

German Constitutional Court Permits the Seizure of Documents in Possession of Third Party's Lawyers

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The ruling. 27 June 2018: The German Constitutional Court declined to extend privilege protections on constitutional grounds to evidence collected by a lawyer of a third party entity. Current privilege standards under German law remain unaffected by the decision.

Background. Munich, 15 March 2017: The Munich prosecutor raided the Munich offices of Jones Day, counsel to Volkswagen AG ("VW"), seizing hard-copy documents and downloading documents originating from an internal investigation of Jones Day into VW that extended also into VW-sub subsidiary Audi AG ("Audi"). The Munich prosecution targeted members of Audi whereas VW was subject to an investigation of the Braunschweig prosecutor. The Munich raid came after Volkswagen had refused to publish the findings of Jones Day's internal investigation.

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Key considerations of the Court. In considering the constitutional rights of VW, the German Constitutional Court upheld the interference as justified given the strong public interest in efficient prosecution. Jones Day as a foreign entity was held not to enjoy standing under German constitutional law.

The seizure of documents constituted neither a violation of VW's fundamental right of informational self-determination nor of its right to a fair trial. The rights of VW were held inferior to the state's interest in an efficient prosecution of third parties and non-privileged information. The Court saw no reason to extend the privilege to effectively bar seizure of information belonging to a third party. The Court also dismissed VW's "sanctity of the home" argument because its own offices were not searched.

Under German law, privilege is only applicable between a client and its counsel. It does not extend to affiliates of a corporate client. The fact that Volkswagen was under investigation in Germany does not prevent a different prosecutor investigating against a different company or subsidiary from obtaining the evidence gained in internal investigations from such other companies or subsidiaries.

The Court dismissed the constitutional complaints of Jones Day, holding that a foreign law firm is not a domestic legal person as envisioned by the German constitution and

lacks standing to lodge a constitutional complaint. The rights of individual lawyers, the Court stated, were not affected.

German law privilege in principle. German law privilege hinges on the principal obligation of a lawyer to not reveal client-confidential information, from which derives the right of the lawyer to refuse testimony. In matters where a lawyer is entitled to refuse testimony, investigations against the client may not be conducted at the lawyer's offices. However, while generally prohibiting investigations into the attorney-client relationship, German law does not exclude the seizure of documents unrelated to a client's defense.

There are situations where privilege is clearly not provided. Interview memoranda produced by the client or by a lawyer for and on behalf of the client are generally not protected by privilege as they can be attributed to the client. This view was also accepted by the German Constitutional Court from a constitutional law point of view. There is also no privilege protection for evidentiary documents that are (re-)located to the client or other third party. German law does not extend privilege to documents retained by a lawyer that originate, or are received from, the client or a third party. For purposes of privilege, the lawyer is simply considered a third party in possession.

Is there a protection similar to the U.S. concept of attorney work product? One key question in internal investigations is whether documents generated by a lawyer in connection with an internal investigation are protected from disclosure, namely documentary evidence sourced from the client or third party, or internal notes such as interview memoranda produced by the lawyer.

In Germany, there is no principle comparable to the work-product doctrine. Documents produced by an attorney for his own support, such as internal notes, are protected from disclosure. Likewise, documentation that contains legal advice in relation to an ongoing matter is protected.

However, there is disagreement in criminal courts whether lawyer-produced interview notes and reports are also privileged in the absence of an actual or specifically anticipated or imminent defense matter involving the client.

In July 2015, a Braunschweig Regional Court stated that all documents retained by a defendant that had been created for the purpose of its criminal defense could not be confiscated. A criminal court in Mannheim extended protection to situations immediately prior to the launch of a public prosecution of the client, a view that remains disputed among scholars and courts.

Is there a safe haven to avoid seizure? Information derived from interviews may only be safely protected to the extent it has been generated as part of a lawyer's work in evaluating a defense case for the client and communicated as part of legal advice. Similar to the current situation in the United Kingdom, privilege depends on whether there is an actual or imminent defense case and to what extent the findings made by a lawyer are part of his own assessment of the case and his legal advice. Privilege may not attach if a lawyer conducts an interview and produces notes directly for, or on behalf of, a client as the notes could be attributed to the client and not constitute a privileged communication. This is particularly true in non-defensive situations, if the aim is to remedy a compliance situation.

Consequences for internal investigations. The implications for conducting internal investigations in Germany have remained unchanged. The risk of confiscation of documents for internal investigations, even in law firms, was already understood on the basis of previous criminal court decisions. Professional secrecy in Germany does not extend to documents prepared by the attorney during an attorney-led internal investigation unless prepared as part of the communication in the defense of a specifically existing or imminent prosecution. In the absence of a criminal prosecution and related defense communication, written conclusions or other work product rendered by a law firm in the course of a client-initiated internal investigation are not safe from disclosure or seizure. This holds true in particular if the material has been sourced from a third party.

As a result, clients should determine at the outset (1) who is the client in the corporate group environment, treating each affiliate as an independent entity for the purposes of investigation and privilege; and (2) if and when the investigation is undertaken for defense purposes; documents are only privileged to the extent they form part of legal advice in an actual or imminent defense communication.

Privileged communications residing with a German lawyer should be marked as privileged. Other, namely third-party, documentation that is not protected should be kept separate from privileged information to avoid privileged and non-privileged material from being taken by the prosecutor together.

A company's vulnerability to forced disclosure of sensitive information originating from internal investigations may be mitigated if the company pursues cooperative measures with the relevant authorities and implements adequate practices regarding the communication of sensitive information and the protection of individuals involved.

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Please do not hesitate to contact us with any questions.

FRANKFURT

Thomas Schuerrle
tschuerrle@debevoise.com

WASHINGTON, D.C.

Kara Brockmeyer
kbrockmeyer@debevoise.com

Jil Simon
jsimon@debevoise.com

NEW YORK

Erich O. Grosz
eogrosz@debevoise.com

SHANGHAI

Philip Rohlik
prohlik@debevoise.com