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THE RIGHT TO AVOID SELF-INCRIMINATION: YET ANOTHER ELEPHANT IN THE AUTOMATED COMPETITION LAW ENFORCEMENT ROOM?

PIETER VAN CLEYNENBREUGEL*

ABSTRACT: The right to avoid self-incrimination forms part of the fundamental rights of the defence accompanying the public enforcement of European Union (EU) competition law. Thanks to this right, undertakings cannot be forced to produce guilt-admitting answers to the European Commission or national competition authorities applying arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Despite its general recognition, open questions relating to its scope and importance throughout enforcement procedures constrain its practical use. Although those questions are problematic as a matter of EU law in general, this *Article* submits that they also have a direct and significant impact on the ability for EU and Member States' competition authorities to introduce artificial intelligence-backed enforcement tools. Against such background, the *Article* prospectively analyses how the right to avoid self-incrimination could constrain the design and use of tailored automated competition enforcement tools. The first part of the *Article* revisits the scope of the right to avoid self-incrimination as apparent from the Court of Justice of the European Union's case law. It identifies and distinguishes three open questions which underlie the right's application in EU competition law enforcement. The second part argues that those questions directly condition the ways in which artificial intelligence-backed public enforcement tools can be implemented at different stages of the investigation and decision-making. Anticipating litigation on those questions, the *Article*

* Full Professor of European Union law, University of Liège, pieter.vancleynenbreugel@uliege.be.

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therefore calls for the right to avoid self-incrimination to be given more explicit attention when designing or introducing automated enforcement tools.

KEYWORDS: competition law – public enforcement – self-incrimination – artificial intelligence – arts 101 and 102 TFEU – automated decision-making.

I. INTRODUCTION

The right to avoid self-incrimination forms part of the fundamental rights of defence granted to accused or suspected persons in many criminal law systems.[1] It also applies to punitive administrative procedures.[2] In the field of European Union (EU) competition law, the Court of Justice of the European Union (CJEU) acknowledged that undertakings suspected of anticompetitive behaviour cannot be coerced into providing answers through which they would themselves establish their participation in anticompetitive behaviour.[3]

This *Article* analyses to what extent the right to avoid self-incrimination conditions or constrains the design or implementation of automated EU competition law enforcement. Automated law enforcement refers to those tools making use of natural language processing, machine learning or other artificial intelligence techniques in order to detect, analyse or establish competition law infringements.[4] The essence of those techniques is to allow competition authorities to monitor or analyse massive amounts of data featuring on servers kept by more or less suspected undertakings in the context of different competition law procedures. By making use of those techniques, infringements of arts 101 and/or 102 of the Treaty on the Functioning of the European Union (TFEU) could be uncovered more rapidly or without need for extensive information gathering through questionnaires and traditional inspections.[5] However, it cannot be excluded that more intru-

[1] International Covenant on Civil and Political Rights, art. 14(3)(g) states that an individual facing a criminal charge have the right not to be compelled to testify against himself or to confess guilt. The right to avoid self-incrimination is prone to terminological differences. In common law systems, it is often referred to as the privilege against self-incrimination. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, art. 7 refers to the right to remain silent and the right not to incriminate oneself in relation to natural persons in criminal proceedings. In its recent case law, the CJEU relies on the term "right to avoid self-incrimination", see case C-481/19 *DB v CONSOB* ECLI:EU:C:2021:84. This *Article* refers to the latter term. On the terminological right-privilege distinction, see S Trechsel, 'The Privilege Against Self-Incrimination' in S Trechsel and S Summers (eds), *Human Rights in Criminal Proceedings* (Oxford University Press 2006) 341.

[2] See for background, A McCulloch, 'The Privilege against Self-Incrimination in Competition Investigations: Theoretical Foundations and Practical Implications' (2006) Legal Studies 213-220.

[3] A Riley, 'Saunders and the Power to Obtain Information in Community and United Kingdom Competition Law' (2000) ELR 264, 269.

[4] H Quinn, K Brand and S Hunt, 'Algorithms: Helping Competition Authorities to be Cognisant of the Harms, Build their Capacities and Act' (2021) Concurrences 5-11.

[5] H Hofmann and I Lorenzoni, 'Future Challenges for Automation in Competition Law Enforcement' (2023) Stanford Computational Antitrust 36-54.

sive and automated screening or decision-making mechanisms would limit the possibilities for undertakings to refuse to provide guilt-admitting information or to contest the handing over of incriminating pre-existing documents. Questions may therefore arise as to the extent to which the introduction of automated enforcement tools would need to be accompanied by explicit self-incrimination safeguards.

To answer those questions, the first part of this *Article* revisits the scope of the right to avoid self-incrimination in EU competition law. In its current setup, the right to avoid self-incrimination in EU competition law gives rise to fundamental questions regarding its scope, compatibility with the European Convention on Human Rights (ECHR) and its practical implementation. Although those questions are problematic as a matter of EU law in general, this paper submits that they also have a direct and significant impact on the ability for EU and Member States' competition authorities to introduce artificial intelligence-backed enforcement tools. Against this background, the second part of paper prospectively analyses how the right to avoid self-incrimination could constrain the design and use of tailored automated competition enforcement tools. More specifically, it distinguishes three scenarios of automated enforcement which are likely to materialise in the near future. In each scenario, the right to avoid self-incrimination may be more or less affected. Flagging potential self-incrimination issues, the paper will develop proposals as to how increasingly automated enforcement can continue to ensure respect for the right to avoid self-incrimination.

II. The right to avoid self-incrimination in EU competition law

In its barest essence, the right to avoid self-incrimination implies that a suspect of a criminal charge is entitled not to make admissions of guilt when questioned by enforcement authorities.[6] European Union law recognises a right to avoid self-incrimination as part of the fundamental rights of defence. The right implicitly features in the Charter of Fundamental Rights. The meaning and scope of that right at least have to correspond to the standard of protection offered by the ECHR (section II.1). In EU competition law enforcement, however, the CJEU had started to develop a judicially-crafted standard of protection against self-incrimination, which does not fully appear to correspond to the ECtHR's (section II.2).

II.1. The right to avoid self-incrimination in the Charter of Fundamental Rights: article 6 ECHR as a starting point

Art. 48(2) of the Charter of Fundamental Rights implicitly recognises the right to avoid self-incrimination as forming part of the more general rights of the defence.[7] As such, it

[6] See A Sachoulidou, 'Going beyond the "Common Suspects": To be Presumed Innocent in the Era of Algorithms, Big Data and Artificial Intelligence' (2023) Artificial Intelligence and Law (first view).

[7] Charter of Fundamental Rights of the European Union [2012] art. 48(2). *DB v CONSOB* cit. para. 36.

needs to be respected by both EU and Member States' authorities applying EU law, including the European Commission and Member States' competition authorities.[8]

Art. 52(3) of the Charter confirms in addition that in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. The right to avoid self-incrimination directly corresponds to a right guaranteed by the ECHR. Indeed, the ECtHR has recognised the right to avoid self-incrimination as part of the right to a fair trial recognised by art. 6(1) ECHR.[9] It applies whenever an individual is compelled by the authorities to admit its guilt in committing an offence constituting a criminal charge.[10] The concept of criminal charge includes competition law enforcement actions.[11] Being compelled implies that, in order to obtain information, individuals are forced, under threat of criminal sanctions, to hand over information or to respond to certain allegations.[12] Only improper compulsion results in a violation of art. 6 ECHR.[13]

The ECtHR case law generally assesses the presence of improper compulsion on the basis of three key elements: *i)* the nature and degree of compulsion used to obtain the evidence, *ii)* the existence of any relevant safeguards in the procedure, *iii)* the use to which any material so obtained was put.[14] The ECtHR case law has applied those conditions in a variety of settings falling within the ECHR's "criminal charge" notion and notably with regard to the question as to whether the transfer of pre-existing documents could be ordered.[15] In its earliest case law, improper compulsion was in place when information or documents are obtained which could not have been procured "independent from the will" of the person charged.[16] Such somewhat cryptic formulation gave rise to cases in which pre-existing documents containing potentially incriminating information would not fall within the scope of the right to avoid self-incrimination. The transfer of those docu-

[8] As follows from CJEU, C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105 paras 20-21; see also B van Bockel and P Wattel, 'New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson' (2013) ELR 866-883.

[9] ECtHR *Funke v France* App n. 10828/84 [25 February 1993]; see also Y Daly, A Pivaty, D Marchessi and P ter Vugt, 'Human Rights Protections in Drawing Inferences from Criminal Suspects' Silence' (2021) HRLRev 696.

[10] ECtHR *Saunders v United Kingdom* App n. 19187/91 [17 December 1996] para. 68.

[11] ECtHR *Menarini Diagnostics v Italy* App n. 43509/08 [27 September 2011].

[12] ECtHR *John Murray v United Kingdom* App n. 18731/91 [8 February 1996] para. 45.

[13] By way of example, ECtHR *Heaney and McGuinness v Ireland* App n. 34720/97 [21 December 2000] para. 55.

[14] See for an overview ECtHR *Ibrahim et al. v United Kindgom* App n. 50541/08, 50571/08, 50573/08 and 40351/09 [13 September 2016] paras 267-269.

[15] The notion of criminal charge also covers punitive administrative procedures, see ECtHR *Engel v The Netherlands* App n. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 [8 June 1976].

[16] *Saunders v United Kingdom* cit. para. 69.

ments could therefore be ordered without infringing the right to avoid self-incrimination.[17] However, in more recent cases, the ECtHR moved towards a more case-specific assessment whereby the nature of the compulsion is evaluated in the specific factual context.[18] It also follows from the ECtHR case law that, especially in criminal proceedings which are not hard core but give rise to administrative "criminal charges",[19] an overriding public interest could justify the handing over of such documents.[20]

II.2. A specific right to avoid self-incrimination in EU competition law enforcement?

Prior to the adoption of the Charter and the development of ECtHR case law on the right to avoid self-incrimination, the CJEU had previously already recognised itself the contours of such a right in the framework of EU competition law public enforcement procedures. More particularly, it confirmed that "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".[21]

However, the right to avoid self-incrimination had not been conceived of as an absolute right. As the Court confirmed,

> "the Commission remains entitled, in order to preserve the useful effect of the public enforcement of Articles 101 and 102 TFEU 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".[22]

Recital 23 of Regulation 1/2003 confirms that

> "[w]hen complying with a decision of the Commission [ordering such information to be supplied as is necessary to detect any infringement prohibited by Articles 101 or 102 TFEU], undertakings cannot be forced to admit they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even

[17] *Saunders v United Kingdom* cit. para. 70. See also ECtHR *Jalloh v Germany* App n. 54810/00 ECLI:CE:ECHR:2006:0711JUD005481000 [11 June 2006] para. 101.

[18] ECtHR *Corbet and Others v France* App n. 7494/11, 7493/11, and 7989/11 [19 March 2015] para. 34 and ECtHR *Bajic v North Macedonia* App n. 2833/13 ECLI:CE:ECHR:2021:0610JUD000283313 [10 June 2021] paras 69-75.

[19] On criminal charges, see ECtHR *Jussila v Finland* App n. 73053/01 [23 November 2006] para. 43.

[20] ECtHR *Weh v Austria* App n. 38544/97 [8 April 2004]; ECtHR *O'Halloran and Francis v United Kingdom* App n. 15809/02 and 25624/02 [29 June 2007] para. 56. In any case, the suspected person has to be informed of the existence of the right to avoid self-incrimination, see ECtHR *Beuze v Belgium* App n. 71409/10 [9 November 2018] para. 130 and ECtHR *Ibrahim et al. v United Kindgom* cit. para. 273.

[21] CJEU, case 374/87 *Orkem* ECLI:EU:C:1989:387 para. 35. The Court also confirmed the same reasoning in case 27/88 *Solvay v Commission* ECLI:EU:C:1989:388 para. 74.

[22] *Orkem* cit. para. 34.

if this information may be used to establish against them or against another undertaking the existence of an infringement".[23]

It follows from the CJEU's case law that undertakings may not be compelled to provide answers which admit to its guilt to an infringement of arts 101 and/or 102 TFEU. The Court distinguished guilt-admitting answers from answers to purely factual questions. The latter concern questions the answers to which require the undertaking to offer factual clarification as to the subject-matter and implementation of (potentially anticompetitive) measures. By contrast, guilt-admitting questions would be those aimed at obtaining from the undertaking concerned information regarding the purpose of the action taken and the objective pursued by those measures. The undertaking concerned could not be compelled to provide such information of a subjective nature.[24] Although the distinction between factual and guilt-admitting questions is not always easy to make in practice, the EU Courts have not abandoned this distinction.[25]

Subsequent case law made two important clarifications. First, the EU Courts confirmed that the right to avoid self-incrimination only applies when the undertakings themselves do not wish to cooperate voluntarily.[26] When an undertaking decides to hand over incriminating information in response to a request the European Commission without being forced to do so, the right does not apply. In the context of the enforcement of arts 101 and 102 TFEU, this implies that a decision to submit information has to be taken.[27] Second, the CJEU has continued to make a fundamental distinction between the right to

[23] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty, recital 23. See also M Veenbrink, 'The Privilege against Self-Incrimination in EU Competition Law: A Deafening Silence?' (2015) LIEI 119, 132.

[24] Such information would be equivalent to an admission of guilt, see joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinylmaatschappij et al v Commission of the European Communities* ECLI:EU:C:2002:582 para. 273. On admissions of guilt, see P Willis, '"You have the right to remain silent...", or do you? The privilege against self-incrimination following Mannesmannrohren-Werke and other recent decisions' (2001) European Competition Law Review 313-321; see also A Riley, 'Saunders and the Power to Obtain Information in Community and United Kingdom Competition Law' cit. 269.

[25] By way of examples, General Court, case T-112/98 *Mannesmannröhren-Werke AG v Commission of the European Communities* ECLI:EU:T:2001:61 paras 61-67; *Limburgse Vinylmaatschappij* cit. para. 292 and CJEU, case C-466/19 P *Qualcomm, Inc. and Qualcomm Europe, Inc. v European Commission* ECLI:EU:C:2021:76 para. 143.

[26] The right cannot be invoked therefore when another undertaking or an association of undertakings supplies information the suspected undertaking would not have supplied itself, see by way of example, CJEU, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and others v Commission of the European Communities* ECLI:EU:C:2004:6 para. 208.

[27] Case C-407/04 P *Dalmine v Commission* ECLI:EU:C:2007:53 para. 35; joined cases C-125/07 P C-133/07 P and C-137/07 P *Erste Group Bank and Others v Commission* ECLI:EU:C:2009:576 para. 272 and joined cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce and others v Commission* ECLI:EU:C:2015:416 paras 195-197.

provide answers and the right to provide documents.[28] It confirmed that the right to avoid self-incrimination does not extend to pre-existing documents which are in the possession of the undertaking. The obligation to cooperate with the European Commission in the context of competition law investigations thus extends to handing over those documents, even when they may contain guilt-admitting information.[29] In more recent case law, the Courts confirmed that being required to produce new documents containing pre-existing factual information in response to a decision of the European Commission does not infringe the right to avoid self-incrimination either.[30] As a result, the right to avoid self-incrimination has been interpreted rather restrictively.

In addition to those "hard core" right to avoid self-incrimination cases, the EU Courts have acknowledged, at least implicitly, a role for the right to avoid self-incrimination in the context of investigative measures or inspections as well. Just like the European Court of Human Rights,[31] the EU Courts seem to have relied at least implicitly on the right to avoid self-incrimination when evaluating whether an inspection or other investigative measure taken by the European Commission had been motivated sufficiently. It is to be remembered that the European Commission and Member States' competition authorities generally have far-reaching inspection and investigative powers.[32] The use of those powers may require suspected undertakings to hand over documents which in essence self-accuse them of anticompetitive behaviour. With a view to protect the right to avoid self-incrimination at later stages of the procedure, investigative measures have to be necessary for and proportionate to the purpose of the investigation concerned.[33] Stated otherwise, they may not enable so-called fishing expeditions by the enforcement authority.[34] The Commission therefore has to provide reasonable grounds justifying information requests or inspections.[35]

[28] See also M Veenbrink, 'The Privilege against Self-Incrimination in EU Competition Law' cit. 132-133.

[29] See already *Orkem* cit. para. 34.

[30] *Qualcomm* cit. para. 147.

[31] An illustration could be found in the *Funke v France* case, where introducing criminal action to make an individual deliver foreign bank statements in a customs investigation was said to give rise to the right to avoid self-incrimination, see ECtHR App n. 10828/84 *Funke v France* ECLI:CE:ECHR:1993:0225JUD001082884.

[32] See in general A Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar 2008) 296.

[33] M Michalek, 'Fishing Expeditions and Subsequent Electronic Searches in the Light of the Principle of Proportionality of Inspections in Competition Law Cases in Europe' (2014) Yearbook of Antitrust and Regulatory Studies 129-158.

[34] C Nicolosi, 'No Fishing at Dawn (Raids)! Defining the Scope of the Commission's Inspection Power in Antitrust Proceedings' (2016) Queen Mary Law Journal 53-68.

[35] By way of examples, the General Court in *Nexans* and *Prysmian* annulled Commission inspection decisions in the field of electric cables. According to the General Court, although the inspection decision indicated sufficiently clearly the indications required by Regulation 1/2003, it did not make explicit the reasonable grounds for suspicion to include all electric cables in an inspection decision. Although the decision was not annulled in light of non-incrimination arguments, the impact of such a decision on the rights of defence could be considered an a fortiori reason justifying the annulment, see General Court, case T-135/09 *Nexans France*

Although the Commission enjoys a certain degree of discretion in motivating information requests,[36] the Court of Justice has annulled Commission decisions for having been too vaguely formulated.[37] Somewhat remarkably, Advocate General Wahl in those same cases had opined that the right not to incriminate itself had been violated and constituted a ground for the annulment of the decision. The Advocate General had claimed that factual information requested by the Commission in the case at hand could be considered equivalent to admitting an infringement.[38] The Court did not choose to annul the decisions on those grounds, taking a more general perspective instead. It transpires nevertheless from the judgments that the right to avoid self-incrimination constitutes at least a background standard against which the Commission motivation of an information request may have to be evaluated. The Court nevertheless did not rely on such a standard explicitly. As such, it left open whether the right to avoid self-incrimination could be invoked in this context.

In the same way, Commission inspection decisions have to indicate what reasonable grounds for suspicion justify such intrusive measures. Failure to do so would result in an overly broad scope of the envisaged or conducted inspection. As a result, the Commission would be able to get hold of self-incriminating statements or documents an undertaking would not have given in response to more specific requests or decisions to provide information.[39] In practice, this also means that Commission inspectors cannot rely on and search for evidence in relation to another, separate complaint not mentioned in the original decision.[40]

The Court of Justice in this context also confirmed that the effective exercise of rights of the defence – including the right to avoid self-incrimination – may limit the Commission in its reliance on documents obtained elsewhere for the purposes of arts 101 and/or 102 infringement proceedings. As a result, incriminating information obtained by the Commission via other means than inspection or information decisions, could not be used by it to establish infringements of arts 101 and/or 102 TFEU.[41] The ability to exercise the right to avoid self-incrimination therefore constitutes a benchmark against which the motivation of such investigative decisions is to be evaluated by the EU Courts. Indirectly, the

SAS and Nexans SA v European Commission ECLI:EU:T:2012:596 paras 53-59 and case T-140/09 *Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl v European Commission* ECLI:EU:T:2012:597 paras 46-52.

[36] See for a recent example, General Court, case T-451/20 *Meta Platforms Ireland v European Commission* ECLI:EU:T:2023:276.

[37] CJEU, case C-247/14 P *Heidelberg Cement AG v Commission* ECLI:U:C:2016:149 para. 39.

[38] Case C-247/14 P *Heidelberg Cement AG v Commission* ECLI:EU:C:2015:694, opinion of AG Wahl, paras 152-168. See also case C-267/14 P *Buzzi Unicem v European Commission* ECLI:U:C:2015:696, opinion of AG Wahl, paras 74-90.

[39] CJEU, case C-94/00 *Roquette Frères v Commission* ECLI:EU:C:2002:603 para. 54.

[40] CJEU, case C-583/13 P *Deutsche Bahn and others v Commission* ECLI:EU:C:2015:404 paras 62-64.

[41] Case C-60/92 *Otto BV v Postbank NV* ECLI:EU:C:1993:876 para. 20; case C-511/06 P *Archer Midland Daniels Co* ECLI:EU:C:2009:433 para. 96.

right to avoid self-incrimination thus conditions the motivation underlying the adoption of investigative decisions by the European Commission.

Despite relatively consistent case law on the matter, the application of the right to avoid self-incrimination in the context of EU competition law raises three questions, the answers to which have not been fully developed in the CJEU case law.

First, questions remain as to whether the general exclusion of pre-existing factual documents from the protection offered by the right to avoid self-incrimination is compatible with the European Court of Human Rights' (ECtHR's) case law. The CJEU excludes pre-existing documents from the benefit of the right in competition law enforcement. By contrast, the ECtHR appears to require a case-by-case assessment in order to determine whether improper compulsion has taken place (see section II.1). Such an assessment cannot in principle be made in general and ex ante. Although public interests could justify some level of compulsion, the ECtHR's case law would seem difficult to square with a general exclusion of protection against self-incrimination for pre-existing documents without individual case assessment.[42] At the same time, the ECtHR case law has applied the privilege only in procedures against natural persons, despite it having applied other fair trial rights in relation to undertakings or legal persons as well.[43] As a result, it remains uncertain whether the CJEU case law stating that undertakings obliged to provide pre-existing documents cannot invoke their right not to avoid self-incrimination remains compatible with art. 6 ECHR.[44]

Second, the personal scope of application of the right to avoid self-incrimination remains unclear. The CJEU's case law has not dealt with the situation where subjects other than the undertaking itself invoke the right to avoid self-incrimination. The right to avoid self-incrimination protects the subjects which can be coerced into admitting guilt. In EU competition law, the only subjects which can be imposed a punitive sanction are undertakings. As a result, it would seem that only those undertakings can indeed invoke the right when confronted with decisions by the European Commission. In practice, this means that the legal representatives of those undertakings can avail themselves of the right not to incriminate their undertaking. By contrast, employees or directors not having the right of representation would not be able to invoke the right. As EU competition law cannot impose sanctions on them for refusal to confess to their role in anticompetitive behaviour, the right would not apply to those employees. That would be the case even though they would be considered as part of the entity which comprises the undertaking under investigation.[45] The fact that those individuals cannot be coerced by means of sanctions into confessing

[42] *Ibrahim et al. v United Kindgom* cit. para. 269.

[43] ECtHR *SA Capital Oy. v Finland* App n. 5556/10 [26 September 2011].

[44] Contrary to cases involving natural persons, where the CJEU aligned its case law with the ECtHR's, see *DB v CONSOB* cit. para. 40 and M Veenbrink, 'The Freedom from Self-Incrimination – A Strasbourg-Proof Approach? Cases C-466/19 P *Qualcomm* and C-481/19 P *DB v Consob*' (2021) Journal of European Competition Law & Practice 750, at 752.

[45] B Vesterdorf, 'Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law: Recent Developments and Current Issues' (2005) FordhamIntlLJ 1179, 1212-1214.

makes them ineligible to benefit from the right to avoid self-incrimination and therefore a priori obliged to provide guilt-admitting statements to the enforcement authorities. By contrast, in national competition law cases where those individuals could be fined themselves, they would benefit from such a right. It remains at present uncertain whether and to what extent individuals working for or in the undertaking concerned could therefore be forced to provide guilt-admitting information which could result in the undertaking being held liable for the violation of arts 101 and/or 102 TFEU.

Third, an issue not completely addressed in this context pertains to the consequences attached to the finding of a breach of the right to avoid self-incrimination.[46] The Court has in the past annulled the parts of the decision requesting information and containing guilt-admitting questions.[47] It does remain unclear, however, what the impact would be when a final decision finding an infringement of arts 101 and/or 102 TFEU were to be adopted in violation of the right to avoid self-incrimination. It cannot be excluded that the decision would be annulled (in part) for failure to comply with an essential procedural requirement.[48] Annulling such a decision would not undo the harm done, which raises the question as to whether other compensation mechanisms should be envisaged. In practice, this question has been side-lined to some extent by the designation, at European Commission level, of a Hearing Officer responsible for evaluating breaches of procedural rights during the Commission enforcement procedure.[49] When a decision to provide information is being sent or a request is being made, an undertaking may indicate that some questions risk violating its right not to incriminate itself within the time limits set for answering the request. The European Commission's Hearing Officer will then be requested to evaluate the matter and to provide a reasoned recommendation. The European Commission will have to take stock of the Hearing Officer's recommendations when adopting a decision compelling the undertaking to provide information.[50] By setting up this mechanism, the European Commission aims to minimise the risks of decisions being annulled and compensations – in whatever format – being claimed in cases of violation of the right to avoid self-incrimination. In practice, this seems to result in fewer claims regarding the violation of the right to avoid self-incrimination.

[46] The ECtHR requires an assessment of whether compelling incriminating statements at the start of an investigation have taken away the overall fair nature of the procedure, ECtHR *Salduz v Turkey* App n. 36391/02 [27 November 2008] para. 55 and *Beuze v Belgium* cit. para. 150.

[47] *Orkem* cit. para. 42.

[48] According to art. 263 TFEU, a Commission decision could be annulled for infringing such an essential procedural requirement. See, in a context of failing to respect changed procedural rules, CJEU, case C-89/15 P *Riva Fire SpA v European Commission* ECLI:EU:C:2017:713.

[49] W Wils, 'The Role of the Hearing Officer in Competition Proceedings before the European Commission' (2012) World Competition 431.

[50] See Decision of the President of the European Commission 2011/695 of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, art. 4(b).

III. Protection against self-incrimination and automated competition law enforcement

The previous part of the paper revisited the contours of the right to avoid self-incrimination under EU competition law. It confirmed that the scope and role of the right to avoid self-incrimination in EU competition law in the traditional competition law public enforcement context have not been clarified fully. It is submitted that those open questions will require additional attention when considering to rely on automated detection, screening or decision-making techniques. It is therefore important to analyse to what extent protection against self-incrimination would affect the setting up and operations of automated competition law public enforcement. Following a brief general introduction to automated competition law enforcement (section III.1), it distinguishes and addresses three scenarios in which self-incrimination avoidance requirements and automated technologies may meet (section III.2). On the basis of the previous analysis, the need for clarification of the scope of the right to avoid self-incrimination is presented as a precondition to the introduction of more automated competition law enforcement tools (section III.3).

III.1. Automated competition law enforcement as an emerging reality

With the advancements in data processing techniques, it is no surprise that competition authorities also increasingly start to look for ways to automate parts of their enforcement processes.[51] The use of technology to infer or deduce conclusions from a wealth of data could speed up and render more efficient previously time- and resources-consuming factual analyses.[52] Unsurprisingly, the need for and possibilities to screen market behaviour using artificial intelligence-based technologies has gained traction.[53] Those newfound enforcement opportunities have given rise to questions regarding reason-giving requirements, access to documents relating to used algorithms and more generally good administration questions.[54] In addition, the question on how the use of those enforcement techniques affects the presumption of innocence has also been debated already.[55]

[51] T Schrepel, 'Computational Antitrust: An Introduction and a Research Agenda' (2021) Stanford Computational Antitrust 1 and D Lim, 'Can Computational Antitrust Succeed?' (2021) Stanford Computational Antitrust 38. See also N de Marcellis-Warin, F Marty and T Warrin, 'Vers un virage algorithmique de la lutte anticartels? Explicabilité et redevabilité à l'aube des algorithmes de surveillance' (2021) Revue internationale d'éthique sociale et gouvernementale 1.

[52] A von Bonin and S Malhi, 'The Use of Artificial Intelligence in the Future of Competition Law Enforcement' (2020) Journal of European Competition Law & Practice 468.

[53] M Huber and D Imhof, 'Machine Learning with Screens for Detecting Bid-Rigging Cartels' (2019) International Journal of Industrial Organization 277-301; R Abrantes-Metz and D Sokol, 'The Lessons from Libor for Detection and Deterrence of Cartel Wrongdoing' (2012) Harvard Business Law Review Online 10-16.

[54] H Hofmann and I Lorenzoni, 'Future Challenges for Automation in Competition Law Enforcement' cit. 49-53.

[55] A Sachoulidou, 'Going beyond the "Common Suspects"' cit.

Although those questions are correctly put at the forefront of automated competition law enforcement debates, this *Article* submits that questions regarding the right to avoid self-incrimination cannot be ignored either. The latter right offers undertakings an instrument directly to legitimise refusals to cooperate with enforcement authorities or to contest fact-finding results obtained through automated tools. It cannot be excluded that self-incrimination avoidance arguments may constitute a starting point for future litigation focused on infringements of the rights of the defence as well. Future-proof automated enforcement tools therefore need to make sure they are compliant with the right to avoid self-incrimination as well.

This *Article* submits that the question as to the compatibility of automated enforcement tools with the right to avoid self-incrimination cannot be answered in the abstract. It follows both from the CJEU's non-competition law cases and the ECtHR's fair trial case law that questions regarding the infringement of the right to avoid self-incrimination are to be evaluated on a case-by-case basis, in light of the specific use which has been made of incriminating or guilt-admitting information.[56] Despite the case-by-case assessment, it can be argued that, on a more general level, automated enforcement tools need to take stock of the potential self-incrimination avoidance mechanisms they have to incorporate. As a result, one would need to assess, for each screening or processing tool implemented, how it affects the right to avoid self-incrimination and what measures need to be implemented to ensure its compliance. Such an assessment is best done in a pro-active manner if only to avoid too many uncertainties accompanying the design or use of those automated enforcement tools. However, given the current uncertainties accompanying its scope in competition law, it seems inevitable that the EU Courts or national courts will be called upon to review the compatibility of the use of those tools with the EU right to avoid self-incrimination.

III.2. Three automated enforcement scenarios calling for increased attention to self-incrimination avoidance

Automated enforcement tools can provide for more or less far-reaching algorithmic interventions in the public enforcement process. It is therefore useful to highlight how different types of automated enforcement may require different types of engagement with the right to avoid self-incrimination. To do so, this section distinguishes three automated enforcement scenarios. Those scenarios have been chosen as they project varying degrees of automation inserted in the public enforcement process. First, and most likely to be used on a wider scale in the near future, automated enforcement tools could be used to speed up and partially automate the processing of information obtained by the competition authority in response to a decision to provide information or during an inspection (let. a). Second, market monitoring or behavioural screening mechanisms by means of so-called "cartel

[56] M Veenbrink, 'The Freedom from Self-Incrimination' cit. 752.

screening" technologies appear to be considered seriously by competition authorities as well.[57] Although the right to avoid self-incrimination will not be at the heart of this mechanisms, its existence could serve as an additional trigger to take the explicability and human oversight necessary for those mechanisms more seriously (let. b).[58] Third, the emergence of self-learning algorithms increases the potential for collusive behaviour without any human intervention. Although in practice, technology is not at such a level as to fully engage in such behaviour,[59] it is no longer pure science-fiction. In response to such algorithmic behaviour, competition authorities might be inclined also to rely on algorithms screening the behaviour of other algorithms (let. c). In all three scenarios, the right to avoid self-incrimination seems to limit to an important extent the full-fledged introduction of such tools.

a) Automated processing of information

It would not be unimaginable that competition authorities choose to rely on an automated processing system to analyse, summarise or interpret information obtained through a decision ordering its transfer by a suspected undertaking. In those circumstances, the undertaking can invoke its right to avoid self-incrimination and refuse to provide guilt-admitting answers to information questions. However, the data processing and inference advancements made possible by artificial intelligence applications may give an enforcement authority the ability to find incriminating information or patterns which would otherwise have remained hidden.[60] As a result, an undertaking may provide information to the enforcement authority, not realising that processing tools can detect therein incriminating patterns. The question therefore arises as to whether the provision of such information and its subsequent automated processing could still give rise to successful right to avoid self-incrimination claims.

At first sight, it appears to follow from the current CJEU case law that the right would not apply in those circumstances. In its current setup, the EU right to avoid self-incrimination only applies to situations where an undertaking is forced to answer questions which are not factual in nature. By contrast, when asked a factual question, undertakings are obliged to cooperate with the enforcement authorities and to provide pre-existing documents containing such factual information. The fact that increasingly potent screening or processing tools can detect incriminating elements in information given, in principle does not constitute an infringement of the right to avoid self-incrimination. However, as mentioned in the previous section, the general exclusion of pre-existing documents from the scope of the right to avoid self-incrimination may not be fully compatible with art. 6 ECHR.

[57] J Harrington and D Imhof, 'Cartel Screening and Machine Learning' (2022) Stanford Computational Antitrust 133.

[58] On human oversight, see J De Cooman, 'Outsmarting Pac-Man with Artificial Intelligence, or Why AI-Driven Cartel Screening Is Not a Silver Bullet' (2023) Journal of European Competition Law & Practice 186.

[59] A Gautier, A Ittoo and P Van Cleynenbreugel, 'AI Algorithms, Price Discrimination and Collusion: An Economic, Technological and Legal Perspective' (2020) European Journal of Law and Economics 405, 432-435.

[60] H Quinn, K Brand and S Hunt, 'Algorithms' cit. 10.

It follows from ECtHR case law that a more nuanced case-by-case assessment is necessary. Such an assessment requires weighing of an undertaking's silence versus the general interest a public authority wants to safeguard in the particular context of a given case.[61] Although the interest in ensuring undistorted competition justifies an active cooperation obligation with enforcement authorities, legitimate questions arise as to whether this also means that an undertaking has to hand over information which directly implicates its activity in this context and which can be uncovered by automated enforcement tools. The automated nature and more potent abilities of automated tools to uncover guilt-admitting patterns in submitted information may at least raise the question whether automated processing requires an extension of the scope of the right to avoid self-incrimination to the forced handing over of certain types of pre-existing documents or data as well. It would seem possible that the CJEU would be inclined to adopt this approach once automated enforcement tools become more embedded in enforcement practice.

To the extent that the CJEU would indeed require a more case-by-case assessment of self-incrimination protection, it seems necessary to envisage new procedural safeguards to conduct such an assessment in the best possible circumstances. It could even be argued that, to anticipate those developments, pro-actively developing such safeguards is a useful way forward for competition authorities relying on automated processing tools. One way forward could be to extend the already existing role of the Hearing Officer or an equivalent officeholder at Member State level to situations where automated processing of provided information is taking place. The Hearing Officer or a national equivalent would have to assess to whether the right to avoid self-incrimination needs to be safeguarded in the context of automated processing of obtained information a particular case. In order to allow for a meaningful review, setting up such a procedural safeguard would ideally have to be accompanied by legislative or regulatory norms or guidelines explaining or developing in which circumstances protection against self-incrimination could be invoked successfully. The ECtHR's case law could serve as a starting point for the development of such norms or guidelines.

b) Market monitoring and behavioural screening

The second scenario concerns the use by competition authorities of market monitoring or screening mechanisms. Those mechanisms pro-actively follow and analyse transactions and behaviour of undertakings on markets.[62] On the basis of the analyses offered by technology, the authority could then take a decision further to proceed with inspections, decisions requesting information or the adoption of infringement decisions.

[61] EctHR *Bajic v North Macedonia* cit. paras 69-75.

[62] H Quinn, K Brand and S Hunt, 'Algorithms' cit. 9 and R Abrantes-Metz and A Metz, 'Can Machine Learning Aid in Cartel Detection?' (2018) Competition Policy International www.competitionpolicyinternational.com. See also OECD, *Data Screening Tools in Competition Investigations, OECD Competition Policy Roundtable Background Note* www.oecd.org.

Like in the previous scenario, the right to avoid self-incrimination in principle only appears to intervene marginally in this context. The use of screening technologies in the first place obliges competition authorities to prove with a reasonable degree of suspicion that additional targeted inspection or investigative measures need to be taken. It would be in such a context that the competition authority would have to explain why and how it decided to target a specific undertaking as a result of the use of an algorithm.[63] It is only when a decision to proceed with an investigation is sufficiently reasoned and explained, that more specific measures such as decisions requiring information or document-seizing inspections can take place. The right to avoid self-incrimination would only come into play at this second stage when specific answers are requested from the undertaking concerned.

However, it cannot be excluded that, even at the early stage of screening, the right to avoid self-incrimination may call for additional action by the competition authority. Given that the use of such algorithm undertaking would uncover incriminating patterns more easily, questions may arise as to whether surrendering a monitoring mechanism could be considered as indirectly providing guilt-admitting answers falling within the scope of the right to avoid self-incrimination. Although the case law so far has not interpreted the right to such an extent, the CJEU's case law outside competition law does not completely foreclose this kind of interpretation.[64] As a consequence, it could not be fully excluded at this stage that the right to avoid self-incrimination could be invoked in such a way in the context of screening procedures.

Even when the right would not apply as such, competition authorities may be called upon to motivate how self-incrimination avoidance will be guaranteed when using screening tools. Self-incrimination avoidance requires that the actual scope and nature of the alleged incriminating behaviour is made clear. This would be the case particularly as the algorithm could detect patterns a human could not detect with the same ease. In order for an undertaking to refrain from making incriminating statements at later points during the procedure, the authority would have to explain carefully what it is doing and how incriminating information is being assessed. It seems logical therefore to expect as a matter of EU law that the use of screening mechanisms would be accompanied by an explanation regarding the ways in which screening avoids self-incrimination from happening. The exact nature of the motivation remains difficult to determine in the abstract. At present, it remains unclear whether the scope of the right to explanation under EU law is interpreted in a manner sufficiently to protect undertakings' defence rights.[65] It is therefore likely that authorities using screening tools would have to put in place guidelines which determine how self-incrimination avoidance at the screening stage will be developed. The EU Courts will undoubtedly be called upon to clarify the boundaries of the right to explanation and its relationship with the right to avoid

[63] H Hofmann and I Lorenzoni, 'Future Challenges for Automation in Competition Law Enforcement' cit. 50.

[64] M Veenbrink, 'The Freedom from Self-Incrimination' cit. 752.

[65] See M Fink and M Finck, 'Reasoned A(I)dministration: Explanation Requiremnets in EU Law and the Automation of Public Administration' (2022) ELR 376.

self-incrimination in the context of future cartel screening procedures. Absent such clarifications, simply introducing screening tools without due regard to the possibilities of self-incrimination avoidance appears to be a risky enforcement strategy.

c) Enforcement algorithms controlling and communicating with other algorithms

In the previous two scenarios, automated enforcement tools were used to process provided or detected information. In the third scenario, technology would play a much more direct, almost human-replacing role. In such a case, enforcement authorities would use algorithms to screen, assess or correct anticompetitive behaviour by algorithms undertakings use. Enforcement authorities thus delegate part of their enforcement powers to an algorithm, which directly communicates with algorithms, to which pricing or other market decisions had also been delegated by undertakings concerned. Although situation may appear somewhat science fiction, it is known that algorithms communicate with other algorithms and learn from them.[66] It is submitted that in such a scenario, the right to avoid self-incrimination again raises two questions.

First, the question arises as to whether the right to avoid self-incrimination would apply to communication between algorithms. This question is of fundamental importance to determine whether the right to avoid self-incrimination even applies in this scenario. In the context sketched here, the undertakings' algorithms will engage in communication with an enforcement authority's algorithm. During those communications, incriminating information may be shared, without the undertaking itself having explicitly wanted this to happen. The question arises as to whether the undertaking concerned could invoke the right to avoid self-incrimination when its algorithm communicates with the enforcer. In the current state of EU competition law, the aforementioned question remains open. An analogy could be drawn between an algorithm used by an undertaking and its employees, which form part of the economic entity constituting an undertaking.[67] The CJEU has not confirmed that the scope of the right extends to answers provided by employees of an undertaking.[68] It is therefore not excluded that their answers given to the enforcer do not benefit from protection against self-incrimination. The same could be said with regard to algorithms used directly by an undertaking. It is not clear whether, as a matter of EU law, an algorithm, by communicating with an enforcer's algorithm, could incriminate its undertaking. To the extent that this is not the case, enforcer algorithms would be able to impose or demand corrections from the undertaking's algorithm without the undertaking being able to intervene. As the right to avoid self-incrimination only applies when coercion is in place, questions may also arise as to whether such algorithmic communications could qualify as coercion on behalf of an undertaking. As those observations show, it is likely that this scenario

[66] C Coglianese and A Lai, 'Antitrust by Algorithm' (2022) Stanford Computational Antitrust 1, 13.

[67] On the notion of undertaking see CJEU, case C-41/90 *Höfner* ECLI:EU:C:1962:31 para. 21.

[68] See also B Vesterdorf, 'Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law' cit. 1214.

would trigger fundamental questions regarding the scope of the right to avoid self-incrimination. Those questions will unavoidably end up before the EU Courts.

Second, even when the right to avoid self-incrimination applies to communicating algorithms, the practical implementation of the latter right would raise an important design challenge. To the extent that enforcer algorithms would need to safeguard the right to avoid self-incrimination vis-à-vis undertakings' algorithms, they would need to be programmed in a manner allowing for appropriate safeguarding measures to be included in the algorithmic design. Such programming would require the enforcer algorithm to decide whether or not to take a decision based on certain communicated information. In practice, human oversight as to the correct application of such decisions would be necessary too. The use of algorithmic communicating software by enforcers would thus have to conform to the CJEU's and ECtHR's self-incrimination avoidance standards. In the current state of EU law, such conformity assessments for algorithmic software have been provided for in general terms by the EU's Artificial Intelligence (AI) Regulation 2024/1689, (the so-calledAI Act).[69] However, the conformity procedures envisaged in that Regulation do not cover the assessment of the compatibility of software with procedural rights standards.[70] Should the introduction of such technologies by enforcement authorities be considered, it would seem that a more tailored implementing EU regulatory instrument considering the specifics of competition law enforcement and procedures would have to be in place. Such a framework could guarantee, in manners similar to the regime put in place by the EU AI Act, that software used in enforcement activities complies with the fundamental rights of the defence and the right to avoid self-incrimination in particular. Absent such a regulatory framework, the use of this kind of enforcer algorithms without preliminary conformity assessment may be difficult to justify and would go at least against the spirit of the AI Act. EU norms complementing the AI Act and focusing particularly on procedural rights therefore seem to constitute a prerequisite to the introduction of those tools by competition authorities.

III.3. Future-proofing competition law enforcement requires future-proofing the right to avoid self-incrimination

The three above-mentioned scenarios allow concluding that the introduction of more automated screening, assessment and decision-making tools will have an impact on the procedural rights framework in place in general and on the right to avoid self-incrimination. In the current setup, the right to avoid self-incrimination in EU competition law has a relatively

[69] See more particularly, arts 40-49 of Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

[70] On its coverage and scope, see M Almada and N Petit, 'The EU AI Act: A Medley of Product Safety and Fundamental Rights' (RSCAS Research Paper 2023-59) cadmus.eui.eu.

narrow scope. However, even keeping this limited scope in mind, the right to avoid self-incrimination merits attention when envisaging to use automated enforcement tools.

On the one hand, the right protects against fishing expeditions without clear focus. Whenever the European Commission initiates investigations, it has to motivate sufficiently what it is looking for. In practice, a sufficiently motivated decision suffices to avoid claims that the right to avoid self-incrimination would be violated potentially. To the extent that a sufficient motivation is in place, the right to avoid self-incrimination does not impede far-reaching collaboration with the enforcement authorities in the interest of the effective application of EU competition law. As a result, as long as the Commission or a national competition authority explains why it uses its automated tools and why they are necessary for and proportionate to the investigation at hand, arguments invoking an uncontrolled fishing expedition through automated screening tools may be difficult to maintain. The scenarios sketched above nevertheless show that the use of automated processing, screening or monitoring software extends the power to detect and uncover information beyond current possibilities. Questions can therefore be raised as to whether a more stringent motivation of the choice to use such software would be necessary. Although this question has already been debated as a matter of EU law in general, it remains unclear as to whether such a motivation would particularly have to include elements of self-incrimination avoidance tailored to the specifics of the case at hand.[71] It is therefore uncertain to what extent such a motivation would be necessary and whether the absence of it may result in the annulment of a decision taken in the context of EU competition law investigations.

On the other hand, even when inspection or information decisions would be sufficiently motivated, the right to avoid self-incrimination as such protects against providing guilt-admitting answers to questions raised by enforcement authorities. As the CJEU's case law currently stands, the right to avoid self-incrimination covers only answers and documents containing subjective appreciations of the facts at hand. Any other type of document or factual information, even though potentially allowing the enforcement authority to infer incriminating evidence therefrom, would have to be handed over. It cannot be denied, however, that screening and monitoring algorithms increase enforcement authorities' abilities to interact directly with undertakings' algorithmic technologies or at least infer certain subjective elements from information obtained. It may therefore be questioned whether this case law would therefore require adaptation in light of the potentially unbalanced investigation powers the enforcement authorities would have. It is at present unclear whether the CJEU would be willing to extend the right to avoid self-incrimination when confronted with automated enforcement tools. At the very least, it may not be excluded that the Court of Justice would be willing to revise and strengthen the scope of protection offered by the right to avoid self-incrimination.

[71] On questions regarding the reasoning requirement, H Hofmann and I Lorenzoni, 'Future Challenges for Automation in Competition Law Enforcement' cit. 51-52.

The abovementioned observations would be even more salient should the right to avoid self-incrimination in competition law be interpreted more directly in conformity with the ECtHR's most recent case law, as required also by the Charter. At present, the CJEU considers that the right to avoid self-incrimination in competition law is to be interpreted differently from other fields of EU law.[72] However, in the context of ne bis in idem, it did abandon this competition law exceptionalism in 2022.[73] It is therefore likely that questions regarding the right to avoid self-incrimination will also have to be interpreted more directly in light of the ECtHR case law. Should this be the case, the ECtHR seems to require a case-by-case assessment as to whether the right to avoid self-incrimination has been violated.[74] Such a reasoning would be in line with the finding that "[t]he right to silence cannot reasonably be confined to statements of admission of wrongdoing or to remarks which directly incriminate the person questioned, but rather also covers information on questions of fact which may subsequently be used in support of the prosecution and may thus have a bearing on the conviction or the penalty imposed on that person".[75] In the practice of automated competition law enforcement, this would imply that every involvement of automated enforcement tools at every stage of the enforcement procedure would need to be reviewed in every specific case. Such a review would have to evaluate whether incriminating information has been extracted unlawfully and used in the final decision-making stage. In practice, this implies strong human-controlled and, if necessary, corrected actions accompanying the use of those tools. Those potential safeguards accompanying automated enforcement tools in turn require competition authorities carefully to balance the costs and benefits of introducing them.

It follows from the previous analysis that fundamental questions regarding the scope and limits of the right to avoid self-incrimination are likely to come to the forefront once again in the context of the increased use of automated enforcement tools. Should the European Commission or Member States' competition authorities envisage to take steps in the direction of introducing those tools, increased clarity regarding the scope and consequences of the right to avoid self-incrimination would appear more than necessary. Given the fact that the right has been judicially developed, it would seem only the EU Courts can provide this clarity even in the presence of regulatory norms applying the right to automated competition law enforcement. Absent those judicial clarifications, automated enforcement tools are likely to operate in a legally uncertain manner. It would not seem exaggerated to submit that such legal uncertainty surrounding the scope of the right to avoid self-incrimination could or should even discourage the introduction of automated enforcement tools in the short to mid-term.

[72] *DB v CONSOB* cit. paras 46-47.
[73] CJEU, case C-117/20 *BPost* ECLI:EU:C:2022:202; case C-151/20 *Nordzucker* ECLI:EU:C:2022:203.
[74] *Ibrahim et al. v United Kindgom* cit. para. 269.
[75] *DB v CONSOB* cit. para. 40.

IV. Conclusion

The right to avoid self-incrimination forms part of the fundamental rights of defence granted to undertakings suspected of having infringed arts 101 and/or 102 TFEU. This paper assessed the extent to which the right to avoid self-incrimination may have an impact on the implementation of automated competition law enforcement tools. It revisited the scope of the right in the context of arts 101 and 102 TFEU public enforcement. The analysis concluded that the right to avoid self-incrimination has an impact, both in cases where undertakings are coerced into providing information, but also in the motivation and drafting of information or inspection decisions. In its current setup, the right to avoid self-incrimination gives rise to important open questions with regard to its scope, consequences and compatibility with art. 6 ECHR.

This *Article* submitted that it would be precisely those questions which constrain or at least affect the use of automated enforcement tools. It examined the impact the right to avoid self-incrimination would have on the automated processing of obtained information, behavioural screening of markets and the algorithmic supervision of potentially anticompetitive algorithms. In all three scenarios, it argued that, absent judicial clarifications, the right to avoid self-incrimination is likely to impose important limits on the use of automated competition law enforcement tools.