

International Comparative Legal Guides



Practical cross-border insights into business crime law

Business Crime 2022

12th Edition

Contributing Editors:

Ryan Junck & Andrew Good
Skadden, Arps, Slate, Meagher & Flom LLP

[ICLG.com](https://www.iclg.com)

Expert Analysis Chapters

- 1** **Enforcement Under the Biden Administration and Outlook for the Second Half of 2021**
Ryan Junck, Andrew Good & Oyere Etta, Skadden, Arps, Slate, Meagher & Flom LLP
- 6** **The Business Crime Landscape**
Aziz Rahman, Nicola Sharp & Syedur Rahman, Rahman Ravelli
- 17** **Why Corporate Culture is Key in the Fight Against Fraud**
Richard Shave & Kaley Crossthwaite, BDO LLP
- 21** **Who Owns a Bribe? And Why Should You Care?**
Andrew Stafford QC & Evelyn Sheehan, Kobre & Kim
- 26** **APAC Overview**
Dennis Miralis, Phillip Gibson, Jasmina Ceic & Lara Khider, Nyman Gibson Miralis

Q&A Chapters

- 33** **Argentina**
R.&R. Durrieu: Dr Roberto Durrieu & Lautaro A. Elorz
- 44** **Australia**
Clayton Utz: Tobin Meagher, Andrew Moore & William Stefanidis
- 54** **Austria**
IBESICH: Michael Ibesich
- 63** **Brazil**
Joyce Roysen Advogados: Joyce Roysen & Veridiana Vianna
- 76** **China**
Global Law Office: Alan Zhou, Jacky Li & Jenny Chen
- 86** **Czech Republic**
JŠK, advokátní kancelář, s.r.o.: Zuzana Valoušková & Helena Hailichová
- 95** **France**
Debevoise & Plimpton LLP: Antoine Kirry & Alexandre Bisch
- 106** **Germany**
Hengeler Mueller: Dr. Constantin Lauterwein, Dr. Maximilian Ohrloff, Dr. med. Mathias Priewer & Friedrich Florian Steinert
- 116** **Greece**
Anagnostopoulos: Ilias G. Anagnostopoulos & Jerina (Gerasimoula) Zapanti
- 126** **Hong Kong**
Haldanes: Felix Ng, Vanessa Wong & Emily Cheung
- 137** **India**
Kachwaha and Partners: Sumeet Kachwaha & Tara Shahani
- 149** **Italy**
Studio Legale Pisano: Roberto Pisano
- 161** **Japan**
Nagashima Ohno & Tsunematsu: Yoshihiko Matake, Tomohiro Hen & Shin Mitarai
- 170** **Malaysia**
Skrine: Lim Koon Huan & Manshan Singh
- 180** **Netherlands**
De Roos & Pen: Niels van der Laan & Brendan Newitt
- 191** **Nigeria**
AO2LAW: Bidemi Daniel Olumide & Kitan Kola-Adefemi
- 198** **Poland**
Sołtysiński Kawecki & Szlęzak: Tomasz Konopka & Katarzyna Randzio-Sajkowska
- 209** **Romania**
ENACHE PIRTEA & Associates S.p.a.r.l.: Simona Pirtea & Mădălin Enache
- 218** **Singapore**
Kalidass Law Corporation: Kalidass Murugaiyan, Chua Hock Lu, Ashvin Hariharan & Nithya Devi
- 226** **Slovenia**
Zdolšek – Attorneys at Law: Stojan Zdolšek
- 234** **Spain**
Geijo & Associates SLP: Arantxa Geijo Jiménez, Louise Lecaros de Cossio & Elena Bescos Gracia
- 243** **Switzerland**
Kellerhals Carrard: Dr. Florian Baumann, Dr. Claudia Götz Staehelin, Dr. Omar Abo Youssef & Marlen Schultze
- 257** **USA**
Skadden, Arps, Slate, Meagher & Flom LLP: Ryan Junck, Andrew Good & Oyere Etta

Austria

IBESICH



Michael Ibesich

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?

Business crime offences are primarily governed by criminal law and prosecuted by the Austrian Public Prosecutor's Office (*Staatsanwaltschaft, StA*) or the more specialised Public Prosecutor's Office for the Enforcement of Business Crimes and Corruption (*Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption, WKStA*).

However, there are other authorities that may be responsible for prosecuting business crime offences, such as the financial criminal authorities, for certain financial offences.

The Austrian Criminal Code (*Strafgesetzbuch, StGB*) differentiates between offences to be prosecuted *ex officio* (*Offizialdelikte*) and offences for which the victim must authorise prosecution (*Ermächtigungsdelikte*) or for which the victim must file charges themselves (*Privatanklagedelikte*). However, most offences are prosecuted *ex officio*.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

A public prosecutor's office is established at each location of a regional court that has jurisdiction over criminal cases. These public prosecutor's offices are responsible for investigation and prosecution in the jurisdiction of that court and in the district courts subordinate to the regional court, where they may be represented by district prosecutors. Most of these district prosecutors are not trained lawyers but specially trained civil servants. District prosecutors handle crimes with low penalties only.

About 10 years ago, a public prosecutor's office specifically responsible for corruption and white-collar crime was established: the Public Prosecutor's Office for the Enforcement of Business Crimes and Corruption (*WKStA*). Among other things, it is responsible for serious official and corruption offences as well as white-collar criminal and financial offences with damages exceeding EUR 5 million.

The public prosecutor is responsible for initiating criminal proceedings, as well as investigating, pressing charges, or suspending investigation procedures. The public prosecutors are assisted in their investigations by the criminal police. Judicial authorisation is required for some investigative measures.

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?

A victim may join the criminal proceedings as a private party and/or file a civil lawsuit. After winning a civil case, the awarded amount can be executed on the defendant.

In criminal proceedings, the prosecuting authorities can order seizures or freeze accounts. Victims of crime have the right to inspect files and can use this information.

Austrian law provides for the possibility of applying for temporary injunctions to secure claims.

There are various administrative agencies that can impose administrative sanctions depending on the sector in which the infringement occurs.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

The most remarkable business crime case in Austria in recent years was the so-called "BUWOG scandal". After three years of trial, in December 2020, a former Austrian Minister of Finance – as one of several defendants – was sentenced to eight years in prison (appeal pending). The subject of the proceedings was, among other things, the accusation of corruption in connection with payments of millions of euros related to the privatisation of federal housing.

2 Organisation of the Courts

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

In the first instance, either a district court (*Bezirksgericht*) or a regional court (*Landesgericht*) makes a ruling. The district courts have jurisdiction to rule on all criminal offences for which a mere fine or imprisonment not exceeding one year is threatened. The regional courts have jurisdiction to rule on all misdemeanours and felonies for which imprisonment exceeding one year is threatened, as well as – regardless of the threat of punishment – over certain offences specified in the law (e.g. dangerous threat).

While cases before the district courts are always adjudicated by a single judge, the composition of regional courts varies. Criminal offences punishable by life imprisonment or by a threatened minimum sentence of more than five years and additionally a maximum sentence of more than 10 years, as well as other special offences mentioned in the law (e.g. political

crimes), are tried before a panel consisting of three professional judges and eight jurors (*Geschworenengericht*). Criminal offences punishable by a minimum sentence exceeding five years that do not fall within the competence of the *Geschworenengericht*, as well as offences mentioned in the law (e.g. embezzlement, serious fraud – if a certain amount of damage has been exceeded or there was an intention to exceed it), are tried before a panel of one or two judges and two lay jurors (*Schöffengericht*). Other criminal offences are decided by a single judge.

There are no specialised criminal courts for any particular crimes.

In the second instance, the Higher Regional Courts (*Oberlandesgerichte*) and/or the Supreme Court (*Oberster Gerichtshof*) have jurisdiction, depending on which court had jurisdiction in the first instance and on the nature of the appeal.

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

Under Austrian law, there is no fundamental right of the accused to a jury trial. As mentioned above, depending on the threatened punishment or the offence charged, a jury trial (either *Geschworenengericht* or *Schöffengericht*) may or may not be mandatory.

3 Particular Statutes and Crimes

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

• Securities fraud

Under Austrian criminal law, a person commits fraud if, by deceiving someone about facts, he causes that person to do, tolerate, or refrain from doing something that harms that person or another person's property, with the intention of unlawfully enriching himself or a third party through the deceived person's conduct.

In any case, the Austrian Stock Exchange Act 2018 (*Börsegesetz 2018*, *BörseG 2018*) should be mentioned in connection with securities fraud. This Act regulates the administrative offence of misusing insider information and market manipulation as well as market manipulation punishable by court.

• Accounting fraud

While for a long time in Austria accounting fraud offences were scattered over several laws (e.g. Stock Corporation Act, Limited Liability Company Act), accounting fraud offences were included in the Criminal Code in 2016.

Decision-makers and authorised representatives are liable to prosecution, for example, if they misrepresent the net assets, financial position, or results of operations of a company by providing false or incomplete information – e.g. in the annual financial statements or at the Annual General Meeting, if this is likely to cause significant damage (to the company, shareholders, creditors, etc.).

• Insider trading

The misuse of inside information is both an administrative criminal offence and a criminal offence. The relevant provisions can be found in the Austrian Stock Exchange Act 2018 (*BörseG 2018*). It is a criminal offence to exploit insider information for oneself or a third party. This can be done by buying and selling securities, changing or cancelling trading orders, or recommending securities or passing on the information to third parties.

• Embezzlement

Austrian criminal law distinguishes between two types of embezzlement (“*Untreue*” and “*Veruntreuung*”).

“*Untreue*” is committed when someone knowingly abuses his authority to dispose/to oblige another person to dispose of another's property and thereby damages the other's property. A person abuses his authority if he unreasonably violates such rules that serve to protect the assets of the beneficial owner.

“*Veruntreuung*” is committed when someone appropriates something entrusted to him or to a third party with the intention of unlawfully enriching himself or the third party thereby.

• Bribery of government officials

The criminal offence of bribery of public officials is comprehensively regulated. In principle, both sides are liable to prosecution, i.e. the public official who demands an advantage and the one who promises an advantage to a public official.

A public official is liable to prosecution if he demands, accepts, or allows himself to be promised an advantage for performing or omitting an official act in breach of his duty, or for performing or omitting an official act for himself or a third party in breach of his duty.

The public official shall also be liable to prosecution if he demands an advantage for himself or a third party or accepts or allows himself to be promised an undue advantage with the intention of allowing himself to be influenced in his activity as a public official.

As already mentioned, the person who offers, promises, or grants an advantage to the public official or a third party shall also be liable to prosecution.

• Criminal anti-competition

The Austrian Criminal Code prohibits agreements restricting competition in public procurement procedures. Anyone who submits a request to participate in a procurement procedure or submits a bid or conducts negotiations based on an unlawful agreement aimed at inducing the contracting authority to accept a particular bid is liable to prosecution. Punishment for fraud also appears to be possible in such cases.

Price agreements between bidders in private tenders may constitute fraud.

The Austrian Federal Act against Cartels and other Restraints of Competition (*Kartellgesetz 2005*, *KartG 2005*) prohibits, among other things, the abuse of a dominant market position. Such abuse may consist in particular of demanding purchasing or selling prices or other business terms and conditions that deviate from those that would be very likely to arise if effective competition existed, taking into account, in particular, the conduct of entrepreneurs in comparable markets with effective competition.

• Cartels and other competition offences

The beforementioned Austrian Cartel Act prohibits, among other things, all agreements between undertakings, decisions by associations of undertakings, and concerted practices that have as their object or effect the prevention, restriction, or distortion of competition (cartels).

The Federal Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*, *UWG*) prohibits, for example, aggressive or misleading business practices to protect entrepreneurs and consumers. In the event of violations, penalties are possible in addition to actions for injunctive relief and damages.

• Tax crimes

The Austrian Financial Crimes Act (*Finanzstrafgesetz – FinStrG*) regulates a wide range of financial offences. Some offences fall under the jurisdiction of the courts; others are the responsibility of the tax authorities.

Offences include tax evasion, smuggling, tax fraud, and cross-border VAT fraud.

• Government-contracting fraud

Reference is made to the previous remarks.

Separate criminal offences have been created with regard to expenditure fraud detrimental to the financial interests of the European Union and misappropriation of funds and assets detrimental to the financial interests of the European Union.

• Environmental crimes

The Austrian Criminal Code regulates extensive criminal offences against the environment. These include, for example, intentional and negligent environmental damage.

• Campaign-finance/election law

Regulations in this regard can be found in the Federal Act on the Financing of Political Parties 2012 (*Parteiengesetz 2012 – PartG*).

It states, for example, that each political party must publicly report annually on the nature of its income and expenditure in an accountability report. The Court of Auditors reviews the reports. Donations and other benefits to parties are also regulated. There are limits and reporting requirements.

• Market manipulation in connection with the sale of derivatives

The Austrian Stock Exchange Act (*Börsegesetz 2018, BörseG 2018*) criminalises market manipulation and refers to relevant European legislation (Market Abuse Regulation (MAR); Markets in Financial Instruments Directive (MiFID)). Some of the offences are administrative violations that are prosecuted by the Financial Market Authority, while others are punishable by the courts.

• Money laundering or wire fraud

The criminal offence of money laundering has gained importance in recent years, also due to European legislation.

The criminal provision covers money laundering on the basis of two different connecting factors. On the one hand, there are assets that originate from a specific predicate offence, and on the other hand – without a specific predicate offence being relevant – assets that belong to a terrorist organisation.

Extensive auditing and reporting requirements have been introduced in numerous areas to combat money laundering. This applies, for example, to credit and financial institutions, insurance companies, as well as to lawyers and notaries, who must carefully check all transactions in which they carry out financial or real estate transactions on behalf of and on the account of their client, etc.

• Cybersecurity and data protection law

The Austrian Criminal Code recognises several offences related to cybercrime.

Criminal offences include unlawful access to a computer system, violation of telecommunications secrecy, improper interception of data, data damage, disruption of the functioning of a computer system, misuse of computer programs or access data, etc. In addition to these specific offences, general offences such as fraud may also be applicable.

The Austrian Data Protection Act (*Datenschutzgesetz, DSG*) contains a fundamental right to data protection. In addition to the Austrian Data Protection Act, the European General Data Protection Regulation (GDPR) is directly applicable in Austria.

• Trade sanctions and export control violations

The Austrian Foreign Trade and Payments Act 2011 (*Außenwirtschaftsgesetz 2011, AußWG 2011*) has implemented key European law requirements and contains provisions on export controls, the control of the movement of defence goods within the European Union, and the control of the takeover of Austrian companies by persons or companies from third countries (outside the EU, EEA and Switzerland).

In the event of violations, the law provides for consequences under administrative criminal law as well as offences punishable by the courts.

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

Under Austrian law, the attempt to commit an offence is generally punishable.

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 Austrian Act on Corporate Criminal Liability (*Verbandsverantwortlichkeitsgesetz, VbVG*) regulates the liability of an association (e.g. stock corporations, limited liability companies, etc.) for criminal offences committed by its decision-makers and employees, when there have been violations of duties affecting the association. The decisive factor is that the criminal offence of a decision-maker or an employee can be attributed to the association. The criminal offence either must have been committed for the benefit of the association or must have violated obligations that affect the association.

While criminal offences committed by decision-makers can be attributed to the association immediately, additional criteria must be met for criminal offences committed by employees. So-called organisational culpability on the part of the association is required, i.e. that the criminal offence must have been made possible or substantially facilitated by the negligence of a decision-maker, for instance if reasonable and necessary technical, organisational or personnel measures to prevent such criminal offences were committed. A criminal offence is attributable to the association if an employee has acted unlawfully; fault on the part of the employee is not required.

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

Regardless of the criminal liability of the association, the decision-makers and employees who committed the crime are also criminally liable at the same time. Thus, simultaneous punishment of legal persons and natural persons is possible.

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?

Authorities conduct proceedings against the association and the natural persons simultaneously. However, experience shows that the authorities often focus more on the individuals and tend to treat the proceedings against the association as ancillary.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

The Austrian Act on Corporate Criminal Liability contains a legal succession clause. It provides that in the event of legal

succession, the legal consequences provided for in this Act shall affect the legal successor. If there is more than one legal successor, a fine imposed on the legal predecessor may be enforced against any legal successor.

5 Statutes of Limitations

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

While under Austrian civil law most claims are subject to a three-year statute of limitations (from the time when the damage and the person of the tortfeasor became known to the injured party; if the damage and the person of the damaging party have not become known to the damaged party, the limitation period is 30 years), the limitation period is 30 years if the damage has arisen from one or more offences that are punishable by law, can only be committed intentionally, and are punishable by more than one year of imprisonment (the limitation period begins to run from the time of the damaging event).

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

The statute of limitations does not begin to run for offences that are ongoing. In these cases, the statute of limitations does not begin to run until the last criminal offence is completed.

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

The limitation period shall not include, for example, a period during which prosecution may not be initiated or continued under a statutory provision (e.g. in case of diplomatic immunity). The time between the first questioning of the accused and the final termination of the proceedings shall also not be included in the limitation period.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Austrian criminal laws apply to certain offences enumerated in the law that were committed abroad, regardless of the criminal laws of the place where the offence was committed. For acts other than those expressly designated in the law that were committed abroad, the Austrian criminal laws apply under certain conditions, provided that the acts are also punishable under the laws of the place where they were committed.

Austrian law enforcement agencies regularly cooperate with foreign law enforcement agencies within the framework of national and international regulations.

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

Most criminal offences are official offences. For these offences,

the public prosecutor's office must act when it becomes aware of the case. In a few cases, the victim of the crime must authorise the public prosecutor's office to prosecute or, in some cases, file a criminal complaint himself.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Austrian authorities can and regularly do seek legal assistance from foreign authorities.

7 Procedures for Gathering Information from a Company

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

Austrian law enforcement authorities have numerous powers at their disposal for gathering evidence. Witnesses can be questioned, houses searched, documents seized, or conversations intercepted. For certain measures, however, the public prosecutor's office needs court approval.

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?

The search of places and objects (as well as persons) is permissible if it can be assumed on the basis of certain facts that a person suspected of committing a criminal offence is hiding there or that evidence is present that may need to be secured or evaluated.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

The Austrian Code of Criminal Procedure (*Strafprozessordnung, StPO*) provides that documents and information in the possession of the accused and prepared by him or his lawyer for the purpose of his defence may not be seized.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) that may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

Austria is subject to the rules of the General Data Protection Regulation.

7.5 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?

The conditions under which the government may demand documents from an employee are the same as when documents are demanded from the company.

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

If the legal requirements, for e.g., a house search are met, such a search is also permissible in this case.

Questioning of Individuals:

7.7 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?

A distinction must be made between whether the person is to be questioned as an accused or as a witness.

An accused person is someone who, on the basis of certain facts, is specifically suspected of having committed a criminal offence, and in order to clarify this suspicion, evidence is taken, or investigative measures are ordered or carried out.

An accused person may not be forced to incriminate himself. He shall be free to testify or refuse to testify, and shall have the right to have a defence attorney present at any stage of the proceedings.

Witnesses are persons other than the accused who could have directly or indirectly perceived facts that are essential for the clarification of the criminal offence or otherwise relate to the subject matter of the proceedings and who are to testify about them in the proceedings. Witnesses are obliged to testify correctly and completely. In certain cases, witnesses have the right to refuse to testify or may not be examined as witnesses. Witnesses have the right to have a trusted person present during questioning.

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

Largely under the same conditions and prerequisites as just described.

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

See the answer to question 7.7 above.

The principle of free evaluation of evidence applies to Austrian criminal proceedings. In principle, it is permissible to evaluate the silence of the accused. In accordance with Art. 6 of the European Convention on Human Rights, it depends very much on the individual case whether and how the silence of the accused is assessed. The prerequisite will probably be that the evidence against the accused gives rise to such a serious suspicion that, according to common sense, the only conclusion that can be drawn from the accused's silence is that the accused has no answer to the evidence against him (following a decision of the European Court of Human Rights).

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

The criminal investigation department and the public prosecutor's office are obliged to investigate *ex officio* any initial suspicion of a criminal offence that comes to their attention and that is not merely to be prosecuted at the request of a person entitled to do so. In practice, criminal offences are often actively reported to the police or prosecutor's office, and the authorities then begin their investigation.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

In Austria, the Austrian Act on Corporate Criminal Liability regulates the liability of an association for criminal offences committed by its decision-makers and employees.

See in detail the answer to question 4.1 above.

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 agreements are available to dispose of criminal investigations.

If the requirements are met, "diversion" is possible.

The prerequisites are that the facts of the case have been sufficiently clarified, the offence is not punishable by more than five years' imprisonment, the guilt of the defendant is not considered to be serious, and the offence has not resulted in the death of a human being, unless a relative of the defendant was killed through negligence and punishment does not appear to be necessary in view of the severe psychological stress this caused the defendant. Furthermore, punishment of the defendant must not be necessary to deter him from committing crimes or to counteract the commission of crimes by others. Instead of punishment, the prosecution (or later the court) imposes a diversion measure, to which the defendant must consent. The diversion measures available are: the payment of a sum of money; the performance of community service; the imposition of a probationary period, combined with probation and the performance of conditions; and offence resolution.

Diversion for the offence of abuse of official authority is statutorily restricted, and diversion for sex offences punishable by more than three years' imprisonment is statutorily excluded.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

The only possible option is “diversion” as described in question 8.3 above. In preliminary proceedings, the power of decision lies with the public prosecutor’s office; in main proceedings, it lies with the court.

8.5 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 may apply.

In addition to the criminal proceedings, civil proceedings may also be instituted. The victim of a crime may join the criminal proceedings with his claims against the defendant and/or pursue these under civil law as well.

8.6 Can an individual or corporate commence a private prosecution? If so, can they privately prosecute business crime offences?

See the answers to questions 1.1 and 8.1 above.

There are some offences for which the victim must file charges themselves (*Privatanklagdelikte*, e.g. insult) and offences for which the victim must authorise prosecution (*Ermächtigungsdelikte*, e.g. deception). However, the classic business crimes (e.g. fraud, embezzlement) do not fall under these categories, but are rather offences to be prosecuted *ex officio* (*Offizialdelikte*).

9 Burden of Proof

9.1 For each element of the business crimes identified above in section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The prosecution has the burden of proof.

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

The standard of proof generally required is proof beyond any reasonable doubt.

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

The court decides according to its free conviction on the basis of the evidence presented.

10 Conspiracy / Aiding and Abetting

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

Not only the direct perpetrator commits the punishable act, but also the person who designated another to perform it or otherwise contributes to its performance. A designating offender is one who causes another to commit a criminal offence. A contributory offender is anyone who otherwise – i.e. in a way other than by designating another person – contributes to the execution of a criminal offence.

If more than one person was involved in the act, each of them shall be punished according to their fault.

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?

A person acts intentionally if he intends to commit an act that corresponds to a statutory crime; for this it is sufficient that the perpetrator seriously believes that this realisation is possible and accepts it (*dolus eventualis*). This form of intent is sufficient in most cases.

For some offences, the offender must act intentionally (*dolus directus*) or knowingly.

The perpetrator acts intentionally (*dolus directus*) if he is concerned with the realisation of the circumstance or result for which the law presupposes intentional action.

The offender acts knowingly if he not only considers the circumstance or result for which the law presupposes knowledge to be possible, but also considers its existence or occurrence to be certain.

Some criminal offences require negligence for criminal liability.

A person acts negligently if he disregards the care that is incumbent on him under the circumstances and that is possible and reasonable for him under his mental and physical circumstances, and therefore fails to recognise that he may bring about a condition that corresponds to a statutory offence. A person is also negligent if he considers it possible that he will bring about such a condition but does not intend to do so.

A person acts grossly negligent if he acts in an unusually and conspicuously careless manner, so that the occurrence of a condition corresponding to the legal facts was foreseeable as a most probable.

Whether the requirement of intent or negligence is met, the court decides according to its free conviction on the basis of the evidence.

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?

If the alleged offender does not recognise the unlawfulness of the act due to an error of law, he shall not act culpably if he cannot be blamed for the error.

The error of law is blameworthy if the wrong was easily recognisable for the offender as for everyone or if the offender did not familiarise himself with the relevant regulations although he would have been obliged to do so according to his profession, activity, or other circumstances.

If the error is reproachable and if the offender acted intentionally, the penalty provided for the intentional act shall be imposed and if he acted negligently, the penalty provided for the negligent act shall be imposed.

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 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?

If the offender does not realise that he is committing a criminal offence by his actions, he may be acting without intent. He can therefore not be punished according to an intentional offence. If, however, there is a corresponding negligence offence and the offender has acted negligently, then possible liability for negligent action remains.

Again, burden of proof lies with the court. The court must investigate all the arguments, in this case especially if the offender was aware of all the facts of the case.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

There is no general obligation for individuals or companies to report a crime. However, voluntarily reporting a crime, cooperating with the authorities, making amends for damages, etc. are all mitigating factors and can mitigate the threat of punishment.

The leniency programme is still very new in Austrian criminal law. It was introduced for a limited period of time for the purpose of evaluation – according to the current status, it shall expire at the end of 31 December 2021. It is not yet possible to estimate what the future will look like.

13 Cooperation Provisions / Leniency

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

As mentioned under question 12.1, the leniency programme is still new in Austria and currently under evaluation.

In general, leniency is a special form of "diversion". The offender must voluntarily approach and cooperate with the prosecution and he must make a remorseful confession. If all legal requirements for granting leniency are met, the prosecution must proceed as in the case of "diversion". The principal witness agrees to a measure (payment of a monetary reward, performance of community service, probationary period, etc.)

and the proceedings against him are discontinued, subject to later prosecution. If, in the course of further proceedings, it turns out that the principal witness has violated duties, the proceedings against him may be reopened. If the proceedings against the accused third party have been concluded with legal effect, the public prosecutor's office shall finally discontinue the investigation conducted against the principal witness. It is required that the principal witness has fulfilled his obligations (payment of a monetary reward; performance of community service, probationary period, etc.).

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

See the answer to question 13.1 above.

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?

Plea bargaining is prohibited in Austria.

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?

Plea bargaining is prohibited in Austria.

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 a sentence on the defendant? Please describe the sentencing process.

Once the court is convinced of the defendant's guilt, it must determine the punishment it deems appropriate. Austrian criminal law provides for minimum and maximum penalties (for both fines and imprisonment). The court is not bound by precise guidelines in sentencing but must consider mitigating and aggravating circumstances. Mitigating circumstances are, for example, a remorseful confession, compensation for damages, or if the crime was only attempted, etc. Aggravating circumstances are, for example, if the defendant already has a criminal record or the amount of damage caused. The court may also suspend certain sentences.

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 association is responsible for an offence, an association fine shall be imposed on it.

The fine shall be assessed in units of EUR 50 to EUR 10,000 according to the earning situation of the association, taking into account its other economic performance. The court shall weigh aggravating and mitigating grounds.

In particular, the fine shall be higher the greater the damage or endangerment for which the association is responsible; the greater the advantage gained by the association from the offence; and the more unlawful conduct was tolerated or encouraged by employees.

In particular, the fine shall be lower if the association has already taken precautions to prevent such acts before the act in question occurred or has urged employees to behave in a law-abiding manner; if the association is only responsible for criminal offences committed by employees; if it has made a considerable contribution to establishing the truth after the act; if it has made good the consequences of the act; if it has taken substantial steps to prevent similar acts in the future; and if the act has already resulted in serious legal disadvantages for the association or its owners.

Suspension of the sentence is possible in certain cases.

16 Appeals

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

Both the defendant and the prosecution may appeal against a guilty verdict. Only the public prosecutor may appeal against an acquittal.

If both parties appeal, the verdict can be changed in both directions, i.e. both in favour of the defendant and against the defendant.

If only the defendant appeals and the prosecution does not, the appellate court may not increase the sentence on appeal.

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

See the answer to question 16.1 above.

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

An appeal against a criminal conviction may have several grounds related to the verdict itself or of the preceding proceedings for errors that must result in nullity. The question of guilt may be contested. It is also possible to challenge the sentencing and decisions on private law claims. In the case of judgments in which jurors have participated, it is not possible to contest the question of guilt.

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

The details depend on which courts have jurisdiction in the first and second instance. The following may be possible depending on the jurisdiction of the court:

The court of appeal may uphold the contested decision or annul the contested judgment and refer the criminal case back to the first instance. A new hearing will then take place and a new decision will be issued. The court of appeal may also change the contested judgment and possibly arrive from a guilty verdict in the first instance to an acquittal (or *vice versa*).



Michael Ibesich is an attorney-at-law in Vienna, Austria. His main focus of activity includes handling dispute resolution cases and white-collar crime matters. Michael frequently acts as a defence lawyer in criminal cases, especially in white-collar crime. He provides in-depth experience, representing clients in all phases of white-collar litigation, with particular capabilities handling fraud, bribery and corruption. Michael further represents companies as well as private individuals in the enforcement and defence of claims.

IBESICH
Josefstädter Straße 11/16
A-1080 Vienna
Austria

Tel: +43 1 505 37 05 – 0
Email: office@ibesich.at
URL: www.ibesich.at

IBESICH is a full-service law firm that serves private individuals, companies, and organisations, with a strong focus on litigation and white-collar crime matters. IBESICH cooperates on a regular basis with renowned law firms and individual experts. This network of experts enables the firm to handle even extensive and complex cases for clients in the best possible way.

www.ibesich.at

IBESICH