CEJ
COMPLIANCE
ELLIANCE
JOURNAL

PROCEEDINGS OF THE 5TH MUNICH COMPLIANCE TALK

Antonia Orterer & Theresa Albert

AUTHORS

Antonia Orterer is currently working as a scientific associate for Prof. Dr. Hendrik Schneider at the chair for Criminal Law, Criminal Procedure, Criminology, Juvenile Law and Sentencing at the University of Leipzig Faculty of Law, where she is also writing her doctoral thesis. Ms. Orterer passed the first state examination at the University of Munich in 2016.

Theresa Albert studies law at the Johann-Wolfgang Goethe University in Frankfurt/Main. She works as Office & Research assistant for Prof. Dr. Hendrik Schneider. (www.hendrikschneider.eu)

The Munich Compliance Talk entitled "Legal Privilege – What is its use actually about?" took place on April 26th, 2016 at the Literaturhaus Munich. At this event, which has been organized together by the Deutschen AnwaltSpiegel – Gruppe and Recommind, compliance professionals, namely lawyers, employees of in-house legal departments, compliance officers and compliance managers have been present. The conference program included impulsive lectures by the experts Dr. Burkhard Schmitt[1] (Vice President, Head of EMEIA Compliance at Fujitsu, Munich) and Patrick Späth[2], LL.M. (Counsel of WilmerHale in Berlin). Emphasis was – among other things - placed on the legal framework of legal privilege. Moreover the focus was on the company´s point of view, thus the question, how to deal with legal privilege in the company.

The opening was made by the compliance officer of Fujitsu, Dr. Burkhard Schmitt. He spoke about the interests concerned by legal privilege and the aims pursued by means of legal privilege. Furthermore he orated about the legal framework of legal privilege. Thereby he started with two examples from current case law, which deal with the problem of legal seizure of investigation reports in a company, which itself has previously commissioned those reports by extern law firms. In doing so he raised the question whether the seizure has been lawful or not, but in the first instance this question remained unanswered. In order to put explanations regarding the accompanying clashing interests first, one should for instance be aware of the collision of the affected companies´ interests and those interests of the individual or of the state. Moreover the striving for substantive truth on the one hand and procedural guarantees on the other hand would be opposed. Besides internal investigations would pursue different aims than the state´s investigations.

As regards legal privilege, the legal problem would be focused on the guarantee of free communication between the suspect and his defense counsel (§ 148 StPO), as well as on the associated right to refuse to give evidence and correlative confiscation bans (§ 97 StPO in conjunction with § 53 StPO). However, the confiscation of the suspect´s notifications being in the custody of a person who has got the right to refuse to give evidence, i.e. the defense counsel, an attorney or a notary, would be prohibited, but, so said Dr. Schmitt, this would according to the new legal framework not apply – subject to § 53a StPO – for the in-house counsel regarding those information, that was entrusted to him in that capacity. Whereas his work products would, according to the jurisdiction of the *LG Mannheim* be protected by § 148 StPO. Moreover § 148 StPO would as well apply in relations between the company und its attorney. To round off his speech the referee then answered the questions that he asked at the beginning. The investigation report would be covered by § 148 StPO – that is what the *LG Braunschweig* ruled – as far as it has been created for needs of defense.

---

1 Vice President, Head of EMEIA Compliance at Fujitsu: burkhard.schmitt@ts.fujitsu.com.

2 Counsel at Wilmer Hale: patrick.spaeth@wilmerhale.com

The attorney Patrick Späth then took up the company´s point of view. At the beginning of his speech he laid down that companies regularly deal with the question, whether they really "want" legal privilege. In doing so he made reference to the motto of the event "Legal Privilege – What is its use actually about?". As cooperation with the prosecution authorities would be considered positively, the companies should think carefully about their conduct towards the prosecution authorities, even if legal privilege is the companies´ undeniable right. If one pursued legal privilege, the clarification of the intern communication issues in the company would be decisive. It would fundamentally be recommendable to limit the communication to few employees only as well as to limit the written communication if possible. Moreover it might be necessary to acquire specific legal expertise in cases of doubt and there should always be an extern attorney present when it comes to employee interviews.

The subsequent closing discussion broached the issue of whether companies had the obligation to decrypt data that has been encrypted by the company for safety reasons, if required by prosecution authorities. Agreement was reached that there would not be such an obligation in case of an existing confiscation ban, while, conversely, i.e. there is no confiscation ban, decoding would have to be performed. Besides referring to this the difference between duties to tolerate and active obligations to cooperate were discussed. Furthermore the question, whether within the scope of employee interviews, which should only be hold in the presence of an attorney, an intern attorney would be hold sufficient or an extern attorney would be considered to be preferable, came up. The speakers deemed with respect to the still contradicting jurisdiction on such cases hiring an extern attorney as preferable as this would guarantee greater and safer protection.