

Law Firm Search in Connection With “Diesel Emissions Scandal” Lawful, German Federal Constitutional Court Says

The recent Federal Constitutional Court decision severely limits legal privilege in German criminal investigations, but provides useful guidance to ensure privilege in limited circumstances. German government is called upon to provide adequate safeguards for internal investigations.

The German Federal Constitutional Court has rejected constitutional complaints filed by Volkswagen AG, Jones Day, and the firm’s lawyers in a decision on July 6, 2018. The complaints challenged the search of the law firm’s Munich office, and Munich public prosecutors’ securing of documents and data in 2017. The search and securing of documents and data were conducted in connection with Munich public prosecutors’ criminal investigation against Volkswagen subsidiary Audi AG regarding diesel emissions.

Volkswagen engaged Jones Day in 2015 to conduct an internal investigation and to represent the company against US authorities. This included representation against the US Department of Justice in connection with the emissions controversy affecting diesel models that Volkswagen and its group companies produced, including Audi. Lawyers from the law firm’s Munich office conducted interviews and reviewed documents and data, not only within Volkswagen AG, but also Audi AG. However, as per the German Constitutional Court’s decision, Audi AG did not itself engage the law firm.

Munich public prosecutors searched the law firm’s Munich office in March 2017, and secured numerous files and electronic data. After German courts had found the prosecutor’s actions to be legal, Volkswagen, Jones Day, and the firm’s lawyers filed constitutional complaints.

Key elements of the Court’s reasoning

In Volkswagen’s case, the Court found the search and securing of documents and data to be justified under applicable constitutional standards.

- The Court confirmed the lower courts’ analysis that only Volkswagen AG had formally engaged Jones Day, such that no attorney-client privilege existed between Audi AG and the law firm.
- Given that Volkswagen AG is investigated separately by the Braunschweig prosecutors, the Court held that the use of the documents and data that the Munich prosecutors secured in the proceeding against Audi AG did not affect Volkswagen AG.

- More broadly, the Court held that under German criminal law, documents and data are protected from search and seizure only in the relationship between a person formally charged with a criminal offence (or a company in a position similar to a person charged with a criminal offence) and their lawyer. Moreover, the protection typically only applies to documents and data in the possession, custody, and control of the lawyers (apart from rare exceptions regarding defence counsel-client communication).
- The Court further held that these protections do not extend from a parent company to its subsidiaries. The Court clarified, however, that the seized documents must not be used in the Braunschweig prosecutors' investigation against Volkswagen AG.
- Finally, the Court found that an entity may only claim to be treated similarly to an individual charged with a criminal offence (and therefore be protected from certain investigation measures), if the entity may possibly be subject to further investigations, which is to be measured by way of objective criteria. Legal privilege will not apply if an entity is only concerned about potential future investigations and engages a law firm to conduct an internal investigation.

The Court rejected the complaints brought by the law firm and its lawyers on the following grounds:

- Pursuant to German constitutional law, only domestic entities can claim the infringement of fundamental rights. The law firm, as a partnership under US state law, did not qualify under this standard. The Court further found that the prosecutors' measures were only directed against the law firm, and only affected the law firm, but did not affect the individual lawyers' fundamental rights.

Key takeaways

German law does not provide a uniform concept of legal privilege. Protection from prosecutorial investigation measures only applies under limited circumstances. The Court's decision highlights some of these conditions, and notes strict limitations to other conditions that were discussed controversially in lower court decisions and legal literature in recent years — especially in the context of an internal investigation.

The Court's decision is useful in that it eradicates some of these controversies. Entities commissioning an internal investigation, and lawyers conducting those investigations, will have to analyse carefully:

- How to structure their mandates
- Where and how to store investigation results and reports
- Under which conditions legal privilege is ensured

The Court's decision provides some helpful guidelines for this analysis under the current law. Critically, however, the Court left limiting legal privilege by separating proceedings against different subsidiaries within a group to the prosecutors' discretion. If an entity engages counsel to conduct an internal investigation in the preparation of a potential defense, legal privilege should apply regardless of whether the opening of official criminal proceedings is probable or not.

Overall, the Court's decision reinforces the need for a legal framework for internal investigations. The current German government promised in its 2018 coalition contract to establish legal requirements for internal investigations, especially with regard to the scope of legal privilege. Whether, when, and what the German government will deliver on this promise remains to be seen.

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