



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

**AUSTRIA: PHASE 1bis
REVIEW OF IMPLEMENTATION OF THE
CONVENTION**

October 2010

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REVIEW OF IMPLEMENTATION OF THE CONVENTION - PHASE 1BIS

1. Austria signed the Convention on December 17, 1997 and deposited its instrument of ratification with the Secretary-General on March 24, 1999. The first implementing legislation entered into force on October 1, 1998.

The OECD Working Group on Bribery monitoring process and the Austrian legislation

2. The Phase 1 review of Austria took place in 1999 and the Phase 2 review took place in 2005¹. In 2009, the Working Group expressed concern that an urgent amendment to Austria's anti-corruption legislation that entered into force in September 2009² (hereinafter "the 2009 Amendment Act"), could weaken Austria's laws against bribery of foreign public officials. This amendment to Austria's anti-corruption legislation -- that was not directly aimed at addressing issues raised in Phase 1 or Phase 2³ -- followed a first amendment to the legislation implementing the-Convention⁴, which entered into force on 1 January 2008⁵ (hereinafter "the 2008 Amendment Act") and was in force for less than two years.

3. Considering the broad scope of the 2009 Amendment Act to Austria's anti-corruption legislation, the Working Group decided to engage in an exceptional additional review of Austria's legislation (Phase 1bis). The present review focuses on the changes introduced with the 2009 Amendment Act in the Austrian anti-corruption legislation implementing the Convention. The review also addresses additional amendments that have introduced changes in the Austrian anti-corruption legislation since the Phase 2 evaluation of Austria in 2005.

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

4. At the time of Austria's Phase 1 evaluation, the Austrian Penal Code⁶ was amended in order to implement the requirements of the Convention by adding new subsections to sections 307 (offence of bribery) and amending section 308 ("trafficking in influence"). Previously, sections 307, 308 only covered offences in relation to a domestic public official. The amended sections 307, 308 extended to foreign public officials.

¹ The written follow-up to the phase 2 report was approved in March 2008 and the Working Group on Bribery Group heard Austria present an oral follow-up to the written follow-up was in June 2009.

² The Federal Law Amending the Penal Code with regard to Corruption Offences 2009 ("Korruptionsstrafrechtsänderungsgesetz 2009"), published in the Federal Law Gazette Nr. I 98/2009, entered into force 1 September 2009

³ Phase 1 evaluates the implementation of the Convention into Austria's legislation. Phase 2 evaluates Austria's enforcement of its legislation implementing the OECD Convention, assesses its application in the field and monitors Austria's compliance with the 1997 Revised Recommendation.

⁴ The Act changing the Criminal Law 1998 ("Strafrechtsänderungsgesetz 1998"), published in the Federal Law Gazette on 20 August 1998 (BGBl. I 1998/153), entered into force 1 October 1998

⁵ The Act changing the Criminal Law 2008 ("Strafrechtsänderungsgesetz 2008"), published in the Federal Law Gazette Nr. I 109/2007

⁶ Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch - StGB), BGBl. 1974/60 in der Fassung BGBl. I 1998/153.

5. With the 2009 Amendment Act, all these sections of the Austrian Penal Code were revised. The offence of foreign bribery is now covered by sections 307, 307a and 307b of the Penal Code (hereinafter “PC”).

6. Section 307 PC establishes the offence of bribery and expressly uses the term “*bribery*”. Section 307a, “*Granting of a benefit to a public official*” establishes an offence that is distinct from the bribery offence per se (it does not expressly use the term “bribery”) but which, according to Austria, also covers foreign bribery cases within the meaning of the Convention. While section 307 deals with offences where the public official acts or refrains from acting in violation of his/her duties, section 307a covers cases where the act or omission conforms to such duties.

7. Section 307b covers the offence of bribery (although the term “bribery” is only expressly mentioned in the title) of *a public official of another member state of the European Union, or a Community official*. As was already the case under the former law, separate provisions exist concerning the bribery of public officials of other EU member states on the one hand, and bribery of foreign public officials on the other hand.

8. Section 307c deals with “*active repentance*”.

9. Section 308 deals with the offence of illicit intervention (“*trafficking in influence*”).⁷ Trafficking in influence is an offence that is not covered by the Convention. The following review does therefore not deal with section 308 of the Austrian Penal Code.

10. Section 74 (1) contains several definitions in relation to “*public officials*” and in particular clarifies that the notion of public official -- including those covered under sections 307 to 308 -- encompasses public officials of another State, i.e. foreign public officials.

Bribery Section 307

(1) Whoever offers, promises or gives an advantage to a public official or an arbitrator for himself or a third person for performing or refraining from performing an official act in violation of his duties, shall be punished by imprisonment up to three years. Likewise anybody is to be punished who offers, promises or gives an advantage to an expert (sec 304 par. 1) for himself or a third person for delivering an incorrect evidence or expertise.

(2) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euros shall be punished by imprisonment from six months up to five years, whereas whoever commits the offence with regard to a value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from one year up to ten years.

Granting of a benefit to a public official Section 307a

(1) Whoever offers, promises or gives an advantage to a public official according to section 74 (1) (4a) subpar b to d or an arbitrator contrary to an interdiction by public service or organization law for himself or a third person for performing or refraining from performing an official act in accordance with his duties shall be punished by imprisonment of up to two years.

⁷ It addresses cases where one seeks that an official acts or refrains from acting *by third party intervention*. The direct offender is the (third) person who tries to induce a domestic or foreign public official to behave improperly with regard to his/her responsibilities. One means of such inducement is bribery. Besides the third party, the person who offers the advantage to the former in order that he/she intervenes is also punishable under section 308.

(2) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euros shall be punished by imprisonment from six month up to five years, whereas whoever commits the offence with regard to a value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from one up to ten years.

Preparation of Bribery Section 307b

(1) Whoever offers, promises or gives an advantage to an Austrian public official or arbitrator, a public official or arbitrator of another Member State of the European Union or a Community official for himself or a third person in order to initiate the performance or refrainment from performing of an official act in violation of such duties in the future shall be punished by imprisonment up to two years.

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

Active Repentance Section 307c

(1) With respect to criminal offences according to Section 304 to 307b anybody is not to be punished who, before the authority (section 151 par 3) is informed about his guilt, abdicates to conduct or - in case more persons are involved -, impedes the conduct or averts the success and, in any case, in the course of a self-denunciation, deposits the accepted advantage or the equivalent amount of money to the authority.

(2) Under the preconditions of par 1 the offender is also not to be punished if in case where without his assistance, the conduct or the success remains undone, he however unknowing that fact, seriously makes an effort to impede the conduct or to avert the success.

Section 74 (1) - definitions in relation to “public officials”:

(4a) public official: anyone who

a) is member of a domestic constitutional assembly, insofar as he votes in an election or ballot or otherwise acts or refrains from acting in the exercise of the duties determined in the internal rules of procedure,

b) as an organ or employee discharges tasks of legislation, administration or justice for the federation, for a province (Bundesland), for an association of municipal corporations, for a commune, for a social insurance institution or its association, for another state or for an international organisation, with the exemption of public officials mentioned under a) when executing their duties,

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

d) acts as an organ of a legal entity or due to the employment status to a legal entity, which is under the review of the court of auditors, or a comparable institution of the Provinces (Länder) or a comparable international or foreign control institution and works by far predominantly for the administration of a body mentioned under b).

1.1 The Elements of the Offence

1.1.1 Any person

11. As in phase 1, Section 307 and 307a of the Penal Code (PC) applies to “*a person*”. The Austrian authorities explain that “*a person*” means any natural person. The offence however extends to legal persons through the law establishing general criminal liability of legal persons that entered into force on 1 January 2006 and that applies to all offences, intentional and non-intentional, thus including bribery of foreign public officials (as further discussed below under Section 3, Liability of legal persons).

1.1.2 Intentionally

12. The revised sections 307, 307a and 307b require that the improper reward be given, etc. to obtain actions or omissions of a foreign public official, i.e. for “*performing or refraining from performing an official act*”. At the time of Phase 1 and Phase 2, it was sufficient that the offender at least earnestly considers the possibility of acting in a way to commit the offence and resign himself/herself to it (*dolus eventualis*). The coverage of the *dolus eventualis* had been further reinforced with the 2008 revision of the offence that created, under section 307, paragraph 2,⁸ a new offence covering the offer (and acceptance) of undue advantages in connection with the carrying out of official duties, without a need to prove a link to a specific act or omission by the public officials (act without *quid pro quo*). Offering, promising or giving an advantage with regard to the official’s function was enough to be punishable. This was going beyond the requirements of the Convention.

13. The revised foreign bribery offences gave rise to academic and political debate notably with regard to the notion of intent. The criticism levied against the legislation focused on issues of uncertainty under the law⁹ to trigger criminal responsibility: should the briber at least have *dolus eventualis* that the public official sometime in the future, somehow might be useful to him or would it be enough that an advantage be offered etc. even without the vaguest idea of a possible official act? In October 2009, Austria explained, in the context of a GRECO Tour de Table about “Corruption in Sport”¹⁰, that problems concerning sponsorship similar to those faced by some countries in the domain of sport, had also been faced in Austria in relation to cultural festivals, and that the “criminal law had been revised to narrow the scope of the relevant provision which now only criminalises the offering of complementary tickets to a public official with the aim of inciting him/her to act or to not act in a way that would violate the public official’s duty or in a way that would be in conformity with the public official’s duty if the acceptance of the tickets is forbidden by the service or organisation law applicable to him/her.” Such invitations, gifts and gratuities may be offered to foreign public officials up to a non-limited level [*emphasis added*]. This is further discussed under the subsection below with regard to small facilitation payments.

14. After the 2009 Amendment, the coverage of the *dolus eventualis* under sections 307 and 307a is, according to the Austrian authorities, the same as under the former (pre-2008) provisions. Nonetheless, the notion of intent¹¹ under the revised section 307 and 307a does not appear to contemplate the case where a

⁸ According to the Group of States against Corruption (GRECO) Joint First and Second Evaluation Round, Evaluation Report on Austria (adopted by GRECO at its 38th Plenary Meeting 9-13 June 2008), and as confirmed by Austria in its comments to the first draft Phase 1 bis report.

⁹ The then new provision was criticised partly as being too indeterminate and partly as going too far.

¹⁰ Group of States against Corruption (GRECO), Document Greco (2009)28, Corruption in Sport, Presentations and summary record, Tour de Table (GRECO 44, October 2009), [http://www.coe.int/t/dghl/monitoring/greco/documents/2009/Greco\(2009\)28_TourdeTableGR44_Corruption%20in%20Sport_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/2009/Greco(2009)28_TourdeTableGR44_Corruption%20in%20Sport_EN.pdf)

¹¹ The Austrian authorities explain that pursuant to section 7 of the Penal Code, even where a particular intention is not required in the offence itself, “any crime is punishable if committed intentionally”.

person is wilfully blind to whether the act of offering, etc. money or any other advantage would induce an act or omission by the public official. The offering of advantages not directly aimed at obtaining (or preparing and/or remunerating) actions or omissions of a foreign public official is therefore no longer forbidden under the new law.

15. In order to clarify how the element of intent will be applied in practice, the issues outlined above should be subject to follow-up in Phase 3.

1.1.3 To offer, promise or give

16. As in Phase 1, section 307 applies to a person who “offers, promises or gives” a bribe, etc. in compliance with the requirements of the Convention.

1.1.4 Any undue pecuniary or other advantage

17. Sections 307, 307a and 307b prohibit the giving, etc. of “*an advantage*”. This includes, but is not limited to, pecuniary advantages. It comprises anything that can be defined as a benefit, including an intangible benefit, such as social or professional advantages.

18. The Austrian authorities indicate that, as under the former law, and conforming to the Austrian legal tradition, it is not required that the award be improper. The Austrian authorities explain that while the initial 2009 proposed Amendment Act included the notion of “*undue advantage*”, the report of the Parliamentary Justice Committee pointed out that the concept of “*advantage*”, insofar as it is linked to the official act, is in itself sufficient to establish the illegitimacy. Therefore the Austrian Parliament decided to keep the traditional concept of “*advantage*” as it had been established before.

19. However, while the broad interpretation of an advantage (which accordingly does not need to be qualified as “*undue*”) may be retained for the acts of bribery contemplated under section 307, it is not applicable to section 307a, where it is required that the advantage be given “*contrary to an interdiction by public service or organisation law*”.

Autonomy of the offence

20. While, at first glance the definition in the law appears to cover a very broad range of advantages, the necessity to establish under section 307a that the advantage received by the foreign public official is forbidden under his or her law appears to be contrary to the requirement for an autonomous definition of the foreign bribery act (contemplated under commentary 3 on the Convention).

21. The Austrian authorities indeed explain that, with regard to the application of section 307 and 307a, two situations should be distinguished in order to establish whether the advantage is improper or not. In the first situation (section 307), any advantage is automatically improper (an “*undue advantage*” within the meaning of the Convention) when it aims at or is given for performing or refraining from performing an act in violation of the official’s duties (“*an undue act*” according to Austria). However, in the second situation, where the bribe is given etc. for performing or refraining from performing an act in accordance with the official’s duties (i.e. for “*a due act*”), the impropriety of the advantage has to be established in public service or organisation law¹². Therefore, this implies that in both situations, it has to be established under the foreign public official’s law that either the act performed by the foreign public official (see subsection 1.1.8 below) or the advantage he receives is improper.

¹² Austria explains that, for instance, under the Austrian federal public service law, customary presents of low value do not fall under the prohibition to accept gifts while small facilitation payments are never permitted.

22. In defining an undue advantage under section 307a, the Austrian authorities refer to Commentary 8 on the Convention. With regard to the impropriety of the advantage, commentary 8 captures the notion that an offence is not committed where the advantage is expressly permitted or required under the law of the foreign public official's country [*emphasis added*]. However, the Austrian legislation does not establish that there must be an express permission or requirement for the advantage to be lawful, as contemplated under commentary 8 but rather that the advantage must be “*contrary to an interdiction by public service or organisation law*” in the country of the foreign public official -- thus going beyond the exception under commentary 8. In other words, an offence is not committed if the advantage is not prohibited under the law of the foreign public official.¹³ Austria contends that it is not necessary that the law of the foreign public official's country establish a bribery offence and that it is sufficient that the acceptance etc. of a gift be simply forbidden (with either no consequences at all or only disciplinary or administrative consequences) to trigger Austrian criminal responsibility. However, the lead examiners are concerned that the prosecution will have to prove that such advantage (or an advantage of such value) is forbidden under the public official's law in order to be able to trigger the liability of the defendant. This means that the offence provided under section 307a not only contains an additional element that is not contemplated by the Convention but that it also requires to look at the law of the foreign public official to prove this element, thus contravening to the requirement for an autonomous definition provided under Commentary 3 on the Convention.

23. In further defining what an undue advantage is, the new section 307a underwent a modification compared to the former section 307 paragraph 2 (in force at the time of Phases 1 and 2) insofar as the old “*de minimis*”- threshold of €100 has been replaced by a reference to “*an interdiction by public service or organisation law*” [*emphasis added*]. As a consequence, any invitation, gift or gratuity may be offered to foreign public officials up to a non limited level in cases where the offering is aimed at an official act or omission in conformity with a public official's duty, if the acceptance of the invitation, gift or gratuity is not prohibited by service or organisational law of the country of the foreign public official [*emphasis added*]. However the Austrian authorities confirmed (as in Phase 1) that with regard to the latter provision, small facilitation payments are considered as "advantages" in the meaning of commentary 7 on the Convention. The examiners consider that such “invitation, gift or gratuity” cannot be considered as small facilitation payments and note that, in order to determine that such advantages are not disallowed, the Austrian law depends as well on the law of the foreign official's country, which raises particular concerns given the suppression of the former threshold. The establishment in practice that the advantage received by the foreign public official is improper should be further evaluated in Phase 3.

1.1.5 Whether directly or through intermediaries

24. As in phase 1, the Austrian authorities explain that the briber is always punishable - no matter how many intermediaries he/she uses. The possible sanction of the intermediary depends of the exact role he/she is playing¹⁴. The Austrian authorities explain that if the intermediary acts without being aware of the criminal impact, not even in the form of *dolus eventualis* (see 1.1.2 above), he/she would not be punishable

¹³ This interpretation seems to be confirmed by the Austrian authorities when they explain – in order to illustrate how such an interdiction can be defined -- that, for instance, under the Austrian federal public service law, customary presents of low value do not fall under the prohibition to accept gifts.

¹⁴ The Austrian authorities refer to a Supreme Court decision (Supreme Court, EvBl 1981/34) where a tax-official has been bribed by a person and a third person had instigated the bribe-giver to pay the money as well as the tax official to accept it. All three were convicted: the bribe-giver for active bribery, the tax official for passive bribery and the third person for active and passive bribery.

at all. If the intermediary is intentionally involved in the offence he/she might be even punishable for bribery itself¹⁵.

1.1.6 To a foreign public official

25. While former section 307 included the term "foreign public official", the revised provisions in sections 307, 307a and 307b generally refer to "*a public official*". Only section 307a refers to the definition of a public official contained in section 74 (1) (4a) of the Austrian Penal Code. However, Austria maintains that the definition also applies to both article 307 and 307b -- with the exceptions discussed below. Section 74 (1) (4a) defines as "*public official*", *anyone who:*

a) is member of a domestic constitutional assembly, insofar as he votes in an election or ballot or otherwise acts or refrains from acting in the exercise of the duties determined in the internal rules of procedure,

b) as an organ or employee, discharges tasks of legislation, administration or justice [...] for another State or for an international organisation, with the exception of public officials mentioned under a) when executing their duties."

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

d) acts as an organ of a legal entity or due to the employment status to a legal entity, which is under the review of the court of auditors, or a comparable institution of the Provinces (Länder) or a comparable international or foreign control institution and works by far predominantly for the administration of a body mentioned under b.)"

Meaning of the general terms used under section 74 (1.) (4a)

26. The Austrian authorities confirm that, as in phase 1, the term "*another State*" in paragraph b) includes all levels and subdivisions of government, from national to local and thus conforms to the definition in commentary 18 to the Convention.

27. According to the Austrian authorities, "*an organ*" under b) is a natural person exercising public functions whereas "*an organ*" under d) (i.e. "*an organ of a legal entity*") is a natural person who represents the entity like members of the board of directors or the management board of a Company. As regards "*employees*", Austria specifies that the function within the hierarchy does not have any impact on the qualification of public official.

28. The Austrian authorities explain that the qualification of a foreign public official (i.e. "*an organ or employee [who] discharges tasks of legislation, administration or justice [...] for another State*") has to be determined by analogy with Austrian provisions. The requirement of an autonomous definition would therefore be satisfied if the Austrian domestic definition covers all the categories of officials covered under the Convention and does not require any further element of proof. Therefore, it has to be examined how an organ or employee of another country could be determined as a foreign public official under section 74 (1) (4a), sub-paragraph b to d, of the Austrian Penal Code (see subsections below).

¹⁵ Austria specifies that according to sec 12 CC (General Provisions) not only the immediate offender but also anybody who instigates another person to commit a crime as well as anybody who otherwise contributes to its commission is punishable for the crime concerned (with all of them in principle facing the same sanctions).

29. The Austrian authorities specify that when determining whether a person is a foreign public official by analogy with the Austrian provision, the level of proof required is identical with regard to domestic or foreign public officials¹⁶. Relatively detailed elements need to be determined through this analogue test (as further discussed under sub-section below). This implies that, whether “*an organ or employee discharges tasks of legislation, administration or justice [...] for another State*” will be determined in accordance with the law of the State in which the person exercises that function. This appears to require a level of proof of the law of the particular official’s country which may not be compatible with the requirement of an autonomous definition of the notion of “foreign public official” (commentary 3 on the Convention).

Coverage of officials of public agencies and public enterprises

30. Prior to the revision of the Austrian Penal Code, the definition of foreign public official, contained in former section 74 (4c) of the Austrian Penal Code, was more comprehensive¹⁷ and expressly covered “*anybody who performs a public function for a public agency or a public enterprise*”. Concerning the term “*foreign public enterprise*”, the Austrian authorities referred to an explanatory report to the draft implementing legislation which clarified that the term “foreign public enterprise” had to be interpreted in accordance with commentary 14 on the Convention.

31. Under the new law, the public agencies and enterprises exercising public functions for a foreign state (with the exception of official duties in fulfilment of the law as provided under section 74 (1) (4a) c)), are covered by section 74 (1) (4a) d) insofar as they fall under the control of an institution comparable to the Austrian Court of Auditors (“*comparable control institution*”) or a similar institution of the provinces (Länder) and would “*work by far predominantly for the administration of a body mentioned under b) in the [foreign] state*”. As confirmed by Austria, this implies that the notion of “*comparable control institution*” of another country has to be determined by analogy to the legal base for the Austrian Court of Auditors or similar institutions in the provinces. The terms “*works by far predominantly for the administration of a body mentioned under b)*” would also need to be determined by analogy to the Austrian law. Given the level of proof required (as detailed in the above subsection about the “autonomous definition”), this may raise practical difficulties in determining who is a foreign public official exercising a public function for a public agency or public enterprise within the meaning of article 1 of the Convention.

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

¹⁶ See Austrian answer to question 1.8.

¹⁷ It covered “*any person who:*
- *has a public function in the legislation, administration or in the judiciary in a foreign state;*
- *exercises a public task for a foreign state, a foreign administrative authority, or a foreign public enterprise;*
- *is a public official or otherwise authorised person of an international organisation.*”

33. The Austrian authorities indicate that active bribery of organs or employees of public enterprises that operate on a normal commercial basis is punishable under section 168 d (Bribery of servants or agents of a company) or section 153 of the Penal Code (Breach of Trust) or Section 10 of the Unfair Competition Act (Bribery of Employees or Agents).¹⁸ In most instances, these provisions provide for sanctions that are lower than those contemplated under sections 307, 307a and 307b.

34. In general, the new section 74 (1) (4a) appears to narrow the definition of a foreign public official in that it is no longer possible to determine with sufficient certainty what foreign public enterprises will fulfil the criteria of section 74 (1) (4a) d). It therefore remains uncertain whether Austrian law still fully implements article 1 of the Convention (Article 1, paragraph 4 a) and commentaries 14 and 15 on the Convention).

Coverage of elected persons

35. Article 1, paragraph 4a, of the Convention defines a “foreign public official” as “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected”. Austria underlines that whether a person is appointed, elected or otherwise entrusted with a public function is of no importance to determine whether this person is a foreign public official or not

36. The new law expressly provides that a “*member of a domestic constitutional assembly*” is not covered under section 74 (1) (4a) b) which includes the definition of foreign public official (“*an organ or employee [who] discharges tasks of legislation, administration or justice for [...] another State with the exception of public officials mentioned under a)*”, i.e. a “*member of a domestic constitutional assembly*”). The Austrian authorities contend that “*a domestic constitutional assembly*” exclusively targets an Austrian constitutional assembly and that members of parliament of other states are covered under the definition of foreign public official under the new section 74 (1) (4a) b) as “*an organ or employee [who] discharges tasks of [...] legislation for another state*”. Any other person exercising a public function for a foreign country who has been elected is also covered by the new definition. Likewise, according to Austria, a minister of a foreign state would be covered as “*an organ or employee [who] discharges tasks of [...] administration for another state*”.

37. Section 307a, which covers “*an official act in accordance with [the official’s] duties*” and targets officials within the definition of section 74(1) (4a) b) to d) also excludes those public officials defined under sections 74 (1)(4a) a), i.e. members of domestic constitutional assembly but, for the same reasons as above, appears to cover members of parliaments and ministries of foreign states. Elected persons acting in accordance with their duties are therefore covered by the definition of foreign public officials.

Coverage of public officials of another Member State of the European Union or a Community official

38. The new Austrian legislation, unlike the texts in force at the time of Phase 1 and Phase 2, no longer provides a separate definition for a public official of another member state of the European Union, or a Community official. Sections 307 and 307a apply to the bribery of all foreign public officials, including public officials of other EU member states and Community officials. However, as discussed below (under subsection 1.1.8), section 307b applies only to public officials of other EU member states and Community officials (and not to other foreign public officials) but has a narrower scope than sections 307 and 307a as it only covers the acts of preparation of bribery – otherwise provided under section 306 in respect of other foreign public officials. It remains however unclear why separate provisions – even if now

¹⁸ Please see relevant provisions in Annex 2.

limited to section 307b – still exist concerning the bribery of public officials of other EU member states on the one hand, and bribery of foreign public officials on the other hand.

39. Since there is no longer any difference between the definition of a foreign public official and the definition of a public official of another EU member state with regard to acts of foreign bribery, it appears that, for the same reasons as discussed above any person holding a legislative, administrative or judicial office in another EU member state would be covered. However, it remains unclear from the text whether persons exercising a public function, including for a public agency or public enterprise, in another EU member state would fall under the definition.

Other categories of persons

40. Section 307 covers the bribery of an *expert* in connection with the provision of incorrect evidence or expertise. The Austrian authorities confirm that this category of persons is covered under the foreign bribery offence if they exercise a public function in a foreign state.

41. The Austrian authorities also specify that anyone who, pursuant to c), “*is otherwise authorised to perform official duties in fulfilment of the law*” for a foreign state covers persons acting on behalf of the state like for instance notaries appointed by the Court or mechanics entrusted to conduct technical inspections of cars for the administration.

42. According to the Austrian Authorities, the situation described in paragraph 10 of the Commentaries on the Convention is covered by the new law, i.e. case where an advantage is promised or given to any person, in anticipation of his or her becoming a foreign public official. They explain that cases where an advantage is given etc., to a person, in anticipation of his or her becoming a foreign public official are punishable under sections 307 and 307a of the Penal Code as far as a connection exists between giving etc., an advantage and an official act. For instance, if a candidate for a public office or a person already appointed but not yet in function is offered, promised or given an advantage with regard to an official act which shall be performed by the person after he or she had taken office, such conduct is covered by sections 307 or 307a.

1.1.7 For that official or for a third party

43. Sections 307, 307a and 307b similarly include the words “*for himself or a third person*”. Both alternatives are therefore explicitly mentioned in the text of the provision.

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

44. Sections 307, 307a and 307b criminalise active bribery of a public official (including a foreign public official) and explicitly cover the two alternatives “*performing or refraining from performing an official act*” either in violation of the official’s duties (section 307) or in conformity with the official’s duties (section 307a) or even (as regards public officials of another Member State) to initiate it in violation of their duties in the future (section 307b).

45. The Austrian authorities specify that the notion of “*official act*” includes factual acts which may be of preparation, supporting or controlling character. It also does not matter if the concrete act falls within the competence of the public official as far as the public official has the power to conduct official acts.

Acts completely outside of the competence of the public official are not covered by the concept¹⁹. This appears to be in line with the requirements of the Convention.

46. The coverage under new Austrian law of acts committed either *in violation* of the public official's duties or *in accordance* with his/her duties ensure that any official act or omission in relation to the performance of official duties is covered.

Acts in accordance with the official's duties

47. At the time of the phase 1 evaluation, acting *in accordance* with his/her duty -- provided in former section 307, paragraph 2 -- did not apply to bribery of *foreign* public officials. The provisions of the Penal Code were therefore narrower than the requirement of the Convention that the "*official act or refrain from acting in relation to the performance of official duties*". This situation has been remedied in the new law.

Acts in violation of the official's duties

48. According to the Commentaries on the Convention, it is sufficient for the implementation of the Convention if the offence comprises payments "*to induce a breach of the official's duty*" provided that it was understood that every public official had a duty to exercise judgment or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.

49. With regard to the impartial exercise of judgment and discretion, the Austrian authorities indicate that the non-impartial exercise of discretion represents a violation of the officials' duties and falls under section 307. They underline that due to the "fact based principle" which also applies to decisions requiring the exercise of discretion by the public official, the discretion has always to be exercised on the basis of the law.²⁰

50. The Austrian Authorities stress that there is also a subjective element to be taken into account; that is, whenever a public official gives any consideration to the advantage he/she receives, he/she is considered to act in violation of his/her duties even if his/her margin of discretion is not exceeded²¹. This subjective element may however be difficult to evaluate for the Austrian prosecutors. It will notably depend on the extent to which the "state of mind" of the foreign public official would have to be taken into account in order to establish the liability of the briber. It remains for instance unclear whether the liability of the briber would be established where the bribe did not influence the foreign public official's decision to act or not to act (which could lead to taking into account considerations forbidden under the Convention as explained under Commentary 4). Such element would not only raise serious difficulties in triggering the briber's responsibility but it would also require "*proof of elements beyond those which would be required to be proved if the offence were defined as in [Article 1, paragraph 1 of the Convention]*" (Commentary 3 on the Convention).

51. It remains, as discussed above under section 1.1.4 about the improper nature of the advantage and 1.1.6 about the definition of a foreign public official, that the violation of the official's duties (section

¹⁹ Fuchs/Jerabek in Corruption and Abuse of Power³, §§ 304 – 306 rec. 17 und 18

²⁰ The public official acts in violation of his duties if he act is in contradiction with the concrete legal base, decrees, binding instructions or guidelines from the superior authorities. In accordance with the principle of fact based decisions, the public official has to base his decisions exclusively on facts and legal grounds. The same principle applies when officials exercise discretionary powers. The public official's duties include the principle of impartiality.

²¹ See answer to question 1.2, page 2.

307 and 307b) will have to be established under the foreign official's law contrary to the requirement in commentary 3 on the Convention that the offence be autonomous.

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

52. Pursuant to sections 307, 307a and 307b, under the offence of bribery of a foreign public official (and contrary to the former law), there is no longer a requirement that the bribe be given "*in order to obtain or retain business or other improper advantage in the conduct of international business*". It is sufficient to establish the offence that the act of the foreign public official is in violation of his duties or, when the act is in accordance with his duties, that the advantage had been given etc., contrary to an interdiction by the public service or organisation law.

53. According to section 307b, this requirement does not exist either with regard to bribery of a public official of another member state of the European Union or a public official of the European Union itself. Likewise, it does not exist with regard to bribery of domestic public officials. Accordingly, the Austrian law goes beyond the requirements of the Convention in this regard.

54. The Austrian authorities assert that since any non-impartial performance of an official act constitutes a breach of the official's duties, sections 307 would cover cases where the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business as contemplated in commentary 4 on the Convention. They further specify that where no margin of discretion was given and the bidder had to be awarded the business (without any choice), the case would be covered under section 307a.

55. Austria also indicated that if one or more official acts are necessary to retain business (e.g. renewal of a contract, further orders) it is sufficient to establish a business relationship, i.e. the nature of the official acts and the official's competences to have the conduct covered by sections 307 and 307a. To support this assertion, Austrian authorities pointed to a Supreme Court decision.²²

56. However, it may nevertheless be difficult to prove that an act was done by a public official in violation of his or her duties or that a bribe had been given contrary to an interdiction by the public service or organisation law. Depending on whether the act falls under section 307 or 307a, this will require proof of the law of the particular official's country and may be more difficult to establish than the pursued objective to obtain or retain business or other improper advantage in the conduct of international business, as contemplated in the Convention.

1.2 Complicity

57. The new law has not introduced any changes concerning complicity. Pursuant to section 12 of the Penal Code, punishments under the Code shall be imposed not only on the perpetrator of the act but also on anyone who is an accessory to its commission or who instigates another person to commit the act. As noted in phase 1, this would appear to include incitement, aiding and abetting, and authorisation of an act of foreign bribery.

²²

Supreme Court 19.2.1986, 90s 45/85

1.3 Attempt and Conspiracy

Attempt

58. The new law has not introduced any change either as regards attempt. Pursuant to section 15, paragraph 1, an attempt to commit an offence and complicity in an attempt are punishable like the committed offence. Pursuant to section 15, paragraph 2, an attempt has been committed once the offender has taken the decision to commit the act, or to induce somebody else to do it, and the offender materialises the decision by an action immediately preceding the committal of the offence. The applicable rules are the same for cases involving domestic or foreign public officials.

Conspiracy

59. At the time of phase 1, conspiracy was not punishable under Austrian law. However, section 278 PC on criminal associations now criminalizes the founding or participation in a criminal association, defined as a union of more than two persons, planned over a period of time and aiming at the commitment of one or more criminal offences listed in section 278 (including sections 307, 307a and 307b) by one or more members of the association. The association may also aim at committing only one single crime, notably if complex preparation or planning is required. To be punishable under sec 278 it is not necessary that the crime itself (for instance under section 307) be committed. According to Austria, the mere fact that the association aims at committing acts of bribery of foreign public officials would be sufficient.

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

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

61. During the Phase 1 examination conducted in early 2000, the absence of meaningful sanctions applicable to legal persons led the Working Group to conclude that Austrian law did not conform to the standard of the Convention and to urge Austria to implement Article 2 and 3 of the Convention.

62. In October 2005, shortly after the Phase 2 on-site visit, the Austrian Parliament adopted legislation establishing general criminal liability of legal persons, including for bribery offences. The Austrian Federal Statute on the Responsibility of Entities for Criminal Offenses (*Verbandsverantwortlichkeitsgesetz*, VbVG) entered into force on 1 January 2006. It introduced general criminal liability for legal persons, in addition to and independent from, the liability of the natural persons involved. It applies to all offences, intentional and unintentional, thus including bribery of foreign public officials. Criminal liability would apply to most forms of entities: those having a legal personality and those that do not; profit and not-for-profit; public²³ and private.

63. While this was a welcome act of implementation of the Convention and of a recommendation in the 1999 Phase 1 report on Austria by the Working Group, its timing did not allow for a review of the practical operation of such liability, as is contemplated in the Phase 2 process. However, a phase 1 type of analysis of the new legislation was conducted and can be found in the Phase 2 Report. The legislation

²³ The Austrian Authorities underline that section 1, paragraph 2, subpara 3, clarifies that the state and state-owned or state controlled companies are exempt from criminal liability only **insofar** as they enforce laws i.e. insofar as they exercise state authority but not insofar as they act like other legal entities.

currently in force remains unchanged and there is therefore no need to duplicate this analysis in this Phase 1 bis report.

64. In phase 2, based on the analysis they had been able to conduct, the lead examiners recommended that (recommendation 3e) the Austrian authorities 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). In the context of its oral follow up to the written Phase 2 follow-up, in June 2009, Austria indicated that a decree was in preparation that would clarify that prosecution of allegations of foreign bribery by legal persons is required in all cases. This was before the amendment to Austria's anti-corruption legislation entered into force, in September 2009. Austria indicates that there is currently a comprehensive study on the application of the VbVG and its impact on behaviour of economic operators being carried out and that the decree will be issued only after the results of this study are available, i.e. not before February 2011. As of the time of this report, this recommendation has not yet been implemented.

65. It was also decided that the Working Group will assess the practical application of the new law both in the context of normal Phase 2 follow up procedures and once there has been sufficient practice (Issue for follow up). Such further analysis cannot take place in the context of the current phase 1bis evaluation (which as all phase 1 analysis is an analysis of the legislation implementing the Countries obligations in terms of the Convention) and should therefore be conducted in Phase 3.

3. ARTICLE 3. SANCTIONS

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

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

67. 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). At the time of the written follow up to the phase 2 evaluation, in response to recommendations 5a and 5b, Austria had 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 considered that these levels of sanctions were still not dissuasive and that recommendations 5a and 5b were therefore not implemented.

68. In the context of its oral follow-up report to the Working Group on Bribery a year later, the Working Group on Bribery heard that the Austrian Ministry of Justice issued a decree in July 2008 clarifying the scope of new anti-corruption legislation that entered into force in January 2008. The decree addresses the new provisions, and also Austria's overall obligations in relation to the OECD Anti-Bribery Convention. It particularly explicitly excluded diversion and non-punishment in serious cases of foreign bribery. This effort was in response to Phase 2 recommendations 3a and 5c. Austria indicates that the decree is still in force and remains valid in this respect, since these issues have not been modified by the recent changes in the law.

Natural Persons

69. Pursuant to new sections 307, 307a and 307b, the upper limit for deprivation of liberty for the bribery of public officials has been raised from two to ten years in two steps (it has been raised from two to three years on the occasion of the 2008 Amendment Act of the Austrian Penal Code and then from three to ten years with the 2009 Amendment). This is a significant increase compared to the maximum of two years available at the time of the Phase 1 and Phase 2 evaluations. Austria underlines that with this level of deprivation of liberty, bribery is now a felony.

70. Now following the same principles as those concerning crimes against property in general, the level of sanctions depends upon the value of the advantage. The first paragraphs of sections 307, 307a and 307b respectively provide for sanctions of up to three years (section 307) and two years (sections 307a and 307b). These first paragraphs do not explicitly link the sentence to the value of the "advantage" but provide for sanctions in cases where the advantage is not quantifiable or where the advantage is below the first threshold, i.e. below 3000€. However, each section contains a second paragraph where the level of sanctions depends explicitly on the value of the advantage: above 3000€, and above 50 000€.

Section 307	No threshold	Imprisonment up to 3 years
	Advantage exceeding 3 000 €	Imprisonment 6 months to 5 years
	Advantage exceeding 50 000 €	Imprisonment 1 year to 10 years
Section 307a	No threshold	Imprisonment up to 2 years
	Advantage exceeding 3 000 €	Imprisonment 6 months to 5 years
	Advantage exceeding 50 000 €	Imprisonment 1 year to 10 years
Section 307b	No threshold	Imprisonment up to 2 years
	Advantage exceeding 3 000 €	Imprisonment up to 3 years
	Advantage exceeding 50 000 €	Imprisonment 6 months to 5 years

71. As reflected in the new law, the seriousness of the sanctions depends on the gravity of the act. The sanctions are accordingly more severe if the offence implies also a breach of the official duties than if it is committed with a view to acting or refraining from acting in compliance with his duties.

72. These thresholds may, however, raise difficulties in the case of non-pecuniary advantages or when the advantage is composed of both economic and non-economic benefits. The Austrian authorities indicate that there is no difference in the sanctions depending on the character of the bribe and that the Court has to establish the value of the non-pecuniary benefit on the basis of any evidence it may deem necessary. No sentencing guidelines have been issued for this purpose. The Austrian authorities explain that such an interpretative decree could be considered (as discussed below in respect of the new possibility for "active repentance") but that it would have to be completely non-binding as, under the Austrian legal system, this would otherwise constitute an infringement of the independence of the judiciary. The assessment in practice of such advantages and the availability of guidelines or interpretative decree to that effect should be further assessed in Phase 3.

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

Proportionality of sanctions available for foreign bribery with other economic offences and domestic bribery

74. The sanctions introduced with these new thresholds seem to address the concern expressed in Phases 1 and 2 about the proportionality of sanctions between foreign bribery and economic crime in aggravated cases²⁴. This will need to be further assessed in Phase 3.

75. The Austrian Penal Code provides sanctions for foreign bribery that are identical to those for domestic bribery. However, it was noted in Phase 2 that in many cases, comparable domestic and foreign active bribery would not be sanctioned to the same degree, as domestic bribery cases routinely gave rise to sanctions under additional provisions that either do not apply to foreign bribery as a matter of law or would be very difficult to apply in practice. According to the Austrian authorities, this difference has become practically irrelevant with the entry into force of the 2009 Amendment since the same maximum penalty is now available for the bribery offences, breach of an official's duty (section 302 PC) and breach of trust (section 153PC). This will need to be further assessed in Phase 3.

Fines available for natural persons

76. The Penal Code provides only prison sentences for bribery by natural persons. No change has been introduced to that effect. However, the Austrian authorities indicate²⁵ that, pursuant to section 37(1) a fine shall be applied in lieu of prison (or in addition to prison) in cases where i) the infraction carries up a five years maximum sentence, ii) the judge would impose a prison sentence of no more than six months in the specific instance and iii) it would not be deemed necessary to impose a prison sentence on the offender to keep him/her from committing further offences. The maximum number of daily rates would be 360. The maximum amount per daily rate would be €5000 (€500 at the time of Phase 2). The maximum fine would therefore currently be €1.8 Million (€180.000 at the time of Phase 2). Austria underlines that this provision is more likely to be applied to first time offender than to recidivists but that no data is available as to the application in practice of section 37 PC.

Active repentance

77. With the 2009 Amendment Act, a new provision was introduced in the Austrian Penal Code that now provides, under section 307c, a possibility for *Active repentance*:

(1) With respect to criminal offences according to Section 304 to 307b anybody is not to be punished who before the authority (section 151 par 3) is informed about his guilt, abdicates to conduct or - in case more persons are involved -, impedes the conduct or averts the success and in any case in the course of a self-denunciation deposits the accepted advantage or the equivalent amount of money at the authority.

²⁴ The Austrian authorities explain that the English term of "embezzlement" translates into three different German meanings, namely "Veruntreuung", "Unterschlagung" and "Untreue", each of which constitutes a different offence in the Penal Code (sections 133, 134 and 153). The maximum penalty for aggravated embezzlement in the sense of "Veruntreuung" and "Untreue" as well as for aggravated fraud or theft is 10 years of imprisonment, whereas the maximum penalty for aggravated embezzlement in the sense of "Unterschlagung" is 5 years of imprisonment.

²⁵ In their comments on the first draft Phase 1 bis report.

(2) Under the preconditions of par 1 the offender is also not to be punished if in case without his assistance the conduct or the success remains undone, he however unknowing that fact seriously makes an effort to impede the conduct or to avert the success.

78. The Austrian authorities explain that section 307c may only apply at the initial stage of the procedure, since the Police or the Public Prosecutor must not be aware of the offender's involvement before the offender's self-denunciation. They contend that there is practically no margin for prosecutorial discretion as section 307c does not provide for mitigating circumstances or "out of court" settlements. The Austrian authorities indicate that the Ministry of Justice is currently working on an interpretative decree with regard to the amended provisions and that this decree should be published soon.

79. Whether a sanction is entirely executed or not depends on the circumstances of the individual case. This has not changed since phase 1. The general rules of the Penal Code concerning completely or partially suspended sentences, conditional release and pardon apply to all offences, including bribery.

Legal Persons

80. The main sanction against a legal person is a fine. Similar to fines imposed on natural persons, the law that entered into force on 1 January 2006 (the VbVG) provides a daily rate system. The law creates a sliding scale of maximum fines ranging from 40-180 daily rates based on the maximum imprisonment sentence for the offence in question. The amendment of the law applicable to the foreign bribery offence and the increase of the maximum prison sentence it contains therefore had a direct impact on the maximum fine available for legal persons. Two-year offences such as the less serious bribery offences under sections 307a and 307b paragraph 1, are still limited to a maximum of 70 daily rates, but 10-year maximum offences such as bribery offences under section 307, paragraph 2, are subject to up to 130 daily rates. Thus the increase of sanctions for foreign bribery to a ten-year maximum would also increase maximum sanctions under the law. The maximum daily rate has been fixed at EUR 10 000, which means the maximum fine for foreign bribery that was EUR 700 000 at the time of phase 2 would now be EUR 1 300 000. This represents a significant increase but this still does not reach the level of fines available for natural persons (see paragraph above). Moreover, it should be further assessed in Phase 3 how likely it is that this maximum will be applied. The effectiveness of the sanctions against legal persons should also be assessed together with the implementation of the rules on forfeiture and asset recovery (described below).

81. Daily rates are assessed based on the income situation and financial performance of the company, but are principally determined by yearly proceeds. The increase of the maximum penalty does not impact this central element in the calculation of the actual fine and the concern expressed in phase 2 remains that the law does not provide for effective, proportionate and dissuasive criminal penalties for legal persons in cases where the legal person may not have generated profits over the relevant period remains. It gave rise to recommendation 5 b) which was considered not implemented in the context of Austria's written follow up. This does not need to be reassessed at this stage.

82. The other concerns expressed in phase 2 as to the effectiveness of the sanctions available for legal persons also remain and include: the existence of aggravating and mitigating factors; the large number of alternatives to fines; the exceptional regime of prosecutorial discretion not to proceed or to drop cases against legal persons (that gave rise to recommendation 3e, as briefly discussed above under section 2); the availability of diversion; and the mandatory remission of fines under certain conditions.

83. Consequently, it is questionable whether current penalties in Austria are sufficiently effective, proportionate and dissuasive, in particular with regard to legal persons. It will remain to be seen in Phase 3 what sentences are imposed in practice, notably in respect of legal persons.

3.3/3.4 Penalties and Mutual Legal Assistance - Penalties and Extradition

84. The 2009 Amendment Act on foreign bribery has no impact on Austria's capacity to provide mutual legal assistance in cases of bribery. It did not either impact the Austrian rules on extradition as assessed in Phase 2 by the Working Group on Bribery.

85. Pursuant to section 56 of the Extradition and Mutual Assistance in Criminal Matters (Extradition and Mutual Assistance Law (ARHG)) no limitation to MLA with regard to the level of sanctions is established. Investigating measures requested by MLA are applicable in accordance with the national principles contained within the Austrian Criminal Code of Procedure.

86. Furthermore MLA with regard to other Member States of the European Union is based on the Federal law on judicial cooperation in criminal matters with the Member States of the European Union (EU-JZG).

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

87. No legislative change since Phase 2 have been introduced in the area of non-criminal sanctions applicable to legal persons for bribery of foreign public officials.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

88. Sections 20 to 20c of the Austrian Penal Code provide the legal basis for seizure and confiscation of the bribe and the proceeds of bribing a foreign public official. Section 20 PC contains rules for confiscation of profits. Section 20b PC provides for the "forfeiture".

89. The Austrian authorities indicate that, on 11 September 2009, the Ministry of Justice issued a Decree about the increased usage of freezing, seizure and confiscation and practicable problems in its execution with the aim to identify shortcomings in the field of freezing, seizing and confiscation of assets and to promote the use of these instruments. The Decree explains the legal situation in detail and gives a comprehensive overview of the procedural aspects of confiscation. In addition to these legal clarifications, the Ministry called for a report by all prosecution authorities by 31 October 2009 on their experiences with freezing, seizure and confiscation of assets, existing problems, and suggestions for improvements of the current system. The Austrian authorities indicate that these reports have been the starting point for further reflection and that a draft bill on freezing, seizure and confiscation was approved by the Austrian Council of Ministers on 12 October 2010 and should be soon submitted to Parliament.

3.7/3.8 Civil Penalties and Administrative Sanctions

90. No legislative changes since Phase 2 have been introduced in the area of civil penalties and administrative sanctions applicable for bribery of foreign public officials.

4. ARTICLE 4. JURISDICTION

91. As regards the establishment of Austrian jurisdiction over foreign bribery cases, no legislative changes are to be noted since the Phase 2 evaluation.

5. ARTICLE 5. ENFORCEMENT

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

Prevention, Investigation and Prosecution

93. As of the time of the phase 2 evaluation, the primarily competent Austrian police body responsible for major economic and financial crimes other than domestic bribery was the Economic and Financial Investigations section of the Federal Criminal Investigation Office (BKA), a subdivision of the Ministry of the Interior. This section included a white-collar crimes unit which was charged with prevention and awareness-raising with regard to foreign bribery, and had jurisdiction to investigate all foreign bribery cases. While other police forces could also investigate such cases, the white collar crimes unit could take over a foreign bribery case at any time.

94. The Bureau of Internal Affairs (BIA), an independent agency created as part of the Ministry of the Interior, was Austria’s central government body for prevention, awareness raising and training in anti-corruption matters. Domestic corruption offences were generally investigated by the BIA. Unlike the BKA, the BIA was free from instructions in all of its investigations and inquiries.

95. In the context of the current phase 1 bis evaluation, the Austrian authorities informed the Working Group on Bribery that with the entry into force of the Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption (BAK-G)²⁶, as of 1 January 2010, the Federal Bureau for Internal Affairs (BIA) was transformed into the Federal Bureau of Anti-Corruption (BAK). Like the BIA, the BAK is an independent agency created as part of the Ministry of the Interior. Its mandate includes: Prevention, Education, Investigation and International Cooperation.

96. In terms of prevention, the Austrian authorities underline that the BAK shall analyse corruption phenomena, gather information on preventing and combating bribery and develop appropriate preventive measures.²⁷

97. With regard to investigations, the BAK has nationwide jurisdiction to investigate cases of bribery under section 307, 307a and 307b of the Austrian Penal Code, as well as domestic corruption offences and money laundering (among other economic crime offences listed in Section 4, paragraph 1 of the BAK-G). The BAK’s competences have been extended (compared to former BIA competences) to encompass other economic crimes such as money laundering (Section 4, paragraph 1 of the BAK-G, point 10 to 13). The Agency’s jurisdiction implies a close cooperation with the Public Prosecutor’s Office for Corruption (KStA) that was established on 1 January 2009^{28,29}. The Austrian authorities stress that the BAK is the security police’s counterpart of the KStA³⁰.

²⁶ BGBl. [Federal Law Gazette] I, no. 72/2009

²⁷ Further information regarding the tasks of the BAK is available under the following link: www.bak.gv.at.

²⁸ BGBl. [Federal Law Gazette] I, no. 109/2007

²⁹ The cooperation with the KStA is defined in paragraph 1 of the Federal Law on the Establishment of the BAK defines. A similar provision on cooperation with the KStA in preliminary proceedings can be found in the Austrian Code of Criminal Procedure (section 20a, paragraph 2).

³⁰ Paragraph 4 of the BAK-G

98. Further responsibilities of the BAK include international cooperation (Section 4 paragraph 2 of the BAK-G). The BAK has jurisdiction over investigations within the framework of international police cooperation and administrative assistance, as well as for cooperation with the corresponding institutions of the European Union and the investigating authorities of the EU Member States, notably in the above mentioned offences. Regarding international police cooperation, the BAK acts as the point of contact for OLAF, Interpol, Europol and other comparable international institutions³¹.

99. The BAK appears to gather within one single agency the preventive, investigative and international cooperation powers formerly divided between the former BIA and BKA, and encompasses the experience of both former agencies. It is also in charge of education through information transfer as well as educational and awareness raising campaigns. It also enjoys an independence formerly only attributed to the BIA. The Working Group will assess the practical application of the new law and the impact of the establishment of this new federal agency in the context of the phase 3 evaluation, once there has been sufficient practice.

Considerations such as national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person involved

100. In the context of the Austrian oral follow-up report to the written Phase 2 follow up report in June 2009, the Working Group on Bribery heard that the Austrian Ministry of Justice issued a decree in July 2008 clarifying the scope of new anti-corruption legislation which entered into force in January 2008. The decree addressed the new provisions, and also Austria's overall obligations in relation to the OECD Anti-Bribery Convention. It particularly pointed out that national economic interest, the potential effect on relations with other states, or the identity of individuals or companies must not influence the investigation or prosecution of foreign bribery cases. Austria confirmed that the decree is still in force and valid in this respect, as the new legislation has had no impact on these issues.

³¹ As far as the offences mentioned in section 4 paragraph. 1, point 1 to 13 BAK-G are concerned.

EVALUATION OF AUSTRIA

General Comments

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

102. Several legislative developments have occurred in Austria since the Phase 2 evaluation of Austria's implementation of the Convention in 2005. In 2009, the Working Group expressed concern that an urgent amendment to Austria's anti-corruption legislation that entered into force in September 2009³² (hereinafter "the 2009 Amendment Act"), could weaken Austria's laws against bribery of foreign public officials. This amendment to Austria's anti-corruption legislation -- that was not directly aimed at addressing issues raised in Phase 1 or Phase 2³³ -- followed a first amendment to the legislation implementing the Convention³⁴, which entered into force on 1 January 2008³⁵ (hereinafter "the 2008 Amendment Act") and was in force for less than two years. Considering the broad scope of the 2009 Amendment Act to Austria's anti-corruption legislation, the Working Group decided to engage in an exceptional additional review of Austria's legislation (Phase 1bis). Prior to these amendments, in October 2005, shortly after the Phase 2 on-site visit, the Austrian Parliament had also adopted legislation establishing general criminal liability of legal persons, including for bribery offences: the Austrian Federal Statute on the Responsibility of Entities for Criminal Offenses (*Verbandsverantwortlichkeitsgesetz, VbVG*) that entered into force on 1 January 2006.

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

³² The Federal Law Amending the Penal Code with regard to Corruption Offences 2009 ("Korruptionsstrafrechtsänderungsgesetz 2009"), published in the Federal Law Gazette Nr. I 98/2009, entered into force 1 September 2009

³³ Phase 1 evaluates the implementation of the Convention into Austria's legislation. Phase 2 evaluates Austria's enforcement of its legislation implementing the OECD Convention, assesses its application in the field and monitors Austria's compliance with the 1997 Revised Recommendation.

³⁴ The Act changing the Criminal Law 1998 ("Strafrechtsänderungsgesetz 1998"), published in the Federal Law Gazette on 20 August 1998 (BGBl. I 1998/153), entered into force 1 October 1998

³⁵ The Act changing the Criminal Law 2008 ("Strafrechtsänderungsgesetz 2008"), published in the Federal Law Gazette Nr. I 109/2007

Specific issues

1. The offence of active bribery of foreign public officials

1.1 Lack of autonomy of the offence

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

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

Definition of a foreign public official

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

Coverage of officials of public agencies and public enterprises

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

Act performed/advantage received

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

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

shall be interpreted to mean that the conduct does not constitute an offence as long as the advantage is not prohibited under the law of the foreign public official's country.

110. However it has been widely accepted in the Working Group on Bribery that Commentary 8 only provides an exception to the offence where the law of the foreign public official's country expressly permits or requires the advantage in question, in other words where the advantage is "due" in terms of the law. The Austrian exception is broader in the sense that it would apply even where the advantage is not expressly prohibited by the public service or organisation law of the foreign public official's country which implies that the onus of proof (that the advantage was forbidden under the foreign public official's law) rests with the Austrian prosecution which may be a serious deterrent to an effective prosecution of the foreign bribery acts.

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

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

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

2. Sanctions

Natural persons

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

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

Legal persons

115. The Working Group is also concerned about the level of the maximum fine available for legal person both in absolute terms and with regard to the higher level of the maximum fine available for natural persons. The maximum fine for foreign bribery that was EUR 700 000 at the time of phase 2 has been raised to EUR 1 300 000. This represents a significant increase but still does not reach the level of fines available for natural persons (where a fine shall be applied in lieu of prison). As in phase 2, the working Group also remain concerned that, the daily rate system retained under Austrian law being based on the income situation and financial performance of the company, the law does not provide for effective, proportionate and dissuasive criminal penalties for legal persons in cases where the legal person may not have generated profits over the relevant period. Moreover, the Working Group is of the view that it should be further assessed in Phase 3 how likely it is that this maximum sanction will be applied.

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

ANNEX 1 - FEDERAL LAW AMENDING THE PENAL CODE WITH REGARD TO CORRUPTION OFFENCES 2009³⁶

Other definitions Section 74 par 1 (4a):

(4a) public officer: anyone who

- a) is member of a domestic constitutional assembly, insofar as he votes in an election or ballot or otherwise acts or refrains from acting in the exercise of the duties determined in the internal rules of procedure,
- b) as an organ or employee discharges tasks of legislation, administration or justice for the federation, for a province (Bundesland), for an association of municipal corporations, for a commune, for a social insurance institution or its association, for another state or for an international organisation, with the exemption of public officials mentioned under a) when executing their duties,
- c) is otherwise authorised to perform official duties in fulfilment of the law for a body mentioned under b)
- d) acts as an organ of a legal entity or due to the employment status to a legal entity, which is under the review of the court of auditors, or a comparable institution of the Provinces (Länder) or a comparable international or foreign control institution and works by far predominantly for the administration of a body mentioned under b)

Corruption Section 304

- (1) A public official or an arbitrator, who demands, accepts or causes someone to promise an advantage for himself or a third person for performing or refraining from performing an official act in violation of his duties shall be punished by imprisonment of up to three years. Likewise to be punished is an expert assigned by the court or another administrative body for certain proceedings who demands, accepts or causes someone to promise an advantage for himself or a third person for delivering an incorrect evidence or expertise.
- (2) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euros shall be punished by imprisonment from six month up to five years, whereas whoever commits the offence with regard to a value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from one year up to ten years.

Acceptance of a benefit by a public official Section 305

- (1) A public official according to section 74 par 1 (4a subpar b to d) or an arbitrator who accepts or causes someone to promise an advantage contrary to an interdiction by public service or

³⁶ “Korruptionsstrafrechtsänderungsgesetz 2009”, published in the Federal Law Gazette Nr. I 98/2009, entered into force 1 September 2009

organization law for himself or a third person for performing or refraining from performing an official act in accordance with his duties shall be punished by imprisonment up to two years.

- (2) Likewise such a public official or arbitrator shall be punished who demands an advantage for himself or a third person for performing or refraining from performing an official act in accordance of his duties, unless that was explicitly permitted according to a public service law or organization law provision or by a public service approval.
- (3) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euros shall be punished by imprisonment up to three years, whereas whoever commits the offence with regard to a value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from six months up to five years.

Preparation of Corruption or of the Acceptance of a benefit by a public official Section 306

- (1) An Austrian public official or arbitrator, a public official or arbitrator of another Member State of the European Union or a Community official, who demands, accepts or causes someone to promise an advantage for himself or a third person with the intention to initiate the performance or refrainment from performing of an official act in violation of his duties in the future shall be punished by imprisonment up to two years.
- (2) Likewise a public official according to section 74 par 1 (4a subpar b to d) or an arbitrator shall be punished, who demands an advantage for himself or a third person with the intention to initiate the performance or refrainment from performing an official act in accordance with his duties in the future, unless that was explicitly permitted by public service law provision or institutional service provisions or a public service approval.
- (3) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euros shall be punished by imprisonment up to three years, whereas who commits the offence with regard to the value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from six month up to five years.

Bribery Section 307

- (1) Whoever offers, promises or gives an advantage to a public official or an arbitrator for himself or a third person for performing or refraining from performing an official act in violation of his duties, shall be punished by imprisonment up to three years. Likewise anybody is to be punished who offers, promises or gives an advantage to an expert (sec 304 par. 1) for himself or a third person for delivering an incorrect evidence or expertise.
- (2) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euros shall be punished by imprisonment from six month up to five years, whereas whoever commits the offence with regard to a value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from one year up to ten years.

Granting of a benefit to a public official Section 307a

- (1) Whoever offers, promises or gives an advantage to a public official according to section 74 par 1 (4a) subpar b to d or an arbitrator contrary to an interdiction by public service or organization law for himself or a third person for performing or refraining from performing an official act in accordance with his duties shall be punished by imprisonment of up to two years.

- (2) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euros shall be punished by imprisonment from six month up to five years, whereas whoever commits the offence with regard to a value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from one up to ten years.

Preparation of Bribery Section 307b

- (1) Who offers, promises or gives an advantage to an Austrian public official or arbitrator, a public official or arbitrator of another Member State of the European Union or a Community official for himself or a third person in order to initiate the performance or refrainment from performing of an official act in violation of such duties in the future shall be punished by imprisonment up to two years.
- (2) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euros shall be punished by imprisonment up to three years, whereas whoever commits the offence with regard to a value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from six month to five years.

Active Repentance Section 307c

- (1) With respect to criminal offences according to Section 304 to 307b anybody is not to be punished who abdicates to conduct or - in case more persons are involved -, impedes the conduct or averts the success before the authority (section 151 par 3) is informed about his guilt. And in any case, the person has to deposit the accepted advantage or the equivalent amount of money to the authority in the course of a self-denunciation.
- (2) Under the preconditions of par 1 the offender is also not to be punished if case where without his assistance the conduct or the success remains undone, he however unknowing that fact seriously makes an effort to impede the conduct or to avert the success.

Illicit Intervention Section 308

A person who knowingly either directly or indirectly exercises influence so that a public official or an arbitrator performs or refrain from performing an official duty by violating his duties and demands, accepts or causes someone to promise an advantage for himself or a third person is to be punished by imprisonment up to two years. Whoever commits the offence in regard of the value of the advantage exceeding 3.000 Euro shall be punished by imprisonment up to three years, whereas who conducts the acts with regard to a value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from six month up to five years.

ANNEX 2 - SECTION 153 OF THE AUSTRIAN PENAL CODE - BREACH OF TRUST

Section 153 - Breach of trust

(1) Whoever knowingly abuses the authority conferred to him by statute, official order or contract to dispose of property not belonging to him or to oblige this other person and causes damage to another person in this way, shall be liable to imprisonment for up to six months or a fine of up to 360 daily rates.

(2) Whoever causes a damage exceeding 3,000 Euros shall be liable to imprisonment for up to three years, whoever causes damage exceeding 50,000 Euros shall be liable to imprisonment from one to ten years.

Section 168d Bribery of servants or agents

Whoever offers, promises or gives an not insignificant advantage to a servant or agent of an enterprise for himself or a third person for the performing or refraining form performing of an legal act in violation of his duties, shall be punished by imprisonment up to two years.

Section 10 of the Unfair Competition Act - Bribery of Employees or Agents

(1) Any person who, in the course of business for purposes of competition, offers, promises or grants gifts or other benefits to an employee or agent of an enterprise in order to obtain, through the unfair conduct of the employee or agent, an advantage for him or a third party in the procurement of goods or services, shall be sentenced by the court to a prison term not exceeding three months or to a fine not exceeding 180 daily rates.

(2) The same penalty shall be imposed upon any employee or agent of an enterprise who, in the course of business, demands, permits to be promised or accepts gifts or other benefits, in return for providing another person through unfair conduct with competitive advantages in the procurement of goods or services.

(3) Paragraphs 1 and 2 shall not apply if the conduct is subject to the same or more severe penalties under other provisions.

(4) Prosecution shall only take place at the request of a person entitled to apply for an injunction under the first sentence of section 14.

ANNEX 3 - FEDERAL STATUTE ON RESPONSIBILITY OF ENTITIES FOR CRIMINAL OFFENCES³⁷

Chapter 1

Scope of Application and Definitions

Entities

Section 1.

(1) This Federal Statute regulates the conditions under which entities are responsible for criminal offences, the criminal penalties for such offences as well as the procedure according to which responsibility is ascertained and criminal penalties are imposed. For the purpose of this Federal Statute a criminal offence shall mean an act punishable by court under a federal statute or a provincial statute; however, this Federal Statute shall only apply to tax offences to the extent provided for in the Tax Offences Act, BGBl. [Federal Law Gazette] No. 129/1958.

(2) For the purpose of this statute entities shall mean corporations, registered partnerships [*Eingetragene Personengesellschaften*] and European Economic Interest Groupings.

(3) For the purpose of this statute the following shall not be entities:

1. a (deceased person's) estate;
2. the federal state, provinces and municipalities and other corporations to the extent they enforce laws;
3. recognised churches, religious societies and religious communities to the extent they are engaged in pastoral care.

Decision Makers and Staff

Section 2.

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

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

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

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

³⁷

(Verbandsverantwortlichkeitsgesetz - VbVG) Federal Law Gazette [BGBl.] I 2005/151. Amended by Federal Law, Federal Law Gazette [BGBl.] I 2007/112.

Chapter 2

Responsibility of Entities – Provisions relating to Substantive Law

Responsibility

Section 3.

- (1) Subject to the additional conditions defined in paragraphs 2 or 3 an entity shall be responsible for a criminal offence if
 1. the offence was committed for the benefit of the entity or
 2. duties of the entity have been neglected by such offence.
- (2) The entity shall be responsible for offences committed by a decision maker if the decision maker acted illegally and culpably.
- (3) The entity shall be responsible for criminal offences of staff if
 1. the facts and circumstances which correspond to the statutory definition of an offence have been realised in an illegal manner; the entity shall be responsible for an offence that requires wilful action only if a staff has acted with wilful intent, and for a criminal offence that requires negligent action only if a staff has failed to apply the due care required in the respective circumstances; and
 2. commission of the offence was made possible or considerably easier due to the fact that decision makers failed to apply the due and reasonable care required in the respective circumstances, in particular by omitting to take material technical, organisational or staff-related measures to prevent such offences.
- (4) Responsibility of an entity for an offence and criminal liability of decision makers or staff on grounds of the same offence shall not exclude each other.

Fine for the entity

Section 4.

- (1) If an entity is responsible for a criminal offence, a fine shall be imposed.
- (2) The fine shall be assessed in the form of daily rates. The fine shall amount to at least one daily rate.
- (3) The number of daily fines shall be up to 180
 - if the criminal penalty for the offence is a life sentence or imprisonment of up to twenty years, 155
 - if the criminal penalty for the offence is imprisonment of up to fifteen years, 130
 - if the criminal penalty for the offence is imprisonment of up to ten years, 100
 - if the criminal penalty for the offence is imprisonment of up to five years, 85
 - if the criminal penalty for the offence is imprisonment of up to three years, 70
 - if the criminal penalty for the offence is imprisonment of up to two years, 55
 - if the criminal penalty for the offence is imprisonment of up to one year, 40
 - in all other cases.
- (4) The daily rate shall be assessed on the basis of the income situation of the entity by taking into account its other financial performance. The daily rate shall be equal to one 360th of the yearly proceeds or exceed or fall short of such amount by not more than one third; however, the daily rate shall amount to not less than 50 euros and not more than 10.000 euros. If the association serves charitable, humanitarian or church purposes (Sections 34 to 47 Fiscal Code, BGBl. No. 194/1961) or is not profit-oriented, the daily rate shall be fixed at a minimum of 2 euros and a maximum of 500 euros.

Assessment of the Fine for the Entity

Section 5.

- (1) When fixing the number of daily rates the court shall weigh aggravating causes and mitigating causes to the extent they have not already been used for fixing the amount of the threatened fine.
- (2) The number shall, in particular, be the higher
 1. the larger the damage or threat for which the entity is responsible;
 2. the larger the benefit for the entity obtained from the criminal offence;
 3. the more illegal conduct of staff was tolerated or favoured.

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

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

Conditional Remission of the Fine

Section 6.

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

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

Conditional Remission of Part of the Fine

Section 7. If an entity is sentenced to a fine and if the conditions of Section 6 are met with respect to part of the fine, such part, but at least one third and not more than five sixth thereof, shall be conditionally remitted by fixing a probationary period of a minimum of one and a maximum of three years, if applicable by giving instructions (Section 8).

Instructions

Section 8.

(1) If a fine is conditionally remitted in whole or in part, the court may give instructions to the entity.

(2) The entity shall be instructed to endeavour to make good the damage caused by the offence unless this has been done already.

(3) For the rest, the entity may be instructed to take technical, organisational or staff-related measures to counteract commission of further offences for which the association would be responsible (Section 3).

Revocation of Conditional Remission of the Fine

Section 9.

(1) If the entity is convicted on grounds of responsibility for an offence committed during the probationary period, the court shall revoke the conditional remission of the fine and enforce the fine or part of the fine if this appears to be necessary in view of the repeated conviction in addition to the same to prevent commission of further offences for which the entity would be responsible (Section 3). An offence that is committed during the period between the decision of the court of first instance and non-appealability of the decision on conditional remission shall be deemed equivalent to an offence committed during the probationary period.

(2) If the entity fails to comply with an instruction despite a formal warning, the court shall revoke the conditional remission and enforce the fine or part of the fine if this appears to be necessary in the circumstances to prevent commission of further offences for which the entity would be responsible (Section 3).

(3) If in the cases described in paragraphs 1 and 2 the conditional remission is not revoked, the court may extend the probationary period to a maximum of five years and give new instructions.

(4) If, applying of Section 31 StGB [Criminal Code], the entity is subsequently sentenced to an additional fine, the court may revoke the conditional remission of the fine in whole or in part and enforce the fine or part of the fine to the extent that the fines would not have been remitted conditionally in case of concurrent conviction. If the conditional remission is not revoked, each of the probationary periods which coincide shall last until the end of the probationary period that ends last, but not longer than five years.

Legal Succession

Section 10.

(1) If the rights and obligations of the entity are transferred to another entity by way of universal succession, the legal consequences provided for in this Federal Statute shall apply to the legal successor. Legal consequences imposed on the legal predecessor shall also apply to the legal successor.

(2) Individual succession shall be deemed equivalent to universal succession if more or less the same ownership structure of the entity exists and the operation or activity is more or less continued.

(3) If there is more than one legal successor, a fine imposed on the legal predecessor may be enforced vis-à-vis any legal successor. Other legal consequences may be attributed to individual legal successors to the extent this is in line with their area of activities.

Exclusion of Recourse

Section 11. For criminal penalties and legal consequences affecting the entity on the basis of this Federal Statute there shall be no right of recourse to decision makers or staff.

Applicability of General Criminal Laws

Section 12.

(1) For the rest, the general criminal laws shall also apply to entities unless they exclusively apply to natural persons.

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

(3) Enforceability shall become statute-barred after fifteen years

- if the sentence is more than 100 daily rates,

ten years

- if the sentence is a fine of more than 50 but not more than 100 daily rates, and

five years

- in all other cases.

Chapter 3

Proceedings against Entities

Initiation of Proceedings

Section 13.

(1) If, on the basis of certain fact, the suspicion arises that an entity might be responsible for a criminal offence that is to be prosecuted *ex officio* (Section 3), the public prosecutor shall initiate investigations to determine such responsibility or file a petition for imposition of a fine with the court. In the proceedings the entity shall have the rights of an accused (prosecuted entity).

(2) If a criminal offence has to be prosecuted only at the request of the person harmed, Section 71 of the Code of Criminal Procedure 1975 (StPO), BGBl. [Federal Law Gazette] No. 631/1975, shall apply.

Applicability of the Provisions on Criminal Proceedings

Section 14. (1) The general provisions on criminal proceedings shall apply to proceedings based on this Federal Statute unless they are exclusively applicable to natural persons and nothing else results from the following provisions.

(2) Within the meaning of the *Gerichtsorganisationsgesetz* [Statute on the Organisation of the Courts], the *Staatsanwaltschaftsgesetz* [Statute on the Department of Public Prosecution] and the *Geschäftsordnung für die Gerichte I. und II. Instanz* [Internal Rules of Procedure for the Court of First and Second Instance], proceedings against entities are considered criminal matters.

(3) The terms "*strafbare Handlung*" [punishable act], "*Vergehen*" [misdemeanour] and "*Verbrechen*" [felony] used in paragraphs 1 and 2 shall be understood as reference to criminal offences for which the entity might be responsible; the terms "*Beschuldiger*" [defendant] and "*Angeklagter*" [accused] shall be understood as reference to the prosecuted entity (Section 13); the term "penalty" shall be understood as reference to the fine.

Jurisdiction

Section 15. (

1) Jurisdiction of the public prosecutor or a court over the natural person suspected of a criminal offence shall also establish jurisdiction over the proceedings against the prosecuted entity, whereas preliminary proceedings shall be conducted jointly by one public prosecutor and the trial shall be conducted jointly by one court (Sections 26, 37 StPO). In the proceedings against the natural person the entity shall also have the rights of a defendant.

(2) Under the conditions laid down in Section 27 StPO separate proceedings are admissible. In this case, Sections 25 para. 2 and 36 para. 3 StPO shall apply subject to the proviso that jurisdiction depends on the registered office of the prosecuted entity and, if there is no registered office in Austria, on the operation or establishment. If in this way Austrian jurisdiction cannot be established, jurisdiction for preliminary proceedings shall be located at the Public Prosecutor's office of Vienna [*Staatsanwaltschaft Wien*] and for trial at the Provincial Court for Criminal Matters Vienna [*Landesgericht für Strafsachen Wien*] or the District Court Vienna Innere Stadt [*Bezirksgericht Innere Stadt Wien*].

Service of Process and Necessary Defence

Section 16.

(1) Notifications that preliminary proceedings are being conducted (Section 50 StPO), applications for imposition of a fine, summons to a trial, sentences *in absentia* as well as notifications and communications under Sections 200 para. 4, 201 paras. 1 and 4 and 203 paras. 1 and 3 StPO shall be served on the prosecuted entity itself to the personal attention of a member of the body authorised to represent the entity vis-à-vis third parties.

(2) If all members of the body authorised to represent the entity vis-à-vis third parties are themselves suspected of having committed the criminal offence, the court shall provide the prosecuted entity with a defence counsel *ex officio*. The defence counsel shall also take the steps required for a proper representation of the entity, such as notification or appointment of suitable bodies, owners or members. The appointment shall end upon intervention by a representative or chosen defence counsel.

(3) If process was effectively served on a prosecuted entity, in the area of application of Section 10 also notification of the legal successor shall be considered effected.

Examination as Defendants

Section 17.

(1) The decision makers of the entity as well as those staff members who are suspected of having committed the criminal offence or have already been convicted for the criminal offence shall be summoned and examined as defendants. Section 455 paras. 2 and 3 StPO shall be applied.

(2) The decision maker or staff member shall be informed about the criminal offence they are accused of prior to commencement of the examination. Thereupon he shall be advised that he has the right to make a

statement on the matter or not to make a statement and beforehand to consult with his defence counsel. He shall also be advised that his statement will serve as defence for himself and the prosecuted association but that it may also be used as evidence against him or the entity.

Discretion regarding Prosecution

Section 18.

(1) The public prosecutor may refrain from or abandon prosecution of an entity if, when weighing the seriousness of the offence, the weight of the 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 appears to be unnecessary. This shall, in particular, be the case if investigations or requests for prosecution would involve an enormous amount of time and money which would obviously be disproportionate to the importance of the matter or to the sanctions to be expected in case of a conviction.

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

1. because of a danger originating from the entity of commission of an offence with serious consequences for which the entity might be responsible,
2. to counteract commission of offences in connection with the activity of other entities, or
3. because of any other particular public interest.

Abandonment of Prosecution (Alternative Measures)

Section 19.

1) If it has been ascertained on the basis of facts and circumstances that have been sufficiently clarified that the closing of the proceedings under Sections 190 to 192 StPO or a procedure as laid down in Section 18 is out of the question, and if the conditions stated in Sections 198 para 2 items 1 and 3 StPO have been met, the public prosecutor shall abandon prosecution of a prosecuted entity on grounds of responsibility for a criminal offence if the entity makes good the damage caused by the offence and eliminates other consequences of the offence and gives immediate evidence thereof and if, in view of

1. payment of money in an amount of up to 50 daily rates plus the costs of the proceedings to be reimbursed in case of a conviction (Section 200 StPO), or
2. a probationary period of up to three years to be determined, to the extent possible and expedient in combination with the expressly declared willingness of the entity to take one or several of the measures listed in Section 8 para 3 (Section 203 StPO), or
3. the express statement of the entity to render certain charitable services free of charge during a period to be determined of not more than six months (Section 202 StPO),

imposition of a fine does not appear to be necessary to counteract commission of criminal offences for which the entity can be held responsible (Section 3) and commission of criminal offences in connection with the activity of other entities. Section 202 para 1 StPO shall not be applicable.

(2) After a motion for imposition of a fine has been deposited for commission of an offence which is prosecuted ex officio, the court shall apply paragraph 1 *mutatis mutandis* and, if the conditions described therein are met (Section 199 StPO), discontinue the proceedings against the entity by a decision, until the end of the trial.

Interim Injunctions

Section 20. If there is a strong suspicion that a prosecuted entity is responsible for a certain criminal offence and if it is to be expected that a fine will be imposed, the court shall, upon a motion of the public prosecutor, order seizure under Section 109 item 2 and 115 para. 1 item 3 StPO to secure the fine, if and to the extent that it has to be feared on the basis of certain facts that otherwise execution would be put at risk or made much more difficult. For the rest, Section 105 paras. 4 to 6 StPO shall apply.

Motion for Imposition of a Fine

Section 21.

(1) The main proceedings shall be initiated by a motion to impose a fine, to which in proceedings before a provincial court in the form of a court with a jury [*Geschworenengericht*] or in the form of a court consisting of one professional judge and two lay assessors [*Schöffengericht*] the provisions on bills of indictment [*Anklageschrift*] shall be applied and in proceedings before a provincial court in the form of a single judge or before a district court the provisions on demands for prosecution [*Strafantrag*] shall be applied. In any case, however, the facts and circumstances leading to responsibility of the entity shall be summarised and assessed (Section 3).

(2) The motion for imposition of a fine shall be combined with the indictment or demand for prosecution against natural persons if the proceedings can be conducted jointly (Section 15 para 1).

(3) If the proceedings against the prosecuted entity cannot be conducted jointly with those against the natural person, the public prosecutor shall file a separate motion for imposition of a fine. The court shall decide on such motion by sentence in separate proceedings after an oral hearing.

Trial and Sentence

Section 22.

(1) If the trial is held against the prosecuted entity and a natural person jointly (Section 15 para 1), the court shall first, after evidence has been taken for both proceedings together, allow only the final addresses concerning the natural person and then pronounce the judgment [verdict and sentence] regarding the natural person.

(2) In the event of a conviction, in the continued trial final addresses shall be made with regard to the conditions of a responsibility on the part of the entity and the facts relevant to assessment of a fine and determination of other criminal penalties. Thereafter the court shall pronounce the judgment concerning the entity.

(3) In the event of an acquittal the public prosecutor shall, within three days, declare whether a decision should be made on imposition of a fine on the entity in separate proceedings; otherwise the right of prosecution shall be lost. If the public prosecutor makes such a declaration, the court shall proceed as laid down in paragraph 2.

(4) In the event of a conviction the judgment concerning the entity shall state the criminal offence for which the entity is found to be responsible and on which grounds; otherwise the judgment shall be void; for the rest, Section 260 para 1 items 3 to 5 StPO shall apply.

(5) The court-sealed copy of the judgment shall have the contents listed in Section 270 para 2 StPO and in para 4.

Trial and Sentence in absentia

Section 23. If the prosecuted entity is not represented at the trial, the court may conduct the trial, take evidence and render the judgment, however only if the summons to the trial was served effectively and the summons stated such legal consequences; otherwise the proceedings shall be void. In such a case the judgment shall be served to the entity in form of a written copy.

Appeal

Section 24. The appeals and remedies provided for against judgments in the Code of Criminal Procedure (StPO) shall be available against judgments rendered against an entity, also in case of separate proceedings.

Proceedings in case of a Revocation of Conditional Remission

Section 25. Section 494a StPO shall be applied to a revocation of a conditional remission as laid down in Section 9 para 1 subject to the proviso that the district court is the court having jurisdiction only if the fine or part thereof does not exceed 55 daily rates; a single judge at a provincial court shall have jurisdiction only if the fine or part thereof does not exceed 100 daily rates.

Notification of the Competent Administrative or Supervisory Authority

Section 26.

(1) The public prosecutor shall notify the administrative or supervisory authority competent with respect to the area of activity concerned preliminary proceedings as well as closing thereof and abandon of prosecution (Sections 194 and 208 para. 4 StPO); for the rest, the court shall notify the authority discontinuation of proceedings and send it a copy of the decision by which the proceedings are discontinued or of the judgment.

(2) The public prosecutor or the court may ask the authority (para 1) to co-operate in monitoring compliance with an instruction or measure as laid down in Section 19 para 1 item 2.

Enforcement of Fines

Section 27.

(1) Upon entry into force of the decision the court shall request the entity in writing to pay the fine within 14 days, failing which the fine would be collected by statutory enforcement. If the entity fails to comply with such request, collection by court shall be effected according to the Statute on Court Collection 1962 [*Gerichtliches Einbringungsgesetz 1962*].

(2) If it is foreseeable that the entity will make good the results of the offence and that, in this way, the conditions for subsequent reduction of the fine will be fulfilled, the presiding judge may, upon motion, postpone payment of the fine in whole or in part for a period of not more than six months.

(3) If immediate payment of the fine constituted inequitable hardship for the entity, the presiding judge may, upon motion, grant a reasonable respite by instalments, with the last instalment having to be paid after two years and all outstanding partial amounts becoming due if the entity is in delay of payment of two instalments.

Chapter 4 - Final Provisions - Entry into Force

Section 28.

(1) This Federal Statute shall enter into force on 1 January 2006.

(2) The provisions in Sections 1 para. 2, 13 para. 2, 14 para 3, 15 paras. 1 and 2, 16 para. 1, 17 para. 1, 19 para. 1 and 2, 20, 21 para. 2, 23, 25 and 25 paras. 1 and 2 as amended by Federal Law, Federal Law Gazette [BGBl.] I 2007/112, shall enter into force on 1 January 2008.

References

Section 29.

(1) References in this Statute to other statutory provisions of the federal state shall be references to the most recent version.

(2) If names relating to persons are only stated in masculine gender when used herein, they refer to women and men alike. When applying the name to certain persons the relevant gender-specific form shall be used.

Enforcement

Section 30. The Federal Minister of Justice shall be in charge of enforcing this Federal Statute.