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Preserving privilege in cross-border internal investigations

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Benjamin D Singer at O'Melveny & Myers examines two recent US and German high-profile decisions that raise new questions about how companies facing cross-border investigations can balance a desire to cooperate with the need to preserve legal privilege.

DOJ privilege-waiver agreements in grand jury investigations

The US Department of Justice continues to maintain a firm policy that it will neither request that companies waive legal privilege nor reward them for doing so. A recent grand jury investigation that appeared to involve allegations of violations of the FCPA, however, indicates that defence counsel and the government may be operating under different assumptions about exactly what that means in certain cases.

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The agreement

In a recent (unpublished) grand jury investigation in the Eastern District of Virginia into potential FCPA violations by an unnamed company (Although the company and alleged offenses were anonymised in the opinion, the lawyers appearing for the government were part of the US Department of Justice (DOJ) fraud section's FCPA unit) the government sought to interview in-house lawyers for the company, including the general counsel of a subsidiary. Before doing so, the company entered into a written agreement with the government, which was the standard form for the DOJ.

The agreement provided that the general counsel "might disclose privileged or protected information … defined herein as protected information" during the interview. The agreement further provided that the company did "not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege". Finally, the agreement provided that the DOJ would maintain the "confidentiality" of the protected information and not disclose it to third parties, "except to the extent that the [DOJ] determines in its sole discretion that disclosure would be in furtherance" of its duties or required by law.

During the subsequent voluntary interview, the general counsel provided privileged information to the Justice Department. Four years later, the government sought to compel the general counsel to testify before the grand jury about the privileged topic(s) discussed during the interview. The company moved to quash the subpoena on the grounds that the information was privileged and that it had preserved privilege by entering into the aforementioned agreement. The government argued that the agreement, rather than protect the company's privilege, gave the government the discretion to disclose the information to the grand jury. The district court agreed with the government, focusing on the clause that provided the government with the "sole discretion" not to maintain the confidentiality of the information to discharge its duties. The company appealed against the decision.

The Fourth Circuit's decision

The US Court of Appeals for the Fourth Circuit reversed the decision on 27 June, finding that the company had in fact preserved its privileges based

on the language of the agreement. The Fourth Circuit relied on the first clause of the agreement, which expressly stated that the company did not intend “to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege” and distinguished the “exception” clause relied on by the district court as dealing with confidentiality, not privilege. In essence, the appellate court found that, although the company had waived its privilege by disclosing information to the government, the government had contractually agreed not to assert that waiver in future proceedings.

Main takeaways

The DOJ intends to effect a waiver by such agreements

According to court filings, the above-cited language was the “standard language” for the DOJ in such agreements, and the government’s intent in entering such agreements was to effect at least a partial waiver by the company of privileged information. Based on that position and the Fourth Circuit’s adverse decision, the government may be expected to amend its standard language to clarify that a company entering into such an agreement is waiving its legal privilege, at least as to the select topics. In the case at issue, the company suggested it would never have signed a waiver agreement, because it “would have had no reason – in light of the government’s policy against seeking privilege waivers – to agree to waive privilege”. Despite this assertion, many companies choose to waive legal privilege over certain information when cooperating with the government for a variety of legitimate reasons, including to raise advice of counsel defences, to expedite investigations, and in cases involving conduct that would implicate the crime-fraud exception. And to the extent there was confusion before, the government has now made its intent in entering into such agreements clear – it is seeking to affect a waiver.

Ambiguity can be dangerous

The case also shows that the parties held the exact opposite view of what the one-page agreement meant. That the government and a well-represented company could have held completely different views on such a fundamental question suggests that companies may need a more robust dialogue with the DOJ when disclosing otherwise privileged information.

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Indeed, had the company not appealed, the district court's finding of a waiver would have meant that the general counsel could have been compelled to testify in the grand jury, and potentially at any future trial with the company as the potential defendant. Though during cooperation the DOJ and defence counsel sometimes engage in an elaborate dance where the government accepts information without commenting on whether it views such a disclosure as a privilege waiver, this case demonstrates the risks of such ambiguity for both sides. Should the government clarify its standard agreement in light of this decision, as it is likely to do, it would help reduce any ambiguity in this area.

Third-parties are not bound by the agreements' protections

The court's decision strongly suggests that by allowing the general counsel to be interviewed, the company did waive its privilege with respect to third-parties, *i.e.,*potential civil litigants. The court noted: "[D]isclosure agreements, such as the one here, bind only the parties to the agreement, not third parties." One way that companies can provide potentially privileged information to the government in grand jury investigations while protecting it from third-parties is by obtaining a sealed court order under Federal Rule of Evidence 502(d) rather than simply entering into an agreement with the government.

Germany's highest court upholds search of Jones Day offices

Although the DOJ has a policy against seeking waiver of legal privilege from companies engaged in internal investigations, and US courts have upheld work product protection for such investigations (see *In re Kellogg Brown & Root, Inc.*), in the past few years, authorities in foreign jurisdictions, including in the United Kingdom and Germany, have at times taken the opposite approach. They have aggressively pursued materials gathered or created by outside counsel during internal investigations that would be privileged under US law, creating potential tension with the DOJ in cross-border investigations. Most recently, German prosecutors raided the Munich offices of US firm Jones Day in March 2017 and seized voluminous evidence that the firm had obtained during its internal investigation of German car manufacturer Volkswagen.

The investigation

In response to a DOJ criminal investigation relating to manipulated emissions of diesel vehicles, Volkswagen retained Jones Day in September 2015, to conduct an internal investigation and to provide legal advice. In order to investigate the facts, Jones Day attorneys examined a large number of documents held by Volkswagen and its subsidiary, Audi, and conducted hundreds of interviews with Volkswagen and Audi employees in the US and Germany. In large part, because Volkswagen shared the non-privileged results of its internal investigation with US criminal authorities, Volkswagen received substantial cooperation credit, amounting to billions of dollars in penalty reductions, when it ultimately pleaded guilty in the United States in January 2017.

The search

At the same time that Volkswagen was negotiating a resolution with the DOJ, two sets of state prosecutors in Germany opened investigations – the Braunschweig Public Prosecutor's Office where Volkswagen is headquartered and the Munich Public Prosecutor's Office where Audi is headquartered. The Munich prosecutors focused on Audi and certain of its current and former executives. After they obtained an order from the state court, they searched the Munich offices of Jones Day on 15 March 2017.

During the search, the Munich prosecutors obtained large volumes of electronic data containing the results of the internal investigation. In a decision in May 2017, Munich District Court I upheld the search after Volkswagen, Jones Day and the firm's lawyers challenged it. Volkswagen and Jones Day then appealed the decision to the Federal Constitutional Court, Germany's highest court, which decided on the matter this year.

The decision

In a ruling on 26 July, the Federal Constitutional Court upheld the government's search of Jones Day's offices and dismissed the objections to the search from Volkswagen, Jones Day and the lawyers. The court held that because Volkswagen was not a defendant in any criminal investigation, but only a potential suspect in the investigation, it only had a right to confidentiality, not legal privilege. What's more, the court said that

Volkswagen's rights were which outweighed by the government's interest in pursuing its criminal investigation. The court also ruled that as a foreign firm, Jones Day has no rights under the German constitution to challenge the search. Finally, the court ruled that the individual Jones Day lawyers failed to have a right to have a right to object to the search because they didn't work at the office that was raided and none of the items seized belonged to them personally. At the time, some German practitioners told GIR that they were not "surprised" by the constitutional court decision; however, Volkswagen and Jones Day appear to feel otherwise.

Main takeaways

Companies caught in cross-border enforcement actions in Germany and the United States are caught between a rock and a hard place
In this case, Volkswagen's decision to conduct an internal investigation and cooperate with the DOJ was relatively straight-forward. It had enormous civil and criminal liability in the US, as reflected by the billions it paid to the DOJ and US customers. Had Volkswagen chosen not to conduct an internal investigation or cooperate, that decision might have threatened the company's ability to conduct business in the US. Having chosen to cooperate, especially with the DOJ, Volkswagen needed to conduct a thorough investigation that included gathering volumes of documents and conducting hundreds of witness interviews.

Because most of the conduct took place in Germany, Volkswagen was forced to gather this evidence in a jurisdiction in which it did not have a legally cognisable privilege that shielded the materials, even though the materials were privileged under US law. In Germany, the type of cooperation that the DOJ expects – handing over all relevant non-privileged information – is practically unheard of. Had it faced a purely domestic investigation, Volkswagen would likely not have gathered the information in the same manner, let alone produced it all to the Munich public prosecutors. So in the end, Volkswagen faced the worst of both worlds – comprehensive evidence gathering and cooperation without the shield of legal privilege, at least in Germany.

The court decision poses particular challenges for non-German law firms
The court's position that foreign law firms lack any constitutional rights to challenge searches on their property should serve as a cautionary note to

companies that are conducting even part of an internal investigation in Germany. Although prosecutors sometimes search lawyers' offices even in the US, as evidenced by the recent search of President Trump's former lawyer Michael Cohen's offices in New York, the protections under the country's law and DOJ policy are robust and apply regardless of the nationality of the firm or lawyer involved. The Cohen case – where an independently appointed special master is reviewing the materials for privilege before making them available to the prosecution with input from the third-party client – shows how far US courts will go to protect legal privilege even after a search is authorised. No such protections were granted by the German court.

The DOJ cannot afford to be a bystander

For the DOJ, the Jones Day raid also poses challenges. The DOJ credited Volkswagen's cooperation, which was facilitated by Jones Day's internal investigation, with helping it to prosecute culpable individuals, a longstanding policy goal. Indeed, at the press conference announcing the charges against Volkswagen executives, then-Deputy Attorney General Sally Yates cited it as an example of the Yates Memo at work. But, the subsequent search of Jones Day's offices could have a chilling effect on corporate cooperation in the next major cross-border investigation in Germany, making it more difficult for the DOJ to investigate conduct in Germany that harms the United States or its citizens. Fortunately, the DOJ, and the criminal division's fraud section in particular, which currently has a senior prosecutor embedded with the UK Serious Fraud Office, have never been better-positioned to coordinate with foreign counterparts in both the UK and Germany to find solutions that will preserve each jurisdiction's rules without compromising the collective effort to hold individuals accountable.

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