

BRIEFING APRIL 2021

SWISS FEDERAL SUPREME COURT LIMITS PRIVILEGE AGAINST SELF-INCRIMINATION IN ANTITRUST PROCEEDINGS

The Federal Supreme Court has ruled that a former CEO of a corporation that is a party to an antitrust proceeding, cannot in principle invoke the privilege against self-incrimination under Article 6(1) of the European Convention on Human Rights (ECHR) in that proceeding. However, the Federal Supreme Court appears to recognize the privilege against self-incrimination of the current members of the bodies of the corporation in the respective proceeding.

https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Fa-za://08-03-2021-2C_383-2020&lang=de&zoom=&type=show_document

On 13 November 2018, the Competition Commission opened an investigation against several Swiss financial institutions.

In this investigation, the former CEO of a subsidiary of one of the financial institutions involved was ordered to testify as a witness (with the obligation to testify truthfully).

The affected financial institution, the former employer of that former CEO, argued that the former CEO should not be interrogated as a witness. Rather, the former CEO should be interrogated as a party representative while being able to invoke the privilege against self-incrimination under Article 6(1) ECHR.

The Federal Supreme Court rejected this view in a [judgment of 8 March 2021](#). The Federal Supreme Court agreed that corporations could invoke the guarantees under Article 6(1) ECHR in antitrust proceedings, in particular the privilege against self-incrimination. However, the Federal Supreme Court held that the protection of legal entities by the privilege against self-incrimination in antitrust proceedings would pursue a partially different target than in the case of individuals. It argued that individuals could not be fined under Swiss competition law. As a consequence, the purpose of the privilege against self-incrimination in antitrust proceedings would not be to protect the free will related to human dignity, but solely to guarantee the effective rights of defence of the corporation. The Federal Supreme Court argued that, in light of this purpose, there would be no apparent reason to allow former members of the bodies of corporations under investigation to benefit from a privilege against self-incrimination.

There is also a bright spot, however, as it can be inferred from the judgement that current members of the formal and de facto bodies of the corporation have a privilege against self-incrimination with regard to the subject matter of the investigation. This is because corporations act through their current formal and de facto bodies. The current members of these formal and de facto bodies are therefore to be treated like parties to the investigation and not as third parties. However, this privilege against self-incrimination appears to be limited to the current members of these formal and de facto bodies. Persons without such board status cannot invoke the privilege against self-incrimination in relation to an antitrust proceeding. They can be interrogated as witnesses.

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