

Business vs Criminal Law: The growing Unease in the Economy.

MARKET Study Presents
Business Sentiment Survey

**petsche
pollak**



one point ahead

INDEX

TOPIC	2
REPORT	6
SOUNDING BOARDS – VOICES OF THE ECONOMY	18
INTERVIEW PARTNERS	22
INTRODUCTION OF THE LAW FIRM PETSCHÉ POLLAK	26

EDITORIAL

The criminal prosecution is getting tougher. How do Austria's corporations see it? How do they assess the developments? Where do they see the greatest need for action around investigations and proceedings? In the first petsche pollak white-collar crime report, we present you a scientifically sound overview on these topics based on an empirical study by the Linz Market Institute headed by Dr. David Pfarrhofer.

The study shows that the current prosecution of corporations entails considerable challenges both for the actors concerned and for Austria as a business location. On the one hand, companies are required to increase their awareness for criminal investigations and media reports. On the other hand, legal framework conditions and their implementation practice become an increasingly virulent topic considering the importance of the business location. This thesis was strengthened within the context of exclusive sounding boards moderated by trend editor-in-chief Andreas Lampl and other participants from politics, judiciary, and economics.

Hereafter, we will provide you with an annual status update on this topic in the petsche pollak white-collar crime report. Hence, it will be possible to objectively monitor how criminal prosecution is developing from the point of view of Austria's business community. This shall provide a valuable basis for future business, economic and legal policy decision-making.

With this in mind, we wish you a pleasant read!



Simone Petsche-Demmel
PARTNER PETSCHÉ POLLAK

petsche-demmel pollak
rechtsanwaelte gmbh



Andreas Pollak
PARTNER PETSCHÉ POLLAK

petsche-demmel pollak
rechtsanwaelte gmbh

TOPIC



Criminal prosecution in the economy is getting tougher

For about 20 years, Austrian white-collar crime has been swinging from a rather lax prosecution practice to an ever-increasing severity. However, there is currently no foreseeable end to this movement. Additionally, the internationalization of criminal prosecution is becoming more important for white-collar crime

An intensification of criminal prosecution practice can be observed in Austria.

For decades, the member states of the EU and its previous organizations had resisted to give up competences in criminal prosecution. Nowadays, the criminal law section in the Federal Ministry of Justice is constantly engaged with the implementation of Brussel's guidelines. Last year, the European Public Prosecutor's Office was established in Luxembourg. In general, an intensification of prosecution practice in Austria can be observed within the past two decades. A current example is the prosecution of former ministers (most recently there has been an imposition of pre-trial detention under investigation on former minister Sophie Karmasin, who was, however, ultimately exonerated by the Higher Regional Court). Nevertheless, (ex-) ministers have already been prosecuted before, i.e. in previous cases of Karl Heinz Grassner, Ernst Strasser, Peter Westenthaler or Franz Olah. The current intensity and scope of the investigation by the public prosecutor is, however, a novelty.

Changing values in the judiciary

Where does this change come from? First and foremost, changing values in the judiciary and society have a strong influence on the practice of criminal prosecution. Furthermore, activities by legislative have some effect, although the essential elements of the offence have changed only slightly. What does change, however, is their interpretation. One example is the responsibility for more minor acts of support as an accomplice. Basically, anyone who commits an act that at least has a favorable effect on the offence is liable to prosecution. In this case it is irrelevant which act would have led to the same offence. A simple factual situation as an example: A senior bank employee who intentionally carries out an unfaithful – legally groundless

– transfer to the account of a dummy company of the board of directors can, according to the currently prevailing opinion, participate in the breach of trust of the board of directors. A few years ago, an accountant who carries out transfers based on instructions from the board of directors would not have been included in the circle of defendants in white-collar crime proceedings – nowadays this depicts uncertainty.

Expansion of criminal prosecution practice is an European trend

The increasing expansion of criminal prosecution practice is an European trend and is particularly evident in international cases. For example, investigations are currently being conducted in France against textile traders because they are alleged to have participated in the slave-like exploitation of the Uyghurs in China. Some time ago, such an accusation would have been seen as insufficiently substantiated in France as well, especially since the direct events in China take place far away from France. However, the standards applied there are different from those of a few years ago.

In particular, this French example illustrates how society's changing values about social responsibility and environmental protection influence the practice of white-collar crime. Current legislative plans aim to accelerate this trend. Above all, the Commission's proposal for an EU directive on corporate sustainability obligations, which is currently being discussed in Brussels, will also have an implied impact on criminal law. The due diligence defined therein could also expand the criminal law understanding of obligations to act and thus potentially lead to previously unseen liability for criminal offences that primarily take place abroad.

However, the prosecution practice over the years does not only affect natural persons. In Austria, criminal liability of companies exists since 2006. Even though the Corporate Criminal Liability Act was applied rather hesitantly in the first few years, it now represents an indispensable component of criminal prosecution in white-collar crime cases. With fines reaching up to 1.2 million euros, the penalties initially seem manageable in international comparison. However, this is deceptive. In Germany, for example, asset seizures are imposed in con-

nection with economic offences against companies with fines up to hundreds of millions of euros. In this context, the legal situation in Austria is similar.

The change in criminal law practice in recent years would not have been possible without the continuous upgrading of the public prosecutors' offices

The change in criminal law practice in recent years would not have been possible without the continuous upgrading of the public prosecutors' offices. The starting signal was the reform of criminal procedure in 2008, which made the public prosecutor's office the head of investigative proceedings in Austria. Since then, the public prosecutors' offices have received more and more resources and the self-confidence of the investigators has strengthened.

At the same time, criminal proceedings are becoming more and more extensive and challenging. Coercive measures by the public prosecutor's office, such as house searches and data seizures, also lead to an increase in complexity and thus to uncertain proceedings, notably due to today's almost endless electronic data material. Criminal proceedings are covered by the information society as well.

In the end, not every person prosecuted is in fact a perpetrator.

Indeed, the prosecution of criminals represents an important factor for a society as well as the economy. Otherwise, many law-abiding citizens will sooner or later have to ask themselves whether to take the easy path and not be too strict about obeying the law. However, prosecuting offenders also entails costs for the public. In the end, not every person prosecuted is in fact a perpetrator. The more intensive and extensive the prosecution, the more people are inevitably falsely (co-)accused. For

example, according to a parliamentary inquiry, the Austrian Prosecutor's Office Against Economic Crime and Corruption (WKStA) had abated the proceedings against more than 10,000 persons as of the end of December 2020. This contrasts with 471 judicial court convictions. Statistically, this is a ratio of 20:1, or to put it another way: In only 1 out of 20 cases do the proceedings end in a conviction. The background for this comparatively 'meagre' yield of the WKStA is complex. In addition to the aforementioned complexity of white-collar crime proceedings, it is also due to the fact that the public prosecutors currently are obliged to pursue every initial suspicion. Following the 'opportunistic principle', a broader discretion could be a way to use the resources of the prosecution authorities more efficiently.

Nowadays, the mere suspicion of criminal behavior can very quickly destroy one's career or an entire company

Nowadays, the media play an increasing reinforcing role. There is no doubt that it makes sense to report publicly on mistakes made by decision-makers. However, negative news or scandals seem to be more in the public's interest than reports about positive events. Consequently, the social media soften the presumption of innocence. Today, the mere suspicion of criminal behavior can very quickly destroy a career or an entire company. The final verdict is often not what matters.

Sooner or later, the legislator will have to become active to intervene in these developments in a steering manner: at the latest when responsibility for social and environmental issues enters criminal law practice. Until then, it is important to take precautions, document critical decisions and, if necessary, maintain resilience.

Authors

Simone Petsche-Demmel and Andreas Pollak
petsche-demmel pollak rechtsanwaelte gmbh





MARKET study

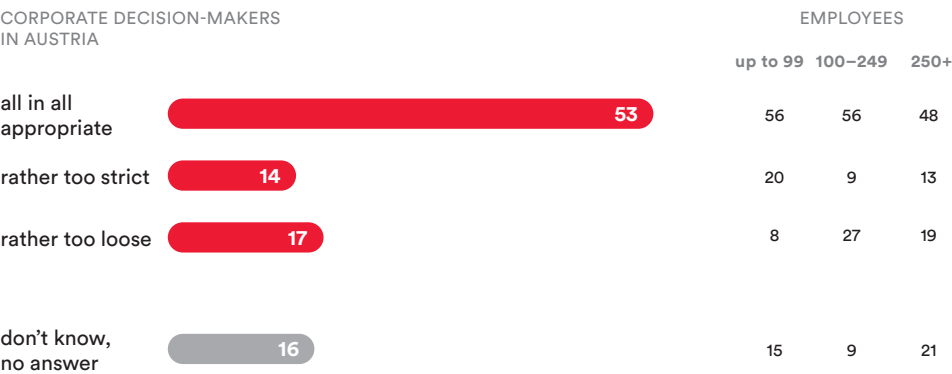
“The Unease of the Economy Is Growing.”

A survey among Austrian companies shows: The danger of criminalization of business activity is increasing considerably. The length of proceedings and prejudices in the media render particular challenges to corporate success.

A total of 167 decision-makers from large, medium-sized and small corporations took part in the MARKET study concerning the topic of ‘Business and Criminal Law’. The MARKET researchers gathered the moods and experiences of Austrian companies with regard to white-collar crime laws and jurisdiction. The results are clear according to Institute Director Dr. David Pfarrhofer: “The unease of the business community about criminal prosecution and media coverage is growing. Not only large companies, but also Austria’s small and medium-sized enterprises are aware that this can become a massive problem for their success.”

Perception of the current situation in white-collar crime laws and jurisdiction.

The corporate decision-makers in Austria perceive the current situation in business law and jurisdiction as appropriate, however ...



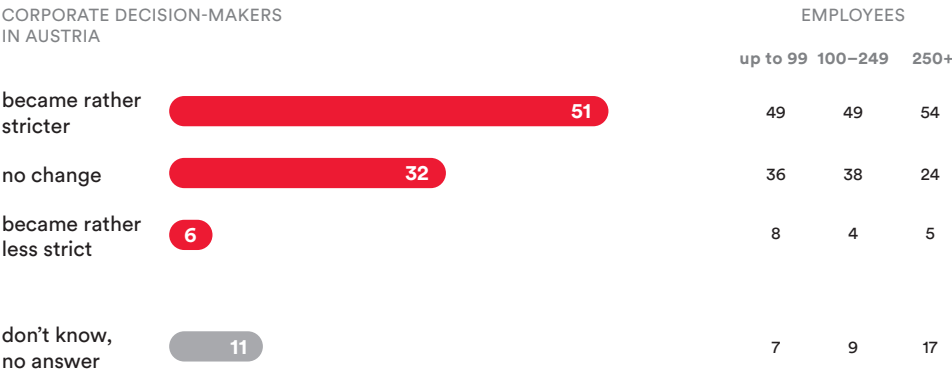
Right at the beginning: How do you perceive the current situation in white-collar crime and jurisdiction in Austria? In your opinion, is white-collar crime or jurisdiction in Austria all in all appropriate, rather **too strict** or rather **too loose**?

White-collar crime becomes stricter

The MARKET study clearly shows that currently the majority (53 percent) of white-collar crime and jurisdiction are assessed as ‘all in all appropriate’. “However, many entrepreneurs are sensing an uncomfortable situation,” researcher Pfarrhofer concludes. More than half (51 percent) report that white-collar crime has become stricter in the past four to five years.

Changes in white-collar crime laws

... one senses an uncomfortable situation: More than half of Austrian’s corporate decision-makers note an aggravation within business law.



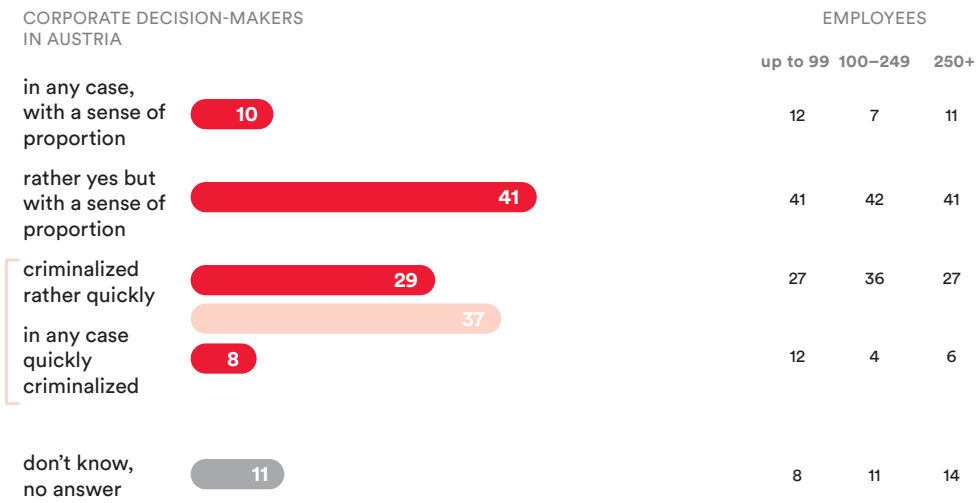
Let's first turn to white-collar crime: What changes do you perceive in white-collar crime, i.e. in the legal foundations? All in all, has white-collar criminal law become stricter or less strict over the past four or five years?

Corporations are criminalized more quickly

The entrepreneurs also criticize the fact that white-collar crime is not proceeded with a sense of proportion: Only ten percent of decision-makers see this ‘in any case’ guaranteed, while 37 percent admit that criminalization is ‘rather’ or ‘definitely’ criminalized. A striking trend: smaller companies are more concerned (12 percent ‘definitely criminalized’) than large companies (six percent ‘definitely criminalized’).

Criminalization factor white-collar crime

Almost 40 percent of entrepreneurs see a (too) rapid criminalization in white-collar criminal!



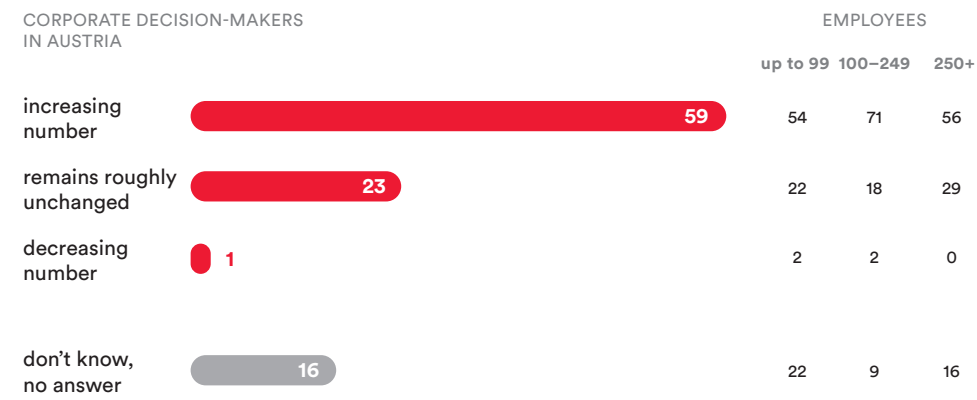
How do you assess this: In your opinion, is white-collar crime generally designed **with a sense of proportion** or is white-collar crime designed in such a way that, all in all, you are **quickly criminalized**?

More white-collar crime investigations and proceedings

The MARKET study also documents a relevant increase in business law investigations: 59 percent of businesses report an increase. In the case of companies with 100 to 249 employees, this was even observed by 71 percent. This shows that only 21 percent of the companies surveyed state that the majority of investigations are justified in any case. In the case of the main proceedings, 48 per cent observe an increase.

Development of white-collar criminal investigations

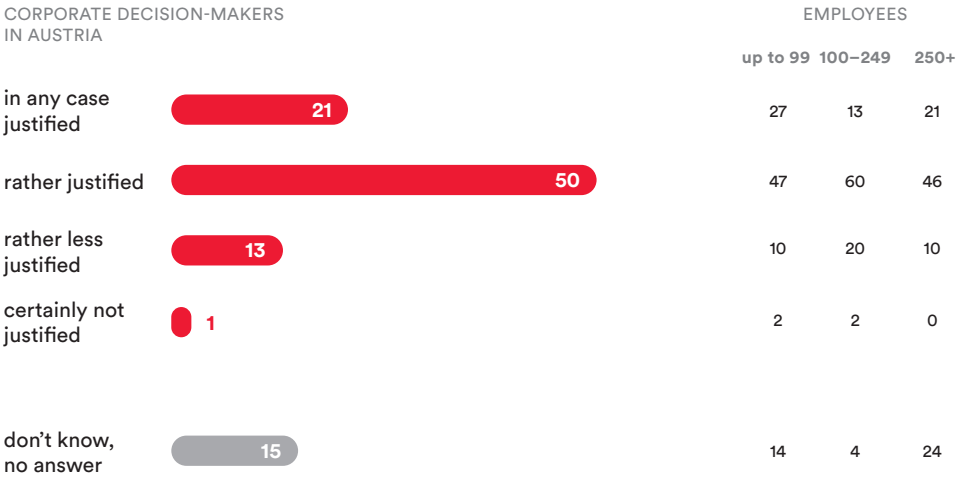
Clear mood: The business law investigations are increasing!



How do you assess the development of the number of white-collar criminal investigations in Austria – Do you feel an increase, does this remain **roughly unchanged** or are they becoming **rarer**?

Assessment of the investigation procedures

Only one fifth is convinced that many investigations are ‘definitely’ justified!



In your opinion, is the majority of these investigations justified, or not?

Procedures take too long

“The criticism of the long duration of the investigations is massive,” reports MARKET Institute director Pfarrhofer, who made a legally correct distinction between investigation and main proceedings concerning the question of time. The results show that 76 percent consider the investigations to be too slow. 73 percent also perceive this to be the case in the main proceedings. Pfarrhofer states: “The mood in the main proceedings is similar to the one in the investigations. Although somewhat less clearly than in the investigations, an increase is felt here as well, and the long duration of the proceedings is criticized.”

Duration of investigations

Topic of duration: The investigation procedures simply take too long!



And how do you assess the length of time that such an investigation usually takes?

Public prosecutor's office and media as 'drivers'

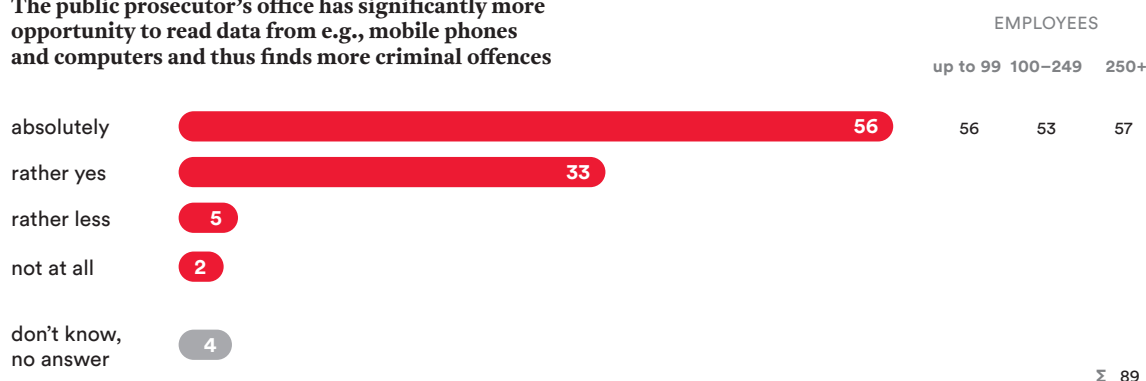
The fact that charges and criminal proceedings against companies are increasing has many reasons due to increasingly fierce economic competition. However, the corporate decision-makers surveyed see the public prosecutors (56 percent) as the main driver for the increasing number of proceedings, with significantly more possibilities to read out data (e.g. from mobile phones and computers), which also leads to more criminal offences being found. This is followed by media coverage (50 per cent), which increases the pressure to initiate investigations. In addition, the companies state that criminal behaviour is less overlooked today than in the past (42 per cent).

Reasons for the increasing number of proceedings

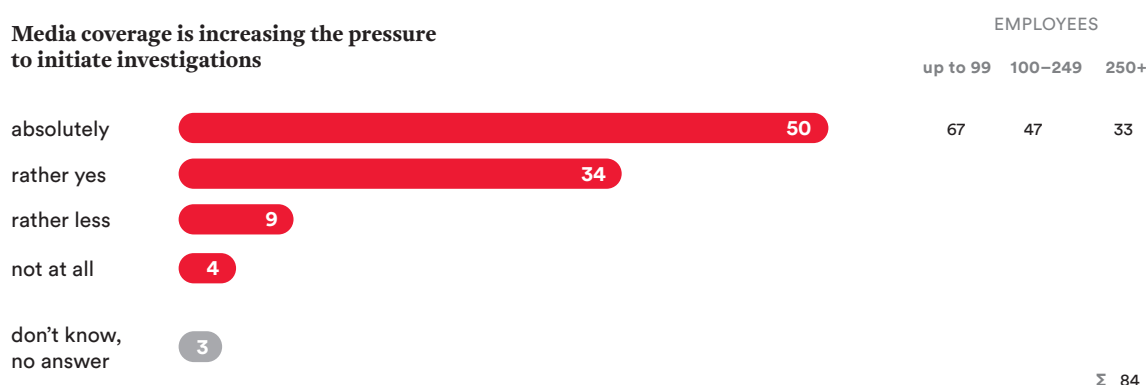
Basis: Corporate decision-makers in Austria who perceive an increase in investigations or main proceedings.

I will read you some statements that may have led to more proceedings in white-collar crime. What do you think? Which of these points lead to an increase in proceedings in white-collar crime, which rather not? Please answer with in **any case, rather yes, rather less, not at all**.

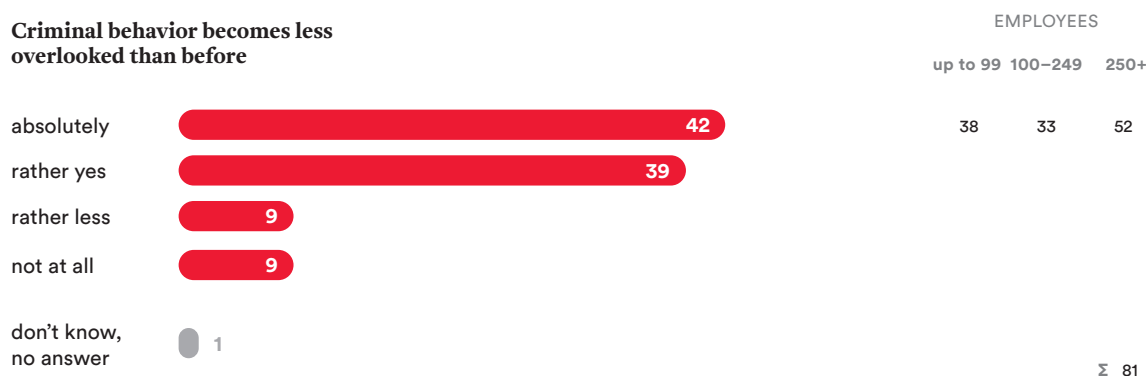
The public prosecutor's office has significantly more opportunity to read data from e.g., mobile phones and computers and thus finds more criminal offences



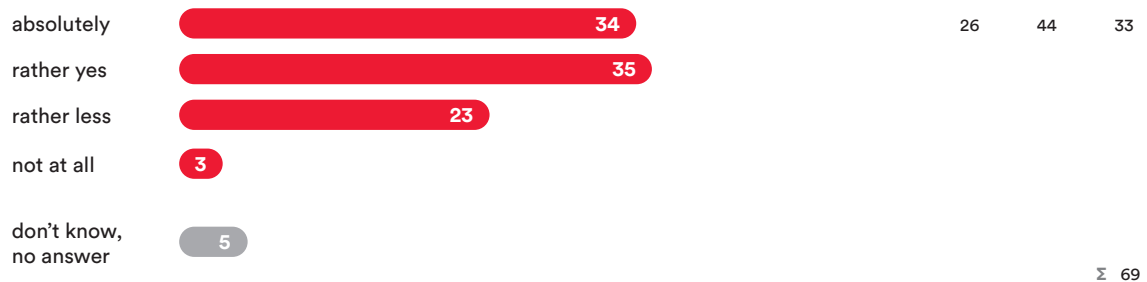
Media coverage is increasing the pressure to initiate investigations



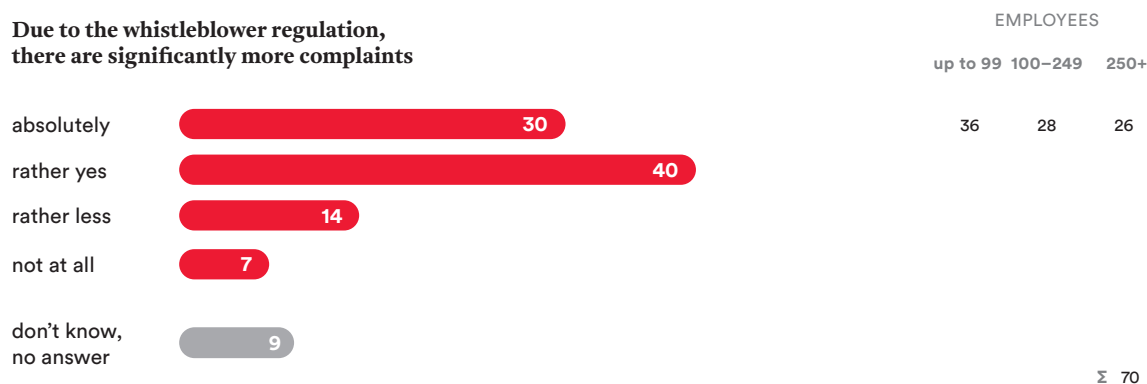
Criminal behavior becomes less overlooked than before



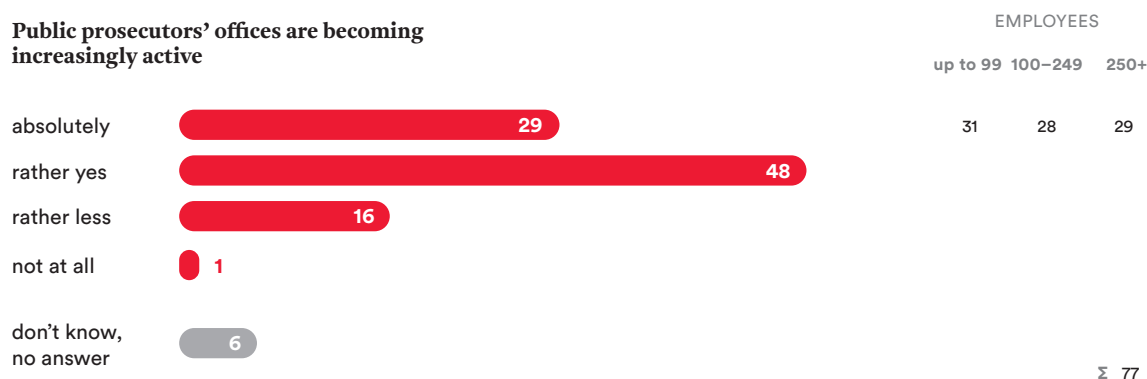
In the parliamentary committees of inquiry, things are uncovered, which are then investigated by the public prosecutor's office.



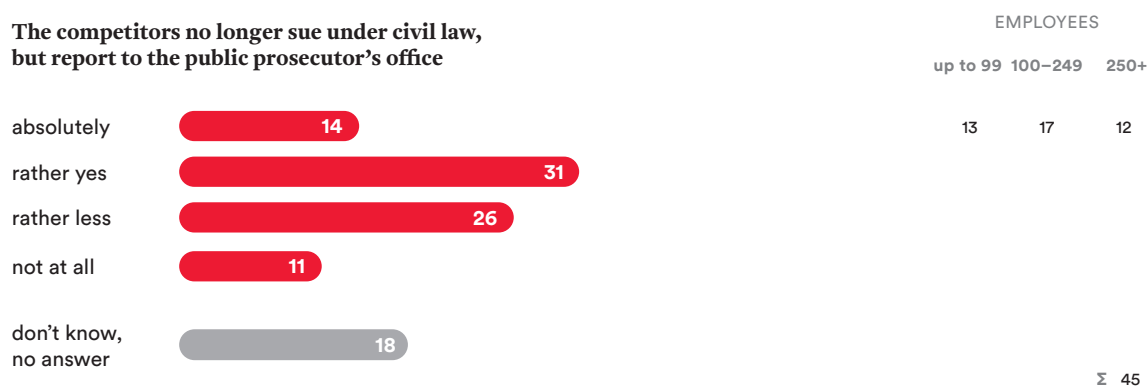
Due to the whistleblower regulation, there are significantly more complaints



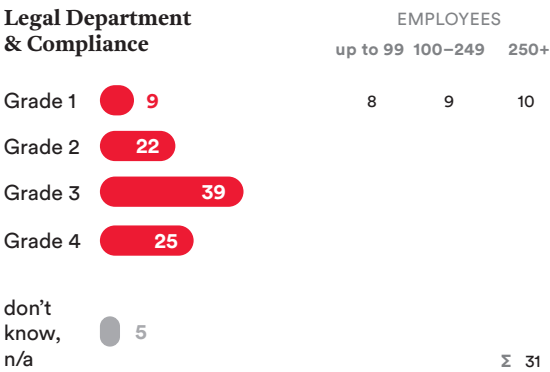
Public prosecutors' offices are becoming increasingly active



The competitors no longer sue under civil law, but report to the public prosecutor's office



**Legal Department
& Compliance**



**Difficulties already caused by the initiation
of a proceeding**

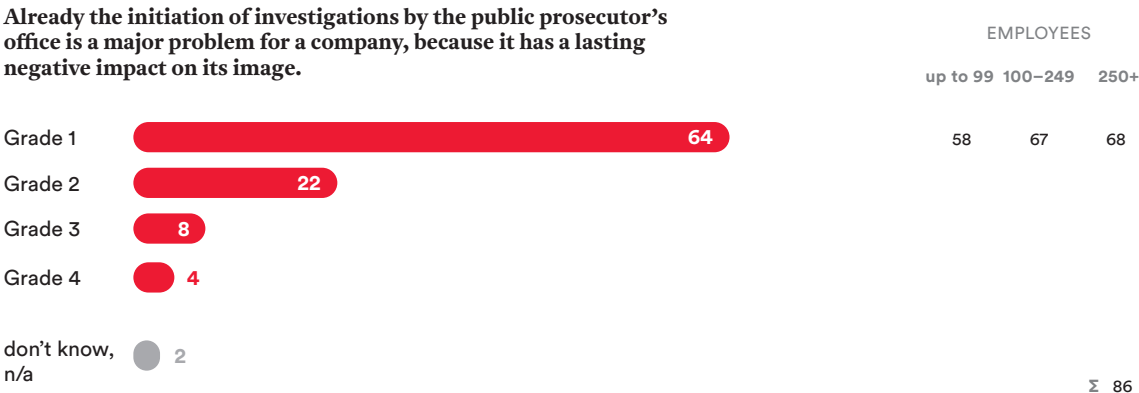
As part of the MARKET study, decision-makers in companies were also asked about the consequences of criminal proceedings. It became clear that for about two-thirds (64 percent), even the initiation of investigations represents a serious intervention in the company's success because of its lasting negative impact on the company's image. Researcher Pfarrhofer: "When it comes to the Legality as a topic, it is not surprising that a lot of companies correlate with it; even if one takes into account that the regulations to be complied with are becoming increasingly complex." This is precisely what 59 percent of the companies criticise.

Statements on business law investigations

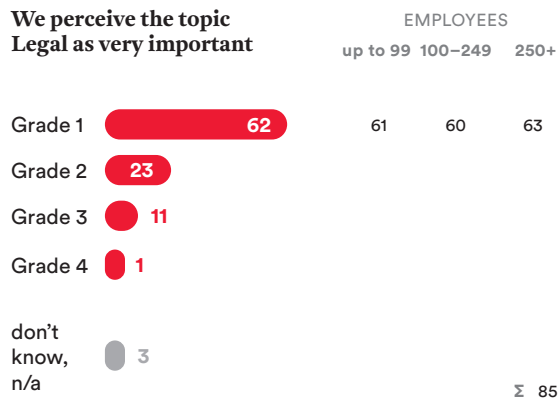
The corporate decision-makers already see a big problem within the initiation of proceedings and at the same time fear the increasingly complex regulations!

To what extent do you agree with the following statements about white-collar criminal investigations? Please judge each statement from **1 = strongly agree** to **4 = strongly disagree**. In between, you can grade freely.

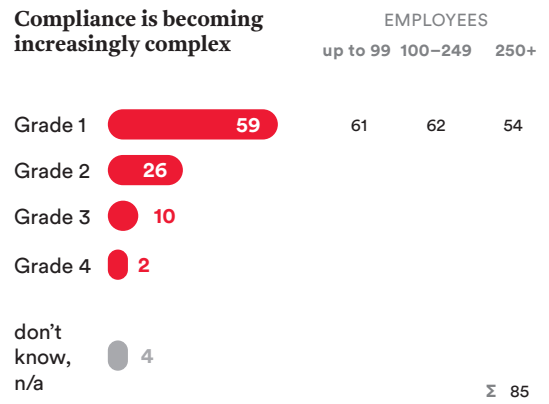
Already the initiation of investigations by the public prosecutor's office is a major problem for a company, because it has a lasting negative impact on its image.



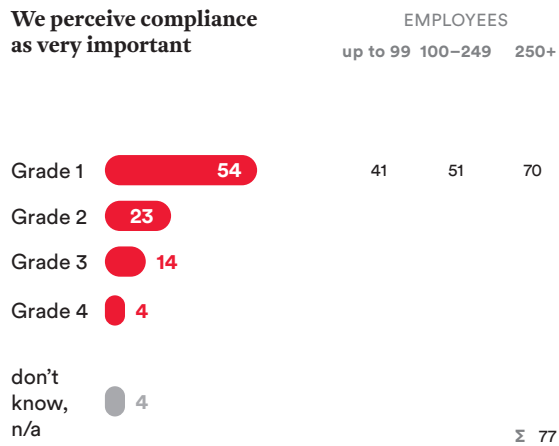
**We perceive the topic
Legal as very important**



**Compliance is becoming
increasingly complex**



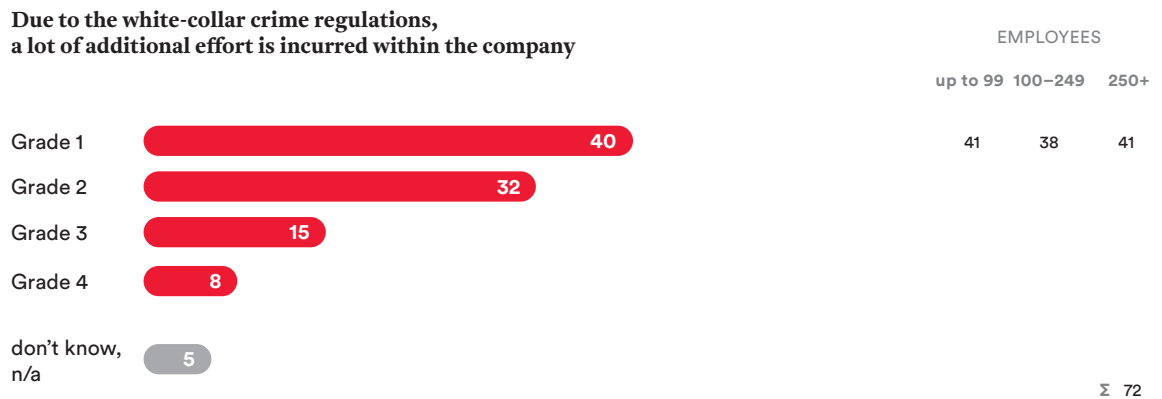
**We perceive compliance
as very important**



**Our company has a lawyer
or a law firm specializing
in white-collar crime
proceedings**



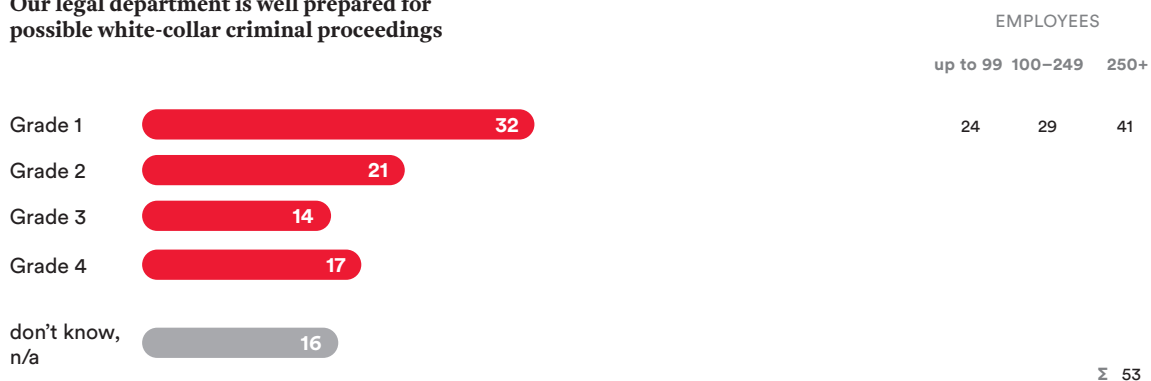
**Due to the white-collar crime regulations,
a lot of additional effort is incurred within the company**



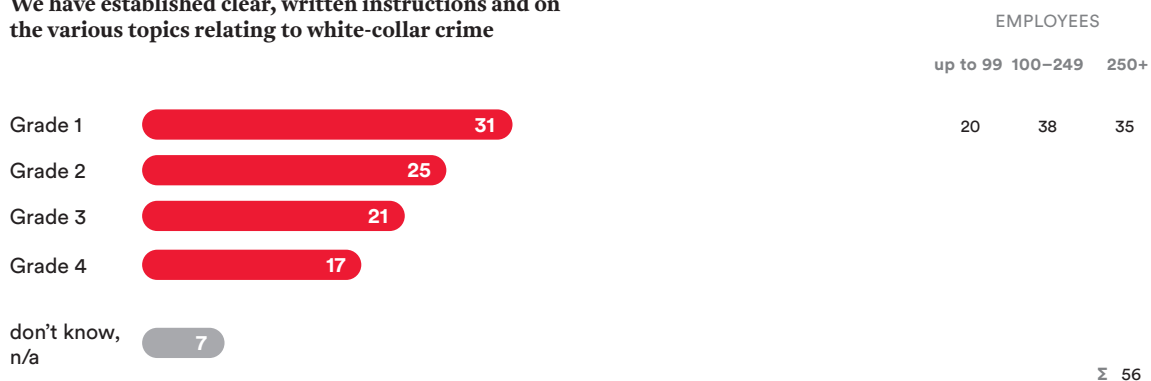
**We are convinced that we will be treated fairly in the
event of white-collar criminal investigations and proceedings**



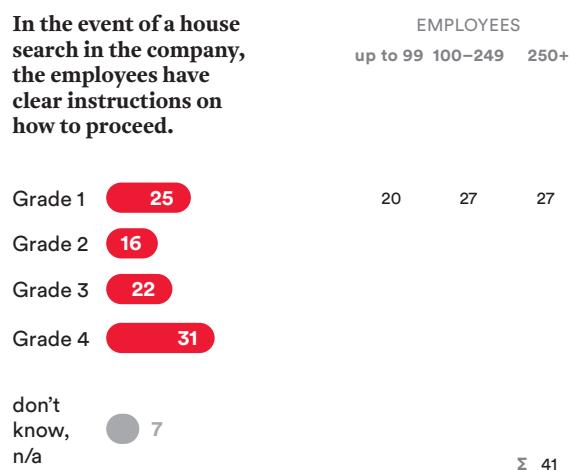
Our legal department is well prepared for possible white-collar criminal proceedings



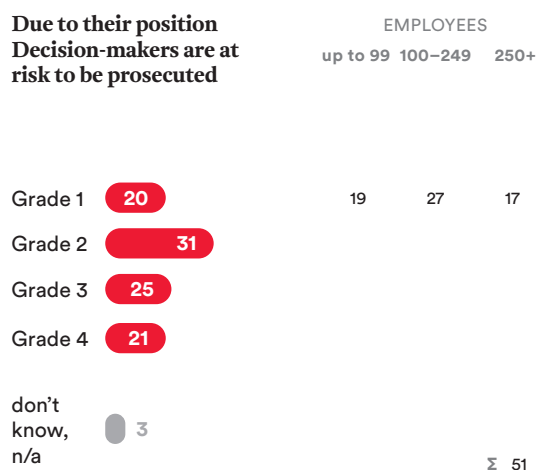
We have established clear, written instructions and on the various topics relating to white-collar crime



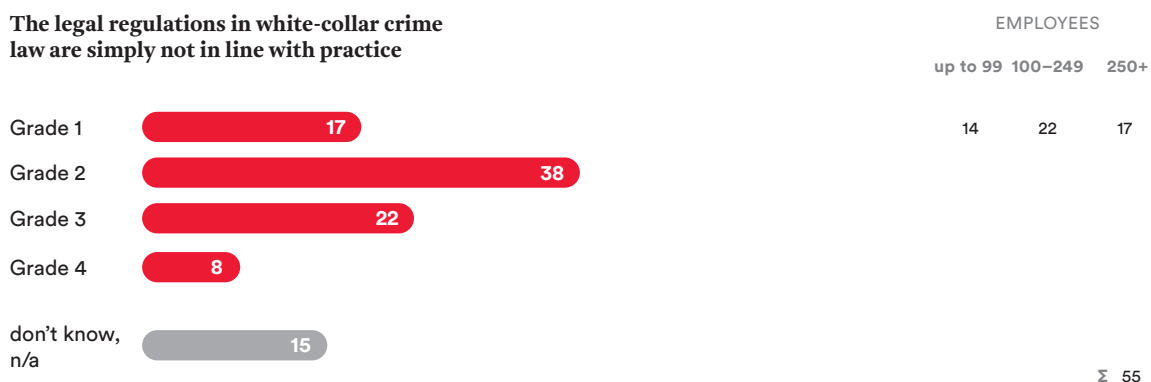
In the event of a house search in the company, the employees have clear instructions on how to proceed.



Due to their position Decision-makers are at risk to be prosecuted



The legal regulations in white-collar crime law are simply not in line with practice

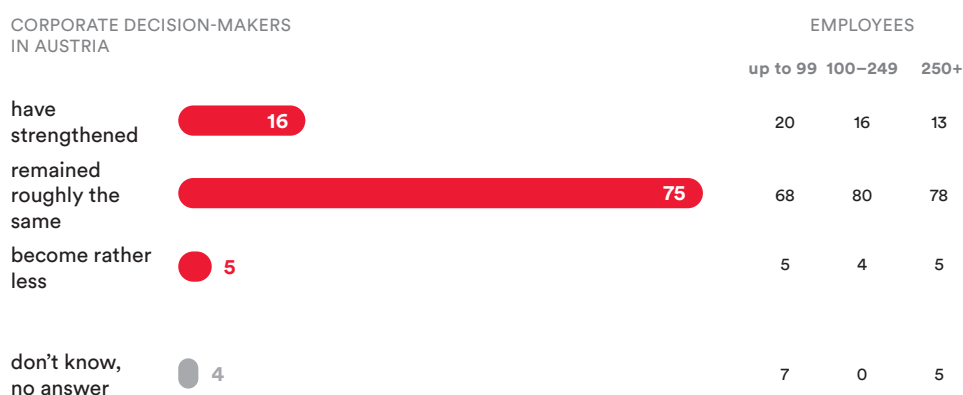


Gaps in legal advice

In the worst case scenario, small and medium-sized enterprises are comparatively undersupplied with legal advice: only 32 per cent of enterprises with up to 99 employees state that they hired an appropriately specialised lawyer or law firm, while at enterprises with more than 250 employees this is the case for 48 per cent. As this is indispensable, every fifth respondent agrees with the statement “Due to their position company managers are at risk to be arrested”.

Development of personal concern

The fears surrounding one's own career remain essentially constant.



Has this fear increased in recent years, has it **remained roughly the same** or has it **become less**?

High risk for proceedings

The MARKET study also brings alarming results when it comes to the assessment of industry risks: A quarter (23 percent) of the respondents estimate the risk of white-collar criminal proceedings as high. MARKET board member Pfarrhofer: “Many companies in Austria reckon that they can slip into proceedings with serious consequences for their image and competitiveness. This is an extremely problematic situation for companies and the entire business location, not only in economically challenging times like this.”

The survey

Institute
MARKET

Head
Dr. David Pfarrhofer

Basis of evaluation
167 company decision-makers
(at least more than 50 employees)

Survey
telephone interviews

Survey period
10th August – 22nd September 2022



What challenges us

Why is white-collar crime becoming a challenge for more and more companies in Austria? Which developments are problematic from an economic and legal point of view – and which are desirable? The petsche pollak White-Collar Crime Report 2023 presents positions and statements from a background discussion with experts from business, law, and politics.

Within the framework of small, exclusive sounding boards with representatives from politics, business and the judiciary, discussions were held on the topic of white-collar crime in compliance with the Chatham House Rules. The arguments put forward by the high-profile guests were summarized below in anonymized form in order to provide a picture of the mood in the relevant areas in addition to the study.



Chats

“Conversations in chats and by mail are more accessible and provide far-reaching background information on decision-making processes.”



Standards

“Compliance departments in companies are becoming more and more extensive and the requirements for decision-makers are becoming stricter and stricter. It is no longer possible to operate in business without an appropriate code of conduct and compliance with various standards. This development is reinforced by the European Union’s Supply Chain Directive, which obliges entrepreneurs to comply with various standards along their supply chain.” Where once the accountant was looking for financial benefits, today abuse is immediately assumed. The ESG reports are now denser than some balance sheets – it is no longer possible to comply meticulously with all the rules.



Criminal Law

“It would be easy to assume that the legislator has created a web of various stricter laws, which leads to decision-makers committing crimes more frequently. A closer look reveals that about 95% of the offences have remained unchanged. What has changed is the enforcement and application of the various laws. On the one hand, ‘dead law’ is being revived. On the other hand, the law is being reinterpreted, resulting in an expansion of the scope of application. The problem behind this is that the change happens insidiously and not publicly. This creates enormous legal uncertainty for decision-makers, making it almost impossible to act in accordance with the law.”



Change of Value

“Management boards are no longer untouchable individuals who are not subject to public demands. Decisions are more often questioned and can lead to the removal of individuals – or plunge companies into crisis.”



Media

“The media contribute significantly to the perception of a criminalized economy. There is no doubt that it makes sense for journalists to report on mistakes made by decision-makers for economic reasons. Negative news and scandals sell better than reports about positive events. However, this form of reporting places the economy under general suspicion.” The differentiation between morality and criminal law is missing in the media, this mix often creates the appearance that morally wrong actions are equal to criminal actions. While the reporting on the initiation of investigations is widely discussed in the media, and in some cases is not even further examined, the abortion (*Einstellung der Verfahren*) of such proceedings is an incidental. Unlike in Germany, it does not constitute a criminal offence in Austria to pass on investigation files to the media. This leads to the problem that one-sided contents become public knowledge without a confrontation of exculpatory material. In addition to the prejudice, this approach leads to the destruction of social cohesion.



Climate Protection

“Especially in terms of climate protection, the requirements for businesses have increased. Today, ignoring climate protection in corporate activities is morally prohibited. Also, criminal law provides that companies act accordingly.”



Costs

“The increasingly complex regulations require additional financial expenditure for the companies. Own compliance departments are being set up and new structures created. Acting in a legally compliant and morally impeccable manner is becoming increasingly cost-intensive.”



Time

“The investigations drag on for many years and in some cases impede entrepreneurial activity to an extreme degree. Participation in tenders is denied to companies that are currently under investigation. If the investigations are then closed after ten years without any results, those affected are left with very high costs for their defence, that have incurred during the investigation.”



Social Media

“The presumption of innocence has been eroded by traditional and new social media. Nowadays, mere suspicion of criminal behavior can destroy a career or a company in its entirety. The final verdict often doesn’t matter.”



Risk

“Pursuing civil litigation carries a financial risk. Criminal law offers a cost-effective alternative. Therefore, the deviation to criminal law is being chosen more and more frequently. Here, the public prosecutor’s office takes over the investigation. If there is no verdict in the end, the accused does not face any financial risk. However, this approach leads to criminalization where civil law would actually suffice.” Concerns about legal and reputational risk are paralyzing decision-making in some areas. There is a reluctance to make risky decisions in C-level circles for fear of liability or criminal investigation.

The liability risk for supervisory board members is becoming greater and greater, but in proportion the salaries are significantly lower than what German supervisory board members earn in comparable companies.



Gold-Plating

“Austria is considered the world champion in gold plating. The over-regulation of the Austrian legislator makes legally compliant action almost impossible in some cases.”

INTERVIEW



“Companies must keep their capability to take actions”

What does increased and tougher criminal prosecution mean for businesses and their business location? White-collar crime experts Simone Petsche-Demmelt and Andreas Pollak report on challenges for the economy and the right reaction in a worst-case scenario.

The rules and standards for which companies bear responsibility are increasing. Are white-collar crime and its rigid interpretation becoming a problem for corporations?

POLLAK Yes, we can clearly see this in practice: the extent to which companies are affected by the activities of law enforcement authorities has increased significantly. It is not so much about the laws becoming stricter, but more about their application and interpretation. As a result, more and more persons are being prosecuted.

“The impact of companies being prosecuted has increased significantly by the growing activities of the law enforcement authorities”

PETSCH-DEMME What used to be considered legally correct is no longer applicable today. For companies, the problem lies primarily in the fact that the authorities' practice is no longer predictable. This is precisely what creates legal uncertainty as well as a lack of calculability.

What does this development mean for the business location?

PETSCH-DEMME The consequences are serious as many companies fear the criminal prosecution for wrong business decisions. This is a major barrier for the development of the business location because there is no understanding for the concept of 'failure culture' in Austria. By adding the criminal law component to this, dealing with entrepreneurial risk becomes increasingly difficult. In the worst case, important future and investment decisions are left out. This is precisely what Austria as a business location should not risk.

“The fear of criminal prosecution based on wrong business decisions [...] is a major barrier to the development of the business location”

POLLAK At business level, the problem also becomes evident in the fact that more and more clients are having their business decisions approved from a criminal law perspective beforehand. Nevertheless, entrepreneurial risk is part and parcel of do-

ing business – dealing with it must be normal and not questionable under criminal law. If, according to the Market Institute, every fourth company now assumes a high risk of criminal prosecution, the business location is facing a serious problem.

The MARKET study commissioned by you (page 7) also documents that companies trust the judiciary, however, the damage caused by legal proceedings is enormous. Is there a possibility for change?

PETSCH-DEMME The damage is already caused by the previous good reputation. The statement, that “The presumption of innocence applies” is unfortunately no longer applicable. The system is in need of serious legal protection for those who have not yet been convicted ...

POLLAK ... in other words: it must be possible for an accused to save his face. With the increased investigative activity and more proceedings, the costs for the economy and for businesses increase. There is a need for improvement in the question of who bears the costs if there are no proceedings initiated. Also, it is important to bear in mind the disadvantages that come along, such as the aforementioned loss of reputation. A possibility would be a public statement by the law enforcement authorities that discloses the presumption of innocence of the accused in the case of discontinuation.

“The statement, that ‘The presumption of innocence applies’ is unfortunately no longer applicable.”

What advice would you give to a company that is suddenly under criminal investigation?

POLLAK Do not ignore the problem, but try to actively manage it. In other words: understanding the suspicious situation, working up the necessary data basis within the company and seeking access to the authorities.

PETSCH-DEMME And, of course, getting support from professionals in the legal field and, if necessary, in the communication area. External assistance is highly recommended, as the facts of the case must be thoroughly investigated. More often than not, it is hard to define the exact facts of the case. It must be clarified, for example, which employees are involved as well as to discuss further proceedings within the company. It is crucial that the corporation keeps its ability to take actions in such difficult situations.

“It must be possible for an accused to save his face.”

And what should you not do under any circumstances?

POLLAK Falling into a state of shock and procrastinating with further necessary proceedings ...

PETSCH-DEMME ... it is also inevitable to think thoroughly through the exact process. Making rash statements in which the public prosecutor’s office is either blamed or reassured are to be avoided. Corporations should not increase the problem by harming themselves through weak communication. It is also clear that careful preparation makes all the difference. Those who prepare for the worst-case scenario of a criminal law crisis, including house searches and seizures, maintain their ability to act even in such challenging times. In the end, that is exactly what matters.



petsche pollak is Austria's largest independent law firm for corporate criminal defense. The firm specializes in the defense of entrepreneurs and corporations in white-collar crime. The partners and counsels have a vast experience in the management of crisis situations, may it be in civil or in criminal courts.



petsche
pollak



one point ahead

petsche
pollak



Point ahead

Imprint

© 2023 petsche-demmel pollak rechtsanwaelte gmbh

The disclosure according to ©§25 MedienG is available under www.petschepollak.com/en/imprint.html.

Registered office Vienna I Commercial Court Vienna I FN 392913p I

**petsche
pollak**



one point ahead