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PERSPECTIVES

COMMITTEES OF INQUIRY – THE STRONG BUT SHORT ARM OF PARLIAMENTS

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Lawmakers as investigators? What appears to be a caricature of the separation of powers principle is in fact commonplace when it comes to major public scandals in business. Corporates have to deal not only with domestic and foreign prosecution offices, regulatory and supervisory authorities and civil claimants. On top of all that, they also have to directly deal with parliaments. Since last October, a committee of inquiry of Germany's Bundestag has been holding hearings into the Wirecard scandal. Before that, German MPs had focused on cum/ex transactions and the emissions scandal.

Criminal, regulatory and civil proceedings at home and abroad typically begin in parallel with such committee hearings, but they can also be instigated and fuelled by the media dimension of parliamentary fact-finding. The brief imprisonment of the head of a German trade union company to compel his testimony before a committee of inquiry and the resignation of a renowned chief executive of Wells Fargo following his testimony hearing before the US Senate Banking Committee have not been forgotten. Most recently, EY auditors have become the target of the German Wirecard committee.

In many places, a parliament's right to investigate on a case-by-case basis is a core element of

democracy and the rule of law. In Germany, it is granted by constitutional law and exercised by committees, which may be established by both the German Bundestag and the sixteen state parliaments. Their work is a specific instrument of parliamentary control.

It would, however, be a mistake to assume that this topic was exclusively aimed at the executive branch. In practice, initial questions relating to state entities are frequently used contrary to their intended purpose, so MPs can have a closer look at the inner workings of companies that are somehow involved, or are merely suspected of being somehow involved, and the individuals in charge at these companies. Germany's Federal Constitutional Court has clarified that private sector issues may also be a legitimate object of inquiry if, as is virtually always the case in the modern regulated economy, there is a link to governmental aspects. Such a link is assumed to exist if, for example, there have been possible rules violations or even if just subsidies or public contracts were involved.

Documents and, most importantly, witness statements are a key source of information. Generally, the provisions of the German Code of Criminal Procedure governing the taking of evidence apply analogously to the taking of evidence by committees of inquiry, which includes the imposition of coercive instruments – for example a fine, imprisonment, search, seizure and confiscation.

Generally, every individual resident in Germany can be summoned to testify before a committee of inquiry. However, for German and foreign nationals living abroad to testify, an international agreement must be in place that expressly permits extraterritorial service of summons for the specific purpose. Experience shows that such an agreement usually does not exist. Committees of inquiry are not permitted to summon witnesses under treaties on mutual legal assistance in criminal matters: in criminal proceedings, a court examines whether a crime has in fact been committed and whether a particular individual can be found personally guilty. In contrast, the proceedings before a committee of inquiry are about nothing more – but nothing less, either – than establishing the facts from a political view.

In the absence of a valid summons, a witness declining the 'offer' to testify cannot be objected to from a purely formal legal perspective. Whether or not such a response may be deemed the reasonable response to a parliamentary body, however, should be reviewed carefully, taking into consideration the advantages and disadvantages of testifying voluntarily. Voluntary testimony is possible and is, in fact, frequently given.

The reason for this is that taking a confrontational stance is not always the best option. In cross-border matters in particular, committee members are sometimes keen to access witnesses residing abroad. It has also been observed that, occasionally,

the political context is the cause for particular sensitivity. This is why, sometimes, even if a witness is claiming legitimate interests, he or she might be deemed to be uncooperative or even to be using blocking tactics, which is met with consequences. During the hearings of the Wirecard committee of inquiry, for example, legal uncertainties about the scope of the duty of confidentiality have culminated in politicians questioning any further collaboration with the witnesses' auditing firm, securing maximum publicity.

Evidence as means of political warfare

Media reporting is far more intimate with the work of committees of inquiry than with the typical taking of evidence in court proceedings. For that reason, appearing in person, for example, is fraught with different and additional risks. Committees of inquiry serve the purposes of political battles of opinion. In Germany, the parliamentary minority, too, has the right to establish committees of inquiry and to be heard with their requests for the taking of evidence accordingly. In terms of comparative law, this is unusual, which is why committees of inquiry are mainly used as a political instrument by the opposition. Opposition politicians benefit more from the investigations as such, and less from their findings.

Sometimes, this means that witnesses become caught in the crossfire of the political battle of opinion. Having to wait in the corridors of the parliament building for hours and hours on end is

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just the beginning of what will happen to them in the hearing room. Public perception of a witness reflects onto the company that the witness represents. Moreover, there might be considerable implications for further criminal investigations into the matter, not least because studies have shown time and again that public prosecutors and judges have taken a biased view of a case because of media reports.

Parallel investigations conducted by law enforcement authorities

Where law enforcement authorities conduct parallel investigations, the fact that they can be influenced by media coverage is not the only area of concern. Of great practical importance is the direct



transfer of information. Word-for-word minutes are taken of all committee meetings and, therefore, of the taking of evidence as well, and routinely an audio recording is also made. It is not unusual for public prosecutors and law enforcement officers to attend committee meetings as observers.

However, it is totally unusual for them not to request the committee's files about relevant witness examinations. Witnesses will find it hard to distance themselves in other proceedings from their statements documented in those files, not least because making false statements before a committee of inquiry is an offence

punishable by imprisonment of up to five years. Vice versa, prosecutors today know that their own investigations are not immune from later becoming the subject of a parliamentary committee of inquiry.

Protecting secrets

Committees of inquiry generally tend to request that law enforcement authorities submit their investigation files. In addition, they may use documents from private individuals and companies. This is tricky because the scope of file inspection and production requests can be so broad as to make it entirely unclear what is in fact being requested. In addition, sensitive trade and business secrets might be at risk of being disclosed.

It is therefore advisable to contact the committee as soon as possible. First, to address any potential interpretation issues and, second, to agree on the further course of action in order to ensure the protection of sensitive information. One conceivable solution would be for documents to be produced in redacted form or to be categorised as classified information. But there are also other, more individualised solutions that may be considered, provided that the committee has given its consent.

Protecting the individual

Witnesses and recipients of production requests are often not familiar with what the work of a committee of inquiry is like in real life, and they are not aware of the legal and factual risks. From a rule

of law perspective, it is highly problematic that no structural corrective for protecting the individual is in place when it comes to assembling committees. All members, including the chairman, are politicians and are motivated by the – more or less – strongly pronounced political interests of their respective parties. None of them is a neutral judge, and many of them also lack forensic experience. Still, they may use the invasive instruments of criminal procedure.

The lawyer as counsel, defence attorney and negotiator

A possible remedy for witnesses is to opt for counsel to be present at the examination. Experience shows that counsel's involvement should begin early on. It is true that witnesses are obliged only to focus on what is happening during the examination and that they are not also obliged to engage in any preparatory work ahead of the examination. Still, it is advisable to thoroughly familiarise oneself with the subject matter of the examination. This will at least potentially help counteract the allegation of being uncooperative. In this context, witnesses benefit from a special feature of committee of inquiry proceedings: in their summons, they are informed about the subject matter, which is not the case in criminal proceedings.

Moreover, the involvement of counsel should not end immediately after the hearing. The witness will be provided with a verbatim transcript of his or her testimony and be given the opportunity

to review and correct it. Since the hearing is not deemed complete until the witness has had that opportunity, the risk of making false statements can be minimised. This opportunity should be seized with proper consideration, not least because of the significance of the testimony for parallel criminal and civil proceedings.

Lawyers must not regard the tasks and responsibilities of counsel as a limitation. A parliament's right to conduct investigations is a special hybrid legal field with numerous areas of conflict. A lawyer is obliged to ensure that the rights of his or her client are safeguarded. This obligation includes, first, to prevent any unlawful fishing expeditions, to invoke the right of his or her client to remain silent and, in a worst-case scenario, to challenge coercive measures. Second, a lawyer is obliged to ensure that the proceedings are conducted in a fair manner and, in this regard, to act as a moderator ensuring that the political dynamics do not derail.

Therefore, in substance, acting as counsel for the witness may also take the form of acting like a traditional defence attorney in court. However, ideally, the lawyer has an iron hand in a velvet glove. It is often possible to tackle controversial issues proactively in cooperation with the committee of inquiry. In practice, an agreement can frequently be reached that is satisfactory for both sides. **CD**

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