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*Nemo tenetur*

# No compulsion through the request for the production of bank documents

Par Célian Hirsch le 2 February 2023

Does the right not to incriminate oneself make it possible not to produce bank documents specifically requested by an administrative authority under threat of criminal sanction ? No, answers the ECtHR unanimously in the De Legé case of October 4, 2022, no. 58342/15.

The story begins with the theft of banking data concerning the assets of Dutch residents deposited with a Luxembourg bank. As a result of criminal proceedings, the Belgian authorities obtained the data, which they then passed on to the Dutch tax authorities. The latter orders a taxpayer to disclose all the accounts he holds with foreign banks, in particular his account with the Luxembourg bank. The taxpayer invoked art. 6 ECHR, which allows a suspect not to incriminate himself (nemo tenetur se ipsum accusare).

Despite this refusal, the authorities assessed the tax due on the basis of the documents in his possession, and also imposed a fine for his failure to cooperate. It also brought the matter before the competent court to order him to produce the bank documents, with the threat of criminal penalties. The taxpayer complies with the court order and provides the tax authorities with the requested documents, i.e. bank statements and portfolio summaries for his Luxembourg account.

In the tax objection proceedings, which were resumed after the documents had been produced, the Dutch courts held that the nemo tenetur principle did not allow the taxpayer to object to the usability of the documents submitted to the authority. Indeed, documents which exist independently of the suspect's will (pre-existing documents) are not protected by art. 6 ECHR. Banking documents in casu exist independently of the taxpayer's will. The taxpayer cannot therefore invoke the nemo tenetur principle.

Referred to by the taxpayer, the ECtHR took the opportunity to reiterate both its own case law and that of the Court of Justice of the European Union on the nemo tenetur principle (see not. cdbf.ch/1176/). This principle applies firstly to the condition that a person has been subjected to some form of coercion by the authority. Secondly, either this coercion must have been exercised for the purpose of obtaining information that could incriminate the person concerned in criminal proceedings pending or planned against him or her, or the case must concern the use, in criminal proceedings, of incriminating information that was obtained by coercion outside criminal proceedings.

This being the case, the nemo tenetur principle does not extend to the use of material which can be obtained from the suspect through the use of coercive powers, but which has an existence beyond his control (the pre-existing documents exception). In order to determine whether this exception applies, the ECtHR deduces a new distinction from its case law. If the authority orders the production of specific documents, the exception applies and art. 6 ECHR is of no help in opposing the production of the requested documents. On the contrary, if the authority compels a person to provide documents which it believes must exist, even though it is not certain that they do, this constitutes a fishing expedition. This falls within the scope of the nemo tenetur principle, and is in principle prohibited.

In the present case, the bank documents (portfolio statements and summaries) were indeed obtained by means of a coercive measure, which in principle makes art. 6 ECHR applicable. However, these documents are pre-existing documents. The tax authorities were aware of their existence. It therefore did not carry out a fishing expedition. Consequently, these documents fall outside the scope of the nemo tenetur principle. The Court concluded unanimously that there had been no violation of art. 6 ECHR.

The request for referral to the Grand Chamber having been refused, this decision is final.

As a reminder, the Court has twice condemned Switzerland for forcing a taxpayer to provide documents in tax proceedings (J.B. v. Switzerland, no. 31827/96 and Chambaz v. Switzerland, no. 11663/04 ; see now art. 183 para. 1bis LIFD). In 2022, the Federal Council published a report on administrative monetary penalties, in which it examined various legislative solutions for resolving the conflict between the obligation to cooperate in administrative proceedings and the right not to incriminate oneself under criminal law, without advocating a general solution.

This ruling has the merit of bringing some clarity to an area where uncertainty still reigns. Henceforth, an administrative authority that is aware of the existence of a document can order its production under threat of a penalty, without the nemo tenetur principle applying. On the contrary, fishing expedition is not allowed. This distinction, which to our knowledge has neither been applied by the Federal Court nor advocated by Swiss legal scholars, could change practice if it is properly invoked by the legal profession. To be continued.

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