



CLIENT ALERT GERMANY



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JONES DAY DAWN RAID VS. ATTORNEY-CLIENT PRIVILEGE

by Dr. Oliver Sahan and Dr. Andreas Minkoff

Key Notes

- › Investigators searched Jones Day to seize documents related to the law firm's internal investigation of Volkswagen.
- › In principle, the German criminal procedural law does protect the attorney-client privilege.
- › According to some authorities and courts, however, representatives of companies do not enjoy the privilege if criminal proceedings are being conducted against individual employees.
- › Companies and law firms have hoped for clarification by the German Federal Constitutional Court.
- › The Germany Federal Constitutional Court preliminarily decided on the lawfulness of the search by decision on 25th of July. As a measure of immediate legal protection, the Court declared the assessment of the seized documents to be suspended until a final judgment will be rendered.

Introduction

The investigation concerning “Volkswagen Dieselgate” still keeps busy lawyers in many countries. The U.S. law firm Jones Day is conducting the internal investigation with Volkswagen and its subsidiary Audi. Appearing nearly unthinkable in countries like the US, prompted by the public prosecutor’s office Munich, German investigators searched offices of the law firm to gain facts about the internal investigation.

Prominent Searches of Law Firms in Germany

This was not the first search of a major law firm in Germany. In contrast to the Jones Day case, however, in prior cases, the investigators suspected the lawyers of having been at least contributing to criminal acts. The fact that law firms were searched if the lawyers are suspected of criminal activity is not surprising and likely common in other jurisdictions.

There was, however, one prior incident where a law firm was searched without any indication that it had contributed to criminal offenses. In 2010, the international law firm Freshfields Bruckhaus Deringer was searched accordingly on the initiative of the public prosecutor’s office of Hamburg. Back then, the investigators seized the records of the lawyers on employee interviews made in connection with an internal investigation at a bank. Freshfields opposed the seizure. The Hamburg Regional Court confirmed the legality of the investigators’ measures. Later on, another attorney who was appointed as ombudsperson to receive confidential information from whistleblowers shared a similar fate. That attorney’s office was also searched to gain further information about the whistleblower and the reported facts.

The Attorney-Client Privilege in German Criminal Procedure Law

Nevertheless, the attorney-client privilege is a fundamental principle of German law of criminal procedure. Basic elements in this context are the right of the attorney of an accused person to refuse to give evidence in the criminal proceedings to any investigators and courts, as well as the prohibition of seizure. German law enforcement authorities thus generally are prohibited in principle from seizing client-related documents from counsels of accused persons. Searches are not permitted, either, if their purpose is the seizure of such documents.

Problems with the Assessment of Corporate Clients

There is, however, no general criminal liability for corporations in Germany. German criminal procedural law provides for the involvement of companies only in the course of the proceedings when the culpability of senior officers is established, which makes a subsequent sanctioning of the company possible. Only then, a company will have the typical rights of the accused. This creates unclarified difficulties with the given standards if a law firm is retained by a company. This is due to the fact that criminal proceedings are first conducted against individual persons, and only then administrative proceedings are brought against the corporate bodies or subordinate employees of the company, respectively.

Faced with this situation, law enforcement authorities and the courts resort to the following stratagem:

1. If criminal proceedings are conducted against individuals, only the relationship of trust to their individual counsel is covered by the attorney-client privilege.
2. As long as a company is not (yet) a party to the proceedings (which is usually the case early in the proceedings), its lawyers do not represent an “accused person” and are therefore not covered by the protection.
3. Even if the company is officially involved, thus enjoying the rights of an accused, the protection shall only apply to the relationship to the company counsel. If attorneys have not been retained specifically for the defense in the criminal proceedings, they enjoy no counsel status and the privileges must not apply. Thus, if law firms are retained exclusively to clarify the facts or to receive anonymous information without having any concurrent defense function vis-à-vis the investigating authorities, the position as counsel with attorney-client privilege does not apply.

Whether such an interpretation of the prohibition of seizure is still permissible under the exceeding practice of targeting corporations with criminal proceedings marks a highly controversial point in the German criminal law discourse. The German Code of Criminal Procedure, enacted in 1877, is indeed tailor-made for the classic relationship between counsel and accused client. Until now, the case of internal clarification of corporate offenses by commercial law firms has not been specifically regulated by the legislature.

The Jones Day Case

The Jones Day search arises against the background of this unclear legal situation. On the application by the public prosecutor's office in Munich, the Munich Local Court issued a corresponding search warrant. Jones Day took legal action to oppose the search after its completion and – after unsuccessful complaints before the regular courts – filed a complaint with the German Federal Constitutional Court for violation of its fundamental rights. Meanwhile, the German Federal Constitutional Court has rendered a preliminary decision for immediate legal protection on 25th of July. The Court declared the immediate appeal neither inadmissible nor “evidently ill-founded”. Therefore, the assessment of the seized evidence had been suspended until the release of the final judgement by the Court. The seized documents now have to be deposited under seal at the local district court in Munich for a period of not more than six months.

The Court stated, that it did not seem unapparent, that Jones Day enjoys basic constitutional rights as a judicial body seated in Germany (Art. 19 Sec. 3 of the German Constitution).

Concerning the merits of the case, Court weighed the menacing disadvantages for both parties that will occur until awaiting a pending final decision by the court. Under these restrictions, the Court decided that the bond of trust between a client and his lawyer in the special scope of private internal investigations and the lawyer's general right to inviolability of his office (Art. 13 of the German Constitution) and his freedom of exercising his profession (Art. 12 of the German Constitution) could be infringed in a non-reparable way, if measures of search and seizure were executed in the lawyer's office although the client was not an official suspect in criminal proceedings. Moreover, a further investigation assessment of potentially unlawfully collected data may harm client's rights and also the rights of third parties being named in the documents in question. Especially in cases of internal investigations initiated by the client during criminal investigations, the client's and third persons' vulnerability seems evident because of their voluntary disclosure of information during the process of an internal investigation. Particularly in the face of current media attention for the underlying matter, the protection of client's rights therefore shall predominate the state's right for an immediate investigation into the documents since the order to deposit the material under seal avoids the danger of the loss of evidence.

Conclusion

As long as federal courts or the legislature do not provide any clarification, the prospect of search measures of major international commercial law firms conducting corporate internal

investigations has to be reckoned with for the time being. Nevertheless, it should be emphasized that the search of law firms is not common practice in Germany either. The prominent cases show, however, that particularly in significant proceedings with comprehensive internal investigations, there is no certainty for law firms and companies. For the time being, the only possible defense strategy is to reduce the risks of searches as much as possible. Combining the internal investigation with the corporate representation in criminal proceedings may be an option. Moreover, the close coordination and cooperation with the investigation authorities should be given even more importance. Nevertheless, this does not make for perfect certainty. Considering this, the hope of law firms and companies is focused on the Federal Constitutional Court and its pending final decision in the current case.