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Practice Group(s):

Corporate

Legal Privilege for Information in Investigations in Germany – New Developments

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Summary

For companies conducting an internal investigation of potential wrongdoing in Germany, one important consideration is to protect the confidentiality of the information developed. Given court decisions in Germany which hold that the work of inside counsel is not covered by the attorney-client privilege, companies generally turn to outside counsel to conduct internal investigations, in part to avail themselves of legal privilege protections such as that offered by section 160a of the German Code of Criminal Procedure (*Strafprozessordnung, StPO*), which generally protects information held by outside attorneys from prosecutorial measures on the grounds of privilege (see alert “Amendment of German Code of Criminal Procedure broadens Scope of Legal Professional Privilege” of 2 February 2011 on the latest amendment of this provision).

Reliance on the protections of section 160a StPO, however, has remained subject to considerable uncertainties. Under German law, the concept of corporate criminal liability does not exist. Accordingly, German law enforcement investigations focus on offences that can only be committed by natural persons. Individuals subject to prosecution (such as members of a corporate management board or supervisory board) are ordinarily viewed as third parties, outside of the attorney-client relationship between the corporation and its outside corporate counsel conducting an internal investigation. This was the basis for a 2010 decision by the Regional Court (*Landgericht*) of Hamburg, approving the seizure of internal investigation documents from a law firm (decision 608 Qs 18/10 – see alert “Legal Privilege for Information in Investigations in Germany” of 22 August 2011).

A more recent decision, however, has taken a different approach and extended a limited degree of protection to a law firm’s investigation report. The Regional Court (*Landgericht*) of Mannheim (decision of 3 July 2012 – 24 Gs 1/12) held that the report on an internal investigation conducted by an outside law firm engaged by a corporation was protected from seizure from the law firm’s possession. This is a welcome decision for any corporation faced with the question whether or not to retain outside counsel to investigate suspicions of wrongdoing. While the decision is not binding on other German courts, it enhances the possibilities for outside counsel to claim legal privilege protection for investigation reports and working documents in the outside counsel’s possession.

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Facts

In the case now decided by the Mannheim court, the public prosecutor had obtained a court order permitting the search of the corporation's premises and the seizure of relevant documents found during that search. In an effort to preempt an enforcement of this order, the company cooperated itself with the prosecution and produced a number of documents – including the preliminary report of an outside counsel retained to conduct an internal investigation. Subsequently, the corporation filed a complaint with the local court (*Amtsgericht*) of Mannheim objecting to the prosecutor's taking possession of and securing the preliminary report, and demanding its return. The local court so far has not ruled on the company's objection, but instead proceeded to issue orders to both the corporation and its outside counsel permitting the seizure of the final version of the report if it is not produced voluntarily. The law firm's and the corporation's appeals from this order were the subject matter of the Mannheim court ruling discussed here.

Decision

With regard to the law firm, the Mannheim court held that neither the investigation report nor the client documents reviewed for the report or the interview memos could be subject to seizure from the law firm, because section 160a StPO grants outside counsel absolute protection against any prosecutorial measures in an attorney-client relationship.

While prohibiting the seizure from the law firm in this case, the Mannheim court emphasized the nature of the protection afforded by section 160a StPO. The court noted that section 160a was far reaching, in that it largely favored the constitutionally protected confidentiality interest of the client over the state's interest in effective legal prosecution. The court stated that these protections were not without limits – and that those limits would be reached where a client was no longer acting in good faith in turning over documents to its outside lawyer, such as by purposefully including among materials necessary for providing the legal advice unrelated but incriminating documents simply to try and protect the incriminating documents from seizure. As another extreme example to illustrate the point, the court described a scenario in which a corporation would turn over an entire part of a building to lawyers such that all materials in that part of the building would no longer be in the care of the client but exclusively with the lawyer. In the reasoning of the Mannheim court, such behavior would constitute an abuse of the protection afforded under section 160a StPO, and would not be tolerated.

Interestingly, the Mannheim court did not definitively decide whether the other statutory provision prohibiting seizure of documents, section 97 para. 1 sentence 1 number 3 StPO, would apply in a case of this nature, where the law firm's client, i.e., the corporation, was not/could not be "the accused" in the sense of this provision. Prior to the amendment of section 160a StPO into its current form, it had been a widely held view in German legal literature (and formed the basis for the above mentioned Hamburg court decision) that section 97 para. 1 sentence 1 number 3 StPO did not protect individuals from seizure of documents at a law firm with which they did not have an attorney-client relationship. While leaving open the question of whether the seizure in this case would also be prohibited by section 97 StPO, the Mannheim court did hold that the documents in this case were of a kind that would generally qualify for protection under that provision.

The Mannheim court also ruled on a parallel appeal by the corporation itself, but denied the corporation's appeal on the basis that confidentiality protection applies only to materials "in the care of" (*im Gewahrsam*) the lawyers. Thus, materials in the care of the corporation could be seized.

The decision is final and cannot be appealed. However, it is not binding on other courts.

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Analysis

The decision is important in the context of internal investigations, as it acknowledges confidentiality protection between outside counsel and client against criminal prosecution, no matter whether the client is a natural person or a corporate entity.

In the usual situation of an internal investigation, where a corporation retains outside counsel to conduct the internal investigation, the issue in German courts had been: are individual corporate executives who become subject to criminal prosecution for allegations that are investigated among the clients of the outside law firm conducting the company's internal investigation, and thus can claim privilege? So far, German courts had held that corporate executives/employees could not claim privilege because there was no client relationship between them and the corporation's outside counsel. This meant that prosecutors investigating executives/employees could seize investigation reports and related documents from the corporation's law firm.

The Mannheim court's ruling, while not binding on any other court, raises hopes that other courts will eventually follow this example and apply section 160a StPO in the same fashion. That way, the possibilities for corporations to rely on the privilege protection of documents entrusted to their outside lawyers would be significantly increased.

At the same time, it must be remembered that the protection granted by the Mannheim court extends only to documents in the possession of the law firm. Findings and reports of the internal investigation which have been provided to the client and remain in the client's care can still be seized.

It should also be noted that simply handing over everything to an outside law firm will not protect a corporation or its executives and employees, as this could be viewed as an abuse of the privilege rules. Therefore, care must be taken to limit the scope of documents to what the corporation reasonably believes to be in connection with the subject matter of the investigation.

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