

## Self-incrimination

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## Overview

- Outline of the principles established in the Court of Justice's case law
- Critical issues
  - Unprincipled distinctions and weak arguments
  - Influence of ECHR / Charter after Lisbon (?)
  - An alternative...

## Established principles in EU law

- Starting point: “Commission is entitled ... to compel an undertaking to provide **all necessary information concerning such facts as may be known to it ...**”
  - ECJ, Orkem, C-374/87, para 34; Aalborg Portland, Joined Cases C-204/00 etc, para 61; Dalmine, C-407/04 P, para 34; Raiffeisen Zentralbank Österreich AG, Joined Cases T-259/02 etc para 543; see also SGL Carbon, Case C-301/04 P, para 39, 41; ThyssenKrupp Stainless, Joined Cases C-65/02 P and C-73/02 P, para 49
  - CFI, Mannesmannröhren-Werke, Case T-112/98, para 65; Société Générale, Case T-34/93, para 74

- In other words, in contrast to the position in criminal proceedings in most jurisdictions there is an **‘obligation to cooperate actively’**
  - ECJ, Aalborg Portland, Joined Cases C-204/00 etc, paras 62, 207; SGL Carbon, Case C-301/04 P, paras 40, 47
  - CFI in Mannesmannröhren-Werke, Case T-112/98, para 62; Société Générale, Case T-34/93, para 72
- This obligation to cooperate entails that **‘the undertaking may not evade requests for production of documents on the ground ... it would be required to give evidence against itself.’** (SGL Carbon, para 48)

- ‘However, it 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’
- ECJ: Orkem C-374/87 para 35; ThyssenKrupp Stainless, Joined Cases C-65/02 P and C-73/02 P, para 49; Aalborg Portland, Joined Cases C-204/00 etc. para 65, Dalmine, C-407/04 P para 34; SGL Carbon, Case C-301/04 P, para 42
- CFI/GC: Amann & Söhne, T-446/05 para 325; Société Générale, T-34/93, para 74; Raiffeisen Zentralbank Österreich AG, Joined Cases T-259/02 etc para 539; Novácke chemické závody, T-352/09 para. 112
- Similarly LVM, Joined Cases C-238/99 etc, para 273; Otto BV v Postbank, Case C-60/92 paras 11, 12
- CFI in Mannesmannröhren-Werke, Case T-112/98 para 67; ADM, T-59/02 para 262,

### Admission v ‘purely factual questions’ I

- The ‘admission’-exception to the general obligation does not extend to ‘purely factual questions’
  - ECJ, Orkem, paras 34, 37, 38; CFI, Amann & Söhne, T-446/05 para 328; Mannesmannröhren-Werke, Case T-112/98, para 70, 78; Société Générale, Case T-34/93, para 75

### Admission v 'purely factual questions' II

- The Court distinguishes from factual questions **'requests calling on an undertaking to describe the object of and what occurred at meetings where it is suspected that the object of the meetings was to restrict competition ...'** (ECJ, SGL Carbon, Case C-301/04 P, para 74; CFI: Raiffeisen Zentralbank Österreich AG, Joined Cases T-259/02 etc para 540; Mannesmannröhren-Werke, paras 71-73; see already ECJ, Orkem, para 38: 'purpose of the action taken and the objective pursued by those measures')
  - (so 'what occurred at meetings' is apparently not a factual question... see below)

### Admissions v pre-existing documents I

- Nor can the undertaking resist 'request[s] for the production of documents already in existence ... even if the latter may be used to establish the existence of anti-competitive conduct'
  - ECJ, Orkem, para 34; Aalborg Portland, Joined Cases C-204/00 etc, para 61; Raiffeisen Zentralbank Österreich AG, Joined Cases T-259/02 etc paras 539, 543; SGL Carbon, C-301/04 P para. 41, 44
  - CFI in Mannesmannröhren-Werke, Case T-112/98, para 65

## Admissions v pre-existing documents II

- NB: The obligation to cooperate actively includes production of ALL pre-existing documents; as regards documents, there is NO distinction between 'admissible' and 'non-admissible' documents relating to admissions (see SGL Carbon: CFI's view that certain requested documents did not have to be produced was held to be an error in law).

## 'Voluntary' answers to (possibly) impermissible questions I

- Even in the small category of cases in which answering the questions would require an admission of an infringement, the undertakings cannot invoke the privilege against self-incrimination **where they have answered 'voluntarily'**, eg in response to a mere *request for information* (now Article 18(2) Reg 1/2003) or in the context of a leniency application - Dalmine, C-407/04 P para 35; LVM, Joined Cases C-238/99 etc, para 279; Novácke chemické závody, T-352/09 para 112; Fresh Del Monte, T-587/08 paras 836-838; Amann & Söhne, T-446/05 paras 331, 332
- The Commission may even give an extra bonus to those who not only admit the facts but also admit the infringement (ThyssenKrupp Stainless, paras 51-60)

### **Exchange of information and differing standards I: More protective national rules**

- Where MS afford more protection against self-incrimination, the undertakings cannot rely on these more protective standards vis-à-vis the Commission;
  - argument: where the national authorities wish to rely on statements compelled by the Commission, the national authorities will have to comply with the stricter national standards (see Mannesmannröhren-Werke, paras 80 et seq, esp. 85 et seq)

### **Exchange of information and differing standards II: Less protective national rules**

- Where, conversely, a MS imposes wider disclosure obligations than the Orkem principle allows (eg in *private* enforcement proceedings), the undertakings cannot avoid these by reference to Orkem (see ECJ, Otto v Postbank, C-60/92 paras 18 et seq).

### Exchange of information and differing standards III: Initiation of investigations based on 'foreign' information?

Note: There seems to have been a slight difference between *Mannesmannröhren-Werke* and *Otto*:

- In *Otto*, the ECJ stated that the Commission and NCAs '**cannot use that information** to establish an infringement of the competition rules in proceedings which may result in the imposition of penalties, or **as evidence justifying the initiation of an investigation** prior to such proceedings';
- In *MMRöhren-Werke*, the CFI stated that the information extracted by the Commission '**may be used only to decide whether or not it is appropriate to initiate a national procedure**'.
- See also **Article 12(3) Reg 1/2003**

### Exchange of information and differing standards IV: Use of information from extra-EU proceedings

- Use of information from proceedings from outside the EU: Commission has to examine the procedural standards applied in these proceedings on its own motion only if '**prima facie, there is serious doubt as to whether the procedural rights of the parties concerned were complied with in the procedure during which they provided such statements**';
- if, prima facie, there are no serious doubts, the Commission has to announce their intention to use the information in the SO, and the undertakings can then 'point out irregularities and circumstances' in the foreign proceedings (see ADM, T-59/02 para 265)

## Critical issues

### **‘Purely factual question’ v ‘admission of guilt’**

Is the question “Have you eaten my chocolate?” a request for purely factual information or does answering it require an admission of guilt?



### Admission v purely factual question

- The answer is: BOTH – ‘I have eaten your chocolate’ is a factual statement AND an admission of guilt.
- The distinction is indeed ‘illusory’ (as MacCulloch put it in ‘The privilege against self-incrimination in competition investigations: theoretical foundations and practical implications’ (2006) 26 Legal Studies 211, 237) where the infringement is to be proven by proving facts.
- Implicitly, the Court admits as much when it treats a statement about ‘what occurred at meetings’ as an admission of guilt

### Admission v pre-existing documents

- This is a distinction that is possible
- One could even give a justification for this distinction: with answers to questions, there is the danger of a pooling equilibrium consisting of truthful innocent parties and lying guilty parties; with requests for the production of pre-existing documents, the danger of ‘lying’ (= producing fake documents) is arguably much lower (cf Seidman & Stein; MacCulloch; Wils, Self-incrimination)

### Admission v pre-existing documents

- And yet, the veracity justification is not the reason advanced by the cases (to the extent any reason is given). Instead it is argued:
  - ‘the **defendant is still able ... to contend that the documents produced have a different meaning from that ascribed to them by the Commission**’ – so? Does this take away the compulsion from the request for information by decision? Or the incriminating character? (The chocolate in my son’s face could also be explained away – eg, ‘Mommy framed me’). The argument is probably meant to be only one factor in a balancing exercise, but this is never spelled out.

### Admission v pre-existing documents

- A second ‘argument’ is that this makes the Orkem standard compatible with the *Saunders* principles, cf AG Geelhoed in SGL Carbon, paras 65-66. However, this misrepresents the *Saunders* standard. *Saunders* stated: ‘[I]t [scil.: the right not to incriminate oneself] does not extend to the use in criminal proceedings of **material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant**, breath, blood and urine samples and bodily tissues for the purpose of DNA testing’.
- AG Geelhoed restated this as: ‘Thus, the right not to make self-incriminating statements does not extend to information which exists independently of the will of the suspect such as, inter alia, documents.’ This **omits the defining clause ‘acquired pursuant to a warrant’**. In other words: *Saunders* arguably meant to allow authorities to **take away such material by force without active participation by the defendant**

## Influence of human/fundamental rights – a genesis

- In Orkem (para 30): ECHR does not even contain a privilege against self-incrimination – superseded by later recognition of this right under Article 6 ECHR by the ECtHR (Funke, Saunders, J.B. etc)
- Of course, the ECHR is not directly applicable to the Commission, because the EU is not (yet) a Contracting State of the Convention
- However, by virtue of Art 6(3) TEU, the standards do apply indirectly (and see Art 6(2) TEU – after accession, the ECHR will be directly applicable)
- Also: After Lisbon, the Charter is primary EU law

## Influence of human/fundamental rights – a genesis

- Competition law clearly fulfils the ‘Engel criteria’ for the autonomous qualification as ‘criminal’ in the ECHR sense (for competition law: Menarini, para 40; Société Stenuit v. France, para 62; Lilly; more generally cf, eg, Öztürk, Jussila v Finland, Ezeh and Connors)
- In any case, the Court claims that ‘rights of the defence or ... the right to fair legal process ... offer ... in the specific field of competition law, protection equivalent to that guaranteed by Article 6 of the ECHR’ (Amann & Söhne T-446/05 para 328; Mannesmannröhren-Werke, para 77)

## Influence of human/fundamental rights – a genesis

- Critics point to *Saunders*.
- AG Geelhoed justified the compatibility of the Orkem principles with *Saunders* by pointing to four arguments:
  1. ECtHR case law concerned natural persons in a 'classical' criminal procedures
  2. While the ECtHR does extend some rights to companies, a lower standard of protection may apply (see *Niemitz* and *Colas Est* for the right to privacy under Article 8 ECHR)
  3. The 'existence-independent-of-the-will' argument based on language from *Saunders* (see above)
  4. Balancing exercise: effectiveness of competition enforcement v rights of defence

## Influence of human/fundamental rights – a genesis

- AG Geelhoed considered the argument derived from the 'existence independent of the will' language in *Saunders* 'decisive'. I find this argument the weakest, as it arguably misinterprets *Saunders*.
- What remains, however, are the following questions:
  1. Does the ECHR privilege apply to legal persons?
  2. Does the same standard of protection apply (a) to legal persons, in (b) 'non-classical' 'criminal' proceedings?
  3. Can we balance the 'effectiveness' of enforcement against the privilege?

## Influence of human/fundamental rights – a genesis

- As MacCulloch has pointed out, the answer to these questions depends on one's understanding of the basis for the privilege. There is an inherent dilemma facing those arguing for an extension:
- If the privilege is 'dignity'-based (or 'privacy'-based), it is difficult to argue that it should extend to legal persons (personal scope of the privilege)
- If it is an instrumental privilege, it may be harder to justify the substantive extension to cover pre-existing documents and incriminating factual statements (substantive scope of the privilege)

## Conclusions

1. The current state is very unsatisfactory. Neither are the categories sensible, nor are the reasons advanced persuasive.
2. IF undertakings were included in the personal scope of the ECHR privilege, AND the substantive scope in competition cases were the same for undertakings as for individuals in classical criminal cases, then the Orkem criteria arguably would infringe the *Saunders* standard. In LVM, the Court even indicated as much in an *obiter*, but this was buried in SGL Carbon.
3. It seems doubtful to me, however, that the personal scope of the ECHR right not to self-incriminate oneself includes legal persons. The same would arguably be the case under the Charter.

## Conclusions

4. From a pure policy point of view (rather than as a matter of human rights), one could well argue that EU law could still operate effectively if one did away with the 'obligation to cooperate actively' in Regulation 1/2003, and replaced it with a 'right to silence', coupled with (1) the powers to search for evidence by force, and (2) the possibility of voluntary cooperation in return for a reduction of the fine.

## Conclusions

- The alternative of a right to silence (coupled with seizing evidence by force + bonus for voluntary cooperation) would eliminate the artificial distinctions and provide clear answers
- It does not seem as unworkable as is often claimed by the EU institutions: the German *Bundeskartellamt* de facto has to operate under such a regime – and, by the way, public prosecutors everywhere seem to cope...
- Wouter Wils discusses the respective merits of the three approaches to collecting evidence (ie, force ('stick'), compulsion to cooperate, voluntary cooperation ('carrot')), and considers a combination of all three necessary. And yet, one could question whether the marginal benefit of the compulsion to cooperate really justifies the marginal cost of the drawbacks in the current regime.

## Conclusions

- The chances that the EU institutions adopt this regime voluntarily without outside pressure: (you must be joking!)
- Chances that this outside pressure comes from the ECtHR: as discussed above, low, but slightly higher than that of a spontaneous reorientation of the EU institutions

And for those who wonder what became of my chocolate-eating son...

**... he and his accomplice will be out in five!**

