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Pleading the Fifth: the regulatory duties of self-reporting in financial services

KEY POINTS

- Financial and market regulators work on the basis that guilt is presumed until the offender establishes his innocence.
- Given the Draconian nature of the penalties imposed, it is odd that, as far as can be ascertained, little or no attempt has been made by those on the sharp end of financial regulation to invoke the ancient privilege against self-incrimination, established as a constitutional right by the Fifth Amendment to the Constitution of the United States and a creature of English common law – or indeed Art 6 of the European Convention on Human Rights.
- What would be unthinkable with criminal offences, however trivial, is now the norm for regulatory requirements.

In this article, Richard Mawrey QC queries the presumption of guilt in the context of the obligation to self-report.

Those of us who are, as the Book of Common Prayer so charmingly puts it, "of riper years" can remember the reports of the horrendous conditions in China during the Cultural Revolution (1966-76). People of all walks of life, but particularly those who had any kind of official post, were obliged to make humiliating public confessions of their (often entirely fictitious) wrongdoing before being punished. This followed in the communist tradition, having been much in vogue in the Soviet Union under Stalin. Even today in authoritarian states the forced confession remains popular. Those of even riper years will also recall the classic black-and-white Hollywood movies where some Mr Big of the New York or Chicago underworld (think James Cagney or George Raft) has been cornered by the Feds and snarls "I take the Fifth". This succinct, though inelegant, assertion refers, of course, to the Fifth Amendment to the Constitution of the United States, which establishes (*inter alia*) the privilege against self-incrimination as a constitutional right.

The Fifth Amendment forms part of the Bill of Rights, the First to Tenth Amendments to the Constitution, adopted in 1791. James Madison (later the fourth President from 1809 to 1817) produced a first draft of the Bill in which the privilege was stated in fairly bald terms: "no person … shall be compelled to be a witness against himself" and included in the context of both criminal and civil proceedings. This was not particularly revolutionary: eight of the thirteen states had already written the privilege into their state constitutions. Congress was warier and incorporated the privilege against self-incrimination (with four other rights) into the Fifth Amendment in the words "nor shall be compelled in any criminal case to be a witness against himself". The Supreme Court, relying on the 14th Amendment (1868), has extended the interpretation of the Fifth Amendment to cover a very wide range of circumstances in which the privilege may be invoked, going well beyond the narrow words of the Founding Fathers.

The draftsmen of the US Constitution were keen to adopt what they believed had been their constitutional rights when still subject to the British Crown. In Britain, however, the privilege against self-incrimination was a creature of the common law rather than statute. It had been revived after the Civil War to counter what had been the oppressive procedures of the former Courts of High Commission and Star Chamber. Interestingly it had not been included in the Bill of Rights adopted by Parliament in 1688/9 after the Glorious Revolution. Nevertheless, by the time that the American colonists rose in rebellion against George III, the privilege was so well recognised in criminal proceedings that its inclusion in the Constitution caused little controversy.

In England, the 19th and 20th centuries saw the issue of privilege against self-incrimination in criminal cases the subject of a great deal of judge-made law and ultimately statute. We are all familiar with the old Judges' Rules: "'It is my duty to warn you that it will be used against you', cried the inspector, with the magnificent fair-play of the British criminal law" recounts Dr Watson in The Dancing Men. This has morphed into the Police and Criminal Evidence Act 1984 and is fundamental to the criminal justice system.

The law has always recognised this basic principle, even when Parliament has decided that it should be over-ridden in particular instances, such as, for example, requiring those suspected of drink driving to provide a sample of breath, urine or blood. Courts will usually err on the side of the privilege and take the view that, for Parliament to abrogate or restrict the privilege, express wording must be included in the relevant statute, see *R v K* [2009] EWCA Crim 1640.

Outside the provisions particularly applicable to the criminal law, the principal statutory provision is to be found in the Civil Evidence Act 1968 s 14.

The material parts read:

> "(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or

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thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—

(a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and
(b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty.

(2) In so far as any existing enactment conferring (in whatever words) powers of inspection or investigation confers on a person (in whatever words) any right otherwise than in criminal proceedings to refuse to answer any question or give any evidence tending to incriminate that person, sub-s (1) above shall apply to that right as it applies to the right described in that sub-section; and every such existing enactment shall be construed accordingly."

The statute does not create the privilege – it is merely declaratory: *In re Westinghouse* [1978] AC 547 per Lord Diplock at 636. Although there is some vagueness around the margins of the definition of "criminal offences", none is relevant to this article. For these purposes "criminal offences" can be taken to have its usual meaning. More interestingly, there is the question of what constitutes "penalties provided for by such law". The term "penalties" is not defined in the 1968 Act and has only really been considered by the courts in relation to whether the proceedings for contempt of court amount to a "penalty" for the purposes of s 14, usually in the context of disclosure orders and freezing injunctions.

When the 1968 Act was passed, the power of the state and its emanations to impose penalties without invoking the criminal law, with all the safeguards of the rights of the citizen involved, was very limited. The Inland Revenue (now HMRC) had always had powers to impose penalties but in most cases this was as an alternative to criminal proceedings. The vast and mighty army of regulators had not yet been assembled. If the state wished to impose sanctions on a citizen, then magistrates or juries were the answer.

From the 1970s onward, however, the army of regulators began its forward march, first by stealth and then with banners flying and trumpets blaring. A pioneer in this field was the Director-General of Fair Trading, later the Office of Fair Trading, to be joined in 2000 by the bodies set up under the Financial Services and Markets Act 2000 (FSMA). Now both the Consumer Credit Act 1974 and FSMA do contain a number of criminal offences properly so called and the usual rules of criminal law will apply to them, including the privilege against self-incrimination. But what of "penalties" and what *are* "penalties"?

Almost all regulators, whether operating in the context of the market or in the context of regulating individual professions, have the power to impose financial penalties, normally referred to as "penalties". Regulators of professions tend to proceed in a quasi-criminal manner with investigation followed by charge, trial and, on conviction, imposition of a penalty. Market regulators, however, are generally much rougher. Not for them such namby-pamby liberal feebleness as the presumption of innocence. Like the old style prep-school headmaster, they work on the sound basis that guilt is presumed until the offender establishes his innocence (and not always then). After all, everybody is guilty of *something*. It is just a question of what. And also, as Voltaire said of Admiral Byng, "*il est bon de tuer de temps en temps un amiral pour encourager les autres*".

The *modus operandi* of financial regulators is to place the rope round the neck first and then say to the victim: "OK, buster, convince me I shouldn't pull the lever". The regulator contacts the firm concerned and, in effect, tells it "you have been doing X in breach of FSMA/CONC/ICOBS: tell us why you have done it, what you are doing to rectify it in future and what you are doing to compensate your clients". The onus is then on the firm to beat its breast, cry "*mea culpa, mea maxima culpa*" and to throw itself on the regulator's mercy. It is, of course, *theoretically* possible to say: "actually I haven't been doing X" but that will cut very little ice with any regulator worth its salt. Regulators, like our old friend Philippe-Antoine Merlin de Douai, are firm believers in La Loi des Suspects of 1 Sansculottides Year II (17 September 1793 – but you knew that). (Actually, the Revolution gave an individual name to every day of the year: 17 September was *La Fête de la Vertu* – Hmm). The essence of this was, in summary, "it is a crime to be suspected of a crime". Saves prosecutors no end of time, that does.

Having decided that the firm was, after all, guilty as charged, the regulator informs the miscreant that it is going to impose such and such a penalty and the firm is invited to say why the regulator should not (or should impose some lesser penalty). Of course, at the end of the day a firm can always appeal to the relevant Tribunal, though in many cases this may prove little more than seeking a revision of the murder conviction years after the defendant has been hanged. The firm is already pushing up the corporate daisies (particularly if, as so often happens, its demise has been gloatingly reported in the media). The FCA's modern offices in Canary Wharf may not have ceilings decorated with heavenly bodies but they have none the less successfully recreated the Star Chamber. Archbishop Laud did not die in vain.

Given those circumstances and the Draconian nature of the penalties imposed by regulators, it is odd that, as far as can be ascertained, little or no attempt has been made by those on the sharp end of financial regulation to invoke the ancient privilege against self-incrimination. It is also rare to come across firms relying on Art 6 of the European Convention on Human Rights, though its opening words are:

"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

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> by an independent and impartial tribunal established by law." (emphasis supplied)

After all, would the legendary Man on the Clapham Omnibus be able to perceive any real difference between a financial company being subjected by the FCA to a "civil penalty" of, say, £100,000 for breach of FSMA and a construction company being subjected by a court to a fine of £100,000 for a breach of health and safety legislation?

If it is strange, therefore, that those on the receiving end of regulatory procedures, however punitive, do not assert the same rights that would be claimed by the dumbest Bill Sykes in the hands of the Old Bill, it is passing strange that nobody has considered those rights in the field of self-reporting. In financial matters the *locus classicus* of self-reporting is found in the Principles section of the FCA Handbook at PRIN 2.1R, the R, of course, connoting a rule and not simply guidance.

Principle 11 reads:

> "A firm must deal with its regulators in an open and cooperative way, and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice."

These Principles form part of what the Handbook calls High Level Standards – in biblical terms, these are in Ten Commandments territory. Failure to abide by the Principles is a serious offence. Perhaps one is being fanciful to hear in PRIN an echo of Prynne – William Prynne (1600-1669), who was in fact hauled up before the Star Chamber for writing a 1,000-page polemic against actresses and ended up in the pillory with his ears cropped.

Nor is Principle 11 an isolated example. We are all having to learn to cope with the General Data Protection Regulation 2018. This too is heavy on self-reporting. Consider, for instance, Art 33: the material parts of 33(1) and (2) read:

> "(1) In the case of a personal data breach, the controller shall without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the personal data breach to the supervisory authority competent in accordance with Article 55, unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. Where the notification to the supervisory authority is not made within 72 hours, it shall be accompanied by reasons for the delay.
> (2) The processor shall notify the controller without undue delay after becoming aware of a personal data breach."

This is followed by detailed instructions as to how to drop yourself in it.

Is it not curious that we seem to have accepted without demur a system whereby an obligation of self-reporting is placed not only on those who know they have broken the rules but also on those who might possibly have broken the rules but are not sure? What would be unthinkable with criminal offences, however trivial, is now the norm for regulatory requirements. Where now the presumption of innocence? Where now the privilege against self-incrimination? Where now Art 6 of the ECHR?

Imagine, if you will, that some modern Merlin de Douai were to present a Bill in Parliament which made it obligatory for anyone who had committed a criminal offence, from serial murder to parking on a yellow line, immediately to give himself up to the police and provided that failure to do so would constitute a *further offence*. Indeed, not simply a further offence but (if we are to follow PRIN) a more serious offence. Any villain who had not presented himself at his local nick within, say 24 (or, let's be generous, 48) hours of his crime, would face a charge sheet or indictment in which each count would be doubled. Count 1: murder of Joe Bloggs on 5 March 2018; Count 2: failure to report murder of Joe Bloggs to the police by close of business on 7 March 2018. In order to mark the gravity of the offences, his life sentences would probably have to be consecutive and not concurrent.

If any MP were sufficiently career-suicidal to introduce such a Bill, the outcry would be enormous. The media and every action group in the Kingdom would be up in arms. The ECHR would be paraded on banners round Parliament Square. The whole exercise would be seen as an affront to democracy and the rule of law – and rightly so.

Yet, one asks again: what is the difference in principle between the fantasy proposed Bill posited above and the provisions of Principle 11 and GDPR Art 33? Are we so convinced of the beauties of regulation that we have sided with Chairman Mao against James Madison (or even James Cagney)?

The religions that practice confession, whether individual confession as in Roman Catholicism or communal confession, as in the Church of England, do so as a prelude to absolution and forgiveness, not further and additional punishment. And in their cases, an omniscient deity knew about the offence at the time and was simply waiting for us to fess up. The FCA and the Data Commissioner do not know in advance and this saves them the trouble of having to find out.

One would like to have been able to report that Merlin de Douai had, like so many of the enragés of the Revolution, perished on the guillotine when the Terror turned on its leaders on 9 Thermidor Year III (27 July 1794) but, sad to relate, he lived to 84, having outlived the Directory, the Consulate, the Empire, the first Restoration, the 100 Days, the second Restoration and (almost) the July Monarchy. If nobody stands up for basic rights, whether time-honoured like the privilege against self-incrimination or recent like EHCR Art 6, then provisions like Principle 11 might also last for 84 years. ■

Further Reading:

- Financial oppression: money, banks and the rule of law (2012) 9 JIBFL 531.
- Self-reporting and internal investigations: speak now or forever hold your peace (2014) 10 JIBFL 643.
- LexisPSL: Financial Services: Incentives for self-reporting are real, enforcers insist.