Privilege against Self-incrimination in International, European and Czech Law

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Summary: Fair-trial guarantees were originally developed for the protection of natural persons accused of criminal conduct, taking into account the fact that such persons might be punished by imprisonment in case they would be found guilty. These guarantees stem from international, European and national law and the corresponding jurisprudence. Increasingly, this jurisprudence is being employed in proceedings of different nature – proceedings with legal persons, most often undertakings, equipped constantly with professional legal representation. Most case-law of such nature is connected with antitrust proceedings. On an example of privilege against self-incrimination, this article will argue that in antitrust proceedings against undertakings, the traditional jurisprudence, developed for the purposes of criminal proceedings, cannot be fully employed.

Keywords: Competition Law; Fair Trial; Fundamental Rights; Self-Incrimination

1. Introduction

The right to fair trial constitutes a fundamental right of any participant to any proceedings where the participant's rights and duties are being determined. Fair trial is especially important in cases where the participants are accused of illegal conduct and where sanctions may be imposed on them. Fair trial guarantees are regulated on various levels, including national, international and EU law. Due to inherent characteristics of these various legal systems, the interpretation of procedural rights is to certain extent different on every regulatory level.

Procedural safeguards were originally developed in order to protect the rights of natural persons, accused of committing a crime and threatened with imprisonment; nonetheless, they are currently applied in non-criminal pro-

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ceedings with non-natural persons. We will argue in this article that the fair trial guarantees may (and ought to) be more limited in non-criminal (or "less" criminal) cases.

National authorities are put in an especially precarious position. In case they apply EU law, they need to safeguard all the guarantees afforded by it, and they are subjected to supervision of the Court of Justice of the European Union (hereinafter referred to as "**CJEU**"). At the same time, they are also within jurisdiction of the European Court of Human Rights (hereinafter referred to as "**ECtHR**"). In case the jurisprudence differs, as is sometimes the case, they need to reconcile their approaches.

As is evident from the jurisprudence of the ECtHR interpreting the European Convention on Human Rights (hereinafter referred to as "**Convention**"), the vast majority of its cases does concern criminal proceedings against natural persons; the situation is similar on national level, which will be demonstrated on jurisprudence of the Constitutional Court of the Czech Republic (hereinafter referred to as "**CC**").

The situation is however different on the EU level. The Charter of Fundamental Rights of the EU (hereinafter referred to as "**Charter**") contains rights corresponding to those enshrined in the Convention and it is to be interpreted in the same way. Nonetheless, proceedings before EU institutions are often of different character, as they are mostly concerned with business entities – undertakings. The author will further employ antitrust proceedings as an example, because the case-law is most often dedicated to this field, but his conclusions are valid for other types of such proceedings as well.

This article explores the interpretation of the right not to incriminate oneself on international, EU and national level.[1] It argues that the level of protection accorded by the ECtHR to natural persons might hinder effective investigation of business entities; therefore, the more lenient approach, adopted by the CJ EU, may be fully sufficient to guarantee fair trial, while securing efficiency of the proceedings. It also notes that recently, Czech justices adopted a similar approach.

The rest of this article is structured as follows. In Chapter II it explores the nature of antitrust proceedings and its characteristics as far as the fair trial guarantees are concerned; Chapter III deals with the privilege against self-incrimination in the jurisprudence of ECtHR, CC and CJ EU; Chapter IV discusses a recent Czech judgment on this matter. The final Chapter brings the conclusions.

[1] The national level is almost exclusively concerned with the Czech Republic.

2. Antitrust proceedings

In the EU, competition law stems from Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter referred to as "**TFEU**"). These rules are applicable to such anticompetitive agreements (Art. 101 TFEU) or abuses of dominant position (Art. 102 TFEU) which can appreciable affect trade between EU member states. It can be applied by both the European Commission and the National Competition Authorities (hereinafter referred to as "**NCAs**").

Whereas the NCAs' proceedings are regulated by respective national laws, the Commission's conduct is primarily governed by the Regulation 1/2003.[2] With respect to fair trial, it claims that

"[t]his Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles".[3]

The Charter, which is the principal source of fundamental rights, has the same legal value as the Treaties;[4] the general principles of EU law, stemming from constitutional traditions common to the member states, which used to be the principal source of fundamental procedural rights,[5] will thus apply only secondarily.[6] The Charter declares that rights contained in the Charter corresponding to those in the Convention shall have the same meaning and scope.[7]

According to the Convention, the fair trial guarantees apply to "criminal charges".[8] According to the Regulation 1/2003, the penalties imposed by the Commission for breaches of competition law shall not be of a criminal nature;[9] the same is true for sanctions imposed by most of the NCAs, including the Czech Competition Authority (hereinafter referred to as "**CCA**"). The terms used in the Convention are however to be interpreted autonomously; the extent

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2 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. OJ L 1, 4. 1. 2003, p. 1.

3 Preamble to Regulation 1/2003, par. 37.

4 Art. 6 (1) of the Treaty on European Union (hereinafter referred to as "**TEU**").

5 Case 11/70 *Internationale Handelsgesellschaft*, [1970] ECR 1125, par. 4.

6 Art. 6 (3) TEU. See also *Wils, W*. EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights. [2011] 2 *World Competition* 189.

7 Art. 52 (3) of the Charter.

8 Determination of civil rights and obligations, also covered by the provisions on fair trial, is not discussed in this paper.

9 Art. 23 (5) of the Regulation 1/2003.

of the term "criminal charges" was first considered in *Engel*, where the ECtHR held that "criminal" are not only those offences thus classified by national law, but also other offences, the criminal character of with may be implied from their "very nature" or "severity of penalty".[10] Assuming that competition law is "criminal" law within the meaning of the Convention,[11] the procedural guarantees provided for by the Convention shall also apply in antitrust proceedings of the Commission and the NCAs. It is indeed followed in practice.

It nonetheless needs to be observed that antitrust proceedings do not exhibit characteristics of "traditional" criminal proceedings. The ECtHR is itself aware of the fact that the Convention currently applies to situations different from those it was designed to deal with; it distinguishes between "hard core" criminal proceedings, typically those where natural persons are charged – in such situation, the fair trial guarantees need to be fully observed. In other cases, however, these guarantees do not necessarily have to apply with full stringency. As the ECtHR observed in *Jussila*,

"*[t]here are clearly "criminal charges" of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties […] [or] competition law […]. [These] differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency […]*".[12]

The ECtHR thus itself distinguishes between, on the one hand "hard" criminal law, usually connected with liability of natural persons, risk of imprisonment and "*significant degree of stigma*",[13] and on the other, infringements that fulfil the *Engel* criteria but do not belong to "*traditional categories of criminal law*" (we can call them "soft" criminal law), usually connected with liability of companies and other legal persons, that can be punished by pecuniary penalties. The ECtHR has explicitly proclaimed that competition law belongs to the latter category. Fair trial guarantees prescribed for criminal proceedings

[10] Case *Engel and others v. the Netherlands*, dated 8 June 1976, application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, par. 82.

[11] Case *Jussila v. Finland*, dated 23. November 2006, application no. 73053/01; case *Menarini Diagnostics v. Italy*, dated 27. November 2011, application no. 43590/08; see also *Andreangeli, A*. Toward an EU Competition Court: "Article-6-Proofing" Antitrust Proceedings before the Commission? [2007] 4 *World Competition* 608.

[12] Case *Jussila v. Finland,* dated 23 November 2006, application no. 73053/01, par. 43.

[13] *Ibid*.

therefore need to be observed in antitrust cases, but they do not necessarily have to be applied to their full extent.

On the EU level, the CJ EU has not yet specifically discussed whether it considers antitrust proceedings to be criminal. It is however not necessary, as the Charter guarantees the respect for the rights of the defence to "*anyone who has been charged*",[14] not "criminally charged" as in the Convention. The fair trial guarantees thus need to be applied by the EU institutions as well.

As has already been mentioned, the ECtHR's case law is mostly concerned with "hard" criminal law, whereas the CJ EU typically deals with "soft" one. We will therefore argue that even if the CJ EU was more lenient concerning the right not to incriminate oneself in antitrust proceedings, its findings do not necessarily have to be inconsistent with the ECtHR's jurisprudence.

3. Right not to incriminate oneself in case-law

The right not to incriminate oneself has been so far most extensively discussed in the ECtHR's jurisprudence. We will therefore start with its case law, and only then proceed to the EU one; we will also briefly outline the situation in the Czech Republic.

3.1 Privilege against self-incrimination in the ECtHR's case-law

Although not mentioned explicitly in the Convention, the ECtHR considers the privilege against self-incrimination as an essential condition for fair trial. As the court proclaimed in *Saunders*,[15]

"*the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. […] 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*".[16]

According to the ECtHR, it is not possible to distinguish *a priori* which information is incriminating and hence covered by the privilege; decisive is the way in which the evidence will be used:

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[14] Art. 48 (2) of the Charter.

[15] Case *Saunders v. the United Kingdom*, dated 17 December 1996, application no. 19187/91.

[16] *Ibid*, par. 68.

"*the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. […] It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial*".[17]

It can be concluded that "*[t]he right not to incriminate oneself is primarily concerned […] with respecting the will of an accused person to remain silent*".[18] Evidence gathered under compulsion and subsequently used in order to demonstrate liability of the accused would thus be contrary to the privilege against self-incrimination; in the *Saunders* case, the "compulsion" consisted in a legal duty, enforceable be penalties, to answer questions of investigators.[19]

Special rules apply to the evidence existing "*independent of the will of the suspect*". According to the ECtHR, the right not to incriminate oneself

"*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 […]*".[20]

Arguably, this does not mean that the accused is obliged to submit to the investigators pre-existing documents of potentially incriminatory nature; the investigators are however not prevented from seizing such documents, typically during on-site inspections.

This conclusion seems to be supported by the *J. B.* case,[21] in which the accused natural person was requested to submit, for the purposes of tax-evasion proceedings, all documents concerning his involvement in certain companies; the accused was ultimately fined when he refused to do so. The ECtHR concluded that

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[17] *Ibid*, par. 71.

[18] *Ibid*, par. 69.

[19] In *Saunders*, the ECtHR found and infringement of the right to fair trial because "*the transcripts of the applicant's answers, whether directly self-incriminating or not, were used in the course of the proceedings in a manner which sought to incriminate the applicant*" (par. 72).

[20] *Ibid,* par. 68.

[21] Case *J. B. v. Switzerland*, dated 3 August 2001, application no. 31827/96.

"*various provisions in criminal law [may oblige] a person to act in a particular way so as to enable the authorities to obtain his conviction, for instance the obligation to install a tachograph in lorries, or to submit to a blood or a urine test. In the Court's opinion, however, the present case does not involve material of this nature which, like that considered in Saunders, has an existence independent of the person concerned and is not, therefore, obtained by means of coercion and in defiance of the will of that person*".[22]

It is however important to note at this stage that the ECtHR's case law on self-incrimination has only concerned natural persons so far.[23]

3.2 Privilege against self-incrimination in the CC's case law

The jurisprudence of the Czech Constitutional Court may be summarised only briefly, because it is in principle identical with the ECtHR's one. The CC confirmed that the accused cannot be forced to actively help the investigating authorities to acquire incriminatory evidence; they are however obliged to enable the pre-existing evidence to be taken, as is often the case with biological materials.[24]

The CC has even ruled specifically on the duty to submit pre-existing documents. In course of a criminal investigation, the police requested a natural person to submit certain accountancy documents; when the request was declined, a fine was imposed upon that natural person. This decision was challenged and the dispute was ultimately solved by the CC, which proclaimed that no one may be compelled to hand over potentially incriminatory evidence; according to the CC, there is a *constitutionally guaranteed right not to be forced to self-incrimination, i. e. to submit incriminating evidence under coercion.*[25]

Similarly to the ECtHR's case law, it ought to be stressed that the CC arrived to this conclusion in course of "traditional" criminal proceedings against a natural person.

3.3 Privilege against self-incrimination in the CJ EU's case law

As has already been mentioned, parties to the antitrust proceedings are usually companies. When the CJ EU dealt for the first time with self-incrimination, it held in *Orkem*[26] that only natural persons enjoy such a privilege:

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[22] *Ibid*., par. 68.

[23] See also *Wils, W.* Self-incrimination in EC antitrust enforcement: a legal and economic analysis. [2003] 4 *World Competition* 567.

[24] Opinion of the CC plenary of 30 November 2010, ref. no. Pl. US 30/10.

[25] Ruling of the CC of 21 August 2006, ref. no. I. US 636/05.

[26] Case 374/87 *Orkem v. Commission* [1989] ECR 3283.

"*the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings. A comparative analysis of national law does not therefore indicate the existence of such a principle […] which may be relied upon by legal persons in relation to infringements in the economic sphere, in particular infringements of competition law*".[27]

Despite this conclusion, the CJ EU added nonetheless that the power of the Commission to ask information is not unlimited; whereas it is free to pose "factual" questions, it may not compel an undertaking to admit liability:

"*whilst the Commission is entitled […] to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not […] undermine the rights of defence of the undertaking concerned.*
Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove".[28]

The General Court later summarised this approach:

"*To acknowledge the existence of an absolute right to silence […] would go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance to the Commission's performance of its duty […] to ensure that the rules on competition within the common market are observed*".[29]

The CJ EU thus seems to be more lenient in antitrust proceedings than the ECtHR; in particular, it clearly accepts the duty of an undertaking to hand over pre-existing documents, even if they might be of incriminatory nature,[30] and to answer "factual" questions, as long as they are not obliged to admit guilt. [31] Conversely, the ECtHR's case law seems to suggest that the investigating

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[27] *Ibid.*, par. 29.
[28] *Ibid.*, par. 34 and 35.
[29] Case T-112/98 *Mannesmannröhren-Werke v. Commission* [2001] ECR II-729, par. 66.
[30] For the sake of completeness, it ought to be mentioned that the General Court seems to have claimed in case T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon Co. Ltd and Others v. Commission* [2004] ECR II-1181, par. 406 – 408, that the privilege might cover also certain categories of pre-existing documents.
[31] This was explicitly acknowledged by Regulation 1/2003, which in its Preamble, par. 23, states that "*undertakings cannot be forced to admit that they have committed an infringement, but*

authorities are only allowed to seize such documents, while the accused has an absolute right to remain silent.

At the same time, the ECtHR itself distinguishes between "soft" and "hard" criminal proceedings, putting antitrust into the former category; it has not yet analysed the extent of privilege against self-incrimination in the context of "soft" criminal proceedings. Even though the CJ EU has not yet explicitly ruled on this issue, such thinking is already apparent, for example in opinion of Advocate General Geelhoed:

"*[ECtHR] case-law concerned natural persons in the context of 'classical' criminal procedures. Competition law concerns undertakings. […] It is not possible simply to transpose the findings of the European Court of Human Rights without more to legal persons or undertakings*".[32]

According to the Charter, rights enshrined in it need to be interpreted in accordance with the Convention.[33] Even though the ECtHR awards the accused more far-reaching protection, the author still takes the position that it is possible to argue that the "soft" nature of antitrust proceedings justifies the interpretation adopted by the CJ EU.

Indeed, the current EU jurisprudence is arguably capable of safeguarding the privileges of the accused in antitrust proceedings more than the absolute right to remain silent. Antitrust proceedings are based on vast quantities of evidence; for example, if abuse of dominant position by price-related conduct (e.g. predatory pricing, excessive pricing or margin squeeze) is under investigation, competition authority needs to collect precise accountancy information concerning costs and revenues of the undertaking concerned. Competition authorities are empowered to collect data during on-site inspections. If we compare the intrusion of public authority caused, on the one hand, by an inspection, which significantly affects operating of all of the undertaking, and on the other hand, by submitting data that the undertaking already has in its possession, the latter seems to be far less intrusive.

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they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement".

[32] Similar reasoning is apparent in the EU context as well. For example, Advocate General Geelhoed stated in his opinion to case C-301/04 P *Commission v. SGL Carbon AG and Others* [2004] ECR I-5915, par. 63, that "*[ECtHR] case-law concerned natural persons in the context of 'classical' criminal procedures. Competition law concerns undertakings. […] It is not possible simply to transpose the findings of the European Court of Human Rights without more to legal persons or undertakings*".

[33] Article 52 (3) of the Charter.

4. Privilege against self-incrimination in Czech jurisprudence

As has already been mentioned, these differences among CJ EU and ECtHR have most challenging impact on national enforcers, who need to reconcile them. It is therefore worth mentioning that the Regional Court in Brno, reviewing the decisions of the Czech Competition Authority, has attempted to do so.

In a cartel investigation, the CCA invited one of the parties to the proceedings (a suspected cartelist) to submit certain documents; as in other such requests, the CCA informed the undertaking concerned that it is under a legal obligation to do so and that its failure to provide the documents might result in imposition of a fine.[34]

The undertaking refused to submit the documents, claiming that it cannot be obliged to provide incriminatory evidence, and approached the Regional Court in Brno, seeking protection against an allegedly unlawful interference from the CCA.[35] The court rejected the complaint as premature, because the conditions for such a court proceedings were not fulfilled. According to it, the CCA's request did not directly and immediately infringe the undertaking's rights – it either could have refused to submit the documents, and if it was sanctioned, bring an action against the decision imposing fine, in which it might claim that it was not obliged to hand over the documents in question; or it could have submitted the documents and claimed the irregularity of the CCA's procedure while challenging the CCA's decision on the merits.[36]

The undertaking than submitted the documents, but after the CCA had issued a final decision finding a cartel, it appealed it to the Regional Court, claiming among others that its right not to incriminate oneself was breached. The court however rejected the appeal in its entirety.[37]

The court recalled the ECtHR's jurisprudence and admitted that also the CC had opined that even though the accused have to allow the evidence to be taken, they are not under any obligation to actively participate in the process.[38] The Regional Court than summarised the CJ EU's case-law and concluded that to grant the parties to the antitrust proceedings an absolute right to remain silent would go beyond what is necessary to guarantee a fair trial; it held that

[34] Sections 21e and 22c of the Act No. 143/2001 Coll., on the Protection of Competition, as amended.
[35] Section 82 *et seq*. of the Act No. 150/2002 Coll., Code of Administrative Justice, as amended.
[36] Judgement of the Regional Court in Brno Ref. No. 62 Af 3/2010 of 8 April 2010; judgement of the Regional Court in Brno Ref. No. 62 Af 46/2010 of 4 November 2010.
[37] Judgement of the Regional Court in Brno Ref. No. 62 Af 75/2010 of 23 February 2012.
[38] Opinion of the CC ref. no. Pl. US 30/10, *op. cit. supra*.

the privilege against self-incrimination is not violated if a competition authority requires certain materials or information, unless the undertaking is coerced to provide answers that would amount to accepting it breached the law, to provide answers other than those concerning solely the facts or to submit other documents than those already in existence when they were requested.

The Regional Court in Brno thus proclaimed that the CCA is allowed to request pre-existing documents from the undertakings suspected to have infringed competition law, and that it can pose such undertakings factual questions unless answering such questions would amount to admission of guilt.

Such an approach is fully in line with the CJ EU's case law. Regrettably, even though the court recalled the ECtHR's jurisprudence (and that of the CC as well), it did not substantiate why their more stringent requirements were not applicable in this case.

This judgement was upheld by the Supreme Administrative Court.[39] Unfortunately, the Supreme Court did not address the issue concerning self-incrimination, as it stopped the proceedings against the particular undertaking that raised these objections, because the time limits had elapsed.

5. Conclusions

The Charter has become a fully binding legal source of fundamental rights, which obliges both the EU and national institutions to interpret these rights in accordance with the Convention. The author has argued in this article, taking the privilege against self-incrimination as an example, that it is not possible fully to transfer the ECtHR's case law into antitrust proceedings – and correspondingly, to other proceedings with legal persons – and that it might be possible for the CJ EU to retain its current approach; such reasoning is also apparent on national level, as has been demonstrated by the judgement of the Regional Court in Brno.

This conclusion may be supported by experience in other jurisdictions. For example, the Supreme Court of the United States declared, that

"*[s]ince the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. The greater portion of evidence of wrongdoing by an organization or its representatives is to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal*

[39] Judgement of the Supreme Administrative Court Ref. No. 8 Afs 25/2012 of 29 January 2015.

records and documents, effective enforcement of many federal and state laws would be impossible".[40]

Similar reasoning might be found also in some EU countries. For example, the Bundesverfassungsgericht – the German constitutional court – likewise stated that the privilege against self-incrimination can only be invoked by natural persons.[41]

Taking all these facts into account, the interpretation adopted in the Czech Republic, even though not fully aligned with the ECtHR, may still be held in line with the Convention.

[40] *United States v. White*, 322 U.S. 694, 700, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944). See also Snider, J. G. *Corporate privileges and confidential information*. New York: Law Journal Press, 2006, p. 5–5.

[41] Decision of the *Bundesverfassungsgericht* of 26 February 1997, 1 BvR 2172/96 (*Radio Dreyeckland Betriebsgesellschaft mbH* and *M.*), which declared that „*[Das] Recht, sich nicht selbst einer Straftat bezichtigen zu müssen, ist […] nicht auf juristische Personen anwendbar*".