CROSS-BORDER INVESTIGATIONS: WHEN ARE DOCUMENTS DEVELOPED IN THE COURSE OF AN INTERNAL INVESTIGATION PROTECTED BY LEGAL PRIVILEGE?

Date: 27 August 2018

Investigations, Enforcement and White Collar Alert

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INTRODUCTION

A recent decision by Germany's Federal Constitutional Court (*Bundesverfassungsgericht*) (“FCC”) [1] has renewed important questions with respect to legal privilege, its varied conceptual and practical scopes and application in different jurisdictions, and the implications of these differences for multi-jurisdictional internal investigations. The decision concerned the seizure of materials from Jones Day's offices in Munich. That firm had been retained to undertake an internal investigation on behalf of its client, the supervisory board of Volkswagen AG. The company was facing high-profile compliance issues and resulting enforcement actions around the globe, including in the United States and in Germany, relating to the alleged manipulation of emissions performance data of diesel engines installed in its passenger vehicles.

QUESTIONS

How far do prosecutors' powers reach to search for and seize documents obtained or generated by an outside law firm in an internal investigation, and to what extent does legal privilege offer protection against measures such as those taken by the German public prosecutor (*Staatsanwaltschaft*) in the above mentioned case? To what extent does the voluntary disclosure of some information to prosecutors (a possible “selective waiver of privilege”) in one jurisdiction predetermine the chances of success of asserting legal privilege in other jurisdictions, particularly in circumstances where prosecutors or regulators from various jurisdictions and countries cooperate and exchange information?

The following discusses these questions from the perspective of the United States, the United Kingdom, and Germany.

Legal privilege is acknowledged in all three jurisdictions, albeit based on different concepts.

GERMANY

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In Germany, as outlined in previous alerts [2], the two pillars of legal privilege are an attorney's: (i) legal obligation to maintain confidentiality of client information [3], and (ii) right to remain silent as a witness in legal proceedings [4]. The right to remain silent is flanked by protections also implemented in the code of criminal procedure (*Strafprozeßordnung*, (StPO)) against a public prosecutor's searches and seizure of information. For example, German law prohibits the seizure of written correspondence between defense attorney and client [5] as well as "defense materials" (*Verteidigungsunterlagen*) more generally, which include documents prepared by an attorney or the client for purposes of the defense.

While it is clear that the above protections apply to individuals who have been formally accused, it is not clear to what extent the client must be formally accused before the client or legal counsel can successfully claim the protection. There is also uncertainty regarding how privilege protection can be applied to corporate entities (which under German law cannot commit a crime as German law requires individual culpability), as opposed to natural persons, particularly in the context of an internal investigation.

In recent years, privilege protections have been the subject of some legislative action [6], as well as a number of court decisions prompted by a phenomenon, which is still relatively new in Germany, that an outside law firm may conduct an internal investigation for a corporate client. Due to the absence of corporate criminal liability in Germany, legal privilege and related legal issues traditionally have centered on the relationship between accused individuals and their lawyers; however, the increased prevalence of internal investigations has created a need to consider these questions with respect to the relationship between corporate clients and their lawyers.

Section 160a StPO in its 2011 amended form [7], on its face, affords external lawyers absolute protection in criminal investigations in that attorneys may not be subject to any investigatory measures concerning criminal matters in which they are providing advice. The provision also prohibits the monitoring (e.g., wiretaps) of defense attorneys and provides that their offices must not be searched for files of clients under criminal investigation. However, the exact reach of the protections under section 160a StPO remains unclear.

A favorable interpretation of this provision was taken by the Regional Court of Mannheim [8] to the effect that defense counsel, whether for an individual or a corporation, enjoyed protection from seizure and subsequent use in criminal proceedings of confidential client documents in the lawyer's care, as long as the client provided the materials to counsel in good faith (i.e., not as a means of seeking to impede the investigation). As the court explained, "good faith" would not be assumed where the client provided incriminating documents unrelated to the matter at issue purposefully to counsel solely to protect those incriminating documents from seizure. Other, subsequent court decisions indicate that documents, even if prepared by company staff (in-house legal counsel or otherwise), enjoy protection from seizure:

- If they have been prepared for the purpose of defending a corporation in possible legal proceedings [9];
- Even if the documents are possessed by and located at the business premises of the potentially accused person or entity [10];
- And even if they were created before legal proceedings were initiated, as long as those proceedings were anticipated [11] and a professional relationship of trust between the accused (individual or corporation) and the lawyer already existed as part of the process leading towards a formal retention [12].

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Despite such favorable and encouraging rulings, effective confidentiality protection of documents related to internal investigations remains a challenge following the FCC's recent ruling.
For a start, none of the above-cited decisions by local or regional courts are binding on other courts. Procedurally, in these matters, challenges against prosecutorial search and/or seizure warrants have to be brought to the local courts and appeals against local court decisions can be brought to regional courts, but not higher.

In addition, the FCC has now made the following important points, confirming that a court order to seize documents in the care of a law firm conducting an internal investigation did not violate the corporate client's constitutional rights:

1. The FCC did not find fault with the Munich regular court's finding that section 160a StPO would not have to be interpreted as granting absolute protection against the preliminary search or subsequent seizure of client information from a lawyer's office where, as in the given case, core rights such as protection of human dignity, have not been at stake.
2. Legal privilege protection under section 97 para. 1 number 3 StPO applies only in a relationship of trust between a lawyer and a person charged with a criminal offence within a specific criminal investigation and not more generally or before a person actually becomes accused. Such a relationship does not yet exist where a corporation only fears future criminal investigations directed against it and therefore seeks legal advice from a lawyer or orders an internal investigation of the company.
    - Underlying this reasoning is the principle that a company cannot be an accused party in a criminal investigation; instead, only individuals amongst its legal representatives and employees may be criminally accused; the FCC's ruling now confirms the constitutionality of the argument that, though the company may have an attorney-client relationship with the investigating law firm, the privileges of section 97 (which shall remain unaffected pursuant section 160a para 5 StPO) do not extend to corporate bodies because they are not formally accused. Individuals are not protected against seizure of documents from a law firm with which they do not have an attorney-client relationship (cf. section 97 para. 1 no. 3 and section 97 para 2 sentence 1 StPO).
3. The prosecutorial search and seizure in the context of investigations against a subsidiary by one German federal state's prosecutors is independent of an investigation of regulatory offences against the parent company by another state's prosecutors.
4. It is not constitutionally required to extend the protection of a lawyer-client relationship involving a parent company to a subsidiary company; the court similarly ruled that a parent company could not argue that a seizure is prohibited because the subsidiary company's position is similar to that of a natural person accused of a criminal offence.

The FCC also rejected complaints by the affected U.S. law firm and its German lawyers on the grounds that (i) the law firm is a U.S. partnership and, therefore, did not have standing to claim a violation of German constitutional rights, and (ii) the constitutional rights of the German lawyers whose offices were searched were not violated because:

- The complainants are not holders of the fundamental right under Art. 13(1) GG as this only extends to the authorized user (in this case Jones Day), not its individual employees, and it was not argued that offices are to be attributed to their personal private sphere.

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- Generally, prosecutorial measures based on the mandatory provisions under part 8 of the StPO do not, as a matter of principle, violate the right of occupational freedom under Art. 12(1) GG, as such measures affect all criminal persons charged with criminal offences indiscriminately, or are directed at everyone. Only a violation of the law firm's rights in this respect was argued; however, the law firm, as a U.S. entity, does not have the required standing to claim these rights.
- The seizure of the data also did not violate the individual lawyers' right to informational self-determination, because the seized data are connected to the case and thus must be attributed to the Jones Day law firm, Volkswagen AG (as the initiator of the internal investigation), and Audi AG (to the extent that the information came from its sphere). The seized data are not attributed to the individual lawyers, who are not parties to the proceedings, not even in a broader sense, because their individual rights are not affected.
- Finally, the seized documents are owned by the Jones Day law firm, which holds the right of possession; seizure of those documents therefore does not violate the ownership rights of the individual lawyers.

UNITED STATES

Had the Volkswagen/Jones Day matter been brought in the United States, the result would have likely been much different, as the United States has doctrines that provide greater protection of documents generated in the course of an internal investigation. Because of that greater protection, cooperation and communication between and among different government regulators and prosecutors in the course of a cross-border investigation may be impacted when some of those jurisdictions (here, Germany) seize and review documents that would still be considered privileged in other jurisdiction such as the United States.

In the United States, documents created during the course of an internal investigation are potentially protected by two principles—the attorney-client privilege and the attorney work product doctrine. The attorney-client privilege applies to protect confidential communications made between a client and an attorney for the purposes of seeking or providing legal advice. The attorney work product doctrine protects from disclosure documents that are prepared “in anticipation of litigation.” The attorney-client privilege is absolute, while the attorney work product doctrine may be overcome for certain types of work product (e.g., documents that do not reveal an attorney's thought processes or opinions (also known as “nonopinion work product”)), upon showing of “substantial need,” whereas “opinion work product” enjoys greater protection.

As internal investigations are often undertaken when there is the prospect of litigation, both the attorney-client privilege and work product doctrine protection may protect from disclosure the types of materials at issue in internal investigations like those in the Volkswagen/Jones Day matter.

First, attorney notes or summaries of witness interviews (and documents reflecting such information) may be protected by both the attorney-client privilege and the work product doctrine. In the United States, when an attorney represents a company, the “client” for purposes of the attorney-client privilege has been held to encompass all employees, so long as the communications at issue meet a test set forth by the U.S. Supreme Court in *Upjohn* [13]. Specifically, (1) the communication must be authorized by the corporate superiors, (2) the employee must be aware that the communication is related to legal advice, (3) information covered by the communication cannot be available from the corporate superiors, and (4) the communication must be related to

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the employee's duties at the company. Some courts look carefully at materials generated in an internal investigation to determine whether a primary purpose of the investigation was to obtain or provide legal advice [14]. As a result, this analysis may differ depending on whether the internal investigation is performed by counsel retained for its independence, and who might be representing a board or audit committee, as opposed an investigation performed by counsel retained by the company to represent it in the matter, who might do so as part of the representation and advocacy.

Second, internal investigation documents (including witness interview notes, various types of summaries and memoranda, and investigative reports) may also constitute attorney opinion work product when the documents contain an attorney's mental impressions or reflect attorney thought processes, and the document is considered to be made “in anticipation of litigation.” Different courts apply the “in anticipation of litigation” standard with some variation, making it important to make clear in conducting an internal investigation that the possibility of litigation is reasonably anticipated.

It is important to note that either the attorney-client privilege or work product protection may be waived under certain circumstances. One method by which waiver could be deemed to occur is when a client decides to voluntarily provide information learned during an internal investigation to government authorities. This can take many forms (e.g., oral, written) and may differ in scope (e.g., limited read-outs of interviews, high-level summaries of issues, full reports). Some courts in the United States have grappled with the extent to which such voluntary disclosures to regulators or prosecutors may constitute a waiver of attorney-client privilege and/or work product doctrine protection [15].

UNITED KINGDOM

In the United Kingdom, there are two doctrines similar to those adopted in the United States that may provide protection over materials generated in an internal investigation. Legal advice privilege protects confidential communications between a lawyer and client made for the purpose of receiving or providing legal advice. Litigation privilege protects confidential communications between a lawyer and client, or either and a third party, where the dominant purpose of creating the communication is for use in litigation reasonably in prospect. The issue of what constitutes “litigation in prospect” has received recent, controversial attention in ENRC v. SFO [16], discussed below.

As internal investigations are often carried out with the prospect of litigation, legal advice privilege and litigation privilege can ensure that a significant portion of information gained or developed during the course of an internal investigation is protected from disclosure or seizure. Currently, however, the law in relation to litigation privilege in the United Kingdom is the subject of significant uncertainty. The judgment in ENRC v. SFO, considered in the court of appeal this month, suggests that it will be more difficult to claim litigation privilege in relation to many internal investigation materials.

Legal Advice Privilege

There are a number of noteworthy differences between the approaches of the United States versus the United Kingdom relative to privilege, highlighted by a recent UK case involving the Royal Bank of Scotland (RBS) [17],

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which dealt with legal advice privilege [18].

Unlike the United States, where the corporate 'client' for purposes of assigning an attorney-client privilege is defined widely to potentially include any employee, the United Kingdom adopts a more restrictive interpretation of a corporate 'client.' Under UK law, the definition of the 'client' does not extend to all employees of a company. Instead, only those employees who have the authority to give or receive legal advice on behalf of the company will be deemed the 'client'. In practice, this means that any communication between lawyers and a nonclient employee, such as interviews, cannot be protected by legal advice privilege as it is not a communication between a lawyer and client.

As a consequence of the narrower interpretation of the 'client' in the United Kingdom, notes of interviews with employees who do not belong to the 'client' group are not protected under the legal advice privilege unless they "give a clue as to the trend" of legal advice being given to the company. The RBS decision confirmed that the legal advice privilege only applied to lawyers' working documents to the extent that they related to the trend of the legal advice. An attendance note (or summary) of an interview with a potential witness is not on its face a privileged document, even if there is an intention to use this evidence as a basis for advising his client.

In the recent ENRC v. SFO appeal, the appellant argued that all employees are the client to the extent that they have information of the corporation and are authorized to give this information. If upheld by the court of appeal, this would represent a significant (and perhaps surprising) widening of the scope of legal advice privilege.

Litigation Privilege

The distinctions between U.S. and UK privilege law have historically been less significant where litigation privilege applies (as may be the case during an internal investigation). In such circumstances, interviews with nonclient employees and notes of those interviews may be covered by litigation privilege in the UK, as communications between a lawyer and third party, and the work product doctrine in the United States. In light of ENRC v SFO, however, the difference in approach between the two countries may widen.

In ENRC v. SFO, the court adopted a very narrow interpretation of the requirement that litigation be in prospect and declined to accept that a criminal investigation by the Serious Fraud Office constituted adversarial litigation for the purpose of determining whether litigation privilege applies. The fact of an SFO investigation, albeit a preliminary step to prosecution, has traditionally been understood as sufficient to establish this limb and has allowed defense counsel to claim litigation privilege to protect documents created during this phase. The court went one step further in ENRC v. SFO, finding that even if a prosecution had been reasonably in prospect, the documents were not created for the dominant purpose of being used in litigation. Instead, they were intended to test the credibility of whistleblower allegations and to prepare for any potential SFO investigation. In practice, the ENRC v. SFO judgment means that notes of interviews between lawyers and third parties created during an internal investigation may no longer be covered by litigation privilege.

ENRC v. SFO has generated widespread concern that privilege is being eroded. With a Lord Justice of Appeal noting that the appeal has a "real prospect of success," we are likely to see clarification on the approach to privilege in the UK in the next few months [19]. Until then, any clients considering (or conducting) internal investigations will need to seek strategic legal advice on how to protect documents created during this process.

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IMPACT ON CROSS-BORDER PROSECUTIONS

The *Bundesverfassungsgericht*'s ruling may also have consequences for international cooperation among government authorities conducting cross-border investigations. Specifically, when two or more countries are cooperating in an international investigation, the compelled disclosure or seizure of internal investigation documents in one jurisdiction may taint prosecutions in the other jurisdiction(s) that would have recognized such materials to be privileged. This may open prosecutions to challenge or cause the different government authorities to consider whether they should stop cooperating. For example, the Second Circuit recently overturned a conviction in the United States when it determined that the evidence derived, in part, from compelled testimony in the United Kingdom, in violation of the defendants' U.S. constitutional privilege against self-incrimination [20]. Although that case raised different issues and involved a U.S. constitutional privilege, it is conceivable that similar questions and defenses could also be raised when one country seizes key internal investigation documents from a foreign office of a U.S.-based law firm, when the investigation related to alleged violations of U.S. law, and the documents were seized at the same time that U.S authorities have an open criminal investigation into the matter and are working with the seizing country's prosecutors.

CONCLUSION

When planning or conducting an internal investigation that involves cross-border issues, it is prudent—indeed necessary in many circumstances—to consider issues involving legal privilege and protections of communications, documents, and information developed during the investigation. In particular, one should develop an investigatory process with an understanding of the differences in privileges and protections afforded among the relevant jurisdictions, as well as the consequences those differences, and perhaps conflicts, may have with respect to the protection of investigation materials. As illustrated above, it could be a mistake to assume that the application of these concepts in different jurisdictions is consistent or similar. Nevertheless, recent events should not give rise to the fear that, where the international nature of the underlying facts requires a cross-border internal investigation involving European jurisdictions, the information gathered and documents generated will be entirely without privilege protection. Companies and their legal advisors must understand the limits of privilege in each relevant jurisdiction to frame any investigation accordingly and to make conscious decisions on how and where best to generate and store documents and information so as to afford them maximum protection.

Notes:
[1] Press Release No. 57/2018 of July 6, 2018.
[2] “Expanded Protections for Documents Developed in the Course of Internal Investigations and Located at the Client's Business Premises“, of 4 March 2016; “Legal Privilege for Information in Investigations in Germany - New Developments“, of September 27, 2012; “Legal Privilege for Information in Investigations in Germany“ of August 22, 2011; “Amendment of German Code of Criminal Procedure Broadens Scope of Legal Professional Privilege“ of February 2, 2011.
[3] Disclosing confidential information without a prior waiver of privilege will be punishable under section 203 German Criminal Code (Strafgesetzbuch).
[4] See section 53 para. 1 no. 3 StPO.

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[5] Section 97 para. 1 no 1 StPO.
[6] See alert of Feb. 2, 2011, “Amendment of German Code of Criminal Procedure Broadens Scope of Legal Professional Privilege”.
[7] An English translation of the statute can be accessed at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1341.
[8] Decision of July 3, 2012 - 24 Qs 1/12 (see “Legal Privilege for Information in Investigations in Germany - New Developments” of Sept. 27, 2012).
[9] Regional court of Braunschweig, decision 6 Qs 116/15.
[10] Regional Court of Braunschweig, see above.
[11] Regional Court of Giessen, decision of June 25, 2012 - 7 Qs 100/12, as well as Regional Court of Frankfurt, decision of Apr. 23, 2004 - 5/2 Qs I/04 on documents developed for the same case, but only in relation to a criminal investigation of a different public agency.
[13] German Federal Court of Justice, decision of Feb. 2014 - StB 8/13.
[14] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).
E.g., In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014) (concluding that “[i]n the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply”).
[15] See, e.g., SEC v. Herrera, 2017 WL 6041750, at *1 (S.D. Fla. Dec. 5, 2017) (concluding that law firm's “oral downloads” to the SEC of information learned from internal investigation interviews was sufficient to waive work product protection because the SEC was the “adversary” of the law firm's corporate client).
[16] ENRC v. SFO [2017] EWHC 1017 (QB) (08 May 2017)
[17] The court's approach in RBS was upheld in ENRC v. SFO.
[18] The RBS Rights Issue Litigation, [2016] EWHC 3161 (Ch).
[19] We will publish an update once the court of appeal has delivered its judgment.
[20] US v. Allen, 2017 WL 3040201 (2d Cir. July 19, 2017).

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