

## AUSTRIA

### REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

#### A. IMPLEMENTATION OF THE CONVENTION

##### Formal Issues

Austria signed the Convention on December 17, 1997. On July 17, 1998, the Austrian Parliament passed the necessary amendments to Austrian legislation in order to be able to ratify and implement the Convention. The implementing legislation entered into force on October 1, 1998, and the instrument of ratification was deposited with the OECD on May 20, 1999.

##### Convention as a Whole

The Austrian Penal Code<sup>1</sup> was amended in order to implement the requirements of the Convention by adding new subsections to sections 307 (offence of bribery) and amending section 308 (“trafficking in influence”). Previously, sections 307, 308 only covered offences in relation to a *domestic* public official. The amended sections 307, 308 extend to *foreign* public officials.

#### 1. ARTICLE 1. THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL

Section 307 of the Austrian Penal Code establishes the offence of bribery. While section 307, paragraph 1, deals with offences where the public official acts or refrains from acting *in violation* of his/her duties, section 307, paragraph 2, - which does not apply to *foreign* public officials - covers cases where the act or omission *conforms* to such duties.

Section 308 deals with the offence of illicit intervention (“trafficking in influence”). It addresses cases where one seeks that an official acts or refrains from acting *by third party intervention*. The direct offender is the (third) person who tries to induce a domestic or foreign public official to behave improperly with regard to his/her responsibilities. One means of such inducement is bribery. Besides the third party, the person who offers the advantage to the former in order that he/she intervenes is also punishable under section 308.

The Austrian authorities point out that the provision needs to be seen in the context of paragraph 19 of the Commentaries on the Convention. According to this paragraph, one could contemplate a case of bribery where an executive of a company gives a bribe to a senior official of a government in order that this official use his office to make another official award a contract to that company. Similarly, section 308 covers cases of third party intervention, although it does *not* require that the intervening third party be *an official*.

“Trafficking in influence” is an offence that it is not covered by the Convention. The following review does therefore not deal with section 308 of the Austrian Penal Code. However, for information purposes,

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<sup>1</sup> Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch - StGB), BGBl. 1974/60 in der Fassung BGBl. I 1998/153.

the text of section 308 - as well as the other relevant provisions - are reproduced below, and the amendments for the purpose of implementing the Convention are indicated in bold.

Section 307, paragraph 1:

“Whoever offers, promises or gives an advantage to

1. a public official, a public official of another member state of the European Union or an official of the European Communities for the exercise or the refraining from the exercise of an official act in violation of his/her duties (section 304 paragraph 1),

2. a senior executive of a public enterprise for the exercise or the refraining of the exercise from a legal act in violation of his/her duties (section 305 paragraph 1),

3. an expert witness for delivering false findings or a false opinion (section 306),

4. a staff member of a senior executive of a public enterprise for influencing that the latter exercises or refrains from exercising a legal act in violation of his/her duties (section 306a paragraph 1),

5. an expert adviser acting for payment for influencing the exercise or the refraining from the exercise of an official act or a legal act in violation of duties (section 306a paragraph 2)<sup>2</sup>, or

6. with the exception of the case in subsection 1 above, a foreign public official for the exercise or the refraining from the exercise of an official act in violation of his/her duties in order to obtain or retain business or any other improper advantage in the conduct of international business

for him/her or a third party, shall be liable to imprisonment for up to two years.”

Section 307, paragraph 2:

“Whoever offers, promises or gives not merely a petty advantage to

1. a public official for the exercise or the refraining from the exercise of an official act in conformity with his/her duties (section 304 paragraph 2) or

2. a senior executive of a public enterprise for the exercise or the refraining from the exercise of a legal act in conformity with his/her duties (section 305 paragraph 2)

for him/her or a third party, shall be liable to imprisonment for up to six months or to a fine up to 360 daily rates, unless the perpetrator - according to the circumstances - cannot be blamed for having offered, promised or given this advantage.”

Section 308:

“(1) Whoever knowingly, directly or indirectly, exercises influence so that a public official, a senior executive of a public enterprise, a member of a legislative body or a foreign public official exercises or refrains from exercising an official duty or a legal act partially and demands, accepts or has been promised an advantage for him/her or a third party for exercising this influence, shall be liable to imprisonment for up to three years.

(2) A person who accepts or has been promised only a petty advantage shall not be punished according to paragraph 1, unless the offence is committed with the intent of gaining a consecutive income.

(3) A person who acts within the competence as attorney (against payment) shall not be punished according to paragraph 1.”

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<sup>2</sup> “Official act” means an act by a public official; “legal act” means an act by a senior executive.

Section 74 contains several definitions in relation to “public officials”:

“In the sense of this federal law

...

4. public official: means anybody who is appointed to exercise - alone or together with another person - legal acts in the name and as an organ of the federal state, a region, an association of communities or a community or who is otherwise entrusted with tasks of federal, regional or community administration;

4a. public official of another member state of the European Union: means anybody who is a public official according to the penal law of another member state and would be so in corresponding application of subsection 4.;

4b. official of the European Communities: means anybody who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of employment of other servants of the European Communities or who has been seconded to the European Communities by the member states or by any public or private body and is entrusted with tasks equivalent to those performed by officials of the European Communities or other servants; officials of the Communities are also the members of bodies set up in accordance with the treaties establishing the European Communities and the staff of such bodies as well as the members of the Commission, the Court of Justice and the Court of Auditors of the European Communities and the members of organs and employees of the European Police Office (Europol);

4c. foreign public official: means anybody who holds a legislative, administrative or judicial office, who performs a public function for another country or a public agency or a public enterprise of such a country or who is an official or an agent of an international organisation;”

....

## **1.1 The Elements of the Offence**

### **1.1.1 any person**

Section 307 of the Penal Code applies to “a person”. The Austrian authorities explain that “a person” means any natural person.

### **1.1.2 intentionally**

There is no requirement under section 307 that the improper reward be given, etc. to obtain actions or omissions of a foreign public official. It is sufficient that the offender at least earnestly considers the possibility of acting in a way to commit the offence and resign himself/herself to it (*dolus eventualis*).

### **1.1.3 to offer, promise or give**

Section 307 applies to a person who “offers, promises or gives” a bribe, etc. in compliance with the requirements of the Convention.

### **1.1.4 any undue pecuniary or other advantage**

Section 307, paragraph 1, prohibits the giving, etc. of “an advantage”. This includes, but is not limited to pecuniary advantages. It comprises anything that can be defined as a benefit, including an intangible

benefit. Under the previous law, only pecuniary advantages were covered - although understood in the widest possible meaning<sup>3</sup>.

It is not required that the advantage be improper. Accordingly, the Austrian Penal Code is broader than the Convention that stipulates that the reward be "undue".

It is not an offence if the advantage is permitted or required by the law of the foreign public official's country.

In contrast to section 307, paragraph 2, - which does not apply to foreign public officials - there is no explicit exception in section 307, paragraph 1, concerning small facilitation payments<sup>4</sup>. The Austrian authorities confirm that with regard to the latter provision, small facilitation payments are considered as "advantage" in the meaning of paragraph 7 of the Commentaries.

### **1.1.5 whether directly or through intermediaries**

The Austrian authorities explain that the briber is always punishable - no matter how many intermediaries he/she uses. The punishability of the intermediary depends of the exact role he/she is playing. The Austrian authorities explain that if the intermediary acts without being aware of the criminal impact, not even in the form of *dolus eventualis* (see 1.1.2 above), he/she would not be punishable at all. If the intermediary is intentionally involved in the offence he/she might be even punishable for bribery itself.

### **1.1.6 to a foreign public official**

Section 307, paragraph 1, new subsection 6, follows the description of the offence as laid down in Article 1 of the Convention by introducing the term "foreign public official". The definition of foreign public official is contained in section 74, paragraph 4c of the Austrian Penal Code. It follows closely the text of Article 1.4 of the Convention. It covers any person who

- has a public function in the legislation, administration or in the judiciary in a foreign state;
- exercises a public task for a foreign state, a foreign administrative authority, or a foreign public enterprise;
- is a public official or otherwise authorised person of an international organisation.

Article 1, paragraph 4a, of the Convention defines a "foreign public official" as "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected". The definition in section 74, paragraph 4c, of the Austrian Penal Code does not include this qualification. In the German language, the term "public official" ("Beamter") does usually not include persons who were elected to a political office. The language of section 74, paragraph 4c, leaves it therefore open whether Austrian law covers

- A minister of a foreign state,
- A member of the legislative assembly of a foreign state,
- Any other person exercising a public function for a foreign country who has been elected.

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<sup>3</sup> For instance, an invitation for dinner would fall under this provision.

<sup>4</sup> According to case law, amounts of up to ATS 1.000 can be considered as non-punishable bribes in the context of section 307, paragraph 2.

The Austrian authorities explain that the definition in section 74, paragraph 4c, is not restricted to persons who have been appointed. In their view, it also covers persons holding a legislative, administrative or judicial office or performing public functions - although they are not explicitly mentioned. The reason for holding the office or performing these functions is irrelevant.

The Austrian authorities refer in this context to a publication of the Federal Ministry of Justice that has been transmitted to all criminal courts and prosecutorial offices by decree of 6 October 1998. It clarifies that the definition in section 74, paragraph 4c, is more comprehensive than the other definitions of public officials in the Penal Code. As an example for this more comprehensive definition members of parliament are explicitly mentioned.

Furthermore, the Austrian authorities point out that the expression “public official” has always been understood in Austria in a wide sense. The existing case law considers, for example, the following persons to be “public officials under section 74, paragraph 4: All supreme administrative functions like Austrian ministers and other members of the federal government or state (*Länder*) governments, members of town assemblies, mayors<sup>5</sup>, jury members and other lay judges<sup>6</sup>.

Section 74, paragraph 4c, includes anybody who performs a public function for a public agency or a public enterprise. Concerning the term “foreign public enterprise”, the Austrian authorities refer to an explanatory report to the draft implementing legislation<sup>7</sup>. This report clarifies that the term “foreign public enterprise” has to be interpreted in accordance with paragraph 14 of the Commentaries.

Section 307, paragraph 1, subsection 1, covers the offence of bribery of a public official of a *member state of the European Union*, or a *public official of the European Communities*. Section 74, paragraphs 4a, b, defines these officials (see above page 3). Pursuant to section 74, paragraph 4a, a “public official” of another member state of the European Union is defined in accordance with the penal law of that country. Furthermore, it is required that the person would likewise fall under the definition of an Austrian public official pursuant to section 74, paragraph 4.

Section 74, paragraph 4a, leaves it open whether any person holding a legislative, administrative or judicial office in another EU member state would be covered. Furthermore, it remains unclear from the text whether persons exercising a public function, including for a public agency or public enterprise, in another EU member state would fall under the definition.

In view of the Austrian authorities, it is not necessary that the type of officials mentioned in the previous paragraph fall under the definition of a “public official of another member state of the European Union” in section 74, *paragraph 4a*. According to the Austrian authorities, public officials of other EU member states not covered by the definition in section 74, paragraph 4a, but falling under the definition of the Convention, would be covered by the autonomous definition in section 74, *paragraph 4c*. The Austrian authorities also refer to a publication of the Federal Ministry of Justice<sup>8</sup>. According to the Austrian authorities, this publication points out that the definition in section 74, paragraph 4c, is more comprehensive than the other definitions of public officials, and that the bribery of a public official of another EU member state could fall under section 307, paragraph 1, subsection 6, even if it does not fall under section 307, paragraph 1, subsection 1.

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<sup>5</sup> Supreme Court decision of November 11, 1980, 13 Os 155/80.

<sup>6</sup> Decisions of the Imperial Supreme Court KH 142, 201, 334, 979, 1458.

<sup>7</sup> Published in the Parliament protocols, GP XX RV 1230 AB 1359, p. 137.

<sup>8</sup> Decree of 6 October 1998, page 4.

The question has been raised why separate provisions exist concerning the bribery of public officials of other EU member states on the one hand, and bribery of foreign public officials on the other hand. The Austrian authorities responded that the former provision implements the EU Anti-Bribery Convention into domestic law, whereas the latter provision reflects the OECD Convention.

The Austrian authorities confirm that the term “foreign state” includes “all levels and subdivisions of government, from national to local”, and that the term “public authority” corresponds in meaning with the term “public function” in Article 1.4 of the Convention. They refer to the explanatory report to the implementing legislation<sup>9</sup>.

With regard to the bribery of *domestic* citizens, section 307 of the Penal Code applies to a number of professional activities that are not explicitly mentioned in the definition of a “foreign public official”. There is therefore the issue whether such professional activities are covered by the latter definition:

- As far as bribery of domestic public officials is concerned, section 307, paragraph 1, subsection 2, and section 307, paragraph 2, subsection 2, cover the bribery of any *senior executive* of a public enterprise. By contrast, section 307, paragraph 1, subsection 6, in connection with section 74, paragraph 4c, - which covers bribery of foreign public officials - relates to any person who performs a public function for a foreign public enterprise. Coverage is therefore broader in case of bribery in connection with a foreign than a domestic public enterprise. This is in accordance with the Convention.

- As far as bribery of domestic persons is concerned, section 307, paragraph 1, subsection 3, covers the bribery of an *expert witness* in connection with the provision of an incorrect expertise. Subsection 4 deals with bribery of a *staff member of a senior executive of a public enterprise* in order that the former influences the latter to act improperly. Subsection 5 covers bribery of an *expert advisor* in order that he/she influences an improper act or omission.

The Austrian authorities confirm that these categories of persons are covered by section 307, paragraph 1, subsection 6, if they exercise a public function in a foreign state.

### **1.1.7 for that official or for a third party**

Section 307 includes the words “whether for himself or any other person”. Both alternatives are therefore explicitly mentioned in the text of the provision.

### **1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties**

Section 307 of the Austrian Penal Code explicitly covers the two alternatives “acting or refraining from acting”.

Section 307, paragraph 1, applies where a bribe is given for an act or omission *in violation* of the public official’s duties. By contrast, section 307, paragraph 2, relates to cases where a bribe or improper award is given that the official acts or refrains from acting *in conformity* with his/her duties. *Both alternatives together* ensure that any official act or omission in relation to the performance of official duties is covered. However, section 307, paragraph 2, does not apply to bribery of *foreign* public officials.

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<sup>9</sup> Published in the Parliament protocols, GP XX RV 1230 AB 1359, p. 137.

It therefore seems that section 307 paragraph 1 is narrower than the requirement of the Convention that the “official act or refrain from acting in relation to the performance of official duties”.

The Austrian authorities are of the opinion that section 307, paragraph 1, is in accordance with the Convention. They point out that they interpret this provision in light of the Commentaries on the Convention, and that Austrian case law understands the term "in violation of his/her duties" in a very broad sense. In particular, the Austrian authorities refer to the explanatory report to the implementing legislation<sup>10</sup> that reads as follows:

"According to the Commentaries on the Convention it is sufficient for the implementation if the offence comprises payments "to induce a breach of the official's duty" provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country. In this sense and with a view to the wide understanding of breach of duty under Austrian law it can be considered acceptable to limit the implementation of the OECD-offence to acting in violation of his/her duties, i.e. to section 307, paragraph 1. It is namely already a violation of the official's duties if he/she lets him/herself be influenced by the advantage even if he/she stays within his/her margin of discretion, for example when choosing the best qualified bidder in public procurement procedures, or when dealing with applications for subsidies or the assignment of license plates preferentially more quickly. It is part of the requirements of exercising a public function in conformity with the official's duties that the official is exclusively guided by objective and legal reasons and not by reasons of sympathy or dislike of a party. Therefore, any partiality, including a preferentially quicker treatment, is a violation of his/her duties (cf. ....)."

#### **1.1.9/1.1.10 in order to obtain or retain business or other improper advantage/in the conduct of international business**

Pursuant to section 307, paragraph 1, subsection 6, the offence of bribery of a foreign public official requires that the bribe be given “in order to obtain or retain business or other improper advantage in the conduct of international business”. The requirements of the Convention have therefore been implemented.

According to section 307, paragraph 1, subsection 1, this requirement does not exist concerning bribery of a public official of another member state of the European Union or a public official of the European Union itself. It does likewise not exist with regard to the bribe of domestic public officials. With regard to these provisions, the Austrian law therefore goes beyond the requirements of the Convention.

#### **1.2 Complicity**

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

Pursuant to section 12 of the Penal Code, punishments under the Code shall be imposed not only on the perpetrator of the act but also on anyone who is an accessory to its commission or who instigates another person to commit the act. This would appear to include incitement, aiding and abetting, and authorisation of an act of foreign bribery. According to the Austrian authorities, even only moral support may suffice to establish responsibility.

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<sup>10</sup> Published in the Parliament protocols, GP XX RV 1230 AB 1359, p. 137

### **1.3 Attempt and Conspiracy**

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

#### ***Attempt***

Pursuant to section 15, paragraph 1, an attempt to commit an offence and complicity in an attempt are punishable like the committed offence. Pursuant to section 15, paragraph 2, an attempt has been committed once the offender has taken the decision to commit the act, or to induce somebody else to do it, and the offender materialises the decision by an action immediately preceding the committal of the offence. According to section 15, paragraph 3, the attempt is not punishable if accomplishment of the offence was not possible under any means because of lack of personal characteristics or relations required by the law on behalf of the acting person or with respect to the act or the object against which the offence is committed.

The applicable rules are the same for cases involving domestic or foreign public officials.

#### ***Conspiracy***

Conspiracy is not punishable under Austrian law.

## **2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS**

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official”.

### **2.1 Criminal Responsibility**

Austrian Criminal Law so far knows only a very limited criminal responsibility of legal persons, namely that proceeds of a crime can be confiscated directly from a legal person if it has been illegally enriched (section 20, paragraph 4, of the Penal Code)<sup>11</sup>.

The Austrian authorities point out that Austria is - aside from the present Convention - obliged to introduce criminal liability of legal persons according to the Second Protocol to the EU Convention on the Protection of the Financial Interests of the European Community by mid-2002. The Austrian authorities consider that they will then fully comply with the requirements of the Convention. The necessity of this further undertaking has been stressed in the explanatory report to law ratifying the present Convention.

The main features of the Second Protocol concerning the liability of legal persons are contained in Articles 3 and 4. Pursuant to Article 3, each Member State shall take the necessary measures to ensure that legal persons can be held liable for, inter alia, active corruption committed for their benefit by any person who has a leading position in the enterprise, acting either individually or as part of an organ of the legal person. According to Article 4, each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions.

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<sup>11</sup> See below under section 3.6.



## ARTICLE 3. SANCTIONS

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are “subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

### 3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Official

#### *Natural Persons*

Pursuant to section 307, paragraph 1, the offence of a bribe given, promised or offered by a natural person to a domestic or foreign public official is punishable by imprisonment for at most two years.

The Penal Code provides only prison sentences for bribery. Fines can be applied to offences of bribery only if certain conditions are met.

The Austrian authorities are of the opinion that - considered in the context and system of the Austrian Penal Code as a whole - this sanction is effective, proportionate and dissuasive. They point out that criminal penalties for the bribery of foreign public officials are the same as for the bribery of domestic public officials. They emphasise that the upper limit for deprivation of liberty for the bribery of public officials has been raised from one year to two years on the occasion of the Penal Code Amendment Act implementing the present Convention.

The maximum penalty for any offence against property (e.g. theft, fraud, etc.) is under normal circumstances deprivation of liberty for up to 6 months or a fine of up to 360 daily rates. In aggravated cases of offences against property, especially if the value of the property stolen, etc. is more than ATS 25.000, the penalty is deprivation of liberty for up to 3 years. If the value of the property stolen is more than ATS 500.000, the penalty is between 1 and 10 years deprivation of liberty.

The offence of aggravated bribery is unknown in Austrian law. The only possibilities to raise the maximum penalties are if the act of bribery is committed by a public official by abusing the possibilities created by his official function<sup>12</sup>, or if the offender has already twice been punished for criminal acts based on the same bad inclination. In these cases, the maximum penalty for bribery would be deprivation of liberty for up to 3 years.

Pursuant to section 32, paragraph 1, of the Penal Code the sanction is to be determined according to the guilt of the offender, taking into account aggravating and mitigating circumstances and the impact of the sanction and other consequences of the offence for the life of the offender in society.

Whether a sanction is entirely executed or not depends on the circumstances of the individual case. The Austrian authorities point out that the general rules of the Penal Code concerning completely or partially suspended sentences, conditional release and pardon apply to all offences, including bribery.

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<sup>12</sup> Section 313 of the Penal Code.

## *Legal Persons*

As explained above (see section 2), Austrian law currently only provides for the possibility to confiscate the proceeds of a crime from a legal persons<sup>13</sup>. The Austrian legislation therefore, by not providing for monetary sanctions, would appear to fall short of the requirements of the Convention.

### **3.3 Penalties and Mutual Legal Assistance**

#### *Treaty-Based Legal Assistance*

According to the Austrian authorities, bilateral or multilateral treaties on mutual legal assistance to which Austria is a party do not require higher sanctions than those existing under section 307 of the Penal Code.

Austria has concluded bilateral treaties on mutual legal assistance in criminal matters with Australia, Estonia, Latvia, Monaco, Slovenia, the former Yugoslavia, and the United States. Moreover, Austria is a partner to several pertinent multilateral treaties<sup>14</sup>.

#### *Non-Treaty-Based Legal Assistance*

The Austrian authorities may provide non-treaty-based legal assistance in accordance with the requirements of the Extradition and Mutual Legal Assistance Act.

Pursuant to section 2 of the Extradition and Mutual Legal Assistance Act, a foreign request to grant legal assistance may only be fulfilled if it does not violate the public order or other essential interests of the Republic of Austria. The provision intends to protect the fundamental principles of the Austrian law, including, for instance, the right of asylum and human dignity.

Pursuant to section 3, paragraph 1, of the Extradition and Mutual Legal Assistance Act, a foreign request to grant legal assistance may only be fulfilled if the requirement of reciprocity is met.

Section 51 of the Extradition and Mutual Legal Assistance Act lists a number of further cases where legal assistance is not permissible. According to section 51, paragraph 1, in connection with sections 14, 15, legal assistance is not allowed with regard to political, military or fiscal offences. Pursuant to section 51, paragraph 1, in connection with section 19, paragraph 1, legal assistance is likewise not permitted if penal proceedings, including enforcement of a judgement, in the requesting country are contrary to the European Convention on Human Rights.

### **3.4 Penalties and Extradition**

According to section 11, paragraph 1 of the Extradition and Mutual Legal Assistance Act, extradition is permitted for the prosecution of a deliberately committed offence, if it is punishable

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<sup>13</sup> See section 3.6.

<sup>14</sup> European Convention of 20 April 1959 on mutual assistance in criminal matters, Additional Protocol of 17 March 1978 to the European Convention on Mutual Assistance in Criminal Matters, Additional Protocol of 15 March 1978 to the European Convention on Information on Foreign Law, European Convention of 15 May 1972 on the Transfer of Criminal Proceedings, Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the Gradual Abolition of Checks at Common Borders, Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

- under the law of the requesting country with imprisonment of more than one year or with a precautionary measure of the same period, and

- under Austrian law with imprisonment of more than one year.

### **3.5 Non-criminal sanctions applicable to legal persons for bribery of foreign public officials**

According to the Austrian authorities, there are various forms of (indirect) administrative liability of legal persons. For instance, pursuant to section 58, paragraph 1, subsections 3 and 4 of the Federal Law on Public Procurement (“Bundesgesetz über die Vergabe von Aufträgen”), a legal person may be excluded from a public procurement procedure if there is the likelihood of a serious misbehaviour of an employee of this enterprise in the conduct of business. According to the Austrian authorities, a conviction or even criminal proceedings against the employee is not necessary.

According to the Austrian authorities, section 123 of the Federal Law on Public Procurement even allows to step back from a contract already awarded in a public tender procedure if the contract was obtained through a criminal act of a representative of the legal person<sup>15</sup>.

Section 13, paragraph 7, of the Business Law 1994 (Gewerbeordnung 1994) provides for the exclusion from the exercise of business if a person having significant influence on the legal person has been sentenced to deprivation of liberty - e.g. for the offence of bribery - for more than 3 months or a fine of more than 180 daily rates.

### **3.6 Seizure and Confiscation of the Bribe and its Proceeds**

Section 20 of the Austrian Penal Code contains general principles concerning confiscation of illegal gains. Accordingly, any person who committed a criminal offence and obtained an economic benefit from it, or received an economic benefit for or with a view to the commission of an offence, is liable to damages. The amount of damages has to be equivalent to the generated illegal gains. In addition, section 20, paragraph 4, provides for the possibility to confiscate from any person - including legal persons - who illegally profits from a criminal act of another person the value of these gains.

Pursuant to section 20a, paragraph 1, confiscation is not permitted if the enriched person

- has satisfied civil law claims in connection with the offence;
- has undertaken a contractual and enforceable commitment to satisfy such claims;
- has been sentenced or will be sentenced simultaneously to satisfy such claims;
- or if the gains are removed by other legal measures.

According to section 20a, paragraph 2, confiscation is also not permitted if

- the gains do not exceed 300 000 ATS and the confiscation is not necessary, for specific reasons, to prevent future criminal offences;
- the amount of money to be confiscated or the prospects to enforce the order are disproportionate to the expenditure of proceedings;
- it would unreasonably endanger the subsistence of the enriched person or would constitute an inappropriate hardship, especially because the gains do not exist anymore. Other disadvantageous consequences of a conviction have to be taken into account.

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<sup>15</sup> E.g. bribery of a public official involved in the public tender procedure.

### 3.8 Civil Penalties and Administrative Sanctions

There are no specific bribery-related additional sanctions. However, the general civil remedies and administrative sanctions applicable in other cases of criminal behaviour also apply in cases of bribery. In particular, section 13, paragraph 1, of the Business Law 1994 (“Gewerbeordnung 1994”) provides that a natural person may be excluded from the exercise of business if it has been sentenced by a court to punishment of deprivation of liberty of more than three months or to more than 180 day fines. Pursuant to section 13, paragraph 7, the same applies to legal persons if the convicted natural person had a significant influence in the conduct of business of the former.

## 4. ARTICLE 4. JURISDICTION

### 4.1 Territorial Jurisdiction

Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. Commentary 25 on the Convention clarifies that “an extensive physical connection to the bribery act” is not required.

Sections 62, 63 and 67, paragraph 2, of the Penal Code establish Austrian jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

Pursuant to section 62, the Austrian Penal Code applies to all offences committed in Austria. According to section 63, the Austrian Penal Code also applies to offences that have been committed on an Austrian vessel or aircraft, independent of its location.

According to section 67, paragraph 2, of the Austrian Penal Code, an offence is committed wherever the perpetrator has acted or where a result required by the definition of the criminal act ensued or should have ensued according to the intentions of the perpetrator. Therefore, it is not necessary that the whole offence or even a major part of it is committed in Austria to establish Austrian jurisdiction; even the smallest part of the offence would be sufficient<sup>16</sup>.

Furthermore, according to section 64, paragraph 8, Austrian law applies irrespectively of the criminal law of the foreign country where the following criminal acts have been committed: participation (section 12) in a criminal act, which the immediate offender committed in Austria, as well as Handling Stolen Goods (section 164) and Money laundering (sections 165, 278a, paragraph 2) in respect of a criminal act committed in Austria.

With regard to bribery of a foreign public official, this results in criminal prosecution according to section 307 of the Penal Code for anyone who incites, aids, abets or authorises *abroad* an act of bribery committed - even partially - in Austria. Money laundering of property deriving from bribery committed in Austria may be prosecuted according to section 165, even if the act of money laundering itself is committed abroad.

### 4.2 Nationality and other Extraterritorial Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be

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<sup>16</sup> For example, it would be sufficient if the money is sent from Austria to the foreign country or if instructions are given by phone from Austria, even if everything else happens in the foreign country.

necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirement of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

### ***Jurisdiction over Nationals***

Section 65, paragraph 1, subsection 1, of the Penal Code establishes Austrian jurisdiction to prosecute its nationals for offences committed abroad. The provision requires that the offence is also punishable in the country where it has been committed. According to the Austrian authorities, one can assume that the bribery of domestic public officials is a criminal offence in every country around the world. Therefore, in the Austrian view, the bribery of a foreign public official by an Austrian national establishes Austrian jurisdiction even if it is committed in the home country of the former person. If the offence has taken place in a third country (e.g. an Austrian national bribes a public official of country A in country B) it would be necessary that the bribery of a foreign public official is also punishable in this specific country (country B).

### ***Jurisdiction over Non-Nationals***

Pursuant to section 65, paragraph 1, subsection 2, Austrian jurisdiction also applies to offences committed abroad by a foreign offender, if he/she was arrested in Austria, and cannot be extradited to the foreign country. Once again, it is required that the offence is also punishable in the country where it has been committed.

## **4.3 Consultation Procedures**

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

The Austrian authorities confirm that Austrian law allows consultations with a view to determining the most appropriate jurisdiction and to decide on an eventual transfer of a case. The Extradition and Mutual Legal Assistance Act provides in section 60 for the transfer of a case to Austria, and in section 74 for the transfer of a case to a foreign state.

Pursuant to section 60 of the Extradition and Mutual Legal Assistance Act, the Federal Minister of Justice examines requests of a foreign state for a transfer of a case to Austria. If no reasons for prosecution in Austria exist, the request is refused; otherwise the case is handed over to the competent public prosecutor. The requesting state is informed about these steps and about the results of the proceedings.

According to section 74 of the Extradition and Mutual Legal Assistance Act, the Federal Minister of Justice may request a foreign state to initiate prosecution of a person for a criminal act subject to Austrian jurisdiction, if the foreign state seems to have jurisdiction. In addition, it is required that the perpetrator can not be extradited to Austria or a request for extradition is not made for other reasons, or prosecution in the foreign state of a person in Austria has advantages

- in respect to establishing the truth, to the expected penalties or to the execution of the penalty, and
- the perpetrator will be present for trial in the foreign state.

With regard to the possibility to refrain from a request for extradition “for other reasons” (see above), the Austrian authorities refer to section 68, paragraph 2, of the Extradition and Mutual Legal Assistance Act. Pursuant to this provision, the Federal Minister of Justice may refrain from obtaining extradition, if:

- an extradition cannot be expected;

- it is anticipated that only a fine or a small or conditionally suspended penalty of imprisonment would be imposed;
- the penalty of imprisonment to be enforced is small; or
- extradition would involve disadvantages or burdens for the Republic of Austria that are disproportionate to the public interest in criminal prosecution or enforcement.

Pursuant to section 74, paragraph 3, a request of a foreign state is not permissible if there is reason to believe that the person will be exposed to prosecution contrary to the Convention for the Protection of Human Rights, if the foreign state punishes the offence with the death penalty.

According to section 74, paragraph 4, proceedings in Austria are suspended after the transfer of a case to a foreign state. After the foreign verdict has become unappealable and has been executed, the proceedings in Austria are terminated.

#### **4.4 Review of Current Basis for Jurisdiction**

Article 4.4 requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps.

The Austrian authorities see no need for further improvement of the principles for jurisdiction over cases of bribery of foreign public officials. They point out that jurisdiction can be established on a broad territorial basis as well as on the nationality principle - the applicability of which they consider to be sufficiently broad as well.

### **5. ARTICLE 5. ENFORCEMENT**

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

#### **5.1 Rules and Principles regarding Investigations and Prosecutions**

Pursuant to section 34 of the Criminal Procedures Code, criminal procedures are characterised by a strict principle of legality. Accordingly, law enforcement authorities are obliged to investigate and prosecute offences like the bribery of foreign public officials ex officio whenever they get knowledge of a suspicion of such an offence.

There are several grounds for terminating prosecution:

- It turns out that the behaviour of which the suspect is accused does not constitute a criminal offence<sup>17</sup>;
- There is virtually no possibility to prove the offence during the proceedings<sup>18</sup>;
- The public prosecutor may terminate prosecutions if the offender has already been convicted for the same offence by a foreign court and an (additional) Austrian verdict is not necessary. The same applies

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<sup>17</sup> Section 90 of the Criminal Procedures Code.

<sup>18</sup> Section 90a of the Criminal Procedures Code.

if the proceedings against the offender have been terminated in the cause of a victim-offender mediation or have been suspended conditionally<sup>19</sup>.

- In case that the suspect is accused of several offences:
  - The public prosecutor may refrain from prosecution of one accusation if this is not of decisive impact on the penalties as a whole<sup>20</sup>;
  - If the suspect is accused of one offence in Austria and is going to be extradited to another country because of other accusations, the public prosecutor may step back, provided that the dropping of the Austrian case presumably does not influence the outcome of the proceedings for the remaining accusations decisively<sup>21</sup>.

According to section 90a of the Criminal Procedure Code, prosecution may also be terminated if punishment does not seem to be necessary to keep the suspected person from committing further crimes or to keep other persons from committing crimes. However, this provision may only be applied if, inter alia, the guilt of the perpetrator cannot be considered as “grave”<sup>22</sup>. The decision whether guilt is grave or not requires an overall assessment of the concrete case, including the seriousness and the duration of the committed offence, and the recklessness of the action.

The Austrian authorities confirm that guilt in the case of bribery of a foreign public official will usually be grave, especially if it is committed in the conduct of international business. According to section 32, paragraph 3, of the Penal Code, the sanction has to be the more severe the more premeditation or preparation the offender put into it. In view of the Austrian authorities, bribery in international business transaction is usually committed with a large amount of premeditation and preparation.

A recent amendment to the Austrian Criminal Procedures Code<sup>23</sup> will broaden the possibilities of the public prosecutor to terminate proceedings informally, for example, after successful victim-offender mediation or by directly imposing a fine on the suspect without going to court. The Austrian authorities consider that this amendment will have no impact on cases of bribery of foreign public officials.

## **5.2 Considerations such as National Economic Interest**

The Austrian authorities confirm that investigation and/or prosecution of the bribery of a foreign public official must not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal person involved.

## **6. ARTICLE 6. STATUTE OF LIMITATIONS**

Article 6 of the Convention requires that any statute of limitation with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

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<sup>19</sup> Section 34, paragraph 2, 3<sup>rd</sup> sentence, of the Criminal Procedures Code.

<sup>20</sup> Section 34, paragraph 2, subsection 1, of the Criminal Procedure Code.

<sup>21</sup> Section 34, paragraph 2, of the Criminal Procedures Code.

<sup>22</sup> This provision will enter into force on 1 January 2000.

<sup>23</sup> This amendment came into force on 1 January 2000.

According to section 57, paragraph 3, of the Penal Code, a briber can no longer be prosecuted if proceedings against him/her have not been initiated within five years after the commission of the offence. According to section 58, paragraph 2, if the suspect has committed another offence based on the same “bad inclination” during the limitation period, the earlier offence only comes under the statute of limitation if the limitation period has expired also for the latter offence. Pursuant to section 58, paragraph 3, subsection 2, periods during which criminal proceedings are pending do not count in this respect. This includes periods during which the procedure has been suspended according to section 412 of the Criminal Procedure Code due to the unknown whereabouts of the perpetrator.

According to section 71 of the Penal Code offences are based on the “same bad inclination” if they are directed against the same object of legal protection. E.g., bribery of a public official is directed against the same object of legal protection as instigating a public official to commit an abuse of official powers or as trafficking in influence.

## **7. ARTICLE 7. MONEY LAUNDERING**

Article 7 of the Convention requires that where a Party has made bribery of a domestic official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

According to section 165, paragraph 1, of the Penal Code, money laundering is punishable. The provision applies to any person who conceals property items that derive from a crime committed by another person, such a misdemeanor according to section 304 to 308 or a tax offense of smuggling or evasion of import or export taxes (insofar as these fall within the competence of the courts), or disguises the origin thereof, particularly by giving in legal relations false information regarding the origin or true nature of those property items, the ownership of or other rights to them, the right to dispose of them, or their transfer or their location.

Punishment is imprisonment for up to two years or at most 360 day fines. Pursuant to section 165, paragraph 3, punishment is imprisonment between six months and five years if the offence involves items worth more than 500 000 ATS, or if it is committed in a gang on a permanent basis.

Bribery of domestic or foreign public officials is therefore a predicate offence in Austria for the purpose of application of the Austrian money laundering legislation.

The Austrian authorities point out that in addition to section 165 of the Penal Code, administrative measures contained in the Austrian Banking Law may apply to money laundering. These administrative measures include, for example, the obligation for credit institutes to identify customers and to report suspicious transactions, and the possibility for the Ministry of the Interior to prohibit or suspend a suspicious transaction.

According to the Austrian authorities, it does not matter where the act of bribery occurred. Both the provisions of the Penal Code as well as those of the Banking Law are applicable to money laundering even if the predicate crime was committed abroad<sup>24</sup>.

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24 See, for example, the commentary of FOREGGER-FABRIZY on the Penal Code, 7th edition, comment 2 on section 165.



## **8. ARTICLE 8. ACCOUNTING**

Article 8 of the Convention requires that within the framework of its laws and regulations on the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

### **8.1 Accounting and Auditing Requirements**

According to section 189, paragraph 1, of the Austrian Code of Commercial Law, the merchant has to keep books and record in these books its business transactions and the situation of its property according to the principles of correct accounting. The books must be kept in such a way that a competent third party is able to get a picture of the business transactions and the situation of the enterprise within reasonable time. The business transactions must be recorded in a way that makes it possible to follow their origins and development.

According to Section 190 paragraph 2 of the Austrian Code of Commercial Law, all the entries in the books and other records must be complete, correct, up-to-date and orderly. The Austrian authorities confirm that these general provisions prohibit, inter alia, the making of false statements as described in Article 8 of the Convention.

Pursuant to section 268 of the Code of Commercial Law, the annual financial statement and the situation report of companies have to be examined by an auditor. According to section 273, paragraph 2, of the Code of Commercial Law, the auditor has to report immediately to the legal representatives and the members of the supervisory board if he/she establishes within his/her competence facts that endanger the existence of the examined enterprise. The same applies if he/she discovers facts that influence the development of the enterprise significantly, or show serious violations of legal obligations by the legal representatives.

### **8.2 Companies Subject to the Accounting and Auditing Requirements**

The general accounting provisions apply to all persons engaged in commercial activities ("Kaufleute"). This includes trading partnerships (Offene Handelsgesellschaften [OHG] - general partnerships, and Kommanditgesellschaften [KG] - limited partnerships), commercial co-operatives (Genossenschaften) and the EEIG (European Economic Interest Grouping). Certain companies - such as the AG (*Aktiengesellschaft*), stock corporations and the GmbH (*Gesellschaft mit beschränkter Haftung*), companies with limited liability - are regarded as "Kaufleute" independently from their actual commercial activity<sup>25</sup>. According to section 4, paragraph 1, of the Code of Commercial Law, only the so-called "Minderkaufmann" - a type of small trader [minor merchant] -, whose business does not require a commercial organisation, is exempt from these provisions.

Pursuant to section 268 of the Code of Commercial Law, an obligatory audit does not exist with regard to small private companies, unless they are required by law to establish a supervisory board. According to section 278 in connection with section 277 of the Code of Commercial Law, small private companies have to hand over the balance sheets and the annex.

According to section 221, paragraph 1 of the Code of Commercial Law, "small corporations" are those that do not exceed at least two of the three following criteria:

1. balance sheet total: 37 million shillings

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<sup>25</sup> Section 6 of the Code of Commercial Law.

2. turnover in the twelve months preceding to the closing date: 74 million shillings
3. annual average of employees: 50.

Pursuant to section 29 of the Federal Law on Private Companies, the latter may be required to establish a supervisory board if

1. the stated capital exceeds 70.000 Euro and the company has more than 50 shareholders, or
2. the average number of employees exceeds 300, or
3. the company centrally manages stock corporations, companies with limited liability with a mandatory supervisory board or companies with limited liability within the meaning of subsection 2 (1), or if it controls them by means of a direct interest exceeding 50 % and, in either case, the average number of employees of the controlling company and the controlled companies together amounts to more than 300, or
4. the company is a general partner of a limited partnership and the average number of employees in the company's and the partnership's business together exceeds 300.

### **8.3 Penalties**

False statements in the meaning of Article 8 of the Convention may lead to criminal proceedings. Criminal penalties exist with regard to "Gesellschaften mit beschränkter Haftung" (GmbH)<sup>26</sup>-companies with limited liability-, and "Aktiengesellschaften" (AG)<sup>27</sup>- stock corporations. The relevant provisions penalise as a court offence all incorrect or incomplete information, especially in annual financial statements, in the annexes thereto and in situation reports, and all incorrect or incomplete information given to the auditor.

Pursuant to section 122 of the Federal Law on Private Companies, the penalty is deprivation of liberty for up to two years or a fine of up to 360 daily rates for managing directors, members of the supervisory board, agents and liquidators of private companies. According to section 255 of the Federal Law on Stock Companies, the same penalty applies to members of the managing board, members of the supervisory board and liquidators of stock companies. In exceptional cases, these acts may also give ground for a claim to compensation according to the general principles of the Austrian law of torts.

Only intentional infringement can be penalized under section 122 of the Federal Law on Private Companies or section 255 of the Federal Law on Stock Companies. An employee may fall under the meaning of the term "agent" ("Beauftragter") in section 122 paragraph 1 of the Federal Law on Private Companies.

In addition, members of the management board, etc. may be punished if they knowingly authorize the transmission of incorrect statements drafted by a "normal" employee, for example when signing an annual financial statement containing incorrect or incomplete information.

Pursuant to section 51, paragraph 1c, of the Federal Law on Financial Criminal Law and Financial Criminal Procedure, cases of incorrect statements by employees not covered by criminal penalties may be punished with administrative fines of up to ATS 50.000 for violation of tax law obligations to keep records.

The Austrian authorities point out that sanctions can also be imposed on private foundations in accordance with section 41 of the Federal Law on Private Foundations. They declare that these sanctions are practically identical with those mentioned in section 122 of the Federal Law on Private Companies. Furthermore, the Austrian authorities refer to section 89 of the Law on Commercial Cooperatives that provides for prison sentences of up to 3 months or a fine of up to 180 daily rates for acts similar to those referred to in section 122 of the Federal Law on Private Companies.

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<sup>26</sup> Section 122 of the Federal Law on Private Companies

<sup>27</sup> Section 255 of the Federal Law on Stock Companies.

Smaller partnerships that are not legal persons (i.e. trading partnerships, [general partnerships - “Offene Handelsgesellschaften”, limited partnerships - “Kommanditgesellschaften”], “Europäische Wirtschaftliche Interessenvereinigungen” - European Economic Interest Groupings, and “Vereine” - clubs - the latter only if they engage in commercial activities exceeding those of a small trader) are not covered by specific criminal provisions. However, the Austrian authorities point out that according to section 51, paragraph 1 b of the Federal Law on Financial Criminal Law and Financial Criminal Procedure the responsible persons may be subject to administrative fines of up to ATS 50.000 for violation of tax law obligations to keep records

According to the Austrian authorities, the Austrian law on torts may apply if the infringement of the provisions of section 122 of the Federal Law on Private Companies and section 255 of the Federal Law on Stock Companies results in a financial loss of the company or of creditors of the company. Action could be brought against the managing directors or even the auditor as an accomplice. Only the company, not its creditors, are entitled to recover damages for financial loss.

## **9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE**

Article 9.1 of the Convention mandates that each Party co-operate with each other to the fullest extent possible in providing “prompt and effective legal assistance” with respect to the criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

### **9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance**

In respect to matters falling under the scope of the Convention, the Austrian authorities may provide mutual legal assistance in criminal matters on the basis of existing multilateral and bilateral treaties. In absence of a treaty, such assistance may be provided under the Austrian Extradition and Mutual Legal Assistance Act (ARHG) on the basis of reciprocity (see section 3.3 above).

According to the Austrian authorities, the respective instruments concerning mutual legal assistance in criminal matters do not cover police investigations not involving judicial control. These requests typically relate to international police co-operation and may be fulfilled only under the applicable conditions and prerequisites as laid down in the framework of INTERPOL, European Police co-operation agreements and bilateral police agreements.

#### **9.1.1/9.1.2 Criminal Matters/Dual Criminality**

Pursuant to section 51, paragraph 1, subsection 1, of the Extradition and Mutual Legal Assistance Act, dual criminality is required for the granting of mutual legal assistance. According to the Austrian authorities, the requirement of dual criminality has been restricted to cases of coercive measures in bilateral treaties between Austria and other European countries and in the treaty between Austria and the United States.

The Austrian authorities point out that between Parties to the Convention, the condition of dual criminality is always met because of the obligations contained in its Article 1.

### 9.1.2 Non-Criminal Matters

According to the Austrian authorities, mutual legal assistance can be granted in non-criminal proceedings or proceedings against legal persons, if a specific - even unidentified - person is a possible suspect. Non-criminal proceedings and proceedings exclusively against legal persons have not yet been introduced in the Austrian legislation. Proceedings concerning seizure and forfeiture are not deemed as "non-criminal" proceedings as long as a specific person is treated as a suspect in connection with the property in question.

The Austrian authorities point out that it is long-standing practice in Austria to provide mutual legal assistance in non-criminal proceedings on the basis of reciprocity even without explicit legal provisions. If this condition is fulfilled mutual legal assistance will also be provided in non-criminal proceedings concerning legal persons according to article 9 of the Convention.

Pursuant to the Austrian authorities, *seizure* is possible subject to the general provisions of the Extradition and Mutual Legal Assistance Act and the provisions of the Criminal Procedure Code. Accordingly, seizure in Austria is only permitted following a court order<sup>28</sup>.

In view of the Austria authorities, the execution of foreign *forfeiture* orders as an act of enforcement and recognition of a definitive court order might go far beyond the obligation to render mutual legal assistance. Nonetheless, section 64 of the Extradition and Mutual Legal Assistance Act provides for the execution of foreign court sentences that pronounce a prison sentence, a fine, a precautionary measure or a court order relating to property. The Austrian authorities point out that the expression "court orders relating to property" includes forfeiture orders. According to the Austrian authorities, the execution of these foreign sentences is possible if the foreign court decision is the result of a fair trial in the meaning of the European Convention of Human Rights. Further requirements are that the condition of double criminality is met, the decision does not concern a political, military or fiscal offence, the act is not yet subject to prescription according to Austrian law and the offender is or has not been not prosecuted or acquitted in Austria. In addition, execution requires that according to Austrian law similar measures could have been pronounced if the property forfeited had been in Austrian territory.

### 9.3 Bank Secrecy

The Austrian authorities confirm that they do not decline to render mutual legal assistance for criminal matters within the scope of the Convention on the ground of bank secrecy. The request for mutual legal assistance concerning the lifting of the bank secrecy has to include that criminal proceedings by a judicial authority or a criminal investigation under the conduct and control of a judicial authority have been instituted in the requesting State. In addition, a link needs to be established - or at least the suspicion of a connection -between the alleged offence and the requested bank information. The requesting authority does not necessarily have to specify the number of the bank account or the name of the account holder, if other information is available to fulfil the above-mentioned requirements and enable the competent authority in the requested country to execute the request.

Pursuant to the Austrian authorities, section 38, paragraph 1, of the Federal Law on Banks (Federal Law Gazette 1993/532, most recent amendment in Federal Law Gazette I 1999/123) lays down the basic principle of bank secrecy. Accordingly, credit institutes are obliged to ensure that confidential information to which they have access only because of their professional relationship to their client does not become public and is not used for other purposes. The Austrian authorities point out that pursuant to section 38, paragraph 2, subparagraph 1, this obligation does not exist in relation to criminal courts in connection with criminal proceedings and in relation to authorities competent to prosecute tax law violations in financial

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<sup>28</sup> Section 56, paragraph 2, of the Extradition and Mutual Legal Assistance Act.

criminal proceedings in relation to intentionally committed tax law violations - except minor tax law violations.

According to the Austrian authorities, section 38, paragraph 2, subsection 1, of the Federal Law on Banks is not limited to criminal proceedings where the trial takes place in Austria. It is generally understood that it is sufficient for the application of this exception from bank secrecy if an Austrian court is requesting information from a credit institute due to a request to render mutual legal assistance. Thus, the proceedings taking place at an Austrian court requested to render mutual legal assistance are meant to fall within the expression “criminal proceedings” of this provision. Case law supports this practice<sup>29</sup>. In view of the Austrian authorities, case law might even indicate that this exception has to be applied also if the request does not originate from a foreign court but from an authority that is functionally equivalent to an Austrian court in the legal system of the requesting state.

## **10. ARTICLE 10. EXTRADITION**

### **10.1/10.2/10.5 Extradition for Bribery of a Foreign Public Official/Dual Criminality**

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

The Austrian authorities confirm that bribery of a foreign public official is an extraditable offence under the extradition treaties to which Austria is a party.

In the absence of an extradition treaty, Austria can extradite a person pursuant to section 3, paragraph 1, of the Extradition and Mutual Legal Assistance Act, if the requirement of reciprocity is met. The Austrian authorities consider that this requirement is met with regard to the Convention, unless the requesting State refuses to grant reciprocity.

Section 11, paragraph 1, of the Extradition and Mutual Legal Assistance Act requires dual criminality for extradition to other States. Dual criminality is also required in all extradition treaties to which Austria is a party. The Austrian authorities consider the requirement of dual criminality fulfilled in respect of Parties to the Convention.

### **10.3 Extradition of Nationals**

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

Section 12, paragraph 1, of the Extradition and Mutual Legal Assistance Act, prohibits the extradition of Austrian nationals. This provision has constitutional character.

Pursuant to section 65, paragraph 1, subsection 1 of the Penal Code, Austria has, in principle, jurisdiction in cases where extradition is refused on the ground that the person sought is an Austrian citizen (see section 4.2 above).

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<sup>29</sup> E.g. Supreme Court decisions of December 16, 1993, 15 Os 167/93 and of April 19, 1995, 13 Os 34/1995.

According to the Austrian authorities, the Austrian Court of Appeals decides whether or not the extradition is permissible. Pursuant to section 34, paragraph 1, of the Extradition and Mutual Legal Assistance Act, the decision is binding for the Minister of Justice in cases where the Court of Appeals declares the extradition impermissible.

The Court has to inform the public prosecutor about the outcome of the extradition proceedings. In case that extradition is denied, the public prosecutor has therefore the opportunity to initiate domestic proceedings in respect of the accusations contained in the extradition request. Under the principle of legality, the prosecutor is obliged to initiate such proceedings.

## **11. ARTICLE 11. RESPONSIBLE AUTHORITIES**

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

On 20 May 1999 Austria notified the OECD Secretary-General that the responsible authority is the Ministry of Justice.

## **B. IMPLEMENTATION OF THE REVISED RECOMMENDATION**

### **3. TAX DEDUCTIBILITY**

Section 20, paragraph 1, subsection 5, of the Income Tax Law 1988<sup>30</sup>, as amended by Federal Law Gazette I 1999/28, contains a list of non-deductible expenses. This list includes in subparagraph 5 “monetary and other gifts, when giving or receiving them constitutes a criminal offence”.

The Austrian authorities point out that neither the Income Tax Law 1988 nor the Corporate Tax Law 1988 requires conviction as a prerequisite for denying tax deductability. Furthermore, they refer to section 116 of the Federal Law on Tax Matters (“Bundesabgabenordnung”). According to the Austrian authorities, this provision empowers tax authorities to decide on questions falling normally into the competence of other administrative authorities or the courts if a decision on this question is necessary as a prerequisite for a decision in a taxation matter. In view of the Austrian authorities, this means that the tax authorities have to decide on their own whether the giving or receiving of a gift constitutes an offence - as long as no decision by the competent court is available.

Section 12, paragraph 1, subsection 5, of the Corporate Tax Law 1988<sup>31</sup> refers in its list of non-deductible expenses to “monetary and other gifts as referred to in section 20, paragraph 1, subsection 5 of the Income Tax Law 1988”. Thus, bribes given to domestic or foreign public officials are not tax-deductible. Deducting bribes given to public officials in a tax declaration - whether done openly or by disguising the bribe as some other form of expense - could constitute the offence of tax evasion pursuant to section 33 of the Financial Criminal Law, or the offence of negligent tax evasion pursuant to section 34 of the Financial Criminal Law.

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<sup>30</sup> The law applies to the income of natural persons.

<sup>31</sup> The law applies to the income of legal persons.

According to the Austrian authorities, the Corporate Tax Law 1988 provides that only „corporate bodies“ are liable to corporate income tax. According to section 1, paragraph 2, „corporate bodies“ are:

1. legal persons under civil law,
2. commercial enterprises carried on by public law bodies,
3. associations of persons, not constituting legal entities, establishments, foundations and other property dedicated to specific purposes.

The Austrian authorities point out that income and expenses of enterprises *not* covered by this definition are attributed directly to the shareholders or partners who are subject to the rules of the Income Tax Law 1988, including the provision on non-deductability as contained in section 20, paragraph 1, subsection 5.

According to section 33, paragraph 5 of the Tax Penal Code, tax evasion is punishable with a fine of up to twice the value of the taxes evaded. In addition to a fine, imprisonment of up to two years may be ordered. According to section 34, paragraph 5 of the Tax Penal Code, negligent tax evasion is punishable with a fine of the value of the taxes evaded.

## EVALUATION OF AUSTRIA

### General Remarks

The Working Group complimented the Austrian authorities for their speedy and thorough implementation of the Convention into Austrian legislation. Delegates thanked the Austrian authorities for their co-operation in the evaluation process, including their complete and speedy replies to questions that had been raised.

The Working Group considered in light of the available documentation and explanations provided by the Austrian authorities that the Austrian legislation - with one important exception - conforms to the standards of the Convention. This exception relates to the fact that currently there is only a very limited criminal responsibility of legal persons. The Working Group urged the Austrian authorities to take remedial action as soon as possible.

### Specific Issues

#### 1. Definition of “foreign public officials”

##### 1.1. Coverage of appointed and elected officials

Article 1, paragraph 4a, of the Convention defines a “foreign public official” as “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected”. The definition in section 74, paragraph 4c, of the Austrian Penal Code does not include this qualification.

The Austrian authorities confirmed that the expression “public official” has always been understood in Austria in a wide sense. In particular, they pointed out that the definition in section 74, paragraph 4c, covers any person holding a legislative, administrative or judicial office or performing public functions.

##### 1.2. Public officials of other EU member states

Section 74, paragraph 4a, of the Austrian Penal Code defines a “public official of another member state of the European Union” as anybody who is a public official according to the penal law of another member state, and who would fall under the corresponding definition of an Austrian public official. Section 74, paragraph 4a, of the Penal Code leaves it therefore open whether *any* person holding a legislative, administrative or judicial office in another EU Member state would be covered. Furthermore, the question has been raised how the definitions of a “public official of another EU member state” and an “official of the European Communities” (section 74, paragraphs 4a,b) relates to the general definition of a “foreign public official” (section 74, paragraph 4c). In this context, concern has been expressed that the various definitions might result in “discriminatory punishments”.

The Austrian authorities considered it unnecessary that the type of officials mentioned in the previous paragraph fall under the definition of a “public official of another member state of the European Union” in section 74, paragraph 4a. According to the Austrian authorities, public officials of other EU member states not covered by the definition in section 74, paragraph 4a, but falling under the definition of the Convention, would be covered by the autonomous definition in section 74, paragraph 4c. As far as section 74, paragraph 4, contains several categories of public officials, the Austrian authorities pointed out that this reflects the existence of various definitions at the international level, including EU legislation and the Convention.



The Working Group remained concerned about a possible lack of clarity in respect of the various definitions, in particular with regard to the coverage of members of the European Parliament. It stressed the importance of an unambiguous definition of a “foreign public official”.

## **2. Responsibility of legal persons**

Austrian Criminal Law so far knows only very limited criminal sanctions against legal persons, namely that proceeds of a crime can be confiscated directly from a legal person if it has been illegally enriched. Furthermore, administrative sanctions can be ordered, like the exclusion of natural persons engaged in bribery from the exercise of business. However, there is no possibility to impose fines on legal persons. The Working Group considered that this situation falls short of the requirement of the Convention that parties at least establish effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for the offence of bribery of foreign public officials (Articles 2, 3.3).

The Austrian authorities emphasised that they intend to introduce by mid-2002 criminal liability of legal persons according to the Second Protocol to the EU Convention on the Protection of the Financial Interests of the European Community. They are of the opinion that they will then fully comply with the requirements of the Convention.

The Working Group urged the Austrian authorities to implement Articles 2, 3 of the OECD Convention as soon as possible.

## **3. Sanctions**

Pursuant to section 307, paragraph 1, the offence of bribery of a foreign public official is punishable by imprisonment for at most two years. Concerns have been expressed whether this complies with the requirement of the Convention according to which sanctions have to be effective, proportionate and dissuasive.

The Austrian authorities are of the opinion that - considered in the context and system of the Austrian Penal Code as a whole - this sanction is in accordance with the Convention. They stressed that the upper limit for deprivation of liberty for the bribery of public officials has already been raised from one year to two years on the occasion of implementing the Convention. They also referred to the fact that the maximum penalty for any offence against property (e.g. theft, fraud, etc.) is under normal circumstances deprivation of liberty for up to 6 months or a fine of up to 360 daily rates. In aggravated cases of offences against property, deprivation of liberty may be up to ten years. However, the latter sanction does not exist with regard to bribery.

The Working Group invited the Austrian authorities to consider reviewing the effectiveness of penalties provided for in section 307 of the Penal Code concerning cases of aggravated bribery.

## **4. Small facilitation payments**

The issue has been raised how the Austrian Penal Code deals with small facilitation payments. The Austrian authorities confirmed that as far as bribery of foreign public officials is concerned, such payments are always considered as an “advantage” in the meaning of paragraph 7 of the Commentaries.