

GERMAN FEDERAL CONSTITUTIONAL COURT PERMITS PROSECUTORS' REVIEW OF INTERNAL INVESTIGATION DOCUMENTS SEIZED DURING A DAWN RAID ON A LAW FIRM

On 6 July 2018, the German Federal Constitutional Court (*Bundesverfassungsgericht*) issued its long-awaited decisions on constitutional complaints (*Verfassungsbeschwerden*) raised by a German car manufacturer and its US law firm. These followed a dawn raid and seizure of documents by the Munich Prosecutors at the Munich office of the US law firm, in connection with their role in the internal investigation into the so-called "diesel scandal". The decisions are not the end of internal investigations in Germany, but will need to be considered carefully when planning and executing future internal investigations.

After considering the matter for over a year, the German Federal Constitutional Court finally permitted the Munich Prosecutors to review documents and electronic data that were seized during a dawn raid at a US law firm's Munich office in March 2017. The US law firm had conducted an internal investigation into the so-called "diesel scandal" for a German car manufacturer. The car manufacturer had included the findings from this internal investigation into a plea agreement with US prosecution authorities and accepted a substantial criminal penalty imposed by the US Department of Justice (DOJ). However, the car manufacturer did not share such findings with German prosecutors conducting parallel investigations. The Munich Prosecutors took matters into their own hands, and seized documents (185 paper binders) and electronic data during the raid.

The car manufacturer and its US law firm first tried to prevent a review of the seized documents and data by filing several appeals with the Munich Local Court (*Amtsgericht*) and the Munich District Court (*Landgericht*), all of which failed. However, they obtained a partial victory in July 2017, when the German Federal Constitutional Court granted an interim injunction (*einstweilige Anordnung*) (which was once extended) ordering the Munich Prosecutors to refrain from reviewing the seized documents and to seal and deposit them at the Munich Local Court, pending its final determination.

That ruling was made on 6 July 2018, when the German Federal Constitutional Court dismissed the constitutional complaints of the car manufacturer

The most important aspects at a glance

- The German Federal Constitutional Court has allowed Munich Prosecutors to review documents and data from an internal investigation into the so-called "diesel scandal", which had been seized from the Munich offices of a US law firm.
- The US law firm and its corporate client had tried to prevent such review by various legal remedies, including constitutional complaints, all of which eventually failed.
- The decisions do not mean the end of internal investigations in Germany.
- Internal investigations will remain necessary to safeguard and defend a company's interests, especially in criminal investigations.
- Dawn raids and seizures at law firms were an existing risk in Germany, but should now be actively considered when planning and executing internal investigations.

and the US law firm and, thereby, paved the way for a review of the seized documents and electronic data by the Munich Prosecutors. The judges' view was that neither the car manufacturer's right to informational self-determination (*Recht auf informationelle Selbstbestimmung*) nor its right to a fair trial (*Recht auf ein faires Verfahren*) would be violated. However, the judges referred to the fact that the criminal investigation proceedings in which the law firm was dawn raided and the documents and electronic data were seized did not relate to the car manufacturer that instructed the law firm with the internal investigation but to a separate group company. Notably, the judges also held that the US law firm had no right to file a complaint (unlike German law firms and law firms from other member states of the European Union) as, being a US law firm, it did not have the same rights under the German constitution. However, in our understanding, this aspect was eventually not relevant for the outcome of the decision.

In a separate case, the Stuttgart District Court had permitted the Stuttgart Prosecutors to review documents of another US law firm regarding an internal investigation into allegations of manipulations of Diesel engines by another car manufacturer.

IMPLICATIONS FOR THE PRACTICE

The decisions by the German Federal Constitutional Court are not the end of internal investigations in Germany. Such investigations have always been, and will remain, necessary to adequately assert and defend the legitimate interests of companies and financial institutions, especially in criminal and regulatory enforcement proceedings. The approach taken by the German Federal Constitutional Court was not unexpected (though, in that context, it is puzzling why the injunction was not only granted but then also extended and it took the German Federal Constitutional Court over a year to decide that the seized documents and data could be reviewed). There has always been the risk of raids at law firms in Germany. However, with its decision, the German Federal Constitutional Court has endorsed a less restrained approach taken by some of the German regional prosecution authorities and courts under the rules of criminal procedure, to material held by law firms, by holding that such actions are in compliance with the German Federal Constitution. It remains to be seen to what extent the more restrained approach taken by other German regional prosecution authorities and courts will continue, specifically due to the fact that the investigation in which the law firm was dawn raided and the documents and electronic data were seized did not relate to the car manufacturer that instructed the law firm with the internal investigation but to a separate group company. In any event, the decision demonstrates that corporates and financial institutions (and their law firms) should continue to take care to plan the execution of internal investigations. In particular, consideration needs to be given as to the risks of seizure when investigation materials are held in hard copy or electronically on site. Finally, we note that the less restrained approach by criminal prosecutors mirrors trends in other European jurisdictions, where the Courts are currently grappling with issues around the extent of legal professional privilege or the confidentiality of investigation materials held by clients and their lawyers.

AUTHORS



Heiner Hugger
Partner

T +49 69 7199 1283
E heiner.hugger
@cliffordchance.com



David Pasewaldt
Counsel

T +49 69 7199 1453
E david.pasewaldt
@cliffordchance.com



Alexander Cappel
Counsel

T +49 69 7199 1458
E alexander.cappel
@cliffordchance.com



Beatrix Perkams
Senior Associate

T +49 69 7199 1455
E beatrix.perkams
@cliffordchance.com



Julia Baedorff
Senior Associate

T +49 69 7199 1452
E julia.baedorff
@cliffordchance.com



Tim Müller
Senior Associate

T +49 69 7199 1420
E tim.mueller
@cliffordchance.com



Gerson Raiser
Senior Associate

T +49 69 7199 1450
E gerson.raiser
@cliffordchance.com



Christina Hund
Associate

T +49 69 7199 1405
E christina.hund
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. If you would like to know more about the subjects covered in this publication or our services, please contact the authors or your usual contact at Clifford Chance.

www.cliffordchance.com

Clifford Chance, Mainzer Landstraße 46,
60325 Frankfurt am Main, Germany

© Clifford Chance 2018

Clifford Chance Deutschland LLP is a limited liability partnership with registered office at 10 Upper Bank Street, London E14 5JJ, registered in England and Wales under OC393460. A branch office of the firm is registered in the Partnership Register at Frankfurt am Main Local Court under PR 2189.

Regulatory information pursuant to Sec. 5 TMG and 2, 3 DL-InfoV: www.cliffordchance.com/deuregulatory

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.