

KNOETZL

CRIMINAL LAW AMENDMENT ACT

Public mores and social values have changed significantly since the enactment of the Austrian Criminal Code (the “Code”) 40 years ago. Consequently, in February 2013 the Austrian Minister of Justice tasked a working group with making recommendations for amendments to the Code. The recommendations were used as a basis for the most extensive amendment since the enactment of the Code.

This newsletter will outline the most important of the amendments for businesses that came into full force and effect on 1 January 2016 in the form of an amendment to the Criminal Code and further Austrian laws (the “Amendment Act”).

KNOWHOW

CHANGES AT A GLANCE

- The breach of trust provision has been clarified
- The business judgment rule has been introduced
- Provisions on fraudulent accounting have been harmonized
- New rule on whether an offense is deemed commercial
- Gross negligence has been defined
- Value limits have been raised
- Amendments regarding cybercrime, bid rigging, social security crimes

BREACH OF TRUST

The main amendment to the breach of trust provision is the introduction of a **definition** of the central, but previously unclear term **“abuse of power”**: someone is deemed to have abused his power when he **“unjustifiably” violates rules designed to protect the assets of the beneficial owner**. The initiative that led to this revision defines “unjustifiable” as the use of legal authority which oversteps the range of “reasonably justifiable”, which will depend on how precisely the rules of internal authorization are determined by the relevant law, contract, policies and so forth.

BUSINESS JUDGEMENT RULE

The amendment also introduces the business judgment rule that originated in Anglo-American law into the Austrian Stock Corporation Act and the Austrian Limited Liability Companies Act: this Austrian version of the rule provides that a board member or manager is deemed to be acting in accordance with the diligence of a prudent and conscientious manager **if in making a business decision he is not guided by extraneous interests, has adequate information and may justifiably assume that he is acting in the best interest of the company**.

The aim of the rule is clear: if the manager conforms with these requirements, the content of his decision should in principle **not be subject to substantive review** by civil courts or – with regard to breach of trust proceedings – by criminal courts.

The latest development regarding the business judgment rule is the Supreme Court’s decision to extend the applicability of the

business judgment rule to representatives of private foundations (“Stiftungen”) (6 Ob 160/15w).

FRAUDULENT ACCOUNTING

Prior to this amendment, fraudulent accounting practices were penalized under several Austrian laws. Sec. 163a-d of the amended Code now serve to **harmonize** most of these provisions. The provisions in the Capital Market Act, the Investment Fund Act and the Real Estate Investment Fund Act are not affected.

The Code distinguishes between offenses committed by persons belonging to the respective legal entity (**“decision-makers”**) and those committed by **external auditors**.

Decision-makers can be authorized officers or other persons who exercise significant influence on the legal entity as well as the official company bodies (members of the managing board, managing directors etc). Such decision-makers may be subject to imprisonment in particular if they **incorrectly or incompletely present essential information** in the financial statements, management reports and the like or if they **fail to set up a special report** in the face of an imminent threat to liquidity.

Auditors may be subject to imprisonment

- if they **wrongly represent** essential information in audit reports and the like,
- if they **conceal** the fact that essential information in financial statements and the like are **represented in a misleading or incomplete way**,
- if they issue a **misleading audit certificate**, or
- if they **fail to set up a report** in the face of an imminent threat to the continued existence of the company.

The **maximum imprisonment** in such cases is two years or, if the legal entity is listed, three years.

The Code now gives further guidance by providing the **criteria for active repentance**.

A list of the types of **legal entities** that are subject to these provisions is also provided: private partnerships, limited liability companies, private trusts, etc² ; comparable foreign legal entities are also caught if their shares are listed on a regulated market in Austria or if they have a branch registered in the Austrian companies’ register.

According to the amendments in sec. 64 of the Code, prosecution in Austria can now even result if the criminal offense was **committed abroad**, provided that the legal entity has its principal place of business in Austria.

“COMMERCIAL NATURE” OF AN OFFENSE

The penalties for the commercial commission of offenses are considerably higher than for non-commercial commission. Prior to the Amendment Act, the criterion for determining whether an offense was commercial in nature was purely subjective, i.e. that the offender “intended to generate an ongoing source of income by recurrent commission”.

The Code has now been amended to include more objective criteria to ensure that only “professional” criminals are caught: **in addition** to the requirement that the perpetrator **intends to generate an ongoing source of illicit funding** that is not purely marginal (i.e. the monthly average on a yearly basis must exceed EUR 400) by recurring commission over an extended period, there are now several **alternative objective criteria** such as **acting with the aid of special skills** or tools or **planning or committing multiple offenses** of the same kind.

GROSS NEGLIGENCE DEFINED

The term “gross negligence” had in the past already been used in the wording of some criminal offenses, including sec. 159 of the Code (“grossly negligent impairment of creditors’ interests”). However, there was no generally applicable definition in the Code. This has now been rectified: under sec. 6 of the Code a perpetrator is deemed to have acted with gross negligence if he **acted with a lack of care that was unusual and striking, so that it was foreseeable that a punishable offense would in all likelihood occur.**

RAISING OF THE VALUE LIMITS

Sanctions for damages to property are considerably higher if certain value thresholds are exceeded. These value thresholds had not been changed for over ten years. The comparatively high penalties for offenses against property compared to the penalties for offenses against life and limb have, moreover, been subjected to strong public criticism. In consequence, the Amendment Act **raised the first damage threshold from EUR 3,000 to EUR 5,000** and the second damage threshold from **EUR 50,000 to EUR 300,000.**

For example, if a non-qualified fraud results in damages of less than EUR 5,000, the penalty is imprisonment of up to 6 months or a monetary fine; if the damages exceed EUR 5,000, the penalty

is imprisonment of up to 3 years and if the damages exceed EUR 300,000 the penalty is a minimum of one and a maximum of 10 years’ imprisonment.

This amendment does not, however, apply to money laundering, malpractice and in corruption cases.

CYBERCRIME & CYBERBULLYING

In order to implement the cybercrime directive (2013/40/EU) and to extend the scope of punishable behavior, the so-called “**hacking**”-rule of sec. 118a of the Code was **reformulated and extended**: prosecution can result if a hacker gains unauthorized access to personal data by overcoming a specific safety feature in a computer system. This applies when the hacker infringes personal or secret information or if the hacker harms the owner of the data by using data stored in the system of which he unlawfully gained knowledge.

With regard to **data corruption** and the **interference** of the functioning of a computer system, a **qualification** was introduced: if a computer program, password, or similar information that enables access to a computer system is used and a large number of computers are compromised, the penalty is increased up to a 3-year prison sentence.


The ever-increasing use of social media has led to a new problem, which has now been penalized, i.e. **cyberbullying**, defined as the continued harassment by means of telecommunications or computer systems.

FORBIDDEN BID RIGGING IN ENFORCEMENT PROCEEDINGS

In view of findings on frequent irregularities in the bidding processes in particular in court-ordered auctions, the Amendment Act now added a criminal element to deter such behavior. Any person who **demands, accepts or receives** a promise of a **benefit** for himself or a third party **for tampering with the bidding process** may be subject to imprisonment for up to two years. This also applies to the person offering, promising or granting the benefit.

SOCIAL SECURITY CRIMES

In the field of social security crimes, the penalty of 2 years imprisonment for the withholding of employees’ Social Security contributions was **reduced to one year** imprisonment or an equivalent fine.



Criminal liability **for fraudulent registration for Social Security** was extended: It is now a criminal offense subject to a penalty of imprisonment of up to three years to undertake, facilitate or order the registration of a person for Social Security in the full knowledge that the person making such fraudulent registrations will fail to fund the registration. If the offense is of a commercial nature or affects a large number of people, the penalty is imprisonment for a minimum of six months to a maximum of five years.

WHAT TO EXPECT

The clarification of the provision on breach of trust in connection with the introduction of the business judgment rule emphasizes the importance of granting board members or managers a margin of discretion, without exposing them to the risk of prosecution. So far, there is no decision by the Supreme Court regarding the amended provision. However, it can be expected that the Supreme Court will remain true to its former decisions as it had already been applying the criteria of the business judgment rule before the Amendment Act, but a change of direction is always possible.

The raising of the value limits relating to the offenses against property leads to a considerable advantage with regard to alternative ways of “settling” criminal cases. Under Austrian law, criminal proceedings dealing with minor or moderate offenses can be terminated if the suspect fulfils an alternative duty such as community service or the payment of a lump sum (“Diversion”). As one of the prerequisites for diversion is the maximum threat of imprisonment of five years, for example a fraud resulting in damages of up to EUR 300,000 can now be settled by diversion. Before the Amendment Act, all cases of fraud exceeding the threshold of EUR 50,000 were excluded from diversion right away.

All in all, the amendments added some objective criteria and provide for clarification and harmonization of important provisions in the Code. However, it remains to be seen whether these amendments will lead to more predictable results in the future.