

# *Fordham International Law Journal*

---

*Volume 28, Issue 4*

2004

*Article 11*

---

## Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law: Recent Developments and Current Issues

Bo Vesterdorf\*

\*

Copyright ©2004 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law: Recent Developments and Current Issues

Bo Vesterdorf

## **Abstract**

I will focus my contribution on two distinct limitations on the Commission's investigative rights in competition proceedings: (i) legal professional privilege ; and (ii) the privilege against self-incrimination. My intervention is divided into two sections. The first section describes the evolution of these two privileges and their current scope. The second section focuses on the issues raised by the application of legal professional privilege and the privilege against self-incrimination within the framework of Regulation No. 1/2003.

# LEGAL PROFESSIONAL PRIVILEGE AND THE PRIVILEGE AGAINST SELF-INCRIMINATION IN EC LAW: RECENT DEVELOPMENTS AND CURRENT ISSUES

*Bo Vesterdorf\**

## INTRODUCTION

In 1989, my former colleague David Edward delivered a brilliant speech at the Fordham conference about “Constitutional Rules of Community Law in EEC Competition Cases.”<sup>1</sup> He concluded by noting that “the number of competition cases in which the Court [of Justice of the European Communities] has sustained an argument based on fundamental rights is very small indeed,” but that it was not “too late to bring out the big guns of constitutional artillery.”<sup>2</sup>

Fifteen years later, following substantial modifications of the enforcement scheme of European Community (“EC”) competition law, it remains interesting to inquire how the “big guns” have shaped EC competition law and, in particular, whether their number and range have somehow evolved.

In that regard, it is difficult to escape the conclusion that the fundamental-rights artillery has developed and evolved substantially over the years. The rhetoric of fundamental rights, or principles, in competition cases pervades a significant number of areas such as the rights of the defense, the prohibition of double jeopardy, and the prohibition of arbitrary and disproportionate investigations.<sup>3</sup> However, given that the theme of this conference is “Rights, Privileges and Ethics in Competition cases,” I will focus my contribution on two distinct limitations on the Commission’s investigative rights in competition proceedings: (i) le-

---

\* President of the Court of First Instance of the European Communities. The views expressed are entirely personal. They endeavor to set out the law as it stands on September 27, 2004. I would like to thank Eric de La Serre, *référéndaire* in my chambers, for his assistance with the preparation of this Article.

1. David Edward, *Constitutional Rules of Community Law in EEC Competition Cases*, in ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE 383 (Barty Hawk ed., 1990).

2. *Id.* at 418.

3. See Charter of Fundamental Rights of the European Union, arts. 48, 50, O.J. C 364/01 (2000).

gal professional privilege; and (ii) the privilege against self-incrimination.

These two privileges have, indeed, much in common:

- at the EC level, both are judicial creations; they were established and developed by the Court of Justice (“ECJ”) and the Court of First Instance (“CFI”);<sup>4</sup>
- both aim, *inter alia*, at protecting the rights of the defense;<sup>5</sup>
- both have experienced important evolutions since they were established;<sup>6</sup> and
- last but not least, their application within the enforcement scheme created by Regulation No. 1/2003<sup>7</sup> vividly illustrates several intricacies of that regulation.<sup>8</sup>

My intervention is divided into two sections. The first section describes the evolution of these two privileges and their current scope. The second section focuses on the issues raised by the application of legal professional privilege and the privilege against self-incrimination within the framework of Regulation No. 1/2003.

## I. *THE EVOLUTION OF LEGAL PROFESSIONAL PRIVILEGE AND THE PRIVILEGE AGAINST SELF-INCRIMINATION*

This Section will first describe the initial legal framework as set out in Regulation No. 17/62 (“Regulation No. 17”).<sup>9</sup> It will then focus on the development of legal professional privilege and the privilege against self-incrimination under EC law.

### A. *The Initial Situation Resulting from Regulation No. 17*

When Regulation No. 17 was adopted in 1962, it vested the Commission with investigation powers that were much less impressive than those enjoyed by the federal authorities of other jurisdictions<sup>10</sup> (e.g., the United States, where the investigating

---

4. See *AM&S Europe Ltd. v. Commission*, Case 155/79, [1982] E.C.R. 1575, ¶¶ 18-28.

5. See *id.* ¶ 20.

6. See *infra* notes 27-132 and accompanying text.

7. Council Regulation No. 1/2003, O.J. L 1/1 (2003).

8. See *id.*; see also *infra* notes 155-80 and accompanying text.

9. Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87.

10. See *id.* arts. 11, 14, O.J. Eng. Spec. Ed. 1959-62, at 90-91.

authorities may in certain circumstances use the investigation powers attached to criminal offenses<sup>11</sup>). However, despite these differences, the powers enjoyed by the Commission were not insignificant, as illustrated, in particular, by the Commission's power to send requests for information and to perform investigations without a warrant of judicial authority.<sup>12</sup> The significance of the Commission's powers was enhanced by the relatively short catalogue of rights explicitly conferred by Regulation No. 17 on the undertakings subject to investigation.<sup>13</sup> In brief, it can be recalled that the Deringer Report (which was prepared in the course of the consultation of the Parliament on the adoption of Regulation No. 17) had proposed that Regulation No. 17 include a right not to be forced into self-incrimination and a right to lawyer-client confidentiality.<sup>14</sup> However, the final version of Regulation No. 17 adopted by the Council did not provide for such rights. Regulation No. 17 merely provided for: (i) the undertakings' right to be heard on the matters to which the Commission had objected before the adoption of certain decisions;<sup>15</sup>

---

11. See Federal Trade Commission, Office of the General Counsel, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority* (revised Apr. 1998), available at [http://library.lp.findlaw.com/articles/file/00002/001995/tide/Subject/topic/Antitrust%20and%20Trade%20Regulation\\_Statutes/filename/antitrustand-tradereregulation\\_2\\_229](http://library.lp.findlaw.com/articles/file/00002/001995/tide/Subject/topic/Antitrust%20and%20Trade%20Regulation_Statutes/filename/antitrustand-tradereregulation_2_229).

12. See Council Regulation No. 17/62, *supra* note 9, arts. 11, 14, O.J. Eng. Spec. Ed. 1959-62, at 90-91.

13. See *id.* arts. 19-20, O.J. Eng. Spec. Ed. 1959-62, at 92-93.

14. See *Rapport fait au nom de la Commission du marché intérieur ayant pour objet la consultation demandée à l'Assemblée parlementaire européenne par le Conseil de la Communauté économique européenne sur un premier règlement d'application des articles 85 et 86 du traité de la C.E.E.* (Doc. 104/1960-1961), 30:

*[C]ette réglementation ne correspond pas en plusieurs points aux principes généraux en vigueur dans un État fondé sur la légalité ce qui fait que le règlement risque d'être annulé par la Cour de justice. . . . Il conviendrait . . . de préciser que seuls les propriétaires ou les représentants légaux des entreprises interpellées sont tenus de fournir des renseignements. En tout cas, toute personne tenue de fournir des renseignements doit avoir le droit de refuser le témoignage tout comme le secret professionnel, par exemple des avocats et des experts-comptables, doit être garanti.*

For the history and the aftermath of the *Deringer Report*, see Opinion of Advocate General Darmon, *Orkem v. Commission*, Case 374/87, [1989] E.C.R. 3283, 3301, ¶¶ 90-91.

15. Article 19 provided that the undertaking concerned was entitled to make known in writing, and, if appropriate, orally its views on the objections raised against them. See Council Regulation No. 17/62, *supra* note 9, art. 19, O.J. Eng. Spec. Ed. 1959-62, at 92-93; see also *Hoffmann-La Roche v. Commission*, Case 85/76, [1979] E.C.R. 461; *Musique Diffusion Française & Others v. Commission*, Joined Cases 100-103/80, [1983] E.C.R. 1825.

and (ii) the right to judicial review of certain decisions.<sup>16</sup>

Despite the explicit acknowledgment of a right to be heard, one point perhaps overlooked by the Council was that, as a general matter, the exercise of significant powers during preliminary investigations can create occasions of irreparable impairment of the rights of the defense. Such irreparable harm may occur, for instance, when an undertaking is prevented from showing, when exercising its rights of the defense at a later stage of the procedure, that the information collected during the investigation has not the incriminating meaning that seemed obvious at the time of the investigation.<sup>17</sup> This may be the case especially when undertakings or persons are led to make admissions, whether justified or not, under psychological pressure or through fear of being fined if they do not speak.<sup>18</sup> That may also be the case if an undertaking is bound to provide information that it had itself produced for the purpose of preparing its defense, e.g., information forwarded to an attorney.

Accordingly, Regulation No. 17 could appear somewhat incomplete in that it acknowledged the existence of the rights of the defense after the sending of a statement of objections but did not provide for the safeguards that could prevent prior irreparable impairment of these rights at the investigation stage.<sup>19</sup>

Faced with this apparent inconsistency, the ECJ found several rights enjoyed by the undertakings before the formal exercise of their rights of the defense (i.e., before a statement of objections is served upon the undertaking).<sup>20</sup>

16. In particular decisions ordering investigations (Article 14(3)); and decisions requesting information (Article 11(5)). See Council Regulation No. 17/62, *supra* note 9, arts. 11(5) & 14(3), O.J. Eng. Spec. Ed. 1959-62 at 90, 93.

17. See K.P.E. Lasok, *The Privilege against Self-Incrimination in Competition Cases*, 11 EUR. COMPETITION L. REV. 91 (1990).

18. The use of pressure may also jeopardize the reliability of the information collected:

[W]here the undertakings or persons being investigated are in reality innocent, there is a risk that ingenious questioning will lead less sophisticated respondents to make seemingly inculpatory statements, or, in situations of on the spot oral questioning where psychological or physical pressure is created or felt, the individuals questioned may end up making untruthful inculpatory statements so as to escape from the pressure.

W.P.J. Wils, *Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis*, 26(4) WORLD COMPETITION 567, 584 (2003). See also Lasok, *supra* note 17, at 90-91.

19. See Council Regulation No. 17/62, *supra* note 9, O.J. Eng. Spec. Ed. 1959-62.

20. For a general presentation of the "finding" of these rights, see Edward, *supra* note 1.

An important step in this direction was taken in the *National Panasonic (UK) Ltd. v. Commission* case,<sup>21</sup> in which the ECJ interpreted Article 14 of Regulation No. 17 by reference to the principles laid down in *Nold KG v. Commission*.<sup>22</sup> In *Panasonic*, the ECJ chose to apply the principles set down in Article 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 ("European Convention").<sup>23</sup> As a consequence, although the ECJ ruled against the applicant in this specific case,<sup>24</sup> it expressed its general determination to apply certain procedural safeguards in the context of competition investigations.<sup>25</sup> *Panasonic* therefore actually set the stage for the explicit acknowledgment of (i) legal professional privilege and (ii) a qualified privilege against self-incrimination in competition investigations. The rise and development of these two rights will be analysed in the two following sections.

### B. *The Development of Legal Professional Privilege in EC Law*

In spite of the Council's refusal to provide for an express statutory acknowledgment of legal professional privilege, some members of the European Parliament apparently refused to surrender. In 1978, the Commission was asked by a Member of the

---

21. Case 136/79, [1980] E.C.R. 2033, [1980] 3 C.M.L.R. 169.

22. Case 4-73, [1974] E.C.R. 491, ¶ 13. In *Nold*, the European Court of Justice ("ECJ") ruled that fundamental rights formed an integral part of the general principles of law, the observance of which the ECJ ensures, in accordance with constitutional traditions common to the Member States and with international treaties on which the Member States have collaborated or of which they are signatories. *See id.*

23. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, art. 8(2). *See Panasonic*, [1980] E.C.R. at 2058, ¶ 19, [1980] 3 C.M.L.R. at 186 (holding that Article 8(2) of the European Convention for the Protection of Human Rights ("European Convention") defines the conditions in which interference with the rights expressed in Article 8(1) of the European Convention (the right to respect for one's private and family life, home, and correspondence) is possible). Pursuant to Article 8(2), such interference is possible if it "is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others." *Id.* ¶ 19.

24. Having found that the aims of the investigative powers of the Commission under Regulation No. 17 were to contribute "to the maintenance of the system of competition intended by the Treaty which undertakings are absolutely bound to comply with," the ECJ ruled that Regulation No. 17 did not infringe the right to respect for private and family life, home and correspondence. *Panasonic*, [1980] E.C.R. at 2058, ¶ 20, [1980] 3 C.M.L.R. at 186.

25. *See id.*

European Parliament to specify its stance as regards the protection of legal papers.<sup>26</sup> In its answer, the Commission stated that even though Regulation No. 17 did not provide for any protection for legal papers, "the Commission . . . follows the rules in the competition law of certain Member States and is willing not to use as evidence of infringements of the Community competition rules, any strictly legal papers written with a view to seeking or giving opinions on points of law to be observed or relating to the preparation or planning of the defence."<sup>27</sup> The Commission further stated that "[s]ubject to review by the Court of Justice, it is for the Commission to determine the nature of a given paper."<sup>28</sup>

The Commission's official stance was not sufficient to settle the issue: four years later the question of legal professional privilege was raised before the ECJ in the seminal *AM&S Europe Ltd. v. Commission* case.<sup>29</sup> *AM&S* was the first case in which the ECJ had to decide whether and how legal professional privilege applied in EC law.

In order to answer this question, the ECJ decided to examine the national laws of the Member States. The ECJ found common ground in these national laws to the extent that they protect the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of the defense and, on the other hand, they emanate from independent lawyers who are not bound to the client by a relationship of employment.<sup>30</sup> The ECJ further specified that: (i) the confidentiality covered all written communications exchanged after the initiation of the administrative procedure under Regulation No. 17 as well as earlier written communications having a relationship to the subject-matter of that procedure;<sup>31</sup> (ii) the independent lawyer involved could be any lawyer

---

26. See Written Question No. 63/78 by Mr. Cousté to the Commission of the European Communities, O.J. C 188/30 (1978).

27. *Id.* at 31.

28. *Id.*

29. Case 155/79, [1982] E.C.R. 1575. The significance of the issues raised by the case is illustrated by the fact that two different opinions were delivered before the ECJ gave judgment. See Opinion of Advocate-General Warner, *id.* at 1619; see also Opinion of Advocate-General Slynn, *id.* at 1642.

30. See *AM&S*, [1982] E.C.R. 1575, ¶ 21.

31. See *id.* ¶ 23.



entitled to practice his or her profession in one of the Member States.<sup>32</sup> Finally, the ECJ established certain rules of procedure that had to be followed by the Commission when faced with a claim of legal professional privilege.<sup>33</sup>

Eight years later, in *Hilti Aktiengesellschaft v. Commission*, the CFI slightly broadened the scope of legal professional privilege by making it clear that in view of its purpose the principle must be regarded as extending also to “the internal notes which are confined to reporting the text or the content” of written communications between lawyer and client.<sup>34</sup>

While the scope of legal professional privilege as defined in *AM&S* and *Hilti* attracted much criticism,<sup>35</sup> until recently there were no major developments concerning this question before the EC Courts.

In 2003, however, Akzo Nobel Chemicals and Akcros Chemicals filed a case that raises very interesting issues concerning the scope of legal professional privilege.<sup>36</sup> As the case is currently pending before the CFI, I will not make any comments on it. Let me, however, explain some of the issues raised by the case and put them into perspective.

This case originated in a Commission investigation carried out at Akzo Nobel Chemicals’ and Akcros Chemicals’ premises

---

32. See *id.* ¶ 25.

33. See *id.* ¶¶ 29-31. In substance, the ECJ ruled that an undertaking that claims legal professional privilege is to provide the Commission’s authorised agents with relevant materials of such a nature as to demonstrate that the communications fulfil the conditions for being granted legal protection, although it is not bound to reveal the contents of the communications in question. See *id.* ¶ 29. The ECJ added that where the Commission was not satisfied that such evidence had been supplied, it was for the Commission to order, pursuant to Article 14(3) of Regulation No. 17, production of the communications in question and, if necessary, to impose on the undertaking fines or periodic penalty payments under that regulation as a penalty for the undertaking’s refusal either to supply such additional evidence as the Commission considers necessary or to produce the communications in question whose confidentiality, in the Commission’s view, is not protected in law. See *id.* ¶ 31. Finally, the ECJ ruled that the interests of the undertaking concerned were safeguarded by the possibility of obtaining an order suspending the application of the decision which has been taken, or any other interim measure. See *id.* ¶ 32.

34. Order of the Court of First Instance (Second Chamber) of 4 April 1990, *Hilti Aktiengesellschaft v. Commission*, Case T-30/89, [1990] E.C.R. II-163, ¶ 18.

35. See, e.g., Theofanis Christoforou, *Protection of Legal Professional Privilege in EEC Competition Law: The Imperfections of a Case*, 9 *FORDHAM INT’L L.J.* 1 (1985).

36. See *Akzo Nobel Chemicals & Akcros Chemicals v. Commission*, Cases T-125 & T-253/03, O.J. C 146/42, 239/20 (2003) (CFI, pending).

in February 2003.<sup>37</sup> During this raid, the Commission copied a number of documents.<sup>38</sup> Akzo Nobel Chemicals and Akcros Chemicals claimed privilege over two different sets of documents.<sup>39</sup> First, they alleged that a first set of documents had been prepared in the framework of a compliance program and should be considered as privileged.<sup>40</sup> Second, they contended that a second set of documents comprised drafts of the documents of the first set as well as correspondence with in-house lawyers and should therefore also be considered as privileged.<sup>41</sup>

However, the Commission officials who conducted the investigation decided on the spot to join the second set of documents to the file and to put the first set in a sealed envelope which they brought back to the Commission.<sup>42</sup> The Commission then adopted a formal decision that the two sets of documents were not covered by legal professional privilege.<sup>43</sup> Akzo Nobel Chemicals and Akcros Chemicals challenged this decision before the CFI.<sup>44</sup> They also filed a request for interim measures under Articles 242 and 243 of the EC Treaty.<sup>45</sup> The request sought, in substance, an order (i) preventing the Commission from opening the sealed envelope containing the first set of documents and (ii) enjoining the Commission from using the second set of documents (which had already been joined to the file).<sup>46</sup>

In the order issued on the request for interim measures, it was considered that it could not be excluded that the two sets of documents at stake in this case were privileged.<sup>47</sup> First, it could not be precluded that the first set of documents (allegedly prepared in the framework of a compliance program) was privileged because, *prima facie*, there was reason to conclude that working or summary documents prepared by an undertaking for

37. See *Akzo Nobel Chemicals & Akcros Chemicals v. Commission*, Joined Cases T-125 & T-253/03 R (CFI, not yet reported).

38. See *id.*

39. See *id.*

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.*

44. See *Akzo Nobel Chemicals & Akcros Chemicals v. Commission*, Joined Cases T-125 & T-253/03, O.J. C 146/42, 239/20 (2003) (CFI, pending).

45. *Akzo*, Joined Cases T-125 & T-253/03 R, ¶¶ 14-17.

46. See *id.* ¶¶ 1-16.

47. See generally *Akzo*, Joined Cases T-125 & T-253/03 R.

the purpose of the exercise of the rights of defense by its lawyer might be covered by professional privilege.<sup>48</sup>

Second, the second set of documents (containing drafts of the documents of the first set as well as correspondence with in-house lawyers) mainly raised the question of whether, in spite of earlier case-law, correspondence with in-house counsel was privileged.<sup>49</sup> It must be emphasized that, in this specific case, the lawyer involved was a member of the Dutch bar employed by the undertaking on a permanent basis. Accordingly, the lawyer concerned was subject to certain rules of professional ethics.

Had it been decided to rely on *AM&S* only, the correspondence with this lawyer would have clearly been unprivileged, because, in *AM&S*, the ECJ had excluded correspondence with in-house lawyers from the scope of legal professional privilege.<sup>50</sup> However, it was considered in *Akzo Nobel Chemicals & Akros Chemicals v. Commission* that the solution in *AM&S* was based, *inter alia*, on an interpretation of the principles common to the Member States dating from 1982.<sup>51</sup> It was further concluded that the evidence produced in the case tended to show that the position in the legal orders of the Member States had changed.<sup>52</sup> In particular, it could not be excluded that there was no longer "presumption that the link of employment between a lawyer and an undertaking will always, and as a matter of principle, affect the independence necessary for the effective exercise of the role of collaborating in the administration of justice by the courts."<sup>53</sup> It could not be excluded either that independence could be assured where "the lawyer is bound by strict rules of professional conduct, which, where necessary, require that he [or she] ob-

---

48. See *id.* ¶ 104. This conclusion was based on the idea that if, in the context of competition investigations, the Commission were able to copy working or summary documents prepared by an undertaking solely for the purpose of the exercise of the rights of defence by its lawyer, the consequence might *prima facie* be an irremediable impairment of the rights of defence of that undertaking. For an early consideration of this question, see J. Joshua, *The Element of Surprise: EEC Competition Investigations under Article 14(3) of Regulation 17*, 8 EUR. L. REV. 3, 17 (1983) ("[i]n fairness . . . documents concerned with the preparation of the firm's bona fide defence should not be examined by the Commission. It would be otherwise where the firm had decided to deceive the Commission by putting up a colourable defence").

49. See *Akzo*, Joined Cases T-125 & T-253/03 R, ¶¶ 115-130.

50. See *AM&S Europe Ltd. v. Commission*, [1982] E.C.R. 1575, ¶ 27.

51. See *Akzo*, Joined Cases T-125 & T-253/03 R, ¶ 122.

52. See *id.* ¶ 124.

53. *Id.* ¶ 126.

serve the particular duties commensurate with his [or her] status.”<sup>54</sup>

The order therefore considered that it could not be excluded that the documents contained in the two sets were actually covered by legal professional privilege.<sup>55</sup> However, as explained below, interim relief was not granted for all these documents.

As regards the first set of documents, since the Commission had not opened the sealed envelope yet, it was considered that it was urgent to prevent the Commission from doing so.<sup>56</sup> Since the balance of interests tipped in favor of interim relief, the article of the decision by which the Commission indicated that it would open the sealed envelope containing the first set of documents was suspended.<sup>57</sup> However, as regards the second set of documents, which had already been joined to the file, it was considered that, even assuming that it was privileged, the harm suffered by the applicants was already irreparable and therefore did not justify any interim measure.<sup>58</sup>

The Commission and Akzo Nobel Chemicals filed an appeal

54. *Id.*

55. As regards the procedure applicable to a claim of privilege, it was ruled that, in light of the procedural principles developed in *AM&S*, it could not be precluded *prima facie* that the “Commission’s officials must refrain from casting even a cursory glance over the documents which an undertaking claims to be protected by professional privilege, at least if the undertaking has not given its consent.” *Id.* ¶ 139.

56. For that purpose it was considered that the fact that the Commission would be unable to use the documents as evidence if the decision was declared unlawful would have no impact on the serious and irreparable harm which would result from their mere disclosure, since the

purpose of professional privilege is not only to protect a person’s private interest in not having his rights of defence irremediably affected but also to protect the requirement that every person must be able, without constraint, to consult a lawyer . . . . That requirement, which is formulated in the public interest of the proper administration of justice and respect for lawfulness, necessarily presupposes that a client has been free to consult his lawyer without fear that any confidences which he may impart may subsequently be disclosed to a third party.

*Id.* ¶ 167.

57. *See id.* ¶ 190.

58. It is not for the judge hearing an application for interim measures to adopt measures designed to make up for harm which is already irreversible. Order of the President of the Court of Justice in *Austria v. Council*, Case C-445/00 R, [2001] E.C.R. I-1461, ¶ 113). It must also be stressed that, in its observations, the Commission had undertaken not to allow third parties access to the litigious documents. *See Akzo*, Joined Cases T-125 & T-253/03 R, ¶ 176.

against the order.<sup>59</sup> On September 27, 2004, the President of the ECJ found that the condition relating to urgency was not satisfied. Accordingly, the President annulled the order.<sup>60</sup>

It would be of course inappropriate for me to make specific comments concerning questions on the substance of which the CFI will have to rule on shortly. Let me, however, make one very general comment about the *Akzo* case. As has already been suggested elsewhere,<sup>61</sup> whatever the outcome of this case may be in the main action, it illustrates the potentially evolutionary nature of certain rights. Indeed, while undertakings undergoing competition investigations should certainly not hope that the scope of their rights will evolve at will, there is no reason to believe that once the scope of a right is set, it will remain cast in stone for ever. The evolutionary nature of these rights seems indeed particularly logical when they are rooted in the national laws of the Member States: these laws evolve, and so does the number of Member States. As a consequence, the evolutionary nature of such rights, although it does not necessarily materialise often, is nonetheless inherent in the EU legal system.

In addition, even when a right is not rooted in the national laws of the Member States, the increasingly pervasive influence of the European Convention creates additional leeway for evolution. As will be shown in the following section, the evolution of the privilege against self-incrimination illustrates the instrumental role played by the European Convention in this field.

### C. *The Evolution of the Privilege Against Self-Incrimination*

As noted above, Regulation No. 17 did not provide for any

---

59. See *Commission v. Akzo Nobel Chemicals & Akcros Chemicals*, Case C-7/04 P(R) (ECJ, not yet reported).

60. In substance, the President of the ECJ ruled that the condition relating to urgency was not satisfied in view of the Commission's undertaking not to allow third parties to have access to the Set A documents and of the impossibility of the Commission using those documents as evidence if the decision were held to be unlawful. The President of the ECJ judged that since the Commission's officials had already examined, albeit cursorily, documents in Set A during the investigation, the harm which might possibly result from a more detailed reading of those documents was "not sufficient to establish the existence of serious and irreparable harm, since the Commission is prevented from using the information thus obtained." Order of the President of the ECJ, *Commission v. Akzo Nobel Chemicals & Akcros Chemicals*, Case C-7/04 (P) R, ¶¶ 40-44 (ECJ, not yet reported).

61. See P.J. Slot, *A View from the Mountain: 40 Years of Developments in EC Competition Law*, 41 COMMON MKT. L. REV. 443, 448 (2004).

right against self-incrimination. It was not until 1989, when the *Orkem v. Commission* case was decided, that the ECJ was required to decide whether such privilege nonetheless existed.<sup>62</sup> As explained below, *Orkem* and its progeny have sparked intense debate about the rationale and the scope of the privilege against self-incrimination.

The first part of this section will describe the principles set out in *Orkem*. The second part will present the evolution of the case-law of the European Court of Human Rights ("ECtHR") on this topic. The third section will describe the increasing influence of the ECtHR case-law.

### 1. The Initial Principles Set Out in *Orkem*

The applicant in *Orkem* was an undertaking that challenged a request for information made pursuant to Article 11 of Regulation No. 17. The undertaking contended that several questions asked by the Commission infringed "the general principle that no one may be compelled to give evidence against himself."<sup>63</sup> The applicant submitted that the principle was supported by three different legal bases: (i) the laws of the Member States; (ii) the European Convention and (iii) the International Covenant on Civil and Political Rights of December 19, 1966 ("International Covenant").<sup>64</sup>

The ECJ examined each of the three legal bases relied upon by the applicant. First, the ECJ noted that, "in general, the laws of the Member States granted the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings."<sup>65</sup> By contrast, there was no principle common to the laws of the Member States which allowed legal persons to claim a right against self-incrimination in the context of alleged infringements in the economic sphere.<sup>66</sup>

Second, the ECJ considered that, although Article 6 of the European Convention "may be relied upon by an undertaking subject to an investigation relating to competition law, . . . neither the wording of that article nor the decisions of the

---

62. See *Orkem v. Commission*, Case 374/87, [1989], E.C.R. 3283.

63. *Id.* ¶ 18.

64. 999 U.N.T.S. 71.

65. *Orkem*, [1989] E.C.R. 3283, ¶ 29.

66. See *id.* ¶ 29; see also Opinion of Advocate-General Darmon, *id.* ¶¶ 98-121.

[ECtHR] indicate that it upholds the right not to give evidence against oneself.”<sup>67</sup>

Third, the ECJ considered that the right not to give evidence against oneself or to confess guilt upheld by Article 14(3)(g) of the International Covenant “relate[d] only to persons accused of a criminal offence in court proceedings and thus ha[d] no bearing on investigations in the field of competition law.”<sup>68</sup>

Accordingly, the ECJ ruled that none of the legal bases relied upon by the applicant were an appropriate basis for the right invoked.<sup>69</sup> However, the ECJ went on to examine whether certain limitations on the Commission’s powers of investigation were “implied by the need to safeguard the rights of the defense which the [ECJ] has held to be a fundamental principle of the Community legal order.”<sup>70</sup> In that regard, the ECJ found that the Commission was “entitled . . . to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to the Commission, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish . . . the existence of anti-competitive conduct.”<sup>71</sup>

On the other hand, the ECJ also made it clear that the Commission “may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned.”<sup>72</sup> The ECJ went on to explain that “the Commission may not compel an undertaking to provide it with answers which might involve an *admission* on its part of existence of an infringement which it is incumbent upon the Commission to prove.”<sup>73</sup> Accordingly, the principles laid down in *Orkem* protected undertakings against self-incrimination only to the extent that replying to questions would result in an actual *admission*.<sup>74</sup>

The scope of the principle was further delimited three years

---

67. *Orkem*, [1989] E.C.R. 3283, ¶ 30.

68. *Id.* ¶ 31; see also Opinion of Advocate-General Darmon, *id.* ¶ 127.

69. See *Orkem*, [1989] E.C.R. 3283, ¶ 29-31.

70. *Id.* ¶¶ 32-33.

71. *Id.* ¶ 34.

72. *Id.* ¶ 34.

73. *Id.* ¶ 35 (emphasis added).

74. See also *Société Générale v. Commission*, Case T-34/93, [1995] E.C.R. II-545, ¶ 75; Lasok, *supra* note 17, at 91.

later in *Otto v. Postbank*, a case in which the ECJ ruled that the privilege against self-incrimination could not be claimed in the framework of national civil procedures applying Articles 81 EC and 82 of the EC Treaty before a court, since civil proceedings cannot lead, directly or indirectly, to the imposition of a penalty by a public authority.<sup>75</sup>

## 2. The Evolution and the Influence of the ECtHR Case-Law

The solution in *Orkem* was based, *inter alia*, on the idea that neither the wording of Article 6 of the European Convention nor the decisions of the ECtHR indicated that it upheld the right not to give evidence against oneself.<sup>76</sup> However, in a series of cases decided shortly after *Orkem*, the ECtHR considered that the privilege against self-incrimination formed part of the notion of a fair procedure under Article 6 of the European Convention.

The first step in that direction was the *Funke v. France* case.<sup>77</sup> That case originated in a complaint by a French citizen against France. French custom officers had searched Mr. Funke's home and asked him to produce statements concerning foreign bank accounts. Mr. Funke was fined, pursuant to the French Customs Code, for refusing to provide the statements.<sup>78</sup> The ECtHR considered that: "the customs secured Mr. Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed."<sup>79</sup> The ECtHR concluded that "[t]he special features of customs law . . . cannot justify such an infringement of the right of anyone 'charged with a criminal offence,' within the autonomous meaning of this expression in Article 6 [of the European Convention], to remain silent and not to contribute to incriminating himself."<sup>80</sup>

Accordingly, not only did the ECtHR consider that Article 6

75. See *Otto v. Postbank*, Case C-60/92, [1993] E.C.R. I-5683, ¶ 17.

76. See *Orkem*, [1989] E.C.R. 3282, ¶ 30. The ECJ was aware of the decision of the Commission of Human Rights in *Funke*. See Opinion of Advocate-General Darmon, *id.* ¶ 133.

77. [1993] Eur. H.R. Rep. 297.

78. See *id.* ¶¶ 9-11.

79. *Id.* ¶ 44.

80. *Id.*



included some kind of a privilege against self-incrimination, but moreover it found that this privilege applied to incriminating documents (and not only to admissions).<sup>81</sup> Thus, the ECtHR adopted a stance that is much more far-reaching than that of the ECJ in *Orkem*.<sup>82</sup>

This trend continued in the *Murray v. United Kingdom* and *Saunders v. United Kingdom* judgments, both delivered in 1996.<sup>83</sup> In *Saunders*, the ECtHR ruled, on the one hand, that “[t]he right not to incriminate oneself is primarily concerned . . . with respecting the will of an accused person to remain silent.”<sup>84</sup> Therefore, “it 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 tissue for the purpose of DNA testing.”<sup>85</sup> On the other hand, the ECtHR also ruled that the right not to incriminate oneself “cannot reasonably be confined to statements of admission of wrongdoing or to remarks that are directly incriminating.”<sup>86</sup> The ECtHR further noted that “[t]estimony obtained under compulsion which appears on its face to be of a non-incriminating nature — such as exculpatory remarks or *mere information on questions of fact* — may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other state-

81. The inclusion of potentially incriminating documents into the scope of the privilege against self-incrimination was confirmed in substance 8 years later in *J.B. v. Switzerland*, [2001] Eur. Ct. H.R. 320.

82. For a criticism of the principles laid down in *Funke*, see G. Stessens, *The Obligation to Produce Documents Versus the Privilege against Self-incrimination: Human Rights Protection Extended Too Far?*, 22 EUR. L. REV. 45 (1997). Three years after *Funke*, in *John Murray*, the European Court of Human Rights (“ECtHR”) specified that “[a]lthough not specifically mentioned in Article 6 of the [European] Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aim of Article 6.” *Murray v. United Kingdom*, [1996] 22 Eur. H.R. Rep. 29, 60, ¶ 45.

83. See generally *Murray*, [1996] 22 Eur. H.R. Rep. 29; *Saunders v. United Kingdom*, [1997] 23 Eur. H. R. Rep. 313.

84. *Saunders*, [1997] Eur. H.R. Rep. at 314, ¶ 69.

85. *Id.*

86. *Id.*

ments of the accused or evidence given by him during the trial or to otherwise undermine his credibility.”<sup>87</sup>

As the protection granted by the ECtHR in these cases went far beyond the protection against actual admissions, they raised the question of whether the limitations set out in *Orkem* were still good law.<sup>88</sup> In *Mannesmannröhren-Werke v. Commission*, however, the CFI adopted a fairly skeptical stance on this issue.<sup>89</sup> In this case, the applicant submitted, *inter alia*, that, based on *Funke*, the scope of the privilege against self-incrimination as laid down by the ECJ in *Orkem* had to be broadened.<sup>90</sup> In response to this plea, the CFI recalled that it had no jurisdiction to apply the European Convention when reviewing an investigation under competition law, inasmuch as the European Convention as such is not part of EC law.<sup>91</sup> The CFI, however, stated its classic stance that (i) the ECJ and the CFI draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated and to which they are signatories; and (ii) the European Convention has special significance in that respect.<sup>92</sup> Applying these principles to the facts of the case, the CFI considered that the privilege against self-incrimination was not absolute, as such a solution “would go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance to the Commission’s performance of its duty.”<sup>93</sup> As a consequence, an undertaking in receipt of a request for information pursuant to Article 11(5) of Regulation No. 17 could be recognised as having a right to silence “only to the extent that it would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to

---

87. *Id.* (emphasis added).

88. See, e.g., W. van Overbeek, *The Right to Remain Silent in Competition Investigations: The Funke Decision of the Court of Human Rights Makes Revision of the ECJ’s Case Law Necessary*, 15 EUR. COMPETITION L. REV. 127 (1994).

89. See *Mannesmannröhren-Werke v. Commission*, Case T-112/98, [2001] E.C.R. II-729.

90. *Id.* ¶¶ 36-38.

91. *Id.* ¶¶ 59 & 75 (citing *Mayr-Melnhof v. Commission*, Case T-374/94, [1998] E.C.R. II-1751, ¶ 311).

92. *Mannesmannröhren-Werke*, [2001] E.C.R. II-729, ¶ 60.

93. *Id.* ¶ 66.

prove,"<sup>94</sup> which in practice confirmed the limits laid down in *Orkem*.

*Mannesmannröhren-Werke* could be interpreted as a signal to the effect that the EC Courts' interpretations of certain rights in competition proceedings did not have to coincide exactly with those of the ECtHR when the latter deals with criminal procedures involving natural persons. However, as explained below, the EC Courts have recently showed that they were inclined to make these interpretations converge.

### 3. Recent Signs of Change in the EC Courts' Case-Law

The first sign of change came from the ECJ in 2002. In the appeal of *Limburgse Vinyl Maatschappij & Others v. Commission* ("PVC II"), the ECJ explained in very explicit terms that it was ready to analyse the privilege against self-incrimination based on the ECtHR case-law.<sup>95</sup> In the case before the CFI,<sup>96</sup> *Limburgse Vinyl Maatschappij* ("LVM") and *DSM NV* and *DSM Kunststoffen BV* ("DSM"), had submitted that the Commission should not have used allegedly incriminating answers given by *any* of the undertakings fined by the Commission (and not only their own answers) under any legal basis (i.e., either under Article 11(1) or under Article 11(5) of Regulation No. 17).<sup>97</sup> LVM and DSM contended that Article 6 of the European Convention, as interpreted by the ECtHR (relying on *Funke* and *Saunders*), laid down a right to remain silent and in no way to contribute to one's own incrimination, without any distinction being made according to the type of information requested (including documentary form).<sup>98</sup> In its judgment, the CFI started by restating the *Orkem* principles.<sup>99</sup> The CFI then found that the questions contained in the decisions requiring information, and which were challenged by the applicants, were identical to those annulled by the ECJ in *Orkem* and that they were therefore unlawful.<sup>100</sup> However, the CFI also pointed out that the undertakings had either re-

---

94. *Id.* ¶ 67 (citing *Orkem v. Commission*, Case 374/87 [1989] E.C.R. 3283, ¶ 35).

95. *Limburgse Vinyl Maatschappij & Others v. Commission*, Joined Cases C-238, 244, 245, 247, 250-52, 254/99, [2002] E.C.R. I-8375, ¶¶ 274-77 [hereinafter *PVC II*].

96. *Limburgse Vinyl Maatschappij & Others v. Commission*, Joined Cases T-305-07, 313-16, 318, 325, 328, 329, 335/94, [1999] E.C.R. II-931.

97. *See id.* ¶¶ 429-35.

98. *See id.*

99. *See id.* ¶ 449.

100. *See id.* ¶ 451.

fused to answer those questions or denied the facts on which they were being thus questioned, which meant that the illegality of the questions could not affect the legality of the decision by which the Commission had fined them.<sup>101</sup> The CFI added that requests for information under Article 11(1) of Regulation No. 17 did not contain any element of compulsion and therefore could not warrant a claim of the privilege against self-incrimination.<sup>102</sup>

On appeal, LVM and DSM contended before the ECJ that, in its judgment, the CFI had ruled to the same effect as the judgment in *Orkem*, thereby affording lesser protection to that right than resulted from recent developments in the case-law of the ECtHR.<sup>103</sup> In its ruling on this ground of appeal, the ECJ, like the CFI, did not examine whether an undertaking has standing to raise another party's privilege against self-incrimination.<sup>104</sup> Instead, the ECJ first noted that, on the one hand, the CFI had not reiterated "the finding . . . of the *Orkem* judgment that neither the wording of Article 6 of the [European] Convention nor the decisions of the [ECtHR] indicate that that article recognises any right not to give evidence against oneself."<sup>105</sup> On the other hand, the CFI had upheld other principles laid down in the *Orkem* judgment.<sup>106</sup>

Having summarized the main findings of the CFI, the ECJ found that there had been considerable evolutions in the case-law of the ECtHR since *Orkem* "which the Community judicature must take into account when interpreting the fundamental rights."<sup>107</sup> However, the ECJ made the crucial judgment that "both the *Orkem* judgment and the recent case-law of the [ECtHR] require, first, the exercise of coercion against the suspect in order to obtain information from him, and, second, establishment of the existence of an actual interference with the right which they define."<sup>108</sup> Having defined these two conditions, the ECJ considered that, examined in the light of that

---

101. *See id.* ¶¶ 452-53.

102. *See id.* ¶¶ 455-57.

103. *See PVC II*, [2002] E.C.R. I-8375, ¶ 263.

104. *See id.* ¶ 270.

105. *Id.* ¶ 271.

106. *See id.* ¶ 272 (referring to the principles set out in Paragraphs 27, 28, 32-35 of *Orkem v. Commission*, Case 374/87, [1989] E.C.R. 3283).

107. *Id.* ¶ 274.

108. *Id.* ¶ 275.

finding and the specific circumstances of the case, the ground of appeal raised by the applicants “[did] not permit annulment of the contested judgment on the basis of the developments in the case-law of the [ECtHR].”<sup>109</sup>

For that purpose, the ECJ first considered that the CFI had correctly drawn the appropriate distinction between (i) a simple request for information, which left the undertaking the possibility not to reply;<sup>110</sup> and (ii) a decision requiring information (pursuant to Article 11(5) of Regulation No. 17), which additionally subjected an undertaking to a penalty in the event of a refusal to reply: only the latter exerts actual compulsion on the recipient undertaking.<sup>111</sup>

Second, as regards requests pursuant to Article 11(5) of Regulation No. 17, for which an element of compulsion exists, the ECJ observed that “LVM and DSM did not indicate any aspects of those answers which were in fact used to incriminate” them or the addressees of the requests.<sup>112</sup> The ECJ therefore deemed it unnecessary “to rule on the question whether the CFI had erred in law in holding . . . by reference to the *Orkem* judgment, that such decisions are illegal only in so far as a question obliges an undertaking to supply answers leading it to admit that there has been an infringement.”<sup>113</sup>

Three comments can be made about the *PVC II* case. First, the ECJ and the CFI made the privilege against self-incrimination dependent on an element of compulsion or coercion.<sup>114</sup> This requirement is perfectly in line with the rationale of the privilege, because coercion is the main element that may induce a person (including an innocent one) to make statements that would seem *prima facie* incriminating and on which he will not be able to cast a new light at later stages of the proceedings.<sup>115</sup>

Second, the ECJ very explicitly emphasized the relevance of the case-law of the ECtHR for the purpose of interpreting fundamental rights.<sup>116</sup> This stance contrasts with previous statements

---

109. *Id.* ¶ 276.

110. *See id.* ¶ 279.

111. *Id.*

112. *Id.* ¶ 289.

113. *Id.* ¶ 292.

114. *Id.* ¶¶ 275-76.

115. *See supra* note 18 and accompanying text.

116. *See id.* ¶ 274.

to the effect that the interpretations of fundamental rights by the EC Courts did not have to coincide exactly with those of the ECtHR.<sup>117</sup> This stance is also in line with (i) a more general trend of the EC Courts to rely extensively on the case-law of the ECtHR<sup>118</sup> and (ii) the express reference by the Charter of Fundamental Rights to the case-law of the ECtHR.<sup>119</sup> Beyond questions of legal consistency, such convergence is recommendable for one additional reason: in a case before the ECtHR, an undertaking argued that certain of its obligations under EU law infringed the European Convention.<sup>120</sup> Additional convergence of

---

117. See, e.g., Opinion of Advocate-General Darmon, *Orkem v. Commission*, Case 374/87, [1989] E.C.R. 3283, ¶¶ 139-40. Advocate General Darmon writes:

the existence in Community law of fundamental rights drawn from the European Convention does not derive from the wholly straightforward application of that instrument as interpreted by the Strasbourg authorities. . . . This Court may . . . adopt, with respect to provisions of the Convention, an interpretation which does not coincide exactly with that given by the Strasbourg authorities, in particular the [ECtHR]. It is not bound, in so far as it does not have systematically to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities.

*Id.*

118. For example, in a recent case, the ECJ interpreted a directive almost exclusively in light of the ECtHR case-law on Article 8 of the European Convention. *Österreichischer Rundfunk & Others*, Joined Cases C-465/00, C-138, 139/01, [2003] E.C.R. I-4989, ¶¶ 73, 77, 83).

119. See Charter of Fundamental Rights of the European Union, Recital 5, O.J. C 364/01 (2000). Recital 5 states in relevant part: “[t]his Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from . . . the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights” (emphasis added). Article I-9 of the Draft Treaty establishing a Constitution for Europe provides that “[t]he Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights.” Draft Treaty establishing a Constitution for Europe, Dec. 16, 2004, O.J. C 310/1 (2004) (not yet ratified). Pursuant to the same provision, it is planned that the Union will accede to the European Convention.

120. See *DSR Senator Lines* (EU), Application No. 56672/00. *DSR Senator Lines*’ application must be analysed against the recent case-law of the ECtHR according to which

acts of the EC as such cannot be challenged before the [ECtHR] because the EC is not a Contracting Party. The [European] Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured.” Member States’ responsibility therefore continues even after such a transfer.

*Matthews v. United Kingdom*, [1999] 28 Eur. H.R. Rep. 361, 396, ¶ 32. In 1998, *Senator Lines* was fined by the Commission for an infringement of Articles 81 and 82 of the EC Treaty. Requests by *Senator Lines* for payment of the fine to be suspended pending the outcome of the appeal were rejected by the CFI on July 21, 1999 (Order of the President of the CFI in *DSR-Senator Lines v. Commission*, Case T-191/98 R, [1999] E.C.R. II-2531), and on appeal by the ECJ on December 14, 1999 (Order of the President of

the interpretations of the EC Courts and the ECtHR would probably transform many of these delicate issues into moot questions.

Third, the ECJ explicitly left open the possibility that the CFI erred in law in holding, by reference to *Orkem*, that decisions under Article 11(5) were illegal only in so far as a question obliged an undertaking to supply answers leading it to admit that there has been an infringement.<sup>121</sup>

However, it is important to note that in *Tokai Carbon & Others v. Commission*,<sup>122</sup> the CFI confirmed its previous finding in *Mannesmannröhren-Werke* that “[a] right to silence can be recognised only to the extent that the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.”<sup>123</sup> The CFI also restated its previous finding that the Commission “is entitled to compel the undertakings to provide all necessary information concerning such facts as may be known to them and to disclose to the Commission, if necessary, such documents relating thereto as are in their possession, even if the latter may be used to establish the existence of anti-competitive conduct.”<sup>124</sup> Fur-

---

the Court in *DSR-Senator Lines v. Commission*, Case C-364/99 PCR, [1999] E.C.R. I-8733). Senator Lines contended before the ECtHR that the requirement to pay the fine before a decision was taken in the substantive proceedings was a violation of Article 6 of the European Convention. The hearing in this case was cancelled in light of the judgment of the CFI setting aside the fine imposed by the Commission on Senator Lines. See *Atlantic Container Line & Others v. Commission*, Joined Cases T-191 & 212-14/98 (CFI, not yet reported); see also Press Release, On the Cancellation of Hearing in the Case Senator Lines GmbH v. the 15 Member States of the European Union (Oct. 16, 2003), available at <http://www.echr.coe.int/eng/press/2003/oct/senatorlinescancelled.htm>. On March 10, 2004, the Grand Chamber of the ECtHR declared the application inadmissible because “the facts of the present case were never such as to permit the applicant company to claim to be a victim of a violation of its [European] Convention rights.” *Senator Lines GmbH v. the 15 Member States of the European Union*, [2004] 39 Eur. H.R. Rep. SE3.

121. See *PVC II*, [2002] E.C.R. I-8375, ¶ 292.

122. Joined Cases T-236, 239, 244-46, 251, 252/01 (CFI, not yet reported). The question of the privilege against self-incrimination arose in the specific context of the assessment of the reduction of the fine from which SGL Carbon AG (“SGL”) should have benefited due to its cooperation with the Commission. See *id.* ¶¶ 410-11. SGL argued that it had provided the Commission with information that it could have withheld (because it was covered by the privilege against self-incrimination) and that accordingly it should have benefited from an additional reduction of the fine imposed to it. See *id.* ¶ 382.

123. *Id.* ¶ 402 (citing *Mannesmannröhren-Werke*, [2001] E.C.R. II-729, ¶¶ 66-67).

124. *Id.* ¶ 403 (citing *Mannesmannröhren-Werke*, [2001] E.C.R. II-729, ¶ 65).

thermore, the CFI considered that this power did not fall foul of either Article 6(1) and (2) of the European Convention or the case-law of the ECtHR, noting that in *PVC II* the Court had not reversed its previous case-law in spite of *Funke, Saunders, and J.B. v Switzerland*.<sup>125</sup>

Accordingly, in *Tokai Carbon* the CFI explicitly restated the principles laid down in *Mannesmannröhren-Werke*.<sup>126</sup> One may note, however, that when the CFI applied these principles to the facts of the case, it seemed to take a broader view of the scope of the privilege against self-incrimination. The CFI first considered that the privilege applied to requests to describe the object of and what actually occurred at those meetings.<sup>127</sup> More importantly, the CFI also considered that the privilege applied to certain types of *documents* related to these meetings (e.g., protocols, working documents and preparatory documents, handwritten notes, notes and conclusions, planning and discussion documents).<sup>128</sup> As the *Tokai Carbon* case is currently under appeal, I will not make further comments on this topic.<sup>129</sup>

It is apparent from the description above that the scopes of both legal professional privilege and the privilege against self-incrimination have evolved over the years. These two privileges also illustrate two different patterns of evolution: whereas legal professional privilege is rooted in the national laws, so that its evolution is mainly influenced by the evolution of these laws, the privilege against self-incrimination is more influenced by the European Convention. However, these patterns are complementary, as the European Convention also influences the national

---

125. *See id.* ¶ 404-06. The CFI further considered that “the mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its requests for the production of documents already in existence cannot constitute a breach of the principle of respect for the rights of defence or impair the right to fair legal process, which offer, in the specific field of competition law, protection equivalent to that guaranteed by Article 6 of the [European] Convention.” *Id.* ¶ 406. The CFI explained this stance by the fact that “[t]here is nothing to prevent the addressee of a request for information from showing, whether later during the administrative procedure or in proceedings before the Community Courts, when exercising his rights of defence, that the facts set out in his replies or the documents produced by him have a different meaning from that ascribed to them by the Commission.” *Id.* (citing *Mannesmannröhren-Werke*, [2001] E.C.R. II-729, ¶¶ 77-78).

126. *See id.* ¶ 402.

127. *See id.* ¶ 407.

128. *See id.* ¶ 408.

129. *See* Commission v. SGL Carbon AG, Case C-301/04 P (pending).



laws that in turn influence EC law. Fundamental rights and, more generally, rights in competition law are now shaped by a complex and intricate set of mutual influences.

As explained below, the interactions between the European Convention, EC law, and the national laws on competition investigations have been further complicated by the entry into force of Regulation No. 1/2003.<sup>130</sup>

## II. THE IMPACT OF REGULATION NO. 1/2003 ON THE APPLICATION OF LEGAL PROFESSIONAL PRIVILEGE AND THE PRIVILEGE AGAINST SELF-INCRIMINATION UNDER EC LAW AND NATIONAL LAWS

To put it simply, Regulation No. 1/2003 has revolutionized the way in which information is now collected and used by the Commission and the national competition authorities (“NCAs”), which together form the European Competition Network (“ECN”). The generalization of exchange of information within the ECN now makes it impossible to envisage EC and national procedural laws in isolation, a principle that echoes vividly the ECJ’s statement in *AM&S* to the effect that “Community law . . . derives from not only the economic but also the legal interpenetration of the Member States.”<sup>131</sup>

This Section will first present an overview of the new enforcement scheme governing the collection, exchange and use of evidence under Regulation No. 1/2003. Second, this section will analyze how these powers may affect the application of legal professional privilege and the privilege against self-incrimination under Regulation No. 1/2003.

### A. *The New Legal Scheme Governing the Collection, Exchange, and Use of Evidence*

Before the entry into force of Regulation No. 1/2003, Article 20(1) of Regulation No. 17 provided that information acquired through investigations, inquiries, and requests for information was to be used only for the purpose of the relevant request or investigation.<sup>132</sup> The Commission had to forward

---

130. See Council Regulation No. 1/2003, O.J. L 1/1 (2003).

131. *AM&S Europe Ltd. v. Commission*, Case 155/79, [1982] E.C.R. 1575, ¶ 18.

132. See Council Regulation No. 17/62, *supra* note 9, art. 20(1), O.J. Eng. Spec. Ed. 1959-62.

certain pieces of information to the national authorities pursuant to Article 10(1) of Regulation No. 17.<sup>133</sup> However, in 1992, the ECJ made it clear that competition authorities which received information pursuant to Article 10 of Regulation No. 17 were not allowed to use that information as evidence in national proceedings (even though they could use it as circumstantial evidence in order to justify initiation of a national procedure).<sup>134</sup> Furthermore, there was no general provision in Regulation No. 17 or elsewhere that organized or even allowed the circulation of information between the national authorities.

Regulation No. 1/2003 changed this scheme radically by making exchange of information a basic principle of the application of EC competition law and generalizing the exchange of information within the network.<sup>135</sup> Article 12(1) of Regulation No 1/2003 reads:

[f]or the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.<sup>136</sup>

Article 12 of Regulation No. 1/2003 further allows the use of that information by the NCAs for the application of Articles 81

133. "The Commission shall forthwith transmit to the competent authorities of the Member States a copy of the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Articles 85 or 86 of the Treaty or of obtaining negative clearance or a decision in application of Article 85(3)." *Id.* art. 10(1).

134. See *Dirección General de Defensa de la Competencia v. Asociación Española de Banca Privada & Others*, Case C-67/91, [1992] E.C.R. I-4785, ¶¶ 35-39.

135. See Council Regulation No. 1/2003, pmbl. ¶ 16, O.J. L 1/1 (2003). The Regulation states in the Preamble:

Notwithstanding any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network even where the information is confidential. This information may be used for the application of Articles 81 and 82 of the Treaty as well as for the parallel application of national competition law, provided that the latter application relates to the same case and does not lead to a different outcome. When the information exchanged is used by the receiving authority to impose sanctions on undertakings, there should be no other limit to the use of the information than the obligation to use it for the purpose for which it was collected given the fact that the sanctions imposed on undertakings are of the same type in all systems.

*Id.*

136. *Id.* art. 12(1).

and 82 of the EC Treaty and, in certain circumstances, of national law.<sup>137</sup>

Accordingly, as Regulation No. 1/2003 did not harmonize the national procedural laws applicable to the enforcement of Articles 81 and 82 of the EC Treaty at the national level,<sup>138</sup> the new scheme gives rise to situations where evidence will be used in a legal jurisdiction which is not the one where it was collected. It has therefore become necessary to make a distinction between the law applicable to the collection of information and the law applicable to the use of that information.

### 1. Law Applicable to the Collection of Information

As regards the law applicable to the collection of information, two straightforward cases must first be mentioned: where the Commission or a NCA conduct investigations alone and for their own account, it is clear that their powers are exercised under EC law and the relevant national law respectively.

The issue becomes more complex when investigations are carried out pursuant to Article 22 of Regulation No. 1/2003 by a NCA “on behalf and for the account” of another NCA or “[a]t the request of the Commission,” since in this case the NCA acts as the agent of another authority.<sup>139</sup> Article 22 of Regulation No. 1/2003, however, provides clear guidelines in this respect. It provides that:

- when a NCA conducts an investigation on its own territory “on behalf and for the account” of another NCA, it does so “under its national law;”<sup>140</sup>

---

137. *See id.* art. 12(2) (“[i]nformation exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.”). In addition, under Article 5, national authorities can impose any penalty provided for in national law (which may include criminal sanctions on individuals).

138. For a detailed account of the diversity of these laws, see *THE MODERNISATION OF EU COMPETITION LAW ENFORCEMENT IN THE EU*, FIDE 2004 NATIONAL REPORTS (D. Cahill ed., 2004).

139. Council Regulation No. 1/2003, art. 22(1), O.J. L 1/1 (2003).

140. *Id.* *See also* Paragraph 27 of the Commission Notice on Cooperation within the Network of Competition Authorities, O.J. 2004, C 101/43, stating: “[t]he question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority.”

- similarly, when a NCA conducts an investigation on its own territory “[a]t the request of the Commission, . . . [t]he officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law.”<sup>141</sup>

A rule of thumb to determine the law applicable to the collection of information is therefore that it is the law of the authority conducting the investigation.

## 2. Law Applicable to the Use by the Commission or a NCA of Information Collected in Another Jurisdiction

Article 12 of Regulation No. 1/2003 makes it possible for the Commission or an NCA to receive and use evidence that it could not have collected itself.<sup>142</sup> The question therefore arises as to what the receiving authority should feel entitled to do with such evidence: must the authority disregard the evidence on the ground that it would not have been allowed to collect it if it had been located on its territory, or may the authority feel entitled to use it?

Here again, a straightforward answer can be found in Regulation No. 1/2003. Article 12(1) provides that “[f]or the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with *and use in evidence* any matter of fact or of law, including confidential information.”<sup>143</sup> The general principle therefore seems to be that information can be used by the Commission and the NCAs even if it has been collected under rules that are less protective than those of the Commission or the receiving NCA.<sup>144</sup>

There is also no doubt that the Council intended that, like any other regulation, Regulation No. 1/2003 would supersede national laws, as Recital 16 provides that the right to exchange and use information applies “[n]otwithstanding any national

141. Council Regulation No. 1/2003, art. 22(2), O.J. L 1/1 (2003).

142. *See id.* art. 12(1), O.J. L 1/1 (2003).

143. *Id.* (emphasis added).

144. This possibility is grounded on the idea expressed in Recital 16 that “[t]he rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent.” *Id.* Recital 16, O.J. L 1/1 (2003).

provision to the contrary.”<sup>145</sup>

The only specific limitation to the principle concerns individuals. Pursuant to Article 12(3), the information exchanged can only be used in evidence to impose sanctions on natural persons where:

- “the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or 82 . . . ;”<sup>146</sup>

or, in the absence thereof,

- “the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.”<sup>147</sup>

The case of legal professional privilege, which has varying scopes under EC laws and the national laws,<sup>148</sup> exemplifies the practical consequences of the scheme established by Article 12. Information may have been collected by an NCA under a specific standard of legal professional privilege (e.g., France), and then forwarded to an NCA in the jurisdiction of which the standard of legal professional privilege is higher (e.g., the United Kingdom).<sup>149</sup> The use of the information in the United Kingdom to fine undertakings should be possible irrespective of UK standards. Indeed, the Office of Fair Trading (“OFT”) has recently indicated that “[w]hilst UK privilege rules would apply to cases being investigated in the [United Kingdom] by the OFT on its own behalf under national and EC law, the OFT could be sent the communications of in-house lawyers . . . by an NCA from

---

145. This point is also recalled in Paragraph 27 of the Commission Notice on Cooperation within the Network of Competition Authorities, O.J. C 101/43 (2004): “Article 12 of the Council Regulation takes precedence over any contrary law of a Member State.”

146. Council Regulation No. 1/2003, art. 12(3), O.J. L 1/1 (2003).

147. *Id.*, O.J. L 1/1 (2003). *See id.* Recital 16, O.J. L 1/1 (2003); *see also* Commission Notice on Cooperation within the Network of Competition Authorities, O.J. C 101/43, ¶ 28(c) (2004).

148. For a recent and very detailed account of these laws, see the following CCBE publication: John Fish, *Regulated Legal Professionals and Professional Privilege within the European Union, the European Economic Area and Switzerland, and Certain Other European Jurisdictions* (Feb. 2004), available at [http://www.ccbe.org/en/comites/in\\_house\\_en.htm](http://www.ccbe.org/en/comites/in_house_en.htm).

149. *See id.* at 84-85 (France), 104-05 (UK).

another Member State where the communication of such lawyers are not privileged. Under those circumstances, the OFT may use the documentation received from the other NCA in its investigation.”<sup>150</sup>

Accordingly, the undertakings under investigation should not assume that the standard of legal professional privilege of the jurisdiction where the information is used will necessarily apply. What matters more is the standard applicable in the jurisdiction where the information was collected.

Regulation No. 1/2003 therefore sets the stage for a comprehensive interpenetration of the national procedural laws. It must be stressed that it will not necessarily level down the national laws: nothing in Regulation No. 1/2003 prevents a Member State from increasing the current level of protection granted in its jurisdiction for the collection of evidence. It remains to be seen, however, what incentives Article 12 will create for the NCAs and whether their cooperation will somehow trigger some kind of a spontaneous harmonisation of the national procedural laws.

EC law, like the national laws, is not exempt from these potential influences under Article 12 of Regulation No. 1/2003. The following section will analyse whether Regulation No. 1/2003 contains other provisions susceptible of directly affecting the scope of legal professional privilege and the privilege against self-incrimination under EC law.

### *B. The Direct Consequences of Regulation No. 1/2003 for Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law*

This Section analyses how Regulation No. 1/2003 may impact on the scope of legal professional privilege and of the privilege against self-incrimination under EC law.

First, with regards to legal professional privilege, the response seems to be quite straightforward. The text of Regulation No. 1/2003 does not refer to legal professional privilege. Moreover, there is *prima facie* no reason to believe that the scope of that principle under EC law should be affected by Regulation No. 1/2003, as the latter affected neither the legal roots (i.e., the

---

150. Office of Fair Trading, *Powers of Investigation, Draft Competition Law Guideline for Consultation* 19, ¶ 6.3 (2004).

Member States' laws on that question) nor the rationale of legal professional privilege.

The situation is more complex as regards the privilege against self-incrimination. On the one hand:

- Regulation No. 1/2003 contains a "catch-all" recital stating that it "respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles."<sup>151</sup>
- Recital 23 of Regulation No 1/2003 codifies the principles defined in *Mannesmannröhren-Werke*.<sup>152</sup>

Regulation No. 1/2003 therefore reflects *prima facie* the current position on the privilege against self-incrimination.

On the other hand, as explained by the ECJ in *PVC II*, the application of the privilege against self-incrimination closely depends on the existence of an element of compulsion.<sup>153</sup> Accordingly, the modification of the Commission's powers (i.e., its means of compulsion) under Regulation No. 1/2003 potentially affects the scope of the privilege. It is therefore necessary to determine how it applies when these new powers are wielded.

The first Sub-section will present briefly the new investigation powers enjoyed by the Commission under Regulation No. 1/2003. The second Sub-section will then focus on preliminary thoughts about how Regulation No. 1/2003 could impact on the privilege against self-incrimination.

### 1. The New Investigation Powers Enjoyed by the Commission Pursuant to Regulation No. 1/2003

During the adoption process of Regulation No. 1/2003, most of the legal scholars' attention was focused on two features of the new scheme of enforcement of EC competition rules: (i) the creation of the ECN; and (ii) the move, in the application of

151. Council Regulation No. 1/2003, Recital 37, O.J. L 1/1 (2003).

152. Recital 23 reads: "[w]hen complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement." *Id.*, Recital 23, O.J. L 1/1 (2003).

153. See *PVC II*, Joined Cases C-238, 244, 245, 247, 250-52, 254/99, [2002] E.C.R. I-8375, ¶ 275.

Article 81 of the EC Treaty, from an *ex ante* notification and authorisation mechanism to an *ex post* exception system.<sup>154</sup> One additional important aspect of the reform, which seems to have been sometimes overlooked by the abundant legal literature on Regulation No. 1/2003, was the substantial increase of the investigative powers enjoyed by the Commission.<sup>155</sup> This increase was grounded *inter alia* on the idea that “[t]he detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission’s powers of investigation need to be supplemented.”<sup>156</sup>

The Commission’s powers were increased in several respects: (i) first, as regards the collection of information;<sup>157</sup> and (ii) second, the fines attached to a breach of the duties triggered by these powers.<sup>158</sup>

As regards, first, the collection of information by the Commission, in addition to the power to send requests for information similar to those previously provided for by Article 11 of Regulation No. 17,<sup>159</sup> the Commission now has the power:

- to take statements: “the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.”<sup>160</sup>
- “to seal any business premises and books or records for the period and to the extent necessary for the inspec-

154. See Council Regulation No. 1/2003, art. 1, O.J. L 1/1 (2003).

155. There are, however, several articles dealing with the issues raised by the new investigation powers enjoyed by the Commission. See, e.g., Mario Siragusa, *A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules*, in 1999 *FORDHAM CORPORATE LAW INSTITUTE* 273 (Barry Hawk ed., 2000); see also Ivo Van Bael, *Procedural Rights and Issues*, in 2000 *FORDHAM CORPORATE LAW INSTITUTE* 377 (Barry Hawk ed., 2001); Wouter P.J. Wils, *The EU Network of Competition Authorities, the European Convention on Human Rights and the Charter of Fundamental Rights of the EU*, in *EUROPEAN COMPETITION LAW ANNUAL 2002: CONSTRUCTING THE EU NETWORK OF COMPETITION AUTHORITIES* (Claus Dieter Ehlermann & Isabela Atanasu eds., 2005); Laurence Idot, *Le nouveau système communautaire de mise en œuvre des articles 81 et 82 CE (règlement 1/2003 et projets de textes d’application)*, in 35 *CAHIERS DE DROIT EUROPÉEN* 283 (2003). All deal with the issues raised by the new investigation powers enjoyed by the Commission.

156. Council Regulation No. 1/2003, Recital 25, O.J. L 1/1 (2003).

157. See *id.* arts. 19-21, O.J. L 1/1 (2003).

158. See *id.* art. 23, O.J. L 1/1 (2003).

159. See *id.* art. 18, O.J. L 1/1 (2003). Under Article 17, the Commission also has the power to carry out investigations into sectors of the economy and into types of agreements. See *id.* art. 17, O.J. L 1/1 (2003).

160. *Id.* art. 19, O.J. L 1/1 (2003). See *id.*, Recital 25, O.J. L 1/1 (2003).



tion;”<sup>161</sup>

- “to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers” (which means that, contrary to previous case-law, these persons can be heard on topics going beyond the documents at issue);<sup>162</sup>
- if certain conditions are met, to carry out inspections in other premises than business premises, including private dwellings.<sup>163</sup>

These powers are enhanced by the increase of the penalties (i.e., the means of coercion) that may be imposed on undertakings or

161. *Id.* art. 20(2)(d), O.J. L 1/1 (2003). *See id.* Recital 25, O.J. L 1/1 (2003) (specifying “[s]eals should normally not be affixed for more than 72 hours.”).

162. *Id.* art. 20(2)(e), O.J. L 1/1 (2003). By contrast, Article 14(1)(c) of Regulation No. 17 provided for the possibility to request oral explanations relating to the books and records under examination, which was often interpreted as meaning that the Commission had no general right of interview. *See* Council Regulation No. 17/62, *supra* note 9, art. 14(1)(c), O.J. Eng. Spec. Ed. 1959-62. For literature regarding the right of interview before the entry into force of Council Regulation 1/2003, O.J. L 1/1 (2003), see *National Panasonic (UK) Ltd. v. Commission*, Case 136/79, [1980] E.C.R. 2033, ¶ 15; see also CHRISTOPHER KERSE, *E.C. ANTITRUST PROCEDURE* 140 (4th ed., 1998).

163. *See* Council Regulation 1/2003, art. 21(1), O.J. L 1/1 (2003). Article 21(1) states:

If a reasonable suspicion exists that books or other records related to the business and to the subject matter of the inspection, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

*Id.* This extension was justified by the fact that “[e]xperience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking.” *Id.* Recital 26, O.J. L 1/1 (2003). Unlike commercial premises, private premises are constitutionally protected in all the national laws. *See Hoechst v. Commission*, Joined Cases 46/87 & 227/88, [1989] E.C.R. 2859, ¶ 17. As a consequence, pursuant to Article 21(3), a prior authorization from a national court is always necessary to carry out such inspections. In addition to the criteria laid down in Article 20(8), the national court must check “the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested.” Council Regulation 1/2003, art. 21(3), O.J. L 1/1 (2003). Article 21(4) specifies that the officials can enter the premises, examine the records and take copies but they have no right to affix seals and/or ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers. *See id.* art. 21(4), O.J. L 1/1 (2003).

associations of undertakings if they provide inaccurate or misleading information. The Commission may now impose fines not exceeding 1% of the total turnover of the undertaking concerned in the preceding business year if intentionally or negligently:<sup>164</sup>

- the undertakings supply incorrect or misleading information in response to a request made pursuant to Article 17 (i.e., in the framework of an investigation into sectors of the economy) or Article 18(2) (i.e., a simple request for information);<sup>165</sup>
- in response to a request made by decision adopted pursuant to Article 17 (i.e., in the framework of an investigation into sectors of the economy) or Article 18(3) (i.e., a formal decision requesting information), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit;<sup>166</sup>
- they produce the required books or other records related to the business in incomplete form during inspections under Article 20 or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4) (i.e., a decision ordering an investigation);<sup>167</sup>
- in response to a question asked in accordance with Article 20(2)(e) (i.e., a question put to representatives or members of staff): (i) “they” give an incorrect or misleading answer; (ii) “they” fail to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or (iii) “they” fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4) (i.e., a decision ordering an investigation).<sup>168</sup>

Passing now to the relationship between these provisions and the application of the privilege against self-incrimination, it must first be remembered that one of the yardsticks against which

---

164. See Council Regulation 1/2003, art. 23, O.J. L 1/1 (2003). Pursuant to Article 15(1) of Council Regulation No. 17/62, *supra* note 9, O.J. Eng. Spec. Ed. 1959-62, fines could range from \_100 to \_5000.

165. See Council Regulation 1/2003, art. 23(1)(a), O.J. L 1/1 (2003). The undertakings have the right not to reply to a request made under Article 18(2).

166. See *id.*, art. 23(1)(b), O.J. L 1/1 (2003).

167. See *id.*, art. 23(1)(c), O.J. L 1/1 (2003).

168. See *id.*, art. 23(1)(d), O.J. L 1/1 (2003).

such powers must be analysed is the existence of compulsion.<sup>169</sup> Keeping in mind this criterion, it seems *prima facie* that the following situations could be distinguished:

- as regards statements taken pursuant to Article 19, it seems that no privilege could be asserted by the natural or legal person concerned, as the latter must consent to be interviewed;<sup>170</sup>
- as regards simple requests for information made under Article 18(2), the undertaking is not obliged to answer and no fine is provided for by Article 23;<sup>171</sup> the second condition defined in *PVC II* being absent, the privilege should probably not apply;
- as regards requests made by decision pursuant to Article 17 or Article 18(3), there is an element of coercion resulting from the possibility that fines may be imposed under Article 23(1)(d); accordingly, the privilege could potentially apply.

The situation is a bit more complex where “representative[s] and member[s] of staff” are asked questions pursuant to Article 20(2)(e) (i.e., in the course of an investigation conducted pursuant to Article 20), because in this case: (i) it is more difficult to determine when compulsion actually weighs on the person questioned and/or the undertaking; and (ii) the person questioned may or may not speak on behalf of the undertaking.

As a preliminary matter, it may be noted that, pursuant to Article 23(1), procedural fines can be imposed only on undertakings and not on individuals.<sup>172</sup> In particular, pursuant to Article 23(1)(d), first indent, “[t]he Commission may by decision impose on undertakings and associations of undertakings fines

169. See *PVC II*, Joined Cases C-238, 244, 245, 247, 250-52, 254/98, [2002] E.C.R. I-8375, ¶ 275.

170. Their protection is enhanced by Article 3(1) of Commission Regulation No. 773/2004, which provides that:

[w]here the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No. 1/2003, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.

Commission Regulation No. 773/2004, O.J. L 123/18, art. 3(1) (2004). See *id.* Recital 3, O.J. L 123/18 (2003).

171. Pursuant to Article 23(1)(a), a fine may be imposed only if, having accepted to answer the request, the undertaking provides misleading or incorrect information.

172. See Commission Regulation No. 1/2003, art. 23(1), O.J. L 1/1, at 16 (2003).

. . . where, intentionally or negligently. . . in response to a question asked in accordance with Article 20(2)(e), they give an incorrect or misleading answer.”<sup>173</sup> Therefore, while under Article 20(2)(e) questions are put to “representative[s] and member[s] of staff”<sup>174</sup>, the wording of Article 23(1)(d), first indent, clearly shows that an undertaking may act or “speak” (and be fined) in this context.

It must therefore be determined when the undertaking can be held to have given an “incorrect or misleading answer”<sup>175</sup> through a representative or a member of staff (and therefore be fined). One possibility in that respect would be to transpose the principles applicable to impute an employee’s acts to an undertaking in the context of a violation of Articles 81 and/or 82 of the EC Treaty (i.e., the employee’s acts are imputable to the undertaking if the former is authorised to act on behalf of the latter).<sup>176</sup> That would mean in practice that the offense defined in Article 23(1)(d), first indent,<sup>177</sup> would be imputable to the undertaking if it has been committed by a person authorised to speak on its behalf. This principle seems indeed to be implicitly reflected in Article 4(3) of Regulation No. 773/2004, which gives the undertaking under investigation the possibility of rectifying, amending or supplementing the explanations given by a member of staff “who is not or was not authorised . . . to provide explanations on behalf of the undertaking.”<sup>178</sup> The latter provision seems to suggest that, in certain circumstances, members of staff may be authorized to speak on behalf of the undertaking.

173. *Id.* art. 23(1)(d), O.J. L 1/1 (2003).

174. *Id.* art. 20(2)(e), O.J. L 1/1 (2003).

175. *Id.* art. 23(1)(d), O.J. L 1/1 (2003).

176. *See* *Musique Diffusion Française & Others v. Commission*, Joined Cases 100-103/80, [1983] E.C.R. 1825, ¶ 97; *HFB & Others v. Commission*, Case T-9/99, [2002] E.C.R. II-1487, ¶ 275.

177. *See* Commission Regulation No. 1/2003, art. 23(1)(d), O.J. L 1/1, at 16 (2003).

178. Commission Regulation No. 773/2004, art. 4(3), O.J. L 123/18 (2004). Article 4(3) reads in relevant part:

In cases where a member of staff of an undertaking or of an association of undertakings who is not or was not authorised by the undertaking or by the association of undertakings to provide explanations on behalf of the undertaking or association of undertakings has been asked for explanations, the Commission shall set a time-limit within which the undertaking or the association of undertakings may communicate to the Commission any rectification, amendment or supplement to the explanations given by such member of staff.

Commission Regulation No. 773/2004, art. 4(3), O.J. L 123/18 (2004).

Conversely, since the undertaking under investigation is not given the possibility to rectify the explanations given by “representatives,” it could be considered that the latter must normally be deemed to speak and act on behalf of the undertaking.<sup>179</sup>

Assuming that the “authorisation to speak” is a correct criterion to impute an offense to an undertaking in this context, two situations could be distinguished for the application of the privilege against self-incrimination. First, assuming that the person answering the Commission’s questions under Article 20(2)(e) is authorized to act on behalf of the undertaking (so that the undertaking is indeed “speaking”), an element of compulsion weighs on the latter pursuant to Article 23(1)(d), first indent. Since its statements could be relied upon to find an infringement of Articles 81 and/or 82 of the EC Treaty, it seems that the privilege against self-incrimination could apply to the undertaking. Accordingly, the undertaking’s “mouths” would probably be allowed not to make statements incriminating the undertaking (assuming of course that the other conditions for the application of the privilege are met). In this case, the question nonetheless arises whether the person questioned could assert the privilege for his own account when he is requested to make statements that would incriminate him under certain national laws while *not* incriminating the undertaking. However, it seems doubtful that such a situation will often arise in practice: an admission by a person who is authorised to speak in the name of an undertaking to the effect that he personally participated to a breach of Articles 81 and/or 82 of the EC Treaty will in most instances incriminate the company itself (and therefore be covered by the latter’s potential privilege).<sup>180</sup>

---

179. This principle would mirror the principle laid down in Article 18(4) of Regulation No. 1/2003 according to which replies to Article 18 requests must be supplied by “[t]he owner of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution.” Regulation No. 1/2003, O.J. L 1/1, art. 18(4) (2003).

180. Should the situation nonetheless arise, it could be argued that an element of compulsion sometimes weighs on the person under questioning: although formally only the undertaking could be fined for a lack of cooperation, the conflict of interests imposed on the person (i.e., the conflict between his duty of loyalty to the undertaking and his own protection) could be considered to amount to actual compulsion. On the other hand, individuals cannot be fined for a breach of the EC competition rules. Accordingly, no incrimination of these individuals can occur *under EC law*. As regards to the possibility that the information will be later exchanged with NCAs and used in crim-

Second, where the person questioned under Article 20(2)(e) is not authorised to speak on behalf of the undertaking, it seems difficult to acknowledge the existence of a privilege against self-incrimination, as there would be no element of compulsion weighing on the undertaking and the natural person: in particular, the natural person could not be forced to speak because no penalty could be imposed on him, as an individual, for his lack of cooperation. However, the natural person would probably enjoy a broader possibility to remain silent because the Commission would have no way of obliging him to speak.

As a consequence, *prima facie* there seems to be fairly good reasons to think that representatives or members of staff questioned under Article 20(2)(e) can refrain from making statements incriminating the undertaking.<sup>181</sup> Reality, however, remains more complex than the imagination can foresee and it will be the province of the EC Courts to settle this complex question.

### *CONCLUSION*

The very purpose of competition investigations is to create an “element of surprise.” That element undoubtedly remains instrumental for the preservation of the Commission’s ability to collect reliable evidence.<sup>182</sup> However, the importance of surprise to the discovery of truth must be balanced against the

---

inal procedures *under national law*, as explained above, based on the conditions set out in Article 12(3) of Regulation No. 1/2003 (which lays down limits on the use of exchanged information), the NCAs concerned would probably be barred from using these statements to impose criminal penalties on individuals, because (i) no criminal sanction exists for individuals under EC law; and (ii) the evidence would not have been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving NCA (all the Member States being parties to the European Convention, it is assumed that the European Convention standards preventing the self-incrimination of individuals would fully apply under the national laws). Accordingly, it seems doubtful that the person under questioning could assert any privilege in this case because in practice he could not be sentenced on the basis of such evidence.

181. *Prima facie* the same principles seem to apply, *mutatis mutandis*, to the behaviour incriminated by Article 23(1)(d), second and third indents (i.e., when in response to a question asked in accordance with Article 20(2)(e), the undertaking or association of undertakings fails to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or fails or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4)).

182. See Joshua, *supra* note 48.

probability that unlimited powers may lead the persons under investigation (including innocent ones) to irremediably impair their defense without necessarily contributing to the correctness of the decision to be adopted. For that reason, the protection of the rights of the defense against irreparable harm, a principle whose scope encompasses both legal professional privilege and the privilege against self-incrimination, should remain one of the most pervasive limitations to the powers enjoyed by the Commission during investigations. That limitation being general, it remains to be seen whether in the context of Regulation No. 1/2003 it will prompt novel limitations that were not necessary under Regulation No. 17. Now, as in 1989, it is never too late to wield the “big guns” of “constitutional” artillery.