THE INTERNATIONAL INVESTIGATIONS REVIEW

Eleventh Edition

Editor
Nicolas Bourtin

THE LAWREVIEWS

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PREFACE

Observers perceived a deprioritisation of white-collar criminal prosecutions in the United States during the Trump administration and the adoption of policies that were arguably more favourable to corporate defendants: (1) a May 2018 'anti-piling on' policy, (2) an October 2018 policy concerning the selection of monitors, (3) an October 2019 'inability to pay' policy, and (4) a February 2017 policy for the evaluation of corporate compliance programmes, which was further revised in April 2019 and June 2020. These policies, however, while arguably providing transparency, did not mark a foundational change in the US approach to resolving corporate investigations. For example, the US Department of Justice (DOJ) continued its focus on individual culpability in corporate prosecutions – which was formally announced in the September 2015 'Yates Memorandum'. In November 2018, revisions to the Yates Memorandum relaxed the requirements to receive cooperation credit, allowing partial credit for good-faith efforts by a company to identify individuals 'substantially involved', even if the company is unable to identify 'all relevant facts' about individual misconduct.

As the United States emerges from the covid-19 pandemic, the new Biden administration faces a freshly awakened and potentially permanently changed economy. The Biden administration is widely anticipated to reprioritise white-collar criminal prosecutions and usher in a period of increased enforcement and harsher penalties for foreign corruption, healthcare, consumer and environmental fraud, tax evasion and price-fixing, export controls and other trade sanctions, economic espionage, and cybercrime. US and non-US corporations alike will continue to face increasing scrutiny by US authorities. And while many corporate criminal investigations have been resolved through deferred or non-prosecution agreements, the DOJ has increasingly sought and obtained guilty pleas from corporate defendants, often in conjunction with such agreements.

The trend towards more enforcement and harsher penalties 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 several 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 or, conversely, have their own rivalries and block the export of 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. Of course, nothing can replace the considered advice of an expert local practitioner, but a comprehensive review of corporate investigative practices around the world will find a wide and grateful readership.

The authors who have contributed to 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 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 11th edition, this publication covers 20 jurisdictions.

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

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
July 2021

Chapter 4

AUSTRIA

Norbert Wess and Markus Machan[1]

I INTRODUCTION

A distinction has to be made between the police and judicial authorities in Austria with respect to law enforcement authorities. In general, the police as the law enforcement authority, and subordinate to the applicable public prosecutor, lead the investigation. The public prosecutor is the head of investigations and responsible for the prosecution of crimes. A permit regarding investigations is in general not required; for example, to question witnesses. However, specific permission from the court is 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, there is no distinction between corporate criminal proceedings and the prosecution of individuals.

After the investigation procedure has been completed, the public prosecutor 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 as a response 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 or 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 the obligation of public prosecutors to report to higher authorities, these higher authorities have the right to issue instructions to subordinate public prosecutors.

The possibility of directives being given by higher public prosecutors has been the subject of 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. Therefore, a commission of experts was set up in 2014 to make a proposal concerning each single case that is reported to the Minister.

1 Norbert Wess is a partner and Markus Machan is an attorney at wkk law Rechtsanwälte.

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, it may be exempted from punishment. 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 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. Owing 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 and all relevant circumstances that are important in determining 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, tax evaders will not be exempt from punishment. Moreover, the amount due must be paid within a month. It is possible, however, 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 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

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

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

a well-founded request permission to carry out a house search. If the corporation is not the first to provide 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 cooperation may lead to 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) 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 investigations 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 (e.g., concerning stock market-listed corporations).

Regarding sophisticated cases, there is often a requirement to set up 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 'forensic interviews' of this kind, the interrogated person may (very often) incriminate himself or herself by a statement, hence an interview can be conducted only if the person cooperates voluntarily and is given the opportunity to consult an attorney at law in advance.[4]

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 from the outset.

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 (owing 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 (ed.), *Wirtschaftsstrafrecht und Organverantwortlichkeit Jahrbuch 2013* (2013) 271.

A few years ago, there was a discussion[5] regarding whether law enforcers are entitled to request the surrender or to effect the detention of documents and reports kept by the corporation against its will. As a result of an amendment to 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 the prevention of business crimes and corruption. There is no legal obligation for corporations in Austria to make anonymous whistle-blowing facilities available. However, the Austrian legislature has to transpose the EU Whistleblower Directive into national law by 17 December 2021 at the latest, which will result in an obligation for certain companies and authorities to establish a whistle-blowing facility. Appropriate whistle-blowing facilities can consist of a corporation's own hotline, an email address established specifically for this purpose or a suitable internet platform. Often the corporation mandates a third party (e.g., a law firm) 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 whistle-blowing reports.

In general, whistle-blowing facilities create certain tensions between an 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. Owing to the fact that an 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.[6]

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 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.

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

6 See ECHR 9 January 2018, 1874/13, *López Ribalda and others/Spain* (video surveillance due to suspicion of theft by employees).

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 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 to prevent unauthorised access to collected data.

Moreover, the Austrian judicial authorities have established their own whistle-blowing home page.[7] 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 March 2013 and has been frequently used since then. In the first complete year of its existence (2014), more than 1,900 tip-offs had been registered, only 6 per cent of which were dismissed as being unsubstantiated. However, in the following years, there have been consistently about 1,000 tips per year. Although only about 7 per cent of the tips themselves result in the initiation of criminal proceedings, many of these tips are being used as further evidence in already ongoing investigations. All in all, information obtained from this platform has already led to a number of charges and convictions, thus 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). 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 as being to the benefit of a corporate entity if it has improved its competitive situation; material gain is not required. Obligations of the corporate entity that, 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, above all, 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

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

corporation's failing to take measures in terms of technology, organisation and personnel to prevent such an offence. The employee must not have acted culpably (e.g., he or she can be exculpated owing 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 prosecuted individuals and the corporate entity. For this reason, attorneys at law are advised against representing corporate entities and prosecuted individuals 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 punished only 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 is derived from the penalty range applicable for individuals (e.g., an offence punished with 10 to 20 years or life imprisonment may lead to a fine with up to 180 daily rates imposed against the corporate entity). The next step is for aggravating and mitigating circumstances to be taken into consideration, to determine the specific number of daily rates within this range (e.g., if the maximum is 180 daily rates, the court might find 60 daily rates adequate in the specific case). 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 to prevent such offences in the future. In practice, the maximum number of daily rates for business crimes that are relevant 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 1/360 of the corporation's annual yield (this amount may be exceeded or fall below by a 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 (one example being an established compliance programme) 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, turn out to be inappropriate – and if, consequently, efforts to prevent violations of laws of this kind 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 decides – following the disclosure of misconduct by employees or decision makers – to establish a compliance programme or to remedy its weaknesses 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 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. That 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 a review of 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 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 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 a 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, the employee who triggered the criminal liability of the company would go unpunished (e.g., if he or she did not act in a 'culpable' manner).

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 likely 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 dismissal of employees or decision makers being criminally charged cannot always hinder the imposition of a fine against a company, the company – in cooperation with specialised attorneys at law – should devise a strategy for dealing 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 where 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 an 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 bribe an Austrian public officer – even from another country.

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

ii International cooperation

The Austrian criminal justice authorities cooperate closely with the authorities in foreign countries. The applicable legal basis is laid down in bilateral or multilateral international treaties and their corresponding 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 the case of intentional offences and for those who 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, 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 European Union 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 implemented in Austria 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) and non-appealable sentences (execution of a sentence). These processes have been substantially simplified, compared with extraditions to third countries, owing 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 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 banking secrecy laws that are comparatively strict. Information concerning transactions may only be given with prior approval of the court based on a motion filed by the public prosecutor. However, banks now have to report current accounts, building society accounts, passbooks and securities accounts to a central account register. Since 2017, Austria also participates in the international exchange of information on bank accounts.

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 seizure. In the event of an 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.[8] 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 communications from banks.

V YEAR IN REVIEW

In 2020, there were several changes in the Austrian Criminal Procedure Law in response to the worldwide covid-19 pandemic. They especially include a suspension of legal and judicial deadlines (e.g., for filing an appeal against a judicial decision) and the possibility of questioning a suspect held in pretrial detention via videoconferencing. Now more than a year after the start of the covid-19 pandemic, the majority of the changes have been withdrawn.

Apart from the changes connected to the covid-19 pandemic, the following amendments to Austrian criminal law were introduced last year:

a expansion of the offence defined in Section 107c of the Criminal Code ('continuing' harassment instead of continued harassment by means of telecommunications or a computer system – 'cyberbullying');

b introduction of a new offence against unauthorised recording of images, in particular 'upskirting';[9] and

c expansion of the offence defined in Section 283 Paragraph 1 No. 2 of the Criminal Code (incitement to hatred) by including insults that violate the human dignity of members of protected groups thus putting them on an equal level with such insults against protected groups.

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

9 Section 120a Criminal Code.

In substantive criminal law, there are thus several stricter provisions in the area of cybercrimes and the protection of images. Because of the expansion of Section 107c of the Criminal Code, the offence can now be committed by a single act of writing a hate post against someone's honour as well as by a single publication of facts or images of someone's most personal sphere. Following the example of other European states, the criminal law protection of images will be improved in the future by creating a new offence against unauthorised recording of images, in particular upskirting, as well as their distribution. By additionally including insults that violate someone's human dignity in the provision of Section 283 Paragraph 1 No. 2 of the Criminal Code, cases of this kind will be prosecuted as incitement to hatred with a correspondingly higher penalty in the future.

In criminal procedural law, there has recently been made an amendment and an expansion of legal assistance for certain victims in the course of the newly created provision of Section 66b of the Code of Criminal Procedure. In addition, it was made easier to identify perpetrators in the case of offences prosecuted upon request (e.g., defamation,[10] accusation of an offence that has already been settled by a court[11] and insult[12]) and that are committed by means of telecommunications or by using a computer system.

To clarify the most recent case law of the Supreme Court on the question of granting victims, private parties as civil claimants or private plaintiffs access to files, the newly introduced Section 49 Paragraph 2 of the Code of Criminal Procedure now explicitly states a right of the accused, according to which the aforementioned parties are only granted access to files to the extent that is necessary 'to protect their own interests'. This means that there will be a significant restriction on the extent of file inspection in everyday practice.

VI CONCLUSIONS AND OUTLOOK

The amendments introduced mainly address individual procedural rights of suspects and victims in criminal proceedings. It remains to be seen how these will ultimately be implemented in practice and how the new or adapted criminal provisions will influence the work of the law enforcement authorities.

10 Section 111 Criminal Code.

11 Section 113 Criminal Code.

12 Section 115 Criminal Code.

Appendix 1

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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 by acting 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 and 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, Norbert is the author of various publications regarding criminal procedural law and gives lectures and presentations on issues relating to criminal law, compliance and related topics. He is co-editor of the *Journal for Business and Tax Criminal Law* (*Zeitschrift für Wirtschafts- und Finanzstrafrecht*), of the *Manual of Criminal Defense* (*Handbuch Strafverteidigung*, 2017), the *Commentary Business Criminal Law* (*Praktikerkommentar Wirtschaftsstrafrecht*, 2018) and the *Linzer Commentary on the Code of Criminal Procedure* (*Linzer Kommentar zur Strafprozessordnung*, 2020).

Norbert Wess is a member of the board of the Association of Austrian Defence Lawyers (VÖStV), a member of the Commercial Criminal Law Association (WiSteV) and the International Association of Penal Law (AIDP), a member of the disciplinary board of the Vienna Bar Association, and a member and deputy chairman of the disciplinary committee of the Austrian Federal Football League.

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Markus Machan is an attorney at wkk law Rechtsanwälte. Markus specialises in corruption and white-collar crime cases and advises clients in financial criminal matters and extradition proceedings. He graduated from the University of Vienna in 2009 and worked as a research assistant in the department of criminal law at the University of Vienna from 2011 to 2014 and as research assistant at the Supreme Court of Justice. Markus Machan is a certified compliance officer, a lecturer at the University of Vienna and St Pölten University of Applied Sciences, a member of the Association of Austrian Defence Lawyers (VÖStV) and author of numerous specialist publications.

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