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PRIVILEGE ISSUES

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EDITORIAL

PRIVILEGE ISSUES

It gives us great pleasure to introduce you to our fourth edition of the Compliance Elliance Journal (CEJ).

We are particularly pleased of a significant innovation, which accompanies our new edition. From now on the CEJ has an Advisory Board, consisting of Derek Six (Compliance Manager at DAW Group, Germany), Marcus Traut (Attorney at and Owner of Anwaltskanzlei Marcus Traut, Germany) and Kenneth Tung (Co-Founder and Chief Strategy Officer at In-Gear Legalytics Limited, China). We are glad that they are willing to support CEJ by their pushing ideas, suggestions and contributions. Thank you for deciding to join CEJ.

Moreover, Cheryl E. Zuckerman, who is a Professor of Legal Writing and Lecturer in Law and Annette Torres, who is a Professor of Legal Writing, both at the University of Miami School of Law, will be part of our team. As mentors they will support ambitious students, who strive for submitting their contributions for CEJ. We would like to thank you for supporting us as well.

You can read more about all of our new members under the section “Advisory Board”.

This edition starts with the authors Bernd Mayer and Nicola Zeibig. In their essay “In-house lawyer under the new German Legislation” they scrutinize the recent development regarding the professional regulations of in-house lawyers. Thereby they focus on the legislative process as happened in Germany. The authors show up the significant differences of the in-house counsel’s status before and after the legislative change within the Federal Lawyer’s act. Moreover they point out potential difficulties for in-house lawyers, now that the law for them has changed. Dilemmas as to terms of Independence and of professional secrecy are just two of them. The content of this paper was first presented at International Legal Ethics Conference VII in New York in 2016.

In our second piece, entitled “Company-internal Studies from the Public Prosecutor’s Perspective – A critical Analysis of 10 Years after Siemens”, Renate Wimmer deals with relevant questions all around internal investigations. Therefore she picks the famous “Siemens case” to function as thematic hook. She emphasizes the change in meaning from “foreign body” to “creature of habit”, which internal investigations have been undergone regarding the factual basis, whereas from the legal aspect internal investigations have not lost their status of being “foreign bodies”. Renate Wimmer examines

how the investigation authorities handle or should handle company-internal investigations and she discusses open legal questions as well.

Thereafter follows the critical depiction of the protection zone of legal privilege in German and US penal law in the article “The Enterprise in Testudo Formation” written by Hendrik Schneider. Based on the meaning of the legal privilege when it comes to Internal Investigations, the author outlines the existing differences of the legal situation in Germany on the one hand and the USA, where confidentiality is applied more generously, on the other hand. He thereby critically analyses why those differences cannot be proved sustainable and why the privileges should at least claim validity for the in-house lawyers in Germany as well. Moreover the essay contains solutions for Germany, in order to include in-house lawyers (so-called Syndikus) within the scope of the legal privilege. The content of this paper was first presented at International Legal Ethics Conference VII in New York in 2016.

Lastly, the student Luisa Andonie features the vulnerability of the United States taxpayers' confidentiality due to the United States Whistleblower Program's lack of adequate protections in its push for compliance.

With our best regards,



Michele DeStefano & Dr. Hendrik Schneider
Founders and Content Curators of CEJ

ADVISORY BOARD

Derek Six

BIOGRAPHY

Derek Six, born and raised in northern Germany, attended high-school in Germany and California, US. Working as a paramedic during his “Zivildienst” and following university studies he learned that most of the time the worst decision is to take no decision at all.

Derek studied law at Christian-Albrecht-University in Kiel, Germany, passing first law examination in 1996 followed by his referendar time in Duisburg, Düsseldorf and San Francisco, California. He passed second law examination in 1999.

After a short stop in a law firm specialized on trademark und commercial law in Düsseldorf he started out in the department Legal and Business Development of Deutsche Amphibolin-Werke von Robert Murjahn GmbH & Co KG, now DAW SE, in year 2000.

DAW SE is a family owned, private enterprise with appr. 5.600 employees and a turnover of more than 1,2 billion Euro developing, producing and distributing paints, lacquers, mortars and a wide range of coating systems as well as thermal insulation systems. DAW SE has affiliated companies in most EU and many other countries.

Over the last 16 years Derek was and still is responsible for various legal issues, e.g. IT contracts, national and international commercial contracts, trademark and IP law and administration, corporate law, M&A and many others.

In 2003/2004 Derek successfully participated in a LL.M. oec program at University of Cologne, Germany, focusing on corporate, labour, patent, trademark, insolvency law as well as economic studies.

Since 2011 he is responsible for the implementation and development of the Compliance Management Program of DAW Group, focused on corruption prevention and anti-trust law. Derek is member of BCM, Germany, a union of Inhouse Compliance Managers.

DEREK SIX' BIG FIVE IDEAS ON COMPLIANCE

Compliance Management is usually linked to the core business and aligned central departments of a company. If thoroughly implemented “compliance” needs to be acknowledged in every process of any entity. An almost impossible task if you don’t have unlimited resources and still want to make profit as a private company. In addition the various interests of Shareholders, Stakeholders, Management, individual personal interests of involved people and longtime implemented workflows (to name only a few) make it very complex and often political. On the other hand compliance is very easy with the right people in place and a management that has compliance and ethics included in its strategy for the company’s business.

Asked to give 5 ideas on Compliance I would like to name

- Strategy
- Common Sense
- Added Value to business processes
- Stringent Control and Sanctions
- Communication (Compliance Managers shouldn’t take themselves too serious)

knowing that you need a lot more to make compliance management a success.

I. STRATEGY

It’s a common saying that business follows strategy to be successful. And in fact this is true for compliance management as well. The top management of a company needs to have a strategy for their business that includes a strategy for a compliance and ethical approach. An approach that fits the philosophy of the company so it is believable by all stakeholders. Parameters for the strategy can be risk evaluations (although most risk assessments will lead to the same results in my opinion and show that corruption prevention and anti-trust are key issues) and core values and strategic targets of the company to name 2 major aspects. Compliance management needs a strong and stable support as it will most likely come to discussions with managers that might have different priorities on business decisions. Knowing that, having a strategy on the compliance and ethical approach is fundamental and must be backed by the top management (and shareholders).

II. COMMON SENSE

Business is done between people that in general have a common sense well built on their family background, education and many other individual aspects. Common Sense of most people let them know what’s wrong or wright – the others must be identified.

That is why in my opinion compliance is common sense based on implemented and communicated rules. Rules may be defined as laws and internal and external directives, principles and guidelines.

Defined as that compliance is part of business and administration management since the beginning of doing business – in many cases not under the name “Compliance” but expressions with similar meaning. This needs to be emphasized because compliance is not a new thing, it was/should have been/is/should be a vital part of business administration in most companies in most parts of the world.

An essential part of compliance management should therefore be to remind and strengthen the common sense of the stakeholders, especially employees and to encourage them to well consider it in the decisions they take in the course of business.

Too simple? Maybe, but it’s like in any sport: the basics must be repeated and trained in order to get ahead and develop additional skills. Strengthen the common sense is such a basic element to ensure successful compliance management.

III. ADDED VALUE TO BUSINESS PROCESSES

Always find a way to add value to the business.

Any compliance approach needs to take a close look at the business processes of an entity or business unit. This integrated compliance with clear and effective business processes will transport and strengthen compliant behavior.

In addition a combination of process evaluation or definition serves several goals for the benefit of the company, e.g:

- Process owner and stakeholders create any modifications to the process themselves: added compliance/controlling elements evolve from “the inside” of the business unit. That way acceptance is higher and it is more likely to act according “own” process and rules.
- Review of processes with process owner and stakeholders should lead to more efficient processes. That way compliance approach adds value to the business processes.

Compliance should be no issue next to but implemented in the business processes and decisions (of any kind and level).

IV. STRINGENT CONTROL AND SANCTIONS

Part of the process integrated approach are defined controlling mechanisms following the responsibilities and competences of involved departments (e.g. Internal Audit, Legal, Controlling, Compliance). Detected misbehaviour or ignorance must be sanctioned – sanctions must be transparent, stringent, appropriate and communicated to the most possible extent.

I am no fan of a “zero tolerance” proclamation as it is almost impossible for company to truly stick to such a rule but I am convinced that if a violation of defined rules is not sanctioned as described above it will lead to less discipline in the respective process by the stakeholders in future.

No control, no sanctions – no discipline, no effective processes: no added value.

Or even more simple: No compliance – no effective business.

V. COMMUNICATION - COMPLIANCE MANAGERS SHOULDN'T TAKE THEMSELVES TOO SERIOUS

Last but not least you need an appropriate communication on compliance issues in the company. This might be the hardest part of all as communication should fit the company culture, identify and reach relevant stakeholders but must not annoy. Less is sometimes more – a true saying on compliance communication I would say. You don't find a culture in every company that deem comics, videos or gaming apps to be appropriate compliance communication tools. Every compliance department must find their own, appropriate way of communication for the benefit of the company.

Being the communicator in their own business Compliance Managers shouldn't take themselves too serious. Compliance should be integral part of business processes and as that it should be self-explaining that we should work on making things and business possible, we should not hinder it if not absolutely necessary.

ADVISORY BOARD

Marcus Traut

BIOGRAPHY

Marcus Traut is an attorney and an accredited specialist in criminal law. His law firm is located in Wiesbaden, Hessen, Germany, with a district office in Würzburg, Bavaria, Germany.

After finishing his legal studies at the Johannes-Gutenberg-University of Mainz, he completed his practical legal training within the district of the Regional Court Wiesbaden.

Since his admission as a lawyer, Traut has exclusively practiced in the field of criminal law and is a very experienced defense lawyer. In 1999, the Board of the Chamber of Lawyers Frankfurt am Main granted him the right to use the title “Accredited Specialist for Criminal Law” based on his particular theoretic and practical qualifications.

The law firm Marcus Traut exclusively specialises in the field of criminal law, especially in the areas of white-collar crime, criminal tax law, criminal corruption law, criminal medical law, and criminal appellate law.

In addition to defending individuals in criminal proceedings and representing them in occupational law proceedings, the law firm also offers legal counseling and representation to business enterprises.

The law firm Traut offers preventive counseling on criminal law (compliance) and internal investigations.

Offering preventive counseling to companies on criminal law issues is becoming increasingly important in the firm’s regular consulting practice.

MARCUS TRAUT'S FIVE SUPPORTING PILLARS OF COMPLIANCE

Compliance is crucial for all economic players worldwide.

Thus, enterprises and authorities are requested to comply with the multitude of applicable regulations. Further regulations enter into force. Again and again, attempts are made to define so-called Codes of Conduct or Codes of Ethics and to oblige parties to comply with them. At the same time, new penal provisions are passed for violations of compliance regulations.

In this context it becomes apparent how difficult it is to define the term "compliance", simply because no general rules apply to private enterprises or authorities, and in particular to different countries on different continents.

In the author's opinion, however, there are fundamental principles which should always apply worldwide, despite different jurisdictions and legal regulations. In spite of different values, cultures and legal views it should be possible to define generally applicable common denominators. These cornerstones can - though subject to certain amendments - always be transferred to other users. The following shall illustrate, which major five common denominators should apply internationally - wherever - i.e. be indispensable in compliance structures. These cornerstones are:

- Attitude
- Rules
- Control
- Consequences of violations
- Improvement

In detail:

I. ATTITUDE

The fundamental basis is the awareness that compliance is necessary and the willingness to act accordingly. Functioning compliance systems can be implemented only with a positive attitude. Such attitude, however, also requires the willingness to discipline oneself and others, but to generally recognise the necessity of compliance as a natural requirement.

Thus, a positive, demanding and supportive environment always needs to be created for all parties, where performance and compliance with fundamental values are recognised and rewarded, with equal chances and development options for each individual.

After all, the concept of compliance is to reinforce the legal and ethical principles in the action and awareness, i.e. the attitude of employees and responsible persons. This, however, is possible only if all parties accept that their actions depend on practicability and admissibility. Crossing borders must be taboo. All of parties involved have to be convinced of the attitude. It is of utmost importance that the management acts as a role

model for good conduct and attitude, setting the so-called "tone at the top". Only then can a compliance philosophy evolve.

II. RULES

The digital and very complex world of the 21st century requires rules to govern interaction. It is necessary that legal regulations exist which determine and document behaviour. It goes without saying that everybody is bound by law and order. However, legal frameworks that guarantee open, transparent and fair cooperation have to be created for all parties in the development of compliance structures.

These rules extend to national and international regulations such as those which govern the cooperation between parties and which sanction the non-compliance with agreements, but they also include the drafting of a so-called Code of Conduct or Code of Ethics.

Penal law always lays down regulations which in the event of violations provide for penalties for persons but also for fines to be paid by enterprises and corporate bodies. Therefore, organisational obligations according to penal law must also always be complied with.

III. CONTROL

The creation of rules requires control of compliance with the same. Only if effective control mechanisms are installed for ensuring that the rules are complied with will it be possible to actually guarantee compliance. There are numerous options for self-control or for third-party control.

Compliance with existing regulations must always be checked - however, changes and new or increasing risks must also always be pointed out. This requires regular reviews of business transactions and processes, for example by informal checks or random sampling, but also by checks for potential weaknesses in a system.

Formal controls on whether compliance systems work need to be additionally performed.

It is of course necessary that persons identifying the violations also disclose them. Creating the function of an ombudsman can be just as useful as motivating whistleblowers.

Besides, it is necessary to document any compliance incidents, but also their controls.

IV. CONSEQUENCES OF VIOLATION

The implementation of compliance structures and their controls make sense only if violations have consequences.

It already applies that violations of compliance regulations have noticeable consequences.

Thus, enterprises are regularly threatened with high fines in case of violations, and decision makers regularly face criminal proceedings. Additionally, claims for damages are frequently asserted against them.

Violations of compliance structures regularly cause considerable costs.

V. IMPROVEMENT

Any crisis also includes a chance.

It is not always detrimental when violations of existing rules are identified during controls and entail consequences. This also gives rise to the opportunity to learn from a crisis and to improve. Naturally, it then needs to be regularly checked whether the existing compliance structures have to be adjusted. At least, it has to be analyzed why the violations occurred and how they can be prevented in the future.

If such analysis is successful and leads to changes in the compliance structures, then a crisis can also fulfil the purpose of learning from it.

ADVISORY BOARD

Kenneth Tung

BIOGRAPHY

Kenneth Tung, Founder and Chief Strategy Officer, In-Gear Legalytics Limited

As a lawyer with almost three decades in commerce, Kenny has embarked on a journey that has seen him play many roles, including lawyer, business manager, ideas curator, evangelist, strategist and solution provider. Kenny is seen as someone who relates to a broad range of disciplines and naturally gravitates to a holistic approach to solving problems.

He believes that the legal service industry will change at an accelerating rate and decided to dedicate the rest of his career playing a role in this transformation. Upon graduation from Columbia University School of Law, Kenny practiced in New York City with Coopers & Lybrand International Tax Group and Goodman Phillips & Vineberg, before joining Coudert Brothers in China. After having worked on landmark projects such as negotiating the Shanghai GM JVs, he moved in-house (in search of what happens before and after business engagements with external counsel) and served as the regional GC for Kodak, Honeywell, Goodyear and PepsiCo in various geographies and business units.

After serving as the Chief Legal Counsel at Geely Holding, working primarily on new projects and strategies around the world, Kenny has been the ad hoc GC under Lex Sigma Ltd. advising top global industrial and financial players on strategic and business-critical issues and projects in Asia.

Together with Bill Novomisle, Kenny co-founded In-Gear Legalytics Limited to help bring efficacy and efficiency to existing and new providers of legal services. In a career inside multinational companies for almost two decades, Kenny has been building on his business and law experience and learned about driving process and efficiency in complex organizations. In-Gear has been advising clients such as a Magic Circle law firm and the top media player in India.

Born in Hong Kong to parents who left mainland China in the 1940s, Kenny went to a Chinese school before leaving for the U.S. to attend Choate and then college and law school at Columbia University

KENNETH TUNG'S FIVE BIG IDEAS IN COMPLIANCE MANAGEMENT

In 1997, when the author took up his first regional general counsel role, among the inheritance from his predecessor was a general memo on the FCPA. The author duly studied and learned from the memo, but compliance matters as we know it today did not take up a major part of his responsibilities. In 2005 in New York, the author spoke at his first conference on compliance, not so much for any experience in investigations or negotiating with the DOJ & SEC, but more as a voice from the business. Since then, the following five topics have been stirring in the author's mind, some of these informed by new developments such as technology and behavioral science, but all top of mind ideas that may shed a light on why compliance can be a strategic corporate function.

This is because compliance is much more than a check-the-box cost center with policy wonks who are designated as the conscience of their organizations or called upon to ceremonially pull the "stop" handle long after the problem became too big to fix. An effective compliance program flies off the page to imbue decisions even in day-to-day activities and permeate the organization. Compliance is part of everyone's job, and therefore is about inducing everyone in an organization to triage and trade off, not just about simple do's and don'ts and records on training sessions. Compliance cannot be summed up by merely a declaration of "zero tolerance", a list of company values or keeping a steady hand on reputational risks. It has context and is an integral part of a sustainable strategy to achieve an organization's goals, be it business models to achieve profits or policy implementation to deliver public good.

I. FINDING A COMPLIANCE STRATEGY & DEFINING THE FUNCTION

Self-regulation existed arguably since the beginning of human time (the Golden Rule), an example being the guilds in Middle Ages and their equivalents in ancient civilizations. However, the compliance role has been a relatively new profession in the business world as recruiters around the world would tell us. Born in an ambit much broader than public accounting function, compliance faces myriad and proliferating government regulations as well as labors to anticipate socio-economic forces, now ricocheting at the speed of social media.

A conversation about principal approaches to compliance helps to illustrate the headaches of chief compliance officers. Take the FCPA in the U.S., the journey so far does not paint a proud picture of compliance – fines, monitors, bigger fines, reputational risks (some impact on a listed company's stock price and abilities to do business), closing

down the third parties and other willful ignorance excuses, whistleblowers protection and incentives (to tell on businesses), criminal sanctions for individuals¹, rejection of paper-only/public relations like compliance programs,² and recently credits for companies to point out individual liabilities (the Yates memo). It reads like a Hollywood script for *Godfather* with the Fed's strategy in pushing the gangsters to testify against each other under the Racketeer Influenced and Corrupt Organizations (RICO) Act. Has our compliance effort come to this?

Behind closed doors, seasoned compliance leaders have been drawn into heated debates and form battle lines about whether a company's compliance policy and practice should accomplish just enough to meet the common denominators of regulatory expectations from relevant jurisdictions or be driven by a "true north" standard above all applicable laws. One point the people in the arena do agree on: many have experienced the frustration of the whack-a-mole school of compliance which is an untenable strategy.

In this light, organizations, whether businesses, NGOs and international sport associations are going through the growing pains in determining how their compliance departments fit into the organizational structure. For example, whether the chief compliance officers should report to an organization's board or its CEO has been discussed as a "hot topic". While this determination raises the awareness to develop compliance function into more than a "window dressing" exercise (or a pretty vase, as in a Chinese saying), this topic may turn out to be a red herring. The trade-off between independence and effectiveness needs to be managed from the highest governing bodies down through the organizations, regardless of which reporting line may be adopted.

A more useful focus may be to define the purpose of a compliance function and how it fits along the organization's strategy and reason for existence. More on this later.

II. GLOBALIZATION

As technologies that thrive upon the internet converge to bring us into the Information Age (following the Agricultural & Industrial Ages), the world has experienced the highest level of global trade, financial flows and information exchanges that history has witnessed. Also going global are fraud opportunities, validating the universality of human natures that underpin the fraud triangle.

Next, hot on the heels, it will not be a surprise to see law enforcement to go global. The U.S. has led by decades in the international application of antitrust, anti-corruption and sanctions laws. Back in a less international world, some of these applications were perceived as downright bullying attempts to exercise long arm jurisdiction. Today, we have

¹ Compare in China application of criminal liabilities for corporate executives who know or have reason to know wrongdoings.

² See, e.g., *Evaluation of Corporate Compliance Programs* recently issued by the U.S. DOJ.

regular cooperation among national authorities exchanging information and even coordinating prosecutions and extraditions, perhaps driven in part by the contributions of the fines to the fisc. Together with international anti-money laundering networks, driven in part by terrorist activities, these three “anti’s” form a triad of a global law enforcement that is worthy of comparison with the Interpol.

This brings multiple risks, and multiple-jeopardies, to companies that operate in multiple jurisdictions. It is not uncommon today to hear about coordination with other parts of a company or its HQ before deciding on responses to investigation, allegations or whistleblowing reports in a particular country, voluntarily disclosure in one jurisdiction versus another, the pressure of the game of being the first to disclose, etc., all snowballing into a complex calculus.

Western multinationals have been among the firsts to tackle the challenges and discontinuities of cultural, practical and legal aspects of these compliance issues. Now multinationals from emerging markets are paying attention to adapt to the expectations and regimes in the west where they are becoming significant investors. It is during these times and circumstances that compliance leaders must be conversant with and guided by their respective organizations’ globalization business strategy, if only to prioritize solutions and decide on trade-offs.

III. DATA ANALYTICS, ARTIFICIAL INTELLIGENCE (AI) AND TECHNOLOGY

Among the fanfare of compliance management systems and IT augmented risk management systems, witness JP Morgan’s 2015 announcement of a billion-dollar investment in a system, including algorithms that help to predict employees’ rogue activities before the employees themselves commit any wrongdoing. Think of the Pre-Crime team in the movie, *Minority Report*.

Under a more prosaic view, many companies have been deploying compliance systems to chew through structured and increasingly unstructured data generated by the organizations. The systems enable the companies to investigate and, to some extent, prevent wrongdoing, and to support the notion that their compliance systems have met standards of an effective compliance program in practice prescribed by the authorities.

Before compliance teams go out to select one of these compliance management systems from the bewildering range of offerings, it would behoove us to distinguish among system/platform, process and people. Here lies the hard-learned lesson that a significant proportion of technology deployment fails. More precisely, technology famously failed in adoption by many organizations. One only needs to picture a cart before a horse as an organization suits up in technology, often with vendors who don’t understand the beginnings of the company’s business strategy and operations, and little to no appreciation by the relevant function (here being legal and compliance) and the implementation agents of the job to be done by the entire organization.

So the starting point for compliance is to work with the rest of the organization to appreciate the workings of the body of a patient that we call the business of the organization - the strategies being deployed at any one time, the strategic initiatives, their implementation and day-to-day operations that follow. From there compliance needs to sort through how various parts of the organization are set up to do their jobs, how compliance mandates will impact such activities, solving conflicts, assessing trade-offs in various solutions and persevering in the change management required to implement these compliance mandates.

Only then will we have the blue print to talk to vendors and technology experts about a system that is informed by such insights to automate and augment a compliance program. This will of course require access to talents in the data analytics field that are in short supply, decisions on IT systems that suit the organization's people and processes in a dynamic business road map, and contending with cultural stereotypes and bias that stick only with anecdotes, judgment and intuition and resist to consider data and computing power.

For those who are lucky enough to work in more data sophisticated organizations, they may even be able to design a compliance system that will convert colleagues' perception of legal & compliance resources from being un-parsable and unhelpful to meeting today clients' expectation in terms of providing instant access, seamless interoperability, mobile connectivity, and an intuitively obvious user experience.

In the broader business world and across industries, the above is not a recent discovery, but the compliance function's recognition of what technology may involve as a big idea will be an important step in the right direction.

IV. EMOTIONAL INTELLIGENCE (EI)

This concept dovetails into the discussion above on AI augmented fraud detection technologies. As the Tom Cruises in the Pre-Crime - ahem - compliance department profile likely offenders before the proto-offenders commit the offense, we should also delve deeper into the fraud triangle to understand how to deter non-compliant behaviors and align the rest of the organization, from social forces to whistleblowers psychology, to address root causes and perceptions of compliance.

In addition to data analytics, compliance functions and supporting professionals can and should leverage recent advances in behavioral sciences, whether from the field of economics or behavioral science. For example, connecting parts of the organization to the perspective of an offender, before, during and after apprehension brings out the human angle of what compliance needs to address, beyond some box checking routine, abstract anecdotes and case studies.

In many cultures, the compliance function has to turn around the tribal and deep seated feelings that compliance serves as the tool of the corporate hierarchy, out there to scapegoat the under-informed and unfortunate who get caught in the bureaucratic net with

some minor and victimless infractions, and to make the boss's look good in maintaining "zero tolerance". Everyone in the organization pulling for compliance makes the difference between being against the tide and with the tide.

The application of behavioral science touches every corner of an organization. This is because compliance is everyone's job. But at the same time, the compliance function needs to take leadership in this effort.

V. CORPORATE LEGAL/COMPLIANCE STRATEGY

The point above on defining the compliance strategy and function goes hand-in-hand with business strategies of an enterprise or, in case of a non-commercial organization, its mission and strategies.

The idea here is not to emphasize that the tail should not wag the dog or that no business has room for conscience. It is to lead with the reason of existence of the organization. Whether in a world with a developed socio-economic environment that has been cultivating generations of citizens who share a political culture that values the rule of law or in the "wild west" where might still makes right, all organizations have a job to be done. Compliance must advance and be an integral part of the reason for existence of the organization, not only just to help avoid fines and reputational damage.

A similar argument has been made for corporate social responsibility – that it is not just charity, public relations or some feel-good aspects of social media marketing. A CSR that gets traction is one that gets in-gear with one or more core strategies of a business.

The same goes for compliance.

Moreover, for a compliance effort to be successful, it must work through the business models, operations, people and processes lest it will just end up as a compliance program on paper only. That means compliance must cross silos. Being deeply connected to and driven by the organization's strategy will give a fighting chance to initiate and reach understanding with the rest of the organization and to achieve the delicate balance under a common purpose. Speaking the same language as those in charge of the business of the organization will also help to avoid the all too common phenomenon of the "tone at the top" diluting into "muddle in the middle" and ending up in "baffle at the bottom".

To this end the compliance function, like corporate legal departments, has first to assess and fill in the gaps its current capabilities.

The punch list for gap closure is not long but fundamentally includes many "business" competence. Compliance professionals, whether or not lawyers, must debunk the expectation and perception that we operate like lone wolves rather than as members of teams who must trust and delegate. We need to stop leading only with the rules and regulations and adopt the mind frame of an owner who is driven to make the business

model work, and if necessary reinvent a business model that can circumvent external barriers, whether or not founded on laws and regulations. That is to say, be someone who can navigate the spheres of rules, business needs and facts with equal fluency.

It is only on the basis of having realized these ideas can an organization gain the credibility to discuss “zero tolerance”.

MENTORS

Cheryl E. Zuckerman

BIOGRAPHY

Cheryl E. Zuckerman, Professor of Legal Writing and Lecturer in Law J.D. 1999, University of Miami School of Law B.A, 1996, University of Maryland

Professor Zuckerman earned her B.A. in Psychology with honors from the University of Maryland. She received her J.D. magna cum laude from the University of Miami School of Law in 1999, where she was a member of the University of Miami Law Review. While in law school, Professor Zuckerman received recognition for her excellence in Legal Research and Writing, Constitutional Law II, and Advanced Evidence.

After law school, she joined the law firm of Kozyak Tropin & Throckmorton, P.A. as a litigation associate in Miami. In 2004, she joined the Miami office of Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., practicing employment litigation in state and federal court. In 2006, she joined the law firm of Meland Russin & Budwick, P.A. as Of Counsel, specializing in complex commercial matters and employment litigation. She was named a "Top Up & Comer" attorney in the 2010 and 2011 editions of the *South Florida Legal Guide*; and in 2009 and 2011 she was named a "Rising Star" in *Florida Super Lawyers*.

Professor Zuckerman previously taught for the University of Miami Paralegal Studies Program and served as a guest lecturer for the University of Miami School of Law Litigation Skills Program. She is also a mentor for the Law School's LawWithoutWalls Program.

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IN-HOUSE LAWYER UNDER THE NEW GERMAN LEGISLATION¹

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ABSTRACT

Recently professional regulations regarding in-house lawyers have undergone a serious change that will profoundly change their occupational profile. This paper illustrates the legislative process that led to the new regulatory framework. It further discusses the potential problems arising from the cornerstones of professional conduct on the one hand and the typical daily tasks of in-house lawyers on the other hand.

¹ This article is based on a presentation for the International Legal Ethics Conference VII: *The Ethics & Regulation of Lawyers Worldwide: Comparative and Interdisciplinary Perspectives* in New York City from 14th – 16th July 2016.

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I. INTRODUCTION

They say that hard cases make bad law.² The following paper focuses on a legislative process in Germany in which the lawmakers followed the path of least resistance and produced a new regulatory framework for the legal profession without due justification. Following two decisions by the Federal Social Court of Germany in 2014, in which the Court held that the occupational field of in-house counsels is profoundly different from that laid out in the German Federal Lawyers' Act, a new statutory regulation for said professional group was passed and came into force by 1 January 2016.

Admittance to the bar is mandatory for lawyers in Germany and according to the Federal Bar Association's annual statistics approximately 164,000 lawyers were admitted in Germany in 2015.³ With a population of around 82 million⁴ this translates to about 200 lawyers per 100,000 citizens. In comparison, at a population of around 320 million⁵ there are roughly 1.3 million attorneys⁶ in the United States which results in a ratio of 400 lawyers per 100,000 citizens. The aforementioned new regulation in Germany addresses about 40,000 in-house lawyers.⁷ The term 'in-house lawyer' in the context of this paper refers to lawyers who are employed at a company or corporation which is not a law firm. This distinction is essential to understand the dimension of the legislative change. The new regulation stipulates that in-house counsels as well as lawyers fall within the scope of said law. This alignment is bound to raise questions how an in-house lawyer can reasonably be expected to adhere to the same standards of professional conduct that an independent lawyer has to honor. Professional independence on the one side and being subject to directions by their superiors within the company, namely the board, might create a constant field of tension for in-house counsels. Focusing on the cornerstones of professional conduct certain issues become apparent.

II. STATUS OF THE IN-HOUSE COUNSEL BEFORE THE LEGISLATIVE CHANGE WITHIN THE FEDERAL LAWYERS' ACT

Before the new regulations came into force, academic literature assumed that an in-

² Hodgens v. Hodgens (1837), quoted in FRED SHAPIRO, THE YALE BOOK OF QUOTATIONS (2006).

³ German Federal Bar Association, *Member statistics*, Jan. 1, 2015, see: http://www.brak.de/w/files/04_fuer_journalisten/statistiken/2015/grmgstatistik2015.pdf.

⁴ Federal Statistical Office, *Press release of Aug. 26, 2016 – 295/16*, see: https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2016/08/PD16_295_12411pdf.pdf?__blob=publicationFile.

⁵ United States Census Bureau (Jan. 15, 2017, 7:11 PM), see: <https://www.census.gov/topics/population.html>.

⁶ American Bar Association, *National Lawyer Population Survey* (2015).

⁷ *Legislative draft on the regulation of the legal profession of in-house lawyers* 13 (BT printed matter 18/5201, June 30, 2015).

house counsel could fulfill two rather different functions: On the one hand, the in-house counsel held an employment which was subject to directives by the employer; on the other hand, he could have a second occupation as a lawyer in the sense of the Federal Lawyers' Act.

The first was not considered to be typical attorney work and as such would not have to conform to the professional standards and duties set out in the Act. In his second occupation as a lawyer he was barred from representing his employer in court or in front of arbitral tribunals, cf. § 46 Federal Lawyers' Act (old version). This prohibition to represent the employer in court came into effect only in proceedings where the representation by a lawyer is mandatory. In any other proceedings, the in-house counsel could still be present as his employer's representative.⁸ For the second occupation as a lawyer to be permissible, the Act required to conform with § 7 no. 8 Federal Lawyers' Act. This provision states that the applicant's envisioned occupation needs to be consistent with the profession of a lawyer in the sense of the Act. In particular, his status as an independent agent in the administration of justice and the general confidence in his professional independence must be upheld. This two-fold approach was based on a case-by-case assessment and its general compliance with the statutory regulation in § 7 no. 8 Federal Lawyers' Act was judicially accepted.

III. LEGISLATIVE BACKGROUND FOR THE NEW REGULATION AND ITS EFFECTS

The legislators aimed to ensure the pension entitlements for in-house lawyers which were endangered after rulings by the Federal Social Court. As a background, lawyers admitted to the bar are exempted from the general pension systems to which all employees have to contribute according to a statutory scale. The entitlement to the lawyers' pension fund is considerably higher compared to the state managed pension funds. This monetary incentive seems to have been the motivation for the respective interest groups to promote the legislative alignment of in-house lawyers and lawyers which ultimately led to a legislation which affects only a limited number of in-house lawyers and which results in significant conflicts regarding professional conduct. In a broader sense, it is a remarkable example for the underlying drivers in a law-making process.

A. Decisions of the Federal Social Court in 2014

With the legal amendment of the Federal Lawyers' Act, the legislator responded to two rulings by the Federal Social Court of April 3, 2014 (B 5 RE 13/14 R⁹ and B 5 RE 9/14

⁸ WILHELM FEUERICH & DAG WEYLAND, COMMENTARY ON THE FEDERAL LAWYERS' ACT, § 46 para. 20 (9th ed. 2016).

⁹ BSG: *Versicherungspflicht in der gesetzlichen Rentenversicherung für Syndikusanwälte*, NEUE JURISTISCHE WOCHENSCHRIFT, 2743 (2014).

R¹⁰).

While it might seem odd at first sight that the decisions of the Federal Social Court led to a legislative change in the regulations regarding the legal profession, the reason for this peculiarity lies in the exemption from the statutory pension obligation for lawyers. According to § 6 (1) no. 1 Volume VI of the Social Insurance Code a lawyer can be exempt from such obligation and instead be a member of the lawyers' pension fund. This is generally considered to be preferable to the statutory pension scheme. The members of the lawyers' pension fund pay a certain percentage of their income which is oriented on the contribution rate of the statutory pension scheme. While the latter generates the pensions of its members by way of an apportionment procedure, the lawyers' pension fund achieves higher returns by means of capital-forming investments.

In the above-mentioned decisions, the Federal Social Court held that the status of an in-house counsel was not comparable to the occupational profile of a lawyer as required by the Federal Lawyers' Act with its accompanying professional duties.

The reaction to the ruling were controversial. While some would have preferred to have the issue dealt with in social legislation¹¹, especially the Federal Association of In-house counsels and other interest groups strongly supported a regulation in the Federal Lawyers' Act¹². The legislator finally opted for the latter option and incorporated the occupational field of an in-house counsel in the Act.

B. The Federal Lawyers' Act of 2016

The new Act came into force by 1 January 2016. Apart from the content-related changes, the law introduced a linguistic alteration. In its § 46 (2) Federal Lawyers' Act the term 'in-house lawyer' is now used to emphasize the new status. The new regulations stipulate that in-house lawyers are lawyers within the scope of the Act and as such have to adhere to the same standards of professional conduct that an independent lawyer has to uphold. The new Act outlines the necessity that the in-house lawyer's occupation must be characterized by professional independence, cf. § 46 (3) Federal Lawyers' Act. In addition to this content-related requirement, the Act provides for a formal condition, namely the admission to the bar, §§ 46 (2), 46 a Federal Lawyers' Act. The local bar association will decide about the applicant's request to be admitted as an in-house lawyer and grant the request if the in-house lawyer fulfills the general requirements to be admitted

¹⁰ BSG: *Keine Befreiung von der gesetzlichen Rentenversicherungspflicht für Syndikusanwälte (hier: Vorstandsreferent) und Compliance*, 39, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT, 1883 (2014).

¹¹ Reinhard Singer, *Advisory opinion on the legislative draft on the regulation of the legal profession of in-house lawyers* 5 (Jan. 15, 2017, 5:17 PM), see: (<https://www.bundestag.de/blob/381030/2dc3a0b17d11cae3bd98979b8b7671c1/singer-data.pdf>).

¹² Federal Association of In-house counsels, *Opinion on the position paper of the Federal Ministry of Justice and Consumer Protection* 2 (Feb. 18, 2015) (http://www.buj.net/resources/Server/BUJ-Stellungnahmen/BUJ_Stellungnahme_150218.pdf).

as a lawyer in the sense of § 4 Federal Lawyers' Act, provided that no reasons for a rejection of an application for admission exist, § 7 Federal Lawyers' Act, and the professional activity of the in-house lawyer complies with the standards set out in § 46 (2) - (5) Federal Lawyers' Act. Once the local bar association has decided about the in-house lawyer's admission, the competent pension insurance institution is bound by this decision and has to decide correspondingly with regard to the exemption from the statutory pension scheme, § 46 a (2) Federal Lawyer's Act.

At the same time the new regulation did not significantly extend the in-house lawyer's right to represent its employer in court. The in-house lawyer's right to act for his employer in court is still limited to proceedings where representation by a lawyer is not mandatory, § 46 c (2) Federal Lawyer's Act. The significant change in the Act does not concern the in-house lawyer in his function as an employee but rather his second occupation as a lawyer. Contrary to the old regulation, the in-house lawyer may now, not in his position as in-house lawyer, but in his function as a lawyer represent his employer. This result can be inferred from § 46 c (2) Federal Lawyer's Act by means of a *contrario* reasoning. This provision prohibits the representation in criminal or administrative offence proceedings. Neither in his function as an in-house lawyer nor within his potential second occupation as a lawyer may the in-house lawyer represent his employer or his employer's employees, § 46 c (2) Federal Lawyers' Act. In contrast to the old regulation, this provision does not stipulate a general prohibition for the in-house lawyer to act for his employer as a lawyer. Consequently, the employer can instruct his own in-house lawyer even in proceedings where representation as a lawyer is mandatory as long as he is formally instructed in his occupation as a lawyer.

The above-mentioned provision contains also one of the inconsistencies and uncertainties of the new regulation. The statutory definition of the in-house lawyer in § 46 (2) Federal Lawyer's Act should not detract from the fact that there is still the possibility for legal professionals, who are employed by a company or corporate group and work in their legal departments, to retain the status of an in-house counsel – as before – without the in-house lawyer's professional rights and obligations under the Federal Lawyers' Act. These in-house counsels are not mentioned in § 46 c (2) Federal Lawyers' Act which, consequently, does not apply to them. Provided the lawyer was not involved in the same matter within his occupation as an in-house counsel he can represent his employer or other employees in criminal or administrative offence proceedings within his second occupation as a lawyer.¹³ Exactly this difference in treatment is commonly mentioned as one of the inconsistencies the new regulation has created.

¹³ Martin Henssler & Christian Deckenbrock, *Keine Zulassungspflicht für Alt-Syndizi mit gültigem Befreiungsbescheid*, NEUE JURISTISCHEN WOCHENSCHRIFT, 1345, 1350 (2016).

IV. CORNERSTONES OF PROFESSIONAL CONDUCT

The year 1987 marked a turning point for the regulation of the lawyers' professional conduct in Germany. On 14 July 1987, the Federal Constitutional Court decided that the Code of Ethics and Professional Conduct by the Federal Bar Association could not supplement the rather general provision in § 42 Federal Lawyers' Act (old version). The Court held that the Code constitutes an interference with the constitutionally protected occupational freedom (cf. Art. 12 (1) Basic Law for the Federal Republic of Germany) and lacks the required democratic legitimization, in particular because the Federal Lawyers' Act at that time did not contain any provision that transferred the competence to issue regulations on professional conduct on the Federal Bar Association or any other interest group.¹⁴

To comply with the decision of the Federal Constitutional Court the legislator incorporated the general standard for professional conduct as well as the possibility to supplement this standard in a code of professional conduct given by the Statutory Assembly of the Federal Bar Association, see §§ 59b, 191a Federal Lawyers' Act.¹⁵ The Statutory Assembly made use of authorization and agreed on Rules of Professional Practice for Lawyers.

As a general professional standard, the law stipulates in § 43 Federal Lawyers' Act that a lawyer must practice his profession conscientiously. The following provision in § 43a Federal Lawyers' Act lists a number of basic duties. The enumeration contains inter alia the lawyer's obligation to professional secrecy and the prohibition to represent conflicting interests. These duties as well as the prohibition to approach the other party apply for the in-house lawyer as well as any other lawyer.¹⁶

In its §§ 113 ff. the Federal Lawyers' Act deals with sanctions for breaches of duty by the Lawyers' Disciplinary Court, which is the competent authority to decide about such offenses. These sanctions include warnings, fines or – for severe violations – even the exclusion from the legal profession, § 114 Federal Lawyers' Act.

V. POTENTIAL DIFFICULTIES FOR IN-HOUSE LAWYERS UNDER THE NEW ACT

As mentioned before the in-house lawyer is subject to the general professional standards for lawyers. In-house lawyers are now challenged to structure their workplaces in a way

¹⁴ BVerfGE, NEUE JURISTISCHE WOCHENSCHRIFT, 191 (1988).

¹⁵ WILHELM FEUERICH & DAG WEYLAND, COMMENTARY ON THE FEDERAL LAWYERS' ACT § 43a para. 1 (9th ed. 2016).

¹⁶ Christian Wolf, *Sozialrechtliche, arbeitsrechtliche und berufsrechtliche Implikationen für den Syndikusrechtsanwalt*, BUNDESRECHTSANWALTSKAMMER-MITTEILUNGEN, 9 (2016).

that conforms to the standards set out by the law. While some problems might be solved by a new organizational structure within the in-house lawyer's legal department, other might require a rework of the new Act by the legislator. In view of the above, independence, professional secrecy and potential inherent conflicts of interests shall be touched upon with regard to problems that in-house lawyers will likely encounter.

A. Independence

The legal profession is traditionally an independent one. Professional independence is the striking characteristic commonly associated with the legal profession. Inventing an in-house lawyer with the same professional duties as a regular attorney creates a legal minefield for this profession. The new regulation tries to harmonize the in-house lawyer's employment with the characteristic professional independence by stipulating that professional independence has to be – contractually and factually – ensured by the employer, cf. § 46 (4) Federal Lawyers' Act. The law recognizes that personal independence is impossible for the in-house lawyer and instead deems it sufficient if he is professionally independent. This has been aptly described as 'independence within dependence'.¹⁷ The delimitation issues seem to be endless in this contradictory legal framework.

B. Professional secrecy

Professional secrecy is one of the cornerstones of the legal profession. Strict secrecy between the lawyer and his client is essential to establish a relationship of trust.¹⁸ The respective provision within the Federal Lawyers' Act can be found in § 43 (2) as well as in § 2 Rules of Professional Practice for Lawyers. In order to effectively enforce professional secrecy, the law provides several provisions to safeguard confidentiality within the professional relationship between the lawyer and his client. On the one hand violating the obligation of professional secrecy constitutes a criminal offence, § 203 (1) no. 3 Criminal Code, on the other hand the lawyer has the right to refuse to give evidence (§ 53 (1) no. 3 Code of Criminal Procedure; § 383 (1) no. 6 Code of Civil Procedure; § 84 (1) Code of Procedure of Fiscal Courts, § 102 Fiscal Code). The common objective of these provision is to protect the professional relationship between lawyer and client.¹⁹

Since the new regulation came into effect, the rules regarding professional secrecy in the Federal Lawyers' Act and the Rules of Professional Practice for Lawyers apply to in-house lawyers as well. They have to keep information which has become known to them in their professional practice confidential. The evident problem in this context is to

¹⁷ Volker Römermann & Tim Günther, *Syndikusrechtsanwalt – der (un)abhängige Rechtsallrounder mit der besonderen Lizenz*, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, 71, 72 (2016).

¹⁸ Martin Henssler, *Das anwaltliche Berufsgeheimnis*, NEUE JURISTISCHE WOCHENSCHRIFT, 1817 (1994).

¹⁹ BVerfGE, NEUE JURISTISCHE WOCHENSCHRIFT, 1305 (2004); WILHELM FEUERICH & DAG WEYLAND, COMMENTARY ON THE FEDERAL LAWYERS' ACT § 43a para. 12 (9th ed. 2016); VOLKER RÖMERMAN, COMMENTARY ON THE FEDERAL LAWYERS' ACT § 43a para. 32 (12th ed. 2016).

exactly define the attorney-client-relationship. At first glance, the professional relationship will be established between the in-house lawyer and the respective employer binding the in-house lawyer to secrecy. The situation will become more complicated if the in-house lawyer is not only advising his employer, but also subsidiaries within the corporate structure of the employer. Would the in-house lawyer be obligated to report to the management of the parent company about the legal problems and his advice to the management of the subsidiary? Does the attorney-client-relationship only exist between the employing company and the in-house lawyer or is it possible for the in-house lawyer to have several different clients in one corporation? Is the in-house lawyer in a legal department which advised several companies within a corporate group then forbidden to share information within said corporate structure? The legislator obviously did not envision such scenario which will be the unfortunate reality for many in-house lawyers under the new regulation.

Furthermore, this obligation to uphold professional secrecy generally corresponds with the lawyer's right to refuse to give evidence. However, the legal situation for the in-house lawyer differs with respect to the kind of proceedings. In civil court proceedings as well as proceedings which refer to the respective rules in the Code of Civil Procedure the in-house lawyer may refuse to testify. The relevant provision can be found in § 383 (1) no. 6 Code of Civil Procedure which grants '[...] persons to whom facts are entrusted, by virtue of their office, profession or status, the nature of which mandates their confidentiality, or the confidentiality of which is mandated by law, where their testimony would concern facts to which the confidentiality obligation refers' a right to refuse testimony. Correspondingly, professionals in the above-mentioned sense are under no obligation to provide or produce documents to the extent that they are entitled to refuse testimony, § 142 (2) Code of Civil Procedure. However, in criminal proceedings the situation is quite different. The in-house lawyer is neither entitled to refuse testimony, § 53 (1) no. 3 Code of Criminal Procedure, nor is his correspondence privileged, § 97 Code of Criminal Procedure – irrespective of whether or not his professional activity includes typical attorney work like legal counseling or other business advice for his employer.²⁰ While one might name valid reasons for this difference in treatment particularly with regard to an effective law enforcement against large corporations, the law shows yet again an inconsistency the legislator has created by changing the professional regulations of in-house lawyers instead of amending social legislation to solve the initial problem.

C. Conflict of interest

The prohibition to represent conflicting interests can be found in § 43a (4) Federal Lawyers' Act. Its basis is the trustful relationship between the lawyer and his client, ensuring the independence of the lawyer and the public interest in his role in the administration

²⁰ JÜRGEN-PETER GRAF, COMMENTARY ON THE CODE OF CRIMINAL PROCEDURE § 53 para. 12 (26th ed. 2016).

of justice. These objectives are inseparable and interconnected.²¹ The prohibition is further regulated in § 3 (3) Rules of Professional Practice for Lawyers. Additionally, a violation could constitute a criminal offence, § 356 Criminal Code. These provisions have the common purpose to protect the individual and general trust in the legal profession.²² Once the lawyer realizes that a conflict of interest occurs, he has to inform his clients immediately and must cease to act for all clients involved in the same matter, § 3 (4) Rules of Professional Practice for Lawyers.

It is controversially discussed whether the conflict of interest has to be determined from a subjective or objective point of view. It is mostly assumed that the interest has to be determined subjectively according to the party's intention. Even scholars, who favor an objective determination with respect to the various protective purposes of § 43a (4) Federal Lawyers' Act, concede that such conflict can be resolved if the involved parties know about their different interests and still explicitly agree to be represented by the same lawyer. Consequently, despite their different starting point, both interpretations will ultimately lead to a similar result.²³

The in-house lawyer may legally advise and represent his employer in its legal matters, § 46 (5) Federal Lawyers' Act. The provision explicitly specifies that this includes legal matters of affiliated enterprises in the sense of § 15 Stock Corporation Act. To put it in rather harsh terms, one might say that a conflict of interest is immanent in such circumstances.

The representation of one company itself might lead to difficulties with respect to the conflicting interest of the involved persons. In complex corporate matters the lawyer as well as the in-house lawyer needs to strictly distinguish whether he acts for the corporation, its shareholders, the executive management or even the supervisory board.²⁴ If the in-house lawyer is employed to advise more than one company within one corporate group the risk of conflicting interests between these affiliates increases.

The prohibition to represent conflicting interests does not only concern each individual lawyer but extends to all lawyers who are connected in a joint practice or even through shared office premises, § 3 (3) Rules of Professional Practice for Lawyers. The new Act as well as the Rules of Professional Practice for Lawyers remain silent on the question whether or not a legal department consisting of in-house lawyers are considered to be such joint practice. During the legislative process this question was raised by the Federal Bar Association in its opinion on the legislative draft. The Federal Bar Association ex-

²¹ BVerfGE, NEUE JURISTISCHE WOCHENSCHRIFT, 2520 (2003).

²² VOLKER RÖRMANN, COMMENTARY ON THE FEDERAL LAWYERS' ACT § 43a paras. 163 f. (12th ed. 2016).

²³ VOLKER RÖRMANN, COMMENTARY ON THE FEDERAL LAWYERS' ACT § 43a paras. 181 ff. (12th ed. 2016).

²⁴ VOLKER RÖRMANN, COMMENTARY ON THE FEDERAL LAWYERS' ACT, § 43a para. 173 (12th ed. 2016).

pressed the view that legal departments must be treated the same way as the typical joint practice – the law firm.²⁵ Consequently, the prohibition to represent conflicting interests would also concern the in-house lawyer's colleagues within their joint practice and substantially complicate the organization and work in the legal departments of large corporations. Without considerably restructuring the work process in the legal departments (e.g. Chinese walls) or creating new positions in each company, compliance with the professional regulations seems almost impossible under the new legislation.

These considerations show that the legislator seems to have paid little attention to the economic reality that in-house lawyers commonly not only act for one company, but for all companies within one corporate group. He himself will have to decide towards whom he feels obligated to maintain loyalty. In reality, one can hardly picture a situation where that internal conflict will not be resolved in favor of the employer paying the monthly salary.

VI. CONCLUSION

In view of the above, it appears that the legislator almost overeagerly reacted to the Federal Social Court's ruling. Dismissing to solve a social law problem within the respective field of law and developing new regulations in less than two years seems attributable to the significant political interference of lobby groups who opted for such a solution. It seems that the legislator chose the path of least resistance. Amending the social securities laws might have led to much broader discussion with the stakeholders and would most likely have provoked a discussion about the principle question why certain profession, such as the legal profession and other independent professions, are exempt from the statutory pension scheme.

Instead the legislator chose to change the regulations of the legal profession and, thereby, created regulations that assign a different legal status to legal professionals, who are essentially doing the same work. The formal requirement of the admittance to the bar cannot distract from the fact that the in-house lawyer's and the in-house counsel's occupation is hardly different. As a consequence of the new regulation, some legal professionals in the same legal department might be subject to professional regulations while their colleagues still operate under the old status of in-house counsel. This issue has raised the question whether legal professionals who fulfill the requirements set out by the law to be admitted as an in-house lawyer are obliged to make a request to that effect or if the admission is optional.²⁶

²⁵ Federal Bar Association, *Opinion No. 17/2015 on the Ministerial Draft for the regulation of the legal profession of in-house lawyers* 7 (May 2015).

²⁶ Martin Henssler & Christian Deckenbrock, *Keine Zulassungspflicht für Alt-Syndizi mit gültigem Befreiungsbescheid*, NEUE JURISTISCHE WOCHENSCHRIFT, 1345, 1349 (2016).

It will be the task of the legislator to answer this question as well as find a solution for the inconsistencies in the course of a review of the new regulations.

COMPANY-INTERNAL STUDIES FROM THE PUBLIC PROSECUTOR'S PERSPECTIVE

*A Critical Analysis of "10 Years after Siemens"*¹

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Ms Wimmer likes to give lectures about White Collar Crime and Compliance Matters especially about Internal Investigation. She is also publishing about this frequently discussed legal matters.

ABSTRACT

The processing of the "Siemens case" has not only triggered an unexpected compliance shaft in Germany but has also meant that in the meantime internal investigations are commissioned in nearly all the major public investigations for corruption or other economic crimes by the companies concerned. A critical analysis of "10 years after Siemens" shows that this trend has led to a variety of open legal issues and a different handling in the judicial practice. A legal regulation is likely to be inevitable in the long run.

¹ The author presented this text on May 10, 2016 in Munich before the Munich Law Society. The presentation style has been kept, footnotes have been added to the text.

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I. REVIEW OF “10 YEARS AFTER SIEMENS”

Marked by a major search measure by the Prosecuting Attorney Munich I in the “Investigation Complex Siemens”, November 15, 2006 is not only a milestone for the public disclosure of one of the largest German investigations into suspected corruption, but also the start of a development/continued development of compliance measures not yet foreseeable at this time and concurrently of company-internal investigations, which as a repressive component form a necessary part of compliance measures in the company.

Whereas the company-internal investigations initiated by the Siemens company group very quickly after disclosure of the accusations in Penal Law were still at this time “uncharted territory” for the German investigation authorities, a “foreign body” in German investigation proceedings, this perception has changed fundamentally over the last 10 years.

Actually, company-internal investigations are no longer a “foreign body” in German investigation proceedings. In almost all major investigation proceedings in which responsibility of the company concerned in accordance with § 30 OWiG (Administrative Offense Act) is the focus internal investigations are now being conducted. In the majority of the cases, external law firms are hired for this. The legal admissibility of these measures has not yet been questioned².

The fact that this development has led to a new, lucrative field of activity in the legal counsel sector does not require any further explanation. In view of the intensity of time and manpower normally associated with company-internal investigations and the costs thereby incurred Stoffer³ even speaks of a “gold-digger attitude”.

This is accompanied by what has now become innumerable publications from attorneys, academia and in some cases representatives of the judiciary⁴. The image of internal investigations being depicted is highly diverse and partly influenced by the respective role of the author in the investigation/penal proceedings. At times it seems as if a complete privatization of the German investigation proceedings is feared⁵.

² cf. on the general topic in detail: *Renate Wimmer, in Wirtschafts- und Steuerstrafrecht*, § 152 Marginal No. 6ff. (Werner Leitner & Henning Rosenau, 1st. ed. 2017).

³ HANNAH STOFFER, WIE VIEL PRIVATISIERUNG »VERTRÄGT« DAS STRAFPROZESSUALE ERMITTLUNGS-VERFAHREN? Marginal No. 902, (1st. ed. 2016).

⁴ cf. the academic literature references *in Wirtschafts- und Steuerstrafrecht*, § 152 Marginal No. 6ff. (Werner Leitner & Henning Rosenau, 1st. ed. 2017); further: Rolf Raum, *Die Verwertung unternehmensinterner Ermittlungen*, STRAFVERTEIDIGER FORUM, 395ff. (2012); Amr Sarhan, *Unternehmensinterne Privatermittlungen im Spannungsfeld zur strafprozessualen Aussagefreiheit*, 12, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 449ff. (2015).

⁵ Presentation by Attorney-at-law Dr. Anne Wehnert on the occasion of the event of the Institute for Law and Finance “Economy, Criminal Law, Ethics (ECLE) – Third Symposium“, “Economy versus Law on the

From the legal aspect company-internal investigations remain “foreign bodies” in German penal proceedings. For, neither the Penal Procedure Ordinance nor the Administrative Offense Act mentions a word of this phenomenon. The legislator has not followed the “power of the factual”, leaving the clarification of the open legal questions “imported” with the internal investigations to be resolved in legal practice. The fact that this is not easy at times, particularly within the context of an aspired uniformity of the legal order, will be proven.

This situation is exacerbated by the draft of a law for the introduction of responsibility of companies and other associations of the state of North Rhine Westphalia under Penal Law⁶. § 5 Sect. 2 stipulates that the Court can desist from a penalty where the association significantly contributed toward detecting a penal offense by the association and provided the investigation authorities with evidence suitable for proving the offense as well took adequate organizational and human resources-related measures to prevent similar offenses by the association in future. This promotion of assistance with detection of the crime, which is essentially to be welcomed, and self-exoneration of the companies is likely to have as a consequence that the associations concerned conduct their own investigations with even greater intensity in order to enjoy freedom from prosecution. However, the draft of the law does not provide for the organization of company-internal investigations⁷.

It presently remains an open-ended question whether the legislator ultimately will take a stance within the scope of any re-regulation of responsibility of associations under Penal Law/Administrative Offense law.

II. HANDLING OF COMPANY-INTERNAL INVESTIGATIONS BY THE INVESTIGATION AUTHORITIES

Legal practice is highly fragmented due to the fact that there have been no specific legal provisions on the handling of company-internal investigations.

Unlawful, as they are in breach of the official investigations principle set out in § 152 Sect. 2 StPO both are in my opinion extreme positions. The attitude of “sitting back and taking things easy” exhibited by public investigators frequently invoked in academic

Financial Market?“ on Nov. 20, 2010 in Frankfurt am Main; critical on internal investigations but more differentiated: Klaus Leipold, *Internal Investigations – Fluch und Segen zugleich?*, FESTSCHRIFT FÜR WOLF SCHILLER, 418, (2014); highly critical also HANNAH STOFFER, WIE VIEL PRIVATISIERUNG »VERTRÄGT« DAS STRAFPROZESSUALE ERMITTLUNGS-VERFAHREN?, Marginal No. 901ff, (1st. ed. 2016).

⁶ Presented on September 19th 2013.

⁷ cf. in detail Elisa Hoven et al., *Der nordrhein-westfälische Entwurf eines Verbandsstrafgesetzes – Kritische Anmerkungen aus Wissenschaft und Praxis, Teil 2*, 6, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, WTEUER- UND UNTERNEHMENSSTRAFRECHT, 201ff. (2014).

literature⁸ and the suspension of all independent investigation activity in the case of announced company-internal investigations or even the demand thereof with reference to tight independent resources and the communication of detailed investigation orders is definitely in breach of § Sect. 152 para. 2 StPO. This does not do justice to the role of the prosecuting attorney as the “master of the investigation proceedings” and leads to a distorted establishment of truth. However, simply ignoring the results of internal investigations is not compatible with the official investigations principle either. Because the prosecuting attorney must exhaust all evidence available to him. This includes the results of private investigators. For example, it can be expedient for assessment of the credibility of a statement to consult records or notes on an internal interview with witnesses/cross-examine the internal investigator as a witness. If necessary this can be asserted by force where there is no seizure prohibition or right to refuse testimony in the individual case.

There is no “one size fits all solution” as to how investigation authorities are to handle company-internal investigations. This depends on the situation and motivation of the initiation of the investigations (self-reporting on the basis of independent investigations already conducted, commissioning after disclosure of events in the company relevant in Penal Law by press reporting or search measures by the prosecuting attorney) as well as on the seriousness of the company’s intention to detect the offense.

The judiciary, including the judicial administration, needs to meet the challenge of sensible handling of company-internal investigations in light of the development depicted above. It is not helpful here to lament the “power of the factual” or to consider the possibility of prosecuting private investigators on grounds of unauthorized assumption of official authority (§ 132 StGB) as they usurp the public proceedings with an actual precedence because they (initially) seize all key evidence using a high volume of personnel capacities/efficient technical means⁹. It would make more sense to consider clear statutory regulations followed by internal investigations, answering the open questions of the influence of the internal investigations on the proceedings against the employees and bodies concerned. The fact that white collar crime can only be fought effectively with adequately trained expert personnel needs no further discussion.

III. OPEN LEGAL QUESTIONS

Company-internal investigations being alien to German penal proceedings, the legal user is confronted with the same legal questions for which neither the Penal Procedure Ordinance or Administrative Offense Act have a clear answer. There has not yet been

⁸ cf. as an example: Presentation by Attorney-at-law Dr. Anne Wehnert on the occasion of the event of the Institute for Law and Finance “Economy, Criminal Law, Ethics (ECLE) – Third Symposium”, “Economy versus Law on the Financial Market”²⁴ on Nov. 20, 2010 in Frankfurt am Main.

⁹ But this is argued by HANNAH STOFFER, WIE VIEL PRIVATISIERUNG »VERTRÄGT« DAS STRAFPROZESSUALE ERMITTLUNGSVERFAHREN?, *Marginal No. 911*, (1st. ed. 2016).

any ruling by a higher court or even by the Supreme Court.

A. Seizure of results of company-internal investigations

As discussed, it can be expedient in accordance with the official investigation principle to consult documents from company-internal investigations, where necessary using means of force. However, the prerequisite for this is that the documents be subject to seizure.

1. Seizure in the company affected

In the companies affected the results of company-internal investigations may only be subject to a seizure prohibition if they are defense documents as defined by § 148 StPO. Defense documents are exempt from seizure beyond the wording of § 97 Sect. Clause 2 StPO where they are being kept by the defendant. The same applies to the company affected as an ancillary party via § 444 Sect. 2 Clause 2, § 432 Sect. 2, § 434 Sect. 2 Clause. 2 StPO¹⁰.

The fact that internal investigations commissioned by the company cannot be any defense documents by the employee or body requires no further discussion. The objective of self-investigations by the company is normally also detection of misconduct by the employee or body who may later become the defendant in public investigation proceedings in order to take corresponding legal steps against him. To classify these documents as defense documents of the employee or body would be a contradiction and put the investigator in an unresolvable conflict of interest¹¹.

The question is more nuanced in the case of the ancillary participation of the company. Here the company can invoke the rights of the defendant from the Penal Procedure

¹⁰ Klaus Rogall in: KARLSRUHER KOMMENTAR ZUM GESETZ ÜBER ORDNUNGSWIDRIGKEITEN, §30 Marginal No. 209, (4th ed. 2014); Frank Peter Schuster, LG Mannheim, 3. 7. 2012 - 24 Qs 1/12; 24 Qs 2/12: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen vorrangig nach § 97 Abs.2 StPO, 11, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 424 ff. (2012); Alexander von Saucken, Zur Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen nach §§ 160a, 97 Abs. 2 StPO, JOURNAL DER WIRTSCHAFTSSTRAFRECHTLICHEN VEREINIGUNG E.V., 1 (2013); Renate Wimmer, „Gesetzliche Privilegierung“ von internal investigations durch externe Kanzleien?, JOURNAL DER WIRTSCHAFTSSTRAFRECHTLICHEN VEREINIGUNG E.V., 2 (2013); cf. also Werner Leitner, Die Nebenbeteiligung des Unternehmens – Das Unternehmensmandat als Verteidigungsverhältnis, Unternehmensstrafrecht – Festschrift für Jürgen Wessing, 149ff. (Heiko Ahlbrecht et al. 2015); without substantiation Serini/Witzigmann, in Handbuch für den Staatsanwalt (Helmut Vordermayer & Bernd v. Heintschel-Heinegg 5th ed. 2016) 2nd part Chapter, 595f. generally reject a right of silence by the association concerned referring to the Supreme Court ruling of Jan. 23,2014 – KRB 48/13. This cannot be concluded from the cited ruling which refers exclusively to the information by the association as set out in §§81 a Sect. 1 and Sect. 2 GWB and is contrary to the law that concedes the company a right of silence at least under ordinary law (cf. Klaus Rogall in: KARLSRUHER KOMMENTAR ZUM GESETZ ÜBER ORDNUNGSWIDRIGKEITEN, § 30 Marginal No. 209, (4th ed. 2014)).

¹¹ cf. here District Court of Hamburg, ruling of October 15, 2015 – 608 Qs 18/10, NJW 2011, 942.

Ordinance according to § 444 Sect. 2 Clause 2, § 432 Sect. 2, § 434 Sect. 1 Clause 2 StPO and accordingly refuse the release of defense documents as defined in § 148 StPO.

The assessment whether there are defense documents as defined by § 148 StPO depends on a **chronological** and **substance-related** component.

From the **chronological aspect** the question arises whether documents already prepared before initiation of the proceedings could constitute defense documents. This is assessed differently in rulings by municipal courts and in academic literature. The Municipal Courts of Gießen and Braunschweig are very extensive in their rulings of June 25, 2012¹² – 7 Qs 100/12 – resp. July 21, 2015¹³ – 6 Qs 116/15. According to these, documents which were prepared well in advance of the knowledge of the incriminating facts by the public investigators could constitute defense documents. Large portions of academic literature follow this opinion¹⁴. This cannot be followed just as little as can the highly formalistic opinion by the Municipal Court of Bonn which seems to rely in its ruling of June 21, 2012¹⁵ - 27 Qs 2/12 – on the date on which the proceedings were formally initiated by the investigation officials. § 97 StPO presupposes the defendant character as defined by the Penal Procedure Ordinance and a subsequent associated defense relationship¹⁶. However, it is not relevant here when the prosecution attorneys formally initiated the proceedings but when they should have done it, i.e. the time at which an initial suspicion of responsibility pursuant to §30 OWG should have formed from the perspective and status of knowledge of the prosecuting attorney.

Whether company-internal investigations represent defense documents, **from the substance-related aspect** as defined by § 148 StPO cannot be generally assessed but is always subject to individual review. The time of commissioning, the specific content of the investigation assignment/ documents are relevant here.

However, in no case are documents which were not produced by the protected relationship of trust, i.e. business documents submitted to the investigator for conducting the

¹² LG Gießen, Beschluss vom 25.06.2012 – 7 Qs 100/12 : Beschlagnahmeverbot für Verteidigungsunterlagen, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 409ff. (2012).

¹³ LG Braunschweig, Beschluss vom 21.07.2015 – 6 Qs 116/15 : Verteidigungsunterlagen und interne Ermittlungen, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 40ff. (2016).

¹⁴ cf. exemplary: Reinhard Michalke, *Verteidigungsunterlagen sind auch vor Einleitung eines förmlichen Ermittlungsverfahrens geschützt*, 1, JOURNAL DER WIRTSCHAFTSSTRAFRECHTLICHEN VEREINIGUNG E.V. (2013); Bastian Mehle & Volkmann Mehle, *Beschlagnahmefreiheit von Verteidigungsunterlagen – insbesondere in Kartellbußgeldverfahren*, 23, NEUE JURISTISCHE WOCHENSCHRIFT, 1639 (2011); Emanuel H. F. Ballo, *LG Braunschweig vom 21.07.2015 – 6 Qs 116/15 – Verteidigungsunterlagen und interne Ermittlungen*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 43 (2016).

¹⁵ Matthias Jahn & Stefan Kirsch, *Kartellrechtliches Ermittlungsverfahren*, 1, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 21 (2013).

¹⁶ *Betram Schmitt, in Strafprozessordnung, § 97 Marginal No. 36* (Lutz Meyer-Goßner & Betram Schmitt 59th ed. 2016).

internal investigation, exempt from seizure. In this sense the Municipal Court of Gießen exempts the documents which “do not specifically concern the defense relationship”, “but general accounting documents/letters to third parties” from seizure in its ruling of June 25, 2012¹⁷. The statements by the Municipal Court of Braunschweig in its ruling of July 21, 2015¹⁸ follow the same line.

2. Seizure by the external investigator

Where documents are to be seized from company-internal investigations by an external law firm hired for the purpose the Municipal Court of Mannheim in its ruling of July 3, 2012¹⁹ - 24 Qs 1/12 - as well as the vast proportion of academic literature²⁰ assumes exemption from seizure with regard to § 160a StPO new version even in investigation proceedings against an employee or body.

This cannot be followed with the convincing arguments by the Municipal Court of Hamburg in its ruling of October 15, 2010²¹ - 608 Qs 18/10, which continues to be valid even after the new version of § 160a StPO²².

§ 160a Sect. 5 StPO in the version applicable since Feb. 1, 2011 with which attorneys in the absolute area of protection of § 160a Sect. 1 StPO were included beyond the defense attorney continues to assume precedence of § 97 StPO over § 160a StPO as *lex specialis*. Due to this ranking the District Court of Hamburg assumed exemption of seizure with

¹⁷ LG Gießen, Beschluss vom 25.06.2012 - 7 Qs 100/12 : Beschlagnahmeverbot für Verteidigungsunterlagen, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 409ff. (2012).

¹⁸ LG Braunschweig, Beschluss vom 21.07.2015 - 6 Qs 116/15 : Verteidigungsunterlagen und interne Ermittlungen, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 40ff. (2016).

¹⁹ Frank Peter Schuster, LG Mannheim, 3. 7. 2012 - 24 Qs 1/12; 24 Qs 2/12: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen vorrangig nach § 97 Abs.2 StPO, II, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 424 ff. (2012).

²⁰ cf. as an example: Tido Park, Schutz der im Rahmen von unternehmensinternen Untersuchungen gewonnenen Informationen vor behördlicher Beschlagnahme nach deutschem Recht, JOURNAL FÜR STRAFRECHT, 20 (2014); 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 (2011); Matthias Jahn & Stefan Kirsch, Anmerkung zu LG Hamburg, Beschluss v. 15.10.2010 - 608 Qs 18/10, 3, Strafverteidiger, 151 (2011); Thomas C. Knierim, LG Hamburg: Beschlagnahmefähigkeit von Grundlagen eines Rechtsgutachtens, FACHDIENST STRAFRECHT, 314177 (2011); Frank Peter Schuster, LG Mannheim, 3. 7. 2012 - 24 Qs 1/12; 24 Qs 2/12: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen vorrangig nach § 97 Abs.2 StPO, II, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 424 (2012); Emanuel H. F. Ballo, Beschlagnahmeschutz im Rahmen von Internal Investigations - Zur Reichweite und Grenze des § 160a StPO, 2, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 46 (2013).

²¹ 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 (2011).

²² Cf. here also: Renate Wimmer, „Gesetzliche Privilegierung“ von internal investigations durch externe Kanzleien?, JOURNAL DER WIRTSCHAFTSSTRAFRECHTLICHEN VEREINIGUNG E.V., 2 (2013).

convincing ratio decidendi in its ruling of October 15, 2010. §97 StPO only protects the relationship of the accused and party subject to professional secrecy. There is no relationship similar to a retainer or a retainer per se between the external investigator and the body or employee. Nothing is to be added to this. A different result could only be justified if one were to take a minority opinion²³ that § 97 StPO does not only apply with regard to the accused party in the respective penal and investigation proceedings. With regard to the unambiguous adjudication by the Federal Constitutional Court²⁴ this is not convincing²⁵.

However, something else would have to apply with regard to § 444 Sect. 2 Clause. 2, § 432 Sect. 2, § 434 Sect. 1 Clause 1 StPO where the company is an “affected party” in § 30 OWiG proceedings. The company can invoke the defendant rights of the Penal Procedure Ordinance as well as protection from seizure under § 97 StPO in this case. The contrary stance sometimes taken by the public investigators is to be rejected and is not justified on the basis of the ruling by the Federal Constitutional Court of February 26, 2009²⁶ - 1 BvR 2172/96. The Federal Constitutional Court merely concludes therein that the legal entity does not need to be granted exemption from self-incrimination from the constitutional aspect. However this does not prevent the legislator from conceding the association this right on the basis of ordinary law. The ruling by the Supreme Court of Jan. 23, 2014²⁷ – KRB 48/13 – specified in this context does not justify denial of the right of silence either. The ruling by the anti-trust senate refers exclusively to the information by the association as set out in §§ 81 a Sect.1 and Sect. 2 GWB. (Act Against Restraints on Competition). Here an exception from the right of the association to not have to incriminate itself is regulated with regard to the facts necessary for determining the amount of the fine (§ 81 Sect. 4 Clause 2, 3 GWB).

B. Validity of self-incriminating information

Investigation and disclosure can be of decisive, often existential significance for the company not only de lege ferenda, but also de lege lata with regard to the bonus system in Anti-trust Law. The interest of the association in a complete and rapid clarification of the facts of the case, also through questioning of the employees concerned, is in conflict with its interest not to incriminate itself with detrimental facts.

The solution approaches for solving this conflict of interest mostly have only a possible

²³ Cf.: Renate Wimmer, *Die Verwertung unternehmensinterner Untersuchungen – Aufgabe oder Durchsetzung des Legalitätsprinzips?* Festschrift für Imme Roxin, 544 (Lorenz Schulz et al. 2012).

²⁴ BVerfG, Ruling of October 27, – 2 BvR 2211/00, NSStZ-RR 2004, 83 ff.

²⁵ Cf. Renate Wimmer, *Die Verwertung unternehmensinterner Untersuchungen – Aufgabe oder Durchsetzung des Legalitätsprinzips?* Festschrift für Imme Roxin, 544 (Lorenz Schulz et al. 2012).

²⁶ BVerfGE 95, 220ff.

²⁷ NZKart 2014, 236ff.

investigation by the prosecuting attorney as a negative consequence for the employee. A vast proportion of academic literature²⁸ – predominantly invoking the joint and several debtor ruling by the Federal Constitution Court²⁹ – assumes with regard to the nemo-tenetur principle resulting from Art. 2 in conjunction with Art 1 Sect. 1 GG (Basic Law) that self-incriminating information by the subsequent defendant in public investigation proceedings are subject to a prohibition of use or exploitation as evidence. Already from the dogmatic aspect this is not convincing, as the nemo-tenetur principle only protects against compulsory public self-incrimination and essentially does not apply to private law situations. A comparison of the handling of self-incriminating information in other legal situations shows that the law has always assumed it is usable in investigation or penal proceedings if it was not provided on the basis of a statutory duty³⁰ (e.g. in the case of self-incriminating information in civil proceedings or toward a third party liability insurer). In the case of company-internal investigations the latter are conducted on the basis of a self-incrimination duty from the private law employment relationship according to rulings by the Employment Court. Taking into account the result just now elaborated that only a statutory information duty leads to prohibition of use, the latter does not apply to self-incriminating information in company-internal investigations.

There may be a case in which the private investigations are to be **allocated** to public investigators, for instance, where in order to circumvent the nemo-tenetur examination of witnesses who may become defendants the public investigators deliberately transfer the case to the private investigators. However, such constellations tend to be the exception. The very exhaustive allocation of the internal investigations to the public authorities made in parts of academic literature for example because the company cooperates with the investigators and they have raised the prospect of a mitigation of the penalty in the case of internal solution of the case³¹ is not convincing. Because taking into account internal solution of the case is a compulsory allocation criterion as a post-offense action pursuant to § 17 Sect. 3 OWiG, i.e. the investigators and the courts must already take into account de lege lata a serious internal solution of the case by the company. Consistently pursuing this concept, every case of positive post-offense behavior within the context of setting the extent of the penalty would be allocable to the public investigators. De lege ferenda regarding the possibility of an association being exempt from prosecution in the case of independent solution of the case under certain circumstances in § 5 of

²⁸ Cf. the detailed presentation of the opinions represented in academic literature Renate Wimmer, *Die Verwertung unternehmensinterner Untersuchungen – Aufgabe oder Durchsetzung des Legalitätsprinzips* Festschrift für Imme Roxin, 544ff. (Lorenz Schulz et al. 2012); and Renate Wimmer, in *Wirtschafts- und Steuerstrafrecht*, § 152 Marginal No. 22 (Werner Leitner & Henning Rosenau 1st. ed. 2017).

²⁹ Ruling of January 13, 1981 – 1 BvR 116/77. NJW 1981, 1431ff.

³⁰ cf. in detail: Renate Wimmer, *Die Verwertung unternehmensinterner Untersuchungen – Aufgabe oder Durchsetzung des Legalitätsprinzips?* Festschrift für Imme Roxin, 548ff. (Lorenz Schulz et al. 2012 and Renate Wimmer, in *Wirtschafts- und Steuerstrafrecht*, § 152 Marginal No. 23ff. (Werner Leitner & Henning Rosenau 1st. ed. 2017).

³¹ HANNAH STOFFER, WIE VIEL PRIVATISIERUNG »VERTRÄGT« DAS STRAFPROZESSUALE ERMITTLUNGSVERFAHREN?, Marginal No. 938ff., (1st. ed. 2016).

the draft of a law to introduce liability of companies and other associations of the state of North Rhine Westphalia under penal law the same would apply.

The solution approach on the fair trial principle based on Art. 6 EMRK for instance in the case of the exercise of undue force or deception in order to attain a prohibition of use³² is more convincing. However, due to the lack of statutory binding provisions on the organization of company-internal investigations it is difficult to define when unfair proceedings start.

Both solution approaches only take Penal Law into consideration and do not answer the question as to how the employee with self-incriminating information is to be dealt with for example within the framework of proceedings against unfair dismissal or damage compensation.

Hence, in my opinion it would be expedient to reconsider **de legal lata** the employee's duty under Employment Law to incriminate himself, as is the case in an increasing share of academic literature.

De lege ferenda a statutory provision not only on the issue of the validity of self-incriminating information but also on a minimum standard which internal investigations need to meet in order to enable the company affected a penalty mitigation or even exemption from prosecution in accordance with the draft of the law would be desirable.

IV. CONCLUSION

The development triggered by the "corruption case Siemens" in Germany, which allows the observation of company-internal investigations in almost all major investigation proceedings focusing on the imposition of a fine on an association seems unstoppable. The legislator and judiciary need to meet this challenge and should guarantee fair results with an equitable statutory regulation and responsible handling of the cases which comply with both the public (and company's) interest in solution of the case but also account for the rights of the individual defendants. Solution approaches to counter "negative spin-offs" with criminalization of the internal investigators on grounds of unauthorized assumption of authority or coercion to not seem to be sensible or harbor prospects of success.

³² As argued in Christoph Knauer & Michael Gaul, *Internal investigations und fair trial – Überlegungen zu einer Anwendung des Fairnessgedankens*, 4, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 193 (2013).

THE ENTERPRISE IN TESTUDO FORMATION

The Protection Zone of Legal Privilege in German and US Penal Law¹

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ABSTRACT

For companies legal privilege represents an essential bulwark against the state. In the case of internal investigations legal privilege is of prime importance to the companies. At crucial points of intersection the legal situation in the US differs from that of Germany. In the US, confidentiality is regarded with the aura of a Holy Grail, applying to in-house counsel and external lawyers alike. However, in Germany those privileges do not apply to in-house counsels and neither are they intended to apply to the corporate lawyer (so-called Syndikus). This is explained by Criminal Law policy arguments, which according to the author's opinion are not tenable. This essay represents solutions de lege lata and de lege ferenda, in order to at least include in-house lawyers (so-called Syndikus) within the scope of legal privilege. For this purpose, the author argues in favor of a partial adoption of the American way.

¹ This article is based on a presentation for the International Legal Ethics Conference VII: *The Ethics & Regulation of Lawyers Worldwide: Comparative and Interdisciplinary Perspectives* in New York City from 14th – 16th July 2016.

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I. LIMITLESS CRIMINAL BUSINESS LAW AND THE REACTION OF BUSINESSES

A. Evolution of Criminal Business Law

In Western countries, Criminal Business Law has evolved with increasing momentum from an ameba into a dinosaur.² Whereas in 1949 Edwin Sutherland still posed the question as to whether deviant behavior in business is labeled as “crime” and falls under the jurisdiction of Criminal Law,³ today businesses and the crimes of powerful economic agents are at the focus of public investigations and the public interest.⁴

The starting points for this are instances of re-criminalization and a stricter application of substantive Criminal Business Law.⁵ The latter affect all subsectors of the economy in the already highly-regulated markets.⁶ A general point of focus is the fight against corruption. In Germany too, criminal liability loopholes are currently being closed⁷ and through implementation of an “overseas clause” the German legislator purports to be the

² White Collar Crime Act of 1949 (WiGBL 1949, 193), Act Against the Restriction of Competition 1957 (BGBl. I 1957, 2114), White Collar Crime Prevention Acts of 1976/1986 (First White Collar Crime Prevention Act of July 29, 1976 (BGBl. I, 2034), Second White Collar Crime Prevention Act of May 15, 1986, (BGBl. I, 721)), Securities Trading Act 1994 (BGBl. I 1994, 1759), Anti-Corruption Act of 1997 (BGBl. I 1997, 2038), Anti-Tax Evasion Act of 2001 (BGBl. I 2001, 3922).

³ cf. Edwin H. Sutherland, *Is White Collar Crime Crime? In: White Collar Crime*, 29 ff. (Edwin H. Sutherland 1949).

⁴ The ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK also dealt with the subject in its 10 years, cf. only: Matthias Jahn, *Die verfassungskonforme Auslegung des § 97 Abs. 1 Nr. 3 StPO*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 453 (2011); Carsten Momsen, *Internal Investigations zwischen arbeitsrechtlicher Mitwirkungspflicht und strafprozessualer Selbstbelastungsfreiheit*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 508 (2011); Frank Peter Schuster, *Verwertbarkeit von Beweismitteln bei grenzüberschreitender Strafverfolgung*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 68 (2010); Hans Theile, *Die Herausbildung normativer Orientierungsmuster für Internal Investigations – am Beispiel selbstbelastender Aussagen*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 378 (2013).

⁵ Forerunner: Sarbanes-Oxley Act 2002 (SOX). cf. also the US Federal statutes “Mail Fraud Statute” (2012), “Wire Fraud Statute” (2012), and “Anti-Kickback Act” (2012), which also are for the purpose of battling corruption, for more details: Jeffrey Boles, *Examining the lax treatment of commercial bribery in the united states: A prescription for reform*, AMERICAN BUSINESS LAW JOURNAL, 119 (2014); as well as in general regarding expansion of US Criminal Business Law: Lucian E. Dervan, *International White Collar Crime and the Globalization of internal Investigations*, FORDHAM URBAN LAW JOURNAL, 361, 363 f. (2011). Further Physician Payments Sunshine Act 2010, which contains prior offenses and provides for a duty of reporting to the relevant authorities with regard to donations of the pharmaceutical industry to Health Care Professionals which is subject to penalty upon violation.

⁶ Parallel to this development, a hyphenation effect has formed, e.g. Employment-Criminal Law, Capital Markets-Criminal Law, Medical-Criminal Law (Business Criminal Law for the doctor), Anti-trust-Criminal Law, Pharmaceuticals-Criminal Law, Environmental-Criminal Law.

⁷ Introduction of § 299a StGB, Reform of § 299 StGB, in detail: Hendrik Schneider, *Sonderstrafrecht für Ärzte? Eine kritische Analyse der jüngsten Gesetzentwürfe zur Bestrafung der „Ärztelkorrumpion“*, ONLINEZEITSCHRIFT FÜR HÖCHSTRICHTERLICHE RECHTSPRECHUNG ZUM STRAFRECHT, 473 (2013).

guardian of foreign competition orders.⁸ It is well known that the reach of US criminal law has been extended since the FCPA was passed in 1977.⁹

The same applies to the introduction of the UK Bribery Act on July 1, 2011¹⁰, whose “offences” are so vague that the Ministry of Justice published guidelines for application of the law setting the perimeters of the new law for the businesses.¹¹

Parallel to this, the risks of detection for occupational and corporate crime¹² have increased. A key role in this context is played by whistleblowing, which was taken to the extreme through Sec. 922 of the Dodd-Frank Act¹³, but after having transcended initial resentment¹⁴ is also increasingly being applied in Germany as a measure to make crime more visible and as a bottom up instrument of sustainable compliance.¹⁵

Ever since Enron and WorldCom in 2001 and 2002 and the subprime crisis in 2007¹⁶ public opinion, which is the forerunner and pacesetter (buzzword: “political-journalistic re-inforcement cycle”¹⁷) of punitive criminal law policy in the area of Criminal Business Law, has changed. Introduction of the SOX in 2002 was accompanied by the words of then

⁸ Günter Heine & Jörg Eisele, in *Strafgesetzbuch*, § 299 No. 29a StGB (Adolf Schönke & Horst Schröder 29th ed. 2015); Gerhard Dannecker, in *Strafgesetzbuch* Bd.3, § 299 StGB, No. 74 (Urs Kindhäuser, Ulfrid Neumann & Hans-Ulrich Paefßgen, 4th ed. 2013).

⁹ Regarding the historical context of the FCPA, cf. Hendrik Schneider, in *Wirtschaftsstrafrecht*, § 3 No. 498 (Hauke Brettel & Hendrik Schneider 1st ed. 2014), as well as in detail Hartmut Berghoff, *From the Watergate Scandal to the Compliance Revolution: The Fight against Corporate Corruption in the United States and Germany*, BULLETIN OF THE GHI, 7 (2013); for a historical overview of the expansion of US Criminal Law see: Lucian E. Dervan, *International White Collar Crime and the Globalization of Internal Investigations*, FORDHAM URBAN LAW JOURNAL, 361, 363 f. (2011).

¹⁰ Jochen Deister & Anton Geier, *Der UK Bribery Act 2010 und seine Auswirkungen auf deutsche Unternehmen*, CORPORATE COMPLIANCE ZEITSCHRIFT, 12 (2011).

¹¹ Jochen Deister & Anton Geier, *Der UK Bribery Act 2010 und seine Auswirkungen auf deutsche Unternehmen*, CORPORATE COMPLIANCE ZEITSCHRIFT, 81 (2011).

¹² MARSHALL R. CLINARD & RICHARD QUINNEY, CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY, 130 ff. (1967).

¹³ The entire text of Section 922 can be retrieved at <https://www.sec.gov/about/offices/owb/dodd-frank-sec-922>; cf. also: Caitlin Hickey, *Incentivizing Whistleblowing in the United States Qui Tam, Anti-Retaliation and Cash-For-Information*, NEUE KRIMINALPOLITIK, 388 (2015).

¹⁴ Exemplary here Thomas Lampert, in *Corporate Compliance: Handbuch der Haftungsvermeidung im Unternehmen*, § 9 No. 35 (Christoph E. Hauschka et al. 2nd ed. 2010); Frank Maschmann, in *Handbuch der Korruptionsprävention*, 138 ff. No. 125 ff. (Dieter Dölling et al. 2007); regarding the status of the Rotsch debate, Criminal Compliance, § 2 Rn. 28 ff. (Thomas Rotsch 2015).

¹⁵ ESTHER PITTRÖFF, WHISTLE-BLOWING-SYSTEME IN DEUTSCHEN UNTERNEHMEN EINE UNTERSUCHUNG ZUR WAHRNEHMUNG UND IMPLEMENTIERUNG (2011); HENDRIK SCHNEIDER & DIETER JOHN, DAS UNTERNEHMEN ALS OPFER VON WIRTSCHAFTSKRIMINALITÄT (2013).

¹⁶ Regarding the analysis of international criminology against the backdrop of the subprime crisis, Hendrik Schneider, in *Festschrift für Wolfgang Heinz* 661, (Eric Hilgendorf & Rudolf Rengier 2012).

¹⁷ Sebastian Scheerer, *Der politisch publizistische Verstärkerkreislauf. Zur Beeinflussung der Massenmedien im Prozess strafrechtlicher Normgenese*, KRIMINOLOGISCHES JOURNAL, 223 (1978). (Analysis of International Criminology Against the Backdrop of the Subprime Crisis).

President George W. Bush: “The era of low standards and false profits is over ... no boardroom in America is above or beyond the law... No more easy money for corporate criminals, just hard time.”¹⁸ These statements were backed by creation of a *Corporate Fraud Task Force* to step up the intensity of prosecution of white collar crime.¹⁹

In Germany as well, there are predominant calls for stricter prosecution of white collar criminals and “tax evaders”. Criminal law experts, criminologists,²⁰ practitioners, politicians²¹ and other economic agents²² predominantly support this process. They participate in public discourse as *moral entrepreneurs*²³. They demand strict measures,²⁴ advocate the extensive interpretation of existing regulations on grounds of Criminal Law policy,²⁵ scandalize the violation of norms,²⁶ demonize perpetrator legal entities²⁷ and regard the

¹⁸ Elisabeth Bumiller, *Corporate Conduct: The President; Bush Signs Bill Aimed at Fraud In Corporations*, in: THE NEW YORK TIMES (July 31, 2002).

¹⁹ cf.: Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54, BOSTON COLLEGE LAW REVIEW, 73, 83 f. (2013).

²⁰ In this context Marxist-leaning approaches which attack the market economy as an economic system dominate (“greed-is-good mentality”; Predatory Society), cf. e.g. PAUL BLUMBERG, THE PREDATORY SOCIETY. DECEPTION IN THE AMERICAN MARKETPLACE (1989); further James William Coleman, *Toward an Integrated Theory of White-Collar Crime*, 93, AMERICAN JOURNAL OF SOCIOLOGY, 406 (1987); summary JAMES WILLIAM COLEMAN, THE CRIMINAL ELITE: UNDERSTANDING WHITE-COLLAR CRIME, 193-233 (6th ed. 2006).

²¹ cf. press release by the SPD party by Johannes Fechner (Member of Parliament), “Korruption im Gesundheitswesen beenden.” retrievable at: <http://www.spdfraktion.de/presse/pressemitteilungen/korruption-im-gesundheitswesen-beenden>, as well as the website of the Member of Parliament Kathrin Vogler (Die Linke), retrievable at: <http://www.kathrin-vogler.de/themen/gesundheit/korruption/details/zurueck/aerztekorrup-tion/artikel/korruption-im-gesundheitswesen-die-krebsmafia/>.

²² e.g. Transparency International.

²³ HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE, 147 ff. (1966).

²⁴ Paradigmatic Thomas Fischer, ZEITSCHRIFT FÜR MEDIZINSTRAFRECHT 1, 1 f. (2015): “Corruption in the healthcare system, in particular in the contract doctor system, must finally be made prosecutable and consistently prosecuted. Only after several dozen doctors and distributors have actually been sentenced and have been deprived of their careers will the message that gang-like corruption to the detriment of the public and its weakest members will not be tolerated.” And: “unscrupulous enrichment at the expense of society which significantly defines the healthcare market”; see also: Cornelia Gaedigk, *Kein Sonderrecht für Ärzte – ein Einwurf aus Sicht der Ermittlungspraxis*, 5, ZEITSCHRIFT FÜR MEDIZINSTRAFRECHT, 268 (2015).

²⁵ e.g.: Oliver Pragal, *Das Pharma-„Marketing“ um die niedergelassenen Kassenärzte: „Beauftragtenbestechung“ gemäß § 299 StGB!*, 5, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 133 (2005); THOMAS FISCHER, STRAFGESETZBUCH, § 299 No. 10e StGB (62th ed. 2015).

²⁶ In Germany hyphenated terminology has established itself in this context: Arzneimittel-Skandal, Organspendeskandal, Pflegeskandal or the name of the affected company is used, e.g. Ratiopharm-Skandal, cf.: DER SPIEGEL ONLINE, Ratiopharm-Skandal: “Das erschüttert den Glauben an den Rechtsstaat”, in: <http://www.spiegel.de/wirtschaft/service/ratiopharm-skandal-das-erschuettert-den-glauben-an-den-rechtsstaat-a-648892.html>. (Ratiopharm Scandal: “Undermining Faith in the Rule of Law”).

²⁷ Pamela H. Bucy, *Coporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75, MINNESOTA LAW REVIEW, 1095, 1157 (1991); a differentiated reconstruction of this approach can be found in Alschuler, who i.a. presents the view advocated by Beale (follows below), Albert W. Alschuler, *Two ways to think about the punishment of corporation*, 46, AMERICAN CRIMINAL LAW REVIEW, 1359, 1369 (2009): “The entity can be evil although the people who comprise it are mostly good. (...) the entity has not only an ethos, but a soul. The devils inside it must be exorcised despite the human cost”.

facts of a case as a criminal offense which has not yet been solved.²⁸ In this spirit, the judges increasingly gravitate towards incarceration of “corporate criminals” and toward imposition of Draconian company penalties,²⁹ where the respective legal system provides for such an instrument or an equivalent (economic “forfeiture” in German Criminal Business Law³⁰).³¹

B. The Defense Strategy of the Businesses- the Significance of Internal Investigations in Punitive Criminal Business Law

The depicted development naturally did not pass over the businesses without any impact. Investigation proceedings against the competitors are perceived as a “ticking time bomb”.³² It is expedient to prepare for investigations, to have an effective defense. In short: Businesses all over the world have set themselves up in a testudo formation in an attempt to effectively defend themselves from the attacker in the shape of a strong state and its investigation authorities (similar to the well trained Roman legionnaires when using the “*scutum*”). The name of the ever-so ponderous bulwark is Compliance and has at least the latent function³³ of shielding the business from government encroachment, preventing corporate misconduct from the start or at least making it internally visible and retaining the defining authority over cases relevant in Criminal Law.

²⁸ cf. the reports in the media on the DRK clinic scandal, cf.: “DRK-Skandal So lief die Abzocke”, (DRK Scandal: This Is How the Rip-Off Happened) retrievable at: <http://www.berliner-kurier.de/berlin/polizei-und-justiz/drk-skandal-so-lief-die-abzocke-4543444>.

²⁹ For example, the British pharmaceutical company GSK in China was fined 491 million dollars in China, cf.: Thomas Fox, *GSK in China: A New Dawn in the International Fight Against Corruption*, 1, COMPLIANCE ELLIANCE JOURNAL 29, 41 (Vol. 1 No. 1 2015), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176485>; the CEO of Worldcom Bernie Ebbers was sentenced to 25 years of incarceration at age 63 on grounds of accounting fraud, see <http://www.capital.de/themen/der-worldcom-skandal.html> (retrieved on March 16, 2016).

³⁰ Hans Theile, *Die Herausbildung normativer Orientierungsmuster für Internal Investigations – am Beispiel selbstbelastender Aussagen*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 378, 379 (2013) referring to qualitative Interviews: “Nowadays there are ‘hitlists’ regarding which prosecuting attorney can show the greatest adsorption volume. This is a mindset that was totally irrelevant when I [...] started out with legal defense. Looking at it this way [...] prosecuting attorneys have now also become business enterprises”.

³¹ In detail Hendrik Schneider, in: Matthias Jahn & Charlotte Schmitt-Leonardy & Christian Schoop (publ.), DAS UNTERNEHMENSSTRAFRECHT UND SEINE ALTERNATIVEN, 25 (2016)

³² cf. Burkhard Boemke et. al, *Evidenzbasierte Kriminalprävention im Unternehmen. Wirksamkeit von Compliance-Maßnahmen in der deutschen Wirtschaft – Ein empirisches Forschungsvorhaben*, 9, DENKSTRÖME, 79 (2012); Hendrik Schneider & Kevin Grau & Kristin Kißling, „Der Schock von Berlin saß tief.“ Ergebnisse eines empirischen Forschungsvorhabens zu Compliance im Gesundheitswesen und der Pharmaindustrie, CORPORATE COMPLIANCE ZEITSCHRIFT, 48 (2013).

³³ In detail: KRISTIN KIßLING, DIE LATENTE FUNKTION VON COMPLIANCE. (2016); Michele DeStefano, *The Chief Compliance Officer - Should there be a new “C” in the C-Suite?*, THE PRACTICE (July 2016), retrievable at: <https://thepractice.law.harvard.edu/article/the-chief-compliance-officer/>.

One key means of the repressive arm of Compliance³⁴ are “internal investigations”.³⁵ These are investigations carried out by the business or by a hired agent in the case of suspicion of breaches of the law or other legal violations.³⁶

The function of the internal investigations varies depending on the question of whether the facts to be determined are already the subject of government investigation proceedings. In the case of ongoing investigation proceedings, searches (still legal in compliance with the rule of reasonableness³⁷) may be prevented by the internal investigations.³⁸ Evidence may be provided to the authorities under supervision. In this way, a certain degree of control by the business is retained in the proceedings. Moreover, the (customary) public guarantee of extensive internal solution of the case³⁹ is a means of limiting reputation damage and diverting the accusation from the delinquent corporate structure to the individual criminal employee, i.e. from a failure of the system to an individual transgression. Outside of government investigation proceedings, internal investigations provide the opportunity of detecting incriminating conduct and subjecting it to the judgment of an entrepreneurial decision (to continue or to modify the business activity that has been acknowledged or is regarded as relevant in Criminal Law?). It is part of risk screening and risk management and prepares internal sanctions against the perpetrators. Internal investigations provide the freedom to make a decision as to whether and in what way (criminal prosecution or “only” an Employment Law measure) to react to a detected violation.⁴⁰ Where instated immediately in the case of existing grounds of suspicion, the business is prepared if government proceedings should be taken. Moreover, an external or internal

³⁴ Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 74, 77 (Vol. 1 No. 1 2015), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176443>; Hans Theile, *Die Herausbildung normativer Orientierungsmuster für Internal Investigations – am Beispiel selbstbelastender Aussagen*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 378, 384 (2013).

³⁵ The emergence of Internal Investigations was backed differently by academia and practice in Germany and the US, in Germany the attitude toward internal investigations tended to be suspicious and unfavorable: clear skepticism at Gina Greve, *Privatisierung behördlicher Ermittlungen*, STRAFVERTEIDIGER FORUM, 89 (2013) with further references; in contrast, the attitude in the US was embrative from the start: cf. Lucian E. Dervan, *International White Collar Crime and the Globalization of internal Investigations*, FORDHAM URBAN LAW JOURNAL, 361, 364 (2011), with reference to relevant case law.

³⁶ cf. JOSEPHINE SCHARNBERG, *ILLEGALE INTERNAL INVESTIGATIONS*, 27 (2015); cf. also Sascha Süße & Carolin Püschel, *Collecting Evidence in Internal Investigations in the Light of Parallel Criminal Proceedings*, COMPLIANCE ELLIANCE JOURNAL, 26, 29 f. (Vol. 2 No. 1 2016), retrievable at <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199168>; showing the initial situation upon instatement of an Internal Investigation: Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54, BOSTON COLLEGE LAW REVIEW, 73 (2013).

³⁷ Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 74, 87 (Vol. 1 No. 1 2015), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176443>.

³⁸ Sascha Süße & Carolin Püschel, *Collecting Evidence in Internal Investigations in the Light of Parallel Criminal Proceedings*, COMPLIANCE ELLIANCE JOURNAL, 26, 34 (Vol. 2 No. 1 2016), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199168>.

³⁹ Klaus Moosmayer, in *Interne Untersuchungen*, 3 (Klaus Moosmayer & Niels Hartwig 2012).

⁴⁰ cf. Sascha Süße & Carolin Püschel, *Collecting Evidence in Internal Investigations in the Light of Parallel Criminal Proceedings*, COMPLIANCE ELLIANCE JOURNAL, 26, 30 (Vol. 2 No. 1 2016), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199168>.

whistleblower is likely to refrain from criminal prosecution if he recognizes that the company has already adequately responded to the offense reported by him.

II. THE ROLE OF THE IN-HOUSE COUNSEL - GERMAN AND INTERNATIONAL PERSPECTIVE

A. Involvement of the in-house counsel in internal investigations

In-house counsels, who are frequently corporate lawyers, are directly involved in internal investigations. Klaus Moosmayer, Chief Counsel Compliance of Siemens AG, summarizes it as follows:

“Either a corporate lawyer with the relevant expertise or an external lawyer hired for the purpose may participate as a representative of the company in the investigations. It must be taken into account here that even where an external law firm is hired for the internal investigations the function of coordinator is always required within the company, which is normally performed by a lawyer from the internal Legal and/or Compliance department. Without this “project office”, investigations performed by external professionals in the company will hardly be able to be performed within an acceptable period and at reasonable costs.”⁴¹

Nothing could be truer. The fact that internal investigations have developed into a lucrative market for external providers is not to be underestimated. The problem of the limits on internal investigations exists in particular where the company promised to solve the case completely, as is often the case. External providers of “forensic services” take advantage of this and conclude their reports with a statement that further investigation of the case is necessary, not only to avoid liability risks. Moreover, the external specialists are often not lawyers but former police officers, economists or IT specialists. They need to submit the investigations to legal guidance with regard to the applicable Criminal Law provisions to the facts of the case. Failing this, there is a risk that the investigations become trivial or extend to facts which have already lapsed under the statute of limitations. To this extent, in-house counsels fill an important interdisciplinary function. They coordinate the work of external providers of relevant services, evaluate the results, draw legal conclusions from them and prevent unnecessary expenses (which may even be the basis of embezzlement accusations against the executive body having the investigations performed).

B. Significance of Legal Privilege

1. Consequences for the practice of internal investigations

Against this backdrop it is decisive for the work of the in-house counsels and the external

⁴¹ Klaus Moosmayer, in *Interne Untersuchungen*, 3 (Klaus Moosmayer & Niels Hartwig 2012).

lawyers involved in the internal investigations whether they can trust that the information obtained by them and the documents prepared by them will remain confidential in the case of investigation proceedings. Extensive protection would be ensured if the legal privileges set out in the StPO (Criminal Proceedings Ordinance) (right to refuse to provide evidence, § 53 Sect. 1 Clause. 1, No. 3; prohibition of seizure, § 97 Sect. 1-3; surveillance prohibition, § 100c Sect. 6 and the restriction of investigation measures in accordance with § 160c StPO) can be claimed.⁴² For US proceedings, they would have to be covered by the *Attorney-Client Privilege* or respectively the *Work Product Doctrine* would have to apply.⁴³ If they can claim these privileges the defense strategy of the testudo takes the desired effect. The company has absolute control over the flow of information to the investigation authorities. The latter cannot gain anything from the internal investigation results without the consent of the company and may not resort to them. In the case of refused cooperation, prosecuting attorneys and police forces have to start from scratch; the key documents may be in the possession of the party subject to professional secrecy.

If in contrast legal privilege is denied, the company loses the protection and the head of the internal investigations will find himself in hot water. On the one hand, he owes his company or employer secrecy and loyalty, on the other hand, as a witness, he is obligated to testify and must do so truthfully and completely; his documents may be seized in the process.⁴⁴

The conception of internal investigations, the question as to who heads them, who is involved and who is not be involved, is thus decisively dependent on the extent of the legal privilege. According to the legal situation in Germany a distinction is to be made between (external) lawyers /defense counsels, in-house counsels and corporate lawyers. This distinction is unknown in the Anglo-Saxon legal tradition. Which model is preferable, which an atavism in the globalized economy?

2. Substance and legitimation of legal privilege

It can be stated in a somewhat simplified manner that legal privilege has a longer tradition than the in-house counsel profession. The corporate lawyer or “Syndikus” has an exceptional position in this context. In the Middle Ages this was regarded as a legal scholar in charge of the legal affairs of the towns or local authorities.⁴⁵ It was not until World War I that companies switched to having internal corporate lawyers advise and represent them

⁴² cf. see detailed Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 74, 92 ff. (Vol. 1 No. 1 2015), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176443>.

⁴³ Basics on *Attorney-Client Privilege*: *Upjohn Co. v. United States* 449 U.S. 383, 389 (1981); on *Work Product Doctrine*: *Hickman v. Taylor* 329 U.S. 495, 511 (1947).

⁴⁴ Rainer Griesbaum, in *Karlsruher Kommentar zur Strafprozessordnung*, § 161a No. 4 StPO (Rolf Hannich 7th ed. 2013); cf. *BVerfG: Recht des Zeugen auf einen Rechtsbeistand*, NEUE JURISTISCHE WOCHENSCHRIFT, 103 (1975).

⁴⁵ The term “Syndikus” is derived from the Greek “*syndikos*” (advocate, attorney).

and resorted to external lawyers with less and less frequency.⁴⁶ Contrary to the in-house counsel, the corporate lawyer is simultaneously admitted to the bar, a fact which cast doubts on his legal position if he is employed by the company he represents, ever since his emergence.⁴⁷ The same was true of the terminology. Whereas up until 2016 the talk was either of *Syndizi*, *Syndikusanwälte* or *Syndikus-Rechtsanwälte*,⁴⁸ i.e. a uniform terminology was lacking, the legislator with the Act on the Reorganization of Corporate Counsel Law in 2016⁴⁹ introduced the uniform term “Syndikusrechtsanwalt” (§ 46 II BRAO) (roughly: corporate lawyer). According to the legal definition in § 46 Sect. 2 BRAO a corporate lawyer is an employee who practices as a lawyer (as defined by § 46 Sect. 3 BRAO) for his employer who is not a lawyer, patent lawyer or legal firm or patent law firm. For his work, the corporate lawyer must be admitted to the bar pursuant to § 46a BRAO.

In contrast, legal privilege originated in the 16th century in the Anglo-Saxon legal tradition⁵⁰ and in Germany as a uniform provision for the right to refuse evidence for the defendant’s legal defense counsel and public lawyers in the “Draft of a German Criminal Law Ordinance” of 1874: “For the attorney-client relationship is always based on trust which is entitled to protection of the law and the law may not force the client to conceal specific facts because of the fear that their disclosure could lead to criminal prosecution”.⁵¹ The right to refuse evidence for lawyers with regard to information disclosed to them during the exercise of their profession was finally set forth in § 52 No. 3 of the Criminal Procedural Ordinance of the German Empire (1877).

Recognition of the right to refuse evidence or the Attorney-Client Privilege⁵² was not to be taken for granted. Only gradually did the attitude gain ground that confidentiality of communication between attorney and client is not only in the individual interest of the parties involved, but also in the interest of administration of justice in general and takes precedence over the possibilities of more extensive investigation of the case. In the Anglo-

⁴⁶ cf.: Hans-Jürgen Hellwig, *Der Syndikusanwalt – neue Denkansätze. Die systematische Ausgrenzung des Syndikusanwalts seit 1934*, 1, ANWALTSBLATT, 2 (2015).

⁴⁷ Claus Roxin, *Das Zeugnisverweigerungsrecht des Syndikusanwalts*, NEUE JURISTISCHE WOCHENSCHRIFT, 1130 (1992).

⁴⁸ Cf. Gregor Thüsing & Johannes Fütterer, *Der Syndikus und die Anwaltszulassung nach dem Referentenentwurf des BMJV – Sein oder Nichtsein?* NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, 595, 596 (2015).

⁴⁹ BT-print. 18/5201.

⁵⁰ In his study Auburn refers to a dozen cases between 1570 and 1580 through which the Attorney-Client Privilege was established, cf. JONATHAN AUBURN, *LEGAL PROFESSIONAL PRIVILEGE: LAW AND THEORY*, 2000. In detail: Geoffrey C. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, CALIFORNIA LAW REVIEW, 1061, 1070 (1978).

⁵¹ CARL HAHN, *DIE GESAMMTEN MATERIALIEN ZU DEN REICHS-JUSITZGESETZEN* BD. 3, 106 f. (1880/1881).

⁵² According to an established definition the Attorney-Client Privilege comprises the following legal position: “(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.”, cf. JOHN H. WIGMORE, *WIGMORE ON EVIDENCE* § 2292, at 554 (*McNaughton*, revised ed. 1961).

Saxon legal tradition this perspective, which reinforced and established the attorney-client privilege can be traced to a paradigm shift in the derivation of the privilege. The reason for the legal privilege was no longer the “gentleman approach” which traced the lawyer’s right to silence and to refuse evidence to “oath and honor of the attorney”⁵³, but the notion embedded in Utilitarianism that the proceedings must be in accordance with the rule of law and the corresponding general interest in a well-functioning practice of the legal profession.⁵⁴ In Germany legal privilege is also an expression of the idea that the lawyer is a legal administration body. In an essential ruling the German Supreme Court expounds⁵⁵:

“The protection of the practice of the legal profession against government control and patronization is not solely in the individual interest of the specific lawyer of the specific client. The lawyer is a ‘*legal administration body*’ whose vocation is to represent the interests of his client. His professional work is in the public interest in effective legal administration in accordance with the principles of the rule of law. Under the principle of the rule of law set out in the Constitution, already on grounds of equal opportunity and procedural equality the citizens are entitled to a legal counsel who they can trust and who they can expect to represent their interests independently, freely and free of self-interest. As the appointed independent advisor and counsel it is incumbent on him to provide comprehensive support to his client.

The prerequisite for fulfilling this task is a relationship of trust between the attorney and the client. Integrity and reliability of the individual member of the profession as well as the right and duty of confidentiality are basic conditions for the development of this trust. Hence, professional secrecy has always been one of the lawyer’s fundamental duties.”

3. Extent of legal privilege

It can be concluded from this that the lawyer as well as the defense counsel (§ 138 StPO) have a right to refuse evidence as bound to professional secrecy under German Criminal Law § 53 Sect. 1 Nr. 2, Nr. 3 StPO. Protection against circumvention is provided by the right to refuse evidence by paraprofessionals (§ 53a StPO), the seizure prohibition (§ 97 StPO) and the prohibitions on the recording and evaluation of evidence set out in § 160a StPO (as from Jan. 1, 2008) for investigative acts which concern parties subject to professional secrecy who have the right to refuse evidence. Naturally, the particulars of these

⁵³ JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2292, at 554 (*McNaughton*, revised ed. 1961).

⁵⁴ *Hunt v. Blackburn* 128 U.S. 464, 470 (1988): the privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”; *Trammel v. United States* 445 U.S. 40, 51 (1980): “The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out”.

⁵⁵ *BVerfG: † Geldwäsche durch Strafverteidiger*, NEUE JURISTISCHE WOCHENSCHRIFT, 1305, 1307 (2004).

privileges in internal investigations are contested.⁵⁶ The prevalent opinion is that under German Employment Law associates are obligated to provide information in the case of an “interrogation” by private persons even if they incriminate themselves.⁵⁷ For members of the representative and supervisory boards this duty is derived from Company Law.⁵⁸ Despite the conflict between the duty to provide information and the procedural right to refrain from self-incriminating testimony (interrogation of an employee suspected of an offense), legal practice assumes that the information provided by the employee or executive is at least indirectly of use.⁵⁹ Such information may in any case be used to instate investigative proceedings against the party concerned.⁶⁰

With regard to the right to refuse evidence and seizure prohibition it is important who gave the lawyer (or defense counsel) the retainer. If the retainer is from the company the company may release him from the duty of professional secrecy with the consequence that the documents can be seized and evaluated when the accused associate objects.⁶¹ It has not yet been determined if documents such as final reports on the internal investigation are at least not subject to seizure if the investigations are aimed against the company (in connection with the order of forfeiture or imposition of a company fine). Moreover,

⁵⁶ Basics: Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC*, STRAFVERTEIDIGER, 41 (2009); Carsten Mosen, *Internal Investigations zwischen arbeitsrechtlicher Mitwirkungspflicht und strafprozessualer Selbstbelastungsfreiheit*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 508 (2001); Christian Pelz, *Ambiguities in International Internal Investigations*, COMPLIANCE ELLIANCE JOURNAL 14 (Vol. 2 No. 1 2016), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199152>; Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 74 (Vol. 1 No. 1 2015), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176443>; Sascha Süße & Carolin Püschel, *Collecting Evidence in Internal Investigations in the Light of Parallel Criminal Proceedings*, COMPLIANCE ELLIANCE JOURNAL, 26 (Vol. 2 No. 1 2016), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199168>.

⁵⁷ Hans Theile, *Die Herausbildung normativer Orientierungsmuster für Internal Investigations – am Beispiel selbstbelastender Aussagen*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 378, 378 (2013); Martin Lützel & Patrick Müller-Sartori, *Die Befragung des Arbeitnehmers – Auskunftspflicht oder Zeugnisverweigerungsrecht?* CORPORATE COMPLIANCE ZEITSCHRIFT, 19 (2011); cf. also: Burkhard Göpfert & Frank Merten & Carolin Siegrist, *Mitarbeiter als „Wissensträger“. Ein Beitrag zur aktuellen Compliance-Diskussion*, NEUE JURISTISCHE WOCHENSCHRIFT, 1703, 1705 (2008).

⁵⁸ cf. Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 74, 97 (Vol. 1 No. 1 2015), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176443>.

⁵⁹ Important detail questions discussed in the literature have not yet been the subject matter of court rulings such as the question of usability of statements obtained using prohibited interrogation methods within the scope of internal investigations, see Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC*, STRAFVERTEIDIGER, 41 (2009).

⁶⁰ For example the Municipal Court of Hamburg: “The idea that the authority of the state may not force the subjects of the law to self-incrimination through duties of cooperation and information subject to punishment upon breach and to use the disclosed information to prosecute him is clearly not applicable to the present case in which private persons have entered legal (employment) relationships which may force them to disclose criminal behavior”, Margarete Gräfin v. Galen, *LG Hamburg: Beschlagnahme von Interviewprotokollen nach „Internal Investigations“ – HSH Nordbank*, NEUE JURISTISCHE WOCHENSCHRIFT, 942, 944 (2011); in contrast Hans Theile, *Internal Investigations und Selbstbelastung*, STRAFVERTEIDIGER, 381, 384 ff. (2011); also Luís Greco & Christian Caracas, *Internal investigations und Selbstbelastungsfreiheit*, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 7, 8 ff. (2015).

⁶¹ cf. Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 74, 97 (Vol. 1 No. 1 2015), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-176443>.

it is unclear when the protection starts to take effect, i.e. when a protected defense relationship starts.⁶² Hence, in conclusion it must be stated that already in the group of lawyers and defense counsels who have a right to refuse evidence, protection of the procured facts against the encroachment of the investigation authorities is only patchy. The testudo strategy only works partially: German Criminal Procedural Law only equips the legionnaires with the round shield (parma), not with the rectangular shield (scutum).

Protection through the said procedural privileges fails entirely where the parties in question are not subject to professional secrecy, but belong to the company (Compliance Officer, associates/Head of Internal Auditing, Corporate Lawyer or an employee of a company specialized in conducting internal investigations (forensic services). According to the legal situation since Jan. 1, 2016 (Act on the Reorganization of Corporate Lawyers Law⁶³) this has now also been settled for corporate lawyers. Pursuant to § 53 Sect. 1 Nr. 3 StPO they are explicitly exempt from the right to refuse evidence and the procedural guarantees securing this.⁶⁴ The ratio decidendi for this restriction are Criminal Law policy motives. “The ratio decidendi for the restriction of legal privileges is the need for effective criminal prosecution. Inclusion of the corporate lawyers and corporate patent lawyers under the scope of application of §§ 97 and 160a StPO would harbor the risk that relevant evidence would not be available to the investigation authorities.” The legislator is following the precedent set by the European Supreme Court in the well-known Akzo/Nobel case.⁶⁵ Here, denial of protection of the confidentiality of communication was rejected with the argument that due to his economic dependence on the employer the corporate lawyer does not have the same freedom as the external lawyer. The consequences of the exclusion of corporate lawyers from legal privileges in practice are radical: An associate who discloses information to a corporate lawyer (often the corporate lawyer and Head of Compliance are the same person) cannot rely on confidentiality. The corporate lawyer may be interrogated as a witness, his documents are subject to seizure. The case is entirely different in the US. There it has been initially acknowledged as the

⁶² According to the Municipal Court of Gießen, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 409, 409 f. (2012), the seizure prohibition set out in § 97 Sect. 1 Nr. 1 StPO “also applies to defense documents prepared for the formal instatement of investigation proceedings”, for more details see: Stefan Rütters & Anne Schneider, *Die Beschlagnahme anwaltlicher Unterlagen im Unternehmensgewahrsam*, GOLTDAMMER'S ARCHIV FÜR STRAFRECHT, 160 (2014).

⁶³ BT Drucks. 18/5201

⁶⁴ Regarding the legal situation prior to Jan. 1, 2016, cf. Winfried Hassemer, *Das Zeugnisverweigerungsrecht des Syndikusanwalts*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 1 (1986), Claus Roxin, *Das Zeugnisverweigerungsrecht des Syndikusanwalts*, NEUE JURISTISCHE WOCHENSCHRIFT, 1129 (1992), Claus Roxin, *Das Beschlagnahmeprivileg des Syndikusanwalts im Lichte der neuesten Rechtsentwicklung*, NEUE JURISTISCHE WOCHENSCHRIFT, 17 (1995) and Konrad Redeker, *Der Syndikusanwalt als Rechtsanwalt*, NEUE JURISTISCHE WOCHENSCHRIFT, 889 (2004).

⁶⁵ EuGH, (European Supreme Court) ruling of Sept. 14, 2010, C-550/07. P. Hustus, rightly points out that this ruling only concerned the European anti-trust proceedings and was not necessarily capable of being extrapolated to the StPO, Ludmila Hustus, *Der Syndikusanwalt und das Legal Privilege respektive das Anwaltsprivileg – alea iacta est*, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 65 (2016); detailed reconstruction of the ruling and the underlying facts of the case in: Lucian E. Dervan, *International White Collar Crime and the Globalization of internal Investigations*, FORDHAM URBAN LAW JOURNAL, 361, 369 ff. (2011).

flipside of Corporate Criminal Law since the *Upjohn* ruling by the Supreme Court in 1981⁶⁶ that legal privilege does not only apply to natural, but also to legal entities:

“Admittedly complications in the application of the privilege arise when the client is a corporation, which, in theory, is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation.”⁶⁷ From this point on, it is now a foregone conclusion that attorney-client privilege applies to the corporation,⁶⁸

and that there is no difference between an in-house counsel and external lawyer or defense counsel⁶⁹. The arguments that the corporate lawyer⁷⁰ is economically dependent and subject to the duty to follow his employer’s instructions have been deemed untenable for justifying a distinction between the two professional groups: “[t]hese are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege.”⁷¹ Therefore, attorney-client privilege technically applies equally to in-house and external counsel, as the “lawyer’s status as in-house counsel ‘does not dilute the privilege.’”⁷²

Within the context of the emergence of internal investigations it was then contested however, who the attorney’s client is and accordingly who can decide on the exercise and grant of the privilege. According to the “Control Group Test” the status of the associate disclosing information to the internal or external lawyer is decisive.⁷³ According to this, the privilege applies to the extent that the associate can implement legal counsel provided on

⁶⁶ In detail: John E. Sexton, *A Post-UPJOHN consideration of the corporate attorney-client privilege*, NEW YORK UNIVERSITY LAW REVIEW, 443 (1982); cf. also Gerald F. Luttikus, *Implications of Upjohn Symposium: The Role of Professionals in Corporate Governance: Note*, 57, NOTRE DAME LAW REVIEW, 887 (1981); Lucian E. Dervan, *Internal Investigations and the Evolving Fate of Privilege*, COMPLIANCE ELLIANCE JOURNAL, 3, 5 (Vol. 2 No. 1 2016), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199145>.

⁶⁷ *Upjohn Co. v. United States* 449 U.S. 389-390 (1981).

⁶⁸ *CFTC v. Weintraub* 471 U.S. 343, 348 (1985): “It is by now well established, and undisputed by the parties to this case, that the attorney-client privilege attaches to corporations as well as to individuals.”

⁶⁹ Grace G. Giesel, *Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, UNIVERSITY OF MIAMI LAW REVIEW, 109, 140 (2010), the article refers to rulings by district courts in which even non-lawyers are subject to the protection of privilege; for the distinction between Inhouse Counsel and external lawyer or defense council with the example of the *Bank of China* case see also Lucian E. Dervan, *Internal Investigations and the Evolving Fate of Privilege*, COMPLIANCE ELLIANCE JOURNAL, 3, 10 (Vol. 2 No. 1 2016), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199145>.

⁷⁰ *United States v. United Shoe Machinery Corp.* 89 F.Supp 357, 358-359 (D. Mass.1950).

⁷¹ *United States v. United Shoe Machinery Corp.* 89 F.Supp 357, 358-359 (D. Mass.1950).

⁷² *In re Kellogg Brown and Root*, 756 F.3d; cf. also Lucian E. Dervan, *Internal Investigations and the Evolving Fate of Privilege*, COMPLIANCE ELLIANCE JOURNAL, 3, 6 (Vol. 2 No. 1 2016), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199145>; Michele DeStefano describes the difference between the in-house counsel and the compliance professional: Michele DeStefano, *The Chief Compliance Officer - Should there be a new “C” in the C-Suite?*, THE PRACTICE (July 2016), retrievable at: <https://thepractice.law.harvard.edu/article/the-chief-compliance-officer/>.

⁷³ *City of Philadelphia vs. Westinghouse Electric. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962)

the basis of his representation of the facts of the case as a business decision. From a different standpoint, the subject matter of the associate's statement is decisive ("Subject Matter Test"⁷⁴). Where communication takes place at the instruction of a body of the company looking for legal counsel for the company and the associate's statement refers to his duties under Employment Law, the privilege applies.

The difference between the two approaches lies primarily in the question of the involvement of associates from lower hierarchy levels in the privilege's scope of protection. The lowest common denominator can be found in the distinction between business and legal advice. Privilege only exists where legal counsel, but not merely business advice is being sought⁷⁵. In more recent case law on the issue of the distinction between business and legal advice the "but for" is partially relied on⁷⁶. According to this it must be proven that the communication has the purpose of obtaining legal counsel: "the communication would not have been made 'but for' the fact that legal advice was sought."⁷⁷ Only in this case does the privilege apply. According to the other standpoint it is merely necessary that legal advice be obtained, among other things.⁷⁸ A final ruling by the Supreme Court on this issue is still pending.

In the Upjohn ruling by the Supreme Court the Control Group approach is abandoned as a distinction criterion for the extent of protection of the privilege. The status of the employee is not decisive, as valuable information may be provided by associates at all hierarchy levels who are thus worthy of protection. Where protection of confidentiality is denied there is a risk that interrogation of employees outside of the Control Group will be refrained from on procedural grounds in the investigation. This is incompatible with the nature and purpose of the attorney-client privilege and its fundamental significance for legal proceedings based on the principles of the rule of law.⁷⁹ The Supreme Court

⁷⁴ Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-492 (7th Cir. 1970), confirmed by 400 U.S. 348 (1971).

⁷⁵ Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 605 (8th Cir. 1978). The distinction between Business and Legal Advice needs a thorough examination. In particular in the case of corporate lawyers it is not clear that legal advice is being sought: Grace M. Giesel, *The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys representing Corporations*, MERCER LAW REVIEW, 1169 (1997); Michele DeStefano, *The Chief Compliance Officer - Should there be a new "C" in the C-Suite?*, THE PRACTICE (July 2016), retrievable at: <https://thepractice.law.harvard.edu/article/the-chief-compliance-officer/>.

⁷⁶ In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014).

⁷⁷ United States ex rel. Barko v. Halliburton Co. No. 05-cv-1276, 2014. WL 1016784 (D.D.C. Mar. 6, 2014).

⁷⁸ In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014).

⁷⁹ The significance of the privilege is highlighted as follows: "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." cf. Upjohn Co. v. United States 449 U.S. 389 (1981).

then makes it clear that in the case where internal investigations are ordered for the purpose of providing legal counsel, the sole client is the company. According to this, only the company bodies can release parties from the duty of confidentiality. According to the Supreme Court this can lead to misunderstandings in the interrogation of the associates. Accordingly, a caveat is necessary following the ruling by the Supreme Court (Upjohn warning) comprising the following elements and the disregard of which can entail an evidence evaluation prohibition:⁸⁰

“the attorney represents the corporation and not the individual employee; the interview is covered by the attorney-client privilege, which belongs to and is controlled by the corporation, not the individual employee; the corporation may decide, in its sole discretion, whether to waive the privilege and disclose information from the interview to third parties, including the government.”⁸¹

Thus the two jurisdictions, Germany and the US arrive at different results when determining the extent of legal privilege. In the US there is extensive protection of communication within the scope of the internal investigation without taking into consideration whether the investigation is being performed by a corporate lawyer or an external lawyer. This consolidates the position of the company. As the master over the privilege the company can decide whether and to what extent it releases its legal counsel from the duty of secrecy and discloses information on corporate misconduct. The US works with the carrot, Germany with the stick. If the company cooperates with the investigation authorities in the US and discloses all information obtained without reservations, the sentence will be lighter in accordance with the sentencing guidelines⁸². In Germany it is unclear if cooperation is rewarded as the efforts in the Compliance sector do not necessarily extend to company fines or the forfeiture order⁸³. Where there is no cooperation and open communication with the prosecuting attorney the investigation authorities will use coercive

⁸⁰ U.S. v. Nicholas 606 F. Supp. 2d 1109, 1112 (C.D. Cal.); lifted on other grounds: United States v. Ruehle 583 F.3d 600 (9th Cir. 2009); but cf.: In Re Grand Jury Subpoena: Under Seal, 415 F.3d 333 (4th Cir. 2005).

⁸¹ Lucian E. Dervan, *International White Collar Crime and the Globalization of internal Investigations*, FORDHAM URBAN LAW JOURNAL, 361, 379 f. (2011).

⁸² A points system is used for determining the severity of the sentence which is reduced by 2 to 5 points depending on the extent of the company's cooperation. Chapter 8 Section (g) “Self-Reporting, Cooperation and Acceptance of Responsibility” of the Federal Sentencing Guidelines states: “(1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, *fully cooperated in the investigation*, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 5 points; or (2) If the organization *fully cooperated in the investigation* and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 2 points; ...” [bold type by the author], retrievable at: <http://www.ussc.gov/guidelines-manual/2011/2011-8c25>.

⁸³ Convenient overview at: Imme Roxin, *Probleme und Strategien der Compliance-Begleitung in Unternehmen*, STRAFVERTEIDIGER, 116, 117 f. (2012); regarding cooperation cf. Sascha Süße & Carolin Püschel, *Collecting Evidence in Internal Investigations in the Light of Parallel Criminal Proceedings*, COMPLIANCE ELLIANCE JOURNAL, 26, 52 f. (Vol. 2 No. 1 2016), retrievable at: <http://nbn-resolving.de/urn:nbn:de:bsz:15-qucosa-199168>.

measures in the investigation proceedings and procure the necessary information. As expounded above, this is justified primarily with a Criminal Law policy argument. No strong defense positions and privileges may be conceded to the strong company, or else the investigation will come to naught.

C. Expedient Corrections

According to the stance taken here the legislative ruling to exclude corporate lawyers from legal privilege if they work as a lawyer for the company is inconsistent and dubious from the aspect of Criminal Law policy.⁸⁴ It therefore behooves correction de lege lata through a teleological reduction of § 53 Sect. 1 Nr. 3 StPO. De lege ferenda cancellation of the restriction set out in § 53 Sect. 1 Nr. 3 StPO and thus a partial equalization of the legal situation in German with that in the US is advisable. In contrast, the ruling by the German legislator to exclude other company lawyers from legal privilege is accurate. However, the extent of privilege to legal professionals not admitted to the bar in accordance with the legal situation in the US is alien to the system, at least according to the legal understanding here.

§ 53 StPO and the privileges of the defense counsel and lawyers securing it have the primary purpose of protecting the relationship of trust between the person of trust and the party obtaining legal advice. As already expounded, the attorney/defense counsel privilege also protects the public interest in criminal justice administration based on the rule of law and procedural equality and intends to ensure that parties seeking counsel are not hindered from providing complete information to the person of trust because they fear that he has to disclose the entrusted information.⁸⁵ Moreover, the party subject to professional secrecy is also to be protected from the coercive situation of keeping confidentiality with regard to the client in conflict with cooperation in the investigation⁸⁶.

The reorganization of the law concerning corporate lawyers recognizes that the corporate lawyer provides legal counsel to his employer and rightly identifies this as the work of a lawyer. Accordingly, the legislator declares the aspect of the lack of economic independence of the corporate lawyer, formerly decisive for denial of legal privilege, as irrelevant

⁸⁴ Regarding the extension of legal privilege to the corporate lawyers, cf. already Christian Burholt, *Ein Schritt vor, zwei zurück – Gilt das Anwaltsprivileg im europäischen kartellrecht auch für Syndikusanwälte?*, 3, BUNDESRECHTSANWALTSKAMMER-MITTEILUNG, 100, 102 (2004).

⁸⁵ Spaulding stresses this using a metaphor from the healthcare sector: “the patient cannot hope to receive adequate treatment without revealing her symptoms, she is obliged to be full and frank in order to receive effective service”, Norman W. Spaulding, *Compliance, Creative Deviance, and Resistance to Law: A Theory of the Attorney-Client Privilege*, AMERICAN BAR ASSOCIATION JOURNAL OF THE PROFESSIONAL LAWYER, 135, 159 (2013).

⁸⁶ Lothar Senge, in *Karlsruher Kommentar zur Strafprozessordnung*, § 53 StPO No. 1 (: Rolf Hannich 7th ed. 2013); GERD PFEIFFER, *STRAFPROZESSORDNUNG*, § 53 StPO, No. 1 (5th ed. 2005); ROBERT MAGNUS, *DAS ANWALTSPRIVILEG UND SEIN ZIVILPROZESSUALER SCHUTZ*, 22 ff., 30 ff. (2010); Ludmila Hustus, *Der Syndikusanwalt und das Legal Privilege respektive das Anwaltsprivileg – alea iacta est*, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 65, 70f. (2016).

and applies the distinction between business and legal advice customary in Anglo-Saxon legal systems, as can be concluded from the legal definition of the functions of a lawyer. Because (with the exception of § 46 Sect. 3 Nr. 3, 4 BRAO) only “the examination of legal issues including solving of the case as well as elaborating and evaluating potential solutions and providing legal advice” is counted among the professionally independent and autonomous functions which are a constituent element of the work of a lawyer and thus not provision of exclusively economic advice to the company. It would be logical to allow the right to refuse evidence according to § 53 StPO including the privileges secured by it for provision of legal advice on Criminal Law, which likewise can fall under the definition of lawyer’s work in the same way as for external lawyers⁸⁷. Because the initial situation is identical in this regard: The corporate lawyer providing legal counsel commands trust, is dependent on complete communication of the facts of the case in order to provide legal advice and requires protection himself from the conflict of interests depicted above. US Criminal Law, normally regarded as being “on top of it”, recognizes this whereas the German legislator apparently does not.

If the similar initial situation of external lawyers and of corporate lawyers as presented is to be accounted for, there are two different solution approaches. It is at first expedient to interpret the restriction in the scope of application of the right to refuse evidence as a procedural securing of the prohibited action in § 46c Sect. 2 BRAO. According to this corporate lawyers “in penalty or fine proceedings against the employer or his associates” “may not act as their defense or representative, this applies where the subject matter of the penalty or fine proceedings is a company-related offense accusation, also with regard to work as a lawyer as defined by § 4.” Accordingly, § 53 Sect. 1 Nr. 3 StPO can be interpreted to the effect that the restriction of the right to refuse evidence only applies where the corporate lawyer acts in breach of § 46c BRAO but not when he merely provides legal advice internally to the employer with regard to facts relevant to a case in Criminal Law which he is solving.

The other possibility of securing the relationship of trust consists in recourse to § 53a StPO. If the term paraprofessional is interpreted broadly, which cannot be excluded from the wording of § 53a StPO,⁸⁸ the corporate lawyer can also be included under this provision which in accordance with § 53 Sect. 1 Nr. 3 StPO does not explicitly remain unaffected.⁸⁹ In this way the important coordinating work of the corporate lawyer in the case of management of the internal investigations by an external party subject to professional

⁸⁷ Also agreed on by Winfried Hassemer, *Das Zeugnisverweigerungsrecht des Syndikusanwalts*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT, 1 (1986); Claus Roxin, *Das Zeugnisverweigerungsrecht des Syndikusanwalts*, NEUE JURISTISCHE WOCHENSCHRIFT, 1129 (1992); Konrad Redeker, *Der Syndikusanwalt als Rechtsanwalt*, NEUE JURISTISCHE WOCHENSCHRIFT, 889 (2004) on the legal situation prior to the Act on the Reorganization of the Law on Corporate Lawyers 2016.

⁸⁸ Lothar Senge, in *Karlsruher Kommentar zur Strafprozessordnung*, § 53a StPO No. 2 (Rolf Hannich 5th ed. 2013); GERD PFEIFFER, *STRAFPROZESSORDNUNG*, § 53a StPO No. 1 (5th ed. 2005); TIDO PARK, *DURCHSCHÜCHUNG UND BESCHLAGNAHME*, No. 547 (3rd ed. 2015).

⁸⁹ BT-Drs. 18/5201, 40.

secrecy would be protected, reinforcing the testudo formation in this empirically relevant area. There is no reason today for the general weakening of his position in relation to the external lawyer on grounds of economic policy. The recourse to corporate lawyers may have made sense in the First World War era by sustainably keeping freelance lawyers away from corporate clients⁹⁰ – but nowadays this context is certainly not verifiable.

The restriction set out in § 53 Sect. 1 Nr. 3 StPO advocated here to correct the depicted inconsistency is also not pertinent from the aspect of Criminal Law policy. Forced disclosure of information and the confiscation of documents will entail tactical circumventive maneuvers which make it more difficult instead of easier to ascertain the facts of the case. Informed companies will resort to external counsel from the start or take other measures to foil access to the relevant documents. This undermines the cooperative approach which the investigation authorities depend on not least due to their limited resources and limits prevention because the corporate lawyer, who may act as the “legal conscience”⁹¹ of a company is excluded on procedural grounds in the case of suspicion and consequently cannot draw any conclusions for improvement of the Compliance Management system from the case. For this reason, in awareness of the legal situation in Germany it is even advised in the US to reduce the number of personnel in the Legal Department of the company and to rely exclusively on consulting by external lawyers.⁹²

However, the present plea for assumption of the American Way⁹³ does not extend to including the company lawyer who is not admitted to the bar or is admitted as a corporate lawyer according to the new legislation (§ 46a BRAO) under the protection of § 53 StPO. De lege lata there is no dogmatic leeway. Even de lege ferenda the differences between the corporate lawyer not admitted to the bar and the corporate lawyer admitted to the bar are factors in favor of the current procedural distinction. The corporate lawyer not admitted to the bar may also provide legal advice. But it depends on the individual case to what extent he provides the advice independently. Professional independence is the key to trust in legal advice that is worthy of protection and thus a constituent element for application of legal privilege.

⁹⁰ Claus Roxin, *Das Zeugnisverweigerungsrecht des Syndikusanwalts*, NEUE JURISTISCHE WOCHENSCHRIFT, 1129, 1131 (1992).

⁹¹ cf. the well-known case of the Compliance Officer ruling by the German Supreme Court (BGHSt 54, 44 ff.), in detail: Hendrik Schneider & Peter Gottschaldt, *Offene Grundsatzfragen der strafrechtlichen Verantwortlichkeit von Compliance-Beauftragten in Unternehmen*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 573 (2011).

⁹² Andrew R. Nash, *In-House but out in the Cold: A Comparison of the Attorney-Client Privilege in the United States and European Union*, ST. MARY'S LAW JOURNAL, 453, 492 (2012); with reference to the Akzo Nobel ruling by the: “For corporations operating on both sides of the Atlantic Ocean, there appears little value in maintaining large in-house legal departments in any European offices”.

⁹³ The extent of legal privilege in US law is naturally not uncontested, cf. the summary of the arguments “against confidentiality” on the basis of an economic analysis of the law (without reference to internal investigations) in Dru Stevenson, *Against Confidentiality*, UC DAVIS LAW REVIEW, 337, 403 (2014): “The rules undermine the other ethical rules that call for candor, integrity, and fairness; they undermine public confidence in the legal system; and they undermine transparency trust in general through lemons effects”.

D. Conclusion

The imponderables of current Criminal Business Law create a demand for legal advice which should be subject to clear procedural rules and competences. Analysis of the legal framework conditions for internal investigations has proven that currently this is not the case. The legal situation in Germany is already not transparent, partly inconsistent and diversified. This is especially true of national procedures and the corresponding Cross-Border Internal Investigations in which even lawyers' professional duty of secrecy can conflict with the duty to disclose information under Criminal Law.⁹⁴ Criminal Business Law already acts as an obstacle to growth⁹⁵ nowadays, as economic decisions first need to be secured through Compliance and Legal, a cumbersome process. The flipside of this development is at least the securing of trust in the lawyers providing advice, internal as well as external. Companies need a safe harbor to navigate these waters. The present approach which stabilizes the tactics of the testudo at least in one detailed area and represents a certain counterweight to the encroaching risk of companies from unpredictable Criminal Business Law serves this purpose.

⁹⁴ Concise presentation of the most important legal issues in Christian Pelz, *Ambiguities in International Internal Investigations*, COMPLIANCE ELLIANCE JOURNAL, 14 (Vol. 2 No. 1 2016).

⁹⁵ Hendrik Schneider, *Wachstumsbremse Wirtschaftsstrafrecht*, 1, NEUE KRIMINALPOLITIK, 30 (2012).

WHISTLEBLOWER PROTECTION PROGRAMS COMPROMISE THE REPORTED TAXPAYER'S PRIVACY

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ABSTRACT

The United States Whistleblower Program's inadequate protections have placed the privacy and confidentiality rights of United States taxpayers in a vulnerable state. By using the United States Whistleblower Program as an example, this paper seeks to illustrate the risk of eroding the confidentiality and privacy rights of the taxpayer, which is a risk that other national and international governments should likewise attempt to mitigate in their own whistleblower protection programs.

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I. INTRODUCTION

Much discussion related to whistleblower programs focus on the importance of protecting the identity and interests of the whistleblower, as he is emblematically the hero who jeopardizes himself personally and professionally to report tax noncompliance. However, little discussion contemplates the privacy interests of the reported taxpayer who is the subject of the whistleblower claim and potentially resulting investigation. The taxpayer, whom the whistleblower reports, may or may not be actually noncompliant. Yet, the reported taxpayer's name, address, tax returns, and return information may become exposed—not only to the whistleblower—but also to the public, due to inadequate legislative safeguards. In 2014, the Internal Revenue Service (“IRS”) adopted the Taxpayer Bill of Rights to inform taxpayers of their fundamental rights when dealing with the IRS. The Right to Privacy and the Right to Confidentiality are two of these ten rights, which are the same rights Congress codified in the Internal Revenue Code (“IRC”) in 2015.¹ With the push for compliance, these rights are at risk.

This topic becomes increasingly relevant in 2017, as Australia and the European Union have recently announced intentions to institute comprehensive whistleblower protection programs. While their proposed programs will be more expansive in scope than the United States IRS program in that they will cover corporate and other types of whistleblowing in addition to tax, this paper will focus on tax whistleblowing specifically. Other governments should scrutinize the United States IRS Whistleblower Program when instituting their own programs, so that they may learn from its shortcomings and institute legislative safeguards from the onset. Increased compliance should not come at the cost of taxpayer privacy.

II. THE UNITED STATES IRS WHISTLEBLOWER PROGRAM

A. Background

When Congress added IRC §7623(b) in 2006, the United States IRS Whistleblower Program (“Whistleblower Program”) expanded into a fully-fledged program by taking three measures: 1) instituting its own office, the Whistleblower Office, 2) paying mandatory awards to certain whistleblowers, instead of only discretionary rewards, and 3) allowing whistleblowers unsatisfied with their reward determinations to appeal to the Tax Court. Where previously the IRS had the discretion to decide whether to issue awards, now, in general, whistleblower claims that are determined to “substantially contribute”

¹ IRS, Taxpayer Bill of Rights: #8, The Right to Confidentiality, Fact Sheet FS-2016-17, March 2016, *see*: <https://www.irs.gov/taxpayer-bill-of-rights/taxpayer-bill-of-rights-the-right-to-confidentiality>; IRS, Taxpayer Bill of Rights: #7, The Right to Privacy, Fact Sheet FS-2016-15, March 2016, *see*: <https://www.irs.gov/uac/newsroom/fact-sheets-2016>.

to the IRS secretary's decision to proceed on administrative or judicial action must receive an award if the statutory threshold amounts are met and if it resulted in collection of tax, penalties, or other amounts.² Where the maximum reward was previously a maximum of 15% of the collected proceeds and the reward could not exceed \$10 million, now whistleblowers can receive a higher reward ranging between 15% and 30% of the collected proceeds resulting from the action and at an unlimited dollar amount.³ With the higher potential for payouts, the program offers greater financial incentives, explaining the rise in whistleblower claims. "Indeed, since 2007, information submitted by whistleblowers has assisted the IRS in collecting \$3.4 billion in revenue, and, in turn, the IRS has approved more than \$465 million in monetary awards to whistleblowers," said the Director of the IRS Whistleblower Office in the 2016 IRS Whistleblower Program report.⁴

B. Problem

As the IRS Whistleblower Program incentivizes more whistleblowers to file claims, taxpayer information becomes continually more exposed. A whistleblower is often conceptualized as the conscientious employee that reports the tax fraud of his corporate employer. However, anyone can blow the whistle on anyone: a nosey neighbor, or a revengeful lover—with or without good faith.

The taxpayer's information—which may range from name, address, or Social Security Numbers on a tax return, to whether the taxpayer owes taxes and in what amount—may become exposed at multiple points.⁵ Although there is a general rule against disclosure under IRC §6103, as part of an investigation, the IRS officer might disclose information to a whistleblower, whether illegitimately or through one of the permissible exceptions to the general rule against disclosure.⁶ The whistleblower might then intentionally or inadvertently disclose that information to a third party, or to the public. If the whistleblower does not receive an award when he contends he deserves one, or is unsatisfied with the amount of his award, he may bring a claim to the Tax Court for review of the IRS decision, at which point, the whistleblower might again disclose sensi-

² IRC 7623(b).

³ IRC §7623(b)(1); Internal Revenue Manual (IRM) 1.2.13.1.12, Policy Statement 4-27, August 13, 2004, *see*: https://www.irs.gov/irm/part1/irm_01-002-013.html.

⁴ Internal Revenue Service, IRS Whistleblower Program: Fiscal Year 2016, Annual Report to the Congress at 3, *see*: https://www.irs.gov/pub/whistleblower/fy16_wo_annual_report_final.pdf.

⁵ IRC §6103(b)(2)(A) defines "return information" broadly to include the taxpayer's identity, source of his income, whether there is outstanding liability, whether the return is subject to investigation, etc.

⁶ *Whistleblower Program Does Not Meet Whistleblower's Need for Information During Lengthy Processing Times and Does Not Sufficiently Protect Taxpayer's Confidential Information from Re-Disclosure by Whistleblowers*, National Taxpayer Advocate, Internal Revenue Service, 2015 Annual Report to Congress, Vol. 1, The Most Serious Problems Encountered By Taxpayers, #13, at 152–53 (2016) [hereinafter *Most Serious Problems #13*] (explaining the general non-disclosure rule has exceptions under IRC §§ 6103(n) and 6103(k)(6), which though not specifically addressing disclosures to whistleblowers, could apply in such a context), *see*: http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15_Volumer.pdf.

tive information. The Tax Court records are public, meaning the taxpayer's information would be published, even if the Court determined he owed nothing in taxes.⁷ The taxpayer would not be party to the case, so he may never become aware his name has been sullied.⁸ Even if he does become aware, he cannot practically seek redress given he is not a party to the case.

Thus, as will be discussed below, the taxpayer confidentiality and privacy rights become increasingly compromised due to a lack of four protections:

- sanctions if the whistleblower reveals information to third parties through an unauthorized disclosure;
- safeguards to protect the information in the first place;
- remedies to compensate the taxpayer for his loss of privacy; and
- procedural rules in the Tax Court's judicial proceedings.

C. Lack of Sanctions

Whistleblowers who disclose a reported taxpayer's information to the public or to third parties should be subject to sanctions to deter future unauthorized disclosures. Under IRC §6103's general rule against disclosure, IRS employees are subject to a general prohibition against disclosing a taxpayer's returns or return information.⁹ They cannot, for example disclose to a whistleblower that the claim he submitted led to an audit.¹⁰ If the IRS employee violates this provision, the employee is subject to sanctions under IRC §§7431, 7213, and 7213A.¹¹ Problematically, the whistleblower is not subject to these sanctions.¹²

To bypass the general rule against disclosure, IRS officers disclose information to whis-

⁷ *Lampert v. United States*, 854 F.2d 335, 337 (9th Cir. 1988) (listing cases in which district courts found that once tax return information is disclosed in court, "such information is no longer confidential, the taxpayer loses any privacy interests in that information, and there is no violation of section 6103 for subsequent disclosures").

⁸ *Whistleblower Program Does Not Meet Whistleblower's Need for Information During Lengthy Processing Times and Does Not Sufficiently Protect Taxpayer's Confidential Information from Re-Disclosure by Whistleblowers*, National Taxpayer Advocate, Internal Revenue Service, 2015 Annual Report to Congress, Vol. 1, The Most Serious Problems Encountered By Taxpayers, #13, supra note 6, at 156, see: http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARCI5_Volume1.pdf.

⁹ IRC §6103(a).

¹⁰ Internal Revenue Service, Confidentiality and Disclosure for Whistleblowers (March 21, 2017), see: <https://www.irs.gov/uac/confidentiality-and-disclosure-for-whistleblowers>.

¹¹ IRC §§7431(a)(2), 7431(c); 7213(a)(1); 7213A(a)(1)(B), 7213A(b)(1).

¹² *Whistleblower Program: Make Unauthorized Disclosures of Return Information by Whistleblowers Subject to the Penalties of IRC §§ 7431, 7213, and 7213A, Substantially Increase the Amount of Such Penalties, and Make Whistleblowers Subject to the Safeguarding Requirement of IRC §6103(p)*, National Taxpayer Advocate, Internal Revenue Service, 2015 Annual Report to Congress, Vol. 1, Legislative Recommendations #14, at 413 (2016), [hereinafter Legislative Recommendations #14], see: http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARCI5_Volume1.pdf.

tleblowers as part of an investigation under the exceptions afforded by IRC §6103(h)(4) through confidentiality agreements and IRC §6103(k)(6) for investigative purposes.¹³ Sometimes, the whistleblower can only continue to be helpful to the IRS investigation, if he knows an important piece of information, which is part of the taxpayer's confidential information.

Under IRC §6103(h)(4), the whistleblower enters into a confidentiality agreement with the IRS, allowing the IRS to share taxpayer information with the whistleblower, which the whistleblower agrees not to disclose.¹⁴ However, these confidentiality protections are largely ineffective, because the punishment the IRS imposes on the whistleblower is considering his violation as a negative factor when computing his final award.¹⁵ Because such a negative factor would do nothing to dissuade the whistleblower from disclosing the information when the award has already been paid, the National Taxpayer Advocate suggests the reported taxpayer should be allowed to receive damages for the whistleblower's subsequent unauthorized disclosures.¹⁶ If the IRS officer revealed the information under one of the exceptions to the general non-disclosure rule, i.e. under §6103(h)(4) or §6103(k)(6), then the whistleblower would not be subject to the sanctions. The Whistleblower Office admits that there is no effective sanction if the whistleblower violates the confidentiality agreement.¹⁷

However, a whistleblower would be subject to IRC §7213 sanctions if he obtained the information illegitimately, (such as if the IRS officer wrongly provided him the information), and the whistleblower then willfully prints or publishes the information.¹⁸ The whistleblower would also be subject to the sanctions if he entered into a tax administration contract with the IRS under an IRC §6103(n) contract.¹⁹ However, this remains an unused sanction as the IRS has never entered into a contract under IRC §6103(n).²⁰

The question remains whether the sanctions would significantly deter wrongdoing, given that the amounts have never been adjusted for inflation since enactment. Established more than forty years ago in 1976, the statutory damages under IRC §7431 cap at

¹³ IRC §6103(k)(6); Treasury Regulations § 301.6103(h)(4)-1.

¹⁴ Treasury Regulations §§ 301.7623-3(c)(3)(iii), 301.7623-3(c)(4).

¹⁵ Treasury Regulations § 301.6103(h)(4)-1.

¹⁶ *Protect Taxpayer Privacy in Whistleblower Cases*, National Taxpayer Advocate, Internal Revenue Service, 2010 Annual Report to Congress, Vol. 1, Legislative Recommendations #7, at 396-97 (2011), *see*: https://www.irs.gov/pub/tas/legislativerecommendations_2010arc.pdf.

¹⁷ Internal Revenue Service, IRS Whistleblower Program, Fiscal Year 2015, Annual Report to the Congress, at 9, *see*: https://www.irs.gov/pub/whistleblower/WB_Annual_Report_FY_15_Final%20Ready%20for%20Commissioner%20Feb%208.pdf.

¹⁸ IRC § 7213(a)(3).

¹⁹ IRC § 7213(a)(1), (2); *see also* Treasury Regulation § 301.6103(n)-2(c).

²⁰ Internal Revenue Service, IRS Whistleblower Program, Fiscal Year 2016, Annual Report to the Congress, at 8, *see*: https://www.irs.gov/pub/whistleblower/fy16_wo_annual_report_final.pdf.

\$1,000 and the fines under IRC §7213 cap at \$5,000.²¹ Adjusted for inflation, these amounts would be \$4,000 and \$21,000 in 2015 dollars.²² Instituted in 1997, the \$1,000 maximum fine under §7213 is slightly less outdated, but would also be greater at \$1,500 in 2015 dollars.²³

D. Lack of Safeguards

Safeguards are one of the methods of ensuring that information is not disclosed and that it is kept physically safe to prevent inadvertent or negligent disclosure. IRC §6103(p)(4) has a list of safeguards that the listed government agencies must abide by, such as maintaining “a secure area or place in which such returns or return information shall be stored,” to the satisfaction of the IRS Secretary.²⁴ However, these requirements apply only to the IRS officer—not to the whistleblower.²⁵ Therefore, regardless of whether the whistleblower acquired the information himself or through the IRS, that information would not have a physical information protection when it is in the whistleblower’s hands. One can imagine a situation in which the whistleblower leaves a copy of the return information visible or accessible to passing eyes. Thus, the National Tax Payer Advocate recommends requiring that the whistleblower enter into confidentiality agreements with the IRS that impose a safekeeping requirement.²⁶ However, even if the safeguards applied to whistleblowers, the safekeeping requirement would be significantly more difficult to enforce than to the officers, as the IRS Secretary cannot as easily oversee a whistleblower as he can an IRS agent.

An existing rule does impose safeguard requirements on the whistleblower: IRC

²¹ *Whistleblower Program: Make Unauthorized Disclosures of Return Information by Whistleblowers Subject to the Penalties of IRC §§ 7431, 7213, and 7213A, Substantially Increase the Amount of Such Penalties, and Make Whistleblowers Subject to the Safeguarding Requirement of IRC §6103(p)*, National Taxpayer Advocate, Internal Revenue Service, 2015 Annual Report to Congress, Vol. 1, Legislative Recommendations #14, supra note 12, at 416 (2016), see: http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARCI5_Volume1.pdf.

²² *Id.*

²³ *Id.*

²⁴ IRC §6103(p)(4).

²⁵ *Whistleblower Program: Make Unauthorized Disclosures of Return Information by Whistleblowers Subject to the Penalties of IRC §§ 7431, 7213, and 7213A, Substantially Increase the Amount of Such Penalties, and Make Whistleblowers Subject to the Safeguarding Requirement of IRC §6103(p)*, National Taxpayer Advocate, Internal Revenue Service, 2015 Annual Report to Congress, Vol. 1, Legislative Recommendations #14, supra note 12, at 416 (2016), see: http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARCI5_Volume1.pdf.

²⁶ *Whistleblower Program: The IRS Whistleblower Program Does Not Meet Whistleblowers’ Need for Information During Lengthy Processing Times and Does Not Sufficiently Protect Taxpayers’ Confidential Information From Re-Disclosure by Whistleblowers*, National Taxpayer Advocate, Internal Revenue Service, Objectives Report to Congress Fiscal Year 2017, Vol. 2, IRS Responses and National Taxpayer Advocate’s Comments: Regarding Most Serious Problems Identified in the 2015 Annual Report to Congress, at 83 (2017) (providing IRS’ response to the Tax Advocate Service’s recommendation), see: https://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-JRC/Volume_2.pdf

§6103(n). Still, the situation that would allow for the application of this rule has never arisen.²⁷ This provision allows the IRS to enter the premises of the whistleblower (or his legal representative) and ensure that the return information is secure.²⁸ However, this provision only applies when the IRS enters into what is known as a “tax administration” contract with the whistleblower. Because the IRS has never entered into a §6103(n) contract with a whistleblower, this safeguard remains but an empty protection.

E. Lack of Remedies

The remedy that is available under current code provisions is significantly outdated. Even seeking the remedy may prove difficult, as the taxpayer would not be a party to the case to be able to have a claim for damages.²⁹ To make matters worse, if the Tax Court found that the reported taxpayer was noncompliant as the whistleblower insists he is, it is likely the nonparty taxpayer will have even more difficulty in winning damages because there would be a prejudice against him. Even if the Tax Court determines that the taxpayer was indeed compliant, the nonparty taxpayer has had his information disclosed publicly for no reason. The reported taxpayer would still face the burden of showing damages for ruining a name, which is difficult to quantify. This scenario assumes that the taxpayer was aware that he was mentioned in the claim. However, because there is no notice requirement, the taxpayer may have never known that the whistleblower mentioned his information, which is itself a disturbing matter.³⁰

F. Lack of Judicial Procedural Rules

In 2012, the Tax Court amended its procedural rules to require that the whistleblower who appeals an IRS award decision must exclude or redact the reported taxpayer’s identifying information. Previously, whistleblower pleadings and court decisions regularly included the reported taxpayer information as a matter of practice.³¹ An area when taxpayer information may become inappropriately disclosed is in discovery. As the IRS admitted, “[t]here appears to be no effective sanction, and no effective restraint, when a whistleblower obtains confidential taxpayer information in discovery and chooses to

²⁷ Fiscal Year 2016, Annual Report to Congress, *supra* note 20.

²⁸ IRC § 6103(n).

²⁹ Internal Revenue Service, Whistleblower Program (Internal Revenue Code 7623), Fiscal Year 2014, Report to the Congress, at 7, *see*: https://www.irs.gov/pub/whistleblower/WB_Annual_Report_FY_14_Final_Signature_June_11-signed%20corrected.pdf.

³⁰ Most Serious Problems #13, *supra* note 6, at 156.

³¹ See, e.g., *Cooper v. Commissioner of Internal Revenue*, 135 T.C. 70, 71 (T.C. 2010) (in which a whistleblower appealed to the Tax Court when his claim had not resulted in a reward and unfairly disclosed the reported taxpayer’s name. The Court determined the taxpayer owed nothing in taxes.).

release that information to the public.”³² In the 2016 Annual Report, the IRS stated “there is no restraint on whistleblowers redisclosing return information following the completion of the administrative and judicial processes.”³³ Such a lack of protective judicial measures is particularly unsettling given the simultaneous lack of statutory protections discussed above.

While the United States IRS Whistleblower Program has taken laudable strides to improve the protection of taxpayer information, there remains a need for reinforced protections, as other governments should take note.

III. EUROPE

As the European Parliament announced it would “study best practices from whistleblower programmes already in place in other countries around the world,”³⁴ it is likely that the EP will look to the United States IRS Whistleblower Program. However, it is unlikely that they prioritize the taxpayer right to privacy given their broad and media-driven agenda. With the media pressures that have accompanied the recent LuxLeaks scandal—whereby Luxembourg strives to convict high-profile whistleblowers to uphold its legislative protection of business secrets, much to the dismay of the European Parliament—it is likely that the public and the parliament will align with the interests of the whistleblower, forgetting those of the taxpayer civilians.

The European Parliament voted to institute a whistleblower protection program in the February 14, 2017 plenary session.³⁵ The European Parliament requested that the Commission submit a legislative proposal before the end of 2017, and called upon those Member States that do not have existing principles in their domestic law that protect whistle-blowers to introduce these as soon as possible.³⁶ Indeed, after the LuxLeaks verdict, which German MEP, Sven Giegold calls one that reduces “heroes to criminals,” Members of the European Parliament demand a new and comprehensive whistleblower program.^{37 38}

³² Report to the Congress, *supra* note 29.

³³ Annual Report to the Congress, *supra* note 4.

³⁴ European Parliament Resolution on the role of whistleblowers in the protection of EU’s financial interests (Feb. 2 2017), 2016/2055(INI), P8_TA-PROV(2017)0022, *see*: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0022+0+DOC+PDF+Vo//EN>.

³⁵ Teri Sprackland, *European Parliament Votes for EU-Wide Whistleblower Protection*, taxnotes, Worldwide Tax Daily (Feb. 15, 2017), *see*: <http://www.taxnotes.com/worldwide-tax-daily/2017-02-15>.

³⁶ *Id.*

³⁷ Teri Sprackland, *Appeals Court Reduces Sentence of LuxLeaks Whistleblower*, taxnotes, Worldwide Tax Daily (Mar. 16, 2017), *see*: <http://www.taxnotes.com/worldwide-tax-daily/2017-03-16>.

³⁸ *EU Parliamentary Group Criticizes LuxLeaks Appeal Verdict*, Tax Analysts, Transfer Pricing Expert, (Mar. 16, 2017), *see*: <http://www.taxnotes.com/transfer-pricing-expert>.

The program goals seem overambitious in scope. It seeks to protect whistleblowers that “disclose their information on possible irregularities affecting the financial interests of the Union.”³⁹ The definition of “possible irregularities” has yet to be limited. A U.K. MEP, Molly Scott Cato advocated for protection in “all areas of EU competence,” mentioning “environmental crimes, human rights violations, and any other wrongdoing.”⁴⁰ If the final proposals do indeed reflect such a broad vision, the implementation may prove unwieldy, given the complexity inherent in each area. The United States boasts its own independent office for purely tax whistleblowing and despite this dedicated resource; the complexity of the problem proves there are no easy answers.

With the European Parliament’s broad ambitions, it is likely that the privacy rights of the taxpayer will be neglected. The text adopted by the European Parliament focuses exclusively on the confidentiality of the whistleblower and does not mention protecting the interests of the reported taxpayer. Thankfully, the European Parliament does mention inclusion of a good faith requirement (albeit a relatively lenient one), which would aim to bar ill-intentioned whistleblowers, by requiring a reasonable belief that the information is true at the time the whistleblower reports it, with an allowance for honest errors.⁴¹ Barring bad faith whistleblowers is a preventative measure in minimizing whistleblowers from intentionally disclosing taxpayer information.

The European Commission is expected to provide an anti-tax-evasion directive, which would include some whistleblower protections in 2017.⁴² However, unless there are specific safeguards to protect taxpayer privacy, such a directive could serve to erode taxpayer privacy rights instead of protect them.

With the difficulty of implementing a whistleblower program and the circumstances that glorify the protection of the whistleblowers, European taxpayers have reason to be fear for their privacy rights.

IV. AUSTRALIA

The Australian Government of the Treasury issued a consultation paper, called *Review of Tax and Corporate Whistleblower Protections in Australia*, which is not law, but is a discussion paper that solicited comments from the public by February 10, 2017. The consultation paper is much more detailed than Europe’s published plans, and does explicitly contemplate the importance of protecting the taxpayer. It specifically refers to

³⁹ *EU Parliament Issues Motion for Resolution on Whistleblower Protection*, Tax Analysts, Worldwide Tax Daily, Other Administrative Documents (Feb. 15, 2017), *see*: <http://www.taxnotes.com/worldwide-tax-daily/2017-02-15>.

⁴⁰ *Teri Sprackland, European Parliament Votes for EU-Wide Whistleblower Protection*, Worldwide Tax Daily (Feb. 15, 2017), *see*: <http://www.taxnotes.com/worldwide-tax-daily/2017-02-15>.

⁴¹ *Id.*

⁴² *Id.*

the regimes in place in the US, New Zealand, and Canada, and announces that like the laws in these jurisdictions, the Australian Tax Office will be prohibited from releasing “any information pertaining to the progress of the investigation.”⁴³ While these statements may not become law, the fact that the consultation paper at least contemplates the privacy of the taxpayer should be reassuring to Australian taxpayers. As part of the comments it sought from the public, it explicitly asked commenters whether they agree “that the proposed tax whistleblower protections should include provisions preventing the disclosure of taxpayer information to the informant.”⁴⁴ A commenter, Kenneth H. Ryesky, Esq. wisely observed that “[i]n processing the whistleblower report, there needs to be an evenhanded balance between the whistleblower and the taxpayer who is the subject of the whistleblowing.”⁴⁵ The Australian government shows admirable clairvoyance in contemplating the risks to taxpayer privacy rights even at such an early stage in the implementation of its whistleblower program.

V. CONCLUSION

The global push towards increased compliance is a worthy one, but as the United States IRS Whistleblower Program shows, without the proper safeguards, compliance endangers taxpayer privacy. Perhaps this is a compromise taxpayers are willing to make. But such a compromise should be the result of a conscious choice as opposed to an ignored side effect. The IRS Whistleblower Program has made great progress since it was first instituted, and the Tax Court has amended its procedural rules to provide more protection for taxpayer privacy thanks to advocates of taxpayer privacy. With this knowledge, the United States and other jurisdictions may optimistically journey towards a future of increased compliance while valiantly striving to protect taxpayer privacy.

⁴³ The Australian Government, Review of Tax and Corporate Whistleblower Protections in Australia, THE AUSTRALIAN GOVERNMENT THE TREASURY, (Dec. 20, 2016), see: <http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2016/Whistleblower%20protections/Key%20Documents/PDF/CP-whistleblowing.ashx>

⁴⁴ *Id.*

⁴⁵ Commentary Submission by *Kenneth H. Ryesky, Esq., Practitioner Responds to Australian Whistleblower Protections Consultation*, WORLDWIDE TAX DAILY (Feb. 7, 2017). See: <http://www.taxnotes.com/worldwide-tax-daily/2017-02-07>.