

# Federal Constitutional Court draws formal limits to the prohibition of seizure of evidence on lawyers' premises

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The protection from seizure by law enforcement, which the client-attorney privilege affords to the findings gathered by lawyers who are commissioned with internal investigations at businesses, has narrow limits. The affiliate of a law firm's client has been denied protection from seizure by the German Federal Constitutional Court (*Bundesverfassungsgericht*), highlighting the crucial role played by the actual existence of a client-attorney relationship.<sup>1</sup> This adds merit to the coalition government's declared intention to create special rules for internal investigations.

## The facts of the case

In September 2015, Volkswagen AG had asked a U.S.-based law firm to conduct internal investigations, to provide legal advice, and to represent them vis-a-vis the U.S. authorities (which had initiated criminal investigations against Volkswagen Group earlier in 2015 over emission figures). The said internal investigations extended inter alia to Audi AG, with the consent of the latter (who however had not itself commissioned the law firm with such investigations). In Germany, public prosecutors in Braunschweig and Munich are pursuing the case. The investigations by the public prosecutor's office in Munich concern Audi AG.

Upon a motion by the public prosecutor's office in Munich, the Amtsgericht in Munich in March 2017 ordered a search of the business premises in Munich of the law firm commissioned by the automotive company. In the course of the search, numerous files as well as a sizable amount of electronic records were secured – in some cases by accessing servers located in Belgium. Legal remedies were invoked against these measures, but without any avail – with the exception of the seizure of material in Belgium, which was found to be unlawful in the absence of a formal request for judicial assistance. In due course, Volkswagen AG, the law firm employed by them, and three of their lawyers all filed their own constitutional complaints against the search and the securing of documents. A preliminary injunction was initially successful in preventing the use by law enforcement of the secured material.<sup>2</sup> In the main proceedings, the Constitutional Court now decided against admitting the constitutional complaints for a decision on the merits.

<sup>1</sup> Case reference 2 BvR 1405/17, 2 BvR 1780/17, 2 BvR 1562/17, 2 BvR 1287/17, 2 BvR 1583/17

<sup>2</sup> Resolution of 15 March 2017 – 2 BvR 1405/17. This preliminary injunction was extended by a six-month period by way of another resolution of 09 January 2018.

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## **Volkswagen cannot invoke rules prohibiting seizure**

All the constitutional complaints have thus turned out unsuccessful, and the public prosecutor's office in Munich may now proceed and use the secured material. The relevant issue was whether and to what degree German criminal procedural law draws limits to the search and the related securing of files and data. "Other items" covered by the attorney's right to refuse to testify may principally be subject to the prohibition of seizure by law enforcement under Sec. 97 (1) No. 3 of the German Code of Criminal Procedure. However, according to the prevailing interpretation of the law, this presupposes that the material in question originated from a pre-existing relationship between the attorney and a party who has been accused in a specific criminal trial or specific proceedings on an offense or misdemeanor. Internal investigations are not covered by this prohibition of seizure, unless the client is at the same time the accused party in proceedings, according to various court rulings.

The Constitutional Court believes this interpretation is admissible under constitutional law, arguing that any other interpretation would open the gates to abuse: evidence could be intentionally placed on the premises of lawyers' offices which are turned into "safe houses", and thus removed from the reach of law enforcement. A business which is concerned that it may in the future become the subject of criminal investigations and is therefore ordering legal counsel to perform an internal investigation does not attain a status equivalent to that of an "accused party".

Within the context of the investigations against Audi, Volkswagen AG could not be considered an "accused" party in criminal proceedings, and thus has no recourse to the prohibition of seizure pursuant to Sec. 97 of the Code of Criminal Procedure. Responding to Volkswagen's defense, the Constitutional Court says that the criminal investigation conducted by the public prosecutor's office in Braunschweig against Volkswagen must be strictly differentiated from the Munich proceedings against Audi. The Constitution does not suggest that subsidiaries should be brought within the fold of a protected client-attorney relationship between their parent company and a lawyer, or that the parent company should be allowed to invoke the prohibition of seizure because its subsidiary's situation is similar to that of a party accused of a criminal offense.

The defense built on Sec. 160a of the Code of Criminal Procedure (Measures towards persons bound by a professional duty of secrecy who have a right to refuse to testify) was considered inadmissible, firstly because Sec. 97 represents a special law and thus overrides the more general provisions of Sec. 160a, and secondly because effective law enforcement would be unduly affected if one derived an absolute prohibition of collecting and using evidence from Sec. 160a.

In the consequence, this means that the results of internal investigations by law firms enjoy only protection under the law to the extent that the relevant interventions by the authorities are targeted at the business which commissioned the internal investigations, and which finds itself in a role similar to that of the accused party. However, if the search conducted on the premises of a given law firm concerns another business (which is not itself the client ordering the internal investigations), then the (incriminating) documentation found by law enforcement is not protected from seizure. In other words, such documents and records do not come within the purview of client-attorney privilege.

## **Lawyers' individual complaints were inadmissible**

As to the constitutional complaints filed by individual lawyers of a firm, the Constitutional Court finds them inadmissible in the first place. According to the Court, these lawyers could not invoke Article 13 (1) of the German Basic Law (*Grundgesetz*) (which guarantees the inviolability of business premises) because this right can only be held and invoked by the partnership itself but not by individual employees. Nor may a violation of the fundamental right to freely pursue one's profession (Art. 12 of the Basic Law) be inferred: measures taken under criminal procedural law show no tendency to regulate individual occupations, seeing as they are being applied indiscriminately to everyone who is charged with a crime. The right to informational self-determination could not have been violated because the search order was not directed at obtaining personal data of individual lawyers but at obtaining data collected and generated by (and thus attributable to) the partnership. The right to a fair trial (Art. 2 in conjunction with Art. 20 (3) of the Basic Law) was not violated because the lawyers were not parties to the proceedings.

## **International law firm holds no fundamental rights**

The constitutional complaint by the law firm as a whole was also declared inadmissible. As a partnership organized under U.S. law, it has no fundamental rights in Germany (cf. Art. (3) of the Basic Law).

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While this does not apply in the same way to German law firms, their eligibility as holders of fundamental rights ultimately lends them no superior protection from seizures. International firms, too, may fight seizures of evidence in the general courts. What is more, the Constitutional Court, in ruling on the potential violation of fundamental rights of VW, has given substantial preference to the efficiency of law enforcement and to avoiding the risk that "safe houses" may be created. These deliberations on the limitations to the prohibition of seizure apply equally to a German firm in an advisory role.

### Consequences of the ruling

The Constitutional Court has upheld previous jurisprudence of the general courts on the limitations to the prohibition of seizure of evidence at law firms. In line with this case law, the prohibition of seizure only holds if there exists a client-attorney relationship between the law firm and a specific (group) company, and if the company's status in the given criminal trial or offense procedure is equivalent to that of an accused party. These limitations to the prohibition of seizure attain special relevance in group-wide internal investigations. Creating a broadly conceived client-attorney relationship may be advisable to uphold as much of the prohibition of seizure as possible. If such a relationship can be shown to exist also for individual group members, the searched law firm ought to be able, even under the current rulings, to invoke the prohibition of seizure if and when criminal proceedings are initiated against their client (that relate to the specific mandate). In such a case, it will be of no concern whether the firm that was asked to perform the internal investigations is based in Germany or abroad.

In its coalition agreement<sup>3</sup>, the new German federal government has vowed to create "statutory provisions" for internal investigations, "with a particular view to secured documents and the right to conduct searches". It also declared that it wants to "create legal incentives for companies to assist the authorities through 'internal investigations' and the subsequent disclosure of findings obtained in such investigations." In the wake of the Constitutional Court ruling discussed in this Client Alert, the need for such special statutory provisions governing internal investigations has become self-evident.

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<sup>3</sup> "Ein neuer Aufbruch für Europa, Eine neue Dynamik für Deutschland, Ein neuer Zusammenhalt für unser Land" (A new awakening for Europe; a new dynamic for Germany; new cohesion for our country). Coalition agreement between CDU, CSU, and SPD, 19th legislative term, Recital 5895 et seq.