DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

AUSTRIA: PHASE 2

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

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 16 February 2006.

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EXECUTIVE SUMMARY

The Phase 2 Report on Austria by the Working Group on Bribery evaluates Austria's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Overall, the Working Group finds that Austria has engaged in significant legislative efforts to implement the Convention, but that stronger efforts are necessary to address the lack of awareness of the Convention and the offence of foreign bribery both in the public and the private sectors, which impacts directly on the proper implementation of the Convention. The Working Group is seriously concerned about the absence of any foreign bribery investigations in Austria since the adoption of the foreign bribery legislation in 1998, including with regard to allegations in the public domain.

With regard to liability for foreign bribery, the Working Group recommends that certain issues be addressed including ensuring that the law also applies to bribes to foreign public officials designed to obtain acts outside of their scope of competence. The Working Group also recommends that the available criminal sanctions for foreign bribery, particularly for more serious cases, should be increased.

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. 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 a review of the law as applied in practice as is contemplated in the Phase 2 process. Accordingly, the Working Group decided that a review of the law's application should occur at a date to be determined once sufficient practice exists. In addition, the Working Group has recommended that Austria take appropriate measures to ensure that legal persons that engage in foreign bribery are subject to effective, proportion and dissuasive penalties in all cases and the Group will follow up with regard to the application of the law to cases involving bribes by agents acting on behalf of the company.

The Report also highlights a number of positive aspects in Austria's fight against foreign bribery. For instance, the law on confiscation has been strengthened. Austria has also adopted a law that will provide for mandatory exclusion from participation in public contracts of a candidate or tenderer who has been the subject of a final judgement for corruption. As the Report also notes, Austria has also responded to concerns about its trade promotion agencies by indicating that it will engage in awareness raising efforts directed at employees of its principal trade promotion agency, as well as make information available to Austrian businesses through that agency.

The Report, which reflects findings of experts from Greece and Luxembourg, was adopted by the OECD Working Group along with recommendations. In addition to the expected additional review of corporate liability referred to above, regular Phase 2 follow up procedures will occur: within one year of the Working Group's approval of the Phase 2 Report, Austria will report to the Working Group on the steps that it will have taken or plans to take to implement the Working Group's recommendations, with a further report in writing within two years. The Report is based on the laws, regulations and other materials supplied by Austria, and information obtained by the evaluation team during its on-site visit to Vienna. During the five-day on-site visit in June/July 2005, the evaluation team met with representatives of Austrian government agencies, the private sector, civil society and the media. A list of these bodies is set out in an annex to the Report.

A. INTRODUCTION

1. This report 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. It reflects the Austrian authorities' written responses to the general and supplementary Phase 2 questionnaires (the "Responses" and "Supp. Responses", respectively), interviews with government experts, representatives of the business community, lawyers, accounting professionals, financial intermediaries and representatives of civil society encountered during the on-site visit from 27 June to 1 July 2005 (see the list of institutions encountered in Annex 1), and review of relevant legislation and independent analyses conducted by the Lead Examiners and the Secretariat.[1]

2. The report is structured as follows. The Introduction in Part A reviews Austria's role in the international economy and provides an overview of corruption trends. Part B focuses on the prevention and detection of foreign bribery and discusses ways to enhance their effectiveness. In a similar manner, Part C deals with the investigation, prosecution and sanctioning of foreign bribery and related offences. This part also examines the recent legislative developments in Austria that impact on the implementation of the Convention and the Revised Recommendation. Part D sets forth the recommendations of the Working Group and the issues that it has identified for follow-up. A list of the principal acronyms and abbreviations used in the report is included in Annex 2. Translations of the principal legislative and other legal provisions are reproduced in Annex 3.

1. Austria's participation in the international economy[2]

3. Austria's economy is highly integrated internationally, with one out of three Austrian jobs depending on exports. Germany remains the destination of a higher share of total export value than Austria's seven next most important partners combined (Italy, USA, Switzerland, France, U.K., Hungary and the Czech Republic). In recent years, Austrian exports have expanded rapidly in Central and Eastern Europe (CEE). In 2003, 18.5% of total Austrian exports went to thirteen CEE countries, a fourfold share increase from the early 90s.

4. Austria is also a major source of investment in CEE countries. About 60% of Austria's foreign direct investment was directed toward CEE in 2002 and Austrian companies have set up more than 15 000 subsidiaries, representative offices and joint ventures in CEE countries. There are also more than 1 000

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1 The examining team was composed of lead examiners from Greece: Dr. Maria Gavouneli, Lecturer in International Law, University of Athens, and Advisor, Ministry of Justice, and Mr. Constantinos Papageorgiou, Special Investigations Service (SDOE), Ministry of Economy and Finance; lead examiners from Luxembourg: Mr. Luc Reding of the Directorate for Public Safety and Law Enforcement of the Ministry of Justice, and Mr. Lucien Schiltz of the Grand Ducal Police; and members of the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs at the OECD Secretariat: Mr. David Gaukrodger, Principal Administrator – Coordinator Phase 2 Examination of Austria; Mr. Joachim Pohl, Legal Expert; Mr. Sébastien Lanthier, Consultant. The meetings during the on-site visit, which were in English or with occasional consecutive interpretation, took place at the offices of the Ministry of Justice in Vienna.

2 Economic data are drawn from a variety of sources, including OECD (2005), *OECD Factbook 2005*, OECD; OECD (2005), *Development Co-operation Report 2004*, Volume 6, No.1, OECD; Statistik Austria, *Austrian foreign trade in the year 2004*, Updated 05.07.2005 Huber-Bachmann: http://www.statistik.at/englisch/results/business/trade_txt.shtml; Economist Intelligence Unit (November 2005), *Country Report – Austria;* Foreign Trade Austria (2004), *Austria – Gateway to Eastern Europe II*, Austrian Federal Economic Chamber; OECD (2003), *Economic Survey: Austria*, OECD; Economic Policy Department (2003), *Austria: An Overview*, Austrian Federal Economic Chamber.

foreign and international firms coordinating their CEE businesses from bases in Austria.[3] Many of these companies have important dealings with Eastern and South-eastern European governments through privatisation and public procurement, notably in the telecommunication, information technology, energy (including oil) and transportation sectors.

5. Small and medium-sized enterprises (SMEs) in industry and trade are "the pillars of growth and employment in the Austrian economy".[4] According to a recent business survey, Austria is the European country with the highest level of exporting SMEs (58%).[5] Of these, 82% counted EU-15 among their export destinations, while as many as 52% cited having Eastern Europe and Russia as export destinations. Only 160 enterprises out of approximately 332 000 have more than 1 000 employees.

2. Overview of corruption trends

6. Austria adopted its foreign bribery legislation in 1998. The lead examiners are concerned that at the time of the on-site visit there had been no investigations or prosecutions of foreign bribery in Austria since the legislation entered into force. Given the extent of Austria's foreign economic relations and role in the international economy, the examiners consider that allegations should normally be expected to surface and be investigated with some regularity. As described further below, a number of interlocutors during the on-site visit had few doubts that foreign bribery remained a serious problem, particularly in certain markets in which Austrian companies are very active; as a general matter, the lead examiners invite the Austrian authorities to examine the effectiveness of their detection and enforcement systems, and to re-examine the reasons for the absence of investigative activity to date.

7. In October 2005, after the on-site visit, the Austrian Parliament adopted legislation introducing the criminal liability of legal persons, including for foreign bribery, and the law will enter into effect on 1 January 2006. The legislation is discussed below, notably in the sections on the liability and sanctions applicable to legal persons.

8. Austria has signed, but not yet ratified, both the Council of Europe Civil and Criminal Law Conventions on Corruption. During the on-site visit, representatives of the Ministry of Justice indicated that they expect ratification of those Conventions later in 2005, which would also result in Austria becoming a member of GRECO. Austria also played an active role during the negotiation of the United Nations Convention against Corruption and in particular with respect to its provisions on the prevention of corruption. Austria ratified the UN Convention in November 2005 and is a strong proponent of active monitoring under that Convention. Austrian authorities have also pointed out that the fight against corruption would be high on the agenda of the upcoming Austrian EU-presidency beginning 1 January 2006, but representatives at the on-site visit indicated that foreign bribery is not currently expected to be a priority in this regard.[6]

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3 Austrian Business Agency (2004), Austria: The Ideal Hub for Central and Eastern Europe.

4 Dr. Klaus Liebscher, Governor of the Austrian National Bank, Speech given at the International Bankers Forum, Luxembourg (4 September 2002).

5 Grant Thornton, European Business Survey 2002.

6 On the EU-level, Austria has signed, ratified and implemented the First Protocol to the Convention on the Protection of the Communities' Financial Interests and the Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union. It has not yet ratified the Second Protocol to the Convention on the Protection of the Communities' Financial Interests.

9. Austria ranked 10th out of 158 countries in 2005 in Transparency International's Corruption Perception Index.[7] It also ranked 4th in the 2002 Bribe Payers Index although few of the countries surveyed are significant trading partners with Austria.[8] According to parliamentarians and journalists met during the on-site visit, consciousness of the need to address the problem of corruption at the domestic level has been improving steadily in the past 20 years. The institutional framework for prevention and repression has been strengthened; and shady transactions once tolerated as "*Freunderlwirtschaft*", literally business between good friends, are now being actively fought and condemned. The fight against domestic corruption has thus gained importance on the Austrian political agenda, but the fight against the bribery of foreign public officials has not to date been an object of particular attention.

B. PREVENTION AND DETECTION

1. Prevention of foreign bribery and related offences

10. Awareness about the foreign bribery offence and training for all relevant personnel and entities are crucial elements in reaching the goals of the Convention and Revised Recommendation. The Austrian Responses to the Phase 2 questionnaire (§ 9.2) identify the importance of prevention and education in the fight against foreign bribery and note that problems may arise from the lack of public awareness in this field.

a) Government and public agencies in general

11. The Bureau of Internal Affairs (BIA) is Austria's central government body for prevention, awareness raising and training in anti-corruption matters. Created in 2000 as part of the Ministry of the Interior as an independent agency to address police misconduct, its jurisdiction has been significantly extended although it does not cover foreign bribery.[9] It has engaged in a wide range of awareness raising and preventive efforts with regard to corruption. However, as its name suggests, the BIA's efforts are focussed on preventing (as well as investigating) domestic corruption. There is no similar agency charged with prevention and awareness raising with regard to foreign bribery, although after the on-site visit, the Austrian authorities claimed that the Federal Criminal Investigation Office (BKA) may have competence to exercise this task.

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7 The Corruption Perception Index (CPI) provides data on perception of the "extent of corruption" within countries. It focuses on domestic corruption and is in fact a "poll of polls"; a composite index aggregating the results of various selected international surveys and experts scorecards. The source data used to create the composite index reflect the perceptions of non-resident experts, non-resident business leaders from developing countries and resident business leaders evaluating their own country. The questions used by the sources relate the "extent of corruption" to the perceived frequency of bribe payments and/or overall size of bribes in the public and political sectors.

8 The Transparency International Bribe Payers Index (BPI) ranks leading exporting countries in terms of the degree to which international companies with their headquarters in those countries are perceived to be likely to pay bribes to senior public officials in key emerging market economies. The BPI 2002 was conducted by Gallup International Association in 15 emerging market economies, via a total of 835 interviews. Of the 15 countries, only Poland, Hungary and Russia have substantial trade relations with Austria.

9 In the Responses (§ 2.1) and according to the BIA representative at the on-site visit, the BIA has a broad mandate with regard to corruption in the Austrian public sector. After the on-site visit, the Austrian authorities indicated that the BIA's jurisdiction is limited to corruption cases involving law enforcement organisations or other officials who perform tasks in connection with security.

12. While many ministries reported efforts to fight domestic corruption and while public officials met by the examining team were aware of bribery issues, particularly in the domestic sphere, there have been few if any efforts in the Austrian government directed at raising awareness about or preventing foreign bribery. Many major ministries, including the Ministry of Economics and Labour, the Ministry of Foreign Affairs (MFA), the Ministry of Finance, the tax administration and the Financial Market Authority (FMA) have not taken any specific measures to fight foreign bribery, either for their own staff or their main interlocutors in Austrian society. In the development cooperation area, as discussed further below, the newly-formed Austrian Development Agency is in the process of adopting an anti-corruption policy that is expected to address foreign bribery.[10]

b) Trade promotion

13. The Austrian Trade Agency (AWO) of the Austrian Federal Economic Chamber (WKÖ) is the most important trade promotion agency in Austria.[11] The AWO has a network of 70 offices situated abroad whose mission is to help Austrian companies to find new contacts and develop existing business. Its trade commissioners provide advice to Austrian businesses and put them in contact with potential agents, importers and co-operation partners. Although business representatives and others recognized that the AWO is strategically placed to assist Austrian businesses in prevention of foreign bribery, the AWO has not sought to raise awareness about the offence of foreign bribery or to prevent bribery by providing assistance to companies. During the on-site visit, AWO agents indicated that their role was to provide information about foreign rather than Austrian laws and that their focus is on using their expertise to help Austrian businesses conduct activities abroad. Moreover, awareness of the foreign bribery offence within the AWO itself appears to be very poor: an AWO representative recognized that he was not aware of the consequences under Austrian law of bribery abroad. Vigorous action may required to improve awareness in this area; an agent from the WKÖ indicated that the problem with business sector awareness raising and prevention is that "no one wants to speak about" the foreign bribery issue.

14. The Ministry of Economics and Labour, through its Division I/3 (Economic Chamber; Chartered Accountants, Tax Advisors and Licensed Bookkeepers; Architects and Chartered Engineering Consultants), acts as the supervising body for the WKÖ/AWO. Representatives from the Ministry appeared to have little awareness of their potential role in the prevention of foreign bribery, and considered it to be an issue for the WKÖ/AWO. The absence of efforts to raise awareness or prevent foreign bribery was explained by the fact that the issue is "not a priority for the Ministry" or that it is not an issue for Austrian businesses "since Austrian businesses are mostly SMEs". Proposals by the Austrian branch of an international business organisation to work with the Ministry of Economics and Labour on issues directly related to the Convention, including proposals to develop seminars and workshops for businesses, have so far no led to concrete results, allegedly due to budget constraints; when questioned, however, the official replied that amending the budget to provide for anti-corruption initiatives was not a priority. After the on-site visit, the Austrian authorities indicated that the Ministry had published a brochure about the Guidelines for Multinational Enterprises which include provisions referring to foreign bribery.

15. A representative of the Ministry of Economics and Labour indicated that there are a total of 26 export-promotion instruments and initiatives with active implication by the Ministry. However, it does not

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[10] The specific issue of training for the law enforcement agencies is examined below in the section on investigative and prosecutorial bodies.

[11] The WKÖ is the legal representative of the entire Austrian business community. Membership is compulsory by statute for all Austrian companies (around 332 000 members). It is self-financed (although most funds come from the compulsory membership dues) and is registered as a public corporation. Among its roles, it is responsible by statute for the promotion of international trade and carries out this activity through the AWO. The MFA has no significant role with regard to trade promotion.

appear that efforts to fight foreign bribery have been undertaken in this context either. For example, during the on-site visit, the examiners met with agents from the "Go-international" initiative, which uses Austrian and foreign based export advisers to help SMEs take their first steps into new markets and help in establishing initial contacts with foreign agents. While these export advisers (currently 60) are self-employed, the Ministry and the WKÖ oversee their accreditation. There have been no efforts to date for awareness raising or prevention of foreign bribery in this context.

16. Austrian trade promotion also operates through public financial support for the internationalisation of Austrian businesses. One important agency for such a task is the *ERP-Fonds*, which is part of a government-run and funded bank, *Austria Wirtschaftsservice* (AWS). The *ERP-Fonds* lends approximately EUR 500 million a year in the form of soft loans, mostly to SMEs, for international expansion and direct investment particularly in CEE countries. The *ERP-Fonds* is a potentially important strategic actor in the fight against foreign bribery – it provides general information and support as well as loans to SMEs operating in sensitive environments – but it appears to have no strategy for awareness raising and prevention of foreign bribery among its clients.

17. Following the on-site visit, the Austrian authorities indicated that the WKÖ and AWO have acknowledged that the issue of foreign bribery needs to be dealt with seriously. Measures to be implemented shortly include: the production of brochures for export related events organized by the AWO, the production and circulation of information and guidelines to all relevant staff of the AWO, amendments to the AWO internal guidelines to address the main issues and problems of foreign bribery, the inclusion of information about foreign bribery and its consequences (with a link to the corresponding OECD website) in all country reports published by the AWO, and posting information about foreign bribery and the Convention on AWO's website. The examiners encourage the authorities to include concrete examples of the application of the law in their brochures, and to include foreign bribery issues in training for staff.

Commentary:

The lead examiners recommend that Austria increase its efforts to raise the level of general awareness of the foreign bribery offence and the Convention. Given the major role played by the AWO in promoting foreign trade and advising Austrian companies, the examiners welcome the planned future action in this regard by the WKÖ and AWO. They recommend that the Austrian authorities ensure the development of the WKÖ and the AWO into effective actors in the fight against foreign bribery. The examiners further recommend that the Austrian authorities also make full use of the strategic position of the Ministry of Economics and Labour as a participant in numerous export promotion initiatives to improve awareness and to promote measures to prevent foreign bribery.

c) Export credit agencies

18. In accordance with the OECD Action Statement on Bribery and Officially Supported Export Credits, Austria's main official export credit agency, the OeKB (*Oesterreichische Kontrollbank*), informs all applicants for support that bribery of a foreign public official is a criminal offence punishable in an Austrian court, and requires from each applicant a formal declaration that no bribery payments were made in relation to the contract for which support is requested. Trade union representatives met during the on-site visit referred to a bill currently before Parliament relating to the export credit system and noted that their proposals to explicitly link the availability of support to broad requirements of corporate social responsibility were not included in the bill.

19. The Austrian export credit system does not use any fixed criteria in the assessment of bribery risks and relies on the judgement of employees to assess whether, for example, a particular commission

rate is excessive. The level of a commission is assessed against standard business practice, but OeKB representatives indicated that they do not assess bribery risks against identified risk factors such as specific fact patterns, sensitive markets, or particular countries or individuals.[12] Actions by the OeKB are also discretionary where bribery issues arise after support has been given. OeKB staff indicated that further questioning is conducted upon presentation of a claim for indemnification. Regardless of the circumstances, however, no particular action is mandated. No practice exists in this field which could provide guidance to staff members. Other than actions taken around 2000 to implement the OECD Action Statement, no specific awareness raising activities have been carried out.

20. The OeKB has two subsidiaries that provide export credit for their own account. The first, *OeKB Versicherung AG*, created 1st January 2005, is wholly owned by the OeKB and provides short term export credits (less than two years) in non-OECD countries. The second, *Export-Fonds GmbH*, created in 1950, is 70% owned by the OeKB and 30% owned by the WKÖ. It specialises in export credit and financing for Austrian SMEs. Although these two bodies are well-placed to help prevent foreign bribery, they do not appear to engage in any anti-corruption efforts and do not include anti-corruption clauses in their contracts.

Commentary:

The examiners recommend that the Austrian authorities ensure that where Austrian export credit and export support agencies have reasonable grounds for suspecting that a foreign bribery offence has been committed, export support will be refused, including though the adoption of criteria for assessment of bribery risks and reinforced due diligence. The examiners recommend that Austrian authorities take specific measures in order to ensure that all relevant personnel is aware of specific fact patterns that suggest risks of foreign bribery, and treat such situations appropriately. Austria should also ensure that preventive anti-bribery clauses are applied by subsidiaries of OeKB.

d) Preventive organisational measures by business, business organisations and the professions

21. Large firms in Austria have considered the risks of bribery in foreign markets and have set up systems (of varying comprehensiveness) in an attempt to keep their employees from committing bribery offences. Measures in place include codes of conduct and anti-corruption clauses in contracts with foreign parties. However, management and monitoring of outside agents for bribery risks appeared to be somewhat lax; company representatives did not appear to be fully aware of the need to engage in due diligence with regard to the selection and use of outside agents and appeared to consider that companies have little ability to supervise them. For most of these firms, which have many employees and operations outside Austria, their policies in this area seem principally to take account of the obligations imposed in countries other than Austria and the risk that the firm or its executive bodies will incur criminal or civil liability in those countries, as well as the potential impact of bribery allegations on the firm's reputation. During the on-site visit, representatives of large firms noted that incentives to adapt to evolving international standards are strong because of the pressure building from institutional investors or due to the requirements of foreign stock exchanges. In implementing prevention policies, such firms generally try to adopt uniform, group-wide standards rather than tailor them to each country's legislation.

22. Representatives of a number of SMEs frankly recognized that foreign bribery is widespread in certain markets in which they are active, but awareness that foreign bribery is an offence was uneven. Foreign corruption still appeared to be considered as necessary and even acceptable behaviour for a

[12] See Working Party on Export Credits and Credit Guarantees (2005), Export Credits and Bribery: Review of Responses to the 2004 Revised Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits – Situation as of 21 January 2005, OECD. [TD/ECG(2005)4]

significant range of companies. SMEs indicated that they rely heavily on the AWO in foreign markets and indicated that they would likely follow its advice with regard to local practices. Although the SMEs had frequently worked with the AWO, none had received advice on the law governing foreign bribery. More broadly, none of the firms at the on-site visit, large or small, were aware of enforcement action or awareness raising by the Austrian authorities with regard to foreign bribery.[13] SMEs generally did not have formal policies in place to address the risk of foreign bribery.

23. With some exceptions, the major business organisations have generally not played an active role in fighting foreign bribery or in assisting companies in this regard. Neither the WKÖ nor the AWO have programs addressed to foreign bribery, either in the context of their export promotion efforts or elsewhere. The Austrian Code of Corporate Governance, last amended in February 2005, does not contain any express anti-corruption provision.[14] One notable exception is the Austrian chapter of the International Chamber of Commerce, which has been active and regularly receives requests for advice about foreign bribery.

24. Professions that work directly with companies can also be key players in raising awareness and preventing bribery. In contrast to company representatives, however, at least some accountants and auditors appeared to consider that the problem was not a major one, as exemplified by a representative of an accounting organisation who stated that the detection of foreign bribery was not a significant issue for auditors because he did not expect that Austrian firms would give bribes abroad. While the accounting and auditing bodies have organised conferences and produced brochures about money laundering, they have not produced materials concerning foreign bribery. Lawyers indicated that clients have not asked them for advice on foreign bribery issues to date, and considered that clients intending to engage in foreign bribery would not consult a lawyer in Austria. The organised Bar has not produced any specific training materials relating to foreign bribery, but a representative indicated that the laws governing bribery are included in general training materials for young lawyers.

25. The lead examiners consider that the introduction of criminal liability for legal persons in January 2006 will offer an excellent opportunity to prevent foreign bribery by improving awareness of the offence in Austrian companies and related professions. As discussed below, the new law requires evaluation of the quality of management organisation both in determining liability and sanctions for companies, but it offers no guidance as to what types of measures should be in place.

Commentary:

The examiners regret that few efforts have been made to date by the Austrian authorities to raise awareness about and help business prevent foreign bribery. The examiners recommend that Austria conduct or provide support for seminars, conferences and technical assistance targeted at the business sector on foreign bribery issues, including in particular SMEs active in foreign

13 Few of the firms represented during the on-site visit had heard of a recent attempt by the Ministry of Economics and Labour in cooperation with WKÖ and the Austrian Federation of Industries (IV) to promote corporate social responsibility. Named CSR-Austria and initiated in 2002, the program has generated CSR guidelines that include a reference to the OECD Convention. However, as recognised by a representative of the CSR-Austria initiative during the on-site visit, no efforts have been made to address the issue of foreign bribery beyond this initial point and no assistance is provided to companies on this matter. A CSR-Austria representative suggested that the limited focus on anti-bribery efforts was justified because the preponderance of SMEs among Austrian companies makes foreign bribery less of a problem for Austria than for other countries, a view which contrasted sharply with the views of a number of SMEs.

14 The Code was developed by the Austrian Institute of Certified Public Accountants (IWP) and the Austrian Association for Financial Analysis and Asset Management (ÖVFA) in cooperation with the Austrian government and the Vienna Stock Exchange. It is a voluntary code principally applicable to listed companies.

markets. The examiners recommend in particular that the authorities work with the business sector to develop standards for organisational and staff-related measures to be taken by companies to prevent bribery.

Simple awareness raising means should also be encouraged and implemented; e.g. brochures specifically targeting the business sector describing the foreign bribery and related offences and their application in specific fact patterns. The government should encourage all relevant public and private agencies, including the Ministry of Economics and Labour, the WKÖ, the AWO, the CSR-Austria initiative, the Austrian Development Agency and the export credit agencies, to make information about foreign bribery easily available to businesses with whom they deal, including on their websites.

e) Civil society and parliamentarians

26. Civil society, including NGOs and the press, can play an important role both in preventing foreign bribery by raising awareness and in monitoring enforcement. Although Austria has numerous active NGOs in many fields, NGOs appear not to have focussed to date on the issue of foreign bribery by Austrian companies. The Austrian chapter of Transparency International has recently been reorganized.

27. The press in Austria reports regularly on issues of domestic corruption and has engaged in some investigative reporting, although resources for such reporting are limited. The press has as yet shown relatively little interest in foreign bribery issues although the examiners noted that a senior editor of the business section of a leading daily newspaper indicated that he believed it is widely engaged in by Austrian companies. Austria was perceived by the media representatives met during the on-site visit to have relatively severe libel and slander laws, and an investigative journalist stated that lawsuits are used to apply pressure on journalists. Media representatives also reported practical difficulties in obtaining information about ongoing investigations even where no actual legal impediment to disclosure exists. Prosecutors are seen as regularly keeping information secret or as not answering inquiries even where the information is not confidential. Press representatives indicated that a new law is expected to improve access to information somewhat.

28. The examiners had a limited opportunity to evaluate the role of parliamentary oversight with regard to foreign bribery issues. A number of major political parties were not represented during the on-site visit, but one member of Parliament (MP) expressed little concern about the scope of the problem for Austrian business or the absence of government advice to business in this area. The MP further indicated that in countries where it is customary to bribe, Austrian businesses should be expected to do so because of their desire to conduct business. A Parliamentary advisor suggested that she expected that the AWO would advise Austrian companies about bribery issues, but considered that bribery was no longer a major issue in many neighbouring countries. The examiners are concerned that these attitudes, if widely held, would limit the role of Parliament in monitoring efforts to fight foreign bribery and enforce the law.

2. Detection and reporting of foreign bribery and related offences

29. As noted above, there have been no investigations of foreign bribery in Austria since the establishment of the offence in 1998; a prosecutor indicated that the Vienna prosecutor's office had not received any allegations or evidence of foreign bribery. Given the statements by business representatives, the press and others indicating that the problem is still widespread, the examiners are concerned that barriers exist with regard to the detection and reporting of suspicions to the prosecutorial authorities. This section of the report reviews the applicable rules and practice with regard to the detection and reporting of suspicions of foreign bribery by personnel in key sectors of the Austrian public service and economy.

a) The public administration generally

30. According to section 84 of the Austrian Criminal Procedure Code (CPC), every "public authority or public agency" has the duty to report (to the police or to the public prosecutor) any suspicion of a criminal act of a type that would be prosecuted by the public prosecutor *ex officio* (which includes bribery) as long as the suspected act falls within the statutory area of activities of the agency.[15] In addition to the duty to report, employees of such agencies or entities may rely on section 86(1) CPC, which provides that anyone who obtains knowledge of an act than can be prosecuted *ex officio* is entitled to report it to a prosecutor.

31. Public officials must report to the head of the agency pursuant to section 53 of the 1979 Civil Service Code; the agency head represents the agency and must report to the prosecutorial authorities under section 84 CPC. Generally, while the lead examiners found that considerable attention had been focussed on efforts to detect and report suspicions of domestic bribery in many Ministries and agencies, little if any attention had been paid to the detection and reporting of suspicions of foreign bribery.

32. The lead examiners found that employees of government ministries were generally aware of obligations under section 84 CPC (although the situation was less satisfactory with regard to public agencies, see below). Disciplinary sanctions can apply to the failure to report by officials. Disciplinary matters are decentralized to each Ministry and there are no statistics in this area. Intentional failures to report can also constitute the section 302 PC offence of abuse of authority by an official, as has been found in certain cases involving non-reporting by police officers.

b) Export credit and trade promotion agencies; development agencies

33. Section 84 CPC applies only to a "public authority or public agency". In practice there is significant uncertainty about its application to certain key agencies because section 84 CPC applies only insofar as they are exercising sovereign (imperium) powers. Responses about the application vary widely. At the on-site visit, representatives from a number of important actors in the fight against foreign bribery, including AWO, OeKB and the Austria Development Agency (ADA), indicated that those agencies were not subject to section 84 CPC. In contrast, section 84 CPC applies to the FMA, a independent constitutional authority.

34. Austria has indicated that it is prepared to exchange information with other OECD Export Credit Group Members about suspected and/or proven instances of bribery related to specific officially supported export credit transactions, but the OeKB had no experience with such cooperation as of the date of the on-site visit. Similarly, the AWO did not have any policies with regard to the detection or reporting of suspicions of foreign bribery.

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[15] Section 84(2) CPC defines exceptions to the duty to report where (1) a report would impair an official activity the effectiveness of which requires a confidential personal relationship, or (2) there are "sufficient reasons to assume that the deed will shortly not be punishable anymore because of measures to make good the harm caused." The legislative history for section 84 CPC makes clear that the first exception is limited to social-service type activities, and this limitation appeared to be well-understood by the relevant personnel during the on-site visit. The second exception in section 84(2) CPC should not apply to bribery because it should remain punishable regardless of any measures taken to attempt to make good the harm caused. However, as addressed below, there remains a theoretical possibility of non-punishment of foreign bribery where remedial action is taken by the briber.

35. The ADA is a private law body wholly owned by the MFA that administers the MFA's bilateral aid programme.[16] It is an important actor in the fight against bribery because, like other development agencies, the ADA is often called to work closely with the private sector and also, increasingly, with foreign public officials present on local tendering boards. It was established in January 2004 to take over responsibilities previously carried out by the MFA itself. There were some anti-corruption measures in place at the MFA prior to 2004, such as anti-corruption clauses in contracts, but the agency is currently developing a broader anti-corruption policy for implementation later in 2005.

Commentary:

In light of the apparent absence of any reports from public agencies of suspicions of foreign bribery since the introduction of the offence, the lead examiners recommend that the Austrian authorities take steps to improve detection and reporting of allegations of foreign bribery by public officials, authorities and agencies. The lead examiners recommend that the Austrian authorities establish procedures to be followed by employees of export credit, trade promotion and development aid agencies for reporting credible evidence of bribery of foreign public officials to competent prosecution authorities. The lead examiners also recommend that the Working Group follow up on the implementation of anti-corruption policies by the ADA and export credit agencies.

c) The tax administration[17]

36. Tax administrations can serve as an excellent source of information that may lead to cases of active bribery of foreign public officials, because the scrutiny of financial operations can bring to light suspicious payments in operations in foreign markets. Since 1998, Austria prohibits the deduction of payments constituting bribes to foreign public officials from taxable profit. As such, the country's tax authorities are in an excellent position to detect such payments and trigger criminal investigation. Evidence of bribes could surface either during the handling of companies' tax returns or in the course of regular tax audits. Austrian tax administrations conduct such audits at least once every three years in larger companies and once every five years in smaller companies. For example, the tax authorities could come across suspicious payments when verifying tax declarations. Paragraph 162 of the Federal Tax Procedural Act (*Bundesabgabenordnung*, BAO) empowers the tax authorities to request the taxpaying company or individual to disclose the identity of the recipient of payments, providing the tax authorities with an effective mechanism to identify suspicious payments and their recipients. The tax authorities are required to communicate suspicions about offences, for example indications of foreign bribery, to the prosecutorial authorities according to section 84 CPC.

37. Although this regulatory framework places the tax authorities in a favourable position to detect foreign bribery, the lead examiners fear that in certain cases the tax administration's role in triggering investigations into foreign bribery offences is rather limited in practice due to an uncertain capacity to identify suspicious payments and a restrictive policy with regard to investigating them. Austrian laws on income and corporate tax allow the deduction of commissions up to amounts that the tax authorities consider customary in a given foreign market. The lead examiners are concerned that some tax administrators may not have sufficient knowledge about such business practices and environments in different industry sectors in the numerous countries where Austrian companies operate; hence it appears unlikely that they are capable of identifying potentially suspect payments. No typologies of potential risks

16 Significant recipients of Austrian development aid include Serbia and Montenegro, Turkey, Bosnia and Herzegovina, Bulgaria and Afghanistan.

17 Additional information on tax administration is included in the section on Enforcement of Related Offences and Obligations.

or any other form of guidance on thresholds and business practices in exposed countries or industry sectors appear to exist, and, according to the lead examiners' interlocutors, no particular efforts are undertaken to scrutinize commissions paid in risk areas.

38. The lead examiners are also concerned about a limitative interpretation of the foreign bribery offence and a restrictive policy formulated in the "Guidelines on income tax", an official and internally binding interpretation of the Income tax law issued by the Ministry of Finance. These Guidelines present a limited interpretation of the offence of foreign bribery that corresponds neither to the Convention nor to Austrian criminal law: (1) it requires that the bribed official act in a "sovereign function"; (2) it restricts non-deductibility to Austrian citizens (no. 4844); and (3) it allows the deduction of bribes that the bribe payer committed to pay before 1 October 1998, date of the entry into force of the amendment of the Penal Code (no. 4841). Further, the Guidelines stipulate (no. 4844) that investigations by the tax authority into suspicious payments are not appropriate unless there is "reasonable suspicion" or the criminal nature of the payment is obvious. In other cases, according to information provided by the Austrian tax experts, scrutiny of suspicious payments would be limited to a request to disclose the payment's recipient according to section 162 BAO. Where the taxpayer refuses to provide this information, tax deductibility would be denied. The reporting obligation of section 84 CPC would apply to the tax authorities, although its effectiveness in this context appears unclear.

Commentary:

The lead examiners recognise the potential of Austria's regulatory framework to detect suspicions of foreign bribery and trigger investigations. They are, however, concerned that limited knowledge of the tax authorities regarding business practices in destination countries of Austrian exports reduces the tax authorities' contribution to triggering investigations in practice. The lead examiners fear that this contribution is further weakened by the limiting interpretation of the foreign bribery offence contained in the Guidelines on income tax and the restrictive policy on investigations that they impose. The lead examiners recommend that the Austrian authorities revise the Guidelines appropriately, and provide guidance on business practices and corruption risks in foreign markets to tax inspectors.

d) Private individuals and employees of businesses

39. Employees of companies and other individuals can be an important source of information about acts of bribery. As noted above, section 86(1) CPC provides that anyone who obtains knowledge of an act that can be prosecuted *ex officio* is entitled to report it. However, the power to report may conflict with certain secrecy or confidentiality obligations, and a variety of views were expressed about the relationship between such provisions. The Responses state that "in general such secrecy or confidentiality obligations are prevailed by [section 86 CPC]". But this view was sharply contradicted by certain panellists from key sectors. For example, as noted below, audit industry representatives indicated that they consider that auditors are not entitled to disclose matters outside the audited company because of their confidentiality obligations regardless of section 86 CPC. Similarly, bank secrecy, as discussed below, appears to take precedence over the section 86 power to report. The Austrian authorities consider these to be exceptional cases.

40. The effectiveness of section 86 CPC with regard to employees of private companies and with regard to contractual confidentiality clauses appeared to be limited. The law does not appear to provide specific protection against retaliation to individuals, such as employees of the involved companies, who come forward and report foreign bribery offences committed by their employer. Indeed, section 27 of the Law on Private Sector Employees (*Angestelltengesetz*) appears to constitute a legal basis for the dismissal of an employee who has undermined, through his/her actions, the relation of trust with his/her employer. In addition, any informant runs the risk of being prosecuted for false accusations under Austrian penal law. In

general, the lead examiners found that little consideration appears to have been given to the concrete difficulties and fears of reprisals faced by an employee who is considering whether to report about suspicious activities. Investigators stated that in practice reports of suspicions rarely come from employees unless they have already been terminated. Union representatives noted that an employee who reported would almost certainly be dismissed from their job and that the sole redress would be to seek damages under applicable labour law. The representatives did not consider the introduction of whistleblowing protections to be a priority.[18]

Commentary:

The lead examiners recommend that the Austrian authorities take measures to facilitate the reporting of foreign bribery by employees, including clarifying the effect of section 86 CPC. The lead examiners also recommend that Austria examine whether existing labour law provisions sufficiently protect people in the private sector who report foreign bribery cases from retaliatory action and invite the Austrian authorities to consider the appropriateness of establishing whistleblower protections for employees who report suspicions of foreign bribery in good faith.

e) Bank secrecy

41. Austrian law provides bank secrecy in section 38 of the Law on Banking (*Bankwesengesetz* - BWG). Section 38 applies to prohibit credit institutions, their employees and persons acting for them from disclosing any "secrets which have been entrusted to them or made accessible to them solely due to [their] business relationships with customers..." Although the general power to report suspicions of crime under section 86 CPC is not mentioned in section 38 of the Law on Banking, it appears to be overridden by the specific bank secrecy provisions. There is an express exception to bank secrecy for criminal courts in connection with criminal proceedings once they have commenced (and for certain administrative-criminal tax proceedings), which is examined below in the section on investigation and prosecution and in the section on the treatment of known allegations.

f) Accountants and auditors[19]

42. Two principal associations in Austria represent the accounting and auditing professions. Licensed bookkeepers, tax advisors, chartered accountants/auditors and audit/accounting firms must belong to the Chamber of Chartered Accountants, Tax Advisors and Licensed Bookkeepers (*Kammer der Wirtschaftstreuhänder*, hereinafter the "Chamber"). It is a self-regulated body under public oversight by the Ministry for Economic Affairs. The other, the Institute of Certified Public Accountants (IWP), is a voluntary membership body for external auditors.

43. Accountants and auditors can play a vital role in detecting and reporting suspect payments in a company's records and accounts, alerting management and/or outside authorities so that appropriate preventive or punitive action can be taken. However, the examiners found that Austrian law and practice in this regard appeared to be of concern both with regard to detection and reporting. With regard to detection, neither the Chamber nor the IWP has provided any specific training or diffusion of information on the detection of foreign bribery and at least some leading members of the profession consider that it has a limited role in this regard. A representative of the Chamber enquired about the appropriateness of having

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18 As discussed below in the section on investigative techniques, private individuals or employees who become witnesses can benefit from certain protections, including the ability to testify anonymously if their life or bodily integrity are in danger.

19 Additional information on accounting and auditing is included below in the section on Enforcement of Related Offences and Obligations.

an accounting/auditing panel in the context of a Phase 2 process and on-site visit addressed to the fight against foreign bribery.

44. International Standards of Auditing (ISAs) developed by the auditing profession can also be important in efforts to detect bribery. As revised in 2004, ISA 240 is important for the detection of bribery because it requires the auditor to direct more focused efforts on areas where there is a risk of material misstatement of financial statements due to fraud, including management fraud. Auditors are required to design and perform audit procedures responsive to the identified risks of material misstatement due to fraud, including procedures to address the risk of management override of controls. The Chamber has formed a working group to adopt the revised version of ISA 240 into its guidelines for auditors. The lead examiners noted, however, that a leading representative of the profession stated that auditors must have trust in the management board and in management's declaration that the financial statements are complete, while others challenged this view as outdated and as failing to reflect the need for professional scepticism. Subsequent to the on-site visit, Austria noted continuing attention to ISA 240, including its inclusion as part of training for future statutory auditors.

45. In addition to concerns about detection, the lead examiners are concerned about the rules governing the internal and external reporting of suspicions of foreign bribery by auditors. Section 275(1) of the Commercial Code (CC) subjects auditors to a general obligation of secrecy. Section 273(2) CC does not require auditors to report illegal acts of bribery by regular employees to corporate bodies unless they meet a threshold of importance to the company. The Austrian authorities contend that the limitation of article 273(2) is not a problem because directors are liable to ensure that the operations of the company are in accordance with the law. Thus, any misdeed by an employee could entail the liability of directors and would consequently trigger the disclosure obligations of article 273(2). The lead examiners are concerned about a rule which apparently requires an auditor to in effect make a determination of liability of directors – their failure to fulfil supervisory or reporting obligations - as a condition to internal disclosure of suspicions of bribery by agents and employees.

46. The Commercial Code distinguishes between reports ("*Bericht*") of an auditor to corporate bodies as an instrument of intra-corporate information and the audit report ("*Bestätigungsvermerk*") as an instrument to inform the public. Under section 273(3) CC, reports are provided to the management board and to the supervisory board where one exists. However, a representative of the Chamber indicated that no further reporting is permitted even where the auditor suspects that the board members are personally involved in the wrongdoing. There is no provision permitting or requiring immediate reporting to law enforcement or other competent outside authorities. The only possibly applicable mechanism is a qualified audit report which would be included with the next set of financial statements.

47. The lead examiners note that accountants and auditors have reported suspicions to law enforcement agencies where reporting to outside bodies is required by law, as in the case of money laundering. During the on-site visit, the number of such reports was estimated to be approximately 20.

48. There are no specific sanctions for the failure to report under section 273(2) CC. According to a representative of the Chamber at the on-site visit, the potential consequences of non-reporting would include civil liability if the accounts are misleading and intent is established; potential liability for an underlying offence if complicity is established; and disciplinary sanctions by the Chamber pursuant to the general requirement that auditors should act in accordance with the law.

Commentary:

The examiners recommend the Austrian authorities take steps to improve the detection of foreign bribery by accountants and auditors, including taking measures to increase awareness of those professions about the status of the foreign bribery offence as a predicate offence for money

laundering and about their role in the fight against bribery. This should include encouraging these professions to develop specific training on foreign bribery in the framework of their professional education and training systems, and including foreign bribery in efforts relating to the implementation of ISA 240.

The examiners recommend that Austria require auditors to report suspicions of bribery to management and, as appropriate, to corporate monitoring bodies, and should provide for appropriate sanctions. Reportable suspicions should include any good faith suspicions of bribery by agents or employees, regardless of the potential personal liability of officers and directors. In addition, Austria should consider requiring auditors, notably in the face of inaction after appropriate disclosure within the company, to promptly report suspicions to the competent authorities.

g) The money laundering reporting mechanism[20]

49. In order to facilitate detection of money laundering operations, Austria has imposed an obligation to report suspicious financial transactions on certain entities that are particularly at risk of being intermediaries in money laundering schemes. Suspicious transaction reports are managed by Austria's financial intelligence unit (FIU), the *Geldwäschemeldestelle* (money laundering reporting office). This entity is established as a special police body under the Ministry of the Interior. It is obliged to forward intelligence on possible offences to the prosecuting authorities. The mechanism of suspicious transaction reports can thus bring indications of foreign bribery offences linked to money laundering to the attention of prosecutors.

50. The reporting obligation is imposed on financial institutions, bureaux de change, money remittance services, life insurance companies and certain other professional categories. These entities must report transactions immediately to the FIU if there is a "reasonable suspicion" [*begründeter Verdacht*] that the transaction is an attempt to launder assets that originated from one of the offences listed in section 165 PC, which includes foreign bribery. The FMA and the BKA have jointly developed a circular that sets out criteria that indicate a suspicious transaction. However, addressees of this guideline – notably representatives from Austrian banks – that the lead examiners met during the on-site visit seemed to be unaware of its existence or contents. Austrian law does not establish an explicit obligation to report to the FIU individuals that attempt to open a bank account in Austria in suspicious circumstances. The Austrian authorities explained that the obligation to report such instances would flow from the obligation to report a "forthcoming suspicious transaction". Some financial institutions indicated that they would in practice refuse the opening of an account in these cases but would not alert the FIU.

51. Statistics for 2004 – the first year of publication of the annual report of the FIU's activities – show that the number of suspicious transaction reports (STRs) submitted to the FIU is low, especially in relation to Austria's considerable role as a financial centre. In 2004, the FIU's 14 staff received 373 reports on suspicious transactions from bodies subject to a reporting obligation; over 90% of these reports (349) came from banks, up from 215 in 2002.[21] The Austrian authorities and representatives from major banks explained that the relative rarity of STRs results from the tendency of banks to scrutinize transactions thoroughly before submitting a report. The lead examiners suppose that the relatively high threshold of "reasonable suspicion" required to trigger the reporting obligation in practice may also have a considerable impact on the number of STRs that the FIU receives.

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20 Additional information on money laundering is included below in the section on Enforcement of Related Offences and Obligations.

21 Sicherheitsbericht 2002, Parlamentskorrespondenz/03/30.07.2003/Nr. 610.

52. The lead examiners recognize that there can be good reasons for a reporting policy that does not define criteria that trigger automatic reports, but rather requires banks and other financial institutions to evaluate each transaction in light of the given client and other factors. The lead examiners also do not question the Austrian authorities' approach of allowing financial institutions to design a risk management system that they deem fit. However, the lead examiners consider that wide liberty granted to financial institutions and absence of automatic triggers for STRs need to be counterbalanced by clear guidance and methodical supervision. Both guidance and supervision with regard to the risk of money laundering linked to foreign bribery appear insufficient. While the FMA issued its circular for banks in 2004, it appears to provide little guidance as to the interpretation of the criterion of "reasonable suspicion" or the design of assessment criteria for scrutiny of transactions and their application in practice. Additional circulars are in preparation. (See also the section below on treatment of allegations in the public domain for a discussion of concerns about money laundering reporting relating to specific allegations.)

Commentary:

Austria has put in place obligations for banks and other institutions in order to prevent money laundering and detect suspicious transactions. The examiners note that in practice the threshold triggering the reporting obligation is fairly high, and consider that the supervisory authorities' efforts to provide guidance and to assess the entities' reporting practices with regard to suspicions of money laundering related to foreign bribery should be strengthened. The lead examiners consider that the delegation of responsibilities to individual entities should be counterbalanced by detailed guidelines on the implementation of the money laundering regime as well as adequate supervision.

C. INVESTIGATION, PROSECUTION AND SANCTIONS

53. The Austrian Parliament passed a law in 2004 amending large sections of the CPC, which is the principal source of law governing criminal procedure in Austria.[22] As noted in the legislative history of the law, many of the changes are designed to bring the law into line with existing practice. The law will, however, significantly expand the role of prosecutors and will enter into force only in January 2008 in order, *inter alia*, to allow sufficient time to recruit and train 90 additional prosecutors. While the discussion below principally focuses on current law and practice, occasional references are made to the new law where it is expected to introduce significant changes.

1. Investigative and prosecutorial bodies

a) Police bodies

54. The primarily competent Austrian police body in major economic and financial crimes other than domestic bribery is the Economic and Financial Investigations section of the Federal Criminal Investigation Office (BKA), a subdivision of the Ministry of the Interior. This section includes a white-collar crimes unit, which has jurisdiction to investigate all foreign bribery cases.[23] While other police forces could also investigate such cases, the white collar crimes unit can take over a foreign bribery case at any time. At the on-site visit, the examiners were informed that domestic corruption offences are not

22 Austria is a federal republic, but its government is relatively centralised and the federal government is exclusively competent with regard to criminal procedure. The federal government is also primarily competent in, *inter alia*, the areas of justice, substantive criminal law and police matters.

23 Other units of the Economic and Financial Investigations section cover Fraud, Money-Laundering, Environmental Crimes and Asset Forfeiture.

generally investigated by the BKA, but by the BIA.[24] Unlike the BKA, the BIA is free from instructions in all of its investigations and inquiries, but the BIA has not developed extensive expertise in economic or financial crime.[25]

55. A BKA representative indicated that issues related to fighting foreign bribery are addressed generally in the context of seminars and training targeted at future BKA agents charged with fighting economic crimes; however, it does not appear that the specific nature of the foreign bribery offence or approaches to investigating it have been addressed. The BKA has participated in some general seminars on corruption.

b) Prosecutors

56. Public prosecutor offices are attached to courts and are hierarchically structured. They are under the ultimate supervision of the Federal Ministry of Justice.[26] At the time of the on-site visit, there were 208 prosecutors in Austria. Prosecutors are appointed by the Ministry of Justice based on panels submitted by prosecutor's offices, and only judges with at least one year of judicial experience may be appointed as prosecutors. A common prosecutorial database at the federal level for all cases handled by prosecutors prevents unnecessary parallel investigations and allows for enhanced cooperation amongst offices of public prosecution. Any conflict in jurisdiction would be resolved between the heads of the office of public prosecution involved, and ultimately by the office acting as their hierarchical superior.

57. Training efforts for prosecutors with regard to foreign bribery have been very limited. Austrian prosecutors with experience in white-collar crime indicated that they acquire the vast majority of their knowledge while working on actual cases. Other than materials accompanying the 1998 implementing legislation, no publication, brochure or guidelines have been issued with regard to the foreign bribery offence. A Ministry of Justice official gave presentations to judges on the offence at major annual judicial conferences in 1998 and 2000, but no training about foreign bribery has been provided to prosecutors and no further training has been available for judges. An approach to training for law enforcement personnel based on on-the-job learning and voluntary attendance at courses is unlikely to foster widespread or thorough knowledge of new infractions such as foreign bribery that are rarely prosecuted.

Commentary:

The lead examiners consider that training with regard to foreign bribery would be particularly useful in light of the expected introduction of criminal liability for legal persons and ratification of additional international anti-bribery conventions. They recommend that Austria provide appropriate training to law enforcement personnel and judges to enable them to effectively investigate, prosecute and adjudicate the foreign bribery offence.

2. Initiation and conduct of cases

58. As in many other countries, Austrian criminal procedure does not sharply distinguish between the investigation and prosecution of offences, which are perceived as a single process. Other than for specific

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24 See above the "Prevention and Detection" section for a brief description of the somewhat uncertain jurisdiction of the BIA.

25 Police units not organised under the BKA or the BIA could only get involved in major economic crime or corruption investigations in the event that the BKA or the BIA ask them to conduct investigations on their behalf. Local police force representatives indicated that if they became aware of allegations of serious crime or one with international aspects, they would report them to the BKA.

26 See Bundesministerium für Justiz (2004), *Justice: Offices of Public Prosecution*.

infractions, the state has a monopoly on prosecution of criminal offences through the public prosecutor's office. However, as discussed below, there is a possibility for private parties to take over prosecutions dropped by prosecutors and act as subsidiary prosecutors under certain conditions.

59. The commencement of criminal investigation and prosecution is governed by the principle of legality (or compulsory prosecution): the law enforcement authorities are bound to investigate all alleged offences (with the exception of certain minor offences). While this principle is clear in theory, the lead examiners are concerned about its application in practice with regard to certain allegations of possible foreign bribery, as discussed below in the section on the treatment of known allegations.

60. Currently, Austrian criminal procedure defines two pre-trial investigatory phases, an informal provisional inquiry (*Vorerhebungen*) and a formal preliminary investigation (*Voruntersuchung*). The provisional inquiry is conducted to determine if a formal procedure is warranted and can be initiated even if the identity of the perpetrator is unknown. In theory, the public prosecutor begins the provisional inquiry after receiving a formal complaint (from the police, a public institution or a private person), as a result of sustained rumours, or based on his/her own observation. Prosecutors are not permitted to take independent action and must request assistance from either an investigative judge or the police. In practice, these informal investigations are almost always initiated and conducted to some extent by the police on their own. In many cases, prosecutors only become involved when they are needed to request a judicial decision (either to file formal charges in an indictment or for using particular investigative tools such as detention or telephone interception). At the conclusion of this phase, the prosecutor can petition an investigating judge to open a formal preliminary investigation, immediately bring formal charges against the suspect and move directly for a trial, or withdraw the complaint.

61. The preliminary investigation is opened by a decision of an investigating judge upon a request from a prosecutor. It is a formal procedure to determine whether there is sufficient evidence for the filing of formal charges against a suspect. It would be possible but not mandatory to use this procedure in foreign bribery cases (except for exceptional cases where it is mandatory such as cases involving absentees or private prosecutors). Once the investigating judge has determined that the preliminary investigation is complete, the file is given to the public prosecutor, who must decide whether to file an indictment with formal charges or to notify the investigating judge that the case will not be pursued. An indictment leads to a trial with a public oral hearing in the presence of the prosecutor and the accused.

62. Regional courts (*Landesgerichte*) are courts of first instance for all felonies and serious misdemeanours, including foreign bribery (a serious misdemeanour). Depending on the gravity of the offence, "they sit as *Einzelrichter* (single judge), when the defendant may be sentenced to not more than five years imprisonment; *Schöffengericht* (two judges and two lay assessors), when the maximum sentence may exceed five years and in several other case enumerated by law ...".[27] For the most serious cases, they sit with three judges and eight jurors. As discussed further below in the section on sanctions, foreign bribery cases would be decided by a single judge because the maximum sentence is two years whereas most domestic bribery cases and serious economic crime cases are decided by two judges and lay assessors in the *Schöffengericht* courts. All Austrian courts are federal bodies and the federal Constitution guarantees their independence.

63. The CPC reform to take effect in 2008 will expand the role of prosecutors by eliminating the formal preliminary investigation and replacing it with a police investigation conducted under the supervision of a prosecutor. The investigatory role of courts has thus been diminished in the pre-trial stage. (See Responses § 9.6) However, judges or tribunals will be responsible for exercising judicial control and granting legal protection including with regard to the use of intrusive investigative measures.

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[27] See H. Hausmaninger, The Austrian Legal System (3rd ed. 2003) p, 126.

a) Investigative techniques

64. The CPC provides prosecutors investigating foreign bribery cases with a wide arsenal of investigative techniques, including searches and wiretaps. The use of particularly intrusive means requires a court order. In urgent cases, the court order can be replaced by the decision of a single judge or, for less invasive techniques such as searches, a public prosecutor. According to practitioners whom the lead examiners met, such court decisions are usually issued swiftly. However, in a substantive proportion of cases, requests for such warrants were said to be denied on the grounds of being disproportional. Given that at the time of the on-site visit, no investigations of foreign bribery cases had been conducted in Austria, judges' appreciation of proportionality of the use of these investigative means in such cases remains uncertain.

65. As of the date of the on-site visit, Austria had established only limited mechanisms for the protection of witnesses. One of these mechanisms, laid out in section 166a CPC, allows a witness not to respond to certain questions concerning his/her identity or any other matter if this "seriously endangered the witnesses' life, corporal integrity, or liberty". The Austrian authorities explain that under these conditions, it would also be possible for a witness to remain anonymous to the court. The testimony would then be recorded on video tape in a separate room. The Austrian authorities explain however that the probative value of an anonymous witnesses' statement may be limited. The lead examiners deem the threshold for applying this witness protection mechanism rather high and fear that it would only rarely be met in foreign bribery cases. A second witness protection mechanism, laid out in section 153 CPC, sets lower thresholds. It provides for the right to refuse testimony upon threats to the witnesses' assets, but granting this privilege is subject to the discretion of the sitting magistrate. In the opinion of the lead examiners, this renders the protection mechanism unpredictable and limits its impact in lowering the reluctance of witnesses to present themselves to law enforcement authorities.

66. Austria maintains substantial procedural requirements that limit investigating authorities' access to suspects' bank accounts. Bank secrecy provisions in section 145a CPC and section 38 of the Law on Banking prevent the police, prosecutors or the FIU from directly accessing bank information; their access to information on bank account holders, beneficial owners and transactions requires a court order. The CPC allows the court to prevent disclosure of the investigation if it would undermine investigations. It appears that in economic and financial crime cases the suspect is in practice most often not informed about the investigation at the time bank information is obtained.

67. Practitioners whom the lead examiners met explained that banks would usually produce the requested evidence within a couple of days but sometimes responses would take up to two months. The reform of the CPC that will enter into force in 2008 will not substantially change investigators' access to bank accounts. The reform allows public prosecutors to open bank accounts but continues to require a court warrant.

68. During the on-site visit, Austrian officials indicated that they regularly request MLA from other countries and that they have generally experienced satisfactory results, although at times with significant delays. They have not to date requested such assistance in a foreign bribery case.

b) Resources available for investigation and prosecution of foreign bribery cases

69. A senior representative of the Economic and Financial Investigations section of the BKA recognized that staff resources available for fighting complex and international economic crimes, including foreign bribery, are relatively limited. The Economic and Financial Investigations section, as a whole, employs 52 persons, mostly investigators. Twelve investigators in the BKA's white-collar crimes unit, supported by police officers at regional and local levels, worked on about 1 800 cases in 2004. Ninety

percent of these cases originate from foreign police bodies through Interpol cooperation. A prosecutor confirmed that limited police resources were a recurring cause for delay in investigations.

70. Police during the on-site visit described generally good cooperation amongst police forces. Adequate channels, mostly informal, appear to allow for efficient resource allocation and generally avoid burdensome parallel investigations, although there is no common database for information about ongoing police investigations. In the event of a negative or positive conflict in competence, heads of units or higher ranking officials in the Ministry of the Interior would resolve the problem.

71. The prosecutors interviewed by the lead examiners explained that the human and material resources at their disposal were overall satisfactory. For the investigation of complex cases, a specific major case could be assigned to a prosecutor for investigation within a prosecutor's office; this however is not done on a regular basis given the small size of most prosecutors' offices.

72. Overall satisfaction was also expressed with regard to the available technical expertise within the prosecuting agencies in matters of financial and economic crimes – a crucial precondition for the success of complex investigations into foreign bribery. The lead examiners did not succeed in understanding the exact source of this expertise: There is no formal specialization and no specialized white-collar crime service, and none of the specialised training for judges and prosecutors – university curriculum; four-year training of future prosecutors or judges; training provided in the course of a prosecutor's or judge's career – addresses issues such as forensic accounting or financial and economic analysis in depth. The practitioners the lead examiners met explained that some prosecutors would seek to enhance their respective knowledge for the sake of their personal interest and expressed their conviction that a prosecutor would acquire sufficient and ample expertise in the course of an investigation of an economic crime case.

73. In addition to this reported in-house expertise, prosecutors and judges may call for the support of external expert witnesses. Such experts would be mandated by a court order to provide their view on specific questions that arise in the course of an investigation and are formulated in the order. This approach requires a new judicial mandate every time investigations bring to light unknown aspects, suspects, and traces, which requires a relatively time-consuming application to a judge. However, Austrian prosecutors explained that they can obtain a broader initial mandate that seeks to anticipate necessary extensions of the mandate in the course of the investigation. Other than potentially causing delays, the call for external expertise to investigate complex economic and financial crimes has a further important procedural consequence: The issuing of a mandate for an external expert has to be declared to the suspect. As a consequence, investigations can no longer be kept secret once external expertise is sought. However, the right to access the records can be restricted if and as long as it would undermine the investigation, thus preventing the suspect from destroying evidence and thus jeopardizing the investigation. The reform of the CPC that will enter into force in 2008 will entitle prosecutors to seek external expertise themselves. It will however not change the legal situation in this context substantially.

Commentary:

The lead examiners encourage the Austrian authorities to ensure that the police have sufficient resources to investigate properly all significant foreign bribery allegations without undue delay. Further, the lead examiners are doubtful whether the prosecuting authorities have at their disposal the expertise required to successfully investigate complex economic and financial crime cases. The lead examiners note that recourse to external expertise requires the investigation to be disclosed to the suspect, thus potentially endangering its success.

c) Ending public prosecutions

i) Ending public prosecutions on the basis of lack of evidence

74. In countries where the principle of legality obliges the prosecutorial authorities to investigate all allegations that come to their knowledge, the conditions and procedures to dispose of cases merit particular attention. Prosecutors can close cases if no formal preliminary investigation has taken place; if a formal preliminary investigation has been conducted, only the involved magistrate can close the file.

75. The Austrian authorities explained that there is no formal policy regarding the priorities of prosecution between different offences. A high-ranking official in the Ministry of the Interior indicated that decisions about prioritising prosecutions would be taken on a case-by-case basis. The official stated that such decisions would be influenced, *inter alia,* by the degree of media attention to a case. In the eyes of the lead examiners both this procedure and criteria are likely to result in unpredictable results for the prosecution of foreign bribery cases.

76. Within each office of public prosecution the staff members must comply with the instructions of the head of the office. Instructions by the senior offices of public prosecution or by the Federal Minister of Justice may be given only in writing and must contain a statement of reasons. Procedures exist if prosecutors consider an instruction to be contrary to law, including mandatory reports to superior, automatic withdrawal of requests subject to such reports unless they are reconfirmed in writing, and the possibility for the prosecutor to be relieved of the case. During the on-site visit, prosecutors indicated that these instructions never concern the assignment and transfer of prosecutors and generally take the form of an inquiry into how a case is developing; they considered that politically motivated instructions by the Ministry of Justice would be most unlikely today in Austria. Nonetheless, the lead examiners have concerns about the absence of a prosecutorial investigation with regard to allegations discussed below in the section on the treatment of allegations in the public domain. Some critics of the CPC reforms that will enter into force in 2008 have pointed out that the Ministry of Justice will retain its right to issue instructions in writing to prosecutors while the investigative role of the judge will be diminished.

Commentary:

The lead examiners urge the Austrian authorities to give foreign bribery cases sufficient priority to ensure effective prosecution.

ii) Diversion and related procedures

77. Diversion is a means of ending criminal prosecution of less important crimes without a trial despite the presumed guilt of an individual. Introduced into Austrian law in 2000, this procedure must be applied under section 90a CPC to an individual whose guilt cannot be considered as "grave" and who accepts certain obligations, most often a fine, in order to purge the guilt, unless there is a need for specific or general deterrence. Under the new law introducing criminal liability for entities, legal persons will also be potential beneficiaries of this procedure.

78. Pursuant to section 90a CPC, diversion is available for infractions carrying up to a maximum five-year imprisonment except for those that must judged by a lay jury court (*Schöffengericht*). Under these principles, diversion is theoretically possible in all foreign bribery cases under section 307(1) PC because they carry only a two-year maximum sentence. In contrast, diversion is often excluded by law in domestic bribery cases and is always excluded by law in aggravated embezzlement, theft and fraud cases.[28]

[28] As discussed further below in the section on sanctions, this is because many active domestic bribery cases are prosecuted not only under section 307 PC, the active bribery provision, but in addition as cases of

The Austrian authorities have noted that a recent comprehensive report on Austrian criminal procedure concluded that diversion should not be restricted with regard to specific offences. However, the lead examiners note that increased sanctions for the foreign bribery offence, which they recommend below for other reasons, could also have the effect of excluding diversion in foreign bribery cases, without requiring special treatment for foreign bribery.

79. Diversion has substantial practical importance because prosecutors and courts must apply it when the statutory conditions are met. While a grant of diversion by a prosecutor is not subject to review by the court, the court can grant diversion even where the prosecutor does not favour it. In addition, if grounds for diversion are found to exist on appeal, it would constitute a ground for nullity of a sentence. There is no criminal record created in cases of diversion, but prosecutors can track diversion cases for five years in internal registers. The application of complementary administrative sanctions appears to be practically excluded.

80. In the absence of any known practice, the likelihood of use of diversion in foreign bribery cases remains unclear. The Responses suggest that foreign bribery cases would likely not be subject to diversion because it would not provide sufficient special or general deterrence, and because in bribery cases guilt would often be considered to be grave. (See Responses B.6.4) In particular, they refer to Supreme Court cases that have underlined the pernicious effects of corruption and the importance of general deterrence of corruption.[29] They also note that section 32 PC requires that the severity of sanctions increase if the offence was premeditated and that bribery is generally such an offence. However, during the on-site visit, a prosecutor who has given seminars on diversion indicated that as a matter of principle it will generally be offered by prosecutors to take the place of punishment. In response to a question, he noted that in an average case for an infraction carrying a two year maximum sentence with a normal level of guilt, the normal practice would be to offer diversion. A defence lawyer noted that its primary function, at least in quantitative terms, relates to traffic accidents, but also that it could apply to economic crime if the requirements are satisfied. He further noted that the notion of not-grave guilt is difficult to define, but he considered that an "ordinary" foreign bribery transaction without special circumstances could be considered to involve non-grave guilt.

81. In addition to diversion, a separate provision in section 42 PC provides for non-punishment of crimes subject to imprisonment for less than three years where, inter alia, the offender's guilt was "light", the infraction had limited consequences and the offender attempted to remedy them, and there is no need for specific or general deterrence. Like diversion, section 42 PC must be at least considered by prosecutors and the court in all foreign bribery cases, but would not be available as a matter of law in many domestic bribery cases and all aggravated economic crime cases because they are subject to more than three year maximum sentences. However, panellists were unanimous in considering section 42 PC would not be applied in foreign bribery cases.

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complicity by the active briber with a violation by the Austrian public official of section 302, the abuse of authority offence. Section 302 PC applies only to Austrian public officials. In addition to carrying a five-year maximum sentence, Section 302 CPC cases must be judged by a lay jury and accordingly diversion is excluded under section 90a CPC. Aggravated embezzlement, theft and fraud carry a ten-year maximum so that diversion is also excluded by law.

29 One recent Supreme Court case (12 Os 45/04) addressed diversion in the context of repeated acts of petty domestic bribery primarily for purposes of maintaining good relations with traffic control officers. The court found that repeated acts should be addressed collectively for purposes of determining the degree of guilt, and found that diversion should not be granted because the repetitious nature of the behaviour both demonstrated grave guilt and the need for deterrence. The application of the reasoning to foreign bribery is unclear because the court relied heavily on the repeated nature of the offence. See below the section on the foreign bribery offence.

82. Austria has pointed out that diversion and section 42 PC are the only exceptions from the principle of legality permitted by Austrian law and that the margin of discretion in Austria is thus less than in countries where the procedural system is governed by the principle of prosecutorial discretion.

Commentary:

The lead examiners note that diversion is always available for the offence of foreign bribery while it is excluded in many cases of domestic bribery and all cases of aggravated embezzlement, fraud or theft. The lead examiners are concerned that the application of diversion to foreign bribery cases provides insufficient penalties. While they recognize that its actual use in a foreign bribery case is uncertain, they consider that such uncertainty would add to the legal and procedural difficulties in prosecuting a foreign bribery case. They recommend that the Austrian authorities take appropriate measures to ensure that diversion is excluded at least in all serious cases of foreign bribery.

The lead examiners also note that non-punishment pursuant to section 42 PC is at least a theoretical possibility in foreign bribery cases. They recommend that the Austrian authorities take appropriate measures to exclude its use in at least all serious foreign bribery cases.

iii) Subsidiary prosecution (by private individuals)

83. Under current law, if the public prosecutor decides to drop the charges, an intervener who would have status to make civil law claims in the proceeding (a *Privatbeteiligter*) may in theory take over the prosecution as a subsidiary prosecutor (*Subsidiärankläger*). For offences within the jurisdiction of the regional courts (*Landesgerichte*) such as foreign bribery, the subsidiary prosecutor is closely monitored by the presiding judge and a formal pre-trial investigation is mandatory; the public prosecutor can also resume the prosecution at any time.[30] The subsidiary prosecutor cannot re-open cases that have been closed. In practice, the applicable costs rules, which require the subsidiary prosecutor to pay the costs of the proceeding if no conviction results, are highly dissuasive and such cases are infrequent. It is unclear whether disappointed competitors would have standing to act as a civil claimant and thus as a subsidiary prosecutor. The Responses refer to some cases in this area: none directly addresses the point, but the Austrian authorities consider that they demonstrate a broad approach that could apply to a competitor.

84. The CPC reform will significantly change these rules in 2008. The role of subsidiary prosecutors will be sharply narrowed and will only be available where the alleged offender has already been indicted and the public prosecutor refrains from pursuing the indictment. Where prosecutors seek to close a file during the pre-indictment phase, a new procedure has been adopted: any person with a "legal interest" will be able to request the continuation of a proceeding under sections 195 and following of the CPC as amended.[31] The Court of Appeal (*Oberlandesgericht*) decides about such a request. The court, however, can only order the public prosecutor to continue the proceeding by conducting further investigation. Due to the system of separation of powers, it cannot order the public prosecutor to indict or to carry out particular investigations. If the public prosecutor – after having conducted the investigations he/she considers

30 See Hausmaninger p, 200-01, 191.

31 Standing will be expanded under the new rules with regard to requests to continue the proceedings. Currently, only a person who claims to have suffered damage from the alleged offence and seeks monetary compensation from the alleged offender is entitled to lodge a subsidiary prosecution. The possibility to request the continuation of a proceeding will be open to all persons who have a legal interest in the prosecution of the alleged offender, which may include not only the victim who seeks monetary compensation, but also the victim who has suffered other (non-monetary) damage or has another legal interest in the prosecution. Under both current and amended law, the victim must bear the costs of the proceedings if the alleged offender is discharged by the court.

necessary – again decides not to indict, the persons entitled to request the continuation of the proceeding can only repeat their request to the Court of Appeal.

85. The Responses suggest that this CPC reform will improve the ability of victims to exercise control over the public prosecutor's decision to drop a case. Standing to request a continuation will be based on a "legal interest" test, which is broader than the current requirement of a civil law claim in order to qualify as a subsidiary prosecutor. It is more likely that competitors or foreign states would have standing under the new rules although it is not certain. However, private parties will no longer be able to ensure that a case proceeds to a trial as subsidiary prosecutors can at present, at least in theory. Persons requesting a continuation will not be liable for the costs of an unsuccessful attempt to have the Court of Appeal continue the proceedings or for continued proceedings that do not result in a conviction.[32] Overall, it remains uncertain whether the amended law will offer meaningful control over prosecutorial decisions in foreign bribery cases; much will depend on the application of the standing rules and on the attitude of the Court of Appeal and prosecutors.

Commentary:

The lead examiners recommend that the Working Group follow up with regard to the application of the subsidiary prosecution provisions.

3. Mutual legal assistance and extradition

a) Mutual legal assistance

86. Mutual legal assistance ("MLA") in Austria is principally governed by treaties and by the Extradition and Mutual Legal Assistance Act ("EMLAT"). International agreements take precedence over EMLAT. Austria is a party to a number of multilateral MLA conventions, including the 1959 European Convention and its Additional 1978 Protocol[33]; and the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985. Austria has also concluded bilateral treaties with a number of countries. MLA treaties in force in Austria are applied directly and do not require implementing legislation or other measures. As noted below, a number of framework decisions by the Council of the European Union are also of great importance for MLA in Austria, as for other EU countries, particularly in the field of seizure and confiscation.

87. No statistics are kept regarding the number, nature or time taken to fulfil MLA requests. Most requests arise with countries which are parties to the 1990 Schengen Convention or with which Austria has concluded bilateral agreements which permit the direct transmission and return of MLA requests. Thus, most requests are dealt with by the courts without any specific involvement on the part of the Ministry of Justice or any other authority. Contested MLA cases (other than minor cases) are resolved by an investigating judge in the first instance, with an appeal to a council chamber of a higher regional court (Ratskammer). According to Ministry of Justice officials, both levels proceed rapidly with decisions, generally within one or two months. Ministry of Justice representatives indicated that five jurists are available to give assistance to courts on MLA matters and that refusals of MLA are "very rare".

88. Section 51(1)(1) of EMLAT requires dual criminality for the granting of mutual legal assistance. According to the Austrian authorities, in bilateral treaties between Austria and other European countries and in the treaty between Austria and the United States, the requirement of dual criminality has been

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32 Under current law, subsidiary prosecutors are liable for costs if no conviction results.

33 European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters and its Additional 1978 Protocol of 17 March 1978.

restricted to requests for coercive measures. At the time of the on-site visit, MLA could not be granted for criminal proceedings against legal persons when double criminality is required. This major deficiency should be corrected with the expected entry into force of criminal liability of legal persons in Austria on 1 January 2006. EMLAT does not apply to non-criminal proceedings (see EMLAT § 50). However, as noted in Phase 1, it is long-standing practice in Austria to provide MLA in non-criminal proceedings on the basis of reciprocity even in the absence of explicit legal provisions.[34]

89. Austria's bank secrecy laws must be complied with to obtain bank or financial information through MLA. As noted in the Phase 1 report, the need for a court order to obtain bank information under section 145a of the CPC and section 38 of the Law on Banking does not appear to require a foreign court order. Case law has generally established that an Austrian court order requesting information from a financial institution due to an MLA request is sufficient to lift bank secrecy. Nonetheless, based on a recent case involving MLA requests for bank information, it appears that bank secrecy can preclude the availability of MLA in some cases. (See below the section on the treatment of allegations in the public domain). Section 38 of the Law on Banking also blocks the availability of bank information for foreign administrative proceedings, including proceedings against legal persons, because it requires a criminal proceeding in order to lift bank secrecy.

90. Representatives of the Ministry of Justice reported that MLA requests for seizure and confiscation are frequently received and are executed in accordance with the Austrian CPC. However, no statistics are maintained. Currently, amounts seized accrue to the Austrian state. This situation will change with regard to EU countries once Austria implements the EU framework decision on mutual recognition of confiscation orders, which will require sharing of amounts seized with the requesting state. Austrian officials consider that the asset return provisions of the UN Anti-Corruption Convention, which Austria has now ratified, are self-executing.

Commentary:

The lead examiners welcome the recent adoption of legislation that will allow the provision of MLA in criminal cases against legal persons and they consider that Working Group should follow up with regard to this issue. They also recommend that the Austrian authorities seek to identify methods to collect MLA statistics while maintaining the efficiency of a decentralized system.

As a general matter, the lead examiners were impressed with the prompt treatment of MLA requests and the generally the positive approach of the Austrian authorities to MLA. However, as discussed below, the lead examiners have serious concerns about delays in providing MLA with regard to certain foreign bribery allegations.[35]

b) Extradition

91. According to section 11(1) EMLAT, extradition is permitted for the prosecution of a deliberately committed offence, if it is punishable under both the law of the requesting country and under Austrian law with imprisonment of more than one year. Austrian law prohibits the extradition of Austrian nationals. As noted in the Phase 1 report, the relevant court informs the public prosecutor about the denial of extradition on this ground, and the prosecutor then has the opportunity to initiate domestic proceedings. Where suspicions exist, an investigation would be required under the general legality principle. The Austrian authorities have not indicated whether in practice investigations and prosecutions have occurred in such

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34 Austria has ratified the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters Between the Member States of the European Union, 2000/C 379/02, which entered into force on 28 August 2005.

35 See below the section on the treatment by the prosecutorial authorities of allegations in the public domain.

circumstances. As of January 2009, extradition of Austrian nationals to EU countries will be permitted pursuant to the European arrest warrant.

Commentary:

The lead examiners recommend that the Working Group follow up with regard to the effective prosecution of Austrian nationals for whom extradition is unavailable.

4. Treatment by the prosecutorial authorities of allegations in the public domain

92. During the on-site visit, the examiners inquired about whether investigative action had been taken with regard to certain allegations of foreign bribery involving Austrian companies or individuals that had appeared in the foreign press or in judicial decisions reported in the foreign and Austrian press. None of the reported allegations had been investigated. The examiners were concerned in particular about allegations in an MLA request to Austria from a Middle Eastern country, as described in an Austrian appellate court decision regarding the request.[36] According to the decision, the request sought, *inter alia*, Austrian bank records relating to three alleged payments totalling over USD 4 000 000 from accounts at an Austrian bank to close family members of a leading politician and elected official in the requesting country. It indicated that there was no recognizable reason for the identified holder of the account, a citizen of an African country, to make one payment of over USD 1 400 000. It was suspected that the account holder served as a front for another identified person (an Austrian citizen) and that the payment was a bribe to the public official. The investigative judge denied the MLA request based on an absence of double criminality. On appeal, the request was granted in part and denied in part. The appellate court found that double criminality existed at least under section 304(2) PC (a domestic passive bribery offence) and ordered the investigating judge to provide MLA regarding certain accounts of the citizen of the African country. The court denied the balance of the requests, including those relating to the Austrian citizen, on the ground that the MLA request did not provide a sufficient basis of suspicion to lift bank secrecy with respect to that individual's accounts.

93. The allegations and the case raises a number of serious concerns. First, at the time of the on-site visit, both Ministry of Justice and police representatives stated that no Austrian investigation had been commenced with regard to the very serious and, according to the appellate court, "detailed" allegations in the MLA request. According to the appellate decision these allegations concerned payments from an Austrian bank, allegedly by an identified individual on behalf of an Austrian national, in order to induce an foreign elected official "to abuse his powers and to take measures to assist in [the Austrian's] business-interests" relating to an identified specific venture. The lead examiners express no opinion about the substance of the allegations, but they consider that allegations of this kind should be investigated.

94. The lead examiners also consider that the decision to deny MLA concerning the Austrian citizen due to insufficient evidence to justify lifting bank secrecy should not have affected a decision to open a domestic investigation for two reasons. First, the apparently detailed allegations concerning the Austrian should likely have been investigated even if they were insufficient to lift bank secrecy. Serious and detailed allegations about foreign bribery by an Austrian should be vigorously investigated by the Austrian authorities. Second, even if there were no allegations concerning the Austrian individual, the fact that over USD 4 000 000 in payments were made from an Austrian bank to close family members of a foreign public official under allegedly suspicious circumstances should be sufficient to establish territorial jurisdiction for a foreign bribery investigation in Austria regarding all relevant individuals and entities.

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[36] See Decision of the Council Chamber of the Regional Court for Criminal Affairs of Vienna, 274 Hs 12/03 (20 December 2004) (hereinafter, "MLA Decision").

95. The lead examiners did not receive information about this case from the Austrian authorities prior to the on-site visit. However, as noted, the examiners asked about the case in light of press reports and, upon learning that there had been no Austrian investigation, about the reasons for the decision not to open an investigation.[37] The Austrian authorities confirmed that some MLA had been granted, but stated that the case had not been investigated in Austria because there was an insufficient basis to investigate. The lead examiners note the absence of any investigation in these circumstances and are concerned that considerations of national economic interest, the potential effect upon relations with another State and the identity of the natural or legal persons involved may have affected the decision not to commence an investigation, contrary to Article 5 of the Convention. The foreign elected official at issue occupies a highly powerful political office, the Austrian bank is a major financial institution and a police official and journalists described the Austrian citizen as a highly influential and wealthy businessperson. The Austrian authorities recognized no efforts had been made to contact the requesting State authorities or other sources to learn more about the case for purposes of commencing a domestic investigation.

96. Second, the case raises serious concerns about the money laundering reporting system in Austria in cases of alleged foreign bribery. The Austrian authorities have not indicated whether the Austrian bank filed STRs with regard to any of the payments to the family member of the elected official, or how such reports, if any, were treated. However, as noted, a senior BKA official indicated that his office had no record of any investigation regarding the case generally so that the existence of such reports or any investigations thereof appears unlikely. Given that the payments were made to close family member of a "politically exposed person" (PEP) within the meaning of the 40 Recommendations of the FATF[38], the lead examiners consider that heightened scrutiny should have been applied by the bank and the money laundering authorities. One or more STRs filed at the time of the payments could have prompted an Austrian investigation prior to the receipt of the MLA request. The Austrian authorities have also not indicated whether any regulatory actions were taken with regard to the bank in the event no filing was made. They have indicated generally that the FIU compiles accurate statistics listing all cases involving PEPs and that the issue of PEPs is explained and discussed during all training and awareness raising courses and seminars for entities obliged to file STRs.

97. Third, the lead examiners also have concerns about the denial of MLA due to insufficient evidence to warrant lifting bank secrecy. The appellate court found that the detailed arguments in the letters rogatory, which apparently mentioned specific firms, individuals and payments, were "only suppositions of the [requesting] authorities which would disproportionately interfere with [bank secrecy]". The lead examiners express no opinion about the merits of the court's decision in the individual case, but they are concerned about a threshold evidentiary requirement necessary to lift bank secrecy. The requesting country is not a party to the Convention, but the Revised Recommendation (Art. VII(i)) calls for international cooperation with all other countries with regard to investigations of foreign bribery. Moreover, for requests from Working Group members, Article 9(3) of the Convention provides that a party "shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy". It is unclear whether or on what basis Austrian law would apply a different bank secrecy standard to a request from a Working Group member from that applied in this case.

98. In response to questions since the on-site visit about the evidentiary threshold required to lift bank secrecy in the context of an MLA request from a Working Group member relating to a foreign bribery case, the Austrian authorities have indicated that under the bank secrecy law, "there is no evidentiary threshold required to lift bank secrecy with regard to national criminal proceedings ... or with regard to MLA requests relating to a foreign bribery case, subject to the existence of double criminality. In

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37 A translation of the appellate decision granting in part and denying in part the requesting State's second MLA request was provided after the on-site visit.

38 See Recommendation 6 and the Glossary of the 40 Recommendations of the Financial Action Task Force.

view of the clear text of the above-mentioned provision in connection with the existing case law (e.g. Supreme Court decisions of December 16, 1993, 15 Os 167/93, and of April 19, 1995, 13 Os 34/1995), there is no need to clarify the rules governing bank secrecy with regard to MLA requests relating to foreign bribery from Working Group members and other countries."[39] It is unclear whether these arguments were made to the court in the case under discussion.

99. Fourth, the lead examiners are concerned about delays in supplying MLA in the case. The requesting authorities have publicly complained about the delay in the time taken to receive information from Austria. The Austrian authorities have explained that the MLA request which was partially granted on appeal was in fact the second request made by the requesting country. The first, which dates from the winter of 2002, was denied at first instance and on appeal for lack of double criminality because it apparently referred to an offence relating to political party financing which does not exist in Austria. The Austrian authorities have indicated that the second request was received in August 2004 and that, after the appellate procedures were completed in December 2004, information was first supplied to the requesting country in May 2005. The examiners invite the Austrian authorities to consider whether guidance to the requesting country authorities could have accelerated the provision of MLA by avoiding the need for the first decision and/or appeal, or whether other measures could be taken to accelerate the provision of MLA.

100. Fifth, the case raises serious issues about the possible application of section 307(2) PC to very large bribes. This issue is addressed below in the section on the foreign bribery offence.

Commentary:

The lead examiners are very concerned about the absence of any investigation of allegations of foreign bribery by Austrian individuals and companies, including allegations in the public domain. They are particularly concerned about the treatment of detailed allegations included in an MLA request made to Austria and they consider that the lack of any investigation in that case may have been influenced by considerations of national economic interest, the potential effect upon relations with another State and the identity of the natural or legal persons involved, contrary to Article 5 of the Convention. They recommend that the Austrian authorities take appropriate measures to ensure that considerations prohibited by Article 5 will not be considered in foreign bribery cases, and that the authorities adopt criteria and methods to monitor prosecutorial and investigative agencies with regard to such cases on an on-going basis, including in particular with regard to decisions not to open an investigation.

The lead examiners consider that in light of the apparent absence in that case of any suspicious transaction reports concerning the alleged large suspicious payments from accounts at Austrian banks to close relatives of a prominent foreign public official, the Austrian authorities should carefully review both applicable anti-money laundering policies at financial institutions and regulatory oversight to ensure that any such transactions are promptly reported and, if appropriate, investigated. The lead examiners also recommend that the Austrian authorities take all necessary measures to clarify the rules governing bank secrecy with regard to MLA requests relating to foreign bribery from Working Group members and other countries and ensure that bank secrecy cannot be a ground for denial of MLA to a Working Group country in a foreign bribery case. They consider that the Austrian authorities should take all appropriate measures to ensure the provision of MLA in foreign bribery cases without undue delay. They also consider that the Working Group should follow up with regard to these issues.

[39] The examiners have not had an opportunity to review the cases cited by the Austrian authorities in this respect.

5. The foreign bribery offence

a) Overview of relevant provisions

101. The provisions on foreign bribery, which were adopted in 1998, remain unchanged since the Phase 1 review in 1999.[40] Section 307 PC establishes offences of active bribery. Section 307(1) PC deals with a series of offences where the briber seeks to obtain actions or omissions by public officials *in violation* of their duties. Section 307(2) PC covers bribery cases where the expected act or omission of the public official *conforms* to their duties. However, it applies only to bribery of Austrian officials and does not apply to the bribery of foreign public officials.

102. Austrian law is complex in its application to the bribery of EU and EU member state officials as opposed to foreign public officials generally. The bribery provisions, and in particular section 307(1) PC, make reference to different definitions of public officials for Austria, EU member states, the EU and foreign countries generally, all in section 74 PC. Section 307(1) PC thus has both (1) what may be termed an "EU bribery offence" applicable to bribery of Austrian, EU and EU member state officials – [see section 307(1)(1) and the definitions in sections 74(4), (4a) and 4b)]; and (2) an "OECD" foreign bribery offence that applies to bribery of "foreign public officials" [see section 307(1)(6) and the definition in section 74(4c)]. This approach has been adopted to incorporate various international conventions.

103. Section 308 PC deals with the offence of trafficking in influence, including the offence of trafficking in influence of a foreign public official. Although, as noted in the Phase 1 report, the Convention does not require coverage of trafficking in influence as such, section 308 is of relevance because, as discussed below, Austrian authorities have recognized that it may apply to certain Convention cases that would not be covered by section 307(1) PC.

104. An important publication of the Ministry of Justice was transmitted to all criminal courts and prosecutorial offices by decree of 6 October 1998 (hereinafter the "1998 Decree"). The 1998 Decree consists of the text of the law, the legislative materials (the explanatory report to the government bill and the report of the parliamentary justice committee), the commentary of the Ministry of Justice and a comparison of the old and new law. The Ministry of Justice always makes new laws known by ways of such a decree, known as an *Einführungserlass*. The 1998 Decree can be found in the official journal of the Ministry of Justice and panellists indicated that judges and specialized lawyers might refer to the Decree if the law were unclear. Interpretations in such a decree, however, do not bind the judiciary.

b) Elements of the offence

i) Definition of foreign public official

105. The Phase 1 report highlighted two issues relating to the definition of foreign public official for follow up in Phase 2: application of the law to (1) elected officials; and (2) public officials of other EU member states. The concern about elected officials arises principally because the definition of "foreign public official" in section 74(4c) PC does not expressly refer to elected officials. In addition, the domestic definition of official does not include elected officials.[41] This contrasts with Article 1(4)(a) of the

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40 Austria signed the Convention on 17 December 1997, its implementing legislation entered into force on 1 October 1998, and its instrument of ratification was deposited with the OECD on 20 May 1999.

41 The term “official” (*Beamter*) in section 74(4) PC does not include persons who were elected to a political office. See section 74(4) PC (defining a "public official" (*Beamter*) as someone "appointed" or otherwise entrusted with tasks of administration); see also 1998 Decree ("As a matter of principle the Austrian definition [of public official] does not include office holders in the area of legislation.")

Convention, which refers, *inter alia*, to any person holding a legislative, administrative or judicial office of a foreign country, "whether appointed or elected". There has not been any case law in this area, but the lead examiners note that the 1998 Decree expressly states that the section 74(4c) PC definition covers foreign members of parliament and is broader than other definitions of public official in section 74 PC. [See 1998 Decree ("[*Section 74(4)(c)] regulates who is a foreign public official. In this respect it should be pointed out that the term "foreign public official" is broader than the other definitions of "public official". For example, it is the only term that comprises members of parliament ....*")]

106. The 1998 Decree also satisfactorily addresses the issue of overlap between the "EU" and "OECD" offences. As noted above, within section 307(1) PC, there are separate offences for bribery of EU and EU member state (including Austrian) officials on the one hand, and for bribery of "foreign public officials" on the other hand, and the two offences refer to different definitions of officials in section 74 PC. The definitions of EU and EU member state officials in sections 74(4a) and (4b) PC are in some respects less broad than the "OECD definition" in section 74(4c) – for example they do not apply to members of the European Parliament. The key question is thus whether certain cases — those involving bribery of EU officials not included in the EU definitions — would be covered by the "OECD" definition and offence or whether the "EU" bribery provisions are exclusive. Again, although there are no cases, the 1998 Decree expressly states that the OECD definition can apply to public officials from EU states.[42]

107. Generally, the lead examiners noted that Austrian law includes a number of Convention-required elements in the section 74(4c) PC definition of foreign public official that are not in the other section 74 PC definitions of public officials. In addition to the coverage of elected officials and certain EU public officials not included in the other definitions, the "OECD" definition differs from the others both in referring to "functional" public officials, i.e., persons who carry out public functions even though they do not hold a public office, and in providing for a autonomous definition of a foreign public official. These aspects are also supported by a careful reading of the 1998 Decree.[43]

Commentary:

Because the section 74(4c) PC definition of foreign public official is different in several important respects from other section 74 PC definitions of public official that may be more frequently at issue in bribery cases, the lead examiners encourage the Austrian authorities to ensure that relevant persons, including law enforcement personnel and companies, are made properly aware of the broad scope of the section 74(4c) definition and its application in practice.

ii) Bribery through intermediaries

108. Article 1 of the Convention requires that the foreign bribery offence must apply to a briber who uses an intermediary. Section 307 PC does not expressly cover acts of bribing through an intermediary.

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42 See 1998 Decree ("*Thus bribery of a public official of other EU Member States could not be covered by item 1 if the public official is not covered by the definition of Section 74 item 4a because s/he does not have the hypothetical characteristics of a public official according to Austrian law, however, it could be punishable if the remaining prerequisites of item 6 are met.*").

43 Similar issues arise with regard to a number of provisions in the Penal Code that apply broadly to provide for defences for many offences similar to foreign bribery [see, e.g., section 167 PC (active repentance)]. These defences are expressly not available in foreign bribery cases and there is thus no issue with regard to the law applicable to foreign bribery. However, given the widespread applicability of these defences and thus the exceptional nature of the rules applicable to foreign bribery in this regard, the lead examiners encourage the Austrian authorities to emphasize the unavailability of these provisions with respect to foreign bribery in brochures and awareness-raising materials for businesses, trade promotion agencies, relevant professionals and government officials.

Austria has indicated that its law on complicity governing participants would be applicable to bribers who use intermediaries. According to section 12 PC (Treatment of all Participants as offenders) not only the immediate offender commits the offence but also any person that instigates another person to commit it as well as everybody who is an accessory to its commission. The 1998 Decree states that a reference to intermediaries in the text of the law was unnecessary because of section 12 PC. During the on-site visit, questions were raised about the liability of a briber who uses an innocent intermediary to transmit the payment and about cases where the intermediary does not follow-through with the direction to bribe. but Austria has not supplied cases.. A representative of the Ministry of Justice indicated that such circumstances would be covered under Austrian law, but Austria has not supplied cases in this area.

Commentary:

The lead examiners recommend that the Working Group follow up with regard to the application of the law to cases involving intermediaries as case law develops.

iii) The expected acts or omissions by foreign public officials

109. The Convention requires the criminal offence of foreign bribery apply to bribes to obtain a broad range of expected acts or omissions by foreign public officials. Questions arise in particular with regard to the application of Austrian law in three contexts: (1) undue payments for acts outside the competence of the foreign public official; (2) undue payments to affect the official's exercise of discretion; and (3) substantial undue payments to officials for acts in conformity with their duties.

<u>Undue payments for acts outside the competence of the foreign public official</u>

110. The Convention expressly requires that the offence apply to undue payments for "any use of the public official's position, whether or not within the official's authorised competence". [See Convention Art. 1(4)(c)] The application of Austrian law is uncertain in this regard. Section 307 PC does not refer to acts outside of the official's competence and refers only to a payment to an official "for the exercise or the refraining from the exercise of an official action in violation of his duties". The reference to the "exercise of an official action" could be interpreted to require an act within the official's competence. The 1998 Decree suggests that the section 307 PC offence may not apply to undue payments for acts outside of the competence of the official. [See 1998 Decree (noting that "the problem arises whether or to what extent use of office/position outside the official's competence is already covered by section 307").]

111. The 1998 Decree addresses in particular the example identified in paragraph 19 of the Commentary to the Convention involving a company and two public officials: "an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office – though acting outside his/her competence – to make another official award a contract to that company". The 1998 Decree suggests that section 307 PC would apply to the case where the exercise of the influence by the first official on the second official was within the first official's competence (even if the award of the contract were outside the first official's competence). However, where the first official's exercise of influence itself was outside of his/her competence, the 1998 Decree suggests that section 307 PC would not apply and that only section 308 PC would be the applicable provision. There is no requirement in section 308 that the influence be exercised by an official or that it be within his/her competence. Accordingly, the influence peddler would be guilty of the section 308 trafficking in influence offence and the briber would be complicit (under section 12 PC). Apparently based on this rationale and the need to cover the paragraph 19 scenario, the 1998 Decree proposed the amendment of section 308 to add a reference to the trafficking in influence on foreign public officials, an amendment which was included in the 1998 law.

112. The lead examiners recognize the meritorious efforts of the Austrian legislator to capture under section 308 PC the specific example identified in paragraph 19 of the Commentary. However, two issues

remain of concern. First, section 308 would not apply in a case where a bribe to paid to a single public official who oversteps his/her competence in awarding a benefit because there would be no exercise of influence. In many straightforward bribery cases under section 307 PC, complicated factual and legal disputes could arise about whether the official's granting of the benefit was within his/her competence and resolving the issue would appear to require reference to foreign law, contrary to the requirements of the Convention. [See Commentary § 3 (noting that offence must not require proof of the law of the official's country).] Second, it appears that the application of section 308 PC in a case involving two public officials could still require that the second official – the one being influenced to provide the benefit – must be acting within his/her competence in providing the benefit. It requires that the influence be exercised so that a foreign public official "exercises or refrains from exercising an official duty or a legal act partially". While the language differs from that in section 307 PC, it is not clear that it includes acts outside of the official's competence.

Undue payments to affect the foreign public official's exercise of discretion

113. The application of the law to undue payments to influence the exercise of discretion is much more certain. Although neither section 307(1) nor (2) PC refer to the exercise of discretion, there is little doubt that payments to affect the exercise of discretion are covered by the concept of violation of duties in section 307(1). Case law and commentary have underlined that an official would be acting in violation of duties as soon as he/she gives a preferential treatment to one of several applicants with the effect that the others have to wait considerably longer. The 1998 Decree refers to the Convention and to the requirement that the exercise of discretion must be covered, and states that the very broad concept of breach of duty under Austrian law would apply to any partiality in the exercise of discretion. Panellists at the on-site visit confirmed this view.

Substantial undue payments to foreign public officials for acts in conformity with their duties

114. The third issue in this area involves substantial undue payments to officials for acts in conformity with their duties. Section 307(2) PC, which covers bribes for acts in conformity with the official's duties, applies only in the domestic sphere; accordingly, bribes of the type that fall within the scope of section 307(2) are not prohibited when paid to foreign public officials. The scope of section 307(2) is thus of key importance. One difficulty arises because section 307(2) itself applies only to promises of "not merely a petty advantage", i.e., to relatively significant payments.[44]

115. The recent MLA decision discussed above in the section on the treatment by the prosecutorial authorities of allegations in the public domain raises serious concerns in this regard. The issue about the scope of section 307(2) PC arises out of the characterization by the prosecutor and the court of the alleged offence for purposes of double criminality. Because the offence being investigated by the country requesting MLA involved alleged passive bribery of a public official of that country, a relevant Austrian offence for purposes of double criminality was the domestic passive bribery offence in section 304 PC. As in the case of the active bribery offences in section 307 PC, section 304 PC distinguishes payments to a public official for purposes of obtaining official acts in violation of duties — section 304(1) — from those

[44] The Austrian legislator thus apparently considered that, in the domestic sphere, there was a substantial risk of significant payments to obtain official action in conformity with duties, and that section 307(2) was necessary to prohibit such payments with penalties of up to six months imprisonment. According to the Responses, none of the materials in the 1998 Decree explain what the legislator had in mind when differentiating between section 307(1) and (2). The Responses recognize that some decisions by the Supreme Court as well as commentaries indicate that in spite of a broad interpretation of the concept of "violation of duties", some scope of application remains for section 307(2).

made to obtain official acts in conformity with duties — section 304(2). Thus, section 304(1) corresponds to section 307(1) and section 304(2) to section 307(2).

116. The view that section 304(2) PC could apply to the very sizeable payments at issue was shared by all of the authorities involved in the case. The prosecutor lodged its appeal on the basis that double criminality existed "under section 304 para. 2" of the Penal Code[45] and the appellate court stated that the investigating judge similarly "correctly" pointed out that the incriminated acts in the letters rogatory "could legally cause the offence of bribery by a public official under section 304 para. 2 [PC]." The lead examiners recognize that the possible characterization of the payment as a section 304(2) PC type infraction occurred in the context of an MLA case in which it suffices for the court to find any Austrian offence. They also note that although the appellate court referred to the investigative judge's section 304(2) PC characterization as correct, it found that the initial suspicion indicated that the alleged unknown giver intended "at least to maintain ... the 'general benevolence' of the official for a dutiful performance of the office". The court thus did not find that the section 304(2) PC offence was necessarily the applicable offence and left open the possibility that the more serious section 304(1) PC offence might apply. Nonetheless, the lead examiners are very concerned by any possibility that the section 304(2) offence — and thus presumably the section 307(2) active offence — could even conceivably apply to several payments totalling over USD 4 000 000. They consider that such payments (when they are given in order to obtain or retain business or other improper advantage in the conduct of international business) cannot be found to fall outside the scope of Article 1 of the Convention based on the theory that they were only intended to obtain actions in conformity with an official's duties. Commentary 9 to the Convention limits facilitation payments to "small" payments.

117. The concern about the scope of section 307(2) PC applies notably to foreign MLA requests relating to bribery and whether they will trigger an Austrian investigation. The characterization of the allegations by the Austrian prosecutor or judge as a section 304(2) or a 304(1) type case can determine whether he/she considers that an Austrian investigation must be opened. Where the prosecutor or judge considers that an MLA request alleging Austrian involvement in bribery of a public official in the requesting country involves a section 304(1) type infraction, the legality principle should require the opening of an Austrian investigation under section 307(1) if Austria has jurisdiction, i.e. if part of the alleged bribery took place in Austria or if an Austrian citizen is allegedly involved. However, where the Austrian prosecutor or judge considers that a request involves only a section 304(2) type infraction, no Austrian investigation is required because the corresponding active offence, section 307(2), does not apply to foreign bribery. The examiners are very concerned about any possible impact of the apparent section 304(2) characterization of the allegations in the MLA case on the failure to open an Austrian investigation. However, until review of a translation of the appellate decision after the on-site visit, they were unaware of that characterization and consequently did not inquire about it during the visit.

118. The issues raised with regard to the expected acts or omissions of the foreign public official are of particular importance because of the risk that the offence will be interpreted as requiring recourse to foreign law, contrary to the requirements of the Convention. A defence attorney at the on-site visit indicated in this regard that he would expect the courts to look to foreign law with regard to the issue of the legality and nature of the foreign official's acts. In order to establish the existence of the section 307(1) PC offence, the prosecuting and other judicial authorities face the practical problem of proving that the foreign official had a degree of discretion under foreign law. Given the absence of any limit on the amount of payments under section 307(2) PC, such proof must be furnished in all cases, even when very large amounts of money are involved.

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[45] See MLA Decision at 3 (the prosecutor's appeal "stated essentially that an initial suspicion under section 304(2) of the Criminal code would exist regarding the payments ...").

119. Since the on-site visit, the Austrian authorities have indicated that the Austrian legislator is engaged in an ongoing process of review of Austrian bribery law with international requirements and that a review of whether sufficient criminal liability exists in the cases of concern to the lead examiners in this report will be reviewed in that context.

Commentary:

The lead examiners commend the Austrian authorities for their efforts to review Austrian bribery law in light of international requirements. In this context, they recommend Austria take appropriate action to ensure that the law applies to all bribes offered, promised or given to a foreign public official for "any use of the public official's position, whether or not within the official's authorised competence", as required by the Convention. The examiners also recommend that Austria take all necessary measures to ensure that, except where small facilitation payments are involved, a foreign public official's acceptance of an undue advantage is deemed contrary to his/her duties and therefore constitutes the basis for a foreign bribery offence. The examiners also invite the Austrian authorities to re-examine the section 307 PC foreign bribery offence to ensure that it does not require recourse to foreign law for its application.

Generally, given the complexities of the offence and its broad scope, the lead examiners encourage the government, as noted above, to consider producing and distributing widely a guide to explain the foreign bribery and related offences using a series of concrete examples to explain their operation, including the autonomous nature of the offence.

c) Jurisdiction

i) Jurisdiction over natural persons

120. Section 62 PC establishes territorial jurisdiction over crimes committed in Austria, including the offence of bribing a foreign public official. Section 67(2) PC provides that an offence is committed wherever the perpetrator has acted or where a result required by the definition of the criminal act ensued or should have ensued according to the intentions of the perpetrator. It is not necessary that the whole offence or even a major part of it is committed in Austria to establish Austrian jurisdiction; even the smallest part of the offence would be sufficient. However, it does appear that an element of the offence must have occurred in Austria.

121. Section 65(1)(1) PC establishes Austrian jurisdiction to prosecute its nationals for offences committed abroad. The only additional requirement for nationality jurisdiction is double criminality. There are no requirements for government authorisation or for reporting of the offence by particular persons (e.g. an employer or a victim) for either territorial or nationality-based jurisdiction. (See Responses § 8.1)

ii) Jurisdiction over legal persons

122. As noted above, Austria does not have experience with criminal jurisdiction over legal persons. The Austrian authorities have indicated that, with the expected entry into force of criminal liability of legal persons in Austria on 1 January 2006, criminal jurisdiction over legal persons will follow jurisdiction for the underlying offence and that the general rules under sections 62-65 PC will apply, including the rules for territorial and nationality based jurisdiction. Under section 12(2) of the law, nationality jurisdiction for legal persons will "follow[] the main seat or the place of the establishment (*Betrieb*) or of the branch (*Niederlassung*)". Ministry of Justice officials indicated that nationality jurisdiction would exist over (1) an Austrian company that incites or authorizes its foreign subsidiary to commit bribery abroad; and (2) an Austrian company where a non-Austrian employee bribes a foreign public official abroad (and the employee is still abroad).

123. As discussed below, liability under the law introducing criminal liability of legal persons can be triggered by intentional acts of decision-makers, or by intentional acts of staff together with negligence of decision-makers. Under general principles, it would appear that actions by either a decision-maker or staff in Austria or negligence by a decision-maker in Austria should be sufficient to allow territorial jurisdiction over a legal person.

Commentary:

The lead examiners recommend that the Working Group follow up with regard to the application of nationality jurisdiction to legal persons.

d) Statute of limitations and other time limits

124. Statutes of limitation in Austria depend on the maximum sanction for the offence. For a two-year maximum offence such as foreign bribery, the limitations period is five years in all cases. (See § 57(3) PC). Offences with maximum imprisonment of 5-10 years have a limitation period of 10 years. Such offences include aggravated economic crimes such as embezzlement, theft and fraud. It also includes complicity with domestic bribery where, as frequently happens according to prosecutors, it is prosecuted under the section 302 PC abuse of authority offence. Where the complicity with domestic passive bribery is prosecuted only under the domestic passive offence in section 304 PC, it is subject to a ten year limitation period in cases where the bribe is greater than EUR 3 000, and a five year period in the remaining cases. The offence is committed and the period begins when the perpetrator committed the illegal acts, regardless of the time when the consequences ensue (see section 67(1) PC),

125. Suspension provisions apply broadly once the case has started. In particular, section 58(3)(2) PC provides that the time during which criminal proceedings because of the offence are pending against the offender in court is not included in the period. Investigators indicated that this provision applies once there has been an act by a judge in a case. The law also excludes periods during which the procedure has been suspended according to section 412 CPC due to the unknown whereabouts of the perpetrator. Panellists indicated that these rules are flexible enough to allow sufficient time once an investigation has commenced. Investigators indicated that there are no other time limits or constraints applicable to the period for investigation or prosecution of a bribery case. They noted that a judge could mitigate a sentence if the duration of the case was considered to be excessive under the circumstances.

6. Liability of legal persons

126. 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, 3 of the Convention. These articles require the liability of legal persons for the bribery of foreign public officials together with effective, proportional and dissuasive sanctions. At that time, the Austrian authorities had expressed their expectation that criminal liability would be established by mid-2002.

127. A federal bill to establish the criminal liability of legal persons was finally tabled in Parliament in June 2005, shortly before the on-site visit, and was adopted by the two Chambers of Parliament on 28 September and 13 October 2005, respectively. Known as the Law on the Responsibility of Associations (*Verbandsverantwortlichkeitsgesetz* – VbVG), it entered into force on 1 January 2006. At the time of the on-site visit, the liability of legal persons for foreign bribery in Austria was still not in conformity with the standards of the Convention. In addition, other than certain Ministry of Justice officials, participants at the on-site visit were unfamiliar with the bill submitted to Parliament because it was a revised version of an earlier draft and had only been recently made public.

128. The new law will introduce general criminal liability for legal persons, in addition to and independent from the liability of the natural persons involved. It would apply to all offences, intentional and unintentional, thus including bribery of foreign public officials.[46] Criminal liability would apply to most forms of entities: those having a legal personality and those that do not; profit and not-for-profit; public and private. However, there are two categories of entities that would be exempt from criminal liability; state entities to the extend they enforce laws and recognised religious entities to the extent they are engaged in pastoral care. A parent company would not be directly liable for acts committed by one of its subsidiaries, but could be sanctioned as an instigator according to the general rules of Austrian penal law.

129. Section 3 VbVG foresees that liability would be triggered by an offence committed by a "decision-maker" for the benefit of the legal person; this could be a person empowered to commit the legal person, a person who is entitled to control the legal person, or who substantively influences the conduct of the legal person. In addition, a legal person would be liable for an offence committed by staff for the benefit of the company, if decision-makers have made the commission of the offence possible or significantly easier as a result of their negligence, in particular by failing to take technical, organisational or personnel measures to prevent the offence.

130. A legal person would not be liable for offences of individuals who act on its behalf and in its interest, but who are not "staff". Staff is generally defined in section 2(2) VbVG to encompass employees or those with a similar dependent status, but not independent contractors or outside agents. Accordingly, an intentional act must be committed either by a decision-maker or by staff; the legal person is not responsible for actions by outside consultants, agents or commissioners unless they are determined to have an employee-like status. The Austrian authorities justified this exclusion of agents on the basis that non-staff would not be under supervision of the legal person; this justification appeared to echo the problem discussed above of relatively weak due diligence by companies with regard to outside agents. The lead examiners are concerned that this limitation could seriously restrict the application of the law in cases where outside agents are retained and paid by the company to act in its interests in obtaining contracts – a very frequent scenario.

131. The examiners are also concerned about the absence of any standards with regard to the necessary organisational measures to prevent foreign bribery, particularly in light of the absence to date of government or business organisation action with regard to prevention of foreign bribery. In the absence of relevant standards, prosecutors will face a major burden in establishing organisational failures, particularly by major companies. The examiners encourage the Austrian authorities to develop standards in this regard. For the reasons noted above, such standards should encompass not only the organisation of employees, but also appropriate measures with regard to outside agents and others who are retained to act for the benefit of the company.

132. During the on-site visit, practitioners suggested that the legal community might be reluctant to apply the law because of widespread scepticism towards the concept of criminal liability of a legal entity, which breaks with the principle of guilt as the basis for criminal liability in the Austrian legal tradition. The law opens a door for this reluctance among practitioners, as it foresees – as an exception to the principle of legality (or mandatory prosecution) that applies to criminal procedure in Austria – that the public prosecutor can "refrain from or abandon prosecution" of legal persons under broadly defined conditions (section 18 VbVG). The law would in particular allow prosecutors to not open, or to close a file if the efforts required to investigate appear out of proportion to the expected sanction. Prosecutors may be tempted to find that this condition is fulfilled rather often given the complexity of economic and financial crime cases, the difficulties of proving both intent by a staff member and organisational failures or

[46] Elements of the law that do not apply to the intentional offence of foreign bribery are not addressed.

negligence by management, and the relatively low level of sanctions applicable for the foreign bribery offence. Moreover, unlike diversion, which is expressly made available for legal persons, this procedure does not require the prosecutor to investigate the case thoroughly.

133. Representatives of the Ministry of Justice recognized that this broad discretion to drop cases against legal persons at the outset or subsequently would be in contrast to the general rules applicable to criminal procedure in Austria. Austria has noted that other countries apply a general principle of discretionary prosecution whereas in Austria it will apply only to legal persons. Ministry of Justice officials also explained that the provision was necessary to gain acceptance of the law's broad coverage of all offences, and that the provision is intended to apply to very minor offences or to one person companies where the responsible individual is already being prosecuted. The lead examiners recognize the importance of a broad application of the law in order to improve awareness and generate case law concerning its application, but they are concerned that the limited purposes described by the Ministry of Justice officials are not found in the text of the law. The only exception to the application of discretion that could apply in a foreign bribery case would be a vague provision excluding discretion where prosecution is necessary "because of any other particular public interest". The lead examiners encourage the Austrian authorities to consider applying the general principles and excluding discretion in foreign bribery cases against legal persons, or instituting appropriate guidelines, oversight and public control mechanisms for the exercise of discretion in such cases.

Commentary:

The lead examiners note that, as of the time of the on-site visit, Austria had still not established meaningful liability of legal persons for the offence of foreign bribery as required by the Convention. The examiners were accordingly unable to review the practical operation of such liability, as is contemplated in the Phase 2 process. They welcome Austria's recent efforts with regard to the introduction of criminal liability of legal persons and recommend that the Working Group assess the practical application of the new law once there has been sufficient practice.

Based on the analysis they have been able to conduct, the lead examiners recommend that, with respect to the issue of the discretionary prosecution of legal persons that engage in foreign bribery, Austria issue guidelines to prosecutors clarifying that prosecution of bribery of foreign officials is required in the public interest subject only to clearly defined exceptions, and take effective measures to bring these guidelines to the attention of all prosecutors. In light of the importance of organisational measures taken by companies with regard to both liability and sanctions under the law, they also recommend that Austria develop guidelines with regard to organisational measures for business for the fight against bribery. In addition, the lead examiners recommend that follow up by the Working Group address liability for foreign bribery generally under the new law and in particular the application of the statutory definition of staff.

7. Sanctions for foreign bribery

a) Criminal sanctions

i) Natural persons

134. Under section 307 PC, active domestic or foreign bribery by natural persons is punishable by imprisonment for at most two years. This results in foreign bribery being classified as a misdemeanour (*Vergehen*) rather than a felony (*Verbrechen*). The text of section 307 PC does not refer to fines, but they can be applied if certain conditions are met. Under section 37(1) PC, which applies to infractions carrying up a five year maximum sentence, a fine shall be imposed where imprisonment would actually be imposed for a term not exceeding six months, unless a sentence of imprisonment is necessary for purposes of

specific or general deterrence. The fine under section 37 PC is applied in lieu of prison. The maximum fine is 360 daily rates, which can amount a maximum of EUR 180 000.[47] Determination of the availability of a fine under section 37 PC depends on the gravity of the offence, the existence of mitigating factors and the degree of fault. A defence lawyer indicated that section 37 PC is applied in particular to first-time offenders.

135. Section 32 PC establishes that 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. In particular, the courts have to take into account whether offence was caused by circumstances or motives that could drive even a person respecting values protected by law to commit the offence. During the on-site visit, panellists unanimously considered that the arguable economic benefit to Austria of foreign bribery would not be considered as a mitigating factor for sentencing.

136. Section 43 PC provides for suspended sentences in cases where an offender is sentenced to imprisonment of not more than two years or a fine. It provides for probation for one to three years if it can be assumed that the mere threat of execution of the sentence alone or in conjunction with other measures will suffice to deter the offender from committing further punishable acts and that execution of the sentence is not necessary for general deterrence. The general circumstances are also considered. Because of the two-year maximum sentence for foreign bribery, this provision would be available in every foreign bribery case. Partial suspended sentences are also available under section 43a PC.

137. Austria had two convictions for active bribery in 2000, two in 2001, 16 in 2002, and three in 2003. For passive bribery, it had two in 2000, one in 2001, one in 2002 and four in 2003. Austria has supplied statistical information with regard to 2001 with regard to the categories of sanctions for a series of offences.[48] For active bribery, there were only 2 convictions, one for a fine and one for prison with a suspended sentence. It thus appears that no prison sentences have been served for bribery. For fraud, approximately 40% of the 838 convictions were for imprisonment, but two-thirds of those were for suspended sentences. For embezzlement, 64% of convictions gave rise to prison sentences, but 84% of those sentences were suspended. For theft, 31% of convictions resulted in prison sentences, but 63% of those were suspended.

138. In Phase 1, the Austrian authorities suggested that the two year maximum sentence for foreign bribery provided for effective, proportional and dissuasive sanctions on the basis that (1) the maximum penalty for offences against property (e.g. theft, fraud, etc.) is under normal circumstances imprisonment of up to six months or a fine; (2) the same penalties apply to domestic and foreign bribery; and (3) the two year limit was in fact an 1998 increase from an earlier one year limit. The lead examiners recognise that the maximum penalty was increased in 1998, but consider that the sanctions for foreign bribery in Austria do not meet the standard required by the Convention.

139. The sanctions for foreign bribery are not proportional to those for comparable offences in aggravated cases. Aggravated cases of offences against property are subject to much higher maximum penalties than for foreign bribery. For example, for embezzlement, fraud or theft, cases involving amounts of more than EUR 3 000 carry a three year maximum, and cases involving amounts over EUR 50 000 are

47 Under section 19 PC the daily rate depends on the personal situation and economical circumstances of the offender and can vary between two and 500 euros. The amount of one "daily rate" is subject to the personal and economic situation of the suspect and should have the effect to reduce the possible income of the suspect to the minimum subsistence level.

48 Statistics Austria can provide only information about categories of sanctions imposed, not about the quantum of actual sanctions.

sanctioned with by between one and 10 years. Such substantially greater sanctions for cases involving somewhat greater amounts are not possible for active foreign bribery regardless of the amount of the bribe or benefit obtained through bribery.[49]

140. In addition to concerns about the proportionality of sanctions between foreign bribery and economic crime in aggravated cases, it appears that in many cases, comparable domestic and foreign active bribery would not be sanctioned to the same degree. It is true, as noted in the Phase 1 report, that both domestic active and foreign active bribery are subject to the same sanctions under section 307. However, domestic active bribery cases routinely give 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.

141. Two provisions are of particular note in this regard; in both cases, the liability of the active domestic briber would arise under principles of complicity with the primary offence committed by the recipient of the bribe. Section 302 PC establishes the offence of abuse of official authority for "officials" and is sanctioned by imprisonment of up to five years. As recognized by prosecutors and others during the on-site visit, in many cases, an active briber in a domestic case can be charged pursuant to section 12 PC as an accessory to the official's infraction under section 302 PC and will thus be subject to a five-year maximum penalty.[50] But by its terms, section 302 PC applies only to passive bribery by "officials" (*Beamter*), a defined term limited to Austrian public officials (see PC section 74(4) and discussion above). Accordingly, as a matter of law, it does not apply to foreign officials and thus cannot apply to foreign bribery cases.[51]

142. Another potentially applicable provision is section 153 PC, which sanctions breaches of trust with imprisonment of up to ten years if the damage exceeds EUR 50 000. Its application to domestic bribery cases is undoubted: the Supp. Responses note (§ 16) that "*section 307 mostly has a subsidiary (or complementary) function"* because "[*i*]*n many cases of bribery to obtain or retain a contract section 153 .. .would be applicable"*. It is thus clear that in certain cases of domestic bribery, liability for complicity with the primary section 153 PC offender could act to greatly increase the penalties for active bribers.

143. It is unclear whether, as a legal matter, section 153 PC can apply to foreign public officials and thus to foreign bribery cases. A large majority of panellists considered that section 153 PC would not apply to foreign public officials. Prosecutors considered that section 153 PC would not apply to foreign bribery: it applies to the private sphere, i.e. to private bribery, whereas section 302 PC would apply to bribery in the public sphere. A representative of the Ministry of Justice recognized that section 153 PC applies to private as opposed to public activities, but noted that "it depends on where you draw the line between public and private" and suggested that section 153 PC would apply to all officials engaged in public procurement activities, whether domestic or foreign. In contrast, section 302 PC would be limited to officials engaged in sovereign activities narrowly defined, i.e., the exercise of the "imperium power". Under this theory, which Austrian officials have indicated is supported by certain legal commentators, section 153 PC could apply to Austrian or foreign officials involved in public procurement. However, a defence lawyer and another senior lawyer and representative of the Bar, when specifically asked about this Ministry of Justice interpretation, responded that they would expect that section 302 PC and not section 153 PC would apply

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49 The only possibilities to raise the maximum penalties (to 3 years) are in certain cases of bribery by public officials or for repeat offenders [see Phase 1 Report at 9 (citing Section 313 PC).]

50 As noted above, Austrian officials have underlined the breadth of liability for contribution or complicity with criminal acts in Austria.

51 The active briber could apparently be potentially liable for attempt in cases where the public official refused the bribe. See PC section 15(2) ("An offence is attempted as soon as the offender materializes his decision ... to instigate another to [commit the offence] (section 12) with an action immediately preceding the committal of the offence").

to bribery of an Austrian public official engaged in public procurement. No case law has been provided in this regard, either to support the application of section 153 to foreign officials or its potential application to officials engaged in public procurement and public contracts.[52]

144. As discussed above in the section on ending cases, prosecutors and courts can also terminate prosecutions through diversion, which involves the imposition of significantly less severe sanctions than in the case of a conviction. Diversion also applies differently to foreign bribery on the one hand, and to active domestic bribery and aggravated economic crime on the other hand. Pursuant to section 90a CPC, diversion is available for infractions carrying up to a maximum five-year imprisonment except for those that must judged by a lay jury court (*Schöffengericht*). Diversion is excluded by law in active domestic bribery cases where the liability of the active domestic briber allegedly arises under principles of complicity with the primary section 302 PC offence because such cases must be heard by a lay jury court. Diversion is always excluded in aggravated embezzlement, theft and fraud cases because of the applicable 10-year maximum sentence. In contrast, diversion must always be considered in a foreign bribery case.[53]

Commentary:

The lead examiners consider that as a matter of law and practice, the sanctions for foreign bribery are not proportional to those for domestic bribery or for comparable economic crime cases, particularly in major or aggravated cases, and that they are insufficiently dissuasive and effective. The lead examiners recommend that the Austrian authorities increase the criminal sanctions applicable to foreign bribery and in particular to serious cases in order to provide for effective, proportional and dissuasive sanctions.

ii) Sanctions applicable to legal persons

145. As noted above, there was no criminal liability for legal persons in Austria at the time of the on-site visit. Under the law that will enter into force on 1 January 2006, the main sanction against a legal person will be a fine. 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: two-year offences such as foreign bribery are limited to a maximum of 70 daily rates, whereas 10-year maximum offences such as aggravated embezzlement or fraud are subject to up to 130 daily rates. Thus the limitation of sanctions for foreign bribery to a two-year maximum would also significantly limit maximum sanctions under the law.

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52 Even if under the theory of section 153 PC proposed by the Ministry of Justice official, the provision could apply in some foreign bribery cases, the examiners consider that its application in practice would in any event be far more difficult in foreign bribery cases than in domestic cases, principally because of the almost-certain unavailability of the foreign public official. As recognized by the Ministry of Justice official at the on-site visit, in order to establish liability under section 153 PC for the principal offender, the court must determine that the recipient of the bribe had an intent to harm and that he/she knowingly violated their duties. A defence lawyer further noted that section 153 has a relatively high form of intent requirement on these issues. In domestic cases, the recipient of the bribe and other relevant parties will more frequently be available for the proceedings and proof of these elements will be easier. Since the on-site visit, the Austrian authorities have indicated that they consider that "the threshold for proving the elements of section 153 PC [is] not higher than for proving that the advantage given was undue and the advantage received was improper as required by the Convention".

53 The payment of an amount of money (up to a maximum of 180 daily rates) is in practice the most common sanction in connection with diversion (about half of diversion cases in 2002-2003). Other possible sanctions include community service; probation or participation in victim-offender mediation. The suspect has to be prepared to assume responsibility for his act and, as far as possible, indemnify the victim. The victim's consent is generally required.

The maximum daily rate has been fixed at EUR 10 000, which means the maximum fine for foreign bribery would be EUR 700 000.

146. Daily rates are assessed based on the income situation and financial performance of the company, but are principally determined by yearly proceeds. The notion of yearly proceeds is a new one in Austrian law; according to Ministry of Justice representatives, it is akin to the notion of profit and its calculation will require recourse to financial expertise.[54] The daily rate for the legal person "shall be equal to one 360th of the yearly proceeds", reduced or augmented by up to 30% taking into consideration its overall economic situation. (See section 4(4) VbVG)

147. Fines for loss-making companies are minimal: the daily rate is fixed at EUR 50 for companies that make no profits.[55] Accordingly, regardless of the size of the bribe or contract at issue, the maximum fine for such a company would be EUR 3 500. While the lead examiners recognize the important policy reasons for adjusting sanctions for legal persons in accordance with their profits, they have serious concerns about the practical absence of financial sanctions for loss-making legal persons under the law. These concerns are compounded by the inherent uncertainty of rules requiring the calculation of profits and the determination of relevant time periods. Unlike in an earlier version of the bill, the law as adopted does not define the revenue period to be considered; the authorities have explained this deletion as resulting from efforts to make manipulation of the amount of revenues more difficult. The law also does not generally define what constitutes revenues or permissible deductions. However, the document explaining the government's considerations indicates that "necessary investments" would be deductible from the revenues for purposes of determining the daily rate. This not only reduces considerably the amount of the revenues but may also give management the possibility to influence the amount of a fine.

148. The amount of the fine in an individual case will also depend on the existence of aggravating and mitigating factors. All section 3(3) VbVG cases, which are based on intentional acts by staff together with negligence by decision-makers, are considered to involve mitigating factors.[56] Given the requirement of managerial negligence (as well as intentional acts by staff) to establish liability in section 3(3), the systematic consideration of all such cases as involving mitigating factors is of concern, particularly in light of the low sanctions for foreign bribery generally.

149. The lead examiners also note that a large number of alternatives to fines would need to be considered in all foreign bribery cases. As noted above, the law introduces an exceptional regime of prosecutorial discretion not to proceed or to drop cases against legal persons and also provides for the availability of diversion (see above the section on ending cases). In addition, the law provides for mandatory remission of fines under certain conditions. For all fines of not more than 70 daily rates – and thus in all foreign bribery cases because of the two-year maximum – the fine "shall be" conditionally remitted for a one to three year period providing this would not result in insufficient specific or general deterrence. (See section 6 VbVG) Remission can be accompanied by instructions which can relate to technical, organisational or staff-related measures. The fine is not payable unless remission is revoked, which can occur if there is a conviction during the probationary period or if the association fails to comply with an instruction.

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54 Based on a maximum of 70 daily rates, the maximum fine for foreign bribery for profit-making companies could thus range from approximately 13% to 26% of yearly proceeds. It is, however, subject to the overall limit of EUR 700 000.

55 Non-profit and charitable entities are subject to daily rates of between two and EUR 500.

56 See section 5(2) VbVG ("The number [of daily rates] shall be the lower if ... the association is merely responsible for criminal offences committed by staff (section 3(3))".

150. The law contains important provisions that should help to improve the effectiveness of the enforcement of sanctions. The law allows pre-trial seizure of the expected amount of the fine under certain conditions; previously, such seizures were only possible with regard to amounts expected to be confiscated (see below). The law also provides that the court shall notify the competent administrative or supervisory authority about the commencement and conclusion of proceedings against a legal person and send the authority a copy of any sentence. (See section 26 VbVG) Courts may ask such authority to cooperate in monitoring compliance with instructions. Such authorities are also advised in certain cases of diversion involving probationary periods and instructions. These measures should assist in rendering administrative sanctions more effective. The lead examiners encourage the Austrian authorities to consider appropriate measures to prevent individuals involved with convicted companies from avoiding the impact of such measures by creating new companies.

Commentary:

The lead examiners note that, as of the time of the on-site visit, Austria had still not established effective, proportional and dissuasive sanctions for legal persons that engage in foreign bribery, as required by the Convention. They note Austria's ongoing and recent efforts with regard to the introduction of sanctions and recommend that the Working Group assess the practical application of the new law once there has been sufficient practice.

Based on the analysis they have been able to conduct, the lead examiners consider 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. They recommend that Austria take all necessary measures to ensure that legal persons that engage in foreign bribery are subject to effective, proportionate and dissuasive criminal penalties in all cases. The Working Group should also follow up with regard to the issue of sanctions on legal persons for foreign bribery.

b) Seizure and confiscation

151. Section 20 PC contains general principles concerning confiscation of illegal gains. Any person who committed a criminal offence and obtained an economic benefit from it, or received an economic benefit for or with a view to the commission of an offence, can be ordered to make "payment of an amount of money equivalent to the gained illegal profits". The Austrian authorities have not provided information about the interpretation of the notion of enrichment or about its application to foreign bribery cases.

152. Confiscation can apply regardless of whether the original assets are still available or not. Until recently, confiscation did not apply to gains of less than EUR 21 802 unless it was necessary to deter future criminal offences, but as of 1 January 2005, the general principles apply to the confiscation of all amounts.[57] A conviction is not required and the decision about confiscation can either be made in a criminal trial or separately. Although at present only natural persons can commit offences in Austria, section 20(4) PC provides for the possibility to confiscate from legal persons and partnerships illegal gains resulting from criminal acts of other persons.

153. Section 144a CPC provides for pre-trial seizure of both the bribe and the proceeds of bribing a foreign public official to secure enforcement of an order of confiscation. Such a preliminary injunction may be issued even if the exact amount to be safeguarded is not yet known (section 144a(3) CPC). Such an order may, for example, prohibit a bank from paying the holder of the account. There is no experience with this provision in bribery cases.

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[57] See Art. 1 A no. 2 of the Budget Complementary Act (*Budgetbegleitgesetz*) 2005, BGBl. I Nr. 136/2004; Responses §§ 7.1-7.3.

154. Statistics on seizure and confiscation in relation to the bribery of foreign public officials are not maintained in Austria nor are such cases especially reported. Prosecutors indicated during the on-site visit that they were unaware of any seizure or confiscation in bribery cases.

c) Non-criminal sanctions

155. Non-criminal sanctions include exclusions from public procurement and general provisions providing for possible exclusions from the exercise of business. In addition, there are possible contractual consequences with regard to export credits. There is no provision requiring exclusion of convicted bribers from participation in privatisations.[58]

i) Public procurement

156. Under section 51 of the Federal Law on Public Procurement 2002 (*Bundesvergabegesetz* – BVergG), the purchaser shall exclude entrepreneurs from participating in an award procedure if, inter alia, (1) a final judgment challenging their professional conduct has been rendered against them or, in the case of legal persons and certain other entities, against natural persons on their managerial body (section 51(3) BVergG); or (2) evidence available to the purchaser demonstrates that they have been guilty of grave professional misconduct, in particular in violation of provisions of labour or social laws (section 51(4) BVergG). Section 182 BVergG allows the purchaser to withdraw from a contract already awarded if "the tenderer or a person acting for him during the award procedure has committed a criminal offence suitable to influence the award decision". The excluded bidder can challenge the exclusion before a procurement tribunal.

157. The Federal Law on Public Procurement does not specify the timeframe during which the company is excluded. The lead examiners were informed that exclusions from participation in government tenders would last for three months and could be extended by six months, but the company would have the possibility to have the suspension lifted by demonstrating that it has done everything possible to avoid a recurrence.

158. The effectiveness of these provisions, however, appears limited. A representative of the central procurement agency of the Austrian federal government (BBG - *Bundesbeschaffung GmbH,* owned by the Republic of Austria) stated that "there is no real possibility to exclude firms from a tender procedure", including in the case of convictions for bribery. The BBG is entitled to request from suppliers documentation that allows it to assess whether or not the supplier is eligible. Austrian procurement authorities also have access to a database known as ANKÖ with information on companies participating in tenders, including registration, business performance, past court procedures and convictions. Austria has not clarified the extent to which BBG makes use of this power to request information or to which it uses the information contained in the database. Since the establishment of this database in 2001, the BBG has not excluded any individual or company from participation in procurement based on a conviction or evidence of grave professional misconduct related to corruption.

[58] Large State-owned companies have in the past played an important role in the Austrian economy, but government holdings have fallen considerably over the past 15 years.

159. Austria has adopted a law implementing the European Union public procurement directive.[59] This law will enter into force on 1 February 2006 and will provide for mandatory exclusion from participation in public contracts of a candidate or tenderer who has been the subject of a final judgment for corruption.

ii) Exclusion from exercise of business

160. Section 13(1)(b) of the Trade Code 1994, as amended, (*Gewerbeordnung* 1994) provides that a natural person shall be excluded from practicing a trade if he/she had been sentenced by court to punishment of deprivation of liberty of more than three months or to a fine of more than 180 daily rates, unless the records have been cancelled. Section 87(1)(1) of the Trade Code provides for withdrawal of a trade license. It provides that the licence shall be withdrawn if the holder of the licence is convicted as defined in section 13(1) and commission of a similar act is to be feared in the future. At the time of the Phase 1 report, the relevant law required the exclusion of a legal person if the convicted natural person had a significant influence in the conduct of its business. This provision appears to have been repealed. The Austrian authorities have not provided statistics about the application of the exclusion from business provisions.

iii) Export credit and insurance agencies

161. The lead examiners note that the Action Statement requires official export credit or insurance providers to refuse to approve support for exports where there is "sufficient evidence" of bribery in the award of the export contract. If, after support has been approved, there is proof of bribery in the award of the export contract, it requires "appropriate action, such as denial of payment or indemnification, refund of sums provided and/or referral of evidence of such bribery to the appropriate national authorities". The lead examiners consider that a conviction for bribery related to the export contract would satisfy both of these tests and should result in a refusal of support and/or taking of other appropriate action.

162. Prior to provision of export support, Austria's export credit agency (OeKB) is not legally required to take any measures or deny support with regard to companies convicted of bribery, but has the power to withhold support for the transaction in question. It has no power to deny access to official support for all business of all company. After support has been provided, OeKB is similarly not required to take action in the event of a conviction for bribery. Possible actions include invalidating the support, denying a claim for indemnification and seeking legal recourse.[60] Austria's official export credit system has so far had no experience in dealing with bribery convictions.

Commentary:

The lead examiners note that Austria has significant possible administrative sanctions for persons convicted of foreign bribery. In light of evidence that such sanctions are rarely applied in practice, they invite the Austrian authorities to consider ways to enhance their effectiveness in bribery cases, including with regard to legal persons.

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59 OJ L 134/114, 30 April 2004 (Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts).

60 See Working Party on Export Credits and Credit Guarantees (2005), *Export Credits and Bribery: Review of Responses to the 2004 Revised Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits – Situation as of 21 January 2005*, OECD, Paris. (TD/ECG(2005)4) (Questions 5-7).

8. Enforcement of related offences and obligations

a) Accounting and auditing

163. The Commercial Code establishes the generally applicable accounting provisions, which incorporate the requirements of the Fourth and Seventh Directives of the European Union. Section 189(1) CC requires a merchant (*Kaufmann*) to record in its books its business transactions and the situation of its property according to the principles of correct accounting.[61] The books must be kept in such a way that a competent third party is able to get a picture of the business transactions and the situation of the enterprise within a reasonable time. The business transactions must be recorded in a way that makes it possible to follow their origins and development. According to section 190(2) CC, all the entries in the books and other records must be complete, correct, up-to-date and orderly. Material contingent liabilities, including those derived from bribery, must be disclosed according to section 222(2) CC and section 237(8) CC. Additionally the annual accounts must disclose any material risk to the company. Limited liability (GmbH) and joint stock (AG) companies have to submit their annual reports to the Commercial Register (*Firmenbuch*); additional publication requirements apply to certain specific types of entities such as banks. In accordance with an EU regulation, Austrian companies listed on a regulated European securities market must prepare their consolidated financial statements in accordance with International Financial Reporting Standards (IFRS) starting in 2005. Austria has opted not to require the application of IFRS to individual company financial statements.

164. External audits are required for a broad range of companies. Section 268 CC requires that an auditor must examine the annual financial statement and the situation report of companies as presented by the company's legal representatives. An obligatory audit does not exist with regard to small corporations unless they are required by law to establish a supervisory board.[62] Requirements for auditors are set out in the Statute of the Regulation of the Auditing, Tax Advising and Related Professions (*Wirtschaftstreuhandberufsgesetz*). To qualify as an auditor, an individual must have practical experience, pass examinations and be licensed by the Chamber.

165. Austria has recently adopted laws concerning the independence of auditors that will enter into force in 2006. They require the rotation of audit partners (but not firms) after five years and place some limits on or prohibit the provision of certain types of services by auditors to the company in the financial year to be audited (legal or tax advice or services related to accounting information systems). For auditors of certain large companies, the degree of permitted economic reliance on a single client has also been reduced. Only civil liability (loss of remuneration and civil damages) applies to breaches of the independence requirements. Recent steps have also been taken to improve the quality of audits by establishing a new mandatory system of peer review combined with public oversight.

166. Austrian law has recently been amended to require audit committees for listed companies and for those with a supervisory board of more than five members. Internal control systems must be established for GmbH and AG companies pursuant to the Law on Private Companies and the Law on Public Companies, and supervisory boards, where they exist, must also consider the functioning of internal controls. However, there does not appear to be any requirements that such controls specifically address bribery risks. Rule 78

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61 The Commercial Code applies to merchants, which can be legal or natural persons, and distinguishes them from persons to whom only the ordinary civil law applies. Accordingly, the Commercial Code accounting provisions do not apply to civil law entities such as civil law partnerships.

62 Supervisory boards are required for (1) joint stock (AG) corporations; and (2) limited liability companies (GmbH) with over 300 employees or with more than 50 shareholders and share capital in excess of EUR 70 000. Their purpose is to control and supervise the board of management. The criteria for small companies are described in the Phase 1 report (at 17-18).

of the Austrian Code of Corporate Governance (a voluntary Code principally applicable to listed companies) requires the auditor to consider the functioning of risk management (including internal controls) and report to the president of the supervisory board who must ensure this report is discussed by the board. However, it does not appear that company management is required to make any statements about internal control mechanisms relating to bribery in annual reports. (See Revised Recommendation Art. V.C.ii.)

167. There is no general fraudulent accounting offence in Austrian law, but criminal sanctions can be imposed, *inter alia*, if published annual accounts intentionally give an inaccurate view of the financial situation of the entity. The penalties apply under different statutes to GmbH and AG companies, to private foundations, and, according to the Austrian authorities, to all other entities required to publish a balance sheet. [See, e.g., section 122 of the Law on Private Companies (for GmbH companies) and section 255 of the Law on Public Companies (for AG companies)]. Prosecutors indicated that accounting violations can under some conditions give rise to sanctions under certain offences such as breach of trust (section 153 PC), fraud or embezzlement. The penalties for violations in connection with GmbH and AG companies are a fine of up to 360 daily rates or imprisonment for one year (until 2001, the sanction was two years' imprisonment or 360 daily rates). They apply to managing directors, members of the supervisory board and liquidators, and for GmbH companies only, to "agents". There does not appear to be any possibility of liability of legal persons for accounting offences.

168. A breach of duty by an auditor is not subject as such to criminal liability in Austria. Auditors may be liable for various criminal offences if they abuse their position (e.g., contributing to fraud by directors or assisting directors in tampering with the accounts). The Chamber has a disciplinary function with regard to accountants and auditors. No statistics have been provided in this regard, but the number of disciplinary proceedings was described as "very small" by a Chamber representative at the on-site visit; none relate to bribery.

169. The lead examiners were not able meaningfully to evaluate the effectiveness of the enforcement of accounting and auditing obligations in Austria. No information or statistics has been provided about the enforcement of accounting and auditing obligations. The Ministry of Economics and Labour receives an annual report from the Chamber, but the report apparently does not contain statistics about disciplinary activity. Its representative considered that the small number of disciplinary actions was a sign that self-regulation was working. According to the Austrian authorities, a new law that entered into force in September 2005, after the on-site visit, provides for sanctions for violations of the Statute on the Regulation of the Auditing, Tax Advising and Related Professions.

Commentary:

The lead examiners welcome the recent efforts of the Austrian authorities to encourage companies to implement internal controls generally and encourage Austria to ensure both that such controls address bribery and that annual reports are required to address the application of controls relevant to bribery. The lead examiners also welcome recent amendments to require the creation of audit committees for listed companies and certain other companies. The lead examiners note that Austria has reduced the sanctions applicable to false accounting and recommend that Austria ensure that its law adequately sanctions accounting omissions, falsifications and fraud in relation to all companies subject to its accounting and auditing laws, and that Austria re-examine whether the sanctions apply to all relevant persons, including legal persons.

In the absence of examples of or statistics about enforcement of accounting and auditing obligations, the lead examiners are unable to comment on its effectiveness, and therefore

recommend a future assessment when Austria has had adequate time to compile the relevant information.

b) Non-deductibility of undue payments to public officials

170. Austria's law on corporate tax, through reference to the income tax law, explicitly forbids the deductibility of payments, in money or in kind, the offering or acceptance of which would constitute a criminal offence. Since October 1998, this rule applies also to bribery of foreign public officials. The Guidelines on income tax, an official and internally binding interpretation of the Income tax law issued by the Ministry of Finance, explicitly mention bribery – section 307 PC – as one of these offences. The reference to the penal provisions for the purpose of regulating the tax deductibility of certain payments has direct repercussions on the regulation's scope and enforcement in practice. The abovementioned uncertainties about the interpretation of elements of the offence impact on the application of the provision on tax deductibility, and tax officials accordingly need to be thoroughly trained in the interpretation of the criminal law.

171. The lead examiners' concerns expressed above[63] about the tax authorities' limited capacity to detect illicit payments and about the restrictive interpretation of the foreign bribery offence formulated in the Guidelines on income tax also apply to the enforcement of the prohibition of the deduction of illicit payments from taxable income. Moreover, serious difficulties in applying the Guidelines to companies arise because they are drafted with a view to the taxation of individuals; this concerns, for instance, the definition of "citizenship" of a company. The lead examiners learnt that this issue will be resolved in light of the new law on criminal liability of legal entities. Although the Austrian tax authorities explained that guidelines that are not in line with the law would not be applied, the lead examiners fear that tax administrators would in practice apply the limiting interpretations of the guidelines when deciding whether payments are tax-deductible.

172. Illegal deduction of payments that constitute bribes can be prosecuted as tax evasion and sanctioned by a fine equalling up to twice the amount due and imprisonment of up to two years if the offence was committed intentionally. If the tax evasion was committed by negligence, a fine up to the evaded sum can be imposed. The procedure applicable for sanctioning tax evasion depends on the amount of evaded tax: only cases where the evaded amount exceeds EUR 75 000 fall into the competency of the regular law enforcement agencies. All other tax cases are dealt with by a branch of the tax administration that applies a distinct administrative criminal tax procedure, laid out in the Code on financial crimes.

Commentary:

The lead examiners are satisfied with the clear prohibition of deductibility from taxable profits of bribes paid to foreign public officials, but they are concerned that the interpreting Guidelines are at variance with the law and diminish the effectiveness of the legal provisions. The lead examiners recommend that the Austrian authorities revise the Guidelines appropriately including with regard to the new law on criminal liability of legal entities and provide training with regard to the relevant criminal law provisions to tax inspectors.

c) Money laundering

173. Money laundering has been a criminal offence under section 165 PC since 1993. Money laundering is defined as an act of intentionally concealing property items that derive from certain offences; foreign bribery was added to the catalogue of predicate offences in 2002. Austrian penal law does not incriminate self-laundering, i.e. the laundering of assets that originate from an offence that the launderer

63 See the section on "Prevention and detection – the tax administration" above.

him/herself has committed; for purposes of detection, financial institutions are however obliged to report suspicions of self-laundering. Penalties for money laundering may include up to two years' imprisonment, or imprisonment up to five years if the value of the laundered assets exceeds EUR 50 000 or the act was committed by a member of a criminal organisation.

174. The Austrian FIU triggered 147 investigations in 2004. Investigations are commenced based on information received from various sources – suspicious transactions reports, reports from other national law enforcement authorities or requests from Interpol, Europol and FIUs of the Egmont-group. About two thirds of these cases were transmitted to the prosecutorial authorities for criminal prosecution. The outcome of these investigations remains unknown to the lead examiners. No statistics on criminal proceedings and convictions for money laundering offences appear to be kept. The Austrian authorities explained that offenders convicted for money laundering would most often have committed other crimes that entail harsher punishment. Only these offences would appear in the statistics.

Commentary:

The lead examiners regret that little information is available on the enforcement of the offence of money laundering. They consider that statistics specific to money laundering would be required to allow assessment of the enforcement of the money-laundering offence in Austria.

D. RECOMMENDATIONS

175. The Working Group welcomes Austria's recent efforts with regard to the introduction of criminal liability of legal persons and the fact that the law will enter into force on 1 January 2006. The Working Group notes that as of the time of the on-site visit, Austria had not yet established liability of legal persons for the offence of foreign bribery as required by the Convention. The lead examiners and the Working Group were accordingly unable to review the practical operation of such liability, as is contemplated in the Phase 2 process. 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.

176. Based on its findings regarding Austria's implementation of the Convention and the Revised Recommendation, the Working Group (i) makes the following recommendations to Austria under part I; and (ii) will follow up the issues in part II when there is sufficient relevant practice.

Part I. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

177. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Austria:

a) take measures, including appropriate training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that interact with Austrian companies that are active in foreign markets, including trade promotion, export credit and development aid agencies (Revised Recommendation, Paragraph I);

b) take further action to effectively improve awareness among companies, and in particular small and medium sized companies active in foreign markets, of the legislation regarding foreign

bribery and of the government's intention to enforce it, and to assist companies in their efforts to prevent foreign bribery (Revised Recommendation, Paragraph I);

c) work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to develop specific training on foreign bribery in the framework of their professional education and training systems (Revised Recommendation, Paragraph I).

178. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Austria:

a) establish procedures to be followed by employees of export credit, trade promotion and development aid agencies for reporting credible evidence of bribery of foreign public officials to competent prosecution authorities, and ensure that preventive anti-bribery clauses are applied by subsidiaries of OeKB (Revised Recommendation, Paragraph I);

b) take measures to facilitate the reporting of suspicions of foreign bribery by private sector employees, including clarifying the effect of section 86 CPC and considering steps to better protect from retaliatory action employees who report in good faith suspicious facts involving foreign bribery (Revised Recommendation, Paragraph I);

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

d) require auditors to report all suspicions of bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, and consider requiring auditors, in the face of inaction after appropriate disclosure within the company, to report all such suspicions to the competent law enforcement authorities (Revised Recommendation, Paragraph V.B).

Recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences

179. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Austria:

a) monitor and evaluate the performance of investigation and prosecution agencies with regard to foreign bribery allegations on an on-going basis, including in particular with regard to decisions not to open or to discontinue an investigation, and including in order to ensure that considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person involved do not influence the investigation or prosecution of foreign bribery cases (Convention, Article 5; Revised Recommendation, Paragraph I);

b) take all necessary measures to ensure that Austria does not decline to render mutual legal assistance (MLA) in foreign bribery cases on the ground of bank secrecy, take all appropriate measures to ensure the provision of MLA in foreign bribery cases without undue delay, and consider developing methods to collect statistics regarding MLA while maintaining the efficiency of a decentralized system (Convention, Articles 9(1), 9(3));

c) ensure that the necessary resources, including specialized expertise, are made available to prosecutors for the effective investigation and prosecution of the foreign bribery offence (Convention, Article 5; Revised Recommendation, Paragraph 1);

d) take appropriate measures to ensure (i) that all bribes offered, promised or given to a foreign public official for any use of the official's position, whether or not within the official's authorised competence, constitute the basis for a foreign bribery offence; and (ii) that a foreign public official's acceptance of an undue advantage exceeding a small facilitation payment is deemed contrary to the official's duties and would therefore constitute the basis for an active foreign bribery offence (Convention, Article 1);

e) issue and publicize guidelines to prosecutors clarifying that prosecution of allegations of bribery of foreign public officials by legal persons is always required in the public interest under the new law on the criminal liability of legal persons, subject only to clearly defined exceptions, and develop guidelines with regard to organisational measures for business with regard to the fight against bribery (Convention, Articles 2, 3, 5); and

f) provide appropriate training to judges and law enforcement personnel, including prosecutors and the staff of the Federal Criminal Investigation Office (BKA), with respect to the investigation, prosecution and adjudication of foreign bribery cases (Revised Recommendation, Paragraph I).

180. With respect to related accounting/auditing and tax offences and obligations, the Working Group recommends that Austria:

a) ensure that its law and practice adequately sanction accounting omissions, falsifications and fraud relating to foreign bribery, and re-examine whether the law applies to all companies subject to Austrian accounting and auditing laws and whether such sanctions are capable of being imposed on legal persons (Convention, Article 8); and

b) revise the Guidelines on income tax so that they accurately reflect the applicable law, and provide training with regard to the relevant criminal law provisions to tax officials (Revised Recommendation, Paragraph IV).

181. With respect to sanctions, the Working Group recommends that Austria:

a) increase the criminal sanctions applicable to foreign bribery and in particular to serious cases in order to provide for effective, proportional and dissuasive sanctions (Convention, Article 3(1));

b) take all necessary measures to ensure that legal persons that engage in foreign bribery are subject to effective, proportionate and dissuasive criminal penalties, including in cases where the legal person may not have generated significant profits over the relevant period (Convention, Articles 2, 3(1));

c) take appropriate measures to ensure that diversion and non-punishment pursuant to section 42 PC are excluded at least in all serious cases of foreign bribery (Convention, Article 3);

d) compile statistics with regard to cases brought and types of sanctions imposed with regard to money laundering and accounting offences (Convention, Articles 7, 8).

Part II. Follow-up by the Working Group

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

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

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

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

ANNEX 1

List of Participants in the On-Site Visit

MINISTRIES

Federal Chancellery
– Civil Service and Administrative Reform Division
Federal Ministry of Economics and Labour, including:
– Enterprise Department
– Exports and Investment Policy Division (Home of Austria's National Contact Point for the OECD Guidelines for Multinational Enterprises)
Federal Ministry of Finance
– Directorate General for Taxes and Customs
– Export Financing and International Export Promotion Policy Division
– Export Promotion and Export Guarantees Division
– Financial Markets and Supervision of Financial Market Authority Division
Federal Ministry of Foreign Affairs
Federal Ministry of the Interior
Federal Ministry of Justice, including:
– Criminal Procedure Law Division
– Penal and Grace Affairs Section – International Affairs and Mutual Legal Assistance Division
– Penal Law Codification Section

LAW ENFORCEMENT AND JUDICIAL AUTHORITIES

Bureau of Internal Affairs at the Federal Ministry of the Interior
Federal Criminal Investigation Office, including:
– Economic and Financial Crime Division
Office of the General Procurator
Regional Court (Vienna)
Regional Public Prosecutor's Office – Korneuburg (Lower Austria)
Senior Public Prosecutor Office (Vienna)
Supreme Court
Vienna Federal Police

OTHER STATE ORGANS

Austrian Development Agency (ADA)
Austrian Export Credit Agency (OeKB)
Austrian Financial Market Authority (FMA), including:
– Finance and Controlling Division
– Legal and Enforcement Affairs Division
Austrian Government Holding Company and Privatisation Agency (ÖIAG)
Board of Audit

CSR-Austria Information Office
City of Vienna Chief Executive Office – *Wiener Antikorruptionsprojekt*
Federal Procurement Agency (BBG)
National tax agency – Large Enterprises Examination Office Vienna
Ombudsman Board
Parliamentarians

CIVIL SOCIETY AND THE SOCIAL PARTNERS

Austrian Bar Association
Austrian Chapter of the International Chamber of Commerce (ICC-Austria)
Austrian Defence Lawyers' Association
Austrian Federal Chamber of Labour
Austrian Federal Economic Chamber (WKÖ), including:
– Foreign Trade Austria (AWO)
Austrian Trade Union Federation
Austrian Public Services Trade Union
Daily newspaper
Federation of Austrian Industries (IV)
Weekly political magazine
Academics

ACCOUNTING BODIES

Austrian Institute of Certified Public Accountants (IWP)
Chamber of Chartered Accountants, Tax Advisors and Licensed Bookkeepers (KWT)
Large and medium size accounting firms

PRIVATE SECTOR

Austrian Bankers' Association
Austrian multinational company – energy sector
Austrian multinational company – information technology and manufacturing sectors
Austrian SME involved in official aid development projects
Exporting Austrian SMEs of the medical equipment sector
Major Austrian banks
Major Austrian insurance company
Private law firm

ANNEX 2

List of Acronyms and Translations

ADA	**Austrian Development Agency**
AG	**Joint-stock company (Aktiengesellschaft)**
AWS	**Austria Wirtschaftsservice**
AWO	**Austrian Trade Agency**
BAO	**Federal Tax Procedural Act (Bundesabgabenordnung)**
BBG	**Federal Procurement Agency (Bundesbeschaffung GmbH)**
BIA	**Bureau of Internal Affairs at the Federal Ministry of the Interior**
BKA	**Federal Criminal Investigation Office**
CC	**Commercial Code (Handelsgesetzbuch – HGB)**
CEE	**Central and Eastern Europe**
CPC	**Criminal Procedure Code (Strafprozeßordnung – StPO)**
CSR	**Corporate Social Responsibility**
EMLAT	**Extradition and Mutual Legal Assistance Act**
FIU	**Financial Intelligence Unit**
FMA	**Financial Market Authority**
GmbH	**Limited liability company (Gesellschaft mit begrenzter Haftung)**
GRECO	**Group of States against Corruption (Groupe d'États contre la Corruption)**
ICC	**International Chamber of Commerce**
IFRS	**International Financial Reporting Standards**
ISA	**International Standards of Auditing**
IV	**Industriellenvereinigung**
IWP	**Austrian Institute of Certified Public Accountants (Institut österreichischer Wirtschaftsprüfer)**
MFA	**Federal Ministry of Foreign Affairs**
MLA	**Mutual legal assistance**
MOJ	**Federal Ministry of Justice**
MP	**Member of Parliament**
NGO	**Non-governmental organisation**
OeKB	**Austrian export credit agency (Oesterreichische Kontrollbank)**
ÖVFA	**Austrian Association for Financial Analysis and Asset Management**
PC	**Penal Code (Strafgesetzbuch – StGB)**
Responses	**Responses of Austria to the general Phase 2 questionnaire**
SME	**Small and medium enterprise**
STR	**Suspicious transaction report**
Supp. Responses	**Responses by Austria to the questions in the supplemental Phase 2 questionnaire**
WKÖ	**Austrian Federal Economic Chamber**

ANNEX 3

Excerpts from Relevant Legislation

1. Austrian Penal Code [Strafgesetzbuch – StGB]

Section 12. [Treatment of all participants as offenders] – Not only the immediate offender commits the offence but also any person that instigates another person to commit it as well as everybody who is an accessory to its commission.

Section 37. [Imposition of fine in lieu of imprisonment] – (1) Where an offence is punishable by a penalty not severer than imprisonment for a term up to five years, be it in combination with a fine or not, and where in such a case imprisonment would actually be imposed for a term not exceeding six months, sentence shall nonetheless be passed for a fine not exceeding 360 day-fines, unless a sentence of imprisonment is necessary in order to restrain the offender from committing further criminal offences of to counteract the commission of criminal offences by other persons. […]

Section 74. [Other definitions] – (1) In the sense of this Federal Law means […]

4. public officer: everyone who is appointed to perform legal acts in the name of the Federal Government, a Provincial Government, an association of municipalities, a municipality or any other person of the public law with the exception of a Church or confession as its administrative organ by oneself or together with any other person or is entrusted in another way with duties of the federal, provincial or municipal administration;

4a. public officer of another member state of the European Union: everyone who is a public officer or office-bearer under the penal law of another member state of the European Union or would it be pursuant to the application of para. 4 mutatis mutandis.

4b. public officer of the Communities: everyone who is a public officer or employee in the sense of the statute of the public officers of the European Communities or the employment-conditions for the other employees of the European Communities or is at the disposal of the European Communities by order of the member states or public or private entities and is entrusted there with duties corresponding to the duties of public officers or another employees of the European Communities; public officers of the Communities are also the members of entities which has been founded under the treaties for the institution of the European Communities and the employees of these entities, the members of the Commission, the Court and the Audit Office of the European Communities as well as the executive organs and employees of the European Police Office (Europol);

4c. foreign public officer: everyone who holds an office within the legislation, administration or judiciary in another state, who performs public duties for another state or an authority or public entity of such a state or who is a public officer or representative of an international organization;

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 Euro shall be liable to imprisonment for up to three years, whoever causes damage exceeding 50,000 Euro shall be liable to imprisonment from one to ten years.

Section 165. [Money laundering] – (1) Whoever conceals property items that derive from the crime of another person, from such an offence under sections […] 304 to 308, or from such a tax offence of smuggling or evasion of import or export taxes (insofar as these fall within the competence of the courts), or disguises the origin thereof, particularly by giving in legal relations false information regarding the origin or true nature of those property items, the ownership of or other rights to them, the right to dispose of them, their transfer or their location, shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding 360 daily rates.

(2) Whoever knowingly acquires such property items, holds them in custody, invests, administers, converts, realizes, or transfers them to a third party, shall be liable in the same way.

(3) Whoever commits the offence involving items worth more than 40,000 Euro or as the member of a criminal group associated for the purpose of continuous money laundering shall be liable to imprisonment for a term of six months to five years.

(4) A property item shall be deemed to derive from an offence when the perpetrator of the crime has obtained it through that offence or received it for the commission of that offence, or when it represents the value of the originally obtained or received property item. […]

Section 302. [Abuse of official authority] – (1) An official who abuses wilfully his authority to carry out official matters executing the laws in the name of the federal government, a land, a local government, a municipality or another person under public law with the intent to harm the right of others shall be punished by prison sentence from six months to five years.

(2) Who commits the offence carrying out official matters with a foreign power or a multilateral or bilateral institution shall be punished by prison sentence from one year to ten years. By the same sentence shall be punished who causes through the offence a damage exceeding 40 000 Euro.

Section 304. [Acceptance of gifts by public officials] – (1) A public official, a public official 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 for a third party for performing or refraining from performing his official duties in violation of such duties shall be punished by imprisonment of up to three years.

(2) A public official who demands, accepts or causes someone to promise an advantage for himself or for a third party for performing or refraining from performing his official duties in accordance with such duties shall be punished by imprisonment of up to one year.

(3) If the value of the advantage exceeds EUR 3,000, the offender shall be punished by imprisonment of up to five years in a case as laid down in paragraph 1 and by imprisonment of up to three years in a case as laid down in paragraph 2.

(4) A person who accepts or causes someone to promise only a minor advantage shall not be punished as laid down in paragraph 2 unless the deed is committed on a commercial basis.

Section 307. [Bribery] – (1) Whoever offers, promises or gives an advantage to

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

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

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

4. a staff member of a senior executive of a public enterprise for exercising influence [on the senior executive] with a view to the exercise or the refraining from the exercise of a legal act [by the senior executive] in violation of his [the senior executive's] duties (section 306a para. 1),

5. an expert adviser acting for payment for exercising influence [on a public official or a senior executive] with a view to the exercise or the refraining from the exercise of an official act [by the public official] or a legal act [by the senior executive] in violation of his [the public official's/the senior executive's] duties (section 306a para. 2) or

6. a foreign public official - aside from a case falling under No. 1 - for the exercise or the refraining from the exercise of an official act in violation of his duties in order to obtain or retain business or any other improper advantage in the conduct of international business

for him or a third party shall be liable to imprisonment up to two years.

(2) Whoever offers, promises or gives not merely a petty advantage to

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

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

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

2. Austrian Criminal Procedure Code [Strafprozeßordnung – StPO]

Section 84. [About examination of punishable acts and about preliminary investigations] – (1) If a public authority or public agency learns about a suspicion of a punishable act to be prosecuted ex officio which concerns its statutory area of activities, it is obliged to make a report to a public prosecutor or security agency. [...]

Section 86. [on reporting by the general public] – (1) Anybody who obtains knowledge of a punishable act which is to be prosecuted ex officio is entitled to report the same. Not only the public prosecutor is obliged to receive the report but also the investigating judge, the district court and the security agency; they have to transmit the report to the public prosecutor. [...]

Section 90a. [on diversion; i.e. alternatives to mandatory prosecution and section 90 termination] – (1) The public prosecutor has to proceed according to this chapter and refrain from prosecuting a criminal act if considering the sufficiently clarified facts a

termination of proceeding according to section 90 is not possible, but a punishment does not seem necessary to keep the suspected person from committing further crimes or to keep other persons from committing crimes in view of

1. the payment of an amount of money (section 90c) or

2. the furnishing of services in the public interest (section 90d) or

3. the laying down of a period of probation combined with assistance by probation services and complying with duties (section 90f), or

4. an out-of-court victim-offender mediation (section 90g).

(2) However, this chapter may be applied only if

1. the criminal act does not fall within the competence of a court comprising lay judges

2. the guilt of the perpetrator is not considered to be grave

3. the criminal act did not entail the death of a person.

Section 145a [on the disclosure obligations of banks, credit and financial institutions] – (1) As far as credit or financial institutes are not obliged to keep the banker‘s secrecy [sect. 38 para.2 n.1 of the Banking Act, Federal Law Gazette Nr. 532/1993] and supposing that it seems to be necessary for clearing up a crime or offence within the jurisdiction of a court of first instance they and their persons are obligated

1. to disclose the name and other data being known to them about the identity of the holder of a business connection as well as his address;

2. to give information whether a suspected person holds a business connection with this institute, is economically empowered by it or authorized to it and in the affirmative to make all statements being necessary for the precise characterization of this business connection as well as to produce all documents about the identity of the holder of such a business connection and about his right of disposal;

3. to hand over all documents and any records about the nature and the extent of the business connection and business activities being connected with it and other business events of a certain period in the past or in the future if it must be supposed for certain reasons

a) that the business connection of a person with the credit or financial institute is related to the commission of the penal offence and either the holder of the account is personally suspicious to have committed the offence or it is to be expected that a person being suspected of the offence has realized a transaction through the account or will realize it; or

b) that the business connection is used for the transaction of a profit which has been obtained by penal offences or received for them (sect. 20 of the Penal Code or which is at the disposal of a criminal organization or terrorist group or has been provided or collected as a means for financing terrorism (sect. 20b of the Penal Code);

(1a) On the conditions mentioned under para.1 the persons being employed with the credit or financial institute must make a statement as a witness about facts which have been entrusted or made accessible to them by reason of the business connection.

(1b) A judicial order about the existence of the obligations under para.1 is only admissible if the proportionality for the purpose of the measure is observed. In this connection it shall be particularly taken into consideration that the aimed success is justifiably proportionate to the presumably effected infringement upon the rights of disinterested third parties and it shall be examined whether there could be also a reasonable chance of the aimed success by taking less incisive measures.

[…]

(3) The existence of the obligations under para. 1 has to be determined by an order the investigating judge. […]

(4) An order under para. 1 must be served upon the credit or financial institute, the accused and the persons being authorized to dispose by virtue of the business connection as soon as they are known to the court. The service upon the accused and the persons being authorized to dispose may be suspended so long as the purpose of the investigation would be endangered. About that the credit or financial institute must be informed which is obliged to keep all the facts and occurrences in connection with the judicial order temporarily a secret from costumers and third parties.

[…]

Section 166a. – If it is to be feared, on the basis of certain facts, that the witness would expose himself or a third person to a grave danger of life, health or personal liberty by indicating his name or other personal data (sec. 166 para. 1) or by answering questions allowing conclusions thereto, the investigating judge may grant exemption from replying such questions.

3. Federal Statute on Responsibility of Associations for Criminal Offences [Verbandsverantwortlichkeitsgesetz – VbVG]

Section 2 [Decision Makers and Staff] – (1) For the purpose of this statute decision maker shall mean a person who

1. is a managing director, an executive board member or Prokurist [translator's note: compare: authorised officer] or who is authorised in a comparable manner to represent the association 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 association.

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

1. on the basis of an employment relationship, apprentice relationship or other training relationship,

2. on the basis of a relationship that is subject to the provisions of the Outwork Act [Heimarbeitsgesetz] 1960, BGBl. [Federal Law Gazette] No. 105/1961 or that is of an employee-like status,

3. as an employee provided on a temporary basis as defined in Section 3 para 4 of the Act on Temporary Provision of Employees [Arbeitskräfteüberlassungsgesetz – AÜG], BGBl. No. 196/1988, or

4. on the basis of a service relationship or other special public-law relationship.

Section 3 [Responsibility] – (1) Subject to the additional conditions defined in paragraphs 2 or 3 an association shall be responsible for a criminal offence if

1. the offence was committed for the benefit of the association or

2. duties of the association have been neglected by such offence.

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

(3) The association 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 association 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 association for an offence and criminal liability of decision makers or staff on grounds of the same offence shall not exclude each other.

Section 4 [Fine for the Association] – (1) If an association 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 association by taking into account its other financial performance. The daily rate shall be equal to one 360th of the yearly proceeds or exceed or fall short of such amount by not more than one third; however, the daily rate shall amount to not less than 50 euros and not more than 10.000 euros. If the association serves charitable, humanitarian or church purposes (Sections 34 to 47 Fiscal Code, BGBl. No. 194/1961) or is not profit-oriented, the daily rate shall be fixed at a minimum of 2 euros and a maximum of 500 euros.

Section 18. [Discretion regarding Prosecution] – (1) The public prosecutor may refrain from or abandon prosecution of an association if, when weighing the seriousness of the deed, the weight of the breach of duty or care, the consequences of the deed, the conduct of the association after the deed, the amount of the fine to be imposed on the association which is to be expected, as well as legal disadvantages for the association or its owners resulting from the deed which have already occurred or are imminent, prosecution or a criminal penalty appears to be unnecessary. This shall, in particular, be the case if investigations or requests for prosecution would involve an enormous amount of time and money which would obviously be disproportionate to the importance of the matter or to the criminal penalties to be expected in case of a conviction.

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

1. because of a danger originating from the association of commission of a deed with serious consequences for which the association might be responsible,

2. to counteract commission of deeds in connection with the activity of other associations, or

3. because of any other particular public interest.

Section 19. [Abandonment of Prosecution (Alternative Measures)] – (1) If it has been ascertained on the basis of facts and circumstances that have been sufficiently clarified that cancellation of the report made or a procedure as laid down in Section 18 is out of the question and if the conditions stated in Sections 90a para 2 items 1 and 3 StPO have been met, the public prosecutor shall abandon prosecution of a prosecuted association on grounds of responsibility for a criminal offence if the association makes good the damage caused by the offence and eliminates other consequences of the offence and gives immediate evidence thereof and if imposition of a fine does not appear to be necessary in view of

1. payment of money in an amount of up to 50 daily rates plus the costs of the proceedings to be reimbursed in case of a conviction (Section 90 c StPO),

2. a probationary period of up to three years to be determined, to the extent possible and expedient in combination with the expressly declared willingness of the association to take one or several of the measures listed in Section 8 para 3 (Section 90f StPO), or

3. the express statement of the association to render certain charitable services free of charge during a period to be determined of not more than six months (Section 90d StPO),

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

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

4. Banking Act [Bankwesengesetz – BWG]

Section 38. [Bank Secrecy] – (1) Credit institutions, their shareholders, members of their organs, employees as well as other persons acting for credit institutions may not disclose or make use of secrets which have been entrusted or made accessible to them solely due to the business relationships with customers […](banking secrecy). If facts that are subject to banking secrecy come to the attention of functionaries of the authorities or of the Oesterreichische Nationalbank in the course of their official activities, they shall keep such banking secret as an official secret from which they may only be released in the instances set forth in para 2. The obligation to maintain secrecy shall apply without time limit.

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

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

[…]

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

5. Code of Commercial Law [Handelsgesetzbuch – HGB]

Section 273. [Audit report] – (1) The auditor shall report in writing on the result of his/her/its audit. The report shall, in particular, state whether the book-keeping, the annual financial statements, the annual report, the group financial statements and the group annual report comply with the statutory provisions and whether the legal representatives have provided the disclosures and evidence requested. The items of the annual financial statements shall be broken down and explained. Detrimental changes of the assets

situation, financial situation and income situation compared to the previous year and losses that have not insignificantly affected the profit or loss for the year shall be stated and explained. If facts as defined in para 2 are not stated, this shall be expressly stated in the report.

(2) If in performing his/her tasks the auditor identifies facts which may jeopardise the existence of the audited undertaking or substantially impair its development or which suggest serious violations by the legal representatives of the law or the articles of association, s/he shall immediately report thereon. The auditor shall also report immediately if in the course of the audit of the annual financial statements it is found out that the prerequisites for assuming that there is a need for reorganisation (Section 22 para 1 item 1 URG [Statute on Reorganisation of Business Undertakings]) are fulfilled; the report shall state the equity ratio (Section 23 URG) and the fictitious debt retirement period (Section 24 URG).

(3) The auditor shall sign the report and present it to the legal representatives and the members of the supervisory board. If a supervisory board has been established in the case of a personally liable partner of a commercial-law partnership as defined by Section 221 para 5, the auditor shall present the report with regard to the partnership also to the members of that supervisory board.

6. Federal tax law [Bundesabgabenordnung – BAO]

Section 48a. – (1) The tax secrecy obligation shall apply in connection with the conduct of fiscal procedures, monopoly procedures (Sec. 2 (b)) or fiscal penal procedures.

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

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

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

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

[…]

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

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

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

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

Section 162. – (1) If the taxpayer claims a deduction of debts, other burdens or expenses, the tax authority may request the taxpayer to state precisely the creditors or the recipients of the deducted amounts.

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