Sponsoring and the Law: Criminal Liability of both Sponsor and Sponsored Party under Austrian law

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Contents

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University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

I. Introduction

Sponsoring is an effective marketing instrument that is becoming increasingly popular. While the sponsored party directly benefits from financial contributions, the sponsor – in most cases a corporation – can profit in various ways. Sponsoring can, for example, enhance consumer awareness and recognition, demonstrate corporate responsibility, and strengthen customer loyalty. Though the commercial value of sponsorship is generally not precisely foreseeable, its existence is undisputed.

While the profitability of sponsorship is generally not questioned from an economical point of view, such activities can be open to criminal liability risks. These risks are on the one hand related to business decisions concerning sponsoring that result in financial losses and in consequence potentially entail criminal and civil liability. On the other hand, financial contributions through sponsoring can also entail corrupt practices; this is especially relevant when the sponsored party is a public authority.

The following text provides an overview of the potential criminal liability in connection to sponsoring activities. It is divided into four sections: after a brief definition of the term 'sponsoring' used as basis for the other sections (II.), the analysis under criminal law focuses on risks concerning the sponsor and sponsored party. While the sponsor can potentially be held liable for the offence of dishonesty (III.), criminal acts connected to the sponsored party are examined with regard to Austrian anti-corruption law (IV.).[1] The last section deals with the responsibility of legal entities associated with sponsoring activities (V.).

This article is an abstract of a doctoral thesis that was submitted to the University of Vienna in September 2017 and thus can only offer a short overview of the key issues within sponsoring and criminal law. A detailed discussion and analysis can be found in the revised extensive version published by *Springer*[2] in 2019.

II. Definition of 'sponsoring'

There is no generally accepted definition of 'sponsoring' in marketing, economic or legal terms. Sponsoring activities can entail similarities to donations, fundraising and traditional advertising and thus vary according to the specific agreement. This diversity is reflected in contractual arrangements that differ greatly and are subject to

[1] The structure of this article was solely chosen for better clarity and should not give the impression that the offence of dishonesty or corruption charges only concern one of both parties.

[2] Clara Ifsits, *Strafrechtliche Risiken des Sponsoring: Zur Strafbarkeit von Sponsor und Gesponsertem wegen Untreue und Korruption* (Wiesbaden: Springer, 2019).

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

mutual agreement between the parties. Nevertheless, it is important to at least determine the key elements of sponsoring as a basis for an analysis under criminal law.

One of the defining characteristics of sponsoring is that the agreement is specified in a bilateral contract:[3] in exchange for money, goods or services the sponsored party agrees to provide a specific contractual service.[4] Sponsorship agreements follow commercial objectives. Sponsors do not act altruistically, but expect a return for their financial input. The nature of the contractual service provided by the sponsored party depends on the common agreement. In general, sponsorship contracts include the right to use intellectual property in association with brand trademarks and logos for marketing and promotion.

In practice, the characteristics of sponsorship agreements in particular depend on the specific goals of the sponsor, which are not necessarily limited to an overall financial benefit, but can also be intended to increase awareness, customer relations, demonstrate corporate social responsibility as well as other long-term marketing strategies. An important objective of sponsoring is to be generally associated with the positive image of the sponsored party in the mind of the general public and thus achieve a so-called 'image transfer'.[5]

The commercial objectives of sponsoring are a key element distinguishing such activities from donations and are specifically important for the evaluation of the legitimacy of sponsoring under corporate and criminal law.

III. Criminal Liability of the Sponsor

On side of the sponsor, risks of criminal liability primarily concern the offence of dishonesty (breach of trust). According to Austrian Law, this offence is committed by any person who knowingly abuses his or her authority to dispose of property of another or to engage another thus causing a financial detriment to the other person

[3] Martin Witt, *Kunstsponsoring* (Berlin: Erich Schmidt, 2000), p. 49; Martin Burgi, Daniel Hampe and Andres Friedrichsmeier, 'Der Rechtsrahmen des Verwaltungssponsoring: Regelungsbedarf, Verfassungsvorgaben, empirische und rechtsvergleichende Erkenntnisse', in Martin Burgi (ed.), *Sponsoring der öffentlichen Hand: Rechtsrahmen, Empirie, Regelungsvorschläge* (Baden-Baden: Nomos, 2009) 71-306, p. 77; Tobias Nuß, *Untreue durch Marketingkommunikation* (Berlin: Logos-Verlag, 2006), p. 100.

[4] Clemens Thiele, *Sponsoring* (Wien: Manz, 2000), p. 3; Manfred Bruhn, *Sponsoring: Systematische Planung und integrativer Einsatz*, 6th edn. (Wiesbaden: Springer Gabler, 2018), p. 6; Helmut Satzger, 'Bestechungsdelikte und Sponsoring' (2003) Zeitschrift für die gesamte Strafrechtswissenschaft 469-500, p. 471; for further references see Ifsits, 'Strafrechtliche Risiken des Sponsoring', pp. 2-3.

[5] Witt, 'Kunstsponsoring', p. 91; Bruhn, 'Sponsoring: Systematische Planung und integrativer Einsatz', p. 50.

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

(§ 153 Austrian Criminal Code, 'Strafgesetzbuch [StGB]'[6] henceforth: StGB). The law further defines the specifications of such an abuse: a person abuses his or her authority if he or she violates rules that serve to protect the economic interests of the owner in an indefensible manner.[7]

The offence of dishonesty can thus be committed through sponsoring activities if, for example, the general manager of a company signs a sponsorship agreement in violation of the law and/or company rules that results in a financial loss.

An analysis of the criminal risks of sponsoring in regard to the offence of dishonesty requires a closer examination of the actus reus, the abuse of authority (A.) and financial detriment (B.) in connection with sponsoring activities.

A. Abuse of authority

An abuse of authority according to § 153 StGB firstly requires the perpetrator to have been effectively granted authority. A person that has not been granted power of attorney, thus cannot abuse this power to the detriment of his or her principal.[8]

If the perpetrator has been granted authority, an abuse entails a violation of a rule. Such rules are not directly contained in criminal law, but rather in civil and corporate law as well as in requirements set by the principal him- or herself. In regard to sponsoring, relevant rules can, for example, consist in an internal limitation to specific sponsoring sectors or a maximum amount intended for such activities. If no such rules or guidelines have been set out in the company and there is no specific statutory obligation applicable, the decision in question is to be examined under the general obligation to act diligently.[9]

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[6] Austrian Federal OJ 1974/60 as amended most recently by Austrian Federal OJ I 2019/111.

[7] Translation according to the bilingual edition of the Austrian Criminal Code: Andreas Schloenhardt and Frank Höpfel, *Strafgesetzbuch: Austrian Criminal Code* (Graz: NWV Verlag, 2016).

[8] Kurt Kirchbacher and Walter Presslauer, '§ 153 StGB', in Frank Höpfel and Eckart Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch* (Wien: Manz, 2018), para 2; Herbert Pfeifer, '§ 153 StGB', in Otto Triffterer, Christian Rosbaud and Hubert Hinterhofer (eds.), *Salzburger Kommentar zum Strafgesetzbuch* (Salzburg: LexisNexis, 2001), para 3; Helmut Fuchs and Susanne Reindl-Krauskopf, *Strafrecht Besonderer Teil I*, 6th edn. (Wien: Verlag Österreich, 2018), pp. 222-223; Alois Birklbauer, Marianne Johanna Hilf and Alexander Tipold, *Strafrecht Besonderer Teil I*, 4th edn. (Wien: Facultas, 2017), pp. 484-485; Nina Huber, *Die Organuntreue zu Lasten von Kapitalgesellschaften* (Wien: Springer 2012), pp. 9 et seq.

[9] Fuchs and Reindl-Krauskopf, 'Strafrecht Besonderer Teil I', p. 228; Kirchbacher and Presslauer, '§ 153 StGB', para 28; Austrian OGH, 20.11.1985, 10 Os 211/84; all decisions of the Austrian OGH can be accessed via https://www.ris.bka.gv.at/Jus/ with their case numbers.

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

Austrian corporate law (see for example § 70, § 84, § 99 Austrian Stock Corporation Act, 'Aktiengesetz [AktG]';[10] § 25 Austrian Limited Liability Companies Act, 'GmbH-Gesetz [GmbHG]')[11] stipulates the obligation of authorized representatives to exercise due commercial care. Where there is no specific legal or companywide provision the representative has to adhere to in the particular situation, this general stipulation is applicable and offers scope for flexible and fast decisions. At the same time, the general obligation to exercise due commercial care has previously led to uncertainty in company decision making: high risk business decisions, which at the time and under the circumstances were advisable, but eventually result in financial losses, could in hindsight give rise to civil and criminal liability.[12] In consequence, this would postulate strict liability of business representatives, which goes against civil and corporate law principles.[13]

After many discussions, the Austrian legislator implemented the business judgement rule in corporate law with the goal of reducing legal uncertainty.[14] Business decisions made by authorized and well informed representatives in good faith and without being interested in the subject matter of the transaction should be shown deference and not be reviewed by the court. The representative thus remains inside a 'safe harbour' and is not liable for any detriment occurring from the decision.

Overall, the business judgment rule serves as a fundamental principle to determine whether a director has reached a decision within the range of reasonable choices. At the same time, if the representative does not meet all of the stipulated criteria and thus acts in violation of the business judgement rule, this does not automatically constitute his or her liability. The action is then to be examined under the general obligation to exercise due commercial care as stipulated for example in § 25 GmbHG and §§ 70, 84, 99 AktG.[15]

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[10] Austrian Federal OJ 1965/98 as amended most recently by Austrian Federal OJ I 2019/63.

[11] Austrian Federal OJ 1906/58 as amended most recently by Austrian Federal OJ I 2018/71.

[12] See for example Johannes Reich-Rohrwig, 'Damoklesschwert über jedem Manager', Der Standard 2013/10/09.

[13] Austrian OGH, 31.10.1973, 1 Ob 179/73; Johannes Reich-Rohrwig, '§ 25 GmbHG', in Manfred Straube, Thomas Ratka and Alexander Rauter (eds.), *Wiener Kommentar zum GmbH-Gesetz* (Wien: Manz, 2018), para 32.

[14] § 84 (1a) AktG and § 25 (1a) GmbHG; cf. Explanatory remarks on the government bill proposing the implementation of the Business Judgment Rule, JAB 728 BlgNR XXV. GP 7.

[15] Austrian OGH, 23.02.2016, 6 Ob 160/15w; Johannes Reich-Rohrwig, 'Gesellschaftsrechtliche Pflichtenverletzung und Untreuevorwurf (Entscheidungsanmerkung zu BGH 12.10.2016, 5 StR 143/15)' (2017) ecolex 539-541, p. 540; Julia Told, 'Business Judgement Rule und ihre Anwendbarkeit in Österreich' (2015) Zeitschrift für Gesellschaftsrecht 60-72, p. 65; cf. Explanatory remarks on the government bill proposing the implementation of the Business Judgment Rule, JAB 728 BlgNR XXV. GP 7.

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

If, according to this assessment, a business decision constitutes a breach of duty and thus results in civil liability, it can additionally be considered an abuse of authority according to § 153 StGB, if the violated rule serves to protect the economic interests of the principal and the representative acted knowingly.

Applying the above conditions and principles to sponsoring decisions, it is necessary to determine, whether the representative complied with the criteria of the business judgement rule or rather exercised due commercial care.

As sponsorship contracts are bilateral and follow commercial objectives (see section 1), corporate sponsorship – as opposed to anonymous donations – in principal is in line with the company's best interest. Whether this can be concluded in a particular case, has to be examined in view of specific criteria.

Not only the Austrian[16] ('Oberster Gerichtshof [OGH]' henceforth: Supreme Court or OGH), but also the German[17] Supreme Court ('Bundesgerichtshof [BGH]' henceforth: BGH) has previously issued a judgment concerning the criminal liability resulting from sponsoring activity; both decisions were widely discussed and frequently cited in Austrian academic literature.[18] Taking these court rulings into account, the entrepreneurial suitability of a sponsoring decision depends strongly on the specific goals of the sponsorship. Other criteria are the connection between the occupational fields of sponsor and sponsored party, the transparency policy, the influence of personal preferences and the financial commitment in regard to the specific sponsorship.

In consideration of the particular objectives, the sponsor does not necessarily have to share an occupational field with the sponsored party. With regard to the objective of an image transfer it can even be advisable for the sponsor to be associated with a completely different area. For example, though there is no apparent connection, an insurance company could try to promote a positive image by financially supporting a local art fair.

Especially the BGH considered an enhanced transparency policy as an important indicator for a reasonable decision.[19] In regard to this approach, it is important to note that the transparency of an act does not necessarily indicate its economic viability.

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[16] Austrian OGH, 06.09.1990, 12 Os 50/90.

[17] German BGH, 06.12.2001, 1 StR 215/01.

[18] See for example Kirchbacher and Presslauer, '§ 153 StGB', para 35; Margarethe Flora, '§ 153 StGB', in Otto Leukauf and Herbert Steininger, *Kommentar zum Strafgesetzbuch*, 4th edn. (Wien: Linde Verlag, 2017), para 27; Reich-Rohrwig, '§ 25 GmbHG', para 65/2.

[19] German BGH, 06.12.2001, 1 StR 215/01; for further references see Ifsits, 'Strafrechtliche Risiken des Sponsoring', pp. 62-63.

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

Even if the transparency policy is considered relevant, in turn the lack of transparency should not be decisive in examining the reasonableness of a decision. A similar concept applies to the existence of personal preferences of directors. If, for example, a director concludes a contract with a specific party he or she considers worthy of support, this can but does not necessarily have to negatively affect his or her business decision.

The financial commitment is to be examined critically with regard to the specifics of the sponsorship. While no fixed amount can be considered inadmissible, the objectives and business earnings are to be taken into account.

The above outlined criteria developed by the Courts have to be viewed as a dynamic system for examining sponsoring decisions, in which not every element has to be equally weighted. Criminal liability can only arise if the examination shows a violation to be 'indefensible' pursuant to § 153 StGB; thus, severe.

B. Financial detriment

The offence of dishonesty requires a financial detriment arising from the representative's act. According to principles of criminal law, financial damages caused by the abuse of authority or for example fraudulent actions, can be compensated by simultaneously occurring benefits.[20] This leads to difficult legal issues with regard to sponsorship.

Though economic benefits of sponsorship are evasive, it is in general deemed profitable.[21] As an exact calculation of benefits is not possible, the analysis under criminal law has to focus not on the effects of sponsoring, but rather on an evaluation of the sponsored party's contractual obligation. The sponsor's financial commitment can thus be compensated by the sponsorship contract itself, which obligates the sponsored party to render the service agreed upon. Thus, without having to measure the actual impact in the sense of a financial benefit resulting from the sponsorship, being in a contractual relationship with a specific person or entity itself can be deemed economically valuable.[22] If the value cannot be precisely determined, in application

[20] Kirchbacher and Presslauer, '§ 153 StGB', para 39; Diethelm Kienapfel and Kurt Schmoller, *Studienbuch Besonderer Teil II*, 2nd edn. (Wien: Manz, 2017), '§ 153 StGB', para 91; Pfeifer, '§ 153 StGB', para 34; Flora, '§ 153 StGB', para 28; Austrian OGH, 11.11.2015, 15 Os 97/14z; Austrian OGH, 25.11.2015, 13 Os 142/14b; Austrian OGH, 07.11.2000, 14 Os 123/00.

[21] Thiele, 'Sponsoring', p. 29; Reich-Rohrwig, '§ 25 GmbHG', para 65/1.

[22] Ifsits, 'Strafrechtliche Risiken des Sponsoring', pp. 105-107.

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

of the general principle to which doubt benefits to the accused, the financial damage is to be considered compensated.[23]

IV. Criminal Liability of Sponsored Parties in the public sector

Apart from potentially contributing to the offence of dishonesty committed by the sponsor, the sponsored party's criminal liability risks in the public sector primarily concern corruption charges.

Before giving an overview of Austrian anti-corruption law and outlining the legal questions that arise in connecting with sponsoring (see sections 4.1. – 4.3.), it is necessary to establish, whether sponsoring is permissible in view of Austrian administrative law. This legal substantiation of sponsorship in the field of public administration serves as a precondition for any further analysis of criminal consequences.

Austrian administrative law occasionally provides for specific provisions in regard to sponsoring. For example, the Austrian Broadcasting Law contains a legal definition of 'sponsoring' as well as relevant regulations concerning sponsored broadcasts (§ 1a No 11 and § 17 Austrian Broadcasting Law, 'ORF-Gesetz');[24] corresponding provisions can also be found in the Austrian University Law (§ 26 and § 28 Austrian University Law 'Universitätsgesetz 2002')[25] or the Federal Hospitals Act (§ 8c Federal Hospitals Act 'Krankenanstalten- und Kuranstaltengesetz').[26] As there is no overriding principle on sponsorship applicable to Austrian administrative law, the admissibility of sponsoring activities in the public sector has to be examined under general law.

As opposed to actions within the government's administration that require a specific legal basis (Article 18 Federal Constitutional Law 'Bundes-Verfassungsgesetz [B-VG]'),[27] private-sector administration activities are only bound by civil law

[23] Nuß, 'Untreue durch Marketingkommunikation', pp. 609-610; Erich Samson, 'Untreue durch Unternehmensspenden?', in W. Rainer Walz, Hein Kötz, Peter Rawert and Karsten Schmidt (eds.), *Non Profit Law Yearbook 2004* (Köln: Carl Heymanns Verlag, 2005) 233-244, p. 241.

[24] Austrian Federal OJ 1984/379 as amended most recently by Austrian Federal OJ I 2001/83.

[25] Austrian Federal OJ I 2002/120 as amended most recently by Austrian Federal OJ I 2018/31.

[26] Austrian Federal OJ 1957/1 as amended most recently by Austrian Federal OJ I 2019/14.

[27] Austrian Federal OJ 1930/1 as amended most recently by Austrian Federal OJ I 2019/57.

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

framework.[28] Sponsorship does not qualify as a sovereign decision,[29] but can be taken up in the public sector regardless of the existence of a specific sponsoring-provision, as long as the independence and impartiality of the administration is ensured.[30]

A. Sponsoring as a 'benefit' under anti-corruption law

Austrian anti-corruption law contains a variety of different offences stipulated in §§ 304 et seqq StGB: for instance, passive bribery (§ 304 StGB) is constituted by any person being an office bearer or adjudicator who demands, accepts, or accepts the promise of a benefit for him- or herself, herself or a third party in return for the unlawful execution or omission of official duties. The following § 305 StGB applies to the acceptance of undue advantages; taking up most of the factual elements of passive bribery, this provision refers to the connection between an undue advantage and the lawful execution or omission of official duties. § 307 and § 307b StGB correspondingly deal with active corruption. As all corruption offences require the existence of a 'benefit' or 'advantage', it is firstly important to examine, whether and in what circumstances sponsoring can be qualified as such.

A benefit is by definition a legal, economic, or personal betterment to which the recipient is not legally entitled.[31] In consequence, a payment that is made in exchange for a service and thus is in line with a contractual obligation cannot constitute a benefit under anti-corruption law. For a long time, the prevailing opinion in legal literature insisted that only appropriately balanced services exclude the presence of any advantage.[32] This legal opinion was overruled by a landmark decision of the Supreme

[28] Walter Antoniolli and Friedrich Koja, *Allgemeines Verwaltungsrecht*, 3rd edn. (Wien: Manz, 1996), pp. 225, 246; Heinz Mayer, Gabriele Kucsko-Stadlmayer and Karl Stöger, *Grundriss des österreichischen Bundesverfassungsrechts*, 11th edn. (Wien: Manz, 2015), para 569.

[29] Albert Koblizek, 'Verwaltungssponsoring', in Andreas Wieselthaler (ed.), *Korruptionsprävention in Theorie und Praxis* (Wien: Verlag Österreich, 2015) 57-64, p. 58; Austrian OGH, 06.06.2016, 17 Os 8/16d.

[30] See Ifsits, 'Strafrechtliche Risiken des Sponsoring', pp. 140-143.

[31] Günther Hauss and Peter Komenda, '§ 304 StGB', in Otto Triffterer, Christian Rosbaud and Hubert Hinterhofer (eds.), *Salzburger Kommentar zum Strafgesetzbuch* (Salzburg: LexisNexis, 2001), para 64; Eva Marek and Robert Jerabek, *Korruption und Amtsmissbrauch*, 12th edn. (Wien: Manz, 2019), p. 94; Hubert Hinterhofer and Christian Rosbaud, *Strafrecht Besonderer Teil II*, 6th edn. (Wien: Facultas, 2016), p. 479; Susanne Reindl-Krauskopf and Stefan Huber, *Korruptionsstrafrecht in Fällen* (Wien: Verlag Österreich, 2014), p. 8; Christian Bertel and Klaus Schwaighofer, *Österreichisches Strafrecht Besonderer Teil II*, 13th edn. (Wien: Verlag Österreich), p. 246; for further references see Ifsits, 'Strafrechtliche Risiken des Sponsoring', p. 147.

[32] See for example Hauss and Komenda, '§ 304 StGB', para 77; Hinterhofer and Rosbaud, 'Strafrecht Besonderer Teil II', p. 479; Maria Eder-Rieder, *Einführung in das Wirtschaftsstrafrecht*, 4th edn. (Wien/Graz: NWV, 2016) p. 171-172; Christoph Aichinger, '§ 304 StGB', in Otto Leukauf and

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

Court in 2016, in which the Court stated that the assessment of values is based on private autonomy and not subject to judicial examination.[33] As rightly held by the Court, whether or not contractual services are proportional is solely evaluated by the parties concerned. This principle does not apply in the case of fictional transactions, in which the parties do not intend to actually exchange goods or services.

Due to the protective purpose of anti-corruption law, which is to maintain the objectivity and impartiality of administration,[34] the Supreme Court additionally stated that benefits accepted by an official bearer for the public authority qualify as an acceptance for a 'third party'.[35] Thus, even if the official bearer does not intend to keep a bribe payment personally for him- or herself, but to use it for business purposes, this conduct is punishable. Until this ruling of the Supreme Court, this question was subject to controversial discussion in legal literature.[36]

As a result of these principles, sponsorship in the public sector can in general not be considered a 'benefit' under anti-corruption law. As sponsorship agreements stipulate an exchange of services, the sponsored party is legally entitled to claim the specified service. However, if the parties do not intend the sponsoring service as a contractual exchange, it can be qualified as a 'benefit' under anti-corruption law. This must also apply if the sponsoring payment is at least partly aimed at a service beyond the scope of the sponsorship contract, the sponsor thus directs his or her payment not only at the contractual exchange, but also at an additional service.[37]

If a sponsoring service qualifies as a benefit under anti-corruption law, this does not automatically result in criminal liability. Inter alia, it has to be further ascertained, whether the benefit was demanded or accepted in connection with the execution or omission of official duties. In the case of a connection between a benefit and *lawful* official duties, the individuals involved are not criminally liable, if the benefit is not undue.

Herbert Steininger, *Kommentar zum Strafgesetzbuch*, 4th edn. (Wien: Linde Verlag, 2017), para 12; Reindl-Krauskopf and Huber, 'Korruptionsstrafrecht in Fällen', p. 9.

[33] Austrian OGH, 06.06.2016, 17 Os 8/16d.

[34] See inter alia Aichinger, '§ 304 StGB', para 1; Hauss and Komenda, '§ 304 StGB', para 38; Marek and Jerabek, 'Korruption und Amtsmissbrauch', p. 83.

[35] Austrian OGH, 06.06.2016, 17 Os 8/16d.

[36] See inter alia Artur Schuschnigg, *Korruptionsstrafrecht* (Wien: Linde, 2015) para 128; Peter Lewisch, 'Altes und Neues zum Korruptionsstrafrecht', in Peter Lewisch (ed.), *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit 2015* (Wien/Graz: NWV, 2015) 383-400, pp. 387-393; Reindl-Krauskopf and Huber, 'Korruptionsstrafrecht in Fällen', p. 12; Florian Messner, 'Zuwendungen an Schulen und Lehrer – eine korruptionsstrafrechtliche Gratwanderung' (2015) Journal für Strafrecht 7-13, pp. 10-11; Aichinger, '§ 304 StGB', para 13.

[37] See Ifsits, 'Strafrechtliche Risiken des Sponsoring', pp. 155-160.

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

§ 305 (4) StGB contains different constellations in which a benefit qualifies as 'not undue'. Accordingly, undue advantages in particular do not include benefits that can lawfully be accepted or that are provided in the context of events in which there is an official or factual interest to participate as well as benefits for charitable causes if the office bearer or adjudicator has no particular influence on their use. The latter case of a 'not undue benefit' can especially be relevant in the sector of cultural and social sponsoring, in which the sponsor engages in presumably altruistic activities to demonstrate his or her social responsibility.[38] If in such cases the existence of a benefit can be established, as long as it is intended for a charitable cause and the office bearer has no specific influence,[39] its acceptance is legitimate.

B. Sponsoring activities for the purpose of interference

Questions of criminal liability in regard to sponsoring activities have previously often arisen in connection with cases, in which high state representatives were granted invitations to sports or cultural events by the sponsor of these activities.[40] It is important to note that these issues do not concern the actual relationship between sponsor and sponsored party, but rather the usage of services obtained by the sponsor through the sponsorship.

In 2008, the BGH issued a decision[41] regarding the grant of tickets to the 2006 Football World Cup by an energy corporation (one of the main sponsors) to prominent politicians and other high ranking officials. The Court examined the facts under anti-corruption law and stated that though the tickets qualified as benefits[42] there was no punishable offence in default of a connection to the official duties of the recipients. To establish the existence of such a connection, the BGH referred to specific criteria, such as the plausibility of the stated objective, the position of the recipient, the potential connection to business activities, the kind, value and scope of the benefit as well as the transparency of the approach. Though the criteria cannot be generalized, it serves as a starting point that has to be assessed on a case-by-case basis.

[38] Eder-Rieder, 'Einführung in das Wirtschaftsstrafrecht', p. 178; Hinterhofer and Rosbaud, 'Strafrecht Besonderer Teil II', p. 488.

[39] For a detailed analysis of this 'specific influence' see Ifsits, 'Strafrechtliche Risiken des Sponsoring', pp. 180-181.

[40] See for example Andreas Schnauder, 'Kleine Geschenke', Der Standard 2008/07/15.

[41] German BGH, 14.10.2008, 1 StR 260/08.

[42] In contrast to this, the Court of first instance had not qualified the tickets as a benefit under German anti-corruption law, see Regional Court Karlsruhe, 28.11.2007, 3 KLs 620 Js 13113/06.

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

Under Austrian criminal law, cases like this have to be considered in regard to the offence of the acceptance of benefits for the purpose of interference (§ 306 StGB) or – concerning the liability of the company representatives – to the giving of undue advantages for the purpose of interference (§ 307b StGB).[43] As opposed to bribery or the acceptance of advantages in connection to lawful acts, § 306 StGB does not require the connection to a *specific* official duty, but rather the recipient's intent to *generally* let him- or herself be influenced in the performance of his or her duties and function. § 306 StGB therefore does not only consist of a mental element referring to the actus reus, but an additional form of intent directed at a future point and can thus be qualified as a crime with an extended mental element.[44] The official duty does not have to be specified at the time of the commission, any kind of influence is sufficient.[45]

Whether the perpetrator acted with this extended intent is determined in view of the criteria previously developed under German jurisprudence.[46] Due to this overall approach and the significance of the extended mental element, § 306 StGB seems vague and uncertain. To provide legal certainty, the criteria thus have to be interpreted restrictively. Particularly, it has to be taken into account whether there is another plausible reason for the granting of the advantage. The intent has to be specifically established in every case, even when it appears evident, as for example if a company regularly stands in a business relationship with the beneficiary.[47] In accordance with the offence of passive bribery (§ 304 StGB) and the accepting of undue advantages (§ 305 StGB), the recipient has to be an office bearer or adjudicator.

[43] Though, for the sake of clarity, the following section only refers to § 306 StGB, it correspondingly applies to the beneficiary under § 307b StGB.

[44] Hagen Nordmeyer and Martin Stricker, '§ 304 StGB', in Frank Höpfel and Eckart Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch* (Wien: Manz, 2018), para 21.

[45] Cf. Explanatory remarks on the government bill proposing § 306 StGB, IA 1950 BlgNR XXIV. GP 11 (=JAB 1833 BlgNR XXIV. GP 9); Hauss and Komenda, '§ 304 StGB', paras 31-32; Aichinger, '§ 304 StGB', para 5; Hinterhofer and Rosbaud, 'Strafrecht Besonderer Teil II', p. 491.

[46] Cf. Explanatory remarks on the government bill proposing § 306 StGB, JAB 1833 BlgNR XXIV. GP 10; Hauss and Komenda, '§ 306 StGB', para 33; Aichinger, '§ 306 StGB', para 9; Marek and Jerabek, 'Korruption und Amtsmissbrauch', pp. 111-112; Markus Höcher and Peter Komenda, 'Spezialfragen des KorrStrÄG 2012' (2012) ecolex 688-691, p. 690.

[47] Lothar Kuhlen, 'Sponsoring und Korruptionsstrafrecht' (2010) Juristische Rundschau 148-273, p. 153.

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

C. Risk of criminal liability in specific sponsoring areas

The above outlined principles are generally applicable in connection with sponsorship. However, as sponsoring activities often particularly concern specific areas – such as the *pharmaceutical industry* and the *political sphere* – it is worth examining them more closely.

The medical sector requires a great deal of financial resources. As state support is constrained, it has become increasingly dependent on other financial sources, such as sponsoring by the pharmaceutical industry ('pharmasponsoring').

Pharmasponsoring can include a variety of different activities, such as the funding of a medical congress, at which the pharmaceutical company presents its own products, financially supporting a clinical study, contributions regarding the purchase of medical equipment or inviting doctors and medical staff to training courses.[48]

To establish criminal liability, doctors in question have to qualify as 'office bearers' and thus as potential perpetrators of corruption offences. § 74 (1) lit 4a No b-d StGB provides a definition of this term; in regard to doctors especially the alternative No b is relevant. An office bearer is any person who exercises legislative, administrative, or judicial functions as an organ or employee of the Federal Government, a State Government, a municipalities association, a municipality, or a public corporation, not including churches and religious groups, another country or an international organization. According to this definition, doctors and medical staff employed in hospitals are office bearers, if the respective hospital carrier is a municipality or other legal entity under public law.[49] If the hospital carrier is a state-owned corporate entity, employees qualify as office bearers under § 74 (1) lit 4a No d StGB[50].[51] However,

[48] For further examples see Peter Steiner, 'Drittmitteleinwerbung im Krankenhaus' (2005) Recht der Medizin 132-138, p. 132; Kai Höltkemeier, *Sponsoring als Straftat* (Berlin: Duncker & Humblot, 2005), pp. 205 et seqq.

[49] Markus Grimm, 'Korruption im stationären Bereich', in Walter Pfeil and Michael Prantner (eds.), *Sozialbetrug und Korruption im Gesundheitswesen* (2013) 87-115, p. 104.

[50] § 74 (1) lit 4a No d StGB entails any person who acts as an organ or employee of a corporation in which one or more domestic or foreign territorial authorities have, directly or indirectly a 50 per cent stake in the share capital, capital stock or equity, and that is run by the territorial authority alone or together with other territorial authorities or that is factually controlled by the territorial authority through financial or other business or organizational mechanisms, but in any case any corporation whose business is subject to review by the audit office, institutions similar to the audit office established by the States, or comparable international or foreign audit entities.

[51] Grimm, 'Korruption im stationären Bereich', p. 105.

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

doctors employed in private hospitals or hospitals owned by the church are not office bearers and can thus not be prosecuted under anti-corruption law.[52]

The main issue[53] in regard to pharmasponsoring is, whether the service rendered by the company constitutes an advantage, more precisely an *undue advantage*, under anti-corruption law. If the sponsoring service is part of the contract, for example in cases of monetary bonuses in connection with the purchase of medical equipment, the recipient is legally entitled to the service, which in consequence does not qualify as an advantage (see section IV. A.). In contrast, the invitation of doctors to medical congresses or other training courses does prima facie constitute an advantage.[54] However, as it is directed at research purposes or professional training, it can be qualified as 'not undue' unter § 304 (4) StGB. The acceptance of such an advantage is not liable to prosecution, even in connection to a lawful official duty, for example the rightful purchase of medical devices or pharmaceutical products.

Without giving a detailed examination of criminal liability in connection with sponsorship in the *political sphere*, it is imperative to take the Austrian Law on Political Parties ('Parteiengesetz 2012 [PartG]'[55] henceforth: PartG) into account, which does not only provide a legal definition of sponsoring, but even an exemplary list of possible activities (§ 2 No 6 PartG). Accordingly, sponsoring measures include running booths and highlighting products at party events as well as logo placement on event information, invitations, etc. Financial contributions or contributions in kind that are in line with the legal definition of sponsoring do not qualify as an advantage under anti-corruption law.[56] Such sponsoring activities are a permissible method of political party funding. However, cases in which the legal framework is not met and financial contributions stand, for example, in exchange for individual meetings with high-ranking politicians, are generally open to criminal charges. While the payments can be qualified as a benefit under anti-corruption law, it has to be ascertained,

[52] Grimm, 'Korruption im stationären Bereich', p. 105; Ifsits, 'Strafrechtliche Risiken des Sponsoring', p. 207.

[53] For a detailed examination of practical cases see Ifsits, 'Strafrechtliche Risiken des Sponsoring', pp. 208-218.

[54] Grimm, 'Korruption im stationären Bereich', p. 108; the legal qualification of a benefit under anti-corruption law might be different if the doctor is for example invited to give a lecture at the medical congress, Hubert Hinterhofer, 'Zur Strafbarkeit des „Anfütterns" von Amtsträgern – Versuch einer einschränkenden Auslegung' (2009) Österreichische Juristen-Zeitung 250-254, p. 252.

[55] Austrian Federal OJ I 2012/56 as amended most recently by Austrian Federal OJ I 2019/55.

[56] Ifsits, 'Strafrechtliche Risiken des Sponsoring', p. 232.

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whether they stand in connection to the execution or omission of official duties or are intended to influence a politician being an office bearer.[57]

V. Responsibility of legal entities

If sponsoring activities constitute a criminal act, this can additionally entail the responsibility of the legal entity, where the perpetrator is employed.

The Austrian Act on Corporate Criminal Liability ('Verbandsverantwortlichkeitsgesetz [VbVG]'[58] henceforth: VbVG) was implemented in 2006. According to this law, corporations and legal entities can be fined up to 1.8 million euros (§ 4 VbVG).

Corporate responsibility according to the VbVG requires not only a criminal act committed either by a specific company representative or employee, but also this act being imputable to the corporation. The link between the individual criminal liability and the corporate responsibility is established, if the perpetrator commits the offence either to the benefit of the corporation or acts in violation of a company rule (§ 3 (1) VbVG).

Concerning sponsorship, responsibility under the VbVG cannot be linked to the offence of dishonesty: as this offence is contingent on the financial detriment of the corporation and thus directed against its interests, the corporation (the 'victim') itself cannot be deemed responsible.[59] Corporate responsibility is however possible in regard to criminal acts committed in contribution to the immediate perpetrators conduct:[60] in this case, the perpetrator (acting in contribution) can be linked to a corporation that is not the victim, but potentially profits from the committed offence.

Individual criminal liability concerning the sponsored party under anti-corruption law can constitute responsibility of the corporation, or rather the public authority. The VbVG is thus also applicable to the federation, state and community, in exception of

[57] For a further analysis under anti-corruption law see Ifsits, 'Strafrechtliche Risiken des Sponsoring', pp. 231-234.

[58] Austrian Federal OJ I 2005/151 as amended most recently by Austrian Federal OJ I 2016/26.

[59] Cf. Explanatory remarks on the government bill proposing the implementation of the VbVG, EBRV 994 BlgNR XXII. GP 22; Marianne Hilf and Fritz Zeder, '§ 3 VbVG', in Frank Höpfel and Eckart Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch* (Wien: Manz, 2018), para 19; Martin Boller, *Die strafrechtliche Verantwortlichkeit von Verbänden nach dem VbVG* (Wien: Manz, 2007), p. 158.

[60] Cf. Explanatory remarks on the government bill proposing the implementation of the VbVG, EBRV 994 BlgNR XXII. GP 21; Hilf and Zeder, '§ 3 VbVG', para 24; Boller, 'Die strafrechtliche Verantwortlichkeit von Verbänden nach dem VbVG', p. 165.

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

the execution of sovereign power.[61] Responsibility pursuant to the VbVG can especially become relevant in regard to criminal acts, in which a sponsoring contribution is granted to the public authority itself, constituting not only an advantage under anti-corruption law, but also an offence committed to the benefit of the authority and thus the necessary link to be able to prosecute not only the individual perpetrator as a natural person, but also the entity.

VI. Conclusion

Risks of criminal liability in connection with sponsorship can concern the sponsor as well as the sponsored party: while the sponsor may be subject to investigation in relation to the offence of dishonesty, a sponsored party from the public sector could be confronted with corruption charges or allegations.

The offence of dishonesty (§ 153 StGB) can be committed through sponsoring, if a company representative – engaging in sponsoring activities – knowingly acts in violation of the law or a company rule, causing financial detriment to the corporation. If there is no specific regulation applicable, the company representative must exercise due commercial care in accordance with general stipulations of civil and corporate law. In attempts to make this clearer, the business judgement rule sets criteria, which – if upheld by the representative – constitute a 'safe harbour' eliminating risks of liability. Beyond the business judgement rule, the permissibility of a business decision concerning sponsoring inter alia has to be examined with regard to the specific goals of the sponsorship, the transparency policy, influences of personal preferences and the financial commitment.

The consequential financial losses have to be assessed in consideration of relevant benefits occurring from sponsoring, namely the value of the sponsorship contract. When in doubt, the outflow of funds is to be considered compensated in favour of the accused.

Sponsoring activities concerning the public sector can entail corruption charges. Key requirement is the existence of an 'undue advantage'; thus a legal, economic, or personal betterment to which the recipient is not legally entitled. As sponsoring entails a bilateral contract and the sponsored party is therefore obliged to render a service as part of the agreement, the sponsoring contribution generally does not constitute an 'advantage' under anti-corruption law. This does not apply in fictional transactions, in which the contribution is not (solely) intended as an exchange for the

[61] Hilf and Zeder, '§ 3 VbVG', paras 23-25; Boller, 'Die strafrechtliche Verantwortlichkeit von Verbänden nach dem VbVG', p. 118.

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

stated service. However, the value ratio between the contractual services is not to be ascertained by the Court; sponsoring contributions that exceed the value of the agreed service do not automatically constitute an 'advantage'.

If sponsoring does entail an advantage under anti-corruption law, but the advantage can be qualified as 'not undue' under § 304 (4) StGB, the conduct is not punishable, even if the benefit was offered in return for the execution or omission of a lawful official duty. In cases, in which sponsoring contributions are an 'undue advantage' under anti-corruption law, it is necessary to further establish a connection to an official duty or the intent to influence the recipient in his or her official function.

Individual criminal liability for sponsoring activities can additionally entail responsibility of legal entities, specifically the perpetrator's employing organisation.

University of Vienna Law Review, Vol. 3 (2019), pp. 73-92, https://doi.org/10.25365/vlr-2019-3-1-73.

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