



## A Business Day in Court? The draft corporate criminal law

**Kaprun, 2000: 155 died in a cableway accident. The public quickly zoomed in on the culprits: the companies that had manufactured and operated the cableway which became a death trap for its passengers. Since evidence for individual guilt on the part of company executives is hard to get in cases like this, calls for a "corporate criminal law" have emerged once again. The spectacular failure of national and international companies (Enron, Worldcom, Parmalat) acted as another trigger for the envisaged law intended to extend criminal accountability to companies themselves. Recently, the Austrian Federal Ministry of Justice presented a bill governing the liability of enterprises for activities punishable by court (Verbandsverantwortlichkeitsgesetz VbVG).**

The new provisions, provided that they will be adopted by Parliament, will apply to all legal entities and some specified partnerships. While in the draft this category is known as "Verbände" (associations), we will use "enterprises" here, in line with general usage.

In the future, enterprises themselves may be sentenced in criminal proceedings just like natural persons when persons *acting for such enterprise* commit a crime within the scope of the enterprise's activities. According to the bill, an enterprise may be **made responsible for any criminal offence** and will be accountable for all its employees, who nevertheless may still be exposed to criminal prosecution on a personal level.

An enterprise may be subject to punishment when an offence is committed **by its decision-makers**. Under the bill, decision-

makers are natural persons who act in an executive function for the enterprise. The enterprise will be accountable for a fault committed by a decision-maker only when s/he acted in an illegal and culpable manner in his/her executive capacity "for the enterprise and within the scope of its activities" and when there are no legally recognised grounds of justification, of precluding culpability or excuses.

On the other hand, an enterprise may be responsible for an offence committed by a "normal" employee for the enterprise and within the scope of its activities. For such "normal" employees, the enterprise is punishable only when the crime was enabled or substantially facilitated by a decision-maker failing to exercise the due and reasonable care required by circumstances. Particularly, due care is not exercised if essential technical, organisational or personnel measures



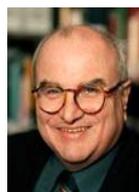
were omitted which would have prevented the crime, i.e. when the lack of monitoring and supervision increased the risk. Accordingly, criminal liability is linked to **“negligence with regard to monitoring, supervision and/or organisation”**. The staff member need not be known by name and it is not important whether s/he acted culpably.

Since jail sentences obviously cannot be imposed on an enterprise, the bill envisages **fin**es as a punishment which are calculated on the basis of the enterprise’s profit situation and are commensurate with its turnover. According to the bill, the maximum fine may be **15% of the annual turnover**. It will be possible to grant conditional or partly conditional indulgence for such fines. The authorities may alternatively and “only” order technical, organisational or personnel measures or measures to repair the damage. Also permissible is diversion, i.e. a process where the public prosecutor discontinues prosecution and the court suspends proceedings upon compliance with specified stipulations. It should also be considered that sentencing an enterprise under criminal law will have far-reaching consequences with regard to liability claims under civil law because a criminal judgement is normally binding on civil courts.

The review process for the bill has since been completed, and no significant change can presently be expected, although the bill still needs to be discussed in and adopted by Parliament.

For enterprises the bill harbours some serious risks. It should thus be considered whether additional technical, organisational

and personnel measures will have to be taken to prevent an enterprise becoming accountable for any criminal action on the part of any of its staff members. In view of this aspect it is necessary to accord even more attention to the **internal supervision system**. In order to guard against an emergency, we recommend that measures to safeguard the internal supervision system be documented in writing on a regular basis, so as to be able to submit such documents to the courts for the purpose of exoneration. An audit certificate confirming that the internal supervision system works may also be helpful. **Useful preventive measures** should be directed against the “classical” offences such as bodily injury, disclosure of business or plant secrets, providing credit information with intent to cause damage, fraud or environmental crimes, but also e.g. against crimes under social welfare, data protection, telecommunications and company laws, which do not readily come to mind in such a context.



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At the occasion of a "Location Austria Day" organised by the Austrian Economic Chamber at the Dutch Chamber of Commerce in Rotterdam, Martin Preslmayr recently discussed the legal and tax frame for investing in Austria, presenting our brochure on "Investing in Austria", which is now in its 6<sup>th</sup> edition. The considerable interest evinced by Dutch entrepreneurs clearly showed that Austria is a top-ranking investment location in Europe, a view confirmed by A. Ruys, Chairman of the Executive Board of Heineken, who spoke about the success achieved by Heineken's purchase of a stake in Brau Union and the benefits gained from canvassing other European markets from a base in Austria.