

# The Directive on the Presumption of Innocence

A Missed opportunity for Legal Persons



## Article

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The recently adopted Directive on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings<sup>1</sup> (hereafter: Directive on the Presumption of Innocence)<sup>2</sup> applies exclusively to natural persons.<sup>3</sup> This is in contrast to previously adopted directives of the Roadmap for strengthening procedural rights in criminal proceedings<sup>4</sup> which applied to suspected or accused persons and did not explicitly exclude legal persons.<sup>5</sup> Therefore, one could argue that legal persons could benefit from the implementation of relevant provisions of the previously adopted directives of the Roadmap<sup>6</sup> but that they cannot infer rights from the Directive on the Presumption of Innocence.

Limiting the scope of application of the Directive on the Presumption of Innocence to natural persons was an explicit choice of the EU legislator.<sup>7</sup> The legislative history of the Directive shows that the European Parliament tried to broaden its scope in order to cover legal persons.<sup>8</sup> However, the Council, supported by the Commission, rejected the Parliament's approach.<sup>9</sup> In support of its arguments, the Council and the Commission referred to several considerations that have now been incorporated into the recitals of the Directive.<sup>10</sup> Accordingly, the EU legislator considered the needs and levels of protection for individuals and legal persons with regard to certain aspects of the presumption of innocence to differ. The EU legislator hereby relies on the case law of the Court of Justice. It has held that the rights stemming from the presumption of innocence do not accrue equally to both categories of persons. Ultimately, the recitals recall that, in light of national law, as well as of Union law and national case law, legislative action with regard to legal persons is considered premature. These arguments raise several interesting issues.

First, referring to the case law of the Court of Justice on legal persons, in order to exclude them from the Directive's scope seems to overlook the specific context of this case law.<sup>11</sup> Landmark cases, such as *Orkem*,<sup>12</sup> have been handed down in the context of EU competition law. Until now, the Court of Justice has not accepted that fines in competition cases are criminal in nature.<sup>13</sup> Moreover, Art. 23(5) of Council Regulation (EC) 1/2003 explicitly rules out that fines imposed in this context by the Commission are of a criminal nature. In other words, excluding legal persons from a Directive applicable to criminal proceedings by reference to case law, which relates to an area of law that has not been recognized as being "criminal", seems questionable.

Second, the arguments of the EU legislator seem to pay little attention to the importance of corporations in criminal proceedings. In the meantime, most EU Member States have introduced corporate criminal liability or punitive mechanisms for corporate wrongdoing. In particular, investigations involving the financial interests of the EU can focus on "economic operators",<sup>14</sup> making legal persons the object of investigations and prosecution.<sup>15</sup> Yet, this attention to corporations as subjects of criminal law is not always matched by similar attention to their procedural rights, and national practices often differ.<sup>16</sup>

This article will argue that the exclusion of legal persons from the scope of the Directive is a missed opportunity. It aims to examine what protection is available to legal persons under the ECHR and in the case law of the Court of Justice with regard to some of the rights covered by the Directive.<sup>17</sup> More specifically, the analysis will focus on the protection of legal persons' right to remain silent as well as on their right not to incriminate themselves,<sup>18</sup> as the applicability of this right has been subject to different approaches in the various Member States. Before turning to the protection of legal persons' right to silence, however, the article will provide a brief analysis of what exactly is covered by the right to silence as foreseen by the Directive on the Presumption of Innocence.<sup>19</sup> This will help us understand to what extent the exclusion of legal persons from its scope can be considered a missed opportunity.

# I. The Right to Silence in the Directive on the Presumption of Innocence

It should be recalled that the Directive's scope is limited to "criminal proceedings",<sup>20</sup> thus not covering punitive administrative proceedings. Suggestions to adopt a broader scope,<sup>21</sup> better reflecting the case law of the ECtHR in *Engel* and subsequent cases, did not make it into Art. 2 of the Directive. In order to align the different views, the first sentence of Recital 11 nevertheless states that "This Directive should apply only to criminal proceedings as interpreted by the Court of Justice of the European Union (Court of Justice), without prejudice to the case law of the European Court of Human Rights." This first sentence suggests that the scope of the Directive could be broader than proceedings that are formally qualified as criminal by the legislator. The second sentence of recital 11, however, stipulates that: "This Directive should not apply to civil proceedings or to administrative proceedings, including where the latter can lead to sanctions, such as proceedings relating to competition, trade, financial services, road traffic, tax or tax surcharges, and investigations by administrative authorities in relation to such proceedings." Read in combination, the two sentences of recital 11 strike one as odd. This risks blurring the Directive's scope. The legal status of testimony and other evidence obtained under compulsion in non-criminal proceedings, proceedings not covered by the Directive, is particularly problematic. In light of the *Saunders* case law of the ECtHR, due attention should be paid in order to prevent evidence obtained in non-criminal proceedings by the use of compulsion<sup>22</sup> from later being admitted in criminal proceedings.<sup>23</sup>

The key provision on the right to silence, Art. 7 of the Directive, provides an explicit legal basis for the right to silence,<sup>24</sup> which as such is innovative for the EU and the Council of Europe, as neither the Charter of Fundamental Rights nor the ECHR expressly provide for the right to silence.<sup>25</sup> Nevertheless, the ECtHR has repeatedly stressed that these rights [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 Art. 6 [ECHR]."<sup>26</sup> The right to remain silent applies in relation to the criminal offence that the person is suspected or accused of having committed.<sup>27</sup> Recital 26 suggests that the reference to the criminal offence of which the person is suspected or accused of having committed is used to make sure that the person can still be required to answer certain questions, for instance, to identify himself.

A combined reading of Art. 7(1), 7(2), and 7(5) suggests that the right to silence, as incorporated in the Directive, is quite strong, since exercising the right to silence cannot lead to negative inferences. Art. 7(5)<sup>28</sup> explicitly spells out the fact that a suspected or accused person exercising his right to silence cannot have this right be used against him/her and it is not to be considered evidence.<sup>29</sup> Yet, several articles of the Directive seem to undercut the strength of the right to silence to some extent. Art. 7(4) gives Member States the power to allow judicial authorities to take into account the cooperative behaviour of the defendant when sentencing and thereby potentially discourages suspects from invoking the right to silence. This – in combination with recital 28, with its reference to "in itself"<sup>30</sup> and the absence of a strong exclusionary rule – seems to allow for some flexibility on the part of the Member States.

A further weakening of the right to silence can be found in Art. 7(3) and recital 29 of the Directive, which states that "The exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons." Art. 7(3) clearly draws on some of the ECtHR's case law<sup>31</sup> that adopts a restrictive view with regard to evidence existing independently of the will of the accused, thereby enabling limitations of the protection provided by the right to silence. According to *Saunders*, evidence that has an existence independent of the will of the accused covers documents acquired pursuant to a warrant. Nevertheless, recital 25 explicitly stipulates that suspects or accused

persons should not be forced to produce documents that could lead to self-incrimination. As will be shown below, the protection offered against self-incriminating documents under the case law of the ECtHR is more complicated than the *Saunders* judgment may suggest.<sup>32</sup> The scope of the term “legal powers of compulsion” in Art. 7(3) can be understood in different ways. A Member State may interpret it as allowing blood tests or the taking of DNA samples, yet nothing precludes a Member State from understanding it as allowing the use of production orders<sup>33</sup> to obtain documents from a suspect under the threat of a sanction for failure to comply with the order. As a result, the Directive on the Presumption of Innocence seems to allow Member States, which wish to do so, to keep up practices under which suspects can be required to hand over self-incriminating documents, which can then be used against the suspect.

Lastly, the final text changed the wording of the exclusionary rule<sup>34</sup> foreseen for breaches of the right to silence. Art. 10(2) of the Directive now requires that the fairness of the proceedings and the rights of the defence be respected, which is less strong than an absolute exclusionary rule. Admittedly, the ECtHR’s case law does not go so as far as to provide an absolute exclusionary rule for breaches of the right to silence either.

In sum, if the Directive had included legal persons in its scope, they would have benefited from the following protection (in the context of the right to silence): they would have expressly been granted a right to silence, which would not explicitly protect them against the use of evidence obtained under compulsion in non-criminal proceedings and – depending on the Member States’ interpretation of “legal powers of compulsion” – not allow them to refuse to hand over self-incriminating documents. Furthermore, if the Directive had included legal persons in its scope, the current wording of Art. 7 would have allowed Member States to apply the right to silence of legal persons in a very restrictive manner: a key issue connected to the right to silence of legal persons is which employees or officials of the legal person can exercise the right to silence on behalf of the legal person. Member States that would have wanted to restrict the impact of the Directive could have defined a very small circle of individuals who can exercise the right to silence of the legal person. In particular, the possibility to keep requiring suspects to hand over documents would be very unfavourable for legal persons, as documentary evidence is often of crucial importance in the prosecution of legal persons.<sup>35</sup>

## II. Legal Persons’ Right to Silence under the ECHR?

Although the ECtHR has handed down several landmark cases on the right to silence since its ruling in *Funke*,<sup>36</sup> it has not directly addressed the question of whether its case law on the right to silence applies to legal persons (in the same way).<sup>37</sup> Yet, the ECtHR has generally been willing to apply Art. 6 ECHR to legal persons.<sup>38</sup> In the context of articles other than Art. 6, the ECtHR has nevertheless shown that it may be more willing to accept interference with Convention rights in the context of claims made in a business setting.<sup>39</sup> If the ECtHR were to apply a similar reasoning in relation to a future case on the right to silence of legal persons, it is uncertain whether legal persons would be able to fully rely on the protection offered by the ECtHR in this context.<sup>40</sup>

In order to ascertain to which extent legal persons may invoke the right to silence, the cases in which the ECtHR deals with the compulsory handing over of documents are particularly insightful, since documents often play a key role in criminal proceedings against legal persons.<sup>41</sup> The *Funke* case dealt with the issue of compelled cooperation with law enforcement officials. After a house search by custom officials and a police officer turned up financial documents linked to foreign banks, Mr. Funke was asked to hand over documents related to his accounts at these banks. Since he did not do so, criminal proceedings were brought against him in order to convict him to a fine and further penalties until he produced the documents. The ECtHR found that securing this conviction aimed at getting the documents, which the authorities believed to exist and which they could not or did not want to get by other means.<sup>42</sup> Thereby, they attempted to compel Mr. Funke

to provide evidence of offences he had allegedly committed. The ECtHR found that this amounted to an unjustifiable breach of the right to silence. It is worth noting that the Court did not find that the special features of customs law justified this infringement.

The *Funke* case left several questions unanswered,<sup>43</sup> particularly in relation to the scope of this newly recognized right to silence. The landmark judgment in *Saunders*,<sup>44</sup> handed down just three years after *Funke*, raised additional questions. *Saunders*, who was under an enforceable obligation to respond to questions asked by Department of Trade and Industry inspectors, complained about the later use in criminal proceedings of the statements he had made. The Strasbourg Court stressed that its sole concern was the use of these statements in the criminal proceedings.<sup>45</sup> It highlighted the importance of the right to silence<sup>46</sup> as an essential part of the right to a fair trial.<sup>47</sup> It pointed out that the prosecution needs to prove its case without using evidence that has been gathered through coercive or oppressive methods in disregard of the will of the accused. The ECtHR then held that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent,<sup>48</sup> thereby finding that the right to silence does not cover the use in criminal proceedings of material gathered from the accused by using compulsory powers but which exists independently of the will of the accused. One of the Court's examples of such material is "documents acquired pursuant to a warrant". This reference has been considered to justify practices that require suspects to hand over documents, even if they are self-incriminating and if they are used in criminal proceedings.

How should the findings in *Saunders* and *Funke* be reconciled? Was the practice in *Funke* too much of a fishing expedition, as the authorities were not fully certain of the existence of the documents? Or was the ECtHR simply trying to prevent the right to silence from becoming an insurmountable obstacle to prosecuting crime? Alternatively, one could argue that the reference to warrants in *Saunders* should be understood as a reference to search warrants. Since search warrants do not, as opposed to production orders that compel a person to actively hand over documents, require the suspected person to actively contribute to his own incrimination, they are not directly problematic in light of the right to silence. Nevertheless, such a reading does not fully address the ECtHR's reference to "evidence which has an existence independent of the will of the accused."

In a post-*Saunders* judgment, *J.B. v Switzerland*,<sup>49</sup> the ECtHR was again faced with a case in which the claimant had been required to hand over documents and where a fine had been imposed for failure to provide these documents. The Court paid particular attention to the fact that the individual involved could not rule out that these documents might be detrimental for him in a tax evasion case.<sup>50</sup> Interestingly, the Court added that *J.B.* "did not involve material of this nature, which like that considered in *Saunders*, has an existence of the person concerned and is not, therefore, obtained by means of coercion and in defiance of the will of that person".<sup>51</sup> This case further leads to confusion by suggesting that the right to silence can protect suspects against the compulsory handing over of documents. The key question remains as to what the status of pre-existing documents is.<sup>52</sup> Whereas *Saunders* seems to suggest that the right to silence would only protect a person from being compelled to create new documents, as opposed to handing over documents that already exist, *Funke* and *J.B.* do not seem to be that restrictive.<sup>53</sup> In *Jalloh*, where intrusive chemicals were used to force a suspect to regurgitate drugs, the ECtHR referred to *Funke* and *J.B.* and added that in these cases, like in *Jalloh*, real evidence was retrieved in disregard of the applicant's will,<sup>54</sup> thereby stressing the importance of the will of the suspected person. In its more recent judgment in *Chambaz*, the ECtHR confirmed again that the privilege against self-incrimination was violated after the claimant had been fined, as these fines amounted to pressure on the claimant to submit documents and that he could not rule out that these documents might harm his position in a tax evasion case.<sup>55</sup>

Not only the ECtHR's case law on the issue of documentary evidence, but also its case law on the right to silence in general is at times confusing.<sup>56</sup> In *Jalloh*, the ECtHR pointed out which factors are decisive in deciding whether a violation of the right to silence has taken place or not: "the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put."<sup>57</sup> This reconfirms that the right to silence, as understood by the ECtHR, is not an absolute right. The Court stressed that measures cannot go so far as to extinguish the very essence of the right,<sup>58</sup> but not every form of direct compulsion automatically results in a violation.<sup>59</sup> In *O'Halloran*, the ECtHR confirmed that – in the particular context of road traffic offences – requiring the registered keeper of a car to inform the authorities of the identity of the driver on a specific date, failure of which can be subject to a fine, does not necessarily amount to the violation of the right to silence.<sup>60</sup> Thus, the ECtHR allows states, in specific circumstances and subject to certain conditions, to require individuals to state a fact. Unlike the case law of the Court of Justice in competition cases, the scope of this approach is strictly limited. It should be noted that the complexity of certain types of crime, for example corporate crime or fields of law, e.g., the special features of customs law, cannot be accepted by the ECtHR as justifying provisions that extinguish the essence of the right to silence.<sup>61</sup>

In sum, the case law of the ECtHR on the right to silence does not always offer clear guidance on issues, such as requiring suspects to contribute to their own incrimination. Moreover, the interplay between the *Jalloh* criteria and other case law, such as *Funke* and *Saunders*, is not yet fully clear: are the *Jalloh* criteria to be applied when the issue of the forced handing over of documents comes up<sup>62</sup> or is the previous case law still relevant? *Chambaz* suggests that pre-*Jalloh* case law remains relevant. Moreover, the Court in Strasbourg has not yet ruled on the applicability of the right to silence for legal persons. Therefore, any protection that can be derived from the ECHR by legal persons who seek to have an effective right to silence is precarious.

### III. The Court of Justice's Approach to Legal Persons' Right to Silence

If one looks at the protection of the right to silence of legal persons by the Court of Justice, this necessarily leads to its case law in the field of competition law. As has been mentioned above, the Court of Justice in Luxembourg has not considered competition fines imposed by the Commission criminal sanctions, and Regulation 1/2003 also stresses that they are not criminal in nature.

The question of whether undertakings can benefit from a right to silence in the context of competition proceedings by the Commission was addressed by the Court of Justice in its landmark judgment in *Orkem*.<sup>63</sup> The judgment predates the ECtHR's judgment in *Funke*, and it must thus be seen in a context in which Art. 6 ECHR was not yet understood as including a right to silence. *Orkem*, a limited liability company, challenged a decision of the Commission requesting information on several grounds, one of which was the breach of the rights of defence. According to *Orkem*, the applicant, the decision compelled it to incriminate itself by admitting an infringement of competition law.<sup>64</sup> Since the applicable Regulation at the time<sup>65</sup> did not explicitly provide for a right to silence, the Court of Justice turned to the general principles (at that time) of Community law. It took stock of the fact that there was neither a judgment of ECtHR recognizing a right to silence nor an express provision in the ECHR on it.<sup>66</sup> Moreover, its analysis of the Member States' law on the issue showed that the right to silence was primarily reserved to natural persons in criminal proceedings.<sup>67</sup> Yet, it found that the power of the Commission to compel undertakings to provide it with information and documents may not go so far that it would, by means of a decision calling for information, undermine the rights of defence of the undertaking.<sup>68</sup> It then held that compelling an undertaking to provide answers that

might involve an admission of the existence of a competition law infringement on its part could not be accepted.<sup>69</sup> Ultimately, requiring answers to factual questions and the handing over of documents is acceptable, whereas requiring an admission of a violation of EU competition law is not. *Orkem* was later incorporated into Recital 23 of Regulation 1/2003. The Court of Justice has not fundamentally altered its case law in light of the case law of the ECtHR, although it acknowledged the developments in the Strasbourg Court's case law in *Limburgse Vinyl Maatschappij*.<sup>70</sup> In the same judgment, it specified that the right to silence can only come into play where coercion is involved.<sup>71</sup>

It is self-evident that the limited scope of the right to silence recognized by the Court of Justice leads to difficult distinctions in practice between admissible factual questions, on the one hand, and forbidden questions, on the other hand, which might involve an admission on the part of the undertaking of the existence of an infringement.<sup>72</sup>

In sum, the protection that legal persons can derive from the Luxembourg Court's case law with regard to the right to silence is limited: factual questions must be answered, the handing over of incriminating documents can be required, and only questions that might imply an admission of guilt do not have to be answered.

## IV. Concluding Remarks

Is the exclusion of legal persons from the scope of the Directive on the Presumption of Innocence a missed opportunity? It is, to a certain extent. This article has shown the following: the Directive adopts a minimum level of protection on several points, e.g. by broadly referring to "the use of legal powers of compulsion." Depending on its implementation by the Member States, this can, for example, result in situations in practice in which suspects are required to hand over documents. Hence, even if the Directive had covered legal persons, the protection it offers on some points seems limited. One could even argue that Member States will have to keep an eye on the more protective case law of the ECtHR when they implement Arts. 7 and 10 of the Directive, as they cannot undermine the protection offered by the ECHR.<sup>73</sup>

However, if the Directive had covered legal persons, additional protection would have been made available to them: until a future case of the ECtHR decides along these lines, legal persons cannot be sure that the case law of the ECtHR on the right to silence is applicable to them. Having been included in the Directive's scope would at least have removed some of that uncertainty.

Admittedly, even if the Directive on the Presumption of Innocence had covered legal persons, this would still allow Member States to adopt diverging approaches. One of the key questions related to a legal persons' right to silence is the definition of persons who may exercise this right on behalf of the legal person. Is it limited to a very select group of employees or officials of the legal person, or can it be invoked on behalf of the legal person by a broad circle of individuals? Member States could have answered this question restrictively, thereby limiting the impact of the Directive in practice.

1. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, O.J. L 65, 11.3.2016, p. 1.<sup>69</sup>

2. On the Directive, see also the contribution of Cras and Erbežnik in this issue.<sup>70</sup>

3. See Art. 2 of the Directive on the Presumption of Innocence, as well as recitals 13-15.<sup>71</sup>

4. Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, O.J. C 295, 4.12.2009, 1.<sup>72</sup>

5. See, for example, Art. 1 of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings and Arts. 1 and 2 of Directive 2012/13/EU on the right to information in criminal proceedings.<sup>73</sup>

6. Or, in case of an improper implementation, rely directly on the Directive.<sup>74</sup>

7. It is interesting to note in this context that the legal basis used for the Directive on the Presumption of Innocence, Art. 82(2)(b) TFEU, refers to "the rights of individuals in criminal procedure". Should this be understood as limiting the competence of the EU legislator to procedural safeguards that apply only to natural persons and thus not to legal persons? Other language versions of the TFEU, such as the Dutch and the French versions,

refer to "persons" and thus seem less restrictive in their wording. Moreover, the use of the term "individuals" in Art. 82(2)(b) TFEU does not seem to have been an issue during the negotiations on the Presumption of Innocence Directive. On the limits of Art. 82 TFEU, see: S. Peers, *EU Justice and Home Affairs Law –Volume II: EU Criminal Law, Policing and Civil Law*, Oxford 2016, pp. 134-138. ↵

8. EP Document of 20.04.2015, A8-0133/2015, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0133+0+DOC+PDF+V0//EN>, amendments 9 and 39. ↵

9. See Council doc. of 29.07.2015, 11112/15, p. 4, n1, available at: <http://data.consilium.europa.eu/doc/document/ST-11112-2015-INIT/en/pdf>. ↵

10. See recitals 13-15 of the Directive on the Presumption of Innocence. ↵

11. See, similarly, the ECBA response to the Commission's Proposal for a Directive on certain aspects of the presumption of innocence and of the right to be present at trial, available at: [http://www.ecba.org/extdocserv/20141106\\_ECBA\\_PresumptionOfInnocence.pdf](http://www.ecba.org/extdocserv/20141106_ECBA_PresumptionOfInnocence.pdf), p. 5. ↵

12. ECJ, Case C-374/87, *Orkem v Commission*, 18 October 1989. ↵

13. K. Lenaerts, "Due process in competition cases", in *NZKart* 2013, p. 175. Yet it has accepted the *Engel* criteria of the ECtHR. See: ECJ, C-489/10, *Lukasz Marcin Bonda*, 5 June 2012, paras 36-46. ↵

14. See Art. 2(6) of Regulation (EU, Euratom) 883/2013 concerning investigations conducted by OLAF. ↵

15. In this context, see also the joint position paper of Fair Trials and the Legal Experts Advisory Panel on the proposed Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings of 11 November 2014, available at: <https://www.fairtrials.org/wp-content/uploads/Presumption-of-Innocence-Position-Paper2.pdf>, pp. 8-9. ↵

16. The EP considered the fact that several MS have introduced the concept of criminal liability of legal persons to justify the application of the Presumption of Innocence Directive. See also amendment 39. ↵

17. Recital 14 of the Directive expressly refers to these instruments as the sources on which legal persons can rely in order to obtain protection. ↵

18. Hereafter, these two rights will be referred to as the right to silence. ↵

19. See Arts. 7 and 10(2) of the Directive. For a more extensive overview of the Directive, see the author's recent contribution to the European Law Blog, <http://europeanlawblog.eu/?p=3192>. ↵

20. See Arts. 1 and 2 of the Directive, as well as Recital 11. ↵

21. Amendments 6 and 39, EP Document of 20/04/2015, A8-0133/2015, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0133+0+DOC+PDF+V0//EN>. ↵

22. For example, by requiring the person involved to answer questions under the threat of sanctions. ↵

23. Similar concerns were expressed in the joint position paper of Fair Trials and the Legal Experts Advisory Panel, *op. cit.* (n. 16), p. 9. ↵

24. Both the right to remain silent and the right not to incriminate oneself. ↵

25. Admittedly, Art. 3 of Directive 2012/13/EU on the right to information in criminal proceedings already foresaw an obligation to provide information on the right to remain silent. Yet, it did not address the contents of that right. ↵

26. ECtHR, *Shlychkov v Russia*, 9 February 2016, (Appl. no. 40852/05), para 81; ECtHR, *Saunders v UK*, 17 December 1996, (Appl. no. 19187/91), para 68. ↵

27. Art. 7(1) of the Directive on the Presumption of Innocence. ↵

28. The exercise of the right to remain silent or of the right not to incriminate oneself by suspects and accused persons shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence. ↵

29. Indeed, this seems to go further than the criticised case law of the ECtHR in *Murray*, which accepts, under certain conditions, negative effects of the choice to stay silent. See ECtHR, *Murray v UK*, 8 February 1996, (Appl. no. 18731/91). See more recently: ECtHR, *O'Donnell v UK*, 7 April 2015, (Appl. no. 16667/10). ↵

30. The exercise of the right to remain silent or the right not to incriminate oneself should not be used against a suspect or accused person and should not, in itself, be considered to be evidence that the person concerned has committed the criminal offence concerned. This should be without prejudice to national rules concerning the assessment of evidence by courts or judges, provided that the rights of the defence are respected. ↵

31. ECtHR, *Saunders v UK*, 17 December 1996, (Appl. no. 19187/91), para 69. ↵

32. See *infra*. ↵

33. A production order requires a person to hand over or make available certain material, such as documents to persons such as law enforcement officials within a specified period. ↵

34. Admittedly, the exclusionary rule of the original proposal was not absolute either. ↵

35. US Supreme Court, *Braswell v United States*, 1988, 487 US 99, p. 115; J. Gobert and M. Punch, *Rethinking Corporate Crime*, Cambridge 2003, pp. 189-190; V.S. Khanna, "Corporate Defendants And The Protections of Criminal Procedure: An Economic Analysis, in *Law & Economics Working Papers Archive: 2003-2009*, Paper 29, [http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1029&context=law\\_econ\\_archive](http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1029&context=law_econ_archive), p. 46; J. McDonald, "No Body to Be Kicked or Soul to be Damned: Corporate Claims to the Privilege Against Self-Incrimination", in *Bond Law Review*, vol. 5, 1993, p. 5. ↵

36. ECtHR, *Funke v France*, 25 February 1993, (Appl. no. 10828/84). ↵

37. P. Oliver, "Companies and their fundamental rights: a comparative perspective", in *International and Comparative Law Quarterly*, vol. 64, 2015, p. 685. ↵

38. See for example: ECtHR, *Menarini Diagnostics v Italy*, 27 September 2011, (Appl. no. 43509/08). On this topic, see also: P. H. van Kempen, "The Recognition of Legal Persons in International Human Rights Instruments: Protection Against and Through Criminal Justice" in M. Pieth and R. Ivory (eds.), *Corporate Criminal Liability – Emergence, Convergence and Risk*, Dordrecht 2011, p. 373. ↵

39. ECtHR, *Bernh Larsen Holding AS and Others v Norway*, 14 March 2013, (Appl. no. 24117/08), para 104. ↵

40. See the critical analysis D. Brodowski, "Minimum Procedural Rights for Corporations in Corporate Criminal Procedure" in D. Brodowski, M. Espinoza de los Monteros de la Parra, K. Tiedemann and J. Vogel (eds.), *Regulating Corporate Criminal Liability*, Heidelberg 2014, pp. 221-223. ↵

41. See *supra* n. 35. ↵

42. ECtHR, *Funke v France*, 25 February 1993, (Appl. no. 10828/84), para 44. ↵

43. See also B. Emmerson, A. Ashworth and A. Macdonald, *Human Rights and Criminal Justice*, London 2012, p. 615. ↪

44. ECtHR, *Saunders v UK*, 17 December 1996, (Appl. no. 19187/91). ↪

45. And not whether the investigation of the DTI inspectors was subject to the guarantees foreseen in Art. 6 ECHR. *Ibid.*, para 67. ↪

46. Understood as also covering the privilege against self-incrimination. ↪

47. *Ibid.*, para 68. ↪

48. *Ibid.*, para 69. ↪

49. ECtHR, *J.B. v Switzerland*, 3 May 2001, (Appl. no. 31827/96). ↪

50. *Ibid.*, para 66. ↪

51. *Ibid.*, para 68. ↪

52. Documents that already exist at the time a request to hand them over is made by government officials, thus not documents drawn up in response to such a request. ↪

53. B. Emmerson, A. Ashworth and A. Macdonald, op. cit. (n. 43), p. 620. ↪

54. ECtHR (GC), *Jalloh v Germany*, 11 July 2006, (Appl. no. 54810/00), para 113. ↪

55. ECtHR, *Chambaz v Switzerland*, 5 April 2012, (Appl. no. 11663/04), paras 53-58. ↪

56. M. Veenbrink, "The Privilege against Self-incrimination in EU Competition Law: A deafening Silence?", in *Legal Issues of Economic Integration*, 42, 2015, p. 123. ↪

57. ECtHR (GC), *Jalloh v Germany*, 11 July 2006, (Appl. no. 54810/00), paras 97, 101, and 117. ↪

58. *Ibid.*, para 97. See also: ECtHR, *John Murray v UK*, 8 February 1996, (Application no. 18731/91), para 49. ↪

59. ECtHR (GC), *O'Halloran and Francis v UK*, 29 June 2007, (Appl. nos. 15809/02 and 25624/02), para 53. See on this case: J.R. Spencer, "Curbing speed and limiting the right to silence", in *Cambridge Law Journal*, vol. 66, 2007, pp. 531-533. ↪

60. *Ibid.*, para 62. ↪

61. See in this context: ECtHR, *Marttinen v Finland*, 21 April 2009, (Appl. no. 19235/03), para 75. ↪

62. Deruyck suggests that it is likely that such questions will be governed by the *Jalloh* criteria. See: F. Deruyck, "De rechten van verdediging van de rechtspersoon in de Belgische strafprocedure: van verre evident, maar verre van evident", in *Nullum Crimen* 2016, p. 43. ↪

63. ECJ, Case C-374/87, *Orkem v Commission*, 18 October 1989. ↪

64. *Ibid.*, para 18. ↪

65. Regulation No 17 of the Council of 6 February 1962, the first Regulation implementing Arts. 85 and 86 of the Treaty, O.J., English Special Edition 1959-62, p. 87. ↪

66. *Orkem*, para 20. ↪

67. On this point, see the extensive analysis of AG Darmon in *Orkem*, starting at para 97. ↪

68. *Orkem*, para 34. ↪

69. *Ibid.*, para 35. ↪

70. ECJ, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij et al. v Commission*, 15 October 2002, para 274. ↪

71. *Ibid.*, para 275. See also: L. Ortiz Blanco, *EU Competition Procedure*, Oxford 2013, p. 307. ↪

72. For a recent example, see: Opinion of AG Wahl in Case C-267/14 P, *Buzzi Unicem SpA*, 15 October 2015, paras 73-91. ↪

73. Art. 13 of the Directive on the Presumption of Innocence. ↪

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