

So far, one could think that only smuggling and the evasion of entry or exit levies are predicate offence to ML in Austria, but that is not the full picture. In December 2010, an additional para 3 was added to § 1 FinStrG, declaring that “all premeditative financial misdemeanours, which are punishable with a mandatory deprivation of liberty of more than three years, are felonies in the sense of § 17 para 1 Criminal Code”.²⁴ There are (only) two misdemeanours that are in scope of § 1 para 3 FinStrG: § 38a (financial misdemeanour committed by a gang or using violence) and § 39 (fraud on levies) FinStrG.²⁵ 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 3, 5 or 10 years, depending on the amount smuggled, evaded, defrauded or concealed.²⁶ 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 term levy covers both direct and indirect tax in Austria, including entry levy fraud and excise tax/VAT fraud in other member states of the EU (§ 2 para 1 lit. c FinStrG, under the condition that the requirements of § 39 FinStrG are met). Financial misdemeanours according to § 38a FinStrG include the cases of simple tax evasion (as defined in § 33 FinStrG, covering both VAT and direct taxes) if committed by at least two cooperating (§ 11 FinStrG) members of the same gang which has to have at least three members (§ 38a para 1 lit. a FinStrG). Point 2 of the interpretive note to FATF recommendation 3 seems to be met.

Should all these conditions explained above not be met, the FinStrG only protects taxes as defined in § 2 FinStrG, hence e.g. an evasion of German income tax committed in Austria is out of scope of § 165 Criminal Code, because the Austrian law, namely the FinStrG, does not punish the evasion of German income tax.²⁷ Point 5 of the interpretive note to FATF recommendation 3 seems not to be fully implemented by the Austrian Financial Criminal Act (FinStrG).

²⁴ [BGBl. I Nr. 104/2010](#) (NR: GP XXIV [RV 874 AB 945 S. 85](#), BR: [AB 8415 S. 790](#)), to be found at https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2010_I_104/BGBLA_2010_I_104.pdf, accessed online on April 3, 2016:

„(3) Vorsätzliche Finanzvergehen, die mit einer zwingend zu verhängenden Freiheitsstrafe von mehr als drei Jahren bedroht sind, sind Verbrechen im Sinne des § 17 Abs. 1 StGB.“

²⁵ For the sake of shortness of this text, the German version of §§ 38a and 39 can be found in Annex C below.

²⁶ 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-strafoehe.html>, accessed on April 3, 2016, is very helpful and can be found in German in Annex D below.

²⁷ As explained by Prof. Dr. Jens Bülte, in his presentation on financial felonies als predicate offence to ML, (in German: „Finanzverbrechen als Vortaten der Geldwäscherei“), given at the 17th conference on financial criminal law, Linz, Austria, on March 8, 2012.