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Update

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Swiss Federal Administrative Court protects right to silence of companies in antitrust sanction procedures

In a recent decision, the Federal Administrative Court acknowledges the fact, that an unrestricted interrogation of a former employee could undermine the right to silence of a company subject to antitrust sanction procedures. The Federal Administrative Court clarifies under which conditions the Secretariat of the Competition Commission may interrogate former employees as witnesses.

Facts

In April 2016, during a bid-rigging investigation against various Swiss construction companies, the Secretariat of the Competition Commission summoned the individual Y as a witness. Until his retirement at the end of February 2014 and during the investigation period, Y had been employed by stock company X (the complainant) as a branch manager with collective (dual) power of representation. The complainant requested Y to be questioned as its representative and not as a witness, but the Secretariat of the Competition Commission rejected the request. The matter was brought before the Federal Administrative Court (Federal Administrative Court, Decision B-3099/2016, B-3702/2016 (17 September 2018)).

Summary of the decision

At first, the Federal Administrative Court addresses the question of which natural persons may represent the legal person (i.e. the company) in administrative procedures and holds that a company is represented by its members of *de jure* and *de facto* management bodies ("Organ") and acts in administrative procedures through them. The court concludes, that if a company is a party in an (antitrust) administrative procedure, its members of *de jure* and *de facto* management bodies also constitute the party and shall be interrogated as party representatives. Other members of the company may, in principle, be interrogated as witnesses.

With regard to the assessment of the procedural role of Y (as a witness or company representative), the court notes that taking into consideration that the company can only be represented by its *current* management bodies, *former* members of the management, such as Y, had to be considered as a third party who may be, in principle, interrogated as a witness with a duty to tell the truth and under threat of punishment in case of false testimony.

Subsequently, the court examines whether and to what extent the minimum procedural guarantees

of the criminal procedure from which the right to silence (*nemo tenetur*-principle) derives, may prevent an interrogation of Y as a witness under threat of punishment in case of false testimony. Concerning this matter, the court states that Y's interrogation as a witness does not constitute a *per se* violation of the minimum procedural guarantees provided under Article 6 of the European Convention on Human Rights.

However, the court acknowledges that an unrestricted interrogation of Y as a witness could ultimately undermine the complainant's right to silence under article 6 of the European Convention on Human Rights as Y's conduct and potential witness statements in this respect would be attributable to the complainant. From this, the court concludes that Y's interrogation as a witness is permissible only if it concerns purely factual information that could have no direct incriminating effect on the complainant with regard to a possible violation of competition law. In contrast, the court holds that interrogating a witness under the threat of criminal penalty is prohibited with regard to questions that could ultimately lead to an indirect acknowledgment of guilt by the complainant.

In case of these types of questions, the court clarifies that Y might be questioned as informal respondent meaning without a duty to tell the truth or threat of punishment in case of false testimony and with the right to silence.

Comment

Although the decision of the Federal Administrative Court protects the minimum procedural guarantees of companies in antitrust sanction procedures, it is not completely convincing.

As the court bases its assessment of the procedural role of Y on the circumstances at the time of the interrogation, it does not sufficiently take into account, that precisely the former employee might have been the one committing the potentially illegal conduct. The court solves the contradiction by prohibiting unrestricted witness interrogations of former employees who have a particularly close relationship to the company as well as to the subject of the investigation. In practice, this rule leads to the situation where such persons will be interrogated as informal respondents and in this position may nevertheless *de facto* refuse to provide information which could incriminate the company.

Please do not hesitate to contact us in case of any questions.

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