

Nemo tenetur

Obligation to cooperate and right to remain silent

Par Célian Hirsch le 18 February 2021

Does the right not to contribute to one's own incrimination allow a person to refuse to cooperate with a European financial market supervisory authority ? In a judgment of 2 February 2021 ([C-481/19](#)), the Court of Justice of the European Union (CJEU) examined this issue in connection with [Regulation No 596/2014 on market abuse](#).

The *Commissione Nazionale per le Società e la Borsa* (Consob), the Italian stock exchange supervisory authority, imposed a fine of EUR 50,000 on a natural person. The person had refused to answer questions put to them by the authority. Consob also fined them EUR 300,000 for insider trading.

On appeal, the Italian Constitutional Court found that, according to Article 30(1)(b) of the Market Abuse Regulation, the competent authority (in this case Consob) must sanction any person who refuses to cooperate. However, according to the Constitutional Court, such an obligation would be difficult to reconcile with the right to remain silent and not to contribute to one's own incrimination (*nemo tenetur se ipsum accusare*). It therefore referred the matter to the CJEU for clarification.

The CJEU, sitting in Grand Chamber, recalled that Articles [47 and 48](#) of the Charter of Fundamental Rights of the European Union correspond to Article [6 of the ECHR](#).

Article 6 of the ECHR (right to a fair trial) applies in particular in the event of a 'criminal charge'. According to the case law of the ECtHR, a criminal charge includes not only criminal proceedings in the strict sense, but also any administrative proceedings that may result in a penalty of a criminal nature.

The CJEU notes that Consob's powers to impose sanctions have a punitive purpose and are of a serious nature (application of the 'Engel' criteria). These sanctions are therefore of a criminal nature. Consequently, Article 6 of the ECHR applies to proceedings before Consob.

According to the case law of the ECtHR, the right not to incriminate oneself, which is derived from Article 6 of the ECHR, is violated when a suspect, threatened with criminal penalties if he does not provide the information requested in proceedings brought against him, either provides the information or is punished for refusing to do so.

The CJEU concludes that the right not to incriminate oneself precludes a person from being

penalised under the Market Abuse Regulation for refusing to provide the competent authority with answers that could implicate them in an offence punishable by administrative penalties of a criminal nature. Consequently, Consob must not penalise persons who refuse to cooperate.

What would be the solution under Swiss law ? Unlike Consob, FINMA cannot impose fines. However, it may order various measures, such as disqualification from office, prohibition from practising and publication of its decisions. The Federal Court considers that these measures do not constitute criminal penalties within the meaning of Article 6 of the ECHR (see in particular [2C. 92/2019*](#), commented on *in* Villard, cdbf.ch/1111/). Since this legal provision does not apply to FINMA measures, the person concerned cannot invoke the principle of *nemo tenetur* in order to refuse to cooperate.

However, a problem arises when FINMA informs the competent criminal authority, pursuant to Art. 38 para. 3 FINMA, of offences of which it is aware. A person accused of market manipulation (an unlawful act within the meaning of [Art. 143 LIMF](#)) who cooperates with FINMA could subsequently be accused of price manipulation (a criminal offence within the meaning of [Art. 155 LIMF](#)). Consequently, the majority opinion convincingly holds that information obtained by FINMA through the duty of cooperation of the person subject to supervision must be declared inadmissible in criminal proceedings (see in particular CR CP II-Rutschmann/Lubishtani, Art. 155 LIMF N 77). A contrary solution would amount to compelling a person to incriminate themselves for a criminal offence, which is incompatible with Art. 6 ECHR.

The CJEU takes advantage of this ruling to emphasise that the case law on the right not to contribute to one's own incrimination applies differently depending on whether the person concerned is a natural or legal person. The Federal Court, criticised by the majority of legal scholars, also considers that the *nemo tenetur* principle applies less strictly to legal persons (see the recent judgment [2C. 342/2020](#) v. 2.3). For its part, the European Court of Human Rights has not yet ruled on this issue. It is to be hoped that it will soon have the opportunity to rule that the right not to incriminate oneself, which is part of the 'core of the concept of a fair trial', applies without distinction to natural and legal persons.

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