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PRIVILEGE AGAINST SELF-INCRIMINATION: THE DILEMMA OF APPROPRIATE STANDARDS IN COMPETITION LAW

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Abstract. The procedures of the European Commission regarding privilege against self-incrimination and its application in competition law proceedings have come under intense scrutiny, yet there has been little analysis of how it is applied in national proceedings. What analysis there is has been confined to how the standards developed by the Court of Justice of the European Union are applied, with little or no reference to the case law of the European Court of Human Rights. In the context of Lithuania and its legal practises, this article presents an analysis of privilege against self-incrimination from the perspective of Lithuanian procedural rights of the administrative process, human rights, and the European Union law. It finds that neither case law of the European Court of Human Rights nor the European Court of Justice of the European Union provide a definitive answer on the implementation of privilege against self-incrimination in competition law proceedings, since undertakings and employees may have a different status in the procedure in order for different guarantees to be applied. Thus, a systematic approach should prevail with national authority applying these standards, taking into consideration distinct features of both competition law and national administrative law.

Keywords: competition law, privilege against self-incrimination, European Court of Human Rights, Court of Justice of the European Union, Convention for the Protection of Human Rights and Fundamental Freedoms

Introduction

In recent decades human rights law has evolved from a set of rights applied only to natural persons to a universal legal system that applies to both natural and legal persons. Today, it is accepted that legal persons deserve to be treated in accordance with human rights standards. In competition law, however, business and human rights often intersect in one core issue, due process, which includes privilege against self-incrimination.

Privilege against self-incrimination is a well-established principle in criminal law, meaning that anyone who is accused of committing a crime has the right not to provide the authorities with information that may incriminate them. Originally, this privilege was applied to natural persons; to this day there are some states which continue to rule out its application to legal persons. For example, the Supreme Court of the United States of America ruled in *Hale v Henkel* that "*there is a clear distinction between an individual and a corporation, and the latter, being a creature of the State, has not the constitutional right to refuse to submit its books and papers for an examination at the suit of the State*" (*Hale v Henkel*, 1906). In Europe, the principle seems to have undergone a metamorphosis, with European states taking a different approach, recognising that legal persons may also enjoy privilege against self-incrimination (*Petrolia ASA and others v The public prosecution authority*, 2011).

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The majority of European Union member states regulate the area of due process in competition law in three ways: through national regulation; application of European Union law; and by the application of human rights law developed mostly by the European Court of Human Rights (hereinafter – ECtHR).

Any meaningful discussion of the issue must first turn to the different sources of the law of privilege against self-incrimination. Due to the limited scope of this Article, the Lithuanian legal system will be used as an example, briefly summarizing the *lex lata* in Chapter 1. Chapter 2 focuses on the *lex lata*, providing insights into the practical application of privilege against self-incrimination in competition proceedings, as well as how the triade of legal sources tends to diverge on core issues. Chapter 3 focuses on the *lex ferenda*, addressing the matter of the possible future evolution of privilege against self-incrimination in competition proceedings, and taking into consideration current trends and unique features of these proceedings. Chapter 4 considers the conceptual issue relating to the application of privilege against self-incrimination to a legal person. This issue is often overlooked. Legal personality is, in fact, a legal fiction, since a legal person exercises their rights and duties only through a natural person. Naturally, the question of dual privilege against self-incrimination arises: is the company and its employees privileged to enjoy a different set of rights, including privileges against self-incrimination? This question is considered in Chapter 4 which seeks to provide some arguments regarding the issue.

Analytic, systematic, generalisation, analogy and comparative methods are used in this paper. Systematic and analytical methods critically examine the criteria and scope of privilege against self-incrimination in the context of the competition law. Comparative and analogy methods distinguish the similarities and differences between the practice of national competition authority and Lithuanian national courts and international courts. Conclusions are drawn based on the generalisation method.

1. *De lege lata*: Privilege Against Self-Incrimination in Competition Law Cases and the Plurality of its Sources

Legal systems in the European Union have recourse to a wide corpus of legal sources, which is largely due to the legislation, and also the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – ECHR). The same triumvirate of legal sources referred to previously is also part of privilege against self-incrimination. Thus, privilege against self-incrimination is analysed from the perspective of the ECHR and then with reference to European Union law. Finally, Lithuanian national legal regulation is addressed.

Of all the possible legal sources of privilege against self-incrimination, the ECHR is the most complex. As part of the right to a fair trial (Article 6 of the ECHR), privilege against self-incrimination is applicable under the criminal limb of Article 6. Therefore, the starting point is to determine if the administrative nature of competition law proceedings under Lithuanian legal regulation fall under the criminal limb of Article 6 of the ECHR.

Under the well-established case law of the ECtHR, cases fall under the criminal limb of Article 6 of the ECHR, provided they satisfy the so-called *Engel* criteria (*Engel and Others v the Netherlands*,1976). While the mere existence of such criteria may give rise to a proposition that not all proceedings based on competition law may fall within Article 6 of the ECHR, further analysis of these criteria quickly dispels such a notion.

The first criterion, and the least important, is the classification of the offence in domestic law. This criterion is determinative only if the offence is criminal under national law (*Benham v United Kingdom*, 1996). Notwithstanding, if for example the offence is administrative or disciplinary, then it may not carry much weight in the determination if it is criminal under the autonomous meaning of the ECHR. According to Lithuanian legal regulation, administrative courts hear disputes concerning decisions or actions of the Competition Council of the Republic of Lithuania (hereinafter – Competition Council). Accordingly, this circumstance has no legal bearing

for the determination if Lithuanian competition proceedings fall under the criminal limb of Article 6 of the ECHR.

The second criterion is the nature of the offence. To evaluate this criterion, the ECtHR considers several factors. It considers if the legal rule has a general binding character or is it just applicable to a specific group (*Bendenoun v France*, 1994). Furthermore, the ECtHR takes into account the nature of an institution which has the power to institute proceedings (*Benham v United Kingdom*, 1996). Other factors must be taken into account, for example the purpose of a legal rule; is it a deterrent or punitive? Further, does the legal rule seek to protect interests that are usually protected by criminal law, whether the imposition of any penalty is dependent upon a finding of guilt, and classification of comparable procedures in other states? Under the Law on Competition, the Competition council of the Republic of Lithuania (hereinafter – Competition council) is an independent authority which investigates infringements of competition law and also imposes fines for these infringements. The Law on Competition applies to all undertakings and the fines imposed are punitive (*UAB "Eksortus" v Competition Council*, 2012). Therefore, the procedure of the infringement of competition law is regarded as criminal under the second *Engel* criterion.

The third criterion concerns the maximum potential penalty which the relevant law provides (*Campbell v the United Kingdom*, 1984). Under the Law on Competition, the Competition council may impose a fine of up to 10 per cent of annual turnover in the preceding business year on undertakings for any infringement of competition law. The Supreme administrative court of Lithuania (hereinafter – Supreme administrative court) found that infringement of competition law is criminal under the third Engel's criterion in the case where the Competition council imposed a fine of almost 36 million euros for the infringement of concentration conditions established by the Competition council. The Supreme administrative court emphasised that severity of the sanction should be the subject of the safeguards provided in Article 6 of the ECHR and that a sanction is criminal only in so far as it relates to the scope of the ECHR (*Gazprom v Competition Council*, 2016).

Even though criteria are not cumulative, it does not prevent the adoption of a cumulative approach if the analysis of separate criterion does not lead to a straightforward conclusion (*Sergey Zolotukhin v Russia*, 2009). The ECtHR took this approach in *Orlen Lietuva Ltd* and concluded that sanctions imposed to undertakings under the Law on Competition are criminal. The ECtHR explained that the Competition council imposed a fine under the Law on Competition and emphasised that fines under this law might be imposed on all undertakings and not just a particular group. The ECtHR also accentuated that the fine imposed on the applicant was not intended to serve as pecuniary compensation for breaches of competition law, but as a penalty to deter reoffending because the penalty the applicant risked incurring was severe, because it amounted to up to 10 per cent of its annual turnover in the preceding business year (*Orlen Lietuva Ltd v Lithuania*, 2019).

Therefore, proceedings under Lithuanian competition law fall under the criminal limb of Article 6 of the ECHR and privilege against self-incrimination applies accordingly.

Under European Union law the question of privilege against self-incrimination is straightforward since undertakings are directly granted privilege against self-incrimination. The preamble of the Regulation 1/2003 stipulates: "*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*." The Court of Justice of the European Union (hereinafter – CJEU) addressed privilege against self-incrimination for the first time in *Orkem*, and later it was confirmed by the CJEU on numerous occasions even though the approach adopted in *Orkem* has not been changed.[2] Though privilege against self-incrimination established in Regulation 1/2003 and

[2] For example, CJEU, 18 October 1989, judgment in *Orkem v Commission of the European Communities* (case No. 374/87); CJEU, 15 October 2002, judgment in *Limburgse Vinyl Maatschappij NV (LVM), DSM NV and DSM Kunststoffen BV, Montedison SpA, Elf Atochem SA, Degussa AG, Enichem SpA, Wacker-Chemie GmbH and Hoechst AG and Imperial Chemical Industries plc (ICI) v Commission of the*

case law of the CJEU concerning self-incrimination is only directly applicable to the European Commission, nevertheless the importance of these sources to national competition authorities is not debatable. Practise of the European Commission and the CJEU is the only source that directly addresses specific issues of competition law and therefore are often considered as guidelines for national competition authorities.

Last, but not least, Lithuanian national legal regulation has its peculiarities. For example, the Constitution of the Republic of Lithuania enshrines privilege against self-incrimination. The Supreme administrative court also found that privilege against self-incrimination applies in competition law cases (*Orlen Lietuva v Competition Council*, 2008). Even though the Law on Competition and the Law on the administrative procedure of the Republic of Lithuania are silent on privilege against self-incrimination, the Competition council directly addresses the issue in an explanatory note, stipulating that privilege applies (Competition council, 2020). Furthermore, the latest amendment to the Law on Competition implementing ECN+ directive also stipulates that officials of Competition Council must uphold the rights enshrined in Constitution, ECHR, Charter and rights and freedoms guaranteed under EU law.

Thus, privilege against self-incrimination essentially has three distinct legal sources, with the result that such a plurality gives rise to the problem of the diverging substance of said sources. The following chapter examines the extent to which privilege applies against self-incrimination in competition proceedings from the perspective of the ECHR. The chapter also compares applicable standards of the ECHR to those standards employed by the CJEU and the European Commission and Lithuanian national competition authority.

2. *De lege lata*: the Extent of the Privilege Against Self-Incrimination in Competition Proceedings

Although not directly mentioned in Article 6 of the ECHR, the case law of the ECtHR reveals that every person charged with a criminal offence has privilege against self-incrimination (*Bykov v Russia*, 2009). The general notion is that privilege against self-incrimination is an element of the presumption of innocence, which is closely related to the burden of proof and the notion that the accused should not be forced to contribute in meeting the evidentiary threshold, which should be established by the prosecuting authority (Schabas, 2017).

While all three legal sources of privilege against self-incrimination essentially share the notion of its definition, the substance (scope) is where the legal sources start to diverge. Divergence, however, is completely natural, since privilege against self-incrimination is now applied in areas, which traditionally were never included in its scope, such as competition law, tax law and related proceedings. The fact that such matters often fall into the administrative sphere of national regulation amplifies the lack of true identity of privilege against self-incrimination in such cases.

Another issue is that any new legal construct must have synergy with an existing legal system. In this respect privilege against self-incrimination in criminal procedure and administrative procedure again diverge greatly.

Under the case law of the ECtHR, privilege against self-incrimination does not protect against the making of an incriminating statement *per se*, but it prohibits obtaining evidence by coercion or oppression (*Ibrahim and Others v the United Kingdom*, 2014). Privilege against self-incrimination also does not extend to the use of material, existing independently of the will of the suspect, which authorities may obtain from the accused through recourse to compulsory powers. For example, documents acquired under a warrant, breath, blood and urine samples and bodily tissue for DNA testing (*Saunders v the United Kingdom*, 1996). Thus, if competition authorities obtain such evidence, for example, during the inspection or under the court warrant, privilege against self-incrimination would not be infringed.

European Communities, (case No. 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), most recent in CJEU, 9 April 2019, judgment in *Qualcomm, Inc.v European Commission* (case No. T-371/17).

The ECtHR in examining whether a procedure has extinguished the very essence of privilege against self-incrimination assesses the following elements: the nature and degree of compulsion; and the existence of any relevant safeguards in the procedure and the context in which authorities use obtained material (*O'Halloran and Francis v. the United Kingdom*, 2007).

The ECtHR distinguishes three situations where an accused person might be forced to give evidence, and accordingly privilege against self-incrimination might be infringed. The first one is when a suspect testifies under the threat of sanctions (*Saunders v the United Kingdom*, 1996) or institution imposes sanctions for refusing to testify (*Heaney and McGuinness v. Ireland*, 2000). The second is where authorities use physical or psychological pressure to obtain evidence or statement (*Jalloh v Germany*, 2006). The third is where the authorities use deception to extract information that they were unable to obtain by other means (*Allen v the United Kingdom*, 2013). Another aspect, which was highlighted by the ECtHR, is that an accused should have access to a lawyer (*Salduz v Turkey*, 2008) and the accused should be informed about privilege against self-incrimination (*Stojkovic v France and Belgium*, 2012).

In comparison, Regulation 1/2003 *expressis verbis* stipulates that the European Commission must respect privilege against self-incrimination. While there is no binding legal regulation, which would specify the European Commission's obligation in implementing privilege against self-incrimination, the European Commission follows the procedure established in a soft-law document – Antitrust Manual Procedures of the European Commission. Under the Antitrust Manual Procedures of the European Commission, undertakings are informed about privilege against self-incrimination (Antitrust Manual Procedures, 2019). The CJEU ruled that if an undertaking answers questions or provides information that self-incriminates, the European Commission should reduce fine due to voluntary collaboration (*Commission of the European Communities v SGL Carbon AG*, 2006). Nevertheless, such information should not be used to prove the infringement unless the representative or duly authorised staff member was in full knowledge that the undertaking was not obliged to answer (Blanco, 2013). Furthermore, if the undertaking raises doubts about infringement of privilege against self-incrimination, the Hearing Officer of the European Commission might make a recommendation as to whether privilege against self-incrimination applies (Antitrust Manual Procedures, 2019).

The CJEU on the element of coercion stated that an infringement of privilege against self-incrimination might occur if authorities use coercion against the suspect in order to obtain information (*Limburgse Vinyl Maatschappij NV (LVM) et al v Commission of the European Communities*, 2002). The decision of the General Court in *SGL Carbon* illustrates that the element of coercion is crucial for the finding of an infringement of privilege against self-incrimination. The General Court admitted that the European Commission asked to provide incriminatory information. However, the Commission did not threaten to impose sanction in case if an undertaking would not provide answers, so that the General Court did not find an infringement of privilege against self-incrimination (*Tokai Carbon Co. Ltd v Commission of the European Communities*, 2004).

Even though, and as noted above, the ECtHR and the CJEU follow a similar approach to the element of coercion, the CJEU giving a more significant meaning to the content of the requested information. The position of the CJEU is that the European Commission has a right to ask questions which require only factual disclosure. It means that undertakings do not have an obligation to provide an opinion or qualification of certain events or facts (Faull, 2014). Accordingly, the CJEU only finds an infringement if the European Commission asks questions which seek to determine the purpose of the action (*Orkem v Commission of the European Communities*, 1989; *Commission of the European Communities v SGL Carbon AG*, 2006).

The approach taken by the CJEU raises the question of whether the European Commission could use the information obtained indirectly (Andersson, 2018). For example, under the case law of the ECtHR (despite testimony obtained under compulsion appears not to be incriminatory) the prosecuting authorities might use information regarding simple facts or exculpatory remarks in support of their case, i.e. to cast doubt or contradict statements of the accused (*Harun Gürbüz v Turkey*, 2019).

Lithuanian national regulation also has its own course in regard to privilege against self-incrimination. The courts in Lithuania generally follow the practise of the CJEU. For example, the Supreme Administrative Court adopted generally the same approach as the CJEU and stated that an undertaking could not refuse to provide information relevant to the investigation because it may be incriminatory. However, the Competition Council may not force undertaking to admit their guilt (*The Lithuanian Chamber of Auditors v Competition Council*, 2008).

For national law the main issue was to somewhat balance the emerged privilege against self-incrimination in competition law with the powers granted to the authority to pursue successful investigations, given that these powers pale in comparison to the tools of prosecution in criminal cases. This still remains the case.

A prime example of this is that under the Law on Competition, the Competition council may impose a fine of up to one per cent of the annual turnover in the preceding business year on undertakings if they do not provide the information required, also for providing incorrect and incomplete information. Also, the Competition Council may impose a fine of up to five per cent of the average daily turnover in the preceding business year on undertakings for each day of the continuation of a violation in the event of failure to comply promptly with the instructions to provide information. Therefore, under the Law on Competition, undertakings must provide information, evidence and answer questions under the threat of sanctions. Accordingly, undertakings are coerced to provide information and privilege against self-incrimination, as it is stated in Article 6 of ECHR, and might be infringed due to the element of coercion (*Ibrahim and Others v the United Kingdom*, 2014).

While the duty of the undertaking to provide all information may be strict, this duty is balanced with several core procedural rights.

Under Regulation of the Competition Council, a lawyer may participate during an inspection, although in their absence this does not prevent officials from conducting an inspection. In practice, undertakings receive an explanatory note regarding their rights and duties. Furthermore, officials do not prevent undertakings from contacting their lawyers and lawyers may participate during the interviews. The same applies if an interview is conducted not during an inspection but at the premises of the Competition Council.

Under the Law on Competition, undertakings have also a right to appeal decisions or actions of the officials directly to the Competition Council. Since officials conduct an investigation and accordingly file requests for information and conduct interviews, these requests and questions during the interview may be appealed to the Competition Council if, for example, they infringe privilege against self-incrimination.

An important question is whether undertakings should appeal alleged infringement of privilege against self-incrimination immediately or wait for the final decision of the European Commission or national competition authority. In *LVM,* an undertaking appealed the final decision of the European Commission. The CJEU stated that the illegality of the questions did not affect the legality of the final decision and noted the importance of assessing whether the European Commission had used such answers to prove an infringement (*Limburgse Vinyl Maatschappij NV (LVM) et al v Commission of the European Communities*, 2002).

This approach taken by the CJEU leads us to conclude that undertakings should appeal the measures immediately and not wait for the final decision. If undertakings appeal requests of the European Commission immediately, not waiting for the final decision of the European Commission, they would only need to prove that privilege against self-incrimination was infringed and would not have an obligation to prove that the infringement affected the final decision. Nevertheless, under the case law of the Supreme administrative court, it might be complicated. Even though under the Law on Competition, undertakings have a right to appeal actions and decisions of officials, it seems that Lithuanian administrative courts hold that measures taken during an investigation should be appealed together with the final decision and not in a separate procedure (*Kesko Senukai Lithuania v Competition Council*, 2018) or stage of the final decision is more appropriate to evaluate the legality

of the measure taken by the authorities (*UAB "EVRC" v Competition Council*, 2020). The case law of the Supreme administrative court shows that undertakings claiming infringement of privilege against self-incrimination at the stage of the final decision must provide arguments proving that this infringement might have influenced the outcome of the proceedings (*Lithuanian Chamber of Auditors v Competition Council*, 2008).

The takeaway is that the ECtHR and the CJEU apply diverging standards to privilege against self-incrimination. Therefore, institutions and national courts should identify applicable standards. The most important aspect is that ECtHR and CJEU standards differ in respect of the content of information. While the ECtHR admits that even non-incriminatory or factual information may infringe privilege against self-incrimination, the CJEU holds that factual information is not incriminatory. Furthermore, the case law of the CJEU demonstrates the importance of appealing actions and decisions of the officials immediately and not waiting for the final decision.

As it was noted in this chapter, standards employed by the ECtHR, the CJEU and Lithuanian authorities differ. Nevertheless, the ECtHR has never addressed privilege against self-incrimination in a competition law case. The following chapter analyses if specific features of competition law might influence the substance of privilege against self-incrimination.

3. *De lege ferenda*: Possible Limits of Privilege against Self-Incrimination Due to the Specific Features of Competition Law

Privilege against self-incrimination has a significant bearing on the effectiveness of investigations. Investigations of infringements of competition law are challenging due to the complexity of infringements and efforts to hide evidence. Therefore, it can be argued that such complexity of these infringements may impact the scope of privilege against self-incrimination. For example, the Supreme administrative court underlined that privilege against self-incrimination does not apply to the full extent in competition law cases comparing to criminal cases (*Orlen Lietuva v Competition Council*, 2008). Furthermore, the ECtHR also stressed that competition law is not a *"hard-core"* criminal law. Thus, different standards apply to guarantees of a fair trial (*Jussila v Finland*, 2006).

The ECtHR on the issue of complexity of infringement has explained that fair trial standards, including privilege against self-incrimination, apply in all criminal proceedings "*without distinction from the most simple to the most complex."*(*Harun Gürbüz v Turkey*, 2019). Thus, the ECtHR rejected the government's claim that compulsory powers that may infringe privilege against self-incrimination could be used to defend public interest due to the complexity of the infringement (*Saunders v the United Kingdom*, 1996). It seems that the ECtHR is not willing to accept the notion that individual features of infringements may differentiate the application of privilege against self-incrimination.
Notwithstanding, the ECtHR developed most of the fair trial standards in the case law concerning *"hard-core"* criminal cases. Even though competition law falls under the criminal limb of Article 6 of the ECHR, it is not the so-called "*hard-core*" criminal law. The ECtHR in *Jussila* states that "*it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example <…> competition law.*" These proceedings differ from the "*hard-core"* criminal law. Therefore, not all guarantees of Article 6 of the ECHR should apply with their full stringency (*Jussila v Finland*, 2006). It is understandable since authorities investigating *"hard-core"* criminal cases have more powers than those authorities that investigate infringements, which under national law are administrative. For example, while most of the institutions investigating *"hard-core"* criminal cases have a right to use measures such as secret surveillance, national competition authorities do not have such rights. Hence, it is not clear if the lack of powers of authorities such as Competition council should not influence the standards of the fair trial, such that these standards should not be applied more leniently.

This lack of clarity is even more confusing due to the ECtHR judgments concerning privilege against self-incrimination and its position that this right should apply in all procedures (*Harun Gürbüz v Turkey*, 2019).

The case law of the ECtHR reveals that in some instances it grants a different standard of protection to legal persons as opposed to natural ones. The case law shows that companies enjoy more limited protection under Article 8 of the ECHR, guaranteeing the right to private and family life than individuals. For example, the ECtHR stated that a wider margin of appreciation could be applied since the authorities aimed this measure at legal persons (*Bernh Larsen Holding AS, Kver AS and Increased Oil Recovery AS v Norway*, 2013). Thus, it is not yet clear if legal persons might be and should be the full beneficiaries of privilege against self-incrimination under Article 6 of the ECHR.

Furthermore, the duty of the undertaking to cooperate also raises an issue. During an investigation of the infringement of competition law, undertakings are obliged to actively cooperate, and make available to the European Commission all information relating to the subject matter of the investigation (*Orkem v Commission of the European Communities*, 1989; *Aalborg Portland A/S v Commission of the European Communities*, 2004; *Commission of the European Communities v SGL Carbon AG*, 2006). The Supreme administrative court has also stated that undertakings must cooperate (*Orlen Lietuva v Competition Council*, 2008). The CJEU explained that it could not recognise an absolute right to silence because this would go beyond what is necessary to preserve the rights of the defence of the undertaking. Accordingly, it would constitute an unjustified limitation to the European Commission's performance to ensure observance of competition law (*Mannesmannröhren-Werke AG v Commission of the European Communities*, 2001; *Limburgse Vinyl Maatschappij NV (LVM) et al v Commission of the European Communities*, 2002).

For example, Helen Andersson agrees that an undertaking must cooperate during an inspection; however, she demurs at the extent of the cooperation, suggesting that the undertaking must let officials in and provide access to IT systems. Note that it is not apparent that a company representatives is required to answer all factual questions posed by the inspectors, because the ECtHR has stated that privilege against self-incrimination also covers factual questions which authorities may later use in the investigation (Andersson, 2018).

Furthermore, under Article 53 of the Charter of Fundamental Rights of the European Union (hereinafter – Charter), in so far as the Charter contains rights that correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. Therefore, Article 48 of the Charter, guaranteeing the presumption of innocence and right of defence, should reflect the provision of Article 6 of the ECtHR as a minimum standard (Peers, 2014). Consequently, it may seem that differences between the ECtHR and CJEU in respect of the content of the requested information and its effect on the infringement of privilege against self-incrimination must resolve in favour of the ECtHR. Nevertheless, the CJEU in response stated that the power of the European Commission to obtain information does not fall out of either Article 6 of the ECHR or the case law of the European Court of Human Rights (Tokai Carbon Co. Ltd v Commission of the European Communities, 2004) and this approach has not changed even after the Charter became legally binding (*Qualcomm, Inc.v European Commission*, 2019). However, this can be explained by the fact that ECtHR has never applied privilege against self-incrimination when investigation was conducted against legal person, and it may be argued that since the case law of the ECtHR concerning privilege against self-incrimination is developed concerning the right of natural persons, there is no need for the CJEU to change its approach.

The analysis of arguments, which might be invoked to justify the application of a lower standard of privilege against self-incrimination in competition law cases, does not provide clear guidance. While the case law of the CJEU demonstrates the importance of undertakings duty to cooperate and effectiveness of the European Commission's powers, Charter stipulates that the same standards as established in the ECHR should apply. Nevertheless, even though the CJEU or national competition authorities would follow this argumentation, the case law of the ECtHR lacks clarity on this issue. The ECtHR found that fair trial standards should not apply to the full extent in cases like competition law infringements and offers narrower protection to legal persons than to

natural ones. Therefore, it may seem that standards developed in natural person cases (mostly in *"hard-core"* criminal cases) may not apply to the full extent in competition law cases.

4. *De lege ferenda*: Employees of Undertakings as Beneficiaries of the Privilege Against Self-Incrimination

One difference that is often overlooked between the applications of privilege against self-incrimination is that legal persons exercise their rights and duties through natural persons. In this event, the application of privilege against self-incrimination might become dual layered and further complicated when authorities interview employees, including the executive officers, of undertakings. Should they be treated as part of an accused entity and accordingly, privilege against self-incrimination should be applied, or they should they be treated as witnesses?

Under Regulation 1/2003, the European Commission for collecting information relating to the subject-matter of an investigation may interview any natural person who gives their consent. Therefore, it is not clear if officials of the Commission at all have a right to ask questions about investigated infringement during an inspection or were it to occur during voluntary interview (Blanco, 2015). It is apparent that when the European Commission conducts an investigation, infringement of natural person's privilege against self-incrimination is almost non-existent. The European Commission can interview natural persons on a voluntary basis and has no power to impose sanctions on natural persons. Therefore, there is no relevant case law of the CJEU or guidelines of the European Commission on privilege against self-incrimination applicable to natural persons.

In contrast, the Law on Competition stipulates more extensive rights of the Competition council. Article 25 of the Law on Competition specifies that officials of the Competition council have the right to receive oral and written explanations from persons who may have relevant information for the investigation, including answers to factual questions and documents from persons involved in the activities of the entities under investigation, to request their presence at the premises of the investigating officer. To obtain documents, data and other information necessary for the investigation from undertakings, other natural and legal persons and public administration entities. Furthermore, the Competition council may impose fines for refusing to provide information or other evidence not just on undertakings but also on natural persons.

These rights raise the question of the status of employees. First, should privilege against self-incrimination be taken into account while questioning employees who may not be personally liable for the infringements? Moreover, should privilege against self-incrimination be respected by the questioning executive officers who may be personally liable for the infringements of competition law?

Privilege against self-incrimination has great importance when the executive officer of an undertaking is interviewed. Under Article 40 of the Law on Competition, if the executive officer of an undertaking contributes to the infringement of the prohibited agreement concluded between competitors or abuse of a dominant position, a court may impose sanctions to the executive officer. The court might restrict a right to be executive officer of a public and/or private legal entity, or a member of the collegial supervisory and/or governing body of a public and/or private legal entity for a period from three to five years and also impose a fine of up to 14 481 euros. Under the case law of the ECtHR, the Supreme administrative court and the Constitutional Court of the Republic of Lithuania (hereinafter – Constitutional Court), such sanction would fall under the criminal limb (*Case No. 71/06-12/07*, 2008; *Storbråten v Norway*, 2007; *Kulių medžiotojų būrelis v Ministry of Environment of the Republic of Lithuania*, 2015).

Therefore, during an interview the executive officer risks providing incriminating information, so that the authorities might use this information in subsequent proceedings. For example, the executive officer of undertaking tried to appeal the decision of the Competition council to impose fines upon the undertaking. He claimed that after the decision comes into force, authorities might initiate subsequent proceedings concerning that person's liability, in which case he should be allowed to appeal the decision. The Supreme administrative

court explained that a contested decision did not impose sanctions on the applicant, concluding that a contested decision has no legal effect for the applicant (*K. N. v Competition Council,* 2018). Accordingly, the executive officer may choose not to represent themself during the infringement procedure of an undertaking; privileging themself against self-incrimination during the interview may seem even more crucial.

In principle, privilege against self-incrimination does not *per se* prohibit the use of compulsory powers to obtain information outside the context of criminal proceedings against the person concerned (*Weh v. Austria*, 2004). Nevertheless, if an executive officer is interviewed, privilege against self-incrimination should be respected due to their status and expectancy that subsequent proceedings concerning liability might be brought.

Another question arises: should the employees of undertakings be granted the same level of protection as executive officers? To the best of the author's knowledge, this issue was raised before the ECtHR on once occasion only. Regardless, the application was found inadmissible (*Peterson Sarspobrg AS and Others v Norway*, 1994).

Since there is no clear standard in the case law of international courts, it seems that this question is left to the national law. For example, the Constitutional Court considered if employees could refuse to testify, thereby claiming privilege against self-incrimination. After due consideration, the court emphasized that legal persons (the same as natural persons) are entitled to equality before the law, and persons having the same status in the criminal case must be treated equally (*Case No. 21/98-6/99*, 2000; *Case No. 7/03-41/03-40/04-46/04-5/05-7/05-17/05,* 2006). Under the Constitution of the Republic of Lithuania, no one can be compelled to give evidence against themself, their family members, or close relatives. The Constitutional Court ruled that this provision ensures protection to natural rather than legal persons since legal persons may not entail themselves into family relations. The Constitutional Court explained that this provision entails a right for a natural person to refuse to testify in cases where authorities may bring criminal charges against them, their family members, or close relatives.

Despite the Constitutional Court having ruled in the context of Lithuanian criminal law, this ruling may be relevant in competition law cases, since the court stated that this right extends not only to traditional criminal cases, but also to those which are criminal due to the severity of the sanction (*Case No. 34/2008-36/2008-40/2008-1/2009-4/2009-5/2009-6/2009-7/2009-9/2009-12/2009-13/2009-14/2009-17/2009-18/2009-19/2009-20/2009-22/2009*; 2009), and it was mentioned previously competition law should be considered as criminal.

It follows from the reasoning of the Constitutional Court that the employees of undertakings do not enjoy privilege against self-incrimination. Accordingly, authorities may interview employees of undertakings as any other witnesses and do not have an obligation to ensure privilege against self-incrimination.

Nevertheless, this conclusion might be flawed, taking into account that legal persons exercise their rights through natural persons. To minimise risks of the infringement of privilege against self-incrimination, authorities may ascertain if a particular employee acts on behalf of the undertaking. Thus, an employee could provide the authorisation from an undertaking to act on behalf of it, except the executive officer of an undertaking, since they act as representatives of undertakings under their legal obligations arising out of laws. If an employee participates at the interview under the authorisation of an undertaking, their statements should represent the position of the undertaking, and thus, privilege against self-incrimination should apply. Accordingly, in case if an employee does not have such authorisation, they should possess the status of a witness, and as a consequence, privilege against self-incrimination would not apply.

Conclusions

Legal regulation of Lithuanian competition law falls under the criminal limb of Article 6 of the ECHR, because the investigation of infringement of competition law is criminal under the second and the third Engel criteria. The CJEU also found that privilege against self-incrimination should apply in competition law proceedings. The Supreme administrative court found that privilege against self-incrimination applies in competition law cases. Thus, privilege against self-incrimination applies in competition law proceedings under the case law of the ECtHR, the CJEU and national administrative courts.

The ECtHR and the CJEU apply different standards to privilege against self-incrimination. The ECtHR admits that even non-incriminatory or factual information may infringe privilege against self-incrimination. Nevertheless, the CJEU holds that factual information is not incriminatory. Therefore, it is clear that standards differ substantially. National courts and national authorities face a challenge in determining the extent of privilege against self-incrimination. It may be argued that standards employed by the ECtHR are not suitable for several reasons. The ECtHR developed most of the fair trial standards in the case law concerning "hard-core" criminal cases. Authorities investigating these infringements are granted more extensive powers than those which investigate infringements which under national law are administrative, such as Competition Council. Therefore, it is not clear if the same standards should apply in the so-called "hard-core" criminal cases as in cases like competition law infringements. The fact that the ECtHR has never applied privilege against self-incrimination in competition case, might be determinative, and application of the ECtHR case law to the full extent might be premature. On the other hand, complete reliance on the case law of the CJEU and practise of the European Commission may also be incorrect since most of the national competition authorities have a right to interview natural persons while the European Commission is allowed to conduct interviews of natural persons only on a voluntary basis. Therefore, practise of the European Commission and the CJEU of privilege against self-incrimination is developed only regarding legal persons.

There is a risk that during interview the executive officers of undertakings may provide incriminating information, since under Lithuanian legal regulation the Competition council may initiate proceedings concerning the personal liability of executive officers. Therefore, privilege against self-incrimination should be ensured. The case law of the Constitutional Court demonstrates that employees of undertakings may not enjoy privilege against self-incrimination, however authorities may ascertain if a particular employee acts on behalf of the undertaking. If they do, privilege against self-incrimination should apply and statements of these employees should represent the position of an undertaking.

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