

DECISION OF THE GERMAN CONSTITUTIONAL COURT ON ATTORNEY-CLIENT PRIVILEGE IN INTERNAL INVESTIGATIONS TO BE EXPECTED

The attorney-client privilege in Germany follows different concepts than in the US or the UK. The current legislation and jurisprudence regarding information and documents derived from internal investigations is ambiguous. The German Constitutional Court now has to decide on the seizure of documents from an internal investigation.

PENDING CASE

In connection with the Diesel-investigation of Volkswagen and its subsidiaries the office of Jones Day in Munich was searched and numerous documents were seized. Jones Day was originally mandated against the background of the US investigations against Volkswagen. After the initiation of investigations by German prosecutors, the courts in Munich approved the seizure of documents at the law firm related to the internal investigation. The Constitutional Court granted interim relief in July 2017 and ruled that the documents in question must not be reviewed and assessed by the Public Prosecutor's Office until a final decision is taken. The interim relief does not give an indication regarding a final decision as the merits of the case are not subject to the interim relief. The court only balanced the potential negative effect on both sides if it would grant or would not grant the interim relief.

The search of the premises of an international law firm and the seizure of numerous documents produced in an internal investigation has raised concerns with international operating corporations in how far findings of internal investigations are protected against the access by investigating authorities.

APPLYING PRINCIPLES

Based on the legislation and jurisprudence so far the following principles apply:

- Defense correspondence and defense documents and any work products of an internal investigation conducted by outside counsel, e.g. protocols of witness interviews, summary of results of review of documents, legal assessments, are privileged under German law and may not be seized.
- This applies, although not undisputed, also in

case that the corporation is not yet formally investigated, but the internal investigation conducted by outside counsel serves the purpose to prepare the potential defense of the corporation in the future, if investigated.

- The results of an internal investigation conducted by in-house counsel or auditors is not protected, the authorities may seize these documents.
- If the internal investigation serves other purposes than the defense of the corporation, e.g. the preparation of claims against or the defense against claims of third parties, assessment of claims against (former) board members or to inform regulators abroad, it may be disputed whether a general attorney-client privilege applies to these documents.

The Constitutional Court will now decide whether the results of internal investigations are privileged as part of the relationship of trust between lawyer and client regardless of the purpose of the internal investigation.

PRELIMINARY CONCLUSIONS

The decision of the Constitutional Court will (hopefully) clarify if a Public Prosecutor's Office can reach out to attorney work products in the context of an internal investigation. So far, the following preliminary conclusions can be made:

- In the engagement letter it should be clearly stated to what extent the investigation is conducted for defense purposes.
- Those defense documents should be marked as such and be stored in custody of the mandated law firm.
- Documents and work products for other purposes, e.g. for remedial actions, civil litigation or for disclosure to foreign authorities, should be separated from purely defense documents.
- Those other purposes should also be clearly stated in the engagement letter in order to try to claim attorney-client privilege based on the relationship of trust.

If you have any questions please do not hesitate to contact us.



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