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Seizure of data and documents in internal investigations in Germany

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Irritations arose not only in Anglo-American countries, when public prosecutors and other authorities in Germany searched (cooperating) companies and their mandated law firms and confiscated a variety of documents and data. One example of this is the recent search of a law firm by the public prosecutor's office of Munich (Staatsanwaltschaft München II) in charge of the investigation of the so-called "diesel affair". The public prosecutor's office of Munich (Staatsanwaltschaft München II) was instructed by the German Federal Constitutional Court (Bundesverfassungsgericht) in an interim proceeding, to deposit the seized documents and data at the Munich District Court (Landgericht München). For the time being the documents cannot be reviewed. A final assessment of whether the public prosecutor's office is allowed to review and use the documents will be issued by the Federal Constitutional Court. The Federal Constitutional Court already indicated that the primarily focus will be on the extent to which the relationship between attorney and client is protected by fundamental rights.

In this post, we analyze the status quo and provide conceptual suggestions for an investigations-related attorney-client privilege. A more detailed version of our analysis (in German language) was published in CCZ 2017, 242.

1. There is no formal corporate criminal law in Germany – but the consequences for companies are just as severe

At present, companies cannot be held criminally liable under German law. But in many cases, the sanctions, in particular fines and confiscations, merely have a different label but are just as severe as if they were criminal sanctions. At the same time, since there is no clear legislative guidance on how to sanction companies, it is challenging to effectively defend companies. Compared to US criminal law, no "leading cases" or "sentencing guidelines" bind the German prosecutors.

2. Attorney-client relationship is less protected in Germany – so far

Under German law, an attorney-client privilege or work product-doctrine do not exist. The main boundaries for public authorities can be found in the German Code of Criminal Procedure. Several sections protect the work of an attorney in connection with criminal procedures. But these sections do not expressly protect companies from a seizure of data

or documents in connection with internal investigations:

i) If related to the engagement, attorneys may refuse to give testimony and thus an investigation is not permitted. However, this section does not cover the seizure of documents.

ii) Items related to the right of an attorney to refuse testimony may not be seized. This section does not protect documents located or data stored at the company.

iii) Communication between defense counsel and accused may not be intercepted. However, companies do not have formal defense counsels since they cannot be held criminally liable under German law.

In light of the legislative uncertainty, district courts have ruled differently on the appeals of companies or law firms against the seizure of documents related to internal investigations. Some approved the seizure, some stopped them. Despite contradicting rulings, the German legislators left it up to the Federal Constitutional Court to provide some guidance on the constitutional permissibility of such seizures.

3. Reform considerations

In the following, we discuss some considerations on what a reform of the German approach to the protection of the attorney-client relationship in the context of internal investigations could look like. Our suggestions go beyond the mere prohibition to seizure documents and data which relate to an investigation. In addition to (1) conceptual considerations of an adapted “legal privilege”, these include (2) codified criteria for the sanctioning of companies, (3) compulsory incentives for companies to cooperate with prosecution authorities and (4) the consideration of third party rights. A supporting analysis of any adjustments to data protection law would also be necessary.

3.1 The suggested attorney-client privilege for internal investigations

The origin of the protection of investigations-related documents and data must be the attorney-client relationship. The required trust between a company and its attorneys deserves protection. Basis for the legal protection of this principle are the rule of law and the fair trial principle. If companies can be held liable for knowledge or misconduct of their employees, companies should be protected if they are in the process of collecting information to determine whether misconduct took place. Employees and the management should be able to interact freely with the company’s investigation counsel without having to fear that their actions or statements can be used as evidence against them. Consequently, work products drafted in connection with an internal investigation must be protected from being seized by the authorities. This comprises reports, their drafts and exhibits as well as related communication. Protection require also interview

minutes and other memoranda etc. which were part of the preparatory work for the investigations report. The aforementioned protection mainly applies if the investigation is conducted by external counsel. External counsels are officers of the court and their role requires protection. Nevertheless, it is worth discussing whether inhouse counsel may require similar protection.

3.2 Obligation to investigate failure to prevent misconduct by employees and misconduct by the board

Public prosecutors are obliged to investigate criminal conduct. However, it is in their discretion to decide whether they want to investigate administrative offenses by the management (failure to implement adequate measures to prevent misconduct by employees) or the company (which applies in case of an administrative offense by the management). To ensure equal treatment all over Germany, it would be preferable to turn the failure to implement adequate measure to prevent misconduct by the employees into a criminal offense (which can be committed negligently or intently).

3.3 Binding incentives for cooperation – binding criteria for sanctioning, judicial control

If work products and communication were protected by the attorney-client privilege and if at the same time public prosecutors were obliged to investigate companies and their management for failure to implement adequate measures to prevent misconduct by the employees, there must be an incentive for companies and their management not to "remain silent". Such incentive must be codified. Concepts for such an incentive have already been introduced as draft laws. Finally, it makes sense to codify any potential in a clear and structured way (cf. the US Sentencing Guidelines). The legislative implementation of advisory, binding criteria to determine fines would be a reasonable step. Currently, there are no formal rules how a fines against the company or the management is determined. The decision by the public prosecutors should be subject to judicial review.

3.4 Protection of employees' rights

The aforementioned concept of an investigations-related attorney-client relationship would – as a reflex – also protect the rights of employees. Employees are contractually obliged to cooperate with the investigators but their statement are currently not protected. Therefore, by seizing interview minutes, public prosecutors and courts may get access to information which they would not be able to obtain otherwise, e.g. if the employees invoke their right to remain silent in a criminal investigation.

But what happens if the company cooperates and hands over the interview minutes? In this case, the affected but cooperating employee should also receive something in return for his cooperation, e.g. reduction of his sentence.

4. Summary

The current situation when it comes to the protection of the rights of companies in connection with internal investigations is unsatisfactory. Structural changes are required to protect the rights of companies, their management and employees. We suggest to introduce an investigations-related attorney-client privilege which should be accompanied by a legal obligation of the public prosecutors to investigate the failure to introduce adequate measures to prevent misconduct. Despite the attorney-client privilege, companies will cooperate with the authorities if adequate incentives are codified.