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ApplePay proceedings lead to clarification on Nemo Tenetur in Competition Law

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Early April, the Federal Supreme Court clarified controversial questions regarding the privilege against self-incrimination in Competition Law Proceedings in three much-noticed decisions (2C_383/2020, 2C_87/2020 and 2C_88/2020)[1].

The Decisions

In 2018, the Swiss Competition Commission ("**ComCo**") opened proceedings against various financial institutions regarding an alleged boycott in Switzerland. The Competition Commission suspected that the addressees of the investigation had entered into unlawful agreements to compete in order to boycott mobile payment solutions from international providers such as Apple Pay and Samsung Pay. In these proceedings, ComCo interrogated current and former employees, as well as executives, including a former CEO, summoned as a witness. Whether an individual is interrogated as a party representative or as a witness is relevant. Witnesses are generally obliged to testify truthfully during their examination, whereas party representatives may refuse to testify based on Art. 6(1) ECHR.

The financial institutions appealed against the interrogations as witnesses to the Federal Administrative Court. The Federal Administrative Court held in a much-discussed decision that a former executive may only be interrogated as a witness with respect to facts that cannot directly incriminate the company investigated. Otherwise, the *nemo tenetur* principle would be violated. ComCo appealed this decision to the Federal Supreme Court that has now ruled in its favour.

In two of the three cases, the Federal Supreme Court concluded that the companies investigated had not substantiated that it would suffer irreparable disadvantage because of the interrogations of the witnesses. In the third case (2C_383/2020), however, the Federal Supreme Court dealt in depth with the scope of *nemo tenetur* in Competition Law Proceedings:

The Federal Supreme Court first clarified that whether an individual may qualify as a witness or a party representative depends on the actual position. Individuals being formal or factual executives in the moment of the interrogation represent the company investigated. Hence, *nemo tenetur* not only covers the personal interests of the individual but also the interests of the company. By contrast, former executives are to be interrogated as witnesses as *nemo tenetur* only applies to their personal interests. Such individuals have no longer a direct interest in the outcome of the proceedings and a possible sanction and are therefore not to be questioned as a party but as a

witness. According to the Federal Supreme Court, *nemo tenetur* shall prevent an individual from becoming a witness on his or her own behalf.

As a consequence, former executives do not have the right to refuse testimony based on *nemo tenetur* as this principle shall only ensure an effective defence for the company investigated. And the latter is not at stake as witness statements of former executives cannot be attributed to the company. The company investigated is still free to refute such statements.

Opinion

In the view of the authors, the practice of the Federal Supreme Court fails to recognize the procedural reality and significantly curtails the rights of defence of companies in Competition Law Proceedings. It factually undermines *nemo tenetur* in Competition Law Proceedings based on a very formalistic approach. Given this practice, companies now run the risk that previous decision makers being involved in the conduct under investigation can be forced to make incriminating statements against the company as soon as their employment or mandate ends. At least four negative consequences are apparent:

First, this violates the Principle of *effet utile* by forcing an individual, who was involved in the conduct under investigation, to testify against their previous employer, resulting in a *de facto* self-incrimination. Second, this could incentivise companies not to dismiss their executives just to exclude a negative testimony. Negative impacts on a company's compliance culture are predictable. Third, the company's lawyers are prohibited by the Rules of Professional Conduct to contact or instruct witnesses before the interrogation. Therefore, this decision not only weakens the company's right of defence but also the possibility to apply for leniency, as for the latter close contact is required between the lawyer and former employees and executives involved in the conduct under investigation. Fourth, the view of the Federal Supreme Court, that the statements of former executives cannot be attributed to the company and be refuted is unrealistic. In practice, such a statement will have almost similar significance in terms of probative value as a confession by the company itself because, by definition, someone who was involved in the conduct under investigation will testify before ComCo.

Against this background, the authors regret the new decisions of the Federal Supreme Court, which shift the balance of power in Swiss competition law proceedings unduly to the authority.

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[1] The authors represent the *Postfinance AG*, which was one of the two financial institutions concerned.

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