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INTERNAL INVESTIGATIONS - LEGAL SITUATION, POSSIBLE OPTIONS AND LEGAL-POLITICAL NEED FOR ACTION[1]

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ABSTRACT

In June 2018, the German Constitutional Court decided on the search of a law firm and the securing of documents and data in the firm's premises by the Public Prosecutors' Office. The Court rejected the respective constitutional complaints and regarded the prosecutions' measures as lawful. The Court's orders received immense public attention as the constitutional complaints were filed by Volkswagen AG, Jones Day, and the firm's lawyer in connection with the "diesel emissions scandal". Besides, the orders were discussed intensely among legal experts, as the Court severely limited legal privilege in Germany. This article examines the Court's orders and its consequences, in particular with regard to internal investigations. In addition, the authors draw a comparison with legal privilege under U.S. law and discuss possible options to avoid extensive disclosure of documents and data. Finally, they demand legislative action and request the legislator to provide adequate safeguards for internal investigations.

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I. INTRODUCTION

The decisions of the German Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) on the constitutional complaints of *Volkswagen*[2], *Jones Day*[3] and three of the firm's lawyers[4] received positive feedback in parts of the press: The investigating Public Prosecutor's Offices can continue to evaluate the "seized" and "explosive" internal VW documents that were found during the search of the firm's Munich office in March 2017 with highest judicial blessing.[5] Apart from the fact that, according to the decisions of the Court, documents were not seized but secured in the course of the search, the perspective of the Court on the *Jones Day* case seems to have been a comparable one: With the simple reference to the necessary "effectiveness of criminal prosecution"[6], the Court not only declared the search of a law firm to be legitimate, but at the same time also justified considerable restrictions on the legal privilege. In the context of internal investigations, prohibitions of seizure and further restrictions on the collection of evidence are to apply only to a very limited extent. The Court also questions if such mandates are genuinely traditional lawyers' activities.[7] And to show even more disdain for the lawyers' profession, the Court also stated that *Jones Day*, as an "internationally active law firm"[8], was not a holder of fundamental rights due to its lack of an organizationally independent position and its lack of a domestic center of activity.[9] The firms' lawyers were also denied the right to rely on a violation of their own fundamental rights, since according to the Court the search warrant only affected the firm and not the individual lawyers.[10]

Hard cases make bad law. This article examines the consequences of the Court's decisions and the consequential restrictions on search and seizure bans with regard to lawyers' premises, in particular in the context of internal investigations (II.B.). The legal situation

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2 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17 = BeckRS 2018, 14189.

3 BVerfG, Orders of June 27, 2018 – 2 BvR 1287/17, 2 BvR 1583/17 = BeckRS 2018, 14188.

4 BVerfG, Order of June 27, 2018 – 2 BvR 1562/17 = BeckRS 2018, 14190.

5 Cf. only reports by Spiegel Online, (Jul. 27, 2018), www.spiegel.de/wirtschaft/unternehmen/vw-ermittler duerfen-beschlagnahmte-vw-unterlagen-auswerten-a-1216985.html; Welt, (Jul. 27, 2018), https://www.welt.de/print/die_welt/wirtschaft/article178943166/Ermittler-duerfen-VW-Akten-einsehen.html; Manager Magazin, (Jul. 27, 2018), www.manager-magazin.de/unternehmen/autoindustrie/volkswagen-verfassungsbeschwerde-abgeschmettert-a-1216984.html; and Handelsblatt, (Jul. 27, 2018), https://www.handelsblatt.com/unternehmen/industrie/bundesverfassungsgericht-volkswagen-muss-brisante-dokumente-im-dieselskandalherausgeben-/22774332.html?ticket=ST-2500188-4trVmKCvFOR5jMBhzwA9-ap5.

6 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 78.

7 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 110.

8 BVerfG, Orders of June 27, 2018 – 2 BvR 1287/17, 2 BvR 1583/17, marginal no. 1.

9 BVerfG, Orders of June 27, 2018 – 2 BvR 1287/17, 2 BvR 1583/17, marginal no. 24 et seq.

10 BVerfG, Order of June 27, 2018 – 2 BvR 1562/17, marginal no. 35 et seq.

in Germany is compared with the US legal privilege (II.C.). This is followed by an analysis of the consequences for the responsibilities and duties of managing directors, when conducting internal investigations and cooperating with German and foreign investigating authorities (III.) Finally, the resulting need for legislative action is pointed out (IV.).

II. CURRENT LEGAL SITUATION IN GERMANY (ACCORDING TO THE CONSTITUTIONAL COURT)

A. Scope of Search and Seizure Prohibitions

The Court's decision has limited the scope of legal privilege under German law by severely narrowing the German Code of Criminal Prodecure's restrictions regarding searches and seizures, but at least the decision largely clarified under which conditions investigating authorities are denied to access documents and data in a lawyer's custody under the current law.[11]

To achieve this clarification, the Court had to decide on a dispute persisting since 2008, when § 160a StPO (*Strafprozessordnung* – German Code of Criminal Procedure) was implemented. The dispute concerned the scope of application or rather the relationship of § 160a and § 97 StPO.[12] § 97 StPO stipulates that correspondence between an accused and his lawyer, notes concerning confidential information entrusted to a lawyer by an accused, and other objects which are covered by a lawyer's right not to testify shall not be subject to seizure. According to § 160a (1) sentence 1 StPO, an investigation measure generally is inadmissible, when it is directed against a lawyer and it is expected to produce information in respect of which the lawyer would have the right to refuse to testify. However, § 160a (5) StPO regulates that § 97 StPO shall remain "unaffected". This ambiguous wording was understood by some to mean that § 97 StPO should take precedence over § 160a StPO and therefore limit the broad prohibition on the collection of privileged information stipulated by § 160a StPO in case of a seizure.[13] In contrast, another interpretation concludes that the seizure of client documents within lawyers' premises or within a law firm is inadmissible because § 160a StPO would expand the limited prohibitions in

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11 Differing: Carsten Momsen, *Zur Zukunft strafrechtlicher Vertretung von Unternehmen in Deutschland*, NEUE JURISTISCHE WOCHENSCHRIFT, 1362 (2018), who does not consider the decision a landmark due to the fact that the standard of review is limited to constitutional requirements.

12 For an overview on the views represented in judicial literature, cf. Matthias Dann, *Durchsuchung und Beschlagnahme in der Anwaltskanzlei*, NEUE JURISTISCHE WOCHENSCHRIFT, 2609, 2913 (2015).

13 Cf. LG Stuttgart, Order of March 26, 2018 – 6 Qs 1/18, marginal no. 40 et seq.; LG Bochum, Order of March 16, 2016 – II-6 Qs 1/16, marginal no. 87 et seq. = NEUE ZEITSCHRIFT FÜR STRAFRECHT, 500, 501 et seq. (2016); LG Hamburg, Order of October 15, 2010 – 608 Qs 18/10, marginal no. 87; Bertram Schmitt, *in:* Straf-prozessordnung, § 160a, marginal no. 17 (Lutz Meyer-Goßner & Bertram Schmitt, 2018); Jörn Hauschild, *in*: Münchener Kommentar zur StPO, § 97, marginal no. 64 (Christoph Knauer et al eds., 2014).

§ 97 StPO to further investigation measures including seizures.[14] The Constitutional Court did not agree with the latter and broader interpretation, and referenced the "constitutionally required effectiveness of criminal prosecution"[15] to establish § 97 StPO to be solely decisive for the measure of seizure.[16]

In addition, the Court also excluded the broad protection of legal privilege resulting from § 160a (1) sentence 1 StPO with regard to searches, since otherwise "the possibilities of obtaining evidence permitted under § 97 StPO [...] would be *de facto* impossible".[17] Unfortunately, the Court ignored the fact that the wording of § 160a (1) sentence 1 in connection with § 160a (5) StPO clearly contradicts this due to a lack of reference to provisions covering searches. Moreover, since § 95 StPO provides an obligation to surrender seized objects, authorities would certainly have a different possibility to request objects even without searches.[18]

Consequently, protection against search and seizure only exists if the following conditions are met cumulatively: Firstly, a special client-lawyer relationship is necessary, which requires a relationship of an accused to his lawyer.[19] Companies therefore have to be in a position similar to that of an accused due to an administrative offence or a revocation proceeding, and they must have mandated a lawyer or a law firm in connection with this proceeding. The prohibition of seizure in § 97 StPO only applies with regard to this relationship.[20]

In the *Jones Day* case, the Constitutional Court (and previously the Munich I Regional Court (*LG München I*)) used the lack of such a relationship as main argument to deny the applicability of § 97 StPO. Although the complaining *Volkswagen AG* was involved

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14 See, e.g., Margarete Gräfin v. Galen, *LG Hamburg, 15. 10. 2010 – 608 Qs 18/10: Beschlagnahme von Interviewprotokollen nach „Internal Investigations" – HSH Nordbank*, NEUE JURISTISCHE WOCHENSCHRIFT, 942, 945 (2011); Frank Peter Schuster, *LG Hamburg, 15. 10. 2010 – 608 Qs 18/10: Beschlagnahme von Interviewprotokollen nach „Internal Investigations" – HSH Nordbank*, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 26, 30 (2012).

15 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 78.

16 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 73 et seq.

17 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 76.

18 However, the use of coercion against persons entitled to refuse to testify is inadmissible in this context, § 95 (2) sentence 2 StPO; cf. also Jörn Hauschild, *in:* Münchener Kommentar zur StPO, § 95, marginal no. 20 (Christoph Knauer et al eds., 2014).

19 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 88.

20 LG Bochum, Order of March 16, 2016 – II-6 Qs 1/16, marginal no. 68 = NEUE ZEITSCHRIFT FÜR STRAFRECHT, 500 (2016); LG Bonn, Order of June 21, 2012 –27 Qs 2/12, marginal no. 42 et seq. = NEUE ZEITSCHRIFT FÜR KARTELLRECHT, 204, 204 et seq. (2013); LG Hamburg, Order of October 15, 2010 – 608 Qs 18/10, marginal no. 70 = NEUE JURISTISCHE WOCHENSCHRIFT, 942, 943 (2011); Bertram Schmitt, *in* Strafprozessordnung, § 97, marginal no. 10 (Lutz Meyer-Goßner & Bertram Schmitt, 2018) with further references; Jörn Hauschild, *in* Münchener Kommentar zur StPO, § 97, marginal no. 8, 64 (Christoph Knauer et al eds., 2014).

in a preliminary investigation by the Braunschweig Public Prosecutor's Office and had also established a client relationship with *Jones Day*, the proceedings of the Munich Public Prosecutor's Office conducting the search were directed against *Audi*, so that *Volkswagen* did not hold a position similar to that of an accused party in these proceedings. *Audi*, on the other hand, had no mandate relationship with *Jones Day*, so that the prohibition of seizure constituted by § 97 StPO was not applicable with regard to this relationship either.[21]

Secondly, the Constitutional Court specified the requirements for a legal entity to be considered in a position similar to an individual charged with a criminal offence (and therefore be protected from certain investigation measures). As a prerequisite, the entity has to be a possible subject to further investigations, according to objective criteria. This presupposes a "sufficient" ("*hinreichend*") suspicion for a criminal offence or a breach of the duty of supervision committed by an individual person in management (§§ 30, 130 OWiG (*Ordnungswidrigkeitengesetz* – German Act on Regulatory Offences)).[22] According to the Court, legal privilege does not apply if a company is merely concerned about potential future investigations and therefore obtains legal advice or engages a law firm to conduct an internal investigation.[23]

Thus the Court rejected the view expressed by, among others, the Bonn Regional Court (*LG Bonn*) in antitrust proceedings,[24] according to which protection against seizure begins with the initiation of formal proceedings. This would have enabled the investigating authorities to limit the application of the protections against seizure almost arbitrarily by delaying the official opening of criminal proceedings.[25] At the same time, however, the requirements of the Constitutional Court also mean that searches and seizures are now clearly possible until sufficient, objective indications of a future involvement in a criminal case exist.

With regard to the applicability of § 97 StPO, the Court clarified, that the seized documents would have been subject to prohibition and therefore inadmissible in the proceedings against *Volkswagen* – even if only used to substantiate further suspicions –, pursuant to § 160a (1) sentence 2 StPO.[26] However, the Public Prosecutor's Office in Braunschweig had already been conducting proceedings against *Volkswagen* since April 2016, so that

21 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 96 et seq., 102 et seq.

22 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 93.

23 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 94.

24 LG Bonn, Order of June 21, 2012 –27 Qs 2/12, marginal no. 42 et seq. = NEUE ZEITSCHRIFT FÜR KARTELLRECHT, 204, (2013).

25 Cf. Ralf Eschelbach, *in:* Strafprozessordnung, § 97, marginal no. 11 (Helmut Satzger & Wilhelm Schluckebier & Gunter Widmaier, 3rd ed. 2018).

26 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 101.

Volkswagen undoubtedly held a position similar to an individual charged with a criminal offence.[27]

B. Cases of Authorized Searches and Seizures

Since the prohibitions of searches and seizures at the lawyer's premises only apply when the client is in a position similar to that of a person charged with a criminal offense, documents drawn up in an internal investigation during the initial consultation or internal clarification of the facts may regularly be classified as seizable. The same applies to situations in which initially only the misconduct of individuals, especially below management level, is investigated. Even though a possible investigation against the company is already being considered and examined by external lawyers, the Constitutional Court does not regard this to be sufficient to cause protection against search and seizure. Hence, the Court does not follow regional courts' decisions,[28] which had granted such protection for earlier stages of internal investigations.[29]

The Constitutional Court states that the search of law firms and the confiscation of client documents is always possible if the lawyer concerned had no client relationship with the respective defendant. As the decisions show, this occurs in particular with regard to group-wide matters, in which the mandate only relates to one of the group's companies or a subsidiary. According to the Court, the protection against seizure provided by § 97 StPO does not apply to other group companies or to the relationship between parent company and subsidiary within a group, if there is no explicit mandate from the respective group company or its subsidiaries.[30]

The orders of the Constitutional Court give an advantage to investigating authorities, which can "adjust" the proceedings accordingly. Since the Public Prosecutor's Offices decide on the connection and separation of proceedings at their duty-bound discretion,[31] it would be possible to separate the preliminary proceedings against each of a group's companies involved and to conduct searches and seizures at the law firms of the respective other companies. The protection against searches and seizures stipulated in § 97 StPO would not apply, since it requires a position similar to that of a person charged with a

27 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 6 et seq.

28 These decisions, however, concern defense relationships in the meaning of § 148 StPO; cf. LG Braunschweig, Order of July 21, 2015 – 6 Qs 116/15, marginal no. 1 = NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 37 (2016); LG Gießen, Order of June 25, 2012 – 7 Qs 100/12, marginal no. 11 = BeckRS 2012, 15498.

29 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 95.

30 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 104; differing view: LG Braunschweig, Order of July 21, 2015 – 6 Qs 116/15, marginal no. 12 et seq. = NEUE ZEITSCHRIFT FÜR STRAFRECHT, 308, 309 (2016).

31 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 97.

criminal offence – which would only exist for each company with regard to the investigation directed against itself. Although the Court points out that the procedural design may not circumvent the protection of § 97 (1) StPO, the recognition of such a constellation seems unlikely due to the discretion granted to the investigating authorities.

With regard to internal investigations, it is repeatedly denied that conducting an investigation qualifies as legal activity in a narrower sense at all.[32] The Munich I Regional Court (*LG München I*) had similar doubts regarding the *Volkswagen* investigation conducted by *Jones Day* on whether the appointment of the law firm was at all to be qualified as a traditional lawyer's mandate – in particular because of the fact that *Volkswagen* was not allowed to influence the investigation in order to comply with the agreements with the Department of Justice.[33] The Constitutional Court used this argument in the context of the principle of proportionality and stated that the client relationship was not characterized by a special relationship of trust, such as is usually inherent in a defense relationship or even the classic attorney-client relationship.[34] The Court did not, however, go so far as to say, mandates from internal investigation generally do not require protection against searches and seizures. Nevertheless, the doubts about the classification as traditional legal activity seem very questionable, especially taking into account that internal investigations often aim to prepare the defense in preliminary proceedings.

The fact that the documents and data in the *Jones Day* case could have been defense documents within the scope of § 148 StPO –with the consequence that they were also protected in the custody of the company - was not considered by the Constitutional Court at all.[35]

C. Legal Comparison with the USA

Contrary to its German equivalent, legal privilege under U.S. law offers extensive protection (even during internal investigations). It is essentially based on two legal institutions, the *attorney-client privilege* and the *work-product doctrine*.

The *attorney-client privilege* extensively protects the communication between a lawyer and his client. The confidentiality guaranteed by the *attorney-client privilege* is intended

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32 Of this opinion, e.g., Renate Wimmer, *in:* Wirtschafts- und Steuerstrafrecht, § 152 StPO, marginal no. 17 (Werner Leitner & Henning Rosenau, 2017).

33 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 55.

34 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 110.

35 Regarding the classification of the results of an internal investigation as defense documents *cf*. Jürgen D. Klengel & Christoph Buchert, *Zur Einstufung der Ergebnisse einer „Internal Investigation" als Verteidigungsunterlagen im Sinne der §§ 97, 148 StPO,* NEUE ZEITSCHRIFT FÜR STRAFRECHT, 383 (2016); regarding the protection of defense documents in the custody of the company *cf*. LG Braunschweig, Order of July 21, 2015 – 6 Qs 116/15, marginal no. 10; Sven Thomas/Simone Kämpfer, *in* Münchener Kommentar zur StPO, § 148, marginal no. 17, 19 (Christoph Knauer et al eds., 2014).

to enable the client to obtain early and comprehensive legal assistance. He should be able to disclose all information relevant for legal assessment to his lawyer without having to fear that this communication is accessed by third parties.[36] The *attorney-client privilege* requires an existing client relationship (or its initiation) as well as confidential communication between client and lawyer aimed at obtaining or providing legal assistance.[37]

The *attorney-client privilege* applies to every lawyer admitted in the U.S. or abroad[38] and does not distinguish – in contrast to German law – between external and in-house counsel. Besides natural persons, the protection applies to legal entities as well. Since the *U.S. Supreme Court's* decision in "*Upjohn Co. v. United States*", the communication of all employees of a legal entity, regardless of their position, can be protected by the *attorney-client privilege*.[39] Interviews with employees conducted by external lawyers are therefore regularly privileged.[40] Communication with in-house counsel is only protected if the predominant purpose of communication is legal advice.[41] The scope of the *attorney-client privilege* extends to both oral and written communication.[42]

In addition to the protection of communication between lawyer and client, the *work-product doctrine* protects the lawyer's work products from access by third parties, as long as they were created in preparation of a current or future legal dispute. This includes documents containing the facts of a case as well as legal assessments and analyses. Work products created within internal investigations may also be protected.[43]

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36 SABRINA POTOČIĆ, KORRUPTION, AMERIKANISCHE BÖRSENAUFSICHT UND ERMITTLUNGEN DURCH PRIVATE IN DEUTSCHLAND, 270 (2016) with further references; regarding legal privilege cf. also Carsten Momsen & Thomas Grützner, *Gesetzliche Regelung unternehmensinterner Untersuchungen – Gewinn an Rechtsstaatlichkeit oder unnötige Komplikation?,* CORPORATE COMPLIANCE ZEITSCHRIFT, 242, 248 et seq. (2017); Hendrik Schneider, *Das Unternehmen in der Schildkröten-Formation – Der Schutzbereich des Anwaltsprivilegs im deutschen und US-Strafrecht*, 9, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 626, 630 (2016).

37 HANNO MERKT, SYNDIKUSANWALT UND DEUTSCHES ANWALTSPRIVILEG IM US-ZIVILPROZESS, 117 (2013); SABRINA POTOČIĆ, KORRUPTION, AMERIKANISCHE BÖRSENAUFSICHT UND ERMITTLUNGEN DURCH PRIVATE IN DEUTSCHLAND, 313 (2016).

38 On the discussion to what extent foreign attorneys have the right to refuse to testify according to § 53 StPO, cf. Marcus Percic, *in* Münchener Kommentar zur StPO, § 53, marginal no. 2 (Christoph Knauer et al eds., 2014).

39 Upjohn Co. v. U. S., 449 United States, 383 (389 et seq.); Jürgen Wessing*, in* Deutsch-Amerikanische Korruptionsverfahren, § 6 marginal no. 103 et seq. (Jürgen Wessing & Matthias Dann, 2013); on the requirements in detail SABRINA POTOČIĆ, KORRUPTION, AMERIKANISCHE BÖRSENAUFSICHT UND ERMITTLUNGEN DURCH PRIVATE IN DEUTSCHLAND, 313 et seq. (2016).

40 SABRINA POTOČIĆ, KORRUPTION, AMERIKANISCHE BÖRSENAUFSICHT UND ERMITTLUNGEN DURCH PRIVATE IN DEUTSCHLAND, 314 (2016).

41 HANNO MERKT, SYNDIKUSANWALT UND DEUTSCHES ANWALTSPRIVILEG IM US-ZIVILPROZESS, 121 (2013) with further references.

42 Cf. MARIUS MANN, ANWALTLICHE VERSCHWIEGENHEIT UND CORPORATE GOVERNANCE, 91 (2009).

43 SABRINA POTOČIĆ, KORRUPTION, AMERIKANISCHE BÖRSENAUFSICHT UND ERMITTLUNGEN DURCH PRIVATE IN DEUTSCHLAND, 316 et seq. (2016) with further references; HANNO MERKT, SYNDIKUSANWALT UND DEUTSCHES ANWALTSPRIVILEG IM US-ZIVILPROZESS, 120 (2013) with further references.

The legal privilege is accompanied by extensive obligations of disclosure in both civil and criminal proceedings. This is based on the fundamental principles of US procedural law, according to which the parties to the proceedings are obliged to engage in clarifying disputed facts. A similar extent of disclosure does not exist under German law.[44]

Furthermore, the protection of legal privilege no longer applies in case of a waiver. It is considered a waiver when protected communication or legal work products are disclosed to third parties. This has far-reaching consequences: Not only the specific piece of information disclosed, but even all related documents and work products might no longer be considered privileged.[45]

III. CONSEQUENCES FOR MANAGEMENT RESPONSIBILITY IN INTERNAL INVESTIGATIONS

A. Basics

Generally speaking, companies are not obliged to file criminal charges because of internal incidents under corporate law.[46] There is also no general obligation to cooperate with the Public Prosecutor's Office.[47] However, this must be separated from the management's obligations to conduct internal investigations if there are indications of irregularities in order to clarify the facts of the case.

Although there is no general obligation to conduct internal investigations under German corporate law, which might result from the countless possible definitions and constellations of internal investigations, an obligation to conduct an internal investigation may nevertheless arise from general managerial duties.

For German Stock Corporations (*Aktiengesellschaft – AG*), such an obligation is being discussed for the management board and the supervisory board with reference to §§ 76

44 HANNO MERKT, SYNDIKUSANWALT UND DEUTSCHES ANWALTSPRIVILEG IM US-ZIVILPROZESS, 114 et seq. (2013).

45 SABRINA POTOČIĆ, KORRUPTION, AMERIKANISCHE BÖRSENAUFSICHT UND ERMITTLUNGEN DURCH PRIVATE IN DEUTSCHLAND, 319 (2016) with further references.

46 A punishable obligation to report criminal offences exists only for the offences listed in § 138 StGB, which do not usually occur in a company; cf. also Jürgen Wessing, *in* Corporate Compliance, 1510 (Christoph Hauschka & Klaus Moosmayer & Thomas Lösler, 3rd ed. 2016).

47 Jürgen Wessing, *in* Corporate Compliance, 1510 et seq. (Christoph Hauschka & Klaus Moosmayer & Thomas Lösler, 3rd ed. 2016).

(1), 93 (1) sentence 1 AktG (*Aktiengesetz* – German Stock Corporation Act), stating a corporate duty of care for managers.[48] This includes the management board's duty to ensure compliance with laws and internal company guidelines. If there are indications of violations, the management board must address those. Pursuant to § 93 (1) sentence 1 AktG, the management board has to exercise the diligence of a prudent and conscientious manager in their conduct of business. Consequently, any indications of violations have to be followed by adequate investigations.[49]

Even the *Business Judgment Rule* does not offer further discretion in this matter. § 93 (1) sentence 2 AktG requires the management board to act on the basis of "appropriate information". Therefore, an entrepreneurial discretion exists solely on "how" to conduct an investigation, not on "whether" to perform it at all.[50] In the *ARAG/Garmenbeck* decision the German Federal Court of Justice (*Bundesgerichtshof – BGH*) correspondingly stated, that while an investigation had to be performed, the extent and general execution remains at the discretion of the management board.[51] Thus, the wide scope of action opened up by the *Business Judgment Rule* is only applicable with regard to the question of how and to what extent the investigation is conducted. The decisive factor then is whether the management board was entitled to assume to act on the basis of appropriate information in the best interest of the company.[52] Whether a reaction is appropriate depends on the circumstances of the individual case, in particular the significance of the possible violation and the expected effort of the investigation.[53]

The supervisory board can also be obliged to conduct an internal investigations. According to § 111 (1) AktG, the supervisory board must monitor the actions of the management board. Again, the required measures vary depending on the individual case. According to the severity of the risk for the company, the supervisory board may either be limited to verifying that the management board has investigated the matter properly and responded appropriately to it, or may be obliged to conduct investigation measures on its own. Similar to the management board's duties, the discretion of the *Business Judgment Rule* does only apply to the operating criteria of an investigation.[54]

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48 In addition, a link between the duty to investigate and the supervisory duty pursuant to § 130 OWiG, the duty to set up a monitoring system pursuant to § 91 (2) AktG or the general compliance responsibility of the management board are discussed; cf. Harald Potinecke & Florian Block, *in* Internal Investigations – Ermittlungen im Unternehmen, 25 et seq. (Thomas Knierim & Markus Rübenstahl & Michael Tsambikakis, 2nd ed. 2016).

49 Harald Potinecke & Florian Block, *in* Internal Investigations – Ermittlungen im Unternehmen, 26 (Thomas Knierim & Markus Rübenstahl & Michael Tsambikakis, 2nd ed. 2016).

50 Harald Potinecke & Florian Block, *in* Internal Investigations – Ermittlungen im Unternehmen, 27 (Thomas Knierim & Markus Rübenstahl & Michael Tsambikakis, 2nd ed. 2016).

51 BGHZ 135, 244, 254 – *ARAG/Garmenbeck* = NEUE JURISTISCHE WOCHENSCHRIFT, 1926, 1927 et seq. (1997).

52 BGHZ 135, 244, 254 – *ARAG/Garmenbeck* = NEUE JURISTISCHE WOCHENSCHRIFT, 1926, 1927 (1997).

53 Cf. Heiner Hugger, *Unternehmensinterne Untersuchungen – Erfahrungen und Standards der Praxis*, ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT, 214, 219 et seq. (2015).

54 Harald Potinecke & Florian Block, *in* Internal Investigations – Ermittlungen im Unternehmen, 34 et seq. (Thomas Knierim & Markus Rübenstahl & Michael Tsambikakis, 2nd ed. 2016).

B. Internal Investigations Remain Admissible

Internal investigations remain permissible and necessary – despite the fact that the orders of the Constitutional Court enable the confiscation of work products from the lawyer conducting the investigation. A reason for this is the aforementioned corresponding obligation under corporate law to clarify facts and carry out investigative measures due to certain events. Furthermore, the risk of seizure existed even before the decisions were made, due to the unclear legal situation. Now, based on the decisions of the Constitutional Court, measures can be taken to minimize the risk of searches and seizures of a lawyer's premises. This can be achieved by taking a closer look at the discretion regarding the operating criteria of an internal investigation.

In addition to the existing legal obligation, further good reasons for carrying out internal investigations exist: A comprehensive clarification of facts informs the company of all relevant irregularities and thus enables the management to make informed decisions. Early clarification can also help to influence the interpretation of the facts – in public and medial perception, and through cooperation with investigating authorities.[55]

In cross-border cases, internal investigations are often without alternative anyway. In contrast to German law, U.S. authorities can force companies to fully investigate suspected criminal offences or have them investigated by external lawyers – as in the *Volkswagen*-case.

C. Possible Options

1. Escape into a Voluntary Self-Disclosure?

Since a report to the authorities could result in preliminary proceedings, the self-disclosure of possible violations by a company could indicate a position similar to that of a person charged with a criminal offence and thus justify the applicability of search and seizure prohibitions (II.A.). Companies therefore could increasingly consider the option of self-disclosure, despite there being no legal obligation to do so (III.A.).

This would, however, not only require the suspicion of a criminal offence committed within the company or by company employees, but also the acting person would have to be enumerated in § 30 OWiG, or a supervisory duty within the scope of § 130 OWiG would have to be breached. Furthermore, the resulting suspicion must be considered to be sufficient, measured by objective criteria, as stated in the Constitutional Court's decision.[56]

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55 Jürgen Wessing, *in* Corporate Compliance, 1512 et seq. (Christoph Hauschka & Klaus Moosmayer & Thomas Lösler, 3rd ed. 2016).

56 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 93.

Further reasons indicate that self-disclosure should be considered with caution and only after assessing each case thoroughly:

Firstly, it remains possible that the Public Prosecutor's Office does not assume sufficient suspicion on the basis of the report. A discretion is granted to authorities in proceedings against companies, due to the *opportunity principle* (§ 47 OWiG), while in proceedings against individual persons there is no discretion, based on the applicable *principle of legality*. And since the investigation against a company is at the prosecutions' duty-bound discretion, there are numerous options for them besides initiating preliminary proceedings against the company. Alternatively, the Public Prosecutor's Office could choose initiating proceedings against individual defendants. This approach is demonstrated by the Constitutional Court's decision: *Audi* had also filed a criminal complaint with the Munich Public Prosecutor's Office. The Prosecutor's Office then conducted preliminary investigations and – after being briefed by lawyers from *Jones Day* on the progress of the internal investigations – initially directed its investigation against parties unknown. Only after the search of the offices had taken place – a few days after the initiation of the preliminary proceedings the investigations against identified individuals and against the company began.[57] The Public Prosecutor's Office argued that the suspicion against the company had previously been insufficient to consider *Audi* to be in a position similar to that of a person charged with a criminal offence because the decision-making structures at *Audi* were unknown.[58]

Secondly, even the initiation of preliminary proceedings or the acceptance of sufficient suspicion offers only limited protection against searches and seizures: The respective prohibitions only apply after all requirements of § 97 StPO are met. All documents created earlier are usually not considered privileged:[59] Documents originating from before may only be protected, if they are considered documents of the defense pursuant to § 148 StPO. In case of a defense counsel-client relationship, comprehensive protection is granted as soon as the mandate is initiated.[60] However, this kind of relationship can be difficult to establish. Not every legal activity in an internal investigation qualifies as a traditional activity for the criminal defense (or its preparation). The defense counsel-client relationship is further limited by criminal law and professional law regulations (III.C.2.). Not least, extensive company-related cases regularly require internal investigations before a criminal charge can be filed.

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57 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 8 et seq., 28.

58 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 11.

59 Renate Wimmer, *in* Wirtschafts- und Steuerstrafrecht, § 152 StPO, marginal no. 15 (Werner Leitner & Henning Rosenau, 2017).

60 Cf. OLG München, Order of November 30, 2004 – 3 Ws 720-722/04 = NEUE ZEITSCHRIFT FÜR STRAFRECHT, 300, 301 (2006); Jörn Hauschild, *in* Münchener Kommentar zur StPO, § 97, marginal no. 29 (Christoph Knauer et al eds., 2014); Matthias Jahn & Stefan Kirsch, *Anmerkung zu einem Beschluss des LG Bonn v. 21.06.2012 (27 Qs 2/12; NZWiSt 2013, 21) - Zum kartellrechtlichen Ermittlungsverfahren,* NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 21, 30 (2013).

Thirdly, a criminal charge may oppose the company's interests. If sensitive information is involved, a premature disclosure to the investigating authorities could increase the danger that information could be leaked to the public. A premature involvement may also be counterproductive if the severity of the alleged of misconduct cannot be assessed yet. Even if cooperation with the authorities is sought, it is often advisable to first establish informal contact, ideally avoiding formal investigation proceedings.[61] However, according to the orders of the Constitutional Court, an informal contact to the authorities does generally not raise sufficient suspicion for the application of the prohibitions of searches and seizures.

2. Group-Wide Mandating?

The Constitutional Court has decided that even if all requirements of § 97 StPO are met, the protection granted by § 97 StPO does not extend to several companies within a group or to subsidiaries. Therefore, a group-wide mandating of law firms could be considered to achieve broader protection. This applies in particular if the internal investigations concern the whole group.

However, there is a risk that this could be considered as representation of conflicting interests, prohibited by § 43 a (4) BRAO (*Bundesrechtsanwaltsordnung* – German Federal Lawyers' Act) or a violation of the attorney-client relationship by serving various parties (§ 356 StGB (*Strafgesetzbuch* – German Criminal Code)), especially if separate criminal proceedings are initiated against the groups' companies involved. Moreover, the problem remains that § 97 StPO is only applicable to the respective investigation proceeding.

Additionally, a counsel must not appear for more than one person accused of the same offense (§ 146 StPO). Although a coordinated defense of different companies is generally permissible,[62] the aforementioned problems regarding § 97 StPO persist. Furthermore, not every activity regarding internal investigations can be qualified as a traditional activity of defense, even if it is possible in general to defend a company.[63]

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61 Jürgen Wessing, *in* Corporate Compliance, 1510 et seq. (Christoph Hauschka & Klaus Moosmayer & Thomas Lösler, 3rd ed. 2016).

62 Matthias Dann, *in* Wirtschaftsstrafrecht, § 146 StPO, marginal no. 54 (Robert Esser & Markus Rübenstahl & Frank Saliger & Michael Tsambikakis, 2017); regarding coordinated defense in general Bertram Schmitt, *in* Strafprozessordnung, § 137, marginal no. 11 (Lutz Meyer-Goßner & Bertram Schmitt, 2018).

63 Jürgen Wessing, *in* Beck'scher Online-Kommentar, § 148, marginal no. 2 (Jürgen-Peter Graf, 29th ed. 2018); Jürgen D. Klengel & Christoph Buchert, *Zur Einstufung der Ergebnisse einer „Internal Investigation" als Verteidigungsunterlagen im Sinne der §§ 97, 148 StPO,* NEUE ZEITSCHRIFT FÜR STRAFRECHT, 383 (2016); Matthias Dann, *in* Wirtschaftsstrafrecht, § 148 StPO, marginal no. 29 (Robert Esser & Markus Rübenstahl & Frank Saliger & Michael Tsambikakis, 2017).

3. Restrained Use of Data?

Another option could be to create or save less seizable data, for example by not recording employee interviews or by avoiding a final report of an internal investigation. In addition, data could be stored outside of Germany.

For example, the avoidance of a final report would make it at least more difficult for investigating authorities to reconstruct the results of an internal investigation. However, this would of course affect the client in the same way. Thus, the absence of a final report probably might not always be appreciated – although the argument of avoiding possible seizure should promote acceptance of this approach, especially since a final report is not essential: results can also be presented orally for example. Against the background that § 97 StPO in general is not applicable with regard to documents outside a lawyer's custody, this is recommendable anyway.[64] A similar practice has been established for a long time in the U.S.: U.S. authorities are only presented with oral summaries of reports and interviews (so-called *readouts* and *oral downloads*).[65] However, this practice requires an examination of the individual case in order to determine whether such verbal reporting fulfills the requirements of corporate responsibilites. For example, a written report is necessary in case of the so-called *Expert Reliance Defence*, although exceptions are possible for good reason.[66]

From a lawyer's point of view, however, it seems unpractical not to record employee interviews or other pieces of information or evaluations of individual facts in an internal investigation. In all likelihood, this would also create a significant tension with regard to the responsibilities of the management's duties.

Following the orders of the Court it was assumed, that employees would be even more likely than before to refuse cooperation regarding employee interviews, since the risk of a seizure of these documents was considered legal.[67] However, it has been predominantly considered that there is no protection against seizures of employee interview minutes with regard to the company's lawyer not defending the respective employee. Therefore, it

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64 On the custody requirement of § 97 StPO cf. Jörn Hauschild, *in* Münchener Kommentar zur StPO, § 97, marginal no. 19 (Christoph Knauer et al eds., 2014).

65 Dorothee Herrmann & Finn Zeidler, *Arbeitnehmer und interne Untersuchungen – ein Balanceakt,* NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, 1499, 1502 (2017); with regard to this practice, however, a Florida court has recently ruled that the reading of summaries may be a waiver with regard to the underlying interview protocols and summaries, SEC v. Herrera et al., No. 17-20301 (S. D. Fl. Dec. 5, 2017).

66 This has been a requirement since the *Ision*-Decision of the German Federal Court of Justice, cf. BGH, Order of September 20, 2011 – II ZR 234/09 = CORPORATE COMPLIANCE ZEITSCHRIFT, 76, 78 (2012); Barbara Dauner-Lieb, *in* Gesellschaftsrecht, § 93 marginal no. 32a (Martin Henssler & Lutz Strohn, 3rd ed. 2016).

67 Cf. http://blog.wiwo.de/management/2018/07/11/vier-fragen-anwirtschaftsstrafrechtler-juergen-wessing-interne-ermittlungen-nur-noch-mitdeutschen-kanzleien/ (July 27, 2018).

seems unlikely that the practice of conducting employee interviews will change significantly, especially considering the German labor law obligation for employees to cooperate.[68]

An alternative to the complete renunciation of documentation would be to save information digitally on foreign servers. A digital procedure in investigations is probably the standard anyway. If, in the event of a seizure, there is no voluntary disclosure, a formal request for surrender could not be enforced against persons who are entitled to refuse to testify on professional grounds such as lawyers due to § 95 (2) StPO.[69] Nonetheless, the search and seizure of the lawyer's computers and office servers and the authorities' attempt to decrypt the data would have to be endured.[70]

Consequently, it could prove to be advantageous to mandate an international law firm whose servers are located outside Germany. Alternatively, the commissioning of foreign service providers remains possible. This would require that § 43e (4) BRAO is observed, which regulates the use of abroad services and requires a standard of protection comparable to that in Germany.[71] As an example, data stored by *Jones Day* on a server in Belgium, which had been downloaded by the Public Prosecutor's Office during the search of the premises, could not be used because a request for judicial assistance had not been submitted.[72]

Since the possibility remains to submit international letters rogatory, there is no absolute protection for data saved on foreign servers.[73] However, this risk would be manageable for servers of a law firm that are operated inside a jurisdiction with a comprehensive legal privilege. In addition, this way of access by the Public Prosecutor's Office is likely to be considerably more difficult or at least delayed.

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68 Dorothee Herrmann & Finn Zeidler, *Arbeitnehmer und interne Untersuchungen – ein Balanceakt,* NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, 1499, 1501, 1503 (2017).

69 Bertram Schmitt, *in* Strafprozessordnung, § 95, marginal no. 6 (Lutz Meyer-Goßner & Bertram Schmitt, 2018); Matthias Jahn, *Die Grenzen der Editionspflicht des § 95 StPO – Ein Beitrag zur Systematik der strafprozessualen Vorschriften über die Beschlagnahme*, *in* Festschrift für Claus Roxin zum 80. Geburtstag am 15. Mai 2011, 1357, 1362 et seq. (2011); Niklas Auffermann & Sebastian Vogel, *Wider die Betriebsblindheit – Verhalten bei Durchsuchungen in Arztpraxen und Krankenhäusern*, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 387, 309 (2016).

70 The review of data carriers in the context of a search, their seizure and - as far as possible - their decoding is covered by §§ 94, 110 StPO; cf. Bertram Schmitt, *in* Strafprozessordnung, § 94, marginal no. 4, 16a et seq., § 110 marginal no. 2a, 6 (Lutz Meyer-Goßner & Bertram Schmitt, 2018).

71 On the provision Thomas Knierim, *in* Gesamtes Strafrecht aktuell, chapter 4, marginal no. 56 et seq. (Thomas Knierim & Anna Oehmichen & Susanne Beck & Claudius Geisler, 2018); for other EU member states, it can generally be assumed that the level of protection of secret information is the same, BT-Drs. 18/11936, p. 35.

72 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 36.

73 Bertram Schmitt, *in* Strafprozessordnung, § 110, marginal no. 7a (Lutz Meyer-Goßner & Bertram Schmitt, 2018); Wolfgang Bär, *Transnationaler Zugriff auf Computerdaten*, 2, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 53, 54 et seq. (2011).

4. Conclusion

As outlined above, the orders of the Constitutional Court leave only limited protection against seizures for lawyers conducting an internal investigation. The most promising course of action seems to be the avoidance of data accumulation – and if this approach is not realizable, at least the data could be saved on foreign servers.

The situation resulting from the Court's orders is dissatisfying, especially when compared with the U.S. (cf. II.C.), where internal investigations are an essential part of the legal practice and the legal privilege therefore is adjusted accordingly. The Court did not use its opportunity to establish comparable principles with regard to German legal practice, although the relevance of internal investigations in Germany continues to grow. Instead, the Court still considers internal investigations to be alien to German law and questions their qualification as a mandate in a traditional sense. Hence, the Constitutional Court counteracts more recent efforts to create incentives for the disclosure of incriminating evidence and to reward companies for transparency and cooperation (cf. IV.). Not least, it seems that the Court has not adequately considered the fact, that its assessment grants a competitive advantage to those foreign law firms with servers located abroad, to which it has denied fundamental rights.

IV. THE NEED FOR LEGISLATIVE ACTION

The orders of the Court clearly demonstrate the need for unambiguous and balanced legal regulations regarding internal investigations. These regulations have to include a practicable protection for lawyers and law firms against searches and seizures. At the beginning of 2018, the German government announced its intention to regulate internal investigations including searches and seizures. These plans explicitly include the creation of legal incentives for the disclosure of information.[74]

A decision of the German Federal Court of Justice in a decision from May 2017 points into the same direction: According to the decision, the establishment of an efficient compliance management system must be taken into account when imposing a corporate fine. The Court further stated that the company's reaction to an infringement has to be considered as well.[75]

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74 Coalition contract between CDU; CSU and SPD, 19th legislative period, dated March 12, 2018, p. 126, (Jul. 27, 2018), https://www.bundesregierung.de/Content/DE/StatischeSeiten/Breg/koalitionsvertrag-inhaltsverzeichnis.html.

75 BGH, Order of May 9, 2017 – 1 StR 265/16, marginal no. 118 = CORPORATE COMPLIANCE ZEITSCHRIFT, 285, (2017).

The regulation of internal investigations and the creation of incentives are already included in various drafts for a corporate criminal law.[76] For example, the Cologne Draft for an Association Sanctions Act (*Kölner Entwurf für das Verbandssanktionengesetz*), inspired by comparison to U.S. law, contains several proposals for procedural regulations for dealing with the findings of internal investigations. The draft includes a right for lawyers (including in-house lawyers) to refuse testimony on results and progress of internal investigations, and it prohibits the seizure of all records regarding such an investigation.[77]

However, if the right to refuse to give evidence and restrictions on seizure depend on the content of the mandate or on the conduct of the internal investigation, the problem of differentiating between normal legal representation and defense may arise.[78] This was, in fact, one of the main reasons why a differentiation between defense lawyers and other lawyers in a previous version of § 160a StPO was abandoned in an amendment from 2011.[79]

As a logical consequence, the legislator should clarify that § 160a (1) StPO offers comprehensive protection for all types of lawyers against investigative measures by the state. It remains incomprehensible why a lawyer may refuse testimony about a mandate while the exact same information may be seized in written form.[80] The attempted justification by merely referencing the constitutionally required "effectiveness of criminal prosecution" is by all means insufficient. The effectiveness of the criminal prosecution is complemented and contrasted by the constitutional requirement for an effective and orderly administration of justice and the requirement of a fair trial. Both demand a corresponding protection of the *attorney-client privilege*. The Constitutional Court also pointed this out

76 On the various drafts Carsten Beisheim & Laura Jung, *Unternehmensstrafrecht: Der neue Kölner Entwurf eines Verbandssanktionengesetzes (VerbSG-E)*, CORPORATE COMPLIANCE ZEITSCHRIFT, 63 (2018); see also propo-sals by Carsten Momsen & Thomas Grützner, *Gesetzliche Regelung unternehmensinterner Untersuchungen – Gewinn an Rechtsstaatlichkeit oder unnötige Komplikation?*, CORPORATE COMPLIANCE ZEITSCHRIFT, 242 (2017).

77 MARTIN HENSSLER & ELISA HOVEN & MICHAEL KUBICIEL & THOMAS WEIGEND, KÖLNER ENTWURF EINES VERBANDSSANKTIONENGESETZES, 10, 24 et seq. (2017); on the draft see also Carsten Beisheim & Laura Jung, *Unternehmensstrafrecht: Der neue Kölner Entwurf eines Verbandssanktionengesetzes (VerbSG-E),* CORPORATE COMPLIANCE ZEITSCHRIFT, 63 (2018). Also in favor of the inclusion of in-house lawyers in the circle of those entitled to refuse testimony Hendrik Schneider, *Das Unternehmen in der Schildkröten-Formation – Der Schutzbereich des Anwaltsprivilegs im deutschen und US-Strafrecht*, 9, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 626, 633 et seq. (2016).

78 LG Mannheim, Order of July 3, 2012 – 24 Qs 1, 2/12 = NEUE ZEITSCHRIFT FÜR STRAFRECHT, 713, 716 (2012).

79 BT-Drs. 17/2637 (2010), p. 6.

80 Likewise: Margarete Gräfin v. Galen, *LG Hamburg, 15. 10. 2010 – 608 Qs 18/10: Beschlagnahme von Interviewprotokollen nach „Internal Investigations" – HSH Nordbank*, NEUE JURISTISCHE WOCHENSCHRIFT, 942, 945 (2011).

in numerous decisions.[81] Since the Court apparently did not want to balance these conflicting interests appropriately, it remains the legislator's responsibility to do so.

The repeated allegation by the Constitutional Court and lower courts of a possible abuse of the legal privilege by lawyers demonstrates an unjustified distrust against the advocacy. The assumption that a comprehensive legal privilege would lead to numerous lawyers being used as "safehouses" for incriminating evidence[82] is absurd and completely disregards the impending professional and criminal consequences of such conduct. This risk is already addressed by § 160a (4) StPO and § 97 (2) sentences 2 and 3 StPO.[83] Another effective measure against such a risk, suggested by the Mannheim Regional Court and implementable through amendment, is that the protection of § 160a (1) sentence 1 could be limited in the case of obvious abuse.[84]

In addition, a legal incentive to cooperate with investigation authorities and disclose relevant information is necessary. This would require that companies would be able to rely on their communication with their lawyers to be treated confidentially. It is now up to the legislator to develop the legal framework enabling an appropriate balance of power between law enforcement authorities and those parties affected. According to recent media reports, the Federal Ministry of Justice is currently working on a draft legislation for a corporate criminal law including regulations for internal investigations and plans to publish its draft in summer 2019.[85] It is hoped that the draft addresses the outlined questions regarding legal privilege and achieves legal certainty for all parties involved.

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81 Fundamentally: BVerfG, Orders of March 30, 2004 – 2 BvR 1520/01, 2 BvR 1521/01, marginal no. 100 = NEUE JURISTISCHE WOCHENSCHRIFT, 1305, 1307 (2004); see also BVerfG, Order of January 12, 2016 – 1 BvL 6/13, marginal no. 83 = NEUE JURISTISCHE WOCHENSCHRIFT, 700, 706 (2016); BVerfG, Order of November 6, 2014 – 2 BvR 2928/10, marginal no. 18; BVerfG, Order of March 18, 2009 – 2 BvR 1036/08, marginal no. 64 = NEUE JURISTISCHE WOCHENSCHRIFT, 2518, 2519 (2009); BVerfG, Order of April 12, 2005 – 2 BvR 1027/02, marginal no. 94 = NEUE JURISTISCHE WOCHENSCHRIFT, 1917, 1919 (2005).

82 BVerfG, Orders of June 27, 2018 – 2 BvR 1405/17, 2 BvR 1780/17, marginal no. 91.

83 According to those regulations, restrictions on searches and seizures shall not apply if certain facts sub-stantiate the suspicion that a lawyer participated in the criminal offence investigated by the prosecu-tion.

84 LG Mannheim, Order of July 3, 2012 – 24 Qs 1, 2/12 = NEUE ZEITSCHRIFT FÜR STRAFRECHT, 713, 716 (2012).

85 Cf. reports by Handelsblatt, (Mar. 7, 2019), https://www.handelsblatt.com/politik/deutschland/sanktionsrecht-wie-katarina-barley-interne-firmenermittlungen-regulieren-moechte/24071464.html?ticket=ST-2075041-WFSQyFwOzyMtwDEEjJyc-ap4; and JUVE, (Mar. 7, 2019), https://www.juve.de/nachrichten/namenundnachrichten/2019/03/neues-unternehmensstrafrecht-zaehes-ringen-um-die-interne-ermittlung.