PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN AUSTRIA

December 2012

This Phase 3 Report on Austria by the OECD Working Group on Bribery evaluates and makes recommendations on Austria's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 14 December 2012.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Phase 3 Report on Austria by the OECD Working Group on Bribery evaluates and makes recommendations on Austria's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and related instruments. The Report focuses on developments since Austria's Phase 2 Review in February 2006, and takes into account Austria's Phase 2 Written Follow-Up Report in March 2008, and Phase 1*bis* Review on legislative amendments in October 2010. It also addresses cross-cutting horizontal issues that are routinely covered in each country's Phase 3 review.

The Working Group regrets that there has not been a conviction of foreign bribery since Austria ratified the Anti-Bribery Convention in 1999, despite a number of allegations that have come to light. The Group therefore welcomes that one case involving five indictments is currently being tried; a second case has resulted in indictments, including against a legal persons; a third is expected to result in an indictment at the beginning of 2013; and four other cases are currently under investigation. In addition, Austria has amended its foreign bribery offences in the Penal Code, in part to address certain recommendations by the Working Group in Phase 2. However, since these amendments do not take effect until January 2012, the Working Group could not assess their impact in practice on foreign bribery enforcement in Austria.

The Working Group makes a number of recommendations regarding Austria's framework for liability of companies and other entities that bribe foreign public officials. The framework is still not widely known or fully understood by prosecutors, and the relevant legislation – Federal Statute on Responsibility of Entities for Criminal Offences (VbVG) -- contains certain unclear concepts. The Working Group recommends that Austria increase the maximum EUR 1.3 million fine for companies convicted of foreign bribery to a level more commensurate with the nature and size of many Austrian companies, and because the maximum EUR 1.8 million fine for natural persons is substantially higher. Moreover, the application of Austria's foreign bribery offences to companies and natural persons that use foreign intermediaries to bribe on their behalf abroad is an area that needs to be followed-up.

The Working Group identifies the need for improved access to bank information in order to make foreign bribery investigations more effective. Although bank secrecy has largely been reduced in Austria, in practice the routine use of remedial actions by financial institutions in response to court orders to provide access to bank records could impede foreign bribery investigations. Austria is recommended to ensure that investigations and prosecutions are not influenced by considerations prohibited by Article 5 of the Convention, including the national economic interest. The Working Group also finds that the Austrian authorities are not making effective use of tax information for detecting and reporting suspicions of foreign bribery, and recommends that Austria urgently take steps to significantly increase the awareness of the law enforcement authorities of the value of tax information in foreign bribery investigations.

The Working Group commends Austria for progress in a number of areas. In addition to the amendments to improve the foreign bribery offences, including by broadening the definition of a "foreign public official", Austria also made it easier to establish jurisdiction over Austrian companies and individuals that bribe foreign public officials abroad, by eliminating the legal requirement of "dual criminality". Moreover, sanctions for individuals were increased to a maximum of EUR 1.8 million, and significant steps have been taken to strengthen the institutional framework for investigating and

prosecuting foreign bribery cases. For instance the Public Prosecutors Office for Combating Economic Crimes and Corruption (WKStA) was established in 2011, the Federal Bureau of Anti-Corruption (BAK) in 2010, Police Headquarters was re-organised in 2012 to include a separate department for economic and financial crime, and the Coordinating Body on Combating Corruption was established in 2010.

The Report and the Recommendations, which reflect the findings of the lead examiners from Germany and Greece, are adopted by the OECD Working Group on Bribery on 14 December 2012. In view of the recent significant increase in law enforcement actions, and the new amendments to the foreign bribery offences, the Working Group invites Austria to report in writing one year after adoption of this Report on progress prosecuting foreign bribery cases, including cases of bribery through intermediaries, cases of bribery by companies and other entities, the confiscation of the proceeds of bribery, and the use of remedial actions by financial institutions in response to court orders to provide access to bank records. At the same time, in accordance with the normal procedure, Austria will provide an oral report on implementation of recommendations 1 c), 4 e) i), and 8 b). In accordance with the normal procedure, a further written report on progress implementing the recommendations will be given within 2 years. This report is based on the laws, regulations and other materials submitted by Austria and information obtained by the lead examiners during their three-day on-site visit to Vienna from 3 to 5 July 2012, during which the examiners met with representatives from Austria's public administration, private sector and civil society.

A. INTRODUCTION

1. The on-site visit

1. On 3 to 5 July 2012, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (WGB) visited Vienna as part of the Phase 3 evaluation of Austria's implementation of the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and related anti-bribery instruments. The 39 States that make up the WGB were represented at the on-site visit by lead examiners from Germany and Greece. The lead examiners were supported by members of the OECD Secretariat.[1]

2. The purpose of the on-site visit was to meet with the main stakeholders in Austria's efforts to combat the bribery of foreign public officials in international business transactions. The visit focused on practical steps taken by Austria to implement and enforce the Anti-Bribery Convention, as well as the 2009 Recommendation for further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation), and the 2009 Recommendation of the Council on Tax Measures for further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

3. Prior to, during and following the on-site visit, the Austrian authorities provided responses to significant requests for information from the evaluation team, including jurisprudence, legislation, statistics, and questions about enforcement practices. Prior to the on-site visit, Austria responded to the standard questionnaire and a supplementary questionnaire with country-specific questions, which together comprise the Phase 3 Questionnaire. The responses to the Phase 3 Questionnaire helped the evaluation team focus on the most important issues regarding implementation and enforcement during the visit.

4. The evaluation team held several meetings with various stakeholders during the three-day visit, including key government ministries and agencies, law enforcement authorities, the private sector and civil society.[2] The on-site visit was very well organised, and the evaluation team was able to meet with the right people in each session. The discussions were very open, and the Austrian authorities were frank about challenges they face in enforcing their foreign bribery offences. Meetings with non-governmental stakeholders were also very fruitful, and there was notable representation by the private sector, and civil society, which included two media representatives.

2. Summary of monitoring steps leading to Phase 3

5. Austria has already undergone a number of monitoring steps leading up to Phase 3 according to the regular monitoring procedure that applies to all Parties to the Anti-Bribery Convention as follows: 1) Phase 1 (December 1999); 2) Phase 2 (February 2006); 3) Phase 2 Written Follow-up Report (March 2008); and 4) Phase 1*bis* (October 2010). The Phase 1*bis* review considered the impact of 2009 legislative amendments to Austria's implementation of the Anti-Bribery Convention. Issues relating to this review are raised where relevant in this Report.

[1] Germany was represented by Mr. Markus Busch, Head of Division, Federal Ministry of Justice; and Mr. Richard Findl, Head of Section, Public Prosecutors Office Munich I. Greece was represented by Mr. Efstathios Tsirmpas, Special Investigator, Ministry of Finance, Financial and Economic Crime Unit. The OECD Secretariat was represented by Ms. Christine Uriarte, Senior Legal Analyst and Counsel, Anti-Corruption Division; and Ms. Melanie Reed, Legal Analyst.

[2] See Annex 4 for a list of participants.

3. Outline of the Report

6. This Report is divided into three parts. Part A provides the introductory sections; Part B examines Austria's efforts to implement and enforce the Anti-Bribery Convention and 2009 Anti-Bribery Recommendation, and 2009 Tax Recommendation; and Part C presents the WGB's recommendations and issues for follow-up. Part B, which comprises the bulk of the analysis in this Report, focuses on three kinds of issues: 1) Austria's efforts to enforce its foreign bribery offences; 2) efforts to address remaining weaknesses identified in previous evaluations of Austria; and 3) new issues, including those arising from amendments to the current legislative framework.

4. Austria's economic background

7. Austria's gross domestic product (GDP) is ranked twenty-second among the 40 members of the Working Group, but its per capita GDP is ranked ninth among these 40 countries – and twelfth in the entire world.[3] Austria's strong economy is bolstered by a highly educated work force, a favourable regulatory environment for businesses and a strategic geographic location between Western Europe and Central, Eastern and South Eastern Europe (CESEE). Austria suffered less than some of its counterparts as a result of the 2008 international financial crisis – although the country's GDP fell 3.9% in 2009, it grew in 2010 and 2011 (2% and 3%, respectively).

8. Since Austria is a relatively small country, Austrian companies must seek markets abroad in order to survive. Austria operates with a small trade surplus: exports are 53.5% (2010) and 56.0% (2011) of Austria's GDP, while imports are 49.8% (2010) and 53.9% (2011) of GDP. The primary commodities exported are machinery and equipment, motor vehicles and parts, paper and paperboard, metal goods, chemicals, iron and steel, textiles and foodstuffs. Although the primary destinations of exports are other European countries, particularly Germany (which receives 32.1% of Austria's exports), the importance of China, Turkey and Brazil as trading partners has grown significantly since Phase 2. For example, China is now ranked twelfth in terms of share of Austrian exports. Austria is ranked nineteenth among Working Group countries in terms of its outward foreign direct investment (FDI) stocks and thirteenth in terms of its outflows. According to Austria, its FDI stocks are regional rather than global in nature, as they are focused on nearby European countries.

9. Small and medium sized enterprises (SMEs) in Austria, which comprise 99.6% of Austrian companies,[4] have a large role in foreign markets, as do a number of companies that are wholly or partly owned by the Austrian government, operate in quasi-governmental service sectors (such as energy and telecom), and engage in significant amounts of international business. The gaming industry in Austria also has strong international ties, and foreigners account for 70% of the bets in Austria. Austria has become a gateway for business in nearby CESEE countries. For example, Austria is the largest single foreign investor in Slovenia, Croatia, Bosnia-Herzegovina and Serbia, and it ranks second in Romania, Bulgaria and the Slovak Republic.[5] In response to the Phase 3 Questionnaire, Austria reported that about 50% (2010) and 43% (2011) of Austria's outward foreign direct investment (FDI) flows and 20.9% (2010) and

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3 Except where otherwise indicated, economic and trade statistics in this section come from the following sources: UNCTADstat (the UN Conference on Trade and Development statistics portal), at http://unctadstat.unctad.org; the US Central Intelligence Agency World Factbook, at https://www.cia.gov/library/publications/the-world-factbook/index.html; OECD Economic Survey: Austria (July 2011); OECD International Direct Investment Database (data from 2010).

4 ABA, Austria: Bringing a Fresh Wind to Companies, at 7 (December 2011), at http://investinaustria.at/uploads/ABA_Business_Location_Austria_2012_10708_EN.pdf.

5 *Id*. at 16.

21.0% (2011) of Austria's exports go to Central and Eastern European countries. All of Austria's top six banks have significant operations throughout CESEE.

10. Austria is also a favourable place for investment *from* other countries, and approximately 1000 international companies coordinate operations in CESEE from Austria.[6] Investment in Austria is bolstered by a tax system that is favourable to corporations as well as the country's role as a financial centre for CESEE. Because of Austria's role as a "financial centre", in 2009 the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) placed the country on its "grey list" of jurisdictions that had committed to the internationally agreed tax standard but had not yet substantially implemented it.[7] However, Austria was removed from this list just a few months later, in September 2009, when it signed its twelfth bilateral tax agreement.[8]

5. Cases involving bribery of foreign public officials[9]

(a) Allegations of foreign bribery

11. During the on-site visit, Austria discussed 14 allegations of foreign bribery that have come to light since Austria ratified the Anti-Bribery Convention on 20 May 1999, [10] and involving a large number of sectors of the Austrian economy. The lead examiners were informed about one more allegation following the on-site visit. Although one of the investigations has led to indictments, there has not been a conviction of the bribery of foreign public officials in Austria to date, and no investigation of such a case has yet proceeded to trial. Out of the 15 allegations that were discussed, the situation regarding these cases was as follows in early December 2012, just before the evaluation by the WGB:

- 6 allegations had either not led to investigations, or the investigations had been terminated, suspended or dismissed;
- 1 case involving five indictments was under prosecution, and was before the court;
- 1 case had resulted in indictments, and a trial date had not yet been decided. In this case a legal person had also been indicted;
- 1 investigation was completed, and an indictment was expected at the beginning of 2013;
- 4 cases were under investigation;
- 1 case was being treated as the offence of abuse of duties of an Austrian official, and the relevant authorities had proposed to dismiss the investigation; and
- 1 case was being treated as embezzlement, and the investigation was being finalised.

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6 *Id.*

7 See: *A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard* (2 Apr. 2009), at http://www.oecd.org/dataoecd/38/14/42497950.pdf.

8 See "OECD removes Austria from tax haven 'grey list'", Reuters.com (23 Sept. 2009), at http://in.reuters.com/article/2009/09/23/austria-oecd-idINLN59687420090923.

9 Case-related information in this section has been anonymised as the cases are ongoing and therefore protected by confidentiality rules.

10 Austria's legislation for implementing the Anti-Bribery Convention came into force on 1 October 1998.

12. These cases are discussed in more detail below, and are also discussed where relevant throughout this Report. For reasons of confidentiality, only non-identifying information is provided about these cases.

(b) Investigations that have been terminated, suspended or not opened[11]

13. The following cases involving allegations of the bribery of foreign public officials, which were discussed at the on-site visit, are not the subject of ongoing investigations:

- *Case #1:* An allegation of foreign bribery by an Austrian company and at least one Austrian national in the gaming sector, which took place in another Party to the Anti-Bribery Convention, was discontinued before 2008. The case led to a prosecution and conviction of the bribe receiver in the other Party to the Convention.

- *Case #2:* An allegation of foreign bribery in the construction sector by an Austrian company and an Austrian member of the company's supervisory board, which took place in another Party to the Anti-Bribery Convention, did not lead to an investigation.

- *Case #3:* An investigation of an allegation in the health sector of foreign bribery involving an Austrian company and an Austrian national was suspended. The bribery payments allegedly took place beginning in 2002. Following the on-site visit, the Austrian authorities confirmed that the public prosecutor in Austria dismissed this case after its dismissal in another jurisdiction following an out-of-court settlement.

- *Case #4:* An investigation of foreign bribery in the property development sector allegedly involves an Austrian national. The case allegedly took place in 2007, and involved suspects from other Parties to the Anti-Bribery Convention.

- *Case #13:* An investigation of bribery in the construction sector was reported as ongoing at the time of the on-site visit. The bribery allegedly took place in another Party to the Convention in 2005, and involves an Austrian company, the Austrian director of the company, and two other Austrian nationals. The case has been the subject of an investigation in the foreign public official's country. Just before the evaluation by the WGB, Austria corrected its original report, stating that an investigation in this case had never been opened.

(c) Ongoing investigations

14. The following allegations are the subject of ongoing investigations, which were discussed at the on-site visit, five of which were expected to be completed soon at the time of the on-site visit:

- *Case #5:* An investigation of foreign bribery in the communications sector, involving an Austrian company and its managing director, is still pending in Austria. The allegations occurred in 2008, and an investigation is also ongoing in the country of the foreign public official who allegedly received the bribe.

- *Case #6:* An investigation of foreign bribery in the financial sector, involving an Austrian financial institution and Austrian individuals, is ongoing, and at the time of the on-site visit, it was expected to be completed before the end of 2012. The case allegedly involves bribery in 2007. Just prior to

[11] The order of the cases is not completely chronological, due to a change in status shortly before the evaluation in the Working Group.

the evaluation by the WGB, the Austrian authorities reported that certain managers and a legal person were very recently indicted, and the investigation continues regarding other facts.

- *Case #7:* An investigation of foreign bribery in the telecommunications sector, involving an Austrian national, is ongoing. The allegations concern bribery that allegedly began in 2004 and took place in several countries. The case has also been the subject of a Parliamentary Investigation Commission Inquiry in Austria. MLA has been requested and obtained by Austria. The case has been reported to the Minister of Justice. At the time of the on-site visit, the Austrian authorities believed that there was enough information to indict in the near future. Just before the evaluation by the WGB, this investigation was still ongoing.

- *Case #8:* An investigation of foreign bribery in the transportation sector, involving an Austrian company, and senior representatives of the company, is ongoing. The case involves bribery alleged to have taken place in another Party to the Anti-Bribery Convention in 2007 and 2008. Just before the evaluation in the WGB, the Austrian authorities informed that this case has actually been investigated as a case of embezzlement, and the legal person is being treated as a victim of the embezzlement. The prosecution authorities were finalising the investigation at the time of the evaluation by the WGB.

- *Case #9:* This investigation is related to the investigation in Case #1, which has been discontinued, and also involves the gaming sector. The case involves bribery of foreign public officials that allegedly took place in 2002 in another Party to the Anti-Bribery Convention. This case does not appear to have been closed, but the investigation does not appear active.

- *Case #10:* An investigation in the defence sector involving allegations of foreign bribery by an Austrian company and several Austrian nationals is ongoing. The case, which allegedly took place in another Party to the Anti-Bribery Convention, concerns bribes that were paid in 2007. The Austrian authorities expect to complete the investigation by the end of 2012. Following the on-site visit, the Austrian authorities stated that 5 people were indicted in this case, including the main defendant, who was charged with committing the bribery of a foreign public official in contravention of section 307(1) of the PC. Just prior to the evaluation by the WGB, the Austrian authorities reported that the main trial in this case was ongoing. Although the trial in this case is public, the relevant documents, including the indictments, are not publicly available.

- *Case #11:* An investigation of an Austrian company in the automotive sector is ongoing. The case has been under investigation in the foreign public official's country since 2006. The case was closed by Austria due to a lack of sufficient evidence, but was reopened in 2012 due to new evidence.

- *Case #12:* An investigation in the telecoms sector is ongoing, and involves bribery in several countries, including one that is a Party to the Anti-Bribery Convention. The bribery allegedly occurred between 2001 and 2007. An Austrian company and Austrian individual have been implicated in this case. The Parliamentary Investigation Committee was investigating political aspects of the case at the time of the on-site visit, and was scheduled to complete its investigation soon after.

- *Case #14:* At the time of the on-site visit, an investigation of bribery in the defence sector was ongoing and involved allegations of bribery between 2002 and 2010. The case allegedly occurred in another Party to the Anti-Bribery Convention. The Austrian authorities explained just before the evaluation that for the moment this case was not being treated as a foreign bribery cases, but as a case of an abuse of duties by an Austrian official.

- *Case #15:* Following the on-site visit, the Austrian authorities informed that an indictment had not yet been issued in a case involving suspicions of bribing high-level foreign public officials in relation to a public procurement contract in a financial sector support industry. Just before the evaluation by the WGB, the Austrian authorities informed that an indictment is soon expected. The prosecution authorities were finalising the investigation and report to be made to the Senior Prosecution Service and the Minister of Justice.

6. Amendments to the foreign bribery offence

15. Following Phase 1*bis*, on 16 May 2012, a draft bill amending the anti-corruption provisions of the Austrian Penal Code (PC) was presented to Austria's Parliament. According to the Austrian authorities, the bill was intended to address recommendations raised in connection with the OECD Working Group on Bribery's evaluations as well evaluations by the Group of States against Corruption (GRECO). The bill also was meant to reintroduce the crime of "*Anfüttern*" -- an offence for offering, promising or granting an advantage that is not related to a specific official act (such as granting a series of small favours to "sweeten" a relationship with a public official).[12] The bill was passed by Parliament in June 2012 – the week before the on-site visit – and published in the Federal Law Gazette on 24 July 2012.[13] The new law goes into effect on 1 January 2013. During the on-site visit, the evaluation team discussed the new law in significant depth with panellists from the public and private sectors.

16. The new law (hereinafter referred to as the '2012 Amendments') addresses a number of concerns that arose in prior Working Group evaluations and is expected to significantly change the legal landscape for prosecuting cases of foreign bribery. Changes to the substance of the offence are discussed in part B.1 below. Public awareness of and knowledge about the 2012 Amendments is discussed in part B.10 below.

7. Next steps

17. The lead examiners have significant concerns that not a single case of foreign bribery has proceeded to trial in Austria since the Anti-Bribery Convention was ratified by Austria in May 1999, especially in view of the international scope and sectors of business of Austrian companies, and the number of allegations that have come to their attention. However, the lead examiners believe that it is a very positive sign that 10 cases are the subject of ongoing investigations, and at least 4 of these investigations are expected to be completed by the end of 2012, and one case is scheduled to go to trial. They also believe that the 2012 Amendments could have an important impact on foreign bribery enforcement in Austria, but since they will not come into force until January 2013, it is too early to assess their full impact.

Commentary

In view of the recent significant increase in law enforcement actions, and the new amendments to the foreign bribery offences, the Lead Examiners recommend that Austria report in writing one year after adoption of this Report on progress prosecuting foreign bribery cases.

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12 See discussion of section 307b PC in section B.1.c below.

13 The law may be accessed on the website of the Federal Chancellery: http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=BgblAuth&Dokumentnummer=BGBLA_2012_I_61

B. IMPLEMENTATION AND APPLICATION BY AUSTRIA OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

1. Foreign bribery offence

(a) Legislative changes to the foreign bribery offence

18. The general offence of foreign bribery in section 307 PC has not changed since Phase 1*bis*, in spite of the 2012 Amendments. However, the 2012 Amendments alter the related bribery offences contained in sections 307a and 307b PC. In addition, the Amendments revise the definition of a public official. The changes to the law are discussed in more detail in the following subsections.

(b) Acts of foreign public official "in relation to the performance of official duties"

19. Section 307 PC establishes an offence when an advantage is offered, promised or given so that a public official will perform or refrain from performing "an official act in violation of his duties". During Phase 2, the Working Group decided to follow up on the application of the foreign bribery offence, and similarly, in Phase 1*bis*, the WGB again raised concerns that the Anti-Bribery Convention requires that the offence prohibit offering, promising or giving an advantage "in order that the official act or refrain from acting in relation to the performance of official duties", but does not require that the act performed be in violation of the official's duties.

20. In its response to the Phase 3 Questionnaire, Austria explained that a public official acts in violation of his or her duties either if: 1) he or she takes an official act contrary to the concrete legal base, decrees, binding instructions or guidelines from his or her superior authorities; or 2) he or she fails to act impartially when exercising discretionary decision-making power.[14] Thus, anytime a public official acts based on an advantage offered, promised or received, the official is arguably failing to act impartially. If section 307 PC is interpreted in this way in practice, the offence may be as broad as the offence set forth under the Anti-Bribery Convention. However, since Austria has not prosecuted any foreign bribery offences under section 307 to date, the application of this law remains to be seen.

(c) Recent changes to related bribery offences

Section 307a

21. The 2012 Amendments changed two related bribery provisions that also apply to bribery of a foreign public official under certain circumstances. First, section 307a, as amended, sets forth an offence for offering, promising or granting "an undue advantage ... to a public official or an arbitrator for him/her or for a third person for performing or refraining from performing an official act in accordance with his/her duties". Section 307a would appear to be a "catch-all" offence for cases where the foreign public official does not act contrary to his/her duties or legal obligations. However, the decision in practice on whether to apply the offence under section 307 or 307a in a particular case is important because sanctions under section 307a are less severe than sanctions under section 307. In addition, diversion (discussed below in part B.3.b) is available under 307a PC, whereas it is only available under section 307 PC for offences involving advantages of EUR 50 000 or less.

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[14] Austria cited two sources in support of this assertion: Supreme Court Decision 29.6.1988, 14 Os141/87) and Commentary on Corruption and Misuse of Power (Korruption und Amtsmissbrauch, Marek/Jerabek, III. A. Rz 34)).

22. During the on-site visit, public prosecutors opined that the choice of which offence to charge would be a question of proof of intent to cause a public official to violate his or her duty.

Section 307b

23. Section 307b, as amended, applies to cases "apart from the cases of sections 307 and 307a", where a person offers, promises or grants an undue advantage with the intention of influencing a public official "in his activity as a public official". During the on-site visit, the Austrian authorities explained that this section was meant to cover the crime of "*Anfüttern*", that is, offering, promising or granting an advantage in order to build or strengthen a relationship with a public official, when no specific future action is in mind. As with section 307a, the application of section 307b in practice raises questions because offences arising under it are subject to lower sanctions and because diversion is a possibility in all cases arising under section 307b.

Commentary

The lead examiners recognize Austria's efforts to amend their criminal provisions prohibiting the bribery of foreign public officials to improve their effectiveness. However, given that the amendments are recent, and have not yet been applied in practice, the lead examiners recommend that the Working Group follow up on the practical application of sections 307, 307a and 307b, to ensure that persons violating the law against foreign bribery are prosecuted to the fullest extent possible.

(d) Definition of foreign public official

24. In Phase 2, the Working Group decided to follow up on the application of the foreign bribery provisions with regard to the definition of "foreign public official". This definition has not as yet been applied in practice. In Phase 1*bis*, the Working Group raised concerns that the definition would require proof of foreign law, thus raising questions about the autonomy of the offence concerns.

Discharging tasks of legislation, administration or justice

25. Austria's definition of a "public official" refers to "an organ or employee [who] discharges tasks of legislation, administration or justice ... for another state". During Phase 1*bis*, the Working Group raised concerns that determining whether a person is a foreign public official would require additional elements of proof as to whether an organ or employee discharges tasks of legislation, administration or justice.

26. This specific part of the definition has not been changed by the 2012 Amendments (see discussion below on changes regarding persons exercising a public function for a public enterprise). As part of the Phase 3 evaluation, Austria has explained that whether a person is a foreign public official is determined based on Austrian law only. The main question is whether, looking at the individual's "concrete function", the individual would be considered a public official under Austrian law.[15] Because no investigations have been successfully prosecuted, no examples illustrate the application of this definition in practice.

[15] Austrian authorities supported their position with the Commentary on the Penal Code (Wiener Kommentar, Jerabek/Reindl-Krauskopf/Schroll in WK2 § 74 Rz 19f) and the Commentary on Corruption and Misuse of Power (Korruption und Amtsmissbrauch, Marek/Jerabek, § 74 Abs. 1 Z 4a RZ 9). The evaluation team has not been provided with copies of these documents.

Employees of state owned or controlled enterprises

27. The Anti-Bribery Convention covers bribery of a person exercising a public function for a public enterprise.[16] Commentary 14 to the Convention states that a "public enterprise" includes "any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence" (Commentary 14 to the Convention). Among other things, the government may exercise a "dominant influence" when it is the majority shareholder, controls the majority of the votes or can appoint a majority of the board of the enterprise.

28. In Phase 1*bis*, the Working Group raised concerns that proof of the foreign law would be required to determine whether a person exercising a public function for a public enterprise would be considered a foreign public official under Austria's law (Phase 1*bis* Report para. 107). This part of Austria's definition was updated as part of the 2012 Amendments. Section 74(1)(4a)(d) now provides that a person is a public official if the person:

> ... acts as an organ or employee of an enterprise, where one or more national or foreign territorial corporate bodies directly or indirectly hold at least fifty per cent of the share, stock, or equity capital , where such a territorial corporate body is either the sole or joint operator with other such territorial corporate bodies or has de facto control by other financial, other economic measures or organisational measures, but at any rate every enterprise the conduct of which is subject to examination of the court of auditors or a comparable institution of the Provinces or a comparable international or foreign control institution.

29. The new definition of a foreign public official in respect of employees of foreign public enterprises would appear to be as broad as Commentary 14 to the Anti-Bribery Convention in this respect.[17] The Austrian authorities explain that the Austrian Constitution defines the three levels of government in Austria -- Federation (Bund), the Provinces (Länder) and the Municipalities (Gemeinden) – as territorial "corporate bodies". Thus, by analogy foreign governments at every level would be considered "corporate bodies". In addition, the Austrian authorities confirm that the definition under section 74(1)(4a)(d) of the amendments covers bribery of an employee of a foreign public enterprise in the following situations: i) a foreign government(s) holds at least 50% of the enterprise's stock; ii) a foreign government(s) holds less than 50% of the enterprise's stock, but has *de facto* control through financial or other economic or organisational measures; or iii) the foreign enterprise is subject to examination by a body comparable to the Court of Auditors in Austria.

Commentary

The lead examiners commend Austria for taking steps to clarify the definition of a "foreign public official" by indicating that employees of enterprises in which foreign territorial bodies have ownership or de facto control are considered public officials. However, given that to date

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[16] To qualify as a foreign public official under these circumstances, an individual must (i) work for a "public enterprise", that is, an enterprise "over which a government, or governments, may, directly or indirectly, exercise a dominant influence" and (ii) "perform a public function" (see Commentaries 14 and 15 to the Convention).

[17] Commentary 14 states: "A 'public enterprise' is any enterprise, regardless of its legal form, over which a government or governments may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

no cases of the bribery of foreign public officials have been prosecuted, the lead examiners recommend following-up in practice the interpretation of the definition by the courts.

(e) Bribery through intermediaries

30. During Phase 2 the Working Group agreed to follow up on the application of the foreign bribery provisions with regard to bribery through intermediaries. Section 307 does not expressly cover bribery through intermediaries. Austria explains that due to the application of section 12 of the PC, section 307 would apply where bribery takes place through an intermediary, as long as part of the bribery took place in Austria (e.g., authorisation, transfer of bribe payment). Section 12 PC provides:

> *A criminal offence is committed not only by the immediate perpetrator who commits the criminal offence, but also by anyone who instigates another person to commit the offence or who contributes to its perpetration in any other way.*

31. On During the on-site visit, several panellists were asked whether Austria's law would apply to an Austrian national, including a legal person, who authorised an intermediary in another country to pay a bribe to a public official. MOJ officials and prosecutors both expressed their views that pursuant to section 12 of the PC,[18] the Austrian individual or company could be prosecuted, as long as part of the bribery occurred in Austria (for example, approval of the bribe). By way of example, prosecutors cited a current investigation of an Austrian company for bribery of foreign public officials. Although the bribery occurred through intermediaries, they stated that this has not been a problem in pursuing the investigation.

32. The Austrian authorities also provided section 67 PC as authority for covering offences that take place abroad through foreign intermediaries. Section 67(2) states that an offender "has committed [a] punishable offence at each place where he has acted or where he should have acted". A commentary on section 67(2) states that acts constituting an offence that are committed partially in Austria and partially in a foreign country must be treated as a unity so that the offender may be punished for the whole offence in Austria. The Austrian authorities also submitted as supporting authority a 1987 Supreme Court case (11Os176/86) in which Austria convicted an individual for fraud (section 146 PC) committed through a foreign intermediary in a neighbouring country.

33. Eight of the ten ongoing investigations appear to involve intermediaries. For two of these cases, however, law enforcement has proceeded along a breach of trust theory, rather than proceeding directly against the Austrian company. In a number of other cases, law enforcement has proceeded only against the individuals involved because the alleged crime was committed prior to entry into force of the Federal Statute on Responsibility of Entities for Criminal Offences (VbVG) in 2006

Commentary

The lead examiners recognize that Austria is pursuing a number of investigations of foreign bribery where intermediaries were allegedly involved. However, due to the absence of decided cases, the lead examiners recommend following up practice as it develops involving the bribery of foreign public officials through intermediaries in the following situation: i) the intermediary acts abroad; and ii) he/she or the company acting as an intermediary is not an Austrian national. The lead examiners therefore recommend that the Working Group follow-up on the application of the foreign bribery provisions in such cases, and further recommend that Austria's written assessment of progress in prosecuting foreign bribery cases to be presented

[18] Section 12 of the PC states: "Not only the immediate offender commits the offence but also any persons who instigates another person to commit it as well as everybody who is an accessory to its commission".

one year from the adoption of this Report (see Commentary in Part A) include information on the practical application of the foreign bribery offences to the bribery of foreign public officials involving intermediaries in this particular situation.

(f) Jurisdiction

Natural persons

34. Austria's law grants both territorial and nationality jurisdiction over foreign bribery offences committed by natural persons. However, prior to the 2012 Amendments, nationality jurisdiction only covered foreign bribery offences committed wholly abroad by an Austrian citizen if the offence was a crime in the country where it occurred. During the on-site visit Austrian authorities confirmed that the 2012 Amendments have eliminated this dual criminality requirement. The relevant provision provides that crimes of corruption and related criminal acts (302-309 PC) "are subject to prosecution according to Austrian criminal law irrespective of the criminal law of the foreign state where the criminal act was committed" as long as "the perpetrator was a national of Austria at the time the act was committed".

Legal persons

35. In Phase 2, the WGB recommended following-up the application of nationality jurisdiction to legal persons, due to a lack of experience in this regard at that time. The Austrian authorities informed that jurisprudence has not developed on the application of nationality jurisdiction to legal persons since Phase 2.

36. Pursuant to section 2(2) of VbVG, if a criminal offence applies to Austrian citizens who commit the offence abroad, the offence is also applicable to an entity that is registered in Austria or has its place of operation or establishment in Austria.[19] In addition, the Austrian authorities confirm that since section 12(1) VbVG states that the "general criminal laws" apply to legal entities unless they exclusively apply to natural persons, the dual criminality requirement is also removed for legal entities that bribe foreign public officials. Thus the dual criminality requirement will be eliminated for offences committed by legal persons as well beginning on 1 January 2013.

37. Since it is common for companies to bribe abroad using non-nationals as intermediaries, such as representatives of foreign subsidiaries, the lead examiners asked the Austrian authorities to confirm whether they would be able to prosecute an Austrian company that uses this kind of bribery methodology.[20] The MOJ believed that an Austrian company that uses a national of the same country as the foreign public official, such as a local agent, could be prosecuted for aiding and abetting the act of bribery committed by the local agent. They said that it would not matter that the local agent has committed the bribery of a domestic public official, or that Austria has no jurisdiction over the offence committed by the local agent. Such a case could be prosecuted because the Austrian company would have committed part of the offence in Austrian territory.

38. The Senior Prosecution Service of Vienna (OStA), on the other hand, stated at the on-site visit that in order to apply nationality jurisdiction to an entity that bribes through an intermediary abroad, the

[19] Section 12(d) VbVG states: "If the law provides that applicability of Austrian criminal laws to offences committed abroad is subject to the fact that the offender's domicile or habitual residence is in Austria or that he is an Austrian citizen, then the registered office of the entity or the place of operation or establishment shall be relevant with regard to associations".

[20] This issue is also discussed above (see: 1.e on "Bribery through Intermediaries"), and below (see: 2.b on the "Liability of Legal Persons in Practice").

intermediary must be an Austrian national. However, the OStA believes that as long as the person who perpetrates the offence abroad is an Austrian national, the Austrian company would be liable under the VbVG, even if the bribe was given on behalf of a foreign subsidiary, and even if the bribe was provided by the foreign subsidiary, because the parent company benefits from the bribery. Following the on-site visit, the Austrian authorities explained that, although OStA's opinion is correct under the current laws, the removal of the dual criminality requirement by the 2012 Amendments would change the situation. The lead examiners on the other hand are not persuaded that removal of the dual criminality requirement would correct the legal gap in this particular case, because Austrian law does not apply to the bribery of domestic or foreign public officials committed by foreign nationals abroad. In response to this concern, Austria recalls its position, as explained under 1(e) on "Bribery through intermediaries".

Commentary

The lead examiners commend Austria for extending its jurisdiction over foreign bribery cases to all offences committed by Austrian citizens, regardless of where the bribe was offered, promised or paid. They also commend Austria for removing the dual criminality requirement through the 2012 Amendments.

Due to a lack of jurisprudence, and concerns about the scope of the application of the foreign bribery offence, the lead examiners recommend that Austria take appropriate steps within its legal system to ensure that nationality jurisdiction apply to Austrian companies that bribe abroad, including by using non-nationals as intermediaries.

2. Responsibility of legal persons

(a) Phase 2 recommendation to issue guidelines for prosecutors

39. In Phase 2 the WGB recommended that Austria issue and publicise guidelines to prosecutors clarifying that prosecution of allegations of bribery of foreign public officials by legal persons is always required in the public interest under the VbVG, subject only to clearly defined exceptions, and develop guidelines on organizational measures for business with regard to the fight against bribery. This recommendation resulted from concerns about the application of prosecutorial discretion pursuant to section 18 of the VbVG, which allows the public prosecutor to "refrain from or abandon" prosecution of legal persons under broadly defined conditions, such as where efforts required to investigate appear out of proportion to the expected sanction.[21]

40. Austria has not implemented this recommendation, and states that guidelines on prosecuting allegations of foreign bribery by legal persons are not necessary, for several reasons, including: 1) the Public Prosecutor's Office for Combating Economic Crimes and Corruption (WKStA) has jurisdiction to prosecute all cases of foreign bribery by legal entities; and 2) limits to refraining from prosecuting or abandoning prosecution of legal persons under section 18 of the VbVG, such as "because of any other particular public interest".

41. However, in the responses to the Phase 3 Questionnaire, Austria refers to a report published in late 2011 of a survey on the effectiveness of the VbVG conducted by the Institute for Legal and Criminal Sociology,[22] which shows that the number of proceedings against legal persons in Austria is steadily increasing, but prosecutors are still unsure about applying it. At the on-site visit, MOJ stated that, as a result of this study, Austria will definitely issue guidelines to prosecutors that will *inter alia* encourage

[21] See paras. 132-133 of Phase 2 Report on Austria.

[22] The report has not been published yet, and still must be forwarded to the Austrian Parliament.

prosecutors to increase their use of the VbVG, and help them to understand how to locate and prove *mens rea* in a legal entity. Following the on-site visit Austria stated that it intends to create a working group consisting of practitioners to study the report's conclusions, and examine the possible need for guidance, such as in the form of a ministerial decree or amendments to the VbVG.

(b) Liability of legal persons in practice

42. In Phase 2 the WGB also recommended following-up how the VbVG is applied generally in cases of foreign bribery involving legal entities. As mentioned above, a recent report by the Institute for Legal and Criminal Sociology indicates that prosecutors are unsure about applying the VbVG. The report states that although use of the VbVG has increased, it has been used in only a very small percentage of cases in the relevant period (January 2006 to December 2010).[23] Most prosecutors involved in the report's survey justified their reluctance to use the VbVG by the need for increased time and effort, lower chances of success in proceedings against legal entities due to missing tools and jurisprudence, and lack of practical experience, specialisation, and routine.

43. The lead examiners consider that a lack of clarity concerning certain aspects of the VbVG might also be obstacles to its effective enforcement. For instance, under section 3(1), a legal entity is responsible for offences committed by a "decision maker"[24] if the decision maker "acted illegally and culpably". This standard appears to require the prosecutor to attribute *mens rea* to one individual perpetrator with a leading role in the company, so that it is not possible to aggregate the acts and mental elements of more than one person and attribute it to the company. The report of the Institute for Legal and Criminal Sociology referred to earlier, states that the survey it conducted showed that prosecutors have encountered problems of proof using the VbVG because of corporate decision-making structures.

44. In addition, under section 3(3) of the VbVG, a legal entity is responsible for criminal offences of "staff" (as opposed to "decision makers") in certain circumstances. In Phase 2, this aspect of the VbVG gave rise to a recommendation to follow-up its application to bribery involving agents, due to limitations in the definition of "staff", which requires essentially an employment, apprentice or training relationship, and would therefore seem to exclude a variety of third parties, including agents, consultants, distributors, suppliers, consortia, and joint venture partners. The Austrian authorities stated in the responses to the Phase 3 Questionnaire that bribery through intermediaries, including related legal persons, is covered by the VbVG, but in practice it might be difficult to produce evidence of the subjective side of the offence concerning the contribution of the "decision maker". In the responses to the Phase 3 Questionnaire and at the on-site visit, the Austrian authorities stated that bribery through an intermediary, such as a related legal person, might be covered by the rule of participation in section 12 of the PC in certain circumstances. This issue is also discussed above (see 1.e on "Bribery through intermediaries")

45. Under section 3(1), the offence must be committed "for the benefit of the entity", or "duties of the entity must have been neglected by such offence". The former criterion would appear to exclude the bribery of a foreign public official by one entity for the benefit of a related entity, such as a subsidiary, or member of the same business group. However, the Austrian authorities confirm that bribing on behalf of a

[23] According to the report's survey, between January 2006 and December 2010, the VbVG has been used in 300 to 350 proceedings in which generally both the legal and natural persons were accused. There were 25 charges against legal entities, in which the entities were acquitted in half of the cases.

[24] A "decision maker" is defined in the VbVG as a managing director, executive board member, or person who is authorised in a comparable manner to represent the entity vis-a-vis third parties, either according to statutory power of representation or based upon contract. A "decision maker" is defined as a member of the supervisory board or board of directors or otherwise exercises controlling powers in a leading position, or otherwise exercises relevant influence on the management of the entity.

related entity would be covered by the latter criterion, as bribery on behalf of a related entity involves a neglect of duties. Following the on-site visit, the Austrian authorities clarified that such bribery could involve a neglect of duty, where, for instance, steps were not taking to contractually obligate intermediaries to establish codes of conduct or refrain from bribery.

46. One issue under the VbVG that was discussed extensively at the on-site visit was the requirement in section 3(3)(2) that, in order for an entity to be responsible for criminal offences of staff, the "commission of the offence [must have been] made possible or considerably easier due to the fact that decision makers failed to apply the due and reasonable care required in the respective circumstances, in particular by omitting to take material technical, organisational or staff-related measures to prevent such offences". This means that it must be proven that decision makers failed to take these steps. At the on-site visit, the OStA stated that in order to prove that a company has not fulfilled the standard of "due and reasonable care" the prosecution would probably provide evidence that compares steps taken by the defendant company with the practices of other companies in the same sector to prevent the bribery of foreign public officials.

47. At the on-site visit, a major anti-corruption NGO stated that the standard of "due and reasonable care" is very vague, and it would be difficult for the prosecution to prove it beyond a reasonable doubt. One representative of the legal profession stated that the onus should be reversed so that it is on companies to prove that they have applied "due and reasonable care" when bribery has been committed by staff on their behalf. One large MNE in the manufacturing sector believed that a company would be exonerated if it took reasonable preventive steps, according to the company's legal advisors. In a panel with MNEs at the on-site visit, all the participants agreed that the Austrian government has not taken steps to inform the private sector about what would meet the standard of "due and reasonable care". However, there was virtually no support among the Austrian authorities, private sector or civil society, for issuing guidelines on the interpretation of this standard; although, interestingly, one representative of a major industrial group stated that the 2010 Guidance for commercial organisations on the United Kingdom Bribery Act is very helpful.

48. In view of the aforementioned unclear concepts, and because the liability of legal persons has not to date been successfully applied to foreign bribery in Austria, the lead examiners consider that it is not possible to state with certainty that the relevant provisions of the VbVG meet the standards under paragraph B of the Good Practice Guidance on Implementing Specific Articles of the Foreign Bribery Convention (i.e., Annex I of the 2009 Recommendation). In particular, it is not fully clear whether in practice Austria will be able to effectively cover cases where a person with the highest level of management authority: i) directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; or ii) fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her, or through a failure to implement adequate controls, ethics and compliance measures.

49. In the responses to the Phase 3 Questionnaire, the Austrian authorities provide further information about their application of VbVG in Cases #8 and #12, which raises concerns for the lead examiners. In these cases, the Austrian authorities do not appear to be considering proceedings against the relevant legal persons for bribery because they regard them as victims of a breach of trust.

Commentary

The lead examiners welcome the decision by Austria to publish guidelines to prosecutors as recommended in Phase 2 on the use of VbVG. However, the recommendation to issue and publicise guidelines to prosecutors has not yet been implemented, and should therefore remain in effect.

The lead examiners believe that Austria needs to review its approach to corporate liability, which prosecutors are generally reluctant to use. It appears that there are also features of the VbVG that are not necessarily clear, and could give rise to interpretations that do not effectively implement the Anti-Bribery Convention. The lead examiners therefore recommend that Austria provide a written assessment of progress in prosecuting foreign bribery cases involving legal persons one year after adoption of this report, which should include an assessment of the application in practice of VbVG to foreign bribery cases, including whether in practice it meets the standards under paragraph B of Annex I of the 2009 Recommendation, and any procedural and legal obstacles to its effective application. The lead examiners further recommend that Austria include consideration of the aspects of the VbVG described as potentially unclear in this part of the report, including: 1) its application to bribery through agents; 2) the standard of "due and reasonable care" that must be proven was not taken by a defendant entity when bribery of a foreign public official was committed by a staff member of an entity; 3) its application to bribery on behalf of a related entity; and 4) the circumstances under which a legal person is considered a victim of a breach of trust.

3. Sanctions

(a) The new sanctions regime

50. In Phase 2, the Working Group recommended that Austria "increase the criminal sanctions applicable to foreign bribery and in particular to serious cases in order to provide for effective, proportionate and dissuasive criminal sanctions". Consequently, Austria passed a new sanctions regime, which entered into force on 1 September 2009 and was discussed in the Phase 1*bis* Report. These sanctions remain unchanged after the 2012 Amendments, and are based on "daily rates", which are determined according to the personal and economic situation of the convicted person. The following table sets out the maximum penalties for natural and legal persons based on this formulation:

Offence	Subpart	Maximum sentence for natural persons	Maximum fine for natural persons	Maximum fine for legal entities
307 PC	Para. (1)	Up to 3 years imprisonment	EUR 1.8 million (360 DRs at EUR 5 000 per DR)	EUR 850 000 (85 daily rates at EUR 10 000 per DR)
	Para. (2), advantage > EUR 3 000	6 months – 5 years imprisonment	EUR 1.8 million (360 DRs)	EUR 1 million (100 DR)
	Para. (2), advantage > EUR 50 000	1–10 years imprisonment	not applicable	EUR 1.3 million (130 DR)
307a PC	Para. (1)	Up to 2 years imprisonment	EUR 1.8 million (360 DRs)	EUR 700 000 (70 DR)
	Para. (2), advantage > EUR 3 000	Up to 3 years imprisonment	(360 DRs)	EUR 850 000 (85 DR)
	Para. (2), advantage > EUR 50 000	5 months – 5 years imprisonment	EUR 1.8 million (360 DRs)	EUR 1 million (100 DR)
307b	Para. (1)	Up to 2 years imprisonment	EUR 1.8 million (360 DRs)	EUR 700 000 (70 DR)
	Para. (2), advantage > EUR 3 000	Up to 3 years imprisonment	EUR 1.8 million (360 DRs)	EUR 850 000 (85 DR)
	Para. (2), advantage > EUR 50 000	6 months – 5 years imprisonment	EUR 1.8 million (360 DRs)	EUR 1 million (100 DR)

Sanctions against natural persons

51. Although sections 307, 307a and 307b expressly provide for imprisonment, section 37 PC sets forth the alternative of assessing a fine. For crimes punishable by a term of imprisonment of 5 years or less (that is, any foreign bribery offence except those under 307 PC involving an advantage of greater than EUR 50 000), the law *requires* a fine to be imposed instead of imprisonment if: 1) the term of imprisonment that would have been imposed by the court would not have exceeded 6 months; and 2) the deprivation of liberty is not necessary for the purpose of general or specific deterrence.[25] In determining the level of sanctions applicable to natural persons, Austrian courts take into account a number of aggravating and mitigating circumstances, as well as the impact of the offence on society (see sections 32–34 PC).

Sanctions against legal persons

52. In Phase 2, the Working Group recommended that Austria "take all necessary measures to ensure that legal persons that engage in foreign bribery are subject to effective, proportionate and dissuasive criminal penalties, including in cases where the legal person may not have generated significant profits over the relevant period". In addition, the Working Group agreed to follow up on the application of the law on the liability of legal persons as it applies to foreign bribery with regard to sanctions generally (follow-up issue 6(b)(ii)).

53. As shown in the chart above, Section 4 VbVG provides that the fine assessed against a legal entity is calculated based on daily rates (DRs). According to Austria, the purpose of the DR calculation is to deprive the entity of profit without jeopardising its business basis. Therefore, the calculation is based on the profit of the entity, taking into account its economic potential. It equals a 360th of the annual profit, but not more than EUR 10 000 (section 4(4) VbVG). According to this formula, a DR of EUR 10 000 would be calculated for a company with an annual profit of EUR 3.6 million or more. In summary, the highest fine available for foreign bribery committed by a legal person in Austria is EUR 1.3 million, under section 307 PC.

54. Up to 130 DRs can be imposed for the offence of foreign bribery that would be punishable against natural persons by a prison term of up to 10years (section 4(3) VbVG), for example, a foreign bribery case where the bribery committed concerned a benefit exceeding a value of EUR 50 000. The higher the benefit, the higher the number of DRs, but within these limits, the actual fine always depends on the individual case.

55. Under the new sanctions regime, the fines for legal persons would not appear to be sufficiently high to be "effective, proportionate and dissuasive" for two main reasons. First, given that sanctions for legal persons are substantially lower than for natural persons, they would appear to be *prima facie* not in accordance with this standard. Second, the fines appear too low in light of: 1) the size of many Austrian companies in international business transactions, the location of their international operations, and the business sectors in which they are involved; and 2) the absence of practice to show whether confiscation

[25] The law also permits (but does not require) the imposition of a fine instead of imprisonment if: (i) the crime is punishable by a term greater than 5 years but no more than 10 years; (ii) the term of imprisonment that would have been imposed is no more than 6 months; and (iii) a prison term is not required to prevent the offender from committing further acts because, under the circumstances, the offence was justifiable or excusable (section 37 (2) PC). This provision is not applicable to offences arising under section 307 PC that involve advantages of more than EUR 50 000, however, because the minimum term of imprisonment that may be applied is 1 year. However, under exceptional cases where the mitigating circumstances far outweigh the aggravating circumstances, the minimum penalty of one year of imprisonment under section 307(2)(2) may be decreased to one month.

would be applied in accordance with Article 3.3 of the Anti-Bribery Convention (see discussion in B. 4, "Confiscation of the bribe and the proceeds of bribery"). The lead examiners take note that, following the on-site visit, the Austrian authorities stated that the level of fines for legal entities will be addressed in the working group that will study the report by the Institute for Legal and Criminal Sociology on the effectiveness of VbVG.

Administrative sanctions[26]

56. Pursuant to article 68(1) of the Federal Procurement Act, an "economic operator" that has been convicted by final judgment of bribery under 307, 307a or 207b PC is required to be excluded from participating in the procurement procedure.[27] In addition, section 402 CPC states that a court that imposes a conviction for an offence that by law implies the deprivation of further rights shall inform the relevant authority, and provide the judgement on request by that authority.

(b) Diversion

57. In Phase 2, the Working Group recommended that Austria "take appropriate measures to ensure that diversion and non-punishment pursuant to section 42 PC are excluded at least in all serious cases of foreign bribery". Diversion is a means of ending criminal prosecution of less serious crimes without a trial and is mandatory when the statutory conditions are met. Non-punishment under section 42 PC allows for a potential offender to avoid punishment for certain crimes punishable by less than three years imprisonment. Section 42 PC has since been repealed,[28] although diversion remains a possibility in foreign bribery cases.

58. The current law provides that diversion applies only to crimes that are either: 1) only punishable by fine; 2) punishable by a prison term of no more than three years; or 3) are punishable by a fine and a prison term of no more than three years (see section 191(1) CCP). In addition, diversion only applies if "considering the guilty, the consequences of the criminal act and the behaviour of the person accused after the criminal act, especially regarding a possible settlement of the damages, as well as other circumstances that would influence the penalty to be imposed, the disruptive value of the criminal act is considered little" and "imposing a punishment or continuing according to the 11th main chapter does not seem necessary in order to prevent the person accused from committing criminal acts or to prevent other persons from committing criminal acts" .

59. Prior to when the new sanctions regime came into effect in September 2009, diversion could potentially apply to all cases of foreign bribery. Due to the increase in sanctions, diversion now applies only to cases where either: 1) the applicable prison term is 3 years or less (that is, offences under 307(1) PC or under 307a or 307b where the advantage was EUR 50 000 or less); or 2) a fine would apply under 37 PC. This means that offences falling under 307 PC when the advantage is more than EUR 50 000 would never be subject to diversion. This appears to at least partially address the concerns raised by the Working Group with regard to high value offences, although it seems that diversion could still apply in low value cases under 307 PC and cases under 307a and 307b PC. The Austrian authorities state that it is also necessary to take into account jurisprudence, which shows that normally a conviction of bribery under

[26] See discussion on anti-corruption policies and measures of Austrian government contracting agencies under 11 on "Public Advantages".

[27] Debarment under article 68(1) of the Federal Procurement Act is also required if the offence for which a conviction has been imposed by final judgment negatively impacts on the applicant's professional reliability. Debarment is also required for grave professional misconduct.

[28] See Act amending the Penal Code, Federal Gazette I Nr. 93/2007.

section 304, 307. 305a or 307b PC is accompanied by convictions under section 302 PC for abuse of office, for which diversion is not available. The Austrian authorities add that even in cases of the active bribery of a public official, the person who offers, gives or promises a bribe is usually also indicted for aiding and abetting the public official who receives the bribe. The lead examiners point out that proceeding against active bribery this way might work for the bribery of a domestic public official, but are unsure of how effectively this would work for the bribery of a foreign public official. .

60. Diversion also can be applied in cases against legal persons. The requirements for applying diversion to legal persons are nearly identical to those for applying diversion to natural persons, except that in the case of legal persons restoration of the damages caused by the crime is *required* (see section 19(1) VbVG).

61. If diversion applies, any one of the following three sanctions may be applied to the defendant on their own, or combined with the obligation to compensate for the damages: 1) payment of a fine (up to 50 DR in addition to reimbursement of expenses of the proceeding); 2) a probationary period with/without additional measures; and 3) community service or settlement of the punishable act.

Commentary

The lead examiners commend Austria for strengthening its sanctions regime. However, given the absence of prosecutions of foreign bribery in Austria, the lead examiners suggest that the Working Group follow-up on the practical application of sanctions to natural persons to determine whether they are "effective, proportionate and dissuasive".

Moreover, the lead examiners recommend that Austria increase the fines for legal persons, as they are not persuaded that the level is sufficient to be "effective, proportionate and dissuasive", given that they are substantially lower than for natural persons, and in light of: 1) the size and importance of many Austrian companies in international business transactions, the location of their international operations, and the business sectors in which they are involved; and 2) the absence of practice to show whether confiscation would be applied in accordance with Article 3.3 of the Anti-Bribery Convention (see discussion in 4. "Confiscation of the bribe and the proceeds of bribery"). The lead examiners welcome that the working group that will study the report by the Institute for Legal and Criminal Sociology on the effectiveness of VbVG will address the level of fines for legal persons, and recommend that Austria report in writing on this study in one year .

4. Confiscation of the bribe and the proceeds of bribery

62. On 30 November 2010, Austria's parliament passed a law that combined prior sections of the PC dealing with the confiscation of proceeds of illicit enrichment and forfeiture into one new provision. The revised provision, at section 20 PC, entered into force on 1 January 2011. The new law requires the court to declare as forfeited all "assets that were obtained for or by the commission of an act punishable by law". In its response to the Phase 3 Questionnaire, Austria reported that this includes all "direct" proceeds from the criminal act plus income (interest, dividends, rent and lease income) as well as any replacement values (sales income) or equivalent sums (if direct proceeds are no longer available). If the assets are no longer available, forfeiture of an amount equivalent to the assets to be forfeited is required (see section 20(3)). When the extent of the assets to be declared forfeited cannot be established, the court determines the amount of forfeiture "according to its conviction" (section 20(4)).

63. Austria has indicated that forfeiture and confiscation measures must be applied equally in all proceedings and in relation to all criminal offences. Decisions about forfeiture, extended forfeiture, confiscation or other offence-related property orders are generally issued in the judgement (section 443(1) CCP), although they may be resolved separately if the results of the main trial are not sufficient or the necessary evidence cannot be collected without considerably delaying the main trial. In any case, however, these measures must be declared by formal judgement.

64. In response to the Phase 3 Questionnaire, Austria reported that one quarter of the on-going investigations concerning bribery of foreign public officials have involved an offence-related property order, such as a seizure or freezing of assets. Austria reports that confiscations of the proceeds and instruments of crime have been made equivalent to the following amounts in recent years: 2008: EUR 0 .80 million; 2009: EUR 1.88 million; 2010: 0.98 million; and 2011: EUR 5.04 million. In addition, in 2011, approximately EUR 60 million in illicit money flows were seized, and the same amount was reached in the first 9 months of 2012.

65. In relation to financial crimes generally, Austria has explained that delays in freezing or seizing assets often occur because it is difficult to obtain information about the accounts in which assets are deposited. Often such inquiries must be directed to a banking association rather than to an individual bank because it is not clear into which account particular funds were deposited. Banking associations are entitled by law to raise legal defences against any order to provide information, and, according to Austria, they make frequent use of this entitlement. (Please see further discussion on the issue of access to bank records under 5. b. "Access to bank and financial records".)

Commentary

Due to the absence of prosecutions, it is not possible to determine whether in practice Austria is able to apply its provisions on confiscation in accordance with Article 3.3 of the Anti-Bribery Convention. The lead examiners therefore recommend that Austria report in writing in one year on application of its confiscation provisions to convictions of the bribery of foreign public officials.

5. Investigation and prosecution of the foreign bribery offence

(a) Detection of foreign bribery allegations

66. In the responses to the Phase 3 Questionnaire, the Austrian authorities explain that the most common sources of allegations of the bribery of foreign public officials include media reports, MLA requests, charges filed by members of legislative bodies, professions subject to Suspicious Transactions Reports (STR) obligations (mainly in the banking sector), foreign Financial Intelligence Units (FIUs), and anonymous reports received by the Federal Bureau of Anti-Corruption (BAK).

67. The Austrian authorities explained that early media reporting resulted in steps being taken by at least one company to cover up its alleged wrong-doing. The payments to the foreign public officials were cancelled, and therefore identification was no longer possible.

(b) Access to bank and financial records

68. At the on-site visit, the lead examiners explored whether Austria's rules and procedures for obtaining access to bank and financial records were an obstacle to the effective detection and investigation of allegations of the bribery of foreign public officials. They discovered that the rules in this regard have become less restrictive, but that financial institutions are able to request remedial actions that slow down

the process for accessing bank records, which could be a fundamental obstacle to the effective enforcement of Austria's foreign bribery offences.

69. Pursuant to section 116 of the CPC, banks are permitted to provide access to information about bank accounts and bank transactions in certain circumstances, including when the information seems necessary to "solve a deliberate criminal act". An order to provide access in these circumstances is normally obtained through the courts. The order (which includes the court's reasoning and important facts about the case as discussed below) is forwarded by the public prosecutor to the credit or financial institution, *and* the defendant and persons owning or authorised to access the account, because, pursuant to section 87 of the CPC, the defendant and other persons whose interests are directly affected are entitled to raise a complaint against the court order. However, the public prosecutor can ask for service to the defendant and the owners of the account to be postponed so as not to derail the investigation, and at the on-site visit, the lead examiners learned that postponements have been instructed routinely since 2008. Public prosecutors use a template with instructions when they deliver a court order for access to bank records, and the template includes the request to postpone service to the defendant and owners of the account. It also appears that these instructions are followed by the institutions, which could be subject to criminal proceedings for "partiality" under section 299 of the Penal Code for non-compliance. Pursuant to section 299(1) PC, the sanction for intentionally aiding another person, who has committed a punishable act, to escape from prosecution, is up to 2 years of imprisonment or up to 360 daily fines. Statistics on application of this provision have not been provided. This provision is further discussed in relation to money laundering reporting later in this report (see: 6. "Money Laundering").

70. To complicate things further, when the law enforcement authorities do not know the bank account of the suspect, they must address the court order to all of the five bank associations in Austria. The bank associations also have the right to raise a complaint against the court order, and do this as a matter of routine. The bank associations are not required to contact their member banks until they have exhausted their right of appeal. Once the specific bank in which the bank account is held is contacted by its bank association, the bank then has the right to go through the same appeal process.

71. Moreover, MOJ explained at the on-site visit that pursuant to section 116 of the CPC, in order to obtain a court order to access bank records, it is necessary to provide extensive details about the facts of the case, including information showing that access to bank records is necessary to solve the alleged crime, and that a transaction related to the crime was committed using the business connection between the bank and the account holder. The court order must *inter alia* include a description of the facts justifying the order and proving its proportionality. This extensive information is needed in the court order to ensure that the bank association and specific bank have necessary information to challenge the order. However, the scope of the information could also be an obstacle to effective law enforcement efforts if it were to fall into the hands of the suspect, the risk of which increases the longer and more steps are involved in the appeal process.

72. Although postponement of disclosure by credit and financial institutions seems to work properly, the MOJ stated at the on-site visit that the Austrian Banker's Association automatically raises complaints to the Higher Regional Court against court orders to provide access to bank information in criminal investigations. A lower percentage of financial institutions also ask for remedial action. The Austrian Banker's Association, which represents all commercial banks, private limited banking corporations and other credit institutions operating in Austria, normally will not provide access to bank information until the court order has been approved by the Court of Appeal. The MOJ stated that this phenomenon is the last vestige of bank secrecy in Austria. A media representative explained that the Banker's Association feels that it has no choice but to appeal court orders for access to bank information due to the risk of law suits for damages by the account owners.

73. Out of the 15 allegations of the bribery of foreign public officials discussed in the context of this review (see A. 5, "Cases involving bribery of foreign public officials"), access to bank records appears to have been requested and obtained in just a few cases. The lead examiners were able to confirm that access to bank records was obtained in only the following cases: Cases #7, 9, 10 and 12. In at least one of the cases, the access order was obtained from the prosecution authority, and in at least one case the company under investigation provided access. Access to bank records was not requested or obtained in any other of the 15 cases.

74. The lead examiners asked whether law enforcement authorities in Austria are not routinely requesting access to bank records in foreign bribery investigations due to the length of time that is required for financial institutions to exhaust the procedure for remedial action. They also asked if there is a risk that the remedial process could become known to the account holder, especially if it is lengthy, and result in the destruction or concealment of evidence. One media representative stated that this process takes "a lot of time", and in one non-international case it took 10 years to produce an indictment in part due to the delay caused by the use of remedial measures. The same media representative stated that as a rule the account holder finds out that the financial institution has launched remedial action. The MOJ agrees that in the procedures involving the Austrian Bank Association there may be more efficient ways of tracking down bank accounts in criminal investigations, but also points out that despite not having a central registry of bank information, the average time for the Court of Appeal to decide upon a legal remedy is 2 to 3 months.

75. Following the on-site visit, and just prior to the evaluation of Austria by the WGB, the Austrian authorities explained that the rules on bank secrecy can only be changed with constitutional quorums by Parliament, because it is enshrined in a legislative provision that has the same legal authority as a provision in the Constitution of Austria. According to section 38(5) of the Banking Act, which has the rank of constitutional law, paragraphs 1 to 4 of the Act on "bank secrecy" may be amended by the First Chamber of Parliament only in the presence of at least one-half of Parliament and with a majority of two-thirds of the votes cast. The lead examiners do not understand why amendments to the process of remedial measures by financial institutions is precluded by this provision, given that section 38 does not address this issue at all, and states explicitly that bank secrecy does not exist in connection with initiated court proceedings.

Commentary

The lead examiners believe that financial institutions' routine use of remedial actions in response to court orders to provide access to bank records in criminal investigations is a serious impediment to the effective enforcement of Austria's foreign bribery offences. They also note that the Austrian Ministry of Justice agrees that there may be more efficient ways of tracking down bank accounts in criminal investigations. The lead examiners note Austria's position that bank secrecy is constitutionally protected, and that it would be difficult to reform the process for remedial actions by financial institutions. The lead examiners therefore recommend that Austria find a way that is appropriate and feasible within its legal system to remove the impediments to effective foreign bribery investigations caused by the routine use of remedial actions, and report in writing on progress in this regard in one year from adoption of this report.

(c) Access to information about beneficial owners of companies

76. At the on-site visit, the lead examiners also explored whether Austria's rules and procedures for obtaining access to information about legal persons were an obstacle to the effective detection and investigation of allegations of the bribery of foreign public officials. (The discussion on access to information about beneficial ownership in this part of the report is separate from requirements for anti-money laundering and financial regulation purposes.) They learned that important measures have been put

into place in Austria to make it easier for law enforcement authorities to identify the beneficial owners of entities, including listed and unlisted stock corporations. They also discovered that there are still obstacles to obtaining information about beneficial owners; although, the use of *Treuhand* trusts, an area of concern for the lead examiners leading up to the on-site visit, does not appear to have been an obstacle in practice, at least so far, to detecting and investigating allegations of the bribery of foreign public officials.

77. Out of the 15 allegations of the bribery of foreign public officials (see A. 5 "Cases involving bribery of foreign public officials"), access to shareholder information does not appear to have been requested in any case; although in at least 7 cases (Cases #1, 3, 6, 7, 8, 10, and 14), house and/or office searches were conducted.

Access to information about beneficial owners of shares of unlisted and listed companies

78. As of 28 July 2011, Austria has made certain changes to increase the transparency of legal persons. The Company Law Amendment Act 2011 requires unlisted stock corporations to convert bearer shares into registered shares. Those bearer shares already issued must be converted by December 2013. A register of shareholders is to be maintained by each unlisted stock corporation, including the name, address, date of birth, commercial registry number (if the shareholder is another legal person), number of shares, and bank account.

79. At the on-site visit, the Austrian Control Bank explained that companies seem to be well aware that they need to complete the conversion of bearer shares into registered shares by December 2013, and some have already concluded the conversion. Approximately 80 unlisted companies still have bearer shares in the system. The Austrian authorities stated that companies that do not complete the conversion by the December 2013 will not be liable to penalties for failing to keep their registry in order. Instead bearer shares will be deemed to be normative shares by law as from 1 January 2014, irrespective of the statutes of the company. Consequently the companies' management boards will be obliged to set up a share registry, and the company will be liable to every shareholder for any damage resulting from not establishing such a registry, or for a registry that has not been properly maintained. The Austrian authorities believe that this is much more effective than penal or supervisory provisions for ensuring that bearer shares are converted to nominative shares. The lead examiners are sceptical, however, that relying on shareholders to bring damage suits would be effective for ensuring that bearer shares are registered, in cases where the beneficial owners of bearer shares in fact want to conceal their identities.

80. The Austrian authorities explained that law enforcement authorities can only obtain access to registers of shareholders maintained by unlisted companies based on an order of the competent enforcement authority. The rules of the Austrian Data Protection Act 2000, as amended, must be observed, of which section 15 provides the general rule of data protection that requires a legally admissible reason for transmitting personal data.

81. In addition, pursuant to section 2 of the Commercial Register Act, certain legal entities, including the following, must be registered in the Austrian Commercial Register: individual entrepreneurs, open partnerships, limited partnerships, stock corporations, and limited liability companies. The Commercial Register must list shareholders of limited liability or private partnership companies, but not shareholders of stock corporations, unless there is a sole shareholder. There is no obligation to list any information in the Commercial Register about "beneficial ownership" deviating from the shareholders published. At the on-site visit, the OStA stated that the "biggest problem" is discovering that the shareholders of the company under investigation are not the beneficial owners.

82. Under certain conditions listed companies are still allowed to issue bearer shares. However, the Austrian authorities explained that the transparency of the beneficial owners is ensured by the requirement

that shares must not be issued separately, but only in a global certificate, which, pursuant to section 10(2) of the Companies Act, must be kept by the Austrian Central Depository. This allows all share transactions to be traced back through the relevant bank account transactions. The requirement in section 91 of the Austrian Stock Exchange Act that relevant share transactions must be notified to the Financial Market Authority and to the issuer, provides additional assurance of transparency.

83. The Austrian Control Bank explained that the global certificate for each listed company is kept in a vault in the Central Securities Depository, which holds the certificates only for the purpose of their client companies. The Austrian Control Bank recalls sharing information in a global certificate with law enforcement authorities only once.

Treuhand trusts

84. In Austria, it is possible to form a trust relationship known as a *Treuhand* trust, which can take the form of a simple contractual (even oral) agreement, where one party mandates the other party to act on its behalf. This relationship is also known as the "hidden *Treuhand*", because the trustor's identity is not revealed. Usually, the trustee is a lawyer, but anyone, even a company, can be a trustee for someone else, including another legal person. The trustor can be hidden because the power of attorney which the trustor gives the trustee does not have to be registered or published, and might fall under the attorney-client privilege. As a result, assets of the benefactor, including corporate shares, can be secretly owned. However, bank accounts can only be secretly owned through a *Treuhand* if the trustee fails to disclose the identity of the beneficial owner of the account, contrary to a legal obligation to do so. (This issue is discussed below.) The lead examiners were concerned that *Treuhand* relationships could be an obstacle to effectively investigating foreign bribery cases, where the beneficial owner of a suspected company is a trustor in a *Treuhand* relationship. In the responses to the Phase 3 Questionnaire, the Austrian authorities stated that it is "not feasible" for "countries and their competent authorities to obtain or have access to accurate and current information" on benefactors of a *Treuhand* trust.

85. During the on-site visit, the lead examiners got a slightly different impression about the potential impact of *Treuhand* trusts on investigating the bribery of foreign public officials. The MOJ stated that pursuant to sections 40 and 41 of the Banking Act, banks are required to obtain information about the benefactor of a *Treuhand* trust. However, since it is up to the trustee to provide the information, the bank must depend on the trustee to truthfully disclose the *Treuhand* trust relationship. In order to provide a safeguard against trustees who fail to disclose, banks are required to make Suspicious Transactions Reports (STRs) to the Austrian Financial Intelligence Unit (A-FIU), when they suspect that a fiduciary relationship has not been disclosed by an account holder contrary to the Banking Act. Banks that violate the reporting requirement are liable to administrative penal proceedings. The administrative penalty for failing to comply with the disclosure obligations under article 40(2) of the Banking Act is a fine up to EUR 60 000 pursuant to article 99(1)(9) of the Act. Persons responsible for financial institutions who violate the reporting obligations under the relevant provisions of the Act, even if through negligence, are liable to an administrative penalty imposed by the Financial Market Authority (FMA) of up to six weeks of imprisonment, or a fine up to EUR 150 000, unless the act is also a criminal offence within the jurisdiction of the courts. The Austrian authorities provided statistics on the relevant administrative penal proceedings from 2008 to the end of the first quarter of 2012, which show that during this period a total of 27 proceedings took place, of which 15 were dismissed, 3 resulted in sentences, and 9 are ongoing. A total of 22 credit institutions and 5 customers were subject to these proceedings over the relevant period.

86. The Financial Market Authority (FMA) explained at the on-site visit that banks provide training on identifying undisclosed *Treuhand* trusts through the normal "know your customer" training. He said that banks will also sometimes obtain legal assistance to help determine whether suspicions are well-founded. The FMA checks whether banks are properly reporting *Treuhand* trusts through its on-site

inspections. The FMA stated that banks put a lot of effort in detecting *Treuhand* trusts, which are often used in real estate transactions, by carefully checking customer documentation.

87. The A-FIU confirmed receiving STRs from banks regarding customers' non-disclosure of *Treuhand* trusts. If money laundering is suspected, an assessment is conducted, and depending on the outcome, the STR might be forwarded to the police. If money laundering is not suspected, the STR is forwarded to the FMA.

88. The representative of a major MNE in the electronics sector stated at the on-site visit that he did not think that his company had shares held by *Treuhand* trusts, and that such trusts are used more by family businesses for tax reasons.

89. The law enforcement authorities represented at the on-site visit uniformly stated that the existence of *Treuhand* trusts has not been an obstacle to detecting allegations of the bribery of foreign public officials.

Commentary

The lead examiners believe that new rules requiring unlisted companies to convert bearer shares into registered shares by December 2013 will increase the transparency of Austrian legal persons, and should make it easier for law enforcement authorities to obtain information about beneficial owners when investigating unlisted legal persons for foreign bribery. However, the lead examiners are not convinced that damage suits by shareholders are sufficient for addressing cases where companies' bearer shares are not registered, especially where the beneficial owners of bearer shares in fact want to conceal their identities. They therefore recommend that Austria consider establishing a system of penalties for addressing these cases. The lead examiners are also concerned that the law enforcement authorities are encountering problems when the shareholders of a company under investigation are not the beneficial owners, and recommend that Austria find a way that is feasible and appropriate within its legal system to make it easier to identify beneficial owners in such companies. The lead examiners note that so far Treuhand trusts do not appear to have been an obstacle to investigating foreign bribery cases. However, given that discovery of a Treuhand trust that has not been disclosed by an account holder to a financial institution depends on detection by the financial institution followed by an STR, the lead examiners recommend following-up whether in the future law enforcement authorities encounter difficulties investigating legal persons due to the existence of Treuhand trusts, as practice continues to develop.

(d) Role of Minister of Justice in prosecution decision-making

90. In Phase 2, the WGB recommended that Austria monitor and evaluate decisions by the law enforcement authorities to terminate and not open investigations, including for the purpose of ensuring that considerations of the national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person involved, do not influence the investigation or prosecution of foreign bribery cases. This recommendation resulted in particular from the WGB's concerns about the decision to not open an investigation of allegations in a politically sensitive case. This recommendation remained unimplemented at the time of Austria's Phase 3 follow-up written review in March 2008.

91. Since the Phase 3 follow-up written review, the MOJ issued a decree on the occasion of the 2008 Act Amending the PC, which mentions the relevant recommendation from the WGB's Phase 2 review. In addition, Austria stated in its responses to the Phase 3 Questionnaire that it has "observed" that foreign

bribery investigative proceedings have not been obstructed due to considerations of the prohibited factors in Article 5 of the Anti-Bribery Convention.[29]

92. Under section 8 of the Public Prosecution Act, the Minister of Justice must approve the final settlement of criminal proceedings in which there is a supra-regional public interest. The Austrian authorities confirmed in the responses to the Phase 3 Questionnaire that reporting to the Minister of Justice will therefore occur for cases of the bribery of foreign public officials, and the bribery of Members of Parliament. In practice, public prosecutors report to senior prosecutors, who then report to the Minister of Justice. The Minister of Justice is politically accountable for the policy of the prosecution service, and may be questioned in Parliament about prosecution policy in general, and also individual prosecution decisions. In Austria the public prosecution service has been institutionalised in the Constitution since 2008.

93. The Austrian authorities explained in their responses to the Phase 3 Questionnaire that the Minister of Justice has not issued general instructions on the enforcement of bribery offences, including the bribery of foreign public officials. Regarding individual cases, the MOJ stated at the on-site visit that the Minister of Justice only becomes involved at the end of an investigation on deciding whether to prosecute. The Minister reviews the report by the prosecutor to determine whether prosecution is justified under the law, and there are few exceptions to prosecution. According to the Austrian authorities, overall state interests, such as the national economic state interest, and the other prohibited factors in Article 5 of the Anti-Bribery Convention, do not constitute an exception to prosecution. Due to the principle of "legality", the public prosecutor as well as the Minister of Justice do not have the legal authority to dismiss or terminate an investigation, or refuse to prosecute a case, on any of the grounds prohibited by Article 5 of the Anti-Bribery Convention. In addition, the Minister of Justice's order must be in writing, is included in the file to which the defendant and other parties can obtain access, and is subject to Parliamentary control. The MOJ stated that the Minister of Justice makes about 5 to 10 orders a year.

94. The Austrian authorities clarified that WKStA, which investigates allegations of foreign bribery, is required pursuant to the Public Prosecution Act (section 2(a), para. 3) to submit a report to the Minister of Justice only *after* important investigative steps have been ordered and only at the end of a foreign bribery investigation, setting out how it intends to bring the investigation to a procedural end -- i.e., by either filing an indictment or dismissing the case – and has to give reasons for the decision. At this stage, the Minister of Justice must decide whether to accept the report, and has the authority to order further investigation.[30]

95. The Austrian authorities explain that the WKStA is not required to report investigative steps to the Minister of Justice in advance of taking them, as the WKStA is competent to initiate investigative steps in all cases of bribery, even in sensitive cases involving a misuse of office. However, during the on-site visit, the MOJ stated that in most cases, when the prosecution authority submits a report to the Minister of Justice at the end of an investigation, the Minister orders more investigative steps. In practice, it is this area of the Minister of Justice's authority that raises issues for the lead examiners. Two representatives of the legal profession said that the process of following-up the Minister of Justice's order for further investigative steps or information can result in subtle pressure on prosecution authorities in politically sensitive cases. A prosecutor can feel very isolated anticipating what the Minister expects, and according to the representative of a major anti-corruption NGO, the prosecution authority can find him/herself reporting every major step, and being asked repeatedly to provide additional information, with the result that his/her independence is affected in anticipation of the expectations of the Minister of Justice.

[29] Article 5 of the Anti-Bribery Convention states that foreign bribery investigations and prosecutions "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".

[30] See the following provisions in the Public Prosecution Act: sections 2a(3), 8(1) and 8a.

96. MOJ does not agree that reporting to the Minister of Justice can result in subtle pressure on the prosecution authority, and also points out that in cases of public interest, prosecutors may benefit from reporting to the Minister of Justice, because the decision on whether to prosecute is taken by the Minister who is held responsible for his/her decision by the public, media and Parliament. MOJ believes that this process protects the public prosecutor in charge of the case, who does not have to justify his/her actions or deal with the media. This can eliminate the burden for prosecutors handling cases that involve suspects with strong ties to the media.

Commentary

The lead examiners recommend that Austria ensure that, in compliance with Article 5 of the Convention, investigations and prosecutions of foreign bribery cannot 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, particularly in view of the Minister of Justice's decision-making authority in foreign bribery cases.

(e) Resources for investigating and prosecuting foreign bribery cases

97. In Phase 2, the WGB recommended that Austria ensure that necessary resources, including specialised expertise, be made available to prosecutors for the effective investigation and prosecution of the foreign bribery offence. At the time of Phase 2, there was no formal specialisation and no specialised economic crime service, or training for judges and prosecutors. The need for specialised expertise was especially pronounced for tasks such as forensic accounting, and financial and economic analysis. Since Phase 3, the Austrian authorities have taken a number of significant steps to increase the level of expertise and specialisation.

98. In the responses to the Phase 3 Questionnaire, the Austrian authorities explained that in 2010 the Coordinating Body on Combating Corruption was established. This is a multidisciplinary committee that coordinates measures on anti-corruption, including foreign bribery. Representatives of various parts of the Government participate in this body, including the Parliamentary Administration of various federal ministries, the Länder, various authorities, including the Federal Bureau of Anti-Corruption (BAK), and the private sector, including the Chamber of Commerce. The body is expected to be formally established by the end of 2012 by a Decision of the Committee of Ministers, and its main task will be to elaborate a National Anti-Corruption Strategy. The responsibility of the BAK therein will be the establishment of the National Anti-Corruption Prevention Strategy Plan (NACPSP).".

99. The Austrian authorities also stated in the responses to the Phase 3 Questionnaire that the most important development since 2009 is the transformation of the Bureau of Internal Affairs into BAK, by adopting the Federal Law that came into force in February 2010. BAK is a unit of the MoI, and its main tasks include the following: 1) preventing and combating corruption in Austria; 2) acting as the central point of contact in Austria on combating corruption at the international level; 3) official functions on matters of MLA; and 4) cooperating with Interpol, Europol and the European Anti-Fraud Office (OLAF). BAK is the police counterpart to WKStA. BAK has a staff of 115 officials, of which 60 work in the Investigation Department. Last year, BAK handled 451 cases, and estimated that it handles approximately 50 to 60 international cases per year. Since it was established in 2009, BAK has doubled its resources.

100. WKStA was established in September 2011 by expanding the jurisdiction of the Office for Prosecuting Corruption (which was established in 2009) to also cover economic crimes. Pursuant to the CPC, WKStA is responsible for conducting investigative proceedings, and acting for the prosecution in main trials, and trials before the Higher Regional Court, for various economic offences, including the bribery of foreign public officials under sections 307, 307a and 307b PC. By September 2012, the authority

of WKStA will be expanded again to cover further economic crimes, such as chain and pyramid schemes. WKStA is responsible for MLA regarding the offences within its responsibility, and criminal cooperation with relevant bodies of the European Union, and justice authorities of the Member States of the EU. It is also the central contact point in Austria for OLAF and Eurojust, regarding the same offences.

101. WKStA may borrow expertise from the competent public prosecutor to take over the prosecution of any economic crime, including foreign bribery, if the offence was committed by receiving a benefit not exceeding EUR 3000, and there is a special interest to solve such an offence due to its significance or the person involved. WKStA employs public prosecutors who mostly have special economic training and at least 5 years of expertise in the financial and business sectors, including employees seconded by MOF. The number of statutory positions of public prosecutors at WKStA has been increased from 5 in 2009, to 21 in 2011. Currently there are statutory positions for 21 prosecutors, and since 1 May 2012, 18 prosecutors have been employed by WKStA. At the on-site visit, WKStA also explained that currently one staff member from the MOF looks at companies' accounts and 4 experts look at documentary evidence.

102. In 2010, Police Headquarters was reorganised, and established a separate department for economic and financial crime, which consists of 4 units that deal with fraud, counterfeiting, serious economic crime, money laundering and asset forfeiture. All the units consist of investigators with special training and experience, who are responsible for developing strategies for combating economic and financial crime, and leading large investigations. The 9 police units at the Länder level each have specialised fraud and economic crime units, and in 2013-2014 they will also establish separate teams for asset forfeiture. At the on-site visit, WKStA explained that the individual units do not have sufficient resources to carry out major economic and financial crime investigations themselves, so they form task forces. Länder police units have jurisdiction to investigate corruption cases when they have been delegated to them by BAK.

103. The WKStA stated at the on-site visit that the BAK model is a better way to organise the police authorities than task forces, and that this issue is under consideration by the MOI. Following the on-site visit, MOJ stated that the task force methodology has been working well. The Austrian Criminal Intelligence Service organises task forces for major economic crime cases composed of relevant specialists, including at least one investigator from the money laundering unit and one from the asset recovery unit. Task forces can also request specialists from other departments, such as experts on IT surveillance and undercover operations. To date, 4 task forces have been established with 54 investigators. Two task forces are working with WKStA, and two with the prosecution services in the relevant regions. In 2011, the economic crime units in the regions were expanded by 33 investigators, and Police Headquarters was expanded from 52 to 64 investigators.

104. The WKStA explained that the Council of Europe's Group of States against Corruption (GRECO) recommended that the MOJ form a central body to coordinate the anti-corruption enforcement bodies in Austria. According to WKStA, a coordination strategy is under development.

105. At the on-site visit, a media representative stated that the law enforcement authorities tasked with investigating and prosecuting foreign bribery cases in Austria lack adequate human resources and technical resources for analysing the information in digitalised files, and that he believes this is a problem that will not be solved very soon. Following the on-site visit, the Austrian authorities stated that they were not previously aware of this perception on the part of the media

106. This opinion was supported by the law enforcement forces themselves at the on-site visit. BAK stated that it has significant practical problems evaluating huge amounts of digitalised data, particularly emails, in a short time, and solutions from 5 years ago are now obsolete. BAK believes that a central body is needed to analyse this information, rather than using parallel structures, as is currently the case. BAK

finds that it is disadvantaged, compared to the resources of the private sector, and badly needs new software tools to handle the data. Following the on-site visit, MOJ pointed out that BAK has implemented a technical system to improve efficiency in handling digitalised data. In addition, a project for implementing a joint eDiscovery-System was started in 2012 for the police, prosecutor services, WKStA and BAK. The project is headed by the Department of Operational and Strategic Analysis in the Criminal Intelligence Service.

107. The OStA said it faces significant challenges tracing money flows in foreign jurisdictions through MLA requests, and it could take a whole year to get access to foreign bank records. The WKStA is facing similar challenges tracing money flows, and not being able to prove that payments constituted bribes, including when they are made through consultants. The MOI echoed the problems about tracing money flows. Following the on-site visit, MOJ informed that a project called "Asset Recovery New" was started in 2011, which will be implemented by separate asset recovery teams in the 9 Länder. The first joint workshop of financial crime investigators and prosecutors on this project will take place at the end of November 2012, and staff recruitment has also begun.

108. In addition, the Austrian authorities report that following the on-site visit a working group was established to reach an agreement between the law enforcement authorities of MOI, MOF and MOJ on how to speed up isolated cases in which investigations take longer than normal.

Commentary

The lead examiners believe that the Phase 2 recommendation to increase prosecution resources has been implemented through the establishment of WKStA in 2011. They also believe that the establishment of BAK in 2010 as the police counterpart to WKStA is an important complementary initiative.

In addition, the lead examiners recommend following-up the establishment and implementation of the strategy for coordinating the anti-corruption bodies, in particular to see if it enables the individual bodies to better utilise their resources. They also recommend that, as a matter of urgency, Austria include in its coordination strategy, concrete and substantial measures for: 1) further improving the capabilities of its law enforcement authorities to effectively evaluate significant amounts of digitalised data, including emails; and 2) tracing the proceeds of foreign bribery.

6. Money Laundering

109. Austria FIU (A-FIU) is located in the Federal Bureau of Criminal Investigations of the MOI. The number of employees was increased by 6 since the Phase 2 review, and currently A-FIU has 20 staff. In addition, a further recruitment process is underway. Austria informed that several training activities have been held by A-FIU on bribery, including the bribery of foreign public officials.

110. In the responses to the Phase 3 Questionnaire, Austria provided that "national legislation for combating money laundering and financing terrorism was substantially amended by the 'transparency package' adopted in 2010, taking into account the conclusions of the FATF [Financial Action Task Force] report published in 2009". The 2012 FATF Follow-Up Report, provided by the Austrian authorities, states that Austria has made "significant" progress to remedy several deficiencies, including those in respect of core recommendations. Measures that have been implemented, include the following: 1) adoption of the Regulation on Money Laundering and Terrorist Financing Risks, which entered into force on 31 December 2011, and further defines cases where enhanced customer due diligence (CDD) is required by financial institutions; 2) introduction of the offence of self-laundering in 2010 through amendments to the PC; and

3) expanded reporting requirements under the Banking Act, which require reporting to the competent authorities upon suspicion that assets originated from one of the criminal acts in sections 304 to 308 of the PC. As a result, a suspicion that money laundering has been committed is no longer necessary to require reporting to the relevant authorities of the bribery of foreign public officials.

111. At the on-site visit, A-FIU stated that it reported corruption offences to BAK 3 times in 2011, but is not sure if any of these offences involved the bribery of foreign public officials. A-FIU stated that it is difficult getting confirmation from BAK about these cases. WKStA did not think it had received any of these reports; however, it stated that cooperation with BAK is excellent. A-FIU also stated that the exchange of information between the various law enforcement authorities regarding STRs is very good, and that it holds regular meetings with prosecutors. It has information-sharing agreements with BAK, the Federal Agency for State Protection and Counter Terrorism (BVT), and MOF. The Austrian authorities state that information-sharing is working well with BVT and MOF, but needs to be improved vis-a-vis BAK. A-FIU explained that previously it did not receive many STRs, but since the offence of self-laundering was introduced in 2010, this situation should change.

112. In the responses to the Phase 3 Questionnaire, the Austrian authorities stated that information about STRs is not available to MOJ -- only data about related proceedings, indictments and convictions. Austria reported data on the number of convictions for money laundering from 2006 to 2010 and unformatted data for 2011 as follows: 3 in 2006, 14 in 2007, 7 in 2008, 5 in 2009, 6 in 2010, and 11 in 2011. At this stage, it is difficult to assess whether the new self-laundering offence has in fact resulted in an increase in money laundering enforcement proceedings.

113. Pursuant to section 41(3b) of the Banking Act, financial institutions are required to not disclose to account holders any actions related to filing STRs as well as to responding to requests made by A-FIU. However, where the A-FIU orders the cancellation or putting on hold of a particular transaction because there is a suspicion or reason to believe that it might serve the purpose of money laundering, and the account holder asks the bank why the account has been frozen, the financial institution is required to refer the account holder to the A-FIU (the financial institution is prohibited from giving information itself to the account holder or any third party of the reasons for cancelling or putting a transaction on hold). The lead examiners expressed concern that referring the account holder to the A-FIU could result in tipping-off the account holder of a foreign bribery investigation, and result in the destruction or concealment of evidence. In many cases, in addition to a freezing order, an STR might have been made to A-FIU, or access to the account holder's bank records might have been requested by the law enforcement authorities. Notification of the freezing order would be tantamount to notification of an investigation. The MOJ strongly disagrees with this opinion, stating that a freezing order has no impact on the investigation itself, even if a party raises a complaint. In any case, the lead examiners believe that this situation is not unique to Austria.

114. According to the Austrian authorities, section 299(1) PC, which provides a prison term of up to 2 years, or up to 360 daily fines for intentionally aiding another person from escaping prosecution, applies to non-compliance with an STR obligation, including the obligation to not "tip-off" an account holder that an STR has been made. Statistics on application of this provision have not been provided. (This provision is also discussed in the context of accessing bank records above in this report under 5.b., "Access to bank and financial records".) However, the lead examiners question the effectiveness of this provision in cases where the failure to make an STR, or "tipping-off" by a financial institution or staff member, was intentional, for the purpose of aiding and abetting the commission of bribery by the account holder, due to

section 299(3) PC, which provides impunity to a person who intentionally helps another person to escape from prosecution if he/she was also trying to protect himself/herself from prosecution.[31]

115. The lead examiners also looked at implementation by Austria of Recommendation 28 of the Revised FATF Recommendations, which concerns the gaming sector, due to allegations of foreign bribery in Cases #1 and #9 involving the gaming sector, and someone who allegedly holds a substantial interest in Austria's gaming sector. The same person is involved in allegations of foreign bribery in Case #12, in the telecom sector. FATF Recommendation 28 states that "competent authorities should take the necessary legal or regulatory measures to prevent criminals 'or their associates' from holding, or being the beneficial owner of a significant or controlling interest, holding a management function in, or being an operator of, a casino". The FATF Glossary does not define "associate".

116. At the on-site visit, the Austrian authorities confirmed that the person in question does not hold a controlling interest in any Austrian entities in the Austrian gaming sector. However, in information provided by the Austrian authorities following the on-site visit, they could not rule out that he owns a substantial or controlling interest in a subsidiary of an Austrian entity in the gaming sector. The Austrian authorities explained that pursuant to current legislation, the Ministry of Finance's gaming supervisory authority only extends to gaming license holders to the extent that their gaming activities are carried out in Austria and tax proceeds are generated from those activities. Affiliates or shareholdings in entities located in Austria or abroad are only to be examined before acquisition/incorporation regarding the financial effects on the concession holder, including the taxes to be generated. The Austrian authorities further explained that gaming entities that are incorporated abroad and are partly owned by Austrian corporations or individuals are subject to the applicable local laws of the host country. They added that, to the extent Austrian authorities have jurisdiction at all, it is the responsibility of the law enforcement authorities to act if an Austrian license holder commits criminal acts abroad.

Commentary

The lead examiners acknowledge important initiatives that Austria has taken since Phase 2 to make its AML system more effective and efficient, including making self-laundering an offence, and expanding the disclosure requirements of banks to include suspicions of the bribery of foreign public officials.

The lead examiners believe that coordination between the A-FIU and the various law enforcement authorities appears to work well generally, except that communication between A-FIU and BAK seems to break down regarding feedback from BAK to A-FIU about how it has addressed STRs. The lead examiners therefore recommend that, where appropriate, BAK provide feedback to A-FIU about STRs regarding the laundering of the proceeds of foreign bribery.

The lead examiners take note that there may be a risk of using the Austrian gaming sector to launder the proceeds of foreign bribery, due to the regulation in this area, which does not require the Minister of Finance to consider whether subsidiaries of Austrian gaming entities

[31] Section 299(3) states: "Furthermore, no punishment pursuant to paragraph 1 [intentional aiding and abetting to escape punishment or execution of punishment] shall be meted out to someone who commits the offence with the intention to protect a relative or to prevent that he himself will be punished or subjected to preventive measures for being an accomplice in the commission of a punishable act for which the beneficiary is being punished or for which such person shall be punished or subjected to preventive measures".

are substantially owned or controlled by persons involved in the bribery of foreign public officials.

7. Accounting requirements, external audit, and company compliance and ethics programmes

(a) Fraudulent accounting for the purpose of bribing or concealing bribery of foreign public officials

117. In Phase 2 the WGB recommended that Austria ensure that its law and practice adequately sanction accounting omissions, falsifications and fraud relating to foreign bribery, and re-examine whether the law applies to all companies subject to Austrian accounting and auditing laws, and whether such sanctions are capable of being imposed on legal persons. This recommendation resulted from a reduction at the time of Phase 2 in the sanctions applicable to false accounting. Although there was not a general accounting offence at that time, criminal sanctions were available under different statutes for publishing accounts that intentionally gave an inaccurate view of the financial situation of an entity (see, for instance, section 122 of the Law on Private Companies, and section 255 of the Law on Public Companies). Penalties for violations of these provisions were a fine up to 360 daily rates or imprisonment up to 2 years. There was no possibility of applying fines to legal persons, as the VbVG did not come into force until 2006.

118. Since Phase 2, this recommendation has only been partially implemented. The VbVG came into force in 2006, which means that since then legal entities have been liable for the various bookkeeping offences. However, in the responses to the Phase 3 Questionnaire, the Austrian authorities informed that the sanctions for the bookkeeping offences have not been changed since Phase 2; although certain other legislative provisions might be relevant, including section 255 of the Securities Act, section 122 of the Limited Liability Act, section 89 of the Cooperatives Act, and section 41 of the Private Foundation Act. Austria also informed that there is an ongoing reform initiative to amend the various provisions concerning balance sheet offences, and combine them into one single offence. In addition, there are plans to introduce a 'qualified balance sheet offence' with a maximum sentence of 5 years of imprisonment, which would also apply to foreign companies listed on the Austrian stock exchange.

119. Representatives of the auditing profession who participated in the on-site visit stated that the enforcement of bookkeeping offences is at a very preliminary stage in Austria, and there is not a consensus on how it should be organised. As a result, there is no general enforcement authority for such offences.

(b) Reporting suspicions of foreign bribery by auditors

120. The Phase 2 Report also recommends following-up enforcement of Austria's auditing obligations. According to representatives of the auditing profession, who attended the on-site visit, in Austria, external auditors are required to report suspicions of foreign bribery to management or the supervisory board. Reporting to the competent law enforcement authorities would conflict with the auditor's duty of confidentiality. In addition, auditors are not required to leave an auditor position or report suspected acts of foreign bribery to the competent law enforcement authorities in situations where management fails to act on auditors' reports of suspected foreign bribery.

121. The representatives of the auditing profession who attended the on-site visit stated that there should be a legal obligation on a company's supervisory board to report suspected foreign bribery to the law enforcement authorities. The representative of a leading energy company said that it is up to the company to respond to reports by auditors of foreign bribery, and to clear up the suspicions. WKStA stated that there should be a legal obligation for external auditors to report suspected foreign bribery to the law enforcement authorities. The auditing profession also attributed a low level of internal reporting to a lack of coordination between the whistle-blowing, internal audit and external audit functions.

Commentary

The lead examiners consider that the WGB's Phase 2 recommendation on accounting omissions, falsifications and fraud relating to foreign bribery is now partly implemented, due to the coming into force of the VbVG, which applies the criminal bookkeeping offences to legal entities. However, since Austria plans to amend its bookkeeping offences, including by combining various balance sheet offences into one single offence, and introducing a new 'qualified offence', this recommendation cannot be considered fully implemented at this stage. The lead examiners therefore continue to recommend that Austria ensure that its law and practice adequately sanction accounting omissions, falsifications and fraud relating to foreign bribery, and re-examine whether the law applies to all companies subject to Austrian accounting and auditing laws.

In addition, in view of the feedback at the on-site visit about reporting by auditors of suspicions of foreign bribery, the lead examiners recommend that Austria encourage companies that receive reports of suspected acts of foreign bribery from an external auditor to actively and effectively respond to such reports. The lead examiners also recommend that Austria consider requiring the external auditor to report suspected acts of foreign bribery to competent authorities independent of the company, such as law enforcement or regulatory authorities, and ensure that auditors making such reports reasonably and in good faith are protected from legal action. Such reporting might also be done via the Austrian Chamber of Auditors and Accountants, which is already responsible for transmitting STRs reported to it by accounting and auditing professionals.

(c) Corporate controls, ethics and compliance measures

Codes of ethics

122. In preparation for the on-site visit, the evaluation team reviewed the codes of conduct/ethics of 12 of Austria's largest companies, some of which are at least partly owned by the Austrian government, and 6 SMEs. Of the large companies, only 2 did not have a code of conduct. Of the SMEs, 4 did not have a code of conduct. Of the 10 large companies that had a code of conduct, no company's code addressed specifically the bribery of foreign public officials; moreover, one did not address bribery and corruption at all, and another only addressed the receipt of bribes. Of the 12 large companies, five have known allegations of corruption, and three of these allegations involve foreign bribery.

123. Of the 8 large companies with a code of conduct that addressed the supply-side of bribery and corruption, one provided significant detail on what constitutes corruption, including a definition of a 'public official'. Another code provided substantial detail about what constitutes 'reasonable entertainment', and three provided substantial detail on what constitutes an acceptable "gift".

124. One code of conduct of a partly state-owned company permitted the provision of gifts and favours that are: 1) for legitimate business purposes and not to obtain benefits permitted by local laws; 2) modest in amount; 3) made in accordance with the prevailing local custom and are not considered to be in violation of the local law as interpreted and applied; 4) authorised by the local manager; and 5) would not embarrass the company. This company is the subject of several publicly known allegations of bribery, one of which involves foreign bribery.

125. At the on-site visit, the evaluation team discussed with the private sector panellists the codes of conduct that they had reviewed in preparation for the visit. A major company in the manufacturing sector stated that the codes of large companies in Austria are generally weak on foreign bribery because they do

not perceive a risk of enforcement. This same company has released guidelines on bribery, which deal with issues such as business gifts and facilitation payments. The code might have to be updated to reflect the 2012 Amendments. Implementation of the code is monitored by the internal audit function, which also reviews their anti-corruption policies.

126. A leading energy company stated that Austrian companies are still in a stage of developing provisions in their codes of conduct that specifically address foreign bribery, and its own code of conduct deals with bribery and corruption, but not foreign bribery specifically. Another large company in the manufacturing sector has incorporated the foreign bribery issue into its code of conduct. The same company has devised important rules to prevent risks of foreign bribery, including a by-law that does not permit local representatives to sign contracts on behalf of the company. This company also has strict rules on hospitality and business expenses.

127. One medium-sized company at the on-site visit in the automotive sector conducts due diligence on business partners using data bases, and a large company in the extractive sector requires intermediaries to be cleared by its compliance department, which requires extensive documentation and conducts background checks.

128. Two companies – a major company in the construction sector and one in the manufacturing sector – stated that they do not examine if companies in the supply chain know about the company's code of conduct. They added that there are other important sources of corporate procedures for preventing foreign bribery, in addition to codes of conduct.

129. A major pharmaceuticals company explained that a code of conduct only works effectively if there is a proper infrastructure in place for implementing it. This company was concerned that in certain countries, especially those where there is corruption at the political level, it is difficult to find local partners who will respect the code of conduct.

Whistleblower protections

130. In Phase 2 the WGB recommended that Austria take measures to facilitate the reporting of suspicions of foreign bribery by private sector employees, including clarifying the effect of section 86 of the CPC, and consider steps to better protect from retaliatory action employees who report in good faith suspicious facts involving foreign bribery. This recommendation resulted from concerns in Phase 2 that the effectiveness of section 86, which permits employees to report suspicions of foreign bribery, is constrained by the absence of specific protections for whistleblowers. In addition, section 27 of the Law on Private Sector Employees appeared to provide a legal basis for dismissing an employee who has undermined, through his/her actions, the employee/employer trust relationship. Informants were also at risk for prosecution for false accusations under the PC.

131. In the responses to the Phase 3 Questionnaire, the Austrian authorities did not address whether this recommendation has been implemented. Instead they provided information about witness protection measures available in Austria.

132. The 18 codes of conduct of Austrian companies (referred to above) that were reviewed by evaluation team before the on-site visit showed that of the 12 large companies, 8 provided whistleblower measures, and of the 6 SMEs, only one provided whistleblower measures. Of the 8 large companies with such measures, 3 provided specific reporting channels or 'hotlines', and two allowed anonymous reporting. The SME did not provide a specific whistleblower 'hotline' or channel. Two of the large companies with whistleblower measures obliged employees to report wrongdoing, and another 2 strongly encouraged employees to report. However, in 3 of the 4 companies with measures, the whistleblower was not protected

against retaliation if the reporting was in bad faith, and one company did not afford any specific protections – instead, its code of conduct stated that "in order to encourage disclosure and limit damages, employees are released from disciplinary and labour law measures to the extent allowed by applicable law if they contact the employee interest representative and are only marginally involved in the breach of regulations".

133. The companies that attended the on-site visit also did not necessarily have dedicated whistleblower 'hotlines' or channels. Two large manufacturers did not have whistleblower systems; although one would allow anonymous reporting. Three large companies – a manufacturer, an electronics company and an energy company – had dedicated whistleblower channels. One large company audited the whistleblower function.

134. Following the on-site visit, the Austrian authorities explained that in Austria, the "duty of loyalty" of employees implies an obligation of secrecy, and whistle-blowing might violate this duty in particular circumstances, thus justifying dismissal on the ground of untrustworthiness.[32] However, under contract law, a contractual obligation to keep illegal acts confidential shall be void. Nevertheless, dismissals due to whistle-blowing can be justified if the information disclosed is false or unsubstantiated, or the whistleblower "failed to proceed in a most considerate manner" with respect to his/her employer. Regarding the latter, disclosing an employer's irregularities to the media would, according to case law, justify dismissal.

135. Austrian labour law provides whistle-blower protections in certain circumstances (e.g., Labour Relations Act, Labour Contract Amendment Act, Equal Treatment Act, and Austrian Civil Code), but these protections apply exclusively to the realm of health, occupational safety and environmental threats, as well as the protection of minors and gender discrimination. Obligations under the law to report matters similarly apply to these areas, except for section 286 PC, which establishes the offence of a failure to prevent a punishable act, including by failing to inform the relevant authority of the act, if such information would have prevented the act.

Commentary

Given that generally speaking, Austrian companies appear to be still in a stage of developing provisions in their codes of conduct that specifically address foreign bribery, the lead examiners recommend that Austria encourage companies to develop and adopt adequate internal controls, ethics and compliance measures to prevent and detect foreign bribery, taking into account the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance.

The lead examiners also do not consider that Austria has implemented the Phase 2 recommendation to take measures to facilitate the reporting of suspicions of foreign bribery by private sector employees, and therefore recommend that Austria: 1) ensure that appropriate measures are in place to protect from discriminatory action, private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of foreign bribery; and 2) raise awareness in the private sector of the Good Practice Guidance, including paragraph 11. ii and iii on effective measures for whistle-blowing.

[32] See section 27(1) of the Employee Act, and section 82(e)(1) of the Trade, Commerce and Industry Regulation Act.

8. Tax measures for combating bribery

Detection and reporting by tax authorities

136. Pursuant to section 78 of the CPC, every public authority is required to report any suspicion of a criminal act, which is related to the authority's scope of public authority, to the competent law enforcement authorities. This obligation extends to tax authorities, who are obliged to report any suspicion of a criminal act, including the bribery of a foreign public official, of which they become aware during their tax audits. Failure to carry out this obligation is subject to punishment for abuse of office contrary to section 302 of the PC. The Austrian authorities explained following the on-site visit that the level of suspicion that triggers this obligation is a "certain probability that a crime has been committed based on specific circumstances that lead to the suspicion", but it is not necessary to hold a strong suspicion.

137. The Fiscal Penal Code requires that all tax authorities carrying out administrative criminal proceedings report tax crimes of which they become aware that have to be prosecuted by the public prosecution service (see articles 54, 80 and 81). Section 81 of the Fiscal Penal Code requires that all public authorities report tax offences to the fiscal penal authorities, including regarding corruption. Thus, there is not a specific obligation under Austrian law that the tax authorities report bribery to the law enforcement authorities that they detect in the course of their tax audits, unless a tax crime has also been committed. However, the lead examiners believe that it would rarely be the case that foreign bribery is not accompanied by tax evasion (i.e., concealment of the bribe payment as an allowable expense), and therefore any gap in reporting in practice is negligible.

138. According to a survey by the OECD Task Force on Tax Crimes and other Crimes, which records statistics of referrals from tax administrations to law enforcement of suspicions of corruption, Austria's tax administration referred 1 case in 2008 and 2 in 2010.[33] It is not clear whether any of these referrals also involved foreign bribery.

139. In addition, WKStA cannot recall a case of foreign bribery being detected and reported by the tax authorities, and attributed this to the following two factors: 1) uncertainty among tax examiners about their reporting obligation; and 2) taxpayers rarely declare bribes in their tax returns. WKStA recommended that tax evaluators be made aware of their duty to report through training. A major audit firm stated that it is very rare for tax evaluators to report suspicions of corruption, and attributed this to the obligation to report only clear breaches of the law.

140. At the on-site visit, the MOF informed that it started training tax authorities in 2011, specifically on detecting and reporting the bribery of foreign public officials. The training included guidance on reporting suspicions of foreign bribery to the head of the competent tax office in cooperation with the Head of the Penal Affairs Unit in that office, who would together decide if there is a sufficient presumption of bribery or corruption to formally report it to the law enforcement authorities.

141. At the on-site visit, the MOF explained that the first step after detecting an unclear and possibly suspicious payment would normally be for the tax examiner to confront the tax payer before referring the yet vague suspicion to the law enforcement authorities. The MOF stated that confronting the tax payer first in writing is a human rights obligation (i.e., right to be heard), and that the taxpayer might be able to show that the suspicion was unfounded. The purpose of going to the tax payer is to obtain further justification for tax purposes only. Normally, the tax payer would be given 14 days to respond. Depending on the tax payer's response, the tax office would decide on the issue of tax deductibility of the relevant expenses. The question of whether to report a presumption of bribery or corruption only arises tangentially. In addition,

[33] The information in this OECD survey was shared by Austria with the evaluation team.

the tax payer would be given the option of self-reporting to the law enforcement authorities. If the tax payer offers to self-report, this is taken on faith, and safeguards do not appear to be in place to ensure that the tax payer follows through with this undertaking. In addition, statistics are not available on how often tax payers have self-reported.

142. At the on-site visit, the WKStA stated that confronting the tax payer before reporting to the law enforcement authorities is a good practice, because it enables the tax examiners to clear up a lot of suspicions, which reduces the volume of reports made by the tax administration to the prosecutor's office. He also stated that self-reporting by a tax payer could result in a mitigated sanction. Following the on-site visit, the Austrian authorities emphasised that giving the tax payer a chance to be heard does not provide an opportunity for the destruction or concealment of evidence, because the books and records are secured by the tax auditor before informing the tax payer. However, the lead examiners believe that there might still be a danger that other evidence could be concealed or destroyed, including payments made by business partners such as foreign subsidiaries, joint venture partners, or members of the same consortium that are not required to be entered in the tax payers books and records, as well as incriminating information not found in a tax payer's books and records, such as emails and phone logs.

Cooperation and coordination with law enforcement authorities

143. In response to the Phase 3 Questionnaire, the Austrian authorities provided that tax authorities share information upon request by the public prosecutor, and have done this in practice with the WKStA in major cases. Moreover, the Minister of Finance and Minister of Justice have agreed on cooperation between the large-company auditing unit of the tax administration and the WKStA. The representative of WKStA stated that cooperation between the tax administration and WKStA works very well. He also explained that there is good cooperation between the tax administration and A-FIU due to a recent legislative amendment that imposes STR obligations on tax examiners. He also said that it will be necessary to raise awareness among the tax authorities about this new obligation.

144. Following the on-site visit, the Austrian authorities reported that they had taken steps to intensify cooperation between MOF and WKStA. The Large Taxpayers Unit held a full day workshop on 22 October 2012 to raise awareness of the legal environment in which different administrations are working, with a view to enhancing cooperation in corruption cases. The workshop was attended by representatives of MOF and WKStA, the Federal Criminal Police Office, and the Large Taxpayers Unit. The tax administration is also planning to issue a guideline on *inter alia* the burden of proof that needs to be met for tax auditors to report suspected corruption to WKStA

145. Regarding specific foreign bribery cases, at the on-site visit, the police stated that they have spoken to the tax authorities about Case #7 (see list of cases discussed at the on-site visit under A. 5 "Cases involving bribery of foreign public officials"). Otherwise, it does not appear that information has been shared between the law enforcement and tax authorities in any of the other 14 foreign bribery cases discussed at the on-site visit.

Bilateral exchange of information

146. In the responses to the Phase 3 Questionnaire, the Austrian authorities provided that Austria has abandoned its reservation on the exchange of information for tax purposes in article 26 of the OECD Model Tax Convention.[34] It has also entered several new bilateral treaties and arrangements, and is re-

[34] On 17 July 2012, after the on-site visit to Austria, OECD Council approved an "Update" to Article 26 of the Model Tax Convention and its Commentary, including Commentary 12.3. The Working Group on Bribery has not yet had an opportunity to assess the impact of the "Update" on implementation of the 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in

negotiating agreements in which it is stated that the name and address of the person in possession of requested information in Austria must be provided in incoming requests. Bilateral agreements for sharing tax information state that the "information requested by a foreign jurisdiction must be 'foreseeably relevant' for the administration and enforcement of the requesting state's law".

Commentary

The lead examiners acknowledge the steps taken by the Austrian authorities to enhance the cooperation in corruption cases amongst the tax evaluators, criminal police, public prosecutors. In view of the low number of reports by tax evaluators of corruption to the law enforcement authorities, the lead examiners encourage the continuation of efforts being made to establish guidelines for tax auditors which inter alia will indicate the level of presumption for reporting to the WKStA by a tax auditor, along with training and awareness raising measures for the tax administration on detecting and reporting suspicions of the bribery of foreign public officials. The lead examiners also conclude that there is a need for a significant increase of awareness on the part of the law enforcement authorities of the value of tax information to assist them with their foreign bribery investigations, and recommend that the first steps taken by the Austrian authorities should be continued.

In addition, the lead examiners are concerned that the routine practice of confronting tax payers about possible suspicious payments before reporting them to the law enforcement authorities provides a significant opportunity for the destruction or concealment of evidence for foreign bribery investigations. They are also concerned that there are not any safeguards to ensure that taxpayers who undertake to self-report to the law enforcement authorities follow through with their undertaking. The lead examiners therefore recommend that the Austrian authorities: 1) take measures that are feasible and appropriate in the Austrian legal system to limit reporting to tax payers to cases where there is a clear absence of risk that reporting will result in the destruction or concealment of evidence; and 2) establish safeguards to ensure that taxpayers who undertake to self-report to the law enforcement authorities, do this in practice.

9. International cooperation

147. In Phase 2, the Working Group recommended that Austria: 1) take all necessary measures to ensure that Austria does not decline mutual legal assistance (MLA) in foreign bribery cases on the ground of bank secrecy; 2) take all appropriate measures to ensure the provision of MLA in foreign bribery cases without undue delay; and 3) consider developing methods to collect statistics regarding MLA while maintaining the efficiency of a decentralized system". Austria has not taken any steps since Phase 2 with regard to issue 1), although it has taken a few steps with regard to issues 2) and 3).

(a) Bank secrecy

148. As discussed earlier in this report (see B.5.b "Access to bank and financial records"), bank secrecy remains a significant obstacle in foreign bribery investigations. During the Phase 2 written follow-up, Austria indicated that "bank secrecy can not preclude MLA", citing section 38(2) of the Law on

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International Business Transactions. As the current report involved an on-site visit prior to the entry into force of this updated Article 26 in the Model Tax Convention, the review under this section is based on the provisions of the Model Tax Convention as they were in force at the time of the visit. The "Update" can be accessed at: http://www.oecd.org/ctp/exchangeofinformation/120718_Article%2026-ENG_no%20cover%20(2).pdf.

Banking (*Bankwesengesetz*), which states that no bank secrecy exists once court proceedings have commenced. This law has not changed since Phase 2, suggesting that Austria has not taken steps to implement this part of the Phase 2 recommendation. It also is unclear how bank secrecy might come into play in investigations that have not yet reached the stage of a court proceeding.

149. During the on-site visit, panellists from the central authority and from the prosecution service indicated that most delays in providing MLA result from bank secrecy issues. In its response to the Phase 3 Questionnaire, Austria reported that these delays are caused by the "extensive remedial rights enjoyed by banks and bank associations, when a breach of bank secrecy is required". Thus, even if Austrian authorities ultimately obtain access to the information required to respond to an MLA request, they may not have access to the information until after a lengthy appeals process. Given the nature of financial crimes, such as foreign bribery, this type of delay can significantly impede investigations, as the funds sought may be moved before the information is provided. (For more information on accessing bank and financial records in foreign bribery investigations, see: B. 5. b. "Access to bank and financial records".)

150. Following the on-site visit, the Austrian authorities pointed out that section 38(2) of the Law on Banking must be read in conjunction with section 116 CPC, which was amended in 2010, to permit banks to provide bank information for all intentional crimes that fall within the competence of either the District Court or Regional Court (previously the relevant offence had to fall within the competence of the District Court), and other crimes within the competence of the Regional Court. The Austrian authorities explain that this amendment was deemed particularly necessary for the purpose of providing bank information in response to MLA requests. In addition, under section 116(2) CPC, the process for obtaining an order for access to bank records was streamlined by, for instance, eliminating the requirement that the account holder is suspected of having committed the offence using the account, or a person suspected of the offence has conducted or will conduct a transaction using the account. Now it is only necessary that it can be assumed that evidence of a business or related transaction can be secured that is necessary for solving a crime.

151. Regarding the provision of confiscation through MLA, the Austrian authorities explain that when an order for confiscation is obtained from a court, any entity or person affected has the right to appeal, and a notification of a freezing order is given in order to grant the affected persons or entities a legal remedy. According to Austria's responses to the Phase 3 Questionnaire, this process of notification appears to have impacted on the efficiency of the investigation in Case #10 (see description of Austrian investigations in 4. "Cases involving bribery of foreign public officials"), in which foreign authorities requested Austria to freeze assets in certain accounts, due to a reasonable suspicion of money laundering. Despite a court order to freeze the assets, the bank raised a complaint with the court by the account holders. The complaint was ultimately unsuccessful, but delayed the process by a few months.

152. Section 19 of the Regulation of the Minister of Justice of 30 April 1980 on Extradition and Mutual Legal Assistance in Criminal Matters (ARHV) requires the MOJ to be informed whenever a request for MLA is denied. According to Austrian authorities, this allows denials of MLA to be monitored and double checked by the Prosecutor's Offices at the Court of Appeals and by the MOJ. This law may be a useful tool for ascertaining whether requests for MLA are currently being denied for reasons of bank secrecy. Even though Austrian law does not prevent MLA from being provided, bank secrecy can seriously delay MLA, as discussed in the next part below.

(b) Safeguards for preventing delays in providing MLA

153. According to Austria, section 9(1) of the CPC, which requires criminal proceedings to be conducted without undue delay, sets forth a standard that MLA must be provided without undue delay. This law also has not changed since Phase 2. However, since before Phase 2, Austria's central authority

began following up execution of incoming MLA requests within three to four months. An electronic file system for this purpose was established at MOJ to enable the central authority to ensure that requests are carried out in a timely manner, and to keep track of the reasons for denying MLA requests, This new practice has provided oversight over MLA requests that go through Austria's central authority; however, it has not addressed potential problems of delay with requests that are submitted directly to prosecutor's offices (for example, requests from other EU countries).

154. The Austrian authorities point out that the main cause for delays in providing MLA is obtaining access to bank information in criminal proceedings, as discussed above under 5(b) on "Access to bank and financial records".

Commentary

The lead examiners commend Austria's central authority for establishing a process of oversight of MLA requests to make sure they are fulfilled in a timely manner. This follow-up process can help ensure timely responses to requests for MLA in cases where requests are submitted to the central authority. The lead examiners consider that it may be helpful for Austria to implement a similar method for follow up on requests submitted directly to the offices of public prosecutors. The lead examiners also note with concern that, due to problems discussed above under 5(b) on "Access to bank and financial records", bank secrecy also continues to be a significant impediment to providing, through MLA, access to information as well as confiscation and freezing orders in a timely manner, despite legislative amendments to improve such access. . They therefore recommend that Austria take immediate measures to ensure that: 1) Austria provides responses to requests for MLA without delay, regardless of whether the request is submitted to the central authority or to a public prosecutor's office; and 2) bank secrecy does not cause unnecessary delays in providing MLA in foreign bribery cases.

10. Public awareness

155. At the on-site visit, the evaluation team observed a high level of awareness among the private sector and civil society about the criminalisation of the bribery of foreign public officials in Austria, and that legal entities are also liable to sanctions pursuant to the VbVG. There was also a high level of awareness of the 2012 Amendments. Participants also indicated that the Government held a wide consultation process on the 2012 Amendments, including a broad invitation to submit comments. Some participants perceived the 2012 Amendments positively, and some were critical, believing that they create a risk of prosecution for providing gifts and entertainment to cultivate and maintain business relationships.

156. At the on-site visit, the evaluation team also observed a perception across the board that it is almost impossible to do business in certain countries without bribing foreign public officials. One major oil and gas company has completely withdrawn its operations from a country due to bribe solicitations. The incentive for doing this appeared to be the risk of prosecution under the UK Bribery Act. A major business association stated bribe solicitation particularly disadvantages SMEs, because large companies have the resources to outsource corruption to intermediaries. Another major business association stated that companies need to be more prepared before they establish operations in countries at high risk for corruption, by, for instance, developing methods for avoiding solicitation. He also explained that officials sometimes give up soliciting bribes after about one year if a company refuses to pay them, but this is costly and time consuming, and the company would have to make sure to always approach the same official.

157. The lead examiners were also told by numerous participants that they do not perceive a risk of prosecution for foreign bribery by the Austrian authorities. One large manufacturer was aware of several pending proceedings, but saw no signs of actual prosecutions. Another major manufacturing company was

aware that specialised anti-corruption law enforcement authorities had been created, but thought that not much enforcement was occurring. Another major manufacturing company did not know of any pending cases in Austria. The some company did not consider whether foreign companies with which it does business are state-owned or controlled. A major auditing firm said that the costs of compliance in Austria are not outweighed by the risk of prosecution, but also said that even one big prosecution could change the attitude of larger companies.

158. The view about enforcement was shared by a medium-sized automotive company, which said that companies are not afraid of the Austrian law. The same company said that a more important incentive for SMEs is that they need to demonstrate robust compliance measures in order to do business with large MNEs. A private lawyer stated that without prosecutions companies will not take seriously the criminalisation of foreign bribery in Austria. Another lawyer is even finding that Austrian companies are not interested in foreign bribery compliance training since they do not perceive a risk of prosecution.

159. A major anti-corruption NGO and a private lawyer stated that companies would more likely take preventive steps if there were concrete evidence that there is a positive correlation between increased compliance and business success. A major electronics company and a large construction company would like the Austrian government to more proactively encourage preventive measures by companies. Companies were generally unaware of the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance.

Commentary

(Please see recommendation under the first paragraph of B.7.c, "Corporate controls, ethics and compliance measures")

11. Public advantages[35]

160. In Phase 2, the WGB recommended following-up implementation of anti-corruption policies by the Austrian Development Agency (ADA) and export credit agencies. This recommendation resulted from the following: 1) ADA was in the process of developing a broader anti-corruption policy; and 2) the Austrian Export Credit Agency (OeKB) did not have experience cooperating with other OECD Export Credit Group Members about suspected and/or proven instances of foreign bribery related to officially supported export credit transactions. At the time of Austria's Phase 2 written follow-up report, the WGB assessed as satisfactorily implemented by Austria, a recommendation to establish procedures for reporting credible evidence of foreign bribery to the competent authorities by ADA and OeKB, and ensure that preventive anti-bribery clauses are applied by subsidiaries of OeKB.

Official development assistance

161. ADA's General Terms and Conditions for Grants provide conditions under which recipients shall be obliged to immediately repay any funds already disbursed, and entitlements to undisbursed funds shall expire. These conditions include the case where "a gift, a pecuniary benefit or any other benefit has been offered, promised or granted to a person or agency directly or indirectly in connection with the awarding of the grant or with the implementation of the Project".

162. ADA also shared with the evaluation team an example of an agreement on general budget support for a developing country. One of the provisions in the agreement "reserves the right of ADA to withhold and/or reclaim all or parts of the grant in case of misappropriation or misuse of funds".

[35] See discussion of debarment on conviction for foreign bribery under 3.c on "Administrative Sanctions".

163. ADA explained at the on-site visit that it has never been approached by police or prosecutors about information concerning companies that are under investigation for the bribery of foreign public officials. Austria informed that after the on-sight visit WKStA requested information from ADA in July 2012 concerning a foreign bribery investigation. However, the concerned company did not have a contractual relation to ADA. If such a request were made, ADA would be able to share information without a court order. The Austrian authorities also explain that ADA is able to share personal information on request by the police or public prosecutor on the basis of the principle of proportionality.

164. ADA stated that it has not received any reports about the bribery of foreign public officials, but there is not a high level of awareness of the appropriate channels for making such a report. Austria also confirmed that, while ADA does not routinely check debarment lists of multilateral financial institutions, it routinely verifies the reliability of potential project partners, including their degree of creditworthiness.

Official export credit support

165. In the responses to the Phase 3 Questionnaire, the Austrian authorities stated that an applicant for officially supported export credits must state if he/she has been found guilty by a "domestic court" of bribing a foreign public official or if bribery charges have been filed against him/her within the past 5 years. The Austrian authorities confirm that a "domestic court" includes a court in a foreign country. The applicant must also warrant not being on a debarment list of the World Bank, AfDB, ADB, EBRD or Inter American Development Bank. Furthermore, the applicant must warrant that no foreign bribery has been or will be involved in relation to the transaction in question. This warranty also extends to representatives of the applicant, including the case where the representative bribes a foreign public official without the knowledge or against the strict order of the applicant.

166. OeKB has an internal service that checks media reports, and OeKB would conduct enhanced due diligence if an exporter were on a debarment list or the media reported allegations that the applicant has been involved in foreign bribery.

167. OeKB has not exchanged information with law enforcement authorities regarding any foreign bribery investigations, and doubts that it would be able to share such information without a court order. However, OeKB has an information line with the MOF, and the MOF in turn would inform the law enforcement authorities. The competent authorities of MOF dealing with export credit guarantees also share information with the tax authorities on indemnifications related to tax debt.

Public procurement

168. At the on-site visit, the Federal Chancellery explained that it can debar a candidate/tenderer for reasons including a criminal conviction or serious violation of professional conduct. A final court judgement would not be necessary to debar in this situation.

169. The Federal Chancellery also stated that it does not have a debarment list, as the Constitutional Court says that each case has to be evaluated individually on its merits. Following the on-site visit, the Austrian authorities confirmed that blacklists are not important in Austria for decision-making regarding public procurement contracting, because the contracting authority has to consider all the reasons submitted by a candidate/tenderer on a case-by-case basis. Although blacklists can be an indication that a candidate/tenderer is not reliable, the mere listing of a company on such a list cannot be the basis for an automatic exclusion from the procurement procedure. In addition, a candidate/tenderer cannot be excluded without providing an opportunity to be heard by the contracting authority. The Federal Chancellery considers that the World Bank Debarment List has no "practical importance in Austria" because companies

that contract with the World Bank rarely participate in Austrian procurement procedures, and due to the low value of the tenders, most companies that participate in Austrian tenders are SMEs.

Commentary

The lead examiners recommend that Austria raise awareness of the appropriate channels for making a report about the bribery of foreign public officials in relation to ODA contracting, and clarify the rules for sharing information on foreign bribery by official export credit support applicants and clients of OeKB with the law enforcement authorities. The lead examiners also recommend that Austria consider routinely checking debarment lists of multilateral financial institutions in relation to public procurement contracting.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

170. The Austrian on-site visit was notably well-organised, distinguished by an extremely high level of transparency, and included a large number of participants from the private sector and civil society, including two media representatives. Throughout the Phase 3 process, the Austrian authorities provided access to all requested documents, and timely and comprehensive responses to questions from the examination team. The on-site visit by the evaluation team took place shortly after amendments were passed by Parliament, which will come into effect on 1 January 2013, for the purpose of amending the anti-bribery offences in the Penal Code, including offences that apply to the bribery of foreign public officials. The amendments, which are intended in part to implement certain Phase 2 Recommendations, also eliminate the dual criminality requirement to establish jurisdiction over foreign bribery offences committed abroad by Austrian nationals. While viewed overall positively by the Working Group, due to the timing, these amendments could not be assessed in practice for their impact on enforcement of Austria's foreign bribery offences.

171. Moreover, the Working Group regrets that there has not been a conviction of the bribery of foreign public officials since Austria ratified the Anti-Bribery Convention in 1999, although approximately 15 allegations have been noted. Of these allegations, one case involving five indictments is currently being tried; a second case has resulted in indictments, including against a legal person; a third is expected to result in an indictment at the beginning of 2013; and four have resulted in investigations that are ongoing. In view of the recent significant increase in law enforcement actions, and the new amendments to the foreign bribery offences, the Working Group invites Austria to report in writing one year after adoption of this Report on progress prosecuting foreign bribery cases. The report should also address cases of bribery through intermediaries, as described in follow-up issue 10 a) i) below, and progress on implementing the following recommendations: 1 a) on prosecuting legal persons; 1 d) on the study of the effectiveness of VbVG; 3 on confiscation; and 4 a) on addressing the routine use of remedial actions by financial institutions in response to court orders to provide access to bank records. In one year, Austria is also recommended to provide an oral report on implementation of the following recommendations: 1 c) on increasing the fines for legal persons; 4 e) i) on law enforcement's capacity for evaluating digitalised data; and recommendation 8 b) on the use of tax information in foreign bribery cases.

172. Austria has now fully implemented the following Phase 2 recommendations that remained outstanding in Phase 2: 3 c) on resource allocation, 5 a) on sanctions for natural persons, and 5 c) on diversion of criminal proceedings. However recommendations 3 a) on implementation of Article 5 of the

Anti-Bribery Convention, 3 b) on mutual legal assistance, and 4 a) on accounting and auditing omissions, are partially implemented; and recommendations 2 b) on foreign bribery reporting, 3 e) on guidelines to prosecutors, and 5 b) on sanctions for legal persons, remain unimplemented. In addition, based on the findings in this Report on implementation by Austria of the Anti-Bribery Convention, 2009 Recommendations, and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations in Part 1 to enhance implementation of these instruments; and (2) will follow-up the issues identified in Part 2 below.

1. Recommendations of the Working Group

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

1. Regarding the liability of legal persons for the bribery of foreign public officials, the Working Group recommends that Austria:

a) Provide a written self-assessment of progress prosecuting foreign bribery cases involving legal persons one year after adoption of this report, which should include an assessment of the application in practice of the Federal Statute on Responsibility of Entities for Criminal Offences (VbVG) to foreign bribery cases, including whether in practice it meets the standards under paragraph B of Annex I of the 2009 Recommendation, and any procedural and legal obstacles to its effective application, with particular attention to the following potentially unclear aspects of the VbVG: i) its application to bribery through agents; ii) the standard of "due and reasonable care" that the prosecution must prove was not taken by a defendant legal person when foreign bribery was committed by a staff member of the legal person; iii) its application to bribery on behalf of related legal persons; and iv) the circumstances under which a legal person is considered a victim of a breach of trust; (Convention, Articles 2 and 5, 2009 Recommendation, par. V)

b) Issue and publicise guidelines to prosecutors clarifying that the prosecution of allegations of bribery of foreign public officials by legal persons is always required in the public interest under VbVG, subject only to clearly defined exceptions, and develop guidelines on organisational measures for business regarding the fight against foreign bribery, as was recommended already in Phase 2; (Convention, Articles 2 and 5);

c) Increase the fines for legal persons for the foreign bribery offence, given that they are substantially lower than the fines for natural persons, and in light of the size and importance of many Austrian companies, the location of their international business operations, and the business sectors in which they are involved; (Convention, Articles 2 and 3.2) and

d) Report in writing in one year on the study by the Austrian Government on the report by the Institute for Legal and Criminal Sociology on the effectiveness of the VbVG. (Convention, Article 2)

2. The Working Group recommends that Austria take appropriate steps within its legal system to ensure that nationality jurisdiction apply to Austrian companies that bribe abroad, including by using non-nationals as intermediaries. (Convention, Article 4.2)

3. The Working Group recommends that Austria in writing in one year on application of its confiscation provisions to convictions of the bribery of foreign public officials. (Convention, Article 3.3)

4. Concerning the investigation and prosecution of foreign bribery cases, the Working Group recommends that Austria:

a) Find a way that is appropriate and feasible within its legal system to remove the impediments to effective foreign bribery investigations caused by the routine use of remedial actions by financial institutions, and report in writing on progress in this regard in one year; (Convention, Article 5)

b) Consider establishing a system of penalties for addressing the situation where bearer shares are not registered pursuant to the rules requiring unlisted companies to convert bearer shares into registered shares by December 2013; (Convention, Article 5)

c) Find a way that is feasible and appropriate within its legal system to make it easier to identify beneficial owners of companies in which the beneficial owners are not the shareholders; (Convention, Article 5)

d) Ensure that, in compliance with Article 5 of the Convention, investigations and prosecutions cannot be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of natural or legal persons involved, particularly in view of the Minister of Justice's decision-making authority in foreign bribery cases; (Convention, Article 5) and

e) Include as a matter of urgency in its strategy for coordinating anti-corruption bodies, concrete and substantial measures for: i) further improving the capabilities of its law enforcement authorities to effectively evaluate significant amounts of digitalised data, including emails; and ii) tracing the proceeds of foreign bribery. (Convention, Article 5)

5. The Working Group recommends that Austria take immediate measures to ensure that: i) Austria provide responses to requests for mutual legal assistance (MLA) from Parties to the Anti-Bribery Convention without unnecessary delay, regardless if the request is submitted to the central authority or to a public prosecutor's office; and ii) bank secrecy does not cause unnecessary delays in providing MLA. (Convention, Article 9)

Recommendations for ensuring effective prevention and detection of foreign bribery

6. The Working Group recommends that, where appropriate, the Federal Bureau of Anti-Corruption (BAK) provide feedback to the Austrian Financial Investigation Unit (A-FIU) about Suspicious Transactions Reports (STRs) regarding the laundering of the proceeds of foreign bribery. (Convention, Articles 5 and 7)

7. Regarding the use of accounting and auditing measures as well as internal controls, ethics and compliance to prevent and detect foreign bribery, the lead examiners recommend that Austria:

a) Ensure its law and practice adequately sanction accounting omissions, falsifications and fraud related to foreign bribery, and re-examine whether the law applies to all companies subject to Austrian accounting and auditing laws; (Convention, Article 8)

b) Encourage companies to actively and effectively respond to reports of suspected acts of foreign bribery from external auditors; (2009 Recommendation, para. X B iv)

c) Consider requiring external auditors to report suspected acts of foreign bribery to competent authorities independent of the company, such as law enforcement or regulatory authorities, and

ensure that auditors making such reports reasonably and in good faith are protected from legal action; (2009 Recommendation, para. X B v)

d) Raise awareness in the private sector of the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance, including paragraph 11.ii) and iii) on effective measures for whistle blowing, and encourage companies to develop and adopt adequate internal controls, ethics and compliance measures to prevent and detect foreign bribery, taking into account the Good Practice Guidance; (2009 Recommendation, para. X C i)

e) Ensure appropriate measures are in place to protect from discriminatory action private sector employees who report suspected acts of foreign bribery to the competent authorities in good faith and on reasonable grounds. (2009 Recommendation, para. X C v)

8. Regarding the use of tax measures to prevent and detect foreign bribery, the Working Group recommends that Austria:

a) Continue efforts to provide training and awareness to the tax administration on detecting and reporting suspicions of foreign bribery detected in the course of performing their duties, including efforts to establish clear guidance on the level of suspicion that tax auditors need to make a report, and the kind of information that is needed to support the suspicion; (2009 Tax Recommendation, para. II)

b) Urgently take steps to significantly increase awareness of the law enforcement authorities of the value of tax information to assist them with their foreign bribery investigations; (Convention, Article 5)

c) Take measures that are feasible and appropriate in the Austrian legal system to restrict the routine practice of confronting tax payers about possible suspicious bribe payments before reporting them to the law enforcement authorities, to cases where there is a clear absence of risk that reporting will result in the destruction or concealment of evidence, and establish safeguards to ensure that taxpayers follow-through with their undertakings to self-report bribe payments to the law enforcement authorities. (Convention, Article 5; 2009 Tax Recommendation, para. II)

9. Concerning the prevention and detection of foreign bribery through the use of contracting opportunities for public advantages, the Working Group recommends that Austria:

a) Raise awareness of the appropriate channels for making a report about foreign bribery in relation to official development assistance (ODA) contracting; (2009 Recommendation, para. IX)

b) Clarify the rules for the sharing of information by the Austrian Export Credit Agency (OeKB) with the law enforcement authorities on suspicions of foreign bribery by official export credit support applicants and clients; (2009 Recommendation, para. IX) and

c) Consider routinely checking debarment lists of multilateral financial institutions in relation to public procurement contracting. (2009 Recommendations, para. XI i)

2. Follow-up by the Working Group

10. The Working Group will follow-up the issues below as case law and practice develop:

a) In light of recent amendments to the foreign bribery offences, application in practice of sections 307, 307a and 307b of the Penal Code, including: i) application of these provisions to the bribery

of foreign public officials through intermediaries, when the intermediary acts abroad, and is not an Austrian national; ii) interpretation by the courts of the definition of "foreign public official" in the Penal Code; and iii) application of sanctions to natural persons to determine if they are "effective, proportionate and dissuasive";

b) Whether in the future law enforcement authorities encounter difficulties investigating legal persons due to the existence of Treuhand trusts; and

c) Establishment and implementation of the strategy for coordinating the anti-corruption bodies, in particular to see if it enables the individual bodies to better utilise their resources.

ANNEX 1:
PHASE 2 RECOMMENDATIONS AND FOLLOW-UP ISSUES

	Phase 2 Recommendations (2006)	**Written follow-up (2008)**
Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials		
1.	With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Austria:	
	a) take measures, including appropriate training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that interact with Austrian companies that are active in foreign markets, including trade promotion, export credit and development aid agencies (Revised Recommendation, Paragraph I);	Satisfactorily implemented
	b) take further action to effectively improve awareness among companies, and in particular small and medium sized companies active in foreign markets, of the legislation regarding foreign bribery and of the government's intention to enforce it, and to assist companies in their efforts to prevent foreign bribery (Revised Recommendation, Paragraph I); and	Satisfactorily implemented
	c) work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to develop specific training on foreign bribery in the framework of their professional education and training systems (Revised Recommendation, Paragraph I).	Satisfactorily implemented
2.	With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Austria:	
	a) establish procedures to be followed by employees of export credit, trade promotion and development aid agencies for reporting credible evidence of bribery of foreign public officials to competent prosecution authorities, and ensure that preventive anti-bribery clauses are applied by subsidiaries of OeKB (Revised Recommendation, Paragraph I);	Satisfactorily implemented
	b) take measures to facilitate the reporting of suspicions of foreign bribery by private sector employees, including clarifying the effect of section 86 CPC and considering steps to better protect from retaliatory action employees who report in good faith suspicious facts involving foreign bribery (Revised Recommendation, Paragraph I);	Not implemented
	c) strengthen efforts to provide guidance to entities subject to money laundering	Satisfactorily

	reporting obligations in relation to foreign bribery and further assess and supervise the reporting practices of relevant entities (Revised Recommendation, Paragraph I); and	implemented
	d) require auditors to report all suspicions of bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, and consider requiring auditors, in the face of inaction after appropriate disclosure within the company, to report all such suspicions to the competent law enforcement authorities (Revised Recommendation, Paragraph V.B).	Satisfactorily implemented
Recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences		
3.	With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Austria:	
	a) monitor and evaluate the performance of investigation and prosecution agencies with regard to foreign bribery allegations on an on-going basis, including in particular with regard to decisions not to open or to discontinue an investigation, and including in order to ensure that considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person involved do not influence the investigation or prosecution of foreign bribery cases (Convention, Article 5; Revised Recommendation, Paragraph 1);	Not implemented
	b) take all necessary measures to ensure that Austria does not decline to render mutual legal assistance (MLA) in foreign bribery cases on the ground of bank secrecy, take all appropriate measures to ensure the provision of MLA in foreign bribery cases without undue delay, and consider developing methods to collect statistics regarding MLA while maintaining the efficiency of a decentralized system (Convention, Article 9(1), (3));	Not implemented
	c) ensure that the necessary resources, including specialized expertise, are made available to prosecutors for the effective investigation and prosecution of the foreign bribery offence (Convention Article 5; Revised Recommendation, Paragraph I);	Not implemented
	d) take appropriate measure to ensure (i) that all bribers offered, promised or given to a foreign public official for any use of the official's position, whether or not within the official's authorised competence, constitute the basis for e foreign bribery offence; and (ii) that a foreign public official's acceptance of an undue advantage exceeding a small facilitation payment is deemed contrary to the official's duties and would therefore constitute the basis for an active foreign bribery offence (Convention, Article 1);	Satisfactorily implemented
	e) issue and publicize guidelines to prosecutors clarifying that prosecution of allegations of bribery of foreign public officials by legal persons is always required in the public interest under the new law on the criminal liability of legal persons, subject only to clearly defined exceptions, and develop guidelines with regard to organisational measures froe business with regard to the fight against bribery (Convention, Articles 2, 3, 5); and	Not implemented
	f) provide appropriate training to judges and law enforcement personnel, including prosecutors and the staff of the Federal Criminal Investigation Office (BKA), with respect to the investigation, prosecution and adjudication of	Satisfactorily implemented

	foreign bribery cases (Revised Recommendation, Paragraph I).	
4.	With respect to related accounting/auditing and tax offences and obligations, the Working Group recommends that Austria:	
	a) ensure that its law and practice adequately sanction accounting omissions, falsifications and fraud relating to foreign bribery, and re-examine whether the law applies to all companies subject to Austrian accounting and auditing laws and whether such sanctions are capable of being imposed on legal persons (Convention, Article 8);	Partially implemented
	b) revise the Guidelines on income tax so that they accurately reflect the applicable law, and provide training with regard to the relevant criminal law provisions to tax officials (Revised Recommendation Paragraph IV).	Satisfactorily implemented
5.	With respect to sanctions, the Working Group recommends that Austria:	
	a) increase the criminal sanctions applicable to foreign bribery and in particular to serious cases in order to provide for effective, proportional and dissuasive sanctions (Convention, Article 3(1));	Not implemented
	b) take all necessary measures to ensure that legal persons that engage in foreign bribery are subject to effective, proportionate and dissuasive criminal penalties, including in cases where the legal person may not have generated significant profits over the relevant period (Convention, Articles 2, 3(1)).	Not implemented
	c) take appropriate measures to ensure that diversion and non-punishment pursuant to section 42 PC are excluded at least in all serious cases of foreign bribery (Convention, Article 3).	Not implemented
	d) compile statistics with regard to cases brought and types of sanctions imposed with regard to money laundering and accounting offences (Convention, Articles 7, 8).	Satisfactorily implemented

Follow-up issues identified by the Working Group in Phase 2

The Working Group will follow-up on the issues below, as practice develops, in order to assess:

a) with respect to the expected entry into force of the law on the liability of legal persons, the application of the law as it applies to foreign bribery with regard to (i) liability generally and in particular liability in cases of foreign bribery involving agents; (ii) sanctions generally (Convention, Articles 2, 3); (iii) the application of nationality jurisdiction to legal persons (Convention, Article 4); (iv) the availability of MLA in criminal cases against legal persons (Convention, Article 9);

b) the application of the foreign bribery provisions as case law develops, including with regard to the autonomy of the offence from any requirement of proof of the law of the foreign public official's country, the definition of "foreign public official" and the question of bribery through intermediaries (Convention, Article 1); and

c) the enforcement of accounting and auditing obligations (Convention, Article 8); and the implementation of anti-corruption policies by the Austrian Development Agency and export credit agencies.

ANNEX 2:
PHASE 1BIS CONCLUSIONS

General Comments

101. The Working Group on Bribery thanked the Austrian authorities for their co-operation and transparency in providing very thorough responses.

102. Several legislative developments have occurred in Austria since the Phase 2 evaluation of Austria's implementation of the Convention in 2005. In 2009, the Working Group expressed concern that an urgent amendment to Austria's anti-corruption legislation that entered into force in September 2009[36] (hereinafter "the 2009 Amendment Act"), could weaken Austria's laws against bribery of foreign public officials. This amendment to Austria's anti-corruption legislation -- that was not directly aimed at addressing issues raised in Phase 1 or Phase 2[37] -- followed a first amendment to the legislation implementing the-Convention[38], which entered into force on 1 January 2008[39] (hereinafter "the 2008 Amendment Act") and was in force for less than two years. Considering the broad scope of the 2009 Amendment Act to Austria's anti-corruption legislation, the Working Group decided to engage in an exceptional additional review of Austria's legislation (Phase 1bis). Prior to these amendments, in October 2005, shortly after the Phase 2 on-site visit, the Austrian Parliament had also adopted legislation establishing general criminal liability of legal persons, including for bribery offences: the Austrian Federal Statute on the Responsibility of Entities for Criminal Offenses (*Verbandsverantwortlichkeitsgesetz*, VbVG) that entered into force on 1 January 2006.

103. The Group expressed its serious concern that Austria's amended legislation i) no longer conforms to the standards of the Convention in particular with regard to the required elements of proof of the law of the particular official's country that are not compatible with the requirement of an autonomous offence; and ii) reduced the scope of the foreign bribery offence regarding public enterprises (as further developed below). Irrespective of any further matters raised by the Working Group in Phase 2, the following aspects of Austria's legislation should be followed up in Phase 3.

Specific issues

1. The offence of active bribery of foreign public officials

1.1 Lack of autonomy of the offence

104. Article 1 paragraph 4 of the OECD Convention gives an autonomous definition of foreign public officials to which national legislation should conform.

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36 The Federal Law Amending the Penal Code with regard to Corruption Offences 2009 ("Korrutptionsstrafrechtsänderungsgesetz 2009"), published in the Federal Law Gazette Nr. I 98/2009, entered into force 1 September 2009

37 Phase 1 evaluates the implementation of the Convention into Austria's legislation. Phase 2 evaluates Austria's enforcement of its legislation implementing the OECD Convention, assesses its application in the field and monitors Austria's compliance with the 1997 Revised Recommendation.

38 The Act changing the Criminal Law 1998 ("Strafrechtsänderungsgesetz 1998"), published in the Federal Law Gazette on 20 August 1998 (BGBl. I 1998/153), entered into force 1 October 1998

39 The Act changing the Criminal Law 2008 ("Strafrechtsänderungsgesetz 2008"), published in the Federal Law Gazette Nr. I 109/2007

105. However, Austria's implementing legislation requires proof of the law of the particular official's country with regard to the following elements.

Definition of a foreign public official

106. In defining a foreign public official, Austria's implementing legislation refers to *"an organ or employee [who] discharges tasks of legislation, administration or justice […] for another State".* This definition appears to cover all the categories of officials covered under the Convention. However the Working Group on Bribery is concerned that determining whether a person is a foreign public official requires additional elements of proof depending on a non autonomous test since *"an organ or employee discharges tasks of legislation, administration or justice […] for another State"* has to be determined in accordance with the law of the State in which the person exercises that function.

Coverage of officials of public agencies and public enterprises

107. Proof of the law of the foreign State is also required to determine whether the recipient of the bribe is working for a public agency or enterprise that i) falls under the control of an institution comparable to the Austrian Court of Auditors ("*comparable control institution*") or a similar institution of the provinces (Länder); and ii) "*work[s]by far predominantly for the administration of the body mentioned under b) in the [foreign] state*" (section 74 (1) (4a) d)). These two requirements again depend on a dual test as they have to be determined by analogy to the Austrian law. The Working Group on Bribery expressed concern that this may raise practical difficulties in determining who is a foreign public official "exercising a public function for a public agency or public enterprise" within the meaning of article 1 of the Convention especially in a situation where in substance the definition of a public enterprise has been narrowed to entities that have their business focussed on "services for the public". The later requirement excludes the entities acting on a commercial basis in conditions equivalent to that of a private enterprise. The Working Group considers that this issue should be followed up in Phase 3 to insure that Austrian law fully implements article 1 of the Convention (Article 1, paragraph 4 a) and commentaries 14 and 15 on the Convention.

Act performed/advantage received

108. While section 307 deals with offences where the public official acts or refrains from acting in violation of his/her duties, section 307a covers cases where the act or omission conforms to such duties but where the advantage is "*contrary to an interdiction by public service or organization law"*. This implies that it has to be established under the foreign public official's law that either the act performed by the foreign public official (see subsection below) or the advantage he receives is improper.

109. Section 307a of the Penal Code provides that a person is guilty of the foreign bribery offence where the advantage is prohibited under the law of the foreign public official. Commentary 8 on the Convention states that it is not an offence *"if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law"*. It is the Austrian view that sections 307a is in line with paragraph 8 of the Commentary to the Convention and that this paragraph shall be interpreted to mean that the conduct does not constitute an offence as long as the advantage is not prohibited under the law of the foreign public official's country.

110. However it has been widely accepted in the Working Group on Bribery that Commentary 8 only provides an exception to the offence where the law of the foreign public official's country expressly permits or requires the advantage in question, in other words were the advantage is "due" in terms of the law. The Austrian exception is broader in the sense that it would apply even where the advantage is not expressly prohibited by the public service or organisation law of the foreign public official's country which

implies that the onus of proof (that the advantage was forbidden under the foreign public official's law) rests with the Austrian prosecution which may be a serious deterrent to an effective prosecution of the foreign bribery acts.

111. The Working Group on Bribery considers that the above required elements of proof of the law of the particular official's country are not compatible with the requirement of an autonomous offence (commentary 3 on the Convention). In order to meet the standards of the Convention, the Working Group strongly recommends that the Austrian legislation be amended as soon as possible so as to provide for an autonomous foreign bribery offence.

1.2 A new definition of the public enterprises that is narrowing the scope of the offence

112. In order to explain the new requirement under section 74(1.)(4a) that a public enterprise "*work by far predominantly for the administration of a body mentioned under b) in the [foreign] state*", the Austrian authorities explain that public enterprises should have their business focussed on "services for the public". Entities acting on a commercial basis in conditions equivalent to that of a private enterprise would therefore, de facto, not be covered by section 74 (1) (4a) which, on its own, may be in line with commentary 15 on the Convention if the enterprise is operating "on a basis which is substantially equivalent to that of private enterprise without preferential subsidies or other privileges". However, this definition no longer fulfils the definition of a "public enterprise" contemplated under commentary 14 on the Convention as it would more generally exclude of the scope of the offence, the officials working for an enterprise "over which a government or governments hold the majority of the enterprise's subscribed capital, control the majority of the votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board". The Working Group expressed its serious concerns about the extent to which the scope of the offence has thus been narrowed in practice.

2. Sanctions

Natural persons

113. Article 3.1 of the Convention requires that sanctions in place for the foreign bribery be effective, proportionate and dissuasive; Article 3.2 makes similar requirements in respect of legal persons. Article 3.3 calls for effective confiscation measures in respect of the bribe and its proceeds.

114. The Working Group welcomed the steps taken by Austria in the 2008 and 2009 Amendment Acts of the Austrian Penal Code to raise the upper limit for deprivation of liberty for the bribery of public officials from two to ten years (new sections 307, 307a and 307b of the Penal Code). This is a significant increase compared to the maximum of two years available at the time of the Phase 1 and Phase 2 evaluations. However, the level of sanctions depending upon the value of the advantage, the working Group is concerned that, in the case of non pecuniary advantages or when the advantage is composed of both economic and non economic benefits, difficulties may arise to apply the thresholds and thus determine the corresponding sentence.

Legal persons

115. The Working Group is also concerned about the level of the maximum fine available for legal person both in absolute terms and with regard to the higher level of the maximum fine available for natural persons. The maximum fine for foreign bribery that was EUR 700 000 at the time of phase 2 has been raised to EUR 1 300 000. This represents a significant increase but still does not reach the level of fines available for natural persons (where a fine shall be applied in lieu of prison). As in phase 2, the working Group also remain concerned that, the daily rate system retained under Austrian law being based on the

income situation and financial performance of the company, the law does not provide for effective, proportionate and dissuasive criminal penalties for legal persons in cases where the legal person may not have generated profits over the relevant period. Moreover, the Working Group is of the view that it should be further assessed in Phase 3 how likely it is that this maximum sanction will be applied.

116. As the effectiveness of the sanctions against legal persons should also be assessed together with the implementation of the rules on forfeiture and asset recovery, the Working Group encourages Austria to pursue with the draft bill aiming at improving the procedural aspects of seizure and confiscation that should be soon submitted to Parliament.

ANNEX 3:
KEY LEGISLATIVE PROVISIONS

PENAL CODE
[*Strafgesetzbuch (StGB)*]

Section 12 – Treatment of all accessories as perpetrators

A criminal offence is committed not only by the immediate perpetrator who commits the criminal offence, but also by anyone who instigates another person to commit the offence or who contributes to its perpetration in any other way.

Section 20 – Forfeiture

(1) The Court has to declare forfeited assets that were obtained for or by the commission of an act punishable by law.

(2) Forfeiture also refers to the use and substitute value of assets to be declared forfeited according to para. 1.

(3) As far as assets subject to forfeiture according to para. 1 or 2 have not been seized or sequestered (sections 110 para. 1 nº 3, 115 para. 1 nº 3 StPO) the court has to declare an amount of money forfeited that corresponds to the assets obtained according to para. 1 and para. 2.

(4) If the extent of the assets to be declared forfeited cannot be established at all or only with disproportionate efforts, the court has to determine it according to its conviction.

Section 32 – Assessment of punishment; basic principles

(1) The basis for the assessment of the penalty is the guilt of the perpetrator.

(2) When assessing the punishment the court has to take into consideration the aggravating as well as the mitigating circumstances, as far as they do not already determine the possible penalty, and the effects of the penalty and other consequences of the criminal act that are to be expected for the future life of the perpetrator in society. Primarily, it has to be considered in how far the criminal act results from a dismissive or indifferent attitude of the perpetrator regarding the legally protected values and in how far it can be attributed to external circumstances or reasons for action that would also influence a person closely involved with the legally protected values.

(3) In general, the penalty has to be the more severe the greater the damages or threat caused by the perpetrator are or that he/she did not cause but however to which his/her guilt extended, the more duties he/she has violated by his/her act, the more he/she deliberated the act, the more careful he/she prepared it or the more reckless he/she perpetrated it and the less protection would have been possible against the act.

Section 33 – Special aggravating circumstances

(1) Among others, it is aggravating if the perpetrator

1. commits several criminal acts of the same or different type or if he/she continued with the criminal act for a considerable period of time;
2. has already been convicted because of a criminal act based on the same dangerous habit;
3. instigated another person to commit the criminal act;
4. was initiator or instigator of a criminal act committed by several persons or was involved in such an act in a leading role;
5. acted out of racist, xenophobic or other especially detestable reasons;
6. acted in a heinous or cruel manner or in a way especially painful for the victim;
7. when committing the criminal act made use of the defenceless or helpless situation of the victim.

(2) Apart from the cases mentioned in section 39a (1) it is also aggravating if a perpetrator of age commits the criminal act using violence or dangerous threats against a minor (person under 18 years).

Section 34 – Special mitigating circumstances

(1) Among others, it is mitigating if the perpetrator

1. commits the criminal act after completing his/her 18th birthday but before completing his/her 21st birthday or if he/she commits it under the influence of an abnormal state of mind, if he/she has reduced intellectual capacity or if his/her education has been grossly neglected;
2. until committing the act has led a decent life and the criminal act is in conspicuous contradiction to his/her general behaviour;
3. committed the act because of respectable reasons;
4. committed the act under the influence of third persons or because of fear or obedience;
5. only committed a criminal act because he/she refrained from avoiding the success in a case in which the law punished causing a certain success;
6. participated in one or more criminal acts only in a subordinate role;
7. committed the act only out of headiness;
8. let himself/herself be carried away to commit the criminal act in an intense emotion that is generally understandable;
9. committed the criminal act primarily taking advantage of an especially tempting situation more than premeditated intention;
10. was in an overwhelming situation of emergency not caused by his unwillingness to work;
11. committed the criminal act under circumstances which would almost be considered as excluding criminal responsibility;
12. committed the criminal act in a situation of an error of law in which criminal responsibility is not excluded (Section 9), especially if he/she is punished because of an intentional criminal act;
13. did not cause damages by the criminal act despite its completion or if the act was not completed;
14. did not cause more damage although he/she had the opportunity for this and voluntarily refrained from it or if the damage has been settled by the perpetrator or a third party;
15. seriously tried to settle the damages caused or to avoid further negative consequences;
16. voluntarily handed himself/herself in although it would have been easy to escape or probable that he/she would not have been found;
17. has made a rueful confession or considerably contributed to finding the truth with his/her statement;
18. committed the criminal act a longer time ago and showed good conduct since then;
19. is affected by the criminal act because he/she or a person close to him/her suffered from considerable bodily harm or health damages or other considerable factual or legal disadvantages caused by the criminal act or its consequences.

(2) It is also mitigating if the proceedings against the perpetrator take a disproportionately long time due to reasons for which neither the perpetrator nor his/her defence lawyer are responsible.

Section 37

(1) For criminal acts punishable by a prison term of up to five years, even in conjunction with a fine, a prison term not exceeding six months shall be replaced by not more than 360 daily rates, unless such prison term is required to prevent the offender from committing further criminal acts, or to prevent others from committing such criminal acts.

(2) For criminal acts punishable by prison terms of a longer duration that mentioned in (1), but by no longer than 10 years, even in conjunction with a fine, imposition of no more than 360 daily rates to replace a prison term of no more than six months is only permissible if such prison term is not required to prevent the offender from committing such criminal acts, e.g. because its circumstances make the offence rather justifiable or excusable.

Section 64 – Criminal acts committed abroad which are subject to prosecution irrespective of the laws of the state where the act was committed

(1) The following criminal acts committed abroad are subject to prosecution according to Austrian criminal law irrespective of the criminal law of the foreign state where the criminal act was committed:

1. …
2. criminal acts committed against an Austrian public officer (section 74 para. 1 item 4), an Austrian public official (section 74 para. 1 item 4a) or an Austrian arbitrator (section 74 para. 1 item 4c) while he/she fulfils his/her tasks or because he/she fulfils his/her tasks and criminal acts committed by someone as Austrian public officer, public official or arbitrator;

2a. apart from item 2 criminal violations of the official duty, corruption and other related criminal acts (sections 302 to 309) if

   a) the perpetrator was a national of Austria at the time the act was committed or
   b) the act was committed for the benefit of an Austrian public official or arbitrator;

…

(2) If the criminal laws mentioned in para. 1 cannot be applied only because the act constitutes an offence carrying more severe punishment, the act committed abroad nevertheless is to be punished according to the Austrian criminal laws independently from the laws of the foreign state.

Section 74 – Other definitions

(1) According to this Federal Law

1. …

4a. public official: anyone who

a) deleted

b) as an organ or employee discharges tasks of legislation, administration or justice for the federation, for a federal state, for an association of municipal corporations, for a commune, for a social insurance institution or its association, for another state or for an international organisation,

c) is otherwise authorised to perform official duties in fulfilment of the law for a body mentioned under b), or

d) acts as an organ of a legal entity

Section 307 – Active bribery

Section 307a – Granting of advantages

(1) Whoever offers, promises or grants an undue advantage (section 305 para. 4) to a public official or an arbitrator for him/her or for a third person for performing or refraining from performing an official act in accordance with his/her duties shall be punished by imprisonment up to two years.

(2) remains unchanged.

Section 307b – Granting of advantages for the purpose of exercising influence

(1) Who, apart from the cases of sections 307 and 307a, offers, promises or grants an undue advantage (section 305 para. 4) to a public official or an arbitrator for him/her or for a third person with the intention of influencing him/her in his activity as public official, shall be punished by imprisonment of up to two years.

(2) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euro shall be punished by imprisonment up to three years, whereas who commits the offence with regard to the value of the advantage exceeding 50.000 Euro shall be punished by imprisonment from six months up to five years.

CODE OF CRIMINAL PROCEDURE
[*Strafprozeßordnung (StPO)*]

Section 9 – Obligation to speed up proceedings

(1) Every accused person has the right that his/her proceedings are terminated within an appropriate time. The proceedings are to be conducted swiftly and without unnecessary delays at all time.

(2) Proceedings in which a suspect is in detention have to be conducted with utmost speed. Every detained person is entitled to a verdict as soon as possible or being set free during the proceedings. All authorities, organisations and persons acting in criminal proceedings are obliged to keep any detention as short as possible.

Section 191 – Dismissal because of insignificance

(1) The office of public prosecution has to refrain from the prosecution of a criminal act that is only punished with a fine, with a prison term not exceeding three years or with such a prison term and a fine and to dismiss the proceedings if

1. considering the guilty, the consequences of the criminal act and the behaviour of the person accused after the criminal act, especially regarding a possible settlement of the damages, as well as other circumstances that would influence the penalty to be imposed, the disruptive value of the criminal act is considered little and

2. imposing a punishment or continuing according to the 11th main chapter does not seem necessary in order to prevent the person accused from committing criminal acts or to prevent other persons from committing criminal acts.

(2) After bringing the charges, in proceedings at the Regional Courts in jury trials or trials with lay judges after the indictment became legally effective, in cases of criminal acts to be prosecuted ex officio, the court has to close the case with a decision under the same prerequisites (para. 1). Section 209(2) first sentence is applicable.

FEDERAL STATUTE ON RESPONSIBILITY OF ENTITIES FOR CRIMINAL OFFENCES
[*Verbandsverantwortlichkeitsgesetz (VbVG)*]

Section 2 – Decision Makers and Staff

(1) For the purpose of this statute decision maker shall mean a person who

1. is a managing director, an executive board member or *Prokurist* [translator's note: compare: authorised officer] or who is authorised in a comparable manner to represent the entity vis-à-vis third parties either according to statutory power of representation or based upon contract,
2. is a member of the supervisory board or board of directors or otherwise exercises controlling powers in a leading position, or
3. otherwise exercises relevant influence on the management of the entity.

(2) For the purpose of this Statute staff shall mean a person who works for the entity

1. on the basis of an employment relationship, apprentice relationship or other training relationship,
2. on the basis of a relationship that is subject to the provisions of the Outwork Act [*Heimarbeitsgesetz*] 1960, BGBl. [Federal Law Gazette] No. 105/1961 or that is of an employee-like status,
3. as an employee provided on a temporary basis as defined in Section 3 para 4 of the Act on Temporary Provision of Employees [*Arbeitskräfteüberlassungsgesetz (AÜG)*], BGBl. No. 196/1988, or
4. on the basis of a service relationship or other special public-law relationship.

Section 3 – Responsibility

(1) Subject to the additional conditions defined in paragraphs 2 or 3 an entity shall be responsible for a criminal offence if

1. the offence was committed for the benefit of the entity or
2. duties of the entity have been neglected by such offence.

(2) The entity shall be responsible for offences committed by a decision maker if the decision maker acted illegally and culpably.

(3) The entity shall be responsible for criminal offences of staff if

1. the facts and circumstances which correspond to the statutory definition of an offence have been realised in an illegal manner; the entity shall be responsible for an offence that requires wilful action only if a staff has acted with wilful intent, and for a criminal offence that requires negligent action only if a staff has failed to apply the due care required in the respective circumstances; and
2. commission of the offence was made possible or considerably easier due to the fact that decision makers failed to apply the due and reasonable care required in the respective circumstances, in particular by omitting to take material technical, organisational or staff-related measures to prevent such offences.

(4) Responsibility of an entity for an offence and criminal liability of decision makers or staff on grounds of the same offence shall not exclude each other.

Section 4 – Fine for the entity

(1) If an entity is responsible for a criminal offence, a fine shall be imposed.

(2) The fine shall be assessed in the form of daily rates. The fine shall amount to at least one daily rate.

(3) The number of daily fines shall be up to

180 - if the criminal penalty for the offence is a life sentence or imprisonment of up to twenty years,

155 - if the criminal penalty for the offence is imprisonment of up to fifteen years,

130 - if the criminal penalty for the offence is imprisonment of up to ten years,

100 - if the criminal penalty for the offence is imprisonment of up to five years,

85 - if the criminal penalty for the offence is imprisonment of up to three years,

70 - if the criminal penalty for the offence is imprisonment of up to two years,

55 - if the criminal penalty for the offence is imprisonment of up to one year,

40 - in all other cases.

(4) The daily rate shall be assessed on the basis of the income situation of the entity by taking into account its other financial performance. The daily rate shall be equal to one 360th of the yearly proceeds or exceed or fall short of such amount by not more than one third; however, the daily rate shall amount to not less than 50 Euros and not more than 10 000 Euros. If the association serves charitable, humanitarian or church purposes (Sections 34 to 47 Fiscal Code, BGBl. No. 194/1961) or is not profit-oriented, the daily rate shall be fixed at a minimum of 2 Euros and a maximum of 500 Euros.

Section 5 – Assessment of the fine for the entity

(1) When fixing the number of daily rates the court shall weigh aggravating causes and mitigating causes to the extent they have not already been used for fixing the amount of the threatened fine.

(2) The number shall, in particular, be the higher

1. the larger the damage or threat for which the entity is responsible;

2. the larger the benefit for the entity obtained from the criminal offence;
3. the more illegal conduct of staff was tolerated or favoured.

(3) The number shall, in particular, be the lower if

1. the entity took measures to prevent such offences already before the offence was committed or has told staff to observe the law;
2. the entity is merely responsible for criminal offences committed by staff (Section 3 para. 3);
3. the entity substantially contributed to finding out the truth;
4. the entity made good the consequences of the offence;
5. the entity took essential steps towards future prevention of similar offences;
3. the offence already resulted in severe legal disadvantages for the entity or its owners.

Section 6 – Conditional remission of the fine

(1) If an entity is sentenced to a fine of not more than 70 daily rates, the fine shall be conditionally remitted by fixing a probationary period of at least one and not more than three years, if applicable by giving instructions (Section 8), if it has to be assumed that this will be sufficient to keep the entity from committing further offences for which it is responsible and there is no need to enforce payment of the fine in order to counteract commission of offences in connection with the activities of other entities. In this connection, above all, the type of offence, the weight of the breach of duty or care, previous convictions of the entity, reliability of the decision maker and the measures taken by the entity after the offence shall be taken into consideration.

(2) If the remission is not revoked, the fine shall be remitted finally. Periods of time which start to run once the fine has been enforced shall, in such a case, be calculated as of the time the sentence becomes non-appealable.

Section 7 – Conditional remission of part of the fine

If an entity is sentenced to a fine and if the conditions of Section 6 are met with respect to part of the fine, such part, but at least one third and not more than five sixths thereof, shall be conditionally remitted by fixing a probationary period of a minimum of one and a maximum of three years, if applicable by giving instructions (Section 8).

Section 18 – Discretion regarding prosecution

(1) The public prosecutor may refrain from or abandon prosecution of an association if, when weighing the seriousness of the deed, the weight of the breach of duty or care, the consequences of the deed, the conduct of the association after the deed, the amount of the fine to be imposed on the association which is to be expected, as well as legal disadvantages for the association or its owners resulting from the deed which have already occurred or are imminent, prosecution or a criminal penalty appears to be unnecessary. This shall, in particular, be the case if investigations or requests for prosecution would involve an enormous amount of time and money which would obviously be disproportionate to the importance of the matter or to the criminal penalties to be expected in case of a conviction.

(2) However, prosecution may not be refrained from or abandoned if it appears to be necessary

1. because of a danger originating from the association of commission of a deed with serious consequences for which the association might be responsible,
2. to counteract commission of deeds in connection with the activity of other associations, or
3. because of any other particular public interest.

Section 19 – Abandonment of prosecution (alternative measures)

(1) If it has been ascertained on the basis of facts and circumstances that have been sufficiently clarified that cancellation of the report made or a procedure as laid down in Section 18 is out of the question and if the conditions stated in Sections 90a para 2 items 1 and 3 StPO have been met, the public prosecutor shall abandon prosecution of a prosecuted association on grounds of responsibility for a criminal offence if the association makes good the damage caused by the offence and eliminates other consequences of the offence and gives immediate evidence thereof and if imposition of a fine does not appear to be necessary in view of

1. payment of money in an amount of up to 50 daily rates plus the costs of the proceedings to be reimbursed in case of a conviction (Section 90 c StPO),
2. a probationary period of up to three years to be determined, to the extent possible and expedient in combination with the expressly declared willingness of the association to take one or several of the measures listed in Section 8 para 3 (Section 90f StPO), or
3. the express statement of the association to render certain charitable services free of charge during a period to be determined of not more than six months (Section 90d StPO),

to counteract commission of criminal offences for which the association can be held responsible (Section 3) and commission of criminal offences in connection with the activity of other associations. Section 90e para 1 StPO shall not be applicable.

(2) The court shall apply paragraph 1 mutatis mutandis on the conditions described therein and discontinue the proceedings against the association until the end of the trial by a decision after initiation of preliminary investigations or filing of a petition for imposition of a fine (Section 90b StPO).

BANKING ACT
[*Bankwesengesetz (BWG)*]

Section 38 – Bank secrecy

(1) Credit institutions, their shareholders, members of their organs, employees as well as other persons acting for credit institutions may not disclose or make use of secrets which have been entrusted or made accessible to them solely due to the business relationships with customers […](banking secrecy). If facts that are subject to banking secrecy come to the attention of functionaries of the authorities or of the Oesterreichische Nationalbank in the course of their official activities, they shall keep such banking secret as an official secret from which they may only be released in the instances set forth in para 2. The obligation to maintain secrecy shall apply without time limit.

(2) The obligation to observe banking secrecy shall not exist:

1. vis-à-vis criminal courts in connection with initiated criminal court proceedings, and vis-à-vis the governmental authorities competent for the punishment of fiscal violations in connection with initiated penal proceedings for intentional fiscal violations, with the exception of fiscal misdemeanours;

[…]

(5) [Provision in the rank of constitutional law] Paras 1 through 4 may be amended by the First Chamber of Parliament only in the presence of at least one-half of the Members of Parliament and with a majority of two-thirds of the votes cast.

FEDERAL TAX LAW
[*Bundesabgabenordnung (BAO)*]

Section 48a

(1) The tax secrecy obligation shall apply in connection with the conduct of fiscal procedures, monopoly procedures (Sec. 2 (b)) or fiscal penal procedures.

(2) A civil servant (Sec. 74 (4) Criminal Code) or former civil servant violates this obligation if he makes unauthorised disclosure or exploitation

(a) of another person's conditions and circumstances which are unknown to the public and which have been entrusted on him or have been made accessible to him exclusively by reason of his official position in a fiscal or monopoly procedure or in a fiscal penal procedure,

(b) of the contents of files of a fiscal or monopoly procedure or of a fiscal penal procedure, or

(c) of the deliberations and vote of the tribunals in a fiscal procedure or in a fiscal penal procedure.

[…]

(4) The disclosure or exploitation of conditions and circumstances is allowed

(a) if such disclosure or exploitation serves to conduct a fiscal or monopoly procedure or a fiscal penal procedure,

(b) if such disclosure or exploitation is based on a legal obligation or if there is an overriding public interest, or

(c) where obviously there is no interest to be protected or where persons whose secrecy interests might be violated agree to such disclosure or exploitation.

Section 162

(1) If the taxpayer claims a deduction of debts, other burdens or expenses, the tax authority may request the taxpayer to state precisely the creditors or the recipients of the deducted amounts.

(2) The claimed deductions shall not be allowed in so far as the taxpayer refuses to make the statements requested by the tax authority under paragraph (1).

ANNEX 4:
LIST OF PARTICIPANTS AT THE ON-SITE VISIT

Government ministries and bodies

- Austrian Development Agency
- Austrian Export Credit Agency
- Federal Chancellery
- Financial Market Authority
- Ministry of Finance
- Ministry of the Interior, including
  - Federal Bureau of Anti-Corruption
  - Federal Bureau of Investigation
- Ministry of Justice, including
  - General Procurator's Office
  - Office of Senior Public Prosecutors Vienna
  - Office of Public Prosecution Vienna
- Vienna Stock Exchange

Private sector

- Representatives of 6 MNEs
- Representatives of 2 SMEs
- 3 representatives of the accounting and auditing profession
- Representatives of 4 Austrian business or trade associations
- International Chamber of Commerce

Civil society, international organisations and the media

- 2 representatives of the journalism profession
- 2 representatives of the academic profession
- 4 representatives of the legal profession
- 1 anti-corruption NGO

ANNEX 5:
LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

ADA	Austrian Development Agency
BAK	Federal Bureau of Anti-Corruption (*Bundesamt zur Korruptionsprävention und Korruptionsbekämpfung*)
BAO	Federal Tax Procedural Act (*Bundesabgabeordnung*)
BIA	Bureau of Internal Affairs at the Federal Ministry of the Interior
BKA	Federal Chancellery (*Bundeskanzleramt*)
CC	Commercial Code (*Handelsgesetzbuch*)
CEE	Central and Eastern Europe
CPC	Criminal Procedure Code (*Strafprozeßordnung*)
EMLAT	Extradition and Mutual Legal Assistance Act
FIU	Financial Intelligence Unit
FMA	Financial Market Authority (*Finanzmarktaufsicht*)
GRECO	Group of States against Corruption (*Group d'États contre la Corruption*)
IACA	International Anti-Corruption Academy
ICC	International Chamber of Commerce
IFRS	International Financial Reporting Standards
ISA	International Standards of Auditing
MLA	Mutual Legal Assistance
MNE	Multi-national enterprise
MOF	Ministry of Finance (*Bundesministerium für Finanzen*)
MOJ	Ministry of Justice (*Bundesministerium für Justiz*)
MOI	Ministry of the Interior (*Bundesministerium für Inneres*)
OeKB	Austrian Export Credit Agency (*Oesterreichische Kontrollbank*)
OStA	Senior Prosecution Service of Vienna
PC	Penal Code (*Strafgesetzbuch*)
SME	Small or medium enterprise
STR	Suspicious transaction report
VbVG	Federal Statute on Responsibility of Entities for Criminal Offences (*Verbandsverantwortlichkeitsgesetz*)
WB	Vienna Stock Exchange (*Wiener Börse*)
WGB	Working Group on Bribery

WKÖ Austrian Federal Economic Chamber (*Wirtschaftskammer Österreich*)

WKStA Public Prosecutor's Office for Combatting Economic Crimes and Corruption (*Wirtschafts- und Korruptionsstaatsanwaltscaft*)