A shifting landscape of privilege in internal investigations

Skadden partners Elizabeth Robertson, Bernd Mayer, Keith Krakaur, Ryan Junck and Gary DiBianco consider the impact of recent court rulings in the UK, Germany and the US on privilege in corporate investigations.

Recent decisions in English, German and US courts highlight the fact that traditional principles of legal professional privilege in the investigations context are being tested by regulators and civil litigants across the globe.

This article considers applicable principles of privilege in England and Wales, Germany and the US, analyses recent case law and considers the potential privilege pitfalls that companies going through an investigation should be alert to in the current privilege landscape.

Principles of privilege

England and Wales

In England and Wales there are two forms of legal professional privilege companies have traditionally sought to rely on to protect documents created in the context of internal investigations:

(i) legal advice privilege, which protects confidential communications passing between the client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice. Following recent developments in case law, the English courts have interpreted the "client" as a narrow group of individuals who are employed by the company to seek and receive legal advice.

(ii) litigation privilege, which protects communications between parties or their solicitors and third parties which are created for the purpose of obtaining information or advice in connection with existing or contemplated litigation when at the time of the communication: litigation is in progress or reasonably in contemplation; communications are made with the sole or dominant purpose of conducting the anticipated litigation; and the litigation must be adversarial, not investigative or inquisitorial.

Germany

In Germany, the concept of privilege is founded on the rules of professional secrecy. The professional secrecy obligation relates to all information that has become known to the lawyer in his or her professional practice and is intended to protect the relationship of trust between client and lawyer. The obligation gives lawyers a right to refuse testimony, regardless of whether they advise on criminal law or other areas of law. To further protect this right, the Code of Criminal Procedure prohibits public prosecutors from seizing related documents. This applies to client-related correspondence, notes and other materials that are covered by the right to refuse testimony.

Although many documents created in the context of an internal investigation qualify as attorney work-product or attorney-client communications, the German Code of Criminal Procedure places a number of restrictions on the exemption of seizure that mean that not all documents created in internal investigations are protected. For example, the exemption will only apply if the company itself is accused or suspected in the investigation or the documents are in the custody of counsel and not the client or other third parties. Documents that are in the custody of the client or a third party, such as IT vendors or external auditors, generally will not be protected. An exception to this rule is correspondence between the accused and defence counsel, which will be protected wherever it is located.

US

When US companies conduct internal investigations, there are two privilege protections at play: the attorney-client privilege and the work-product doctrine.

The attorney-client privilege protects confidential communications between a company and its attorneys in the context of soliciting or providing legal advice. Privileged investigation materials may include confidential interviews with company employees (subject to *Upjohn* procedures that require corporate attorneys to warn employees that privilege resides with the company and that the company may choose to waive this privilege).

The attorney work-product doctrine protects materials prepared in "anticipation of litigation" by the company or its representatives, which includes attorneys and specialists such as forensic accountants. Most documents created during an internal investigation by a company's counsel, or at counsel's direction, are considered to constitute protected work-product. Examples of protected work-product are witness interview memoranda and compilations of facts gathered by attorneys in the course of the investigation.

Recent case law

England

Within the last six months, the High Court of England and Wales has handed down two potentially landmark rulings that question the application of privilege in internal investigations: *RBS Rights Issue Litigation* and *Serious Fraud Office v Eurasian Natural Resources Corporation Ltd (ENRC)*. It is important to understand that both cases were decided on very specific facts.

In *RBS* the court considered the issue of who is the client for the purposes of legal advice privilege. In the course of the proceedings, the claimants, comprising thousands of investors, sought disclosure of interview notes taken by RBS's internal and external legal counsel during internal investigations conducted for the bank. RBS sought to withhold access to these notes on two grounds: first, claiming legal advice privilege and second,



on the basis of the lawyers' working papers doctrine. The judge narrowly defined the "client" for the purposes of analysing the application of legal advice privilege and followed the position that only those who seek and receive legal advice on behalf of a corporate body classify as a "client" for purposes of the privilege. Further, it was held that the mere authority to provide factual information to lawyers is not sufficient to render the individual providing that factual information a client. The interview notes were not protected by the lawyer's working papers doctrine because they did not betray or "give a clue" as to the nature of advice that had been given by the client. The court found it insufficient to merely show that interview notes are not verbatim transcripts or that they contain mental impressions or physical annotations. Something more is required, such as legal analysis on the part of the interviewers, which gives an indication as to the nature of legal advice being given.

In *ENRC*, the SFO primarily challenged ENRC's assertion of litigation privilege over documents prepared during an internal investigation when the company was engaged in a dialogue with the agency regarding allegations of bribery and corruption. The documents sought by the SFO were created prior to the agency commencing a formal criminal investigation and included (i) notes prepared by ENRC's external counsel of interviews of numerous individuals, including former and current employees of ENRC, officers of ENRC and its subsidiaries and suppliers, relating to the events being investigated; and (ii) documents generated by forensic accountants during the same period as part of a books and records review, which sought to identify systems and monitor weaknesses and potential improvements. ENRC claimed that the documents were subject to litigation privilege as the dominant purpose of the documents was to enable ENRC's external legal counsel to obtain relevant information to advise ENRC in connection with the anticipated adversarial, criminal litigation. The court rejected the argument and drew a distinction between criminal investigations and prosecutions, contending that "the reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution." It is the first judicial consideration of litigation privilege in the context of voluntary disclosures to the SFO pursuant to its 2009 and 2012 guidance on cooperation in overseas corruption investigations. ENRC has sought leave from the Court of Appeal to appeal against the decision.

Germany

The exemptions to the seizure restrictions have been considered by the German courts on a number of occasions, recently including whether notes of employee interviews prepared by the company's external counsel in an internal investigation could be seized by prosecutors. In 2010, the Hamburg Regional Court held that the seizure exemption rule did not apply because the criminal investigation related to employees only and the company itself was not accused or suspected. Similarly, materials created by external counsel retained by a parent company to conduct an internal investigation into a subsidiary could be seized. In 2012, the Bonn Regional Court held that external counsel had no client relationship with the subsidiary that was the accused company in an antitrust case.

As stated above, the exemption from seizure only applies if the materials are in the custody of counsel. However, the Mannheim Regional Court decided that even those materials may be seized under certain circumstances: the courts will apply an "abuse test" to the exemption, which can result in the court determining that documents are not protected if a client trans-

Overleaf left to right
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Left to right
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ferred them to the custody of counsel solely for the purpose of obtaining the protection under the seizure exemption.

The search of Volkswagen's external counsel's offices in March 2017 is the most recent case causing concern among internal investigators in Germany. Both the law firm and Volkswagen sought to challenge the search claiming that it "contravenes the principles of the Code of Criminal Procedure". However, the Munich Regional Court I disagreed and in early May determined that the search and seizure of documents was lawful. The court's reasoning has yet to be published, however, Volkswagen and the law firm has appealed against the decision to the Federal Constitutional Court.

United States

US Department of Justice (DOJ) and the Securities Exchange Commission (SEC) policies encourage voluntary disclosures of potential wrongdoing by companies to these authorities, and both agencies encourage cooperation with US government investigations. Such cooperation typically includes the provision of factual information from internal investigations that the company has conducted, including factual information provided by company employees in witness interviews. Although the DOJ and SEC have policies not to request corporates to waive privilege and produce protected information, the mere provision of factual information from an internal investigation may implicate the attorney-client and attorney-work product privileges. Accordingly, US companies frequently seek written assurances from the DOJ and the SEC that they will not consider the sharing of certain types of information (for example, the product of interview summaries or memos) as a waiver of privilege to themselves or to third parties. Several cases have addressed this "selective waiver" theory and a split between the authorities has developed: certain appellate courts uphold the doctrine that disclosure to authorities does not waive privilege as to third parties, while other circuits hold that any disclosure of attorney-client privileged information, even with written assurances of confidentiality and non-waiver, constitutes a waiver as to third parties.

In the recent *USA v Hussain* case, defence lawyers for Sushovan Hussain, the former CFO of British software company Autonomy, sought disclosure of information from an internal investigation conducted by Morgan Lewis & Bockius into Hewlett-Packard's 2011 acquisition of Autonomy. Hussain's counsel argued that HP and Morgan Lewis acted on the government's behalf in the investigation, citing a "close working relationship" between the company, the law firm and the government. Both HP and the US Attorney's Office (USAO) objected to the request on several grounds, including that Morgan Lewis was representing the interests of HP's board and was not working at the behest of the government; and that Morgan Lewis, on behalf of HP, had entered into confidentiality agreements with the USAO and the SEC to protect the privilege otherwise applicable to certain documents and communications that were shared with the authorities while cooperating.

In May 2017, a district court ruled that because the government did not retain or control HP's investigators, government prosecutors were not required to look into the Morgan Lewis files for any potentially advantageous material. The court also ruled while that defence lawyers could still seek information from the Morgan Lewis investigation via subpoenas served on the firm and the company, the firm would probably assert that the material is protected by attorney-client privilege, effectively upholding the selective waiver in this case.

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The future of privilege in internal investigations

The recent English cases do not mean that a company can no longer obtain legal advice privilege in the context of an internal investigation. Communications between the lawyer and "client", as defined for the purposes of legal advice remain protected. However, read in conjunction, the judgments could dramatically affect the practice of internal investigations in the UK, particularly those undertaken to address whistleblower allegations or compliance concerns without a formal inquiry from a government agency. What's more, it is reasonable to assume the SFO will continue to challenge assertions of litigation privilege over interview notes and other materials created by lawyers and third parties, such as forensic accountants, during an internal investigation. As a result, companies should consider when creating documents whether they could ultimately be disclosed to the agency.

In Germany, the increase in the number of high-profile raids of law firm offices and the resulting challenges illustrate that there are significant limits to Germany's narrow legal concept of "privilege", and public prosecutors are clearly willing to challenge the professional secrecy obligation. Lawyers conducting internal investigations should carefully assess whether their client is accused in the proceedings. This may not be clear at the outset because it is common for prosecutors to initially focus on allegedly criminal conduct of individuals and legal persons can only be accused of administrative offences under German law. If criminal proceedings are directed against employees only, counsel should consider whether it is possible that the company will become suspected or accused of a related administrative offence at a later stage. Further, during internal investigations, counsel should keep in mind that correspondence with defence counsel will enjoy stronger protection than correspondence with other counsel – for example, pure corporate counsel.

Unless there are disclosures of otherwise privileged information to external authorities, generally a US company can conduct an internal investigation in the US while enjoying the protections of the attorney-client privilege and the work-product doctrine. However, current US jurisprudence suggests that there can be risks to this privilege when either an investigation is conducted solely for the purpose of providing information to the government or a company shares protected information from the investigation with the government.

Although the recent case law developments in England and Wales, Germany, and the US raise different privilege questions, the results illustrate that companies and lawyers conducting internal investigations need to appreciate that the principles of privilege are not settled, any judgment of the application of privilege can be fundamentally affected by the specific facts of the case and the different jurisdictional approaches need to be considered, particularly when confronted with a cross-border investigation spanning multiple jurisdictions and regulators. This is particularly important with the increase in regulatory cooperation across the world and companies should not make assumptions of privilege protection.