 3 and 4 and Article 8(2) of Directive 2012/13, read in the light of Articles 47 and 48 of the Charter, must be interpreted as meaning that they do not preclude national legislation which prohibits the trial court in a criminal case from raising of its own motion […] a breach of the obligation imposed on the competent authorities […] to inform suspects or accused persons promptly of their right to remain silent, where those suspects or accused persons have not been deprived of a practical and effective opportunity to have access to a lawyer in accordance with Article 3 of Directive 2013/48, if necessary having obtained legal aid as provided in Directive 2016/1919, and where they, like their lawyers, if any, have had a right of access to their file and the right to invoke that breach within a reasonable period of time, in accordance with Article 8(2) of Directive 2012/13". See CJEU, *K.B. e F.S.*, *cit.*, para. 53.

[106] See M. ARANCI, *Diritto al silenzio e illecito amministrativo punitivo: la risposta della Corte di giustizia*, in *Sistema Penale*, 2021, pp. 73-98, p. 91 and 94. The approach on the scope of right to silence designed by the CJEU has recently been endorsed by the Italian Constitutional Court, in the judgement no. 111/2023, ECLI:IT:COST:2023:111. In para. 3.5.1. the Italian Court has recalled the principles enshrined by the CJEU in *Consob* to highlight that *ius tacendi* goes beyond the mere right of a person not to confess, thus encompassing also the right not to render any statement that might be subsequently used against herself.

Despite being so clear in distinguishing the position of individuals from that of companies, the *Consob* ruling does not elaborate on the reasons for this distinction, limiting itself to excluding the analogical application of the *Orkem* reasoning to natural persons. Nevertheless, two reasons can be outlined.[107] First: the most guarantor-oriented judicial interventions have occurred in the field of administrative sanctions which are criminal in nature. Conversely, the jurisprudence dating back to *Orkem* has been exclusively concerned with competition law. And this already seems sufficient to provide an explanation for such a diverse consistency of the right to silence, the full recognition of which arises only within the perimeter of criminal penalties according to the *Engel/Bonda* criteria. Second: it cannot be ignored how the different breadth of *ius tacendi* is also linked to the different nature of the subjects upon which the existence of the right to silence is recognised. If the underlying rationale behind the right to silence is in fact the protection of human dignity and autonomy,[108] it becomes rather easy to understand why this emerges less stringently with reference to legal persons. In this regard, one cannot fail to see that a difference in the needs of protection for natural and legal persons is explicitly mentioned in the recitals of Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence, which, *inter alia*, also deals with the right not to incriminate oneself.[109] In those recitals, in fact, it is acknowledged *apertis verbis* that "the CJEU has, however, 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".[110]

Moreover, the idea of a clear divide between natural and legal persons may also be found in the paragraphs of the opinion of A.G. Colomer in the *Volkswagen* case,[111] in which he highlighted the existence of an asymmetry in the guarantees assured to natural persons in criminal law[112] compared to those enjoyed by legal persons in competition law.[113] Overall, therefore, even considering the rationale underpinning the recognition of *ius tacendi*, admitting that a different consistency to the right to silence would depend on the nature of the subject involved might seem reasonable at a first glance.

However, such conclusion might not appear as consequential as it seems to be at a closer look.[114] On the one hand, Directive 2016/343 chronologically precedes the

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[107] *Ibid.*, p. 96.

[108] See, in these terms, L. LONARDO, *The Veiled Irreverence*, *op. cit*., p. 719, who makes reference to the ECtHR relevant case law and affirms that "the answer is found once more in the reasoning of the Strasbourg Court: in its jurisprudence, the right to silence is predicated on the respect for 'human dignity and autonomy': the fact that legal persons are not humans makes it possible to deny them the right to remain silent under certain circumstances".

[109] The reference is to Article 7 of the directive, headed "Right to Silence and Right Not to Self-Incriminate".

[110] See recital n. 13. Also, recitals 12, 14 and 15 deal with the matter. Recital 14 maintains that the time for a Union's legislation on the presumption of innocence for legal persons is yet to come. However, the following recital makes clear that the lack of legislative intervention does not put into jeopardy the recognition of the already existing protections recognised by the case law. See V. MITSILEGAS, *EU Criminal Law, op. cit.,* p. 277. On this topic see also R. ALONSO GARCÌA, *La puesta en pràtica por la Corte Costituzionale*, *op. cit*., p.10.

[111] See Opinion of A.G. Colomer, 17 October 2002, Case C-338/00 P, *Wolkswagen v. Commission*, ECLI:EU:C:2002:591, para. 66.

[112] "Criminal law" can here be considered as including bot its formal and substantial meaning.

[113] See M. VEENBRINK, *The Freedom from Self-Incrimination - A Strasbourg-Proof Approach? Cases C-466-19/P Qualcomm and C-481/19P* DB v Consob, in *Journal of European Competition Law & Practice*, 2021, pp. 750-752, p.751.

[114] See M. ARANCI, *Diritto al silenzio e illecito amministrativo punitivo*, *op. cit*. p. 92.

acknowledgment of a fully-fledged right to silence made by the CJEU in *Consob*. On the other hand, also A.G. Colomer's opinion in *Volkswagen*—albeit recognising a different necessity of protection between natural and legal persons—only considers the position of individuals in criminal law and of companies in competition law, without further enquiring the situation of these latter in the case of "afflictive" sanctions. At present, therefore, express indications cannot be inferred from neither the ECtHR nor the CJEU jurisprudence about the possible assimilation of legal persons to natural persons in respect to the extendibility of the principles of the *Consob* ruling beyond the substantially criminal sanctions imposed against natural persons.[115] On the other hand, in the next para. it will be shown that it is still possible to identify, by means of interpretation, some elements by which the divide of the *ius tacendi* emanating from *Consob* does not seem straightforward.

6. Beyond *Orkem* and *Consob*

D.B. v. *Consob* represents a welcome realignment of the CJEU with the jurisprudence of the ECtHR.[116] In truth, the case has intervened on a ground where there wasn't a misalignment, or at any rate, if one existed, it was not intended. This is clear if one considers that the Court never had the opportunity to rule on the actual scope of the right to silence in proceedings leading to the imposition of criminal sanctions, and never had it considered the position of a natural person involved in such proceedings. The same, symmetrically, can be said of the ECtHR[117], which has never been called upon to deal with the *ius tacendi* of legal persons, even less so in administrative proceedings that are *not* criminal in nature.

By placing oneself in this perspective, not only does it become more comprehensible the *souplesse* with which the CJEU, in its own motivational path, excluded the applicability of the *Orkem* principles to natural persons involved in proceedings leading to sanctions that are criminal in nature, but it is also possible to soften the criticism of those who maintain that the conservation by the CJEU of a different regime between individuals and legal persons would lead to a possible conflict with conventional law.[118] To date, in fact, nothing justifies the assumption that the *Orkem* rule can also operate in the field of criminal law in nature[119], when a legal person comes into the picture. More in particular, the focus of the CJEU is on the *de facto* criminal nature of the sanction that must be inflicted. Put it in another way, the actual reason behind the divergence between the *Orkem* jurisprudence and *Consob* appears to lie not so much in the nature of the

[115] Therefore, also to natural persons in the field of administrative sanctions which are not substantially criminal according to Engel's criteria.

[116] See E. HANCOX, *The right to remain silent in EU Law*, in *The Cambridge Law Journal*, 2021, pp. 228-231, p. 231. See also A. DE VRIES, *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*, 2022, in *Review of European Administrative Law*, pp. 31-44.

[117] See A. SAKELLARAKI, *Halcyon Days*, *op. cit.*, p. 1552.

[118] In this sense E. HANCOX, *The right to remain silent in EU Law*, *op. cit.*, p. 230.

[119] As pointed out by M. KARNER, *Procedural Rights in the Outskirts of Criminal Law: European Union Administrative Fines*, in *Human Rights Law Review*, 22/2022, pp. 1-24, p. 22, albeit similar to criminal law, competition law still lies outside the core of the latter, therefore allowing a somehow lower standard of protection of certain defence rights. The position is also that of the Court of First instance, 15 December 2008, T-541/08, *Sasol e a v Commission*, ECLI:EU:C:2014:628, para. 207-212.

subject involved, but rather in that of the punishment to be imposed. In *Orkem*,[120] as in the entire subsequent strand of rulings, up to the recent *Qualcomm* judgment, which adds nothing to the earlier case law,[121] the sanctions that come into play are always within the scope of *antitrust* law, outside the perimeter of criminal penalties, in either a formal or substantive sense. Thus, they are within the boundaries of administrative law. In *Consob*,[122] on the other hand, the sanctions taken into consideration are those—far more afflictive and substantially criminal[123]—relating to violations of the TUF (Testo Unico della Finanza).[124] Hence, the different types of persons (legal or natural) to whom *ius tacendi* is recognised is an almost accidental consequence of the nature of the precepts allegedly violated, that were addressed in one case to companies and in the other to individuals. Indirect confirmation of this can be found in the above-mentioned ECtHR jurisprudence, which never intervened in the field of the right to silence of legal persons but heralded a now well-established jurisprudence on the *ius tacendi* of natural persons in substantially criminal proceedings. Assuming that what is key is the nature of the sanction imposed on the person called upon to make self-accusatory statements, it becomes possible to propose a solution for the hypotheses not explicitly "covered" by the *Consob* rule or the *Orkem* rule. In particular, for companies subject to substantially criminal proceedings according to the *Engel/Bonda* criteria, it could be envisaged a *ius tacendi* of similar scope to that recognised for natural persons, that is, covering, for instance, the disclosure of documents that may lead to a self-incrimination[125].[126]

Far from being in contrast with the CJEU's case law, this would find support in the recognition of fundamental rights upon legal persons[127] stemming from the CJEU's jurisprudence, whereby, as known, the applicability of traditional principles of criminal law, such as that of personal responsibility[128], has been extended to companies. The enhancement also appears to overcome two other objections. On the one hand, the European legislator, in Directive 2016/343, has affirmed that it is not necessary to

[120] See CJEU, *Orkem*, cit., para. 26-28.
[121] See M. VEENBRINK, *The Freedom from Self-Incrimination - A Strasbourg-Proof Approach?*, *op. cit*., p. 751.
[122] See CJEU, *Orkem*, cit., para. 35.
[123] See CJEU, 20 March 2018, Case C-537/16, *Garlsson Real Estate* ECLI:EU:C:2018:193. See also CJEU, 20 March 2018, Case C-596/16, *Di Puma and Zecca* ECLI:EU:C:2018:192.
[124] D.lgs. 58/1998. The TUF constitutes the main regulatory source in Italy on finance, financial intermediation, and the provision of investment services. The TUF is also frequently amended by the legislature in order to incorporate within its regulatory acts of the European Union.
[125] As can be easily inferred by the nature of legal persons, a fully-fledged *ius tacendi* for companies would mainly entail the privilege of refusing the disclosure of documents that may, somehow, lead to an incrimination of the company itself, both in present and future proceedings leading to the imposition of penalties that are criminal in nature.
[126] See M. ARANCI, *Diritto al silenzio e illecito amministrativo punitivo*, *op. cit*., p. 96. At this point, it is nevertheless necessary to precise that – in concrete terms – the right to remain silent would be exercised by the legal representative of the company (or by who is deputed to the interlocution with the authority) that – according to the so called "organic identification" is acting as a part of the company and not as an individual.
[127] This is clearly noted by A.G. Pikamäe in his conclusions on 9 June 2022, Case C-203/21, *Delta Stroy*, ECLI:EU:C:2022:454, para. 1, 2 and 34. In doctrine see P. WACHSMANN, *Droits fondamentaux et personnes morales* in *Vers la reconnaissance de droits fondamentaux aux États membres de l'Union européenne? Réflexions à partir des notions d'identité et de solidarité*, Brussels, 2010, pp. 225-235. On the issue of the recognition of fundamental rights upon legal persons in the frame of the ECHR see E. HANCOX, *The right to remain silent in EU Law*, *op. cit*., p. 230.
[128] See CJEU, 10 September 2009, Case C-97/08 P, *Akzo Nobel and Others v Commission*, ECLI:EU:C:2009:536, para. 56.

intervene to regulate the protection of legal persons. Indeed, it maintained that the principles enshrined by case law were sufficient for the time being, thus supporting the idea of an asymmetry of guarantees with respect to natural persons.[129] On the other hand, in the interpretation given to the *D.B.* v. *Consob* judgment—in the margin of his opinion regarding the *Delta Stroy* case[130]—A.G. Pikamäe[131] himself stated that *Consob* was an expression of a "differentiated treatment" of legal persons, characterized by a "lesser intensity of the protection accorded to these persons, notably with reference to the right to silence".[132] None of the objections appears to be decisive. As for the Directive, indeed, it has already been noted that its entrance into force came almost five years before the *Consob* judgement, and therefore its reference to the "current stage of development of the […] case law"[133] might be considered partially outdated. Most importantly, one must not incur into the mistake of overestimating the relevance of A.G. Pikamäe statement in *Delta Stroy* (which is confined to a footnote of its Opinion). Few paragraphs later, in fact, the same Advocate General stated that "in the present case, the financial penalty imposed on a legal person relates to a criminal offence and is criminal in nature, the proceedings concerning that penalty fall within the scope of Articles 6 and 7 of the ECHR and that legal person is thus entitled to rely on the fundamental rights enshrined in Articles 47 to 49 of the Charter". In doing so, therefore, he admitted that the guarantees of due process shall also apply to legal persons involved in proceedings which may lead to the infliction of sanctions that are criminal in nature. And this is also the conclusion reached by the CJEU in the *Delta Stroy* case[134], where it was clearly stated that defence rights guaranteed by the Charter also have to be effectively recognised to legal persons involved in substantially criminal proceedings[135], thus implicitly supporting the claim that, probably, there is no dualism in the wake of the *Consob* judgment.[136] The *ius tacendi*, indeed, is part of the guarantees of due process.[137] Its explicit recognition to legal persons, therefore, seems to be only a matter of time.

7. Conclusions

In the ECtHR's interpretation, the *nemo tenetur se detegere* is not absolute. To ascertain whether a particular procedure has deprived the right not to contribute to one's incrimination of its substance, this Court examines the nature and degree of coercion, the existence of adequate safeguards in the procedure, and the use made of the evidence so obtained. On the one hand, a conviction should not be based solely or primarily on the defendant's silence or refusal to answer certain questions or to testify. Therefore, a

[129] According to Sakellaraki, this argument, together with the different level of protection accorded by the ECtHR to legal persons in the field of right to private and family life, an extension of the *ius tacendi* to legal persons would be "unacceptable". See A. SAKELLARAKI, *Halcyon Days*, *op. cit.*, pp. 1552-1553.
[130] See A.G. Pikamäe, *Delta Stroy*, cit., para. 1, 2 and 34.
[131] Former author of the conclusions in the same case CGJEU, *D.B. v Consob*, cit.
[132] Ibidem, supra note 87.
[133] Directive 2016/343, cit., recital 14.
[134] See CJEU, *Delta Stroy*, cit., para. 1, 2 and 34.
[135] Ibidem, para. 59-64. The doctrine has already considered as "linear" the syllogism that leads to the application of *nemo tenetur* to punitive sanctions inflicted upon natural persons based on the previous recognition by the CJEU of other "criminal guarantees". See S. CONFALONIERI, *Il nemo tenetur se detegere nel labirinto delle fonti*, *op. cit.*, pp. 116-117.
[136] See, in this sense, A. KELLER, *Il diritto al silenzio dell'ente accusato ai sensi del d.lgs. 231/01*, in *Sistema Penale*, 6 October 2023, online, pp. 14-16.
[137] See CJEU, 9 November 2021, Case C-546/18, *Adler Real Estate*, ECLI:EU:C:2021:711, para. 45.

defendant's decision not to answer during criminal proceedings must necessarily be without consequence. On the other hand, the right not to answer does not preclude consideration of the person's silence in situations that certainly require an explanation on his part to assess the strength of the evidence against him.

The Strasbourg Court has distinguished three types of situations that may give rise to abusive coercion contrary to Article 6 ECHR. First, the accused's right to silence is violated when the investigating authorities threaten the individual with sanctions if he or she does not testify[138] or if they punish him/her for refusing to do so[139]. The second situation of violation arises when physical or psychological pressure, often in the form of treatment prohibited by Article 3 of the ECHR, are used to extract confessions or material evidence[140]. Indeed, the interpretation given by the ECtHR prevents the use of statements acquired through torture or inhuman or degrading treatment in violation of Article 3 ECHR. However, this does not automatically mean that the trial is unfair, as the Strasbourg Court reserves the right to examine whether the confession had a unique and decisive influence on the verdict.[141] The third concerns the use of deception by the authorities to extort information that they have not been able to obtain through interrogation.[142] The liberty of choice is infringed when the authorities use trickery to obtain confessions or other incriminating statements from persons who have chosen to remain silent during interrogation, and when confessions or statements obtained in this way are introduced as evidence at trial.[143] Even if a conviction cannot be based exclusively or predominantly on a refusal to answer, it is not contrary to the dictates of the ECHR to use silence to assess the strength of other incriminating evidence, provided that additional safeguards are in place, such as warning the accused of the consequences that may follow from a refusal to answer and the right to consult with counsel. As to the scope of application of the *nemo tenetur se detegere* principle, according to the ECtHR, it applies not only to proceedings which may lead to the imposition of sanctions which are deemed criminal by the national legislature, but also to those which are criminal in nature pursuant to the *Engel* judgment.

The construction of *nemo tenetur of detegere* within the framework of the EU legal system, of course, is linked to the ECtHR case law, as prescribed by Article 52(3) of the CFREU, also in respect to its Articles 47(2) and 48(2). A construction, however, that, beginning with the *Orkem* v. *Commission* judgement, relates "only" to the right to remain silent, as a core element of the *nemo tenetur of detegere* principle, never, at least explicitly, to the latter. Most notably, in *Orkem* the Court affirmed that in proceedings concerning legal persons that were not criminal in nature, like in the field of competition law, certain rights of defence had to be respected. The CJEU, on the one hand, maintained the obligation of cooperation of the undertaking subject to an investigation to "provide all necessary information concerning such facts as may be known to it", even when those documents are suitable for establishing a possible anti-competitive conduct, on the other hand, tempered such approach by asserting a right to remain silent only with regard to questions that could lead to direct self-incrimination. This approach has been confirmed in the following case law until the *Qualcomm* case.

[138] ECtHR, *Brusco v France*, cit., para. 54.
[139] ECtHR *Heaney and McGuinness v Ireland*, cit., para. 40.
[140] ECtHR *Jalloh v Germany*, cit., para. 96.
[141] ECtHR *Zličić v Serbia*, cit., paras. 119 e 120.
[142] ECtHR *Allan v United Kingdom*, cit., para. 49.
[143] Ibidem, para. 50.

Against this background, the *Consob* ruling has marked an important evolution since the CJEU declared the existence of a comprehensive right to silence for natural persons in substantially criminal proceedings, in line with the ECtHR case law. This was not an overruling: the CJEU had for the first time the opportunity to align to the ECtHR and fully grasped it. In this respect, *Consob* must be read in the light of the recent EU case law, most notably of the *Delta Stroy* decision. Indeed, the recognition of due process guarantees and defence rights in this latest strand of the EU case law regarding legal persons is a clear indication that there is no preconceived dualism between natural and legal persons, as far as the *ius tacendi* is concerned. It is, thus, reasonable to expect that in the future the CJEU will expressly recognise the right of silence for legal persons in the context of substantially criminal proceedings, regardless of the specific sector concerned, including antitrust proceedings.