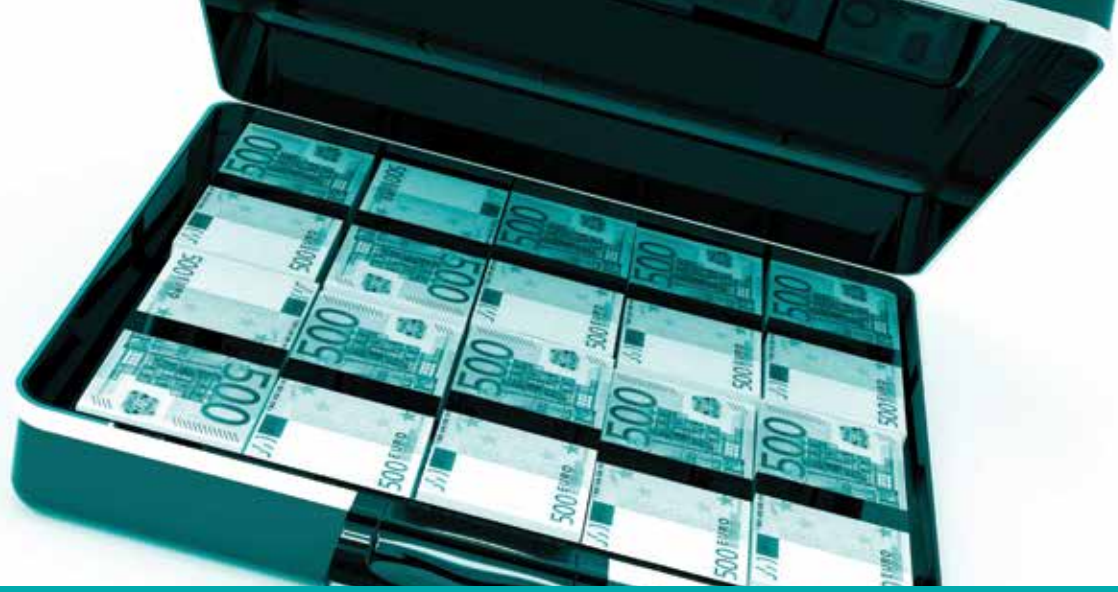

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The International Comparative Legal Guide to:

Business Crime 2016

6th Edition

A practical cross-border insight into business crime

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the sixth edition of *The International Comparative Legal Guide to: Business Crime*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of business crime.

It is divided into two main sections:

Seven general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting business crime, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in business crime laws and regulations in 31 jurisdictions.

All chapters are written by leading business crime lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Gary DiBianco and Ryan Junck of Skadden, Arps, Slate, Meagher & Flom LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

The investigation and enforcement of crimes is coordinated jointly by the criminal police and public prosecution. The investigating officers of the criminal police are at any time subordinate to (at least) one public prosecutor who is responsible for public prosecution. After the preliminary investigation the public prosecutor has to decide whether a charge is brought against a certain person, the charge is withdrawn or proceedings are dismissed. At regional level a public prosecutor's office is established at each provincial court for criminal cases which thus cover the entire federal territory.

In addition, there is a nationwide special authority for the enforcement of business crimes, corruption and relevant organisational offences in the federal territory, the so-called *Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption* (briefly: WKStA, translation: 'Centralised Public Prosecution for the enforcement of business crimes and corruption'). It also manages big and complex proceedings in business crime and misuse of power cases.

1.2 If there are more than one set of enforcement agencies, please describe how decisions on which body will investigate and prosecute a matter are made.

In Austria there are two authorities which are in charge of the investigation and prosecution of crimes. The two authorities are the criminal police, who are responsible for investigating and enforcing crimes, and the public prosecution, which leads the preliminary investigation and gives respective instructions to the criminal police officers.

At the level of the investigating criminal police a so-called special commission is often established for big and complex (business) crimes which then deals with this crime only.

However, in connection with business criminal law the centralised public prosecution for the enforcement of business crimes and corruption plays an important role. It was recently established (since 1 September 2011) because of the increasing complexity of corporate crimes and is in charge of prosecuting business crimes and corruption from a certain amount. If necessary for the efficient enforcement of business crimes, the WKStA may accept and take over business crimes from the responsible public prosecution.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

Victims of a crime which also include persons who suffered damage from a crime can join criminal proceedings as a civil party. In criminal proceedings the civil party can claim compensation for the damage caused by the crime.

The public prosecution can, also upon proposal or request of the victim, order the confiscation of objects or ban the surrender of assets in order to secure these civil claims. This instruction is enforced by the criminal police.

If the objects or assets which serve to satisfy civil claims should be permanently placed in custody, the confiscation of these objects or assets has to take place. This is done by the court upon application of the public prosecutor's office.

2 Organisation of the Courts

2.1 How are the criminal courts in Austria structured? Are there specialised criminal courts for particular crimes?

In Austria, first instance district courts and provincial courts can act as single judges, courts of lay judges or jury courts. The precise competence of the respective court results in Austria (in most cases) from the punishment of the crime. In addition, there are certain crimes which are explicitly allocated to a certain court.

- District courts are in charge of the trial in first instance in cases of crimes for which punishment is only a fine, or a fine or less than one years' imprisonment, or only less than one years' imprisonment, with some exceptions (stalking, acceptance of presents by rulers and gross negligence detriment to creditors' interests).
- The single judge of the provincial court is basically in charge of leading the trial in cases of crimes for which punishment exceeds one years' imprisonment and if a court of lay judges or a jury court is not competent for this crime.
- The provincial court in the form of a jury of one professional judge and two lay judges ("*Schöffengericht*") is in charge of leading the trial in cases of crimes which are subject to more than five years' imprisonment unless a 'real' jury court (three professional judges and eight lay judges – *Geschworenengericht*) is competent. In addition, it is competent for certain crimes, e.g. misuse of power, which

are specified by law. In cases where the charge is brought by the prosecutor after January, 1st 2015 the jury has to consist of two professional judges and two lay judges regarding (amongst others) several business crimes in connection with a damage or a value-determining amount of more than 1 million euros, bribery regarding bribes above EUR 100,000 and financial crimes regarding amounts above 1 million euros.

- The provincial court for criminal cases as a jury court ("*Geschworenengericht*") is in charge of the trial in cases of crimes which are subject to life imprisonment or imprisonment of a minimum of five years and a maximum of 10 years. Furthermore, certain additional crimes which are specified by law and are mainly committed against the government and its institutions are brought before jury courts.

2.2 Is there a right to a jury in business-crime trials?

Due to the regulation of competence described above it is hardly possible to lead a trial before a jury court ("*Geschworenengericht*") in case of business crimes as these are mainly subject to a lower punishment than necessary for a trial before a jury. Jury courts are designed for the trial in case of serious crimes (e.g. murder). However, as mentioned above, several business crimes have to take place in front of a jury of one or two professional judges and two lay judges ("*Schöffengericht*").

In Austria, it is not possible to influence the type of court with respect to the composition of judges and jurors – in whatever form – before which a person has to stand trial as the respective competence is explicitly regulated. In this respect there is no right to a trial before a jury.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in Austria to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

- **Fraud and misrepresentation in connection with sales of securities**

  In case of fraud the offender deceives his victim with respect to a certain fact and therefore causes an error that affects the deceived person. Due to this error the deceived person manages his assets in a way that in turn leads to financial loss for him.

  The offender must have the intent to unlawfully enrich himself or a third party by the conduct of the deceived person (intent of enrichment).

  As from damage exceeding EUR 50,000 the punishment for the accused can be up to 10 years' imprisonment.

  In Austria there are no specific penalty clauses with respect to the fraudulent sale of securities.

- **Accounting fraud**

  Members of corporate bodies or persons in charge (auditors) who intentionally misrepresent, conceal or hide the situation of the corporation or substantial circumstances commit accounting fraud. In this respect, the acting persons' intent of enrichment is not necessary.

  The punishment for this crime can be up to one years' imprisonment or 360 days of fines.

- **Insider trading**

  Anyone who takes advantage of insider information in order to create a financial advantage for himself or a third party commits the crime of insider trading. In this respect, it does not matter whether the offender purchases or sells the respective financial instruments, if he offers insider information to a third party for purchase or sale, or without being obliged to do so offers this information to a third party. A financial advantage in this context is regarded as the making of profit and the avoidance of loss.

  In Austria a distinction is made between so-called primary insiders and secondary insiders. A primary insider is a person who, as a member of an administrative, management or supervisory board of the issuing company or otherwise due to his profession, his employment, his duties or his interest in the issuer's capital, has access to insider information. This typically includes the board of directors, the supervisory board and auditors or interpreters. A secondary insider is a person who without being an insider misuses insider information which was given to him or otherwise made available to him. In other words this includes all other (external) persons who have insider information as e.g. the cohabiting partner of a member of the board of directors.

  In case of a financial advantage of up to EUR 50,000 insider trading for the primary insider is subject to up to three year's imprisonment. In case of damage exceeding EUR 50,000 the punishment is up to five years.

  The punishment for a secondary insider in cases of a financial advantage of up to EUR 50,000 is one year's imprisonment; if the advantage exceeds this amount the punishment is up to three years.

  The *Finanzmarktaufsicht* (abbreviated: FMA, translation: 'Financial Market Supervision') plays a decisive role in the detection and enforcement of insider trading. If the FMA is notified of the suspicion of misuse of insider information by a certain person, it has to inform the public prosecutor's office. To investigate this suspicion the public prosecutor's office has to charge the FMA (and if appropriate also the criminal police) with further investigation.

- **Embezzlement**

  Section 153 ("*Untreue*") of the Criminal Code ("StGB") criminalises a person who knowingly abuses his power that allows him to dispose of the property of another party or to oblige the other party and thereby causes a property loss for the other party. Regarding mental state the accused has to know that he misuses his power and it is required that he has the intention to damage the other party, who he is authorised to oblige. To obtain an (unfair) advantage is not an element of the offence, but usually a direct motive of delinquency. In cases of damages exceeding EUR 50,000 the punishment can be up to 10 years of imprisonment.

  This statute is the most important regarding the prosecution of business crimes in Austria. Nearly all of the big business crime trials in the last couple of years were and (partly) still are prosecuted under this section.

- **Bribery of government officials**

  He who offers, promises or grants to a public official or an arbitrator an advantage for him or a third party in return for an official act which is in contradiction with his duty is guilty of bribery. The criminal offence of bribery also includes the offer, promise, or grant of an advantage to an expert for establishing an untrue report or giving an untrue expert opinion.

  Public officials are persons who, for a regional authority or another entity of public law, perform duties of administration, jurisdiction or legislation as their officers or employees. The

term public official also includes officers or employees of companies in which regional authorities have the majority of interests, control and solely operate them. Thus the term public official in Austrian criminal law is clearly more far-reaching than 'government official'.

The crime of bribery is committed by offering, promising or granting to a public official an advantage, either a financial advantage or an immaterial one, in return for taking or omitting an official act which is in contraction with this duty.

The official act is in contradiction with a person's duty if the taking of the act requires the infringement of laws, regulations, decrees or instructions. The offender's intent has to include all relevant constituent elements of the crime.

If the promised advantage amounts to up to EUR 3,000 the punishment is up to three years of imprisonment. If the amount of the promised advantage is between EUR 3,000 and EUR 50,000, the offender has to be punished with imprisonment of between six months and five years. As for a promised advantage exceeding the amount of EUR 50,000 the punishment is one to 10 years of imprisonment.

In this context it has to be emphasised that even the grant of an undue advantage to a public official or an arbitrator for an official act which is in compliance with his duty constitutes a criminal offence too.

- **Criminal anti-competition**

With respect to competition law, misleading information about a business for the purpose of competition in official publications or other notifications which are suitable for a larger scope of people is forbidden. This should avoid inappropriate designations such as 'authentic' or 'original' as well as information which gives a wrong impression of the relationship to a producer. Geographical information is also covered by the ban on misleading information.

Bribery in business dealings for competition purposes is forbidden too.

In addition, it is not allowed to bribe employees of a company in business dealings for competition purposes by means of presents or other advantages which lead to unfair conduct of the employee with respect to the acquisition of goods or services.

The violation of business and company secrets and the misuse of entrusted documents by employees of a company for competition purposes are liable to punishment.

In cases of misleading information and bribery of employees the publication of the sentence at the expense of the accused can be ordered as an additional sanction.

- **Tax crimes**

The Austrian financial criminal law has been considerably tightened by the legislator in recent years. In addition to fines, substantial prison sentences can be imposed.

The most striking offence in financial criminal law is tax evasion (in very aggravated cases: tax fraud), which consists of evading taxes by violating one's duty of disclosure, statutory reporting or one's duty to give true information. Negligent tax evasion is also liable to punishment. In addition, a person who evades turnover tax by violating his obligation to make an advance turnover tax return is guilty of tax evasion. The evasion of salary tax is tax evasion too.

The taxable person can be exempt from punishment by self-disclosure of tax evasion. He has to give full and detailed information about his misconduct and disclose all relevant circumstances for the assessment of the evasion. In addition, the self-disclosure has to be in time, which means before possible prosecution by the financial authorities. Within one month after the self-disclosure the evaded tax amount has to be paid in order to be exempt from punishment.

Another special feature of financial criminal law is that the court is competent only if the offence was committed with intent and if the evaded amount exceeds EUR 100,000. In all other cases financial criminal proceedings fall within the scope of administrative proceedings.

- **Government-contracting fraud**

In this respect, there is no specific criminal offence in the Austrian criminal code.

- **Environmental crimes**

Most environmental crimes are offences which require the violation of an administrative duty. In case of such an offence it is sufficient that an abstract danger for human beings, animals, plants or waters can exist. The actual existence of danger is not relevant. In addition, most environmental crimes require the violation of an administrative duty. This means that the offender's action has to infringe a legal regulation or an administrative instruction.

- **Campaign-finance/election law**

Every political party in Austria has to present an annual report with respect to its revenue and expenditure. It has to be examined and signed by two auditors. Party donations also represent a source of income for political parties and include payments, contributions in kind or 'living subsidies' which are made available to a party by natural persons or legal entities without a relevant consideration. Donations which in total exceed the amount of EUR 3,500 per year have to be enclosed with the report indicating the donor's name and address. Donations exceeding EUR 50,000 have to be immediately notified to the court of auditors. Then the court of auditors has to publish the donor's name and address. Companies in which public authorities hold at least 25% of interests are allowed to support parties with donations.

The Austrian criminal code contains a section which lists criminal offences during elections or referenda. It is forbidden e.g. to prevent others from voting, to bribe them with respect to the vote, to disseminate incorrect information before the ballot or to violate the secrecy of the ballot. It is taken for granted that electoral fraud is not allowed either.

- **Market manipulation in connection with the sale of derivatives**

The offence of market manipulation can be committed by several types of conduct.

On the one hand transactions which give or could give wrong or misleading signals for the offer, demand or the price of financial instruments can already represent market manipulation. If these transactions with financial instruments create an artificial price level, this represents market manipulation too.

On the other hand the mere dissemination of information, rumours or news via media which convey wrong or misleading signals with respect to a financial instrument leads to forbidden market manipulation.

In Austria market manipulation generally represents an administrative offence; its enforcement is similar to insider trading, the monitoring of this is the responsibility of the financial market supervision. If, however, a criminal offence is committed, the courts are competent.

3.2 Is there liability for inchoate crimes in Austria? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

In Austria the completed crime, as well as the attempt to commit a crime and the participation in such an attempt, are liable to punishment. The decisive criterion of an attempted crime is the missing completion of the crime. A crime is deemed attempted if the

offender starts to implement his decision to commit the crime or to push another person to do so by taking an action which immediately precedes the crime. However, there is the possibility to refrain from the attempt which has the effect of exemption from punishment. The penalty of an attempted crime corresponds with the penalty of a completed crime. However, if the crime was only attempted, it is possible that this will be taken into consideration by the court as grounds for mitigating the penalty.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

The *Verbandsverantwortlichkeitsgesetz* ('The Austrian Code of Corporate Criminal Liability'), which came into effect for criminal offences starting on 1 January 2006, regulates under which circumstances entities are liable for criminal offences of employees or decision-makers. In general, it has to be emphasised that the Code of Corporate Criminal Liability has laid down higher requirements in relation to the liability for criminal conduct of (common) employees than in relation to criminal conduct of decision-makers (board of directors, managing directors, etc.).

A criminal offence committed by a decision-maker will be imputed to the entity if he acted unlawfully and culpably. The liability for the criminal offence of a common employee requires that the offence was made possible or facilitated by decision-makers of the entity who failed to take important measures of a technical and organisational nature as well as in terms of personnel in order to prevent such offences. Such measures should have been taken with care and each individual case has to be examined. This depends on the type, size, organisation and sector affiliation of the entity, the dangerousness of the activity, as well as the training and reliability of employees.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime?

The liability of the entity is generally linked with the liability of certain natural persons. In other words the entity can only become liable if previously the respective decision-makers became liable for the entity. Thus, in general there is parallel criminal liability of entities and their decision-makers. It is within the discretion of the entity to hold decision-makers liable for damage caused unlawfully and culpably. This would have to be done by joining criminal proceedings as a civil party or by initiating separate civil proceedings. With respect to entity fines imposed on the entity by the criminal court, there is of course no right of recourse.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

In general, the public prosecutor would have the legal instruments within his discretion to prosecute crimes in order to refrain from prosecuting natural persons (e.g. as chief witness) or entities if the respective legal requirements are met. However, there should be relevant objective grounds.

The Austrian Code of Corporate Criminal Liability is still a relatively new law. This involves a sharp rise in proceedings with respect to the Code of Corporate Criminal Liability. This also results from the fact that the Code of Corporate Criminal Liability only refers to factual circumstances which were completed after its legal effectiveness on 1 January 2006. However, the public prosecutor's office still has reservations regarding this new legal instrument. This can be caused by a lack of awareness on the one hand, and on the other hand from the enforcement authorities' respect this could sometimes wake a 'sleeping giant' which would considerably increase the pool of opposing parties in proceedings.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

According to the Austrian criminal code the limitation period depends on the seriousness of the offence. That means that the period is determined by the punishment that is set out in the applicable penal provision (StGB, Section 57). The limitations periods in Austria do not start until the criminal action stops or the criminal activity is completed.

If the success of the crime (e.g. the damage) materialises after the unlawful act has ended, the limitation period begins from the date of occurrence (of the success) within the normal limitation period or starts from the date of committing the offence within one-and-a-half times of the limitation period (at least three years), depending on which of these provisions is favourable for the accused.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

A prosecution outside the limitation period is principally not possible. Nevertheless, the limitation period can be extended in cases of crimes which are part of a pattern or practice or ongoing conspiracy (StGB, Section 58).

If within the limitations period the perpetrator commits a crime again based on the same criminal leanings, the limitations period does not expire before the limitations period of the new crime has expired. Thus the limitations period does not start until completion of the last criminal activity.

5.3 Can the limitations period be tolled? If so, how?

The statute of limitation is tolled if it is not possible to commence or continue the prosecution. The period between (i) the first interrogation of the accused, (ii) the first use of force or threat to use force, or (iii) the first investigative measures by the public prosecution and the final decision or any other termination of the proceedings is not included in the limitations period.

6 Initiation of Investigations

6.1 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

Investigations are initiated by a law enforcement authority, this means either by criminal police and/or the public prosecutor's office by investigating against known or unknown persons or exerting pressure on a person because of the initial suspicion of a

criminal offence. Investigation means measures to gather and use information or evidence to investigate the suspicion of a criminal offence.

However, there are also offences for which it is required that the damaged party authorises the prosecution in order to be allowed to initiate investigations. Such an offence is, for example, unlawful entry or deceit. In case of such an offence indictable upon authorisation by the damaged party, the authorised person has to be asked immediately if he grants the respective authorisation to the law enforcement authority as soon as a suspect has been traced.

The aim of investigations has to be to clarify the factual circumstances and the suspicion of crime to the extent that the public prosecutor can take a decision with respect to bringing a charge. Moreover, the speedy implementation of the trial at court should be guaranteed.

6.2 Do the criminal authorities have formal and/or informal mechanisms for cooperating with foreign prosecutors? Do they cooperate with foreign prosecutors?

Administrative and legal assistance with respect to foreign authorities is regulated by international agreements and separate laws such as the Administrative and Legal Assistance Act (*Amts- und Rechtshilfegesetz*).

The Administrative and Legal Assistance Act defines as a general requirement of administrative and legal assistance that the public order or other essential interests of the Republic of Austria may not be violated. In addition, the request received from a foreign country may only be granted if it is guaranteed that the requesting country grants a similar request from Austria. The law regulates in detail extradition, transfer, judicial assistance, taking over of criminal prosecution as well as taking over of surveillance by Austrian authorities. Accordingly, it also regulates how Austrian authorities can obtain such measures.

The law regarding judicial cooperation in criminal cases with the Member States of the European Union is very similar to the Administrative and Legal Assistance Act and takes precedence over the latter. It mainly governs the rules concerning the European Arrest Warrant. The prosecution bodies are entitled to directly communicate with their peers in other Member States (e.g. via email).

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

The Austrian criminal code contains a separate main section which regulates investigation measures and the taking of evidence. This includes the seizure and confiscation of objects, information about bank accounts and bank transactions, raid of premises, objects and persons, determination of identity, optical and acoustic monitoring, surveillance, undercover investigations, confiscation of letters or information about the data of communications.

If fundamental rights are violated by the investigations intended by the public prosecutor's office, authorisation by a judge has to be obtained for the implementation of these investigation measures. The law regulates the respective circumstances under which the relevant measure will be approved by the court for each individual measure described above.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

It is up to the company under investigation to decide whether they will voluntarily hand over to law enforcement authorities any documents which are connected with investigations.

In addition, criminal procedure provides the instrument of the voluntary raid. In this respect the party involved has to agree to the raid of his premises. If this requirement is met, an order issued by the public prosecutor's office and an authorisation by a judge are not necessary to search incriminating documents in premises. However, the suspect has to be explicitly informed about the possibility to reject the raid.

The raid of a company's premises with the aim to find incriminating documents constitutes a violation of the property right which is guaranteed by fundamental rights. Therefore, it requires an authorisation by a court. It is only admissible if certain facts substantiate the suspicion that the defendant is hiding there or that there is evidence within the property that has to be taken into custody or be assessed. This can also be done with the aim of satisfying civil claims resulting from a crime. Moreover, it has to be clearly stated what the object of the raid is. The party involved has to be given the opportunity at the beginning of the raid to surrender the searched property on a voluntary basis. By doing so, he can still avert the raid on his premises. An authorisation for a raid is always given for a limited period of time. Within this period the raid has to take place, or the authorisation ceases to be valid.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does Austria recognise any privileges protecting documents prepared by attorneys or communications with attorneys? Do Austria's labour laws protect personal documents of employees, even if located in company files?

Certain professional groups such as attorneys and certified public accountants (tax consultants, auditors, etc.) have the right to reject the confiscation of written documents and data carriers if this would violate their obligation of secrecy. The confiscated documents have to be sealed and submitted to the court. Subsequently, the attorney or certified public account has to explain in detail at court how the exploitation of such documents would violate his professional obligation of secrecy. Then the judge examines the documents and decides if these are subject to the respective professional secrecy and if it is necessary to integrate the documents into the file. This protection of professional secrets is guaranteed otherwise the procedure is rendered null and void.

In addition, these professional party representatives have the right to refuse to testify in the investigation procedure. This right may not be evaded by the possible seizure and confiscation of documents and data carriers, otherwise the procedure will be rendered null and void. The protected documents include correspondence of the client, meeting papers as well as copies of the attorney or certified public accountant. Originals are not protected. Thus, the suspect cannot retain evidence from the investigation authorities by depositing it with his professional party representative. With respect to other professional groups (e.g. banks) the legal situation in Austria has very recently been substantially softened in favour of

the investigating authorities, which makes it possible now for the authorities to have more comprehensive access to such documents.

7.4 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

Due to the uniform regulation of the home raids and seizures as well as the confiscation of documents there is no difference in whether it tried to obtain the documents from the company under suspicion or from the employee involved. Therefore, there has to be at least the suspicion that a person who is under suspicion of having committed a crime is hiding in the building or that traces or objects can be found which have to be seized and evaluated.

7.5 Under what circumstances can the government demand that a third person produce documents to the government, or raid the home or office of a third person and seize documents?

In this respect there has to be at least the suspicion that a person who is under suspicion of having committed a crime is hiding in the building or that traces or objects can be found which have to be seized and evaluated.

Questioning of Individuals:

7.6 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

The purpose of questioning is to resolve a crime and to take evidence. In this respect no distinction is made between whether the person to be questioned is an 'employee, officer, or director' of a company.

Questionings are preceded by a written summons which has to state *inter alia* the subject matter of the procedure. Everybody is obliged to comply with such a summons. In case of failure to appear at the formal questioning, the compulsory attendance of informants can take place if this was expressly threatened in the summons before.

It is of great importance for the questioning whether the questioned person is examined as a witness or a defendant. As witnesses the questioned persons have to be instructed to testify correctly and completely to the extent that they are able, if necessary, to testify under oath before court. A wrong testimony is subject to punishment.

If a person is questioned as a defendant, he has to be instructed about this fact in the summons of the questioning. Especially, the defendant has to be informed of which offence he is suspected of and that he has the right to refuse to testify. Then he has to be informed that his testimony can serve for his defence, but can be used as evidence against him. At the beginning of the questioning the defendant has to be given the possibility to describe his observations concisely. Only then questions of the investigators are admissible. Suggestive questions are inadmissible. During the questioning the defendant may insist on the presence of his defending counsel who, however, may not participate in the questioning. After the end of the questioning, the defending counsel may ask the defendant individual questions.

7.7 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

As a questioning always serves to resolve a crime or to prepare the taking of evidence, a questioned person has to have the status of witness in the procedure about which he is questioned. If the investigating authorities assume that the person they intend to question can contribute to resolve the case the questioning will be admissible.

7.8 What protections can a person being questioned by the government assert? Is there a right to refuse to answer the government's questions? Is there a right to be represented by an attorney during questioning?

As described above, the accused can refuse to testify in the proceedings in which he stands trial. In addition, relatives cannot be forced to testify against the accused in criminal proceedings.

Certain professional groups (attorneys, certified public accountants, physicians, journalists) have the right to refuse testimony with respect to information which was given to them within the scope of their professional activity.

Persons who are questioned as witnesses can ask for the presence of a trustworthy person during questioning which can also be an attorney. This trustworthy person may not be questioned as a witness or be under suspicion of having participated in the crime. The witness himself has to answer the questions. In this respect, it is not possible for questions posed to the witness to be answered by the attorney.

As described above, the accused persons can also ask for the presence of a defending counsel during questioning. However, the defending counsel cannot intervene in the questioning or replace the questioning of the suspect.

An accused who is not capable of speaking or understanding the language of the case has the right to consult an interpreter, including the right to obtain a written translation of the essential parts of the files (Section 56 of the Code of Criminal Procedure). That right has existed since 1 January 2014 and derives from the Directive 2010/64/EU of the European Parliament and the Council of 20 October 2010.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal police and the public prosecutor's office have the obligation to investigate in a formal investigation procedure any crime for whose existence there are specific reasons. These specific reasons can also be the result of anonymous reporting to these authorities. At any rate criminal police have to submit a report to the public prosecutor's office who decides subsequently if the investigation procedure is continued or not.

8.2 Are there any rules or guidelines governing the government's decision to charge an entity or individual with a crime? If so, please describe them.

The public prosecutor's office has the possibility to discontinue an investigation procedure on grounds of negligibility. This is possible if the damage of the crime with respect to guilt, the consequences of the crime and the conduct of the accused after the crime can be regarded as negligible and if further criminal proceedings are not required on grounds of special and general prevention.

In addition, criminal proceedings can be discontinued if there are several criminal proceedings, if this has prospectively no important influence on the punishment and the legal consequences of a conviction, or if the accused person is also prosecuted abroad.

However, crime victims can file a well-founded petition for continuance of proceedings if these reasons exist.

The public prosecutor's office can discontinue an investigation procedure if the accused person voluntarily discloses his knowledge of facts which have not yet been the subject matter of an investigation procedure initiated against him. However, his testimony has to contain a complete description of his own crime. In addition, the discontinuance has to be justified by the evidential value of the information received (leniency programme).

In addition, there is the possibility that the public prosecutor's office refrains from prosecuting an entity if the prosecution of the entity may not be necessary in view of the seriousness of the crime, the seriousness of the violation of duty, the consequences of the crime, the conduct of the entity after the crime as well as legal disadvantages of the owner.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution are available to dispose of criminal investigations.

If the facts seem sufficiently clear due to the investigation procedure, the public prosecutor's office can withdraw prosecution of the crime under certain circumstances within the scope of pretrial diversion. However, the offence may not fall under the competence of lay judges or a jury and the defendant may not have incurred a heavy burden of guilt. Moreover, there may be no reasons which require the punishment in order to prevent the defendant from committing further criminal offences.

Measures of special prevention are linked with diversion. These range from the payment of a fine to rendering community service and the determination of a probationary period.

In investigation procedures the public prosecutor's office submits a precise diversion proposal to the defendant. Depending on whether or not the defendant wants to risk court proceedings, the defendant accepts or denies this proposal. During court proceedings it is still possible to reach with the defendant a settlement with respect to diversion.

If the defendant fails to comply with the measures imposed on him, criminal proceedings can be continued later.

8.4 In addition to or instead of any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies are appropriate.

Victims of a crime have the right to join criminal proceedings by declaration as civil parties. With this declaration they assert their right to get compensation for damage suffered. In the declaration of the civil party the victim has to indicate the amount of the damage suffered. The damage caused by the perpetrator will then be determined *ex officio* in criminal proceedings or by further investigation. If it is not possible to determine the damage, the civil party is referred to civil proceedings.

In compliance with procedural law a civil party is entitled to describe and justify its claims. In addition, it can request the taking of evidence and after the sentence file an appeal against the decision with respect to its civil claims.

9 Burden of Proof

9.1 For each element of the business crimes identified above, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

Analogous to any other crime, the principle that the public prosecution has to prove the defendant's guilt also applies to business crimes.

In order to be able to bring a charge before court, the facts have to be sufficiently clear and a conviction has to be obvious. The facts are sufficiently clear if all relevant sources of information have been reasonably exploited. The conviction is obvious if the available evidence is sufficient to justify a conviction.

9.2 What is the standard of proof that the party with the burden must satisfy?

After unfettered and detailed evaluation of the produced evidence the court has to be convinced that the accused is guilty with probability bordering on certainty. If the court fails to prove the guilt, the accused has to be acquitted "*in dubio pro reo*".

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

The respective court before which the case is brought has to be convinced of the guilt of the accused. The composition of the court can vary with the type of the accused crime. Lay judges also have to be convinced of the guilt of the accused in lay judge and jury proceedings.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

In this respect the law provides that the immediate perpetrator as

well as the accessory can commit a crime. The accessory is subject to the same punishment as the immediate perpetrator.

The accessory before the fact is the perpetrator who arouses in the immediate perpetrator the precise decision to act. However, it is not required to create the intent to commit the crime. Creating a decision to act means to exert influence on another person's mental state in order to push another person to commit a crime, this prompts the perpetrator to commit a crime.

The contribution to the crime means any participation in a crime of a person who is not the immediate offender or accessory before the fact. Contribution to the crime is any mental or physical contribution which causes the commission of the crime.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

In case of criminal acts with intent every constituent element of the criminal act has to be comprised by the perpetrator's intent. For most crimes conditional intent (*dolus eventualis*) is sufficient. In this case the offender assumes that the realisation of the statutory elements of a criminal act is possible and puts up with it. For certain crimes the statutes provide stricter requirements for the offender's intent.

Thus, the offender who commits embezzlement has to consciously abuse his power to dispose of another person's assets. In this case, he considers the circumstance of misuse of power not only possible, but is sure that it exists.

Another form of intent is deliberateness. In this case it is decisive that the offender regards the circumstance or the success for which the statutes require knowledge not only possible, but is sure that it exists or will exist.

It is the duty of the public prosecutor's office to prove that the accused acted with intent which is the statutory requirement for punishment.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law i.e. that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

To be able to blame an offender for his criminal conduct, it has to be assumed that the offender had to know the law which he violated. This means that the offender, if he claims that he was not aware that his conduct was a punishable act, can at least be blamed for being ignorant of this rule. In this respect certain generally accepted rules have to be taken for granted which, if violated, constitute a punishable act. A person can be blamed for a mistake of law if he was not familiar with the relevant provisions which are necessary for his professional practice. A person cannot be blamed for a mistake of law if he previously obtained advice from independent legal experts.

If within the scope of criminal proceedings the problem should arise that the defendant claims that he was ignorant of the unlawfulness of his act, it is the duty of the public prosecutor's office to prove that the defendant can be blamed for a mistake of law.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts i.e. that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

Basically, every single constituent element of crime has to be satisfied in order to hold a defendant accountable for a criminal offence. If the defendant's intent is missing with respect to only one constituent element of crime, i.e. the offender is mistaken with respect to one element of crime, the criminal act with intent is not punishable. Subsequently, it has to be examined if the offender can be punished for the negligence of his crime. However, a respective negligent crime has to exist and the error with respect to the constituent element of crime has to result from negligence. This means that a careful and assiduous person should have realised that all elements of a punishable act with intent would be fulfilled.

It is again the duty of the public prosecutor's office to prove that a negligent crime was committed although a mistake was made with regard to the statutory constituent element of the crime.

12 Voluntary Disclosure Obligations

12.1 If a person becomes aware that a crime has been committed, must the person report the crime to the government? Can the person be liable for failing to report the crime to the government?

There is no obligation to report crimes committed by other persons. Only the law enforcement authorities have the duty to prosecute crimes *ex officio*.

13 Cooperation Provisions / Leniency

13.1 If a person voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person, can the person request leniency from the government? If so, what rules or guidelines govern the government's ability to offer leniency in exchange for voluntary disclosures or cooperation?

Within the scope of leniency provisions ("*Kronzeugenregelung*"), which was introduced in Austria on 1 January 2011, it is possible to grant exemption from punishment to persons involved in a crime if they voluntarily disclose to the investigating authorities their knowledge of facts which have not yet been the subject matter of investigation procedures initiated against them. In return for exemption from punishment the public prosecutor's office has the right to oblige the defendant within the scope of leniency e.g. to pay a certain amount of money or to render community services.

This information has to make a decisive contribution to resolve the crime which falls under the competence of a court of lay judges, a jury court, or the public prosecutor's office for economic and corruption matters.

However, with respect to the complete description of the crime and the evidential value of the information a punishment may not seem necessary in order to prevent the defendant from committing further crimes.

The leniency programme has the important advantage for the defendant that he does not have a criminal record and will not serve a prison sentence.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in Austria and describe the favourable treatment generally received.

It is within the discretion of the public prosecutor's office to fully refrain from taking legal steps against an entity without imposing any sanctions if this seems not necessary due to the seriousness of the crime, the seriousness of the violation of duty by the entity, the seriousness of the violation of due diligence by the decision-makers, the consequences of the crime or the conduct of the entity after the crime. In this respect it has to be taken into account if there is a misproportion between the seriousness of the crime and the time and effort spent on investigations. The entity does not have the right to file a motion for such a procedure, but it is possible to suggest such a procedure.

If it is not possible to refrain from prosecuting the entity under the aspects described above, there is still the possibility to withdraw from prosecution. The public prosecutor's office has to withdraw from prosecution of the entity if the entity compensates for the damage caused by the crime, has remedied further consequences of the crime and if the imposition of a fine, of a certain probationary period or the declaration of the entity to render certain community services, does not seem necessary on grounds of special and general prevention. Also in this respect, as there is no right to file a motion, it will be possible that the entity suggest such a procedure to the general prosecutor's office.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed upon sentence?

The degree of punishment to be imposed by the court depends on the statutory penalties as well as statutory aggravating and mitigating circumstances which have to be taken into consideration by the court. A confession of the offender represents the most important mitigating circumstance. It is not provided by law that the degree of punishment or the crime for which the offender will be eventually sentenced can be negotiated. Informal agreements with respect to the degree of punishment cannot be ruled out, but they can constitute the crime of misuse of power in compliance with legislation of the Supreme Court.

Since the beginning of 2015 the court has – regarding crimes with a maximum penalty of a three-year prison sentence (that includes several business crimes with a damage lower than EUR 50,000,00) – the opportunity to draw up a written penal order ("*Strafverfügung*") without executing an oral trial. This procedure requires an application of the prosecutor, the defendant's abdication of the execution of a trial and a contradictory interrogation of the defendant. The judge is free to decide on the sentence, so there's no agreed upon sentence. But the sentence must not exceed a one-year conditional prison sentence. The defendant (as well as the prosecutor and the victim) is entitled to appeal against the penal order via protest ("*Einspruch*"), which forces the court to order the execution of the trial. If there is no protest the order becomes effective and has the same effects as a verdict.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

As described above, there are no rules in this respect.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of sentence on the defendant? Please describe the sentencing process.

In proceedings before a single judge at the district court or provincial court the respective judge has the discretion to determine the degree of punishment. In proceedings with lay judges or the participation of jurors, the lay judges and the jurors are involved in the decision on the degree of punishment.

As described above, the legal provisions state a range of punishment for the individual crimes. This can be up to 20 years for prison sentences or life imprisonment. For fines a range of punishment up to 360 day fines is possible. The amount of day fines depends on the income of the convicted. The number of day fines depends on the offender's guilt.

Within this scope of punishment the court has to decide on a fine to be imposed which is also based on statutory aggravating and mitigating circumstances which are listed as examples. As mentioned above, a comprehensive and remorseful confession is an essential mitigating circumstance.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

If an entity is accountable for a crime, a fine can be imposed on the entity. This fine is calculated in day fines and amounts to a minimum of one and a maximum of 180 day fines. The profitability of the company taking into account the general economic performance should influence the calculation of the amount. A day fine should correspond to the 360th part of the annual yield, and this amount may be exceeded by another third or fall below by another third. The minimum day fine has to be EUR 50, the maximum EUR 10,000. This amounts to a maximum fine for the entity of EUR 1.8 million.

For the calculation of the number of day fines the court has to take into account a range of mitigating and aggravating circumstances. The number of day fines is higher, the higher the damage caused by the entity, the bigger the advantage obtained by the entity or the higher the amount of unlawful conduct by employees which was tolerated or favoured. The number of day fines has to be reduced if, before the crime, the entity already took measures to prevent such crimes by his employees or encouraged them to act lawfully. In addition, e.g. compensation for damage or a vital contribution to find the truth can have a positive impact on the degree of punishment for the entity.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

In favour of the accused, an appeal against a conviction can be filed by the accused himself as well as by the public prosecutor's office.

To the detriment of the accused, if the accused is acquitted, only the public prosecutor and, to a limited extent the civil party, can file an appeal. An appeal of the civil party is only possible if a motion for the admission of evidence which is decisive for the guilt is denied, the case is ready for a decision to be made and if there are sufficient reasons for the claims of the civil party.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

The level of sanction imposed by the court can be contested both by the public prosecutor's office and the accused by filing an appeal.

If only the accused contests the level of sanction whereas the public prosecutor's office waives the right of appeal, this has the consequence that the sanction cannot be increased by the court of appeal. If, however, both contest the level of sanction, it can be increased or reduced.

In criminal proceedings the civil party can appeal against the reference to civil proceedings. This is the case if the accused is acquitted or if the court considers the civil party's claims unjustified in full or in part.

If the civil party claims are granted to the civil party, the accused can file an appeal.

16.3 What is the appellate court's standard of review?

A distinction is made between absolute and relative grounds for nullity. Absolute grounds for nullity lead to setting aside a sentence without reviewing how these grounds for nullity affected the sentence. This includes e.g. the wrong composition of the court or the lack of a statutory defending counsel. Relative grounds for nullity lead to set aside the sentence only if it cannot be ruled out that they influenced the sentence to the detriment of the appellant.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

In case of a nullity appeal with respect to a guilty verdict the appellate court has the possibility to decide in a reformatory way. In such a case the appellate court replaces the contested and incorrect sentence by a new one after detailed determination of all guilt-related facts.

However, it is also possible that the court remits the case to the court of first instance for a fresh decision. The court of first instance is bound by the legal position adopted by the higher court.

When the appellate court examines the sentence, it is bound by the ban that the sentence may not be aggravated. Thus the appellate court is not allowed to pass stricter sanctions if only the accused has filed an appeal.

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wkk law

wkklaw attorneys at law is a rising and well-established law firm with highly advanced expertise in corporate criminal law and white-collar crime, located in the centre of Vienna. The firm handles several high-profile white-collar crime and corruption cases as defence counsel as well as civil party representatives. Furthermore, the firm advises companies in matters of compliance and in-house investigations.

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