

Providing an Alternative to Silence:

Towards Greater Protection and Support for Whistleblowers in the EU

COUNTRY REPORT: AUSTRIA

This report belongs to a series of 27 national reports that assess the adequacy of whistleblower protection laws of all member states of the European Union. *Whistleblowing in Europe: Legal Protection for Whistleblowers in the EU*, published by Transparency International in November 2013, compiles the findings from these national reports. It can be accessed at www.transparency.org.

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The project has been funded with support from the European Commission. The sole responsibility lies with the author and the Commission cannot be held responsible for any use that may be made of the information contained therein.

With financial support from the Prevention of and Fight against Crime Programme of the European Union.

European Commission – Directorate-General Home Affairs



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Country Report: AUSTRIA

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I. Introduction

"We say in this nation that we are looking for people with honesty, integrity, drive and dedication, and then when we find such people, we take them out and whip them."

-anonymous whistleblower

According to the quotation, the truth is what people are looking for, but those who have spoken the truth shall be punished for the information they provide. The quote derives from a whistleblower, implying the consequences a whistleblower has to face. Hence, the protection of a whistleblower is still one of the most sensitive topics one can come across. Though when talking about whistleblowing, more questions than answers lay at hand:

- *What is a whistleblower?*
- *Does the Austrian legislation provide for a protection of a whistleblower and what perceptions does whistleblowing have in the public?*
- *What is the situation like in Austria?*
- *Are there people who have already "blown the whistle"?*
- *And what happened to them afterwards?*
- *Were they subjected to consequences?*
- *Did they have to leave their job?*

It becomes obvious that whistleblowing affects various statutory laws (labor, criminal, data protection law). It also becomes obvious that the topic whistleblowing always contains an emotional component: covering up something that is supposed to let alone brings a conflict of interest. The whistleblower has to face the person who disguises the information – at least at some point today. The whistleblower has to face those that do not share his/her opinion. The whistleblower has to be (sometimes) heroic in order to overcome obstacles – *who should I turn to for help? Who can provide assistance?*

Whistleblowing is not merely disclosing information about white-collar crimes, corruption or malversations. It is so much more because the whistleblower usually is the "Vernaderer" or the "tattletale", who is rarely viewed as a hero. His/her actions are rarely publicly honored and often not well received. In 2002 the whistleblowers Sherron Watkins of Enron, Coleen Rowley of the FBI and Cynthia Cooper of

WorldCom were named as Persons of the Year by Time Magazine.¹ This rarely happens. Hence, this article examines the current developments in Austria and tries to provide an overview about regulation, institutions, and cases and conclusively, pose recommendations, which can enhance the protection of whistleblowers and the act itself so that in the future telling the truth will be more appreciated than going along with malversations.

¹ Time Magazine, 30.12.2002, <http://www.time.com/time/magazine/article/0,9171,1003998,00.html> (08.09.2012).

II. WB protection laws and institutions

In the following sections an overview will be provided of the current legislation for the protection of a whistleblower and statutory laws to assess whether it is possible to construe a whistleblowing regulation. Consequences that a whistleblower might face are also explained in the respective sections. Furthermore, this Chapter introduces the institutions that (can) function as a registration office (“Meldestelle”) for a whistleblower.

Whistleblowing Protection Law

1. *The Amendment of the Public Services Law*

On August 28, 2010, I was invited to meet with Stefan Ritter², who is working at the Federal Chancellery, specializing in public services law. I had written to Gabriele Heinisch-Hosek, the Federal Minister for Women and the Civil Service (“Bundeministerin für Frauen und Öffentlichen Dienst”) because I was aware of the fact that she had advocated for a whistleblower protection law for the public servants. Mr. Ritter had called me to discuss the reasons on which the new statutory laws were based on. Ritter was part of the team who formulated the new statutory laws. He explained that these were implemented due to the GRECO evaluation report. According to the GRECO evaluation report Austrian public servants (“Bedienstete”) were already obliged to report a malversation (§ 53 section 1 BDG 1979, § 5 section 1 VBG and § 109 section 1 BDG 1979, § 78 StPO) but so far the Austrian legislation did not provide a protection for these public servants (whistleblower), which was viewed as providing enough protection. When corruption occurs a physical damage cannot be determined. Corruption rather impairs the community. These regulations were enacted in order to provide a protection for the informant and the goal is to support the whistleblower not being subjected to oppressive sanctions from the employer.³

² This article has been approved and all statements have been confirmed by Mr. Stefan Ritter.

³ 326/ME XXIV. KP – Ministerialentwurf – Erläuterungen,
http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00326/fname_233998.pdf (16.08.2012), p. 10.

Before the possible enactment of § 53a BDG 1979 and § 58b RStDG, the experts from the Federal Chancellery presented to the GRECO evaluation team the current legislation how public servants were already protected. As noted by Mr. Ritter, the public servants are protected by the principle of equal treatment as guaranteed by the Austrian constitution, the specific rules laid down by service law (especially those on dismissal and transfer) and other legislation. But this protection was viewed as not being sufficient. Ergo, new legislation needed to be passed.

On January 1, 2012, two new paragraphs entered into force to comply with the GRECO evaluation report (Federal Law Gazette I Nr. 140/2011): **§ 53a BDG 1979**⁴ (in combination with § 5 VBG also applicable on contractual federal employees) and **§ 58b RStDG**⁵. Both of these have the same headline, titled: protection from discrimination (“Schutz vor Benachteiligung”), posing the first attempt in Austrian legislation to legally standardize a protection for whistleblower in the public sphere. Even though the public response was in favor of enacting a whistleblower protection law in the private sector, the Austrian Parliament has so far not bowed to that request. Both of the regulations have a similar coverage – they are both only employable to federal public servants and contractual staff, contain internal and external reporting mechanisms and only apply in case the disclosure was conducted in **good faith**. The prerequisite of good faith can also be found in the Austrian Trade Law (see **Chapter III**)⁸). Unlike the regulations themselves, they both do not contain detailed information on when a disclosure is made in good faith. Only the annotations to these specific regulations make it clear how these regulations shall be applied and most importantly how they should be applied.⁶

As previously mentioned both regulations contain a protection for the whistleblower **when a disclosure is made in good faith**. The disclosure has to be connected to a crime related to the office the public disclosure is made to. According to both regulations the public disclosure can either be conducted to the Agency Management (“Dienststellenleitung”) or to the Federal Bureau of Anti-Corruption (“Bundesamt zur

⁴ **§ 53a BDG**, <http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40133771> (21.09.2012).

⁵ **§ 58b RStDG**, http://www.jusline.at/58b_Schutz_vor_Benachteiligung_RStDG.html (21.09.2012).

⁶ 326/ME XXIV. KP – Ministerialentwurf – Erläuterungen, http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00326/fname_233998.pdf (16.08.2012), p. 9 ff.

Korruptionsprävention und Korruptionsbekämpfung”). In this case only the second institution – the Federal Bureau – is relevant in terms of the information, which the whistleblower provides. The disclosure has to withhold information about a crime constituting the competent jurisdiction of the Federal Bureau. An exclusive enumeration of crimes, such as corruption in the public and private sector as well as money laundering, is listed in the legislation of the Federal Bureau.⁷ **The whistleblower protection only applies when the reported behavior potentially falls within the competence of the Federal Bureau.** Any other crime is not mentioned in the annotations and hence it can be assumed that it will not constitute the competence jurisdiction of the Federal Bureau and therefore not generate a whistleblower protection for the public servant.⁸

Furthermore the whistleblower has to disclose the information in good faith, believing the information to be verifiable and hence substantiate the information.⁹ Already ordinary negligence (“leichte Fahrlässigkeit”) excludes the application of the whistleblower protection regulation.¹⁰ Summarizing the requirements for the application of the whistleblower protection, it can be noted that they are very strict. A whistleblower has to be sure the information will be related to a corruption offence. If the information turns out to be false, and the whistleblower had knowledge about this, he might be subjected to disciplinary transfer or fear a dismissal.¹¹

On the other hand, if the accusations are true and other public servants assist him in the disclosures, the whistleblower protection regulation will be applicable to them as well. Assisting the whistleblower is exemplified in the annotation as acting as a witness in the course of action. It implies that the person who is supporting the whistleblower faces a certain amount of risk when disclosing the information about

⁷ §4 Section 1 BAK-G.

⁸ 326/ME XXIV. KP – Ministerialentwurf – Erläuterungen, http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00326/fname_233998.pdf (16.08.2012), p. 10.

⁹ 326/ME XXIV. KP – Ministerialentwurf – Erläuterungen, http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00326/fname_233998.pdf (16.08.2012), p. 10.

¹⁰ 326/ME XXIV. KP – Ministerialentwurf – Erläuterungen, http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00326/fname_233998.pdf (16.08.2012), p. 10.

¹¹ Parlamentskorrespondenz Nr. 1180 vom 01.12.2011, Beamte, die Korruption melden, werden künftig besser geschützt, http://www.parlament.gv.at/PAKT/PR/JAHR_2011/PK1180/ (16.08.2012), p. 1; PÖLL, Regina, Korruption: Neue Regeln für Beamte, 26.10.2011, http://diepresse.com/home/recht/rechtallgemein/704055/Korruption_Neue-Regeln-fuer-Beamte (16.08.2012).

the employer.¹² Moreover, it is noted that the person who is “accused” with the accusation will neither be denied nor limited of his/her procedural rights.¹³

Mr. Ritter further noted that this law does not provide the whistleblower with a subjective public right. The representative of the employer taking discriminatory repressive action against a whistleblower is subjected then to a disciplinary procedure. But so far no disciplinary procedures are known yet, because the law has been only passed recently, Mr. Ritter concluded.

Complete title of law or regulation:

Beamten-Dienstrechtsgesetzes 1979, §53a – Schutz vor Benachteiligung
(„Protection from discrimination“)

Richter- und Staatsanwaltschaftsdienstgesetzes, §58b – Schutz vor Benachteiligung („Protection from discrimination“)

The table can be applied to both regulations §53a and §58b.

	Yes	No	Partial	Notes
Broad definition of whistleblowing		X		
Broad definition of whistleblower		X		It merely is stated in the annotation that a person informing the authorities is a whistleblower and should be protected.
Broad definition of retribution protection			X	Both regulations merely state that the informant shall not suffer from any discrimination/disadvantages, but there is no precise specification.
Internal reporting mechanism			X	Notification to the Agency Management (“Dienststellenleitung”) according to the explanations
External reporting mechanism	X			Notification to the Federal Bureau of Anti-Corruption (“Bundesamt zur Korruptionsprävention und Korruptionsbekämpfung”)

¹² 326/ME XXIV. KP – Ministerialentwurf – Erläuterungen,
http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00326/fname_233998.pdf (16.08.2012), p. 10.

¹³ 326/ME XXIV. KP – Ministerialentwurf – Erläuterungen,
http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00326/fname_233998.pdf (16.08.2012), p. 10.

Whistleblower participation		X		No precise information in the annotation and in the regulations.
Rewards system		X		No information in the regulations or the annotations
Protection of confidentiality		X		No information in the regulations or the annotations
Anonymous reports accepted				No information in the regulations or the annotations
No sanctions for misguided reporting		X		The whistleblower has to report the malversation but only if he has <u>probable cause</u> and believes the information to be verifiable. If this is not the case the regulation (and its benefits) will not be applicable to the whistleblower.
Whistleblower complaints authority				
Genuine day in court		X		No information in the regulations or the annotations
Full range of remedies		X		No information in the regulations or the annotations
Penalties for retaliation		X		No information in the regulations or the annotations
Involvement of multiple actors		X		No information in the regulations or the annotations

2. *Different statutory legislation in the labor law*

The Austrian labor law constitutes several different protection mechanisms.¹⁴ These are the following:

- There are various sections where an employee can appeal against his/her dismissal („Kündigung“) or his/her suspension, in case the employer fires the employee because of the following reasons/motives, which are connected directly to whistleblowing:

¹⁴ The report that the Ministry sent to me was more detailed. I selected the most important points which are in my opinion the most relevant.

- joining/membership or activity in the labor union (105 Abs. 3 Z 1 lit. a and b Arbeitsverfassungsgesetz)
 - the employer took actions in order to prevent serious endangerment of life and health at the workplace, because the responsible person was not available (§ 8 Abs. 1 and Abs. 2 Arbeitsvertragsrechts-Anpassungsgesetz)
 - enforcement of a title or filing an appeal because of discrimination of gender (§ 12 Abs. 7, § 13, § 51 Abs. 7, § 52 Gleichbehandlungsgesetz)
 - enforcement of a title or filing an appeal due to discrimination of ethnicity, age, religion, sexual orientation or ideology („Weltanschauung“) (§ 26 Abs. 7, § 27 Gleichbehandlungsgesetz)
- According to §879 ABGB a dismissal/suspension is invalid because of violation of morality: Since §879 ABGB also applies to unilateral legal acts, even without an explicit statutory law, dismissals are invalid in case they violate the basic principles of our society („Grundwerte der Gesellschaft“). Even the judiciary accepts the principle¹⁵. The following possibilities why a whistleblower might be fired could be: freedom of speech or affiliation to a political party.¹⁶

	Yes	No	Partial	Notes
Broad definition of whistleblowing		X		
Broad definition of whistleblower		X		
Broad definition of retribution protection	X			The whistleblower is protected in numerous ways.
Internal reporting mechanism		X		
External reporting		X		

¹⁵ See **TROST** in Löschnigg Angestelltengesetz⁸, Bd. II, § 20 Section 51; Judiciary opinion see Schwarz/Martinek/Schwarz Angestelltengesetz⁷, p. 411.

¹⁶ See **BINDER** Individualarbeitsrecht II⁶, p. 103.

mechanism				
Whistleblower participation	X			
Rewards system		X		No information is noted in the specific legislation.
Protection of confidentiality		X		No information is noted in the specific legislation.
Anonymous reports accepted		X		No information is noted in the specific legislation.
No sanctions for misguided reporting		X		The whistleblower can face dismissal or suspension in case he/she conducts a false report.
Whistleblower complaints authority				
Genuine day in court		X		
Full range of remedies		X		
Penalties for retaliation		X		
Involvement of multiple actors		X		

3. §9b of the Environmental Information Act (“Umwelthinformationsgesetz”)

The §9b of the Environmental Information Act¹⁷ was included into the legislation on the 18th of November 2009, titled: Protection of the Informant (“Informantenschutz”). The Austrian Environmental Information Act is the only legislation in Austria that generates a protection for whistleblowers **for the private sector**.¹⁸

¹⁷ §9b of the Environmental Information Act,
<http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40113754>
 (21.09.2012).

¹⁸ See LAIMER, Hans Georg: Welche Risiken ein Whistleblower trägt, Wirtschaftsblatt, 08.08.2012,
<http://wirtschaftsblatt.at/home/1278686/Welche-Risiken-ein-Whistleblower-traegt> (22.08.2012).

According to section 1 of §9b Environmental Information Act the operator (“Betreiber”) of an operational plant shall not punish, pursue or harass a company employee (“Betriebsangehöriger”), if the company employee files a complaint for the violation of specific national or international directives (Directive published by the Federal Ministry of Economy, Family and Youth and the Federal Ministry of Agriculture, Forestry, Environment and Water Management and EU-Directives). The specific ministry is according to section 2 not allowed to pursue, punish or harass someone who filed a complaint because of the infringement of the Directive.

According to the annotations of the specific Act, the specific matters of fact – punish, pursue and – can include the lay-off, the termination or other specific provisions under employment law (disciplinary transfer, restrictions in promotions or compensation).¹⁹

	Yes	No	Partial	Notes
Broad definition of whistleblowing		X		No precise information in the annotation and in the regulations.
Broad definition of whistleblower		X		No precise information in the annotation and in the regulations.
Broad definition of retribution protection			X	The regulation merely states that the informant shall not be punished, prosecuted or be pursued.
Internal reporting mechanism		X		No precise information in the annotation and in the regulations.
External reporting mechanism		X		No precise information in the annotation and in the regulations.
Whistleblower participation		X		No precise information in the annotation and in the regulations.
Rewards system		X		No information in the regulations or the annotations
Protection of confidentiality		X		No information in the regulations or the annotations
Anonymous		X		No information in the regulations or the annotations

¹⁹ 396 der Beilagen XXIV. GP - Regierungsvorlage – Vorblatt und Erläuterungen, http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_00396/fname_169769.pdf (22.08.2012), p. 4.

reports accepted				
No sanctions for misguided reporting		X		No information in the regulations or the annotations
Whistleblower complaints authority		X		No information in the regulations or the annotations
Genuine day in court		X		No information in the regulations or the annotations
Full range of remedies		X		No information in the regulations or the annotations
Penalties for retaliation		X		No information in the regulations or the annotations
Involvement of multiple actors		X		No information in the regulations or the annotations

a) Decision by the Austrian Supreme Court of Justice (Labor Law)²⁰

In accordance with a decision of the Austrian Supreme Court of Justice made 14th of June 2000, anchorless and subjective without merit made statements by the employee, cannot be subsumed under §9b of the *Environmental Information Act*. The employee's subjective perception is essential for the application of §9b of the *Environmental Information Act*.²¹ The employer certainly has no objective justifiable interest in disguising illegal behavior or unfair business practices; hence the employee is allowed to disclose information in case they constitute an infringement of the national or international directives.²²

Other regulations, where one might be able to construe a “whistleblowing”-regulation (obligation to whistleblowing)

4. Labor Law

²⁰ Vgl. OGH, 14.06.2000, 9ObA118/00v, http://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20000614_OGH0002_009OBA00118_00V0000_000/JJT_20000614_OGH0002_009OBA00118_00V0000_000.pdf (22.08.2012).

²¹ 396 der Beilagen XXIV. GP - Regierungsvorlage – Vorblatt und Erläuterungen, http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_00396/fname_169769.pdf (22.08.2012), p. 4.

²² 396 der Beilagen XXIV. GP - Regierungsvorlage – Vorblatt und Erläuterungen, http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_00396/fname_169769.pdf (22.08.2012), p. 4.

The place where whistleblowing is most likely to occur is the place of employment: a whistleblower notices a malversation in a corporation and informs his/her employer; hence the question arises whether he/she – the employee – is obliged to notify/inform his/her employer and whether this notification will generate consequences for the informant?²³

There are different ways to construe a “whistleblowing” regulation; these options will be described as follows:

In accordance with the employee’s duty of good faith („allgemeine Treuepflicht des Arbeitnehmers“), an *obligation to confidentiality* („Verschwiegenheitspflicht“) arises for the employee. Whistleblowing can violate this obligation and hence the following elements of offenses can be fulfilled:

- dismissal due to violation of trust („Vertrauensunwürdigkeit“), (§ 27 *lit 1 Angestelltengesetz*),
- or
- treason of industrial and trade secrets, (§ 82 *lit e Fall 1 Gewerbeordnung 1859*)

According to the judiciary, the filing of a „Strafanzeige“ of the employee does not fulfill the elements of the offense (dismissal due to violation of trust) and hence does not justify the dismissal of the employer.²⁴

Their contractual obligation to keep illegal secrets is invalid.²⁵ However, there is an obligation for the employee to proceed in the most “gentel” („schonenden“) way, which might imply that in the beginning the employee should try to talk with his employer. Only allegations, which are subjectively based on no reasons and are anchorless, constitute a reason for a dismissal due to violation of trust („Vertrauensundwürdigkeit“).

²³ See **KNYRIM/KURZ/HADINGER**: Whistleblowing-Hotlines: Mitarbeiter ‚verpfeifen‘ zulässig?, 12.05.2006, page 4.

²⁴ See **FRIEDRICH** in Marhold/Burgstaller/Preyer Kommentar zum Angestelltengesetz8, § 27 Rz 165; **GRILLBERGER** in Löschnigg Angestelltengesetz8, Bd. II, § 27 Rz 56.

²⁵ Vgl. OGH 8 ObA277/97.

If whistleblower uses company data or records from the company, or violates telecommunication, trade and industrial secrets, the whistleblower can be subjected to a criminal procedure due to the violation of **§118 of the Austrian Criminal Code**²⁶.

There are some special notes in case the whistleblower is a member of a labor union: The obligation to confidentiality is for those members legalized explicitly in §115 Section 4 ArbVG²⁷.

An employer who is part of a labor union is bound to the confidentiality of industrial and trade secrets. According to §122 Section 1 Z 4 ArbVG²⁸, these employees can be dismissed after an approval from the court, in case the sellout trade and industrial secrets. The court has to object to the complaint, if the action the employer has done is done in accordance with his mandate (of the labor union) and is justifiable when weighing all the reasons.

The obligation of confidentiality is not violated, if the interests of the employers are higher than the interest of the company owner and the compliance is colliding with the interests of the labor union.²⁹ When disclosing illegal secrets, the employer of a labor union is equated with an employer (not working in a labor union). The labor union has to proceed in the most “gentle” way (“schonendeste Art und Weise”).

Based on the legal decisions that dealt with the dismissal and whistleblowing, it can be noted that whistleblowers are protected to a certain degree. Dismissals can be justifiable, in case their allegations are cause- and anchorless and he/she failed to proceed in the most “gentle” way. This means that it is best to intervene in the specific labor union institution (Betriebsrat / Arbeitsinspektorat), before customers and the publicity is informed.

5. *§286 of the Austrian Criminal Code (“Strafgesetzbuch”)*

²⁶ **§118 of the Austrian Criminal Code**,

http://www.jusline.at/118_Verletzung_des_Briefgeheimnisses_und_Unterdrueckung_von_Briefen_StG_B.html (21.09.2012)

²⁷ **§115 Section 4 ArbVG**,

http://www.jusline.at/115_Grundsätze_der_Mandatsausübung_Verschwiegenheitspflicht_ArbVG.html (21.09.2012).

²⁸ **§122 Section 1 Z 4 ArbVG**, http://www.jusline.at/122_Entlassungsschutz_ArbVG.html (21.09.2012).

²⁹ Vgl. OGH 4 Ob 91/78.

The Austrian Criminal Code states in §286³⁰ that the person who purposely does not inform the agency (“Behörde”) or fails to prevent that another person commits a delinquency shall be punished. The person is only excluded from being subjected to imprisonment if

- if it is not simple for him/her to inform someone or if he/she would subject an affiliated member to enormous danger or
- if he/she only has come across information about the delinquency due to their function as a counselor (“Seelsorger”) or
- if he/she would break other legally acknowledged confidentiality obligations and by breaking this entrusted information more harm would be done than by not informing the agency.

The delinquent in this case is not the co-perpetrator, an accomplice or a criminal accessory, rather is punished for not preventing the crime.

This legislation is also relevant in the daily life of the employee. An employee is protected explicitly protected from the consequences of §286 due to the employee’s duty of good faith and the resulting *obligation to confidentiality*. Because in case the employee violates the obligation of confidentiality, this can result in the violation of professional secrecy or the violation of industrial (§121 of the Austrian Criminal Code³¹) and trade secrets (§122 of the Austrian Criminal Code³²).

6. §78 and 79 of the Austrian Criminal Procedure Code (“Strafprozessordnung”)

The paragraphs of the Austrian Criminal Procedure Code, §§78³³ and 79³⁴, oblige the public institution or agency to file a complaint in case they become aware of a crime, which is subject to their competency. The complaint shall be addressed either to the criminal investigation department or the department of public prosecution. According

³⁰ § 286 of the Austrian Criminal Code,

http://www.jusline.at/286_Unterlassung_der_Verhinderung_einer_mit_Strafe_bedrohten_Handlung_StGB.html (21.09.2012).

³¹ § 121 of the Austrian Criminal Code,

http://www.jusline.at/121_Verletzung_von_Berufsgeheimnissen_StGB.html (21.09.2012).

³² § 122 of the Austrian Criminal Code,

<http://www.jusline.at/index.php?cpid=ba688068a8c8a95352ed951ddb88783e&lawid=11&paid=122&mvp=136> (21.09.2012).

³³ § 78 of the Austrian Criminal Procedural Code,

http://www.jusline.at/78_Anzeigepflicht_StPO.html (21.09.2012).

³⁴ § 79 of the Austrian Criminal Procedural Code

<http://www.jusline.at/index.php?cpid=ba688068a8c8a95352ed951ddb88783e&lawid=14&paid=79&mvp=84> (21.09.2012).

to section 2 of §78 of the Austrian Criminal Procedural Code an obligation to report ceases to exist,

- if the report would affect an official capacity, whose requirement would constitute a personal bond of trust;
- if and as long there are reasonable grounds to believe a criminal offense will shortly be omitted in case damage settlement was conducted.

The public institution has to do everything in its power to minimize the danger of the victims and other possible affected persons (section 3 of §78 of the Austrian Criminal Procedural Code). If considered necessary, a complaint can also be filed in the cases of section 2.

Moreover, §79 states that as long as there is an official legal complaint obligation, any documentation of files is when requested by the Criminal Investigation Department (“Kriminalpolizei”), the public prosecution offices and the courts, to forward them if it helps for to undermine a criminal offense. The investigation can be conducted because someone filed a request or because of the official principle (“Offizialprinzip”). The official confidentiality does not apply in these cases.

7. §48d of the Securities Exchange Act (“Börsegesetz”)

§48d of the Austrian Securities Exchange Act³⁵ contains a legal provision to whistleblowing.³⁶ Persons, who are working in the financial industry, have to inform the Financial Market Authority (“Finanzmarktaufsicht”) in case they become that a transaction constitutes insider trading or market manipulation.³⁷

The whistleblower protection is included in §48d Section 9 of the Securities Exchange Act. It obliges the Financial Market Authority, in case they receive notification about a malversation from a whistleblower, under any circumstances not to disclose the identity of the whistleblower. The protection is guaranteed in case the whistleblower would or could be subjected to damages. Congruent with §365u of the

³⁵ **§48d of the Austrian Securities Exchange Act**, <http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40102191> (21.09.2012).

³⁶ See §48d Section 1 of the Securities Exchange Act; **RADINSKY**, Orlin: Whistleblowing aus juristischer Sicht – Verpflichtung zur Anzeige oder Laissez-Faire? <http://at.cis-cert.com/News-Presse/Newsletter/NL-Jan-2011/Whistle-Blowing-Pflicht-aus-rechtlicher-Sicht.aspx> (20.08.2012).

³⁷ **RADINSKY**, Orlin: Whistleblowing aus juristischer Sicht – Verpflichtung zur Anzeige oder Laissez-Faire? <http://at.cis-cert.com/News-Presse/Newsletter/NL-Jan-2011/Whistle-Blowing-Pflicht-aus-rechtlicher-Sicht.aspx> (20.08.2012).

Austrian Trade Law, the whistleblowing does not constitute a breach of confidentiality.

8. *§365u of the Austrian Trade Law (“Gewerbeordnung”)*³⁸

Due to the EU legislation, RL 2005/60/EG³⁹, the Austrian trade law was modified in order to be compliant with the directive. The headline, where the paragraph and the following were inserted, is titled: notification requirement (“Meldepflichten”).

§365u of the Austrian trade law⁴⁰ obliges the businessman of a trade (“Gewerbetreibende”), its key facility personnel and executive staff (“leitende Angestellte”) to inform the Austrian Financial Intelligence Unit (“Geldwäschemeldestelle”⁴¹) in case they have probable suspicion or a qualified cause to believe a crime is to be committed relating to money-laundering, to a foreign terrorist organization or criminal organization or the financing of these organizations. A specific enumeration of the crimes, which are subject to disclosure, can be found in §365u of the Austrian Trade Law. The obligation to notify the Austrian Financial Intelligence Unit arises only in connection to these specific crimes. Ergo §365u of the Austrian Trade Law contains a legal provision to whistleblowing but only relating to these specific crimes.⁴²

A (probable) cause is sufficient for the previously named group (businessman, key facility personnel and executive staff) in order to notify the Austrian Financial Intelligence Unit (A-FIU). The A-FIU is authorized to inquire detailed (personal) information from artificial persons or individuals. It becomes obvious that the person who is notifying the A-FIU has to provide some documentation to substantially undermine the information. Hence, §365u cannot be viewed as a general obligation to blow the whistle if a malversation in connection to any of these previously named crimes is committed or becomes obvious. It poses more as a specific obligation for the group of people. In case the A-FIU believes the malversation to be true, the

³⁸ The paragraph §365u of the Austrian Trade Law is appended in the ANNEX.

³⁹ Directive 2005/60/EG of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

⁴⁰ **§365u of the Austrian trade law**, http://www.jusline.at/365u_GewO.html (21.09.2012).

⁴¹ For further information, see **Chapter V(A)** – The Austrian Financial Intelligence Unit.

⁴² **RADINSKY**, Orlin: Whistleblowing aus juristischer Sicht – Verpflichtung zur Anzeige oder Laissez-Faire? <http://at.cis-cert.com/News-Presse/Newsletter/NL-Jan-2011/Whistle-Blowing-Pflicht-aus-rechtlicher-Sicht.aspx> (20.08.2012).

businessman, they key facility personnel and the executive staff are responsible to provide the A-FIU with all the relevant documentation.⁴³

In the second passage of the paragraph, the whistleblower is protected from any consequences, which may arise from breaching statutory, administrative, or contractual provisions but only **if** the disclosure was carried out in **good faith**.⁴⁴

This passage is consistent with Art 26 of the EU directive 2005/60/EG.⁴⁵ It states that the businessman or any of the persons exposing the disclosure cannot be held liable for the notification. The disclosure only constitutes a breach of provisions if notification is not carried out in good faith.⁴⁶ In the annotation to the paragraph, it is noted that the previous mentioned also applies to the key facility personnel and executive staff.⁴⁷ Usually, labor provisions bind the people who are obliged to notify the A-FIU, but these do not apply if the disclosure is conducted in good faith.⁴⁸

On the homepage of the Austrian Financial Intelligence Unit, which is a department set up under the Federal Criminal Agency (“Bundeskriminalamt”), it is possible to download the notification form.⁴⁹ On the last page of the obligation form, it is noted by all means to add documentation in order to guarantee an efficient handling of the case.

a) Whistleblowing according to the representatives of the Austrian Financial Intelligence Unit⁵⁰

On August 29, 2012, I was invited to meet with MinRat Mag. Josef Mahr, head of the Money Laundering and Asset Recovering Unit, and Ms. Mag. Scherschneva-Koller, head of the Austrian Financial Intelligence Unit (A-FIU), to discuss the process of whistleblowing, the receipt of notifications and the actual procedure. As previously stated, §365u of the Austrian Trade Law is viewed as constituting a “whistleblowing

⁴³ GRUBER/PALIEGE-BARFUß, GewO §365u annotation 1.

⁴⁴ §365u passage 2 of the Austrian Trade Law; Gruber/Paliego-Barfuß, GewO §365u annotation 4.

⁴⁵ **Article 26** of the Directive - The disclosure in good faith as foreseen in Articles 22(1) and 23 by an institution or person covered by this Directive or by an employee or director of such an institution or person of the information referred to in Articles 22 and 23 shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve the institution or person or its directors or employees in liability of any kind.

⁴⁶ GRUBER/PALIEGE-BARFUß, GewO §365u annotation 4.

⁴⁷ GRUBER/PALIEGE-BARFUß, GewO §365u annotation 4.

⁴⁸ GRUBER/PALIEGE-BARFUß, GewO §365u annotation 4.

⁴⁹ For further information, please visit the homepage, <http://www.bmi.gv.at/cms/BK/meldestellen/geldwaesche/start.aspx> (20.08.2012).

⁵⁰ The statements have been reviewed and confirmed by Mag. Scherschneva-Koller, head of the Austrian Financial Intelligence Unit.

regulation”. Mag. Mahr and Mag. Scherschneva-Koller did not share this view. Instead, both of them noted the following:

- A whistleblowing regulation cannot be construed of §365u of the Austrian Trade Law because it does not allow the businessmen any decision or freedom in turns of disclosing information. They are legally obligated to do so, hence there is no range and no interpretation of the law whether a notification has to be filed or not.
- Furthermore, especially with the new amendments, the statutory laws contain more specific regulation and oblige the businessmen to do so. Ergo, §365u of the Austrian Trade Law cannot be viewed as a “whistleblower regulation”.

Complete title of law or regulation §365u Gewerbeordnung (Austrian Trade Law)

	Yes	No	Partial	Notes
Broad definition of whistleblowing		X		
Broad definition of whistleblower		X		
Broad definition of retribution protection		X		
Internal reporting mechanism		X		
External reporting mechanism	X			External reporting mechanism to the Austrian Financial Intelligence Unit (“Geldwäschemeldestelle”)
Whistleblower participation		X		
Rewards system		X		
Protection of confidentiality		X		
Anonymous reports accepted				

No sanctions for misguided reporting	X			The whistleblower is protected from consequences resulting from the breach of contractual, statutory or administrative provisions, only if the disclosure was carried out in good faith.
Whistleblower complaints authority		X		
Genuine day in court		X		
Full range of remedies		X		
Penalties for retaliation		X		
Involvement of multiple actors		X		

Excursus: The Protection of a Witness – Applicable to the Whistleblower?

§162 of the Criminal Procedure Code⁵¹ allows the witness to disguise himself/herself if he/she must fear that because of answering the questions their lives, health, physical integrity and their freedom be endangered. However this specific regulation was enacted for people who have to participate in a witness-protection program. Furthermore, only there is a specific informative basis that the witness is subjected to a serious endangerment. This element of §162 is probably the hardest to be existent for a whistleblower. A serious endangerment is correlated to crimes such as prostitution, drug trafficking or human trafficking. These are organized crimes where the witness must fear for his/her life. Hence, it is usually not applicable to a whistleblower and does not allow the judge or the investigator to apply this statutory law to the whistleblower.

⁵¹ § 162 of the Austrian Criminal Code of Procedure,
<http://www.jusline.at/162. Anonyme Aussage StPO.html> (21.09.2012).

Conclusion

As previously stated, a specific obligation to blow the whistle can be construed best in the statutes of the labor law and a whistleblower protection for the public sector is included in the new amendment of the public services law and in the private sector in the environmental information act. Still a general legislation for both – public and private – sector is absent.

III. Excursus: Leniency Program

On January 1, 2011⁵², the new “strafrechtliche Kompetenzpaket” was enacted which included a leniency program. The leniency program was normalized in the Austrian Criminal Procedure Code (§209a⁵³, §209b⁵⁴). The leniency program was already existent in the Austrian anti-trust law and creates an incentive for perpetrators to cooperate with the authorities. The leniency program does not only apply to individuals, but also to corporate bodies and the authorities might exempt them from punishment.

In order to being guaranteed the principal witness position, certain requirements need to be existent⁵⁵:

- 1.) *The accused must disclose voluntarily knowledge about facts, which are not part of an investigation against him or part of an investigation. It is not a disadvantage if an investigation is already taking place against unknown perpetrators or other accused persons.*
- 2.) *The knowledge must pose an essential contribution to crime that lies in the competency of the Criminal Court of Lay Assessor or the WKStA **or** lead to the disclosing of a person who has been operating in a criminal or a terrorist organization (**causality**).*
- 3.) *No “spezialpräventive” reasons must object to the application of the leniency program.*
- 4.) *The leniency program cannot be applied if the delinquency causes the death of a person or the accused is suspicious of committing a crime that is against the*

⁵² ECKEL, Martin: Ausweitung der Kronzeugenregelung, 20.01.2011, <http://wirtschaftsblatt.at/home/1182815/index> (08.09.2012).

⁵³ **§209a of the Austrian Criminal Code of Procedure**, http://www.jusline.at/209a_Ruecktritt_von_der_Verfolgung_wegen_Zusammenarbeit_mit_der_Staatsanwaltschaft_StPO.html (21.09.2012).

⁵⁴ **§209b of the Austrian Criminal Code of Procedure**, http://www.jusline.at/209b_Ruecktritt_von_der_Verfolgung_wegen_Zusammenarbeit_mit_der_Staatsanwaltschaft_im_Zusammenhang_mit_einer_kartellrechtlichen_Zuwiderhandlung_StPO.html (21.09.2012).

⁵⁵ FABRIZY, Ernst Eugen: Die österreichische Strafprozessordnung (Strafprozessordnung 1975)¹¹. Kurzkomentar. Wien: Manz 2011, §209a 1-6.

sexual integrity or self-determination (§§201-220a of the Austrian Criminal Procedure Code).

The following points are listed in the annotation to the legislation, which is especially relevant for the principal witness:

- 1.) The prosecutor **can** apply the leniency program. It is within the prosecutor's discretion/judgment to apply the leniency program.
- 2.) The decision lies merely within the prosecution office.
- 3.) The person who submits the information has no subjective right for the application of the leniency program.

There is an essential difference between the leniency program is that the principal witness a person who has participated in the crime which is about to be disclosed. The whistleblower is not part of the delinquency. The principal witness can, according to the Austrian Criminal Code, still face "Diversion", which allows the authorities to charge him with

- 1.) a fine (§201 of the Austrian Criminal Procedure Code)
- 2.) community services (§202 of the Austrian Criminal Procedure Code)
- 3.) a probation time (§203 of the Austrian Criminal Procedure Code)

If the principal witness accepts any of these points (1.) -3.), then the authorities will step back from prosecuting him/her.

The principal witness has to submit information that actually supports the authorities in their procedure. Ergo, if the principal witness breaches his obligation to cooperate with the authorities they are allowed to resume investigation against the principal witness. The principal witness has to expose himself/herself to the authorities and participate actively in court as well as already during the investigation in order to receive the benefits of the leniency program.

This implies that the application of the leniency program is narrower than any whistleblowing regulation, because it is legalized in the Austrian Procedure Code. The biggest difference however is that the principal witness **was part** of the malversation and now comes to the decision to step out.

IV. Relevant institutions in Austria

The Austrian Financial Intelligence Unit (A-FIU) (*Geldwäschemeldestelle*)

The *Geldwäschemeldestelle*, a term which can be translated as Austrian Financial Intelligence Unit (A-FIU), is constituted based on §4 Section 2 BAK. The A-FIU is an institution organized under the Federal Criminal Agency („Bundeskriminalamt“) and its competencies lie within the fight against money laundering international organized crime according to the respective laws. Most of activities of the A-FIU consist of the acceptance, the analysis and the transfer of the received notifications as well as the correspondence with Interpol and Europol. Hence the A-FIU is a member of the Egmont-Gruppe and referred to as Austrian Financial Intelligence Unit (A-FIU). As the A-FIU, it generates fees for various institutions, such as the European Union, the European Council, the FATF, UNODC and Egmont. As of 2010, the A-FIU consisted of 11 members, consisting of staff of the executing branch, the head of the A-FIU and the secretariat.⁵⁶

The Austrian Data Protection Commission (*Die österreichische Datenschutzkommission*)⁵⁷

The Austrian Data Protection Commission (in German *Datenschutzkommission*) is a governmental authority charged with data protection. The data protection commission is the Austrian supervisory authority for data protection, which constitutes as the equivalent of a national data protection commissioner in other countries.

In terms of whistleblowing, the Data Protection Commission is involved in the application of whistleblowing-hotlines. When corporations, especially subsidiaries (of US companies) are obliged to implement a whistleblowing-hotline, they need to inform the commission and file an administrative decision/approval (“Genehmigung”).

⁵⁶ All of the information is based on the Jahresbericht 2010, available online: http://www.bmi.gv.at/cms/BK/publikationen/files/Geldwsche_Jahresbericht_2010.pdf (28.08.2012).

⁵⁷ For further information, please visit the homepage of the Austrian Data Protection Commission, <https://www.dsk.gv.at/DesktopDefault.aspx?alias=dsk> (16.08.2012).

Sensitive data in terms of names, identities, and personal data is likely to be transferred to another state and hence various legislations need to be considered.

For this report, I was in contact with a representative of the Data Protection Commission to receive information on the potential applications for a whistleblowing hotline and how long it usually takes from the filing until the actual approved hotline. However, the representative denied to make any binding statements and hence, I did not cite the representative. Furthermore, I kindly asked for an approval to cite, which was also left unanswered.

From the correspondence, I can state the following: subsidiaries file application for whistleblowing-hotlines and these are the companies who are mostly obligated to comply because of their mother company. Only a few Austrian companies are filing for such a hotline though. The Data Protection Commission receives about 30-40 applications per year. When requesting information and/or statistics from the Data Protection Commission, the informant told me that they do not maintain this kind of documentation.

The Austrian Data Protection Council (*Datenschutzbeirat*)⁵⁸

The Austrian Data Protection Council is an institution that is setup at the Federal Chancellery of the Republic of Austria. It is a supervisory board, advising the federal and state governments on legal questions in terms of data protection. The main function of the Council is to ensure the data protection, as well as actively advocating for the development of data protection in Austria and preparing suggestions for its improvement. Furthermore, the Council provides advisory opinions to current legislations of the Federal Ministry and can also submit these opinions to the federal and state governments, as well to the legislative bodies.

According to the administration of the Council, the members are representatives of political parties, various statutory corporations (“Körperschaften”) and the Austrian Association of Towns and Municipalities (“Österreichischer Städte- und Gemeindebund”). The Federal Chancellor of the Austrian Republic individually appoints one member of the Council. The Council meets when necessary, but when a member demands a session, the chairman is obliged to follow that request.

⁵⁸ For further information, please visit the homepage of the Austrian Data Protection Council, <http://www.bka.gv.at/site/6417/default.aspx> (16.08.2012).

Mr. Johann Maier, the chairman of the Austrian Data Protection Council, and the board concordantly decided to discuss basic principles of whistleblowing for the first time in the 191st session, which was held on the 16th of November 2009.⁵⁹

Therefore, the Austrian Data Protection Council, advocating for a whistleblower protection law, developed a questionnaire for private and public institutions on the 29th of June 2011 in the 208th session, which was sent on the 8th of July in 2011 to these institutions in order to assess the legitimacy of whistleblowing and hence the necessity for a whistleblower protection law.⁶⁰ The ultimate goal of the questionnaires is to compile information whether these institutions are apt to install such a hotline. The results of these questionnaires are anticipated in the beginning of September 2012, and the chairman, Mr. Maier, assured to pass them on to me.⁶¹ In the following bullet points, a few selected questions of the questionnaires are presented:

- Which social advantages and disadvantages can be seen if a whistleblower protection law would exist? What is your opinion on whistleblowing-platforms established by the media?
- Are there already existing whistleblower protection regulations in your institution or do you think a hotline is necessary?
- If yes, should only be internal or also external whistleblowing be regulated by law?⁶²

The Austrian Ombudsman Board (*Volksanwaltschaft*)

The Austrian Ombudsman Board (AOB)⁶³ is an institution, “independently monitoring Austria’s entire public administration since 1977 by order of the Federal Constitution. It checks the legality of decisions by authorities and examines possible cases of maladministration. The Ombudsman Board provides the opportunity for *all* citizens to file a complaint, “regardless of their age, nationality, or residence. A complaint can be made at any time and entails no expense”.⁶⁴ As of July 1st, 2012, the

⁵⁹ Letter of the Austrian Data Protection Council from the 8th of June 2011 (1), p. 3; letter of the Austrian Data Protection Council from the 18th of November 2009, p. 1.

⁶⁰ **MAIER**, Johann: Datenschutzrat: Fragebogen-Erhebung zu „Whistleblowing“, 26.09.2011, http://www.bka.gv.at/site/cob_44855/currentpage_7/7398/default.aspx?wai=true (17.08.2012).

⁶¹ Correspondence with Mr. Johann Maier, Chairman of the Austrian Data Protection Council, from the 14th of August 2012.

⁶² Letter of the Austrian Data Protection Council from the 8th of June 2011 (1) (2), p. 9f.

⁶³ For further information, please visit the homepage of the Austrian Ombudsman Board, <http://volksanwaltschaft.gv.at/en> (22.08.2012).

⁶⁴ All information is retrieved from the official homepage of the Austrian Ombudsman Board, <http://volksanwaltschaft.gv.at/en> (22.08.2012). In addition information was provided by the Head of the international unit.

mandate of the AOB “also includes the protection and promotion of human rights”⁶⁵. The implementation of the Optional Protocol to the Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and provisions of the Convention on the Rights of People with Disabilities (CRPD) entrusted the AOB with the function of National Preventive Mechanism (NPM). In its function as NPM within the OPCAT regime, the AOB constantly carries out on-site visits of facilities selected at random. There are cases, which do not fall into the jurisdiction of the AOB: such as disputes between private individuals as well as the (independent) judiciary (“unabhängige Gerichtsbarkeit”).⁶⁶

In the year 2011, the AOB received 16.239⁶⁷ complaints. Complaints could be subsumed under the following areas: social (common) area, judicial administration (e.g. lengths of cases), internal security (police, procrastination of asylum cases). Human rights are a horizontal issue that touches upon many of the AOB areas of complaints. “On average, the affected parties are informed within 49 days whether the AOB has determined a case of maladministration.”⁶⁸

⁶⁵ Annual Report of the Austrian Ombudsman Board to the National and Federal Council, 2011, <http://volksanwaltschaft.gv.at/downloads/850m2/Annual%20Report%20-%20Summary%202011.pdf> (24.08.2012), p. 5.

⁶⁶ See Annual Report of the Austrian Ombudsman Board to the National and Federal Council, 2011, <http://volksanwaltschaft.gv.at/downloads/850m2/Annual%20Report%20-%20Summary%202011.pdf> (24.08.2012), p. 13 for further information.

⁶⁷ Annual Report of the Austrian Ombudsman Board to the National and Federal Council, 2011, <http://volksanwaltschaft.gv.at/downloads/850m2/Annual%20Report%20-%20Summary%202011.pdf> (24.08.2012), p. 10.

⁶⁸ Annual Report of the Austrian Ombudsman Board to the National and Federal Council, 2011, <http://volksanwaltschaft.gv.at/downloads/850m2/Annual%20Report%20-%20Summary%202011.pdf> (24.08.2012), p. 10.

Key Figures	2011	2010
Complaints regarding administration	12,331	11,198
<i>Investigative proceedings</i>	7,287	6,613
<i>Federal administration</i>	4,665	4,126
<i>Regional/municipal administration</i>	2,622	2,487
<i>Handled without investigative proceedings</i>	5,044	4,585
Complaints outside AOB mandate	3,908	4,067
TOTAL number of handled complaints	16,239	15,265

Source: Annual Report of the AOB, 2011.⁶⁹

The AOB is known in Austria for its independent method of operation, its barrier-free access for citizens and legal advice also in those cases where it has no jurisdiction. The AOB has access to all files from other ministries, agencies, and the usual “official secrecy” (“Amtsgeheimnis”) that these institutions have to adhere to is not applicable in this case.

Most of the time people disclose their identity when filing a complaint with the AOB. When the AOB wishes not to reveal the complainant’s identity it can start an ex-officio investigation procedure on that matter.

The general procedure of a case is as follows:

- 1.) A person files a complaint that lies within the AOB jurisdiction.
- 2.) The AOB opens an investigation procedure and decides whether there is a case of maladministration.
- 3.) In case the complaint constitutes a case of maladministration, the subsequent scenarios have to be differentiated:
 - If the administration applied the law according to its content, the AOB can recommend a change in legislation in the annual report which is presented

⁶⁹ Annual Report of the Austrian Ombudsman Board to the National and Federal Council, 2011, <http://volksanwaltschaft.gv.at/downloads/850m2/Annual%20Report%20-%20Summary%202011.pdf> (24.08.2012), p. 16.

to and debated in the parliament; this can lead to the amendment of an act (e.g. dual citizen ship law)

- If the behavior constitutes a malversation, the AOB can write recommendations and asks the institution who has conducted the maladministration to resume the decision and make the proposed amendments.

The AOB cannot be seen as a typical whistleblowing registry because its monitoring competency is limited to maladministration. But its competencies still cover a broad horizon. And since it is possible that a person can disclose their identity before the AOB, but in the subsequent developments the AOB can conceal the whistleblower's identity, the AOB plays an important role in the current developments in terms of protecting a whistleblower.

Prosecution Services - Wirtschafts- und Korruptionsstaatsanwaltschaft (WKStA) (official: *Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption*)

The *Wirtschafts- und Korruptionsstaatsanwaltschaft* (WKStA, Public Prosecutor's Office for Combatting Economic Crimes and Corruption) has been established as a prosecuting body in Austria for economic criminal cases and corruption on September 1st, 2011. The Public Prosecutor's Office for Combatting Economic Crimes and Corruption is the successor of the Public Prosecutor's Office for Combatting Corruption (*Korruptionsstaatsanwaltschaft, KStA*). The KStA has been established since the 1st of January, 2009. The WKStA is competent for the procedure of certain economic crimes with damages exceeding five million Euros and for corruption/bribery offences ("Bestechungsdelikte"), which are exclusively listed in the Austrian Code of Criminal Procedure. If the damages do not exceed the five million Euro range and special knowledge about the Austrian economy is required to prosecute these cases, and for cases regarding bribery/corruption offenses ("Amtsmissbrauch"), if there is a special public interest the WKStA is authorized to attract the competency⁷⁰. The responsibility of the WKStA includes not only the prosecution, but also the main proceedings and the appeal proceedings.

⁷⁰ See §20b StPO (Austrian Code of Criminal Procedure).

Mr. Walter Geyer, a member of the advisory board of the Austrian Chapter of Transparency International⁷¹, is head of the WKStA and agreed to discuss the parameters and challenges of whistleblowing for this report. In the meeting with Mr. Geyer, which took place on August 23rd, 2012⁷², he described his view on whistleblowing. He noted that a whistleblower is an insider, who has knowledge about a criminal offense, but who is not part of the malversation and who can disclose information about the offense. This is the main difference between a whistleblower and a principal witness (“Kronzeuge”)⁷³, who is part of the operation. The hardest part about the term whistleblower is that there is no official (legal) definition, Mr. Geyer noted.

The WStKA receives information in two ways: openly and anonymously:

- *Anonymous Whistleblowing*

Most of the times though, Geyer noted, people do disclose information anonymously. (But very often they are not whistleblowers because they just file a complaint file rather than they can provide *knowledge* about an actual situation.

If a person constitutes as a whistleblower and has provided information anonymously, it poses a difficulty since there is no opportunity to inquire further information. Inquiries constitute a challenge and rarely have a positive outcome, Geyer added.

- *Open Whistleblowing*

A whistleblower that provides his identity often does not have the courage to tell the “whole truth”. There is resistance because the information being exposed might generate further consequences for him/her, Geyer explained.

What happens if the information the whistleblower provides turns out to be not verifiable or true? A differentiation has to be made:

In case the information of the whistleblower is not verifiable or the information turns out to be false, the whistleblower does not have to fear any criminal consequences. If it turns out that he accused others on purpose, then the WKStA has to examine due to

⁷¹ For further information, please see <http://www.ti-austria.at/ueber-uns/beirat-ti-ac.html> (28.08.2012).

⁷² The statements of this meeting have been approved and confirmed by Mr. Walter Geyer and Mr. Erich Mayer (Leiter der Medienstelle der WKStA).

⁷³ For further information, please view the **Chapter IV** on the Leniency Program.

the official principle (“Offizialprinzip”) if libel has been committed. Those cases are hardly known within the WKStA.

The information by a whistleblower does not constitute as strong evidence if made anonymously, rather accounts for a cause to find other documentary evidence. In this case the anonymity is not an advantage because the WStKA has no opportunity to retrieve further information from the whistleblower. Even though the anonymity poses a challenge in these cases, Mr. Geyer is advocating for a whistleblower protection law that can guarantee the whistleblower’s anonymity. He further explained that this would imply blackening the name of the whistleblower out in the complaint file/bill of indictment. Mr. Geyer explained that whistleblowing contains a psychological element because the whistleblower – in case he is disclosing information about his employer – is torn between keeping the information a secret and between exposing the knowledge he/she has retrieved. The possible consequences a whistleblower has to face are also points, which need to be taken into consideration, Geyer concluded, and therefore a protection of the whistleblower could diminish these deliberations.

Association “Whistleblowing.at”⁷⁴

“Whistleblowing Austria” is an association registered under Austrian law since the 1st July 2011. Its goal is to contribute to an open society in which it must be possible to speak freely of corruption and other wrongdoings both within the state and the private sector; hence “Whistleblowing Austria” aims at improving Austria’s whistleblowing legislation. Whistleblowing Austria also provides advice and assistance to those who wish to disclose wrongdoings and misconducts and who take action against them within state institutions, private companies, international organizations or NGOs. Its executive committee consists of six members who have a variety of expertise (including in journalism, mediation, domestic and international law, sales management, psychology and public information). It advised the **Austrian Data Protection Council** on the issue of whistleblowing.

⁷⁴ For further information, please visit the homepage of the association, <http://www.whistleblowing.at/> (16.08.2012).

The Press

The past years have shown that information which concerns cases of white-collar crimes were most likely to be handed over to the press. These disclosures of malversations had often to do with political wrongdoings, corruption in the public office or nepotism. Almost every newspaper in Austria has an investigative team who has written about these expositions.

1. Kurier Platform Austrolix

In an article published by the Austrian Data Protection Council, it was noted that the newspaper “Kurier” has implemented a platform called “Austrolix”. From the article, I became aware of the fact that it must function as platform where whistleblower can disclose their information and the investigative reports of the press try to conduct research, accordingly.

Up until this point, I had sent two inquiries to “Kurier”: one general inquiry and another specific one, which were left unanswered. Based on the information found online, I cannot assess whether the platform is (in-)active or how well it has been received.

V. Perceptions and political will

A few years ago, the media and press in Austria looked to the United States and almost “envied” their enhanced legislation on whistleblowing. The massive fraud cases, such as Enron and Worldcon, paved the way for corporations to comply with legislation, such as the Sarbanes Oxley Act and the Foreign Corrupt Practices Act 1977. Corporations are obliged to implement different tools, such as a whistleblowing-hotline for their employees to submit notifications of questionable accounting methods when witnessed within the company.⁷⁵ Even in the year 2012, the United States is ahead of its time, implementing under the Barack Obama administration the Dodd Frank Act, a whistleblower law which rewards money to whistleblowers who successfully generate a case and cause a verdict for a malversation.

Recent developments in the Austrian economy and verdicts (or current ascertainties) in the judicial system have shown that the topic on whistleblowing has become more relevant than before. In the last few years, the Austrian populace has been exposed to a wide series of news on corruption, embezzlement, fraud, nepotism (Austria: “Freunderlwirtschaft”), and misappropriation; hence the trust in the judicial system, the economy and the lack of the decision-making process has been continuously decreasing.

Due to these disclosures the term whistleblowing has been used quite prevalently in the media – newspapers and news coverage. The term “whistleblowing” appears in the newspapers in many different ways. In general four parameters can be observed:

- 1) first of all the term whistleblowing is used in many different ways – it depends on the content of the allegations made by him/her;
- 2) secondly as a new trend to uncover these cases of white-collar crimes and hence as a tool to fight corruption;⁷⁶

⁷⁵ **KNYRIM**, Rainer: US-Hotlines: Grenzen für das Verpfeifen, Die Presse, 13.03.2006, [http://diepresse.com/home/recht/rechtspanorama/100377/USHotlines_Grenzen-fuer-das-Verpfeifen-\(17.08.2012\)](http://diepresse.com/home/recht/rechtspanorama/100377/USHotlines_Grenzen-fuer-das-Verpfeifen-(17.08.2012)).

⁷⁶ **LUKANEK**, Horst: Whistleblowing-Hotlines. Die Presse, 22.5.2012. <http://karrierenews.diepresse.com/home/ratgeber/arbeitsrecht/759772/WhistleblowingHotlines->

- 3) thirdly, whistleblowing is often mentioned in reference to different laws, especially labor law⁷⁷ and data protection law⁷⁸ and
- 4) fourthly in connection to enhance the protection of these whistleblowers⁷⁹:

General perception of whistleblowing

As previously mentioned the first trend in the media has been to use whistleblowing as an instrument to fight corruption and encourage people to step forward, when they become aware of a wrongdoing. The term whistleblower holds a positive connotation, when referring to a person who discovers a malpractice, which turns out to be true. Instead when these allegations turn out to be false, a whistleblower is described in a degrading way and the term is translated with “Denunziant/Verräter/Vernaderer”⁸⁰ – a “shamus/squealer”.

It becomes obvious that the Austrian press is not consistent. On the one hand, a whistleblower is admired because they can disclose corporations of their malversation and encourage transparency. On the other hand, a whistleblower is described as someone who is a “sneak”, betraying the trust of his colleagues, the company or the system he/she is trying to expose. It indicates that because of the recent cases (see **Chapter VIII.**)), there is no consistent line in the press to be seen.

(16.08.2012). **DIE PRESSE**: Daimler: „Jede Firma sollte Whistleblower-Systeme einführen“, Die Presse, 23.02.2012, http://diepresse.com/home/wirtschaft/international/734673/Daimler_Jede-Firma-sollte-WhistleblowerSysteme-einfuehren (17.08.2012); **NEUHOLD**, Christian: Wie “Whistleblowing” Firmen stärken kann, Format, 23.07.2012, <http://www.format.at/articles/1230/527/335646/wie-whistleblowing-firmen> (08.08.2012).

⁷⁷ **ANGERMAIR**, Thomas/**PRCHAL**, Robert: Aufdecker oder Nestbeschmutzer? Die Presse, 29.09.2008, <http://diepresse.com/home/recht/rechtallgemein/418395/Aufdecker-oder-Nestbeschmutzer> (16.08.2012).

⁷⁸ **KNYRIM**, Rainer: US-Hotlines: Grenzen für das Verpfeifen, Die Presse, 13.03.2006, http://diepresse.com/home/recht/rechtspanorama/100377/USHotlines_Grenzen-fuer-das-Verpfeifen- (17.08.2012).

⁷⁹ **SEEH**, Manfred: Whistleblowing – Anonyme Aufdecker ohne Rechtsschutz, Die Presse, 22.09.2011, http://diepresse.com/home/panorama/oesterreich/695314/Whistleblowing_Anonyme-Aufdecker-ohne-Rechtsschutz (16.08.2012); **WETZ**, Andreas: AKH: Eine Kultur des Wegschauens, Die Presse, 02.09.2011, http://diepresse.com/home/panorama/wien/690376/AKH_Eine-Kultur-des-Wegschauens (17.08.2012); **MÖCHEL**, Andrea: Aufdecker sollen geschützt werden, Wirtschaftsblatt, 14.04.2010, <http://www.wirtschaftsblatt.at/archiv/416145/index.do> (08.08.2012).

⁸⁰ **LUKANEK**, Horst: Whistleblowing-Hotlines. Die Presse, 22.5.2012, <http://karrierenews.diepresse.com/home/ratgeber/arbeitsrecht/759772/WhistleblowingHotlines-> (16.08.2012).

A whistleblower as an instrument of corporate compliance

As a new trend evolving due to globalization, many US-companies have subsidiaries in Austria and hence they are obliged, just like the mother company, to comply with the legislation implemented in the United States, e.g. Sarbanes Oxley Act, Foreign Corrupt Practices Act. Therefore, certain Austrian companies – these subsidiaries – are subjected to installing whistleblowing-hotlines in order to be consistent with these laws. This duty causes other discussions in the media as well (see Ad. 3.), especially in terms of data protection and labor law. The Daimler and Siemens corruption case have encouraged the discussion in the press to view whistleblowing-hotlines as a tool to fight corruption. The term “whistleblowing” is described with a general positive connotation because it can help companies (or subsidiaries) to early prevent corporations from being subjected to (public) investigation, media and press coverage, legal fees and other consequences. In these articles whistleblowing is often mentioned with the Data Protection Commission, because they have developed.⁸¹

Furthermore, a whistleblower is referred to as an “ombudsman” and considered part of the internal control system of a corporation in order to enhance corporate security and the monitoring of processes within a company. A whistleblower is therefore described with a positive connotation, posing an asset to the company’s internal control mechanisms, enhancing transparency and diminishing fraud and corruption.⁸² In the paper published by Schneider⁸³, a whistleblower is described as an adjutor.⁸⁴ Customers, contractors and uninvolved third parties can address him/her in case a malversation is observed within the company.⁸⁵ As an ombudsman, he is described as not being part of the staff of the corporation. The description of the whistleblower in Schneider’s article is consistent with the perception in the previously mentioned newspapers. As long as the whistleblower can assist the company preventing it from

⁸¹ LUKANEC, Horst: Whistleblowing-Hotlines. Die Presse, 22.5.2012, <http://karrierenews.diepresse.com/home/ratgeber/arbeitsrecht/759772/WhistleblowingHotlines-> (16.08.2012).

⁸² See SCHNEIDER, Thomas: Ombudsmann als Bestandteil der Unternehmensüberwachung, RWZ 2006/110, Heft 12 v. 22.12.2006, p. 378.

⁸³ See SCHNEIDER, Thomas: Ombudsmann als Bestandteil der Unternehmensüberwachung, RWZ 2006/110, Heft 12 v. 22.12.2006, p. 378 ff.

⁸⁴ See SCHNEIDER, Thomas: Ombudsmann als Bestandteil der Unternehmensüberwachung, RWZ 2006/110, Heft 12 v. 22.12.2006, p. 378.

⁸⁵ See SCHNEIDER, Thomas: Ombudsmann als Bestandteil der Unternehmensüberwachung, RWZ 2006/110, Heft 12 v. 22.12.2006, p. 378.

any damages, the connotation is generally positive. In one article, the headline even states “How Whistleblowing can strengthen the companies” and whistleblowing is seen as the ultimate “weapon against corruption”.⁸⁶ Since whistleblowing is viewed as an instrument of an effective compliance system, the term is contrasted with “to tattle” (Austrian: “vernadern”).

The term whistleblowing in connection with the law

As already previously explained, introducing a whistleblowing-hotline generates discussions, especially in terms of labor and data protection law. The discussion evolves mostly around cases where people have anonymously or non-anonymously disclosed a malversation and therefore been subjected to the consequences of these exposures. The term “whistleblower” is used in these cases, depending on the viewpoint of the people, who evaluate this behavior. On the one hand, a “whistleblower” is described in these cases as a nest-fouler/nest-soiler (“Nestbeschmutzer”⁸⁷) or someone who is admired for his/her courage⁸⁸.

Perception of whistleblowing in the media

In the annotations to the draft of the public services law⁸⁹ a whistleblower and the enacted regulation is viewed as an asset to strengthen the trust in the administration and the Austrian economy. Because the law has been enacted due to the GRECO evaluation report, it is noted that corruption is generating a massive amount of loss for the Austrian economy and therefore whistleblowing – or the whistleblower – is viewed as a tool to prevent corruption and malversations that endanger the economy.

⁸⁶ NEUHOLD; Christian: Wie “Whistleblowing” Firmen stärken kann, Format, 23.07.2012, <http://www.format.at/articles/1230/527/335646/wie-whistleblowing-firmen> (08.08.2012).

⁸⁷ DIE PRESSE: Wenn Arbeitskollegen zu Aufdeckern werden, Die Presse, 29.08.2011, http://diepresse.com/home/panorama/oesterreich/689163/Whistleblowing_Wenn-Arbeitskollegen-zu-Aufdeckern-werden (17.08.2012).

⁸⁸ DIE PRESSE: Wenn Arbeitskollegen zu Aufdeckern werden, Die Presse, 29.08.2011, http://diepresse.com/home/panorama/oesterreich/689163/Whistleblowing_Wenn-Arbeitskollegen-zu-Aufdeckern-werden (17.08.2012).

⁸⁹ 326/ME XXIV. KP – Ministerialentwurf – Erläuterungen, http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00326/fname_233998.pdf (16.08.2012), p. 2.

VI. Current developments

The Whistleblower Platform of the Ministry of Justice (MoJ)

For this section, I sent a questionnaire to [REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] to ask him about his perception on whistleblowing in Austria and the development of a whistleblower platform.

According to [REDACTED], the *idea of establishing a whistleblower platform originally was pushed by the MoI (Ministry of Interior), namely its former Federal Bureau for Internal Affairs (BIA).* [REDACTED] *and still is a strong promoter of such an instrument. The first time the idea came up to develop such a website, was as far as [REDACTED] recalled, in 2006.*

At the conference in 2009, the platform was presented by the German LKA Lower Saxony (Niedersachsen). They illustrated both statistics as well as (other) empirical data. Their experience (the LKA Saxony) was more than positive and promising and the system helped them in some major criminal investigative cases. As con arguments (by others) against the system, the following were stated: legal basis questionable, advocates “Vernaderertum”, data protection issues and inconsistent with the StPO (Austrian Code of Criminal Procedure).

On the international level, the United Nations Convention against Corruption (UNCAC) in its articles 13, 33 would call for such mechanisms [as do – to a certain extent - other international treaties, e.g. CoE conventions etc.].

[REDACTED] *understanding is, that - in general - the StPO (Austrian Code of Criminal Procedure) in its present version would already allow a whistleblower platform to be implemented. With regard to the public sector, § 5 BAK-Gesetz by now provides a special provision in this direction.*

In a nutshell, subject to political will the necessary legislative arrangements could be adopted relatively easily.

⁹⁰ [REDACTED] reviewed and confirmed the statements made in this section.

[REDACTED] also stated that he is still advocating for a similar platform/instrument in Austria (even **[REDACTED]**

Furthermore, I asked him if, [REDACTED], there were any internal or external reporting mechanisms for disclosures. He stated the following:

Not a genuine one, externally we needed to follow the provisions of the StPO (Austrian Code of Criminal Procedure). In addition, we tried - to the best of our possibilities and subject to legal frameworks - to protect the integrity and well-being of witnesses and whistleblowers.

In terms of recent developments taking place at the Ministry of Justice/Ministry of Interior, ██████████ *noted that he thinks no recent developments have taken place, besides the (W)KStA and ██████████, at that time, pushing and urging for such a system/legislation. From his point of view, the WKStA is strongly supporting an initiative to develop a whistleblower-hotline.*

When asked about if, [REDACTED], he is still advocating for a whistleblowing protection law, his response was *affirmative*. Conclusively, [REDACTED] stated the following: *I am a strong believer in a robust and comprehensive whistleblower protection legislation. Experience has shown that intranei normally are in a position to provide strong and reliable information. At the same time, they are regularly afraid to be socially stigmatized if being disclosed as “informants” [see the negative connotation?]. Moreover, as a former police officer and (criminal) investigator as well as from a practical point of view, a well thought-through whistleblower system could even add to the notion of predictability of legal decision (“Rechtssicherheit”) as it would – inter alia – allow the investigator to communicate with the source.*

Inquiries to the Ministry of Justice

On March 28, 2012, [REDACTED] filed an inquiry to the Ministry of Justice (specifically to [REDACTED])

██████████⁹¹ in order to assess whether they are currently developing a whistleblower protection law for the private sector.⁹²

On the 16th of April 2012 the Ministry of Justice replied to the questions posed by ██████████ who wrote the letter, stated that the Ministry of Justice has the intention to develop new measures and strategies to enhance the prosecution for corruption, malversation and white-collar crimes (“Wirtschaftsstrafsachen”). The Ministry of Justice wants to provide the agencies (“Behörden”) all the means so they can fulfill their tasks as best as possible. ██████████ further noted that white-collar crimes and corruption contain the same criteria because the criminals mostly act in the dark and form conspiracies. Criminal structures can only be broken if there is an incentive for whistleblowers to cooperate with the criminal offices. One part of this has been achieved through the Leniency program (see Chapter IV)). Additionally, the Ministry of Justice is also assessing further options to disclose these crimes more efficiently and effectively. At the time the Ministry of Justice examines, also comparing international models and the legislative basis, the legal prerequisites for the implementation of a “whistleblower-hotline”. The Ministry of Justice is always in contact with the Ministry of Interior. *It cannot be assessed yet when the discussion will come to a final conclusion.*

Since I found this answer to be not sufficient, I filed three inquiries with the Ministry of Justice to receive an answer. The first two were unnoticed. My last inquiry was filed on July 31, 2012, where ██████████ sent me an almost identical reply, which he made a few months ago to ██████████ His reply, dated August 28, 2012, contained the same statement as previously made. I based my inquiries on an article that was published in the press last year⁹³, which noted that the MoJ, especially the Federal Minister of Justice is thinking about implementing a hotline. I had asked

⁹¹ Inquiry of ██████████ to the Federal Minister of Justice, 28.03.2012, and reply: 16.04.2012 from ██████████

⁹² The following questions were posed in the inquiry: *when will the Ministry enact a legislation protection whistleblower in the private sector? Will the protection take the recommendations from Transparency International and the OECD into consideration? Will there be a criminal law punishing people who are oppressing whistleblowers? Is the British Disclosure Act a general model for the Austrian whistleblower protection legislation? Should the whistleblower be financially rewarded like in the United States? When will the electronic platform be established?*

⁹³ DIE PRESSE: Justizministerin Karl testet Homepage für Whistleblower, 30.12.2011. <http://diepresse.com/home/politik/innenpolitik/720291/Justizministerium-testet-Homepage-fuer-Whistleblower> (04.09.2012).

questions to [REDACTED] and wanted to know what the current developments are in Austria.

As previously noted, [REDACTED] merely stated that the MoJ is still in the process of assessing the best possible way to implement such a hotline.

From all of the inquiries sent [REDACTED] reply was the most insufficient. I understand that he is not allowed to talk about current developments, but what I also inquired was to receive a statement on what whistleblowing is in Austria and also the perceptions are. And there were no efforts taken from their side to get in contact with me or make a statement that was more precise as the letter described above.

Conclusively, it can be noted that there are developments taking place in the MoJ, which are not yet public or have been published. Furthermore, there was not statement from the Ministry of Justice on when these developments will conclude. Even though – as noted in the article in the press – [REDACTED] planned to implement the homepage in 2012, until this point no further articles have been published to confirm this progression.

Developments in the Austrian Parliament

Accordingly, several inquiries have been filed in the Austrian Parliament concerning the protection of a whistleblower, the regulation of whistleblowing and the implementation of such a hotline. These inquiries will be shortly presented. Furthermore, I was invited to interview [REDACTED], who is an [REDACTED] and who has filed several of these requests. Hence, I wanted know what kind of obstacles he faced when filing these requests and what his (political) perception of whistleblowing in Austria is.

1. [REDACTED] – Motions for a resolution

[REDACTED] [REDACTED] agreed to meet me on September 4, 2012, in order to discuss the various motions he filed in the Austrian Parliament to advocate for a whistleblowing protection in the public and private sphere and also a possible whistleblower hotline for the Austrian Ombudsman Board.

[REDACTED] noted in the meeting that he filed three motions for a resolution (“Entschliessungsanträge”):

⁹⁴ The views expressed in this section reflect only those of [REDACTED]

- Whistleblowing regulation in the public sector
- Whistleblowing regulation in the private sector
- Whistleblowing hotline at the Austrian Ombudsman Board

The whistleblowing regulation in the public sector was fulfilled due to the implementation of the new public services legislation for public servants. The whistleblowing regulation in the private sector is still a topic he is rooting for. The whistleblowing hotline for the Austrian Ombudsman Board was filed on the 21st of October 2009⁹⁵ but lead to no legislation. Mag. Steinhauser explained that during that time the topic whistleblowing was fairly new in Austria and hence, he wanted to sensitize the other assemblymen. In the light of the recent events, [REDACTED] would definitely support the implementation of a whistleblowing hotline at every Austrian (public) institution/agencies (“Behörden”) because every notification by a whistleblower needs to be delegated to a specific institution.

Furthermore, he added that comparing the situation now to recent years, [REDACTED] could see different developments taking place, such as the possible implementation of a whistleblowing homepage for the Ministry of Justice. It is more likely that the Prosecution Services – Wirtschafts- und Korruptionsstaatsanwaltschaft (WKStA) will receive a whistleblower hotline. If this would happen, [REDACTED] explained, he would advocate for a whistleblowing hotline at other institutions.

The current developments in Austria are good because the topic whistleblowing has garnered the attention of the media and the Parliament. [REDACTED] added that still the discussion stays somewhat “low level”, because after all these years the terms “Vernaderer” or “Denunziantentum” are always linked to a whistleblower. Moreover, the discussion always focuses on the topic why whistleblower needs anonymity – this implies that people have not understood the full scope of whistleblowing, [REDACTED] concluded.

⁹⁵ The motion for resolution is available online:
http://www.parlament.gv.at/PAKT/VHG/XXIV/A/A_00827/imfname_169923.pdf (04.09.2012).

VII. Case – What happened to a real whistleblower?⁹⁶

Facts

- According to the articles, in 2009, there was a tender for a cleaning service company for the “Allgemeine Krankenhaus Wien” (General Hospital Vienna), to provide services for the cleaning of the hospital. The tender was conducted by Manfred Blasoni, who was the administrative director of the AKH, and is now a retiree. The Director of the AKH is named Reinhard Kepler.
- The tender took place over a few months, starting in the year 2009, and it is a necessity for the successful conduction of the tender that it is compliant with the Public Procurement Law of Austria.
- The Public Procurement Law constitutes a standstill period (“Stillhaltefrist”), which foresees that the awarding authority and the contractor may not disclose any information to external persons/institutions. Furthermore, no gentlemen’s agreements are allowed during the tender process.
- Several different companies laid an offer, but those who were most likely to be awarded are called Ago Group and the Janus Group (owners: Dragan Janus and Vuka Janus).
- Janus Group’s offer was EUR 3 Million below the offer of Ago Group. Moreover, all conditions that the General Hospital Vienna had required, were fulfilled. The Janus Group has been in business for over 10 years, also for the General Hospital, and there were hardly any complaints. The company’s owner, Dragan and Vuka, are known for their high quality services and for their numerous awards.
- Ago Group laid a higher offer and despite the fact that the Janus Group laid a cheaper offer, the award of contract went to Ago Group for 50 Million Euros.

⁹⁶ The information for the case is based on newspaper articles (see bibliography).

Allegation

- The allegation was that the award procedure has not been compliant with the Public Procurement Law, since the Janus Group despite laying a better offer was not awarded and instead the award went to the Ago Group. Dragan Janus laid according to insiders the best offer.
- Manfred Blasoni is accused of malversation, abuse of office, and coercion.
- There were “elephant rounds” between Manfred Blasoni, the Ago Group, the Janus Group, and public servants of the General Hospital, where the Janus Group was influenced not to interfere with the award procedure and assured if “they would stay out of it”, they will be awarded smaller mandates.

Evidence

- According to the articles, there are several documentary evidence: documents, accountant’s opinion, statements by witnesses, and audio tapes
- Several “poker nights and champagne parties” were held between Ago representatives and public servants from the AKH (General Hospital Vienna).
- According to an accountant’s opinion (KPMG), there was a “tacit agreement” (stilles Übereinkommen), which stated that Dragan Janus will gain other mandates in case they pull out of the tendering. Furthermore, the accountant’s opinion states that the text of the tender was written for the needs of Ago (so they would be selected).

Damages

- According to Dragan Janus, the damages for not receiving the tender amounted to EUR 40.234498,56.
- The damages according to several articles for the selection of Ago Group amount to EUR 3.000.000.

Current status

- Currently, the Public Prosecution Services - Wirtschafts- und Korruptionsstaatsanwaltschaft (WKStA) is evaluating whether the case will be brought to the judge.

- However, the contracts with the Ago Group have been cancelled, and will end in December 2013. Then, a new tendering will be conducted.
- The Janus Group contract was cancelled. They do not work for the General Hospital anymore.

Whistleblowers

- In accordance with the newspaper articles, the staff of the AKH (General Hospital), who had known about the practices of the respective responsible people for a long time, remained silent.
- Furthermore, not only people who have not been involved in the case, but also the accused witness (in the article, no name is provided) had insider knowledge that the AKH and the Ago Group have been involved in the same case in the year 2005. Already in 2005, the Ago Group was a preferred choice for the AKH as their cleaning Service Company and the responsible people “put them through the tender”. Rankings were manipulated so that the Ago Group was assigned again. The accused witness stated that already in the year 2005, she informed her employer about the malversations, but was “calmed down” and assured that “the procedure was correct”.
- Furthermore, an informant of “Die Presse”, who had worked as a lawyer specializing on the public procurement law in the health department of the “Stadt Wien” (City of Vienna), noted the severe malversations. Once he had stated his “critical points”, he was mobbed and then subsequently fired from his job. As a justification for his firing, the department stated that he was not “capable of making decisions”.
- Dragan Janus is also considered a whistleblower, because he recorded several of the meetings he had with Manfred Blasoni. Hence, he and his wife have been questioned. He is also willing to disclose the malversations that happened at the General Hospital. The consequences for the Janus Group were that about 1050 employees did not receive an employment. The Janus Group has been a victim of corruption. The Director of the AKH, Reinhard Keppler, signed the contract with the “competitor”, Ago Group and the contract with the Janus Group has been cancelled, even though that Keppler was aware of

the pending investigations (corruption, abuse of office) against the public servants of the General Hospital.

Conclusion

I originally had planned to include more than one case in this report, but the only ones I came across where those where the whistleblowing did not work to their advance. This previously described case proves different things:

- If there had been a proper whistleblower protection for Dragan Janus, he would not be subjected to the losses (which derive from the contracts).
- If the transparency in the Public Procurement Law would be existent and the people actually complying with it, Dragan Janus would have been awarded the contract-
- The whistleblower protection did not apply in this case and hence, all the “honest” work that Dragan Janus did by supporting his case so far has not being rewarding for him.

VIII. Strengths, weaknesses and recommendations

Strengths

- Whistleblower protection law in the **public sector** for the public servants (Public Services Law)
- Whistleblower protection law in the **private sector** can be derived from different statutory regulations
- Attempts in the Ministry of Justice are conducted to implement a whistleblower-hotline on their homepage
- The topic whistleblowing has been brought up in the media quite prevalently in newspapers/TV
- All the institutions presented in the paper were aware of the topic and had already heard about it, which implies that a discussion is taking place

Weaknesses

- The term whistleblower is most of the time connected to the following words “Denunziant/Querulant”
- There is no explicit – not one cumulative– regulation for the private sector and public sector.
- The involvement of the Data Protection Commission is quintessential for the success of the application of a whistleblower-hotline and in the expansions of corporations implementing whistleblower-hotlines in their companies; the process needs to be transparent and openly communicated within Austria, so that companies are aware of this circumstance. The application needs to be conducted in a reasonable amount of time (3months).
- There is a lack of transparency in the judicial system, especially in terms of investigating high representatives and prosecuting them; hence, the tendency for whistleblowers to stay anonymous is even more prevalent than before, which makes the need for whistleblower protection legislation even more prevalent and **necessary**.

- There is no retribution for the personal consequences a whistleblower has to face, especially psychological consequences.

Recommendations

1. Whistleblowing regulation in the private sector – not only to protect the whistleblower, but also to regulate the whistleblowing itself
2. Definition of whistleblowing in statutory laws – public and private sector
3. Precise definition of the retribution a whistleblower will face once being subjected to wrongful allegations by the people, he/she blew the whistle on
4. Precise definition of internal and external reporting mechanisms that a whistleblower can use (see recommendation **no. 7**)
5. Obligatory regulation for companies of a certain size to implement a whistleblower-hotline
6. Enhance the process of application for a whistleblowing-hotline – taking less time (closer cooperation between the Data Protection Commission and the specific companies that need to implement a hotline due to international regulations, such as FCPA, SOX etc.)
7. Implementation of a whistleblowing-hotline at the Prosecution Services – Wirtschafts- und Korruptionsstaatsanwaltschaft (WKStA) and make this hotline public so that the people are aware of it
8. Discussion in the media about whistleblowing, rather than “Vernaderertum” and more in the sense of what improvements it can bring to institutions/companies and their internal control system

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X. Abbreviations

- A-FIU – Austrian Financial Intelligence Unit
- AKH – General Hospital (Vienna)
- AOB – Austrian Ombudsman Board
- ArbVG, AVRAG, AngG – Austrian Labor Laws
- BIA – Federal Bureau of
- GewO – Austrian Trade Law
- IACA – International Anti-Corruption Academy (Laxenburg)
- LKA – Landeskriminalamt
- MoI – Ministry of Interior
- MoJ – Ministry of Justice
- StGB – Austrian Criminal Code

- StPO – Austrian Criminal Code of Procedure / Austrian Criminal Procedure Code