The International Investigations Review

Fourth Edition

Editor
Nicolas Bourtin

Law Business Research

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This article was first published in The International Investigations Review - Edition 4
(published in July 2014 – editor Nicolas Bourtin).

For further information please email
Nick.Barette@lbresearch.com

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-09-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALUKO & OYEBODE

ANAGNOSTOPOULOS

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EDITOR'S PREFACE

In the United States, it continues to be a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. LIBOR. Foreign corruption. Financial fraud. Tax evasion. Price fixing. Environmental crimes. Export controls and other trade sanctions.

US and non-US corporations alike, for the past several years, have faced increasing scrutiny from US authorities, and their conduct, when deemed to run afoul of the law, continues to be punished severely by ever-increasing, record-breaking fines and the prosecution of corporate employees. As this edition went to press, the debate over the 'too big to jail' phenomenon was being resolved with the US Department of Justice insisting on guilty pleas from two large, foreign financial institutions.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in multiple countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can replace the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world will find a wide and grateful readership.

The authors of this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and

concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with the employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its fourth edition, this volume covers 26 countries.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gift of time and thought. The subject matter is broad and the issues raised deep, and a concise synthesis of a country's legal framework and practice was in each case challenging.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
July 2014

Chapter 3

AUSTRIA

Norbert Wess and Bernhard Kispert[1]

I INTRODUCTION

In Austria, a distinction has to be made between the police and judicial authorities with respect to law enforcement authorities. In general, the police, as the law enforcement authority, is responsible for the investigation and prosecution of crimes and are subordinate to the respective public prosecutor; this also covers business crimes. After obtaining permission from a court, the public prosecutor may take special investigation measures such as house searches (raids), opening of accounts or telephone tapping, and these measures are usually carried out by the police. Law enforcement authorities in corporate criminal proceedings have the same powers as the law enforcement authorities prosecuting other crimes.

When the investigation procedure has been completed, the public prosecution decides whether, based on the precise results of the investigation, a charge may be brought or whether proceedings should be discontinued.

In connection with complex corporate proceedings the Central Public Prosecution for the Enforcement of Business Crimes and Corruption is a special prosecution authority that has been established because of the increasing complexity of business crimes that are now prosecuted. It is in charge of prosecuting all Austrian business crimes involving sums exceeding a certain amount. If necessary, this centralised public prosecution is authorised to take over other public prosecutors' investigation procedures in business crimes that initially (due to the amount involved) may not have fallen within its competence if it could deal with the investigations more efficiently.

A special feature of Austrian criminal law is the reporting obligations of the public prosecutors. The public prosecutor must report crimes to its superior high public prosecutor's office if there is an overriding public interest resulting from the

1 Norbert Wess and Bernhard Kispert are partners at wkk law Rechtsanwälte, Attorneys at Law.

significance of the crime or the suspect. If the importance of the crime is not restricted to the locality, the high public prosecutor's office has to submit another report on the planned procedure to the Federal Ministry of Justice. Thus, the reporting chain can range from the investigating or prosecuting public prosecutor to the Federal Ministry of Justice. Corresponding to the reporting obligation of public prosecutors to higher authorities, these higher authorities have the right to issue instructions to subordinate public prosecutors. As there are fears that political authorities might influence pending criminal proceedings – be it merely by assumptions on the part of the prosecutors – heated controversies on this issue sometimes occur in Austria. Shortly after taking office in 2013, the acting Federal Minister of Justice supported the abolition of the right to issue instructions to subordinate prosecutors. A commission of experts has already been set up to devise alternative models.

Since the Austrian Code of Corporate Criminal Liability (ACCCL) came into effect on 1 January 2006, a business can also be a defendant in criminal proceedings and, like a natural person, be held liable and, if applicable, be convicted in the same way. The way in which it pleads with respect to the charges brought against it is at the discretion of such a business, analogous to natural persons. If the business, represented by its bodies, decides to cooperate with the enforcement authorities, this may well be a reasonable and appropriate decision, as, within the public prosecutor's scope to prosecute a crime, it can refrain from prosecuting a business if this seems unnecessary because of its conduct since the crime. Comprehensive cooperation in addition to a remedy of the consequences, and an efficient surveillance system for the future, are a strong argument to make further prosecution unnecessary.

This legal possibility only applies to legal entities and not to natural persons, and, in terms of criminal and constitutional law, it is a matter of some significance that a legal entity *per se* cannot commit a crime with intent.

II CONDUCT

i Self-reporting

In terms of corporate crimes, Austrian laws do not provide for self-disclosure that would exempt the perpetrators from punishment, but it is possible for an offender or a business that has committed a crime to show active 'repentence', after committing an offence, that is precisely specified by law. The offender or the business has to be willing to remedy the damage voluntarily, even if only pressed by the victim, or at least to commit itself to compensating the damage without the law enforcement authorities becoming aware of the offender's guilt.

Self-disclosure is very important in Austrian tax law. Taxpayers can be often exempted from quite substantial punishment by self-disclosure. The tax enforcement authorities in turn do not have to lead (lengthy) investigation procedures; however, self-disclosure only exempts offenders from punishment under circumstances that are strictly specified by law.

Self-disclosure in financial criminal law only exempts offenders from punishment if it occurs before an offence has been discovered or before the first prosecution measures against the self-disclosing person or business have been taken. In the case of an ongoing audit self-disclosure, exemption from punishment has to take place when the audit starts.

In addition, within the scope of self-disclosure the misconduct, as well as all relevant circumstances that are important for the determination of the evaded amount or the tax loss, has to be disclosed. If the self-disclosure is inaccurate to the extent that not all the relevant facts are disclosed, it will not exempt taxpayers from punishment. Moreover, the amount due must be paid within a month. It is, however, possible to apply to make payment in instalments over a maximum of two years.

It corresponds to the nature of self-disclosure that there is no obligation of self-disclosure; there is no guarantee that self-disclosure will comply with the very strict legal provisions and thus actually exempt offenders from punishment. If, due to inaccurate self-disclosure, exemption from punishment is denied, it may have an impact on the calculation of the penalty to be imposed.

Austrian competition law also provides for a legal remedy with an effect similar to self-disclosure. The Federal Competition Authority (FCA) may refrain from requesting a fine in the event of violation of cartel regulations but, to benefit from this legal provision, a corporation that has violated cartel regulations has to be the first to disclose information and evidence to the FCA that allows it to file a well-founded request permission to carry out a house search or impose a fine for prohibited cartel abuse. Another condition is that the corporation must have ceased violating cartel regulations and cooperated fully with the FCA in investigating the facts. The corporation must also not have forced any other businesses to participate in the violation of cartel regulations. The FCA is entitled to request the imposition of a reduced fine on corporations that have not fully complied with the aforementioned conditions.

The exemption from, or reduction of, a fine is specified as optional provisions, so the FCA has a certain amount of discretion with respect to its procedure. These leniency provisions have now been integrated into Austrian criminal law, but somewhat adapted, both for natural persons and legal entities, which can now act as principal witnesses in criminal procedures.[2] In the case of legal entities it is possible, as mentioned above, that the enforcement authorities may refrain from prosecution if the corporation produces convincing evidence that it will make its best efforts to prevent such misconduct in future and will proactively participate in dealing with past offences.

ii Internal investigations

The internal investigation of businesses is increasingly gaining importance in Austria. The aim of such internal investigations is to gain a full and detailed picture of any criminal conduct of employees and executives if unlawful conduct in the business is suspected. The results of internal investigations may also be made available to the public prosecutor who may be investigating simultaneously or to the interested public (for example, stock market-listed businesses).

In more complicated cases, an entire internal investigation team consisting of specialists within the corporation may set up, supported and strengthened by external experts such as auditors and specialised attorneys at law. This team is in charge of seizing, preparing and analysing relevant data within the scope of the investigation. After

2 These provisions are only valid until 31 December 2016.

screening the data it may also be necessary to question former or current employees of the business about any incidents. When these 'forensic interviews' are conducted, any person interviewed may (very often) incriminate him or herself in any statement, so such an interview can only be conducted if such person cooperates voluntarily and has to be given in advance the opportunity to consult an attorney at law.[3]

It is also currently under discussion whether authorised law enforcement is entitled to request the surrender of documents and reports collected this way against the will of the business. If the data collected, as well as the final report, are kept by the business, Austrian courts consider this admissible, as any correspondence with attorneys is only protected in the attorneys' custody. In terms of constitutional and European law this seems quite critical,[4] but is not relevant in practice if the business intends to cooperate proactively with the law enforcement authorities. As already mentioned repeatedly, such procedure can occur against a legal background in which the public prosecutor has certain discretion with respect to the prosecution of companies. In this context, the public prosecutor will have taken into consideration the company's conduct after the offence (remedy of consequences) and the company's contribution to completely clarifying past events. There is no obligation to share the results of an internal investigation with law enforcement authorities, but if the business decides to cooperate proactively with the enforcement authorities, there may be conflicts of interest with the company's current or former employees. This has to be pointed out in the consultation right from the outset.

iii Whistle-blowers

Internationally, many businesses and public institutions already rely on whistle-blowers in order to prevent business crimes and corruption.

In Austria, there is no obligation for businesses to make depersonalised whistle-blowing facilities available; however, the establishment of whistle-blowing facilities is increasingly acknowledged as part of modern risk-management and is practised accordingly. Appropriate whistle-blowing facilities can be a corporation's own hotline, an e-mail address established specifically for this purpose, or a suitable internet platform. The offences reported to these whistle-blowing facilities are not necessarily only internal offences of the corporation or authority against criminal law – violations of labour law and environmental regulations can also be reported.

In general, whistle-blowing facilities create certain tensions between the employee's duty of loyalty as defined by labour law, which goes beyond the general duty to work, and the employer's duty to have regard for the welfare of employees as defined by labour law. Thus, the employee's duty of loyalty, according to which the employee has to safeguard the operational interests of the employer in the performance of his or her work, may involve that the employee has to report violations of regulations by other employees of which he or she has become aware. An obligation to spy on other employees cannot be assumed for a common employee. For certain employees, however (e.g., employees in

3 See Wess, 'Unternehmensinterne Ermittlungen – Erfahrungen und Problemstellungen in Österreich', *Anwaltsblatt*, April 2013, 223f.

4 See Wess, 'die Privatisierung der Strafverfolgung', *Journal für Strafrecht*, January 2014.

internal review or control departments), an extended obligation to report may already result explicitly from the agreed work activity.

If an employee conceals serious violations of the rules by other employees, this may under certain circumstances lead to his or her summary dismissal as the employee may prove undeserving of the employer's confidence. On the other hand, the employer has the duty to have regard for the welfare of his or her employees, so it will not be appropriate to monitor an employee based on unsubstantiated and unfounded reports in order to be able to document any further violations of rules.

Certain legal provisions may encourage or even force an employee to notify the authorities or a potentially damaged business of unlawful conduct. For example, persons trading in financial instruments in their profession are obliged to notify the Financial Market Authority without delay if they have reason to suspect that a certain transaction could represent insider trading or market manipulation.

Depending on the precise design of an established whistle-blowing facility, this may be a monitoring measure or a monitoring system that could potentially affect human dignity. For this reason, the introduction of such a whistle-blowing facility requires the prior consent from the works council. If the respective corporation does not have a works council, the consent of each employee has to be obtained in advance.

Whistle-blowing facilities also have to take into consideration data protection regulations. The data inspection board dealing with whistle-blowing facilities must evaluate whether appropriate safeguards have been taken in order to prevent unauthorised access to collected data.

Moreover, the Austrian judicial authorities have established their own whistle-blowing home page.[5] It is an anonymous interactive platform that is specifically maintained by the public prosecutor's office for the enforcement of business crimes and crimes of corruption. Instead of being a mere reporting office that is only notified of a suspicion, this platform offers the possibility of the informant and the competent public prosecutor communicating actively if feedback is desired or further details have to be investigated. The informant may, if desired, remain anonymous in the ensuing communications.

This institution has been in place in Austria since March 2013 and has been frequently used. In the first year of its existence over 1,200 tip offs have already been registered, and only 6 per cent of these were dismissed as being unsubstantiated. Information from this platform has already led to a number of charges and convictions, proving its effectiveness of this kind of fight against crime.

III ENFORCEMENT

i Corporate liability

In Austria the ACCCL is a separate law that regulates the criminal liability of entities and therefore of corporations organised as legal entities.

The criminal liability of a corporate entity results from criminal offences committed by its employees or decision-makers. Both forms of criminal liability of a corporate

5 https://www.bkms-system.net/bkwebanon/report/clientInfo?cin=1at21&language=ger.

entity have additional conditions of liability: the offence must have been committed in favour of the corporate entity, or obligations relating to the corporate entity have been infringed. This is irrespective of whether the offence has been committed by an employee or decision-maker. An offence has already been committed to the benefit of a corporate entity even if it has only improved its competitive situation – the financial advantage of the corporate entity does not have to be an immediate one. The obligations relating to the corporate entity the infringement of which may lead to its criminal liability may be found throughout the entire legal system, but may also result from such individual administrative acts as administrative decisions.

If the offence has been committed by a decision-maker, it is sufficient that he or she has committed this offence unlawfully and culpably. Decision-makers are by law persons who are authorised to represent a corporate entity externally, such as members of the board of directors or managing directors.

The statutory prerequisites for holding a corporate entity liable as a result of the criminal offence of a (non-executive) employee are more comprehensive than for the commission of criminal offences by decision-makers. The criminal offence committed by the employee must have been made possible or substantially facilitated by the corporation's failing to take measures in terms of technology, organisation and personnel in order to prevent such an offence. In turn, decision-makers can be held liable for the omission of such measures.

As described above, the criminal liability of a corporate entity depends on the criminal relevance of acts of its employees or decision-makers. As specified, this may lead to serious conflicts of interest between individuals prosecuted and the corporate entity.

For this reason, attorneys at law are advised against representing corporate entities and individuals prosecuted in the same case as this could cause a conflict with respect to the professional prohibition of dual representation.

ii Penalties

Corporate entities that are liable for criminal offences are only punished with fines. The amount of these fines is determined by the number of 'day fines' imposed and the amount of these day fines, and the number imposed depends on the seriousness of the offence committed. In a next step, aggravating and mitigating circumstances have to be taken into consideration. The amount of damage caused by the criminal offence may be an aggravating circumstance, as well as the level of unlawful conduct by employees that was tolerated or even promoted. Mitigating circumstances include whether the corporate entity participates in uncovering the infraction, remedies the consequences of the offence or takes precautions in order to prevent such offences in future. The maximum number of day fines for business crimes that are relevant in practice is 130.

The amount of an individual day fine results from the corporation's profitability, taking into account the corporation's economic performance. A day fine corresponds to one 360th part of the corporation's annual yield. This amount – depending on economic performance – may be exceeded or fall by one-third. The maximum amount of a day fine, irrespective of the corporation's economic performance, is €10,000.

iii Compliance programmes

The establishment of a compliance programme does not automatically release a corporate entity from its criminal liability; thus, a corporate entity may remain liable for the criminal conduct of its employees and decision-makers even if comprehensive precautions are in place to prevent such conduct. It is, however, very possible for an established compliance programme to be a mitigating circumstance for the corporate entity.

The ACCCL explicitly regulates that preventive measures – and an established compliance programme has to be considered such preventive measure – taken both before and after the offence have to be taken into account as mitigating circumstances. If the corporate entity involved took preventive measures already before the offence – which later, however, proved inappropriate – and if, consequently, efforts to prevent such violations of laws by employees are obvious, this will (at least) lead to a significant reduction of the penalty. The same holds true if a corporate entity, after misconduct by employees or decision-makers has been disclosed, decides to establish a compliance programme or to remedy its weaknesses with a view to avoiding future misconduct.

The implementation of suitable training programmes or the drafting of guidelines for employees in sensitive fields of work are other examples of such preventive compliance programmes as seen as mitigating circumstances. In addition, the promotion or establishment of a whistle-blowing system may be regarded as an important step to preventing similar offences in the future.

An essential contribution to uncovering a crime may also lead to a reduction of the fine imposed on the corporate entity. Such contribution will be realised more easily if a compliance programme with comprehensive duties of documentation or support for the corporation's internal review is already in place as this allows documentation of decision-making processes, which should at least make it easier to review them in retrospect.

Furthermore, it is possible for corporate entities that have shown impeccable business conduct to receive lower fines in the event of criminal conviction. The mitigating circumstance of impeccable business conduct of legal entities corresponds with that of 'proper moral conduct' of natural persons. Impeccable business conduct is certainly indicated and supported by the establishment of a comprehensive and, above all, effective compliance programme. In addition to many other advantages, the aim of a compliance programme is, by definition, to prevent the commission of criminal offences in business. If such a compliance programme has been successfully established and integrated into the corporate culture, this may well mean that the corporate entity should be able to produce evidence of its impeccable business conduct if convicted (for the first time).

An effective compliance system can demonstrate that a corporate entity that has already committed an offence can show good conduct over a longer period. This mitigating circumstance of good conduct over a longer time, which the Austrian Criminal Code actually provides for natural persons, can also be applied correspondingly to legal entities and to the good conduct of corporate entities.

iv Prosecution of individuals

Considerations about the criminal liability of individuals, in connection with the criminal liability of companies, have to take into account that the criminal liability of

companies always depends on the unlawful conduct of individuals. These individuals, as mentioned above, can be employees or decision-makers.

If an investigation against individuals working in the company is started, the fundamental question arising for the company is whether it intends to cooperate with the defendants' counsel. In the event of close cooperation with the defendant it can be possible in certain circumstances to avert criminal charges being brought against the individual and, in further analysis, against the company. In this respect, the invalidation of accusations against the individual could also lead to any case against the company of material content being weakened. Ultimately, it is at the discretion of the company to choose the way in which it wishes to cooperate with defendants.

If the company terminates the relationship with such – probably former – employees or decision-makers, the fact that criminal charges being filed against these individuals could also lead to criminal charges being filed against the entire company must be taken into account. In such an event the company, in cooperation with specialised attorneys at law, should devise a strategy as to how to deal with these individuals. At the same time, law enforcement authorities must be convinced (e.g., by the company cooperating as closely as possible) to refrain from bringing criminal charges against the company.

IV INTERNATIONAL

i Extraterritorial jurisdiction

In general, Austrian criminal law applies to all offences committed in Austria. This corresponds with the principle of territoriality, which is now common practice for the application of statutes.

Regardless of the foregoing, Austrian criminal law also applies to certain offences explicitly specified by law even if the relevant offences were committed abroad. In this respect, it does not matter whether the offence was committed by an individual or a company; in other words, the same legal provisions apply to both.

Of particular relevance for companies is the legal provision that crimes of corruption and bribery will be prosecuted in Austria regardless of the place at which the crime was committed if the offender is Austrian. These crimes are also prosecuted in Austria if the offence was committed to the benefit of an Austrian public officer.

If an Austrian citizen, as employee or decision-maker of a company, bribes a foreign public officer, he or she has to be punished pursuant to Austrian criminal laws. This applies regardless of whether the crime was committed in Austria or abroad, and whether it was an Austrian or foreign company.

Conversely, decision-makers or employees of foreign companies can be held criminally liable in Austria if they – even abroad or from abroad – bribe an Austrian public officer.

This type of special regulation goes far beyond the original principle of territoriality. In reality, this means that bribery committed worldwide by Austrian citizens or of Austrian public officers can be prosecuted.

ii International cooperation

The Austrian criminal justice authorities cooperate closely with those in foreign countries. The applicable legal basis is laid down in bilateral or multilateral international treaties, for example, and their respective implementation in Austrian law.

The Austrian Administrative and Judicial Assistance Act regulates, for example, the circumstances under which an extradition request to foreign criminal justice authorities can take place. These statutes also regulate general judicial assistance, the takeover of criminal prosecutions, as well as the takeover of surveillance by Austrian authorities. The statutes specify reciprocity as a general prerequisite for these measures. In addition, administrative and judicial assistance requests may not infringe on public policy or the national interests of Austria.

Austria does not extradite individuals who commit petty crimes. Extraditions from Austria are only admissible in case of crimes with intent, which carry a prison sentence of more than one year pursuant to foreign and Austrian law. Austria does not, however, extradite to countries in which criminal proceedings are not in compliance with the fundamental principles of the European Convention on Human Rights (ECHR), or if the persons extradited are at risk of political persecution, or suffering cruel or humiliating punishments or even the death penalty. In principle, Austria does not extradite its own citizens, but there is an exemption with respect to extraditions to the International Criminal Court.

The influence of EU law on the criminal law of individual Member States is becoming more important in practice. European law can specify, for example, minimum requirements for the determination of offences and penalties, as can minimum requirements to facilitate the mutual recognition of court sentences and decisions.

Extraditions to EU Member States have been specifically regulated by directive in terms of European law and, in Austria, implemented by federal law with respect to judicial cooperation in criminal cases with EU Member States. This encompasses both pending foreign criminal proceedings (extradition for pre-trial detention) as well as non-appealable sentences (execution of a sentence). These processes have been substantially simplified, compared with extraditions to third countries, due to the principle of mutual recognition of criminal sentences passed by European states. It is also required that human rights standards are observed in all of Europe. For a number of exhaustively specified offences, the requirement of reciprocity, for example, is no longer a prerequisite for an extradition to another EU Member State. Consequently, a person who is prosecuted by an enforcement authority can also be extradited for an offence that is not punishable in Austria.

iii Local law considerations

In cross-border cases that have an impact on Austria, some special features have to be taken into consideration in criminal investigations.

Austria still has bank secrecy laws that are comparatively strict. Information about bank accounts and transactions may only be given with prior approval of the court based on a motion filed by the public prosecutor. The unjustified breach of bank secrecy represents a criminal offence, but in 2014 it has been agreed at EU level that banking secrecy also previously applying to foreign individuals will be abolished. Austria has until 2017 to implement the respective EU directive.

Moreover, it must be observed that a strict obligation of secrecy applies to certain professional groups such as attorneys at law, auditors and tax consultants. This obligation may not be invalidated by the seizure or confiscation of communications. Thus, members of these professional groups have the right to object to such seizure. In the event such objection, a court must decide whether the seized communications are covered by professional secrecy. These communications may not be exploited by law enforcement authorities before the court has decided that the seized communications are not protected by the relevant professional secrecy.[6] The protection of other professional groups such as banks has substantially softened in recent years. Therefore, it is now much easier for law enforcement authorities to gain access to such communications at banks.

V YEAR IN REVIEW

Last year, as well as in the years previous, some very comprehensive and complex corporate criminal proceedings took place in Austria that raised strong media and public interest. These proceedings mainly dealt with criminal accusations of embezzlement and corruption in government-related, and were often preceded by many years of investigation, which attracted strong criticism from the public as well as professionals.

In 2013 a commission of experts was set up, which has been charged with reforming and updating the Austrian Criminal Code, which is now almost 40 years old but has already existed for much longer in outline. One of its aims is to correct the imbalance between offences against the person on the one hand and offences against property on the other, which is often perceived as unfair by many parts of the public. A study commissioned by the Ministry of Justice found that 55 per cent of the population think that the penalties that offences against the person carry, such as bodily injury and murder, are not severe enough, whereas the penalties that offences against property carry, such as robbery, theft and embezzlement, are too severe.

The dangers of the internet should also increasingly be accounted for by criminal law and the related protection of the private sphere should be strengthened.

On the whole, the realities of life, which have changed considerably in the past 40 years, should be taken into account by a modern criminal law.

VI CONCLUSIONS AND OUTLOOK

Currently, the Austrian courts have to frequently deal with large corporate criminal proceedings. Particularly because of the often excessive duration of proceedings, the Federal Minister of Justice, who has been in office since December 2013, has considered reforming parts of the criminal code that will undergo major changes. Under the description of 'streamlining proceedings', these changes should relieve the burden on the courts as well as accelerating individual criminal proceedings.

6 See Wess, 'der Rechtsanwalt als Tatbeteiligter im Wirtschaftsstrafrecht – Grenzen strafprozessualer Zwangsmaßnahmen in Lewisch (Hg)', *Wirtschaftsstrafrecht und Organverantwortlichkeit Jahrbuch 11* (2011) 77f.

In future, there should be a time limit for the investigation procedure preceding actual criminal proceedings. This time limit should be three years according to the Federal Minister of Justice (who before his inauguration was a professor of criminal law and also worked as a defence counsel), and should apply regardless of the complexity of the case. It should be possible to extend the investigation procedure once by a further two years, but the law enforcement authorities would first have to obtain the approval of the court.

In future, the investigation procedure should make the distinction between a mere suspect and a defendant. A person who originally is a suspect should subsequently not become a defendant before sufficient concrete evidence is available. This should avoid persons under investigation having the status of defendant, and their reputations being thus stigmatised, solely as a result of anonymous tips.

In addition, certain criminal proceedings that carry only a low penalty should be dealt with in simplified criminal proceedings. Upon request of the public prosecutor, the court of first instance should have the right to refrain from opening a trial with the defendant's consent, after which a recommended sentence should be served by letter. The accused should then have the opportunity to file an appeal within 14 days against this penalty without giving a reason. At this point, regular criminal proceedings at court should then take place.

At the stage of criminal proceedings at court, it is the Minister of Justice's intention that a second professional judge be reintroduced to proceedings before a court of lay judges. This type of court constitution, mainly found in complex business cases, is being changed in the wake of a prior reform in which one of two professional judges, together with two lay judges, had had to decide on the guilt and sentence of the accused, was abolished; as a result, one professional judge has been and is still left on his or her own to cope with the often enormous file contents, which often lead to extensive trials. The provision of a second professional judge – which should not happen in all proceedings with lay judges, but only in very complex proceedings – is intended to assist the courts and to increase the quality of proceedings as well as the quality of any sentence passed.

Moreover – and this also often relates to complex corporate criminal proceedings – there will be changes with respect to the appointment of court experts. The situation as it stands is that an expert is appointed by the public prosecutor in the investigation procedure within the scope of criminal proceedings if the facts can be clarified only with specialised knowledge. During the course of criminal proceedings this expert is appointed as court expert by the court. According to many experts this practice contravenes the right granted by fundamental rights to fair proceedings pursuant to Article 6 of the ECHR.[7]

According to the current proposals of the Minister of Justice, a defendant should be able to file a motion for the removal of an expert during the investigation procedure. In addition, private expert opinions commissioned by defendants should also be taken into account within the scope of criminal proceedings. In the long term, there is also the prospect of using in-house experts of the court in investigation procedures that will not subsequently be appointed as court experts.

7 See Wess, 'Aktuelle Rechtsfragen zur Stellung des Sachverständigen in Wirtschaftsstrafverfahren in Lewisch (Hg)', *Wirtschaftsstrafrecht und Organverantwortlichkeit, Jahrbuch 12* (2012), 117ff.

Appendix 1

ABOUT THE AUTHORS

NORBERT WESS

wkk law Rechtsanwälte

Norbert Wess is a partner at wkk law Rechtsanwälte. He graduated from the University of Vienna as a *Dr iuris* and was admitted to the bar in 2004. Within a short time he established himself in many of Austria's high-profile cases concerning white-collar crime. He advises and represents national and international clients (businesses as well as individuals) in investigations by Austrian as well as foreign agencies and regularly appears in court as a defence counsel, as well as a civil party representative to enforce their claims as victims of crime.

Furthermore, Dr Wess is the author of various publications regarding criminal law and also holds lectures and presentations on issues relating to criminal law, compliance and related topics.

BERNHARD KISPERT

wkk law Rechtsanwälte

Bernhard Kispert is a partner at wkk law Rechtsanwälte. He graduated from the University of Vienna and passed his Austrian Bar exam with distinction in 2005. During his activity as a lawyer he has gained vast experience in civil and criminal proceedings, especially regarding sophisticated corruption and white-collar crime cases. In addition to his activities concerning criminal law, Mr Kispert has ongoing relationships with several insurance companies in the enforcement of extensive claims for damages.

WKK LAW RECHTSANWÄLTE
Himmelpfortgasse 20/2
1010 Vienna
Austria
Tel: +43 1 532 1300
Fax: +43 1 532 1300 90
n.wess@wkklaw.at
b.kispert@wkklaw.at
www.wkklaw.at