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Corporate compliance versus the right to silence of legal entities in Romania: The case of certain tax evasion offences

ABSTRACT: *The concept of 'corporate compliance' is difficult to translate into Romanian through a comprehensive formula. As yet, there is no specific regulation, although some incipient legislative framework could be applied. On the other hand, the right to silence of legal persons is not expressly regulated by law either. This circumstance generates two alternatives. Some believe that this right can be exercised, others do not. But, maybe more important points of view hold that the right to silence is only available to natural persons, not to legal persons, as expressed even by the European Court of Justice in its decision on 2 February 2021, DB v National Commission for Companies and the Stock Exchange (Consob), C-481/19. In these circumstances, we intend to analyse the relationship between prevention and compliance. We will try to argue that the exercise of a form of silence of the legal person should still be specific to legal persons, especially when discussing subjects with a major impact on the social environment, and the crimes provided in Law no. 241/2005, especially Articles 3, 4 and 5. Furthermore, we are trying to address the effect of implementing the SAF-T system in Romania, from the perspective of the efficiency of the right to silence for legal persons. In the end, all persons – irrespective of their nature – do have certain legal rights that are recognized as such by law. So, both natural and legal persons should have the right to silence and the right not to self-incriminate themselves, especially in criminal cases.*

KEYWORDS: *corporate compliance, criminal law, tax evasion, right to silence, legislative framework.*

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1. Introduction

Compliance can be defined as the act of adhering or conforming to a law, a rule or a certain requirement. The term 'compliance', taken from the English language and used directly in the economic and legal literature, signifies precisely this type of behaviour that adheres to certain norms, rules or even self-regulation.¹

Compliance with laws, regulations, rules and policies is a part of business operations often referred to as corporate compliance. In the business environment, which is constantly changing, corporate compliance involves both prevention and supervision, as well as adaptation and making the changes necessary for the business to continue to function normally in the activity field in the community.

In a broad sense, corporate compliance represents a more extensive concept than 'simple' normative compliance (the one subsumed by norms and rules) because it could also include the field of promoting organisational ethics and corporate integrity.

The concept of corporate compliance is difficult to translate into Romanian through a comprehensive formula. Consequently, it is difficult to implement in our legislation.

The importance of corporate compliance for legal entities has been talked about and will increasingly be discussed as time goes by.² Currently, there is still no express, specific regulation, only a certain general, incipient legislative framework that could be applied to legal entities.

However, regarding the importance of corporate compliance for the activity of legal entities, the following aspects can be highlighted.

First, enforcing corporate compliance rules reduces the risk of possible civil, administrative,³ disciplinary and criminal sanctions. In this regard, it has been shown that financial institutions are subject to a variety of compliance requirements not only to maintain the financial security of individuals and national economies but also to ensure that they do not enable transactions in support of money launderers, terrorists, drug traffickers etc.⁴

1 According to the Cambridge dictionary, the definition of the term compliance is as follows: 'the fact of obeying a particular law or rule, or of acting according to an agreement', available at: <https://dictionary.cambridge.org/dictionary/english/compliance> (Accessed: 3 February 2023); Stănilă, 2022, pp. 12–14.

2 RiskOptics, 2023.

3 An important case in this area is the UK Financial Conduct Authority (FCA) fine of Deutsche Bank £163m for exposing the UK financial system to potential financial crime when it failed to appropriately supervise the establishment of new customer relationships. For more details, please see Gensing-Pophal, 2020. Also, for details about the disciplinary procedure in Romania, see Onica Chiștea, 2017, p. 291.

4 Gensing-Pophal, 2020.

There are legislative systems in which the conditions for mitigating forms of legal liability are included, including in criminal matters.

In this regard, we note that the U.S. Sanctions Enforcement Commission (U.S. Sentencing Commission) has established certain guidelines regarding the application of sanctions (Organizational Sentencing Guidelines). This created the possibility of applying milder sanctions when there were elements from which the application of corporate compliance rules emerged, especially when this compliance was voluntary. In practice, the assessment of the sanction is linked to the efforts of the legal entity in the direction of corporate compliance.⁵

Simultaneously, it reduces the risk of other situations that upset the life of the company, like strikes or spontaneous protests, and improves the efficiency of safety and security measures at work. Consequently, the number of legal proceedings in which the legal person is involved should decrease.⁶

From a customer and supplier perspective, enforcing corporate compliance instils confidence in customers and suppliers and increases competitive advantage.⁷ From an employee perspective, employee retention will increase when workers know they are in a safe, professional and fair environment.

In social terms, corporate compliance has as its rationale the huge social impact that some (large) companies have and certain internal and external conduct consequences of these companies, their employees or their partners or collaborators. Corporate compliance requires openness, transparency and clear working procedures, which may sometimes be incompatible with the element of confidentiality that dominates the business environment or with the institution of the right to remain silent as part of the right to defence. This openness and transparency could collide with the right to remain silent.

In the case of companies, there are perspectives that state that the rights to remain silent and not to contribute to self-incrimination can be exercised. However, other important perspectives hold that these rights apply only to natural persons, not to legal entities.

Our initial approach started from a situation in judicial practice in relation to the exercise of legal entities' right to remain silent, regarding the offenses provided for by Law no. 241/2005. However, we noted that the problem must be approached from a

⁵ These rules imposed by the U.S. Sanctions Enforcement Commission (U.S. Sentencing Commission) are available at: <https://www.usc.gov/guidelines/organizational-guidelines> (Accessed: 3 February 2023); Stănilă, 2020, pp. 61–62.

⁶ RiskOptics, 2023.

⁷ For example, in the business market, if you work with Google, Tesla, Coca Cola, etc., your credibility is higher. On the other hand, in case of illegal or even socially immoral behaviour on the part of the 'smaller' partner, there is a risk that the effects will also affect the main partner (company X, which is a partner, subcontractor of 'did that and ...that').

broader perspective and decided to advance towards the specifics of the two crimes of tax evasion under Romanian law.

In judicial doctrine and practice, the right to silence concerns oral communications and particularly refers to the right to not speak and make statements.⁸ In such a situation, the right to remain silent comprises the possibilities of not making statements that could incriminate oneself and not making any statements. We note here a first compliance 'contradiction' from the perspective of the (civic) obligation to cooperate with judicial bodies, which could not be imposed as long as the person in question uses the right to remain silent.⁹

In addressing the right to remain silent, we must also include in our approach the right (privilege) not to contribute to self-incrimination. This right, also known as the right not to incriminate oneself, is inextricably linked to the right to remain silent because it concerns not only communications (statements) but also material facts that may contribute to self-incrimination, such as the obligation to hand over certain documents.¹⁰

In our opinion, the two rights cannot be separated, and their contents do overlap, but this issue is not the subject of this paper.

From a formal perspective, we emphasise that neither the Charter of Fundamental Rights of the EU (the Charter) nor the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) explicitly provide for or expressly enshrine the right to remain silent or the right not to contribute to self-incrimination. Moreover, no reference is made through the rules to the existence of these rights in the charge of legal entities.

2. Recent jurisprudence and impact of the Court of Justice of the European Union and the European Court of Human Rights

A relatively recent decision of the Court of Justice of the European Union (CJEU) pronounced on 2 February 2021 in the case C-481/19, with parties D.B. (natural person) against the Italian Stock Exchange Commission ('Commissione Nazionale per le Società e la Borsa'; Consob), should clarify certain aspects related to exercising the right to remain silent once the case has been resolved. This case concerns sanctions imposed on a natural person (D.B.) for insider trading and failure to cooperate in an administrative investigation.

⁸ Udrioiu, 2020, p. 18; Coman and Burcă, 2020.

⁹ Ibid.

¹⁰ Ibid.

In fact, on 2 May 2012, the Consob imposed sanctions on D.B. for insider trading and non-cooperation owing to his refusal to answer questions during a hearing. His appeal against the sentences was rejected, and he later appealed to Italy's Supreme Court of Cassation (Corte suprema di Cassazione).

On 16 February 2018, the Supreme Court of Cassation referred a constitutionality issue to the Constitutional Court of Italy (Corte costituzionale) regarding the provision of Italian law that served as the basis for the penalty for non-cooperation. After finding that such a provision was derived from Directive no. 2003/65, since replaced by EU Regulation no. 596/20146, the Italian Constitutional Court submitted a request for a preliminary ruling from the CJEU on 21 June 2019.¹¹

The request to the CJEU sought to clarify whether the relevant provisions of Directive no. 2003/6 and Regulation no. 596/2014 allowed member states to (not) impose criminal sanctions on individuals who refuse to answer potentially self-incriminating questions during an investigation. In this direction, the CJEU was particularly asked to rule on whether Articles 47 and 48 of the Charter, which guarantee the right to a fair trial, include the right to remain silent.¹²

The CJEU recognised the right of individuals to remain silent during investigations related to conduct punishable by criminal sanctions:

[...] they allow Member States not to sanction an individual who, in the course of an investigation carried out on him by the competent authority pursuant to the said directive or the said regulation, refuses to provide her with answers that may result in her liability for an illegal act subject to administrative sanctions of a criminal nature or her criminal liability.¹³

For this particular situation, the solution given by the CJEU establishes the connection and the relationship between the provisions of the Charter and the applicable ECHR.

The right to remain silent in the case of natural or legal persons is not expressly recognised by the Charter or by the ECHR, but it is 'a generally recognised international standard that is at the heart of the notion of a fair trial', which belongs to the

11 Perhaps we should recall the regulations incident to this particular matter: Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on the misuse of confidential information and market manipulation (market abuse); Regulation (EU) no. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Directives 2003/124/EC, 2003/125/EC and 2004/72/EC of the Commission Text with EEA relevance.

12 In our opinion these provisions also enjoy the direct effect specific to the mandatory norms of the EU; in this regard, please see Pătrăuș, 2021, pp. 83–84.

13 Judgment of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84).

right to a fair trial, as regulated primarily by means of Art. 6 ECHR and established by the jurisprudence of the European Court of Human Rights (ECtHR).

Given that the rights enunciated in the Charter will have the same meaning as the rights enunciated in the ECHR, the CJEU found that Articles 47 and 48 of the Charter must be interpreted as including a right to remain silent for natural persons in line with previous jurisprudence and doctrine. In practice, the legal effectiveness of a fundamental right not expressly enshrined by the Charter or the ECHR is recognised. It speaks of the right to remain silent and the privilege of non-self-incrimination as an international standard that constitutes 'the core of the notion of due process under Article 6'.¹⁴

However, this right is not an absolute right,¹⁵ and as such, when evaluating its incidence, three aspects must be taken into account: the nature and degree of coercion, the existence of any relevant guarantees in the procedure, and the use of any evidence obtained.¹⁶

In this regard, the ECtHR jurisprudence in the *John Murray v. the United Kingdom* case is mentioned, from the considerations of which it follows that

[...] a conviction must not be based exclusively or mainly on the silence of the accused or on the refusal to answer questions or to testify himself; on the other hand, the right to remain silent cannot prevent the accused's silence—in situations that clearly require explanations from him—to be taken into account when assessing the persuasiveness of the evidence presented by the prosecution. Therefore, it cannot be said that an accused's decision to remain silent during criminal proceedings should not necessarily have any implications.¹⁷

However, the privilege against self-incrimination does not protect against making an incriminating statement per se but against obtaining evidence through coercion or pressure. It is the existence of duress that gives rise to the concern of whether the privilege against self-incrimination has been respected. For this reason, the court must first consider the nature and degree of coercion used to obtain the evidence.¹⁸

14 Council of Europe/European Court of Human Rights, 2022, p. 40.

15 Council of Europe/European Court of Human Rights, 2022, p. 42; *John Murray v. the United Kingdom* [GC], § 47; *Ibrahim and Others v. the United Kingdom* [GC], § 269.

16 Council of Europe/European Court of Human Rights, 2022, p. 42; *Jalloh v. Germany* (Grand Chamber), § 101; *O'Halloran and Francis v. the United Kingdom* (Grand Chamber), § 55; *Bykov v. Russia* (Grand Chamber), § 104; *Ibrahim and Others v. the United Kingdom* (Grand Chamber), § 269.

17 Council of Europe/European Court of Human Rights, 2022, p. 42; *John Murray v. the United Kingdom* [GC], § 47.

18 Council of Europe/European Court of Human Rights, 2022, p. 40; *Ibrahim and Others v. United Kingdom* (Grand Chamber), para. 267.

Although it is obvious that these jurisprudential elements refer to natural persons,¹⁹ we considered it important to highlight them because the same standards should also be recognised in the case of legal persons.

Returning to the findings and disposition of the CJEU decision of 2 February 2020, we consider that several important aspects must be highlighted as follows.²⁰

The court appreciates that the right to remain silent is also violated ‘in the situation of a suspect who, threatened with sanctions if he does not testify, either testifies or is punished for refusing to do so’.²¹ Thus, both situations are considered—the situation in which the pressure of the authority paid off leading to the person unwillingly making statements and the situation in which the person was sanctioned precisely to omit making the requested statements.

The right to remain silent concerns the facts ‘that directly question the person being questioned’, but a broader perspective must be considered that also includes the facts that could indirectly activate or complicate the criminal liability or sanctioning of the person concerned.²²

Because in contravention matters, the regulations in the member countries are not identical or fully harmonised, the Court, in its arguments, is also concerned with this situation. Thus, it is argued that the right to remain silent could be used in the misdemeanour framework, more precisely in ‘procedures that can lead to the application of administrative sanctions that have a criminal character’,²³ but under three conditions necessary to assess the sanction’s criminal character: the legal qualification of the illegal act in domestic law, the nature of the illegal act itself, and the degree of severity of the sanction that the person risks.²⁴

However, the Court does not absolutise this right to remain silent. In this sense, the considerations of the decision argue that the right to remain silent ‘does not justify any non-cooperation with the authorities’, drawing attention to the fact that

19 As Advocate General Pikamäe pointed out in his opinion, the ECtHR only ruled on cases that involved the right to silence of natural persons (Available at: <https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:62019CC04818&from=EN>).

20 Decision of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84); Jourdan, Powell, Raphaelson, Gidley and Abouzeid, *The European Court of Justice affirms the right to silence*, available at: <https://www.whitecase.com/publications/alert/european-court-justice-affirms-right-silence> (Accessed: 3 February 2023).

21 Decision of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, (ECLI:EU:C:2021:84), para. 39, second thesis; also in this regard, see the Court of EDO, 13 September 2016, Ibrahim and Others v. the United Kingdom (CE:ECHR:2016:0913JUD005054108), § 267

22 Judgment of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84), para. 40

23 Judgment of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84), para. 42; for details regarding the debate in Romania about the criminalisation and decriminalisation of misdemeanour, please see Ursuța, 2020, pp. 272–279.

24 Ibid.

the person has the duty to present himself and not to use 'dilatatory manoeuvres' to delay his hearing.²⁵

Simultaneously, from the construction of the arguments of the Court's decision, it appears that the right to remain silent is valid only for natural persons and not for legal persons.²⁶ It is important to underline that in the judgment, the Court traced the nuances of the present case to the previous jurisprudence of the CJEU formulated under the EU competition rules, which deal with legal entities' protection against self-incrimination. This jurisprudence states that a legal person cannot be forced to provide 'answers' that could imply the recognition of illegal anti-competitive behaviour but can be forced to provide information about facts and documents, even if they are used to establish anti-competitive behaviour. The CJEU judgment states that the narrower protection granted to legal persons under that jurisprudence cannot be applied by analogy when determining the scope of the right to silence of natural persons.²⁷

As part of our discussion, we should also address some provisions of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on strengthening certain aspects of the presumption of innocence and the right to be present at trial in proceedings,²⁸ which contain common minimum rules regarding certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings.

From the beginning, we note that Article 2 of this directive expressly states that 'This directive applies to natural persons who are suspected or accused in criminal proceedings', which excludes the incidence of these provisions in the case of legal persons.

In the framework of Art. 7, the existence of the right to remain silent and the right not to contribute to self-incrimination for the accused persons is also expressly stated. Moreover, through the provisions of Art. 7 (4), 'Member States may allow their judicial

25 Judgment of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84), para. 41.

26 Judgment of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84), para. 48.

27 Decision of the Court (Grand Chamber) delivered on 2 February 2021, in file C-481/19, final paragraph (ECLI:EU:C:2021:84), paras. 45–47; Judgment of 18 October 1989, *Orkem v Commission*, 374/87, EU:C:1989:387, point 34 para. 34: 'Although (...) the Commission has the right to oblige the enterprise to provide all the necessary information regarding the facts of which it may be aware and to communicate to it, if necessary, the related documents that are in its possession, even if these may serve to establish, against itself or against another enterprise, the existence of an anti-competitive practice, the Commission would not have the right to infringe, through a decision requesting information, the right of defence of the enterprise'; here are also mentioned other judgments of the Court: Judgment of 18 October 1989, *Orkem/Commission*, 374/87, EU:C:1989:387, point 34; Judgment of 29 June 2006, *Commission/SGL Carbon*, C-301/04 P, EU:C:2006:432, point 41; and Judgment of 25 January 2007, *Dalmine v Commission*, C-407/04 P, EU:C:2007:53, point 34).

28 Published in the Official Journal of the European Union, L65/1 of 11 March 2016.

authorities to take into account the cooperative attitude of suspected and accused persons when pronouncing judgments'. Researching the sources that motivated such a distinct way of regulating the two rights, we note that the European legislator appreciates that at the current stage of evolution of national law and jurisprudence at the national and union levels, the legislation of the presumption of innocence at the union level as far as legal entities are concerned is premature.²⁹ For this reason, this Directive should not apply to legal persons. However, it is considered that this circumstance should not affect the application of the presumption of innocence to legal persons, as it is enshrined in particular in the ECHR and interpreted by the ECHR and the CJEU,³⁰ and that the presumption of innocence with regard to legal persons should be ensured by existing legislative guarantees and jurisprudence, the future evolution of which will determine the need for action at the union level.³¹

Under these conditions, we ask ourselves the question—how could the effectiveness of these rights be ensured if the law does not recognise them in the case of the legal person? What are the existing guarantees that rise to the level of the express consecration of these rights in the case of natural persons in conditions where 'legislation at the level of the Union of the presumption of innocence with regard to legal persons is premature'? It seems that we are in the presence of a lack of decisions taken by the European legislator.

We agree with the point of view previously expressed in the doctrine that a normative double standard was thus created.³² The same author points out that

The legislative history of the directive shows that the European Parliament tried to widen its scope to cover legal entities, however, the Council, supported by the Commission, rejected the approach of the European Parliament, referring to several recitals which have been incorporated into the recitals of the directive.³³

The legal regime applicable to legal entities is not built in a perfect legal framework. In the specialised literature from Romania, substantive and procedural law problems have been reported in relation to the activation of the legal entity's criminal responsibility.³⁴ These are not few and concern the problems of interpretation and

29 Preamble of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016, para. 14.

30 Preamble of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016, para. 14.

31 Preamble of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016, para. 15.

32 Stănilă, 2020, p. 75.

33 Stănilă, 2020, p. 68.

34 Trandafir, 2021, p. 284 et seq.

application and the provisions of substantive (e.g. the demonstration of the subjective element, the approach to the organisational model) and procedural criminal law (e.g. the cumulation of the defendant's quality with the quality civilly liable in a criminal case).

From our point of view, the issue could be removed by recognising the right to remain silent in the case of legal entities. Thus, Art. 6 ECHR and Art. 48 of the Charter of fundamental rights of the European Union (CDFUE) contain the expression 'any person', without a distinction between the natural and legal person.

3. Law no. 241/2005 vs. The right to remain silent and right not to contribute to self-incrimination

We will now discuss certain provisions of Romanian law. The right to defence enshrined in Article 24 of the Romanian Constitution is guaranteed³⁵. However, the content of this right is not expressly defined through the constitutional provisions or another law. As, a consequence, the task to determine the content of this right will be taken by courts through jurisprudence.

Under these conditions, the task of detailing the content of this right therefore rests with judicial practice. Thus, by considering some decisions admitting cases of unconstitutionality of some laws' provisions in Romania, the Constitutional Court ruled as follows:

As for the right to defense, regulated in art. 24 of the Constitution, it gives any party involved in a process, according to its interests and regardless of the nature of the process, the possibility to use all the means provided by law to invoke facts or circumstances in its defense. This right implies participation in court hearings, the use of evidence, invoking the exceptions provided by the criminal procedural law, the exercise of any other criminal procedural rights and the possibility to benefit from the services of a defense attorney.³⁶

We also emphasise the relatively recent practice in the matter of ensuring the right to defence, including the components of the rights to remain silent and not to contribute to self-incrimination, about which Professor Mihai Hotca stated that 'By Decision no. 236/2020, the Constitutional Court reconsidered its own jurisprudence,

35 "Art. 24 – Right to defense: (1) The right of defense is guaranteed. (2) Throughout the proceedings, the parties shall have the right to be assisted by a lawyer, chosen or appointed ex officio."

36 Decision 519 of 6 July 2017, published in the Official Gazette. no. 879 of 8 November 2017, para. 18; Stănilă, 2020, pp. 75–76.

more precisely the solution and considerations of Decision no. 519 of July 6, 2017 and, in this sense, took over the doctrine of living law'.³⁷

We note that Art. 489 of the Criminal Procedure Code establishes the rule that in case of crimes committed by legal entities provided for in Art. 135 para. (1) of the Criminal Code in carrying out the object of activity or in the interest or on behalf of the legal person, the provisions of this code are applied accordingly. The exceptions and additions provided in this chapter are applicable in the procedure of the legal person's criminal liability and the provisions of the preliminary chamber procedure, which are also applied accordingly.

Under these conditions, we consider that the provisions of Art. 83 Criminal Procedure Code, which regulate the rights of the accused, are incidents in the case of natural and legal persons. As it was also emphasised in the doctrine, based on the fundamental principle of law, '*ubi lex non distinguit nec nos distinguere debemus*', there is no impediment to recognising all these rights for legal entities as well.³⁸

The rights enshrined in Art. 83 Criminal Procedure Code³⁹ include the right to remain silent and the privilege of non-self-incrimination in the following form:

[...] the right not to give any statement during the criminal trial, drawing attention to the fact that if he refuses to give a statement he will not suffer any adverse consequences, and if he gives statements they can be used as evidence against him.

Of course, there is the question of the person who can engage the legal entity in the direction of invoking and activating this right. This can only be the person who circumscribes the provisions of Art. 491 Criminal Procedure Code, which fulfils the function of representing the legal entity. Thus, the legal entity is represented by its legal representative when performing procedural acts. If there are certain

37 Hotca, 2020.

38 Stănilă, 2020, pp. 75–76.

39 Art. 83: Rights of the defendant – During the criminal trial, the defendant has the following rights: a) the right not to give any statement during the criminal trial, drawing his attention to the fact that if he refuses to give a statement he will not suffer any unfavourable consequences, and if he gives statements they can be used as evidence against him; a1) the right to be informed about the act for which he is being investigated and its legal framework; b) the right to consult the file, under the law; c) the right to have an elected lawyer, and if he does not appoint one, in cases of mandatory assistance, the right to have a lawyer appointed *ex officio*; d) the right to propose the administration of evidence under the conditions provided by law, to raise exceptions and to make conclusions; e) the right to make any other requests related to the settlement of the criminal and civil side of the case; f) the right to benefit from an interpreter free of charge when he does not understand, does not express himself well or cannot communicate in Romanian; g) the right to appeal to a mediator, in cases permitted by law; g1) the right to be informed about his rights; h) other rights provided by law.

impediments, the law regulates the situation of representation by a representative appointed by the legal entity.

If criminal proceedings have also been initiated against the legal representative of the legal person for the same or related facts, the legal person shall appoint a representative to represent it. In this case, if the legal person has not appointed a representative, such representative shall be appointed, as the case may be, by the prosecutor conducting or supervising the criminal prosecution, by the judge of the pre-trial chamber or by the court, from among the insolvency practitioners authorized according to the law.

The enshrinement of procedural rights, including the right to remain silent, through the provisions mentioned above is complemented and strengthened by other provisions of the Criminal Procedure Code. Thus, just as beyond the provisions of Art. 4 Criminal Procedure Code is the provision for the presumption of innocence without distinction between natural and legal persons. So we underline the judicial bodies' obligation to carry out the criminal investigation and trial respecting the procedural guarantees, the rights of the parties and the procedural subjects. This is to ensure that the facts constituting crimes may be ascertained in a timely and complete manner, no innocent person is held criminally liable and any person who has committed a crime is punished according to the law within a reasonable time.⁴⁰

Within the provisions that regulate the right to defence, it is expressly mentioned that before being heard, the suspect or defendant is given the right not to make any statement.⁴¹

Moreover, the Romanian Constitution has a provision through which effect is given to the more favourable regulation when competition arises between the domestic and international provisions. Thus, Art. 20 of the Romanian Constitution, 'International Treaties on Human Rights', provides that the constitutional provisions regarding the rights and freedoms of citizens will be interpreted and applied in accordance with the Universal Declaration of Human Rights and other pacts and treaties to which Romania is a party; if there are inconsistencies between the pacts and treaties on fundamental human rights to which Romania is a party and between the internal laws, international regulations take precedence unless the Constitution or internal laws contain more favourable provisions.

In circumstances in which the working hypothesis is that no distinction has been made between the natural and legal persons, because of both entities being subject to the regulation of Romanian laws,⁴² any international provisions that would not

40 Art. 8 of Criminal Procedure Code.

41 Art. 10 para. 4 of Criminal Procedure Code.

42 Of course, we could include in the discussion in the strict sense the differences between a Romanian citizen and a Romanian legal person, as an argument for the idea of different legal treatment of natural person citizens in relation to legal persons, especially because in the latter's case, the notion of citizenship is not unanimously recognised.

recognise the right to remain silent in favour of Romanian legal entities would not be effective from a legal point of view, and the more favourable provisions—those of the Romanian law described above—would be applied.

Considering this, we will proceed to the analysis of the ways in which the right to defence can be effectively exercised under the conditions in which the provisions of Articles 3, 4 or 5 of Law no. 241 of 2005 are applied regarding the prevention and combating of tax evasion. The three situations of incrimination concern the act of the taxpayer who does not restore, with intention or through fault, the destroyed accounting records documents within the term entered in the control documents (Art. 3 of Law no. 241/2005); the unjustified refusal of a person to present legal documents and assets from the heritage to the competent bodies to prevent financial, fiscal or customs checks within no more than 15 days from the summons (Art. 4 of Law no. 241/2005); and preventing, in any form, the competent bodies from entering, under the conditions provided by law, premises, sites or land, or the purpose of carrying out financial, tax or customs checks (Art. 5 of Law no. 241/2005).

Viewed in a broader sense, these incrimination hypotheses correspond to situations of non-compliance—a failure to restore or an act of refusal or obstruction—with the responsibility of the taxpayer, who in this situation is usually a legal person.

Compliance with the norm cited above would assume that the (legal) person only has the option of redoing the documents within the term stated in the control documents, under the conditions of Art. 3 of Law no. 241/2005, to present the legal documents and assets from the heritage to the competent bodies, under the conditions of Art. 4 of Law no. 241/2005, or to allow entry into premises, premises or land for the purpose of carrying out checks, under the conditions of Art. 5 of Law no. 241/2005. Another option is not allowed by law without the legal entity being assumed to have committed one of the crimes mentioned above.

Under these conditions, can he still invoke the right to remain silent?

Is the right to silence exercised through passive conduct—not redoing documents, not presenting documents—or passive obstruction, starting from the idea that through such conduct in the event of compliance, one would incriminate oneself?

In our opinion, although Romanian law recognises the right of legal persons to remain silent in criminal proceedings, in the above situations, it cannot be invoked in this form. Just as the CJEU ruled in the judgment mentioned previously, the right to remain silent is not absolute or equivalent to refusing to cooperate with the authorities, just as the obligation to cooperate is not absolute.

The right to remain silent can be exercised in the sense that the accused person does not contribute to his own accusation, and the accused person cannot be forced to fulfil obligations of a different nature (such as those from Arts. 3, 4 and 5 of Law no. 241/2015) that have the effect of proving the accusation against him.

The situation is even more complicated in the scenario where the SAF-T reporting system is applied.⁴³ It has several features⁴⁴ that practically, through the related reporting, transfer financial and accounting data from the taxpayer's 'custody' to the authority's database. Consequently, the tax authority will have a mirror of the taxpayer's financial accounting records. At that time, any exercise of any form of silence on the part of the taxpayer is without practical effect because all the information can be accessed by the authority, whether consent is given by the taxpayer or not.

4. Conclusion

We must reinforce the following principle: where the law does not distinguish, neither should we. Furthermore, we retain the responsibility of a legal entity owing to the actions of natural persons, whose right to remain silent we recognise. We thus arrive at the anachronistic situation in which only the legal entity will be held criminally liable, using its own statements as evidence, and those who compose its structure will be able to be defended by the right to remain silent. Does the person who makes statements on behalf of the legal entity, if not precisely the natural person who acts on its behalf, benefit from the right to remain silent? The answer is affirmative. The natural person's right to be silent is not disputed anymore.

If we refer to the legal person as a legal fiction, we can look at things from another perspective—⁴⁵a legal fiction has rights and obligations under the law, that is, the law recognises them. Are we not in the same situation as any individuals? We have now passed the moment when rights are asserted simply as natural rights and are

43 The SAF-T Fiscal Control Standard File is regulated by Art. 59¹ of Law 207/2015 on the Fiscal Procedure Code and by ANAF Order no. 1783/2021. 'The Standard Fiscal Control File (SAF-T) is an international standard for the electronic exchange of accounting data between companies/organisations and tax authorities. This standard was designed by the Organization for Economic Cooperation and Development in 2005, and since then it has undergone a series of refinements, the most recent version being – Taxpayer's guide for the preparation and submission of the D406 INFORMATION STATEMENT – STANDARD FISCAL CONTROL FILE (SAF – T)', available at: https://static.anaf.ro/static/10/Anaf/Informatii_R/SAF_T_Ghidul_D406_1712021.pdf (Accessed: 3 February 2023).

44 'The initiative arose as a result of the OECD's intention to implement a uniform reporting standard for multinational companies whose tax reporting has become, over time, more and more difficult to achieve and monitor by the authorities. Broadly speaking, the new standard aims to reduce the VAT collection deficit and digitise fiscal inspections. (...) In Romania, the need to implement such a system has become evident for several years, given that our country traditionally records the lowest share of tax revenues in GDP (27% in 2019, compared to the EU average of 40%) and the largest VAT collection deficit in the European Union (estimated at 37.4% for 2020, according to the latest data published by the European Commission)' – Boeriu, 2021.

45 The authorship of this view of the natural person is not entirely mine but is the result of discussions with Prof. Dannecker Gerhard (University of Heidelberg).

instead rights established and recognised by law. Rights are exercised since they are stipulated and protected by provisions of the law.

Thus, in both cases, the laws enshrines rights, so what reason is there for us to limit the exercise of some rights just because one subject is a legal fiction and the other a natural legal fiction?

One can argue that the legal entity`s right to be silent is exercised through the natural person that legally represents the legal entity. In our opinion, the right to remain silent of the legal entity is separate from the right to be remain silent of the natural person representing the legal entity, and both rights should be protected by law.

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