

The Austrian Model of Attributing Criminal Responsibility to Legal Entities

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Abstract With the Act on the Responsibility of Legal Entities for Criminal Offences (“*Verbandsverantwortlichkeitsgesetz*”—VbVG), which came into force in 2006, the Austrian legislator implemented a number of international and European legal instruments. The criteria for attributing criminal responsibility to legal entities are the core element of the VbVG. Such responsibility can be triggered by criminal offences committed either by decision makers or by staff members. Offences committed by decision makers are attributed to the entity, if the decision maker commits the offence culpably (in the sense of blameworthiness), thus fulfills all requirements for a conviction. As regards offences committed by staff members it is not necessary that the staff member acts culpably, the offence he or she commits merely has to be against the law (without justificatory defense). Additionally, the offence must have been made possible or considerably easier due to the fact that decision makers failed to apply the due and reasonable care required in the respective circumstances. In both instances, the entity can be held responsible only if the offence was committed for its benefit or if duties of the entity were neglected. This provision presents a new model of attributing criminal responsibility in Austrian criminal law.

1 Introduction

The Austrian legislator introduced the Act on the Responsibility of Legal Entities for Criminal Offences (“*Verbandsverantwortlichkeitsgesetz*”—VbVG) into Austrian law in 2005 containing special provisions for the criminal responsibility of

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legal entities. The law entered into force on 1 January 2006. The legislator hereby especially implemented legal instruments of the European Union, notably the Second Protocol of the Convention on the protection of the European Communities' financial interests of 1997 (Second Protocol).¹ The Second Protocol defines in its Article 3 certain conditions under which legal persons shall be held liable by the Member States. Article 4 of the Protocol says that each Member State shall take the necessary measures to ensure that a legal person is punishable by effective, proportionate and dissuasive sanctions if the conditions under Article 3 are met. Thus, the Protocol does not specify which kind of liability—criminal, administrative or civil—the Member States shall introduce.

Austria chose to introduce the responsibility of legal entities within the *framework of criminal law*. This decision is supported by the fact that a criminal offence is the subject of the charge against the entity. Furthermore, according to the Explanatory Remarks to the Governmental Bill, the same investigation powers of the police and judicial authorities and the same procedural safeguards should equally apply to natural and legal persons.² Pursuant to Sections 12 and 14 VbVG, the general provisions of criminal law and criminal proceedings also apply to legal entities unless special provisions in the VbVG exist or the general provisions exclusively apply to natural persons.³

Discussion during the drafting of the VbVG led to the question whether an entity is able to act culpably in the sense of the Austrian Criminal Code.⁴ The Criminal Code stipulates the principle “*nulla poena sine culpa*” and thus requires individual fault or blameworthiness as prerequisite of a punishment. According to the VbVG also the criminal responsibility of entities requires some kind of fault, which is not an individual blame, but could be described as an “*organizational responsibility*” (*Organisationsverschulden*). The entity is blamed with deficits in the organizational structure of the entity or in its business ethics. The principle of individual fault concerning natural persons thus has been modified for entities and a separate category of organizational responsibility applies.⁵

¹ Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests, OJ C 221 of 19.07.1997, pp. 12ff.

² Explanatory Remarks to the Governmental Bill (EBRV) 994 B1gNR 22. GP, pp. 11ff.; see also Schmoller (2008), p. 14.

³ EBRV 994 B1gNR 22. GP, pp. 30ff.; Hilf (2006), p. 112.

⁴ See for example Lewisch and Parker (2001), pp. 137ff.; Boller (2007), pp. 60ff.

⁵ Kert (2007), p. 22.

2 Liability Model

The liability model for legal entities presents a new model of attributing criminal responsibility in Austrian criminal law.⁶ It combines elements of an “identification model” and of a “model of direct liability”. The *identification model* requires a criminal offence, illegally and culpably committed by an individual (mostly decision maker). The wrongdoing of the individual is considered as the wrongdoing of the entity. Thus, the entity is identified with the decision maker who illegally and culpably committed the offence. The *model of direct liability* requires liability criteria which directly refer to the entity. Here, the responsibility is primarily based on the faulty organization of the entity.⁷

In Austria the responsibility of entities is based on a criminal offence committed by a natural person, either by a decision maker or staff member of the respective entity (identification model). Additionally, the law requires that the entity failed to exercise due and reasonable care in the given circumstances; especially that it did not prevent the offence committed by the decision maker or staff member. Such failure is an expression of the above mentioned organizational responsibility (direct liability model). Overall, the liability of entities is established *out of*, and not only for, the behavior of an agent.⁸ In the Explanatory Remarks, it is emphasized that the charge against the entity lies mainly in the failure of the entity to act with due and reasonable care and not so much in the criminal offence committed by the individual.⁹

According to Section 3 para 4 VbVG, the responsibility of legal entities is neither subsidiary to individual liability nor does it prevail. Neither kind of criminal liability excludes the other, so that *cumulative proceedings and sanctions* against the individual working for the corporation and the corporation itself are possible.

3 Criteria for Establishing Criminal Responsibility

3.1 “Triggering Persons”

The criteria for establishing criminal responsibility for entities are the core element of the VbVG. They differ, depending on whether a *decision maker* or a *staff member* triggered the responsibility by committing an underlying criminal offence (*Anlassstat*).

⁶ Sautner (2012), p. 550.

⁷ Heine (1998), pp. 102f.; Sautner (2012), p. 547; see also Boller (2007), p. 62.

⁸ Höpfel and Kert (2006), pp. 105f.

⁹ EBRV 994 BlgNR 22. GP, pp. 22, 25.

This is in line with Article 3 of the *Second Protocol* which requires that legal persons shall be held liable for criminal offences committed (1) by any person acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, or (2) by a person under the authority of the legal entity.

Decision makers under the *Austrian VbVG* are directors, members of the board, *Prokuristen* (holder of a power of attorney as defined in the Austrian Companies Code) and other persons who are authorized to represent the company vis-à-vis third parties. Furthermore, members of a supervisory board or administrative board or other persons with supervisory powers also qualify as decision makers (Section 2 para 1 VbVG).¹⁰

According to Section 2 para 2 VbVG, the term *staff members* includes persons who work for the entity, for example on the basis of an employer-employee relationship or of a training relationship. Family members or volunteers, for example, do not qualify as staff members.¹¹

3.2 Underlying Criminal Offence (Anlasstat)

3.2.1 Offences Committed by Decision Makers

Criminal offences committed by decision makers may be attributed to the entity if the following conditions are met (see Section 3 para 2 VbVG): the act or omission has to fulfill all elements of the definition of a criminal offence (*Tatbestand—actus reus* and *mens rea*), the decision maker has to act unlawfully (*rechtswidrig*), which means without any justificatory defenses, and he or she has to act culpably (*schuldhaft*), meaning with individual fault. Thus, in general all requirements for a conviction of the decision maker have to be fulfilled.¹²

In this case the responsibility of the entity is centrally determined by the conduct of the decision maker. Therefore, this case is very much based on the above described identification model. The culpable conduct by the decision maker can be seen as the basis for the presumption that the entity itself did show a lack of due diligence as it did not prevent criminal offences committed by its decision makers.¹³

The needed prerequisites for attributing criminal responsibility are thus quite strict, as all necessary requirements for a conviction of the decision maker have to be fulfilled. However, there are also *facilitations*: According to parts of the

¹⁰ See, e.g., Lehner (2011), pp. 995f.

¹¹ Boller (2007), p. 152.

¹² Hilf and Zeder (2010), WK² VbVG § 3 at 22ff.; Sautner (2012), pp. 547, 549.

¹³ EBRV 994 BlgNR 22. GP, pp. 22ff.; Sautner (2012), p. 549.

academic literature it is not necessary to specify the name of the decision maker, thus it is not necessary that a specific decision maker is identified.¹⁴

3.2.2 Offences Committed by Staff-Members

The second alternative to trigger criminal responsibility for entities under Austrian law is a quite innovative one. Article 3 para 2 Second Protocol provides in this regard that legal persons shall be held liable where the lack of supervision or control by a decision maker has made possible the commission of a criminal offence by a person under its authority.

Based on the Second Protocol Section 3 para 3 VbVG provides for an attribution of criminal offences committed by staff members to entities, only under the condition of certain elements of direct corporate responsibility. This case therefore combines elements of both the identification model and the direct liability model. In order to hold the company liable, the staff member has to fulfill all elements of the definition of the respective criminal offence (*Tatbestand*). The law explicitly states that if an offence requires willful action, the staff member has to act with intent. In case of negligence offences the staff member has to disregard due diligence, thus the physical part of the negligence offence has to be fulfilled. Furthermore, the staff member has to act unlawfully (*rechtswidrig*), meaning without justificatory defense.

In contrast to the case of decision makers, it is *not* required that a staff member acts with *personal blameworthiness*.¹⁵ This means that the personal abilities of the staff member are not taken into account. Thus, in case of negligence offences it is not necessary that the staff member fulfills the subjective part of the offence, meaning that it is irrelevant whether the perpetrator could have lived up to the objective standard of care (*subjektive Sorgfaltswidrigkeit*) and whether the perpetrator was able to individually foresee the final result of the offence (*subjektive Vorhersehbarkeit*). Furthermore, it does not matter if in the given circumstances it can be reasonably expected from the perpetrator to abide by the letter of the law (*subjektive Zumutbarkeit*).

However, in *addition* to the unlawful act of the staff member, the *offence* must have been made *possible or considerably easier* due to the fact that *decision makers failed to apply the due and reasonable care* required in the respective circumstances. Here, an element of individual guilt is included, namely the failure of the decision maker to apply *reasonable care* (*subjektive Zumutbarkeit*).¹⁶ In other words, if the decision maker cannot reasonably be expected to exercise due care the conduct of the perpetrator—the staff member—cannot be attributed to the entity. Overall, the offence by the staff member must have been caused or

¹⁴ For example Hilf and Zeder (2010), WK² VbVG § 3 at 30; dissenting Sautner (2012), p. 549.

¹⁵ Hilf and Zeder (2010), WK² VbVG § 3 at 34.

¹⁶ Cf. Schmoller (2008), p. 10.

facilitated by a failure of the company's management to take appropriate technical, organizational or personnel measures in order to prevent criminal offences.¹⁷ This prerequisite can be seen as the basis for the presumption that the entity itself—not only the decision maker—did show a lack of due diligence as it did not prevent criminal offences committed by their staff members.¹⁸

It is not necessary that a specific staff member who committed the offence has been identified. The certainty that any staff member of a specific organizational unit has committed the offence is sufficient.¹⁹

3.3 *Additional Connection Between the Criminal Offence and the Sphere of the Entity*

In both instances, the entity can only be held responsible if the offence was committed *for its benefit* or if *duties of the entity were neglected*. The offence committed by the individual thus has to reflect an additional connection to the sphere of the entity. The *Second Protocol* foresees in this regard only that Member States shall take necessary measures if the offence was committed *for the benefit* of the legal person.

The offence has been committed for the benefit of the entity if the company has been or was supposed to be *enriched* through the offence or has or should have *saved efforts*. An example would be the committing of fraud by a decision maker which leads to an enrichment of the company. The obtaining of a stronger competitive position through bribery would also fall under this category. However it is necessary that the benefit lies in some material gain.²⁰

If the committed offence is not an offence against property, an alternative criterion might be necessary in order to connect the offence to the sphere of the entity. That is why the Austrian legislator decided that also an *infringement of duties of the entity* can lead to corporate responsibility.²¹ Relevant duties in this regard basically may derive from the whole legal system. However, the duties have to either be addressed to the company as an employer (deriving from labor law) or address the risks involved in the business pursued by the company. Concerning the latter, the duties mostly will derive from administrative or civil law, for example from fire regulations, the trade and commerce regulation (*Gewerbeordnung*), but also from individual acts of administrative authorities like business premises permits.²²

¹⁷ Kert (2007), p. 17; Lehner (2011), at 25/39.

¹⁸ Kert (2007), p. 25.

¹⁹ EBRV 994 BlgNR 22. GP, p. 22.

²⁰ Hilf and Zeder (2010), WK² VbVG § 3 at 8–9.

²¹ EBRV 994 BlgNR 22. GP, p. 21.

²² Lehner (2011), at 25/42.

However, the entity has *no overall duty* to prevent any criminal offence. The entity is not responsible for offences which staff members committed only for their own benefit. For instance if a craftsman doing some work for his company in some customer's flat steals valuables for his own benefit in this flat, his company will not be responsible for the committed offence.²³ The entity also is not responsible for offences which are directed against the interests of the entity.²⁴

4 Summary Overview

In order to establish criminal responsibility for entities, a *criminal offence* committed by a decision maker or staff member must be given. The act or omission by a *decision maker* has to fulfill all elements of the definition of a criminal offence (*Tatbestand*), has to be unlawful (*rechtswidrig*) and culpable (*schuldhaft*). If these requirements are fulfilled, the offence may be attributed to the entity. The act or omission by a *staff member* also has to fulfill all elements of the definition of a criminal offence and has to be unlawful. However, the staff member does not have to act culpably. In addition, the offence committed by the staff member must have been made possible, or considerably easier by the fact that a decision maker failed to act with due and reasonable care. In both instances, the offence committed by the individual has to be connected *to the sphere of the entity*. This requirement is met if the offence was committed for the benefit of the entity or if its duties were neglected.

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²³ Lehner (2011), at 25/43.

²⁴ Hilf and Zeder (2010), WK² VbVG § 3 at 19.

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