



# **AUSTRIA: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS**

**FEBRUARY 2015**

This report, submitted by Austria, provides information on the progress made by Austria in implementing the recommendations of its Phase 3 report. The OECD Working Group on Bribery's summary of and conclusions to the report were adopted on 20 February 2015.

The Phase 3 report evaluated 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.

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## SUMMARY AND CONCLUSIONS OF WORKING GROUP ON BRIBERY

### Summary of Findings

1. Since Austria's Phase 3 review in December 2012, it has made significant progress enforcing its offence of bribing foreign public officials. In summary, six investigations are ongoing, in one case convictions against a natural person and a legal person are under appeal, in a second case convictions against seven natural persons and the acquittal of two legal persons are under appeal, and in a third case indictments against a legal person and senior representatives of the company are under appeal. Through these enforcement actions, Austria has demonstrated that it will proactively pursue legal persons for foreign bribery, including cases involving intermediaries. These cases involve a variety of sectors, including telecoms, construction, defence, financial products, transportation and property development. In addition, a variety of investigative steps were taken in these cases, including requesting mutual legal assistance (MLA), interrogating witnesses, and searches and seizures.

2. Austria has also made significant progress implementing a number of Phase 3 recommendations targeting prosecution of the foreign bribery offence. The Austrian authorities provide a comprehensive assessment of the use of confiscation in foreign bribery cases, and imposed confiscation of EUR 1.3 million in one case. Austria reports on steps it plans to take to implement recommendations in a 2011 study by the Government on the effectiveness of the Federal Statute on Responsibility of Entities for Criminal Offences, including by publishing a manual on prosecuting companies. It has also taken steps to apply nationality jurisdiction in at least one case in which two companies were indicted.

3. Regarding recommendations targeting the effectiveness of investigations, Austria has established a system of penalties for companies that fail to convert their bearer shares into registered shares by December 2013. This step will help the law enforcement authorities more effectively identify the beneficial owners of companies. Investigations should also be enhanced by measures taken by Austria to improve communications between law enforcement authorities and its financial intelligence unit, as well as efforts to increase the detection of suspicious payments by the tax authorities.

4. The Working Group on Bribery (WGB) also notes that Austria has not implemented certain key recommendations. It has not increased the maximum fine available for companies convicted of foreign bribery, which remains EUR 1.3 million, compared to EUR 1.8 million for individuals. In addition, Austria has not directly addressed bank associations' practice of automatically filing complaints against court orders to produce bank information.

5. Challenges in obtaining information about beneficial owners of companies also continue, as companies are not required to include bank information about shareholders in their registries. In addition, steps have not been taken to address the routine practice by the tax authorities of confronting tax payers about suspicious bribe payments, thus decreasing the likelihood that bribe payments detected by the tax authorities would come to the attention of law enforcement. Furthermore, although Austria has established an e-discovery system to enhance the gathering of digitalised data, including emails, more information is needed about how in practice the new system will enhance law enforcement's ability to evaluate such data.

### Conclusions of the Working Group

6. The WGB concludes that Austria has fully implemented recommendations 1(a), 1(d), 2, 3, 4(b), 6, 7(b), 7(d), 8(a), 8(b), 9(a) and 9(b), partially implemented recommendations 4(d), 4(e), 5 and 7(e) and not implemented recommendations 1(b), 1(c), 4(a), 4(c), 7(a), 7(c), 8(c) and 9(c). In December 2015, Austria is invited to give a written report on progress implementing the following unimplemented and partially implemented recommendations: 1(c), 4(a), 4(c), 4(d), 4(e)(i), 5(ii) and 8(c).

## PHASE 3 EVALUATION OF AUSTRIA: WRITTEN FOLLOW-UP REPORT

**Name of country:** Austria  
**Date of approval of Phase 3 evaluation report:** 14 December 2012  
**Date of information:** 11 November 2014

### PART I: RECOMMENDATIONS FOR ACTION

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

##### **Text of recommendation 1(a):**

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)

##### **Action taken as of the date of the follow-up report to implement this recommendation:**

###### *Ad i) The VbVG's application to bribery through agents:*

In the case of the use of so called “Agents” the question has to be solved whether the agent is a person who works for the entity on the basis of an “employee-like” status. If this is the case, an agent may be attributed to the entity. “Employee-like” relationships in labour law mean relationships which are lacking the element of personal dependency which is typical for labour contracts. The entrepreneur is formally independent and receives contracts for special work (“Werkverträge”) or as a sales agent, but nevertheless is treated like an employee due to the extensive economical dependency (sec. 1 par. 1 DHG, sec. 51 par. 3 no. 2 ASGG, sec. 2 par. 2 lit. b AuslBG). Relevant factors for the assumption of an employee-like relationship are that the circle of principals is narrowly limited or unchanging and that there are strict directives concerning the type of goods or services, marketing strategies etc. as is the case with regard to gas station tenants, sales agents or franchise takers.

In cases where you cannot speak of an “employee-like” relationship, the legal person may nevertheless be held responsible for committing a bribery offence, if it has *deliberately* made use of an agent (instead of one

of its staff members) for the purpose of bribing. In such a case the acting employee or manager could be held liable by means of sec. 12 of the Penal Code (PC), according to which not only the immediate offender commits the offence but also any person that instigates another person to commit it as well as everybody who is an accessory to its commission. Whether the manager or employee has acted as the immediate offender or as an instigator or by contributing in another manner to the offence does not matter at all neither with respect to the responsibility of the natural person itself nor in terms of applicability of the responsibility of the legal entity on whose behalf the bribery offence has been committed. Therefore, an entity that uses the services of an agent for bribery purposes may not escape criminal responsibility by doing so.

Difficulties could arise in cases, where an entity argues, that it was not aware of the bribery committed by the agent and where there is no (further) evidence at hand. Such problems of proving an offence, however, are not uncommon to criminal proceedings in general and have to be solved on a case by case basis, but should not give rise to a particular change in the legal framework of establishing the criminal responsibility of legal entities.

Broadening the notion of people who work for an entity to cover agents explicitly is not under consideration at the moment since this could cause an unpredictable and possibly inappropriate extension of the responsibility of legal entities.

*Ad 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:*

If the criteria for the intentional or negligent offence of a staff member of the legal entity are met, establishing criminal responsibility of the entity also requires that 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. The law explicitly mentions the omission to take material technical, organisational or staff-related measures to prevent such offences. One may think of directives, trainings, maintenance, supervisions, spot checks etc. Only feasible and reasonable measures have to be undertaken; if an entity omits measures which are not feasible or may not reasonably be required from the entity, this may not lead to a criminal responsibility of the entity. Which measures may be duly and reasonably required has to be decided on a case by case basis. Factors which have to be taken into consideration when deciding are the type, size or, structure of an entity, the branch of the economy in which the entity operates, whether or not the field of business activities is hazardous, the training or reliability of the employees etc. The standard of care in the meaning of sec 6 PC may be deducted from legal norms, customary rules or – subsidiarily – the hypothetical conduct of a person familiar and in line with the legally protected values relevant for the offender’s sphere of business.

The VbVG in this area does not establish new norms or standards, but builds upon the existing ones. The law explicitly states that only the omission of material measures shall trigger the entity’s responsibility. The violation of mere formalities, therefore, is not covered. This is as a consequence of the wording of the law, according to which only such breaches of the duty of care are relevant which have made the commission of the offence possible or considerably easier.

That the entity’s responsibility for intentional conduct builds on the intent of the staff member who commits the offence rather than on the decision maker’s violation of care, is due to the legislator’s decision for an ‘attribution model’ instead of a model of ‘originary entity responsibility’. Besides, the wording of the law requires only the objective breach of the duty of care by the decision maker in addition to the reasonableness of the observance of the objective duty of care. The law does not speak of the subjective breach of duty of care – neither on the part of the decision maker nor on the level of the staff member. Nor does it speak of subjective foreseeability or culpable violation of safety measures.

Concerning the connection between the violation of duty of care on the level of the decision maker and the

offence committed by the staff member the law does not require a strict causality; in fact the increase in the risk is deemed to be sufficient. It is not necessary that the appropriate or reasonable measures would have been able to avert the offence with probability bordering on certainty; it is sufficient that the existence or making use of such measures would have considerably impeded it.

Decision makers must have violated measures that should prevent „such“ offences. What is necessary, therefore, is the violation of measures that should prevent offences like the one that has been committed. It is essential for the case configuration of par 3 that the decision maker, who has violated the required care, has had no intent with respect of the actual offence. Otherwise, the case configuration of par 2 could become applicable (where the offence has been committed by the decision maker). In particular cases the decision maker may of course be liable for the negligent commission of an offence already because of the violation of the duty of care. Omissions by decision makers which may be punishable under sec 2 PC may be of relevance in the context of the first case configuration of par 2 establishing the entity's responsibility.

*Ad iii) The VbVG's application to bribery on behalf of related legal persons*

The VbVG does not contain particular provisions on the criminal liability of trusts. A trust in its entirety is not an entity in the meaning of the VbVG but merges legally independent enterprises, which may have different legal forms, for economic purposes under a unitary management. Only the enterprises which are part of the trust may be considered entities in the meaning of the VbVG; this goes for the subsidiaries as well as for the parent company. Criminal responsibility has to be examined for every particular entity. If, for example, a subsidiary is criminally liable for an offence, criminal responsibility of other subsidiaries of the parent company may be established by means of the general rules on contribution to an offence as laid down in sec 12 PC (when for example a decision maker of the parent company instigates a staff member of a subsidiary who actually commits the offence). Contribution by means of omission may also be considered, since the parent company has a guarantor position vis-à-vis the subsidiary due to its impact on the latter's management. However, the criteria for establishing criminal responsibility must be (separately) fulfilled for each entity that is involved (through its decision maker or staff member) in the offence.

*Ad 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)*

The ability of the criterium of the violation of the entity's duties to exclude offences against the entity (where the entity is the victim of the offence) is rather limited, but normally may serve as an appropriate criterium for excluding so called excess offences.

From the purpose as well as from the history of the VbVG one may conclude, that offences which are detrimental to the entity's own legal position, should not be able to trigger the entity's responsibility. In so far as the entity is victim of the offence it may not be held liable as the offender. Such a constellation may be the case, when on the one hand duties on part of the entity are violated, these violations, however, are to the detriment of the entity. Detriment here, of course, does not mean every detrimental consequence which may be connected with the offence (such as the possible fine that will be imposed on the entity or the loss of the entity's reputation), but only such negative consequences which make the entity the apparent victim of the offence. Not least because such misunderstandings should be prevented, the phrase „not to its detriment“ which had been contained in the original draft and which should only clarify that offences where the entity is the victim should not be covered, was deleted in the final version of the law. Such cases are regularly beyond the risk context. By means of teleological reduction one may, however, achieve appropriate results.

**If no action has been taken to implement recommendation 1(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 1(b):**

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

- 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);

**Action taken as of the date of the follow-up report to implement this recommendation:**

See recommendations 1c and 1d

**If no action has been taken to implement recommendation 1(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 1(c):**

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

- 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

**Action taken as of the date of the follow-up report to implement this recommendation:**

The Work Programme of the Austrian government for the 25th legislation period (which is to last until 2018), agreed upon by the two coalition parties in December 2013, has as one of its goals in the field of criminal law the “enhancement of the effectiveness of the VbVG” and explicitly mentions the level of fines in this respect.

The Government Work Programme sets the agenda for the work to be done during the legislation period for which it has been agreed upon and should be finalised before its end (in 2018).

**If no action has been taken to implement recommendation 1(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 1(d):**

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

- 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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

The study was commissioned in March 2010 and finalized in November 2011. It evaluates the first five years of the VbVG in force (2006 to 2010). Subsequently the study was analysed within the Ministry of Justice. In March 2014 the study was transmitted to Parliament where it was discussed in the Justice Committee's meeting of June 25, 2014. The result of this discussion was that the Justice Committee unanimously took note of the study.

The study on the one hand acknowledged a certain preventive effect, but on the other hand also carved out some critical aspects, such as the relatively high efforts necessary, the limited resources available and a lack of practical experience, which have led to a rather reluctant application in practice.

The study reflects the situation around 2010/2011. Since then, there have been some indications for a broader use of the VbVG. For example, in Case # 15 (ONB in the matrix) two legal persons had been indicted. (At first instance, they have been acquitted, however, on October 3, 2014; the prosecution authority has announced to appeal the verdict.)

Nevertheless, the competent unit in the Ministry of Justice is currently considering measures such as developing reliable data, establishing a working group, organizing trainings and publishing a manual like in the case of confiscation.

**If no action has been taken to implement recommendation 1(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

1. With the Corruption Criminal Law Amendment Act of 2012 (in force since January 1, 2013), the scope of Section 64 of the Austrian Penal Code – which enumerates the cases where Austria has jurisdiction over offences committed abroad without the requirement of dual criminality – was expanded inter alia to establish Austrian jurisdiction for all corruption cases, including foreign bribery as well as private sector corruption, where the offender is one of its nationals. These cases are now covered by the new section 64 paragraph 1 no.2a lit a PC. (Until then double criminality was needed.).

2. According to section 12 par 1 of the VbVG the general criminal law provisions applicable to natural persons also apply to legal persons unless otherwise stated in the VbVG. There are no particular provisions in the VbVG (or anywhere else) on the treatment of participation in an offence.

3. According to sec 12 par. 2 of the VbVG the seat or the legal person or the location of the enterprise is relevant when jurisdiction is dependent on the offender's nationality or the offender's residence in Austria.

4. Section 64 paragraph 1 no. 2a li a therefore provides for jurisdiction in cases where Companies seated in Austria or operating from Austria commit bribery in a foreign country, even if foreign bribery is not an offence there.

5. As has been already reported in December 2013 and June 2014 in what has been titled „Case # 15“ (“ONB” in the matrix) the Prosecution Authority had issued a comprehensive indictment, which had become final by the end of October 2013.

The indictment involved 9 natural persons and two legal persons. The charges included Criminal organization, Breach of trust, (Foreign) Bribery, Money Laundering and Accounting offences. Not all charges were held against every accused person, but all natural as well as legal persons involved were indicted for (foreign) bribery.

According to the incriminated facts two Austrian enterprises operating in the context of the finance industry allegedly have paid bribes to foreign public officials in two different countries to get contracts. The alleged bribery scheme with respect to both countries was very similar: The foreign public officials are said to have requested bribes as a remuneration for awarding the Austrian enterprises the contracts. It was agreed that the Austrian enterprises should request a higher fee than normally owed and that this surcharge should flow back to the foreign public officials.

In both cases intermediaries were involved, firstly in the context of negotiating the contracts (and the bribes) and secondly for transferring the bribe to the foreign public officials. The intermediaries were among the indicted persons (together with company representatives and the companies).

The trial had opened in February 2014. It had been adjourned in April 2014 for the purpose of summoning and interrogating further witnesses and was re-opened in June 2014. Now on October 3 2014, the verdict was spoken: 7 out of the 9 natural persons indicted were convicted, among them the intermediaries. The verdict

has not become final.

5.1. As also has been already reported on the occasion of the December 2013 and June 2014 meetings concerning what has been titled “Case # 10” (“Patria” under Finland in the matrix) in April 2013 one of the defendants was convicted i.a. for bribery and received a partially suspended sentence of three years of imprisonment together with a considerable financial fine. The verdict, however, has not become final yet; it is still pending on appeal before the Supreme Court.

What should be pointed out with respect to this case is that the convicted person himself in fact could be considered to have acted as an intermediary between the producer and the bribed public officials. His conduct, however, was qualified as collaboration with representatives of the producer (which under Austrian law, according to Section 12 PC does not make any difference). Moreover, the bribery the intermediary/collaborator has been convicted for in first instance (also) included making use of intermediaries – again both in connection with the bribed persons as well as in connection with the transfer of the bribe.

5.2. The issue of bribing through intermediaries had come up with respect to Austria since Article 1 paragraph 1 of the OECD Convention in its definition of the offence explicitly mentions “whether directly or through intermediaries”, whereas the Austrian bribery offences do not. In the past Austria has always indicated that according to the general principles of Austrian Criminal law (in particular as laid down in Section 12 PC) it would be clear that the commitment of any other offence, such as murder, would be treated as murder, irrespective whether the offence was committed by the offender alone (directly) or by means of an intermediary (e.g. a hired killer), although also in the case of murder the description in the PC does not mention the indirect killing through an intermediary. Since there are no differences between bribery and other offences in this respect, there seems to be no plausible reason why bribery through intermediaries – unlike any other offence – should lose its character as bribery only because it was committed by means of an intermediary.

Moreover, already in answering to the follow-up requests in the course of the preparation of the Phase 3 Evaluation report 2012 Austria had referred to the Supreme Court Judgment of 12 June 1980 in the case 13 Os 51/80 (and provided a copy of that judgment together with translation of the relevant parts). In the underlying case, 3 persons were involved, the entrepreneur A, the tax official B and C, one of A’s employees. C (i.a.) encouraged A to offer B an advantage in return for a tax reduction and at the same time he encouraged B to accept the advantage. All three were convicted – A on the basis of Sec 307 PC for active bribery, B on the basis of Section 304 PC for passive bribery and C – the intermediary – on the basis of Section 307 and 304 PC (in combination with Section 12 PC on instigation, aiding and abetting) for both active and passive bribery.

Similar to the OECD Convention the Council of Europe Criminal Law Convention on Corruption in its definitions of the bribery offences explicitly uses the phrase “directly or indirectly” (cf. Articles 2, 3, 7 and 8). Therefore, the issue was also raised on the occasion of GRECO’s Third Evaluation Round which had incriminations as one of its topics. In its report adopted in December 2011, GRECO came to the following conclusion:

“It is irrelevant whether the bribery offence is committed directly or indirectly, i.e. by means of an intermediary. The Austrian authorities and practitioners met on site explained that Section 12 PC on instigation, aiding and abetting is applied broadly to cover also situations which would involve an intermediary (and as indicated in the descriptive part, s/he is him/herself prosecutable depending on his/her level of knowledge and criminal intent). According to information provided after the visit, this interpretation was reportedly confirmed in relevant judicial practice.” As an example for the relevant judicial practice in this respect, GRECO quoted the aforementioned Supreme Court Judgment 13 Os 51/80.

Finally Austria would like to point out that also the UNCAC evaluators have come to the conclusion that

“none of the provisions contain reference to the direct or indirect commission of the offence. Instead, the general principles of criminal law are applicable, particularly section 12 PC (treatment of participants as offenders).”

5.3. In the light of the recent case law, the “old” case law and the findings of the other evaluation mechanisms, Austria hopes to have sufficiently demonstrated that Austrian law enforcement agencies theoretically as well as practically despite the lack of an explicit mentioning in the Penal Code are in a position to prosecute bribery also in cases where use is made of intermediaries.

6. For the sake of completeness it might be added that in cases where the intermediary acts abroad whereas the company for example instructs the intermediary from Austria, or authorizes the bribery or sends the money from Austria, Austria has already territorial jurisdiction according to section 62 of the Criminal Code, since in such cases the offence is considered to be committed also in Austria according to section 67 paragraph 2 of the Criminal Code.

**If no action has been taken to implement recommendation 2, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 3:**

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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

1. As already reported in June 2014 already on 11 September 2009 the Ministry of Justice had issued a Decree about the increased usage of freezing, seizure and confiscation and practicable problems in its execution with the aim to identify shortcomings in the field of freezing, seizing and confiscation of assets and to promote the use of these instruments. The Ministry already then called for systematic investigations into the amount and whereabouts of the proceeds, in particular in cases of drug related crime, sexual crimes committed for profit, traffic in human beings, facilitating of illegal immigration, corruption, money laundering, financing of terrorism, organised crimes, economic crimes as well other crimes against property causing a large amount of damage. Public prosecutors were reminded of the mandatory nature of the provisions on confiscation and to give reasons for failure to confiscate in their files in cases concerning these crimes and are reminded. The Decree explained the legal situation in detail and gave a comprehensive overview of the procedural aspects of confiscation.

In addition to these legal clarifications the Ministry called for a report by all prosecution authorities by 31 October 2009 on their experiences with freezing, seizure and confiscation of assets, existing problems and suggestions for improvements of the current system. These reports will be the starting point for further reflections and legislative action in this field.

Moreover, the decree contained a reference to the OECD Convention on Bribery and also mentioned the respective GRECO recommendation Austria had received during the combined 1<sup>st</sup> and 2<sup>nd</sup> Evaluation Round in 2008, “ to consider strengthening the system of confiscation and temporary measures so that a) the confiscation system also applies to the direct proceeds of corruption and not just to their equivalent value; b)

it is made clear that temporary measures and final measures are applicable to the various forms of proceeds (in particular both tangible and intangible proceeds, proceeds deliberately transferred to third persons to avoid confiscation measures and proceeds intermingled with legitimate assets).”

As a consequence, the Austrian Penal Code was amended as recommended by GRECO in 2010: Confiscation (“Verfall”, section 20 PC) of the direct proceeds of crime was established as the principle, with the possibility of forfeiting the equivalent value if the direct proceeds are no longer available; both tangible and intangible proceeds are covered; and confiscation measures against a third person can only be avoided if the third person had acquired the property in question in good faith and for an adequate sum (in which case this sum could be confiscated from the offender/transferor). The same principles were also made applicable to temporary measures, as the Code of Criminal Procedure – where they are regulated – refers to the Penal Code. Finally, the scope of confiscation of instrumentalities (“Einziehung”, section 26 PC) was broadened.

GRECO very much welcomed the fact that the strengthening of the system of confiscation and temporary measures had not only been considered but that the law in fact had been changed. GRECO concluded that the relevant recommendation had been implemented satisfactorily.

2. As already reported in December 2013, Austria, however, not only has changed its law on confiscation substantially as of 2011. Moreover, a Working Group on confiscation issues has been established in 2011, containing of law enforcement practitioners from the judiciary, including prosecution authorities, as well as from the police.

Topics that have been discussed in this Working Group include i.a.:

- analysis of weak points
- best practices in other EU countries
- training
- problems with the execution of confiscation orders
- the upcoming EU Directive on seizure and confiscation of the proceeds of crime
- the Federal Ministry of the Interior’s project for enhancing the efficiency of confiscation
- the establishment of an Asset Management Office
- special competences for confiscation orders; introduction of test operations in several prosecution authorities
- making use of external services for the estimation, deposit and/or valorization confiscated property etc.

One of the outputs of these discussions is a comprehensive, 210 pages manual dealing with all the most relevant theoretical and – even more important – practical aspects of confiscation (including temporary measures). This manual was introduced and made known to the Prosecutors and Criminal Judges by way of a ministerial decree of 19 February 2014 and was made available for download in the Intranet.

With the same decree also a model project was established in 5 of Austria’s prosecution authorities concerning the specialization of selected prosecutors in confiscation matters. This model project started operating on 1 March 2014.

3. On 31 March/1 April and 6/7 October seminars on „Confiscation“ for police and justice practitioners jointly organized by the Ministries of Justice and of the Interior were held.

Between 16 and 18 June 2014 another (evaluation) workshop on seizure was organized by the Ministry of the Interior which was also open to justice representatives.

4. In October 2014 the manual published in February 2014 was revised in the light of the discussions since its first edition. The revised version may be downloaded from the internet, but also 500 printed copies have been

distributed.

5. In addition to these general endeavors, Austria would like to point out that in Case # 15 as well as in case # 10 confiscation was an issue.

Concerning Case # 15 (“ONB” in the matrix) the prosecution authority as part of the indictment requested the confiscation of the proceeds of bribery from all but two of the involved natural persons as well as from one of the legal persons involved. The amounts to be confiscated concerning the natural persons range between 90.000 Euros and 1,5 Million Euros, whereas the amount requested from the legal person was more than 3 Million Euros and would have been tantamount to the proceeds from the contract (allegedly) obtained through bribery. On October 3, 2014, however, although 7 of the 9 indicted persons were convicted by the court of first instance, all claims for confiscation were rejected. The prosecution authority announced to appeal against this verdict.

Concerning Case # 10 (“Patria” under Finland in the matrix) the confiscation of 1,3 million Euros was ordered, which is the difference between the total amount transmitted to the convicted person in the context of the incriminated bribery and the amount he (allegedly) actually used for bribing. So, in the end this would be the remuneration for his contribution to the incriminated bribery. As has been already mentioned this conviction (including the confiscation order) is not yet final.

6. On October 1, 2014, an amendment to the Execution-Order came into force, according to which final court decisions on confiscation constitute a title for (immediate) execution. Until then the State became “only” the owner of a confiscated property, but eventually had to take further steps to be in a position to in fact gain the property, e.g. to file a suit against a person who despite the confiscation decision refused to hand over the confiscated property voluntarily.

**If no action has been taken to implement recommendation 3, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 4(a):**

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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

The Federal Ministry of Justice on 13 August 2013 rendered a decree in accordance with the representatives of the banking association. This decree aims at raising awareness of practitioners by mentioning mistakes which occurred often in day to day practice in order for practitioners to give additional attention to those circumstances to avoid formal mistakes in the order and therefore legal remedies.

Representatives of the banking association furthermore agreed on a streamlined way of communication which

will take place via fax-transmission. The Ministry of Justice provided practitioners with an additional form which is to be used if bank accounts of a suspect have to be investigated and the specific banking institution/account is not known to the law enforcement authorities. In this form the fax-numbers of the banking associations are already written down.

Additionally, in order to discuss and solve problems of a prosecutorial order in an individual case the banking associations provided law enforcement authorities with contact details (telephone number and e-mail address). It might be worth remembering, that this issue found its way into the evaluation report because it was raised by practitioners when they were heard as interlocutors during the on-site visit.

By February 2014 the Federal Ministry of Justice asked practitioners (again) to comment on the effects of the Decree mentioned above, in particular with regard to problems which might still occur concerning access to banking information. The result of this first evaluation can be summarised as generally positive as it was e.g. mentioned that the new procedure helped speeding up the procedure.

On October 14, 2014, the issue was discussed in the Justice Committee of the Austrian Parliament. There were statements supporting the aim of speeding up financial investigations, whereas the idea of a centralized register of accounts and the abolishment of legal remedies in this respect were also met with serious human rights concerns with a view to data protection and the rights of the accused. In the light of the jurisprudence of the European Court of Justice as well as the Austrian Supreme Constitutional Court concerning data retention there is even more ground for a cautious attitude toward the creation of new data bases which aim at the groundless retention of data concerning the whole population of Austria. The issue was adjourned.

**If no action has been taken to implement recommendation 4(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 4(b):**

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

- 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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

Bearer shares that are not registered pursuant to the rules requiring unlisted companies to convert bearer shares into registered shares by December 2013 were deemed to be and treated as nominal shares by law as from 1 January 2014, irrespective of the statutes of the company. Since being incorporated in the register of shareholders is the only way to be legally accepted as shareholder and to execute the shareholders rights, the incentives for shareholders to contact the company in order to receive nominal shares are very strong and there is no way the Vorstand (executive directors) could risk to neglect the obligation to set up a register of shareholders.

Although there were good arguments that this system was self-executing and did not need any penalties, a working group had been established to elaborate proposals for legislative measures to ensure that bearer shares would be converted into nominative shares.

In answer to the request of the OECD Working Group on Bribery (as well as of the Global Forum on Transparency and Exchange of Information for Tax Purposes), the Austrian Stock Corporation Act was amended in 2014 in the framework of the "Budget Accompanying Law 2014" ("Budgetbegleitgesetz 2014"), Federal Law Gazette I No. 40/2014, in order to introduce additional sanctions for situations where bearer shares were not registered pursuant to the rules requiring unlisted companies to convert bearer shares into registered shares by December 2013.

These new sanctions cover the management of the respective companies as well as its shareholders if they breach their duties to act and/or their duties of cooperation: In terms of a sanction against the board of directors failing to comply with its statutory duty to properly keep a share register under § 61 (1) of the Austrian Stock Corporation Act, § 258 (1) of the Austrian Stock Corporation Act now also provides for imposition of a fine of up to 3.600 Euro. With respect to shareholders failing to convert their shares, the consequence, first of all, is to be that certificates covering their bearer shares will be invalidated by statute (see proposed § 262 (33) of the Austrian Stock Corporation Act). Secondly, shareholders are to lose entitlements to dividends for past periods if they fail to timely have their registered shares entered on the share ledger (see proposed § 61 (5) of the Austrian Stock Corporation Act). The new provisions entered into force on 1 October 2014.

With these new sanctions in place, Austria is confident that the conversion of all bearer shares into registered shares has already been or will very soon be completed.

**If no action has been taken to implement recommendation 4(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 4(c):**

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

- 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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

According to sect 61 of the Austrian Stock Corporation Act (Aktengesetz) owners of nominative shares have to be registered in a shareholders' register maintained by the company. The following information must be kept:

- name
- address
- date of birth (in case of a natural person)
- commercial register number (in case of a legal person)
- number of shares

- in case of par-value shares the value
- bank account

Even though there is no obligation to list any information in the Commercial Register about “beneficial ownership” deviating from the shareholders published, sec 61 paragraph 4 of the Austrian Stock Corporation Act states, that if the owner is somebody else than the (natural of legal) person registered, all the information mentioned above (except the bank account) has to be given on the person to whom the shares belong.

In addition Art 29 of the current Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing („4<sup>th</sup> AMLD”) obliges corporate or legal entities to obtain and hold adequate, accurate and current information on their beneficial ownership. Depending on the concrete wording of Article 29 of the proposed Directive, Member States will have to transpose this provision into national legislation.

The trialogue negotiations on this proposal have just begun (first meeting on October 9, 2014), and the current Presidency envisages an agreement before the end of this year.

**If no action has been taken to implement recommendation 4(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 4(d):**

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

- 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

**Action taken as of the date of the follow-up report to implement this recommendation:**

The Federal Ministry of Justice would like to point out once more, that taking into account considerations of national economic interest, the potential effect upon relations with another State or the identity or legal persons involved is not legal and would result in criminal investigations on the grounds of abuse of office. The Minister him/herself as well as all the staff in the Federal Ministry of Justice are bound by law and an infringement would have the same effect.

Law enforcement authorities are obliged to initiate proceedings and investigate ex officio all kind of crimes which come to their attention. They have to investigate the circumstances of the case in an impartial manner, i.e. by seeking all kind of evidence whether inculpatory or exculpatory. Taking into account the above mentioned considerations (national economic interest etc.) is not mentioned by the law and would – as already cited above – result in an infringement of the law and could give rise to criminal proceedings on the grounds of abuse of office. All these principles apply to the Minister of Justice and the staff of the Federal Ministry of Justice in the same manner.

All orders of the Minister of Justice have to be passed in writing and are part of the file at the public prosecution service/court. All parties to the proceedings are able to access the file. Furthermore the Minister

of Justice has to report all orders, passed to public prosecution services, to Parliament and is accountable. Nevertheless, in January 2014 a so-called „Council of Wise Men“ has been established, consisting of the Legal Protection Commissioner for the Ministry of the Interior, the Legal Protection Commissioner for the Ministry of Justice and the Deputy Procurator General, whose task it is to assess the tenability of draft orders prepared by the head of the competent department of the Ministry of Justice.

Moreover, in February 2014 the „Council of Wise Men“ enlarged by the head of the Criminal Law Department of the Ministry of Justice, the heads of the Ministry’s unit for Criminal Procedural Law and the unit for large and reportable cases, the President of the Supreme Court, the Vice-President of the Supreme Constitutional Court, the President and the Vice-president of the Supreme Administrative Court, the heads of the Superior Prosecution Authorities, the presidents of the Judges as well as of the Prosecutors Association, the head of the Section for Judges and Prosecutors in the Public Officials Union and the President of the Chamber of Private Lawyers, has also been entrusted with the task to elaborate proposals for a reform of the current legal situation concerning orders, which should be molded into a draft bill in 2015. The enlarged council so far has held four meetings, the fifth and possibly last meeting is scheduled for November 19, 2014.

**If no action has been taken to implement recommendation 4(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 4(e):**

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

- 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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

As indicated by the BAK during the on-site visit in Austria, the situation has improved significantly. The e-discovery system has been implemented to a full extent, and it works effectively as far as investigations of corruption cases are concerned. In 2014, an evaluation focusing on the improvement of investigations of financial and economic crime as well as an operational analysis of cases has been conducted.

To further optimize its IT forensic processes and in particular the forensic reviewing/ analysis process, the BAK is currently introducing an advanced e-discovery system.

**If no action has been taken to implement recommendation 4(e), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

As described under point 153 of the report the Federal Ministry of Justice when acting as Central Authority in cases of MLA requests has a system of control of execution in place. Similar mechanisms of control are put in place at the local prosecution services surveyed by the four Higher Prosecution Services in Austria – the automated Court Information System (“VJ”) allows the surveying authorities to easily control the status of execution of a request and to intervene if a delay occurs.

Concerning ii) please see above recommendation 4 a).

**If no action has been taken to implement recommendation 5, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

*Recommendations for ensuring effective prevention and detection of foreign bribery*

**Text of recommendation 6:**

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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

The BAK would like to highlight several initiatives which were promoted during 2013 in order to improve cooperation between the Austrian Financial Investigation Unit and the BAK:

Meetings are held on a regular basis in order to discuss common issues and to improve information exchange regarding suspicious transaction reports and ongoing cases.

A decree regulating the cooperation with and the competences of the A-FIU was adopted in 2011, amended in 2012 and updated in 2013. It defines the duty of the BAK to act immediately and to give feedback on transmitted suspicious transaction reports within one day. The BAK complies with this regulation and as a result it is guaranteed that the A-FIU receives feedback from the BAK within a very short time.

Joint training courses for investigators of the Austrian Financial Investigation UNIT and investigators of the BAK have taken place several times will also be carried out in the future in order to guarantee the sustainable and constructive nature of cooperation.

In the second half of 2014 an investigation team exclusively entrusted with financial and money laundering investigations was established within the BAK, so that the A-FIU has especially trained investigation officials as competent contact persons within the BAK to guarantee short reaction times.

Moreover, there is a permanent exchange of information between the two institutions and a joint planning and organization of regular trainings on “Money laundering” beginning with 2015.

**If no action has been taken to implement recommendation 6, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 7(a):**

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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

The accountability of enterprises is regulated in sec 189 et seqq. of the Code on Enterprises (Unternehmensgesetzbuch, UGB). Capital companies as well as business partnerships without a natural person who is liable without limitation as an associate have a legal obligation to keep records irrespective of the turnover. To sole traders and partnerships – except freelance professionals such as medical doctors, lawyers, notaries or artists and farmers - certain turnover thresholds apply (EUR 700.000,- during two consecutive years or EUR 1.000.000,- in one year); in case of exceeding these thresholds also for those entrepreneurs and enterprises accountability applies.

The duty to have an audit of annual accounts is regulated in sec 268 et seqq. The annual accounts and the management report have to be examined by an auditor. This does not apply to small Limiteds (sec 221 para 1 UGB), unless they are obliged by law to have a supervisory board. The duty to have an audit of annual accounts, therefore, applies only to medium and large capital companies, but not to sole traders or partnerships.

Provisions on accounting criminal law in Austria occur in several acts dealing with the various types of companies:

- sec 255 AktG (concerning stock corporations)
- sec 122 GmbHG (concerning companies with limited liability)
- sec 64 SEG (concerning Societas Europea)
- sec 89 GenG (concerning cooperatives)
- sec 43 ORF-G (concerning the Austrian Broadcasting Corporation)

- sec 41 PSG (concerning private foundations)
- sec 114 VAG (concerning insurance companies) and
- sec 118 SpaltG

Similar provisions are contained in:

- sec 15 KMG (Act on the capital market)
- sec 189 InvFG 2011 (Act on investment funds)
- sec 37 ImmoInvFG (Act on real estate investment funds)

Currently an expansion of accounting criminal law to business partnerships without a natural person who is liable without limitation as an associate (GesmbH & Co KG), to savings banks and to stock listed foreign companies as well as to large associations is under consideration. Whether accounting offences should also be applicable for sole traders or partnerships has not yet been decided; at least with respect to sole traders such a measure is likely to be considered inappropriate, however, not least because most of the offences would not be applicable, anyhow, for factual reasons (since there is no supervisory board, no board of directors, no general meeting, no duty to have annual accounts etc.).

Moreover a restructuring of accounting criminal law is currently under consideration, which could create a central provision in the Criminal Code, applicable to most, if not all, enterprises. A possible draft bill is envisaged for mid-2015.

**If no action has been taken to implement recommendation 7(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 7(b):**

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:

- 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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

"go international" ([http://www.go-international.at/English\\_Version.html](http://www.go-international.at/English_Version.html)) is an export promotion programme of the Austrian Federal Ministry of Science, Research and Economy (BWF), implemented in cooperation with the Austrian Federal Economic Chamber (WKO). In the current period 2013 - 2015 "go international" contains a measure "Anticorruption, Sustainability and Good Will Projects". The following activities have been implemented / are envisaged:

- Conference "Compliance, Lobbying & Anticorruption", 17.6.2013, Vienna
- Austria Connect Greater China, 17.10.2013, Hong Kong
- Anticorruption workshop in Cooperation with ICC, IACA and ICAC (Independent Commission for Anticorruption, Hong Kong)
- Austrian Business Circle CSR and Compliance in Romania, 5. & 6.12.2013, Bucharest and Temesvar

- Business Mission to Switzerland, Focus: “International Compliance” 29.1.2014, Zürich
  - Austrian Business Circle Compliance & Anticorruption in Slovakia, 12.2.2014, Bratislava
  - Training “Preventing Corruption – Six steps to implement an Anticorruption system”, 24.4.2014, Vienna
- Anticorruption workshop in cooperation with respACT and German Global Compact Network
- Workshop “Responsible Supply Chain Management” in Cooperation with respACT 1.12.2014, Vienna
  - Austrian Business Circle Responsible Business Conduct in Serbia, Q1 2015, Belgrade
  - Tailor-made information for subsidiaries of Austrian enterprises abroad about standards and guidelines
  - Ongoing cooperation with ICEP & corporAID Magazine
  - Ongoing cooperation with respACT

respACT (<http://www.respect.at/site/english>) is Austria’s leading platform for Corporate Social Responsibility (CSR) and Sustainable Development. It encourages companies to deal with topics such as anti-corruption, compliance and ethics through different channels.

In April 2014 respACT and the Chamber of Commerce organized a training for company representatives about anti-corruption policies and how to deal with attempted acts of bribery.

Since 2011 respACT has been running an on-going working group on supply chain sustainability, including compliance and anti-corruption in the supply chain.

For respACT the aspect of regionalisation is crucial, thus bringing the topics of the OECD guidelines to the companies in the nine Austrian counties. A business brunch was organized in 2014 to present the OECD guidelines on anti-corruption and bribery to the regional Austrian companies in Graz, Styria – including a presentation of Mr. Zechner, the Austrian NCP at that time.

Members of respACT are often invited as participants at events and discussions on fair trade and anti-corruption. In January 2014 the topic of curbing corruption was discussed e.g. between members of Transparency International Austria, the Austrian Development Agency and respACT, integrating the OECD guidelines on anti-corruption into the event.

At the numerous events that respACT hosts the brochure on the OECD guidelines including a chapter on anti-corruption and bribery is distributed. Moreover, an article on anti-corruption has been published on the respACT homepage in 2013.

**If no action has been taken to implement recommendation 7(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 7(c):**

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:

- 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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

See above recommendation 7 (b)

**If no action has been taken to implement recommendation 7(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 7(d):**

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:

- 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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

See above recommendation 7(b)

**If no action has been taken to implement recommendation 7(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 7(e):**

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:

- 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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

In March 2013 an internet-based anonymous whistle-blowing system for investigations of corruption and economic crime has been established at the Public Prosecutors Office for combating economic crime and corruption for a preliminary test period of two years. This system enables the Public Prosecutors office to

communicate with whistle-blowers, who remain anonymous through a mailbox. Contrary to other anonymous reports this system, therefore, enables the public prosecutor to pose questions to the whistle-blower in order to assess the validity of his/her report, while at the same time guaranteeing him/her absolute anonymity.

The whistle-blowing system has been established to allow reports in the following fields:

- Corruption
- Economic crime
- Social fraud
- Fiscal crime
- Accounting and Capital Market offences and
- Money laundering

During the reporting procedure it is completely in the whistle-blowers discretion to disclose his/her identity or to remain anonymous.; it is not even feasible to trace back the whistle-blower's IP-address.

**If no action has been taken to implement recommendation 7(e), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 8(a):**

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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

A two-day seminar for tax auditors on Bribery and Money laundering was held 5 times within the years 2013 and 2014 at the Federal Finance Academy. The anti-bribery training is based on the OECD Bribery and Corruption Handbook for raising the awareness of tax auditors. At the annual congress of the federal tax investigation unit a half day was designated to the Public Prosecutors Office for combating economic crime and corruption to raise the level of cooperation and mutual information exchange. In 2015 the seminar will be held five times again.

**If no action has been taken to implement recommendation 8(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 8(b):**

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

- 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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

The Public Prosecutors Office for Combating Economic Crimes and Corruption is provided with one expert in full time (the persons change every half year) of the federal unit for large taxpayers audit – Großbetriebsprüfung.

The allocation of the experts was agreed on between the Federal Ministries of Finance and Justice and a respective memorandum of understanding was signed by the two ministers. The Federal Ministry of Justice therefore believes that general knowledge of the value of information of tax authorities to proceedings concerning bribery should be available to the Public Prosecutors Office for Combating Economic Crimes and Corruption.

In the annual report for the year 2012 of the Public Prosecutors Office for Combating Economic Crimes and Corruption it is stated the allocation of the experts improved the mutual understanding between tax and judicial authorities and in particular the transfer of knowledge.

Two public prosecutors of the Public Prosecutors Office for Combating Economic Crimes and Corruption furthermore took part in a working group of the department for tax examination of larger entities, the department for tax fraud investigation and members of the Federal Ministry of Finance. The working group aimed at improving the handling and flow of information giving rise to suspicions concerning further criminal acts, which arise during tax examinations.

Besides that there is a constant exchange of expertise on the occasion of mutual trainings and seminars.

**If no action has been taken to implement recommendation 8(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 8(c):**

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

- 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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

This recommendation seems to be based on a kind of misunderstanding of the Austrian system. Therefore it has not been possible until now to conceive of measures that are feasible and appropriate in the Austrian legal system in this respect.

**If no action has been taken to implement recommendation 8(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 9(a):**

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)

**Action taken as of the date of the follow-up report to implement this recommendation:**

Since 2009 (revised in 2014), the Austrian Development Agency (ADA) distributes a Code of Conduct (CoC) in several languages (German, English, French, Spanish, Portuguese). The CoC, inter alia, contains the following:

- ADA defines “corruption as the abuse of entrusted power for private gain”
- “(n)either we nor others gain unfair advantage as a result of our activities. In line with our internal rules we refuse and neither solicit or accept nor promise, offer or give gifts and “favours
- “we act according to the laws of Austria and of our partner countries as well as our contractual obligations and the internal rules of the ADA.”
- 

The Code also emphasizes that in cases of reasonable suspicion of infringements or violations against the Code of Conduct, ADA staff as well as business and project partners, target groups and interested members of the general public can refer either to their superiors (for ADA staff) or the management of the department on organizational development (for ADA staff and others): [integritaet@ada.gv.at](mailto:integritaet@ada.gv.at) or Tel.: +43(0)1 90399-2250. All information and testimonies are carefully examined and treated confidentially, if so desired. Attention is also given to the protection of ADA staff from possible misuse of this mechanism.

This Code of Conduct is made publicly available :

- At the website of ADA.
  - [http://www.entwicklung.at/uploads/media/Code\\_of\\_Conduct\\_Jan2014](http://www.entwicklung.at/uploads/media/Code_of_Conduct_Jan2014).
- A printed version of the Code is also available:
  - At the ADA headquarters next to the entrance
  - At each coordination office in the respective language

At the beginning of one’s duties, each ADA staff member (both in the headquarter and in the field) receives a printed version of and introduction into the Code of Conduct and has to sign that he or she will comply with

the principles of the Code of Conduct . Additionally, trainings on anti-corruption issues and possible channels for making a report on bribery within the ADA are held. Similarly, ADA organises events with its project partners in which it publicly raises awareness of these channels.

It is also worth mentioning that ADA’s general conditions of contract contain a passage under which the beneficiary of aid is obligated to pay back immediately previously granted aid, “if any gift, pecuniary or other advantage has been, or is being, either directly or indirectly, offered, promised or provided to any individual or institution in the context of executing the project .” Agreements concerning budget support that are concluded with governments include the clause: “ADA reserves the right to withhold and/or reclaim all or parts of the grant in case of misappropriation or misuse of funds”.

In 2014 ADA has

- established an ombudsperson (external law firm) and together with this ombudsperson applied at the Austrian Data Protection Agency for the permission to run a whistleblowing hotline to which reports about a possible misuse of funds can be made (proceedings expected to be finalised in 2015);
- revised and improved its existing regulatory framework and clarify issues related to the prevention of corruption, including clarifications on bribery of foreign public officials;
- has organised a seminar together with the International Anti-Corruption Academy (IACA) and Transparency International-Austrian Chapter (TI-AC), in January 2014 on anti-corruption issues with relevant stakeholder (including NGOs and the private sector).

Aside from beginning the activities of the above-mentioned whistleblowing hotline ADA is also considering to establish “integrity agreements” that would also oblige its partners to obey the principles of the Code of Conduct

**If no action has been taken to implement recommendation 9(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 9(b):**

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

- 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

**Action taken as of the date of the follow-up report to implement this recommendation:**

The Austrian Export Credit Agency (OeKB) is a trustee of the Ministry of Finance. Therefore, there is no direct line of communication to law enforcement authorities. If the OeKB has suspicions of foreign bribery by official export credit support applicants and clients it communicates them to the Ministry of Finance which reports them to the law enforcement authorities.

Concerning the OeKB’s activities in the fight against corruption it may be of interest that it has organized several seminars together with the International Chamber of Commerce on country-specific corruption risk-management and prevention, titled “Business without corruption”, for example on October 7, 2013 and an

November 11, 2013.

**If no action has been taken to implement recommendation 9(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 9(c):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

**If no action has been taken to implement recommendation 9(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

## **PART II: ISSUES FOR FOLLOW-UP BY THE WORKING GROUP**

**Text of issue for follow-up:**

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”;

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

In Cases # 10 (“Patria” in the matrix under Finland; verdict of April 2013) and # 15 (“ONB” in the matrix; verdict of October 2014) the penalties ranged between two and three years of imprisonment. The verdicts are not final yet.

**Text of issue for follow-up:**

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

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

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

No difficulties have been articulated – neither in reports or complaints to the Ministry of Justice nor in the mass media or in scientific literature.

**Text of issue for follow-up:**

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

- 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.

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

The Coordinating Body on Combating Corruption was established in 2010. 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 all federal ministries, the Länder, the Parliamentary Administration, various other authorities, including the Federal Bureau of Anti-Corruption (BAK), and the private sector, including the Chamber of Commerce, as well as Transparency International.

The body has been formally established in January 2013 by a Decision of the Committee of Ministers. The tasks entrusted to the Body according to this Decision are the following:

- Exchange of information concerning the fight against corruption in Austria;
- Observation of and information on international developments in the fight against corruption and corruption prevention;
- Mutual information about events that are relevant for combating corruption and corruption prevention;
- Acting as an information hub concerning the corruption-related endeavors of its members;
- Establishing a platform for the development and coordination of common positions in international anti-corruption fora;
- Development of basic approaches for a national anti-corruption strategy in the repressive field;
- Promotion of the harmonization and coordination of department- and are-specific anti-corruption strategies;
- Establishing a forum for discussion of recent developments in scientific anti-corruption research;

- Information about national initiatives and strategies of other countries;
- Mutual information about preventive measures (in particular through the Ministry of the Interior)