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Internal investigations and the principle nemo tenetur se ipsum accusare – The Austrian perspective**

ABSTRACT: There is no general one but there are limited specific obligations in Austria to carry out Internal Investigations. The Austrian Constitutional Court clarified in a ruling 2016 inter alia that the principles of Article 6 of the European Convention on Human Rights concerning procedural guarantees apply to corporations as well. Yet, it has been accepted also before that the nemo tenetur principle also applies to legal persons. However, disputed questions still exist.

KEYWORDS: internal investigations, principle nemo tenetur se ipsum accusare, European Convention on Human Rights.

1. Introduction

The main features of the Austrian Code of Criminal Procedure (StPO) date back to 1873 and are to be regarded as a milestone and cornerstone for modern criminal proceedings. Since the *Constitutio Criminalis Carolina* of 1768, criminal procedure law in Austria has developed on the way from inquisition to an accusation process with an inquisitorial public hearing.[1] The StPO of 1873 is largely still valid today in the main and appeal proceedings, while numerous amendments have been made since that time. After the re-promulgation of the StPO in 1975,[2] a comprehensive reform process focusing on pre-trial criminal proceedings has taken place since the 1990s. At the beginning of 2004, this resulted in the adoption of the so-called "Strafprozessreformgesetz", the Criminal Procedure Reform Act,[3] which finally entered into force on January 1, 2008, due to the necessary organizational and administrative changes, especially in the public prosecutor's and criminal police area.

The main innovation of this major reform process was the creation of a new structure of pre-trial proceedings: a public prosecutor's preliminary investigation (instead of the former judicial preliminary investigation) with a substantive (instead of a formal) definition of the accused. The activities of the criminal police, the public prosecutor's office and the court in the preliminary proceedings have been separated from each other in new ways. Since then, the public prosecutor's office is responsible for leading the investigation. The investigative competence of the criminal police was recognised and embedded in a cooperation model with the public prosecutor's office. The role of the court in the pre-trial proceedings was mainly defined for the purpose of judicial protection. At the same time, there was an extension of victims' rights and an expansion of the rights of the accused and the defense.[4] This new model of pre-trial investigations has certainly proven itself in the last 15 years and can be seen in the present context with two other significant legislative developments.

On the one hand, a code of corporate criminal law (Verbandsverantwortlichkeitsgesetz[5]) has been in force in Austria since 2006. On the other hand, a central public prosecutor's office

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[1] Birklbauer and Wess, 2020, p. 11; Soyer and Stuefer, 2021, p.7.

[2] Austrian Federal Law Gazette 1975/63.

[3] Austrian Federal Law Gazette I 2004/19.

[4] More closely thereto: Pilnacek and Pleischl, 2005.

[5] Austrian Federal Law Gazette I 2005/151, as amended; Schumann and Soyer, 2019, 403 p.

authority, which is active throughout Austria, was set up with special jurisdiction, in order to intensify the prosecution of white-collar and corruption crimes.[6]

2. Obligation to carry out internal investigations in corporations

Compared to Germany, internal investigations in Austria in connection with criminal proceedings have not yet acquired a very high priority. It should be noted that there is no general obligation in Austria to carry out internal investigations de lege lata. However, in certain areas – particularly securities supervision, financial market supervision, in regard of money laundering and stock exchanges[7] – there is a legal obligation to specific compliance standards. If internal investigations are now considered as a part of an adequate compliance system, for which good reasons can be brought into the discussion, a limited obligation to carry out internal investigations can be deduced from this.[8]

Another basis for an obligation to carry out internal investigations, however, might also be seen in the employer's duty of care under labour law. It aims at the employer's duty of care for the mental and physical well-being of the employee as well as his property. The Austrian Supreme Court has already recognized a duty of the employer to protect employees from the vexatious behavior of other employees.[9] In the correct view, in particular where there is a connection to the alleged commission of a criminal offence, the employer therefore is also obliged to carry out internal investigations.

Finally, it should be noted that obligations under labour law to make statements in the context of an internal investigation are in tension with the principle *nemo tenetur se ipsum accusare*. Internal investigations are capable of counteracting this principle of criminal procedure. This is sharply demonstrated when it is considered permissible that employee interviews carried out in the context of internal investigations are transferred to a court trial without restriction – by reading the minutes of the statements without the consent of the defense.[10]

3. Prohibition of coercion to self-incriminate regarding legal persons (entities)

The ruling of the Austrian Constitutional Court of December 2, 2016, clarified that the principle of guilt, as known in individual criminal law, is not the benchmark for any corporate criminal responsibility of legal entities (legal persons). It was also stated that "those principles of Article 6 of the ECHR concerning procedural guarantees (principle of fairness) [...] also apply to corporations".[11] It should be borne in mind that the European Convention on Human Rights has constitutional status in Austria.[12]

Even before this landmark decision of the Austrian Constitutional Court, other rulings of Austrian courts have already recognized, in principle, the validity of the prohibition of coercion to self-incrimination regarding legal persons.[13] While in Germany, for example, this principle

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[6] Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption – WKStA) (Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption, Available at: https://www.justiz.gv.at/wksta/wirtschafts-und-korruptionsstaatsanwaltschaft.312.de.html (Accessed: 23 July 2022).

[7] See Art. 29 öWAG 2018, § 23 öFM-GWG and Art. 119 (4) öBörseG 2018.

[8] Pollak, 2020, pp. 14-10.

[9] OGH 9 ObA 131/11x, RIS-Justiz RS0119353.

[10] Detailed and critical, for a teleologically restrictive interpretation of Art. 252(2) öStPO. Pollak, 2020, pp. 14-119.

[11] VfGH2.12.2016, G497/2015-26; G 678/2015-20.

[12] Soyer, 2019, p. 385.

[13] OLG Wien 22 Bs 5/13s; OLG Wien 22 Bs 177/24d; Soyer, 2022, pp. 23-47.

is based on the general right of personality and thus tailored to natural persons, it must also be applied to legal persons after the introduction of the corporate criminal liability. For companies (corporations), this principle plays an important role, especially at the beginning of investigations due to the mixture of different interests.[14] Therefore, it has been accepted in Austria that the nemo tenetur principle also applies regarding legal persons already for a long time.

It is disputed, however, which services of an attorney are covered by the protection of professional secrecy, secured in Austria by a procedural right of the attorney to refuse to testify, with protection against circumvention.[15] This is particularly relevant in the case of internal investigations by lawyers: If these investigations are classified as a balancing matter of legal advice, legal representation and criminal defense – collectively constituting the attorney profession –, a protection of seizure by the legal client-attorney privilege applies.

As far as the obligation to submit documents for use in criminal proceedings by a corporation is concerned, it has long been recognised in the legal practice of criminal courts[16] that corporations, as legal persons, are not obliged to provide self-incriminating information or to produce such documents and make them accessible. In other words, they have no obligation to cooperate. However, this does not prevent the prosecution authorities in proceedings against corporations from carrying out the search of a bank and/or seizing documents (incriminating for the corporation).[17]

As a manifestation of the procedural maxim of the prohibition of compulsion to self-incriminate, in proceedings against prosecuted corporations, decision-makers have always conceived the status of accused persons during interrogations, i.e., even without being confronted with a suspicion of having committed a crime themselves,[18] they have a right to remain silent and they are not bound by a duty to tell the truth during interrogations. Employees of the corporation, on the other hand, are only in the position of such a (privileged) status if they are personally suspected of having committed a connecting offence as a prerequisite for the corporation's criminal liability.

In this context, it should be mentioned that the Austrian Criminal Code provides for a dual system for recording personnel evidence: (informal) enquiries and (formal) interrogations.[19] While enquiries – "the request for information and the receipt of a communication from a person" – serve to prepare the taking of evidence, interrogations concern the taking of evidence itself. This occurs once the procedural role of the respondent (witness or accused) has been clarified and the respondent has been formally informed on his or her position and rights in the proceedings as a witness or accused person. Such formal interrogations may not be circumvented by inquiries, otherwise they should be void.[20]

This regulatory mechanism takes account of the nemo tenetur principle in corporate criminal law, as required by the rule of law. In the opinion of the author, the Austrian regulation is a good practice model.

Finally, it should be noted that in Austria a ‘small’ and a ‘huge’ leniency policy (Kleine und Große Kronzeugenregelung) may be applied to accused individuals and/or legal entities.[21] Whereas the Huge Leniency Program ultimately results in impunity, the Small Leniency Program merely leads to a mitigation of the sentence. These regulations have repeatedly been

[14] Urbanek, 2022, pp. 2.155-2.157.
[15] Art. 157(1) no. 2, (2) öStPO.
[16] FN 15.
[17] Urbanek, 2022, p.156.
[18] Art. 17(1) öVbVG.
[19] Art. 151 öStPO.
[20] Art. 152(1) 2nd half sentence öStPO. See specified in Soyer, Pollak, Circumvention of the rights of defendants and witnesses in Austrian criminal proceedings, in the forthcoming.
[21] Art. 209a and 209b öStPO.

adopted and extended for a limited period of time until now. Also, there is already a long-standing special, far-reaching leniency program in the event of antitrust proceedings.[22]

[22] Art. 11b öWettbG.

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