THE CURRENT CASE LAW ON THE FREEDOM OF LEGAL ENTITIES FROM SELF-INCRIMINATION

I. INTRODUCTION

One of the most fundamental principles of criminal proceedings is the right not to incriminate oneself (nemo tenetur). Accused persons have the right to refuse to testify. Statements made in ignorance of the right not to incriminate oneself cannot be used to the disadvantage of the accused. Accused persons are neither obliged to hand over documents nor to participate, in any way, in the investigation of the facts. However, the extent to which freedom from self-incrimination includes legal entities has not been conclusively resolved. Legal areas in which administrative provisions take on the character of sanctions are also of increasing importance. In contrast to criminal proceedings, there is usually a duty to cooperate in administrative proceedings.

II. CASE LAW

The Federal Supreme Court assumes that the principle of nemo-tenetur also applies to legal entities, but that this principle can be restricted. Specifically, the Federal Supreme Court is of the opinion that documents that were created on the basis of legal documentation obligations are not subject to the exemption from self-incrimination (BGE 142 IV 207; BGE 140 II 384). Accordingly, the accused legal entity is obliged to submit documents that it was obliged to produce by law. This is justified by the fact that the nemo tenetur principle is derived from human dignity. This component is missing in the case of legal entities (BGE 140 II 384, E. 3.3.4).

Another example of the aforementioned problem is antitrust law. Art. 49a para. 1 KG provides that companies can be charged with a sanction in case of unlawful restrictions of competition. The Competition Commission has the power to hear third parties as witnesses and to oblige those concerned to provide evidence. In these cases, the legitimate question arises as to the extent to which principles of criminal procedure, in particular the nemo tenetur principle, apply.

The issue was once again brought into the limelight by a recent Federal Supreme Court decision (BGer 2C_383/2020 of 08.03.2021): The Federal Supreme Court had to judge whether former executive bodies could be comprehensively obliged to testify against the company as witnesses. The Federal Supreme Court came to the conclusion that the distinction between “those directly affected by the investigation” and “third parties” (Art. 42 (1) CartA) was of crucial importance for assessing this question. In principle, it was stated that for “persons directly affected by the investigation” Art. 6 para. 1 ECHR applied. They can refuse to testify, while third parties as witnesses are subject to the duty of truthfulness (BGer 2C_383/2020 of 08.03.2021, E. 4.3).

The Federal Supreme Court concluded that only the parties to the proceedings would fall under the term “parties affected by the investigation”. Since legal entities act through their current formal and de facto bodies, they are to be treated as parties. Other employees or former bodies, on the other hand, lack party status, which is why they are to be questioned as witnesses (BGer 2C_383/2020 of 08.03.2021, E. 4.6 f.).

In its reasoning, the Federal Supreme Court stated that in antitrust proceedings a different thrust is pursued than in criminal proceedings against natural persons. The purpose of refusing to testify in antitrust proceedings is not to protect the executive bodies, but to protect the rights of defense concerning the incriminated companies. The executive bodies of legal entities may refuse to testify if they still perform their current function and have not left the company (BGer 2C_383/2020 of 08.03.2021, E. 5.2.2).

III. CONCLUSION

The courts do not grant comprehensive application to the nemo tenetur principle. The restrictive handling leads to the fact that companies can be held criminally responsible, but they do not have the same procedural rights as natural persons. The way in which case law deals with the formulation of the aforementioned principle seems unsatisfactory. It appears that an attempt is being made to water down an elementary procedural principle for practical reasons.

Nevertheless, the scope of application is not completely limited, but a few concessions are made. The flexible design of these rights, however, brings legal uncertainty with it. The principle of freedom from self-incrimination and Art. 6 ECHR should not be applied to varying degrees. From the point of view of the investigating authority, it seems understandable that the determination of the facts is made considerably more difficult without an obligation to cooperate. However, the notoriously limited resources of the prosecution authorities should not undermine the validity of a right with constitutional status.

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