

as Financial Criminal Act) are predicate offence to ML under the condition that a court is competent for taking action against it, i.e. if the perpetrator has committed the misdemeanour with premeditation and the relevant value of the evasion or the smuggling exceeds EUR 50'000 (§ 53 para 1 and 2 FinStrG).²⁰ Once these conditions are met, the court may sentence the offender to a fine and additionally to imprisonment of a period of time up to two years.²¹ The maximum sentence being of more than one year, it appears that the definition according to Art. 3 point (4) (f) of the 4th AMLD seems to be met.

The law is mute on the question whether a predicate offence can be committed in a foreign country, but there is consensus in the Austrian academia that this is possible. Court decisions could not be found on this question. Academics and practitioners have established that proceeds of a foreign offence can be the object of ML in Austria, if the foreign offence would be a predicate offence in Austria too, and the foreign offence would be punished according to the law at the scene of the crime (*lex loci delicti*), while it is not necessary that the foreign offence is a predicate offence to ML in the country where it has been committed.²²

If the predicate offence was committed abroad, Austrian law would request that this act was also punished where it was committed, but to the contrary of German and Swiss law²³, there is no explicit legal norm stipulating this in Austrian law.

On the other hand, it is possible that a foreign offence is a felony and predicate offence to ML in the country where it has been committed but no offence at all in Austria, hence the proceeds of that foreign offence cannot fall in scope of § 165 Criminal Code of Austria, which will be explained below in chapter 3.3. In spite of this, the conditions in point 5 of the interpretive note to FATF recommendation 3 seem to be met by the Austrian Criminal Code.

²⁰ The latest version of the FinStrG can be found (in German only) at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10003898>, accessed online on April 3, 2016. For the sake of shortness of this text, the German version of § 35 can be found in Annex C below.

²¹ The legal construction of the offences being very complicated, the list of potential sanctions available from <https://www.bmf.gv.at/steuern/fristen-verfahren/fsv-straefhoehe.html>, accessed on April 3, 2016, is very helpful and can be found in German in Annex D below.

²² As explained by Mag. Rainer Brandl, attorney-at-law with the law firm LeitnerLeitner, Linz/Wien/Zürich, during his presentation entitled “Steuerdelikte als Vortaten für Geldwäsche in Österreich” given at the 12th AML/CFT Conference in Zürich entitled “ Aktuelle Entwicklungen in der Bekämpfung der Geldwäscherei und der Terrorismusfinanzierung”, organised by Kunz Compliance, Bern, www.compliance.ch.

²³ § 261 para 8 German Criminal Code, Art. 305^{bis} number 3 Swiss Criminal Code.