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THE RIGHT TO SILENCE WITHIN THE EUROPEAN UNION: ONE RIGHT, SO MANY CHALLENGES

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Introductory Remarks

Defined as the 'chameleon of criminal procedure',[1] the right to silence has recently been given new and increasing attention by the academic community and by judges all across Europe thanks to a recent landmark judgment of the Court of Justice of the European Union (*DB v Consob*) and to the entry into force of Directive 2016/362 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial. Despite the fact that almost all modern legal systems recognize to some extent the right to silence of those accused of a criminal offence, there is still controversy over its rationale, its nature, its implications and its scope of application.

This paper aims at analyzing the right to silence in European Union law and in the law of the European Convention on Human Rights (hereinafter 'ECHR') and at discussing its practical implications with special regard to the impact of the case-law of the Court of Justice of the European Union (hereinafter 'CJEU') and of the European Court of Human Rights (hereinafter 'ECtHR') on the Italian legal system.

Firstly, it is important to note that the expressions 'right to silence' and 'privilege against self-incrimination', despite frequently being used as synonyms, do not describe the same guarantee but rather represent two only partly overlapping circles.[2] On one hand, the right to silence entails that individuals suspected with a criminal offence must be accorded the right to remain completely passive when asked questions about their involvement in the offence concerned. On the other hand, the privilege against self-incrimination has a much broader meaning as long as it implies that the accused should in no way be forced to contribute to its incrimination, e.g. by being obliged to hand over documents. In the present paper we will cover both issues, as they frequently overlap.

Scholars worldwide are far from unanimous in pointing out the rationale of the privilege, which is of fundamental importance in assessing its scope of application and precise nature. Whereas it is impractical to discuss all the various theories that have been elaborated in this regard, we focus on those arguments that have gained the greatest attention (and that have also been 'used' in various judgments by the European Court of Human Rights).[3] Despite the widespread opinion that the right to silence lies at the heart of the notion of a fair trial and that it is essential to ensure that the suspect can effectively build his defense strategy, others stress that the right to silence is essential to avoid

[1] For both this definition and an overview of the topic see Lamberigts, 'The Privilege against Self-Incrimination: A Chameleon of Criminal Procedure', 7 *New Journal of European Criminal Law* 2016 418.

[2] In this respect see S. Trechsel, *Human Rights in Criminal Proceedings* (2005), at 343.

[3] See Jackson, 'Re-Conceptualizing the Right of Silence as an Effective Fair Trial Standard', 58 *The International and Comparative Law Quarterly* (2009) 835.

that the suspect is forced to lie, and thus ultimately to diminish the risk of miscarriages of justice. According to another theory the right to silence is a direct corollary of the presumption of innocence, since the burden of proving the accused guilty only relies on the State and in no way should the accused be treated as guilty - and therefore obliged to give its contribution - before the State has successfully proven its case. This approach should be given special consideration, as the European legislator seems to have adopted this exact line of reasoning when it addressed the right to silence in a Directive devoted to the strengthening of the presumption of innocence. Third, a lot of commentators think that the right to silence is crucial in order to respect the will of the accused; this opinion relies on the prohibition of torture, the need to respect for private life or 'the privacy of the mind'.

All these theories show that the right to silence is intertwined with the core principles of criminal law. Furthermore, as the latest case-law of the European Courts seems to suggest, the right should be recognized even beyond criminal law, as an essential safeguard of the individual against the punitive power. However, as it is shown in the paper, the more the connection with a criminal proceeding is weak, the less the protection of the right can be absolute and, in the day-to-day implementation, each of the underlying rationales of the right should be balanced with the countervailing interests.

1. The Right to Silence in the Legal Framework of the European Union and of the ECHR

The first step in this attempt is looking for the legal basis of the right to silence, both in the context of the European Union and in the context of the ECHR, thus taking into account the case law of the CJEU and of the ECtHR.

A. The European Union

The first legal framework to be taken into consideration is that of the European Union. According to most scholars, the right to silence has three different legal sources within this context: Article 6 para. 3 of the Treaty of the European Union (hereinafter 'TEU'), Articles 47-48 of the Charter of Fundamental Rights of the European Union (hereinafter 'CFREU') and Articles 7 and 10 of Directive 2016/362 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial (hereinafter also 'Directive 2016/362').[4]

It must be noted, however, that Article 6 TEU and Articles 47-48 CFREU contain no mention of the right to silence. On one hand, Article 6 para. 3 TEU 'simply' states that 'Fundamental rights, as

[4] For a more in-depth analysis see Caianiello, 'Right To Remain Silent and Not to Incriminate Oneself in the European Union System', available at SSRN: https://ssrn.com/abstract=3743329 or http://dx.doi.org/10.2139/ssrn.3743329 (2020).

guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'. On the other hand, Articles 47 and 48 CFREU respectively guarantee the right to a fair trial and the presumption of innocence (and the rights of the defence). Despite the absence of any explicit mention in the abovementioned provisions, those norms do provide - in fact - a 'constitutional basis' to the right to silence within the context of the EU. Indeed Article 6 para. 3 TEU, in recalling the ECHR and the constitutional traditions of the Member States, implicitly gives the right to silence the status of a general principle of the Union law, since the right to silence has always been treated by the ECtHR as a fundamental component of the right to a fair trial recognized by Article 6 of the ECHR and as a direct corollary of the presumption of innocence.

This inextricable link between the right to silence, the right to a fair trial and the presumption of innocence, in turn, allows us to find another 'constitutional' basis for the right in Articles 47 and 48 CFREU (the Charter having the same value of the Treaties) that recognize and protect - at the EU level - the right to a fair trial and the presumption of innocence. This conclusion is undisputed also in light of the so called 'equivalence clause' embedded in Article 52 para. 3 CFREU. The double reference to the ECHR contained in Articles 6 TEU and 47-48-52 CFREU allows us to conclude that the level of protection that the ECHR (as interpreted by the Strasbourg Court) grants to the right to silence is to be considered a part of the Union Law; since the jurisprudence of the ECtHR, in this respect, is far more rich and detailed than the one of the CJEU, we will devote a special attention to the former in the next paragraph.

Below the constitutional level, [5] the first provisions that explicitly recognize the right to silence are Articles 7 and 10 of Directive 2016/362; the self-declared goal of the Directive that we can see in its title leads us to believe that the European legislator has embraced the opinion that the right to silence is a necessary consequence of the presumption of innocence. As we will see in the second part of this paper, however, some of the implications of the right to silence that can be drawn from the text of the directive are quite incoherent with such a premise. Turning to the specific provisions of the Directive, only two of them are devoted to the right to silence (while a little bit more attention is dedicated to the right in Recitals 24-32). Article 7 recognizes to the suspect and the defendant both the right to remain silent and the privilege against self-incrimination (paras. 1 and 2); the third paragraph recalls almost *verbatim* the jurisprudence of the ECtHR when it states that 'The exercise of the right not to

[5] In this paper we are specifically focusing on the right to silence in the criminal realm; however, we must point out that art. 9 para. 2 of the OLAF regulation (Regulation (EU, Euratom) No. 883/2013) also recognizes such right during a peculiar administrative proceeding, the one conducted by OLAF.

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'; the fourth and the fifth paragraph concern the consequences of the suspect's behavior: on one side, his cooperative attitude may be considered in the sentencing phase; on the other side, his silence shall never be used against him or as incriminating evidence; the sixth paragraph leaves room for exceptions in relation to minor offences.

Article 10, on its part, is devoted to the consequences of the violation of the right to silence and – once again almost quoting the ECtHR – states that 'Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected'.

A significant role in shaping the right to silence within the EU has also been played by the CJEU. Indeed, it was the Court itself that drew the right from the already existing principles and provisions when Directive 2016/362 had not yet been drafted. In this respect, two of the most relevant judgments are *Orkem v. Commission* and *DB v. Consob* which will be analyzed in part. 2.

B. The European Convention on Human Rights and Fundamental Freedoms

As one can easily see by reading the ECHR, there is no explicit mention of the right to silence in any provision of the Convention. This factor, however, did not prevent the ECtHR from deriving this right – and, more generally, the privilege against self-incrimination – from other provisions of the Convention (and from elaborating the most significant international jurisprudence on the issue).[6] The main provisions to which the Court has made reference in building its case law are Article 3 (for the prohibition of torture and degrading treatment) and Article 6 (for the right to a fair trial and the presumption of innocence). It would be impossible, in this paper, to recall each and every significant judgment; for this reason, we will only make reference to the most relevant ones and highlight the general conclusions that can be drawn from them.

Preliminarily, we need to stress that it took the Court quite some time to come to a definitive conclusion as to the rationale of the right to silence and the privilege against self-incrimination. Initially, the Strasbourg judges had been quite laconic, in that they simply stated that anyone charged with a criminal offence within the meaning of Article 6 had the right to remain silent and not to

[6] For a more detailed analysis of the ECtHR's S. Trechsel, *Human Rights in Criminal Proceedings* (2005), chapter 13.

incriminate himself;[7] they did not, however, explain how such right was derived from the right to a fair trial embedded in Article 6 ECHR. Subsequently, the Court clarified that the right to remain silent lies at the heart of the notion of a fair procedure and that protecting the accused against improper compulsion avoids miscarriages of justice.[8] Later on, the judges have reached a more detailed conclusion on the rationale of the right, that can be summarized as follows:

'The right not to incriminate oneself, in particular, 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 is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent.'[9]

Accordingly, the most recent jurisprudence of the ECtHR could be read in the sense that the right to silence is mainly aimed at respecting the will of the accused, and that improper compulsion of the defendant would translate in a violation of the presumption of innocence.

The issue of who enjoys the right to silence will be addressed in the following paragraph; here we will simply point out that the ECtHR has repeatedly stressed that the concept of someone having been "charged" with a criminal offence is an autonomous one, and that it is sufficient – for defence rights to be 'triggered' – that the authorities have sufficient elements to suspect that someone is involved in the commission of a criminal offence.[10]

To ensure that the right to silence is effective, the Court demands that national authorities warn the defendant that he enjoys such right, before any question is put to him. Indeed, as clarified in *Ibrahim and others v. UK*, the Court believes that

'it is inherent in the privilege against self-incrimination, the right to silence and the right to legal assistance that a person "charged with a criminal offence" for the purposes of Article 6 has the right to be notified of these rights… in principle there can be no justification for a failure to notify a suspect of these rights. Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair… where access to a lawyer is

[7] ECtHR, *Funke v. France*, Appl. no. 10828/84, Judgment of 25 February 1993; all ECtHR decisions are available at http://hudoc.echr.coe.int/.

[8] ECtHR, *Murray v. UK*, Appl. no. 18731/91, Judgment of 8 February1996.

[9] ECtHR, *Saunders v. UK*, Appl. no. 19187/91, Judgment of 17 December 1996.

[10] See the position of the fourth applicant in ECtHR, *Ibrahim and others v. UK*, Appl. nos. 50541/08, 50571/08, 50573/08, 40351/09, Judgment of 13 September 2016.

delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer and his right to silence and privilege against self-incrimination takes on a particular importance.'

Accordingly, even in situations in which the suspect has not been warned of his rights, the Court will still proceed to verify whether such failure has rendered the proceeding 'as a whole' unfair, considering all the specific circumstances of the case.

As we have previously stressed, the Court is of the opinion that the right to silence is primarily concerned with the respecting of the will of the accused and avoiding that excessive pressure could be put on him by police and judicial authorities. As such, the Strasbourg judges have had to clarify what constitutes excessive pressure, in order to verify which practices are admissible under art. 6 ECHR. In this respect, 'the Court will have regard, in particular, to the following elements: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put'. This entails that different types of pressure might lead the Court to reach different conclusions; for example, it has considered the obligation imposed upon the owners of cars to disclose the identity of the driver to be admissible,[11] whereas it has found a violation in the case of a suspect who was forcibly administered emetics in order to expel drugs that he had ingested[12] and in several cases of individuals obliged to hand over potentially incriminating documents concerning tax evasion and custom violations.[13]

Another issue that was addressed by the Court multiple times is that of the material scope of application of the privilege against self-incrimination: does it also cover real evidence? Not surprisingly, the natural consequence of the above-mentioned inextricable link between the right to silence and the need to respect the will of the accused, entails that the right to silence *'*does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing*'.*[14]

Lastly, the Court had to examine the topic of adverse inferences being drawn from the defendant's exercise of his right to silence. The leading case, in this respect, is *Murray v. UK*. As the issue will

[11] ECtHR, *O'Halloran and Francis v. UK*, Appl. nos. 15809/02, 25624/02, Judgment of 29 June 2007.

[12] ECtHR, *Jalloh v. Germany*, Appl. no. 54810/00, Judgment of 11 July 2006.

[13] ECtHR, *Funke v. France*, Appl. no. 10828/84, Judgment of 25 February 1993, *J.B. v Switzerland*, Appl. no. 31827/96, Judgment of 3 May 2001, and *Chambaz v. Switzerland*, Appl. no. 11663/04, Judgment of 5 April 2012.

[14] ECtHR, *Saunders v. UK*, Appl. no. 19187/91, Judgment of 17 December 1996, *Jalloh v. Germany*. Appl no. 54810/00, Judgment of 11 July 2006.

be analyzed more in depth in the third section of this paper, we will simply point out that in this specific instance the Court found no violation of Article 6 and stated that

'On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. Wherever the line between these two extremes is to be drawn, it follows from this understanding of "the right to silence" that the question whether the right is absolute must be answered in the negative.'

C. Miscellaneous

Another particularly relevant provision, that has been quoted in various cases by the ECtHR itself, is Article 14 (3)(g) of the International Covenant on Civil and Political Rights. Indeed, after having proclaimed the right to a fair trial and the presumption of innocence, the abovementioned provision states 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 testify against himself or to confess guilt'.

Last, since the legal background of the authors of the present paper is Italian, we shall devote a few words to the Italian legislation. The Italian Constitution does not contain any specific provision devoted to the right to silence. However, multiple norms of the Constitution can be invoked as a legal basis for the right to silence. First, Article 24(2) of the Constitution states that 'The right of defence is inviolable at every stage and level of the proceedings'. Second, in Article 27 (2) of the Constitution is embedded the 'Italian version' of the presumption of innocence: 'The defendant is not considered guilty until the final judgment is passed'. Third, the right to 'a fair trial regulated by the law' is enshrined in art. 111 (1) of the Constitution. Last, Articles 2 and 13 of the Constitution can be read in the sense that the need to respect the human dignity and the personal freedom of the defendant imply that any choice to speak during the criminal trial must be voluntary.

Finally, we must stress that Article 64(3) of the Italian Code of Criminal Procedure devotes a very detailed discipline to the right to silence of the defendant. Indeed, the abovementioned provision states that before the questioning begins, the defendant must be warned that: a) his statements might always be used against him; b) he has the right not to answer to any of the questions, but the proceeding will follow its course; c) should he make any statement on facts that involve the responsibility of other people, he might become a witness in that respect. Last, Article 64(3-*bis*)

affirms that if the defendant is not given the warnings proscribed in the previous paragraphs a) and b), his statements cannot be used.

2. Whose silence is this? The scope of application of the right to silence

A. The accused person in criminal proceedings

A recent debate in both EU and ECHR law has concerned the possibility to recognize the right to silence not only to the accused in the criminal proceedings, but also to the defendant in administrative proceedings.

This issue mainly concerns administrative proceedings that can be considered criminal in substance, according to the autonomous notion of criminal charge, upheld by both the CJEU and the ECtHR. Recently it has also been debated whether the right to silence should be recognized in administrative proceedings that are strictly connected to criminal proceedings deterring and sanctioning the same unlawful conducts, in order to impose limits on the investigative powers of administrative authorities when the evidence collected through the investigation is likely to be used in the criminal proceeding.

While Directive EU 2016/343 seems restrictive on this regard, the Court of Justice has recently adopted a more protective approach, in line with the case-law of the ECtHR.

Article 2 of the Directive explicitly limits its scope of application to "criminal proceedings" and Recital 11 rules out civil or administrative proceedings, 'including where the latter can lead to sanctions, such as proceedings related to competition, trade, financial services, road traffic, tax or tax surcharges, and investigations by administrative authorities in relation to such proceedings'.

On the other hand, Recital 11 refers to the notion of criminal proceedings as interpreted by the CJEU and the ECtHR. This means that the right to silence, enshrined in Article 7 of the Directive, should be recognized in administrative proceedings which lead to the imposition of sanctions of criminal nature according to those criteria firstly set out by the ECtHR in the *Engel* case[15] and most recently adopted by the Court of Justice too:[16] the legal classification under national law; the intrinsic nature of the offence; the purpose and the degree of severity of the penalty.

Although these criteria might seem affected by some uncertainties (for example how to fix the threshold of severity that makes *criminal* a financial penalty) and the outcome of their application may vary depending on a case-by-case assessment, the case-law of the CJEU and of the ECtHR

[15] ECtHR, *Engel and Others v. the Netherlands*, Appl. no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, Judgment of 8 June 1976, at para. 81.

[16] C-489/10, *Bonda* (EU:C:2012:319), at para. 37 and C-617/10, *Åkerberg Fransson* (EU:C:2013:105), at para. 35.

generally regards administrative proceedings concerning the protection of the market and taxation as criminal in nature because of the punitive purpose and the high degree of severity of the sanction.[17]

Indeed, such an assessment has been recently carried out by the CJEU for the benefit of the application of the right to silence in the *DB* judgment with regards to the sanctions imposed by the Italian National Companies and Stock Exchange Commission (Consob).[18]

Answering to the reference for a preliminary ruling of the Italian Constitutional Court concerning the interpretation and the validity of Article 14(3) of Directive 2003/6/EC on insider dealing and market manipulation and Article 30(1)(b) of Regulation (EU) 596/2014 on market abuse, the Court stated that such provisions, interpreted in light of Articles 47 and 48 of the CFREU, do not compel Member States to penalize natural persons who, in an investigation carried out in respect of them by the competent authority, refuse to cooperate and provide information that may contribute to establish their criminal liability or to impose administrative sanctions of criminal nature, such as those inflicted by the Italian Commission for insider dealing.

Relying upon those provisions of the Treaties (Article 6 TEU) and of the Charter (Articles 52-53) that require an interpretation of fundamental rights consistent with the minimum standard of protection provided by the ECHR and with the principles enshrined in Member States' Constitutions, the Court of Justice derives the right to silence from the right to a fair trial and the presumption of innocence. Then, the Court extends the very core of the right to silence – the right of the individual not to be penalized for his refusal to cooperate to the investigation – to an administrative proceeding that imposes punitive sanctions: evidence against the accused person can never be gathered through coercion, to the detriment of the liberty and defense rights of the individual in front of the public authority. And this is true with regards not only to information directly incriminating the person, but also to questions of fact that may be used in support of the prosecution (para. 40).

Such a distinction, that had been drawn by the CJEU in its case-law concerning the application of the right to silence to undertakings in the investigations for anticompetitive conducts,[19] does not apply to natural persons in light of the judgments of the ECtHR.[20]

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[17] Joined Cases C-596/16 and C-597/16, *Di Puma and Zecca* (EU:C:2018:192) para. 38, and C-537/16, *Garlsson Real Estate and Others* (EU:C:2018:193), at para. 34 and 35. ECtHR, *Grande Stevens and Others v. Italy*. Appl. no. 18640/10, Judgment of 4 March 2014, at para. 101.

[18] C-481/19, *DB v. Consob* (EU:C:2021:84), at para. 43.

[19] 374/87, *Orkem v Commission* (EU:C:1989:387), at para. 34; C-301/04 P, *Commission v SGL Carbon* (EU:C:2006:432), at para. 41; C-407/04 P, *Dalmine v Commission* (EU:C:2007:53), at para. 34.

[20] In this respect see part. 1 of the present paper.

B. The defendant in administrative proceedings connected to criminal proceedings

In light of the *DB* judgment of the CJEU, we may also ask whether the right to silence should be recognized to the defendant in administrative proceedings when the investigative outcomes of such proceedings can be potentially used to establish his criminal liability: the Court underlines the fact that the need for the recognition of the right to silence arises also when, 'in accordance with national legislation, the evidence obtained in those proceedings may be used in criminal proceedings against that person in order to establish that a criminal offence was committed' (para. 44).

This issue is relevant considering the possibility that an administrative proceeding is followed by a criminal proceeding, or that both proceedings are opened in parallel to ascertain and sanction the same facts, and that both the CJEU and the ECtHR seem to encourage the circulation of evidence between administrative and criminal proceeding.

Such an interaction, however, might have a negative impact on the right to silence: considering that criminal safeguards apply since the person is suspected of having committed a criminal offence, following a formal decision of the prosecuting authority that may remain unknown to the person,[21] if the criminal liability of the individual is based on the evidence collected during the administrative investigations – then, when criminal safeguards are not still in place – the effective protection of the right is undermined.

Of course, the recognition of the right to silence in administrative proceedings connected to criminal proceedings would affect the rapidity and effectiveness of the former to the detriment of the protection of the underlying public interest.

A balance could be achieved by recognizing the right to silence in administrative proceedings only when elements that a criminal offence has been committed come out. Indeed, this is the solution adopted by Article 220 of the implementation provisions of the Italian Code of Criminal Procedure that requires authorities in charge of conducting enquiries to collect evidence according to the procedural safeguards of the Code, the right to silence in its full extension included, otherwise the evidence obtained cannot be used in the criminal proceeding.[22]

The effectiveness of this provision could be nevertheless undermined as it may often be difficult to establish the exact moment when there are elements that a criminal offence has been committed.

[21] In Italy, for example, the act envisaged by Article 335 of the Code of Criminal Procedure.

[22] Italian Court of Cassation, Section 2, judgement n. 8604 of the 5 November 2020; judgment of 24 November 2020 n. 11794; judgment of the 6 November 2020, n. 3726.

In this respect, the *DB* judgment of the CJEU seems to set a higher standard of protection of the right to silence: although Article 2 of the Directive clearly states that 'it applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence', the Court stated that the criminal liability of the individual can never be established on grounds of evidence that has been collected by the public authority under the threat of imposing a penalty on the individual, in administrative proceedings too.

This approach seems in line with the judgment *Chambaz v. Switzerland* of the European Court of Human Rights;[23] in that case the accused person had been fined during an administrative proceeding because he had refused to provide documents concerning his revenues that could have been used for the purpose of establishing his criminal liability for tax evasion. The Court recognized a violation of the privilege against self-incrimination under Article 6 (1) ECHR as the criminal and the administrative proceedings were strictly related and the former was subsequent to the latter.

C. Can legal persons invoke their right to remain silent?

Another issue affecting the scope of application of the right to remain silent concerns its application in the proceedings involving legal persons, such as corporations.

To this respect, EU legislation seems restrictive: Article 2 of the Directive EU 2016/343 only refers to natural persons and Recital 14 underlines that 'At the current stage of development of national law and of case-law at national and Union level, it is premature to legislate at Union level on the presumption of innocence with regard to legal persons. This Directive should not, therefore, apply to legal persons'. This restraint is due to the awareness of the EU legislator that natural and legal persons differ in their needs and levels of protection as regards the presumption of innocence (Recital 13).

Nonetheless, it must be considered that the Directive only establishes a minimum standard of protection of the presumption of innocence and considers the possibility that the European Court of Human Rights and the Court of Justice recognize its application to legal persons too (Recital 14).

Indeed, as regards the case-law of the Court of Justice, since *Orkem*, a limited protection of the right to silence has been recognized to undertakings too.[24] The company *Orkem* had challenged the decision of the Commission in the field of competition law claiming that it was in breach of his rights of defense as such decision compelled the company to give information that constituted evidence against itself.

[23] ECtHR, *Chambaz v. Switzerland*, Appl. no. 11663/04, Judgment of 5 April 2012.

[24] 374/87, *Orkem v Commission* (EU:C:1989:387).

In that case the Court, relying on general principles of EU law, on the one hand, affirmed that the protection of the right to silence was reserved to natural persons in criminal proceedings; on the other hand, it found that a decision that compels undertakings to provide answers that might involve an admission of the existence of a competition law infringement on its part violated the right to defense.

Thus, the protection of the right to silence of undertakings is quite limited: they cannot be forced to admit that they have committed an infringement, but they are not exempted from answering factual questions and providing documents even though the latter could be used to establish their liability.

Orkem was later incorporated into Recital 23 of Regulation 1/2003[25] and was not overruled by the following judgments[26].

The *DB* judgment of the CJEU did not open up the possibility of extending the right to silence in its full extent to legal entities neither called into question the blurred distinction between factual questions, that are allowed, and questions which might involve the admission of the existence of the infringement, forbidden as contrary to the very essence of the right to silence (paras. 46-47).

The European Court of Human Rights seems not to have directly addressed the issue of the application of the right to silence to legal persons. The ECtHR considered the right to a fair trial in its criminal limb, enshrined in Article 6 (1) ECHR, applicable to administrative proceedings against corporations, such as those imposing sanctions for anti-competitive conducts, provided that the sanctions can be regarded as criminal in substance according to the *Engel* criteria;[27] it is still uncertain, however, whether legal persons could fully rely on the right to silence as acknowledged by the ECtHR with regard to natural persons.

This is also true because the right to silence is not regarded by the ECtHR as absolute: the right can be limited in order to ensure the protection of the public interests involved in the proceeding, provided that its very essence is not undermined according to the ECtHR assessment.

[25] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[26] C-238/99 P, *Limburgse Vinyl Maatschappij et al. v Commission* (ECLI:EU:C:2002:582); C-301/04 P, *Commission v SGL Carbon* (EU:C:2006:432); C-407/04 P, *Dalmine v Commission* (EU:C:2007:53); C-466/19 P, *Qualcomm and Qualcomm Europe v. Commission* (ECLI:EU:C:2021:76).

[27] ECtHR, *Menarini Diagnostics s.r.l. v. Italy*, Appl. no. 43509/08, Judgment of 27 September 2011.

The issue of the recognition of the right to silence to legal persons is going to become more and more relevant considering the extension of a criminal or "quasi criminal" liability of legal persons in EU Member States for the crimes committed by their directors or employees (predicate offences)[28].

In the absence of a case-law on this subject, it seems that the outcome could vary depending on the definition of the main rationale of the right: indeed, if we agree that the rationale of the right is to defend the individual from coercion or oppression and protect human dignity and autonomy, the recognition of the right to remain silent to legal persons does not seem obvious. On the other hand, if we consider essential the need for securing effective defense rights to the accused, the adoption of a different standard of protection between natural and legal persons could seem unjustified. But yet, it could be argued that, while the protection of human dignity and autonomy does not admit derogations, the right to defense can be limited to a certain extent, especially when the liberty of the individual is not at stake.

As regards the concrete implications of the recognition of the right to remain silent to legal persons, it is crucial to define the natural person who should be entitled to exercise this right on behalf of the legal person. It seems necessary to refer to the person through which the legal person participates in the proceeding and *can speak* according to procedural rules.

In Italy, for example, the legal person participates in the proceeding through its legal representative, unless the latter is the person accused of the predicate offence (Article 39 Legislative Decree no. 231/2001 on the administrative liability of legal persons for crimes). However, the legal representative cannot invoke the right to remain silent on behalf of the legal person in every situation. On the one hand, Article 35 extends the safeguards of the Code of Criminal Procedure concerning the accused person to the legal person – the right to remain silent and not to incriminate oneself included – if deemed compatible. On the other, Article 44 excludes the legal representative from the obligation to testify only if he held this position when the crime was committed: as it seems likely the involvement in the commission of the infringement of the legal representative at the time of the infringement in a personal capacity, the Italian legislator decided to avoid any risks of self-incrimination.

[28] For example, in Italy *Decreto Legislativo 8 giugno 2001 n. 231 Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica* (Legislative Decree of 8 June 2001, no. 231 that regulates the administrative liability of legal persons, whose substantial nature is still under debate). In France, Article 121-2 of the French Criminal Code affirms la '*responsabilité pénale des personnes morales*' (the criminal liability of legal persons).

The same provision *a contrario* seems to impose the obligation to testify on the legal representative that participates in the proceeding on behalf of the legal person but that had not this qualification at the time of the infringement. This means denying the right of the legal person, acting in the proceeding through its representative, to remain silent.

3. May the silence speak?

A. Right to silence and unjust detention

The right to silence has assumed, both in the domestic law and in the interpretation of the national courts, the role of a double-edged sword. It is the case of the right to compensation for illegal detention on remand where the silence is a fundamental right and yet an impediment to the compensation.

In the European context, reparation for unlawful detention is provided for by Article 5 of the European Convention on Human Rights (ECHR) which is dedicated to the protection of the right of everyone to freedom and security. Article 5(5) provides that 'everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation'.

The same provision is contained in Article 9(5) of International Covenant on Civil and Political Rights, 1966, according to which 'anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'.

On the contrary, despite the fact that in the European legislation there is still no specific discipline on the subject, the Directive (EU) 2016/343 has had an impact on the present issue, stressing that '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' (see Recital no. 28).

Focusing on the extent of Article 5(5) ECHR, it grants the right to compensation for the time spent in pre-trial detention to anyone who has been unlawfully deprived of personal liberty, regardless of the outcome of the trial: acquittal does not entail the automatic recognition of the right nor does it condemn its exclusion. In accordance with the law, the compensation requires a confirmed violation of Article 5(1)(2)(3)(4) by a national authority and also that the effective enjoyment of the right guaranteed in Article 5(5) of the Convention is ensured with a sufficient degree of certainty.[29]

[29] ECtHR, *Ciulla v. Italia*, appl. no. 11152/84, Judgment of 22 February 1989, para. 44; *Sakık and Others v. Turkey*, appl. no. 23878/94, 23879/94, 23880/94, 23881/94, 23882/94, 23883/94 (joined), Judgment of 26 November 1997, para. 60; *Stanev v. Bulgaria*, appl. no. 36760/06, Judgment of 17 January 2012, para. 182.

However, the case law of Italian Courts has shown some conflicts between the national systems and the ECHR provisions as also interpreted by the ECtHR. More specifically, domestic courts have often denied compensation where, without prejudice to the miscarriage of justice, the applicant has somehow caused or concurred to cause the wrongful detention with his behaviour, such is the case of the decision to remain silent during the trial.

In this context, the right to silence becomes a 'two-faced Janus': at the same time, it can be both a defensive choice which cannot on its own be used as conclusive evidence of guilt in criminal proceedings and an obstacle to the claim for compensation for wrongful detention on remand.

In Italy, the law provides that the right to compensation can be denied where the applicant has by some action of his own caused pre-trial detention either deliberately or through gross neglect.[30] More specifically, although the fact that the person concerned has invoked his right to remain silent is insufficient to refuse his request for compensation, silence may have negative consequences when the suspect had made no attempt to prove his innocence or had concealed facts – ignored by investigators – or failed to provide explanations that could have prevented detention on remand.[31] In this perspective, remaining silence turns into a violation of a prudential rule.

The Italian '*Corte di Cassazione*' has long considered the domestic provisions about the compensation for unlawful detention to be compatible with the ECHR and has also argued that the negative consequences of remaining silent could be explained, to certain extent, through the solidarity principle: to prevent society from paying for the judicial error that the applicant himself has contributed to cause with his reluctant behavior, the right to the compensation demands an objective infringement of personal freedom.

Nonetheless, Strasbourg judges seem to think otherwise. In fact, in a recent ruling – *Fernandes Pedroso c. Portugal* case – the ECtHR condemned the narrow interpretation of domestic jurisdiction about the compensation for wrongful imprisonment arguing that a person who suffered for unlawfulness detention must have a full access to the compensation: this right cannot be affected by any limitations.[32] That is the response of the ECtHR to the domestic courts that, in this case, assuming

[30]Art. 314, Code of Criminal Procedure (Italy): '1. Anyone who has been acquitted with an irrevocable sentence because the fact does not exist, for not having committed the fact, because the fact does not constitute a crime or is not provided for by law as a crime, has the right to equitable reparation for the pre-trial detention suffered if he has not given or contributed to giving cause through willful misconduct or gross negligence'.

[31] Italian Court of Cassation, Section 4, judgement n. 24439 of the 27 April 2018.

[32] ECtHR, *Pedroso v. Portugal*, appl. no. 59133/11, Judgment of 12 June 2018: according to para. 132), compensation at the domestic level depends on a 'manifestement illégale ou fondée sur une erreur grossière detention, within the meaning of Article 225 of code de procédure pénale'.

that the compensation depends on 'si la détention provisoire était fondée sur une erreur grossière, notoire, c'est-à-dire impardonnable'[33], had deemed that such an irregularity had not been obvious, blatant, or manifest.

Applying this decision to the relationship between the right silence and the judgment on reparation for illegal detention, national courts should not evaluate the lawful, legitimate decision to remain silent (which is an expression of the right of defense) as an impediment to claim the compensation.

On the other hand, judicial decisions had to deal with the Directive (EU) 2016/343 which had a direct impact on the right to compensation for illegal detention on remand.

In this regard, in countries such as Italy, where, as already emphasized, silence has always been an instance of seriously reckless and/or negligent conduct that interfered with the the establishment of the facts, case law had to modify its own interpretive approaches. In fact, recently, the Supreme Court has ruled that, albeit it is necessary to ascertain if the applicant contributed to cause the error, it must be considered the direction of Europe to strengthen the procedural rights of defendants especially regarding the presumption of innocence.[34]

Furthermore, following the Directive the Legislator had to adapt its domestic legislation to European requirements about presumption of innocence, also considering the European objective of issuing common rules on the protection of the procedural rights of suspects and defendants (Directive (EU) 2016/343, paras. 10, 24).

In particular, the Code of Criminal Procedure has been modified in order to clarify that the exercise by the accused of the right to remain silent does not affect the right to reparation.[35]

B. Benefits for those who cooperate

The choice to remain silent or to speak also affects the powers which may be exercised by the court during the execution of a conviction. It is what happens in the Italian legislation where the possibility for certain types of convicts of being granted alternative measures depends on these two options which lead to different paths.

More specifically, art. 4-bis of the Prison Administration Act (o.p.) states that those who have been convicted for a list of serious offences – mainly mafia organizations and terrorism related offences – cannot access alternative measures unless they cooperate with the authorities.[36] In other words, the

[33] *Ibid.*, para. 62.

[34] Italian Court of Cassation, Section 4, judgement n. 8616 of the 8 February 2022.

[35] Art. 314(1) Code of Criminal Procedure (Italy) as modified by D.Lgs. 8/11/2021, no. 188.

[36] Alternative measures, however, can still be granted if cooperation is neither possible nor useful, and provided that there are no connections anymore between the convict and organized crime.

access to some benefits – such as the possibility to execution of penalty out of the prison - demands that the convict helps concretely the judicial authorities in the collection of decisive elements for the reconstruction of the facts and for the detection/capture of the other perpetrators.[37] This provision implies an irrebuttable presumption of persistent dangerousness of the non-cooperative convict, despite a potential improvement in his personality due to the time spent in prison.

However, the ECtHR has obliged the domestic courts to reconsider the legitimacy of this provision and the importance of a cooperation.

The leading case - *Viola v. Italy*[38] - focused on the inability of a person with a sentence of life imprisonment to access to release on parole if he/she has decided not to cooperate with the authorities after having been found guilty of specific offences (*ergastolo ostativo*). The case is about Mr Marcello Viola (the applicant) convicted to be a membership of a Mafia-type criminal organisation (1995) and with a life prison sentence for separate offences linked to Mafia-type criminal activities and other serious offences.

In 2015 Mr Viola applied for release on parole, which was dismissed by the Court since such measure was conditional on cooperation with the judicial authorities and the permanent severing of ties between the convicted person and Mafia circles. The ECtHR concluded that the life sentence imposed on Mr Viola under section 4 bis *ordinamento penitenziario* (o.p.) restricted his prospects for release and the possibility of review of his sentence to an excessive degree, without considering the path taken by the applicant through a positive changing in his personality. Doing so, the Court concluded that the requirements of Article 3 ECHR – which prohibited in absolute terms inhuman or degrading treatment – had not been satisfied. In fact, deciding not to cooperate with the authorities, as the ECtHR has pointed out, is not always felt like a free choice by the person, whose decision can be affected by the fear of endangering his own live or those of his family and, moreover, it does not necessarily reflect continuing adherence to criminal values or ongoing links with the criminal – or mafia type – organisation.[39]

Following the ECtHR, the Italian Constitutional Court[40] declared Article 4-bis o.p. to be contrary to the Italian Constitution in the part where it did not permit to a person found guilty of mafia related crimes to be admitted to the short release when he decided not to cooperate with the authorities. The

[37] Art. 58 ter Prison Administration Act (Italy) according to which it is up to the surveillance tribunal to verify whether such conditions are met.

[38] ECtHR, *Marcello Viola v. Italy*, appl. no. 77633/16, Judgment of 13 June 2019.

[39] *Ibid*., para. 118.

[40] Italian Constitutional Court, judgment n. 253 of the 23 October 2019.

Court stressed out the importance of a case-by-case evaluation arguing that what is relevant to that extent is the existence of elements which allow to exclude both any persistent link with the criminal organization and the danger of its restoration. In this perspective, the mere cooperation with the authorities becomes a rebuttable presumption: the decision not to cooperate may lead to a persistent link between the convicted person and the criminal association but it can also be denied by other circumstances existing in the specific case.

Recently, the Italian Constitutional Court, called to decide on the lawfulness of the *ergastolo ostativo* that prevents those who did not cooperate with the authorities from the early release even when their amendment is clear, decided to postpone its decision on the matter to give time to parliament to rule about it.[41]

Indeed, ruling on Article 4 bis o.p. is a delicate matter concerning the State's commitment against the organised crime and it also means striking a balance of two different aspects equally important: the right of the community to security and the right to personal dignity – regardless the membership to a criminal organization – which implies the right to silence due to specific and intimate motivations that everyone can find insuperable compared to the choice to collaborate.[42]

4. Conclusions and proposals

The analysis has shown that, even if the right to silence is recognised as a fundamental right of the individual in EU and ECHR law, however there are still some uncertainties concerning its scope of application and meaning.

A. Firstly, it is not clear whether and to what extent, after the *DB* judgment, the right to silence should be recognized in administrative proceedings. This issue is related to the general topic of the expansion of criminal guarantees beyond the borders of criminal law aimed at creating a common standard of safeguards for the punitive sanctions. Although the outcome would be positive as regards the enhancement of the procedural rights, the protection of the public interests that are the objectives of the administrative proceedings would be undermined as the defendant would be entitled to invoke the right to silence in every situation and to refuse to cooperate with the public authority.

We express some concerns about the simple transferring of the criminal guarantees in the administrative proceedings: an adaptation would be necessary, considering the different interests at stake and the possibility of limiting such guarantees when the outcome of the proceeding is not the

[41] Italian Constitutional Court, judgment n. 97 of the 15 April 2021.

[42] The legislative proposal (A.C. 3160) is currently submitted to the Senate.

restriction of the liberty of the individual. The core of the right to silence that cannot be derogated from, in light of EU and ECHR law, seems the following: criminal liability cannot be established through information obtained by the coercion of the will of the accused. When criminal liability is not at stake, the protection of the right is more limited, as well as when the material to be obtained has an existence independent from the will of the accused so his dignity and autonomy are not endangered.

Indeed, the *DB* judgment neither requires a full implementation of the right to silence in the administrative proceedings: not only the Court underlines 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', but it recognizes a precise and specific right to the defendant in his relation with the investigative authority: the right of the individual not to be penalized for his refusal to provide that authority with information that may be used to establish its criminal liability or the application of an administrative sanction of criminal nature.

As such, our first proposal can be summarized as follows: the right to silence should not be recognized in administrative proceedings, unless the administrative sanction that could be imposed is criminal in its nature pursuant to the case law of the CJEU and the ECtHR. However, the evidence that is collected during the administrative proceeding and that would violate the right to silence should not be used in parallel criminal proceedings.

B. Secondly, there are still some uncertainties concerning the recognition of the right to silence to legal persons. As it has been shown, the CJEU only recognizes a very limited protection to legal persons and the ECtHR has not yet dealt with such an issue.

With regards to EU law, as there is not uniformity in the Member States as regards the nature of the liability of legal persons, it is understandable why Directive EU 2016/343 does not extend the presumption of innocence and the right to silence to legal persons.

Furthermore, such a gap in the protection does not seem to affect the core of the right to silence: human dignity and autonomy are not undermined. Although it is true that the legal person acts through a natural person (e.g. the legal representative), the latter cannot be considered as the accused per se as it only acts on behalf of the legal person.

It seems, then that Member States have discretion in deciding whether or not recognizing the right to silence to legal persons and to what extent.

Finally, it is interesting to underline that, even in those national legal systems that recognize the liability of the legal person as criminal or "quasi" criminal – such is the case of Italy – the specificities of the legal persons and of their liability may justify a different standard of protection in the

proceeding. Let's consider Article 6 of the Italian Legislative Decree no. 231/2001 that, by putting on the legal person the burden of demonstrating that it had adopted all the precautionary measures necessary to avoid any risks of commission of the offence, establishes a presumption that can be rebutted only by the collaboration of the defendant.

As such, our second proposal can be summarized as follows: legal entities should not fully enjoy the right to silence, and their legal representatives have a duty to answer truthfully when questioned by authorities. It goes without saying that methods contrary to art. 3 ECHR shall never be used to compel legal representatives to answer. Following the line of reasoning of our first proposals, the answers that legal representatives are obliged to give shall never be used against them – as natural persons – in criminal proceedings.

C. With regard to the reward measures envisaged by Italian law for the person convicted of mafia-related crimes who decides to cooperate, we point out that they do not violate the right to silence.

Cooperation, provided that it is not impossible, is necessary to obtain some benefits during the execution of the penalty, after the criminal liability of the individual has been established. Remaining silent, then, does not have consequences on the establishment of the criminal liability of the individual, but on the adaptation of the penalty that has already been inflicted. This does not seem unreasonable as the enjoyment of reward measures depends on positive indicators of the personality of the convicted whereas silence is just a neutral element.

Furthermore, in its latest decisions, the Italian Constitutional Court has recognized that silence, as a personal expression of the inner will of the convicted, cannot have per se any negative effects, during the execution of the penalty either. While silence is not sufficient to entitle the convicted to those benefits, it cannot be an absolute obstacle to their enjoyment: as suggested by the ECtHR, it is for the judge to ascertain whether any persistent links with the criminal organization, as well as the danger of their reintegration, can be excluded so as to consider that the convicted person deserves such reward measures.

As such, our third proposal can be summarized as follows: it is admissible to deny benefits to those that have been convicted of mafia-type crimes and have refused to cooperate with the authorities, as long as: a) there is not proof of valid reasons for their refusal to cooperate (eg. they have no useful information or they fear reprisals for themselves or family members); b) the authorities have evidence that there is still an ongoing connection between the convict and the criminal organization.