

Commercial Criminal Law Protection

## The subsequent exclusion from insurance coverage in the criminal law insurance for companies and managers

### 1. INTRODUCTION

In Germany, the criminal law insurance for companies and managers is often offered under the name Industrial Criminal Law Insurance („Industrie-Straf-Rechtsschutzversicherung“, ISRS) or Special Criminal Law Insurance (“Spezial-Straf-Rechtsschutzversicherung“, SSR). The insurance concept addresses companies as policy holders and has the purpose to insure criminal law risks of companies, their managers and employees. The insurances are especially tailored to the needs of criminal defense in commercial criminal cases<sup>1</sup>.

A major feature of SSR is the extension of insurance cover to the defense against the reproach of intentionally committed criminal offences. Subsequent exclusions of insurance coverage in case of conviction correspond with this broad scope of insurance. In this case, companies and managers are threatened with repayment claims of insurers for all payments made, which may be especially high in complex commercial criminal proceedings.

This article examines the requirements for the repayment claim. It shows that a defense which also considers the cost risk of the client, offers strategic options to avoid a

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<sup>1</sup> Dahnz, VP 3/2010, 45, 46.

subsequent exclusion. On the other hand it becomes clear that mistakes, both in the negotiation of insurance terms through the company and with the mandate work through the defense lawyer, may cause pitfalls with severe financial consequences.

## **2. THE INSURANCE CONCEPT OF THE SSR**

The SSR usually constitutes a combination of insurance for one's own account and for the account of a third party. In so far as the risks of the company (policy holder) are self-insured, this is insurance for one's own account. A characteristic feature of the SSR is the extension of insurance coverage to a high number of legal and natural co-insured persons (insured persons). Those are the affiliated and associated companies as well as in particular managers, employees and other persons in an employment relationship with the policy holder or its affiliated or associated companies. With regard to these insured persons, an insurance for the account of a third party in the meaning of secs. 43 to 48 Insurance Contract Act (Versicherungsvertragsgesetz "VVG") is given.

## **3. INSURANCE COVERAGE**

In the SSR the claims-made-principle applies. The insured event is usually triggered by the introduction of preliminary proceedings. If the policy holder is affected by the preliminary proceedings against third person, e.g. in case of inspection or seizure of non-suspects according to sec. 103 Criminal Procedure Code (Strafprozessordnung "StPO"), insurance coverage exists from the introduction of judicial measures. Against this, facts of exclusion only become effective subsequently and depending on the conclusion of the proceeding. Therefore, it has to be differentiated among the claim for insurance coverage (3.1) and the subsequent exclusion from insurance coverage (3.2).

### **3.1 The claim for insurance coverage**

The owner of the claim for insurance benefits will in case of insurance for one's own account be the policy holder. If the insured event though occurred to an insured person, this is a case of insurance for the account of a third party. It will then principally be the insured person who is entitled to the insurance claim while the policy holder may assert the claim against the insurer (sec. 45 VVG (sec. 45 VVG, formal entitlement to claim).

Constructions deviating from sections 43 et seqs. VVG are common in the SSR. The insured person will usually be granted the possibility to assert the claim. At the same time, insurance terms will usually provide for rights to reserve approval and/or the possibility to appeal for the policy holder. If an insured person is employed with the policy holder, then there also has to be considered the internal relationship between the policy holder and the insured person, from which both contractually and as a contractual side obligation, a claim of the insured person against the policy holder for approval and/or omission of an appeal may result.

Consequently, in case of the insurance for one's own account the policy holder will be entitled to the insurance benefit and in case of insurance for the account of a third party, the insured person will be entitled to the insurance benefit to cover the respective costs.

### 3.2. Subsequent exclusion from insurance coverage

All insurance terms customary in the market contain, in detail severely different, subsequent exclusion facts. Those cause the omission of insurance coverage and a repayment claim of the insurer concerning rendered payments.

#### 3.2.1. Principles

A major reason for exclusion is a *final conviction for intentionally committed offences*. Insurance terms though regularly contain limitations of this reason for exclusion in so far as the insurance coverage at *conclusion of the proceeding through penal order*, or in case of *conviction to a fine only for dolus eventualis (conditional intent)* remains.

In addition, differentiating clauses are used in case of a *final conviction both for intent as well as for negligence*. Both the determination of the share to be paid back according to the *significance and importance of the individual reproaches* and a limitation of the repayment

claim to *exclusionary costs which would not have incurred in case of a final conviction for negligent offences*<sup>2</sup>.

Opposite to the standard legal expense insurance according to the ARB, a *causal connection* (sec. 3 para. 5 ARB 2010) with an intentionally committed offence is not sufficient as sole reason for the exclusion. This is because this provision relates to cases of the insurance for one's own account, whereby the policy holder loses insurance coverage if the intentionally offence committed by himself or one of his representatives does not constitute the insured event but preceded the insured event<sup>3</sup>. In case of the SSR the reproach of the intentionally committed offence though triggers the insured event.

Therefore, the question is of importance whether in case of a final conviction of the insured person for an intentionally committed offence also the policy holder loses insurance coverage retrospectively. In the area of standard legal expense insurance according to the ARB, intentional action of a co-insured does principally not<sup>4</sup> change the policy holder's claim for insurance protection, as long as the co-insured is not a representative of the policy holder<sup>5</sup>. In the SSR, this question depends on the drafting and interpretation of the specific exclusion clause.

In the area of SSR, it is usually the policy holder who is in case of an insurance for one's own account liable to repayment, in case of an insurance for a third party, the insured person is liable to repayment. Clauses used formerly, according to which in case of a final conviction

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<sup>2</sup> Cornelius-Winkel, VP 6/2016, 22, 23.

<sup>3</sup> Armbrüster in: Prölss/Martin VVG, ARB 2010, sec. 3, recital 107.

<sup>4</sup> Higher Regional Court Frankfurt on the Main of 13 January 1999, 7 U 312/95, NVersZ 1999, 184, 185.

<sup>5</sup> Armbrüster in: Prölss/Martin VVG, ARB 2010, sec. 3, recital 112.

of the insured person for intentionally committed offences, the policy holder is obliged to pay back the payments (made to the policy holder)<sup>6</sup>, are no longer customary in the market.

### 3.2.2. Claims against the insured persons

The central insured risk of managers and employees is the defense against the *reproach of a breach of provisions of criminal law and regulatory offences law*. If the proceeding results in a final conviction for an intentionally committed offence, a reason for exclusion might intervene.

A reclaim is though not possible in case of a termination of proceedings, even if it happened under condition according to sec. 153a StPO stop as in the following example:

*Example 1: Public prosecution investigates against an employee (insured person) of the company (policy holder) on suspicion of criminal misleading advertising (sec. 16 Law on unfair competition „UWG“). Public prosecution offers termination of proceedings according to sec. 153a StPO against payment of a fine.*

In case of conviction, the requirement for the exclusion is that it is performed due to an intentionally committed criminal offence. If the defendant is accused of several offences as in example 2, a defense strategy considering the cost effects may avoid the repayment claim:

*Example 2: An employee (insured person) of the policy holder is accused of intentional breach of sec. 27 Chemical Act „ChemG“ and negligent water pollution (sec. 324 German Criminal Code “STGB”). The court considers a partial termination of*

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<sup>6</sup> Like this e.g. sec. 4 para.. 1 of the special terms for ISRS published in 1983.

*proceedings with regard to sec. 27 ChemG according to sections 154, 154 a StPO and otherwise conviction.*

If a conviction for an intentionally committed offence is imminent, the cost effect may be warded off if the legal consequence had not been determined by judgment, but, as in the following example, by written penal order according to sections 407 et seqq. StPO. It is often unnoticed that this may procedurally also be possible after opening of main proceedings. A defense strategy aiming thereto may be in the cost interest of the client:

*Example: The managing director of the policy holder has to answer to the suspicion of incorrect presentation of the policy holder's financial situation in the annual statement (sec. 331 German Commercial Code „HGB“). A conviction is imminent. In the main hearing, the defense lawyer suggest the subsequent waiver of a penal order according to sec. 408a StPO.*

In addition, the repayment claim is usually excluded if the conviction is only for *dolus eventualis* and a fine is imposed in the sentence (cf. example 4). In order to avoid disputes with the insurer, the defense lawyer should press for the form of liability of the conditional intent to be presented differentiated in the judgment and to be differentiated from direct intent:

*Example 4: The managing director is sentenced to pay a fine for tax evasion (sec. 370 Fiscal Code „AO“) in favor of the company (policy holder). When committing the offence, he assumed the tax evasion possible, did though not intend it.*

If a conviction takes place both due to an intentional and a negligent offence, the repayment claim usually only refers to the share of costs relating to the intentional offence. In so far as significance and importance of the conviction mainly relate to the offence committed with negligence or the costs have mainly been caused by this offence, this has to become transparent. It should be the defense lawyer's task to clarify this aspect to the court and to push for clarification in the judgment as in the following example:

*Example 5: After time-consuming and costly taking of evidence about the company's (policy holder) indebtedness, the managing director is convicted for negligent delayed*

*filing of insolvency (sec. 15a Insolvency Code “InsO”) and for withholding and for misappropriation of wage (sec. 266a StGB). The conviction according to sec. 266a StGB will be on the basis of a confessing explanation as marginal employee’s contributions to the social security system were not paid during the time shortly before filing for insolvency.*

### 3.2.3. Claims against the policy holder

For companies as policy holders the risk of a reproach of criminal provisions does not exist, because German criminal law does not know any corporate criminal law. The insured risk is in the reproach of a breach of provisions of the Administrative Offences Act (Ordnungswidrigkeitengesetz “OWiG”). Besides, the company’s interests in case of criminal investigations against third persons, in particular against employees of the company, are directly affected. This does for example apply in case of a search of the company as non-suspect according to sec. 103 StPO.

Repayment claims against the company may therefore only be considered, if the conviction of the third person for intentionally committed offenses also affects the company’s insurance coverage.

If, as in example 6, such conviction is not given, principally no exclusion clause may apply to the detriment of the company:

*Example 6: Prosecution investigates against (so far) unknown employees of the company (policy holder) for suspicion of bribery in commercial practice (sec. 299 StGB). The company commissions a lawyer to protect the company’s interest by preparing a company’s response.*

The imposition of a fine against the company (example 7) does not equal a conviction for an intentionally committed criminal offence:

*Example 7: A fine is imposed to the company (policy holder) for a breach of data protection regulations according to sec. 30 OWiG committed by its managing director Dem Unternehmen (VN).*

If the insurance coverage of the company (policy holder) relates to the coordination of the defense of board members or employees (as insured persons), the conviction of the insured person does not have to result in an omission of the company's insurance coverage as shown in the following example, at least in case of an appropriate drafting of the clause:

*Example 8: Several members of the executive board (insured persons) of the company (policy holder) are accused of breach of trust, because they are supposed to have subsequently approved inappropriate premiums for members of the executive board leaving the company. The company commissioned a lawyer to coordinate the defense of the members of the executive board. One member of the executive board is convicted, all others are absolved resp. the proceedings were closed according to sec. 153a StPo.*

If the company receives insurance coverage for the defense against the reproach of an offence (example 9), the conviction of a board member or employee may not lead to an exclusion of insurance coverage for the company as well:

*Example 9: The former managing director of a company (policy holder) is accused of the suspicion of investment fraud (sec. 264a StGB). Das Gericht ordnet die Nebenbeteiligung des Unternehmens gemäß § 444 StPO an. The proceeding ends with the conviction of the former managing director to a prison sentence and a collective fine against the company (sec. 30 OWiG).*

If, as in the following example, the company itself as policy holder requires insurance coverage for the defense of a board member or employee (insured person), the reason for exclusion inherent to the insured person, might lead to a reclaim of payments then made directly to the policy holder.

*Example 10: An employee (insured person) of the company (policy holder) is accused of false testimony (sec. 153 StGB) as witness in a civil proceeding conducted by the company. The company commissions a lawyer with the defense of the employee. The employee is sentenced to a term of imprisonment.*



## 4. CONCLUSION

The SSR grants extensive coverage in the insured event. It will though usually not be clear whether the exclusion clause applies until the end of the process.

A subsequent exclusion from insurance coverage may have severe financial consequences for the company as policy holder and the managers and employees of the company as insured persons. This applies in particular for complex commercial criminal law proceedings which usually require high efforts.

It is therefore reasonable to consider the exclusion clauses already during contract negotiations. Clear wording well thought through avoids unpleasant surprises during the processing of the insurance claim.

Further, there is often the chance to avoid that the facts of exclusion apply by choosing a defense strategy considering the financial consequences. This though requires that the defense lawyer also knows about the insurance law aspects of the mandate in order to assess the financial consequences of strategic decisions.

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