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Guest lecture programme

The privilege against self-incrimination in competition investigations

Speaker's notes

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Introduction

1. Undertakings under investigation by the members of the European Competition Network enjoy a number of rights. These rights include the privilege against self-incrimination – the right not to be compelled to incriminate oneself. This paper, which should not be relied upon as legal advice, explores the development and the current scope of the right. The law is stated as at 25 January 2006.

The *Orkem* principle

2. The privilege first made an appearance in EU competition law in Case 374/87 *Orkem v Commission*.[1] In view of the subsequent unwillingness of the CFI to depart from the *Orkem* formulation, it is worth examining the judgment in some detail.

3. Orkem challenged a Commission decision requesting information under the predecessor to Regulation 1/2003.[2] It argued that the Commission had infringed the general principle that no one may be compelled to give evidence against himself. According to Orkem, the principle forms part of Community law, as a principle upheld, in particular, by Article 6 of the European Convention on Human Rights (ECHR).[3]

4. The Court noted that Regulation 17 (like Regulation 1) contained no express right to remain silent. Significantly, it confirmed that Article 6 of the Convention could be relied upon by "an undertaking subject to an investigation related to competition law".[4] However, it did not consider that the wording of Article 6 or the case law of the ECHR indicated the existence of a right not to give evidence against oneself.

5. Having dismissed the concept of a right not to incriminate oneself under Article 6 of the Convention, the Court then went on to consider whether Community law imposes certain limitations on the Commission's powers of investigation.

6. The Court concluded, at paragraphs 34 and 35, that:

> "while the Commission is 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, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned.
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> Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove."

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1 Case 374/87 *Orkem v. Commission* [1989] ECR 3283.

2 Regulation 17, Article 11(5).

3 Article 6 of the ECHR provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty."

4 *Orkem*, at paragraph 30.

7. The Court then examined the questions posed by the Commission. Applying the principles developed, it concluded that the following questions were permitted:

- questions relating to meetings of producers intended only to secure factual information on the circumstances in which the meetings were held and the capacity in which the participants attended them;
- a requirement to disclose documents relating to those meetings; and
- questions relating to the subject matter and implementation of measures taken in order to determine and maintain a satisfactory price level.

8. It concluded that the following questions were not permitted:

- questions relating to the purpose of the action taken and the objectives pursued;
- a request for clarification on every step or concerted measure which may have been envisaged or adopted to support the price initiatives;
- a request for details of any system or method which made it possible to attribute sales targets or quotas to the participants; and
- a request for details of any method facilitating annual monitoring of compliance with any system of targets in terms of volume or quotas.

9. By this second group of questions, said the Court, the Commission was essentially seeking an acknowledgement of Orkem's participation in an infringing agreement.

Funke

10. The *Orkem* principle was first called into question by the judgment of the European Court of Human Rights (ECtHR) in *Funke v. France*.[5]

11. French customs officers, having found certain documents at Mr Funke's house, requested him to produce further specified documents. Having initially said that he would do so, Mr Funke declined to produce them. When sentenced to pay a periodic penalty for non-production, he claimed that Article 6(1) of the Convention entitled him not to produce the documents. The ECtHR agreed with Mr Funke, holding that there had been an infringement of Article 6.

12. The ECtHR noted 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.[6] 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. The special features of customs law… cannot justify such an infringement of the right of anyone "charged with a

5 *Funke v. France* (1993) 16 EHRR 297.

6 This observation is difficult to reconcile with the fact the customs officers had identified the bank statements and other documents that they required, and that Mr Funke had apparently initially agreed to produce them.

> criminal offence",[7] within the autonomous meaning of this expression in Article 6(1) to remain silent and not to incriminate himself."

13. The ECtHR held that it was unnecessary to consider whether Mr Funke's conviction also contravened the presumption of innocence in Article 6(2).

14. *Funke* therefore cast doubt on the ECJ's assertion in *Orkem* that Article 6 of the Convention does not uphold "the right not to give evidence against oneself." If *Funke* was correctly decided, Article 6 ECHR seemed to allow an undertaking[8] under investigation by the competition authorities not only to decline to provide directly incriminating information, but also to decline to produce documents and purely factual information. However, that is a big "if", in the light of the subsequent judgment in *Saunders v. UK*.[9]

Saunders

15. The Secretary of State appointed inspectors, with the power to compel the production of documents and the provision of information, to look into irregularities in the Guinness takeover of Argyll. The inspectors' file was passed to the Crown Prosecution Service. At Mr Saunders' trial for theft and conspiracy, the prosecution relied heavily on the transcripts of his evidence to the DTI inspectors to refute the evidence which he gave at trial. Mr Saunders was convicted and applied to the ECtHR on the grounds that the use made at his trial of evidence given to the DTI inspectors under their compulsory powers deprived him of the right to a fair trial, contrary to Article 6(1) of the ECHR.[10]

16. The ECtHR held that the exercise of the inspectors' powers did not infringe Article 6, because their function was essentially investigative rather than adjudicative. The ECtHR was therefore concerned only with the use made of the statements at trial.[11] It held, at paragraphs 68 and 69:

> "The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention.
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> The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly

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7 Including competition law infringements capable of punishment by a significant penalty: *Öztürk v Germany* (1984) 6 HRR 409; *Société Stenuit v. France* (1992) 14 EHRR 509

8 Query whether an officer of a company required to provide an explanation of a document is entitled to claim the privilege: he will not incriminate himself but the company by producing it. In *Peterson Sarpsborg AS v. Norway*, the European Commission on Human Rights raised, but did not examine further, the question of 'whether or to what extent [companies under investigation] can incriminate themselves through statements made by their employees.' Realistically, however, an undertaking can act only through its agents and employees and if it is to enjoy the protection of the Convention, the privilege must extend to statements made on its behalf. This also appears to be recognised by the OFT in "Powers for investigating criminal cartels – a consultation paper", OFT 505, April 2003, where it confirms (at paragraph 4.3) that answers to questions posed during a compulsory interview under section 193 EA 2002 would not be used as evidence in CA 1998 proceedings against the individual's employer.

9 *Saunders v. UK* (1997) 23 EHRR 313.

10 See also *IJL, GMR and AKP v. UK*, judgment of 19 September 2000, in which other Guinness defendants successfully argued infringement of Article 6 in their trials.

11 Contrast *Funke*, where the ECtHR held that the infringement of Article 6 lay in the compelled production, not in any subsequent use of the documents.

> understood in the legal systems of the Contracting parties to the Convention and elsewhere, 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 samples for the purpose of DNA testing.
>
> In the present case the Court is only called upon to decide whether the use made by the prosecution of the statements obtained from the applicant by the inspectors amounted to an unjustifiable infringement of the right."

17. The Court also concluded that the right not to incriminate oneself is not confined to "statements of admission of wrongdoing or to remarks which are directly incriminating" but also to "exculpatory remarks or mere information on questions of fact". Even if not directly incriminating, the information, according to the ECtHR, was "used in the course of the proceedings in a manner which sought to incriminate the applicant".[12]

18. The judgment in *Saunders* therefore distinguishes between:

- material obtained through the use of compulsory powers but "having an existence independent of the will of the accused" which is not covered by the right not to incriminate oneself. This category includes documents seized under a warrant or required to be produced; and

- material obtained through methods of coercion or oppression in defiance of the will of the accused, which is covered by the privilege. This would include requirements both to provide explanations of documents produced[13] and to provide information.[14]

19. It will be noted that *Saunders* is wider than *Orkem*, in that it permits a person to decline to provide not only directly incriminating information, but also exculpatory remarks and factual information. However, it is narrower than *Funke*, in that it does not entitle a person to withhold documents.[15]

20. The *Saunders* rationale, that the prosecution must seek to prove its case "without resort to evidence obtained through coercion or oppression in defiance of the will of the person charged" was also applied in *Servès v. France*.[16] However, in *Heaney and McGuinness v. Ireland*,[17] the ECtHR held that a compulsion to account for one's movements under Irish anti-terrorism legislation infringed Article 6(1) even where the statement could not be used in evidence in a criminal trial (so the *Saunders* rationale did not apply). The compulsion "destroyed the very essence of [the accused's] privilege against self-incrimination and their right to remain silent."

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12 Section 434(5A) of the Companies Act 1985 now provides, in response to the *Saunders* judgment, that answers provided to DTI inspectors may not generally be used as evidence in subsequent criminal proceedings against the person providing the information. This principle is also applied in the cartel provisions of the EA 2002 – see paragraph 60 below.

13 Regulation 1, Article 20(2)(e).

14 Regulation 1, Article 18.

15 See the dissenting judgment of Judges Martens and Kuris in *Saunders*, inferring from the majority judgment that "contrary to *Funke* - the privilege does not comprise the power to refuse to hand over incriminating documents nor that to prevent the use of such documents, obtained under compulsion, in criminal proceedings."

16 (1999) 28 EHRR 265.

17 Judgment of 21 December 2000.

21. The ECtHR also seems to have reverted to the *Funke* position in *JB v. Switzerland*,[18] a case, like *Funke*, involving the imposition of fines by tax authorities on a taxpayer who refused to provide information on his financial affairs. The ECtHR specifically distinguished the documents at issue from the material referred to in *Saunders* having "an existence independent of the will of the accused" and therefore not obtained "by means of coercion and in defiance of the will of the accused". It held that the repeated requests for information from the tax authorities were oppressive and violated his right not to incriminate himself.

22. Attempting to draw out from the apparently conflicting case-law a common principle of self-incrimination in relation to requirements to produce documents, Guy Stessens[19] argued that ultimately the purpose underlying the judgments in *Saunders* and *Funke* is the prevention of "fishing expeditions" by the authorities. He argued that a requirement to produce documents falls foul of the privilege only where it gives the authorities access to documents to which they would otherwise have had no access. He referred to the case law of the US Supreme Court, which held in *Fisher v. United States* that:

> "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating.
>
> …
>
> A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications."[20]

23. The rationale in *Fisher* is clearly close to that in *Saunders*.

24. However, in the US, where compliance with a requirement to produce a document *does* have a testimonial element, the Fifth Amendment privilege will attach. So in *United States v. Doe*, the Court of Appeals, upholding the finding of the District Court, had determined that the act of producing the documents would involve testimonial self-incrimination:

> "we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist - or that the appellee even is somehow connected to the business entities under investigation - is attempting to compensate for its lack of knowledge by

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18 Application No 31827/96, judgment of 3 May 2001.

19 "The obligation to produce documents versus the privilege against self-incrimination: human rights protection extended too far?" Stessens (1997) 22 ELRev Checklist No 1.

20 *Fisher v. United States* 425 US 391 (1976) at 408, 409.

> requiring the appellee to become, in effect, the primary informant against himself."[21]

25. The Supreme Court held:

> "A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect… Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena… In *Fisher*, the Court explored the effect that the act of production would have on the taxpayer and determined that the act of production would have only minimal testimonial value and would not operate to incriminate the taxpayer." Unlike the Court in *Fisher*, we have the explicit finding of the District Court that the act of producing the documents would involve testimonial self-incrimination."[22]

26. It should therefore be noted in passing that where justified by the facts, arguments based on *Doe* may be of assistance in extending the scope of the rule in *Saunders*.

27. Mr Stessens noted the similarity between the wording of *Doe* and the wording of *Funke* to deduce that the "no fishing" rule is the basis for the privilege, as applied by the ECJ and the ECtHR.[23] In contrast, Tim Ward and Piers Gardner[24] sought to reconcile the conflicting ECtHR judgments by reference to the question of whether the information might incriminate the person from whom it was requested in pending or anticipated criminal proceedings.

28. However, neither of these rationales really explain the conflicting treatment of documentary requests in *Funke* and *Saunders,* or address *Orkem*, where the ECJ placed no limitation on requests for documents, or *Saunders*, where the production of documents was not in issue. It is submitted that the basis supported by the case law is the rationale set out in *Saunders* and followed in *Servès,* namely that what is offensive is the use of material that the accused is compelled to produce for the purpose and that does not already exist. [25]

Mannesmannröhren-Werke

29. The extent of the right of privilege against self-incrimination following *Orkem*, *Funke, Saunders* and *JB* is therefore not entirely clear. What is clear is that, as a matter of Convention law, *Orkem* is no longer good law, whether under *Funke* or *Saunders*.

30. It had been hoped that the CFI, having side-stepped the issue in *PVC,*[26] would move away from *Orkem* when given a clear opportunity to do so in *Mannesmannröhren-*

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21 Quoted in the judgment of the Supreme Court, note 22 below.

22 *United States v. Doe* 465 US 605, at 613.

23 But see footnote 6 above. The request in *Doe* was very much wider: in addition to requests for specified documents, one of the subpoenas apparently requested 28 broad categories of business documents relating to one of the companies concerned and does seem to have been little more than a "fishing expedition".

24 "The Privilege against Self-Incrimination under the ECHR" [2003] Competition Law 200.

25 See, on this and other issues, "*Saunders* and the power to obtain information in Community and United Kingdom competition law" Riley (2000) EL Rev June, 264.

26 Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV and others v. Commission* [1999] ECR-II 931.

Werke v. Commission,[27] a direct challenge to a decision under Regulation 17, Article 11 (the predecessor of Regulation 1, Article 18).

31. In 1997, as part of its investigation into a suspected cartel involving producers of seamless steel tubes,[28] the Commission had written to Mannesmann to request information on Mannesmann's alleged participation in several meetings, and about agreements it had entered into. When, on legal advice, Mannesmann declined to answer a number of the questions, the Commission issued a decision ordering Mannesmann to supply the information, on penalty of a daily fine of €1000. Mannesmann applied to the CFI for annulment of the Commission's decision. It argued not only that the questions went beyond what was permitted under *Orkem*, but also that the decision infringed Article 6 of the ECHR, on the grounds that the Commission was required to observe Convention rights and that Commission proceedings were criminal within the meaning of Article 6 of the Convention. Mannesmann, citing *Funke*, noted that Article 6 afforded greater protection than that given under *Orkem*. Interestingly, however, it is not reported as having cited *Saunders*.

32. In response, the Commission argued that:

- the ECtHR has never held that the privilege against self-incrimination applies in competition proceedings;
- the ECtHR has never held that the privilege against self-incrimination benefits legal persons (to which EU competition proceedings apply);
- the privilege has been upheld only in the context of criminal law in the strict and traditional sense of the word, ie. in the context of proceedings resulting in possible imprisonment; and
- it is not a tribunal to which Article 6 of the Convention applies.

33. As a preliminary point, the CFI observed that it is not competent to assess the legality of an investigation relating to competition in the light of the provisions of the Convention, insofar as those provisions do not in their own right form part of Community law. It cited its judgment in *Mayr-Melnhof v. Commission*, in which it "recalled" that the ECJ at paragraph 30 of *Orkem* had not said that Article 6 of the Convention applies to administrative proceedings before the Commission, but had merely considered the possibility of its application in that case.[29] This is somewhat disingenuous: as noted above, the ECJ in fact said in *Orkem* that Article 6 "may be relied upon by an undertaking subject to an investigation relating to competition law".[30] Admittedly the ECJ did not expressly refer to Commission competition investigations, but it is submitted that if Article 6 applies to some competition investigations, the principle holds good for all.

34. The CFI noted that fundamental rights form an integral part of the general principles of Community law. The Court draws its inspiration from constitutional traditions common to the Member States and from international human rights instruments to which

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27 Case T-112/98 *Mannesmannrőhren-Werke v. Commission* [2001] ECR-II 729.

28 The infringement decision was issued in December 1999 and published in [2003] OJ L140.

29 Case T-347/94 *Mayr-Melnhof v. Commission* [1998] ECR II-1751, at paragraph 310.

30 Note also that In *Stes Colas Est and Others v. France* Application No 37971/97 [2002] ECHR 421, the ECtHR confirmed that Article 8 ECHR protects the privacy not only of individuals, but also of businesses. It also held that an on-site investigation carried out by the French competition authorities without a prior judicial order infringed the applicant's Article 8 rights.

Member States are party. The Convention has a particular significance. Furthermore, Article 6(2) EU expressly provides that the EU must comply with fundamental rights guaranteed by the Convention.

35. The Court then repeated its observation in *Orkem* that Regulation 17 contained no express right to silence, and that it was therefore necessary to consider whether certain limitations on the Commission's powers were necessary in order to preserve the rights of the defence. It also noted that a right to silence would constitute an unjustified hindrance to the Commission's performance of its tasks.

36. The CFI then held that some of the questions asked by the Commission went further than permitted under *Orkem*. These were requests for a description of the object of the meetings and of decisions adopted during those meetings, where Mannesmann was unable to provide written evidence such as minutes. They were not purely factual questions, and effectively required Mannesmann to admit participation in a cartel. Similarly, the Commission's request for a description of the relationship between a series of agreements and the decisions adopted at the various meetings went further than the merely factual, required an analysis of the nature of the agreements and therefore contravened the *Orkem* principles. To that extent, the judgment provides a useful illustration of the *Orkem* principles.

37. However, the Court dismissed Mannesmann's arguments based on Article 6 of the ECHR, with the following comment:

> "As for the arguments that Article 6(1) and (2) of the Convention allow the addressee of a request for information not to reply to questions, even if purely factual, and to refuse to produce documents to the Commission, it is sufficient to note that the applicant may not rely directly on the Convention before the Community courts".

38. This appears to be a development of the CFI's preliminary point based on *Mayr-Melnhof*, mentioned above. What the CFI seems to be saying is that whereas the Convention itself forms part of Community law (as a general principle of law and by virtue of Article 6(2) EU), applicants may not rely on the ECtHR's interpretation of Convention rights before Community courts. For these purposes, Convention rights therefore mean what the CFI, not the ECtHR, says that they mean. If that is so, the CFI's position is surely at odds with the spirit of both *Orkem* and Article 6(2) EU.

39. It is therefore hard to escape the conclusion that the CFI had moved the goal-posts: before the ECtHR held Article 6 of the Convention to confer a right of silence in *Funke* and *Saunders*, the ECJ was prepared to concede that Article 6 applied to competition proceedings; once the ECtHR held Article 6 to include that right, the CFI held that Article 6 did not apply.

Application by national courts

40. National competition authorities must assist the Commission where an investigation ordered by decision is opposed.[31] This may include seeking an order from the relevant national court, which may even be sought on an anticipatory basis.[32] The involvement of the national courts raises the question to what extent a national court can exercise control over the investigative process. In *Hoechst*, the ECJ held[33] that:

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31 Regulation 1, Article 20(6) to (8).

32 Regulation 1, Article 20(7)

33 At paragraphs 33 to 35.

> "it is for each Member State to determine the conditions under which the national authorities will afford assistance to the Commission's officials. In that regard, the Member States are required to ensure that the Commission's action is effective, while respecting the general principles set out above. *It follows that, within those limits, the appropriate procedural rules designed to ensure respect for undertakings' rights are those laid down by national law* (emphasis added).
>
> Consequently, if the Commission intends, with the assistance of the national authorities, to carry out an investigation other than with the cooperation of the undertakings concerned, it is required to respect the relevant procedural guarantees laid down by national law.
>
> The Commission must make sure that the competent body under national law has all that it needs to exercise its own supervisory powers. It should be pointed out that that body, whether judicial or otherwise, cannot in this respect substitute its own assessment of the needs for the investigations ordered for that of the Commission, lawfulness of whose assessments of fact and law is subject only to review by the Court of Justice. On the other hand, it is within the powers of the national body, after satisfying itself that the decision ordering the investigation is authentic, to consider whether the measures of constraint envisaged are arbitrary or excessive having regard to the subject-matter of the investigation and to ensure that the rules of national law are complied with in the application of those measures".

41. Although a national court called upon to issue a warrant in support of a Commission investigation is therefore not permitted to query the need for the investigation, it is, according to *Hoechst*, permitted to ensure that national procedural safeguards are satisfied in the conduct of that investigation. These national procedural safeguards would be of particular interest if they conferred a greater degree of protection than those recognised by the CFI. They might do so if a national court considered itself bound, on the interpretation of the Convention, by the case-law of the ECtHR rather than that of the Luxembourg courts.

42. However, the opinion of Mischo AG in *Roquette*[34] indicated a rather less protective attitude than that spelt out in *Hoechst*. The Advocate-General concluded[35] that the "procedural guarantees laid down by national law", referred to in *Hoechst*, were merely the national rules designating the competent court and the form in which the court must adopt its decision.

43. Although Mischo AG went on to express the opinion that the national judge could, if permitted by national law, attend the investigation and ensure that any coercive measures were not taken arbitrarily or to excess, and that the undertaking was aware of its rights to legal advice and not to incriminate itself, it appears that he saw the role of the national court as being merely to ensure that the correct formalities are observed, rather than to impose or guarantee *substantive* procedural safeguards (what would be termed "high-level principles" in the context of the UK Competition Act 1998). This formulation seems to allow no scope for more protective national rules on self-incrimination, the scope of a search or legal privilege.

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34 Case C-94/00 *Roquette Frères SA v. DGCCRF* [1992] ECR I-721.

35 Opinion of 20 September 2001, at paragraph 100. The apparent change of attitude is emphasised by the fact that Mischo AG had also delivered the opinion in *Hoechst*.

44. In its judgment in *Roquette*, the Court seems to have attributed a rather more substantive role to the national court and to the national procedural guarantees than the Advocate-General. It specifically referred, at paragraph 52 of its judgment, to case-law of the ECtHR.[36] However, the national procedural guarantees now seem to have been subsumed into the national court's review of whether the Article 20 measures are arbitrary or disproportionate, in other words, whether the issue of a judicial warrant is justified by the likely seriousness of the matter being investigated.

45. This also seems to be the attitude of the Commission. Regulation 1, Article 20(8), provides that:

> "the lawfulness of the Commission Decision [ordering an investigation] shall be subject to review only by the Court of Justice. The power of review of the national court shall extend only to establishing that the Commission decision is authentic and that the enforcement measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. The national court may not review the necessity for the inspection or require information other than that set out in the Commission Decision".

46. In its explanatory memorandum, the Commission claims that Article 20(8) codifies the *Hoechst* case law. However, it omits any reference to "national procedural safeguards". The Commission's view therefore seems to be that national courts may not apply ECHR principles so as to interfere with Commission investigations.

R v. Herts CC, ex parte Green

47. The February 2000 judgment of the House of Lords in *R v. Hertfordshire County Council, ex parte Green Environmental Industries Ltd and another*[37] shed light on the issue from the UK perspective.

48. The case arose under the Environmental Protection Act 1990 (EPA). The Council requested, under s71(2) EPA, information on certain clinical waste which it had found on the applicant's site. Green applied for judicial review of the request, claiming privilege against self-incrimination. The EPA implements the EC Waste Framework Directive 91/156, and so the applicant argued that section 71(2) should be interpreted in accordance with EC principles, including the human rights principles derived from the Convention and applied by the ECJ, and in particular the privilege against self-incrimination in Article 6(1) of the Convention.

49. To some extent the question was academic, because Green and its director Mr Moynihan had already been convicted of offences under the EPA without the Council having to obtain answers to any of its questions. However, Green and Mr Moynihan could still face prosecution for the failure to provide the information, if (as it in fact did) the House of Lords concluded that the privilege did not apply.

50. Lord Hoffmann gave the main opinion. He pointed out that a judge at a criminal trial under the EPA would have to consider whether Article 6(1) ECHR required him to exercise his discretion to exclude any evidence resulting from answers given in response to section 71(2). However, that did not address the question of whether the privilege could be claimed in the context of the exercise of the Council's investigative powers.

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36 Among the cases it referred to were *Funke*, and *Colas Est*, both of which concerned substantive, as opposed to merely procedural, safeguards against the exercise of official power.

37 [2000] 1 All ER 773.

51. Lord Hoffmann pointed out that the purpose of the investigative powers under both the EPA and the Companies Act 1985 was wider than that of merely securing evidence to mount a prosecution. In the case of the EPA, the purpose was "the broad public purpose of protecting the public health and the environment". He quoted the first extract from *Saunders* above, and then went on to say:

> "Thus the European jurisprudence under Article 6(1) is firmly anchored to the fairness of the trial and is not concerned with extra-judicial inquiries. Such impact as Article 6(1) may have is upon the use of such evidence at a criminal trial. Although it is true that the council, unlike the DTI inspectors, has power to prosecute in criminal proceedings, I do not think that the request for information under s71(2) could be described as an adjudication 'either in form or in substance'. Saunders' case is therefore no authority for allowing Green and Mr Moynihan to refuse to answer."

52. But of course the role of the competition authorities differs considerably from that of the DTI inspectors in *Saunders* or of the Council in its investigative role in *ex parte Green*. The purpose of their investigations is to secure evidence for an infringement decision resulting in the imposition of heavy fines. Their purpose can therefore be said to be adjudicative, or "criminal" within the autonomous meaning of Article 6(1), rather than merely investigative.[38] On this basis, the *Saunders* principle can be argued to apply not only to the use of statements in criminal proceedings before the courts, but also to their use in a single procedure comprising both investigative and adjudicative functions.

53. In *OFT v. X*,[39] the English High Court considered, in the context of an application for a search warrant under section 28 of the CA 1998, whether Article 6 ECHR restricted the OFT's right to require the production of documents and to require explanation of those documents. Morison J held that the right under Article 6 was not absolute, and that the position of the undertakings concerned was protected by the requirement that the OFT seek a warrant, the ability to refuse to answer incriminating questions, the right to legal advice and the ability to apply to the court for relief. Contrary to *Saunders*, however, he expressed the view that the privilege would not be infringed by purely factual questions.

The latest round – the CFI's judgment in *Graphite Electrodes*

54. In *Graphite Electrodes*[40], the CFI seems to have reversed its *Orkem* position. The CFI was considering an appeal by SGL Carbon AG against a decision of the Commission fining it €80.2 million for its part in the graphite electrodes cartel. One of SGL's arguments was that the Commission had given it insufficient credit for having voluntarily provided information. The Commission argued that SGL had provided the information in response to a request for information under the predecessor of Article 18 of Regulation 1, that the information was therefore not provided voluntarily and that SGL should therefore not be entitled to a reduction in the amount of the fine imposed on it. The CFI noted that the ECJ had not changed its position in the light of *Funke*, *Saunders* and *JB v. Switzerland*. It confirmed that the requirement to answer purely factual questions and to produce documents already in existence does not infringe the rights guaranteed by Article 6. Confusingly, however, the CFI then noted, at paragraphs 407 to 409:

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38 As acknowledged by the European Commission on Human Rights in *Société Stenuit v. France* (see note 8 above).

39 *OFT v. X* [2003] EWHC 1042 (Comm); [2003] All ER (D) 167.

40 Cases T-236, 239, 244, to 246, 251 and 252/01 *Tokai Carbon Co Ltd and others v. Commission*, judgment of 29 April 2004, not yet reported in ECR.

> "…in addition to the purely factual questions and the requests to produce documents already in existence, the Commission requested SGL to describe the object of and what occurred at a number of meetings in which SGL participated and also the results/conclusions of those meetings, when it was clear that the Commission suspected that the object of the meetings was to restrict competition. It follows that a request of that nature was of such a kind as to require SGL to admit its participation in an infringement of the Community competition rules.
>
> The same applies to the requests for the protocols of those meetings, the working documents and the preparatory documents concerning them, the handwritten notes relating to them, the notes and the conclusions pertaining to the meetings, the planning and discussion documents and also the implementing projects concerning the price increases put into effect between 1992 and 1998.
>
> As SGL was not required to answer questions of that type in the request for information of 31 March 1999, the fact that it none the less provided information on those points must be regarded as voluntary collaboration on the part of the undertaking apt to justify a reduction in the fine under the Leniency Notice."

55. It is not clear on what grounds the CFI distinguished between the protocols and other documents referred to above and "documents already in existence", to which, clearly with *Saunders* in mind, it had ruled that the privilege did not apply. However, the Commission took the view that the CFI had wrongly extended the privilege to cover pre-existing documents, and appealed to the ECJ.[41]

***Graphite Electrodes* – Advocate-General's Opinion**

56. At the time of writing, the ECJ had not given judgment on the Commission's appeal. However, an indication of the likely outcome[42] can be found in the Opinion of Advocate-General Geelhoed, delivered on 19 January 2006. For the first time following the ECtHR case-law referred to above, the Opinion provides a proper analysis by the European Court of the substance of the privilege.

57. Geelhoed AG first confirmed that the key issue was the CFI's distinction between the pre-existing documents, production of which could be required and would not therefore be treated as voluntary co-operation, and the protocols and other documents whose production could not be required.

58. The Advocate-General first expressed the view that the CFI's assessment was wrong for three reasons:

- the CFI failed to address the distinction in the case-law between documents and answers to questions;
- the CFI's reasoning was inherently contradictory – it restated the principle set out in *Orkem* and *Mannesmannröhren-Werke* but then went against it, without providing any reasons.

  There is no reason to depart from *Orkem* in the light of the more recent ECtHR case-law. The case-law of the Strasbourg court is concerned with classical criminal procedures against individuals, and it is not possible simply to

41 Case C-301/04P *Commission v. SGL Carbon Co Ltd*, notice of appeal at 2004 OJ C262, p.13.

42 Although not obliged to do so, the ECJ usually follows the Opinion of the Advocate-General.

transpose this to procedures involving undertakings. Other jurisdictions similarly reserve the right to individuals. The ECtHR extends certain rights to companies, but these rights may be more limited than those enjoyed by individuals.[43] What is decisive, however, is that under *Saunders*, a request for documents is not contrary to the right to remain silent. The production of documents may be requested, and the documents may be used as evidence. They may reveal the likely existence of a cartel or other infringement, but that is not of itself self-incriminating. It is still possible to rebut the likelihood by means of other evidence; and

- the interplay between fundamental rights and competition enforcement is a balancing exercise. If the Commission is no longer able to require the production of documents, its enforcement will become heavily dependent on either voluntary co-operation or other means of coercion such as dawn raids. As case-law currently stands, a defendant is still able to contend that documents have a different meaning from that ascribed to them by the Commission.

59. The Advocate-General still fails to address the contradiction between *Saunders* and *Funke/JB*, but at least the Opinion offers a rather better analysis of the privilege than the judgment in *Mannesmannröhren-Werke.* Although, as stated above, it is likely that the ECJ will adopt a similar conclusion, it remains to be seen whether it will elaborate on the Advocate-General's analysis so as to settle the issue definitively.

Use of information in UK criminal proceedings – statutory provisions

60. Finally, it should be noted that the privilege has also been given statutory expression in the context of the UK cartel offence. Information given by an individual in response to the OFT's powers of investigation under sections 193 (ie. in response to questions posed in a compulsory interview) and 194 (ie. in response to a request to explain a document produced during a search) of the EA 2002 can only be used in evidence against that individual:

- where he or she is prosecuted under section 201(2) of the EA 2002 for providing incorrect or misleading information; or

- in a prosecution for the cartel offence or another offence, where he or she raises evidence or asks a question relating to the statement, and in the course of giving evidence makes a statement inconsistent with the compulsory statement.

61. The same conditions apply to the use in evidence in criminal proceedings of any statement made by a person in response to a requirement to provide information or an explanation of documents in an investigation under the CA 1998.[44]

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[43] Interestingly, Morison J in *OFT v. X* (note above) also suggested that businesses should enjoy a lower level of protection than individuals, in the context of Article 8 ECHR.

[44] CA 1998, section 30A.

Conclusion on the scope of the privilege

62. It is therefore submitted that the current scope of the privilege:

- allows a person or undertaking under investigation not to answer a question by the European Commission, whether explaining a document or providing information, where to do so would directly involve an admission of an infringement of the competition rules (*Orkem*, *Mannesmannröhren-Werke, SGL Carbon*);

- does not allow a person or undertaking under investigation not to provide factual information to the European Commission, whether explaining a document or providing information (*Mannesmannröhren-Werke*), although this is contrary to *Saunders;*

- is unlikely to allow a person or undertaking under investigation not to provide factual information to a national competition authority, whether it is applying national competition law (*OFT v. X*) or acting as a "competent authority" under Regulation 1 (*Hoechst*), although this is similarly contrary to *Saunders*;

- probably does not allow a person or undertaking under investigation not to hand over documents or submit to a search in response to the exercise of compulsory powers by a competition authority (contrast *Saunders, Graphite Electrodes*), although this conflicts with *Funke* and *JB*. It may allow a person or undertaking under investigation not to hand over documents where to do so would involve testimonial self-incrimination (*Saunders, US v. Doe*);

- does not apply to information provided voluntarily or in response to non-binding requests; and

- does not apply to requests for information or documents directed to third parties.

63. Finally, it should be noted that whereas the ECtHR itself is not competent to hear challenges to acts of EU institutions in their own right, EU Member States are required to secure Convention rights in respect of EU legislation.[45] This suggests that one way of challenging the exercise of the Commission's powers of investigation may be to take proceedings against one or more Member States for failing to secure Convention rights in Regulation 1.

64. Whatever the extent of the privilege against self-incrimination under the Act, its exercise will be a matter for careful consideration. Excessive use may be counter-productive, by encouraging inspectors to pursue their investigations further or to draw adverse inferences from documents seized or indeed from the absence of documents.[46] Indeed in some situations, the optimum course of action will be to admit the infringement immediately and claim the benefit of one of the Commission's leniency programmes.

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45 *Matthews v. UK*, judgment of 18 February 1999, in which the ECtHR held the UK government in breach of the ECHR for having failed to secure to Gibraltar citizens the right to vote in elections to the European Parliament, in breach of Article 3 of Protocol 1 to the Convention.

46 Case T-205/94 *Buchmann v. Commission* [1998] ECR II-813. The ECtHR has held that Article 6(2) is not necessarily infringed where an adverse inference is drawn from the accused's failure to account for his activities: *Murray v. UK* [1996] 22 EHRR 29.