

## ‘Diesel affair’: A landmark decision

Not a violation of fundamental rights: German Federal Constitutional Court allows searches at offices of corporate lawyers in connection with internal investigations

Guest contribution from Dr. André-M. Szesny, LL.M.

In July 2018, the Federal Constitutional Court reached a landmark decision: the search of the Jones Day law firm and the seizure of attorney documents did not violate the fundamental rights of the lawyers involved or their clients. The procedural measures were prompted by an investigation into two car manufacturers carried out by the Munich public prosecutor’s office in connection with what has been termed the “diesel affair.” Jones Day had conducted an internal investigation on behalf of one of the car manufacturers. The public prosecutor’s office wanted to obtain the results of this internal investigation with a search and seizure of the attorney documents. The Munich District Court I issued the decisions in question, and the law firm, its affected lawyers and the car manufacturer appealed the decisions with a constitutional complaint.

The decisions of the Federal Constitutional Court do not imply that judicial measures against lawyers are always permitted. Nor do they mark the end of

internal investigations in Germany. However, they reveal that there is no full attorney-client privilege in Germany.

The Federal Constitutional Court took its time in making these decisions: Over a year passed before it released the seized documents for review by the public prosecutor’s office. In the meantime, the Federal Constitutional Court had restricted the public prosecutor’s office from looking into the files.

### No protection of fundamental rights for non-EU law firms

The Court’s Chamber in charge refused protection of fundamental rights to the law firm Jones Day on the grounds that it is a non-EU firm without the standing to bring a constitutional complaint. The law firm, with its registered office in the US, had no independent activity at the Munich office that was searched, indicating that it has an independent administrative seat. In addition, the focus of the law firm’s activities is not in the EU, →



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but in the US, where the diesel affair is being primarily followed by the firm.

The Chamber also did not accept the appeal of the lawyers employed by the firm because they could not seek protection of fundamental rights “*ad personam*.” This applies in any case insofar as the individual lawyers’ offices are not subject to the basic right to inviolability of the home. Due to the lack of a private space to retreat to in the office, it cannot be considered a “home.” Only the firm itself or all its partners can claim protection of fundamental rights.

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**Non-EU law firms must take the decision as an occasion to create conditions in which their capacity to hold fundamental rights is intact. This will also affect British law firms after Brexit.”**



fundamental rights is intact. The lack of capacity to hold fundamental rights and the resulting vulnerability of non-EU law firms creates a dramatic competitive disadvantage in all areas of consultancy. As soon as Brexit becomes effective, law firms based in Great Britain will also suffer from this disadvantage.

#### A narrow interpretation of attorney-client privilege

The Federal Constitutional Court has ruled that the narrow interpretation of attorney-client privilege by the Munich I Regional Court does not violate any fundamental rights of the client. This narrow interpretation comprises two key points: (1) The German Code of Criminal Procedure provides for a prohibition of seizures only for documents that are part of an attorney-client relationship in which the client is charged with an offense. The prohibition of seizures does not apply to documents and objects that are subject to the right of lawyers to refuse to testify due to their relationships to other clients. (2) This implies the admissibility of searches of lawyers as well, insofar as they are not active as defenders. The provision prohibiting searches of lawyers (Section 160a of the German Code of Criminal Procedure) is not applicable to lawyers who are not

defenders. This position is justified by criminal prosecution interests and the legislator’s intention.

This does not mean that a restrictive interpretation is the only one possible: The Federal Constitutional Court has “only” decided that the opinion of the District Court does not violate the constitution. However, it is now expected that other district courts will adopt the narrow interpretation of the District Court Munich I. The decision of the Federal Constitutional Court therefore makes clear that a general attorney-client privilege does not exist in Germany (any longer). The only limit to vulnerability before these measures is the principle of proportionality.

The view of the Federal Constitutional Court is surprising. As recently as 2010, the German legislator demonstrated that in relation to the rules on search and seizure, it wanted to align the level of protection for all lawyers with the level established for defense lawyers. The recent decisions reveal that this is no longer the case.

#### Protection of corporate lawyers

The decision recognizes that corporate defenders enjoy the same protection as

individual defenders. The importance of this lies in the fact that, under German criminal law, only natural persons can be charged and sanctioned. Under German law, corporate defense lawyers are therefore not equal to individual defense lawyers. Fines – but not penalties – can be considered against the company only if a manager is accused.

The protection of corporate lawyers against search and seizure arises when the company takes a “position similar to the accused” – that is to say, when it officially becomes part of the proceedings conducted against an individual (involvement [“*Nebenbeteiligung*”] pursuant to section 438 and 472b of the German Code of Criminal Procedure). This is the case if there is sufficient suspicion against a manager of the company and thus the probability that the company is sanctioned increases. The protection is also extended to the defender of the company no later than when the company has to be heard in relation to its involvement.

#### Not the end of internal investigations

It is clear that corporate lawyers are subject to a risk of search and seizure in relation to internal investigations. Despite the restriction on the lawyer’s privilege, a company must not →

refrain from informational measures: Clarifying suspicious situations is a compliance obligation – violating this obligation can lead to claims for damages by the company against its acting board members on the one hand, and on the other hand to liability under criminal law and fines (liability of the principal or supervisor). Compliance efforts and



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internal investigations have led to a significant reduction of regulatory fines in the latest rulings of the Federal Court of Justice (BGH, Ruling on May 9, 2017 – 1 StR 265/16).



**The introduction of a corporate criminal law, which has been a subject of discussion in Germany for some time, may lead to a change in the legal situation.**



**Changes due to a new corporate criminal law?**

The introduction of a corporate criminal law, which has been a subject of discussion in Germany for some time, may lead to a change in the legal situation. These outlines of corporate criminal law expressly provide for freedom of seizures from corporate lawyers – with good reason. This is a positive incentive for the effective resolution of compliance violations. The impairment of attorney-client privilege between a company and its lawyer, as brought about with the interpretation of section 97 and 160a by the Regional Court Munich I and the Federal Constitutional Court, does not fit in with a modern corporate criminal procedure.

**References:**

*The decisions of the Federal Constitutional Court bear the following reference numbers: 2 BvR 1287/17, 2 BvR 1405/17, 2 BvR 1562/17, 2 BvR 1583/17 and 2 BvR 1780/17. Full versions available in German on the website of the Federal Constitutional Court: [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de) <←*



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