



## **AUSTRIA: PHASE 2**

### **FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS**

#### **APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS**

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 20 March 2008.

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## SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

### a) Summary of Findings

1. At the Working Group's meeting in March 2008, Austria presented its written follow-up report, outlining its response to the recommendations that the Working Group on Bribery had made during the phase 2 examination in 2006. The Working Group welcomed the information provided by the Austrian authorities in the course of this exercise and recognized Austria's significant efforts to implement the recommendations that the Working Group had made. The Working Group deems that Austria has fully implemented ten out of the 19 recommendations made during the phase 2 examination, while eight recommendations remain yet to be implemented. One of the recommendations has been partially implemented.

2. The Group acknowledges that in the two years since the adoption of the phase 2 report, Austria has made efforts to raise awareness about the Convention and the foreign bribery offence, called for in Recommendations 1a, 1b, and 1c. The Group commends Austria on measures to raise awareness of the foreign bribery offense within the public administration as well as trade promotion and export credit agencies (Recommendation 1a), among companies (Recommendation 1b), and among the accounting, auditing, and the legal professions (Recommendation 1c). The Working Group thus considers that Austria has fully implemented Recommendations 1a, 1b and 1c.

3. In the phase 2 report, the Working Group called upon Austria to enhance mechanisms that would help detect the occurrence of foreign bribery (Recommendations 2a to 2d). These recommendations pointed at the need for effective detection mechanisms within Austria's export credit agency (Recommendation 2a) and in the financial sector (Recommendation 2c) and recommended that Austria take action to increase the likelihood that foreign bribery be detected in the course of company audits (Recommendation 2d). In response to recommendation 2a, the Austrian authorities have enhanced the due diligence mechanisms at Austria's export credit agency OeKB, established a mechanism to detect and follow up suspicions, notably in sensitive markets, and have introduced anti-corruption clauses in OeKB's relevant documents. In response to Recommendation 2c, Austria has strengthened the supervision of entities subject to money laundering reporting obligations. Austria has also taken action to implement Recommendation 2d: Auditors are henceforth obliged to report suspicions of foreign bribery to company management. As recommended, Austria has also considered introducing a obligation for auditors to report suspicions to law enforcement authorities in cases where internal disclosure meets with inaction; such an obligation to report externally has not been introduced, however. The Group considers Recommendations 2a, 2c and 2d fully implemented.

4. During the phase 2 evaluation, the Working Group further recommended that Austria clarify the general reporting obligation enshrined in section 86 of the Criminal Procedure Code (CPC), and that the country introduce a whistleblower protection system in the private sector in order to increase the likelihood that foreign bribery be detected (Recommendation 2b). The Austrian authorities reported that no particular steps have been taken to clarify the effect of section 86 CPC and that the introduction of a whistleblower protection system in the private sector is not planned. The Working Group thus considers recommendation 2b not implemented.

5. During the phase 2 evaluation, the Working Group made several recommendations with a view to enhance the effectiveness of the investigation and prosecution of foreign bribery (Recommendations 3a to 3f). The Working Group considers that so far, only two out of the six recommendations in this area have been implemented. The Group notes with satisfaction that the offence of foreign bribery has been significantly broadened and simplified in response to Recommendation 3d. The Working Group further considers that special training for law enforcement personnel and judges will enhance the effectiveness of investigation and prosecution of cases of foreign bribery as suggested in Recommendation 3f and thus consider this recommendation implemented.

6. The Working Group also recognizes that Austria has taken substantial steps to implement Recommendations 3a, 3b, and 3c. These recommendations called for enhancing and monitoring the performance of law enforcement agencies (Recommendation 3a), ensuring the swift provision of MLA in foreign bribery cases (Recommendation 3b), and recommended that Austria makes the resources available to prosecutors to effectively investigate and prosecute foreign bribery cases (Recommendation 3c). In response to these recommendations, Austria has passed legislation that will create, from 2009 on, a specialized prosecution office for corruption offences. At the time of the written follow-up report, however, Recommendations 3a, 3b and 3c are not implemented.

7. The Working Group also notes that Austria has not yet implemented Recommendation 3e. This recommendation suggests that Austria issue guidelines to prosecutors on how to apply the newly introduced legislation on criminal liability of legal persons; the recommendation further suggested that guidance be given to companies regarding organisational measures to fight against foreign bribery. So far, such guidelines have not yet been issued.

8. During the phase 2 evaluation, the Working Group further recommended that Austria ensure that accounting omissions be adequately sanctioned (Recommendation 4a). Austria has extended the scope of application of accounting offenses; also, companies themselves can be prosecuted for accounting offenses. However, the Group remains concerned that the maximum penalty for accounting offenses of one year imprisonment for natural persons remains too low to be dissuasive. The Working Group thus considers that Recommendation 4a is only partially implemented. Recommendation 4b has been implemented by a revision of the income tax guidelines that now reflect accurately the applicable law on non-tax deductibility of bribes.

9. The phase 2 evaluation came to the conclusion that the level of sanctions for foreign bribery may not be dissuasive to effectively combat the bribery of foreign public officials. The Working Group notably recommended that sanctions for the offense of foreign bribery be increased for natural persons (Recommendation 5a), as well as legal persons (Recommendation 5b), and that the availability of diversion be excluded, at least for serious foreign bribery cases (Recommendation 5c). In response to recommendations 5a and 5b, Austria has increased the maximum penalty for foreign bribery from two to three years' imprisonment for natural persons; this also led to a slight increase of the maximum penalty for legal persons. The Working Group however considers that these levels of sanctions are still not dissuasive and that Recommendations 5a and 5b are therefore not implemented. The Working Group further notes that the low level of sanctions has an impact at procedural level, and that diversion is still available for legal persons, even in serious cases. It considers thus that Recommendation 5c is also not yet implemented. The Working Group notes that Austria collects detailed statistics regarding money laundering and accounting offenses, as it recommended during the phase 2 evaluation (Recommendation 5d) and thus considers Recommendation 5d implemented.

**b. Conclusions**

10. Based on the findings of the Working Group with respect to Austria's implementation of the phase 2 recommendations, the Working Group concluded that Austria has fully implemented recommendations 1a, 1b, 1c, 2a, 2c, 2d, 3d, 3f, 4b and 5d; that Austria has partially implemented recommendation 4a; and that recommendations 2b, 3a, 3b, 3c, 3e, 5a, 5b and 5c have not yet been implemented. The Working Group expressed its expectation that the entry into force in 2009 of new legislation will bring improvements in response to some additional recommendations.

11. The Working Group invited Austria to report orally, one year after the written follow-up examination, i.e. by March 2009, on the implementation of the recommendations that the Group considers to be not yet fully implemented.

## Written Follow-up to Phase 2 Reports

Name of country: Austria

Date of approval of Phase 2 Report: 16 February 2006

Date of information: 25 February 2008

### Part I. Recommendations for Action

#### Text of recommendation:

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);

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

Concerning **training** it can be highlighted that the Austrian **Federal Ministry of the Interior (MoI)** organised in the course of 2006 and 2007 a multiplicity of seminars on “Combating and Preventing Corruption” with mandatory participation for law enforcement agents. In order to create increased awareness of domestic and foreign bribery offences, information brochures in German and English on the acceptance of gifts were published and posters distributed within the public administration. Furthermore a special website has been installed and information made available to a broader public. The **Federal Bureau for Internal Affairs (BIA)**, i.e. the anti-corruption body of the Austrian Federal Ministry of the Interior, in addition to reactive investigations, has taken over the task to develop and implement strategies for the prevention of corruption within Austrian law enforcement entities and beyond. The BIA has developed a strategy to widen the scope and to enhance the sustainability of its preventive measures.

Going into detail, it should be mentioned that e.g. leaflets were issued providing information about the Bureau and its activities in the fight against corruption. Another brochure was drawn up dealing with one of the most sensitive areas in the everyday life of public servants: the acceptance of advantages. The objective was to raise awareness about the problem and give advice on how to best avoid conflicts of interest. The brochure was sent out to every employee of the Ministry of the Interior.

Furthermore two sets of posters have been developed by the BIA. One series of three functional posters deals with the actual consequences of corruption on security, economy and society, whereas the other series addresses this issue in a more provocative and emotionalising way.

Moreover the BIA edited and published a book: “The Corruption Monster – Ethics, Politics and Corruption”. Its specific intention is to familiarize a broader interested public with this topic, and not to limit it to a circle of experts and politicians. It is designed to stimulate discussion and thus create sensitivity and awareness. Prominent figures active in politics, science, business, the judiciary, civil society and the media express their thoughts on ethics, politics and corruption in literary form. Aside from distributing this publication through bookstores, the book was sent to over 150 key players in politics, science, business, the judiciary and the media, at national and international level.

The BIA also initiated the "First Austrian Anti-Corruption Day" with the title "Creating Synergy through Cooperation". On 5 and 6 June 2007, 45 high-ranking Austrian experts discussed common approaches of corruption prevention as well as possible networking between the different audit institutions. Representatives of 13 ministries and other state institutions, eight Regional Courts of Audit and the Audit Office of the City of Vienna, as well as of six Austrian Laender and of four municipal audit institutions participated in this two-day exchange of experience and information, which was marked by a number of speeches and interesting discussions. Following this “First Austrian Anti-Corruption Day”, on September 10, 2007, the **Austrian Federal Chancellery (Bundeskanzleramt)**, in cooperation with **Transparency International Austria**, invited to the opening event for the establishment of a “**Code of Conduct**” for the public service. The BIA is involved in the elaboration of this code of conduct proactively.

In this context it has to be pointed out that the fight against corruption has gained much importance on the Austrian political agenda. As a result of a lively discussion on the grey area of corruption triggered by some incidents involving State representatives, the Austrian Federal Chancellery decided to draft a “Code of Conduct” binding all domestic public officials while exercising their official duties in order to increase sensitivity towards the phenomenon of corruption in the public administration. The draft shall be adopted by the government in June 2008. At the same time a rotation system for public officials dealing with public procurement matters shall be introduced aiming at reducing the susceptibility for corruption in this field. As from an outside perspective Austrian public officials have to be considered as foreign public officials, the planned introduction of clear guidelines is worth mentioning in the OECD-evaluation context.

Also in order to raise awareness for the foreign bribery offence the **Criminal Intelligence Service (Bundeskriminalamt)** is in permanent contact with the **International Chamber of Commerce (ICC)**. Furthermore experts of the **Bureau of White Collar Crime** support the **Austrian Federal Economic Chamber (WKÖ)** in organising and performing seminars and trainings on corruption and bribery. To name one example, seminars for foreign trade delegates were organised with the support of representatives of the sub department for white collar crime as trainers.

The **ICC** organised a one full day seminar for export oriented companies on anti-corruption focusing on Eastern Europe in December 2007 and a one week course on Intern Commercial Crime and Security with one block focusing on Anti-Corruption for the Donau University Krems, Austria. In order to introduce an Anti-Corruption System within companies, the ICC advised a big Austrian international-active company on their inhouse anti-corruption system (9 meetings and 2 full-day training sessions took place in this context). Also an international trading company and a Real Estate company were advised on this issue.

Dr. Max Burger Scheidlin, the head of the ICC Austria, tried to raise awareness on foreign bribery in particular and on corruption in general at the following events:

- 2 evening presentations together with a leading international chartered accounting firm on commercial crime and anti-corruption .
- A panel discussion on commercial crime and corruption organised by the Vienna Bar Association.
- 1 seminar for German and Austrian controllers on risk management and anti-corruption.
- An anti-corruption event organised by OKB

- „Preventing Corruption“, 1. European Security Summer School of the Austrian Ministry of Interior
- Presentation at the meeting of the German-Austrian-Hungarian Door- and Windows Manufacturers
- Corruption- Part at the conference „Betrug im Außenhandel“ of the Austrian Association of Foreign Traders
- In-house training for members of the Foreign Trade Department in the Austrian Ministry of Economy and Labour in July 2007
- Advised WKO/AWO on measures to be taken by the Austrian Commercial Counsellors on reporting corruption: 8 trainings for the staff in and outside Austria, a Leaflet and brochure
- Short introduction of corruption and risk at some 50 country-specific seminars of ICC
- Telephone consultations of some 40 companies on international risk and corruption.

The head of the ICC tried furthermore to create an increased sensitivity towards the risk of corruption while doing international business in many publications. As examples, it should be highlighted that he wrote a chapter of the upcoming ICC manual “Fighting Corruption” to be published soon in Paris. He also contributed a 4 page introduction to anti-corruption measures for WKO/AWO. A 44 page Anti-Corruption publication for international exporters and importers for WKO/AWO has also been written by Dr. Burger Scheidlin and listed by BIAC in its international Anti-Corruption Resource Guide. In 2007 he gave 14 interviews to various Austrian and one German newspaper on commercial crime and effects of corruption; in 2008 one press-interview with an Austrian newspaper and an interview with a German TV station took place. Anti-corruption leaflets were distributed to some 2000 seminar participants on the occasion of different events and last but not least the ICC formulated the webpage on anti-corruption for an Austrian Export-Credit Insurance.

But also the official **Austrian Export Credit Agency**, the so-called **Oesterreichische Kontrollbank (OeKB)**, was very active and has implemented further measures aiming at preventing bribery of foreign public officials in cases where officially supported export credits are involved. These measures became effective on January 1, 2007, and were developed on behalf of and in close cooperation with the Federal Ministry of Finance. They reflect the obligations stemming from the OECD Recommendations on Bribery and Officially Supported Export Credits and include inter alia the introduction of amended application forms, a formal “bribery check”, an enhanced due diligence, intensified training of employees and an awareness-raising campaign which started with a workshop in January 2007 to which clients of the export credit agency, representatives of Transparency International as well as other stakeholders have been invited. The reason for this event was to enable an exchange of ideas beneath the different interest groups and to strengthen the general awareness of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in order to be able to fight corruption cases more efficiently. A comprehensive overview of all measures undertaken by the Export Credit Agency in implementation of this recommendation can be found under 2 a).

Since the date of approval of the Phase 2 report, **international cooperation in the fight against corruption has been even more emphasised.**

The ratification of the Council of Europe Civil Law Convention on Corruption (ETS no. 174) which led to the Austrian **membership to GRECO** with December 1, 2006 can be traced back to an increased awareness towards domestic but also foreign bribery. Corresponding to the requirements of a membership to GRECO, an on-site visit in preparation of the First and Second Evaluation Round of Austria’s compliance with GRECO standards took place in November 2007 in Vienna. In view of the First Evaluation Round, it dealt with the independence, specialisation and means of national bodies engaged in the prevention and fight against corruption as well as with the extent and scope of immunities of public officials from arrest, prosecution, etc. As to GRECO’s Second Evaluation Round the identification, seizure and confiscation of corruption proceeds, the prevention and detection of corruption in public administration and the prevention of legal persons (corporations, etc) from being used as shields for corruption were under

consideration. The presentation of the Evaluation Report and the respective recommendations is scheduled for the GRECO plenary meeting in June 2008. As a next step Austria intends to ratify the Council of Europe Criminal Law Convention against Corruption ETS no. 173 and its Additional Protocol ETS no. 191 within 2008.

Austria has ratified the **United Nations Convention Against Corruption** in November 2005 and is a strong proponent of active monitoring under that Convention. In order to assist in the review of the United Nation Convention against Corruption, Austria agreed to take part in a voluntary pilot programme launched last year.

The following overview shall give a slight impression of Austria's commitment in the fight against corruption on an international level:

- INTERPOL Anti-Corruption Academy (IACA): At its 75th General Assembly held in Rio de Janeiro in 2006, INTERPOL decided to establish the IACA in Austria. The delegates of the 76th General Assembly in Marrakech adopted the headquarters agreement (with the headquarters being in Laxenburg, Lower Austria) signed between INTERPOL and the Republic of Austria in July 2007. The Federal Bureau for Internal Affairs is the project coordinator of the Republic of Austria and thus the "point of contact" for INTERPOL. The Academy is to be a centre of excellence, i.e. an international, multidisciplinary centre for education and research. It will offer education for law enforcement officers as well as academic education (Bachelor, Master and PhD) and research open to all kinds of interested individuals or entities. It is also planned to form partnerships with international universities and organizations.
- European Partners against Corruption (EPAC): The BIA is chair and general secretariat of the informal network of the "European Partners Against Corruption (EPAC)", the EU's national Police Oversight and Anti-Corruption Authorities, incl. those of five observer states. The website of EPAC ([www.epac.at](http://www.epac.at)) is constantly updated by the general secretariat.
- European Anti-Corruption Network (EACN): The BIA plays a leading role in the initiative on the setting up of a more formalized EU-wide network to enhance cooperation between anti-corruption authorities of the EU Member States on the basis of EPAC.
- European Healthcare Fraud and Corruption Network (EHFCN): Since October 2005, the BIA is [a founding] member of the European Healthcare Fraud and Corruption Network (EHFCN). The network's preventive and awareness-raising measures as well as its measures of rigorous control show that sustainable improvements and thus an important recovery of resources can be achieved in the healthcare sector.
- Interpol Group of Experts on Corruption (IGEC): Since 2005, the BIA is also represented in the Interpol Group of Experts on Corruption (IGEC). The main objective of this group of experts is not only to raise the awareness of the problem of corruption but also to improve the competencies and effectiveness of law enforcement bodies concerning the fight against corruption.
- OLAF Anti-Fraud Communicators Network (OAFCN): The BIA is a member of this network of the European anti-fraud authorities initiated by OLAF.
- International Anti-Corruption Summer School (IACSS): In July 2007, the BIA in cooperation with professors of European and Northern American Universities organized the first IACSS in order to enhance cross-border cooperation. Under the theme "Practice meets Science", around 50 anti-corruption investigators, prosecutors, judges and journalists of 23 countries of the EU and the

“Western Balkan” and “New Neighbourhood” area were offered lectures of renowned professors and practitioners of the international “anti-corruption community”. A second edition of the IACSS is planned to be organized in July 2008.

- International Network for the Independent Oversight of Policing (INIOP): The BIA is a founding member and member of the steering group of this new worldwide network of police oversight bodies.
- Fight Against Corruption in Europe (FACE): The BIA supports the Italian High Commissioner for the Prevention and the Fight against Corruption in his project to develop a method and computer-based software for the analysis of corruption data.

**If no action has been taken to implement this recommendation, 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. 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:

- 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);

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

Experts of the sub department for white collar crime in the **Criminal Intelligence Service (Bundeskriminalamt)** support Austrian companies in improving their fight against bribery by bringing in their knowledge about (foreign and national) legislation and important control functions in order to avoid corruption. Moreover, they are offering essential practical information on foreign countries and the potential danger of bribery as well as the general risks for companies engaging abroad.

As part of a broader programme called "go international", aiming at strengthening the international competitiveness of the Austrian external sector, **the Federal Ministry of Economics and Labour** has in cooperation with the **Austrian Federal Economic Chamber** launched in 2006 an anti-corruption information and training programme encompassing measures to support Austrian exports, services and investments abroad. In seminars the OECD-Convention is part of the agenda. A special training programme for trade commissioners has already been established. More than 130 participants from Austrian companies have been informed in detail about the OECD-Convention during 5 workshops in 5 different provinces of Austria. In addition, a special training programme for key persons of the Federal Ministry of Economics and Labour and the Austrian Federal Economic Chamber has been established in June 2006. More than 120 persons have been trained, e.g. department managers, trade commissioners. A programme offering anti-bribery consulting services for Austrian companies active abroad has also been established.

Furthermore, the **Austrian Trade Agency (AWO)** has published a brochure on the OECD-Convention and

the prevention of corruption and bribery regarding foreign business transactions. Besides, two different information brochures have been released. Several articles have been published in different magazines of the AWO. Every country report provided online by the AWO includes one page about the OECD-Convention.

In this context reference shall also be made to the measures undertaken by the Austrian **International Chamber of Commerce (ICC)** listed under 1a) in order to create an increased awareness of the risk of corruption among companies active in foreign markets.

**If no action has been taken to implement this recommendation, 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. 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:

- 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).

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

**The Austrian Financial Intelligence Unit (A-FIU)** is the central body in Austria regarding money laundering. It is the only contact point for reporting entities concerning suspicious transaction reports. Moreover the A-FIU performs necessary analysis and has the power to give order to the competent subordinate police departments in the region to investigate special cases of ML. The A-FIU can also investigate any case of ML itself. It is responsible for awareness raising campaigns for the reporting entities (e.g. banks, lawyers, accountants, car dealers etc). Fulfilling this task, the FIU organised 41 seminars in 2006 and 2007.

In these training programmes aiming at awareness raising possible predicate offences are being highlighted. Different phenomena, including corruption, in the field of ML are subject of such trainings.

In this context it should be mentioned that only the last year the A-FIU investigated two international cases with corruption as a predicate offence. In many other cases in the private sector, corruption and bribery can be seen under the umbrella of embezzlement (predicate offence).

The A-FIU also supplies training to other law enforcement agencies.

With regard to awareness raising among accounting, auditing and legal professions the **Ministry of Finance's** efforts in the field of anti-money laundering and the implementation of EU-wide legislation concerning money laundering which include combating bribery have to be pointed out. Especially the Directive on politically exposed persons and simplified customer due diligence (Directive 2006/70/EC) provides for the enhanced risk of corruption – and therefore of money laundering – in connection with high-

ranking or important public officials. The implementation of this directive among other AML-legislation entered into force on December 29, 2007 and has increased bribery awareness significantly. The implementation of the directive is monitored by a special working group consisting of representatives of the accounting, auditing and legal professions.

Directives 2005/60/EC (3rd Money Laundering Directive) and 2006/70/EC (Directive on PEP's and simplified customer due diligence) have been implemented for **lawyers** in Austria through the adoption of special provisions in the **Act on the Profession of Lawyers**. These provisions provide for the enhanced risk of corruption and money laundering in connection with high-ranking or important public officials (PEP's). Special diligence duties apply to lawyers. The new provisions are a topic in the training regime for trainee lawyers. As they are an integral part of the professional regulations for lawyers, every registered lawyer has to comply with them. The local bars monitor the compliance and sanction cases of non-compliance.

Awareness of the foreign bribery offence and its status as a predicate offence of money laundering has significantly increased among lawyers thanks to specific training measures in the framework of professional education.

The Criminal Law Amendment Act 2008 which came into force January 1, 2008 is now an obligatory part of the training regime for trainee lawyers and a subject in the continuing training courses for lawyers.

But also the **Austrian Chamber of Civil Law Notaries** supports all efforts to prevent criminal acts in general, and of money laundering and financing of terrorism in particular. For this purpose, the Austrian Chamber of Civil Law Notaries provides constantly notaries and their candidate-notaries and assistants with information, prepares internal work instruments (application recommendations, "red-flag list) and makes them accessible to the profession of notaries. The spectrum is completed by the preparation auf training courses and seminars. To this extent, the Austrian Chamber of Civil Law Notaries supports notaries to recognize "appropriate and suitable strategies and procedures" for the prevention of money laundering and to develop on this basis a correct behaviour in order to combat money laundering in their offices. As a result of its duty to transpose in due time the Directive 2005/60/EC of the European Parliament and the Council of 26th October 2005 (Third Money Laundering Directive), the Austrian Chamber Notaries of Civil Law Notaries has amplified the information provided for the professionals and also cooperates with the Austrian Federal Ministry of Justice by creating a working group "money laundering and terrorist financing working group". Since bribery often represents a possible offence predicate to money laundering in terms of Section 165 PC, the Austrian Chamber of Civil Law Notaries sets - with the measures described - steps for combating and preventing bribery on a national and international level.

**If no action has been taken to implement this recommendation, 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. 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);

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

In addition to various measures already in place, the **Oesterreichische Kontrollbank (OeKB)**, acting as the official Austrian export credit agency, has implemented further measures aiming at preventing bribery of foreign public officials in cases where officially supported export credits are involved. These additional measures became effective on January 1, 2007, and were developed on behalf of and in close cooperation with the Federal Ministry of Finance. The adopted measures also reflect the obligations stemming from the latest OECD Recommendation on Bribery and Officially Supported Export Credits. Additional anti-bribery measures include:

**Amended application forms**

New questions were added to the application forms for export guarantees, whereby exporters/applicants are required to declare whether they are currently listed on a debarment list of the World Bank or regional IFIs and whether they or anyone acting on their behalf are currently under charge or have been convicted within the past five years in a national court or been subject to equivalent national administrative measures for violation of laws against bribery of foreign public officials.

**Introduction of a formal "bribery check"**

The new "bribery check" will consist of inspections of publicly available World Bank/regional IFI debarment lists, checks on the reasonability of provisions charged (taking into account business practices in the specific industry sectors), and a follow-up on any bribery-related "market rumours". This "bribery check" will be conducted each time an application for an export guarantee has been submitted to OeKB.

**Enhanced due diligence**

If the answer to least one of the questions mentioned above under a.) or the bribery check mentioned under b.) gives rise to suspicion or if the provisions charged are found to be not in line with common business practices, an "enhanced due diligence screening" will be conducted. Measures to be applied will vary depending on the questions raised during processing of specific applications and could include e.g. a request to provide further information and to submit additional documents (e.g. court orders/judgements, information on management control systems set up to prevent instances of bribery) or to disclose the identity of recipients of provisions. The outcome of any "enhanced due diligence screening" will be submitted in writing to the Federal Ministry of Finance. In cases where such screening did not lead to a clearance from an initial suspicion that bribery might be involved in the transaction at stake, export credit support will be refused. Furthermore, the Federal Ministry of Finance (which is required to do so according to Article 78 CPC) will inform law enforcement authorities of instances where there is credible evidence that bribery is involved in a transaction.

In case of articles in the media dealing with bribery issues or suspicions of bribery in connection with OeKB clients, OeKB requires its client to comment in detail such article. The comments are being analysed and a written report is sent by OeKB to the Federal Ministry of Finance.

**Intensified training of employees**

Employees of OeKB undergo intensified training on bribery-related issues. Employees of OeKB subsidiaries are invited and encouraged to participate in these trainings as well.

**Awareness-raising**

In order to raise awareness of applicants/exporters, measures adopted by OeKB to prevent bribery of foreign public officials in cases where officially supported export credits are involved are published on the website of OeKB, together with an encouragement to develop appropriate management control systems

aimed at preventing instances of bribery. Furthermore, in January 2007 the OeKB hosted a “bribery workshop”: Major speaker was a well known representative of “Transparency International” who in his speech described the whole phenomenon of bribery and submitted statistical data. Guests of the workshop were OeKB clients, mainly representatives of big export companies and representatives of Austrian banks. Furthermore stakeholders took part in the discussion of how to combat bribery effectively. For further information please see OeKB’s sustainability report.

**If no action has been taken to implement this recommendation, 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. 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:
  - 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);

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

In order to implement the respective recommendation the Federal Ministry of Justice **has considered the introduction of new provisions in regard to protection of collaborators with Justice**. In a draft act for a Criminal Law Amendment Act 2008 launched in autumn 2007 the Federal Ministry of Justice proposed to envisage to drop charges in cases where the information received was substantial for the progress of the investigations. The proposal for such a provision was declined after a thorough examination of the draft in the legislation process as serious concerns occurred about its scope. In the survey procedure for the new law the unequal treatment of witnesses/collaborators of terroristic acts or organized crimes reporting suspicions in good faith was discussed, as in those cases no reward should be possible, although a comparison to corruption offences can easily be drawn.

Therefore the draft has finally not been implemented. An **extensive and substantial procedure of evaluation to examine adequate ways for comprehensive collaborators of justice protection regulations in general has been launched instead**. Currently, the respective legislation in other countries is under review. The results of this evaluation process are expected by the end of April 2008 and shall serve the Federal Ministry of Justice as a model for a possible reform in the Austrian legislation. Austria will keep the Working Group on Bribery informed about this issue during the tour de table exercise in the next meetings.

Due to a motion for a resolution the Federal Minister of Justice is requested to draft a survey on the existing measures in national competition law and criminal law concerning the protection of collaborators of justice until September 2008.

**If no action has been taken to implement this recommendation, 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. 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:

- c) strengthen efforts to provide guidance to entities subject to money laundering reporting obligations in relation to foreign bribery and further assess and supervise the reporting practices of relevant entities; (Revised Recommendation, Paragraph I);

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

Since the publication of the OECD bribery report in February 2006 anti-money laundering efforts in Austria, led by the Federal Ministry of Finance, on the one hand have been focused on actively participating in the **implementation of EU-wide legislation concerning money laundering, which includes combating bribery**. Especially the Directive on politically exposed persons and simplified customer due diligence (Directive 2006/70/EC) provides for the enhanced risk of corruption or bribery – and therefore of money laundering – in connection with high-ranking or important public officials. The implementation of this Directive among other EU AML-provisions (e.g. Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing) in various national legal acts was concluded in December 2007 / at the beginning of 2008 increasing bribery awareness significantly.

On the other hand, the **Financial Market Authority (FMA)** continued its strong supervisory efforts in combating money laundering in 2006 and 2007, paying attention to bribery as a predicate offence to money laundering. Since 2006 the FMA has **expanded on-site inspections for the banking and insurance sector and introduced company visits** (in depth interviews on-site with AML officials in a financial entity). Both in in-house trainings and in information meetings for the private sector the FMA repeatedly refers to bribery issues and strongly encourages supervisors as well as staff members of the private sector to report suspicious transactions at an early stage.

Currently the FMA is adapting its guidelines for the financial sector based on the amendments to the Banking, Insurance and Securities Act implementing the 3<sup>rd</sup> EU AML Directive (Directive 2005/60/EC). The guidance will also provide additional information related to predicate offences. This will be an opportunity to enhance the guidance underscoring the importance of combating corruption.

All these initiatives seem to prove successful: The number of suspicious transaction reports (STRs) increased from 373 in 2004 to 467 in 2005 (+ 25%) and to 692 in 2006 (+ 48%).

**If no action has been taken to implement this recommendation, 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. 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:
- 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).

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

The Federal Ministry of Justice has introduced changes to the Austrian Commercial Code ("Unternehmensgesetzbuch") under Section 273 coming into force by June 1, 2008 which amongst other issues will **require from auditors in the course of their audit examinations to report immediately any violation of law** (which will also include violations regarding anti-bribing regulations) of employees to those charged with governance (Management Body, Supervisory Body).

Furthermore, in the course of the implementation of the Directive 2006/43/EC of the European Parliament and of the Council of May 17, 2006 on statutory audits of annual accounts and consolidated accounts, the planned amendments to Section 273 of the Austrian Commercial Code will also include a new immediate reporting requirement regarding material weaknesses of the internal control system of a company.

In addition, in order to enforce regular communication and reporting to those charged with governance **the auditor should now get the right and the duty to speak in front of the audit committee about the results of his work** (Section 92 Stock Corporation Act – Aktiengesetz).

Effective for financial statements covering fiscal years ending after December 30, 2007 a new professional standard for statutory audits has been released by the Austrian Chamber of Accountants. This new standard includes a chapter dealing with the responsibility of an auditor regarding fraud and potential violations of law etc. The principles outlined in this chapter follow the provisions of ISA 240 and require the auditor to put more focussed efforts on areas where there is a risk of material misstatement of financial statements due to fraud, including management fraud.

In this context it has to be further mentioned that the **Chamber of Accountants** released a revision of / amendments to the decree covering the business of the accounting professions a whole ("**WT-Ausübungsrichtlinie**"). The amendments and changes are required to reflect the profession's responsibility regarding the third money laundering directive and include, under certain circumstances, the obligation to report to competent law enforcement authorities.

In its annual conference 2007 the Austrian Institute of Chartered Accountants held a working session regarding the new standard covering statutory audit examinations and regarding practical questions in connection with the Money Laundering Directive.

In addition the 2008 training calendar developed by the Austrian Institute of Chartered Accountants and the Accountants Academy ("WT Akademie") puts a focus on further workshops in this arena to raise the awareness of the profession.

**If no action has been taken to implement this recommendation, 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. 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 I);

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

The Criminal Law Amendment Act 2008 has been recently passed by the Parliament and will install by January 1, 2009 a **specialised prosecution service for corruption cases** with jurisdiction all over the state. A draft bill proposing an independent authority only observing reporting obligations towards the Federal Ministry of Justice and/or the Parliament was rejected during the examination process in autumn 2007. As a political compromise a specialised unit acting under the supervision of the Federal Ministry of Justice will start its work in the beginning of next year.

This „**Office of Prosecution for Corruption**” will be competent on a national basis for the supervision of preliminary investigations, their discontinuation, the indictment of cases, the representation of the accusation in the main proceeding as well as for proceedings at the Court of Appeal concerning criminal offences connected with corruption in the private and public sector, among others the abuse of official authority under Section 302 PC, the acceptance of gifts by public officials under Section 304 PC or the offence of bribery under Section 307 PC. The new office will also be in charge of all cases of money laundering under Section 165 PC, criminal offences in the context of public tender procedures under Section 168b PC and the acceptance of presents by private employees under Section 168c para 2 PC.

The “Office of Prosecution for Corruption” will further be **competent for proceedings concerning mutual legal assistance or cooperation in criminal matters in the above mentioned cases**. Its headquarters will be in Vienna; additionally three outposts will be installed in larger cities (Linz, Graz and Innsbruck).

According to specific reporting obligations, the new prosecution service will have to hand in an **annual report to the Federal Ministry of Justice on all pending and closed corruption cases** in which it will have the right to comment on its perceptions concerning the current situation in the fight against corruption, to point out potential leaks in the legislation and to propose changes to the law.

The implementation of the “Office of Prosecution for Corruption” will be accompanied by **specific training measures** for prosecutors, judges and other experts working in this unit.

The Federal Ministry of Justice is actually preparing an **introductory decree** (“Einführungserlass”)

explaining the respective provisions and outlining the importance of the new body in the fight against corruption. The decree will be addressed to all prosecutors and judges and issued when installing the new prosecution service.

As the Reform Act on the Criminal Procedural Code has entered into force by January 1, 2008 and transferred the leading role in the pre-trial phase from the investigating judge to the prosecution service the **Federal Ministry of Justice considers furthermore imposing by decree an obligation to inform the superior authorities about the reasons for opening or discontinuing investigations in corruption cases.** This would facilitate the evaluation of corruption cases in general.

Additionally, the Federal Ministry of Justice **has recently released a decree** to the courts and prosecution services clarifying the current legal situation in the fight against corruption **pointing out that considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person involved shall never influence the decision not to open or to discontinue an investigation.** The decree inter alia aims at deepening the knowledge of prosecutors and judges dealing with corruption cases about the particular requirements resulting from the OECD-recommendations from the Phase 2 report in such a way.

**If no action has been taken to implement this recommendation, 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. With respect to the **investigation and prosecution** of foreign bribery and related offences, the Working Group recommends that Austria:

- 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, Articles 9(1), 9(3));

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

According to Austrian law, bank secrecy can not preclude MLA. **Section 38 para 2 of the Law on Banking (Bankwesengesetz)** states inter alia that for criminal courts no bank secrecy exists once criminal proceedings have commenced. This provision provides an express exception to bank secrecy as a general rule under Section 38 para 1 Law on Banking. Case law of the Austrian Supreme Court has established that MLA proceedings are to be considered as pending criminal proceedings. Therefore an Austrian court order requesting information from a financial institution due to a MLA request is sufficient to lift bank secrecy in any case.

Under Section 9 para 1 of the Code of Criminal Procedure which also applies to mutual legal assistance proceedings (see Section 9 para 1 of the Extradition and Mutual Legal Assistance Act; Auslieferung- und Rechtshilfegesetz – ARHG), **criminal proceedings have to be conducted without undue delay.**

In view of the second part of the recommendation, attention has to be drawn to the government programme for the ongoing election period which demands to develop measures to improve the gathering of statistical

data by the criminal courts in general. In order to comply with this requirement, the **Federal Ministry of Justice** has installed a **working group on statistics** which shall point out ways to make the current system more efficient. Actually, the Austrian Court Administration disposes of an automation of court procedures offering an overview on the status of all pending cases including cases emanating from foreign MLA requests. This system allows an effective control of execution of such requests, but the implementation of steps to collect further statistical data through this electronic case management system is under consideration. The working group on statistics shall present its results, in particular a proposal for improvements before summer 2008.

**If no action has been taken to implement this recommendation, 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. With respect to the **investigation and prosecution** of foreign bribery and related offences, the Working Group recommends that Austria:

- 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 1);

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

Regarding the recommendation of the Working Group to ensure that the necessary resources, including specialised expertise, are made available for prosecutors, reference has to be made once again to the **specialised prosecution office** for corruption offences which will be established by January 1, 2009. This unit shall consist of 5 specially trained prosecutors as well as 20 other experts in the field of economic crime.

In view of the Austrian Police it has to be noted that it is strictly hierarchically organised; in their headquarters and in the crime departments in the nine regions of Austria well trained officers are working on corruption cases. They are closely cooperating with the competent prosecutors on a case by case basis. This cooperation has now even been improved as the new Code of Criminal Procedure which came into force January 1, 2008 strengthened the role of the public prosecutor by transferring the leading role in the pre-trial phase from the investigating judge to the prosecution service.

**If no action has been taken to implement this recommendation, 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. With respect to the **investigation and prosecution** of foreign bribery and related offences, the Working Group recommends that Austria:
- d) take appropriate measures to ensure (i) that all bribes 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 a 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);

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

In order to meet the requirements resulting from the OECD recommendations concerning the substantive penal law, the provisions on corruption, especially Section 307 Penal Code on the offence of foreign bribery have been modified by the Criminal Law Amendment Act 2008 which entered into force on January 1, 2008.

**Section 307 PC** reads now:

*(1) Anyone who offers, promises or gives an advantage to*

- 1. a public officer or arbitrator for performing or refraining from performing an act in connection with his official duty (Section 304 (1)),*
- 2. an expert for presenting a false expert opinion or report (Section 306),*
- 3. a co-worker of an executive employee of a public company for exerting influence in order to make someone perform or refrain from performing a legal act contrary to the duties (Section 306a (1)) or*
- 4. an expert consultant who is working for money for exerting influence in order to make someone perform or refrain from performing an official act or a legal act (Section 306a (2))*

*for the persons themselves or for a third person is to be punished with a prison sentence of up to three years.*

*(2) Anyone who offers, promises or gives not just a small advantage to an Austrian public officer or arbitrator, a public officer or arbitrator of another member state of the European Union or a Community official apart from the case mentioned in paragraph 1 with regard to exercising his official function for the person himself or a third person, is to be punished with a prison sentence of up to six months or with a fine of up to 360 daily rates.*

As a major change **the scope of the offence of foreign bribery has been amplified**. According to the wording of the new Section 307 PC it is **no longer necessary that the foreign public official acts "in violation of his duties" to trigger criminal liability for his corrupt behaviour**. As a result it is clear that the offence applies to all undue payments for any use of the official's position, whether or not within the official's authorised competence. Acts outside of the competence of the official are

now doubtlessly covered.

Another amendment concerns the **treatment of small facilitation payments which are no longer tolerated by the redrafted provisions of passive and active bribery under Section 304 and 307 PC, if only a connection can be established between the advantage and a certain act or omission of an act.** In the explanatory memorandum of the Federal Ministry of Justice to the Criminal Law Amendment Act 2008 is explicitly stated that according to the new provisions there is no room for socially accepted gifts leading to non-punishment. In respect of Article 1 of the Convention it is now certain that a foreign public official's acceptance of any undue advantage – also of small facilitation payments – in connection with an act or the omission of an act in connection with his official duties will therefore constitute the basis for an active foreign bribery offence.

The new provisions go even one step further when **providing for criminal sanctions for buying the benevolence of public officials detached from a concrete official act (“Anfüttern”)**. Thus Section 307 para 2 PC criminalises the offering, promising or giving of all not just small advantages aiming at “improving the general climate” between the giver of the advantage and its taker whereas Section 304 para 2 PC provides for criminal liability for the passive side of the offence.

The **abolishment of the requirement that the punishable foreign bribery act has to be committed “in the conduct of an international business”** led to an additional extension of punishment under Section 307 PC para 1 PC.

In order to comment on all these amendments and its consequences in practise explicitly, a publication of the Federal Ministry of Justice was transmitted to all criminal courts and prosecutorial offices by decree when the new regulations came into force (hereinafter the 2008 Decree). The 2008 Decree consists of the text of the law, the legislative materials (an explanatory report to the government bill and the report of the parliamentary justice committee), the commentary of the Federal Ministry of Justice and a comparison of the old and new law. The Federal Ministry of Justice always makes new laws known by ways of such a decree, known as Einführungserlass. The 2008 Decree can be found in the official journal of the Federal Ministry of Justice.

**If no action has been taken to implement this recommendation, 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. With respect to the **investigation and prosecution** of foreign bribery and related offences, the Working Group recommends that Austria:

- 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 for business with regard to the fight against bribery (Convention, Articles 2, 3, 5); and

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

Concerning the recommendation of the Working Group to issue and publicise guidelines for prosecutors, it has to be noted that with the introduction of the new “**Office of Prosecution for Corruption**” in January 2009 Austria will possess a specialised prosecution service effectively preventing impunity by prosecuting all allegations of corruption and related offences regardless of the offender being an Austrian or a foreign national. It will also be competent for all allegations of foreign bribery involving legal persons.

In addition, the **decree issued by the Federal Ministry of Justice** mentioned under 3a) should help to assure an impartial prosecution of all foreign and domestic bribery cases free of national economic interest, considerations of the potential effect on relations with another state and irrespective of the identity of the natural or legal person involved.

In this context it has to be outlined that the **Austrian Federal Statute on the Responsibility of Entities for Criminal Offences – Verbandsverantwortlichkeitsgesetz – VbVG**) provides for the possibility to refrain from or abandon prosecution of legal persons only in very narrow confines. This is the case if – when weighing the seriousness of the offence, the weight or breach of duty or care, the consequences of the offence, the conduct of the entity after the offence, the amount of the fine to be imposed on the entity which is to be expected, as well as legal disadvantages for the entity or its owners resulting from the offence which have already occurred or are imminent – prosecution or a criminal penalty seems to be unnecessary (Sect 18 VbVG). Consequently, such dismissal of criminal proceedings can solely be effected under the clear prerequisites as defined in Section 18 VbVG.

These conditions are not fulfilled when a case raises difficulties because of its complexity (difficulties to prove the underlying offence, the intent by a staff member or organisational failures and negligence by members).

Moreover, Section 18 VbVG stipulates that prosecution may not be refrained from or abandoned if there persists a danger of an indictable offence under the responsibility of the entity which causes serious consequences or where prosecution is necessary to counteract the commission of offences regarding the activity of other entities or where the prosecution is in particular public interest.

The discretion to refrain from or abandon prosecution according to Section 18 VbVG constitutes a corrective for the broad coverage of all offences by the law and is intended to apply to very minor offences or to small companies, where the responsible individual is already being prosecuted. The exception rule, that prosecution cannot be terminated in cases of public interest, similarly follows a broad concept, taking into consideration, the impossibility to circumscribe in general and for each individual case under which conditions prosecution is in public interest. It must also be noticed that the proposed legally binding standards with regard to the necessary organisational measures to prevent bribery could in fact restrain the application of the law, by having a limiting effect in the possibilities to establish organisational failure or negligence by public prosecutors and courts.

When adopting the Federal Statute on the Responsibility of Entities for Criminal Offences, the first chamber of Parliament (“Nationalrat”) has adopted a resolution requesting the Federal Ministry of Justice to present, within four years, a report on the practical application of the law and on the effectiveness of the sanctions imposed.

Therefore **the Federal Ministry of Justice will evaluate until the End of 2009 all cases with regard to the criminal liability of entities** and examine, if it is necessary, to issue additional guidelines to prosecutors.

In this context it has also to be pointed out that the **Austrian Trade Agency (AWO)** has published a

brochure on the OECD Convention and the prevention of corruption and bribery regarding foreign business transactions including guidelines and a checklist for companies active in foreign markets. Besides, there are two different information brochures. Several articles have been published in different magazines of the AWO. Every country report provided online by the AWO includes one page about the OECD-Convention.

**If no action has been taken to implement this recommendation, 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. With respect to the **investigation and prosecution** of foreign bribery and related offences, the Working Group recommends that Austria:

- 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 foreign bribery cases (Revised Recommendation, Paragraph I).

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

In January 2008 the heads and leading personnel of the four Senior Public Prosecution Services of Austria participated in a seminar in Munich, co-organized by OLAF, on the topic of bribery and anti-corruption measures.

On January 30, 2008 a **seminar for judges and prosecutors on the subject of bribery of foreign public officials** has been organised by the Federal Ministry of Justice already for the second time. Like the first seminar in the first half of 2007, it took place in Vienna and addressed to judges and prosecutors from all over Austria. 30 magistrates were admitted to the event which aimed at raising awareness, especially on the negative impact bribery of foreign public officials might have in view of competitive advantages in international business. Besides focusing on the offence of foreign bribery and its relation to state sovereignty, other connected topics like the applicability of the law on liability of legal persons as well as mutual legal assistance in the context of economic crimes were under consideration in high-level lectures of representatives of the Federal Ministry of Justice in charge of penal law and mutual legal assistance as well as from representatives of the FIU and the BKA involved in the fight of foreign bribery.

As outlined above, a law introducing a Federal Prosecution Service on Corruption has already been adopted and will enter into force on January 1, 2009. 5 prosecutors and further experts in the field of economic crime shall be working in this highly specialised unit installed in Vienna with three outposts in larger cities. In view of the pending installation of this Anti Corruption Prosecution Service, the Federal Ministry of Justice will organize a special (preparatory) training for judges and prosecutors in fall 2008 and offer further training on this topic in 2009.

The fight against corruption was also a big issue in last year's largest conference for criminal judges and prosecutors in February 2007 with around 70 participants from the judiciary.

Nation-wide **the Federal Bureau for Internal Affairs (BIA)** conducts numerous one-day anti-corruption

seminars and – twice a year - a three-week training course on "Combating and Preventing Corruption" (about 2.000 participants in the year 2007). The BIA's seminars and training courses provide a theoretical introduction to problems related to corruption and ways of fighting this phenomenon as well as a presentation of the BIA's activities and legal basis. The target group are interested staff members of the top managerial, superintending and federated ranks serving with the Ministry of the Interior and other public services. Additionally "Combating and Preventing Corruption" also serves a basic course for potential employees of the BIA.

Since summer 2007, the subject of "corruption", presented by the BIA, is integrated into the obligatory ethics training offered by the Federal Security Academy in the framework of the MoI's basic training for the general administration.

Furthermore, the training programme of the Federal Security Academy includes courses on "professional ethics for law enforcement officials". Their goal is to familiarize participants with the UN Code of Conduct in the area of conflict between efficiency and legitimacy of police actions.

The BIA conducts its educational activities partly in cooperation with other organizations and institutions. By way of example the Universities of Vienna or Passau should be mentioned as well as Transparency International, MEPA, CEPOL, the Jordanian Police Academy, UNDP, UNODC, or the European Anti-Fraud Office OLAF.

The **Criminal Intelligence Service** has also organised several training programmes during the last year, whereas the following events especially dealing with the phenomenon of foreign bribery shall be enumerated:

- for the Ministry for European and International affairs: seminars about corruption and prevention measures for ambassadors and the employees foreseen for working in foreign countries
- for the Chamber of Commerce in Austria: seminars especially for foreign trade delegates and their employees
- for the Ministry of the Interior: seminars for officers, who are especially endangered or who are competent to investigate cases of corruption.

**If no action has been taken to implement this recommendation, 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. 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); and

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

Austria has reduced the level of punishment for accounting offences in 2001 and is still of the opinion that a punishment of up to one year of imprisonment in cases where there is no connection with fraud or corruption or any other serious offence is sufficient because in most of the cases accounting offences are part of a corruption or fraud scheme for which the more serious punishment of up to 10 years of imprisonment would be applicable.

With the last amendment to the Co-operative Societies Act (GenRÄG 2006) a provision penalising accounting offences in co-operatives similar to the existing provisions for other companies subject to Austrian accounting and auditing laws has been adopted. The possible punishment for accounting offences has been raised from imprisonment of 3 month or 180 daily rates to imprisonment of one year or 360 daily rates. The penalties for violations in connection with Co-operative Societies are now the same as with GmbH and AG companies.

The responsibility of legal persons would also apply to accounting offences. Since there are no exceptions whatsoever, no further measure are necessary in this context.

On February 22, 2008 a seminar has been held by the society of experts for accounting and the University of Economics with participation of law enforcement practitioners and the Federal Ministry of Justice on accounting offences.

**If no action has been taken to implement this recommendation, 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. With respect to **related accounting/auditing and tax offences and obligations**, the Working Group recommends that Austria:

- 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).

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

With respect to related accounting/auditing and tax offences and obligations the **Federal Ministry of Finance** adopted the proposal in recommendation 4.b) by **revising Section 14.7 of the Guidelines on income tax**, thereby stressing the penal character of such payments and the obligation of tax inspectors to disallow such payments from deduction in a more comprehensive way. The revised version reflects the applicable law and avoids any interpretation which narrows down the scope of application. It has also been made clear that the term “foreign public official” comprises officials performing non-governmental services or officials acting outside their official duties. An excerpt of the income tax guidelines can be found in the appendix.

Moreover, a bribery handbook has been disseminated to all Austrian tax officials via the Intranet platform of the Ministry. Now all tax inspectors have direct access to the content of the handbook. Bribery aspects form part of the regular training programmes for tax inspectors. The guidelines for tax inspectors will also be modified with a view to strengthen the awareness of tax inspectors in detecting bribery payments.

**If no action has been taken to implement this recommendation, 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. 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));

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

Important changes to the Austrian anti-corruption provisions came into force with the Criminal Law Amendment Act 2008 on January 1, 2008. This bill further implemented facultative and mandatory regulations of the United Nations Convention against Corruption, the EU-framework decision Combating Corruption in the Private Sector, the Council of Europe Criminal Law Convention on Corruption as well as the Additional Protocol to the Criminal Law Convention on Corruption, the EU-Anti-Bribery Convention and last but not least the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, especially with respect to sanctions.

Firstly, it has to be mentioned that one of the key elements of the new legislation is the **modified notion of public officer** which substituted the former categories of public officer, public officer of another member state of the European Union and foreign public officer, so that now there is only a distinction between public officer comprising all the before mentioned categories and community official.

In order to comply with the requirements of Article 3 para 1 of the Convention, the **sanctions for active bribery of public officer, comprising acts against foreign public officials, have been raised to imprisonment of up to three years**. Before the amendment the maximum sentence was imprisonment of up to two years.

But also the **offences of passive and active bribery in the private sector have been newly regulated by transforming the current regulation from the Unfair Competition Act “Bribery of Employees or Agents” into the Penal Code**, thereby partially providing for prosecution ex officio and **tightening the sentences considerably to imprisonment of up to 2 years**. Before the introduction of the new provisions a maximum term of imprisonment of up to 3 month was possible.

The new provision on the “acceptance of presents by servants or agents” can be found under **Section 168c PC** and reads the following:

*(1) A servant or agent of a company, who, in the course of business activities, demands, accepts or accepts*

*a promise of an advantage for himself or for a third person for performing or refraining from performing a legal act contrary to his duties, is to be punished with a prison sentence of up to two years.*

- (2) *If the amount of the advantage exceeds € 5,000 the perpetrator is to be punished with a prison sentence of up to three years.*
- (3) *A person who accepts or accepts a promise of only a minor advantage is not to be punished according to paragraph 1 unless the offence is committed on a commercial basis.*

Criminalisation of “bribery of servants or agents” is provided under **Section 168d PC** and reads the following:

*Anyone who offers, promises or gives a not only small advantage to servants or agents of a company for performing or refraining from performing a legal act contrary to the other person’s duties, is to be punished with a prison sentence of up to two years.*

Moreover, the Criminal Law Amendment Act 2008 introduced the criminalisation of corruption in connection with arbitrators: **Active and passive bribery of domestic and foreign arbitrators** can now be sentenced with imprisonment of up to 2 years (passive side of the offence) according to Section 304 PC and with up to 3 years (active side of the offence) according to 307 PC.

**Section 304 PC** reads now:

*Acceptance of presents by public officers or arbitrators*

- (1) *A public officer or arbitrator who demands, accepts or accepts a promise of an advantage for himself or a third person for performing or refraining from performing a legal act in connection with exercising his official function, is to be punished with a prison sentence of up to two years.*
- (2) *An Austrian public officer or arbitrator, a public officer or arbitrator of another member state of the European Union or a Community official, who, in a case other than mentioned in paragraph 1, demands, accepts or accepts a promise of an advantage for himself or a third person in connection with exercising his official function, is to be punished with a prison sentence of up to one year.*

**Section 307 PC** reads now:

(1) *Anyone who offers, promises or gives an advantage to*

1. *a public officer or arbitrator for performing or refraining from performing an act in connection with his official duty (Section 304 (1)),*
2. *an expert for presenting a false expert opinion or report (Section 306),*
3. *a co-worker of an executive employee of a public company for exerting influence in order to make someone perform or refrain from performing a legal act contrary to the duties (Section 306a (1)) or*
4. *an expert consultant who is working for money for exerting influence in order to make someone perform or refrain from performing an official act or a legal act (Section 306a (2))*

*for the persons themselves or for a third person is to be punished with a prison sentence of up to three years.*

- (2) *Anyone who offers, promises or gives not just a small advantage to an Austrian public officer or arbitrator, a public officer or arbitrator of another member state of the European Union or a Community official apart from the case mentioned in paragraph 1 with regard to exercising his official function for the person himself or a third person, is to be punished with a prison sentence of up to six months or with a fine of up to 360 daily rates.*

In correspondence with the requirements of the United Nations Convention against Corruption **active bribery of members of domestic public assemblies has been criminalised** by establishing a new provision in the Penal Code. According to **Section 304a PC** on the offence of “bribery of deputies” anyone who undertakes to buy or sell a vote for an election or ballot in the National Council, in the Federal Council, in the Federal Assembly, in a Diet (= legislative body of the Laender) or in a municipal council, is to be punished with a prison sentence of up to three years.

More information on the new legislation can be found in the appendix.

**If no action has been taken to implement this recommendation, 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. With respect to **sanctions**, the Working Group recommends that Austria:
- 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));

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

The law on the criminal liability for entities provides a sliding scale of maximum fines ranging from 40 to 180 daily rates based on the maximum imprisonment sentence which can be imposed on natural persons for the offence in question.

The amount of the fine depends on the return of the entity as it is provided that the daily rate shall be equal to one 360<sup>th</sup> of the yearly proceed or exceed and can be reduced or augmented by up to 30% taking into consideration the overall economic situation of the legal entity.

It has to be stated that the law on the one hand deliberately does not define the assessment basis for revenues or permissible deductions as a result of the broad coverage of all legal persons, which are generally subjected to various accounting standards depending on their legal structure. The law does on the other hand not determinate the relevant time period for the calculation of profits in order to make manipulations of the amount of revenues more difficult. Furthermore, the provision currently in force enables the court to average out the companies proceeds over several years and therefore minimizing the

risk to influence the amount of fine by transferring gains of one given period with previous losses.

On January 1, 2008 a new legislation with regard to foreign bribery entered into force, lifting the maximum imprisonment sentence from two up to three years (Section 307 Penal Code; Federal Law Gazette No I 109/2007). Therefore the maximum sentence for entities for foreign bribery according to Section 4 VbVG has been lifted from 70 daily rates to a maximum of 85 daily rates nowadays. As the maximum daily rate has been fixed at EUR 10 000 and the minimum daily rate at EUR 50, the maximum fine for foreign bribery has risen up to EUR 850 000. The minimum daily rate, which is only relevant for companies, which do not have gained profit over a reasonable period of time, is now up to EUR 4 250.

It has to be reargued that the setting of a minimum daily rate for loss making entities enables the court to assess a fine in cases where the financial situation basically would not allow to fix any fine. This rule is comparable with the minimum daily rate for natural person of currently EUR 2.

The new legislation, which now constitutes foreign bribery according to Section 307 PC as a 3-year offence, provides proportionate criminal penalties on entities for foreign bribery. In addition to that change the Austrian Federal Ministry of Justice will evaluate the financial sanctions for entities by the end of 2009 according to the parliament decision in connexion with the adoption of the legislation on the Responsibility of Entities for Criminal Offences mentioned already under 3e).

**If no action has been taken to implement this recommendation, 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. With respect to sanctions, the Working Group recommends that Austria:
- 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);

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

All serious cases of foreign bribery would be dealt with **Section 153 PC** criminalising the breach of trust as this provision applies to **Austrian and foreign public officials involved in public procurement**. According to Section 153 PC in cases of damage of over EUR 50 000 a prison sentence from one to 10 years can be imposed. Therefore non-punishment pursuant to Section 191 Code of Criminal Procedure as well as the application of diversion is excluded de lege lata.

Furthermore the Federal Ministry of Justice intends to recommend to all prosecutors and judges dealing with corruption offences the non-applicability of Section 191 Code of Criminal Procedure (ex Section 42 PC) and the provisions on diversion also **in all serious cases of foreign bribery under Section 307 PC**. The introductory decree for the new "Office of Prosecution for Corruption" ("Einführungserlass") will take reference to the respective OECD-recommendation. It will be issued by the Federal Ministry of Justice when installing the new prosecution service with January 1, 2009. By addressing this matter explicitly in a decree the Federal Ministry of Justice intends to establish a uniform practise in dealing with serious foreign bribery cases and to give clear guidance to the judiciary.

**If no action has been taken to implement this recommendation, 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. With respect to sanctions, the Working Group recommends that Austria:
- 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).

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

According to the government programme for the ongoing election period, a general political aim consists in improving the situation on statistics. Therefore the criminal courts shall engage in measures to gather improved statistical data on court proceedings. In 2007, the **Federal Ministry of Justice** has installed a **working group on statistics** in order to make the current system more efficient. The working group on statistics will present its results, in particular a proposal for improvements before summer 2008.

**If no action has been taken to implement this recommendation, 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:

6. 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);

### 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:

According to the new provision of Section 307 PC, which entered into force on January 1, 2008, bribery is now sentenced with a prison term of up to three years. As a direct consequence the law provides now for a maximum fine of 85 daily rates in cases of foreign bribery against legal persons.

As the minimum daily rate – which is only relevant for companies that have not gained profit over a reasonable period of time – unaltered is EUR 50 and the maximum daily rate is fixed at EUR 10 000, the minimum daily rate is EUR 4.250, whereas the maximum daily rate has raised from EUR 700 000 to EUR 850 000.

Therefore Austria has taken relevant measures to enhance national legislation in criminal cases of foreign bribery to entities.

As the Austrian Federal Statute on the Responsibility of Entities for Criminal Offences (VbVG) entered into force – as expected – on January 1, 2006, a general criminal liability for legal persons and other bodies like partnerships to all penal offences has been established in addition to and independent from the criminal liability of natural persons involved. It has to be indicated that the law is only applicable to facts which have occurred after its commencement. Due to this temporal limited span of application and the limited number of cases concerning the bribery of foreign public officials there have been no criminal convictions against legal persons related to foreign bribery cases so far.

Concerning **jurisdiction**, the principle laid down in the VbVG (Section 12 para 1) is that the general rules of the Penal Code apply – in other words: if under Sections 64, 65 of the Penal Code there is Austrian jurisdiction to prosecute the offence against the natural person, there is also jurisdiction to prosecute the legal person. The only change is that, as far as the Penal Code 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, as regards entities, the registered office of the entity or the place of operation or establishment shall be relevant (Section 12 para 2).

Concerning **mutual legal assistance**, the Federal Law of December 4, 1979 on Extradition and Mutual Assistance in Criminal Matters (Extradition and Mutual Assistance Law – “ARHG”) provides in its Section 50 that mutual legal assistance is to be provided in “criminal matters” (“Strafsachen”). As proceedings

against “entities” under the VbVG are generally regarded as “Strafsachen”, there is no doubt that all rules on mutual legal assistance apply also in proceedings against legal entities.

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

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

**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:**

Reference has to be made once again to one of the key elements of the new anti-corruption legislation entered into force on January 1, 2008 which led to a modified notion of the term “public officer”. The new definition which in the scope of application of the OECD convention does not differentiate between domestic and foreign public officials at all, guarantees the notion of an autonomous offence.

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

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

**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:**

Please see 2 a) with respect to the steps undertaken by the **Oesterreichische Kontrollbank**.

As far as the **Austrian Development Agency (ADA)** is concerned it has to be stated that this organisation follows special legal guidelines. The principles of transparency, non-discrimination and equal treatment are specified in the Austrian Federal Act on the Award of Purchase Contracts. ADA guidelines for tendering procedures clearly refer to the obligations to comply with these principles. Grant award decision often following a call for proposal, based on award criteria. These criteria are specified based on the guidelines for call for proposals. For all grant applications there is a quality assessment performed by the members of the evaluation committee according to the pre-announced criteria for qualitative assessment.

In the case of misprocurement, fraud or corruption Austrian Penal Code and sanctions foreseen in Austrian labour-law are referred to.

For the prevention of conflict of interest, the Austrian Development Agency requires an explanation of

impartiality from all the members of an assessment committee, which says basically:

1. The members declare that they don't have any private relationship (affinity, friendship) with bidders (or with their employees).
2. The members of the committee declare further, in case of doubts as to impartiality, they will immediately inform their superior to organize a substitution.
3. They declare, that they did not get any financial or other benefits (gifts or invitations), which would affect their objectivity.
4. Even if the assessment and the proceeding is done, they are not allowed to take benefits or invitations from the contracting party.
5. Finally the members commit themselves to maintain silence about any information they get during the procedure.

Further activities dealing with the conflict of interest and whistleblowing are planned or in preparation stage.

In addition the following anti-corruption clause is included in ADA contracts: Section 5 Anti-Corruption Clause: "The Donor has the right to terminate the Contract immediately or carry out appropriate corrective measures if, in connection with the performance of the Contract, any person or institution was or is offered, promised or given, either directly or indirectly, a gift, a pecuniary advantage or other benefit".

Austria is in line with the **EU obligations concerning accounting and auditing**. In this respect for example a draft bill has passed the Council of Ministers in February 2008 implementing two further directives in this field.

## ANNEX 1

### **Federal Law amending the Penal Code, the Criminal Procedure Code 1975, the Act on the Enforcement of Sentences, the Act on Probation Services and the Juvenile Justice Code 1988 (Criminal Law Amendment Act 2008)**

#### Article I<sup>1</sup>

9. Section 74 Paragraph 1 (4a) to (4c) reads:

“4a. Public officer: Anyone who bears an office for Austria, for another state or for an international organisation in the area of legislation, administration or justice or otherwise is entrusted with public tasks including in public companies, with the exception of members of national constitutional representative bodies;

4b. Community official: Anyone who is an official or contracted employee as defined in the Staff Regulations of Officials of the European Communities or the Conditions of Employment of Other Servants of the European Communities or is placed at the disposal of the Communities by the member states or by public or private institutions and there is entrusted with tasks that correspond to the tasks of the officials or other servants of the European Communities; Community officials are also the members of institutions that are set up in accordance with the Treaties establishing the European Communities and the servants of those institutions, the members of the Commission, the European Parliament, the European Court of Justice and the European Court of Auditors as well as the representatives and servants of the European Police Office (Europol);

4c. Arbitrator: Any decision maker of a court of arbitration as defined in sections 577 ff of the Austrian Code of Civil Procedure (Zivilprozessordnung, ZPO) with its seat in Austria or a seat not yet determined (Austrian arbitrator) or with its seat in another country;”

14. In sections 153b, 153d, 153e and 161 the quotation in parenthesis “(section 309)” is substituted by the quotation in parenthesis “(section 306a)”.

15. In section 165 (1) the quotation “sections 223, 224, 225, 229, 230, 269, 278, 278d, 288, 289, 293, 295 or 304 to 308” is substituted by the quotation “sections 168c, 168d, 223, 224, 225, 229, 230, 269, 278, 278d, 288, 289, 293, 295 or 304 to 308”.

16. After section 168b the following sections 168c to 168e including the headings are inserted:

#### **“Acceptance of presents by servants or agents**

**Section 168c** (1) A servant or agent of a company, who, in the course of business activities, demands, accepts or accepts a promise of an advantage for himself or for a third person for performing or refraining from performing a legal act contrary to his duties, is to be punished with a prison sentence of up to two years.

(2) If the amount of the advantage exceeds € 5,000 the perpetrator is to be punished with a prison sentence of up to three years.

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<sup>1</sup> Amendments to the Penal Code.

(3) A person who accepts or accepts a promise of only a minor advantage is not to be punished according to paragraph 1 unless the offence is committed on a commercial basis.

### **Bribery of servants or agents**

**Section 168d.** Anyone who offers, promises or gives a not only small advantage to servants or agents of a company for performing or refraining from performing a legal act contrary to the other person's duties, is to be punished with a prison sentence of up to two years.

### **Authorisation for the charge**

Section 168e. The criminal offences according to sections 168c (1) and 168d are only to be prosecuted upon request of the person whose interests are prejudiced or one of the persons authorised to file a claim for omission according to section 14 (1) of the Unfair Competition Act 1984 (*Gesetz gegen den unlauteren Wettbewerb 1984, UWG*)."

19. Section 304 is modified as follows:

a) The heading reads:

#### **"Acceptance of presents by public officers or arbitrators"**

b) Paragraph 1 reads:

„(1) A public officer or arbitrator who demands, accepts or accepts a promise of an advantage for himself or a third person for performing or refraining from performing a legal act in connection with exercising his official function, is to be punished with a prison sentence of up to two years."

c) Paragraph 2 reads:

„(2) An Austrian public officer or arbitrator, a public officer or arbitrator of another member state of the European Union or a Community official, who, in a case other than mentioned in paragraph 1, demands, accepts or accepts a promise of an advantage for himself or a third person in connection with exercising his official function, is to be punished with a prison sentence of up to one year."

19a. After section 304 the following section 304a including the heading is inserted:

#### **"Bribery of deputies**

**Section 304a.** Anyone who undertakes to buy or sell a vote for an election or ballot in the National Council, in the Federal Council, in the Federal Assembly, in a Diet or in a municipal council, is to be punished with a prison sentence of up to three years."

20. Section 305 is deleted.

21. To section 306a the following paragraphs 3 and 4 are added:

“(3) A public company is any company that is run by one or more regional authorities or in which one or more regional authorities participate directly or indirectly with at least 50% of the share capital, registered capital or equity capital, in any case however, any company whose financial conduct has to be examined by the Court of Auditors.

(4) Executive employees are employees of a company who have a considerable influence on the management of said company. They are placed on equal footing with managers, members of the executive board or the supervisory board and “Prokuristen” (~ holders of a special statutory authority under Austrian Law) who do not have the status of an employee.”

22. *Section 307 reads:*

“**Section 307.** (1) Anyone who offers, promises or gives an advantage to

1. a public officer or arbitrator for performing or refraining from performing an act in connection with his official duty (Section 304<sup>2</sup>),
2. an expert for presenting a false expert opinion or report (Section 306),
3. a co-worker of an executive employee of a public company for exerting influence in order to make someone perform or refrain from performing a legal act contrary to the duties (Section 306a (1)) or
4. an expert consultant who is working for money for exerting influence in order to make someone perform or refrain from performing an official act or a legal act (Section 306a (2)) for the persons themselves or for a third person is to be punished with a prison sentence of up to three years.

(2) Anyone who offers, promises or gives not just a small advantage to an Austrian public officer or arbitrator, a public officer or arbitrator of another member state of the European Union or a Community official apart from the case mentioned in paragraph 1 with regard to exercising his official function for the person himself or a third person, is to be punished with a prison sentence of up to six months or with a fine of up to 360 daily rates.”

23. *Section 308 (1) reads:*

“(1) A person who knowingly either directly or indirectly exerts influence on a public officer, a member of an Austrian constitutional representative body, or an arbitrator in order to make him exercise services belonging to his official duties in a biased way or refrain from performing them and who demands, accepts or accepts a promise of an advantage for himself or a third person, is to be punished with a prison sentence of up to three years.”

24. *Section 309 is deleted.*

## **Article II<sup>3</sup>**

2. After section 20 the following section 20a including the heading is inserted:

### **Office of Prosecution for Corruption** *(Korruptionsstaatsanwaltschaft)*

**Section 20a.** (1) The Office of Prosecution for Corruption is competent on a national basis for the supervision of the preliminary investigations, for their conclusion as stated in the 10th and 11th section of the Austrian Code of Criminal Procedure, for bringing the public statement of charges and for the representation of the accusation in the main proceeding as well as for proceedings at the Court of Appeal concerning the following criminal offences that do not fall under the jurisdiction of the District Court

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<sup>2</sup> Legislative bodies of the Laender.

<sup>3</sup> Amendments to the Criminal Procedure Code.

(Section 30):

1. Criminal breaches of official duties and other related criminal offences according to section 22 of the Austrian Criminal Code (*Strafgesetzbuch, StGB*), published in the Federal Law Gazette of the Republic of Austria (*BGBl. Nr. 60/1974*),
  2. Breach of trust exploiting a position as an official (section 313 of the Austrian Criminal Code), acceptance of presents by agents as well as misuse of promotional measures according to sections 153 to 153b of the Austrian Criminal Code,
  3. Agreements that restrict competition in public tender procedures according to section 168b of the Austrian Criminal Code,
  4. Acceptance of presents by employees or agents according to section 168c (2) of the Austrian Criminal Code,
  5. Money laundering according to section 165 of the Austrian Criminal Code as far as the property parts result from one of the crimes or offences mentioned in literas 1, 2 or 4, criminal associations or criminal organisations according to sections 278 and 278a of the Austrian Criminal Code as far as the association or organisation aims at committing the crimes or offences mentioned in literas 1, 2 or 4.
- (2) Section 313 of the Austrian Criminal Code only establishes the competence of the Office of Prosecution for Corruption if with its application the crime or offence would fall under the jurisdiction of the Regional Court in the composition of a jury of 3 judges and 8 jurors (*Geschworenengericht*) or 2 judges and 2 lay assessors (*Schöffengericht*).
- (3) The Office of Prosecution for Corruption is also competent for proceedings concerning mutual legal assistance or cooperation in criminal matters with the competent institutions of the European Union as well as with the judicial authorities of the member states of the European Union in the cases mentioned in paragraph 1. It is the central national contact point for OLAF and Eurojust as far as proceedings because of the offences mentioned in paragraph 1 are concerned.”

3. After section 28 the following section 28a including the heading is inserted:

**“Connection and competence conflicts concerning proceedings of the Office of  
Prosecution for Corruption**

**Section 28a.** (1) The Office of Prosecution for Corruption has to proceed as provided in sections 26 and 27 in cases of connection of proceedings. The competence of another Office of Public Prosecution for the preliminary investigations due to a connection with a criminal offence for which the Regional Court in the composition of 3 judges and 8 jurors or 2 judges and 2 lay assessors would be competent (Section 26 (2)) is not altered in cases of suspicion of an offence listed in paragraph 1. Apart from that the Office of Public Prosecution that first obtains knowledge of a criminal act in the sense of paragraph 1, has to impose the urgent measures that cannot be delayed and has to cede the proceeding to the Office of Prosecutor for Corruption.

- (2) The Office of Prosecution for Corruption can transfer the proceeding to the Office of Public Prosecution competent according to sections 26 and 27 if there is no special interest of the public in the case because of the importance of the criminal offence or the person of the accused. The Office of Public Prosecution to which the proceeding is transferred cannot refuse its competence unless it proves to be one of the cases mentioned in sections 25 (5) and (6) or 26. The Office of Public Prosecution to which the proceeding was transferred has to report to the Office of Prosecution for Corruption about the outcome of the proceeding if it is thus requested.

- (3) The General Procurator’s Office has to decide which body is competent in accordance with the aforementioned provisions if there is a conflict of competencies between the Office of Prosecution for Corruption and other Offices of Public Prosecution according to section 28.”

7. After section 100 the following section 100a including the heading is inserted:

**“Reports to the Office of Prosecution for Corruption**

**Section 100a.** (1) The criminal police has to report every suspicion of a criminal offence mentioned in section 20a (1) to the Office of Prosecution for Corruption according to section 100 (1) litera 1.

- (2) The Office of Prosecution for Corruption can request from other Offices of Public Prosecution that they perform specific investigations or other official acts due to reasons of convenience and in order to avoid delays. The other Offices of Public Prosecution are obliged to fully support the Office of Prosecution for Corruption and provide help in the prosecution of criminal offences.”

## ANNEX 2

### Income Tax Guidelines (excerpt)

*[Working translation, March 2007, not for publication]*

#### **14.7. Non-deductibility of bribes as well as of association fines under the Federal Statute on Responsibility of Associations for Criminal Offences (Sec 20 (1) (5) ITA 1998)**

*Note: Changes in relation to the previous version have been earmarked by bold and italic letters)*

##### **14.7.1. General**

###### **4840**

Allocations of funds and property whose granting or accepting is subject to prosecution that are not deductible under Sec. 20 (1) (5) ITA (Income Tax Act), cover only allocations that are punishable domestically. Administrative fines do not impede the deductibility. ***Also association fines under the Federal Statute on Responsibility of Associations for Criminal Offences are not deductible (see m. no. 4846a).***

###### **4841**

As a consequence of the Penal Law Amendment Act 1998, Federal Law Gazette I No. 153/1998 from 20 August 1998, allocations of funds and property whose granting or accepting is subject to prosecution are, non-deductible, even when they are directly connected with export turnovers. For the new offences added by the Penal Law Amendment Act 1998, the non-deductibility is effective from 13 January 1999 (entering into force of the Tax Amendment Act 1998). Payments that are made from that point of time are non-deductible, even when they are directly connected with export turnovers. ***[Last sentence deleted: Excluded are those payments where the obligation is evidently based on agreements that were made before the entering into force of the Penal Law Amendment Act – i. e. before 1 October 1998.]***

##### **14.7.2 Non-deductibility of bribes**

###### **14.7.2.1 Allocation of property**

###### **4842**

The term 'allocation of property' means any benefit in money's worth: besides tangible assets e. g. also the assignment of an apartment or car for free of charge, the payment of holiday trips and the like.

###### **14.7.2.2 Offences concerned**

###### **4843**

The non-deductibility implies that granting or accepting allocations of funds and property is inherently an element of an offence described in penal laws. This is the case with the following offences:

Sec. 302 Austrian Penal Code: Abuse of official authority,

Sec. 304 Austrian Penal Code: Acceptance of gifts by public officials,  
Sec. 305 Austrian Penal Code: Acceptance of gifts by executive employees of public sector enterprises,  
Sec. 306 Austrian Penal Code: Acceptance of gifts by independent experts,  
Sec. 306a Austrian Penal Code: Acceptance of gifts by staff members and independent expert advisors,  
Sec. 307 Austrian Penal Code: Bribery,  
Sec. 308 Austrian Penal Code: Illegal interventions.

#### **4844**

Concerning the evaluation of the non-deductibility of costs and expenses with foreign relations the following applies:

Sec 20 (1) (5) ITA 1998 covers only offences *[middle part of the sentence deleted: that are committed by Austrians or persons who are Austrian citizens at the time the criminal proceedings are instituted and]* that are punishable under the sections mentioned in the Austrian Penal Code.

A punishable offence can be presumed if foreign public officials accept gifts or bribes in exchange for behaviour contrary to their duties in their statutory functions. *The term 'foreign public official' also comprises public officials who act within the scope of the private sector administration or outside their direct competence within the scope of their functions as public officials.* Enquiries ex officio are compulsory, if the tortious character of the payment is not evident and if reasonable suspicion of fulfilling the elements of accepting gifts or bribes of foreign officials exists.

Concerning the other mentioned foreign-related criminal offences, enquiries ex officio - whether an element of a criminal offence is fulfilled through allocations - have to be made only if in Austria prosecution has already been instituted.

#### **14.7.2.3 Offences not concerned**

##### **4845**

The non-deductibility under Sec. 20 (1) (5) ITA 1988 is not effective when granting or accepting an advantage is not directly an element of a criminal offence, as for example with the following offences.

Secs. 123 and 124 Austrian Penal Code: Spying out of a trade or business secret, also for the benefit of the foreign country.

Sec. 310 Austrian Penal Code: Violation of an official secret.

Sec. 311 Austrian Penal Code: False official recording and authentication in office.

#### **14.7.2.4. Preliminary question**

##### **4846**

For the tax authorities the assessment of the legal criminal liability is a preliminary question under Sec. 116 FFC. If the preliminary question assessed is subsequently decided differently by the court or the public prosecutor (e. g. acquittal, withdrawing charges, etc.), a reason for revision under Sec. 303 (1) (c) and (4)

FFC is given.

### ***14.7.3. Non-deductibility of association fines***

***4846a***

***With the Federal Statute on Responsibility of Associations for Criminal Offences, Federal Law Gazette I No. 151/2005, a criminal responsibility for "associations" for criminal offences has been in effect since 1 January 2006. Associations are legal persons as well as certain partnerships. Criminal responsibility of the association exists if a criminal offence is committed by decision makers or by staff in case of insufficient supervision or control. Fines imposed on associations under the Federal Statute on Responsibility of Associations for Criminal Offences are non-deductible. Payments resulting from a diversion in proceedings against associations are not deductible either (see Wage Tax Guidelines (LStR) 2000 m. no. 1517a and m. no. 385).***

***For the treatment of costs of defence and litigation from proceedings according to the Federal Statute on Responsibility of Associations for Criminal Offences see m. no. 1621.***