THE INTERNATIONAL INVESTIGATIONS REVIEW

Seventh Edition

Editor
Nicolas Bourtin

THE LAWREVIEWS

THE INTERNATIONAL INVESTIGATIONS REVIEW

The International Investigations Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The International Investigations Review, - Edition 7
(published in August 2017 – editor Nicolas Bourtin)

For further information please email
Nick.Barette@thelawreviews.co.uk

THE INTERNATIONAL INVESTIGATIONS REVIEW

SEVENTH EDITION

Editor
Nicolas Bourtin

THE LAWREVIEWS

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

MARKETING AND READERSHIP COORDINATOR
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Hilary Scott

SUBEDITOR
Anna Andreoli

CHIEF EXECUTIVE OFFICER
Paul Howarth

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

www.TheLawReviews.co.uk

ISBN 978-1-910813-70-6

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

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE GAMBLING LAW REVIEW

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THE ISLAMIC FINANCE AND MARKETS LAW REVIEW

THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW

THE CONSUMER FINANCE LAW REVIEW

THE INITIAL PUBLIC OFFERINGS REVIEW

THE CLASS ACTIONS LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

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

ALLEN & GLEDHILL LLP

ALVAREZ & MARSAL DISPUTES AND INVESTIGATIONS, LLP

ANAGNOSTOPOULOS

BAKER MCKENZIE

BDO LLP

BOFILL ESCOBAR ABOGADOS

DEBEVOISE & PLIMPTON LLP

DE PEDRAZA ABOGADOS

ESTUDIO BECCAR VARELA

GLOBAL LAW OFFICE

HORTEN LAW FIRM

KHAITAN & CO

LALIVE SA

LINKLATERS LLP

MATHESON

MOMO-O, MATSUO & NAMBA

R&T ASIA (THAILAND) LIMITED

SHIN & KIM

SIQUEIRA CASTRO ADVOGADOS

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

STEPTOE & JOHNSON UK LLP

STUDIO LEGALE PULITANÒ-ZANCHETTI

SULLIVAN & CROMWELL LLP

URÍA MENÉNDEZ-PROENÇA DE CARVALHO

WKK LAW RECHTSANWÄLTE

CONTENTS

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. Foreign corruption. Healthcare, consumer and environmental fraud. Tax evasion. Price fixing. Manipulation of benchmark interest rates and foreign exchange trading. 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. And while in past years many corporate criminal investigations were resolved through deferred or non-prosecution agreements, the US Department of Justice recently has increasingly sought and obtained guilty pleas from corporate defendants. With the new presidential administration in 2017 comes uncertainty about certain enforcement priorities, but little sign of an immediate change in the trend toward more enforcement and harsher penalties.

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 seventh edition, this volume covers 23 jurisdictions.

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 2017

Chapter 5

AUSTRIA

Norbert Wess, Markus Machan and Vanessa McAllister[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, who are subordinate to the respective public prosecutor, are, as the law enforcement authority, responsible for the investigation and prosecution of crimes. The police, subordinate to the public prosecutor, lead the investigations. A permit regarding investigations is in general not required, for example, in order to question witnesses. Specific permissions from the court are, however, necessary if the public prosecutor decides to take special investigation measures, such as house searches (raids), opening of accounts or telephone tapping. All investigation measures are usually carried out by the police. Regarding the powers of the prosecution authorities no difference is made between corporate criminal proceedings and others.

After the investigation procedure has been completed, the public prosecution decides, based on the results of the investigation, whether to press charges against the defendant (either an accused individual or a corporation) or whether proceedings should be discontinued.

The Central Public Prosecution for the Enforcement of Business Crimes and Corruption (WKStA) is a special prosecution authority that was established in 2011 due to the increasing number and complexity of white-collar crimes. It is in charge of prosecuting all Austrian business property crimes involving sums exceeding a certain amount and involving serious cases of corruption.

A special feature of Austrian criminal law is the reporting obligations of the public prosecutors. The public prosecutor must report crimes to its superior public prosecutor's office if there is an overriding public interest resulting from the 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 illustrating the premeditated procedural actions 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 this reporting obligation of public prosecutors to higher authorities, these higher authorities have the right to issue instructions to subordinate public prosecutors.

This possibility of directives given by higher public prosecutors has been subject to numerous discussions, since critics stated that the prosecution should be – as part of the jurisdiction – as independent as courts and, therefore, directives given by higher public prosecutors would be improper. Shortly after taking office in 2013, the acting Federal Minister

1 Norbert Wess is a partner, and Markus Machan and Vanessa McAllister are associates at wkk law Rechtsanwälte, Attorneys at Law.

of Justice supported the idea of an abolition of the right to issue instructions to subordinate prosecutors. A commission of experts has been set up to make a proposal concerning each single case that is reported to the Minister.

Since the Austrian Code of Corporate Criminal Liability (VbVG) came into effect on 1 January 2006, companies and other legal entities can also be accused in criminal proceedings and, like natural persons, can be (under given circumstances) held liable and be convicted. Depending on the conduct of the legal entity following the crime, the prosecutor is entitled to refrain from prosecuting if the prosecution seems unnecessary. Comprehensive cooperation with the prosecution and the installation (or adjustment) of an efficient surveillance system (for the future) can, in fact, protect the legal entity from further prosecution, but not the accused individual.

II CONDUCT

i Self-reporting

In terms of corporate and business crimes, Austrian law does not provide for a specific regulation governing self-disclosure that would exempt the perpetrators from punishment. However, if an offender or a legal entity that has committed or is responsible for a crime shows active repentance, the punishment may be exempted. What is expected from the individual or legal entity when showing repentance after committing an offence is precisely specified by law. The offender or the legal entity has to be willing to remedy the damage voluntarily even if only pressed by the victim, or at least commit himself or herself to compensating the damage without the law enforcement authorities becoming aware of the offender's guilt.

Self-disclosure is a special and very important feature in Austrian tax law. Taxpayers can often be 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 and that have been considerably tightened over the years.[2]

In financial criminal law an exemption of punishment is only possible by means of self-disclosure 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 has to take place when the audit starts. Due to a recent modification, a tax surcharge is added when the offender is guilty of an intentional or grossly negligent tax offence.

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 have to be disclosed. If the self-disclosure is inaccurate to the extent that not all the relevant facts are disclosed, it will not exempt tax evaders from punishment. Moreover, the amount due must be paid within a month. It is, however, possible to apply for payment in instalments over a maximum of two years.

Austrian competition law[3] also provides for a legal remedy with an effect similar to self-disclosure. The Federal Competition Authority (BWB) may refrain from requesting a

2 See Schrottmeyer, 'Verschärfungen bei der Selbstanzeige gemäß § 29 FinStrG', *Aufsichtsrat aktuell* 2014, 13.

3 In Austria, competition law is technically regulated outside the criminal law; however, the cartel fine is a criminal penalty in the meaning of Article 6 ECHR; see McAllister, *Die Kartellgeldbuße* (2017) 83.

fine in the event of violation of cartel regulations if a corporation that has violated cartel regulations is the first to disclose information and evidence to the BWB that allows it to file a well-founded request permission to carry out a house search. If the corporation is not the first one to bring new information, it still can benefit from this regulation if the information disclosed allows the BWB directly to file an application (to the Cartel Court) to impose a fine.

Furthermore, it is required that the corporation has ceased violating cartel regulations and that it fully cooperates with the BWB in investigating the facts. The corporation must also not have forced any other business to participate in the violation of cartel regulations. If the corporation does not fulfil the requirement of being the first (whether to enable a house search or an application to impose a fine), but it complies with all the other aforementioned conditions, the BWB is entitled to request the imposition of a reduced fine.

Complementary to this legal remedy in competition law, the Code of Criminal Procedure contains a leniency programme applicable to offences perpetrated by employees or executives (e.g., Article 168b Criminal Code – collusive bidding) if the corporation benefits from the leniency programme provided by competition law. Furthermore, a general leniency programme (adapted via an amendment in 2016; see Section V.d) enables an 'alternative reaction' in the meaning of 'out-of-court offence resolution' basically limited to small offences. If such an alternative reaction is not possible in particular cases (e.g., the offender did not comply with all the requirements) the offender can at least benefit from an 'extraordinary mitigation of punishment'.

ii Internal investigations

Internal investigations into corporations are increasingly gaining importance in Austria. The purpose of internal investigation is to gain a full and detailed picture of any criminal or illegal conduct of employees and executives if unlawful conduct in the corporation has occurred or 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 (i.e., concerning stock market-listed corporations).

Regarding sophisticated cases there is often a requirement to install an entire internal investigation team consisting of specialists within the corporation, optionally 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 screening the data it may also be necessary to question former or current employees of the corporation about any incidents. During such 'forensic interviews', the interrogated person may (very often) incriminate him or herself by a statement, hence an interview can only be conducted if such person cooperates voluntarily and is given the opportunity to consult an attorney at law in advance.[4]

4 See Wess, 'Unternehmensinterne Ermittlungen – Erfahrungen und Problemstellungen in Österreich', *Anwaltsblatt*, 2013, 223. There is an ongoing discussion whether an employee has to disclose all his or her knowledge (due to the employee's duty of good faith) even if it may result in self-incrimination; see, for example, Zerbes, 'Strafrechtliche Grundsatzfragen 'interner Untersuchungen", in Lewisch (Hg), *Wirtschaftsstrafrecht und Organverantwortlichkeit Jahrbuch* 2013 (2013) 271.

There is no obligation to share the results of an internal investigation with law enforcement authorities, but if the corporation decides to cooperate with the enforcement authorities, there may be conflicts of interest with the company's current or former employees. This must be pointed out by the legal counsellor right from the outset.

Recently there has been a discussion[5] regarding whether law enforcement is entitled to request the surrender or to effect the detention of documents and reports kept by the corporation against its will. Due to a recent amendment of the Code of Criminal Procedure in 2016, the correspondence with an attorney concerning, for example, an internal investigation is also protected if it is in the company's custody (and not only in the lawyer's office). These documents (even in the company's custody) cannot be confiscated; illegally obtained documents containing correspondence with a lawyer are subsequently inadmissible in court.

iii Whistle-blowers

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

In Austria there is no obligation for corporations to make anonymous whistle-blowing facilities available; however, the establishment of whistle-blowing facilities is increasingly acknowledged as part of modern risk-management. Appropriate whistle-blowing facilities can consist in a corporation's own hotline, an e-mail address established specifically for this purpose or a suitable internet platform. Often the corporation mandates a third party (e.g., law firms) with execution of the hotline. The offences reported to these whistle-blowing facilities are not necessarily limited to internal offences against criminal law within the corporation – violations of labour law and environmental regulations may also be the subject of whistleblowing reports.

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. Thus the employee's duty of loyalty, according to which the employee has to safeguard the operational interests of the employer in the course of his or her work, may oblige the employee to report violations of regulations by other employees of which he or she has become aware. An obligation to spy on other employees can usually not be assumed. Regarding certain employees, however, (e.g., employees of internal review or control departments), an extended obligation to report may already result explicitly from the agreed work activity.

If an employee aims to conceal serious violations of rules by other employees he or she may prove to be undeserving of the employer's confidence. This can also result in a subsequent (summary) dismissal. Due to the fact that the employer is obliged to have regard for the welfare of his or her employees, it would, however, not be appropriate to monitor an employee based on unsubstantiated and unfounded reports to document any further violations of rules.

Certain legal provisions may encourage or even force an employee to notify the authorities or a compromised corporation of unlawful conduct. For example, persons trading

5 See Wess, 'Die Privatisierung der Strafverfolgung', *Journal für Strafrecht*, 2014, 12.

financial instruments in their profession are obliged to notify the Financial Market Authority without delay when there is reason to suspect that a certain transaction could represent insider trading or market manipulation.

Depending on its precise design, an established whistle-blowing facility may be a monitoring measure or system that could potentially affect human dignity. For this reason the introduction of such a whistle-blowing facility requires the prior consent of the workers' council. If there is no workers' council, the consent of each employee has to be obtained in advance.

When implementing a whistle-blowing facility, data protection regulations have to be taken into consideration. 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.[6] It is an anonymous interactive platform that is specifically maintained by the WKStA. Instead of being a mere reporting system that allows users to submit a message with a specific suspicion, this platform also offers the possibility of a mutual communication between the informant and the authorities, in which the informant (if desired) can remain anonymous.

This institution was set up in Austria in March 2013 and has been frequently used since then. In the first year of its existence over 1,200 tip-offs had been registered and only 6 per cent of these were dismissed as being unsubstantiated. Information obtained from this platform has already led to a number of charges and convictions proving its effectiveness.

III ENFORCEMENT

i Corporate liability

The VbVG is a separate law that regulates the criminal liability of corporations organised as legal entities, see Section I *supra*.

The criminal liability of a corporate entity results from criminal offences committed by its employees or decision-makers. Irrespective of the level of seniority of the individual offender, liability of a corporate entity is only given if the offence was committed in favour of the corporate entity or if obligations relating to the corporate entity were infringed. An offence is already regarded to be to the benefit of a corporate entity if it has improved its competitive situation; material gain is not required. Obligations of the corporate entity, which, if violated, may result in its liability, can be related to all areas of law.

Regarding offences of a decision-maker, the corporation is (criminally) liable if the decision-maker has committed the offence unlawfully and culpably. Decision-makers are, as the VbVG states, 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. The criminal offence committed by the employee must have been made possible or substantially facilitated by the

6 www.bkms-system.net/bkwebanon/report/clientInfo?cin=1at21&language=eng.

corporation's failing to take measures in terms of technology, organisation and personnel in order to prevent such an offence. The employee himself or herself must not have acted culpably (e.g., he or she can be exculpated due to a mistake of law).

As described above, the criminal liability of a corporate entity depends solely 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 the fine is determined by the number of 'daily rates' imposed and the amount of the daily rate. The range of punishment (number of daily rates for the offence in question) depends on the seriousness of the offence committed and it is derived from the penalty range applicable for individuals (e.g., an offence punished with 10 to 20 years or lifelong imprisonment may lead to a fine with up to 180 daily rates imposed against the corporate entity). In the next step, aggravating and mitigating circumstances have to be taken into consideration in order to determine the specific amount of daily rates. An aggravating circumstance can be the amount of damage caused by the criminal offence 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 the future. The maximum number of daily rates for business crimes that are relevant in practice is 130.

The amount of an individual daily rate results from the corporation's profitability, taking into account the corporation's economic performance. A daily rate corresponds to one 360th part of the corporation's annual yield (this amount may be exceeded or fall below by one-third). The maximum amount of a daily rate, 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. The VbVG explicitly regulates that preventive measures (an established compliance programme is one such preventive measure) taken both before and after the offence are considered mitigating circumstances. If the corporate entity involved has already taken preventive measures before the offence – which later, however, turned out to be 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 for a corporate entity that – after a misconduct by employees or decision-makers has been disclosed – decides to establish a compliance programme or to remedy its weaknesses in order to avoid 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 seen as mitigating circumstances. In addition, the promotion or establishment of a whistle-blowing system may be regarded as an important step to prevent similar offences in the future.

An essential contribution to uncover 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. These documents will most likely facilitate to review the decision-making process in retrospect.

Furthermore a reduction of the fine in the event of a criminal conviction can be achieved with the argument of an impeccable business conduct. This mitigating circumstance for legal entities (liable under VbVG) 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 purpose 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 help the corporate entity that has already been liable once for an offence to show good conduct over a longer period.

iv Prosecution of individuals

Regarding the criminal liability of individuals in connection with the criminal liability of companies, it has to be taken into account that the criminal liability of companies always depends on the unlawful conduct of individuals (employees or decision-makers). Only in exceptional cases would the employee who triggered the criminal liability of the company go unpunished (e.g., if he or she did not act 'culpable').

If an investigation against individuals working in the company is launched, the fundamental question for the company is whether it intends to cooperate with the defendants' counsel. In the event of close cooperation with the defendant, it is not unlikely that criminal charges will be brought against the individual and also (after further analysis) against the company. In this respect, the invalidation of accusations against the individual can subsequently weaken the accusation brought against the company. Ultimately it is at the discretion of the company to choose to cooperate with the defendants.

As the termination of employees or decision-makers being criminally charged cannot always hinder the imposition of a fine against the company, the company – in cooperation with specialised attorneys at law – should devise a strategy as how to deal with these individuals. At the same time, law enforcement authorities must be convinced (i.e., 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 to the principle of territoriality that 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 they were committed abroad.

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 only the offender is Austrian, is of particular relevance for companies. 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 law. 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 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 in Austria.

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 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. This Act also contains several provisions governing general judicial assistance, and 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 must 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 intentional offences and those that 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 person extradited is 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. However, 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 and for the facilitation of the mutual recognition of court sentences and decisions.

Extraditions to EU Member States have been specifically regulated by an EU directive that was, 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 pretrial 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 across Europe. For a number of 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 concerning 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 was agreed at EU level that banking secrecy (also previously applying to foreign individuals) will be abolished. The deadline to implement the respective EU directive expires in 2017 (see Section V.e).

There is also a strict obligation of secrecy regarding 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 of such objection a court has to 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.[7] 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 from banks.

V YEAR IN REVIEW

In 2016 the Austrian procedural law was partially reformed by two amendments to the Austrian Code of Criminal Procedure (StPRÄG 2016 I and StPRÄG 2016 II). The main changes refer to the rights of the accused as well as to the rights of victims of a crime.

a The first amendment (StPRÄG 2016 I) modified Article 157 Section 2 of the Austrian Code of Criminal Procedure and implemented the EU directive governing, *inter alia*, the right of access to a lawyer in criminal proceedings.[8] Article 157 of the Austrian Code of Criminal Procedure regulates, among others, the defence attorney's privilege to refuse to give evidence. In Section 2 the prohibition to bypass this privilege by for example, seizing the attorney's documents concerning the case of the accused, is embedded. According to the new regulation all documents that were prepared for the purpose of the defence or counselling of the accused are included in this prohibition, regardless of who prepared the document (the defence attorney or the accused himself) and regardless of where it is kept (at the lawyer's office or in the custody of the accused). The StPRÄG 2016 I came into effect on 21 May 2016.[9]

---

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

8 EU directive 2013/48/EU, OJ L 294/1.

9 See Kiehl, 'Das Strafprozessrechtsänderungsgesetz 2016 – Was ist neu?' *ecolex* 2016, 578; Klein/Prior, Strafprozessrechtsänderungsgesetz I 2016 und Ausblick auf bevorstehende StPO-Novellen', *Österreichische*

b Due to the implementation of the aforementioned EU directive Article 164 of the Austrian Code of Criminal Procedure has also been modified. The defence attorney now has (explicitly stated by law) the right to ask the accused questions or give explanations after the interrogation or after a certain topic.[10]

c Article 59 of the Austrian Code of Criminal Procedure was modified twice in 2016. The first change concerned the restriction of communication between the arrested accused and the defence attorney. The possibility of monitoring the communication between the arrested accused and his or her defence attorney has been abolished. Only in exceptional circumstances is the limitation of communication between these two admissible, and only to prevent substantial jeopardy to the criminal proceeding. The second amendment broadened the right of the arrested accused to contact an attorney if questioned by authorities.

d The second amendment (StRÄG 2016 II) modified Article 209a of the Austrian Code of Criminal Procedure. This provision contains a leniency programme concerning 'principal witnesses'. If an offender voluntarily confesses a crime in front of the competent authority and discloses new facts or evidence that is of substantial help to solve the crime (more than just his or her own contribution to the crime) this person has the right to an alternative sentence (e.g., out-of-court offence resolution, community service), which would not otherwise be open to offenders of serious crimes. Requirements are that the person involved has not already been questioned as a suspect in this case and that he or she has not been subject to any administrative constraint. This regulation came into effect on 1 January 2017 and expires in 2021.

e The Austrian Code of Criminal Procedure was also adjusted to take account of the newly established register of bank accounts, which contains the specific personal identifier or the name of the customer or the company as well as the account number, the date of the opening or the resolution of the account and the name of the financial institution. The public prosecutor may request such information from the Minister of Finance without a court order.

f Following rulings of the European Court of Human Rights Austria had to adjust the given legal situation regarding the involvement of an undercover agent. The fact that the offender was unlawfully provoked to commit a crime was, until now, only a reason to reduce the punishment. According to the rulings of the ECHR, a sole reduction of the penalty is, however, not enough when the offender was illegally provoked by an undercover agent. Due to the new regulation set out in Article 133, Section 5 of the Code of Criminal Procedure, the public prosecutor must refrain from prosecuting if the offender was illegally provoked to commit a crime by an undercover agent.

VI CONCLUSIONS AND OUTLOOK

Despite the last, rather comprehensive, amendment to the Austrian Criminal Code that came into effect only one year ago, a new amendment to the Austrian Criminal Code is currently planned for 2017. The main changes, however, focus on sexual offences, anarchist movements and the protection of office-holders and public authorities.

Juristenzeitung 2016, 867.

10 See Rom, 'Neuerungen im Strafverfahren – Das Strafprozessrechtsänderungsgesetz II 2016', *Anwaltsblatt* 2017, 154.

One adjustment of the Austrian Criminal Code is particularly worth mentioning. In implementation of the Directive 2015/149/EU (the Fourth Money Laundering Directive) Article 165 of the Austrian Criminal Code will be modified. The list of predicate offences will be expanded (all offences with a threatened imprisonment of over one year can be predicate offences, it is not limited to those against property).

Furthermore it should be mentioned that the Austrian Constitutional Court decided that the VbVG does – contrary to the applications of judicial control – comply with the principle of equality and the principle of liability.[11] Until then, there was an ongoing discussion in Austria about whether the punishment of legal entities complies with Austrian constitutional law. Thus, discussions over whether the VbVG should be reformed drastically, have (at least for now) come to an end.

11 See Austrian Constitutional Court, decision of 2 December 2016 – G 497/2015 and 679/2015, *Zeitschrift für Wirtschafts- und Finanzstrafrecht* 2017, 20 with a comment of Dorigatti/Schmieder.

Appendix 1

ABOUT THE AUTHORS

NORBERT WESS

wkk law Rechtsanwälte

Norbert Wess is a founder and partner at wkk law Rechtsanwälte. He graduated from the University of Vienna as 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 (corporations as well as individuals) regarding investigations by Austrian as well as foreign authorities and regularly appears in court as a defence counsel as well as a civil party representative to enforce their claims as victims of crimes.

Furthermore Dr Wess is the author of various publications regarding criminal (procedure) law and also holds lectures and presentations on issues relating to criminal law, compliance and related topics. He is co-editor of the Zeitschrift für Wirtschafts- und Finanzstrafrecht (journal for business and tax criminal law) and of the Handbuch Strafverteidigung (2017).

MARKUS MACHAN

wkk law Rechtsanwälte

Markus Machan is an associate at wkk law Rechtsanwälte since February 2015. He graduated from the University of Vienna in 2009 and worked as a research assistant at the Department of Criminal Law of the University of Vienna from 2011 to 2014. Markus mainly assists Norbert Wess in corruption and white-collar crime cases.

VANESSA MCALLISTER

wkk law Rechtsanwälte

Vanessa McAllister is an associate at wkk law Rechtsanwälte since October 2016. She graduated from the University of Salzburg in 2013 and worked as a research assistant at the Department of Criminal Law of the University of Salzburg from 2013 to 2016. Her doctor-thesis, published in 2017, deals with criminal aspects of the cartel law fine. Vanessa mainly assists Norbert Wess in corruption and white-collar crime cases.

WKK LAW RECHTSANWÄLTE

Himmelpfortgasse 20/2
1010 Vienna
Austria
Tel: +43 1 532 1300
Fax: +43 1 532 1300 90
n.wess@wkklaw.at
m.machan@wkklaw.at
v.mcallister@wkklaw.at
www.wkklaw.at