# Developing Tendencies of Criminal Law and Criminal Procedural Law in Austria

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## Abstract

*The article discusses the trends of development of Austrian criminal law over the past few years. The first part of the presentation deals with the area of substantive law and the perceptible trends: the development of criminalization and the change of criminal law to a danger prevention law by creating so-called "preparation crimes". The second part of the paper shows the developing tendencies in criminal procedural law: the substantive reforms of preliminary proceedings and the strengthening and expansion of instruments of intervention. The identified developing tendencies are based on a description of the legislative measures of the Austrian legislator within the last decade; various international regulations and secondary legislation acts within the European Union had to be implemented.*

*In the final step of the paper, the author comes to the conclusion that the trends of development within Austrian criminal law show substantial changes that must be observed critically – especially as far as the substantive areas and the expansion and tightening of instruments of investigation are concerned.*

## I. Introduction

Even though criminal law – which is one of the most delicate fields of the legal system – seems to be well-established in Austria as far as its traditional standing is concerned, it has in the past few years been subject to the benchmark for people's attitude in the course of socio-political changes and hence the resulting threats. A change in values that is constantly taking place in a political community with effects on criminal law is not a new phenomenon, however, in Austria the speed of adaptations of criminal law to new social needs has increased considerably. This is not an exclusively "homemade" Austrian development, but various international regulations and secondary legislation acts within the European Union had to be carried out. Both the substantive and the procedural Austrian criminal law were thus affected by substantial changes that showed clear trends of development. The substantive criminal law shows a change towards both expansion and tightening of legal regulations and towards a preventive criminal law. De-criminalization – if anything – has only been a marginal issue in the past decade in Austria. Procedural law shows complex changes in two directions of development: major reforms of the preliminary proceedings where the prosecutor plays the leading role and, parallel to this, the rights of victims and defendants will be re-evaluated and the criminal procedural instruments will be tightened and massively expanded.

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With reference to one of the most important characteristics of criminal law the following short fragment of the trends of development of Austrian criminal law will be restricted to some of the essential issues of the past ten years. The examples given shall help to illustrate these trends.

## II. Substantive law

### 1. The development of criminalization

Also due to the large amount of guidelines within the European Union and internationally, the developments in substantive law clearly show a trend towards the consistent expansion of elements of an offence by the creation of new elements, by intensifying of existing elements of an offence and through stricter punishments.[1]

The direction of development in substantive law is documented in many legal measures (for example in the areas of responsibility of legal entities; corruption; terrorism; computer crimes; criminal law on sexual activity; organized crime; money laundry; people trafficking; stalking; etc). In what follows, examples will be given of the first two areas mentioned as significant and typical examples from the recent past.

#### a) The introduction of the responsibility of legal entities in criminal law (in the form of a law on the responsibility of legal entities)

With the introduction of the criminal liability of legal entities in 2006 (the legal basis of which is the Federal Law on the responsibility of legal entities for criminal offences[2]), the Austrian legislator fulfilled numerous international responsibilities within the framework of legal acts of the European Council, the European Union and the OECD[3]. For the Austrian legal system the introduction of the criminal

[1] See *W. Hassemer*, Strafrecht im Wandel, Journal für Rechtspolitik (JRP), 2007, p 83; *B. Hoinkes–Wilflingseder*, Aktuelle Entwicklungen des österreichischen Strafrechts in: Fàbiàn (ed.), Jog ès jogàszok a 21. szàzàd küszöbèn. Nemzetközi konferencia (Pècs, 2003, Oktober 16). A közigazgatàsi jogi aleszekciò elöadàsainak szerkeszett vàltozata, Pècs 2004..

[2] So-called Verbandsverantwortlichkeitsgesetz (VbVG), BGBl I 2005/151 idF BGBl 2007/112 (*Strafprozessreformbegleitgesetz* II).

[3] Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests (OJ 1997 C 221, 11); Joint action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on the European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (OJ 1998 L 351, 1); Council framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ 2000 L 140, 1); Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment (OJ 2001 L 149, 1); Council Framework Decision of 13 June 2002 on combating terrorism (OJ 2002 L 164, 3); Council Framework Decision of 19 July 2002 on combating trafficking in human beings (OJ 2002 L 203, 1); Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, 1); Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ 2003 L 29, 55); Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ 2003 L 192, 54); Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (OJ 2004 L

liability of legal entities means a revolutionary innovation[4], as according to the former traditional understanding exclusively natural persons were accountable for criminal liability. Though the Federal Law on the responsibility of legal entities for criminal offences has been designed as an individual law, the responsibility of legal entities, however, applies to all activities that give rise to criminal proceedings. The main purpose of the Federal Law regarding the responsibility of legal entities for criminal offences is to prevent criminal acts by legal entities and thus aims at the prevention and compensation for damages.[5]

### b) The area of corruption

The development of the expansion also refers to the area of corruption. Right now, the topic of corruption is in the focus of public attention in Austria. At the interface between politics and economics and in midst of considerable media attention, one alleged corruption scandal after the other has been uncovered. For this reason, and in order to fulfil numerous legislation acts within the European Union and international directives[6] and responsibilities, the Austrian legislator revised the substantive legal provisions of the anti-corruption law with the Criminal Law Amendment Act 2008[7].

For the first time, the Austrian legislator created offences in the area of private corruption (§§ 168 c and b Austrian Criminal Act – StGB, concerning the acceptance of presents by staff members or authorized persons/bribe of staff members or authorized persons) and considerably expanded criminal liability in the public sector (§§ 304 ff StGB). Soon serious criticism was raised about the changes of the provisions in public sectors[8]. Entrepreneurs within the surroundings of public enterprises and the entrepreneurial event culture regarded the extension of the criminal liability for

13, 44); Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ 2004 L 335, 8); Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (OJ 2005 L 69, 67); Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, 16); OECD-Übereinkommen über die Bekämpfung der Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr (BGBl III 176/1999); Council of Europe Convention on the Protection of Environment through Criminal Law (ETS 172); Council of Europe Convention on Cybercrime (ETS 185); Criminal Law Convention on Corruption (ETS 173).

[4] See *M. Hilf,* Verbandsverantwortlichkeitsgesetz (VbVG), Wien 2006, p. 3; *M. Burgstaller*, Aktuelle Wandlungen im Grundverständnis des Strafrechts, Juristische Blätter (JBl) 1996, 365.

[5] See *M. Hilf,* Verbandsverantwortlichkeitsgesetz (VbVG), Wien 2006, pp. 16 et seq.

[6] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ 2003 L 192, 54); United Nations Convention against Corruption (A/RES/58/4); Council of Europe ETS 173 Criminal Law Convention on Corruption and Council of Europe ETS 191 Additional Protocol to the Criminal Law Convention on Corruption; Council Act of 26 May 1997 drawing up, on the basis of Article K.3 (2) (c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ 1997 C 195); The OECD Convention on Bribery (17. 12. 1997).

[7] Strafrechtsänderungsgesetz 2008, BGBl I 2007/109.

[8] See e. g. *U. Medigovic,* Geht das neue Korruptionsstrafrecht für Amtsträger zu weit? Österreichische Juristenzeitung (ÖJZ) 2009, pp. 149 et seq.; *S. Reindl-Krauskopf*, Korruptionsstrafrecht in Österreich – Überzogen oder zahnlos?, Journal für Strafrecht (JSt) 2/2009, pp. 17 et seq.; *H. Hinterhofer*, Zur Strafbarkeit des „Anfütterns" von Amtsträgern – Versuch einer einschränkenden Auslegung, Österreichische Juristenzeitung (ÖJZ) 2009, pp. 250 et seq., *P.J. Schick,* Korruptionsstrafrecht, in Brünner/Hauser/Hitzler/Kurz/Pöllinger/Reininghaus/Thomasser/Tichy/Wilhelmer (eds)

corruption and corruptibility in the public sector as seriously disruptive for their business. A few months later, the legislator reacted with an Anti-Corruption Amendment Law, 2009[9], which mitigated the criticized "elements of baiting" and specified the term "*Amtsträger*"[10]. The uncovered cases of corruption of the last few months, however, make the governing Minister of Justice reconsider a tightening, i. e. an introduction or re-introduction of the criminal liability for "baiting".

The Anti-Corruption Amendment Act, 2009, tightened the elements of corruption in the private area by modifying the value threshold and the abolishment of impunity of the recipient if he or she demands, accepts or has himself/ herself been promised a minor advantage.

## 2. The change of Criminal Law to a Danger Prevention Law by creating so-called "preparation crimes"

A distinctive example of this development is the law in connection with terrorism.The latent and worldwide terror threat has not only changed the world altogether, it also influenced the development of criminal law to a great extent. The balance of freedom and safety changes and as a result the substantive criminal law is this time modified in favour of safety[11]. The main focus of the legislator – namely to guarantee the safety of society – changed criminal law from a traditionally repressive law of justice to a danger prevention law. As such, the elements of criminal terrorist acts so called preparation offences were created which expand criminal behaviour to activities in preparation of a criminal act which went unpunished until now[12]. This meant that in the fight against terrorism, Austrian criminal law shifted to a preventive law – similar to the provisions for organized crime. 9/11 speeded things up considerably and after setting the course on a European and international level, Austria started implementing the Council Framework decisions on combating terrorism[13], the International Convention for the Suppression of the Financing of Terrorism[14] and the UN – Resolution 1373 (Anti-Terrorism Resolution) in form of the provisions of §§ 278b-d StGB (*Strafgesetzbuch*/ Austrian Criminal Act)[15]. § 278 b StGB (concerning terrorist groups) and § 278 d

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Mensch – Gruppe – Gesellschaft. Von bunten Wiesen und deren Gärtnerinnen bzw Gärtnern, Festschrift für Manfred Prisching zum 60. Geburtstag, Wien-Graz 2010, p. 332.

[9] Korruptionsstrafrechtsänderungsgesetz 2009 (KorrStrÄG 2009), BGBl I 2009/98.

[10] See e. g. *U. Medigovic,* Was vom Korruptionsstrafrecht übrig bleibt, Österreichische Juristenzeitung (ÖJZ) 2010, p. 251 et seq., *idem*, Das neue Korruptionsstrafrecht (KorrStrÄG 2009) Recht der Wirtschaft (RdW) 2010, pp 263 et seq.; *S. Reindl-Krauskopf,* Korruptionsstrafrecht neu – ein Überblick, ecolex 2009, p. 732 et seq.

[11] See *W. Hassemer,* Strafrecht im Wandel, Journal für Rechtspolitik (JRP), 2007, p. 82.

[12] See e. g. *B. Bierlein,* Terrorismus und Menschenrechte aus verfassungs- und europarechtlicher Sicht, in Landesgruppe Österreich der Internationalen Strafrechtsgesellschaft (AIDP) (ed.), Terrorismus und Menschenrechte, Neue Entwicklungen und Herausforderungen, Wien 2007, p. 20; *St. Schumann/R. Soyer,* Terrorismus und Menschenrechte. Rechtsschutz im Mehrebenenverbund zwischen Gefahrenabwehr und Strafrecht, in Landesgruppe Österreich der Internationalen Strafrechtsgesellschaft (AIDP) (ed.), Terrorismus und Menschenrechte, Neue Entwicklungen und Herausforderungen, Wien 2007, p. 81.

[13] OJ 2002 L 164, 3.

[14] Internationales Übereinkommen zur Bekämpfung der Finanzierung des Terrorismus, BGBl III 2002/102.

[15] Strafrechtsänderungsgesetz 2002 (StrÄG 2002) BGBl I 2002/134.

StGB (the offence of financing terrorism) were designed as independent types of preparation offences. This element is supposed to penalize terrorist activities right at the start before the actual criminal act takes place[16]. In keeping with this, Austria started to implement framework decisions in connection with the European arrest warrant[17].

During the course of the Council of Europe Convention on the prevention of terrorism[18] and the Council Framework Decision amending the Framework Decision on combating terrorism[19], the offence of "training for terrorist purposes" as a preparation crime was included into the Austrian Criminal Act as of January 1, 2011 (§ 278 e StGB). This new offence, however, only includes parts of the international requirements, which implies the necessity of a further legal measure in the near future.[20]

## III. Criminal Proceedings Law

The starting point for legal measures in procedural law was a preliminary procedure that did not correspond to reality. On the other hand, the Austrian system of justice has always been confronted with very complex procedures in the area of economic crime, with its fight against corruption and the increasing number of procedures due to the increasing number of newly created elements of offence. Both aspects and the decreasing human resources have shaped the Austrian Criminal Proceedings Law in the recent past.

The changes in Austrian criminal proceedings law in recent years focused on preliminary proceedings. The preliminary proceedings have widely been reformed and totally redesigned. The rights of victims and defendants have been considerably re-evaluated. Step by step the criminal preliminary proceedings have been tightened and expanded – parallel to the expansion trends of substantive law. Two trends of development in the area of Criminal Procedure are therefore of interest here: the substantive reforms of the preliminary proceedings and the development of tightening and expansion.

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[16] See *F. Plöchl*, in Höpfel/Ratz (eds), Wiener Kommentar zum Strafgesetzbuch², Wien 2009, § 278 b marginal No. 2 and § 278 d marginal No. 1.

[17] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190); Gesetz über die Justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der EU (EU-JZG) [Federal Law about judicial cooperation in criminal matters with the Member states of the European Union] 1. BGBl I 2004/36 idF BGBl I 2007/112 (Strafprozessreformbegleitgesetz II).

[18] ETS 196; BGBl III 2010/34.

[19] OJ 2008 L 330, 21.

[20] See *I. Mitgutsch/M. Brandstetter,* Neues aus dem besonderen Teil des StGB, in Mitgutsch/Wessely (eds), Jahrbuch Strafrecht Besonderer Teil 2011 (Wien-Graz 2011) p. 17.

## 1. Substantive reforms of the preliminary proceedings: Public prosecution takes the leading role, the rights of victims and defendants are expanded

The most important change in criminal procedure law within the last decade was definitely the extensive reform of the preliminary proceedings. The old structures of the preliminary procedure with an investigating judge as *dominus litis* that were derived, almost unchanged, from the Criminal Procedure Act of 1873, had never been really convincing in practice. The Criminal Procedure Reform Act of 2004[21] abandons this concept with an investigating judge and introduces a new structural model. The preliminary procedure and the preliminary investigations are replaced by a uniform preliminary procedure under the control of the public prosecutor. The reform law approved the reality of investigation by transferring the task of investigation to the police, strengthening the legal competency of the public prosecutor by granting him/ her ultimate authority. The results of the reform are shown in an extensive evaluation study.[22] The public prosecutor has the ultimate legal authority within the new preliminary procedure whereas the actual investigation power is held by the police forces. The results of the study reflect the legal provisions that include only a minor specification of the leading function of the public prosecutor.[23]

The Criminal Procedure Reform Act 2004 shows further clear trends of development within criminal procedure law, namely the steady expansion of the rights of the defendant by creating a substantive term. As a result of the substantive definition of the term, the following rights of the defendant have been stated as procedural rights: right to receive information, substantive or procedural right of defence and legal remedies as procedural rights of the defendant. In addition to this, in the course of the reform and in order to fulfil the Council Framework Decision on the standing of victims in criminal proceedings[24], the legal status of the victim was re-evaluated by granting the right of receiving information and filing applications in connection with the subject of the procedure.

## 2. Strengthening and expansion on instruments of intervention

At the same time, as a reaction to increasing economic crimes, organized crimes and the terrorist attacks all over the world, special investigation measures were amended in order to (secretly) gain information. This includes, for instance, the legitimacy of observations (§§ 129 ff StPO[25]), fictitious bargain (§§ 129 ff StPO),

[21] Strafprozessreformgesetz 2004, BGBl I 2004/19.

[22] See *A. Birklbauer/W. Stangl/R. Soyer/Ch. Weber/B. Starzer/H. Hirtenlehner/R. Gombots/W. Hammerschick/H. Luef-Kölbl/M. Hotter,* in Bundesministerium für Justiz (ed.), Die Rechtspraxis des Ermittlungsverfahrens nach der Strafprozessreform. Eine rechtstatsächliche Untersuchung, Wien-Graz 2011.

[23] See *A. Birklbauer/W. Stangl/R. Soyer/Ch. Weber/B. Starzer/H. Hirtenlehner/R. Gombots/W. Hammerschick/H. Luef-Kölbl/M. Hotter,* in Bundesministerium für Justiz (ed.), Die Rechtspraxis des Ermittlungsverfahrens nach der Strafprozessreform. Eine rechtstatsächliche Untersuchung, Wien-Graz 2011, p. 417.

[24] OJ 2001 L 82, 1.

[25] Österreichische Strafprozessordnung/Austrian Criminal Procedure Act.

controlled delivery (§ 99 Abs 4 and 5 StPO) and the admission of undercover investigations (§§ 129 ff StPO),[26] enquiries about bank accounts and transactions (§ 116 StPO)[27], and enquiries through communication services about previously stored data (§§ 134 ff StPO)[28]. All these special investigation measures are accepted, however, due to society's increased need for safety. This means that in order to guarantee effective criminal prosecution quite questionable measures have found a place in real life investigations. Even if the instrument of investigation has been strengthened under the cover of controlled mechanisms of legal protection[29] its effect – namely the limitation of the rights of the defendants – are enormous. In this respect – just as with substantive law – the trends of development in criminal procedure are shaped by the intensification and expansion of penal control.

The Austrian legislator also expects to increase the efficiency of the investigations with the installation of a new investigative authority, the Central Public Prosecutor's Office against Economic Crime and Corruption (*Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption* – WKStA)[30]: As per September 1, 2011 a new Central Prosecutor's Office against Economic Crime and Corruption was installed in Vienna, as an efficient and successful instrument against these new forms of crime. For the time being, this office is responsible for crimes concerning officials (except for § 302 StGB), for corruption and for economic crimes in excess of 5 million Euros. The office can also investigate economic crimes involving lower figures if special economic knowledge is needed.

At the same time, the Central Prosecutor's Office against Economic Crime and Corruption has also included a special Leniency Rule in Austrian criminal law[31] (for now limited to 6 years) that is to serve the same purpose: higher efficiency in criminal prosecution of economic crime and corruption, the competency of the Central Prosecutor's Office against Economic Crime and Corruption is a prerequisite and a chief witness is permitted in the case of severe crimes that are decided by a

[26] The introduction for these special investigation measures brought about by the Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ 2000 C 197, 1); Council Act of 18 December 1997 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Convention on mutual assistance and cooperation between customs administrations (OJ 1998 C 24, 1) and Art. 40 of the Schengen Convention.

[27] In implementing the Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ 2001 C 326, 1), BGBl III 2005/66.

[28] In implementing the Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, 54) and the Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ 2001 C 326, 1), BGBl III 2005/66.

[29] See § 147 StPO.

[30] Strafrechtliches Kompetenzpaket BGBl I 2010/108, § 20a ff StPO. The Austrian legislator believes that the introduction of the central prosecutor's office against corruption and economic crime affected the scope of the law of the European Union so far as the concentration should be in the area of prosecution of serious cases of economic crime and ensure better judicial cooperation (918 Blg NR XXIV. GP, p. 2).

[31] Strafrechtliches Kompetenzpaket BGBl I 2010/108, § 209a StPO.

jury or a court of lay assessors. As such, the Leniency Rule is essentially a new instrument of investigation which, at the same time, also develops de-criminalizing properties (such as diversion).

## IV. Conclusion

This fragmentary description of the legislative measures of the Austrian legislator within the last decade provides a clear indication in terms of a conclusion: the trends of development within Austrian criminal law show substantial changes that must be observed critically – especially as far as the substantive areas are concerned. On the other hand, they also show the courage to introduce drastic and long overdue changes, especially in procedural law, concerning the reform in preliminary proceedings. These trends of development also reflect the socio-political changes and the resulting threats, such as globalization along with organized crime, economic crime, terrorism and cyber crime – with all their respective appearances. This is not an exclusively "homemade" Austrian development, but various international regulations and secondary legislation acts within the European Union had to be implemented.

Substantive and procedural law under Austrian criminal law is developing in parallel to each other. The expansion and tightening of the elements of offence in substantial law are used to legitimate the expansion and tightening of instruments of investigation (resulting in a limitation of the civil liberties of every individual concerned).

In addition to this, during the past few years, the outlook of criminal law changed from a repressive criminal law to a preventive criminal law and is constantly approaching a danger prevention law[32] which is normally regulated in police danger prevention acts. This change happened under the guise of guaranteeing safety and effective criminal prosecution with simultaneous disregard for the personal freedom of every individual concerned.

Finally, current legal initiatives in Austria do not lead to the conclusion that these trends of development will be halted or reversed in the near future.

[32] See *W. Hassemer,* Strafrecht im Wandel, Journal für Rechtspolitik (JRP) 2007, pp. 85 et seq.