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The Privilege against Self-Incrimination in EU Competition Law: Time for a Case Law Update?

Abstract: Since 1989, the Court of Justice of the European Union has recognised a privilege against self-incrimination for undertakings subject to public enforcement procedures on the basis of Articles 101 and 102 TFEU. That privilege forms part of the fundamental rights of the defence. Over time, the privilege has been read into Article 6 ECHR and has gained ground in other domains of EU law as well. Against that background, the question arises as to whether the CJEU's original case law in the field of EU competition law needs to be updated. This paper revisits that case law by comparing it with developments in the context of the ECHR and in other domains of EU law. It argues that, in light of those developments, a case law update may indeed prove necessary. However, such an update alone would not sufficiently address the practical difficulties currently surrounding the application of the privilege in practice. For that, more coordinated legislative action would be warranted.
Keywords: ECHR, EU competition law, fundamental rights, public enforcement, self-incrimination

Introduction

The privilege against self-incrimination implies that a suspect of a crime cannot be forced to make statements through which his/her guilt would be admitted. A fundamental right of the defence in national criminal proceedings, it has been recognised in international human rights law as well.[1] However, neither EU law nor the European Convention on the Protection of Human Rights and Fundamental Free-

1 S. Trechsel, The Privilege against Self-Incrimination, (in:) S. Trechsel, S. Summers (eds.), Human Rights in Criminal Proceedings, Oxford 2006, p. 341; Article 14, § 3(g) of the International Cov-

doms (ECHR) explicitly mentions the existence of this privilege. The absence of a verbatim reference to it has not impeded its recognition as a defence right by the European Court of Human Rights (ECtHR).[2] In addition, Article 48, § 2 of the Charter of Fundamental Rights of the European Union explicitly refers to the fact that respect for the rights of the defence of anyone who has been charged shall be guaranteed. The Court of Justice of the European Union (CJEU) has also confirmed that the privilege against self-incrimination ranks amongst those rights.[3]

Despite the explicit recognition of the privilege against self-incrimination, its scope of application remains fraught with uncertainty. Moreover, its scope seems to be different in EU competition law compared to other fields of EU law. This paper therefore questions whether the framework as established by the CJEU in 1989 can still be aligned with current requirements of the rights of the defence flowing from Article 48, § 2 of the Charter. To that extent, it first revisits the CJEU's case law on privilege in EU competition law (section 1), prior to questioning whether that case law can still hold (section 3). To answer that question, it is necessary first to analyse the case law on Article 6 ECHR and to determine to what extent it conditions the application of the privilege (section 2). Although a minor modification to the interpretative framework underlying the CJEU's case law appears preferable to make it fully aligned with human rights law, that change alone would not by itself address the many open questions affecting the privilege's scope in public enforcement of competition law. It is nevertheless submitted that even a minor judicially induced shift in the framework underlying the privilege's application could constitute a fruitful starting point for much-needed and more streamlined upgrades to the EU and Member States' public enforcement frameworks which are in place (section 4).

1. The CJEU's recognition of a privilege against self-incrimination in EU competition law

Although no explicit reference has been made to the privilege against self-incrimination, the Court of Justice has recognised it as a fundamental right of the defence. In the context of an investigation in the thermoplastics industry on the basis of Article 101 TFEU, the Orkem undertaking refused to transmit information to the European Commission, despite being forced to do so by means of a Decision.[4] Some-

enant on Civil and Political Rights, https://treaties.un.org/doc/treaties/1976/03/19760323%2006–17%20am/ch_iv_04.pdf (5.10.23).

2 Judgment of the ECtHR of 25 February 1993 on the case of *Funke v. France*, application no. 10828/84.

3 Judgment of the CJEU of 18 October 1989 on the case of *Orkem v. Commission of the European Communities*, C-374/87.

4 On the basis of Article 11(5), Council Regulation No. 17/62 implementing Articles 85 and 86 of the Treaty (O.J. 13, 21.02.1962, p. 204).

what surprisingly, the CJEU recognised that undertakings are entitled to silence in situations where they are forced to answer questions that would establish their guilt.[5] At the time, the ECtHR had not yet interpreted Article 6 ECHR as containing a right not to incriminate oneself in criminal proceedings. In addition, most Member States of the time also did not recognise this kind of privilege in punitive administrative procedures.[6]

The CJEU nevertheless also maintained that the Commission would remain entitled 'to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct'.[7] Far-reaching investigative powers are necessary in order for the Commission to effectively enforce Articles 101 and 102 TFEU.[8] The Commission cannot, however, 'compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove'.[9] Since 2011, the European Commission's Hearing Officer is called upon to oversee the respect of that procedure and may make a reasoned recommendation to the European Commission as to the privileged status of information.[10]

The privilege thus recognised has constituted the basic framework under which self-incriminating statements are dealt with in the framework of the public enforcement of Articles 101 and 102 TFEU. In that context, Recital 23 of Regulation 1/2003 confirms the Court of Justice's case law, consistently recognising that undertakings have a right not to provide incriminating information.[11] In the same way, it follows from the CJEU's case law that, when applying Articles 101 and 102 TFEU, Member States' competition authorities 'act within the scope of EU law' and hence need to respect the fundamental rights of the defence recognised in the Charter of Fundamental Rights.[12] As a result, the EU privilege against self-incrimination also applies in the

5 *Orkem*..., *op. cit.*, point 34.
6 Opinion of Advocate General Darmon of 18 May 1989, *ibidem*, points 99–125.
7 *Ibidem*, point 34.
8 *Ibidem*.
9 *Ibidem*, point 35. The Court also confirmed the same reasoning in the judgment of the CJEU of 18 October 1989 on the case of *Solvay v. Commission*, C-27/88, point 74.
10 Article 4(b) of Decision of the President of the European Commission 2011/695 of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (O.J. L 275, 20.10.2011, p. 29).
11 Recital 23 of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (O.J. L 1, 07.01.2003, p. 1); M. Veenbrink, The Privilege against Self-Incrimination in EU Competition Law: A Deafening Silence? 'Legal Issues of Economic Integration' 2015, vol. 42, no. 2, p. 132.
12 Judgment of the CJEU of 26 February 2013 on the case of *Åklagaren v. Hans Åkerberg Fransson*, C-617/10. ECLI:EU:C:2013:105, paras 20–21.

context of Member States' public enforcement procedures based on Articles 101 and 102 TFEU.

In accordance with consistent CJEU case law, the privilege against self-incrimination guaranteed in EU competition law only applies when the undertakings themselves do not wish to cooperate voluntarily.[13] When an undertaking decides to hand over incriminating information in response to a request from the European Commission without being forced to do so, the privilege does not apply.[14] In addition, the notion of information which admits guilt has been interpreted in a rather restrictive manner.[15] The Court further added that it does not extend either to pre-existing documents or pre-existing factual information aggregated into a new document.[16] Such pre-existing documents or information in the possession of the undertaking need to be handed over when obliged to do so, in order to ensure the effective enforcement of Articles 101 and/or 102 TFEU.[17]

2. The CJEU's case law in light of Article 6 ECHR

At the time when the CJEU recognised the privilege against self-incrimination in competition law, the ECtHR had not explicitly recognised this privilege, leaving its existence in limbo. Since 1993, however, the ECtHR has recognised it as forming part of Article 6, § 1 ECHR, guaranteeing the right to a fair trial.[18] In subsequent case law,

13 Judgment of the CJEU of 7 January 2004 on the joined cases of *Aalborg Portland and Others v. Commission of the European Communities*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, point 208.

14 See Article 18(2) of Regulation 1/2003; judgment of the CJEU of 25 January 2007 on the case of *Dalmine v. Commission*, C-407/04 P, point 35; judgment of the CJEU of 24 September 2009 on the joined cases of *Erste Group Bank and Others v. Commission*, C125/07 P, C133/07 P and C137/07 P, point 272; and judgment of the CJEU of 24 June 2015 on the joined cases of *Fresh Del Monte Produce and Others v. Commission*, joined cases C-293/13 P and C-294/13 P, points 195–197.

15 See judgment of the CJEU of 15 October 2002 on the joined cases of *Limburgse Vinylmaatschappij et al. v. Commission of the European Communities*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, points 273 and 292; see also judgment of the General Court of 20 February 2001 on the case of *Mannesmannröhren-Werke AG v. Commission of the European Communities*, T-112/98, points 61–67; judgment of the CJEU of 29 June 2006 on the case of *Commission v. SGL Carbon*, C-301/04 P, point 41; and judgment of the CJEU of 28 January 2021 on the case of *Qualcomm, Inc. and Qualcomm Europe, Inc. v. European Commission*, C-466/19 P, point 143. For background, see P. Willis, 'You Have the Right to Remain Silent…', or Do You? The Privilege against Self-Incrimination Following Mannesmannrohren-Werke and Other Recent Decisions, 'European Competition Law Review' 2001, vol. 22, no. 3, pp. 313–321, and A. Riley, Saunders and the Power to Obtain Information in Community and United Kingdom Competition Law, 'European Law Review' 2000, vol. 25, no. 3, p. 269.

16 See also *Qualcomm*…, *op. cit.*, point 147; M. Veenbrink, The Privilege…, *op. cit.*, pp. 132–133.

17 See also *Orkem*…, *op. cit.*, point 34.

18 *Funke*…, *op. cit.*, point 44.

it added that the privilege against self-incrimination – encompassing the right to remain silent as well as to not contribute to incriminating oneself[19] – applies to all criminal proceedings.[20] It is to be remembered in that context that the ECtHR relies on an autonomous notion of what constitutes a criminal charge.[21] Within the field of criminal charges, ECtHR case law distinguishes between 'hardcore' criminal charges and criminal charges not necessarily belonging to this hardcore. In the latter cases, which include competition law, the ECtHR accepted that criminal-head guarantees will not necessarily apply with their full stringency.[22] However, the ECtHR also stated that the privilege against self-incrimination underlying Article 6, § 1 ECHR applies in respect of all types of criminal offences, from the most simple to the most complex.[23] As a result, punitive administrative competition law enforcement procedures engaged in by ECHR states' competition authorities also have to recognise and respect that privilege. To the extent that those authorities are obliged, as a matter of EU law, to apply Articles 101 and/or 102 TFEU, that would mean that the protection offered by the privilege against self-incrimination also needs to apply in those circumstances.[24]

The privilege does not protect against incriminating statements made per se, but rather against the improper use in criminal procedures of statements or information obtained from a suspect under compulsion.[25] Compulsion implies that, in order to obtain information, individuals are forced, under threat of criminal sanctions, to hand over information or to respond to certain allegations.[26] A violation of the right not to incriminate oneself will be found when the level of compulsion used is consid-

19 On that framework, as applied principally to individuals, see Y. Daly, A. Pivaty, D. Marchessi, P. ter Vugt, Human Rights Protections in Drawing Inferences from Criminal Suspects' Silence, 'Human Rights Law Review' 2021, vol. 21, pp. 696–723.

20 Judgment of the ECtHR of 17 December 1996 on the case of *Saunders v. United Kingdom*, application no. 19187/91, point 68.

21 Judgment of the ECtHR of 8 June 1976 on the case of *Engel v. the Netherlands*, application nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, point 82.

22 Judgment of the ECtHR of 27 February 1992 on the case of *Stenuit v. France*, application no. 11895/85; judgment of the ECtHR of 27 September 2011 on the case of *Menarini Diagnostics v. Italy*, application no. 43509/08; and judgment of the ECtHR of 14 February 2019 on the case of *SA Capital Oy v. Finland*, application no. 5556/10. A. Weyembergh, N. Joncheray, Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture That Needs to Be Addressed, 'New Journal of European Criminal Law' 2016, vol. 7, no. 2, pp. 190–209.

23 *Saunders*…, *op. cit.*, point 74.

24 Judgment of the ECtHR of 30 June 2005 on the case of *Bosphorus v. Ireland*, application no. 45036/98, points 155–158.

25 Judgment of the ECtHR of 13 September 2016 on the case of *Ibrahim et al. v. United Kingdom*, application nos. 50541/08, 50571/08, 50573/08 and 40351/09, point 267.

26 Judgment of the ECtHR of 8 February 1996 on the case of *John Murray v. United Kingdom*, application no. 18731/91, point 45.

ered improper in the light of an individual's right to a fair trial.[27] In practice, ECtHR case law assesses the presence of improper compulsion on the basis of the nature and degree of compulsion used to obtain the evidence.[28] Physical or psychological pressure as well as dishonest prosecution measures can be of this nature.[29]

However, the mere fact of having obtained information under compulsion is not as such a violation of Article 6 ECHR. To arrive at that conclusion, the ECtHR requires a careful evaluation of the circumstances in which the information obtained under compulsion has been used. In that assessment, the ECtHR considers (1) the existence of any relevant safeguards in the procedure, (2) the use to which any material so obtained was put,[30] but also and more implicitly, (3) the presence of a general interest justifying compulsion in certain circumstances.[31]

At the outset, improper compulsion can only take place when information or documents are obtained that could not have been obtained 'independent from the will' of the person charged.[32] Pre-existing documents containing potentially incriminating information would be considered to exist independently from the will of the suspect, and their handing over could therefore be forced without the privilege against self-incrimination being violated.[33] However, the ECtHR does not seem to have excluded those documents from the scope of the privilege per se and at all times. In subsequent case law, it more generally proceeded with an analysis of the degree of compulsion applied to determine whether the privilege was violated. To the extent that the compulsion destroys the very essence of the privilege against self-incrimination, it violates Article 6 ECHR.[34] The analysis as to whether the very essence of the privilege is being destroyed requires a contextual and case-by-case assessment.[35]

As part of that assessment, an analysis of whether the forced transmission of pre-existing documents can be justified by an overriding public interest, rather than by the fact that those documents exist independent of the will of the suspect, could

27 By way of an example, judgment of the ECtHR of 21 December 2000 on the case of *Heaney and McGuinness v. Ireland*, application no. 34720/97, point 55.

28 *Ibidem*, points 54–55; judgment of the ECtHR of 29 June 2007 on the case of *O'Halloran and Francis v. United Kingdom*, application nos. 15809/02 and 25624/02, point 55; and judgment of the ECtHR of 10 March 2009 on the case of *Bykov v. Russia*, application no. 4378/02, point 92.

29 Judgment of the ECtHR of 1 June 2010 on the case of *Gäfgen v. Germany*, application no. 22978/05, point 163; judgment of the ECtHR of 5 November 2002 on the case of *Allan v. United Kingdom*, application no. 48539/99, point 50.

30 *Saunders*…, *op. cit.*, point 71.

31 M. Veenbrink, The Privilege…, *op. cit.*, p. 123.

32 *Saunders*…, *op. cit.*, point 69.

33 *Ibidem*, point 70. See also judgment of the ECtHR of 11 July 2006 on the case of *Jalloh v. Germany*, application no. 54810/00, point 101.

34 *Murray*…, *op. cit.*, point 49.

35 *O'Halloran and Francis*…, *op. cit.*, point 53.

justify the handing over of such documents.[36] In the context of punitive administrative procedures, the ECtHR thus accepted that individuals can still be asked to hand over pre-existing documents when the effectiveness of the application or enforcement of administrative rules would so require.[37] However, the case-by-case assessment may also conclude that pre-existing documents containing information admitting guilt do not need to be handed over, as individuals' right not to incriminate themselves would be destroyed in essence when forced to do so, given the use that is made of that information later in the procedure.[38]

In light of the foregoing overview, questions need be raised as to whether the CJEU's case law in competition law is compatible with the ECHR. That question is of some practical relevance, as Article 52, § 3 of the Charter of Fundamental Rights determines that the ECHR standard of protection needs to be met by EU law as well. Although the Charter does not as such require the CJEU to implement identical case law tests to the ECtHR, the same overall level of protection needs to be ultimately guaranteed by the EU.[39]

Just like in the context of Article 6 ECHR, the CJEU's competition law privilege against self-incrimination only applies whenever coercive action is taken by the European Commission or a national competition authority. Such coercion needs to be improper, although the CJEU does not refer to that notion explicitly. The CJEU case law allows us to conclude that coercion is improper when it takes the form of asking questions which would lead to the admission of guilt. However, the case law seems to assume that only such questions constitute improper coercion captured by the privilege. By contrast, requirements to hand over pre-existing documents that could contain information admitting guilt would not fall within the privilege. The obligation to hand over those documents is part of the undertakings' duty to cooperate with the Commission or Member State competition authority. According to the ECtHR's original case law on the matter, only information not existing independently from the will of the suspect would benefit from the privilege.[40] As a result, pre-existing documentary evidence could always be obtained by means of a warrant or other procedure.

The CJEU's approach would a priori appear to be in line with the ECtHR's original privilege against self-incrimination in case law. However, more recent ECtHR

36 Judgment of the ECtHR of 8 April 2004 on the case of *Weh v. Austria*, application no. 38544/97, point 52; *O'Halloran and Francis*…, *op. cit.*, point 56.

37 *Ibidem*, point 62.

38 *Saunders*…, *op. cit.*, point 71; *Jalloh*…, *op. cit.*, point 97; Judgment of the ECtHR of 19 March 2015 on the case of *Corbet et al. v. France*, application nos. 7494/11, 7493/11 and 7989/11, point 34.

39 In practice, this is difficult; see R. Tinière, The Use of ECtHR Case Law by the CJEU: Instrumentalisation or Quest for Autonomy and Legitimacy? 'European Papers' 2023, vol. 8, no. 1, p. 330.

40 *Saunders*…, *op. cit.*, point 69.

case law no longer refers to the 'independent of the will' condition.[41] In contrast, the ECtHR has now even indicated that the use of pre-existing documents may violate the privilege in the particular circumstances of a case.[42] To the extent that the ECtHR implicitly overruled its earlier 'independent of the will' case law, the CJEU's general exclusion of all pre-existing documents from the scope of the privilege no longer appears fully compatible with Article 6 ECHR. The latter provision would therefore seem to require a contextual, case-by-case assessment which could result in extending the privilege to pre-existing documents when relying on them would destroy the essence of the privilege. It is submitted that such an assessment would not in practice necessarily result in a wider recognition of the privilege. Rather, it would principally change the way in which enforcement authorities have to deal with claims invoking the privilege. The latter would indeed no longer be free to exclude the reliance on that privilege in general terms, as the information contained features in pre-existing documents. Even for those pre-existing documents, authorities would have to determine, in a more developed, reasoned manner and in more specific terms, why they consider the privilege to not be applicable. As a result, enforcement authorities would have to be more careful when discarding privileged information claims.

3. Towards a modified CJEU reasoning framework on the privilege against self-incrimination in EU competition law

It follows from the previous section that Article 6 ECHR seems to require, or at the very least favour, more of a case-by-case assessment of the privileged nature of pre-existing documents. By contrast, the CJEU case law in competition law still allows for a general exclusion of pre-existing documents from the scope of application of the privilege. Questions can be raised as to whether this interpretation would still be compatible with the way in which the Charter of Fundamental Rights requires the rights of the defence to be protected in the EU legal order. Such questions are even more relevant given the fact that the privilege appears to be interpreted more extensively in other fields of EU law and the fact that the CJEU has started to apply the ECtHR's reasoning framework accompanying fundamental procedural rights in the context of *ne bis in idem*.

Other fields of EU law maintain an interpretation of the privilege more aligned with Article 6 ECHR. In EU criminal law, a 2016 directive on strengthening the presumption of innocence of natural persons recognises the privilege against self-incrimination. According to the recitals of that directive, the ECHR interpretation given to that privilege serves as a starting point. The directive itself clarifies that the

41 *Ibrahim*…, *op. cit.*, point 269.

42 Judgment of the ECtHR of 10 June 2021 on the case of *Bajic v. North Macedonia*, application no. 2833/13, points 69–75.

privilege does not prevent the competent authorities from gathering evidence which may be lawfully obtained through legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons, such as pre-existing documents.[43] However, the directive does not exclude the extension of the application of the privilege to pre-existing documents.

In the same way, in EU financial law, the CJEU, in its *Consob* judgment of 2021, directly referred to and itself conformed to the most recent ECtHR case law in the context of market-abuse regulation investigations targeting individuals. According to the CJEU, '[t]he right to silence cannot reasonably be confined to statements of admission of wrongdoing or to remarks which directly incriminate the person questioned, but rather also covers information on questions of fact which may subsequently be used in support of the prosecution and may thus have a bearing on the conviction or the penalty imposed on that person'.[44] On the other hand, questions can be raised as to whether EU competition law merits a separate interpretation of the privilege against self-incrimination. CJEU case law in those fields dating from 2021 appears to confirm that approach. In *Consob*, the CJEU effectively ruled that competition law would in this respect be different from other fields of EU law.[45] That difference would be justified because the legal subjects forced to cooperate with the Commission are undertakings and not individuals, who would be entitled to more stringent protection.[46] As a result, in competition law, the duty to hand over pre-existing documents, even those containing information admitting guilt, would still be tolerated because undertakings have to cooperate with the investigation. Individuals subject to sanctions would have a wider scope to invoke the right not to incriminate themselves. Competition law would thus be able to maintain an exceptional status in EU law.

It can nevertheless be submitted that the CJEU's reliance in *Consob* on the privilege being accorded a special status in competition law, in addition to it being difficult to square with Article 6 ECHR's case-by-case assessment, is also no longer fully in line with case law on other, yet related, fundamental procedural rights for three reasons. First, the CJEU in *Consob* considered that the procedural protection of natural persons is different from the one given to undertakings. However, in reasoning in this way, the Court apparently denied that the notion of an undertaking encompasses any

43 Article 7 and Recital 29 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (O.J. L 65, 11.03.2016, p. 1).

44 Judgment of the CJEU of 2 February 2021 on the case of *DB v. Consob*, C-481/19, point 40.

45 *Ibidem*, point 47; for background to the case, see E. Hancox, The Right to Remain Silent in EU Law, 'Cambridge Law Journal' 2021, vol. 80, pp. 228–231.

46 *DB*…, *op. cit.*, point 47.

entity engaged in economic activity, which can also be a single natural person.[47] In addition, although it is true that the ECtHR has never ruled on the privilege invoked by legal persons, it cannot be denied that such persons also enjoy the right to a fair trial under Article 6 ECHR.[48] As a result, that position remains open for contestation, and it is not certain that the ECtHR would be of the same opinion.

Second, the Court implicitly seems to argue – as the Advocate General did more explicitly – that competition law merits a different regime as it falls outside the hard-core of criminal charges in the meaning of Article 6 ECHR.[49] Although the CJEU took no decision on that point, this reason seems to linger in the background as well. At the same time, however, although it is true that Article 6 ECHR does not apply with full stringency to non-hardcore criminal charges, the ECtHR has also stated that the privilege against self-incrimination applies in all kinds of criminal procedures.[50] As a result, the privilege would seem to merit the same treatment across all fields of law covered by Article 6 ECHR. By virtue of Article 52, §3 of the Charter, the meaning and scope of rights corresponding with those of the ECHR is to be the same as in the latter. As Article 6 ECHR requires the same scope of the fundamental rights of the defence to be in place in all types of procedures deemed criminal under ECHR law, it is not impossible to argue that such a coherent scope would also have to be guaranteed as a matter of EU law.

Third, in its 2022 *BPost* and *Nordzucker* judgments, the CJEU favoured a case-by-case assessment of the *ne bis in idem* protection in competition law, in line with the reasoning standard used in other fields of EU law.[51] In prior case law, the CJEU maintained that different enforcement procedures that concern the same persons and facts but protect different legal interests were not covered by *ne bis in idem*. In those judgments, however, the Court deemed such a general exclusion from the scope of *ne bis in idem* to be no longer warranted. In order to benefit from such an exclusion, enforcement authorities would have to justify more explicitly, and on the basis of specific elements of each case, why a second enforcement proceeding is justified in the case at hand. Although this is still somewhat hypothetical, it is not fundamentally impossible to imagine that this recent and more case-by-case approach towards fundamental procedural rights also foreshadows how the privilege could be interpreted

47 M. Veenbrink, The Freedom from Self-Incrimination: A Strasbourg-Proof Approach? Cases C-466/19 P *Qualcomm* and C-481/19 P *DB v Consob*, 'Journal of European Competition Law & Practice' 2021, vol. 12, no. 10, p. 752.

48 By way of example, see the judgment of the ECtHR of 14 February 2019 on the case of *SA-Capital-OY v. Finland*, application no. 556/10, points 66–75.

49 Opinion of Advocate General Pikamaë of 27 October 2020 on the case of *DB… op. cit.*, point 109.

50 *Saunders…*, *op. cit.*, point 74.

51 Judgment of the CJEU of 22 March 2022 on the case of *BPost v. Autorité de la concurrence*, C-117/20, point 35; judgment of the CJEU of 22 March 2022 on the case *Bundeswettbewerbsbehörde v. Nordzucker* et al., C-151/20, point 40.

by the CJEU in the near future. Not unlike *ne bis in idem*, the CJEU established its protective standards in terms of the privilege long before it became a more developed procedural right in other fields of EU law. In the same way, the CJEU's competition law *ne bis in idem* approach has relied on general categories of dual enforcement situations which do not give rise to *ne bis in idem* protection. It cannot be excluded, therefore, that the CJEU, when confronted with a claim based on the privilege against a self-incrimination claim in the context of Articles 101 and 102 TFEU, would be inclined to favour a similar case-by-case assessment of the privileged nature of pre-existing documents.[52]

4. A fresh start for much-needed and more structural streamlining of the privilege within the current public enforcement framework?

On the basis of the foregoing observations, it would not be impossible to argue that the CJEU's case law on the scope of the privilege against self-incrimination in competition law could benefit from a modified interpretative framework. In such a new framework, more akin to the interpretation currently underlying Article 6 ECHR, a more careful and case-by-case assessment would be required in determining whether information, including information featured in pre-existing documents, is privileged for the purposes of the public enforcement of EU competition law.

In practice, however, an interpretative framework updated in this way would not by itself fundamentally change the application of the privilege in competition law investigations. Pre-existing documents could still be excluded from its scope, yet only when the overriding reason, that the effective enforcement of Articles 101 and 102 TFEU requires undertakings to actively cooperate with enforcement authorities and to provide them with all relevant information, can successfully be invoked in the public interest in the case at hand. Enforcement authorities would no longer be able to simply assume this and would be required to justify their reliance on pre-existing documents more explicitly. In every case, they would have to clarify and justify why this overriding interest is at stake and why pre-existing documents have to be handed over. It is therefore to be expected that, with this approach, the privilege will at the very least give rise to more and fresh litigation with regard to the assessments carried out by authorities.

Despite the fact that the practical relevance of a case law update envisaged here would seem limited, we believe that it may constitute the much-needed starting point to address the fundamental uncertainties surrounding the application of the privilege. Those questions emerge in the particular context of enforcement powers for

52 P. Van Cleynenbreugel, *BPost* and *Nordzucker*: Searching for the Essence of *Ne Bis in Idem* in European Union Law, 'European Constitutional Law Review' 2023, vol. 18, no. 3, pp. 367–368.

EU competition law shared between the European Commission and Member States' competition authorities. Indeed, despite consistent case law on the privilege to avoid self-incrimination in the framework of Commission-led enforcement procedures, three remaining open questions surrounding the privilege remain. Those questions remain unaddressed in Regulation 1/2003 and the more recent Directive 2019/1.[53]

First, in its current setup, the privilege under EU law applies only to undertakings. Individuals or workers employed by an undertaking cannot be coerced, by means of sanctions based on Articles 101 and 102 TFEU, into confessing infringements of those provisions. As a result, they are ineligible to benefit from the right to avoid self-incrimination and are therefore a priori obliged to provide statements admitting guilt to the enforcement authorities. By contrast, in national competition law cases where those individuals could be fined themselves, they would benefit from such a right. It remains at present uncertain whether and to what extent the privilege therefore also extends to individuals working for or in the undertaking concerned when a competition authority applies both EU and national competition laws in parallel.[54] A harmonised approach is missing in that respect.

Second, the CJEU has in the past only annulled parts of a decision requesting information and containing questions which may lead to an admittance of guilt.[55] It remains unclear, however, what the impact would be if a final decision finding an infringement of Articles 101 and/or 102 TFEU were to be adopted, in violation of the right to avoid self-incrimination. It cannot be excluded that the decision would be annulled (in part) for failure to comply with an essential procedural requirement. Annulling such a decision would not undo the harm done, which raises the question as to whether other compensation mechanisms should be envisaged in that situation. In practice, that question has been sidelined to some extent by the designation, at European Commission level, of a Hearing Officer responsible for evaluating breaches of procedural rights during the Commission enforcement procedure.[56] At Member State level, however, authorities often function differently, if only to already comply with the ECN+ Directive, leaving open the question of how privilege claims are to be assessed. So far, the CJEU's case law has seemingly not caught up with the changed public enforcement context triggered by Regulation 1/2003 and the ECN+ Directive.

53 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (O.J. L 11, 14.01.2019, p. 3).

54 B. Vesterdorf, Legal Professional Privilege and the Privilege against Self-Incrimination in EC Law: Recent Developments and Current Issues, 'Fordham International Law Journal' 2004, vol. 28, no. 4, pp. 1212–1214.

55 *Orkem*…, *op. cit.*, point 42.

56 W. Wils, The Role of the Hearing Officer in Competition Proceedings before the European Commission, 'World Competition' 2012, vol. 35, no. 3, pp. 431–456.

Third, the ECN+ Directive requires Member States to have leniency programmes in place, through which incriminating information is to be provided in return for immunity from or reduction of fines that may ultimately be imposed.[57] Although the Directive mentions the confidentiality and limited use of such incriminating information,[58] the link between the scope of the privilege and the obligation to provide for leniency applications remains underdeveloped. As a result, Member States risk continuing to rely on their national law standards and interpretations of the privilege against self-incrimination, which may result in diverging enforcement decisions being taken.

It could be imagined that, should the CJEU require enforcement authorities to adopt more reasoned decisions accepting or rejecting the privilege against self-incrimination, more litigation on those issues will follow. Such litigation could not only highlight the limits of the privilege outlined here but also serve as a trigger for much needed harmonised practices – through European Competition Network (ECN) guidelines or EU harmonising legislation. The open questions surrounding the privilege against self-incrimination summarised above show, moreover, that even without CJEU adaptations, the need for more clarity as to the scope and application of the privilege against self-incrimination requires streamlining amongst the different authorities tasked with the public enforcement of Articles 101 and 102 TFEU. At present, and without at least some nudging by the CJEU, the prospects of such coordination taking place spontaneously remain remote.

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57 Article 17 of Directive 2019/1.

58 Recital 72 of Directive 2019/1.

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