The International Investigations Review

Fifth Edition

Editor
Nicolas Bourtin

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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. Foreign corruption. Financial 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, 2014 saw a significant increase in the number of guilty pleas sought and obtained by the US Department of Justice.

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 fifth edition, this volume covers 24 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 2015

Chapter 3

AUSTRIA

Norbert Wess, Bernhard Kispert and Dietmar Bachmann[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. This also concerns 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.

After the investigation procedure has been completed, the public prosecution decides whether, based on the results of the investigation, to press charges against the defendant 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 business crimes. It is in charge of prosecuting all Austrian business crimes involving sums exceeding a certain amount.

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 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

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

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 – sometimes heated controversies on this issue 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 been set up to make a proposal concerning each single case that is reported to the Minister. The Minister follows the proposal of the board of experts, even though he or she is not legally obliged to.

Since the Austrian Code of Corporate Criminal Liability (VbVG) came into effect on 1 January 2006, companies and other legal entities can also be defendants in criminal proceedings and, like natural persons, be held liable and, if applicable, be convicted in nearly the same way. 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 protect the legal entity, but never the natural person, from further prosecution.

II CONDUCT

i Self-reporting

In terms of corporate and business crimes, Austrian law does not provide for self-disclosure that would exempt the perpetrators from punishment, but it is possible for an offender or a legal entity that has committed or is responsible for a crime to show active 'repentence', which is precisely specified by law, after committing an offence with the result of exemption of punishment. 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 to commit himself, herself or 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 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.

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 has to take place when the audit starts. 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.

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 tax evaders from punishment.

Moreover, the amount due must be paid within a month. It is also possible to apply for payment in instalments over a maximum of two years.

Austrian competition law also provides for a legal remedy with an effect similar to self-disclosure. The Federal Competition Authority (BWB) 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 BWB 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 BWB in investigating the facts. The corporation must also not have forced any other businesses to participate in the violation of cartel regulations. The BWB 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 an optional provision, so the BWB 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]

ii Internal investigations

Internal investigation in the space of corporations is 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.[3]

It is also currently under discussion whether authorised law enforcement is entitled to request the surrender or to effect the detention of documents and reports collected this way against the will of the corporation. If the data collected as well as the final report are in custody of the corporation, Austrian courts consider the detention of such documents admissible as any correspondence with attorneys is only protected

2 These provisions are only valid until 31 December 2016.

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

in the attorneys' custody. In terms of constitutional and European law this seems quite critical;[4] in fact this constitutional problem is irrelevant when the corporation proactively cooperates with the authorities. 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.

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 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. Often the corporation mandates a third party (e.g., law firms) with the execution of the hotline. The offences reported to these whistle-blowing facilities are not necessarily internal offences against criminal law within the corporation – 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. 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 for the employer, 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 with regard to a common employee. For 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.

The concealment of serious violations of rules by other employees may lead to the summary dismissal as the (concealing) employee may prove to be undeserving of the employer's confidence. Due to the fact that the employer is obliged to have regard for the welfare of his or her employees, 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 corporation of unlawful conduct. For example, persons trading 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.

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

Depending on its precise design, an established whistle-blowing facility 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 of the workers' council. If there is no workers' council, the consent of each employee has to be obtained in advance.

Whistle-blowing facilities also have to take data protection regulations 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.[5] It is an anonymous interactive platform that is specifically maintained by the WKStA. Instead of being a mere reporting office that is only notified of a suspicion, this platform offers the possibility of mutual communication between the informant and the authorities. 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.

III ENFORCEMENT

i Corporate liability

In Austria the VbVG 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 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 infringed obligations relating to the corporate entity that lead to its criminal liability may be found throughout the entire legal system.

Regarding offences of a decision-maker, the corporation is (criminally) liable when the decision-maker has committed the 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. The criminal offence committed by the employee must have been made possible or substantially

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

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 by the corporation.

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 'daily rates' imposed and the amount of the daily rate. The range of punishment (one daily rate up to the highest possible number of daily rates for the offence in question) 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 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 – depending on economic performance – may be exceeded or fall 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 – and an established compliance programme has to be considered such a 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 for a corporate entity, after misconduct by employees or decision-makers has been disclosed, that 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 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 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 since that enables documentation of the 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 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 demonstrate that a corporate entity that has already once been liable for an offence under VbVG can 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).

If an investigation against individuals working in the company is launched, 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 is not unlikely that criminal charges being brought against the individual will be brought, after 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 to cooperate with defendants.

As the termination of the employment of such – probably former – employees or decision-makers being criminally charged cannot in every case hinder criminal charges against the entire company, 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 (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 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.

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 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 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 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 and for the facilitation of 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 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 has been 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.

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.[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 from banks.

V YEAR IN REVIEW

Several parts of the code of criminal procedure have been reformed due to the Strafprozessrechtsänderungsgesetz 2014, which has been in force since 1 January 2015. The amendments mainly regard the preliminary investigation which is under the principality of the public prosecution.

There have been changes with respect to the appointment of court experts. According to the former legal status, which was in force until the end of 2014, within the scope of the preliminary investigation the expert was appointed by the public prosecutor. During the main trial this expert then was appointed as the only court expert by the

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

court; the accused had no possibility to appoint its own private expert for the main trial. According to many experts this practice contravened the fundamental right to a fair trial pursuant to Article 6 paragraph 3(d) of the ECHR.[7] According to the amended law, the accused is now entitled to demand that the court (and no longer the public prosecutor) appoints and also leads the expert during the preliminary investigation in order to avoid the appearance of the (structural) partiality that resulted from the appointment of the expert by the prosecutor. Meanwhile, the Constitutional Court stated in its decision G 180/2014-30 et al. from 10 March 2015 that the former legal status regarding the appointment of the court's expert violated Article 6 (paragraph 3(d)) of the ECHR. As the condition that does not allow the accused to decline the expert of the prosecution in the main trial is still in force, some are still of the opinion that the new legal status is also against Article 6 (paragraph 3(d)) of the ECHR.

Moreover, a time limit of a maximum of three years has been inserted for the preliminary investigation. It is possible to extend the time limit by a further two years. In such a case the public prosecution has to engage the court, which has to decide whether there is reason to discontinue the preliminary investigation or whether there has been a violation of the rights of the defendant in connection with the long duration of the preliminary investigation.

Furthermore, the public prosecution now has to distinguish between a mere suspect and a defendant. A person who originally is a suspect cannot subsequently become a defendant without sufficient concrete evidence being available. Thereby it shall be avoided that persons under investigation automatically (i.e., solely as a result of anonymous tips) get the status of defendant, which usually damages their reputation.

In addition, certain criminal proceedings that carry only a low penalty can now be dealt within simplified criminal proceedings. Upon request of the public prosecutor, the court of first instance has the right to refrain from opening a trial with the defendant's consent. The court then rules a penal order that can be a fine or a conditional prison sentence. The accused has the opportunity to file an appeal within four weeks against the penal order without giving a reason, which causes the opening of a regular criminal trial.

Last but not least, parties of criminal proceedings (as well as of civil procedures) are now entitled to apply for a constitutional examination of rules (enforced in first instance, that includes procedural law as well as substantive law) by the Constitutional Court.[8]

7 See Wess, 'Aktuelle Rechtsfragen zur Stellung des Sachverständigen in Wirtschaftsstrafverfahren' in Lewisch (Hg), *Wirtschaftsstrafrecht und Organverantwortlichkeit, Jahrbuch 12* (2012), 117ff; Wess/Rohregger, 'Der Sachverständige im Strafverfahren - Jüngste Entwicklungen in der Rechtsprechung des OGH'.

8 See Herbst/Wess, 'Der Parteiantrag auf Normenkontrolle im Bereich der Strafgerichtsbarkeit', *ZWF* 2015, 64.

VI CONCLUSIONS AND OUTLOOK

The introduction of the new remedy regarding the examination of rules from the perspective of constitutional law by the Constitutional Court can have far-reaching consequences to the procedural criminal law as well as to the substantive criminal law. It is foreseeable that the defendants and their lawyers will make frequent use of this remedy.

After the amendment of the procedural law, as mentioned above, there is now the intention of reforming the substantive law. At the moment the draft of the *Strafrechtsänderungsgesetz* 2015, which is meant to come into force on 1 January 2016, is being examined. The main aspects are:

a the insertion of the definition of the notion of gross negligence;

b the amendment of professionally committed crimes (crimes may only be asserted as being professionally committed when the defendant has committed at least two pertinent crimes in the previous 12 months);

c the aggravation of penalties for offenses against persons (e.g., criminal assault);

d intervention in the offences of forced marriage, violation of sexual self-determination, stalking via telecommunication or computer systems, wrong presentation of the financial situation of associations by decision-makers, wrong reports of auditors of certain associations, etc.;

e the increase of the value limits regarding damages from €3,000 to €5,000 and €50,000 to €500,000 concerning the qualification of crimes like damage to property, damage to data, theft, embezzlement, robbery, fraud, breach of trust, bribery, money laundering, etc.; and

f various amendments regarding offences in connection with drugs.

Although it does not emerge from the draft, there is also an intention to amend the (elements of the) criminal offence of breach of trust. Such applications have already been made by some members of parliament. The reason for this is that during the last couple of years the scope of application of breach of trust has widened. There is increasing uncertainty among managers who fear being criminally pursued if they take (risky) measures that turn out to cause damage to the association they represent.

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.

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 contractual relationships with several insurance companies in the enforcement of extensive claims for damages.

DIETMAR BACHMANN

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Dietmar Bachmann is an associate at wkk law Rechtsanwälte since January 2012. He graduated from the University of Vienna in 2009. Dietmar mainly assists Norbert Wess and Bernhard Kispert in corruption and white-collar crime cases.

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