Implementing the OECD Anti-Bribery Convention Phase 4 Report: **Austria**

OECD

This Phase 4 report on Austria by the OECD Working Group on Bribery evaluates and makes recommendations on Austria's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2021 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the OECD Working Group on Bribery on 10 October 2024.

The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability, and international co-operation, as well as unresolved issues from prior reports.

The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Member countries of the OECD.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

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Executive Summary

This Phase 4 report by the OECD Working Group on Bribery in International Business Transactions evaluates and makes recommendations on Austria's implementation and enforcement of the Convention on Combating bribery of Foreign Public Officials in International Business Transactions and related instruments. The report details Austria's achievements and challenges, including in enforcing its anti-foreign bribery laws, as well as the progress made since its Phase 3 evaluation in 2012.

The Working Group commends Austria for the progress made in foreign bribery enforcement since Phase 3. At least ten foreign bribery investigations were opened, and seven cases were concluded through trials, in which Austria obtained its first convictions of natural persons for foreign bribery. In addition, Austria has three investigations and two trials currently ongoing. Austria has also significantly enhanced the resources and expertise available to the law enforcement authorities specialised in anti-corruption, including by increasing their capabilities to process and analyse significant amounts of digitalised data in criminal proceedings. Austria's practices in providing and seeking mutual legal assistance in criminal matters have improved. Significant changes were also made to Austria's anti-money laundering and counter-terrorist financing regime.

Despite these positive developments, however, the overall state of foreign bribery enforcement raises concerns over the following significant issues. Litigated foreign bribery cases have yielded a high number of acquittals. This may be due to recurring issues in the way the foreign bribery offence is interpreted. In particular, certain court decisions have interpreted the Criminal Code notion of bribery for an act "in breach of duties" in a way that requires proof of elements beyond those of the foreign bribery offence under Anti-Bribery Convention Article 1. Austrian authorities have limited options for non-trial resolutions, and certain aspects of the existing framework should be clarified and made more transparent. The inadequacy of Austria's false accounting offence also hampers effective foreign bribery enforcement.

Enforcement against legal persons in foreign bribery cases is very limited. In most cases, companies involved in the alleged foreign bribery scheme were not prosecuted, and in one case that resulted in the conviction of individuals, the two companies allegedly involved were acquitted. Obstacles relating to the interpretation and application of the corporate liability regime, as well as prosecutorial practices in foreign bribery proceedings, may explain this issue. The Working Group commends the adoption of guidelines on the legislation on corporate liability. However, more efforts are needed to encourage proactive corporate enforcement, especially in foreign bribery cases. Despite an increase since Phase 3, sanctions for legal persons remain too low to be effective, proportionate, and dissuasive.

Prosecutorial independence remains a lingering concern since the Phase 2 evaluation. The Working Group expresses grave concerns about the vulnerability of the prosecutorial authorities vis-á-vis potential political interference in criminal justice, concerns supported by serious allegations which have also been documented in a 2024 report by a commission of independent experts established by the Minister of Justice. The Working Group nevertheless commends Austria for its demonstrated willingness to address

these issues in a transparent manner. It urges the authorities to continue these efforts and take meaningful steps to revise the current framework in order to shield prosecutors from undue interference.

Austria was able to detect and initiate foreign bribery cases through a variety of sources, and in particular through formal and informal international co-operation. Notably, however, no allegations of foreign bribery were detected by Austrian public authorities such as officials posted abroad, tax authorities, and agencies dealing with export credits and ODA, nor by accountants and auditors. More efforts should be undertaken to improve detection in these areas, as well as to clarify these officials' obligations to report to law enforcement. In 2023, Austria has established a general framework for the protection of whistleblowers in the public and private sector, which contains several features that are in line with international standards. The new law has some serious limitations that should be rectified as soon as possible, however. In order to enhance prevention and detection, Austria should also address foreign bribery risks in the next national anti-corruption strategy and money-laundering risk assessment, and intensify its engagement with the private sector to raise awareness of foreign bribery and encourage anti-corruption compliance.

The report and its recommendations reflect the findings of experts from Germany and Korea and were adopted by the Working Group on 10 October 2024. The report is based on legislation, practice data, and other materials provided by Austria, as well as research conducted by the evaluation team. Information was also obtained during an on-site visit held in Vienna between 29 January and 2 February 2024, during which the evaluation team met representatives of Austria's public and private sectors, prosecutors, judges, media, and civil society. Austria will report in writing in two years (i.e., in October 2026) on the implementation of all recommendations and on its enforcement efforts.

Introduction

1. In October 2024, the Working Group on Bribery in International Business Transactions (Working Group or WGB) concluded its fourth evaluation of Austria's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention), the 2021 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation) and related instruments.

Previous evaluations of Austria by the Working Group on Bribery

2. The Working Group, composed of the 46 countries Party to the OECD Anti-Bribery Convention[1], conducts successive phases of peer-review evaluations to monitor all Parties' implementation and enforcement of the Convention and related instruments. Since Phase 2, evaluations have included an on-site visit to obtain governmental and non-government views in the evaluated country. The evaluated country may comment on but not veto the evaluation report and recommendations. Evaluation reports are published on the OECD website.

3. The last full evaluation of Austria in Phase 3 dates from December 2012. In the 2015 follow-up report and following additional written reports by Austria, the Working Group concluded that, of the 24 recommendations resulting from the Phase 3 evaluation, 15 were fully implemented, 4 partially implemented, and 5 not implemented (see Figure 1 and Annex 2).

Box 1. Previous WGB Evaluations of Austria

2015 Phase 3 follow-up report
2012 Phase 3 report
2010 Phase 1bis report
2008 Phase 2 follow-up report
2006 Phase 2 report
1999 Phase 1 report

Figure 1. Austria's implementation of Phase 3 recommendations

[1] As of January 2024, the Working Group includes the 38 OECD member countries and 8 non-members (Argentina, Brazil, Bulgaria, Croatia, Peru, Romania, Russian Federation, and South Africa).

Phase 4 process and on-site visit

4. The monitoring process is based on principles agreed by the Parties. Phase 4 evaluations focus on the cross-cutting issues of enforcement, detection, and corporate liability. They also address outstanding recommendations from previous evaluations and changes to domestic legislation or the institutional framework. Phase 4 takes a tailored approach, considering each country's unique situation and challenges, and reflecting positive achievements. This report therefore does not revisit issues that were not deemed problematic in previous phases and have not been affected by later developments.

5. The team for this evaluation was composed of lead examiners from Germany and Korea, as well as members of the OECD Anti-Corruption Division.[2] After receiving Austria's responses to the standard Phase 4 questionnaire and country-specific supplementary questions, the evaluation team conducted an on-site visit in Vienna on 29 January – 2 February 2024. The evaluation team met representatives of the Austrian government, legislature, law enforcement and judiciary, independent supervisory authorities, the private sector (companies and business associations, lawyers, and auditors), as well as civil society (non-governmental organisations, academia, and the media) (see Annex 3 for a list of participants). The evaluation team expresses its appreciation to all on-site visit participants for their openness and contributions. The evaluation team is sincerely grateful to Austrian authorities for their engagement and exemplary co-operation throughout the evaluation and the organisation of the on-site visit.

Austria's economy and foreign bribery risks

6. Austria has a population of 9 million and ranks 24th among the 46 Working Group countries in terms of GDP. Austria's economy is highly developed, diversified, and heavily dependent on international trade. Exports account for around 50% of Austria's economic output, and more than a third of the goods and services produced in Austria are sold abroad.[3]

7. In terms of trade in goods and services, Austria ranked 20th in the Working Group for both exports and imports in 2022. Austria's main exported and imported goods were machinery and transport equipment (35.1% and 30.6%, respectively), manufactured goods classified chiefly by material (21.3% and 16.2%), and chemicals and related products (13.6% and 13.3%). Close to half of the trade in services (46% of exports and 49% of imports) covered services that include mostly business services, as well as telecommunications, computer, and information services, and financial services. Transport represented 27% of exported and 29% of imported services.[4] While the main destination for exports of goods is, by far, the European Union (EU) (68%), Austria's exports to other regions have been growing significantly, in particular in the Asia-Pacific region. Austria's main trade partners for exports of goods in 2022 were Germany (29.7%), Italy (6.7%), the United States (6.5%), and Switzerland (5.3%). The top 20 export

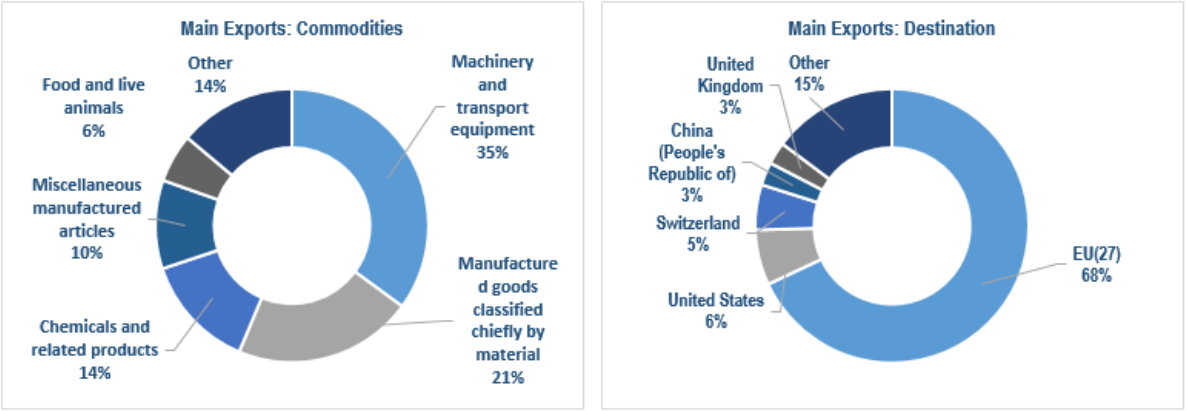
[2] Germany was represented by Dr. Cornelia Spörl, later substituted by Jonas Pfister, Federal Ministry for Economic Affairs and Climate Action, Legal Division; Dr. Maria von Tippelskirch, Prosecutor (temporarily seconded to the Hessian Ministry of Justice); and Mr. Christian Müller, Senior Public Prosecutor, Central Unit Organised Crime and Corruption. Korea was represented by Mr. Sunghwan Jeon, Deputy Director, National Prosecutor, International Criminal Affairs Division, Ministry of Justice; and Mr. Ik Jin Hwang, Prosecutor. The OECD Anti-Corruption Division was represented by Mr. Balázs Garamvölgyi, Legal Analyst and Coordinator of this evaluation, and Ms. Lucia Ondoli, Legal Analyst.

[3] Statistics Austria, Population, 2023; IMF, World Economic Outlook Database, October 2023, GDP, current prices, 2022; Economist Intelligence Unit, Austria; Federal Ministry for European and International Affairs, Foreign Trade (all last accessed in April 2024).

[4] OECD (2024), Trade in goods and services (indicator), imports and exports, Million USD, 2022 or latest available; UN Comtrade Data, Trade Data, SITC Rev. 4 commodity codes, exports and imports of goods, year 2022; UNCTADStat, Exports and imports by service-category (BPM6), year 2022 (all last accessed in May 2024).

destinations also included countries that are associated with higher foreign bribery risks due to the perceived level of public sector corruption, such as the People's Republic of China (2.7% of exports), Russian Federation, and Republic of Türkiye (both close to 1% of exports).[5]

Figure 2. Exports by main goods and destination



Source: UN Comtrade Data, SITC Rev. 4 commodity codes, exports and imports of goods, year 2022.

8. Regarding foreign direct investment (FDI), in 2022 Austria had USD 254 billion in outward FDI stocks and USD 204 billion in inward stocks, ranking 20th and 24th in the Working Group, respectively. Austria's outward foreign direct investments have significantly increased over the past decade. In 2022, the main destinations of outward FDI were Germany (16.2%), the United States (7.1%), the Netherlands (6.8%), Switzerland (6.5%), and Czech Republic (6.3%), although some of these may be "pass through" countries for investment destined for other jurisdictions. Like for exports, other significant FDI destinations are associated with higher foreign bribery risks, such as the Russian Federation (2.9%) and People's Republic of China (1.4%). An Austrian financial group was the largest Western bank in the Russian Federation at the time of writing this report, for example. Most outward investments were in services (half of which financial and insurance activities) and manufacturing (65.8% and 23%). Significant shares were also in mining and quarrying and construction (4.6% and 2.3%), sectors often vulnerable to corruption.[6]

9. Austria's micro, small, and medium-sized enterprises (SMEs) are internationally active, and therefore exposed to foreign bribery risks. SMEs account for 99.6% of Austrian companies and are more export-oriented than in other EU countries. In 2021, 163 817 Austrian enterprises were involved in foreign trade; 98% of the enterprises with exports were SMEs (36 533 out of 37 453).[7]

10. State-owned or controlled enterprises (SOEs) are also at risk of committing foreign bribery. In 2021, Austria had 7 982 public enterprises, at federal, province, or municipal level. Some of Austria's biggest

[5] UN Comtrade Data, Trade Data, SITC Rev. 4 commodity codes, exports and imports of goods, year 2022; Federal Ministry of Labour and Economy, Austria's economic relations by regions; Transparency International, Corruption Perception Index 2023 (all last accessed in May 2024).

[6] UNCTADStat, Foreign direct investment: Inward and outward stock, 2022; OECD Data Explorer, FDI by counterpart area and by economic activity, BMD4 (all last accessed in May 2024).

[7] European Commission (2023), SME Performance Review 2022/2023 - Austria country sheet; OECD (2021), OECD Economic Surveys: Austria 2021, p. 75; Statistics Austria, Trade by enterprise characteristics, Trade by enterprise size class and activity (NACE), reporting year 2021.

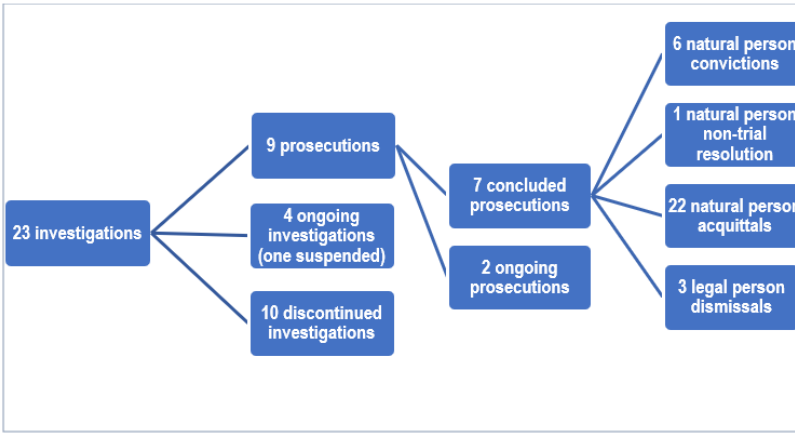
SOEs are internationally active, and operate in risk sectors such as oil, gas, chemicals, and electricity production and supply.[8] Austrian SOEs and their subsidiaries were allegedly involved in three foreign bribery cases concluded since Phase 3.

Foreign bribery enforcement since Phase 3

11. At the time of the Phase 3 evaluation in 2012, there had not been a conviction of foreign bribery since Austria's ratification of the Anti-Bribery Convention in 1999, despite a number of allegations that had come to light. Nevertheless, the Working Group noted some positive developments as five cases were under investigation and two had resulted in indictments, including against a legal person. In 2015, the two-year follow-up revealed significant progress in foreign bribery enforcement as Austria had six ongoing investigations, one case with indictments under appeal, and two cases with convictions under appeal.

12. Since then, Austria made further progress in foreign bribery enforcement. At least ten foreign bribery investigations were opened since the Phase 3 Report. At the time of the on-site visit, three foreign bribery investigations were ongoing, one investigation was suspended, and two cases were on trial before the first instance court. Moreover, seven foreign bribery cases have been concluded through trials since Phase 3. In one case, one person was charged with bribery and was convicted. In another case, five defendants were convicted and four acquitted. In the other five cases, all defendants were acquitted (except for one whose charges were dropped due to a non-trial resolution). The high rate of acquittals raises serious concerns as these may be explained, at least in part, by recurring issues concerning the interpretation of the foreign bribery offence, as analysed in section B.1.

Figure 3. Austria's foreign bribery cases 1999-2024



Note: Prosecutions include charges used as an alternative to foreign bribery, such as breach of trust and commercial bribery.

13. In addition, enforcement against legal persons is very limited. In most cases, companies involved in the alleged foreign bribery scheme were not prosecuted, and in one case that resulted in the conviction of individuals, the two companies allegedly involved were acquitted. The possible reasons for these obstacles to corporate enforcement, which include difficulties in interpreting and applying the corporate liability regime, are analysed in section C.2.

[8] GRÜB, Birgit and GREILING, Dorothea. "Accountability and transparency policies in Austrian Public-Owned Enterprises". In: ZATTI, Andrea (ed.). Accountability, anti-corruption, and transparency policies in Public-Owned Enterprises (POEs) – Part I, CIRIEC, 2020-2021, p. 103-106; Forbes (2023), The Global 2000, Austria.

Commentary

The lead examiners commend Austria for the further progress made in foreign bribery enforcement since Phase 3, as well as for obtaining its first convictions of natural persons for foreign bribery. Despite these positive developments, however, the state of foreign bribery enforcement in Austria raises concerns over the following significant issues. As analysed further in the sections below, litigated foreign bribery cases have yielded a high number of acquittals which may be due to recurring issues in the way the foreign bribery offence is interpreted (section B.1). Moreover, enforcement against legal persons in foreign bribery cases is very limited, in particular because of obstacles relating to the interpretation and application of the corporate liability regime, as well as prosecutorial practices in foreign bribery proceedings (section C.2).

A. Prevention, detection and reporting of the foreign bribery offence

A.1. Austria's Anti-Corruption Strategy

14. Austria is a federal state, comprising nine federal provinces or "*Länder*". Criminal law and procedure fall within the legislative competence of the federal government. However, some of the *Länder* may adopt provisions on corruption-related topics within their competence (including, for example, rules on whistleblower protection, the prevention of money laundering, and integrity for local authorities).

15. Austria has a National Anti-Corruption Strategy (NACS). The current NACS and the National Action Plan (NAP) 2023-2025 for the Federal Ministries were adopted in October 2023.[9] In addition, other authorities and organisations of the public and private sector as well as civil society can plan anti-corruption measures on a voluntary basis. Their NAP for 2023-2025 was adopted in early 2024.[10] The Federal Bureau of Anti-Corruption (BAK) has a leading role in developing the NACS. The Federal Ministry of Justice (MoJ) coordinates the part of the strategy dealing with criminal prosecution. In 2013, Austria created an Anti-Corruption Coordination Body (KgK), which includes all ministries, federal provinces, specialised law enforcement bodies, as well as stakeholders such as Transparency International and trade unions. Led by the MoJ, this body *inter alia* monitors national and international developments and initiatives in the field of anti-corruption, and contributes to the development of the NACS and NAP in the area of repression.

16. The National Anti-Corruption Strategy and derived measures are divided into six areas of action, which include corruption prevention and awareness-raising. Austrian authorities state that "at least some of [these areas of action] have the potential to aid the combat against bribery of foreign public officials". The strategy mentions international anti-corruption instruments and the need to comply with international standards and recommendations stemming from evaluation mechanisms by international organisations,

[9] Austria National Anti-Corruption Strategy (October 2023), available at https://www.bak.gv.at/301/praevention_edukation/anti_korruptionsstrategie/.

[10] The entities that participated in the NAP 2023-2025 on a voluntary basis are the following: Financial Market Authority Austria, Regional Court of Auditors of Lower Austria, Association NEUSTART, ÖBB-Holding AG, Central Bank of the Republic of Austria, Austrian Association of Municipalities, Parliament's General Administration Office, Austrian Court of Auditors, Transparency International Austria, Viadonau, and Verbindungsstelle der Länder.

including the OECD Anti-Bribery Convention and Working Group on Bribery. Foreign bribery and related risks are not expressly addressed, however, and the strategy appears to be focused on preventing corruption in the public sector. The NACS and NAP do not identify targeted measures to prevent, detect, and enforce foreign bribery, which may require different initiatives from those targeting domestic corruption.

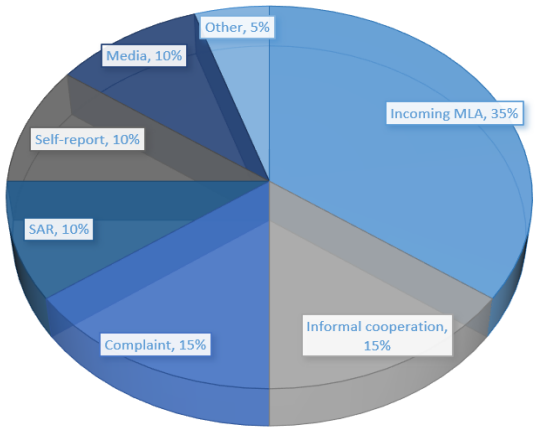
Commentary

The lead examiners welcome Austria's efforts to develop a national anti-corruption strategy and to involve various stakeholders in the process. They note, however, that the current strategy does not specifically identify the sectors and activities in Austria that are at risk of foreign bribery, nor does it specify competent authorities and measures for addressing those risks. The lead examiners therefore recommend that Austria's next anti-corruption strategy specifically address Austria's foreign bribery risks and possible measures to fight foreign bribery, encompassing prevention, detection, awareness-raising, and enforcement.

A.2. Sources of foreign bribery allegations and detection through international co-operation

17. Austrian authorities were able to open foreign bribery cases based on a variety of sources (see Annex 1 and Figure 4 below). The main detection source is international co-operation in criminal matters: most investigations were opened by law enforcement authorities after receiving information through incoming mutual legal assistance requests or informal co-operation (seven and three cases, respectively). Three cases began following criminal complaints (two filed by the companies against their managers and one by an employee), two following self-reports by companies, and one following some allegations raised in a corporate dispute. Suspicious activity reports (SARs) were at the origin of two investigations. According to Austrian authorities, in one of these cases an Austrian company was also implicated by a whistleblower abroad. Finally, two investigations were opened based on media reports. Notably, no allegations of foreign bribery were detected by Austrian public authorities (such as officials posted abroad, tax authorities, and agencies dealing with export credits and ODA), nor by accountants and auditors.

Figure 4. Detection sources in foreign bribery cases



18. As mentioned, international co-operation has been the main source of detection of foreign bribery cases opened by Austrian law enforcement authorities since Phase 3. Austria appears to utilise international co-operation effectively to detect allegations and start its own investigations. This may be a consequence of the "*ex officio* principle" ("*Prinzip der amtswegigen Verfolgung*" or "*Offizialprinzip*", CPC Art 2), which essentially obligates authorities to act upon any information they receive in their official capacity about allegations of a crime and exercise Austrian criminal jurisdiction accordingly. At least seven of Austria's foreign bribery cases were started based on information gained from incoming MLA requests: cases ***Airport Towers (Nigeria)***, ***Diplomatic positions (countries in Africa and Oceania)***, ***Hospital Project (IFI)***, ***Metro carriages (Hungary)***, ***Mining equipment (Poland)***, ***Port and Viaduct Project (Croatia)***, and ***Railway Reconstruction (Romania)***. Three cases (***Construction Contracts (South***

America), ***Property Developers (Türkiye)***, and ***Renovation works (Azerbaijan)***) were detected through informal co-operation, including information obtained in the context of a Working Group on Bribery meeting.

Commentary

The lead examiners commend Austria's ability to detect and initiate foreign bribery cases through a variety of sources, and in particular through formal and informal international co-operation. They are nevertheless concerned for the absence of detection by Austrian public authorities, such as officials posted abroad, tax authorities, and agencies dealing with export credits and ODA. Detection by these authorities is analysed in the sections below.

A.3. Austrian public officials generally

19. Despite the considerable number of investigated foreign bribery cases, in practice none of them was detected based on a report by Austrian public officials, even though, at first glance, Austrian public officials (defined in CC Sec. 74(1)4a and 4b, see section B.1.1) are obligated to report any suspicion of a crime to the criminal police or to the PPO (CPC Sec. 78(1)). Failure to comply with the reporting obligation can be the basis of disciplinary liability and may potentially give also rise to criminal liability for, e.g. suppression of evidence (CC Sec. 295), harbouring of a criminal (CC Sec. 299) or abuse of official authority (CC Sec. 302). However, there are exceptions to this rule, as well as narrowing factors, which have the potential to undermine the effectiveness of the public officials' reporting obligation.

Exceptions

20. The CPC itself creates exceptions from the general rule. There is no reporting obligation (i) if the reporting would impair an official activity whose effectiveness requires a personal relationship of trust, or (ii) if and as long as there are sufficient grounds to assume that the offence will cease to be punishable within a short period of time as a result of measures taken to mitigate the damage (CPC Sec. 78(2)1.-2.). In these cases, reporting should only be made if the protection of the victim justifies it. The CPC declares that confidentiality cannot be an obstacle to report a crime.

21. To clarify these exceptions, the evaluation team was presented with interpretations by academia and commentaries to the CPC. Some of these sources claim that the personal relationship includes trust-based advisory or supervisory roles, especially in health care, social work, and education (e.g., youth welfare officials or teachers learning about offences of juveniles). However, at least one academic source also lists, as an example, public officials advising entrepreneurs on environmental issues and learning about environmental offences in the process. This latter category is alarming and highly problematic if, by analogy, a public official supporting Austrian firms concerning their business activities abroad learns about foreign bribery but, according to this interpretation, has no obligation to report it, due to the "trust based advisory relationship".

22. Concerning the short timeframe for the foreseeable expiration of punishability, another academic source claims that the imminent lapsing of the statute of limitation is not a valid reason not to report, as it has no effect on the damage mitigation requirement. In this view, the heads of the authorities have the discretion to grant the perpetrator a reasonable "grace period" to make amends, before reporting the offence. This vaguely defined discretionary power for public officials is highly problematic if damage mitigation can be interpreted to include, e.g. dissolving contracts obtained through bribery or withdraw paid bribes. In addition, the "grace period" might lead to destruction of evidence, due to the postponed report. Austria states that this "grace period" only applies in cases of exclusion of punishment due to "active repentance" under the Criminal Code. This is not made clear in the CPC, however.

Narrowing factors

23. Another narrowing factor is that the law does not refer to individual officials but "public authorities or public agencies" in general. This, according to the prevailing interpretation of the CPC, means that only the heads of the public offices have the reporting obligation, as representatives of the institutions. The Civil Servants Employment Act (*Beamten-Dienstrechtsgesetz 1979* supports this interpretation as it contains provisions only on internal reporting obligations. In addition, according to Sec. 53 of this Act, the reporting obligation is deemed to be fulfilled if the civil servant has submitted a report or notification to their immediate internal superior or if he/she exercised their right to report to the BAK, see para. 26.

24. Due to the traditionally hierarchical structure of public offices and agencies, this internal superior is not necessarily the head of the institution. Thus, this rule creates a chain of upward reporting and unavoidable delays until the information reaches the head of the office and eventually the law enforcement authorities. In the case of criminal offences, the loss of time and the potential distortion of the information through the communication chain, along with the danger of untimely disclosing the detection of the suspicious activity, are factors that can condemn the subsequent criminal procedure to failure.

25. A further limiting element to the reporting obligation is that the suspicion of a criminal offence has to affect the statutory sphere of the given public authority, i.e. the offence has been committed or reported by an employee in connection with their official activities. Consequently, officials detecting offences, for example, outside working hours or not directly connected to their official mandate or capacity, while not prohibited to raise the suspicion to the law enforcement authorities, do not have to report it either.

Alternative reporting channels

26. The existence of special corruption-related reporting channels somewhat mitigates the hurdles described above. A special reporting obligation is established by the Law on the Federal Bureau of Anti-Corruption (BAK-G Sec. 5). According to this, security police authorities must report to the BAK every suspicion of an offence falling into BAK's competence, including foreign bribery (obligation to report). In addition, BAK-G Sec. 5(3) provides that no federal employee may be prevented from reporting a suspicion or allegation, falling into BAK's competence, directly and outside of official channels to the BAK (right to report). The BAK receives these reports through its Single Point of Contact (SPOC), where employees from different authorities can report suspicious circumstances directly (by post, fax, email, telephone, or in person, as well as through an anonymous reporting online system, see section A.11.3).

Commentary

The lead examiners are concerned that the ostensibly broad reporting obligation for Austrian public officials is undermined by the exceptions in the CPC and their interpretation, along with the fact that only the heads of the public authorities are considered as the obligated subject in practice. The existing alternative reporting channels seem to be appropriate to facilitate confidential or even anonymous reporting as recommended by the WGB and should be promoted and provided to enhance the timeliness and frequency of reporting by public officials. These, however, do not substitute an unambiguous reporting obligation of foreign bribery allegations for every public official that avoids unnecessary delays, especially when there is a risk of loss of evidence.

The lead examiners recommend that Austria clarify, by any appropriate means, that (i) the exceptions according to CPC Sec. 78(2)1.-2. are not applicable to the foreign bribery offence, and (ii) the reporting obligation should be performed by every public official via the available channels in the fastest possible way, so that law enforcement action can be initiated without delay.

A.4. Diplomatic missions

27. Austrian embassies and diplomatic missions are exposed to information regarding Austrian companies operating abroad and can therefore play a crucial role in the detection of foreign bribery. The

staff of diplomatic missions must report any suspicion of a crime according to the general reporting obligation. In addition, the Regulation for the Austrian Diplomatic Service (*Bundesgesetz über Aufgaben und Organisation des auswärtigen Dienstes - Statut / Federal Law on Duties and Organisation of the Foreign Service – Statute*) provides for the obligation for the heads of Austrian diplomatic missions to report any criminal behaviour of any official, honorary officer, or Austrian citizen abroad to the Federal Ministry of Foreign Affairs (section 19(2) of the Statute). There is no data on whether reporting happens in practice and whether these reports reach the law enforcement authorities.

28. According to Austria, the reporting obligation is part of the training each Foreign Service officer receives before being stationed abroad. In addition, the Chancellery trains Austrian representatives delegated to the EU institutions on foreign bribery specifically. According to the information made available to the evaluation team, however, the emphasis of awareness raising and training is on the prevention and detection of misconduct by Austrian public officials in diplomatic service, i.e. on the passive side of bribery. The evaluation team had the impression that the Foreign Service understands foreign bribery as passive bribery committed by Austrian public officials stationed abroad, therefore the trainings are centred around integrity and code of conduct of these officials, for example concerning receiving gifts. This misunderstanding is reflected in the answers given to the evaluation questionnaire as well. While prevention of passive side bribery is also relevant and much needed, understanding and addressing foreign bribery and raising awareness among the staff of diplomatic missions seems to be missing.

29. Austrian diplomatic missions follow the respective local media but do not monitor it to detect allegations of foreign bribery committed by Austrian citizens or companies. The Working Group's own media monitoring exercise contains at least four allegations, covered by the respective foreign media outlets and over which Austria has active jurisdiction, that remained unreported to Austrian law enforcement authorities. In practice, no foreign bribery case has been detected through reporting of diplomatic missions' officials – or at least has not been forwarded to the Austrian authorities. There is no established system for Austrian diplomatic missions to report foreign bribery suspicions.

Commentary

The lead examiners find that awareness raising and training for the staff of the Foreign Service is lacking. Both a basic understanding of the foreign bribery offence and established practice of monitoring foreign media by diplomatic missions for allegations of foreign bribery falling under Austrian criminal jurisdiction are missing.

The lead examiners recommend that Austria (i) revise the curriculum for staff of diplomatic missions to include proactive detection of foreign bribery committed by Austrian citizens and companies abroad; (ii) establish procedures for media monitoring by its diplomatic missions to detect foreign bribery; and (iii) include Austrian legal entities to the reporting obligation for diplomatic missions (Regulation for the Austrian Diplomatic Service Sec. 19(2)3).

A.5. Export credits

30. Export credit agencies (ECAs) are bodies that receive and review applications for officially supported export credits to facilitate international business transactions, and manage the provision of such support, which can take the form of direct credits and loans, refinancing or interest-rate support, or insurance or guarantee cover for credits provided by private financial institutions. Since they provide support to companies active in international business, ECAs can have an important role in preventing, detecting, and reporting potential foreign bribery allegations involving these companies. They can also suspend or deny support as a measure to combat foreign bribery in appropriate cases. Measures that ECAs can take are described in the 2019 Recommendation of the Council on Bribery and Officially Supported Export Credits (2019 Export Credits Recommendation) and in the 2021 Anti-Bribery Recommendation.

31. Austria's export credit agency is the "Austrian Control Bank" (*Österreichische Kontrollbank*, OeKB). The OeKB Group is defined as a "public-private partnership". The group is 100% privately owned by commercial banks headquartered in Austria. However, OeKB is mandated by the Republic of Austria to carry out certain tasks, including processing the export guarantees for the Federation.[11]

A.5.1. Due diligence measures to prevent and detect foreign bribery

32. Austrian authorities reported that, upon instruction of the Austrian Federal Ministry of Finance (MoF), OeKB implements procedures for the verification of applications for officially supported export credits. Since Phase 3, these procedures have been revised in line with the new requirements under the 2019 Export Credits Recommendation. Applicants must provide a declaration confirming that neither they (including their bodies or employees) nor their representatives or agents have been engaged or will engage in bribery, thus including bribery of foreign public officials. Applicants are further required to indicate whether they are currently under any investigation or prosecution for bribery, and whether they have been convicted for violations of bribery laws in the past five years. At the on-site visit, OeKB confirmed that this includes proceedings both in Austria and abroad. Contrary to the Export Credits Recommendation, the declaration does not cover "equivalent measures", such as non-trial resolutions, nor publicly available arbitral awards finding that the relevant company or individual has engaged in bribery. OeKB also requires applicants to confirm that they are not listed on a debarment list of an International Financial Institution (IFI) and verifies such information with the respective lists. OeKB further asks for a declaration that all commissions and fees are paid for a lawful purpose.

33. OeKB explained that it relies on various resources and software (such as World-Check and the Wolfsberg Group) to screen applicants and verify the information they provide, as well as to determine whether particular clients, sectors, or transactions are especially vulnerable to bribery risks. The available systems also allow for media screening. If there are still doubts concerning the declarations and information submitted by the applicants, or if suspicions of misconduct arise, OeKB conducts enhanced due diligence (EDD). OeKB explained that, in practice, EDD would be always triggered for serious crimes, including foreign bribery. In the context of EDD, OeKB can request further information and perform verifications, among other things, on commissions and fees paid by the applicant, as well as on the adequacy of a company's corrective and preventative measures including the adoption of appropriate anti-corruption compliance programmes or measures. Once the process is completed, OeKB provides a report to the MoF, which confirms whether support can still be provided.

34. It is not clear if enhanced due diligence also extends to other relevant parties, where appropriate, such as affiliated companies or joint-venture partners. Pursuant to 2019 Export Credits Recommendation VI, EDD measures should include the possibility to extend due diligence to other parties involved in a transaction, including, for example, joint-venture and consortia partners, and to request information about the beneficial ownership and financial condition of any of the parties in the transaction. Austria argues that such parties are nevertheless covered in the applicant's declaration through the use of the wording "vicarious agents" ("*Erfüllungsgehilfen*"), which may cover affiliated companies and joint-venture partners.

35. OeKB stated that it undertakes increasing awareness-raising efforts for staff on bribery risks, including red flags such as the use of certain agents and payment of excessive fees for representatives or local partners. Staff are also encouraged to take a tailored approach to screening and verifications. There is no training material dealing with detection of suspected bribery in supported transactions, however. OeKB later stated that it also "actively participates in the bribery meetings and workshops organised by the OECD", and "the insights gained in these venues are communicated inside OeKB". This is not sufficient, however, as it cannot replace regular training of relevant staff on the detection of potential foreign bribery. No known foreign bribery investigation was initiated following suspicions detected by OeKB.

[11] See An Overview of OeKB Group.

A.5.2. Reporting foreign bribery to law enforcement authorities[12]

36. OeKB employees are not considered public officials and are therefore not subject to the reporting obligations applicable to the latter. Austrian authorities explained that OeKB "is a trustee of the Ministry of Finance". Thus, there is no direct line of communication to law enforcement authorities. If OeKB has suspicions that foreign bribery may have been committed by applicants and clients, it communicates them to the MoF, which reports them to the law enforcement authorities.

37. OeKB confirmed that, in practice, it must report to the MoF on every aspect which could have a negative impact on a supported transaction or one pending review for granting support. Based on the MoF's regularly adopted mandate for implementing the relevant OECD standards, any suspicions of crimes or detection of suspected bribery in supported transactions would immediately trigger a report by OeKB to the MoF. The MoF can also instruct OeKB to undertake EDD in specific cases, such as if an allegation surfaces in the media.

38. The Ministry of Finance stated that according to internal rules, in case of suspicions of crimes they will seek the assistance of the *Finanzprokuratur*, the official lawyer and legal advisor of the Republic of Austria. The MoF further stated that "severe well-grounded suspicious cases" will be reported to the law enforcement authorities. This threshold for reporting may be too high. Under the Export Credits Recommendation, any "credible allegation or evidence that bribery was involved in the award or execution of the export contract" should be promptly reported to law enforcement authorities.

A.5.3. Denial of support and bribery discovered in a supported transaction

39. OeKB stated that if an applicant has ongoing proceedings for bribery or was convicted of a bribery offence, support would likely be denied. If a bribery allegation surfaces after support has been granted, OeKB would immediately inform the MoF, suspend disbursements and cover for further applications, and launch an EDD process (see para. 33 above). If it is established that the company engaged in bribery, or if an undisclosed charge or conviction is discovered after an applicant has obtained support from OekB, the guarantee may be cancelled with immediate effect. OekB stated that it also considers diversions (see section B.6.2) and arbitral awards finding that an individual or company has engaged in bribery.

Commentary

The lead examiners note as a positive development that Austria's export credit agency OeKB has revised its screening and enhanced due diligence practices to align them with the 2019 Export Credits Recommendation. OeKB can also suspend or deny support as appropriate if the relevant parties engage in foreign bribery. Nevertheless, further efforts are needed to improve the prevention, detection, and reporting of suspected foreign bribery by OeKB and the Ministry of Finance.

The lead examiners therefore recommend that Austria ensure that (i) the applicants' declarations cover "equivalent measures", such as non-trial resolutions, as well as publicly-available arbitral awards finding that the relevant company or individual has engaged in bribery; (ii) enhanced due diligence, as well as commitments to refrain from engaging in foreign bribery, also extend to other relevant parties, where appropriate, such as affiliated companies or joint-venture partners, in line with the measures described in 2019 Export Credits Recommendation V.3 and VI.2.e; and (iii) OeKB personnel receive appropriate guidance and training on the detection of potential foreign bribery schemes, covering in particular foreign bribery risks, red flags, and typologies.

The lead examiners also believe that the Ministry of Finance may be applying a threshold for reporting to law enforcement that is higher than the one required by the Export Credits

[12] 2019 Export Credits Recommendation, IV.6, VII.1, and VIII.1.

Recommendation. They recommend that the Ministry of Finance therefore promptly report to law enforcement authorities any credible allegation or evidence that bribery was involved in the award or execution of the supported transaction.

A.6. Official development assistance

40. Government agencies responsible for official development assistance (ODA) can play an important role in tackling bribery of foreign public officials. The OECD 2016 Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption (2016 ODA Recommendation) and the 2021 Anti-Bribery Recommendation contain standards to ensure that these agencies are able to effectively prevent, detect, and respond to actual instances of corruption in development co-operation.

41. The official development assistance provided by Austria has steadily increased over the past five years and amounted to EUR 1.7 billion in 2022. In terms of ODA recipients, Austria's development co-operation policy focuses on countries in South-East and Eastern Europe and sub-Saharan Africa.[13] The Austrian Development Agency (ADA) is the operational unit of the Austrian Development Co-operation.[14]

A.6.1. Measures to prevent and detect corruption in ODA contracts

42. Austrian authorities confirm that all ADA contracts contain anti-corruption clauses. The General Terms and Conditions, which are part of the ADA Grant contract, contain a section regarding the Code of Conduct and the Principle of Integrity. These principles, which apply to a "*Recipient and / or its staff members or partners engaged in the context of the Project*", include the fact that "*Gifts or other personal benefits may never be granted or accepted with a view to an action or omission in breach of an obligation, or the exercise of undue influence on the decision-making process of a third party*" (Sec. 1.9.2).

43. In the area of procurement, ADA requires bidders to provide criminal records of each person involved in management. In the area of grants, no self-declaration is required, however, which is not in line with 2016 ODA Recommendation III.6.ii. Nevertheless, external services are used to screen applicants for sanctions or past convictions. Under the partner due diligence process, grant applicants are screened for a record of criminal convictions, fines, or sanctions by international or national bodies, as well as charges of corruption or foreign bribery and ongoing investigations or allegations in these areas, as far as availability of information allows. An ADA representative at the on-site visit confirmed that the due diligence covers debarment lists of international financial institutions, and that ADA uses the "World-Check Know Your Customer database" for its due diligence and risk assessment processes. In addition to the information on proceedings and sanctions, the database shows the status of Politically Exposed Person.

44. ADA reported that its assessment of partners also considers the quality of the applicants' internal management and control systems. In addition, auditors' reports on annual financial statements and other independent audit reports are taken into account (as available), especially with a view to identifying shortcomings in the applicants' internal controls and compliance programmes or any types of malpractice. In addition, ADA stated that monitoring to prevent and detect corruption is also done through evaluation and on-site visits by the financial department. Projects are submitted to internal and external audits, which also consider bribery risks.

45. ADA personnel regularly receive training on the legal and compliance practices, and on the ADA whistleblowing system. Over the past four years, ADA also organised live webinars on "Austrian anti-corruption criminal law: cornerstones, must-knows and red flags" (2020), "Case Study Whistleblowing

[13] See OECD (2023), 2023 Trends and insights on development co-operation.

[14] ADA - Austrian Development Agency (entwicklung.at).

System - Reporting Categories, Procedures, Do's and Don'ts" (2022), and "Red Flags and Best Practices to prevent corrupt behaviour" (2023). Trainings are recorded and available to all personnel. The trainings available do not appear to provide sufficient in-depth analysis of foreign bribery risks, red flags, and typologies, which would be essential to ensure that personnel can properly detect foreign bribery schemes.

46. ADA has never detected a foreign bribery case. One allegation recently surfaced in the media, but it relates to a financed project involving multiple donors that had already been implemented. Nevertheless, ADA is reviewing the case. ADA states that it "has detected many other cases", but not foreign bribery.

A.6.2. Reporting and whistleblowing mechanisms in ODA

47. ADA has instituted information contact points for whistleblowing both internally and an externally. The internal contact points are ADA's four independent Integrity Officers, which can be reached through an electronic whistleblowing portal (anonymously if desired). The ADA whistleblowing portal is displayed on every page of the ADA website. The external contact point is the External Ombudsperson, a law firm specialising in white collar crime that reviews reports independently. ADA confirmed that the Whistleblower Protection Act applies to such reports.

48. Austrian authorities state that contract partners must inform ADA immediately of any case or suspicion of misuse of grant funds, fraud, or corruption in connection with the project. Contract partners are also contractually obliged to ensure that all further partners engaged in the funded project observe the anti-corruption clause and are informed about the whistleblowing contact points. To that end, contract partners must share the information sheet "Code of Conduct and Information Points" to their partners.

49. ADA employees have an obligation to report internally any suspicious circumstances relating to certain issues, which include corruption and bribery. They comply with their obligation by reporting to their superiors, or directly to the internal or external contact points. ADA personnel are considered public officials but are not subject to the legal obligation to report to law enforcement authorities (see section A.3). ADA indicated that "on a case-by-case assessment, also taking into consideration aspects of the local law and local aspects of criminal proceedings, ADA reports judicially punishable acts to the law enforcement authorities." An ADA representative explained that ADA usually consults local law firms to determine whether the conduct is criminal under local law. Complaints have been filed before local authorities in the past. ADA later provided one example of a report made to Austrian law enforcement authorities in 2019 and stated that it would report cases that fall within Austria's jurisdiction. Given the lack of a legal obligation to do so, however, it would be important that ADA internal instructions explicitly indicate that any suspicions of foreign bribery and related offences should be reported to Austrian law enforcement authorities.

A.6.3. Sanctioning regime in ODA

50. ADA confirmed that sanctions or past criminal convictions are considered exclusion criteria. Moreover, any breach of corruption clauses is ground for discontinuation of the funding contract and/or for reclaiming funds. Under the ADA grant contract, discontinuation or reclaim of funds applies, *inter alia*, wherever "*a gift, a pecuniary benefit or any other benefit has been offered, promised or granted to a person or agency directly or indirectly in connection with the awarding of the grant or with the implementation of the Project*." (Section 9.1).

Commentary

The lead examiners note that the Austrian Development Agency made important efforts to develop procedures for preventing and responding to instances of corruption. These include in-depth due diligence, assessment of applicants' internal controls and compliance programmes, and various verifications including on-site, as well as the creation of whistleblowing channels. ADA can also discontinue or reclaim funds in case of any breach of corruption clauses.

Nevertheless, further measures are needed, especially to improve detection and reporting of suspicions of foreign bribery in financed projects. There have also been recent allegations of irregularities in relation to a past multi-donor project. To that end, the lead examiners recommend that Austria (a) ensure that ADA personnel receive appropriate guidance and training on the detection of potential foreign bribery schemes, covering in particular foreign bribery risks, red flags, and typologies; (b) clarify, by any appropriate means, that ADA personnel should report to Austrian law enforcement authorities any suspicions of foreign bribery and related offences involving Austrian companies or individuals; and (c) ensure that applicants for ODA contracts are required to declare that they have not been convicted of corruption offences.

A.7. Tax measures to detect foreign bribery

51. In the Phase 3 evaluation, the WGB recommended that Austria take measures to restrict the routine practice applied by the tax authorities to confront tax payers about detected issues, including suspected bribe payments, before reporting them to the law enforcement authorities, so that this step is taken only in cases where there is a clear absence of risk of destruction or concealment of evidence, and establish safeguards that taxpayers follow-through with their undertakings to self-report bribe payments to the law enforcement authorities (Phase 3 recommendation 8(c)).

52. Austria implemented this recommendation by amending the Organisational Handbook of the Tax Office Austria and Tax Office for Large Companies. The updated provisions for tax officials prescribe that, concerning suspected bribes and other suspicious payments: (i) in cases where a suspicion of corruption is clear, a criminal complaint must be filed immediately, (ii) in all other instances, the facts must be established by way of further evidence-taking (independently or by way of formal allegation). The handbook emphasises that a formal allegation should only be raised if there is no risk that evidence could be destroyed. After filing a criminal complaint, the tax authorities must suspend their activities related to the suspected acts but may nevertheless take a decision on the tax deductibility of the payments under scrutiny.

53. In addition, the obligation for public officials to report suspicions of a criminal offence they encounter during their official activity is applicable to tax authorities as well (CPC Se. 78(1)), with the caveats explained in section A.3. According to the available information, no foreign bribery case has been detected by the Austrian tax authorities.

54. Austria is party to the Convention on Mutual Administrative Assistance in Tax Matters since 2014. This Convention allows the tax authorities of the Parties to exchange tax information for tax purposes. Under Art. 22(4) tax information provided to another Party may be used for non-tax purposes (e.g. criminal investigation of foreign bribery), if such use is allowed by the law of the supplying Party and its competent authority gives permission for such use.

Commentary

The lead examiners welcome the changes Austria introduced to the tax procedures to implement the Phase 3 recommendation. They suggest that the Working Group follow up whether staff of tax authorities receive regular training and awareness raising exercises to ensure the proper application of these procedures in practice.

A.8. Anti-money laundering measures

55. Austria transposed the 4th and 5th EU Anti-Money Laundering Directives with the Financial Markets AML Act in 2017 and the Beneficial Owner Registry Act in 2018, and with amendments introduced in a

series of sectoral laws. Austria's anti-money laundering and counter-terrorist financing (AML/CFT) regime was last examined under the FATF country assessment in 2016, prior to these changes.

56. The Austrian Financial Intelligence Unit (A-FIU) has been established at the Federal Criminal Police (BKA-G Sec. 4(2)(1)), as a specialised police unit. It receives information from the obligated entities and professions about transactions where the suspicion of a connection to money laundering or terrorism financing arises. Suspicious activity reports (SARs) must be submitted in electronic form via the dedicated portal. Austria explained that the A-FIU provides stakeholders with trends, patterns and general information about money laundering and terrorism financing through the secured channel "goAML". Typologies are not restricted to certain areas of offence (for example, no distinction is made between domestic and foreign corruption). Thus, there is no specific typology on foreign bribery. Typologies and training specifically addressing potential foreign bribery schemes (providing, for instance, concrete examples of transactions involving foreign intermediaries or Politically Exposed Persons) might be very beneficial, however. On the other hand, the A-FIU reported that it has in-depth cooperation and exchange of information with reporting entities in specific cases, including corruption-related cases.

57. Being part of the law enforcement community, the A-FIU has a wide range of sources and databases at its disposal. If the FIU analysis leads to the suspicion of a corruption offence, the report is sent directly to the BAK (see para. 26). As in other countries, the forwarded information serves "intelligence purposes only", is not directly admissible in the criminal procedure, and must be confirmed through investigative steps or international judicial co-operation.

58. The latest National Risk Assessment of Austria from 2021 (NRA) does not consider the money laundering risk connected to foreign bribery, nor corruption offences in general. Still, based on data of the A-FIU, among the submitted SARs in 2016-2019, suspicions of corruption as a predicate offence ranked sixth as the most frequent basis. On the other hand, the A-FIU's annual reports do not list bribery and corruption as a typical predicate offence. Panellists at the on-site visit attributed this phenomenon to the technical nature of online reporting where the reporting entity must choose from a drop-down menu a category of the alleged predicate offence. This choice has no further bearing, as identifying the predicate offence is the task of law enforcement authorities.

59. The NRA describes the Bank Account Registry and the Registry of Beneficial Owners as the most important tools available for the law enforcement and judicial authorities but recommends further improvements in this regard. In the Bank Account Registry, loan accounts and some of the safe deposit providers are not covered, and registering the account balances would improve the usefulness of the registry. The Registry of Beneficial Owners in 2021 covered 96.09% of the legal entities subject to registration. The Tax Authority has the power to issue fines to enforce registration and reporting of changes.

60. Concerning entities with legal personality, the NRA highlights private foundations and associations as moderately significant, trusts and similar arrangements as very significant money laundering risks overall. In 2021, there were about 130 000 associations and private foundations, while only 6 trusts and similar arrangements registered in Austria.

61. Suspicious activity reports (SARs) were used as the source of detection of foreign bribery in the ***Arms Trade (Slovenia)*** case, where the transfer of the bribe from the active side to the intermediary had been stopped by the financial institution due to the lack of a credible underlying reason. In the ***Software Licences Procurement (Romania)*** case, a SAR was one of the sources of detection.

Commentary

The lead examiners welcome the substantive changes Austria made in its AML/CFT regime since the Phase 3 evaluation. However, they regret that the 2021 National Risk Assessment does not address foreign bribery and corruption as predicate offences, a fact that might negatively affect the awareness of stakeholders throughout the reporting landscape.

The lead examiners recommend that (i) Austria evaluate and incorporate foreign bribery and connected money laundering into its next NRA to raise awareness amongst stakeholders; and (ii) in line with the identified risk, the A-FIU develop and disseminate typologies of foreign bribery schemes and offer foreign bribery-specific training.

A.9. Detecting foreign bribery through accounting and auditing

62. General rules on accounting and audit are laid down in the Austrian Business Code (*Unternehmensgesetzbuch*, UGB). Corporations covered by the law are obliged to have their annual financial statements and management reports audited, with the exception of small companies,[15] unless they are required by the law to have a supervisory board. Accounting and auditing are regulated in separate laws, analysed below.

A.9.1. Accounting standards

63. Accounting is regulated by the Federal Law on the Accounting Professions (*Bundesgesetz über die Bilanzbuchhaltungsberufe*, BiBuG), also implementing the 4th EU Anti-Money Laundering Directive for these professions. The general reporting obligation of public officials is not applicable, but accountants have an obligation to report money laundering and other criminal activities in the AML/CFT framework (BiBuG Sec. 43(2)). The law, amongst others, defines politically exposed persons and beneficial owners, according to the EU AML Directive.

64. Authorised accountants are required to exercise their profession conscientiously, carefully, autonomously and independently, and in compliance with the provisions of the law and the accounting guidelines issued by the Austrian Economic Chamber (WKÖ). From 1 January 2014, the President of the Economic Chamber is responsible for the accountancy professions as the federal authority acting within the remit delegated by the Federal Ministry of Digital and Economic Affairs. These powers are in practice exercised by the Office of the Authority for the Accountancy Professions at the Economic Chamber.

65. Accountants are bound by professional secrecy and enjoy legal privilege, with the exception of the reporting obligation under the AML/CFT regime (BiBuG Sec. 39(4)(1)). This exemption indirectly covers any form of criminal activity, including bribery, regardless of the place of commission.

66. The law describes suspicions that warrant reporting to the A-FIU as “a well-founded suspicion, the assumption of the probability of the existence of a certain fact, which arises from knowledge of facts pointing to it. This assumption must go beyond a mere presumption” (BiBuG Sec. 43(2)(7)). The law sets a higher level of certainty requirement and is thus narrower than the threshold for initiating a criminal investigation, according to which “an initial suspicion exists if it can be assumed on the basis of certain indications that a criminal offence has been committed” (CPC Sec. (1)(3)). As a result, accountants may not be ready to report suspicions of criminal offences and may feel compelled to “investigate” and collect facts themselves even if the law enforcement authorities would be able to act already.

67. The violation of accounting obligations by an accountant constitutes an administrative offence, sanctioned by a fine from EUR 400 to 20 000. For serious, repeated or systematic violations the Chamber can apply (i) a request to the person to cease the conduct and refrain from repeating it, (ii) a public announcement on the Chamber’s website, (iii) a fine twice the amount of the profit made as the result of the violation or EUR 400 to 1 000 000, (iv) a temporary ban on managing and representing an accounting firm, or (v) the suspension of the licence to practice (BiBuG Sec. 52j(2)). There is no data on the application

[15] UGB Sec, 221(1): Small corporations are those that do not exceed at least two of the following three characteristics: (i) 1.5 million euros in total assets; (ii) 10 million euros in turnover in the twelve months prior to the balance sheet date; and (iii) an annual average of 50 employees.

of these sanctions for omission of reporting a suspected criminal offence. On the other hand, the violation of the confidentiality clause is punishable by a fine up to EUR 20 000.

A.9.2. Auditing standards

68. Auditing is regulated by the Law on the Public Accounting Professions (*Bundesgesetz über die Wirtschaftstreuhandberufe*, WTBG). The detecting and obligation to report detected criminal offences, including foreign bribery, are regulated similarly to the rules applicable to accountants, i.e. in the framework of the AML/CFT regime.

69. Under Anti-Bribery Recommendation XXIII.B.ii, "countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of companies' accounts, financial statements and internal controls". Authorised auditors are obliged to exercise their profession conscientiously, carefully, autonomously and independently and in compliance with the provisions of the WTBG and the guidelines (KFS/PE18) issued by the Chamber of Auditors and Tax Advisors (KSW). The Chamber is an autonomous, self-governing body with elected officials. Auditors are bound by professional secrecy with a few exceptions, one being the reporting obligation under the AML/CFT provisions (WTBG Sec. 80(4)). The law applies the same set of definitions, administrative offences, and sanctions for violating professional duties as the BiBuG.

70. Austria has implemented and applies EU and international standards for accounting and audit. The KSW acts as the *de facto* audit standard-setter in Austria under the supervision of the Audit Oversight Body of Austria (*Abschlussprüferaufsichtsbehörde* – APAB). As of June 2016, the KSW adopted the International Standards on Auditing (ISAs) for all mandatory audits.

71. Anti-Bribery Recommendation XXIII.B.(iii)-(v) recommends countries to (a) require external auditors to report foreign bribery to management and, as appropriate, corporate monitoring or governance bodies, (b) encourage companies that receive such reports to respond actively and effectively; and (c) consider requiring external auditors to report suspected acts of foreign bribery to "competent authorities independent of the company, such as law enforcement or regulatory authorities."

72. According to UGB Sec. 273(2), "if the auditor discovers facts that […] indicate serious violations of the law […] by the legal representatives or employees, he must report this immediately". The auditor must submit the report to the legal representatives and the members of the supervisory board. It is not clear to whom the report must be submitted if the breach of the law can be attributed to these persons, or they fail to act upon the reported suspicion. This seems to be a lingering issue, as already during the Phase 3 evaluation, Austrian stakeholders argued that requiring auditors to report to law enforcement authorities would conflict with the auditor's duty of confidentiality. The Working Group recommended that Austria consider requiring the external auditors to report suspected acts of foreign bribery to competent authorities independent of the company, such as law enforcement and regulatory authorities. (Phase 3 Recommendation 7(c)). Austria did not take steps to address this recommendation. The lead examiners consider that the changes in the AML reporting regime opened additional external channels, offering a partial solution to some of these situations. In practice, however, according to the 2022 report of the A-FIU[16], these professional groups only sent 6 SARs altogether from about 6 000 total reports sent by obliged entities.

73. According to representatives of audit companies, a reportable breach of standards exists if it results in a high financial risk, if a significant legal standard has been breached, or if there has been a significant breach of trust. In particular, breaches of corporate and company law, industry-specific laws and articles of association, or articles of company bylaws fall under the duty to disclose. The audit of the financial statements is not explicitly aimed at uncovering breaches of the law; therefore, auditors are only required

[16] Austria's FIU, Annual Report 2022, page 28.

to report issues that come to their attention in the ordinary course of the audit. About the practical implementation of UGB Sec. 273(2), the Austrian Chamber of Tax Consultants and Auditors has issued professional standards. However, these seem to focus on company law and consider criminal offences only tangentially. According to panellists met at the on-site visit, in the last decade auditors very rarely encountered signs raising suspicion of corruption. As they put it, "the time of hand-written notes and sudden cash payments is over".

74. According to the available information, no foreign bribery case has been detected based on accounting or auditing.

Commentary

The lead examiners consider that the reporting threshold applicable to accountants ("well-founded suspicion") and auditors ("facts that indicate serious violations of the law") is higher than the threshold for initiating a criminal investigation. In addition, the issue identified during the Phase 3 evaluation, that auditors are not required to report directly to law enforcement and regulatory authorities, has not been addressed.

The lead examiners therefore recommend that Austria (i) clarify, by appropriate measures, that accountants are not required to investigate suspicions of criminal acts beyond the initial suspicion required to initiate criminal proceedings, and (ii) consider requiring the external auditors to report suspected acts of foreign bribery to competent authorities independent of the company, such as law enforcement and regulatory authorities and, in that case, ensure that auditors making such reports on reasonable grounds are protected from legal action.

A.10. Self-reporting by companies

75. Some legislative provisions create incentives to self-reporting in Austria. First, the mitigating factors that can reduce criminal sanctions include the fact that the offender has: (i) voluntarily surrendered to the authorities in a situation in which the person could have easily escaped or remain undetected, (ii) remorsefully confessed, or (iii) provided a testimony making a significant contribution to finding the truth (CC Sec. 34(16) (17)). Second, as described in section B.6.2, an offender who self-reports and cooperates with the public prosecutor's office can, under certain circumstances, be entitled to a so-called *Withdrawal of prosecution due to co-operation* under CPC Sec. 209a.

76. Two foreign bribery cases were initiated after a voluntary disclosure by the company (***Industrial Services (Bangladesh, Brazil, and Libya)*** and ***Rail Transport II (Eastern Europe)***). In one of these, the company had applied for a *Withdrawal due to co-operation* under CPC Sec. 209a. In the other case, the suspicions were reported by the company's compliance department. Both investigations were eventually discontinued for lack of evidence, however. In two other cases, companies had filed criminal complaints against their managers. It is unclear if these companies considered cooperating to avoid prosecution. In another case, a criminal complaint (for embezzlement) was filed by a company employee.

77. While the law provides some incentives for self-reporting, these are likely not particularly effective due to the very low level of enforcement and sanctions available against legal persons (see section C). The risk of facing prosecution in Austria does not seem to be a significant consideration for some companies. The Phase 4 questionnaire responses and comments made during the on-site visit also suggest that Austrian authorities do not consider voluntary disclosure by companies as a self-standing and important detection source that should be incentivised to increase detection of foreign bribery and other economic crimes. This could be done, in particular, by disseminating clear information on the advantages that companies may obtain by self-reporting to law enforcement authorities, and on the conditions for obtaining such advantages, including under the available non-trial resolutions.

Commentary

The lead examiners consider that self-reporting by companies is a fundamental detection source that should be incentivised in order to increase detection and enhance investigations of foreign bribery. They recommend that Austria, in addition to addressing issues relating to corporate enforcement (see section C.2.4), sanctions (see section C.3.1), and non-trial resolutions (section B.6.2), provide clear and publicly accessible information on the advantages that companies may obtain through voluntary disclosures and full co-operation with law enforcement authorities.

A.11. Whistleblowing and whistleblower protection

78. Anti-Bribery Recommendation XXII recommends that countries establish strong and effective legal and institutional whistleblower-protection frameworks to protect and/or to provide remedy against any retaliatory action to persons working in the private or public sector who report on reasonable grounds suspected acts of foreign bribery and related offences. Countries should afford protection to the "broadest possible range of reporting persons in a work-related context".

79. In Phase 3, the Working Group recommended that Austria adopt appropriate measures to protect whistleblowers in the private sector (recommendation 7(e)). This recommendation was deemed partially implemented at the time of the 2-year follow-up due to the adoption in 2013 of an online whistleblowing channel which allowed anonymous reporting to the WKStA (the prosecutor's office specialised in economic crime and corruption). In 2023, Austria adopted the "Federal Act on the Procedure and Protection in the event of Reports on Violations of Law in Certain Areas" (hereinafter, Whistleblower Protection Act or WPA), to implement the EU "Whistleblower Protection" Directive (Directive (EU) 2019/1937).[17]

A.11.1. Scope of application

80. The Whistleblower Protection Act covers reports of suspected foreign bribery, but not of related offences. More specifically, it covers reports on violations, *inter alia*, in the area of "prevention and punishment of criminal offences according to §§ 302 to 309 of the Criminal Code" (WPA Sec. 3(3)(11)), which include all active bribery offences. Reports concerning foreign-bribery related offences such as false accounting and money laundering are not clearly covered by the WPA. Austria states that a provision that refers to violations concerning *"Financial services, financial products and financial markets and prevention of money laundering and terrorist financing"* (WPA Sec. 3(3)(2)) covers money laundering offences. There is no provision in the WPA that appears to cover accounting violations, however.

81. The material scope of the law has another serious limitation. The "law applies to the areas referred [including criminal offences] for indications of infringements of rights in private sector companies and in public sector legal entities with 50 or more employees" (WPA Sec. 3(1)). Thus, the protections don't apply to whistleblowers from entities with fewer than 50 employees. Whistleblowers from smaller entities may be covered under a few exceptions mentioned in WPA Sec. 3(2) (mainly, reports on violation of legislation on financial services, products and markets, and prevention of money laundering and terrorist financing, within the scope of the EU Directive). This would apply to a marginal number of foreign bribery cases, however.

82. The personal scope of application appears to be sufficiently broad: the law covers persons "who have obtained information about violations of the law on the basis of an ongoing or previous professional relationship with a legal entity" in the private or public sector. These include employees, trainees, self-employed persons, persons working for the entity's contractors or subcontractors, applicants for a job, members of corporate bodies, as well as shareholders of the legal entity. The available protections also

[17] Federal Act on the Procedure and Protection in the event of Reports on Violations of Law in Certain Areas, Federal Law Gazette I No 6/2023, ["Whistleblower Protection Act", WPA / "*HinweisgeberInnenschutzgesetz*", HSChG].

apply to individuals who support the whistleblower's report or who are "close" to the whistleblower, as well as to legal entities wholly or partly owned by the whistleblower, for which he/she works, or is otherwise professionally connected to (WPA Sec. 2).

Commentary

The lead examiners welcome Austria's recent adoption of the Whistleblower Protection Act, which establishes for the first time a general framework for the protection of whistleblowers in the public and private sector. Several features of the new regime are in line with international standards. Nevertheless, the new framework has serious limitations that should be rectified as soon as possible, especially with regard to the material scope of application of the Act.

The lead examiners recommend that Austria amend its legislation to ensure that protection is also afforded in relation to (i) reports concerning suspicions of offences related to foreign bribery such as false accounting, and (ii) reports made by whistleblowers from entities with fewer than 50 employees.

A.11.2. Protections, prohibited acts of retaliation, and remedies available

83. Pursuant to WPA Sec. 6 and 7, the identity of the whistleblower must be protected. As a derogation to confidentiality, the identity may be disclosed if an administrative authority, court, or the public prosecutor's office considers this to be indispensable in the context of administrative or judicial proceedings or an investigation. In such cases, the authorities should ordinarily inform the whistleblower and provide written reasons. Persons who report anonymously are entitled to protection if their identity becomes known, but only if this happens "without their involvement" (WPA Sec. 6(3)). This suggests that a whistleblower who reported anonymously, but later decides to reveal their identity, may not be entitled to protection. This exclusion, the rationale of which is unclear, might lead to unfair exclusions from the legal protection as well as to unwanted consequences. For example, a whistleblower who decides to give up anonymity to provide further information to the authorities on the allegation may not be covered by the WPA. Austria states that such anonymous whistleblowers would be protected, but this is not made clear in the WPA.

84. Reporting persons are entitled to the procedures and protections of the act if, at the time of the report, they can reasonably believe, on the basis of the factual circumstances and the information available to them, that the information they have provided is true and falls within the scope of the WPA (WPA Sec. 6(1)). Such whistleblowers cannot be held liable for the actual or legal consequences of a justified report, nor for the violation of confidentiality obligations (with the exception of enumerated cases of professional secrecy or confidentiality, see WPA Sec. 3(6) and 22). Orders or contractual agreements aiming to set aside the protections afforded in the WPA are considered legally invalid (WPA Sec. 4(4)).

85. The WPA also covers a broad range of retaliatory measures including suspension, dismissal, and similar measures; non-renewal or termination of a fixed-term employment or of a contract for goods or services; demotion and denial of a promotion; reduction in pay and changes of tasks, place of work, and working hours; disciplinary measures and negative performance evaluations; as well as coercion, intimidation, bullying, and marginalisation; discrimination or unequal treatment; infliction of damage (including reputational) or financial loss (including loss of orders or revenue); blacklisting; and referral for psychiatric or other medical treatment (WPA Sec. 20). Measures that are reversible (such as a suspension or dismissal) are declared invalid and give rise to a right to restoration of the legal status, compensation of financial losses, and claims for damages. Measures that cannot be partially or wholly reversed (such as coercion or intimidation) give rise to claims for damages.

86. Whistleblowers can only access the available remedies through ordinary judicial or administrative proceedings. According to company representatives met on-site, Austrian labour courts provide adequate protection to employees. Nevertheless, it may be difficult for whistleblowers to navigate the judicial system to identify the most appropriate avenue for seeking remedies in their case. Ordinary proceedings may also

be significantly long and costly. It is not clear if, and to what extent, whistleblowers can benefit from interim relief pending the resolution of these ordinary legal proceedings. Ministry representatives at the on-site visit explained that this depends on the applicable procedures. Austria later stated that the external bodies that receive reports, i.e. the Federal Bureau of Anti-Corruption (see para. 90), inform and advise whistleblowers about their rights and guide them towards adequate legal action.

87. In these proceedings, whistleblowers do not appear to benefit from a full reversal of the burden of proof, contrary to Anti-Bribery Recommendation XXII.ix. Pursuant to WPA Sec. 23, "it must be credibly demonstrated that the measure was taken in retaliation for the report"; this cannot be assumed "if, when all circumstances are considered, there is a higher probability that another motive was decisive for the measure"; this motive "must be demonstrated by the person who took the measure". The Austrian authorities confirmed that, in practice, the reporting person must demonstrate causality between the report and the alleged retaliation. Once the judge finds that there was a likely causality, then the burden of proof is on the retaliatory person to demonstrate that the measure was justified. This means, however, that there is not a full reversal of the burden of proof as there is no presumption that a measure was in retaliation.

88. Retaliatory measures can be punished with fines up to EUR 20 000, or up to EUR 40 000 in case of a repeat offences. These are administrative offences that apply unless an offence punishable by a more severe penalty is committed in retaliation (WPA Sec. 24). As the Working Group noted in another evaluation, this level of sanctions against retaliatory measures may not be sufficient to deter the most senior managers or officials.[18] These sanctions are also insufficiently dissuasive for most companies. Persons who knowingly make false reports are subject to the same sanctions. Fines for retaliatory measures are imposed by the "district administrative authority". Austria explains that sanctions for retaliation are applied only if whistleblowers initiate separate proceedings before the administrative authorities. This appears to constitute an additional burden for whistleblowers.

Commentary

The lead examiners welcome the fact that the Whistleblower Protection Act covers a broad range of retaliatory measures. They note, however, that certain aspects of the new whistleblower-protection framework need to be rectified through legislative amendments and other appropriate measures. To that end, they recommend that Austria ensure that (i) all relevant protections are available to whistleblowers who report anonymously, but later decide to reveal their identity; (ii) interim relief pending the resolution of legal proceedings is available to whistleblowers; (iii) in administrative, civil, or labour proceedings, the burden of proof is shifted on retaliating natural and legal persons to prove that the alleged adverse action against a reporting person was not in retaliation for the report; and (iv) the law provides for effective, proportionate, and dissuasive sanctions for those who retaliate against reporting persons.

A.11.3. Competent authorities, reporting channels, and awareness raising

89. Under the WPA, entities with more than 50 employees must establish internal reporting channels (WPA Sec. 11). The internal bodies must be provided with the financial and human resources necessary to carry out their tasks. They must also ensure that the confidentiality of the identity of the whistleblower and third parties mentioned in the report is preserved, and that the reports are dealt with in an impartial and unbiased way (WPA Sec. 13). It is not clear if companies can create joint reporting channels, e.g. a single channel for a corporate group. The WPA also states that "the internal whistleblower system must be set up in a way that encourages whistleblowers to give preference to reports to the internal body over an external body." (WPA Sec. 11(1)). This may be counterproductive for the purpose of detecting foreign bribery cases, however. In cases of bribery involving companies, whistleblowers should feel free to

[18] OECD (2022), WGB Phase 4 Report on Italy, para. 33.

approach law enforcement authorities as first reporting channel, especially when an internal report might jeopardise the effectiveness of investigative actions by competent authorities.

90. The Federal Bureau of Anti-Corruption (BAK), which is also the main investigative authority competent for bribery cases, is responsible for the general external reporting channel (WPA Sec. 15). External reports can be filed through the online "BKMS®-System", via telephone, by post, or in person. The online system is certified for protecting the anonymity of whistleblowers and encrypting data, and provides the option of bi-directional communications through a mailbox which allows the informant to remain anonymous. The BAK reports that, since the establishment of these channels, there has been a significant number of reports from whistleblowers. If, upon review, a report appears valid, the body in charge of the external channel must immediately carry out further investigations within its powers or report the case to the competent public prosecutor's office or administrative authority (WPA Sec. 17(4)). Several supervisory authorities, such as the auditor supervisory authority or the A-FIU provide external whistleblowing channels in their respective areas of operation (WPA Sec. 15).

91. The specialised prosecutor's office WKStA also uses the BKMS®-System, which Austrian authorities consider particularly suited for investigations in the area of economic crimes and corruption. The online system was first introduced as a trial in 2013, and subsequently transferred to standard operations after a legal basis for it was created in the Public Prosecution Act. As of 1 September 2023, the reports made through this channel led to the opening of new investigations in 930 cases. The WKStA is not designated in the WPA as a body for external reporting, however. Austrian authorities did not specify if a whistleblower can be afforded protection under the WPA following a report made directly to the WKStA. No foreign bribery case was detected through whistleblower reports made either to the BAK or the WKStA.

92. Austrian authorities reported initiatives to raise awareness and encourage companies to set up adequate channels. The BAK stated it made various presentations on its channels and raised awareness of the importance of the internal company reporting systems. The Economic Chamber publishes material on various topics, including an overview of the relevant legal provisions regarding whistleblower protection, and retains the services of a private company that provides trainings on company reporting systems. The large companies met during the on-site have all established channels for whistleblowers. On the other hand, further efforts to raise awareness and provide information to potential whistleblowers might be required. The discussions at the on-site visit revealed that, for a long time, there was a widespread negative perception of whistleblowing in the public opinion, which contributed to the delayed adoption of the WPA. Two years of public discussions on the draft Act had a rather positive impact on public perception. According to some on-site panellists, however, more could be done as the information provided to potential whistleblowers seems to be limited and confined to a few webpages. More targeted initiatives for awareness-raising and information, addressing both the general public as well as Austrian companies and other legal practitioners, would therefore be welcome.

Commentary

The lead examiners recommend that Austria (i) clarify that all relevant protections are available to whistleblowers who report suspicions of foreign bribery and related offences directly to the BAK or WKStA; and (ii) undertake further initiatives to raise awareness and provide information on the legal and institutional framework, protections, and remedies available to potential whistleblowers.

In light of the recent adoption of the law and uncertain contours of certain provisions in the new regime, the lead examiners also suggest that the Working Group follow up the implementation and application of the Whistleblower Protection Act in practice and, in particular, whether it contributes to the detection of foreign bribery allegations.

A.12. Media reports

93. Austrian authorities state that media reports constitute an important detection source for both the BAK and PPOs. The Criminal Procedure Code (CPC), Section 2, establishes the "*ex officio* principle": investigators and prosecutors are "obliged to investigate *ex officio* any initial suspicion of a criminal offence that has come to their attention". Pursuant to this principle, investigations can be opened based on media reports. National media is screened by special departments of the MoJ and the MoI, which forward daily press reviews to all PPOs as well as to the BAK. The PPOs also monitor media directly, but mainly Austrian media.

94. Only two foreign bribery cases were detected through media reports since Phase 3. In one case, preliminary proceedings were initiated after a press article implicating the company appeared in an Austrian newspaper (***Windfarm Project (Hungary)*** case). In the other case, an Austrian journalist informed specialised prosecutors of a foreign press release (***Military Vehicles (Czech Republic)*** case). This suggests that Austrian authorities could adopt a more proactive approach to detection through media reports and consider using appropriate media screening tools. This could be done either by the special department in the MoJ already in charge of screening national media or the BAK, as the main investigative body competent for foreign bribery cases.

Commentary

The lead examiners consider that detection through media reports, including investigative journalism, may be underutilised in foreign bribery cases. They therefore recommend that Austria encourage competent authorities to adopt a more proactive approach to detection through domestic and foreign media reports and consider using appropriate media screening tools.

B. Enforcement of the foreign bribery offence

B.1. Foreign bribery offence and defences

95. In Austria, foreign bribery is criminalised through three active bribery offences in the Criminal Code (CC), which also apply to bribery of foreign "public officials" (as defined in CC Sec. 74(1)(4a)):

- **Sec. 307**: bribery for the performance or omission of an official act in violation of the public official's duties (hereinafter, "bribery for an act in breach of duties"). In Phase 3, Austria explained that this provision covers cases in which a public official: (i) takes an official act contrary to the legal basis, decrees, binding instructions, or guidelines from his/her superior authorities; or (ii) fails to act impartially when exercising discretionary decision-making powers.
- **Sec. 307a**: bribery for the performance or omission of an official act in accordance with the public official's duties (hereinafter, "bribery for an act in line with duties").
- **Sec. 307b**: bribery with the intent to influence a public official's activity. In Phase 3, Austria explained that this provision is meant to cover the crime of "*Anfüttern*" (which could be translated as "sweetening"), that is, offering, promising, or granting an advantage in order to build or strengthen a relationship with a public official, with no specific future action in mind.

96. These provisions have not been substantially amended since Phase 3. In July 2023, Austria introduced criminal provisions punishing bribery of "candidates for office" (see, in particular, CC Sec. 307(1a)). The Anti-Bribery Convention Commentary 10 notes that, in many countries' legal systems, bribery of a person in anticipation of his/her becoming a foreign public official is considered technically distinct from the offences covered by the Convention. Nevertheless, the Commentary acknowledges a commonly shared concern over this phenomenon. Austria's amendment is therefore a positive development, although it should be noted that the new provisions have a narrow scope of application: Bribery of a candidate is only punishable if it is committed to obtain a future act in breach of duties and if the candidate subsequently becomes a public official. Other legislative amendments covering, *inter alia*, the definition of "public official" and "undue advantage" are described in the sections below.

B.1.1. Elements of the offence

97. As mentioned in the Introduction, seven foreign bribery cases were brought to trial and led to final decisions since Phase 3. Some of these cases raise issues concerning the way Austrian courts interpret

certain elements of the foreign bribery offence, including the definitions of foreign public official and undue advantage, the notion of bribery for an act in breach of duties, and the standard to prove intent. In addition, prosecutors often charged defendants not only with bribery, but also with the offence of breach of trust, which may have caused difficulties in foreign bribery cases.

Definition of foreign public official

98. Austria's definition of (foreign) public official is in CC Sec. 74(1)(4a). Since Phase 3, a Supreme Court decision has confirmed the autonomous nature of the definition. On the other hand, new legislation and case law suggest that the definition of foreign public official might be too narrow.

99. In previous evaluation phases, the Working Group was concerned that the definition of foreign public official might require proof of foreign law. In Phase 3, Austria confirmed the autonomous nature of the definition, but did not have supporting case law. The Working Group therefore decided to follow up the courts' interpretation of the definition of foreign public official (follow-up issue 10(a)(ii)). Since then, the Austrian Supreme Court has confirmed that the definition of foreign public official is autonomous. In a decision issued in 2015 in the ***Financial Institution I (Azerbaijan, Syria)*** case, the Supreme Court ruled that the status of a foreign public official is only determined by Austrian law, regardless of whether the person has the status of public official under the law of the foreign country. In order to decide whether the person is a public official under CC Sec. 74(1)(4a), it is nevertheless necessary to consider the factual and legal circumstances in the foreign state.[19]

100. Austria's legislative definition of foreign public official might be too narrow, however. The definition covers persons who (i) perform "legislative, administrative or judicial duties […] for another state or for an international organisation as its organ or employee", (ii) are European Union (EU) officials (CC Sec. 74(1)(4a)(b) and 74(1)(4b)), (iii) are "otherwise authorised to carry out official business in the name of [these bodies] in the execution of the laws" (Sec. 74(1)(4a)(c)), or (iv) act "as an organ or employee" of a public enterprise (Sec. 74(1)(4a)(d)). The underlined terms might be interpreted in a way that is not broad enough to cover certain persons who perform public functions, including in connection with public procurement, and certain agents of public international organisations.

101. In 2019, for the purpose of implementing the EU's "PIF Directive"[20], Austria added another category of public officials to this provision: i.e. any person who "has been assigned public duties in connection with the administration of or decisions on the financial interests of the European Union in Member States or third countries and performs these duties" (CC Sec. 74(1)(4a)(b)). At the on-site visit, Austrian authorities explained that this amendment was made to match the wording of the PIF Directive. It is also possible, however, that Sec. 74(1)(4a)(c) (which could cover persons who are "otherwise authorised to carry out official business in the name of" a body of the EU or another member state) was not considered to be broad enough to cover these officials, as also suggested by other on-site visit participants. In addition, bribery of these officials can only be punished under CC Sections 307 and 307a (Sec. 307b cannot be applied), and if the briber acts with the intent to harm the financial interests of the EU (CC Sec. 307(3)).

102. The legislative history of the definition of public official also suggests that the provision might be narrower now than it was in the past. As explained by the court in the ***Windfarm Project (Hungary)*** case, under the Criminal Code as amended in 2007, the definition of foreign public official used to cover "[…]

[19] Austrian Supreme Court, OGH 13 Os 105/15p, 6 September 2016 (p. 42 English translation): "*It is true that his status as a public official (in terms of criminal liability under Section 307 CC) is determined solely by Austrian law and not by whether the person concerned is (also) considered a "public official" under the law of the other state* […]. *To answer the question of whether the elements of the offence of § 74 para 1 subpara 4a CC are fulfilled, however, the (factual and legal) circumstances of the other state must be taken into account* […]".

[20] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

'anyone who ... for another state ... is otherwise entrusted with public duties, including in public companies' [...]. Subsequently, however, the broad definition of public official was restricted again by the Corruption Criminal Law Amendment Act 2009, Federal Law Gazette I 98/2009, so that the employees of [public companies] were no longer covered".[21] The definition of public enterprise was broadened again in 2012, as noted in the Phase 3 Report. On the other hand, it is not clear if the current definition of a person "otherwise authorised to carry out official business in the name of [a foreign state] in the execution of the laws" is as broad as the older definition covering anyone "otherwise entrusted with public duties".

103. A foreign bribery case concluded since Phase 3 also raises questions on agents of international organisations. In the ***Hospital Project (IFI)*** case, an independent procurement law expert appointed by an international financial institution (IFI) to review tender applications was not considered as a public official under Austrian law. The indictment itself described this consultant as an "agent" of the international organisation. Nevertheless, prosecutors only filed charges for commercial bribery (and the defendant was eventually acquitted for other reasons). Similarly, the court concluded that the consultant provided "expert opinions on a contract for work basis" and could not be deemed to be an "employee", nor to "act in the name" of the IFI or "take on [its] tasks internally or externally".[22] The court found that this consultant was the only expert retained by the operational unit reviewing the bids, which did not question his opinions. He was therefore delegated an important component of the procurement process. Based on the indictment and court decision, however, it is not clear under which circumstances such a consultant could be considered as an "agent" of the international organisation nor, more generally, whether agents of a public international organisation fall under the definition of foreign public official in Austria.

104. Under the Anti-Bribery Convention Article 1(4)a, the definition of "foreign public official" should cover, among others, "any person exercising a public function for a foreign country" and "any official or agent of a public international organisation". Convention Commentary 12 states that the exercise of a "public function" for a foreign country includes "the performance of a task delegated by it in connection with public procurement". In light of the above, however, it seems that an external contractor involved in public procurement may be covered under Austrian law only if he/she could be considered as an "employee" of a public body or was delegated the authority to make a final decision "in the name" of the body.

Commentary

The lead examiners welcome the fact that a Supreme Court decision has confirmed the autonomous nature of the definition of foreign public official in Austrian law. They note, however, that new legislation and case law suggest that this definition might be narrower than the definition set out in the Anti-Bribery Convention Article 1(4a). The lead examiners therefore recommend that Austria clarify, by any appropriate means, that the definition of foreign public official under CC Sec. 74(1)(4a) also covers any person exercising a public function for a foreign country, including for the performance of a task delegated by it in connection with public procurement, as well as any official or agent of a public international organisation.

Definition of undue advantage

105. Austria's active bribery offences contain two different definitions of bribe. Under CC Sec. 307 (bribery for an act in breach of duties) active bribery is criminalised for offering, promising, or giving any "advantage". On the other hand, Sec. 307a (bribery for an act in line with duties) and 307b (bribery to influence a public official's activity) only cover offering, promising, or giving an "undue advantage". The definition of "undue" advantage, in CC Sec. 305(4), is a "negative" definition (i.e. it indicates which advantages are *not* undue). Under this provision, the following advantages are not "undue", which means

[21] Eisenstadt Regional Court, 15 Hv 51/16z, 7 June 2017 (p. 532 English translation).

[22] Regional Court for Criminal Matters Vienna, 122 Hv 47/17a, 25 July 2018 (p. 5, 7, 22 English translation).

they cannot be considered bribes: (i) "advantages whose acceptance is permitted by law or which are granted in the context of events in which there is an official or objectively justified interest to participate"; (ii) advantages for charitable purposes over which the public official, arbitrator, or a person from their family circle does "not exercise any decisive influence"; and (iii) customary gifts of low value.

106. The exclusion of advantages "for charitable purposes" might be particularly problematic in foreign bribery cases, as bribes could be paid to a foreign public official through fake charitable donations. Criminal liability would only apply if the public official or a person from his/her "family circle" has any "decisive influence" over the charitable donations. The inclusion of persons in the "family circle" was introduced with a legislative amendment in July 2023. These cover the spouse, registered partner, a direct relative, brother or sister, or another relative if he/she lives in the same household (CC Sec. 166). This provision raises several issues, which were confirmed by representatives of the academia and civil society at the on-site visit. First, payments to charities controlled, for example, by an affiliate, business associate, or a member of the same party of the public official would not be "undue". Second, the notion of "decisive influence" may be interpreted too narrowly. According to a civil society representative, this has been interpreted as influence on the charitable organisation itself, not influence over where the money will go. Third, the provision applies to all donations, irrespective of the value. Finally, the burden of proof would mainly fall on prosecutors. Academics and MoJ representatives at the on-site visit confirmed that prosecutors would have the burden to prove that an advantage is "undue", as this is one of the elements of the bribery offence.

107. Participants of the on-site visit further confirmed that this provision has been a subject of political debate. There was a proposal to eliminate it altogether, but it was eventually maintained due to some parties' wish to encourage charity donations. As mentioned above, however, this provision may create significant obstacles for the prosecution of foreign bribery committed through fake charity contributions. The exclusion of advantages "granted in the context of events in which there is an official or objectively justified interest to participate" may also raise issues, but it appears to be interpreted narrowly.

Commentary

The lead examiners are concerned that the definition of advantages that are not "undue" in CC Art. 305(4) may create obstacles to the prosecution of certain foreign bribery schemes, such as schemes in which charitable donations are used as a vehicle to conceal payments made to corruptly influence foreign officials. They therefore recommend that Austria take appropriate measures to ensure that the criminal law exceptions for charitable contributions do not unduly create obstacles to criminalising payments made for the purpose of bribing foreign public officials.

Bribery through intermediaries

108. The active bribery offences in CC Sec. 307, 307a, and 307b do not expressly cover bribery through intermediaries. In previous evaluation phases, however, Austria explained that this would be covered through the combined application of the bribery offences with CC Sec. 12 on participation in a criminal offence, which reads: "*Not only the direct perpetrator commits the offence, but also anyone who instigates another person to commit it or who otherwise contributes to its perpetration*".

109. In the ***Windfarm Project (Hungary)*** case, the court has confirmed that CC Sec. 12 on participation in a criminal offence can be used to prosecute bribery committed through intermediaries. The court explained that, based on this provision, it is not necessary to have a direct link between the briber and the public official. In addition, the person instigating bribery does not need to be aware of all the details of the offence committed by the other person.[23]

[23] Eisenstadt Regional Court, 15 Hv 51/16z, 7 June 2017 (p. 526-527 and 529 English translation): "*It is not necessary for there to be a direct connection between the determinant and the intended person. The designated offender can also use one or more intermediaries to influence the decision of the other person.*" […] "*The contribution and the*

110. Nevertheless, it should be noted that most foreign bribery cases involving intermediaries resulted in acquittals. This might be due to some recurring issues related to proving certain elements of the foreign bribery offence, which are described in the subsections below.

Bribery for an act in breach of the public official's duties

111. The Phase 3 Report mentioned that the Working Group should follow up on the practical application of CC Sections 307 (bribery for an act in breach of duties), 307a (bribery for an act in line with duties), and 307b (bribery to influence a public official's activity), to ensure that persons violating the laws against foreign bribery are prosecuted to the fullest extent possible.

112. The case law on foreign bribery since Phase 3 suggests that some Austrian courts may interpret the notion of bribery for an act "in breach of duties" in a way that requires proof of elements beyond those of the foreign bribery offence under Anti-Bribery Convention Article 1. This would contravene the Convention, as stated in its Commentary 3. If prosecutors cannot prove bribery for an act in breach of duties (CC Sec. 307), bribery for an act in line with duties or to influence a public official's activity (Sec. 307a and 307b) may apply, although these offences carry lighter sanctions.

113. At the time of Phase 3, public prosecutors indicated that the choice of which offence to charge would be a question of proof of the intent to cause a public official to violate his or her duties. Some court decisions focus indeed on the briber's intent and ask whether the purpose of the bribe was to obtain an official act in breach or in line with duties (see, for example the ***Arms Trade (Slovenia)*** case).[24]

> "The offence is already completed when the advantage is offered, promised or granted. It is not necessary for the public official to actually act in breach of duty later on." […] "In the case of a discretionary decision to be made by the public official, it is sufficient that the offender seriously considers it possible and accepts that the public official will make his discretionary decision on the basis of the advantage, even if the decision was made within his discretion".

114. More recent court decisions, however, adopt a narrower approach and require evidence that the bribe actually resulted in an official act in breach of duties. This is particularly problematic in cases involving public procurement procedures, and discretionary decisions more generally. These court decisions seem to suggest that, in such cases, it would be necessary to show that the assessment of the authorities in charge of the tender was incorrect (i.e. the company having paid the bribe was not the best qualified bidder), which imposes a too high evidentiary burden on prosecutors. This kind of reasoning was applied in the ***Hospital Project (IFI)*** case.[25]

> "It cannot be established with the necessary certainty that [the company's] offer for LOT 2 was not to be assessed as 'corresponding'." […] "Since it cannot be established with certainty that [X] carried out its expertise in breach of duty, [the CC provision on commercial bribery] is not applicable for this reason alone. […]"

115. Similarly, in the ***Windfarm Project (Hungary)*** case, the Supreme Court recognised that bribery for an act in breach of duties may occur when the briber aims to influence the public official's discretion. However, the evidence must show that that such influence had (or would have had) an effect on the public

intention to contribute to a sufficiently individualised act must be made, but the contributory offender does not have to be aware of all the details. It is sufficient that the offender is aware of the nature and broad outline of the offence […]".

[24] Regional Court for Criminal Matters Vienna, 15 Hv 7/11y, 5 April 2013 (p. 69 English translation).

[25] Regional Court for Criminal Matters Vienna, 122 Hv 47/17a, 25 July 2018 (p. 10, 18 English translation).

official's decision. According to the Court, if a licence would have been granted anyways, then a causal relationship between the influence of the bribe and the granting of the licence cannot be proven.[26]

> "[…] a breach of duty may also be present if the pecuniary advantage is granted for an influence on the decision – albeit within the scope of discretion […]. However, such an influence must be relevant in the sense of a causal relationship (for the execution), i.e. it must override objective reasons (which suggest a different result), which must be clarified by corresponding (concrete) findings (also on the subjective side of the offence)". […] There is no indication in the judgement that [the company] did not meet the requirements for the granting of a licence or that it was to be given preference over competitors in breach of duties."

116. These court decisions require proof of elements that go beyond the Anti-Bribery Convention's definition of foreign bribery. Even if the Austrian Criminal Code (like criminal codes of other countries) makes a distinction between bribery in breach or in line with duties, the proof of this element should not impose on prosecutors the unreasonably high burden of proving what would have been the "correct" decision in application of the public official's discretion, in order to demonstrate whether bribery was objectively for an act "in breach" or "in line" with the foreign public official's duties. One of the consequences of this approach is that prosecutors also need to identify the specific foreign public official in charge of the advantage sought by the briber. In practice, this entails that a successful investigation into the passive side of bribery is required for Austrian prosecutors to file charges on the active side.

117. Moreover, the focus on what would have been the "right" outcome of a tender may suggest that a company should not be punished for bribery if it was going to win the tender anyway. For example, in the ***Port and Viaduct Projects (Croatia)*** case, the court stressed that it could not be established "[…] that this bidding consortium was not the bidder to which the contract was to be awarded in accordance with the tender criteria and other applicable regulations and which would therefore have been awarded the contract."[27] Pursuant to Convention Commentary 4, however, the foreign bribery offence should apply "whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business".

118. These decisions also show that courts may exclude liability if it is not possible to prove that a public official was in the position to influence, or actually influenced, the official act for which the bribe was given. In the ***Port and Viaduct Projects (Croatia)*** case, for example, the court underlined (in the decision's facts, and not in the legal assessment though) that it could not be established "that [the public official] improperly influenced the tender or subsequently the awarding of the contract to the bidding consortium".[28] The Working Group on Bribery has stated that, for the purposes of foreign bribery, it does not matter whether a foreign public official is in fact in a position to influence the matter for which the bribe was paid. Foreign bribery cases should focus on the briber's intent in offering, promising, or giving a bribe. The recipient's willingness or ability to accept or respond to the offer should not matter.[29] Austria stresses that in the ***Port and Viaduct Projects (Croatia)*** case, the main reason for the acquittal was the expiration of the statute of limitation. This does not eliminate the issue that the cited passages of the judgment clearly sought proof of elements that go beyond Convention Article 1. Austria later provided a Supreme Court principle stating that "*For the completion of the offense* [of passive bribery]*, it is irrelevant whether the official act is actually*

[26] Austrian Supreme Court, 17 Os 8/18g, 26 February 2019 (p. 22-23 English translation).

[27] Regional Court for Criminal Matters Vienna, 122 HV 26/17p, 17 June 2020 (p. 5 English translation).

[28] Regional Court for Criminal Matters Vienna, 122 HV 26/17p, 17 June 2020 (p. 12 English translation).

[29] OECD (2017), WGB Phase 4 Report on Finland, p. 32-33.

carried out or not carried out".[30] This mitigates in part the concerns raised here, but does not eliminate the need for further guidance, given the contradiction in case law.

Commentary

The lead examiners are concerned by Austrian case law which has interpreted the notion of bribery for an act "in breach of duties" in CC Sec. 307 in a way that requires proof of elements beyond those of the foreign bribery offence under Anti-Bribery Convention Article 1.

The lead examiners therefore recommend that Austria clarify, by any appropriate means (including by amending its legislation if necessary), that foreign bribery cases should focus on the briber's intent of offering, promising, or giving a bribe to obtain a foreign public official's act or omission. To that end, the foreign bribery offence should apply, whether or not (i) the public official took a decision within the boundaries of his/her discretionary decision-making powers, (ii) the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business, and (iii) the public official was in a position to influence, and indeed influenced, the matter for which the bribe was paid. They also recommend that Austria provide comprehensive training and awareness-raising to investigators, prosecutors, and judges on foreign bribery, also covering these aspects.

Intent and assessment of circumstantial evidence

119. As mentioned in the Introduction, the majority of cases that reached trial since Phase 3 ended up with the acquittal of all the defendants. In addition to the other issues outlined in this section, this may be due to the fact that courts seem to impose an onerous standard of proof, especially concerning the subjective element of the bribery offences, i.e. the intent requirement.

120. Under Austrian law, bribery can be committed not only with direct intent, but also with *dolus eventualis*, i.e. by acting with the awareness of a serious possibility that bribes will be paid, and accepting that possibility. This was confirmed, for example, by the first-instance court in the ***Windfarm Project (Hungary)*** case.[31]

> "The offender must at least have a contingent intent (Section 5(1) CC) to fulfil the offence. Consequently, he must at least seriously consider the realisation of all objective elements of the offence to be possible and accept this. It is sufficient for the offender to know the meaning of the respective elements of the offence from his layman's perspective."

121. Despite the possibility to rely on *dolus eventualis*, courts appear reluctant to find that the intent requirement is fulfilled. For example, in the ***Port and Viaduct Projects (Croatia)*** case, the court found that a public official (the CFO of a foreign public enterprise) had initially asked the defendant to pay a bribe amounting to 3% of the contract value to secure the award in a public tender. The defendant had refused because this would have been "at the expense" of the company. The public official then proposed a bribe of a higher amount, but to be "borne economically" by the foreign public enterprise. This would have been achieved through a series of supplementary contracts, through which the foreign public enterprise would have overpaid the company, which should have then transferred these sums to a designated third entity. The court eventually found that certain aspects of the scheme were not fully proven, in addition to a jurisdiction issue. However, it also excluded an intent to bribe because it could not establish a direct causal link between the award of the tender and the damage that would have been caused to the foreign public enterprise by the agreed system to conceal the bribe payments.[32] This passage raises questions, because

[30] Austrian Supreme Court, 17Os 20/13i, 26 November 2013.

[31] Eisenstadt Regional Court, 15 Hv 51/16z, 7 June 2017 (p. 539-542 English translation).

[32] Regional Court for Criminal Matters Vienna, 122 HV 26/17p, 17 June 2020 (p. 4-5 English translation).

the defendant's intent to secure the award of the contract by agreeing to implement this scheme appears quite clear.

> "[…The defendant] thereby assured [the public official] provision of a money circuit, including the conclusion of related contracts, in order for the bidding consortium of the [company] Group to be awarded the contract for the tendered […] project. In doing so, the defendant accepted that [the foreign public enterprise]'s assets would be damaged by the future conclusion of supplementary contracts and that he would encourage this by giving his consent. However, he did not accept that such damage to [the foreign public enterprise]'s assets would occur by awarding the contract to the bidding consortium of the [company] Group."

122. This issue is often intertwined with the narrow interpretation of the notion of bribery for an act "in breach of duties", analysed above. In this case, it seems that the court's reasoning, including its assessment of the intent element, was heavily influenced by the impossibility to prove that the company would have *not* won the tender absent the alleged bribery. This kind of reasoning has also been adopted by the Supreme Court. As mentioned above, in the ***Windfarm Project (Hungary)*** case, the Supreme Court required proof of a causal relationship between the bribe and the public official's discretionary decision. If a licence would have been granted anyways, then it is not possible to prove the bribe's influence on that discretion. The Court, however, seems to suggest that this causal relationship should be proven also at the level of the briber's intent. The mere wish to secure a contract that would probably be granted anyways, might not be sufficient for the purpose of proving intent to bribe for an act in breach of duties.[33]

> "[…] There is no indication in the judgement that [the company] did not meet the requirements for the granting of a licence or that it was to be given preference over competitors in breach of duties." […] "Nor has it been shown to what extent, in the defendant's view, the granting of an advantage in the sense of a causal relationship should override factual considerations in the granting of the licence. The mere fear of not obtaining a licence without the granting of an advantage […] is - as already explained - not sufficient."

123. These passages show that, in some of the decisions issued in foreign bribery cases, courts appear to require a very high threshold to prove an intent to bribe and may be reticent to find proof of intent based on circumstantial evidence. This might be indirectly confirmed by the fact that only one foreign bribery case resulted in a conviction without an admission of guilt (***Arms Trade (Slovenia)*** case). In the other case that led to convictions, three out of five convicted defendants provided a remorseful confession (***Financial Institution I (Azerbaijan, Syria)*** case).

Commentary

The lead examiners note that courts appear reluctant to find that the intent requirement is fulfilled in foreign bribery cases, especially based on circumstantial evidence. They therefore recommend that the training and awareness-raising provided to investigators, prosecutors, and judges on foreign bribery cover this aspect. They also suggest that the Working Group follow up, as case law develops, whether courts are able to rely on circumstantial evidence to prove criminal intent in foreign bribery cases.

Concurrent use of the offence of breach of trust

124. In most foreign bribery cases concluded since Phase 3, prosecutors charged the defendants not only with active bribery (CC Sec. 307), but also with the criminal offence of breach of trust (CC Sec. 153). This offence punishes "anyone who knowingly abuses his or her authority to dispose of someone else's property or to oblige another person and thereby damages the other person's property". This offence can be used, for instance, to criminalise forms of infidelity or embezzlement by company managers. Austrian

[33] Austrian Supreme Court, 17 Os 8/18g, 26 February 2019 (p. 22-23 English translation).

prosecutors charged both offences in most foreign bribery cases, by conceptually splitting the foreign bribery scheme. For example, the bribery charge would cover the acts of a manager bribing a foreign public official through an intermediary in order to obtain an advantage for his/her company; the breach of trust charge would cover the acts of the same manager paying the intermediary a sum under a fake contract, for no services in return, which could therefore be considered as causing a damage to the company.

125. The practice of charging breach of trust along foreign bribery charges may have caused some difficulties in foreign bribery prosecutions. The two offences require proof of elements that can be in contradiction: the intent to gain an advantage for *vs* the intent to cause damage to a company. For example, in at least two foreign bribery cases, the courts appear to have relied on evidence that the defendant aimed to obtain an advantage for their company to exclude any intent to cause damage under the breach of trust offence (***Hospital Project (IFI)*** and ***Port and Viaduct Projects (Croatia)***).[34] The reviewed court decisions do not expressly confirm whether the overlapping charges might have also undermined the foreign bribery accusations. Nevertheless, it appears that in all foreign bribery cases in which breach of trust was charged along bribery, all defendants were eventually acquitted. The only exception was one case in which the indictment was construed differently: prosecutors charged the defendants with participation in breach of trust committed by officials of the foreign SOE, i.e. for having contributed to the damage caused to the latter by the bribery scheme (***Financial Institution I (Azerbaijan, Syria)*** case).

126. In 2019, the Austrian Supreme Court has stated the principle that a bribery offence does not constitute, in itself, an "abuse of authority" for the purpose of the breach of trust offence ("[…] *active corruption by a person in power (even if it is relevant under criminal law) does not in itself constitute an abuse of authority in the sense of the offence of breach of trust.*"). The offence could arise, however, from the violation of internal instructions or, more generally, a duty of loyalty. The Supreme Court also excluded the possibility to prove an intent to cause damages for the purpose of breach of trust if the bribe is paid in consideration of a benefit that would at least match the value of the bribe.[35]

127. On-site visit participants confirmed that charging breach of trust in bribery cases was a well-established prosecutorial practice. A judge explained that this was used as a fall-back offence because if bribery could not be proven, the flow of money from the company could still be sanctioned under the breach of trust charge. The use of this offence might also be explained by the inadequacy of Austria's false accounting offences (see section B.5.2). Prosecutors appeared to use this offence to prosecute certain types of accounting misconduct. For example, defendants were charged with breach of trust for having transferred a sum under a fake consultancy contract or having used false invoices to conceal bribes. Nevertheless, prosecutors at the on-site visit agreed that this practice should change in light of the 2019 Supreme Court decision mentioned above. They were not aware of any instruction or guidance issued to prosecutors following the Supreme Court decision.

Commentary

The lead examiners note that a prosecutorial practice to charge breach of trust along with foreign bribery was based on an interpretation of the offence which assumed that paying a bribe would automatically fulfil the breach of trust elements of abuse of authority and damage to another person's property. However, this interpretation was not shared by courts in most foreign bribery cases and in 2019, the Supreme Court clarified that this assumption is no longer tenable. In order to support prosecutors' efforts, the lead examiners recommend that Austrian law enforcement authorities provide guidance to prosecutors involved in foreign bribery cases on good practices in prosecuting foreign bribery, including on the use of concurrent or alternative charges.

[34] See, for example, Regional Court for Criminal Matters Vienna, 122 Hv 47/17a, 25 July 2018 (p. 7 English translation).

[35] Austrian Supreme Court, OGH 17 Os 8/18g, 26 February 2019 (p. 41-44 English translation), and OGH 14 Os 17/19k and 14 Os 18/19g, 3 September 2019 (p. 6-7 English translation).

B.1.2. Defences

128. Austria's Criminal Code provides for certain defences that might apply in foreign bribery cases. First, a person can be excused for the mistaken assumption of a justifying fact (CC Sec. 8) or for an error of law (unless they can be blamed for the error, CC Sec. 9). In the ***Hospital Project (IFI)*** case, the court found that the person who received the bribe was not a foreign public official. The court also mentioned in passing, however, that "already with regard to the subjective ideas" of the defendant, the application of the foreign bribery offence should have been excluded.[36] This suggests that defendants might be exonerated, either for lack of intent or for an error of law, if they erroneously assumed that a person is not a public official. In the evaluation of another country, the Working Group has underlined that the application of such a defence would be problematic.[37] Prosecutors met at the on-site visit, however, refused the idea that a defence of error of law on the status of a foreign public official could succeed in a bribery case.

129. Second, the defence of state of emergency (CC Sec. 10) may be applied in foreign bribery cases. In the ***Financial Institution I (Azerbaijan, Syria)*** case, the defendants put forward that committing the offence was the "only way" for the defendants to "avert the crisis at [the company]". They argued that, consequently, they were protected by "the legal institutions of the justifying and excusing state of emergency and of emergency assistance" (CC Sec. 10(1)), and due to a "justifying collision of duties", because of the precarious financial situation of the company and the need to secure jobs. The Supreme Court rejected this argument, but only because it was not covered by the facts of the judgement.[38] This suggests that, if properly substantiated, the argument might have been otherwise admitted. The availability of such a defence in foreign bribery cases would contravene the Anti-Bribery Convention Commentary 7, which states that foreign bribery should be an offence "irrespective of […] the alleged necessity of the payment in order to obtain or retain business or other improper advantage." For this defence as well, however, prosecutors at the on-site visit ruled out the possibility that such an argument could succeed in a bribery case.

Commentary

The lead examiners are reassured by the Austrian prosecutors' opinion that the defences of error of law and state of emergency would not apply in a foreign bribery case. In light of court decisions that seem to be open to applying such defences, however, they suggest that the Working Group follow up, as case law develops, whether the defences of error of law (CC Sec. 9) and state of emergency (CC Sec. 10) are applied in foreign bribery cases.

B.1.3. Jurisdiction over natural persons to prosecute foreign bribery

130. Foreign bribery offences committed by natural persons can be prosecuted in Austria based on both territorial and nationality jurisdiction. *Territorial jurisdiction* has a broad application, according to Austrian authorities. Austrian criminal laws apply to all offences committed in Austria (CC Sec. 62). A perpetrator is deemed to commit an offence "in any place where he acted or should have acted" (CC Sec. 67(2)). In Phase 3, Austria provided a commentary on the latter provision explaining that offences committed partially in Austria and partially in a foreign country must be treated as a unity so that the offender may be punished for the whole offence in Austria. *Nationality jurisdiction* also applies to foreign bribery. In 2012, a dual criminality requirement was repealed for bribery offences. Pursuant to the current provision, "Austrian criminal laws apply independently of the criminal laws of the place where the crime was committed", for

[36] Regional Court for Criminal Matters Vienna, 122 Hv 47/17a, 25 July 2018 (p. 22 English translation).

[37] OECD (2017), WGB Phase 4 Report on Finland, p. 32-33.

[38] Austrian Supreme Court, OGH 13 Os 105/15p and 13 Os 106/15k, 6 September 2016 (p. 76 English translation).

"criminal breaches of official duty, corruption and related offences (Sections 302 to 309), if (a) the perpetrator was Austrian at the time of the crime […]" (CC Sec. 64).

131. The Phase 3 Report raised a jurisdictional issue relating to bribery committed through intermediaries. Some of the participants in the Phase 3 on-site visit had declared that bribery through intermediaries could only apply as long as part of the bribery took place in Austria (e.g. authorisation, transfer of bribe payment). The Working Group therefore decided to follow up the application of the active bribery offences to bribery of foreign public officials committed abroad through an intermediary who is not an Austrian national (follow-up issue 10(a)(i)). This question has not been clarified by case law since Phase 3. Nationality jurisdiction rules do not appear to raise issues when it comes to their application to individuals. On the other hand, despite reassurances provided by Austrian authorities, some on-site visit participants questioned their application to Austrian companies who commit bribery abroad through a foreign intermediary. This issue is analysed in Section C.1.5 below, on jurisdiction over legal persons.

B.2. Investigative and prosecutorial framework

B.2.1. General background

132. The Austrian criminal procedure is built around the principles of *ex officio* procedure (CPC Sec. 2) obligating the authorities to investigate any reasonable suspicion of a criminal offence, as well as objectivity and exploration of the truth (CPC Sec. 3), i.e. the authorities must act to explore the truth and probe all material facts that are relevant, while exercising their official duty impartially.

133. The criminal investigation is conducted by the Police (*Kriminalpolizei*, criminal police) or by the prosecutor, opened on the basis of an initial suspicion, i.e. it can be assumed that a criminal offence has been committed (CPC Sec 1(3)). The Police and the prosecutor shall conduct the investigation "by mutual agreement" (CPC Sec. 98(1)). However, the prosecutor is in charge of the investigation and the police are obliged to follow the prosecutor's orders (CPC Sec. 99(1)).

134. The prosecutor can order further investigations if it is necessary for legal or factual reasons. If an investigative measure requires authorisation by the judge, the prosecutor makes a substantiated motion and if the permission has been granted, tasks the police with the execution of the measure (CPC Sec 101). The prosecutor may also conduct investigations or task an expert with it (CPC Sec 103). The Commissioner for legal protection (CPC Sec. 47a, *Rechtsschutzbeauftragter*) is an independent actor of the criminal procedure tasked with safeguarding the fundamental rights and civil liberties, and exercising certain procedural rights such as filing a complaint against discontinuation of an investigation if there is no victim (in a substantial criminal law sense) participating in the proceedings. The Commissioner for legal protection and its deputies are appointed by the Minister of Justice for a renewable term of three years from amongst legal professionals with at least five years of professional experience. Austria explained that this function is usually performed by retired judges or prosecutors.

135. At the end of the investigation, the prosecutor must weigh whether a conviction is likely on the basis of sufficiently established facts and whether there are no grounds for discontinuing the case or resolving it without a trial (see section B.6.2). If not, the prosecutor files the indictment to the competent court for the trial (CPC Sec. 210).

B.2.2. Institutional framework and specialisation

136. In response to the need for specialised expertise to fight white collar crime and corruption specifically, Austria established the Federal Bureau of Anti-Corruption (*Bundesamt zur Korruptionsprävention und Korruptionsbekämpfung*, BAK) in 2009, and the Central Public Prosecutor's Office for Combating Economic Crimes and Corruption (*Zentrale Staatsanwaltschaft zur Verfolgung von*

Wirtschaftsstrafsachen und Korruption, WKStA) in 2011. From the perspective of investigation and prosecution of foreign bribery, these authorities are the main actors. At the time of the Phase 3 report in 2012, both were relatively new. Significant practice has developed since then.

137. The BAK is a specialised police unit under the Ministry of Interior with nationwide territorial competence for both prevention (see section A) and investigation of corruption, in particular in co-operation with the WKStA. BAK's material competence also covers investigation of foreign bribery and connected money laundering (CC Sec. 307-307b and 165). Every police unit has the obligation to report immediately any such allegation to the BAK, and according to the CPC, investigations of foreign bribery shall be conducted by the BAK. On the other hand, when it is deemed expedient or due to the low relevance of the case, the BAK can commission other police units with the investigation of individual cases, with or without the need to report on their progress. According to information gathered on-site, transfer of cases indeed happens in minor cases only. Nevertheless, if the case has been transferred due to low relevance, the prosecutor must be informed.

138. The WKStA is a special unit within the prosecution service of Austria, with a federation-wide competence and responsibility for the investigation and prosecution of economic crimes and corruption. WKStA's material competence (CPC Sec. 20a) covers active bribery, including foreign bribery "if it can be assumed that the offence was committed in relation to a benefit with a value exceeding EUR 3000 or the intent extends to this", as well as connected money laundering. The criminal police must report to the WKStA (in addition to the BAK) any suspicion of an offence falling into its material competence, as soon as they become aware of it. According to practitioners, due to the close co-operation between BAK and WKStA, this parallel reporting does not create issues.

139. The WKStA has the possibility to take over from or refer cases to other PPOs, if special knowledge or expertise concerning white collar crimes is required, or for the sake of expedient and effective conduct of the proceedings (CPC Sec. 20b(1)). In addition, the WKStA can take over corruption cases falling outside of its default competence (i.e., those involving bribes below EUR 3 000), if there is a particular public interest "due to the significance of the offence or the suspected person" (CPC Sec. 20b(3)). PPOs must immediately report relevant cases to the WKStA if exercising these powers is deemed to be necessary. In cases taken over by the WKStA the investigation is generally conducted by the BAK.

140. Investigations can be joined in a single criminal procedure by the same PPO, if a person is suspected of having committed several offences or several persons are involved in the same offence or closely related offences (CPC Sec. 26). The WKStA is exempt from this rule if the offences in its material competence are of minor importance in the context of the overall scheme under investigation. This exception aims to avoid overloading the WKStA with minor cases.

141. In the event of a conflict of jurisdiction between the WKStA and another PPO, or if there is a reason to transfer the case from the WKStA to another PPO, the Procurator General's Office decides (see Section B.3.2).

142. The CPC establishes special court divisions at the Regional Court for Criminal Matters Vienna, with nationwide territorial competence for handling the trial phase of the cases in WKStA's competence "which require special knowledge of economic life or the conduct of such complex proceedings due to their extreme scope or due to the large number of parties involved in the proceedings, the economic circles involved and the complex of facts to be investigated or due to the special public interest in the investigation due to the significance of the offence to be solved" (CPC Sec. 32a and Court Organisation Act (*Gerichtsorganisationsgesetz)* Sec. 32a).

143. However, the competence of these special court divisions is not the main rule. Based on the CPC (Sec 32a and 39), the WKStA must file the indictment to the court having competence according to the general rules first, and only after this step can the WKStA or the accused person request the Supreme Court (or the Vienna Higher Regional Court if within its jurisdiction) for the transfer of the case to the special

court divisions. The basis of this motion has to be a "good cause" described in CPC Sec. 39(1a) ("would be expedient in view of the scope of the proceedings, the place of detention of the accused, the whereabouts of witnesses, experts and other evidence or in order to avoid delays or reduce costs for the effective and expeditious conduct of the main proceedings in economic and corruption-related criminal cases"). In practice, the decision is discretionary and can take into account other factors as well, such as workload of these special court divisions. This procedure might add unnecessary delays to the trial phase.

Commentary

The lead examiners are satisfied that the institutional framework provides for a sufficient level of specialisation and coordination, channelling the foreign bribery offences through the dedicated authorities. However, at the courts' level the application of specialisation might be undermined by the requirement that prosecutors first file an indictment before the ordinary court and subsequently apply for the reassignment of the case to the specialised chambers. The lead examiners therefore recommend that Austria revise its criminal procedure rules to ensure that foreign bribery cases can be referred to the specialised court chambers without undue delays, when appropriate.

B.2.3. Resources

144. In Phase 2, the WGB recommended that Austria provide the necessary resources and specialised expertise for the effective investigation and prosecution of foreign bribery offences. By the time of the Phase 3 report, the BAK and the WKStA had been established but lacked sufficient human and technical resources. The WGB welcomed the institutional developments and recommended that Austria, as a matter of urgency, include in its coordination strategy concrete and substantial measures for further improving the capacities of its law enforcement authorities (Phase 3 recommendation 4(e)).

145. During the on-site visit, Austria reported a continuous improvement of the capabilities to process and analyse significant amounts of digitalised data in criminal proceedings (including scanned documents with optical character recognition, blockchain transfer analysis, decryption of mobile devices, linkage of data sources, etc.). The establishment of a secure and dedicated data centre environment at the Federal Computing Centre with excellent storage and computing capacities (i.e. for analysis of digital evidence and data) has been completed in 2023. As of November 2023, there were 15 IT-experts available for the judiciary (prosecutors and judges) with different skillsets and equipped with state-of-the-art data analysis and investigation software. Austria also reports planned procurement tenders of forensic IT-hardware and software to support the IT-experts in investigative proceedings.

BAK

146. Austria reports that the BAK has acquired new software tools which allow for the effective evaluation of significant amounts of digitalised data, including emails. In addition, another tool (NUIX Investigate), which can primarily be used to show connections between actors, has been tested positively by the BAK and is now used as an additional analytical tool. To accommodate the needs due to the trend of increasing cell phone data, an additional analysis tool was made available for use by the BAK's Operational Service as well. The BAK's budget for human and material resources shows a steady increase between 2014 and 2023, slightly above the total inflation in the period. These steps taken since the Phase 3 evaluation can be considered as the implementation of Phase 3 Recommendation 4(e), with the caveat that improving and keeping the tools required to effectively investigate foreign bribery cases must be an ongoing exercise.

147. BAK's Department 3 is responsible for criminal intelligence and criminal investigations in the fields of corruption offences. The department comprises legal experts, economic experts, senior police officers and supporting office workers. It is now subdivided into two units, Corruption Investigations in the Private Sector and Corruption Investigations in the Public Sector. Their tasks include coordinating operations, conducting operational case analyses, and managing asset recovery.

WKStA

148. At the time of the Phase 3 on-site visit in 2011, the WKStA had 21 statutory positions for prosecutors and 5 experts with financial and economic expertise. As of now, the WKStA has 45 prosecutors, 9 experts, and 29 staff members, which is a significant increase. The secondment of experts is guaranteed by the Law on the Public Prosecutor's Office (*Staatsanwaltschaftsgesetz*, StAG Sec. 2a(5)), according to which at least five experts must be made available to the WKStA. Additionally, based on an agreement signed by the Ministry of Justice with the Ministry of Finance in 2011, the WKStA can call upon experts for audits of large-scale enterprises. Recently, the WKStA employed its own media expert and IT manager as well.

149. According to Austria, assignment of experts to large economic proceedings conducted by other PPOs is subject to the conditions set forth in CPC Sec. 20b. If for the sake of an effective and swift conduct of the proceedings "special know-how of business matters and experience in conducting such proceedings" are required, in principle the WKStA would take over the case. Only if the WKStA refuses to take over the proceedings for workload reasons, an expert shall be made available to the requesting PPO.

150. Concerning human resources, however, at the on-site visit, participants in various panels, legal practitioners and the media expressed the view that the PPOs are overloaded and the prosecutors cannot always pay the same level of attention to every case.

Commentary

The lead examiners are satisfied that Austria has a solid institutional framework to investigate foreign bribery and the coordination between the stakeholders seems to work without issues. Apart from the generally shared opinion that the PPOs, especially the WKStA, are reaching the limit of their capacities due to the increasing workload of prosecutors, Austrian authorities did not signalise the lack of resources and appear well aware of the need to constantly update their existing toolkit as relevant technology advances. The guaranteed availability of specialised financial and IT expertise is a good practice and is to be commended.

The lead examiners recommend that Austria, to mitigate the detrimental effect of increased workload, keep increasing the human and material resources available for investigation and prosecution of the foreign bribery offence at the WKStA, including the personnel and specialised expertise that permit effective enforcement in foreign bribery cases.

B.2.4. Investigation and prioritisation of foreign bribery cases

151. After the Phase 3 evaluation, the Austrian law enforcement authorities stepped up their efforts and initiated a remarkable number of investigations into foreign bribery allegations. Nevertheless, the obstacles to effective prosecution, as explained above, paired with the necessity to resort to resource-demanding international co-operation, the very high level of proof required by the courts, and the high acquittal rate in foreign bribery cases may have had a chilling effect on law enforcement authorities to continue to take all necessary steps to detect, investigate, and prosecute this offence.

152. At the moment of writing this report, there were three ongoing foreign bribery investigations. On the other hand, Austria did not report any concrete steps taken to assess and investigate recent foreign bribery allegations which have been identified in the context of the Working Group on Bribery's own media monitoring exercise (see Annex 1, ***Highway toll system tender (Czech Republic)***, ***IT system tender (Zambia)***, and ***Factory building project (Poland)*** cases).

Commentary

The lead examiners recommend that Austria take all necessary measures to ensure that law enforcement authorities act promptly and proactively so that complaints of bribery of foreign

public officials are seriously investigated and credible allegations are assessed by competent authorities.

B.3. Conducting foreign bribery investigations and prosecutions

B.3.1. Investigative techniques

Available investigative measures and techniques

153. In general, the evaluation team did not detect issues concerning investigative techniques available to law enforcement authorities in investigations of foreign bribery. In fact, since the Phase 3 evaluation positive developments occurred in this field, especially concerning access to banking and beneficial ownership data. Law enforcement authorities now have access to data on bank accounts and financial transactions, as well as company information, including beneficial ownership details. Depending on the level of intrusiveness, investigative measures and special techniques may require a judge's permission.

154. The CPC provides for a broad range of measures, including seizure ordered by public prosecutors or the police ("*Sicherstellung*") and court-ordered seizure ("*Beschlagnahme*") for the purpose of evidence, civil claims, or confiscation; identification of persons; search of places, objects, and persons; physical examination; and DNA-testing.

155. Pursuant to CPC Sec. 111, any person who has objects or assets that are to be seized is obliged to hand them over to the criminal investigation authority upon request or to make the seizure possible in another way. If information saved on data storage mediums has to be secured, any person has to grant access to that information. If data storage mediums have been seized, all the data stored on them can be accessed. This also applies if the data is password protected, in which case the criminal investigation authority is authorised to search for the access data or question the person who presumably knows the password. If the authority does not obtain the access data, it may use decrypting/cracking software.

156. The power to seize data from a storage medium (e.g. mobile phone, laptop etc.) also encompasses access to data that is not stored on the data storage medium that is subject to the search but can be accessed via said storage medium. Virtual assets such as cryptocurrencies are also subject to this provision and the BAK informed the evaluation team that due to its strengthened forensic capacities seizure of virtual assets is in fact technically possible. To eliminate the risk of third-party access, assets are transferred to a so-called 'government wallet', managed exclusively by the law enforcement agency.

157. The Federal Ministry of Justice provides practitioners with a continuously updated handbook that comprehensively describes both the legal framework and the case law on seizing objects, data or other assets.[39] The decree issued by the Ministry of the Interior ("Guideline for the handling of seized objects"), outlines further legal and forensics aspects, including the seizure of devices that store electronic data.[40]

158. The CPC also contains a series of communication-related investigative measures that are relevant in foreign bribery cases, i.e. seizure of letters, information on data of communication (traffic, access, and location data), localisation of a technical device (IMSI-catcher), occasional data retention order to service providers (*Anlassdatenspeicherung*), monitoring of communications, and optical and acoustic surveillance of persons. Special investigative techniques, i.e. surveillance, covert investigations, and fictitious transactions can be applied under proportionality, legality, and necessity checks (CPC Sec. 5.) and if their respective legal requirements are fulfilled. For instance, under CPC Sec. 131(2) the requirement for covert investigations is that the offence must be punishable by at least 1 year of imprisonment. The additional

[39] Decree No. 2020-0.303.132 of 28 May 2020.

[40] Decree No. 2022-0.729.911 of 16 October 2022.

requirements do not appear to impede the application of special investigative techniques for foreign bribery cases. As an exceptional investigative measure, data synchronisation (connection and analysis of otherwise separated data bases, also known as "raster investigation") can be ordered, in theory also in foreign bribery cases. Covert remote access and search of a computer system is legally not possible.

Bank account and beneficial owner registry

159. During the Phase 3 evaluation, a series of foreign bribery related issues had been identified concerning access to bank and financial records, information on beneficial ownership, and "*Treuhand*" trusts.

160. At the time of Phase 3, the main problems were that (i) the banks routinely appealed the court decisions ordering them to provide data to law enforcement, and (ii) no centralised bank account registry existed. Thus, in case the exact data of an account was not known, the law enforcement authorities had to address all five bank associations, who, in turn, routinely appealed the orders on their own right. The WGB considered these being serious impediments to effective enforcement of the foreign bribery offence and recommended Austria to find a way to remove them (see Phase 3 recommendation 4(a)).

161. Concerning the information on beneficial owners the Phase 3 report found that, despite positive developments, while the overall transparency of legal persons had been increased, e.g. by mandatorily converting bearer shares into registered ones, there were several gaps concerning beneficial owner information. In addition, "*Treuhand*" trusts were entirely opaque with the trustors' identity not revealed. The WGB therefore recommended Austria to make it easier for law enforcement to identify actual beneficial owners of companies (see Phase 3 recommendation 4(c) and follow-up issue 10(b)).

162. Since Phase 3, amendments of the CPC and the implementation of the EU regulation 2015/849 (5th anti-money laundering directive) seem to have solved these issues. A comprehensive bank account registry has been established in 2015, fully accessible for the BAK, PPOs, and courts.[41] Since 2017, a beneficial owner registry contains the information on actual owners of companies, other legal persons, and trusts. The BAK, PPOs, and courts have the right to access the registry for criminal law purposes.[42]

163. The BAK employs experts to analyse and clarify the information obtained from the registries. Since 2017, in larger public prosecutors' offices (with at least ten established posts), one or more specially trained prosecutors are assigned to assist in aspects of asset recovery in order to ensure the effective implementation of the legal framework in this field (see section B.6.4).

Commentary

The lead examiners are satisfied that the law enforcement authorities have access to a wide range of investigative measures, including special investigative techniques, to conduct foreign bribery investigations. The unrestricted availability of the central bank account registry as well as the registry of beneficial owners is deemed by Austrian authorities to have greatly enhanced the efficiency and timeliness of law enforcement action and can be considered as a good practice.

[41] Kontenregister- und Konteneinschaugesetz, Federal Law Gazette I Nr.116/2015 (KontRegG) Sec. 4.

[42] Wirtschaftliche Eigentümer Registergesetz, Federal Law Gazette I. Nr.136/2017 (WiERegG) Sec. 12.

B.3.2. Independence of investigations and prosecutions under Article 5 of the Anti-Bribery Convention

Background

164. The BAK (see section B.2.1) is an institution of the Federal Ministry of Interior but is not embedded in the general police structure. Its Director and Deputy Directors are appointed by the Minister of Interior for an (extendable) ten years term, upon consultation with the President of the Constitutional Court, the Administrative Court, and the Supreme Court. The high professional requirements paired with incompatibility rules for members of executive and legislative bodies (with a six-year cool-down period) are remarkable and it can be assumed that the BAK is fairly autonomous within the law enforcement community. The BAK has no reporting obligation *vis-á-vis* the Ministry of Interior concerning ongoing investigations. A 2023 amendment to the BAK Act introduced a stricter regulation for secondary employment of officers, to enhance BAK's independence and avoid potential conflicts of interest.

165. The protection of prosecutorial independence from undue influence still raises some issues. Already in the Phase 2 evaluation, the WGB highlighted the role the Austrian Minister of Justice plays in criminal investigations and prosecutions due to its powers of supervision. In Phase 3, the WGB recommended that Austria ensure that investigations and prosecutions of foreign bribery cannot be influenced by considerations prohibited by Article 5 of the Convention, "particularly in view of the Minister of Justice's decision-making authority in foreign bribery cases" (see Phase 3 report paras 90-96 and Recommendation 4(d)).

166. In 2015, the Law on the Public Prosecutor's Office (*Staatsanwaltschaftsgesetz*, StAG) has been amended, specifying the reporting obligations for prosecutors and introducing an advisory council ("*Weisungsrat*") at the Procurator General's Office, with the aim to "counteract the appearance of political influence by the Minister of Justice". These measures were not considered sufficient, however. In 2021 the MoJ therefore established an expert group to examine further reform avenues.

The current legal background and structure of the PPOs

167. The Federal Constitution has been amended in 2008, introducing the first mention of public prosecutors at this legislative level. According to Section 90a of the Constitution, public prosecutors are "organs of the ordinary jurisdiction"[43] with investigative and prosecutorial functions. The inclusion of prosecutors in the constitutional Title on judiciary was triggered by a criminal procedure reform abolishing the role of investigative judges. After the reform, public prosecutors took over the supervision and direction of criminal investigations, while the courts exercise the traditional role of "judge of freedoms", e.g. authorising certain coercive measures. The Constitutional Court clarified that PPOs are assigned to the state's function of jurisdiction, but their status and functioning is different to that of the courts and judges.[44]

168. The standing of prosecutors and judges is regulated in the Judges' and Public Prosecutors' Service Act (RStDG). They share judicial training with similar admission and examination requirements, which qualify the candidates for gaining appointment both as a judge or a prosecutor. Later on, during their careers, judges can be appointed as prosecutors and *vice versa*. Judges and prosecutors are subject to the same disciplinary regime.

169. The public prosecutor's offices (PPOs) are organised into 17 offices at the regional court level, which also exercise the prosecutorial duties in the 117 lower-level district courts; 4 senior public prosecutor's offices (SPPOs) at the seats of the higher regional courts (Vienna, Graz, Linz, and Innsbruck); and the

[43] The adjective "ordinary" was introduced in 2014, after the reform establishing the administrative court system, separately from the ordinary courts.

[44] VfSlg.19.350/2011.

Procurator General's Office ("*Generalprokuratur*") at the Supreme Court level. The WKStA is organised separately, at the seat of the Senior Public Prosecutor's Office Vienna.

170. The SPPOs and the Procurator General's Office are directly subordinated to the Minister of Justice. Consequently, the Minister is the superior of every prosecutor. This is reflected in the Law on the Public Prosecutor's Office (StAG), especially in StAG Sec.2, 8a and 29a.

Reporting obligation and the Minister's power to give instructions

171. Reporting obligations by prosecutors are based on StAG Sec. 8(1), according to which PPOs are obligated to report important cases to their respective higher-level PPO if there is "a particular public interest due to the significance of the offence or the role of the suspect in public life" or the relevance of the legal question at hand warrants this. In these reports, subordinated prosecutors must outline the facts, evidence, and legal assessment of the case. They must also attach the draft of the planned measures.

172. In addition, the SPPOs and the Minister of Justice (StAG Sec. 8a(3)) can order reporting on specific groups of cases, but also request reports in specific individual cases, determining a specific time and content for the report. Foreign bribery is one of the offences to report.

173. In practice, prosecutors are requested to provide two types of report: the so-called "intention reports" (*"Vorhabensbericht"*), and the "for information reports" (*"Informationsbericht"*).

174. As a general rule, the "intention reports" must be submitted *ex ante* if the planned measure is (i) refraining from initiating an investigation, (ii) terminating an investigation, including in application of a non-trial resolution (see section B.6.2), (iii) filing an indictment, (iv) dropping the charges, (v) waiving or submitting an appeal (StAG Sec.8(3)). In addition, in important cases every significant procedural step, especially coercive measures, must be reported *ex post*. In case of imminent danger ("*Gefahr im Verzug*"), investigative steps can be executed prior to fulfilling the reporting obligation (StAG Sec. 8(4)). *A contrario*, this means that if no such imminent danger can be established, reporting (and consequently, waiting for permission and instructions) takes precedence over moving the case forward. In addition, the PPOs are obligated to report their intention to apply specific special investigative measures, optical or acoustic monitoring of persons and automated data comparison, to their respective SPPOs, who may forward these to the Ministry of Justice (StAG Sec. 10a). This reporting might also cause undue delays and render the planned measures meaningless by the time the PPO leading the investigation receives approval. According to data provided by Austria, while the reporting obligations have been lightened in subsequent amendments of the ministerial decree, the PPOs still filed 414 "intention reports" in 2023 to the Ministry.

175. This has been confirmed by prosecutors met at the on-site visit. They explained that even if the PPOs try to minimise internally the delays caused by reporting, due to the multiple levels of hierarchy and the involvement of the Ministry, *ex ante* reporting might in particular slow down indictments or the discontinuation of criminal proceedings considerably, while increasing the workload of prosecutors as well. Prosecutors also mentioned that the information reported can be distorted due to the long reporting channels, resulting in potential misunderstandings. Some prosecutors underlined that the final report on planned measures may also cause undue delays in issuing the indictment, because the review by the superiors and MoJ can take months.

176. The reporting burden appears to be extensive as the threshold is rather low. If the reported case is not of "local relevance" only, the SPPOs must submit the report to the Minister of Justice with proposed measures, for approval (StAG Sec. 8a(2)). This also means that in a selected, and basically unrestricted pool of cases the relevant prosecutorial decisions may effectively be taken at the Ministry level, not by the handling prosecutor.

177. The "for information" reports (*"Informationsbericht"*) also raise some concerns. These requests and reports are not included in the case file but form a part of the "diary" (*"Tagebuch"*, basically a *pro domo* file the prosecutor maintains) and are not disclosed at any point of the procedure. PPOs send these reports

proactively, but higher-level PPOs and the Ministry of Justice can also request information in any case, at any time. According to prosecutors, in extraordinarily important or politically sensitive cases the "for information" reports can be requested on a very frequent basis, which can in exceptional cases slow down investigations and overload the case handler. In addition to this negative effect, the "hands-on" follow-up of ongoing investigations by the Ministry of Justice, including the Minister's option to access the case file (StAG Sec 29a(1a)), carries the risk of confidential or non-public information reaching persons within the MoJ who should not receive it, and may create more favourable conditions for leaks of information to interested parties and attempts of undue interference by the executive branch or the political sphere in general, as alleged in a recent case.

178. Under the rules on reporting and instructions, senior prosecutors are entitled to give instructions on the handling of any particular case, always in writing. Since 2016 oral discussions of a case must be recorded in minutes. Both the written instructions and the minutes must be attached to the case file. The same rules apply to the instructions of the Minister of Justice. Prosecutors who consider that an instruction is unlawful or have reservations about it, can inform their superior and request the instruction in writing. If a prosecutor is convinced that the act according to the instruction is unlawful or "unrepresentable", he or she can be "released" upon written and justified request from the handling of the case (StAG Sec. 30).

179. The possibility of giving binding instructions issued by the Minister in ongoing investigations raises questions concerning the potential influence of the executive in criminal cases. To mitigate some of these concerns, the instructions of the Minister are always documented in writing. The instructions given in a case are included in the case file and disclosed to the parties along the other documents of the investigation. Practitioners at the on-site visit unanimously expressed the view that, in any event, undue influence would never be channelled through the formal instructions but would rather be exerted informally and through undocumented ways. Thus, the formalised instructions do not seem to be as much of an actual problem for legal practitioners but rather a problem of public perception.

The Advisory Council

180. To mitigate the growing public concerns about political influence over the functioning of the PPOs, a new institution, the Advisory Council ('*Weisungsrat*"), has been introduced in 2015. The board has three members, the chairman being the Procurator General. The members are appointed by the President of the Republic for a 7-year term after consultation with the relevant stakeholders. Knowledge and experience of 15 years in a profession tied to a degree in law is a prerequisite for the appointment (StAG Sec. 29b). Active judges, prosecutors, the Commissioner for Legal Protection and lawyers are disqualified. MoJ representatives stated that the exclusion of active practitioners aims to avoid conflicts of interest.

181. The Minister of Justice must ask for the opinion of the Advisory Council if (i) the Minister intends to issue instructions in general, (ii) in cases against supreme executive bodies, or members of the highest level of judiciary, and (iii) if the Minister deems it necessary due to the public interest in a criminal case, "in particular in the case of repeated and supra-regional media coverage or repeated public criticism of the actions of the PPO and the Police, or for reasons of bias". The Minister submits to the Council the draft decision or instruction, but the members of the Advisory Council are entitled to research the case file as well (StAG Sec 29c(2)).

182. The Minister is not bound by the opinion of the Advisory Council, however. The consequence of disregarding the Council's opinion is that the decisions must be published with reasons in the annual report to Parliament. This only happens once the criminal proceedings in question have been completed (StAG Sec. 29a(3)), which may be several years later.[45]

[45] In the latest publicly available Report on Instructions (Weisungsbericht 2021) from the 29 listed cases, (based on the file numbers) the majority, 23 of cases started in 2019 or earlier, among these 3 started in 2013, 1 in 2014.

Allegations of conflicts of interest and political interference

183. The issues described above suggest that in Austrian foreign bribery cases, there is an inherent risk of political interference due to factors prohibited by Article 5 of the Anti-Bribery Convention. Since the Phase 3 evaluation, serious allegations of interference came to light, including in a significant case that also included foreign bribery allegations.

184. The catalyst of the 2015 amendments on reporting and instructions mentioned above was a scandal involving an Austrian bank. The bank was nationalised by Austria in 2009 to avoid its collapse and was eventually dismantled in 2014, amid what was described as one of the largest banking scandals in Europe. In 2014, parliamentary committees were formed to scrutinise serious allegations connected to the activity of the bank, which was suspected of multiple anti-money laundering violations and other criminal offences spanning over two decades, including alleged foreign bribery (***Financial Institution II (Croatia)***). The final Parliamentary Report suggests that (i) several of these allegations (including those related to foreign bribery) were not properly investigated, and (ii) there was an issue of conflict of interest with the Minister of Justice at the time who, before taking up his ministerial office, had represented some key individuals in the bank as a criminal defence lawyer.[46] Representatives from the media and civil society met at the on-site visit stated that the failure to prosecute foreign bribery in this case seemed to be rather due to the extreme complexity of the facts and of the numerous offences committed over the years.

185. Prosecutors met at the on-site visit stated that they never received unlawful or undue instructions. They reported, however, that some of their colleagues perceived certain instructions as politically motivated, which is very concerning.

The expert group report from September 2022

186. In February 2021 the Minister of Justice set up a working group of experts from representatives of courts, PPOs, legal professions, academia, governmental actors, and civil society, with the goal of discussing the creation of an independent federal public prosecutor's office. The working group tabled its final report in September 2022.[47] The experts discussed aspects like appointment and dismissal of the head of the institution, accountability, organisation of a fully independent PPO and its relationship to the existing structures. They examined the European standards, case law of international courts, and solutions applied in the European Public Prosecutor's Office.

187. The working group summarized its findings, indicating also dissenting opinions. The main findings were the following:

- The working group is in favour of the introduction of an independent prosecutorial authority (by separating the PPOs from the MoJ) headed by an independent Prosecutor General.
- The instructions in individual criminal cases should be decided by Senates of prosecutors at the Prosecutor General's Office. Each member of a senate should be free of instructions and independent. If necessary, several senates shall be in place.
- All members of the Office of the Prosecutor General should be appointed in a similar way as in the judiciary, based on high professional expertise and practical experience. The term of office shall be the same as for judges, should not be limited in time, and should end at the age of 65.

[46] See 2016 Parliamentary Report, p. 154-155, as well as 98-131 and 151-158.

[47] Working Group on the Creation of an Independent and Non-Directive Federal Prosecutor's Office, Final report, September 2022.

- Incompatibilities with the office should be regulated in a similar way as for judges of the Supreme Court. In general, dismissal should only be possible by the Supreme Court. Dismissal may occur for disciplinary or criminal liability reasons, or if incompatibilities subsequently arise.
- Parliamentary control should be possible for matters concerning the administration of the public prosecutor's offices. Ongoing criminal proceedings should be excluded from parliamentary control. These should only be subject to legal control by the courts. However, parliamentary control should be possible from the moment of the conclusion of the criminal proceedings.

188. The panellists of the on-site visit were well informed about the issue and the conclusions of the expert group report. Legal practitioners, civil society representatives, and members of the academia were in favour of the reform in general, while expressing slightly differing views concerning the details, e.g. the need of senates and accountability. The opinions of the parliamentarians diverged, depending on their political views. The expert group's report and recommendations seem to offer a feasible solution for the concerns on the prosecution service's independence. However, the implementation of the reform would require the amendment of the Constitution, requiring a 2/3 majority of the votes in the parliament. According to Austria, the ongoing political debates are centred around the questions of the parliamentary control and Senate-system.

The Kreutner Commission

189. The independence of the prosecution service is still a hotly debated topic in Austria, as further allegations of political interference in individual cases continue surfacing. In particular, allegations published in November 2023 involved a former MoJ head of the criminal law department (*"Sektionschef"*) who was, due to the institutional organisation of Austrian PPOs described above, the *de facto* operative head of the Prosecution Service subordinated to the Minister and in charge of instructions.[48] The media published a voice recording of this person (now deceased) who complained about serious political pressure on him to interfere in ongoing politically sensitive cases, for example to forbid planned house searches.

190. In December 2023 the Minister of Justice established a commission of independent experts (*Kreutner Commission*) with the mandate to investigate alleged political interference in the PPO's work between January 2010 and December 2023. The Commission specifically reviewed a number of sensitive cases, including investigations involving high-level politicians and important Austrian companies. These cases also appear to include at least one passive foreign bribery case (i.e. alleged bribery of Austrian officials). A file that covered allegations of active foreign bribery, in addition to other offences, might have also been reviewed, but this could not be ascertained. The Commission published its report in June 2024.[49]

191. The report provides a thorough analysis of the current system's functioning in practice, identifies a series of connected issues, and submits recommendations. It emphasises that the justice system is overall well-functioning and in regular cases the handling is competent, fair, and swift. The report finds, however, "significant manifestations of extraneous influence on public prosecution proceedings, which have played and may generally still play a role in the handling of a number of so-called clamorous" cases. It further concludes that these interferences were mainly politically motivated throughout the period examined and

[48] Austria explains that, as regulated in the Federal Act on the number, the powers and the organisation of Federal Ministries and in the allocation of responsibilities of the Federal MoJ, the "*Sektionschef*" role and powers can be summarised as follows: (i) he/she must be informed about all information and intention reports filed to the MoJ; (ii) he/she is competent to approve the response prepared by the competent head of department to intention reports, as well as instructions that should be issued in the name of the Federal MoJ (after obtaining the opinion of the Advisory Council); and (iii) if an oral discussion in an individual criminal case is held at the MoJ, according to the decision of the Ministry or the SPPO or at the request of the PPO, he/she is leading the discussion.

[49] Commission for the Examination of Possible Politically Motivated Influence on Public Prosecutor's Proceedings, Final Report, 23 July 2024 ["Kreutner Commission Report"].

were the result of a “two-tier” justice system, where the identity of the involved parties can play a role, and, more generally, of the lack of sufficient distance between the politics and judiciary. The Commission also notes that established “networks of political and other close relationships” seem to exist, which make it possible to influence prosecutorial decisions and facilitate strategic appointments. The report also identifies party-politically contextualised efforts and even concrete plans to weaken and ultimately dismantle the WKStA, which has been perceived as a threat by some political actors.[50]

192. The report states that “Numerous conversations with respondents have confirmed that direct political influence only occurs in isolated cases. The main expectation is that *"things are already the way they should be"* without the need for intervention.” It nevertheless states that the Commission identified several attempts at political influence over investigations. The report also establishes the occurrence of very concerning conduct in certain high-level cases: a former *Sektionschef* received regular updates in high-level cases involving individuals close to him or his superior. Certain suspects (including the former *Sektionschef* himself) were informed of investigative steps taken against them or obtained private meetings with the *Sektionschef*. Senior officials fed information to the media or used media declarations to indirectly dissuade prosecutors from acting in certain cases. Moreover, in several proceedings, delays were either deliberately caused or nothing was done to ensure their expedient conclusion.[51]

193. The report also confirms some concerns expressed in the sections above as to the potential misuse of the applicable procedures. The report is very critical of the “highly hypertrophied, time-consuming, often ineffective” reporting regime within the PPO. It finds a misuse of the supervision tools, “aimed at desired results, especially with regard to issuing instructions of various forms”, as well as the “manipulative use of other criminal procedural and supervisory instruments, reporting, and the organisation and recording of service meetings”, as well as “targeted utilisation of non-transparent communication and procedural processes”.[52] While recognising the importance of the Advisory Council, which was specifically designed to diminish any perception of political influence (see para. 180), the report also mentions instances in which the Advisory Council was bypassed (feeding to the practitioners’ perception of this body as a *"fig-leaf senate"* or *"rubber-stamping council")* or was provided selected information in an attempt to influence its conclusions.[53] There is also uncertainty as to the criminal procedure provisions that should apply to the involvement of the MoJ in criminal proceedings.[54]

194. The Commission puts forward several key recommendations, including: (i) strengthening the independence of the public prosecutor’s offices by separating them from the executive branch of power and creating an independent general Prosecutor’s Office, (ii) strengthening judicial control and reducing the reporting system and supervisory levels, (iii) abolishing the “two-tier justice system” by removing reasons of reporting based on the identity of the involved parties, (iv) safeguarding the recruitment, assessment, and promotion of prosecutors and separating administrative and professional supervision.

Commentary

The lead examiners are of the opinion that the institutional framework, the provisions of the StAG, the functioning of the reporting obligation, and the way the power to give instructions is determined lead to the conclusion that the PPOs, although described as part of the judiciary according to the Constitution, are under significant supervision and direction of the Minister of Justice, and thus the executive branch. The Minister of Justice can have knowledge, insight, and even detailed

[50] Kreutner Commission Report, Executive Summary.

[51] Kreutner Commission Report, sections 8.1.4, 8.1.5, 8.1.7, 8.1.8, 8.3.1, 8.3.9, 8.6.3.1, and 8.7.

[52] Kreutner Commission Report, Executive Summary and section 8.1.8.

[53] Kreutner Commission Report, sections 7.6 and 8.1.3.

[54] Kreutner Commission Report, section 8.1.2.

information on cases, including the option to access case files, as well as information on planned investigative steps in particularly "relevant" ongoing criminal cases, and can instruct the PPOs in these cases. While PPOs are described as "monocratically organised authorities" by the Constitutional Court, the Minister of Justice occupies the top of the prosecutorial hierarchy.

The lead examiners express grave concern about the vulnerability of the prosecutorial authorities vis-á-vis potential political interference in criminal justice, concerns supported by serious allegations, which have also been documented by the Kreutner Commission's report. They nevertheless commend Austria for the demonstrated willingness to address these issues in a transparent manner and encourage the authorities to continue these efforts.

Therefore, the lead examiners recommend that Austria urgently take meaningful steps to revise the current framework of reporting and instructions, in order to shield prosecutors from undue interference prohibited under Article 5 of the Anti-Bribery Convention.

B.3.3. Time limits and termination of investigations

195. The default duration of the investigation may not exceed three years, from the first interrogation as a suspect, application of coercive measures, or the first order or application of the prosecutor to carry out or authorise an investigative measure (CPC 108a and CC 58(3)(2)). If the investigation cannot be completed within this timeframe, i.e. no substantiated decision is possible on the termination of investigation or filing an indictment, the prosecutor can make a reasoned motion to the court, asking for an extension of the duration by two years. This extension can be repeated and has no absolute upper limit. The time required for a legal assistance request to be executed by a foreign judicial authority does not count in the time limit.

196. The termination of an investigation is the discretional decision of the prosecutor. An investigation must be discontinued if the act (i) proved to be non-punishable or the prosecution is not admissible for legal reasons, or (ii) there are no grounds for prosecution. The prosecutor can also discontinue the investigation for insignificant offences, alone or when indicting more significant ones (CPC Sec. 191). Partial discontinuation in case of multiple offences under CPC Sec.192(1)(1) may raise concerns in a foreign bribery context. According to this provision, the prosecutor may refrain from prosecuting individual offences and discontinue the investigation if the accused is charged with several offences and the investigation and prosecution of these other offences would have no influence on the applicable range of punishment and "would involve considerable effort and delay the settlement of the main case". Investigation of foreign bribery cases necessarily involve "considerable effort" and additional time, and the law might incentivise prosecutors to cut off the non-domestic element of the case with this justification. While some discontinued cases involved both foreign bribery and other domestic offences, it was not possible to ascertain whether the discontinuance was based on this provision.

197. Discontinued investigations may be resumed if the offence is not time barred and (i) the suspect was not charged with the given offence and no coercive measure was applied against him, or (ii) new facts or evidence arise or become known which justify further prosecution.

198. The decision of the prosecutor must be communicated to the accused person and the criminal police, the court, if it has been involved, and everyone else who has the right to apply for continuation. By default, the decision does not contain a statement of reasons, only the legal basis (CPC Sec. 190 to 192). However, termination of investigations for offences falling into the competence of the WKStA (even if handled by another PPO) and other cases involving "special public interest due to the significance of the offence or the person of the accused" must be communicated to the Commissioner for legal protection along with a statement of reasons.

199. Applications for continuation can be filed within 14 days from receipt of the notification and are examined by the court. If the Commissioner for legal protection examines the case file, the deadline is six

months from receipt of the file. Within the statute of limitation period, the judge can order the prosecutor to continue the investigation if (i) the law has been violated or incorrectly applied, (ii) there are serious doubts as to the accuracy of facts the discontinuation was based on, or (iii) new facts or evidence surface. There is no possibility to appeal the decision of the court.

200. Interestingly, the court can play an unusual role in the course of the investigation. According to CPC Sec. 108, the accused person may, after at least six month if s/he has been charged, request the court to order the discontinuation of the investigation due to (i) non-punishability or legal obstacle to prosecution, or (ii) if the existing suspicion of an offence does not justify the continuation in view of urgency and weight, and no further clarification is expected to intensify the suspicion. In this case, if the court orders discontinuation, the prosecutor can appeal the decision.

Commentary

The lead examiners consider the combination of obligations to proceed without delay on the one hand, and the time limits of the investigation on the other to be adequate to ensure that the investigation and prosecution of foreign bribery is not unduly impeded.

B.3.4. Statute of limitations

201. The applicable statute of limitations (CC Sec. 57) depends on the severity of the offence. For foreign bribery under CC Sec. 307 (bribery for an act in breach of duties) the limitation period is of 5 years (value of advantage below EUR 3 000, or between EUR 3 001 and 50 000), 10 years (advantage between EUR 50 001 and 300 000), or 20 years (advantage above EUR 300 000). Following the Corruption Criminal Law Amendment Act 2023, the limitation period for cases involving bribes over EUR 300 000 was increased to 20 years as a consequence of the increase of the maximum statutory penalty. For the foreign bribery offences under CC Sec. 307a and 307b (bribery for an act in line with duties or to influence a public official's activity) the statute of limitations is 5 years (for an advantage up to EUR 300 000) or 10 years (advantage over EUR 300 000). The limitation period does not include a period during which prosecution cannot be initiated or continued due to statutory provisions (e.g. due to immunity). It also does not run during the period between the first investigative measure concerning the suspect and the final decision in the proceedings. Thus, the starting of an investigation identifying a specific suspect suspends the lapsing of the statute of limitations, considerably extending it.

202. According to CC Sec. 57(2), the limitation period begins by the completion of the punishable activity or cessation of the punishable behaviour ("*the punishable activity has been completed or the punishable conduct has ceased*"). The limitation period can be extended by multiple factors, however. In particular, CC Sec. 58(2) allows for a considerable extension of the limitation period as it provides that if the person commits a further offence during the statute of limitation that is aimed at the same legally protected interest or can be attributed to reprehensible motives of a similar kind or to the same character flaw, the statutory limitation period does not expire any earlier than the point at which the limitation period for the further offence lapses.

203. Case law since Phase 3 has revealed a conceptualisation of the bribery offence which has a negative impact on the calculation of the moment in which the limitation period begins. According to this interpretation, since the bribery offence is completed with the promise of a bribe, the subsequent payment is considered as a separate act of mere material execution. Paying a bribe (after offering or promising it) is not considered as a continuation of the punishable behaviour nor as another offence committed with the same intent. This interpretation was adopted by the court in the ***Port and Viaduct Projects (Croatia)*** case.[55]

[55] Regional Court for Criminal Matters Vienna, 122 HV 26/17p, 17 June 2020 (p. 17 English translation).

> "The offence is completed with the offer, the promise or the granting; if the granting is preceded by an offer or a promise, then the offence is already completed with this and not only with the granting. In this case, the (subsequent) granting of the pecuniary advantage is only a (previously punished and therefore unpunishable) subsequent offence […]. This means that the offence had already been completed before 30 May 2008 and was therefore already time-barred at the beginning of the investigations against the defendant in Austria."

204. This interpretative approach is problematic because, as a consequence, the statute of limitations starts lapsing from the first act of the perpetrator (e.g. an offer) even if it is followed by other elements of the offence, like the subsequent promise or payment. The application of a limitation period starting much earlier would obviously undermine foreign bribery cases, which are often discovered a long time after the facts. Judges and academics at the on-site visit have suggested that courts may consider the payment of a bribe as a continuation of the offence, thus applying a longer limitation period. After reviewing the preliminary report, however, Austria rejected this opinion and stated that, in fact, the position adopted by the court in the ***Port and Viaduct Projects (Croatia)*** case prevails in the case law and academic literature. Austria further explained that CC Sec. 58(2) does not extend the statute of limitations in such a case.

Commentary

The lead examiners are satisfied by the rule which allows for the suspension of the statute of limitations between the first investigative measure concerning the suspect and the final decision in the proceedings. They nevertheless express concern over a narrow judicial interpretation of the completion of the bribery offence, which has a negative impact on the calculation of the statute of limitations and thus creates an obstacle to effective foreign bribery enforcement. This is especially important for bribery cases under EUR 50 000 (or even under EUR 300 000 for lesser bribery offences) as the limitation period is relatively short before it can be suspended.

The lead examiners recommend that Austria ensure by any appropriate means, including by amending its legislation if necessary, that in all foreign bribery cases the statute of limitations allows an adequate period of time for investigation and prosecution if the offer of the bribe has been followed by other material elements of the offence based on the same intent (e.g. the payment of the bribe).

B.4. International co-operation

B.4.1. Mutual legal assistance

Legal and procedural framework

205. The legal framework for international co-operation in criminal matters did not change significantly since the Phase 3 evaluation. Austria applies two distinctive regimes next to each other, one regulating mutual legal assistance (MLA) and extradition concerning non-EU countries based on the provisions of the Law on Extradition and Mutual Legal Assistance (ARHG), and another for the co-operation with EU members states, regulated by the Law on Judicial Co-operation in Criminal Matters with the Member States of the European Union (EU-JZG). Amendments to ARHG usually follow and reflect changes in the EU-related domain and aim to narrow the considerable gap between the two spheres.

206. Provisions of international treaties are directly applicable in Austria. The ARHG and EU-JZG are applicable in the absence of specific treaty provisions (ARHG Sec. 1 and EU-JZG Sec. 1). Austria is party to the following multilateral treaties that provide a suitable legal basis for MLA in foreign bribery cases: United Nations Convention against Corruption (UNCAC), United Nations Convention against Transnational Organized Crime (UNTOC), the Council of Europe 1959 European Convention on Mutual Assistance in

Criminal Matters and its additional protocols, and the 2000 EU MLA Convention. In addition, Austria has also ratified a series of additional Council of Europe co-operation instruments: the Criminal Law Convention on Corruption and its Additional Protocol, the Convention on Cybercrime, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, as well as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. Austria also intends to ratify the second additional protocol to the Cybercrime Convention in the near future. In practice, Austrian authorities do not require the citation of a shared treaty basis in the incoming MLA requests. In the absence of a treaty, mutual legal assistance and extradition can be granted on the basis of reciprocity as well (ARHG Sec. 3).

207. The EU-JZG covers criminal proceedings against both natural and legal persons, while the ARHG is silent on the aspect of legal persons. Both laws limit their scope to criminal proceedings. The MLA request must be issued by judicial authorities, i.e. a judge or a prosecutor, or by an authority identified by its country as an MLA authority (for example, the Police in the case of Finland).

208. The execution of any requested investigative measure is governed by the CPC. Concerning non-EU countries, the ordinance of the Minister of Justice on the Extradition and MLA in Criminal Matters (*Auslieferungs- und Rechtshilfeverordnung*, ARHV) complements the law with additional formal and procedural requirements. The executing authority is the territorially competent PPO. If judicial authorisation is required, the prosecutor files the necessary motion to the judge. In principle, every investigative measure that can be used in domestic investigations is available through MLA, including coercive measures concerning assets. In the EU-context the specific co-operation tools, e.g. freezing order, are applicable.

209. Under the provisions of ARHG, execution of an MLA request is inadmissible if the dual criminality requirement is not met, the offence is not extraditable due to its political or fiscal nature, extradition would be refused due to human rights or fundamental rights concerns, or the requested measure cannot be applied according to the CPC. In relation to EU member states (except for Denmark and Ireland) MLA has been replaced by the European Investigation Order (EIO), eliminating the dual criminality requirement for corruption offences, utilising direct contacts between competent judicial authorities, significantly shortening the time of execution, and facilitating communication between requesting and requested authority. MLA requests based on allegations that are considered administrative or financial offences under Austrian law are forwarded to the respective competent administrative or financial authority (EU-JZG Sec. 55c and ARHG Sec. 55(4)).

Mutual legal assistance in practice

210. In Phase 3, the WGB recommended that Austria take steps to ensure that its authorities respond to MLA requests from Parties to the Convention without unnecessary delay, regardless of whether the request has been submitted to the central authority or directly to a PPO, and also take steps to ensure that bank secrecy does not cause unnecessary delays in providing MLA (Phase 3 recommendation 5). In 2017, this recommendation was deemed partially implemented and to be closely followed up in Phase 4

211. According to Austria, authorities act immediately upon receiving MLA requests. If a request is sent to the Ministry of Justice (which is the rule for requests from non-EU countries), the ministry forwards the request to the competent PPO for execution within two days. EIOs are directly submitted between competent authorities, based on information available online on the European Judicial Network's (EJN) Atlas internet page and contact point network. Eurojust and EJN are well known amongst practitioners and the use of their support is part of the training practitioners receive on international co-operation.

212. Panellists at the on-site visit stated that international co-operation benefited greatly from the introduction of the central bank account registry and related amendments of the CPC, which has considerably facilitated obtaining information on bank accounts. According to prosecutors, obtaining the required court order only causes a slight delay in practice.

213. Austria has no central statistics on MLA, according to the MoJ, because for the vast majority of the MLA traffic the legal basis is the EU framework or the CoE MLA Convention, under which the exchange is direct between the competent judicial authorities. Representatives of the MoJ stated that there were attempts to implement data gathering on the basis of the existing case management systems, but the result was very unreliable. However, retroactive statistical data gathering would not prejudice the otherwise progressive practice of direct MLA exchange.

- **Incoming MLA requests**

214. According to Austria, its authorities usually start the execution of an MLA request submitted by email, as long as it is followed up by a hard copy of the request. Submissions via the Interpol channels or the Cybercrime Conventions 24/7 contact points are also accepted and processed. The request is examined only for formal requirements, minimum elements being the description of the facts and general description of evidence substantiating the suspicion, the legal qualification of the offence and the requested measure, i.e. the evidence itself will not be evaluated by the Austrian authorities.

215. The CPC establishes a special competence for the WKStA to handle international co-operation concerning offences falling into its material competence, particularly incoming MLA requests and requests for the transfer of proceedings (CPC Sec. 20a(3)). Due to the obligation to forward incoming requests to the competent PPO, any other PPO would forward foreign-bribery related MLA requests to the WKStA.

216. Austria claims that incoming MLA requests are executed within two to three months. If the request concerns a legal person, the execution can proceed, especially as company-related information is, to a large extent, publicly available. In principle, incoming requests must have been issued in a criminal investigation. At the on-site visit, however, MoJ representatives stated that requests issued in administrative proceedings by authorities that are considered “judicial authorities” would be executed in practice. Nevertheless, requests for MLA from administrative authorities might cause issues as these can be executed only on a specific treaty basis, which is potentially provided for EU and Council of Europe countries. This limitation and, in any event, the absence of clear provisions regulating this type of MLA requests, potentially hampers Austria’s ability to render assistance for non-European Parties to the Anti-Bribery Convention whose legal system handles the liability of legal persons in non-criminal proceedings.

- **Outgoing MLA requests**

217. The main principles of the criminal procedure compel the prosecutors to issue MLA requests if it is necessary for establishing the facts of the case. Austria stated that most of the outgoing requests concern banking and financial information, hearing of witnesses, and internet-related data. According to Austrian authorities, due to the lack of judicial databases comparable to the EJN Atlas, it is sometimes cumbersome to find the competent authority for non-EU countries. Requests are usually submitted to central authorities. If an outgoing request for MLA is not executed in reasonable time considering the nature and the size of the request, the MoJ either sends official letters of reminder or uses informal contacts, such as judicial networks, to facilitate execution.

218. In relation to non-EU countries, MLA requests are forwarded via the central authorities. According to the law (ARHG Sec. 71(2)), the Minister of Justice (as Austrian Central Authority) can refrain from forwarding a request submitted by the Austrian PPOs or courts if it would violate “essential interests of Austria” (ARHG Sec 2). According to on-site panellists, this provision was never applied in practice and the MoJ only checks outgoing requests for quality to avoid delays and misunderstandings. Nevertheless, the possibility for a discretionary decision by the executive concerning seeking MLA is problematic in light of the independence of investigations and prosecutions according to Article 5 of the Anti-Bribery Convention. While maintaining the right of refusal concerning incoming MLA requests might be feasible, similar provisions for outgoing requests mean in essence overruling the decision of the judicial authority in

charge of the criminal procedure. This can have especially grave consequences in foreign bribery cases where an essential part of evidence must usually be obtained through international co-operation.

Joint investigation teams

219. As a special form of enhanced, close co-operation, Austrian law enforcement authorities are able to form joint investigation teams (JITs) both with EU and non-EU, based on the respective UN, CoE, and EU conventions and the corresponding ARHG Sec. 76b and EU-JZG Sec. 76. The existing EU institutional framework facilitates the exchange between the members and the coordination of investigations and prosecutions.

220. A JIT has already been established in two foreign bribery cases: in the ***Military vehicles (Czech Republic)*** case between the WKStA and its Czech counterpart, and in the ***Arms Trade (Slovenia)*** case between the PPO Vienna and the Finnish investigative authorities. These agreements allow for the direct and real-time exchange of the investigative results, both information and evidence, between the law enforcement authorities without the need of sending repeated MLA requests. Austrian authorities have not entered JIT agreements in foreign bribery cases since 2015, however, despite the fact that they were aware of parallel investigations into the passive side of alleged foreign bribery schemes, e.g. in Romania.

MLA in foreign bribery cases

221. In the foreign bribery cases known to the Working Group, the Austrian authorities took proactive steps to pursue international co-operation, which resulted in a convincing track record. In addition, the evaluation team received feedback from 9 WGB members, which reported overall positive experiences. According to these inputs, since 2013 Austria replied to MLA requests in a timely manner, within 2-4 months, and provided high quality assistance. A member state highlighted a very good experience concerning co-operation with the WKStA in a bribery case using the JIT framework. Another member state provided detailed statistics on MLA traffic with Austria. Since 2017 Austria submitted 899 MLA requests, 5 of which concerned FB, and received 126 requests, 3 of these were FB-related. In two occasions delays occurred. In one case, the execution of an MLA request was delayed because, meanwhile, in Austria the indictment had been filed and the court became the executing authority. In another recent case, the PPO Vienna did not answer a request for more than a year despite repeated reminders. In both cases, the execution issues were resolved thanks to the involvement of the Eurojust channels.

222. Overall, the WKStA appears to be active in international co-operation, seeking and providing MLA in FB cases, and engaging in joint investigations.

Commentary

The lead examiners consider Austria's legal and institutional framework to render effective mutual legal assistance to other WGB members to be largely sound and clear, with the unavoidable difference between EU and non-EU countries. Austria's effort to keep this gap as narrow as possible by legislation is commendable. It should be noted, however, that Austria cannot provide MLA in non-criminal proceedings against a legal person within the scope of the Anti-Bribery Convention, when the request comes from a non-European Convention Party. While this limitation may be in line with Convention Art. 9, the lead examiners recommend that Austria consider extending its national laws so that these can constitute a legal basis for MLA in such proceedings.

Austrian law enforcement and judicial authorities appear to be effective and proactive in both seeking and providing assistance to foreign counterparts.

The foreign bribery investigations conducted since Phase 3 suggest that JITs might be underutilised in cross-border corruption cases, despite the nature of these cases and the available legal framework. The lead examiners therefore recommend that Austria encourage competent law

enforcement authorities to consider setting up joint or parallel investigative teams when conducting foreign bribery investigations and prosecutions, in conformity with national laws and relevant treaties and arrangements.

Austria does not have an institutionalised process to collect statistical information on MLA from competent law enforcement authorities, including information regarding the request execution times, legal basis for requests, type of assistance sought and reasons for refusal. Thus, the lead examiners recommend that Austria maintain comprehensive and detailed statistics on incoming and outgoing foreign bribery related MLA, as this is needed to assess the effectiveness of the international co-operation regime.

B.4.2. Other forms of international co-operation in the context of foreign bribery

The BAK

223. The BAK has exclusive responsibility to handle international police co-operation in cases falling into its competence (BAKG Sec. 4(2)). It is also responsible for co-operation with foreign authorities and international institutions in the field of preventing and combating corruption in general, and, in particular, for the exchange of experience in this area. Therefore, the BAK maintains close contact with comparable anti-corruption authorities and is represented in most of the relevant European and international bodies. Operational information is exchanged using various channels such as Europol and INTERPOL.

224. As of November 2023, 50 bilateral law enforcement agreements related to anti-corruption or combating corruption were in place between Austria and other countries.[56] These can form a basis of police-to-police information exchange in foreign bribery cases as well. According to BAK representatives, these are mostly seen as fall-back options, with a strong preference for MLA between judicial authorities.

225. Based on bilateral agreements, the Federal Ministry of Interior currently posts 25 Austrian police liaison officers covering 34 countries on four continents to facilitate international police co-operation. If the investigation situation so requires, BAK experts can contact these liaison officers directly.

The Austrian FIU

226. The Austrian FIU is a member of the Egmont Group and part of the European Union's information exchange platform FIU.net, enabling it to exchange information with FIUs all over the world. If it is a prerequisite of a foreign FIU, A-FIU can conclude MoUs in order to facilitate information exchange. Due to its organisational place, being a police unit and an organ of the Ministry of Interior, close co-operation between police and FIU is ensured. The FIU's powers and duties are regulated by the Law on International Police Co-operation (PolKG). The obligation to act *ex officio* bounds the FIU as well.

Spontaneous information exchange

227. Spontaneous information exchange is regulated in ARHG Sec. 59a. Courts and public prosecutors may transmit personal data to judicial authorities of another state on the basis of intergovernmental agreements, if the information relates to extraditable offences, the transfer of such information would be permissible in a domestic relation too, and it can be assumed that the information can be the basis of or

[56] These countries are: Albania, Algeria, Azerbaijan, Bolivia, Bosnia and Herzegovina, Bulgaria, China (People's Republic of), Germany, El Salvador, Estonia, Georgia, Guatemala, Honduras, Italy, Japan, Jordan, Canada, Cabo Verde, Kosovo, Croatia, Latvia, Lebanon, Lithuania, Malaysia, Morocco, Republic of Moldova, Montenegro, Nicaragua, North Macedonia, Panama, Peru, Poland, Romania, Russia, Switzerland/Liechtenstein (one common agreement), Serbia, Slovak Republic, Slovenia, South Africa, Spain, Syrian Arab Republic, Thailand, Czech Republic, Tunisia, Türkiye, Turkmenistan, Ukraine, Hungary, Uzbekistan and the Holy See.

further an ongoing criminal investigation, or a serious offence can be prevented. Austria cited cases where spontaneous information exchange triggered or furthered investigations, but no foreign bribery cases.

Consultations on most appropriate jurisdiction for prosecution and transfer of procedures

228. The situation of overlapping jurisdiction or parallel running investigations is usually detected through formal or informal exchanges via police and judicial co-operation channels or incoming MLA requests. In EU relations, the existing institutional framework, Europol, and Eurojust greatly enhance the possibility of detecting linked cases and co-ordinate the investigations and prosecutions.

229. For settling conflicts of jurisdiction and avoiding parallel procedures, the EU-JZG contains detailed provisions for notifications and consultation between the involved EU member states. Due to the EU-wide application of the *ne bis in idem* principle, the PPOs are obligated to notify their foreign counterparts about any ongoing proceedings with the potential to create a conflict of jurisdiction and engage in consultation to ensure efficient investigations and avoid detrimental consequences of parallel proceedings. During the consultation the PPOs must inform their foreign counterpart of the essential steps planned and taken, as well as of the outcome of their proceedings. As the result of the consultation, agreements can be made, e.g. on transfer of criminal proceedings or establishing a JIT for the sake of optimal results. Unfortunately, in relation to non-EU countries no similar provisions exist in the ARHG. This does not exclude the possibility of informal consultations through the central authorities but renders consultations and their results less effective.

230. The transfer of criminal proceedings is regulated in ARHG Sec. 60 for incoming and Sec. 74 for outgoing requests. In both cases the Ministry of Justice examines the request and decides whether to forward it to the competent PPO or to the foreign authority, respectively. If the other state takes over the prosecution, the PPO shall suspend the criminal proceedings in Austria and discontinue the case upon final sentencing and enforcement of the sentence in the other state. In practice, according to participants of the on-site visit, the MoJ defers to the decision of the PPOs, which assess the feasibility based on evidence, practicality, and importance. According to prosecutors, transfer is predominantly applied in cases of minor relevance.

B.4.3. Extradition

231. Similarly to MLA, Austria has different rules on extradition for its relations with EU member states and non-EU countries. Traditional extradition applies in relation to non-EU states, while within the EU, “surrender” procedures under the European Arrest Warrant (EAW) are applicable.

Traditional extradition

232. Under the traditional extradition rules, dual criminality is required. Extraditable acts are intentionally committed offences punishable by at least one year of imprisonment, under the laws of both the requesting state and Austria.

233. Extradition of Austrian nationals is prohibited by ARHG Sec. 12(1), which is considered as constitution-level provision (*“Verfassungsbestimmung”*). In addition, the law provides for a series of restrictions on extradition. As a general rule, extradition is non-admissible for offences subject to Austrian jurisdiction. However, Austria can waive this ground for refusal if jurisdiction would be only exercised on behalf of another state (e.g., if extradition to one country was refused due to fundamental rights concerns, the person can still be extradited to another country where these concerns do not apply), or if from the circumstances of the case it can be concluded that the criminal proceedings in the foreign county can be more effective for reasons of establishing the truth, the assessment of the sentence, or execution.

234. A final conviction or acquittal in Austria for the same facts naturally prohibits extradition (pursuant to the *ne bis in idem* principle). In addition, however, a prosecutorial decision of discontinuation of proceedings (see section B.6.2) has the same effect (ARHG Sec. 16). Like for other countries, extradition is inadmissible if the request concerns certain fiscal offences. Extradition is also inadmissible if the prosecution of the offence or enforcement of the sanction is time-barred under either the requesting state's or Austrian law. Finally, extradition requests for the execution of a custodial sentence rendered *in absentia* must meet high standards of procedural guarantees to be deemed executable.

235. Extradition requests are received by the Ministry of Justice and forwarded to the competent PPO. The prosecutor files the motion to the court that decides on the admissibility of the extradition. If the decision is final, the court sends the file to the Ministry of Justice. The Minister of Justice decides on the authorisation or refusal of the extradition. In doing so, the Minister takes into account Austria's "interests" and international obligations (ARHG Sec. 34). The notion of "Austria's interests" is not clarified and may raise issues in foreign bribery cases if interpreted in a way that is incompatible with Anti-Bribery Convention Article 5.[57] Austria states that the inclusion of international obligations into the Minister's decision making ensures that it always would be compatible with the Convention.

Surrender based on European Arrest Warrant

236. Between EU member states, extradition has been replaced by the European Arrest Warrant (EAW). The application of the dual criminality requirement is prohibited concerning a catalogue of offences, including corruption.

237. In theory, under EAW rules extradition of Austrian nationals would be possible (EU-JZG Sec. 5). However, the law provides for many exemptions and, in practice, these seem to be the rule. Surrender can be refused if the offence also falls within the scope of the Austrian criminal law, including if the Austrian citizen committed the offence outside of the territory of the requesting state and the dual criminality requirement is not met. Similarly, Austrian citizens cannot be surrendered for the serving of custodial sentences. At the on-site visit, practitioners were adamant that the extradition of citizens is excluded in effectively every situation, and the MoJ confirmed that there is no political intention to change the legal framework. Prosecutors stated that they try to solve these situations by taking over the criminal proceeding from the foreign country, but admitted that the other jurisdictions may not be willing to hand over the case.

238. Regardless of citizenship, the fact that Austria exercised criminal jurisdiction is another ground for refusing the execution of the EAW. This includes ongoing investigations for other offences committed in Austria, and the prosecutor's decision to suspend the investigation, drop charges, or discontinue proceedings for the same offence. Lapsing of the statute of limitation according to Austrian law constitutes another case of inadmissibility of surrender. Prosecutors at the on-site visit also noted that not only the conclusion of a non-trial resolution, but also the discontinuation of an investigation by the Austrian PPO (see section B.6.2 and para. 234 on extradition) may result in a refusal of surrender based on *ne bis in idem*. This consideration might have been the reason behind the decision in the ***Military Vehicles (Czech Republic)*** case to keep the Austrian investigation open until the trial in Czech Republic was completed. If grounds for refusals included discontinuation for reasons other than the merits of the case (e.g., prosecutorial decisions to discontinue for lack of evidence), this may raise issues in foreign bribery cases. This question should therefore be followed up as practice develops.

[57] The Working Group has questioned in other evaluations whether such a provision could allow consideration of factors prohibited under Convention Art. 5, namely national economic interest, potential relations with another State, and the identity of persons involved in a case. For example, see OECD (2013), WGB Phase 3 Report on Belgium, paras. 130 and 134 and Follow-up Issue 14(e); OECD (2012), WGB Phase 3 Report on France, para. 160 and Recommendation 6; OECD (2014), WGB Phase 3 Report on Estonia, para. 110 and Recommendation 4.

Extradition in a foreign bribery case

239. A WGB member state requested the extradition of a non-Austrian citizen from Austria in a foreign bribery case in 2014. The extradition procedure was still pending before Austrian courts in April 2024, after the defendant exercised all available legal remedies and obtained nullity decisions. The lead examiners inquired the Austrian authorities about the causes and are convinced that the issues behind the significant delay of this case are not linked to the legal framework or practice of the Austrian authorities.

Commentary

The Ministry of Justice can refuse traditional extradition requests based on the undefined notion of "Austria's interest". This may undermine international co-operation and enforcement of the foreign bribery offence, if interpreted in a way that is incompatible with Anti-Bribery Convention Article 5. The lead examiners therefore recommend that Austria clarify, by any appropriate means, that the criterion of "Austria's interest" for refusing an extradition request cannot be interpreted as national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal persons involved in a foreign bribery case.

In addition, in light of some remarks made by prosecutors during the on-site visit, the lead examiners suggest that the Working Group follow up, as practice develops, whether extradition may be refused when proceedings in Austria were discontinued for grounds other than the merits of the case.

B.5. Offences related to foreign bribery

B.5.1. Money laundering offence

240. The money laundering offence has been amended in September 2021 to implement the EU Directive 2018/1673 (CC Sec. 165). All criminal activities, including foreign bribery, are eligible predicate offences, with the caveat that they must be punishable by at least one year of imprisonment and either fall under Austrian jurisdiction or dual criminality must exist. For corruption offences, the dual criminality requirement has been abolished by the EU Directive 2018/1673 on combating money laundering by criminal law, which is reflected in the Austrian Criminal Code (CC Se. 165(5)2).

241. The disposition of the offence now follows closely the international standards and makes it clear that the predicate offence does not need to be proven beyond reasonable doubt, i.e. no need to establish every element of the facts and all circumstances relating to the criminal activity the assets are obtained, received, or derived from. Self-laundering is also covered in Sec. 165(1). Liability of legal persons for money laundering can be derived from VbVG Section 1(1).

242. The offence is punishable by imprisonment from six months to five years. If the offence was committed in relation to an asset with a value exceeding EUR 50 000 or as a member of a criminal organisation, the penalty raises to imprisonment from one year to ten years. Accordingly, the statute of limitation is 5 years and 10 years, respectively. Based on the statistics provided by Austria, the number of the registered money laundering allegations has been increasing since 2016 and seems to have stabilised around 1500 per year. The law enforcement response grew accordingly, the number of money laundering indictments reached 383 in 2023, and there were 138 concluded cases in 2023.

243. In the Phase 4 Questionnaire, Austria stated that "in general, in the context of money laundering in a cross-border context the law enforcement authorities face the problem that in reports of suspicion of money laundering reference is often made to foreign proceedings that have already been initiated or are pending and which prevent the initiation of parallel domestic proceedings because of the principle *ne bis in idem*." This claim demonstrates a serious misunderstanding of the *ne bis in idem* principle as it does not

exclude parallel investigations nor their coordination and co-operation. If adopted in practice, this stance can pose a serious obstacle to effective international co-operation and not only to the enforcement of the money laundering offence, but cross-border offences in general. Austria later provided reassurances that prosecutors do investigate money laundering in Austria when an investigation into the predicate offence is ongoing in a foreign jurisdiction. Austria also confirmed that one investigation is currently ongoing over money laundering predicated on foreign bribery, and similar investigations were conducted in the past.

244. In actual foreign bribery cases, suspected money laundering was a subject of investigation in the ***Rail Reconstruction (Romania)***, ***Software licences procurement (Romania)***, ***Metro carriages (Hungary)*** and ***Rail Transport II (Eastern Europe)*** cases. In the case ***Online Gaming (Türkiye)***, one individual was prosecuted for money laundering charges, but was acquitted for lack of evidence of guilt (in the same case, the prosecution against several other persons for foreign bribery was also discontinued for lack of evidence).

Commentary

The lead examiners commend Austria for having amended the money laundering offence in CC Sec. 165 in line with international standards. The lead examiners were concerned because Austria's questionnaire responses indicated that, due to ne bis in idem concerns, law enforcement authorities would be reluctant to initiate investigations into money laundering based on predicate offences committed abroad if proceedings are already ongoing in a foreign jurisdiction. The lead examiners were satisfied by the explanation subsequently provided by Austria, but nevertheless recommend that the Working Group follow up, as practice develops, whether in a foreign bribery case, ongoing investigations in foreign jurisdictions over the same facts would prevent Austrian law enforcement authorities from opening a domestic money laundering investigation.

B.5.2. False accounting offence

245. Under the Anti-Bribery Convention, false accounting should be subject to effective, proportionate, and dissuasive civil, administrative, or criminal penalties, as these offences often serve as a vehicle for foreign bribery and are usually committed in the home jurisdiction of the active side of the bribery.

246. Already in Phase 2, the WGB had recommended that Austria ensure that its laws and practice adequately sanction accounting omissions, falsification and fraud relating to foreign bribery, and re-examine whether the law applies to all companies subject to Austrian accounting and auditing laws. During Phase 3, Austria informed the WGB that a comprehensive reform was in view to combine the scattered false accounting provisions into a single offence. Pending the adoption of the reform, the Working Group on Bribery reiterated the Phase 2 recommendation (Phase 3 recommendation 7(a)). Since Phase 3, multiple amendments have taken place concerning the false accounting offenses.

247. Sanctions for a violation of such obligations were formerly provided within the respective sectorial laws, e.g. Austrian Stock Corporation Act, Law on Limited Liability Companies, Act on *Societas Europea*, Act on Cooperatives, etc. In 2015, these provisions were merged into Criminal Code Sections 163a and 163b, introducing the uniform criminal offences of "Non-representable presentation of essential information about certain associations" and "Unrepresentable reports from auditors of certain associations". CC Sec.163a covers decision makers or other authorised persons who are obliged to provide accounting or financial information, CC Sec.163b penalises auditors for misrepresented or incomplete facts or concealment thereof. CC Sec. 163c provides for the definition of associations covered by these provisions, Sec. 163d provides for an impunity clause in case of active repentance. The punishment of both offences is imprisonment up to two years, or up to three years if the concerned legal person has securities traded in the EU or European Economic Area.

248. When creating the new false accounting offences, however, the Austrian legislator added an additional element, purposefully limiting criminal liability in the sense of "*ultima ratio*".[58] Specifically, both offences now require proof of an additional element as well as of the respective intent: the likelihood or capability that the false or incomplete presentation may cause "considerable damage" to the company, its shareholders, members, or creditors. Applying this new restriction, the first instance court in the ***Windfarm Project (Hungary)*** case while convicting one manager and board member for bribery and breach of trust, exonerated the same persons with regard to the accounting offence. According to the court, the manager, while "hiding" the bribe payments as part of the total investment costs in his presentation to the supervisory board had not even seriously considered the possibility that this behaviour could cause considerable damage, particularly because the defendant expected the project obtained by way of the bribes to be profitable.[59]

249. In addition, the offence in CC Sec. 163a appears to be limited to external disclosures (such as financial and management reports presented to the public, shareholders or company members, supervisory board or its chairperson). It is not clear if the offence would cover falsity in internal accounting books and records. Another potential issue is an active repentance clause according to Sec. 163d. The provision, however, only appears to exclude punishment if the false information is rectified (which is unlikely to happen in a case of false accounting committed to conceal foreign bribery).

250. A recent amendment in July 2024 to the Financial Crime Act (*Finanzstrafgesetz*, FinStrG) introduced an administrative offence (misdemeanour) for conducts when the perpetrator, with the intention of falsifying a business transaction or concealing its true content, forges or produces false or incorrect documents of records required by the tax or monopoly laws. The administrative sanction is a fine up to EUR 100 000 (FinStrG Sec. 51b). According to Austria, these new provisions were introduced to extend the liability for conducts in the preparatory stage. This is a positive development but does not remedy the issues described above. Austria also mentions a provision in the Commercial Code (Sec. 283) and another in the Financial Crime Act (Sec. 51) that deal with failure to disclose annual financial statements or to keep and disclose books and records required under tax regulations, respectively. These administrative offences, however, only result in very limited fines, and only the second provision appears to cover falsity in these documents. In addition, none of the foreign bribery cases analysed by the evaluation team had any sign of application of administrative or civil false accounting provisions.

251. Austria provided data on the application of false accounting offences under CC Sec. 163a and 163b in practice, showing that between 2016 and August 2024, only 72 indictments, 10 diversions, and 32 court decisions were issued for false accounting offences. The available statistics cannot indicate whether any case of bribery-related false accounting was prosecuted. The lead examiners believe that the foreign bribery case referenced above clearly demonstrates the main issues that would arise in such cases. Based on these issues, it can be assumed that false accounting to commit or conceal bribery may not be pursued or sanctioned.

Commentary

The lead examiners note that Austria has codified a uniform false accounting offence within the Criminal Code to resolve the previous fragmentation. Despite these welcome efforts, the new false accounting offences do not appear structured as an adequate tool to prohibit accounting misconduct for the purpose of committing or concealing foreign bribery (especially due to a "considerable damage" requirement), as demonstrated by case law on foreign bribery. Therefore, the lead examiners recommend that Austria take further steps to improve its false accounting offence, so that it covers the full range of conduct described in Article 8 of the Convention.

[58] Eisenstadt Regional Court, 15 Hv 51/16z, 7 June 2017, p. 170-188, quoting the legislative motives.

[59] Eisenstadt Regional Court, 15 Hv 51/16z, 7 June 2017, p. 539-542.

B.5.3. Non-tax deductibility of bribes

252. Anti-Bribery Recommendation XX.i requires "Member countries [to] explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner." The relevant provisions of the Federal Tax Law remained unchanged since Phase 3 (*Bundesabgabeordnung*, BAO Sec. 162.) Austrian tax authorities, when assessing deduction of expenses, apply the Income Tax Guidelines (*Einkommensteuerrichtlinien* – EStR). The passage Number 4844 of the Tax Guidelines reads:

> "When assessing the non-deductibility of expenses and costs with a foreign nexus, the following rules apply:
>
> 1. the rule in sec.20(1)(5)(a) Income Tax Act 1988 [EStG 1988] covers only acts that are punishable under the referenced sections of the Criminal Code [StGB].
> 2. A punishable offence may be found where the case involves the acceptance of a gift or the bribery of foreign official acting in a sovereign capacity in exchange for an act which is contrary to his or her duty. This also includes officials acting in the realm of private economic management or acting outside their immediate area of responsibility in connection with their role as officials. Where the criminal character of a payment is not obvious, then ex officio investigations are absolutely required where there are well-founded suspicions present that the elements of gift acceptance and/or bribery of foreign officials are made out.
> 3. As to the other offences referred to with a foreign nexus, ex officio investigations are only required to determine whether the benefit provided constitutes the completion of the elements of a criminal offence if a criminal prosecution has been opened in Austria."

253. The fact that the Income Tax Guidelines recognise the non-deductibility of payments connected to foreign bribery is a welcome sign. The threshold to initiate *ex officio* administrative proceedings, however, seems to be high, as a "well-founded suspicion" of foreign bribery is required. The guidelines are also silent on acceptance of gifts for acts in line with official duties, and thus seem to cover only CC Sec. 307, while entirely omitting 307a and 307b. If guideline no. 4844.3. meant to cover every other offence with a foreign nexus, it is hard to understand why administrative tax proceedings are conditional on criminal prosecution, unlike in the case of bribery. In addition, establishing a direct link to the reporting obligation of tax officials would be beneficial. Austria stated after the on-site visit that the tax authorities recognise the need for further changes and the Income Tax Guidelines will be revised in 2025.

254. The Working Group has recommended that countries engage in post-conviction tax audits since in these cases the tax authorities do not have to prove that a deducted expense was a bribe; this has already been proven in court. Austria explained that Austrian tax authorities can retroactively reopen tax returns when new facts emerge, including following a bribery conviction. In such cases, however, there is a limitation period that does not allow for reclaiming taxes after 10 years (BAO Sec. 207 and 303).

Commentary

The lead examiners welcome the inclusion of payments of foreign bribery in the non-deductible expenses but are concerned about the threshold requiring a high level of suspicion, as well as by the fact that opening tax procedures for other offences (such as foreign bribery-related offences) depends on the existence of a criminal prosecution for these.

The lead examiners therefore recommend that Austria, through appropriate measures, (i) clarify that the required level of suspicion to initiate administrative proceedings is not higher than the simple suspicion required to initiate criminal proceedings, and (ii) expand the ex officio initiation of tax procedures to other suspected offences regardless of their criminal prosecution.

B.6. Concluding and sanctioning foreign bribery cases

255. In Austria, seven foreign bribery cases have been concluded through trials since Phase 3. In five cases, all defendants were acquitted. In one case, four defendants were acquitted and five were convicted. In the last case, one person was charged with bribery and was convicted. In one of the cases that resulted in acquittals, one of the defendants obtained a withdrawal of the charges based on a non-trial resolution. This section examines rules on concluding cases without a trial, sanctions for natural persons (sanctions for legal persons are addressed in section C.3), confiscation, and access to concluded cases.

B.6.1. Concluding foreign bribery cases

256. The 2021 Anti-Bribery Recommendation has introduced principles on the use of non-trial resolutions (NTRs) in foreign bribery cases. Non-trial resolutions are defined as "mechanisms developed and used to resolve matters without a full court or administrative proceeding, based on a negotiated agreement with a natural or legal person and a prosecuting or other authority". Anti-Bribery Recommendation XVII recommends that member countries consider using a variety of forms of resolutions when resolving cases with both legal and natural persons, including NTRs.

257. Austrian authorities can mainly conclude foreign bribery cases through trials. Proceedings can be discontinued or withdrawn, as described in section B.6.2 below. However, there is no possibility to settle cases with the prosecutor's office through "plea agreements" or similar NTRs (with or without admission of guilt).[60] Austrian authorities explain that due to the applicable "*ex officio*" principle, which obligates prosecutors to open proceedings for criminal offences (see section B.2.1 above), "the Austrian system does not give room for any plea bargaining." This argument is not entirely clear, since prosecutors can withdraw charges for certain offences if they consider that prosecution is not warranted, as explained below. Some representatives of the private sector at the on-site visit would see favourably the introduction in Austria of a non-trial resolution akin to plea agreements. This kind of NTR may be particularly useful for prosecutors to resolve foreign bribery cases against both natural and legal persons, in particular in light of the difficulties in securing convictions through trials, highlighted in section B.1.1 above.

Commentary

The lead examiners recommend that Austria consider the possibility of establishing a form of non-trial resolution that would allow both natural and legal persons to settle foreign bribery cases with the prosecutor's office, with or without admission of guilt. To that end, Austrian authorities could examine NTRs available in other countries with similar legal systems.

B.6.2. Discontinuation of proceedings and available non-trial resolutions (Diversion and Withdrawal due to co-operation)

Discontinuation of proceedings

258. One of Austria's provisions on *discontinuing criminal proceedings* would raise issues if applied in foreign bribery cases. Under CPC Sec. 191, an investigation or prosecution of an offence punishable only by a fine and/or imprisonment not exceeding 3 years *shall* be discontinued if: (*i*) considering *inter alia* the guilt, the consequences of the offence, and the behaviour of the accused after the offence (in particular, compensation), "the disturbing nature of the offence would have to be regarded as low", and (*ii*) *diversion* measures (described below) do not appear necessary to deter the accused from committing criminal acts or to counteract the commission of criminal acts by others (i.e. for purposes of specific and general deterrence). This form of discontinuation of the proceedings is available in foreign bribery cases under CC

[60] See OECD (2019), Resolving-foreign-bribery-cases-with-non-trial-resolutions, sections 2.4 and 2.5.

Sec. 307 (bribery for an act in breach of duties) when the bribe is up to EUR 3 000, as well as under Sec. 307a (bribery for an act in line with duties) and 307b (bribery to influence a public official's activity) when the bribe is up to EUR 50 000 (see section B.6.3 below on sanctions).

259. This provision provides some form of prosecutorial discretion to Austrian law enforcement authorities, which are otherwise bound by the *ex officio* principle mentioned above. Nevertheless, it is problematic because, at least in principle, it appears to allow prosecutors to discontinue proceedings in certain foreign bribery cases despite the presence of evidence of guilt and without the imposition of sanctions or confiscation. A similar provision was applicable under CC Sec. 42 at the time of Phase 2, and the Working Group had recommended that Austrian authorities take appropriate measures to exclude its use in at least all serious foreign bribery cases. The provision appeared to have been repealed at the time of Phase 3.[61]

260. Some serious foreign bribery cases may fall within the thresholds for applying the current discontinuation under CPC Sec. 191 as it covers, for example, bribes up to EUR 50 000 to obtain an act in line with a public official's duties. Moreover, there are other provisions, mentioned below, which allow for the withdrawal of proceedings to reward perpetrators who cooperate with the authorities. A discontinuation of proceedings which is not conditioned upon co-operation with the authorities and does not provide for the imposition of any sanction or remediation measure should therefore apply only under exceptional circumstances. Austria states that this is indeed the case, and CPC Sec. 191 is basically a *de minimis* rule. Austrian authorities, however, do not indicate whether any guidance for prosecutors exists concerning the application of this provision in domestic and/or foreign bribery cases.

Commentary

The lead examiners recommend that Austria take appropriate measures to ensure that discontinuation of proceedings under CPC Sec. 191 is only applied under exceptional circumstances in foreign bribery cases and, in such cases, the proceeds of foreign bribery can be subject to forfeiture where appropriate.

Non-trial resolutions: legal framework and scope of application

261. Under Austria's criminal procedure rules, there are only two ways of resolving cases without a trial: *Diversion* (CPC Sec. 198 et seq.) and *Withdrawal of prosecution due to co-operation* (CPC Sec. 209a). Both entail the withdrawal of an investigation or prosecution if certain conditions are met, and are available to natural and legal persons. Specific provisions concerning legal entities are examined in section C.2.2. The scope of application of *Diversion* has been broadened since Phase 3, and this form of NTR can now apply to offences sanctioned with higher penalties. *Withdrawal of prosecution due to co-operation* entered into force in 2011 and was most recently amended in 2021. It was not analysed in the Phase 3 Report.

262. ***Diversion*** (CPC Sec. 198 et seq.) applies in cases that do not appear to require a conviction and criminal sanctions. Criminal proceedings *must* be withdrawn if (*i*) it is certain that a discontinuation of proceedings under CPC Sec. 190 to 192 is out of question and (*ii*) "punishment does not appear to be warranted" for purposes of specific and general deterrence. Instead, the following *diversion* measures are imposed on the alleged offender: payment of a sum of money up to EUR 900 000 (i.e. a maximum of 180 daily rates between EUR 4 and 5 000); community service; probation for a period of 1 to 2 years; or victim-offender mediation. *Diversion* can only apply, *inter alia*, if (*i*) the offence is not punishable by more than 5 years imprisonment and (*ii*) the culpability of the accused would not be considered serious for the purpose of sentencing. It can therefore apply to foreign bribery under CC Sec. 307 (bribery for an act in breach of

[61] OECD (2006), WGB Phase 2 Report on Austria, paras. 81 and 181(c); OECD (2012), WGB Phase 3 Report on Austria, para. 57.

duties) when the bribe is up to EUR 50 000, as well as under Sec. 307a and 307b (bribery for an act in line with duties or to influence a public official's activity) when the bribe is up to EUR 300 000.

263. ***Withdrawal of prosecution due to co-operation*** (CPC Sec. 209a, also known as "leniency programme"; hereinafter, "*Withdrawal due to co-operation*") only applies to perpetrators who cooperate with the prosecutor's office (called "crown witnesses" in Austria). Under certain circumstances, a cooperating perpetrator has the right to ask for the withdrawal of the prosecution and application of the following *diversion* measures: payment of a sum of money up to EUR 1.8 million (a maximum of 360 daily rates between EUR 4 and 5 000); community service; or probation for a period of 1 to 2 years. This applies if (*i*) the perpetrator freely approaches the prosecution or criminal investigation authority, provides a "remorseful confession" about his/her contribution to the offence, and reveals his/her knowledge concerning new material facts or pieces of evidence, (*ii*) such information provides a substantial contribution to support a comprehensive inquiry into an eligible offence beyond the perpetrator's contribution to the offence, or to trace a person who took a leading role in the crime, and (*iii*) punishment does not appear to be warranted to prevent the perpetrator from committing criminal offences.

264. *Withdrawal due to co-operation* applies, *inter alia*, to all offences falling within the competence of the WKStA, which include active bribery under CC Sec. 307, 307a, and 307b when the value of the bribe exceeds EUR 3 000 (CPC Sec. 20a). Covered offences also include, at least in principle, bribery offences that do not meet this threshold, but for which the WKStA may take over the proceedings in light of a "particular public interest" (CPC Sec. 20b). The latter criterion raises some questions, however (see para. 270 below). *Withdrawal due to co-operation* first entered into force in Austria in 2011. Its application was limited to five years, with the possibility to extend it subject to evaluation. Overall, this form of resolution received positive feedback and was re-introduced, following some amendments, in 2017 and then in 2022. It is again only in force for a further seven years, i.e. until the end of 2028, and will be subject to another evaluation before its expiration.[62] Austrian authorities stated that the repeated provisional application of *Withdrawal due to co-operation* is due to "political will".

Oversight and reopening of proceedings

265. Both *Diversion* and *Withdrawal due to co-operation* are subject to some kind of oversight. The prosecutor's decision to end proceedings against a natural or legal person may be submitted for review to the senior prosecutor's office under certain circumstances (Public Prosecution Act, Sec. 8 *et seq.*, see section B.3.2 above). In practice, *Withdrawal due to co-operation* is always reviewed, to ensure its uniform application. The decision on *Diversion* is taken by the prosecutor until the filing of the indictment and, after that, by the competent adjudicating court, even without the prosecutor's agreement (CPC Sec. 198-199 and 209). In this case, the prosecutor can address the court and appeal the decision. On the other hand, if the court decides against a *Diversion*, both the suspect and the prosecutor may appeal before a higher instance. The prosecutor's decision on *Withdrawal due to co-operation* is reviewed by the "Commissioner for Legal Protection", who reviews prosecutorial decisions on certain aspects of the criminal proceedings (CC Sec. 47a and 147, see para. B.2.2 above). The Commissioner for Legal Protection can request the continuation of proceedings. If the public prosecutor's office does not consider the request to be justified, it must submit it to the court, which then decides in closed session whether the proceedings must be continued with no right of appeal (CC Sec. 209a(6), 195(3), 196). A defendant may lodge an appeal claiming he/she has been unlawfully denied the withdrawal of prosecution.

266. Under *Withdrawal due to co-operation*, the proceedings may be resumed if the agreement to cooperate has been violated or if the documents or information provided were false, did not substantially support the investigation, or were provided to conceal the perpetrator's own leading role in the crime. The

[62] Federal Ministry of Justice, Introductory Decree of 31 December 2021 to the Federal Act amending the Criminal Procedure Code 1975 (Federal Law Gazette I No. 243/2021), number: 2021-0.868.177.

proceedings cannot be resumed after the final conclusion of the proceedings against the other defendant(s) in the same case (CPC Sec. 209a(4)&(5)). Both *Diversions* and *Withdrawals due to co-operation* can be revised under the ordinary provisions for reopening proceedings, i.e. if the limitation period has not expired and (*i*) the dismissal was brought about by forgery of documents or false evidence, bribery, or any other offence, (*ii*) the accused subsequently confesses to the offence, or (*iii*) new facts or evidence arise which suggest he/she should be convicted (CPC Sec. 205 and 352).

Compliance with the principles set forth in the 2021 Anti-Bribery Recommendation

267. Anti-Bribery Recommendation XVIII sets forth standards to ensure that NTRs used to resolve foreign bribery cases provide for due process, transparency, and accountability. *Diversion* and *Withdrawal due to co-operation* do not fully comply with some of these principles, as explained in the paragraphs below. The criteria for applying these resolutions, in particular *Diversion*, are not sufficiently clear and transparent, which also raises issues on the way they can be used in foreign bribery cases. In addition, confiscation is not applied under these NTRs, and relevant elements of these resolutions would rarely be made public.

- **Criteria, guidance for the authorities, and information to the public**

268. The criteria for applying these resolutions (in particular *Diversion*) in foreign bribery cases are not sufficiently clear and transparent. *Diversion* is available if "punishment does not appear to be warranted" for purposes of specific and general deterrence. This condition is broadly framed and there is no written guidance on the circumstances under which *Diversion* would typically apply in domestic or foreign bribery cases. On the other hand, there is some guidance on *Withdrawal due to co-operation*. In 2016, the Federal MoJ published a 35-page "Handbook" to clarify the interpretation of the requirements for applying this resolution and develop a standardised procedure.[63] Austrian authorities mentioned that the MoJ is currently revising the handbook to update it with the latest amendments and add more practical examples. Indeed, additional guidance on the application in practice of certain requirements, such as the "substantial contribution" by the cooperating perpetrator to support the investigation into the offence, would be beneficial.

269. There is, in particular, an issue of overlap between the two resolutions. *Withdrawal due to co-operation* is virtually applicable to most foreign bribery cases, while *Diversion* can only be applied in cases involving bribes under certain thresholds (EUR 50 000 for bribery under CC Sec. 307 and EUR 300 000 for bribery under Sec. 307a and 307b). When both resolutions are applicable, however, there is no indication as to which resolution should be preferred under which circumstances. *Withdrawal due to co-operation* contains strict criteria concerning co-operation with the authorities, which may be undermined by the fact that *Diversion* seems to be also used to reward co-operation, but it is not bound by the same requirements in term of provision of information and support to the authorities. Austria states that, in practice, there should not be issues because *Withdrawal due to co-operation* is only applied exceptionally, when the offender approaches the prosecutor's office and provides a remorseful confession.

270. As mentioned above, there is also an issue concerning the application to bribery offences of *Withdrawal of prosecution due to co-operation*. CPC 209a also applies, in principle, to cases in which the value of the bribe is under EUR 3000, but the WKStA may take over the proceedings in light of a "particular public interest" (CPC Sec. 20b). The MoJ Handbook clarifies that the "objective existence of the relevant criteria" is sufficient, even if the WKStA did not opt to take the case. A perpetrator in such cases, however, may be uncertain as to whether this resolution is available, because this would still require an assessment as to the "particular public interest" of the case.

[63] Austrian Federal Ministry of Justice (2017), Handbook on Leniency, CPC Sections 209a, 209b, in the version of the Criminal Procedure Amendment Act II 2016, available at: https://www.bmj.gv.at/themen/Strafrecht--Gesetze/Kronzeugenregelung.html.

271. A website of the Austrian government which provides publicly accessible information on criminal procedure only covers *Diversion*.[64] It is unclear why information on *Withdrawal of prosecution due to co-operation* is not disseminated in the same way. The MoJ Handbook is nevertheless published in the Minister's website. The handbook, which is currently being updated, is meant to provide guidance not only to prosecutors and judges, but also to perpetrators and defence lawyers.

- **Application in foreign bribery cases, sanctions, and confiscation**

272. Some of the features of *Diversion* and *Withdrawal of prosecution due to co-operation* depart from the typical NTRs. In particular, in principle both types of resolution apply on a "mandatory basis", if all the conditions are fulfilled. *Diversion* "has to" be applied if all the conditions are met. Similarly, perpetrators "have a right to demand" *Withdrawal due to co-operation* if they meet all the legislative requirements. A mandatory application of these resolutions would be problematic if it did not leave sufficient discretion to the prosecuting and judicial authorities. For example, the Working Group has often required countries to repeal any exemption from punishment in case of self-reporting (effective regret) that would apply automatically.[65] This concern is mitigated by the fact that some of the conditions for applying these resolutions involve a broad discretionary assessment. *Diversion* is available if "punishment does not appear to be warranted" for purposes of specific and general deterrence. *Withdrawal due to co-operation* can apply only if the cooperating perpetrator provides a "substantial contribution" to support a comprehensive inquiry into the offence. The application of these conditions should be followed up as practice develops, however.

273. The application of *Diversion* in foreign bribery cases raises some concerns because, as mentioned above, there is little guidance on the circumstances under which it should apply. The provisions on *Diversion* do not require perpetrators to voluntary disclose misconduct or fully cooperate with the prosecutor's office. At the same time, under CPC Sec. 198(1), *Diversion* applies when "the facts of the case have been sufficiently clarified". This means that it applies when there is sufficient evidence to conclude that an offence was committed. Despite this, an offender may in principle escape punishment even if he/she has not reported the offence and substantially cooperated with law enforcement.

274. The text of the provision on *Withdrawal due to co-operation* also leaves open some questions on its application in foreign bribery cases. Most of these questions, however, are clarified by the MoJ Handbook. In particular, the Working Group has often noted that, while one of the main policy rationales for granting immunity to cooperating offenders in domestic bribery cases is to punish the domestic public official who accepted the bribe, in foreign bribery cases there is no guarantee that the foreign official who has taken the bribe will be prosecuted, in which case the immunity serves no purpose. Similarly, it would be disproportionate if an offender escapes liability by denouncing a minor or less culpable associate in the crime, e.g. an intermediary in foreign bribery.[66] The MoJ Handbook clarifies that a withdrawal of proceedings would be excluded, for example, if the cooperating perpetrator had a leading role or decisive influence in the offence. Any abuse of the provision by a defendant who attempts to achieve impunity for a serious offence by helping to solve a relatively "minor" offence would also rule out its application. Finally, if several persons simultaneously provide voluntary disclosures on the same offence, it will be necessary to assess whether the requirements for a withdrawal are met for each individual perpetrator. Since the MoJ Handbook is not binding, however, these aspects should be followed up as practice develops.

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[64] Austria's digital government agency, Documents and Law, Criminal Law, available at: https://www.oesterreich.gv.at/themen/dokumente_und_recht/strafrecht.html.

[65] OECD (2015), WGB Phase 3bis Report on Greece, paras. 41-47.

[66] OECD (2012), WGB Phase 3 Report on the Slovak Republic, para. 34; OECD (2022), WGB Phase 4 Report on Italy, para. 154.

275. One issue may deserve additional clarification and, possibly, a change in current practice. The MoJ Handbook explains that under the rules on *Withdrawal due to co-operation*, the Police or public prosecutor's office must be approached voluntarily, which means that the initiative has to come from the cooperating offender. The possibility for the prosecutor's office to suggest this avenue to potential applicants "will have to be examined carefully in each individual case", according to the Handbook. At the on-site visit, however, prosecutors have explained that, in practice, this is interpreted as a complete prohibition for prosecutors to approach potential cooperating offenders, to avoid any allegation of "psychological pressure". This greatly reduces the potential use of this NTR to solve complex cases. Prosecutors could try to find practical solutions (e.g. recording all interactions with suspects to exclude coercion), in order to be able to offer suspects the option of *Withdrawal due to co-operation* where appropriate.

276. Under both resolutions, the proceedings (investigation or prosecution) are withdrawn without a finding of guilt. Criminal sanctions and debarment are therefore not available. However, as explained in the section above, the suspect agrees to *diversion* measures that include payment of a sum of money up to EUR 900 000 for *Diversion* and EUR 1.8 million for *Withdrawal due to co-operation*; community service; or probation for a period of 1 to 2 years. It is not clear if these measures can be cumulated, however. The available monetary penalties may be adequate for natural persons, considering that these resolutions are not plea agreements and should therefore be applied only when the prosecutor or the court consider that criminal sanctions are not warranted. The application of these measures in practice should be followed up.

277. Confiscation of the bribe and proceeds of bribery is, at least in principle, available under the provisions on "forfeiture" (CC Sec. 20 and following, see section B.6.4 below), which do not require a criminal conviction. Austrian authorities explained that forfeiture can be imposed by way of an independent procedure (CCP Sec. 445-445a). However, prosecutors at the on-site visit stated that confiscation cannot be applied under *Diversion* nor *Withdrawal of prosecution due to co-operation*. The fact that they did not mention this possibility to seek forfeiture, suggests that this might not been done systematically. It would be important that, whenever an NTR is concluded in a foreign bribery case, prosecutors always file an application for the separate forfeiture of the proceeds of bribery, where appropriate.

- **Publication of relevant elements of concluded resolutions**

278. Decisions to terminate the proceedings, including discontinuation, *Diversion*, and *Withdrawal of prosecution due to co-operation*, may be published by order of the Chief Public Prosecutor's Office on the official platform "*Justiz*",[67] but only "*insofar as they are of particular public interest or contain special legal statements of significance for the assessment of similar proceedings*" (Public Prosecution Act Sec. 35a). This provision does not apply when NTRs are applied by courts. Thus, contrary to Anti-Bribery Recommendation XXVIII.iv, the authorities would not publish terminations of proceedings in most foreign bribery cases. The only *Diversion* applied in a foreign bribery case (see section below) was not published.

NTRs in practice

279. At the on-site visit, Austrian authorities explained that *Diversion* is very often used to resolve proceedings for lesser offences. According to the latest available statistics, in 2021 diversions represented 22,7% (or 48 015) of all final decisions in case files.[68] *Diversion* was only applied in one foreign bribery case. In the ***Windfarm Project (Hungary)*** case, one defendant received an offer for *Diversion* by the Regional Court of Eisenstadt. After the payment of EUR 25 000, and compensation of EUR 18 000, the court discontinued the proceedings against him. Austrian authorities could not provide this court's decision, which would have shed some light on the criteria for granting *Diversion* and the way diversion payments

[67] *Justiz* platform, available at https://edikte.justiz.gv.at/edikte/ee/eeedi16.nsf/suche!OpenForm&subf=vee.

[68] Austrian Federal Ministry of Justice (2022), Sicherheitsbericht 2021 ("Security Report" 2021), p. 33-34.

are determined. Nevertheless, at the on-site visit a prosecutor confirmed that the *Diversion* was granted to a person who had accepted responsibility for breach of trust. This explains why compensation was imposed, as breach of trust presupposes a damage to someone else's property. The prosecutor's office did not contest the *Diversion* offer because they considered it was appropriate under the circumstances and expected the other defendants to be convicted (these were all acquitted following a retrial, however).

280. Austrian authorities explained that *Withdrawal of prosecution due to co-operation* is meant to be applied only in more serious and complex crimes. Its application has been relatively limited. According to available statistics, 97 decisions in total have been issued under CPC Sec. 209a between 2017 and 2023: 56 provisional withdrawals pending full assessment of the requirements; 12 rejections; 10 discontinuations of proceedings subject to resumption in case of violation of the conditions; and 19 final withdrawals. A *Withdrawal due to co-operation* was never applied in a foreign bribery case. Austrian authorities reported that it was applied in one domestic bribery case, however, and prosecutors provided positive feedback.

Commentary

The lead examiners note that Diversion and Withdrawal of prosecution due to co-operation may be used to resolve foreign bribery cases against certain suspects or defendants. Withdrawal due to co-operation may be particularly useful to encourage voluntary disclosure and co-operation with the prosecutor's office, but it has yet to be applied in a foreign bribery case. These non-trial resolutions (NTRs), however, do not fully comply with some of the principles set forth in the Anti-Bribery Recommendation. The criteria for applying these NTRs, in particular Diversion, are not sufficiently clear and transparent, which also raises issues on the way they can be used in foreign bribery cases. In addition, prosecutors may not systematically seek forfeiture under these NTRs, and relevant elements of these resolutions would rarely be made public.

The lead examiners therefore recommend that Austria clarify, by any appropriate means, (i) under which circumstances Diversion may be applied in foreign bribery cases, in particular in terms of voluntary disclosure and level of co-operation expected from defendants; (ii) under which circumstances a perpetrator may assume that Withdrawal due to co-operation is available in cases in which the value of the bribe is under EUR 3 000; and (iii) whether prosecutors can offer suspects the avenue of Withdrawal due to co-operation.

They also recommend that Austria ensure that following a Diversion or Withdrawal of prosecution due to co-operation, prosecutors always seek the forfeiture of any proceeds of foreign bribery (or an equivalent sum), where appropriate.

Finally, they recommend that Austria (i) provide clear and publicly accessible information on Diversion and Withdrawal due to co-operation; and (ii) where appropriate, and consistent with data protection rules and privacy rights, as applicable, make public elements of Diversions and Withdrawals due to co-operation in foreign bribery cases, including the main facts and the natural and/or legal persons concerned, the relevant considerations for resolving the case with a non-trial resolution, and the nature of the diversion measures imposed and the rationale for applying these.

The lead examiners also suggest that the Working Group follow up, as case law and practice develop, the application of Diversion and Withdrawal of prosecution due to co-operation in foreign bribery cases.

B.6.3. Sanctions against natural persons

Sanctions available and sanctioning principles

281. In Austria, the level of sanctions for foreign bribery depends on the value of the "advantage", i.e. the bribe (see Table 1 below). The basic sanctions for the active bribery offences in CC Sections 307, 307a,

and 307b are imprisonment up to three years (Sec. 307) and two years (Sec. 307a and 307b), respectively. These apply in cases where the advantage is not quantifiable or below EUR 3 000. Higher imprisonment terms are available when the value of the advantage is above the thresholds of EUR 3 000 and EUR 50 000. In July 2023, a legislative amendment has introduced an additional threshold of EUR 300 000, associated with a higher maximum imprisonment term. Sanctions for cases involving bribes of high value have therefore been increased since Phase 3.

282. Pursuant to CC section 37, a fine may also be applied, but only as an alternative to imprisonment. Imposing a fine instead of a prison sentence is *required* if (*i*) the offence carries a maximum sentence up to 5 years, (*ii*) the judge would impose a prison sentence of not more than 1 year, and (*iii*) a custodial sentence is not deemed necessary to deter the offender from committing further offences. Imposing a fine instead of imprisonment is *permitted* if (*i*) the offence carries a maximum sentence of more than 5 years and up to 10 years, (*ii*) the judge would impose a prison sentence of not more than 1 year, and (*iii*) the imposition of a fine is deemed sufficient for the purposes of specific and general deterrence. In both cases, the maximum applicable fine is EUR 3.6 million (not more than 720 daily rates; up to EUR 5 000 per daily rate). Since Phase 3, the amount of the fine has been doubled. However, fines can now be imposed instead of prison sentences up to 1 year, instead of 6 months as at the time of Phase 3.

Table 1. Sanctions against natural persons

Bribery Offences	Applicable Threshold (Value of the bribe)	Imprisonment	Fine
Sec. 307 (bribery for an act in breach of duties)	Not quantifiable or under EUR 3 000	Up to 3 years	Up to EUR 3.6 million (in lieu of a prison sentence up to 1 year)
	Over EUR 3 000	From 6 months to 5 years	
	Over EUR 50 000	From 1 to 10 years	
	Over EUR 300 000	From 1 to 15 years	Not applicable (CC Sec. 37(2))
Sec. 307a (bribery for an act in line with duties); and **Sec. 307b (bribery to influence a public official's activity)**	Not quantifiable or under EUR 3 000	Up to 2 years	Up to EUR 3.6 million (in lieu of a prison sentence up to 1 year)
	Over EUR 3 000	Up to 3 years	
	Over EUR 50 000	From 6 months to 5 years	
	Over EUR 300 000	From 1 to 10 years	

283. Pursuant to CC Sec. 32(1), sanctions must 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, as well as the harm caused by the offender. The daily rate of a fine is calculated based on the personal circumstances and economic capacity of the offender at the time of the first instance judgment (Sec. 19). The Criminal Code also provides non-exhaustive lists of particularly aggravating factors (Sec. 33) and special mitigating factors (Sec. 34). If the mitigating factors considerably outweigh the aggravating factors, and there is a reasonable prospect that the offender will not commit any further criminal offences, the court can impose a custodial sentence below the legal minimum (Sec. 41). If an offender is sentenced to a term of imprisonment not exceeding two years, the sentence may be conditionally suspended, under a probation period between one and three years. Under certain circumstances (including, e.g. if the imprisonment term is up to three years), sentences can be suspended in part (CC Sec. 43 and ff.).

Sanctions applied in practice

284. In Phase 3, the Working Group decided to follow up the application of sanctions to natural persons to determine if they are "effective, proportionate and dissuasive" (follow-up issue 10(a)(iii)). In Phase 1*bis*, the Working Group had noted that the sentence thresholds based on the value of the bribe may raise difficulties in the case of non-pecuniary advantages or when the advantage is composed of both economic

and non-economic benefits. Austrian authorities confirmed that the jurisprudence distinguishes between "material" and "immaterial" advantages. While material advantages can be quantified in most cases, this may not be possible for immaterial advantages. In this case, only the basic sanction can be imposed.

285. Since Phase 3, an additional interpretation issue relating to the application of the value thresholds came to light. In 2016, the Supreme Court ruled that, when multiple bribery payments are not considered as the execution of a single offence but rather as separate offences, the bribes cannot be aggregated to determine the applicable sanctions thresholds (which were introduced in 2009).[69] At the on-site visit, a prosecutor explained that, in practice, bribes for individual offences are not added up, unless the payments are really part of the same transaction. For example, payments made through instalments would be added up for the purpose of the value threshold. On other hand, payments made to different foreign public officials would not be aggregated for the purpose of calculating the thresholds, because they would be considered as separate offences. It was not clear if bribes paid to several foreign public officials for a single purpose (for example, to win a tender), would nevertheless be considered as a single offence for the purpose of determining the thresholds. Austria later explained that, according to established Supreme Court case law "in the case of multiple gifts granted with a unified intent (intent to bribe) for the same reason (by the same giver), the total value of these gifts must be taken as a basis to determine the financial advantage conferred by them". This mitigates the concerns raised by the prosecutor's observations.

286. As mentioned above, only two foreign bribery cases resulted in criminal convictions. In the ***Arms Trade (Slovenia)*** case, an intermediary in a foreign bribery scheme was imposed 3 years' imprisonment (2 of which were conditionally suspended), as well as a EUR 700 000 fine, for bribery and other offences. In the ***Financial Institution I (Azerbaijan, Syria)*** case, five defendants were convicted and imposed imprisonment terms between 16 and 21 months, all suspended (see Table 2 below).

Table 2. Sanctions and confiscation against natural persons in practice

Case	Offences	Resolution	Sanction/measure	Firm/suspended	Confiscation
Arms Trade (Slovenia)	NP1	Trial	3 years imprisonment, EUR 700 000 fine	Partially suspended (2 years and half of the fine) with probation	-
Financial Institution I (Azerbaijan, Syria)	NP1	Trial	18 months imprisonment	Suspended (probation)	-
	NP2	Trial	18 months imprisonment	Suspended (probation)	-
	NP3	Trial	21 months imprisonment	Suspended (probation)	-
	NP4	Trial	21 months imprisonment	Suspended (probation)	-
	NP5	Trial	16 months imprisonment	Suspended (probation)	-

287. These sanctions for foreign bribery appear to be relatively low. There might be a few explanations, however. In both cases the offences were committed before 2009, when the sanctions available for bribery were considerably lower. Moreover, in the first case, the court balanced the conviction for multiple offences (bribery, attempted fraud, and tax evasion), with the mitigating factors that the person had conducted an orderly life, the bribery scheme largely remained an attempt, and the proceedings had lasted a disproportionately long time. In the second case, the court considered the fact that a long time had passed since the offences were committed, the length of the proceedings, and the fact that most of the defendants admitted responsibility. The court also accepted the defendants' argument that their actions were "primarily aimed at securing jobs", in light of their company's difficulties.

288. In addition to the relatively low sanctions applied, the reasoning of the court in the ***Financial Institution I (Azerbaijan, Syria)*** case is extremely concerning because it significantly underplays the seriousness of the phenomenon of foreign bribery. It even suggests that committing bribery of foreign

[69] Austrian Supreme Court, OGH 13 Os 105/15p, 6 September 2016 (p. 84 English translation).

officials in countries in which corruption is widespread may be more justifiable, especially when the company needs to conclude business deals to stay afloat.[70]

> "It should also be noted that until the end of the 1990s, bribery payments to foreign dignitaries were even tax-deductible for export companies in Austria. The social disruptive value of such criminal offences in Austria, especially when they are committed in countries that are ranked 126th or 159th (out of 174) in Transparency International's Corruption Perceptions Index and are also committed with the intention of securing the existence of the company and preserving jobs, is therefore extremely manageable."

289. This kind of reasoning, which dismisses the serious nature of bribery of foreign public officials and the harmful and disruptive effects it has for the countries concerned, should not exist in any Party to the Anti-Bribery Convention. It also suggests that Austrian authorities should make more efforts to raise the awareness among judges of foreign bribery and the Convention.

Commentary

The lead examiners note that the level of sanctions applicable to natural persons in foreign bribery cases appears adequate and welcome the further increase of sanctions for cases involving bribes of high value since Phase 3. The higher sanctions available were not yet applicable in the foreign bribery cases which led to convictions. Moreover, some potential interpretation issues concerning the determination of the value thresholds for the purpose of sentencing may persist. The lead examiners therefore suggest that the Working Group follow up as practice develops sanctions imposed in foreign bribery cases.

The lead examiners are seriously concerned by a court decision which significantly underplayed the serious nature of the foreign bribery offence. The lead examiners therefore recommend that Austria provide training to judges in order to raise awareness of the serious nature of the foreign bribery offence and underline the importance of imposing effective, proportionate, and dissuasive sanctions in foreign bribery cases, where appropriate.

B.6.4. Confiscation

Provisions on seizure and confiscation

290. The rules on the freezing and seizure of objects or assets are in Austria's Criminal Procedure Code. "Seizure" is based on a court's order in criminal proceedings (*Beschlagnahme,* CPC Sec. 115). Some seizure measures can also be applied by the police on a public prosecutor's order or, in some cases, on their own powers (*Sicherstellung,* CPC Sec. 110 et seq). Both coercive investigative measures can be ordered to secure evidence or a decision on confiscation.

291. The provisions dealing with confiscation are in the Criminal Code. Austria has different confiscation measures. "Confiscation" in the narrower sense (*Konfiskation*, CC Sec. 19a) covers any item used or intended to be used for the commission of an intentional offence, or yielded from such an offence, as well as their replacement value, if these items belong to the perpetrator at the time of the first-instance judgment (the possibility to confiscate the replacement value and the precision on timing were introduced in 2015). Austria explains that this is a secondary penalty that may only be imposed in combination with another sanction (fine or imprisonment) and therefore requires a conviction for a criminal offence. "Forfeiture" (*Verfall*, CC Sec. 20) must be ordered over assets obtained for or through the commission of an offence, as well as the use and replacement values of such assets. If these assets have not been seized, the court must order the forfeiture of an equivalent sum (confiscation by equivalent). If the extent of the assets to be declared forfeited cannot be determined or can only be determined with disproportionate effort, the court

[70] Regional Court for Criminal Matters Vienna, 123 Hv 9/13i, 19 February 2018 (p. 62 English translation).

will determine it "in accordance with its conviction". The Criminal Code also contains provisions on confiscation of items to prevent further offences (*Einziehung*, CC Sec. 26) as well as extended forfeiture (*Erweiterter Verfall*, CC Sec. 20b CC), which allows for the confiscation of assets originating from criminal offences beyond those for which the person concerned is prosecuted or convicted. Extended forfeiture became applicable to proceedings for bribery offences and money laundering in 2021. All these confiscation measures can be ordered in the main criminal proceedings or, if this is not possible, through independent proceedings upon a request filed by the prosecutor (CPC Sec. 443-446).

292. The Federal MoJ publishes guidelines for asset recovery, including an overview of the legal basis and examples for investigative tools and orders in this area. The guidelines were last updated in May 2020 (3rd edition), but another revision is planned. These guidelines expressly mention that both the bribe and the proceeds of bribery should be confiscated. They refer to the Anti-Bribery Convention Art. 3, and state: "Because of the requirements of international law, 'the profit that the giver has achieved from a transaction obtained through criminal bribery' must also be confiscated. The bribe itself is - as usual - to be confiscated from the recipient."[71] The guidelines also refer to a ruling according to which the judge must determine what proportion of the total profit achieved can be attributed to the business obtained through bribery. The guidelines do not expressly mention nor provide examples on foreign bribery, however.

293. Despite these guidelines, it appears that prosecutors and judges may interpret the available provisions in a narrow way, which would exclude the confiscation of the proceeds of foreign bribery. At the on-site visit, representatives of the Federal MoJ and academia stated that proceeds of bribery can be confiscated under the provision on forfeiture (CC Sec. 20). On the other hand, most of the prosecutors and judges met by the evaluation team considered that the profits gained by the briber are not clearly covered by the existing provisions. They consider that the benefit to be forfeited should be an immediate gain from an offence. A contract obtained through bribery may be too remote to be encompassed by confiscation.

Commentary

The lead examiners note with preoccupation that most of the prosecutors and judges met at the on-site visit consider that the proceeds of foreign bribery are not clearly covered by the existing provisions on confiscation. They recommend that Austria further develop its guidelines on confiscation (i) to ensure that the proceeds of foreign bribery, or property the value of which correspond to that of such proceeds, can be subject to seizure and confiscation, and (ii) to provide guidance and examples on identifying, quantifying, and confiscating (including by equivalent) bribes and the proceeds of bribery of foreign public officials, and raise awareness of law enforcement and other competent authorities on the importance of such confiscation

Institutional arrangements

294. Concerning institutional arrangements, if proceedings fall within the competence of the WKStA, seizure and confiscation measures are undertaken by the same public prosecutors who are competent for the pretrial proceedings and the main trial. Austria states that these prosecutors receive tailored trainings and deal with such matters on a frequent basis. In the ordinary public prosecutor's offices, special units for asset recovery were established, starting as a pilot project in 2014. Since 2017, one or more specially trained prosecutors are assigned to assist in cases concerning aspects of asset recovery in the larger public prosecutors' offices. A specialised department in the Federal Criminal Police Office acts as Asset Recovery Office (ARO). The ARO department, among other things, processes requests from foreign authorities for tracing assets in Austria and provides assistance, upon request, on complex investigations in this area as well as on identifying, tracking, and securing assets abroad.

[71] Federal Ministry of Justice (2020), *Leitfaden Vermögensrechtliche Anordnungen* (Guide on Property Law Orders), p. 44.

295. Austrian authorities reported that the Federal MoJ, in co-operation with the Federal MoI, FIU, Asset Recovery specialists, as well as representatives of the EU Eurojust and Europol co-organise at regular intervals high-level seminars to raise awareness and advise practitioners on practical challenges in asset recovery proceedings. A joint training for judges, prosecutors, and the criminal police on "Asset orders and financial investigations" aims to improve co-operation between financial investigators in the police and prosecutor's office and deals with practical and legal challenges.

Confiscation in practice

296. As mentioned above, two foreign bribery cases resulted in the conviction of six natural persons since Phase 3. However, confiscation was imposed in none of these cases. In the ***Arms Trade (Slovenia)*** case, prosecutors had asked for the confiscation of EUR 1,3 million, which was considered the remuneration for the defendant's participation as an intermediary in the bribery scheme. However, the court eventually excluded confiscation based on more favourable provisions applicable at the time of the offence, as well as the exceptional hardship this would bring on the defendant, considering his financial situation and the fine already imposed. In the ***Financial Institution I (Azerbaijan, Syria)*** case, prosecutors also sought confiscation of amounts between EUR 90 000 and EUR1.5 million from the natural person defendants. The court rejected the claim as it found that the defendants had not gained a profit from the bribery scheme itself: they merely received annual bonus payments, but it was established that these were not linked to the successful conclusion of the incriminated contracts. In light of the particular reasons for which confiscation was excluded, these cases are not particularly helpful to understand to what extent confiscation of the proceeds of foreign bribery may apply, especially against legal persons.

Commentary

In light of the absence of conclusive case law on confiscation and the narrow interpretation of the provisions on forfeiture analysed above, the lead examiners suggest that the Working Group follow up, as practice develops, whether confiscation of the proceeds of foreign bribery, including by equivalent, is sought by prosecutors and imposed by courts.

B.6.5. Accessing concluded cases

297. Not all final judgments in foreign bribery cases are made public. Austria explains that only anonymized decisions of the Supreme Court and some decisions of the Higher Regional Courts are accessible to the general public via a specific database called "RIS".[72] This contravenes Anti-Bribery Recommendation XV(iii), pursuant to which countries should make public and accessible, consistent with data protection rules and privacy rights, important elements of resolved foreign bribery cases.

Commentary

The lead examiners recommend that Austria make public and accessible, consistent with data protection rules and privacy rights, as applicable, important elements of resolved cases of foreign bribery and related offences, including the main facts, the natural or legal persons sanctioned, the approved sanctions, and the basis for applying such sanctions.

[72] Database "Legal Information System" (*Rechtsinformationssystem*, RIS), available at: https://www.ris.bka.gv.at/Jus/.

C. Legal persons

C.1. Liability of legal persons: framework and enforcement

298. Austria's rules on liability of legal persons are in the Federal Statute on the Responsibility of Entities for Criminal Offences (VbVG). Liability of legal persons is triggered, *inter alia*, by any criminal offence in the Criminal Code, thus including foreign bribery, money laundering, and false accounting offences. The core provisions of the VbVG have not been amended since Phase 3, except for the level of fines available against legal entities (see section C.3.1 below). In 2018, the Federal Ministry of Justice has issued guidelines on the VbVG for investigators, prosecutors, and judges (hereinafter, "2018 MoJ Guidelines").[73] These guidelines are meant to provide practitioners with guidance on the application of the law, especially on procedural aspects, and are not binding.

C.1.1. Entities covered and successor liability

299. The VbVG applies to all entities with legal personality, as well as registered partnerships and European Economic Interest Groupings. The following are not considered "entities" for the purpose of applying the VbVG: (*i*) estates (under inheritance law); (*ii*) the Federation, Länder, municipalities, and other legal entities, "insofar as they act in execution of the law"; and (*iii*) recognized churches, religious societies and confessional communities, "insofar as they are active in pastoral care" (VbVG Sec. 1).

300. In Phase 1bis, Austria clarified that, under this exception, SOEs would be exempt from criminal liability only when they exercise state authority. This means that, in principle, SOEs can be held liable if they commit foreign bribery, as required by Anti-Bribery Recommendation, Annex I.B.1. Austrian SOEs and their subsidiaries were allegedly involved in three foreign bribery cases concluded since Phase 3. Two SOE subsidiaries were acquitted in one case, and no legal persons were prosecuted in the other two cases. In these cases, however, the main obstacles to the prosecution of the entities appeared to derive from some issues with the standard of liability and the prosecutorial approach to foreign bribery cases (see sections C.1.2 and C.2.3 below).

301. The VbVG provides for successor liability. If the rights and obligations of an entity are transferred to another entity by way of universal succession (i.e. transfer of all rights and liabilities), the legal consequences provided for in the VbVG, or that have already been imposed on the legal predecessor, apply to the legal successor. A partial transfer (called "individual succession" in the VbVG) is deemed

[73] Federal Ministry of Justice (2018), *Verbandsverantwortlichkeitsgesetz – Praxisleitfaden* (Responsibility of Entities Act – Practical Guide).

equivalent to universal succession "if the ownership structure of the entity is more or less the same and the operation or activity is more or less continued". If there is more than one legal successor, a fine imposed on the legal predecessor may be enforced vis-à-vis any legal successor. Other legal consequences may be attributed to individual legal successors to the extent this is in line with their area of activities (VbVG Sec. 10). The Austrian Constitutional Court has rejected a challenge to the constitutionality of this provision in December 2023.[74] Austria provided two judgments sanctioning entities as universal successors under VbVG Sec. 10(1).[75] The provision on "individual succession" was not applied by the high jurisdictions. One foreign bribery case potentially involved succession of legal persons (***Windfarm Project (Hungary)*** case). Austria states that this did not have any bearing on the decision not to prosecute the entity.

C.1.2. Standard of liability

302. Liability can be triggered by the acts of both a person with the highest-level managerial authority within the entity and a lower-level person. A legal person is liable for an offence committed by a "decision-maker" "unlawfully and culpably" (i.e. no defences are applicable), either directly or through instigation of another person (CC Sec. 12, see para. 108 above). A "decision-maker" is a person who is empowered to represent the legal person, exercises supervisory powers in a managerial position, or otherwise exerts significant influence on the management of the legal person (VbVG Sec. 2(1) and 3(2)). A legal person is also liable for an offence committed by "employees", if they have unlawfully committed the offence, and if that "was made possible or significantly facilitated by the fact that decision-makers disregarded the due and reasonable care required by the circumstances, in particular by failing to take essential technical, organisational or personnel measures to prevent such crimes" (VbVG Sec. 2(2) and 3(3)).

303. The 2018 MoJ Guidelines clarify that "employees" can also include certain independent workers who have an "employee-like" relationship with the entity, despite not having an employee status. Concerning the standard of "due and reasonable care", in the Phase 3 follow-up, Austria explained that the measures required must be decided on a case-by-case basis, taking into consideration, for example, the type, size, structure, and sector of operation of an entity. The standard may be deducted from legal norms, customary rules or – subsidiarily – the hypothetical conduct of a person familiar and in line with the legally protected values relevant for the offender's sphere of business. A strict causality between the violation of the duty of care and the offence is not required. Austria did not provide supporting case law, however. The 2018 MoJ Guidelines do not provide further clarifications on the application of this element.

304. A legal person can only be held liable if the criminal offence (i) "was for the benefit of the entity" or (ii) "violated the entity's duties" (VbVG Sec. 3(1)). The "benefit" criterion raises several issues. This criterion excludes bribery committed by an entity for the benefit of a related entity (such as a parent company, a subsidiary, or other affiliated entity) as noted in Phase 3. In another evaluation, the Working Group stated that a requirement that the benefit be directed at the legal entity subject to prosecution creates a substantial loophole that companies can seek to exploit by directing payments or contracts to affiliates or, potentially, to other third-party beneficiaries.[76] The benefit criterion also seems to be interpreted as to only cover pecuniary benefits. According to the 2018 MoJ Guidelines, "an offence is committed in favour of the entity, if it has been enriched by the offence, has saved itself an expense, has otherwise gained an economic advantage (even if only indirect), or one of these benefits should have occurred". The guidelines further state that a "favour, even one that is not directly financial in nature, could be considered", but this would

[74] Austrian Constitutional Court, Decision no. G 609-610/2023-10, 5 December 2023.

[75] Austrian Supreme Court, OGH 11 Os 77/17h, 17 October 2017; Regional Court for Criminal Matters Vienna, 122 Hv 2/18 k, 10 December 2019.

[76] OECD (2005), WGB Phase 2 Report on Hungary, commentary after para. 149.

require a "cautious interpretation".[77] The Working Group has stated, in other evaluations, that liability should also arise when bribery results in a financial loss: companies may win an unprofitable contract merely to gain market entry, for example.[78]

305. In a domestic bribery case, the court stated that, for the purpose of the benefit criterion, an intended advantage for the entity is sufficient, even if it did not materialise ("*an offence has also been committed in favour of the association if the association should have been enriched or should have gained an economic advantage that ultimately did not materialise*").[79] Some case law, however, interprets the benefit criterion more narrowly. In the ***Financial Institution I (Azerbaijan, Syria)*** case, the court stated that the benefit criterion can only be fulfilled if the entity *actually* obtained an advantage or made a profit. In that case, the liability of the entities involved was excluded on this basis.[80]

> "However, it could not be assumed that the offences were committed in favour of the entities. According to Hilf/Zeder in WK2 VbVG § 3 Rz 8, an offence has been committed in favour of the entity if the entity has been enriched as a result or has otherwise gained an economic advantage as a result. An economic advantage also lies in the improvement of the competitive position. However, the further view advocated by these authors, according to which an offence should also have been committed in favour of the entity if the entity should have been enriched or obtained an economic advantage, but this did not ultimately occur (e.g. in the case of an attempt, but also in other cases in which the economic advantage does not actually accrue), clearly ignores the wording of the law, which speaks of a commission "in favour" of the entity and such a commission is only given if an advantage actually occurred."

306. Austria stressed that, according to more recent Supreme Court case law, the offence is considered to be committed in favour of the legal entity if it "*has been enriched by the offence, has saved itself an expense, has otherwise gained an economic advantage (even if only indirect) or one of these benefits should have occurred*".[81] This principle indeed mitigates the concern that courts might require proof of an actual advantage obtained by the entity. The fact remains, however, that in the foreign bribery case mentioned above, the acquittal of the legal persons (including on this ground) remained unchallenged. In addition, this recent case law confirms the requirement of an "economic" advantage (even if only indirect), which raises some doubts, as mentioned in para. 304 above.

307. As for the "violation of duties" criterion, its application in practice is unclear. In Phase 3, Austrian authorities clarified that bribery could involve a neglect of duty where, for instance, steps were not taken to contractually obligate intermediaries to establish codes of conduct or refrain from bribery. This is not entirely convincing, however, because if preventing bribes was always considered an entity's duty, this criterion would be automatically applicable in all bribery proceedings, which does not appear to be the case. In the ***Financial Institution I (Azerbaijan, Syria)*** case, the court explained that an entity's duties can be found throughout the legal system. In that case, however, there was no breach of duties because the companies had sufficient internal control measures, and their liability was therefore excluded.[82]

> "Obligations that apply to the entity and whose violation in conjunction with the other requirements can give rise to criminal liability can be found throughout the legal system, primarily in civil and administrative law. Laws, ordinances, but also notices (conditions) or contracts may contain

[77] Federal Ministry of Justice (2018), Responsibility of Entities Act – Practical Guide, p. 16.

[78] See, e.g. OECD (2011), WGB Phase 3 Report on Luxembourg, para. 44.

[79] Regional Court for Criminal Matters Vienna, 122 Hv 2/18 k, 10 December 2019.

[80] Regional Court for Criminal Matters Vienna, 123 Hv 9/13i, 3 October 2014 (p. 103 English translation).

[81] Austrian Supreme Court, OGH 11 Os 10/16d, 28 February 2017; OGH 13 Os 45/22z, 23 November 2022.

[82] Regional Court for Criminal Matters Vienna, 123 Hv 9/13i, 3 October 2014 (p. 103 English translation).

obligations that entities must fulfil. In this case, although the criminal offences were committed by decision-makers of the entity in question, it was not possible to identify an obligation on the part of [the companies] that would have been breached, as they had sufficient internal control measures in place."

308. This suggests that a violation of duties might be excluded when companies already have in place an adequate anti-corruption compliance programme. As provided by Anti-Bribery Recommendation XXIII.D.iii, however, countries should "ensure that the mere existence of internal controls, ethics and compliance programmes or measures does not fully exonerate the legal person from its liability".

Commentary

The lead examiners note that certain interpretation issues relating to the criteria for triggering the liability of legal persons have not been clarified since Phase 3. Moreover, a court decision in a foreign bribery case raises further concerns regarding the application of these criteria. In light of these, they recommend that Austria ensure, including by amending its legislation if necessary, that (i) liability is not excluded if bribes are paid with a view to obtain an advantage for a related legal entity or third-party beneficiary; (ii) liability can result from all acts of foreign bribery, whether they are aimed at obtaining a pecuniary or non-pecuniary advantage; (iii) there is no requirement to prove that the legal person that committed foreign bribery actually obtained an advantage in return; and (iv) the mere existence of internal controls, ethics and compliance programmes or measures does not fully exonerate the legal person from its liability.

C.1.3. Bribery committed using intermediaries or related legal persons

309. Under Anti-Bribery Recommendation, Annex I.C.1, countries should ensure that a legal person cannot avoid responsibility by using intermediaries, including related legal persons and other third parties, irrespective of their nationality, to offer, promise, or give a bribe to a foreign public official on its behalf.

310. In the Phase 3 follow-up, Austria explained that a legal person can be held liable for bribery committed using an agent or a related legal person, through the application of CC Sec. 12 on participation in criminal offences (see para. 108 above). A manager or employee who deliberately used an agent to commit bribery could be held liable under CC Sec. 12, pursuant to which the offence is not only committed by the immediate perpetrator, but also by any person that instigates another person to commit it as well as everybody who is an accessory to its commission. Austria also explained that a corporate group cannot be considered as a single entity: the criteria for establishing criminal responsibility must be separately fulfilled by each involved entity within the group, whether it is the parent or the subsidiaries. However, liability can be established by means of the general rules on contribution to an offence under CC Sec. 12. This could apply, for example, if a decision maker of the parent company instigates a staff member of a subsidiary to commit the offence. Austrian authorities did not provide supporting case law on this point, however.

Commentary

Considering the absence of case law on this point, the lead examiners suggest that the Working Group follow up, as case law develops, whether legal persons can be held liable for foreign bribery committed by using intermediaries, including related legal persons and other third parties.

C.1.4. Autonomous Liability

311. In the VbVG, there is no express provision stating that liability of legal persons is autonomous, i.e. not restricted to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted (as set forth in Anti-Bribery Recommendation Annex I.B.2). The existing provisions would not be incompatible with the principle. The VbVG provides that "the liability of an entity for an act and the criminal liability of decision-makers or employees for the same act are not mutually exclusive" (Sec. 3(4)).

Another provision states that, while proceedings against the legal person and the natural person offender will ordinarily be joined, they can be conducted separately (VbVG Sec. 15(2)). When proceedings are conducted jointly and the natural person offender is acquitted, a decision on the imposition of a fine to the legal person can be taken in independent proceedings upon the prosecutor's request (VbVG Sec. 22).

312. Nevertheless, it appears that in practice, liability of legal persons for bribery offences is not considered entirely autonomous. The Phase 3 report already noted that prosecutors seemed to be required to attribute *mens rea* to one individual perpetrator with a leading role in the company, so that it would not be possible to aggregate the acts and mental elements of more than one person. At the time, a survey showed that prosecutors encountered issues of proof because of the complexity of corporate decision-making structures. This issue has been confirmed in the Phase 4 on-site visit. A prosecutor stated that, if it is not possible to prove the liability of an identified decision-maker, then it is not possible to go after the company. Moreover, according to a judge, if managers from different subsidiaries (or companies in a bidding consortium) intervene in a transaction and contribute to the offence, but it is not possible to attribute the offence to any of them, then it is not possible to prove the company's liability.

313. Similarly, the 2018 MoJ Guidelines state that the "decision-maker who triggers the association's liability under Section 3 (2) VbVG must be identified by name and cited in the judgement". For offences committed by employees, in the case of intentional offences, "it will generally be necessary to establish the name of the perpetrator and his intent".[83] As noted by the Working Group in the evaluation of another country, "a system of liability of legal persons that requires the identification and conviction of the natural person involved in the offence fails to address increasingly complex corporate structures, which are often characterised by decentralised decision-making".[84] Austria states that a "future revision" of the MoJ Guidelines will indicate that identifying the natural person offender is not necessary.

Commentary

The lead examiners note that, in practice, Austria's corporate liability regime requires the identification and prosecution of at least one natural person for intentional offences including foreign bribery. They therefore recommend that Austria ensure that its system for the liability of legal persons does not restrict the liability to cases where the natural person or persons who perpetrated the foreign bribery offence are prosecuted or convicted, in particular when one natural person perpetrator cannot be identified due to the complexity of corporate decision-making structures.

C.1.5. Jurisdiction over legal persons

314. Foreign bribery offences committed by legal persons can be prosecuted in Austria based on the territorial and nationality jurisdiction rules applicable to natural persons (see section B.1.3 above). This is because general criminal laws also apply to entities, insofar as they are not exclusively applicable to natural persons (VbVG Sec. 12(1)). The VbVG also indicates how nationality jurisdiction should be applied to legal persons. If the law makes the application of Austrian criminal laws for offences committed abroad dependent on the Austrian nationality, domicile, or residence of the offender, the registered office of the entity or the place of business or establishment is decisive for entities (VbVG Sec. 12(2)).

315. The Phase 3 Report raised concerns as to the possibility to establish nationality jurisdiction, in particular against legal persons, for bribery committed abroad through foreign intermediaries. The Working Group therefore decided to follow up the application of the active bribery offences to bribery of foreign public officials committed abroad through an intermediary who is not an Austrian national (follow-up issue 10(a)(i)). Austrian authorities do not consider this to be an issue and, indeed, the current rules on nationality

[83] Federal Ministry of Justice (2018), Responsibility of Entities Act – Practical Guide, p. 13-15.

[84] OECD (2005), WGB Phase 2 Report on Hungary, para. 145.

jurisdiction appear to enable the prosecution of an Austrian company having committed bribery abroad, including through a foreign intermediary. The 2018 MoJ Guidelines reiterate that an Austrian association can be held liable for offences committed abroad under VbVG Sec. 12(2). They also clarify that jurisdiction with regard to the liability of a legal person "does not have to coincide with that with regard to the decision-maker or employee" who committed the offence. For the purpose of nationality jurisdiction, "domicile of the association or the place of operation or establishment" are decisive.[85] This was questioned by some on-site visit participants, however. Some practitioners and academics were not sure that Austrian jurisdiction would apply in case an Austrian company commits bribery abroad, but not through an Austrian individual.

Commentary

In light of persistent doubts on this issue among practitioners, the lead examiners suggest that the Working Group follow up, as case law and practice develop, whether authorities are able to exercise appropriate jurisdiction over legal persons regardless of whether they have jurisdiction over the natural person who committed foreign bribery.

C.2. Enforcement against legal persons

C.2.1. Prosecutorial discretion

316. The Working Group had expressed since Phase 2 concerns about a provision on "prosecutorial discretion", pursuant to which prosecutors can "refrain from or withdraw prosecution" of legal persons under broadly defined conditions (VbVG Sec. 18). In particular, prosecutors can waive or withdraw prosecution if the efforts required appear out of proportion compared to the expected sanction, considering *inter alia* the seriousness of the offence and the conduct of the entity after the offence. There are limited exceptions to this discretion, including that prosecution should go ahead if it appears necessary "due to a special public interest". The Working Group recommended that Austria "issue and publicise guidelines to prosecutors clarifying that the prosecution of allegations of bribery of foreign public officials by legal persons is always required in the public interest under VbVG, subject only to clearly defined exceptions" (Phase 3 recommendation 1(b), first part).

317. Austria has addressed this recommendation. The 2018 MoJ Guidelines on the VbVG clarify that the prosecution of foreign bribery falls within the cases covered by the exception of a "special public interest". The guidelines state: "The Materials mention cases in which there is an intergovernmental obligation to provide for the liability of an association with regard to an offence, such as human trafficking and smuggling, as well as corruption in foreign transactions. Such an obligation would indicate a particular public interest in prosecuting the organisation."[86] While these guidelines are not binding, Austria made sufficient efforts to bring them to the attention of prosecutors. Moreover, a prosecutor at the on-site visit stated that, in any event, VbVG Sec. 18 is applied only in exceptional cases, for example if a company is going bankrupt.

C.2.2. Non-trial resolutions

318. The non-trial resolutions (NTRs) under the CPC also apply to legal persons (see section B.6.2 above). Legal persons can obtain a *Diversion* if they compensate the damage caused and remedy other consequences of the offence, and if the imposition of a criminal fine does not appear necessary for purposes of specific and general deterrence considering the imposition of *diversion* measures tailored to legal persons. These measures are: (*i*) the payment of a sum of money up to EUR 1.5 million plus the

[85] Federal Ministry of Justice (2018), Responsibility of Entities Act – Practical Guide, p. 7-8 and 18, respectively.

[86] Federal Ministry of Justice (2018), Responsibility of Entities Act – Practical Guide, p. 54.

costs of proceedings; (*ii*) a probation period up to 3 years associated with the entity's agreement to adopt technical, organisational, or personnel measures to prevent further offences; or (*iii*) an explicit commitment to provide certain non-profit services free of charge within a period of no more than six months (VbVG Sec. 19 and CPC Sec. 198). *Withdrawal of prosecution due to co-operation* also applies to legal persons. In that case, the same measures apply but the sum of money to be paid is up to EUR 3 million (CPC Sec. 209a(7)).

319. The same concerns expressed in section B.6.2 apply to resolutions for legal persons. In particular, there is no sufficient guidance on the conditions for applying these resolutions when they are both available in principle. *Diversion* is particularly problematic with regard to the conditions under which it could be applied in a foreign bribery case, noting that it does not contain any requirement for perpetrators to disclose misconduct and cooperate with the prosecutor's office. The 2018 MoJ Guidelines contain some additional guidance on applying these resolutions to legal persons, but do not address these issues. According to the statistics on enforcement of domestic bribery, five legal persons obtained a *Diversion* for active bribery offences over the period 2019-2023. These decisions are not publicly available, however. The *diversion* measures that apply to legal persons instead of criminal sanctions are examined in section C.3.2 below.

C.2.3. Obstacles to enforcement against legal persons

320. At the time of Phase 3, a 2011 report by the Institute for Legal and Criminal Sociology indicated that liability of legal persons had been used in a very small percentage of cases between the entry into force of the VbVG in 2006 and December 2010. Most prosecutors involved in the report's survey were reluctant to use the VbVG because of the increased time and effort, lower chances of success in proceedings against legal entities due to missing tools and jurisprudence, and lack of practical experience, specialisation, and routine.[87]

321. The Austrian authorities state that the guidelines on the VbVG issued by the Federal MoJ in 2018 were precisely meant to resolve the reluctance to apply the rules on corporate liability. As mentioned in the guidelines, their main purpose is to provide guidance to practitioners on the application of the law and handling of proceedings against legal persons. To that end, the guidelines focus on procedural aspects that are specific to the proceedings against entities.[88] Austrian authorities report that the guidelines were circulated to prosecutors and judges throughout Austria, as well as to investigation authorities. Lectures on their content were offered to prosecutors, trainee judges, police investigators, and tax authorities. The guidelines are also presented and debated in the trainings for prosecutors and judges organised by the Federal MoJ. Austrian authorities at the on-site visit underlined that enforcement under the VbVG has increased after the guidelines were circulated but also acknowledged that it is still limited.

322. The Phase 3 report also raised a more specific concern on the use of "breach of trust" (CC Sec. 153) as an alternative offence to prosecute foreign bribery cases. At the time, the Austrian authorities did not appear to consider proceeding against legal persons in two foreign bribery cases, because they regarded the entities as victims of "breach of trust". Practice since Phase 3 has confirmed these concerns. The 2018 MoJ Guidelines confirm that the VbVG would not apply to a certain offence when the entity itself is considered as the victim of the offence committed by a decision-maker or employee.[89] As a perhaps unwanted consequence, it appears that once breach of trust charges are brought in bribery cases, the company is considered a victim of the offence and a simultaneous prosecution for bribery is unlikely. This occurred at least in two foreign bribery cases. In the cases ***Port and Viaduct Projects (Croatia)*** and ***Windfarm Project (Hungary)***, the companies involved were treated as (potential) victims of breach of

[87] OECD (2012), WGB Phase 3 Report on Austria, para. 42.

[88] Austrian Ministry of Justice (2018), Responsibility of Entities Act – Practical Guide, p. 4.

[89] Austrian Ministry of Justice (2018), Responsibility of Entities Act – Practical Guide, p. 17.

trust entitled to claim civil compensation in the proceedings. This was the main reason why these companies were not prosecuted for the bribery charges. In ***Rail Transport I (Hungary)***, one individual was only charged with breach of trust, as an alternative offence given the insufficient proof of foreign bribery, and no legal person was therefore prosecuted. This case also indicates that Austria's false accounting offences do not offer the enforcement options required under Art. 8 of the Convention. Without elements restricting the application of this offence (see section B.5.2 above), the company might have been held liable. Similarly, in ***Mining equipment (Poland)***, two individuals were only charged with breach of trust, and the Austrian company was not prosecuted (noting, however, that only some of the alleged acts were committed after the entry into force of the Austrian corporate liability).

C.2.4. Enforcement against legal persons in practice

323. Enforcement against legal persons in foreign bribery cases raises serious concerns. The seven foreign bribery prosecutions concluded since Phase 3, resulted in the following outcomes for legal persons:

- In one case, the proceedings against the legal person were dismissed because the main defendant in the bribery scheme was acquitted (***Hospital Project (IFI)*** case).
- In another case, two legal persons were acquitted because the criteria for applying the VbVG were not fulfilled (***Financial Institution I (Azerbaijan, Syria)*** case, see section C.1.2 above).
- In five cases, while charges were filed against individuals, no legal persons were prosecuted. In one case, an intermediary in the bribery scheme was tried in Austria but the foreign legal person was tried abroad (***Arms Trade (Slovenia)*** case). In four cases, no legal persons were charged due to the prosecutors resorting to breach of trust charges (***Mining equipment (Poland)***, ***Port and Viaduct Projects (Croatia)***, ***Windfarm Project (Hungary)***, and ***Rail Transport I (Hungary)***, see section C.2.3 above).

324. As already mentioned in the sections above, those foreign bribery cases in which legal persons were acquitted or could not be prosecuted, especially when this was due to a narrow interpretation of the VbVG, raise serious concerns.

325. Prosecution of legal persons appears to be limited in domestic bribery cases as well. Over the period 2019-2023, one legal person was convicted, one was acquitted, and five obtained *Diversions* for active bribery offences (CC Sec. 307, 307a, and 307b). Statistics on other economic and financial crimes show a similar trend. In the period 2019-2023, there have been 26 convictions and 14 acquittals of entities for offences of fraud and dishonesty. In the same period, there were no final outcomes and there was only one indictment for false accounting offences. Austria did not provide statistics on money laundering.

Commentary

The lead examiners commend Austria for the adoption of guidelines on the Federal Statute on the Responsibility of Entities (VbVG), which aim to provide support on the interpretation of the law and encourage prosecutors to apply the corporate liability regime. They also note that the guidelines have addressed an outstanding Phase 3 recommendation to clarify that prosecution of legal persons for foreign bribery should always be considered in the public interest.

Nevertheless, the lead examiners note that enforcement against legal persons is very limited. Some of the possible obstacles to such enforcement include a narrow interpretation of the conditions for triggering corporate liability (see recommendation in section C.1.2), as well as the practice of charging "breach of trust" along with bribery. In addition, data on enforcement of domestic offences suggest that, while some progress has been made, enforcement against legal persons is still limited. More efforts are therefore needed to encourage proactive enforcement, especially in foreign bribery cases. To that end, the lead examiners recommend that Austria proactively pursue

criminal charges against legal persons, where appropriate, for foreign bribery and related offences such as false accounting and money laundering.

C.3. Sanctions for legal persons

C.3.1. Criminal sanctions and confiscation against legal persons

Provisions on sanctions and confiscation

326. The only criminal sanction provided for in the VbVG against legal persons is a fine. Like for natural persons, the fine is determined based on daily rates. The maximum number of daily rates depends on the maximum imprisonment term applicable to the relevant offence. The amount of each daily rate is calculated based on the entity's financial situation (VbVG Sec. 4). The rules on confiscation described in section B.6.4 above apply to legal persons as well (CC Sec. 19 and following, VbVG Sec. 12).

327. In Phase 3, the maximum fines against legal persons for foreign bribery ranged from EUR 700 000 to 1.3 million, depending on the type of bribery offence. The Working Group noted that these fines were not sufficiently "effective, proportionate, and dissuasive", as they were substantially lower than those for natural persons and appeared too low in light of the size and importance of many Austrian companies, the location of their international business operations, and the business sectors in which they were involved. The Working Group therefore recommended that Austria increase the fines for legal persons for the foreign bribery offence (Phase 3 recommendation 1(c); not implemented at the time of the Phase 3 follow-up).

328. Since Phase 3, there has been an increase in the maximum number and in the amount of daily rates for determining fines against legal persons. First, as mentioned in section B.6.3, the maximum imprisonment terms for cases involving bribes over EUR 300 000 have been increased. As a consequence, the maximum number of daily rates that can be imposed on an entity in such cases is now higher. Second, Austria has also increased the cap on the amount of a daily rate from EUR 10 000 to 30 000 (VbVG Sec. 4). The maximum fines available now range from EUR 2.1 million to 4.65 million (see Table 3 below).

Table 3. Sanctions against legal persons

Bribery Offences	Applicable Threshold (Value of the bribe)	(Applicable imprisonment term for natural persons)	Fines for Legal Persons
Sec. 307 (bribery for an act in breach of duties)	Not quantifiable or under EUR 3 000	Up to 3 years	Up to 2.55 million (85 daily rates)
	Over EUR 3 000	From 6 months to 5 years	Up to 3 million (100 daily rates)
	Over EUR 50 000	From 1 to 10 years	Up to 3.9 million (130 daily rates)
	Over EUR 300 000	From 1 to 15 years	Up to 4.65 million (155 daily rates)
Sec. 307a (bribery for an act in line with duties); and **Sec. 307b (bribery to influence a public official's activity)**	Not quantifiable or under EUR 3 000	Up to 2 years	Up to 2.1 million (70 daily rates)
	Over EUR 3 000	Up to 3 years	Up to 2.55 million (85 daily rates)
	Over EUR 50 000	From 6 months to 5 years	Up to 3 million (100 daily rates)
	Over EUR 300 000	From 1 to 10 years	Up to 3.9 million 130 daily rates)

329. The VbVG contains general provisions on how corporate fines must be determined. To decide on the number of daily rates, courts must weigh aggravating and mitigating factors. In particular, aggravating factors are the high damage caused or benefit obtained by the entity with the offence, or the fact that the employees' unlawful conduct was tolerated or encouraged. Mitigating factors apply if: the entity had taken measures to prevent the offence before it was committed or had encouraged employees to comply with

legislation; the offence was only committed by employees (not "decision-makers", see para. C.1.2); the entity has significantly contributed to establishing the truth after the facts, has remedied the consequences of the acts, or has taken significant steps to prevent similar acts in the future; the offence has already resulted in serious legal disadvantages for the entity or its owners (VbVG Sec. 5). Austrian authorities state that, in this context, courts take into consideration the entity's timely and appropriate remediation, including the implementation or enhancement of an effective ethics and compliance programme, in line with Anti-Bribery Recommendation XV.iii.

330. The amount of daily rates is determined based on the entity's earnings situation, taking into account its other economic performance. It must be set at an amount corresponding to the 360th of the entity's annual proceeds (or an amount which exceeds or falls short of this by a maximum of one third). In Phase 2, Austria explained that the notion of "yearly proceeds" is akin to the notion of "profit" and its calculation requires recourse to financial expertise. In any event, the amount of a daily rate cannot be lower than EUR 50 nor higher than EUR 30 000. Lower amounts apply to non-profit entities (VbVG Sec. 4(4)). The rules on the amount of daily rates raise a question of proportionality and equal treatment. For the companies with annual proceeds under EUR 10.8 million, the amount of the daily rate corresponds to the 360th of the entity's annual proceeds. For those with higher profits, however, the amount is in any event capped at EUR 30 000. Thus, the calculation rule is more favourable for companies with the highest earnings.

331. Fines can also be conditionally suspended ("conditional leniency", VbVG Sec. 6-9). Courts should grant conditional suspension if imposing a fine is not deemed necessary for purposes of specific and general deterrence, and considering the nature of the offence, seriousness of the breach of duty or due diligence, previous convictions, reliability of the decision-makers, and measures taken by the entity after the offence. The conditional suspension can cover the entire fine, if it does not exceed 70 daily rates, or part of the fine (but not less than one-third and not more than five-sixths). The fine is conditionally suspended for a probation period from 1 to 3 years. The court may also issue "instructions" to the entity, which include compensating the damage or (if the entity consents) adopting technical, organisational, or personnel measures to prevent further offences. The court may revoke the conditional leniency or extend the probation if the entity reoffends during the probation period or fails to comply with the instructions.

332. Overall, the sanctions available against legal persons appear not to be as effective, proportionate, and dissuasive, as required by Anti-Bribery Convention Art. 3. While Austria's increase of the cap for daily rates is a positive development, the maximum fines are still low under the Convention's standards as interpreted by the Working Group and compared to other Parties. For instance, certain Parties can rely on specific criteria as a basis to determine the fine, such as the company's turnover or the amount of the advantage obtained or sought, and impose fines up to ten per cent of the legal person's annual turnover in the preceding fiscal year; three times the financial advantage obtained or sought; twice the gross pecuniary gain or loss resulting from the offense; ten times the proceeds of the offence; or even without an upper limit.[90] In addition, Austria's rules on leniency seem to facilitate a broad application of the conditional suspension of the fine, which may undermine dissuasiveness. Austria stated that a planned bill would increase fines against legal persons for all offences but did not provide details.

Sanctions and confiscation in practice

333. As mentioned, no legal persons have ever been convicted or sanctioned for foreign bribery in Austria. In one case, ***Financial Institution I (Azerbaijan, Syria)***, the Supreme Court sentenced one legal person to a fine of EUR 500 000, but only for tax offences. Part of the fine (EUR 375 000), was conditionally

[90] See OECD (2020), WGB Phase 4 Report on the Netherlands, para. 203; OECD (2019), WGB Phase 4 Report on Hungary, para. 96; OECD (2021), WGB Phase 4 Report on France, para. 394; OECD (2010), WGB Phase 3 Report on the US, para. 129; OECD (2012), WGB Phase 3 Report on the UK, para. 49, respectively.

suspended for a probation period of three years. This suggests that the conditional suspension of fines might indeed be applied often.

Commentary

The lead examiners welcome the fact that Austria has taken some first steps to implement the Working Group's recommendation to increase the fines for legal persons for foreign bribery. Nevertheless, they note that these fines are still below the Convention's standards as interpreted by the Working Group. The lead examiners therefore consider that Phase 3 Recommendation 1(c) has only been partially implemented and strongly recommend that Austria amend its legislation to ensure that sanctions against legal persons for foreign bribery are effective, proportionate, and dissuasive.

C.3.2. Measures available under non-trial resolutions

334. As mentioned above, legal persons can obtain a *Diversion* or *Withdrawal of prosecution due to co-operation* (see section C.2.2) In such cases, criminal sanctions cannot be applied, but the entity may be asked to adopt one of the following *diversion* measures: (*i*) the payment of a sum of money plus the costs of proceedings; (*ii*) a probation period up to 3 years associated with the entity's agreement to adopt technical, organisational or personnel measures to prevent the commission of further offences; or (*iii*) an explicit commitment to provide certain non-profit services free of charge within a period of no more than six months to be determined (VbVG Sec. 19 and CPC Sec. 198-209a). Under *Diversion*, companies may pay up to EUR 1.5 million (50 daily rates). Under *Withdrawal due to co-operation*, the sum of money is up to EUR 3 million (100 daily rates).

335. The sums that legal persons may pay under these resolutions are not meant to be criminal sanctions but should still have the purpose to deter further offences. Like for the criminal fines available, these *diversion* payments may be too low to be effective, proportionate, and dissuasive, especially for big companies. Moreover, it is not clear if the three types of remediation measure can be imposed cumulatively. In particular, it would be important that companies can be required to both pay a sum and adopt anti-corruption compliance programmes. In addition, forfeiture of the proceeds of bribery should always be required, when appropriate, as already underlined in section B.6.2.

Commentary

The lead examiners recommend that Austria, with regard to Diversion and Withdrawal due to co-operation for legal persons, (i) increase the level of the monetary sums to be paid as diversion measures, to ensure that foreign bribery resolved by non-trial resolutions is met by effective, proportionate, and dissuasive sanctions; and (ii) ensure that diversion measures can apply cumulatively, so that companies can always be subject to a probation period associated with a requirement to develop effective internal controls, ethics, and compliance measures.

C.3.3. Debarment from public procurement

336. The final conviction of a company for the corruption offences under CC Sec. 304-309, which include foreign bribery, constitutes a mandatory ground for exclusion from public procurement pursuant to Sections 78 and 249 of Austria's Federal Procurement Act ("FPA 2018"), and Section 44 of the Federal Act on Concessions.[91] Debarment also applies in case of the final conviction of a person who is a member of the company's administrative, management or supervisory body, or who has representation, decision-making or control powers. In addition, a final conviction for offences under CC Sec. 302, 307, 308 and 310 constitutes a mandatory reason for exclusion pursuant to Section 57 of the Federal Procurement Act in the

[91] Federal Procurement Act and Federal Act on Concessions, both in Federal Law Gazette I 65/2018.

Defence and Security Sector.[92] It is unclear why public procurement in the defence and security sector does not include mandatory exclusion for offences under CC Sections 307a (bribery for an act in line with duties) and 307b (bribery to influence a public official's activity).

337. Companies are excluded from public procurement for a maximum of five years from the date of the final conviction. Nevertheless, they may avoid debarment by taking self-cleaning measures to prove their "professional reliability". To that end, a company must demonstrate that it has taken "specific technical, organisational, personnel or other measures that are suitable to prevent the relevant criminal acts or misconduct from being committed again". In particular, the company must prove that: (1) it has paid or undertaken to pay compensation for any damage caused by a crime or misconduct, (2) it has cooperated fully with the investigative authorities in clarifying all facts and circumstances relating to the crime or misconduct; and (3) it has implemented effective measures like a high-quality reporting and control system, the involvement of an internal audit body to regularly review compliance with the relevant regulations, or the introduction of internal liability and compensation rules to ensure compliance with the relevant regulations (see FPA 2018 Sec. 83; the other Acts contain similar provisions).

338. In addition to a final conviction for foreign bribery, a company can also be debarred if it "has committed serious misconduct in the course of his professional activity" (FPA 2018 Sec. 78(1)(5)). Austrian authorities confirmed that this provision could apply in foreign bribery cases, provided that the misconduct is sufficiently substantiated by evidence. In Phase 3, the Working Group had recommended that Austria consider routinely checking debarment lists of multilateral financial institutions in relation to public procurement contracting (recommendation 9(c)). In August 2024, the MoJ issued a circular encouraging all public contracting authorities to review, where appropriate, such debarment lists when evaluating the eligibility of companies. This recommendation has therefore been implemented.

339. The examination and application of the grounds for exclusion is carried out autonomously by the public contracting authorities, who have no reporting obligations in this regard. Austrian authorities stated that no guidance or training is currently provided to contracting authorities.

Commentary

The lead examiners are satisfied that, in line with the Anti-Bribery Recommendation, Austria's legislation allows contracting authorities to debar from public procurement companies determined to have committed foreign bribery, and to take into account in their decision, as mitigating factors, remedial measures taken by companies. Given the absence of guidance on this, however, they recommend that Austria provide guidance and training to relevant public contracting authorities on remedial measures which may be adopted by companies, including internal controls, ethics and compliance programmes or measures, and the assessment of their adequacy.

The lead examiners note that debarment in the defence and security sectors is limited to convictions for bribery in breach of duties (CC 307). While this limitation may be in line with Anti-Bribery Recommendation XXIV.i, as it applies to domestic and foreign bribery alike, they consider that it may unduly limit debarment options in a sector that is particularly exposed to foreign bribery risks. They therefore recommend that Austria consider extending debarment under Federal Procurement Act in the Defence and Security Sector Sec. 57 to final convictions for the active bribery offences under CC Sec. 307a and 307b.

As a positive development, the lead examiners note that a 2024 MoJ circular encourages all public contracting authorities to review, where appropriate, debarment lists of multilateral financial institutions when evaluating the eligibility of companies in a procurement procedure.

[92] Federal Procurement Act in the Defence and Security Sector, Federal Law Gazette I 10/2012.

C.4. Engagement with the private sector

340. Governmental efforts to raise awareness of foreign bribery risks and prevention among the private sector appear to be insufficient considering Austria's exposure to such risks. The BAK organises yearly an "anti-corruption day" with national and international experts and involving public and private stakeholders. It also disseminates post-event information. The BAK did not report initiatives specifically targeting foreign bribery, however. Austria's Federal Ministry for European and International Affairs does not appear to promote an active role of public officials posted abroad in raising awareness of risks, providing information, and assisting enterprises confronted with bribe solicitation. Some of these efforts, however, are delegated to the Chamber of Commerce, for which there is mandatory membership. According to on-site participants, the Chamber of Commerce has offices worldwide which are very much involved in supporting companies working internationally. It also provides information materials, including on corruption risks. These provide a very synthetic and general overview, however, and do not mention the Anti-Bribery Convention.

341. In Phase 3, the Working Group had recommended that Austria "develop guidelines on organisational measures for business regarding the fight against foreign bribery" (recommendation 1(b), second part). Austria's initiatives to incentivise anti-corruption compliance are also very limited, however. Austrian authorities provided information on activities undertaken by Austria's National Contact Point to promote the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, which include standards on combating bribery and other forms of corruption. While there is no governmental guidance on the adoption of adequate anti-corruption compliance programmes, some support is provided by the Chamber of Commerce and Federation of Austrian Industries, which represents the largest companies.

342. Representatives of large and multinational Austrian companies met on-site showed a good level of awareness of foreign bribery and reported the adoption of elaborate anti-corruption compliance programmes and measures in their companies. However, they confirmed that corporate efforts to prevent and detect foreign bribery are mainly undertaken in reaction to enforcement efforts by foreign jurisdiction, and in compliance with foreign standards and guidance. Company representatives also reported that awareness of foreign bribery is more limited in small and medium-size enterprises (SMEs). For example, companies sometimes need to have very basic discussions on compliance and ethics with SMEs, including on the utility of certain anticorruption termination clauses. They suggested that the guidance and support provided by business associations to SMEs should be improved.

Commentary

The lead examiners observe that governmental efforts to raise awareness of foreign bribery risks and prevention among the private sector appear to be insufficient considering Austria's exposure to such risks. They therefore recommend that Austria (i) further raise awareness of the risk of foreign bribery in Austrian companies, including SMEs, that operate in higher risk countries and sectors, and provide guidance on how to mitigate the risk; and (ii) develop guidelines for officials and business associations on how to support Austrian companies operating abroad that may experience bribe solicitation in the course of international business.

The lead examiners also recommend that Austria take a more proactive approach to encourage (i) companies, including SOEs and SMEs, to develop and adopt adequate internal controls, ethics and compliance programmes or measures specifically targeted at preventing and detecting foreign bribery, and (ii) business organisations and professional associations, where appropriate, in their efforts to encourage and assist companies, in particular SMEs, in developing internal controls, ethics, and compliance programmes or measures specifically targeted at preventing and detecting foreign bribery.

Conclusions

343. The Working Group commends Austria for the progress made in foreign bribery enforcement since Phase 3, as well as for obtaining its first convictions of natural persons for foreign bribery. Despite these positive developments, however, the overall state of foreign bribery enforcement raises concerns over the following significant issues. Litigated foreign bribery cases have yielded a high number of acquittals which may be due to recurring issues in the way the foreign bribery offence is interpreted. In particular, certain court decisions have interpreted the Criminal Code notion of bribery for an act "in breach of duties" in a way that requires proof of elements beyond those of the foreign bribery offence under Anti-Bribery Convention Article 1.

344. Enforcement against legal persons in foreign bribery cases is very limited because of obstacles relating to the interpretation and application of the corporate liability regime, as well as prosecutorial practices in foreign bribery proceedings. The Working Group commends the adoption of guidelines on the legislation on corporate liability, which aim to provide support on the interpretation of the law and encourage prosecutors to apply the corporate liability regime. However, more efforts are needed to encourage proactive corporate enforcement, especially in foreign bribery cases. Despite an increase since Phase 3, sanctions for legal persons remain too low to be effective, proportionate, and dissuasive.

345. The Working Group expresses grave concerns about the vulnerability of the prosecutorial authorities vis-á-vis potential political interference in criminal justice, concerns supported by serious allegations which have also been documented in a 2024 report by a commission of independent experts established by the Minister of Justice. The Working Group nevertheless commends Austria for its demonstrated willingness to address these issues in a transparent manner and encourages the authorities to continue these efforts.

346. Regarding the implementation of the outstanding Phase 3 recommendations, the Working Group considers that since the last Phase 3 follow-up, Austria has fully implemented recommendations 1(b)(first part) on guidelines clarifying that corporate prosecution for foreign bribery is in the public interest, 4(a) on impediments to obtaining banking data, 4(e) on law enforcement capacities, 5 on MLA and bank secrecy, and 9(c) on checking debarment lists of IFIs in public procurement, and has partially implemented recommendations 1(c) on increasing the fines for legal persons and 7(a) on the false accounting offence. Recommendation 7(e) on private-sector whistleblower protection remains partially implemented, while recommendations 1(b)(second part) on anti-bribery compliance guidelines for businesses and 7(c) on external auditors' reporting remain not implemented.

347. In conclusion, based on the findings of this report, the Working Group acknowledges the good practices and positive achievements listed in Part 1 below and makes the recommendations set out in Part 2. The Working Group also identifies issued to be followed up in Part 3. The Working Group invites Austria to report in writing in two years (i.e., October 2026) on its implementation of all recommendations, foreign bribery enforcement efforts, and developments related to the follow-up issues.

Part 1. Good practices and positive achievements

348. The report has identified several positive developments regarding Austria's implementation of the Convention and related instruments. It is still too early, however, to ascertain whether these represent good practices and positive achievements that will prove effective in combating foreign bribery.[93]

349. Since Phase 3, Austria has significantly increased its capabilities to process and analyse significant amounts of digitalised data in criminal proceedings, including by acquiring new software. Austria also guarantees the availability of financial and IT expertise for the law enforcement authorities specialised in anti-corruption. In addition, these authorities now have unrestricted access to the central bank account registry as well as the registry of beneficial owners. All these improvements in the resources available to the specialised police and prosecutors may greatly support foreign bribery enforcement.

350. Significant changes were also made to Austria's anti-money laundering and counter-terrorist financing regime since Phase 3. In particular, the fact that Austria's Financial Intelligence Unit (A-FIU) has been established as a specialised unit within the Federal Criminal Police provides access to a wide range of databases and enhances the efficiency and timeliness of law enforcement action. It should also facilitate information exchange with law enforcement authorities both domestically and internationally.

351. With the adoption of the Whistleblower Protection Act in 2023, Austria has established for the first time a general framework for the protection of whistleblowers in the public and private sector. Several features of the new regime are in line with international standards. The new framework has some serious limitations that should be rectified as soon as possible, however. On the other hand, a very positive aspect is that whistleblowers can directly file external reports to the Federal Bureau of Anti-Corruption *inter alia* through an online system that ensures their anonymity and provides the option of bi-directional communications, which can be very useful for investigators.

Part 2. Recommendations of the Working Group on Bribery to Austria

Recommendations to enhance detection of the foreign bribery offence

1. The Working Group recommends that Austria's next anti-corruption strategy specifically address Austria's foreign bribery risks and possible measures to fight foreign bribery, encompassing prevention, detection, awareness-raising, and enforcement [Anti-Bribery Recommendation III and IV.i].
2. Regarding detection and reporting by Austrian officials, the Working Group recommends that Austria:
   (a) clarify, by any appropriate means, that (i) the exceptions according to CPC Sec. 78(2)1.-2. are not applicable to the foreign bribery offence, and (ii) the reporting obligation should be performed by every public official via the available channels in the fastest possible way, so that law enforcement action can be initiated without delay [Anti-Bribery Recommendation XXI.i-iii]; and
   (b) (i) revise the curriculum for staff of diplomatic missions to include proactive detection of foreign bribery committed by Austrian citizens and companies abroad; (ii) establish procedures for media monitoring by its diplomatic missions to detect foreign bribery; and (iii) include Austrian legal entities to the reporting obligation for diplomatic missions (Regulation for the Austrian Diplomatic Service Sec. 19(2)3) [Anti-Bribery Recommendation XXI.iv-vi].

[93] See the Phase 4 Monitoring Guide, which states that Phase 4 evaluations should also reflect good practices and positive achievements which have proved effective in combating foreign bribery and enhancing enforcement.

3. Regarding export credits, the Working Group recommends that:

   (a) Austria ensure that (i) the applicants' declarations cover "equivalent measures", such as non-trial resolutions, as well as publicly-available arbitral awards finding that the relevant company or individual has engaged in bribery; (ii) enhanced due diligence, as well as commitments to refrain from engaging in foreign bribery, also extend to other relevant parties, where appropriate, such as affiliated companies or joint-venture partners, in line with the measures described in 2019 Export Credits Recommendation V.3 and VI.2.e; and (iii) OeKB personnel receive appropriate guidance and training on the detection of potential foreign bribery schemes, covering in particular foreign bribery risks, red flags, and typologies [Anti-Bribery Recommendation XXI.vi and 2019 Export Credits Recommendation V.3 and 4, and VI.2.e]; and

   (b) the Ministry of Finance promptly report to law enforcement authorities any credible allegation or evidence that bribery was involved in the award or execution of the supported transaction [Anti-Bribery Recommendation XXI.iii and 2019 Export Credits Recommendation IV.6, VII.1, and VIII.1].

4. Regarding official development assistance, the Working Group recommends that Austria:

   (a) ensure that ADA personnel receive appropriate guidance and training on the detection of potential foreign bribery schemes, covering in particular foreign bribery risks, red flags, and typologies [Anti-Bribery Recommendation XXI.iii, iv and vi and 2016 ODA Recommendation III.3];

   (b) clarify, by any appropriate means, that ADA personnel should report to Austrian law enforcement authorities any suspicions of foreign bribery and related offences involving Austrian companies or individuals [Anti-Bribery Recommendation XXI.iii and vi and 2016 ODA Recommendation III.7.ii]; and

   (c) ensure that applicants for ODA contracts are required to declare that they have not been convicted of corruption offences [2016 ODA Recommendation III.6.ii].

5. Regarding detection through the anti-money laundering system, the Working Group recommends that: (i) Austria evaluate and incorporate foreign bribery and connected money laundering into its next NRA to raise awareness amongst stakeholders; and (ii) in line with the identified risk, the A-FIU develop and disseminate typologies of foreign bribery schemes and offer foreign bribery-specific training [Anti-Bribery Recommendation XXI.v].

6. Regarding detection through accounting and auditing, the Working Group recommends that Austria (i) clarify, by appropriate measures, that accountants are not required to investigate suspicions of criminal acts beyond the initial suspicion required to initiate criminal proceedings, and (ii) consider requiring the external auditors to report suspected acts of foreign bribery to competent authorities independent of the company, such as law enforcement and regulatory authorities and, in that case, ensure that auditors making such reports on reasonable grounds are protected from legal action [Anti-Bribery Recommendation XXIII.B.v].

7. Regarding self-reporting by companies, the Working Group recommends that Austria provide clear and publicly accessible information on the advantages that companies may obtain through voluntary disclosures and full co-operation with law enforcement authorities [Anti-Bribery Recommendation VIII and XVIII.iii].

8. Regarding whistleblower protection and detection through whistleblowing, the Working Group recommends that Austria:

   (a) amend its legislation to ensure that protection is also afforded in relation to (i) reports concerning suspicions of offences related to foreign bribery such as false accounting, and (ii) reports made by whistleblowers from entities with fewer than 50 employees [Anti-Bribery Recommendation XXII];

   (b) ensure that (i) all relevant protections are available to whistleblowers who report anonymously, but later decide to reveal their identity; (ii) interim relief pending the resolution of legal proceedings is available to whistleblowers; (iii) in administrative, civil, or labour proceedings, the burden of proof is shifted on retaliating natural and legal persons to prove that the alleged adverse action against a reporting person was not in retaliation for the report; and (iv) the law provides for effective, proportionate, and dissuasive sanctions for those who retaliate against reporting persons [Anti-Bribery Recommendation XXI.ii and XXII.iv, vii, viii, and ix]; and

   (c) (i) clarify that all relevant protections are available to whistleblowers who report suspicions of foreign bribery and related offences directly to the BAK or WKStA; and (ii) undertake further initiatives to raise awareness and provide information on the legal and institutional framework, protections, and remedies available to potential whistleblowers [Anti-Bribery Recommendation XXII.xii].

9. Regarding detection through media reports, the Working Group recommends that Austria encourage competent authorities to adopt a more proactive approach to detection through domestic and foreign media reports and consider using appropriate media screening tools [Anti-Bribery Recommendation VIII].

Recommendations to enhance enforcement of the foreign bribery offence

10. Regarding the foreign bribery offence and defences, the Working Group recommends that Austria:

   (a) clarify, by any appropriate means, that the definition of foreign public official under CC Sec. 74(1)(4a) also covers any person exercising a public function for a foreign country, including for the performance of a task delegated by it in connection with public procurement, as well as any official or agent of a public international organisation [Convention Art. 1(4a)];

   (b) take appropriate measures to ensure that the criminal law exceptions for charitable contributions do not unduly create obstacles to criminalising payments made for the purpose of bribing foreign public officials [Convention Art. 1];

   (c) clarify, by any appropriate means (including by amending its legislation if necessary), that foreign bribery cases should focus on the briber's intent of offering, promising, or giving a bribe to obtain a foreign public official's act or omission. To that end, the foreign bribery offence should apply, *whether or not* (i) the public official took a decision within the boundaries of his/her discretionary decision-making powers, (ii) the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business, and (iii) the public official was in a position to influence, and indeed influenced, the matter for which the bribe was paid [Convention Art. 1]; and

   (d) provide comprehensive training and awareness-raising to investigators, prosecutors, and judges on foreign bribery, also covering the aspects mentioned in recommendation 10(c) as well as the proof of the intent requirement in foreign bribery cases, especially based on circumstantial evidence [Convention Art. 1].

11. Regarding the investigation and prosecution of foreign bribery, the Working Group recommends that Austria:

    (a) revise its criminal procedure rules to ensure that foreign bribery cases can be referred to the specialised court chambers without undue delays, when appropriate [Anti-Bribery Recommendation IX];

    (b) to mitigate the detrimental effect of increased workload, keep increasing the human and material resources available for investigation and prosecution of the foreign bribery offence at the WKStA, including the personnel and specialised expertise that permit effective enforcement in foreign bribery cases [Anti-Bribery Recommendation VII];

    (c) take all necessary measures to ensure that law enforcement authorities act promptly and proactively so that complaints of bribery of foreign public officials are seriously investigated and credible allegations are assessed by competent authorities [Convention Art. 1 and Anti-Bribery Recommendation VI.ii];

    (d) urgently take meaningful steps to revise the current framework of reporting and instructions, in order to shield prosecutors from undue interference prohibited under Article 5 of the Anti-Bribery Convention [Convention Art. 5]; and

    (e) ensure by any appropriate means, including by amending its legislation if necessary, that in all foreign bribery cases the statute of limitations allows an adequate period of time for investigation and prosecution if the offer of the bribe has been followed by other material elements of the offence based on the same intent (e.g. the payment of the bribe) [Convention Art. 6 and Anti-Bribery Recommendation IX.ii].

12. Regarding international co-operation, the Working Group recommends that Austria:

    (a) consider extending its national laws so that these can constitute a legal basis for MLA in non-criminal proceedings against a legal person within the scope of the Anti-Bribery Convention, when the request comes from a non-European Convention Party [Convention Art. 9(1) and Anti-Bribery Recommendation XIX.A.iv];

    (b) encourage competent law enforcement authorities to consider setting up joint or parallel investigative teams when conducting foreign bribery investigations and prosecutions, in conformity with national laws and relevant treaties and arrangements [Anti-Bribery Recommendation XIX.C.v];

    (c) maintain comprehensive and detailed statistics on incoming and outgoing foreign bribery related MLA, as this is needed to assess the effectiveness of the international co-operation regime [Anti-Bribery Recommendation XIX]; and

    (d) clarify, by any appropriate means, that the criterion of “Austria’s interest” for refusing an extradition request cannot be interpreted as national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal persons involved in a foreign bribery case [Convention Art. 5].

13. Regarding offences related to foreign bribery, the Working Group recommends that:

    (a) Austrian law enforcement authorities provide guidance to prosecutors involved in foreign bribery cases on good practices in prosecuting foreign bribery, including on the use of concurrent or alternative charges [Convention Art. 1];

    (b) Austria take further steps to improve its false accounting offence, so that it covers the full range of conduct described in Article 8 of the Convention [Convention Art. 8]; and

(c) through appropriate measures, Austria (i) clarify that the required level of suspicion to initiate administrative tax proceedings is not higher than the simple suspicion required to initiate criminal proceedings, and (ii) expand the *ex officio* initiation of tax procedures to other suspected offences regardless of their criminal prosecution [Anti-Bribery Recommendation XX].

14. Regarding the conclusion foreign bribery cases, including through non-trial resolutions, the Working Group recommends that Austria:

(a) consider the possibility of establishing a form of non-trial resolution that would allow both natural and legal persons to settle foreign bribery cases with the prosecutor's office, with or without admission of guilt. To that end, Austrian authorities could examine NTRs available in other countries with similar legal systems [Anti-Bribery Recommendation XVII];

(b) take appropriate measures to ensure that discontinuation of proceedings under CPC Sec. 191 is only applied under exceptional circumstances in foreign bribery cases and, in such cases, the proceeds of foreign bribery can be subject to forfeiture where appropriate [Convention Art. 3];

(c) clarify, by any appropriate means, (i) under which circumstances Diversion may be applied in foreign bribery cases, in particular in terms of voluntary disclosure and level of co-operation expected from defendants; (ii) under which circumstances a perpetrator may assume that Withdrawal due to co-operation is available in cases in which the value of the bribe is under EUR 3 000; and (iii) whether prosecutors can offer suspects the avenue of Withdrawal due to co-operation [Anti-Bribery Recommendation XVIII.ii];

(d) ensure that following a Diversion or Withdrawal of prosecution due to co-operation, prosecutors always seek the forfeiture of any proceeds of foreign bribery (or an equivalent sum), where appropriate [Convention Art. 3(3) and Anti-Bribery Recommendation XVIII.v];

(e) (i) provide clear and publicly accessible information on Diversion and Withdrawal due to co-operation; and (ii) where appropriate, and consistent with data protection rules and privacy rights, as applicable, make public elements of Diversions and Withdrawals due to co-operation in foreign bribery cases, including the main facts and the natural and/or legal persons concerned, the relevant considerations for resolving the case with a non-trial resolution, and the nature of the diversion measures imposed and the rationale for applying these [Anti-Bribery Recommendation XVIII.iii and iv]; and

(f) make public and accessible, consistent with data protection rules and privacy rights, as applicable, important elements of resolved cases of foreign bribery and related offences, including the main facts, the natural or legal persons sanctioned, the approved sanctions, and the basis for applying such sanctions [Anti-Bribery Recommendation XV.iii].

15. Regarding sanctions and confiscation, the Working Group recommends that Austria:

(a) provide training to judges in order to raise awareness of the serious nature of the foreign bribery offence and underline the importance of imposing effective, proportionate, and dissuasive sanctions in foreign bribery cases, where appropriate [Convention Preamble and Art. 3];

(b) further develop its guidelines on confiscation (i) to ensure that the proceeds of foreign bribery, or property the value of which correspond to that of such proceeds, can be subject to seizure and confiscation, and (ii) to provide guidance and examples on identifying, quantifying, and confiscating (including by equivalent) bribes and the proceeds of bribery of foreign public officials, and raise awareness of law enforcement and other competent authorities on the importance of such confiscation [Convention Art. 3(3) and Anti-Bribery Recommendation XVI.iii and iv];

(c) amend its legislation to ensure that sanctions against legal persons for foreign bribery are effective, proportionate, and dissuasive [Convention Art. 3 and Anti-Bribery Recommendation XV.i]; and

(d) with regard to Diversion and Withdrawal due to co-operation for legal persons, (i) increase the level of the monetary sums to be paid as diversion measures, to ensure that foreign bribery resolved by non-trial resolutions is met by effective, proportionate, and dissuasive sanctions; and (ii) ensure that diversion measures can apply cumulatively, so that companies can always be subject to a probation period associated with a requirement to develop effective internal controls, ethics, and compliance measures [Convention Art. 3 and Anti-Bribery Recommendation XVIII.v and XXIII.D.iii].

16. Regarding public procurement, the Working Group recommend that Austria:

(a) provide guidance and training to relevant public contracting authorities on remedial measures which may be adopted by companies, including internal controls, ethics and compliance programmes or measures, and the assessment of their adequacy [Anti-Bribery Recommendation XXIV.iv]; and

(b) consider extending debarment under Federal Procurement Act in the Defence and Security Sector Sec. 57 to final convictions for the active bribery offences under CC Sec. 307a and 307b [Anti-Bribery Recommendation XXIV.i].

Recommendations to enhance liability of, and engagement with, legal persons

17. Regarding the liability of legal persons and enforcement of the foreign bribery offence against legal persons, the Working Group recommends that Austria:

(a) ensure, including by amending its legislation if necessary, that (i) liability is not excluded if bribes are paid with a view to obtain an advantage for a related legal entity or third-party beneficiary; (ii) liability can result from all acts of foreign bribery, whether they are aimed at obtaining a pecuniary or non-pecuniary advantage; (iii) there is no requirement to prove that the legal person that committed foreign bribery actually obtained an advantage in return; and (iv) the mere existence of internal controls, ethics and compliance programmes or measures does not fully exonerate the legal person from its liability [Convention Art. 2 and Anti-Bribery Recommendation XXIII.D.iii];

(b) ensure that its system for the liability of legal persons does not restrict the liability to cases where the natural person or persons who perpetrated the foreign bribery offence are prosecuted or convicted, in particular when one natural person perpetrator cannot be identified due to the complexity of corporate decision-making structures [Convention Art. 2 and Anti-Bribery Recommendation Annex I.B.2]; and

(c) proactively pursue criminal charges against legal persons, where appropriate, for foreign bribery and related offences such as false accounting and money laundering [Convention Art. 2 and Anti-Bribery Recommendation VI.iii].

18. Regarding engagement with legal persons, the Working Group recommends that Austria:

(a) (i) further raise awareness of the risk of foreign bribery in Austrian companies, including SMEs, that operate in higher risk countries and sectors, and provide guidance on how to mitigate the risk; and (ii) develop guidelines for officials and business associations on how to support Austrian companies operating abroad that may experience bribe solicitation in the course of international business [Anti-Bribery Recommendation IV.ii and XII.i and ii]; and

(b) take a more proactive approach to encourage (i) companies, including SOEs and SMEs, to develop and adopt adequate internal controls, ethics and compliance programmes or measures specifically targeted at preventing and detecting foreign bribery, and (ii) business organisations and professional associations, where appropriate, in their efforts to encourage and assist companies, in particular SMEs, in developing internal controls, ethics, and compliance programmes or measures specifically targeted at preventing and detecting foreign bribery [Anti-Bribery Recommendation IV.ii and XXIII.C.i and ii].

Part 3. Follow-up issues

19. The Working Group will follow up, as case law and practice develop, the following issues:

(a) whether staff of tax authorities receive regular training and awareness raising on the applicable procedures concerning detection of suspected foreign bribery [Anti-Bribery Recommendation XXI];

(b) the implementation and application of the Whistleblower Protection Act in practice and, in particular, whether it contributes to the detection of foreign bribery allegations [Anti-Bribery Recommendation XXII];

(c) whether courts are able to rely on circumstantial evidence to prove criminal intent in foreign bribery cases [Convention Art. 1];

(d) whether the defences of error of law (CC Sec. 9) and state of emergency (CC Sec. 10) are applied in foreign bribery cases [Convention Art. 1];

(e) whether extradition may be refused when proceedings in Austria were discontinued for grounds other than the merits of the case [Convention Art. 10];

(f) whether in a foreign bribery case, ongoing investigations in foreign jurisdictions over the same facts would prevent Austrian law enforcement authorities from opening a domestic money laundering investigation [Convention Art. 7];

(g) the application of Diversion and Withdrawal of prosecution due to co-operation in foreign bribery cases [Convention Art. 3 and Anti-Bribery Recommendation XVIII];

(h) sanctions imposed in foreign bribery cases [Convention Art. 3];

(i) whether confiscation of the proceeds of foreign bribery, including by equivalent, is sought by prosecutors and imposed by courts [Convention Art. 3(3)];

(j) whether legal persons can be held liable for foreign bribery committed by using intermediaries, including related legal persons and other third parties [Convention Art. 2 and Anti-Bribery Recommendation Annex I.C.1]; and

(k) whether authorities are able to exercise appropriate jurisdiction over legal persons regardless of whether they have jurisdiction over the natural person who committed foreign bribery [Convention Art. 2 and Anti-Bribery Recommendation Annex I.B.4.c].

Annex 1. Austria's foreign bribery enforcement actions

Note: In this table, "NP" refers to "natural person", "LP" refers to "legal person".

Concluded Foreign Bribery Cases					
Case (alphabetical order)	**Date of last decision**	**Detection**	**Parties charged**	**Facts**	**Resolution**
				Concluded Trials	
Arms Trade (Slovenia)	2015	SAR (bank)	2 NPs	An Austrian individual acted as an intermediary, together with a foreign national, in the alleged bribery of public officials in Croatia and Slovenia by a Finnish arms manufacturing company. Around 2007, the Austrian individual paid EUR 900 000 to a local intermediary, and later transferred further sums to another intermediary, all allegedly destined for public officials in Slovenia. The investigation was opened in 2008. The Public Prosecutor's Office Vienna charged the Austrian intermediary with bribery (CC Sec. 307(1)(1)), spying on a business or trade secret for the benefit of a foreign country, criminal association, fraud, and tax evasion. The other intermediary was only charged with criminal association because he was already prosecuted for trading in influence in Slovenia.	1 NP was convicted of bribery, attempted fraud, and tax evasion, but acquitted of the other charges. 1 NP was consequently acquitted of the criminal association charge.
Financial Institution I (Azerbaijan, Syria)	2022	Criminal complaint filed by a lawyer and a member of the internal audit board	9 NPs 2 LPs	Two wholly owned subsidiaries of an Austrian financial institution allegedly bribed officials of the national banks of Azerbaijan and Syria to obtain banknote printing and coin minting contracts between 2005 and 2009. The individuals involved included directors, managers, and board members of the two companies. The alleged bribe payments amounted to at least EUR 15 million and were paid via foreign accounts set up in offshore companies. The investigation was opened in 2011, and the Public Prosecutor's Office Vienna charged nine individuals with various offences including bribery (CC Sec. 307), money laundering (CC Sec. 165), and breach of trust (CC Sec. 153(1) &(2), second case). The two subsidiaries of the financial institution were also prosecuted.	5 NPs were convicted of offences including foreign bribery. 4 NPs were acquitted (one of them was only convicted for tax evasion). The 2LPs were found not responsible for the bribery offence, but one was imposed a fine for tax evasion.
Hospital Project (IFI)	2019	Incoming MLA	3 NPs 1 LP	In 2009-2010, the managing director of an Austrian company allegedly promised more than EUR 300 000, and paid EUR 33 000, to an agent of an international financial institution (IFI). In exchange, the latter would have submitted expert opinions in favour of the Austrian company for awarding engineering contracts for a hospital project in Romania. The WKStA initiated preliminary proceedings in 2014, and then charged the managing director with commercial bribery (CC Sec. 309(2)&(3), second case), as well as breach of trust (CC Sec. 153(1) &(3), second case) for having concealed the payment mentioned above through a fake contract with a consultancy firm. Two officers of the consultancy firm were charged with aiding and abetting the breach of trust offence. The WKStA also filed a request to apply a fine against the Austrian company for	All NPs were acquitted for lack of evidence. Consequently, the proceedings against the LP were dismissed. The WKStA appeals against the acquittals were rejected.

Concluded Foreign Bribery Cases					
Case (alphabetical order)	**Date of last decision**	**Detection**	**Parties charged**	**Facts**	**Resolution**
				the commercial bribery committed in its benefit.	
Mining equipment (Poland)	2022	Incoming MLA	2 NPs	Between 1996 and 2007, a managing director and a manager of an Austrian company allegedly instructed the managing director and the commercial director of a Polish subsidiary to bribe officials of Polish mining companies, including SOEs. The "commissions" paid were aimed to obtain numerous contracts for the sale, lease, or maintenance of mining machinery and equipment. The WKStA charged the managing director and manager of complicity in breach of trust (CC Sec. 153), because of their participation in the breach of trust committed by the Polish company officials. No legal person was prosecuted.	The 2 NPs were acquitted.
Port and Viaduct Projects (Croatia)	2021	Incoming MLA	4 NPs	In 2008-2009, managers of an Austrian construction and engineering firm allegedly paid bribes to secure contracts for the development of a port and a viaduct in Croatia. The alleged bribes, amounting at least to EUR 800 000, were paid to directors of the Croatian port authority and state-owned motorway operator. In 2014, the investigation was assigned to the WKStA by another PPO. The WKStA charged both managers with bribery (CC Sec. 307(1)(1)), as well as one with breach of trust (CC Sec. 153(1)&(2) second case) and the other with aggravated fraud (CC Sec. 146 and 147(3)). An alleged intermediary and one of the Croatian public officials were also charged with participating in the breach trust offence. No legal person was prosecuted.	3 NPs were acquitted of all charges. 1 NP obtained a termination of the proceedings because he had received a conviction for the same facts in Croatia (*ne bis in idem*). The WKStA appeals against the acquittals were rejected.
Rail Transport I (Hungary)	2017	Criminal complaint filed by the company against its manager	1 NP	In 2007-2009, the director of a subsidiary of an Austrian railway company made payments amounting to EUR 6.6 million to a Hungarian consulting firm, which was retained without the authorisation of the supervisory board and for no valuable performance in return. The payments were allegedly made to pay bribes that should have facilitated the acquisition of a subsidiary of Hungary's national railway company in the context of its privatisation. The investigation began in 2010, and the WKStA charged one individual with breach of trust (CC Sec. 153) in relation with the unjustified payments. Foreign bribery was never charged for lack of evidence.	The only NP charged was acquitted.
Windfarm Project (Hungary)	2019	Media	10 NPs	In 2008-2010, Austrian and Hungarian subsidiaries of an Austrian energy company allegedly made payments destined to bribe the employees of a Hungarian energy supply company and officials of the Hungarian energy office in order to obtain a contract for a wind park project. They made payments amounting to EUR 3.5 million to an Austrian consulting company and its Hungarian subsidiary, which allegedly acted as intermediaries. The WKStA initiated preliminary proceedings in 2011 and eventually charged eleven individuals (one deceased before the end of the trial) with breach of trust (CC Sec. 153(1)&(3) second case), foreign bribery (CC Sec. 307(1)&(2) second case), and commercial bribery (CC Sec. 309(2)). No legal person was prosecuted.	1 NP accepted a *Diversion* at trial. 9 NPs were acquitted (four of them were convicted in the first-instance trial, but were then acquitted after the Supreme Court quashed the convictions and ordered a retrial for three of them).
Discontinued Investigations					
Airport Towers (Nigeria)	2018	Incoming MLA	-	Around 2006, an Austrian company operating in the field of aeronautic communications allegedly bribed Nigerian public officials to obtain contracts for upgrading the control	The investigation against the suspect was discontinued

Concluded Foreign Bribery Cases					
Case (alphabetical order)	**Date of last decision**	**Detection**	**Parties charged**	**Facts**	**Resolution**
				towers of four Nigerian airports. In 2010, the Public Prosecutor's Office Vienna opened an investigation against the company's CEO, but waited for the results of criminal proceedings against him which were ongoing in Nigeria.	after he was acquitted in Nigeria.
Construction Projects (Albania, Türkiye)	2019	Allegation raised in a corporate dispute	-	An Austrian construction company allegedly paid bribes to public officials in Albania and Türkiye, to win contracts for the construction of a highway and a dam, respectively. The alleged bribe payments amounted to EUR 557 000 and EUR 900 000, and were channelled through companies based in two other countries. The WKStA opened an investigation in 2015.	The investigation was discontinued for lack of evidence.
Industrial Services (Bangladesh, Brazil, and Libya)	2017	Self-report	-	An Austrian industrial services company allegedly paid bribes to public officials in Bangladesh, Brazil, and Libya to obtain the award of public contracts. In 2016, the WKStA opened an investigation after the company applied for a "leniency programme" under CPC Sec. 209a.	The investigation was discontinued for lack of evidence.
Metro Carriages (Hungary)	2014	Incoming MLA	-	An Austrian consulting firm acted as intermediary in the alleged bribery of Hungarian officials by a British firm to obtain a contract for the sale of carriages for Budapest's metro. The alleged bribes, amounting to EUR 2.3 million, were transferred to the Austrian firm in 2005 under a consultancy agreement. In 2012, the WKStA opened an investigation against three individuals involved in the activities of the consulting firm. The firm had already been dissolved by then.	The investigation was discontinued for lack of evidence.
Military Vehicles (Czech Republic)	2018	Media	-	Around 2009 an Austrian manufacturing conglomerate allegedly bribed public officials in the Czech Republic, to secure the sale of military vehicles to the Czech military. The company's head allegedly mandated a Czech lobbyist to facilitate contacts with politicians and agreed to pay a commission worth 7% of the contract's price. The contract was worth approximately EUR 762 million. The WKStA opened an investigation for attempted breach of trust, bribery, and, attempted illicit intervention. It also entered into a joint investigation agreement with the competent Czech Public Prosecutor's Office.	The investigation against the main suspect was discontinued for transfer of the proceedings to the Czech Republic. The investigations against the others were discontinued for lack of evidence.
Online Gaming (Türkiye)	2020	Criminal complaint filed by an employee	[8 NPs]	In 2007, an Austrian online gaming company allegedly bribed public officials in Türkiye, for the purpose of obtaining a valid licence from the state monopoly after a regulatory change. The alleged agreement was concluded through an Austrian consultancy and a local intermediary. A sum amounting to EUR 2 250 000 was transferred to the bank account of a third company for this purpose. In 2016, the Public Prosecutor's Office Vienna filed an indictment for breach of trust, attempted bribery, and money laundering against 8 individuals, who challenged it before the Vienna Court of Appeal. The Court rejected the indictment because the charges were not sufficiently substantiated at that stage. The prosecutor's office searched for more evidence without success. One of the Austrian consultants was nevertheless charged with money laundering, for having withdrawn some EUR	The proceedings against 8 NPs (and potentially against related legal persons) were discontinued for lack of sufficient evidence. 1 NP was acquitted of money laundering charges for lack of evidence of guilt.

Concluded Foreign Bribery Cases					
Case (alphabetical order)	**Date of last decision**	**Detection**	**Parties charged**	**Facts**	**Resolution**
				100 000 from the bank account mentioned above.	
Rail Transport II (Eastern Europe)	2021	Self-report	-	In the period from 1997 to 2009, the director of a subsidiary of an Austrian railway company and other individuals made unjustified payments to foreign companies and individuals amounting to at least EUR 25 million. Some of these payments were allegedly meant for public officials in different Eastern European countries. The investigation was opened in 2014 against several suspects, including the individuals and companies that allegedly acted as intermediaries. In 2021, the WKStA discontinued the investigation for lack of evidence.	The investigation against all suspects was discontinued under CPC Sec. 190.

Ongoing Foreign Bribery Cases					
Case	**Date of last proc. step**	**Detection**	**Parties charged**	**Facts**	**Procedural stage**
Construction contracts (South America)	2023	Foreign investigation	-	In 2010-2016, Austrian citizens in collaboration with Brazilian citizens allegedly organised numerous acts of bribery of public officials in South America to obtain construction contracts, and committed connected money laundering by using Austrian bank accounts.	The investigation is ongoing since 2016.
Diplomatic positions (countries in Africa and Oceania)	2022	Incoming MLA	-	In 2016-2021, Austrian citizens allegedly promised and partially paid bribes to a foreign ambassador to obtain certain diplomatic positions in other foreign countries (positions that might favour business opportunities).	The investigation is ongoing since 2022.
Property Developers (Türkiye)	2012	WGB meeting in 2009	-	An Austrian real estate property developer firm allegedly bribed public officials in Turks and Caicos to obtain multiple real estate projects.	The investigation has been suspended due to an ongoing investigation in Türkiye. Repeated MLA requests sent.
Renovation works (Azerbaijan)	2023	Notification from a foreign country	-	The decision maker of an Austrian company allegedly paid bribes in connection to renovation work tenders in Azerbaijan. The bribe was allegedly transferred to a public official in Azerbaijan through intermediaries.	The investigation is ongoing since 2023.
Rail Reconstruction (Romania)	2022	Incoming MLA	1 NP 1 LP	In 2009-2014 a representative of an Austrian company allegedly paid bribes to Romanian government officials to obtain preferential treatment in public tenders and recognition of claims. The investigation was initiated in November 2017, and indictment has been filed in July 2021 by the WKStA for bribery.	The trial is ongoing.
Software Licences Procurement (Romania)	2023	SARs (and a foreign whistle-blower)	5 NPs	An Austrian IT company allegedly paid bribes to Romanian public officials to obtain software licence agreements. The investigation was initiated in 2010. The indictment has been filed in January 2023 by the Public Prosecutor's Office Vienna for money laundering and breach of trust.	The trial is ongoing.

Foreign Bribery Allegations			
Case (alphabetical order)	**Date of alleged facts**	**Facts**	**Procedural stage**
Factory Building Project (Poland)	2017	An Austrian company allegedly paid bribes to Polish public officials to obtain real estate and permissions to build a new factory.	No investigation initiated in Austria. Indictment in Poland.
Financial Institution II (Croatia)	1994-2007	An Austrian financial institution allegedly bribed influential Croatian politicians, including a former Prime Minister, to facilitate its entry in the Croatian market, influence the approval of projects it financed, and facilitate the approval of the acquisition of a controlling stake by a foreign bank. The WKStA and the Public Prosecutor's Office in Carinthia investigated and prosecuted individuals in relation to other criminal allegations, including for money laundering, fraud, breach of trust, and abuse of office. The foreign bribery allegation does not appear to have been investigated.	No investigation initiated in Austria. In Croatia, a third retrial against the former Prime Minister is ongoing.
Highway Toll System Tender (Czech Republic)	2018	An Austrian IT system provider allegedly paid bribes to a Czech public official to win a highway toll system tender.	No investigation initiated in Austria.
IT System Tender (Zambia)	2017	An Austrian IT system provider allegedly paid around USD 6.5 million bribes to Zambian public officials to obtain public procurement contracts.	No investigation initiated in Austria. Indictments in Zambia.
Metro Construction I (Hungary)	2004	An Austrian construction company allegedly paid bribes to Hungarian government officials to obtain public tenders.	No investigation initiated in Austria due to expiration of the limitation period.
Metro Construction II (Hungary)	2004	An Austrian construction company allegedly paid bribes to Hungarian government officials to obtain public tenders.	No investigation initiated in Austria due to expiration of the limitation period.
Power Plant Engineering (Brazil)	2009-2012	An Austrian power plant engineering company allegedly paid USD 3 million in bribes to obtain public procurement contracts in South America.	No investigation initiated in Austria due to expiration of the limitation period
Telecom tender (Europe and Middle East)	2004-2011	A consortium of telecom companies, including an Austrian company, hired a consultant (Austrian national) who allegedly used the money received from the companies to pay bribes to key political figures in Europe and the Middle East to secure public procurement contracts. An investigation was opened in 2012 against several suspects, but it appears that it did not cover the foreign bribery allegations. In 2023, the PPO Vienna discontinued the investigation due to the lack of evidence.	The investigation did not cover the foreign bribery allegations.

Annex 2. Phase 3 Recommendations and issues for follow up

PHASE 3 RECOMMENDATIONS AND FOLLOW-UP ISSUES		2-YEAR WRITTEN FOLLOW-UP and additional written reports*
Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery		
1	Regarding the liability of legal persons for the bribery of foreign public officials, the Working Group recommends that Austria:	
	(a) Provide a written self-assessment of progress prosecuting foreign bribery cases involving legal persons one year after adoption of this report, which should include an assessment of the application in practice of the Federal Statute on Responsibility of Entities for Criminal Offences (VbVG) to foreign bribery cases, including whether in practice it meets the standards under paragraph B of Annex I of the 2009 Recommendation, and any procedural and legal obstacles to its effective application, with particular attention to the following potentially unclear aspects of the VbVG: i) its application to bribery through agents; ii) the standard of "due and reasonable care" that the prosecution must prove was not taken by a defendant legal person when foreign bribery was committed by a staff member of the legal person; iii) its application to bribery on behalf of related legal persons; and iv) the circumstances under which a legal person is considered a victim of a breach of trust; (Convention, Articles 2 and 5, 2009 Recommendation, par. V)	Fully Implemented
	(b) Issue and publicise guidelines to prosecutors clarifying that the prosecution of allegations of bribery of foreign public officials by legal persons is always required in the public interest under VbVG, subject only to clearly defined exceptions, and develop guidelines on organisational measures for business regarding the fight against foreign bribery, as was recommended already in Phase 2; (Convention, Articles 2 and 5)	Not Implemented
	(c) Increase the fines for legal persons for the foreign bribery offence, given that they are substantially lower than the fines for natural persons, and in light of the size and importance of many Austrian companies, the location of their international business operations, and the business sectors in which they are involved; (Convention, Articles 2 and 3.2) and	Not Implemented
	(d) Report in writing in one year on the study by the Austrian Government on the report by the Institute for Legal and Criminal Sociology on the effectiveness of the VbVG. (Convention, Article 2)	Fully Implemented
2	The Working Group recommends that Austria take appropriate steps within its legal system to ensure that nationality jurisdiction apply to Austrian companies that bribe abroad, including by using non-nationals as intermediaries. (Convention, Article 4.2)	Fully Implemented
3	The Working Group recommends that Austria report in writing in one year on application of its confiscation provisions to convictions of the bribery of foreign public officials. (Convention, Article 3.3)	Fully Implemented
4	Concerning the investigation and prosecution of foreign bribery cases, the Working Group recommends that Austria:	

* Following Austria's additional written follow-up reports in December 2015 [DAF/WGB/M(2015)4/REV2], December 2016 [DAF/WGB/M(2016)4/REV1], and December 2017 [DAF/WGB/M(2017)4/REV1], the Working Group determined that recommendations 4(c), 4(d), 4(e)(i), and 8(c) were fully implemented, and recommendations 4(a) and 5(ii) were partially implemented, to be closely followed up in Phase 4.

	PHASE 3 RECOMMENDATIONS AND FOLLOW-UP ISSUES	2-YEAR WRITTEN FOLLOW-UP and additional written reports*
	(a) Find a way that is appropriate and feasible within its legal system to remove the impediments to effective foreign bribery investigations caused by the routine use of remedial actions by financial institutions, and report in writing on progress in this regard in one year; (Convention, Article 5)	Partially Implemented
	(b) Consider establishing a system of penalties for addressing the situation where bearer shares are not registered pursuant to the rules requiring unlisted companies to convert bearer shares into registered shares by December 2013; (Convention, Article 5)	Fully Implemented
	(c) Find a way that is feasible and appropriate within its legal system to make it easier to identify beneficial owners of companies in which the beneficial owners are not the shareholders; (Convention, Article 5)	Fully Implemented
	(d) Ensure that, in compliance with Article 5 of the Convention, investigations and prosecutions cannot be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of natural or legal persons involved, particularly in view of the Minister of Justice's decision-making authority in foreign bribery cases; (Convention, Article 5) and	Fully Implemented
	(e) Include as a matter of urgency in its strategy for coordinating anti-corruption bodies, concrete and substantial measures for: i) further improving the capabilities of its law enforcement authorities to effectively evaluate significant amounts of digitalised data, including emails; and ii) tracing the proceeds of foreign bribery. (Convention, Article 5)	Partially Implemented
5	The Working Group recommends that Austria take immediate measures to ensure that: i) Austria provide responses to requests for mutual legal assistance (MLA) from Parties to the Anti-Bribery Convention without unnecessary delay, regardless if the request is submitted to the central authority or to a public prosecutor's office; and ii) bank secrecy does not cause unnecessary delays in providing MLA. (Convention, Article 9)	Partially Implemented
Recommendations for ensuring effective prevention and detection of foreign bribery		
6	The Working Group recommends that, where appropriate, the Federal Bureau of Anti-Corruption (BAK) provide feedback to the Austrian Financial Investigation Unit (A-FIU) about Suspicious Transactions Reports (STRs) regarding the laundering of the proceeds of foreign bribery. (Convention, Articles 5 and 7)	Fully Implemented
7	Regarding the use of accounting and auditing measures as well as internal controls, ethics and compliance to prevent and detect foreign bribery, the lead examiners recommend that Austria:	
	(a) Ensure its law and practice adequately sanction accounting omissions, falsifications and fraud related to foreign bribery, and re-examine whether the law applies to all companies subject to Austrian accounting and auditing laws; (Convention, Article 8)	Not Implemented
	(b) Encourage companies to actively and effectively respond to reports of suspected acts of foreign bribery from external auditors; (2009 Recommendation, para. X B iv)	Fully Implemented
	(c) Consider requiring external auditors to report suspected acts of foreign bribery to competent authorities independent of the company, such as law enforcement or regulatory authorities, and ensure that auditors making such reports reasonably and in good faith are protected from legal action; (2009 Recommendation, para. X B v)	Not Implemented
	(d) Raise awareness in the private sector of the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance, including paragraph 11.ii) and iii) on effective measures for whistle blowing, and encourage companies to develop and adopt adequate internal controls, ethics and compliance measures to prevent and detect foreign bribery, taking into account the Good Practice Guidance; (2009 Recommendation, para. X C i)	Fully Implemented
	(e) Ensure appropriate measures are in place to protect from discriminatory action private sector employees who report suspected acts of foreign bribery to the competent authorities in good faith and on reasonable grounds. (2009 Recommendation, para. X C v)	Partially Implemented
8	Regarding the use of tax measures to prevent and detect foreign bribery, the Working Group recommends that Austria:	

	PHASE 3 RECOMMENDATIONS AND FOLLOW-UP ISSUES	2-YEAR WRITTEN FOLLOW-UP and additional written reports*
	(a) Continue efforts to provide training and awareness to the tax administration on detecting and reporting suspicions of foreign bribery detected in the course of performing their duties, including efforts to establish clear guidance on the level of suspicion that tax auditors need to make a report, and the kind of information that is needed to support the suspicion; (2009 Tax Recommendation, para. II)	Fully Implemented
	(b) Urgently take steps to significantly increase awareness of the law enforcement authorities of the value of tax information to assist them with their foreign bribery investigations; (Convention, Article 5)	Fully Implemented
	(c) Take measures that are feasible and appropriate in the Austrian legal system to restrict the routine practice of confronting tax payers about possible suspicious bribe payments before reporting them to the law enforcement authorities, to cases where there is a clear absence of risk that reporting will result in the destruction or concealment of evidence, and establish safeguards to ensure that taxpayers follow-through with their undertakings to self-report bribe payments to the law enforcement authorities. (Convention, Article 5; 2009 Tax Recommendation, para. II)	Fully Implemented
9	Concerning the prevention and detection of foreign bribery through the use of contracting opportunities for public advantages, the Working Group recommends that Austria:	
	(a) Raise awareness of the appropriate channels for making a report about foreign bribery in relation to official development assistance (ODA) contracting; (2009 Recommendation, para. IX)	Fully Implemented
	(b) Clarify the rules for the sharing of information by the Austrian Export Credit Agency (OeKB) with the law enforcement authorities on suspicions of foreign bribery by official export credit support applicants and clients; (2009 Recommendation, para. IX) and	Fully Implemented
	(c) Consider routinely checking debarment lists of multilateral financial institutions in relation to public procurement contracting. (2009 Recommendations, para. XI i)	Not Implemented
Follow-up by the Working Group		
10	The Working Group will follow-up the issues below as case law and practice develop:	
	(a) In light of recent amendments to the foreign bribery offences, application in practice of sections 307, 307a and 307b of the Penal Code, including: i) application of these provisions to the bribery of foreign public officials through intermediaries, when the intermediary acts abroad, and is not an Austrian national; ii) interpretation by the courts of the definition of "foreign public official" in the Penal Code; and iii) application of sanctions to natural persons to determine if they are "effective, proportionate and dissuasive";	Continue to follow-up
	(b) Whether in the future law enforcement authorities encounter difficulties investigating legal persons due to the existence of Treuhand trusts; and	Continue to follow-up
	(c) Establishment and implementation of the strategy for coordinating the anti-corruption bodies, in particular to see if it enables the individual bodies to better utilise their resources.	Continue to follow-up

Annex 3. On-site visit participants

Public Sector and Entities responsible for Export Credits and ODA

- BMJ – Federal Ministry of Justice
- BKA – Federal Chancellery
- BMAW – Federal Ministry for Labour and Economy
- BMEIA – Federal Ministry for European and International Affairs
- BMF – Federal Ministry of Finance
- BMKÖS – Federal Ministry for Arts, Culture, Civil Service and Sport
- ADA – Austrian Development Agency
- OeKB – Austrian Control Bank
- BBG – Austrian Federal Procurement Agency
- BMI FIU – Federal Ministry of the Interior - Financial Intelligence Unit
- Finanzamt – Tax Office
- FMA – Austrian Financial Market Authority
- Federal Disciplinary Authority

Law Enforcement and Judiciary

Public Prosecutor's Offices

- WKStA – Central Public Prosecutor's Office for the Prosecution of Economic Crimes and Corruption
- StA Wien – Public Prosecutor's Office Vienna

Courts

- OGH – Austrian Supreme Court
- OLG Wien – Higher Regional Court Vienna
- LG f. Strafsachen Wien – Regional Criminal Court Vienna

Bodies in charge of investigations

- BAK - Federal Bureau of Anti-Corruption

Private Sector

Enterprises and financial institutions

- AMAG
- ams Osram
- Bawag
- Borealis AG
- Erste Group Bank
- Julius Meinl
- KTM
- OMV
- Raiffeisen Bank International
- Unicredit Bank Austria
- UNIQA Insurance Group AG
- Valneva
- Vienna Insurance Group AG
- Voestalpine

Legal Profession and Academia

- Lawyers, members of the Austrian Bar Association
- Universität Innsbruck
- Universität Wien
- Wirtschaftsuniversität Wien
- IACA – International Anti-Corruption Academy

Accounting and Auditing Profession, Professional Associations

- KPMG
- Ernest & Young
- Grant Thornton
- Pfeilgrau Steuerberatung GmbH
- ÖNK – Austrian Chamber of Notaries
- KSW – Federal Chamber of tax consultants and auditors

Business associations and organisations

- WKÖ – Austrian Federal Economic Chamber
- IVV – Federation of Austrian Industries

Civil Society and Media

Civil Society

- Transparency International

Media

- Der Standard
- Die Dunkelkammer
- Kurier
- ORF – Austrian Broadcasting Agency
- Profil

Parliament

- Members of Parliament from the following political parties: FPÖ, Die Grünen, ÖVP, SPÖ

Annex 4. List of abbreviations, terms, and acronyms

A-FIU	Austrian Financial Intelligence Unit
ADA	Austrian Development Agency
AML/CFT	Anti-Money Laundering and Combating the Financing of Terrorism
ARHG	Law on Extradition and Mutual Legal Assistance
ARO	Asset Recovery Office
BAK	Federal Bureau of Anti-Corruption
BBG	Federal Procurement Agency
BiBuG	Federal Law on the Accounting Professions
CC	Criminal Code
CPC	Criminal Procedure Code
EUR	Euro
FATF	Financial Action Task Force
FDI	Foreign direct investment
IFI	International Financial Institution
KgK	Anti-Corruption Coordination Body
MLA	Mutual legal assistance
MoF	Ministry of Finance
MoJ	Ministry of Justice
MoI	Ministry of Interior
NACS	National Anti-Corruption Strategy
NAP	National Anti-Corruption Plan
NRA	National Risk Assessment
NTR	Non-trial resolution
ODA	Official development assistance
OeKB	Austrian Control Bank
PPO	Public Prosecutor's Office
SAR	Suspicious activity report
Sec.	Section (of a legal provision)
SME	Small and medium-sized enterprise
SOE	State owned or controlled enterprise
UGB	Business Code
USD	United States Dollar
VbVG	Federal Statute on the Responsibility of Entities
WGB	Working Group on Bribery
WKStA	Central Public Prosecutor's Office for the Prosecution of Economic Crimes and Corruption
WPA	Whistleblower Protection Act (*HSchG*)
WTBG	Law on the Public Accounting Professions

Annex 5. Excerpts of relevant legislation

Criminal Code

Definition of public official

Section 74(1). Other definitions

[…]

4a. Public official: anyone who

(Note: lit. a repealed by Federal Law Gazette I No. 61/2012)

b. performs legislative, administrative or judicial duties for the federal government, a province, an association of municipalities, or a municipality, for another person under public law, with the exception of a church or religious society, for another state or for an international organisation as its organ or employee, is a Union official (no. 4b) or - for the purposes of Sections 168d, 304, 305, 307 and 307a - who has been assigned public duties in connection with the administration of or decisions on the financial interests of the European Union in Member States or third countries and performs these duties;

c. is otherwise authorised to carry out official business in the name of the bodies referred to in subparagraph (b) in the execution of the laws, or

d. acts as an organ or employee of an undertaking in which one or more national or foreign local authorities hold a shareholding, directly or indirectly, of at least 50% of the share, stock or equity capital, which such a local authority operates alone or jointly with other such local authorities, or which it effectively controls through financial or other economic or organisational measures, and in any event by any undertaking the conduct of which is subject to audit by the Court of Auditors, institutions similar to the Court of Auditors of the Länder or a comparable international or foreign control body.

4b. “Union official” means any person who is an official or other servant within the meaning of the Staff Regulations of Officials of the European Union or the Conditions of Employment of Other Servants of the European Union, or who is made available to the European Union by the Member States or by public or private bodies and who is entrusted with tasks equivalent to those of officials or other servants of the European Union. In so far as the Staff Regulations do not apply, officials of the Union shall also include the members of the institutions, bodies, offices and agencies of the European Union established pursuant to the Treaty on the Functioning of the European Union or the Treaty on European Union and the staff of those bodies;

4c. Arbitrator: any decision-maker of an arbitral tribunal within the meaning of §§ 577 et seq. of the Code of Civil Procedure (ZPO) with its registered office in Austria or with a seat not yet determined (Austrian arbitrator) or with its seat abroad;

4d. Candidate for office: anyone who is in an election campaign, an application or selection procedure for a function as a public official (no. 4a) or in a comparable position to obtain a function he or she is seeking as a supreme executive body of the federal government or of a federal state or as a body responsible for monitoring the legality of law enforcement, provided that obtaining the function is not entirely improbable.

Active bribery

Section 307. Bribery

(1) Anyone who offers, promises, or grants an advantage to a public official or arbitrator for him/her or a third party for the performance or omission of an official act in violation of his/her duties shall be punished with imprisonment up to three years. Likewise, anyone who offers, promises, or grants an expert (§ 304 para. 1) an advantage for an expert or a third party in exchange for the submission of an incorrect finding or expert opinion is to be punished.

(1a) Likewise, anyone who offers, promises, or grants an advantage to a candidate for office or to a third party in the event that he would become a public official, for the performance or omission of an official act in this capacity in breach of duty, is to be punished. The perpetrator who offers or promises an advantage is to be punished under this paragraph

only if the candidate for office has actually obtained the position of public official.

(2) Any person who commits the offence in relation to a value of the advantage exceeding EUR 3 000 shall be punished with imprisonment from six months to five years, whereas any person who commits the offence in relation to a value of the advantage exceeding EUR 50 000 shall be punished with imprisonment from one to ten years. If the value of the advantage exceeds EUR 300 000, the offender shall be punished with imprisonment between one and fifteen years.

(3) A person who commits the offence in relation to a person who is a public official exclusively under Paragraph 74(1)(4a)(b) last alternative is liable to prosecution under that provision if he/she acts with the intent that the financial interests of the Union will be harmed or are likely to be harmed by the performance or omission of an official act.

Section 307a. Advantage grant

(1) Anyone who offers, promises, or grants an undue advantage (§ 305(4)) to a public official or arbitrator for him/her or a third party in return for the performance or omission of an official act in accordance with his/her duties shall be punished with imprisonment up to two years.

(2) Anyone who commits the offence in relation to a value of the advantage exceeding EUR 3 000 shall be punished with imprisonment up to three years, whereas anyone who commits the offence in relation to a value of the advantage exceeding EUR 50 000 shall be punished with imprisonment from six months to five years. If the value of the advantage exceeds EUR 300 000, the offender shall be punished with imprisonment between one and ten years.

(3) Section 307(3) shall apply mutatis mutandis.

Section 307b. Advantage to influence

(1) Whoever, outside the cases referred to in §§ 307 and 307a, offers, promises, or grants an undue advantage (§ 305(4)) to a public official or arbitrator for him/her or a third party with the intent to influence him/her in his/her activity as a public official or arbitrator shall be punished with imprisonment up to two years.

(2) Any person who commits the offence in relation to a value of the advantage exceeding EUR 3 000 shall be punished with imprisonment up to three years, whereas any person who commits the offence in relation to a value of the advantage exceeding EUR 50 000 shall be punished with imprisonment from six months to five years. If the value of the advantage exceeds EUR 300 000, the offender shall be punished with imprisonment between one and ten years.

False Accounting

Section 163a. Untenable representation of fundamental information concerning certain corporations

(1) Any person who, as a decision-maker (section 2(1) Corporate Liability Act [Verbandsverantwortlichkeitsgesetz (VbVG)], BGBl I 151/2005) of one of the corporate entities listed in section 163c or otherwise as a person assigned by a decision maker to present information in

1. an annual report, consolidated financial report, management report, group management report, or another report addressed to the general public, shareholders or company members, supervisory board or its chairperson,
2. a public invitation to participate in the corporate entity,
3. a presentation or statement to the shareholders' meeting, general meeting, or members' meeting or in another meeting of the shareholders or members of the corporate entity,
4. explanations and verifications (section 272 para. 2 Corporations Act [Unternehmensgesetzbuch (UGB)] or other explanations that are to be given to an auditor sect. 163b para. 1), or
5. an entry into the commercial register concerning the making of deposits into the corporate capital,

falsely or incompletely represents the financial position of the corporate entity or the results of its operations and cash flows or essential information for the assessment of the future development of the financial position of the corporate entity or the results of its operations and cash flows (sect. 189a subpara. 10 Corporations Act), including those circumstances that concern the relationship between the corporate entity and other related enterprises in an untenable manner, is liable to imprisonment for up to two years, if this is capable of creating a serious detriment for the corporate entity, its shareholders, members, creditors, or investors.

(2) The same penalty applies to any person who as a decision-maker fails to provide a special report which due to the imminent insolvency is required by law.

(3) A person is liable to imprisonment for up to three years if the person commits an offence under paras. 1 or 2 in relation to a corporate entity whose transferrable securities are approved to be traded in the regulated market of a

Member State of the European Union or in a State Party to the Agreement on the European Economic Area within the meaning of Article 4 para. 1 No. 21 of Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ. No. L 173 of 12 June 2014 p. 349.

(4) A person is not liable for participation (paras. 12, 14) if his or her conduct is also criminalized by sect. 163b.

Section 163b. Untenable accounts of auditors of certain corporations

(1) Any person being an auditor of annual accounts, of formations of companies, a special auditor, an auditor of mergers, of spin-offs, a controller, an auditor of foundations, a member of the ORF board of examiners (section 40 Austrian Broadcasting Corporation Act [Bundesgesetz über den Österreichischen Rundfunk (ORF-Gesetz, BGBl 379/1984)], or another auditor appointed on the basis of corporate regulations to exercise functions for one of the corporations listed in section 163c falsely or incompletely presents essential information (sect. 163a para. 1) in an untenable manner in

1. his or her auditing report; or
2. a presentation or statement to the shareholders' meeting, general meeting, or members' meeting or in another meeting of the shareholders or members of the corporate entity

or conceals that the annual report, consolidated financial report, management report, group management report, or another audit of the financial statement, contracts or falsely reports or incompletely presents essential information (section 163a para. 1) in an untenable manner is liable to imprisonment for up to two years if this is capable of causing a significant detriment to the corporate entity, its shareholders, members, creditors, or investors.

(2) The same penalty applies to any person who being an auditor (para. 1): 1. issues in an untenable manner an incorrect audit certificate, if this is capable of causing a significant detriment to the corporate entity, its shareholders, members, creditors, or investors; 2. fails to produce a report that is required by law because of imminent threats to the continued existence of the corporate entity.

(3) A person is not liable under para. 2 subpara. 1 if the false or incomplete representation is also criminalized under para. 1. A person is not liable under para. 1 if the failure to produce a report is also criminalized under para. 2 subpara. 2.

(4) Any person who being an auditor of one of the corporate entities listed in sect. 163a para. 3 commits one of the offences under paras. 1 or 2 is liable to imprisonment for up to three years.

(5) A person is not liable for participation (sections 12, 14) if his or her conduct is also criminalized by sect. 163a.

Section 163c. Corporate entities

Sections 163a and 163b apply to the following corporate entities:

1. limited liability companies;
2. public limited companies,
3. European companies (societas europaea (SE)),
4. cooperatives,
5. European cooperative societies (societats cooperative europaea (SCE)),
6. mutual insurance companies,
7. large societies within the meaning of sect. 22 para. 2 of the Societies Act 2002 [Vereinsgesetz 2002], BGBl I 66/2002,
8. open companies and limited partnerships within the meaning of sect. 189 para. 1 subpara. 2 lit. a of the Corporations Act [Unternehmensgesetzbuch (UGB)],
9. savings banks,
10. private foundations,
11. the foundation under the Austrian Broadcasting Corporation Act [Bundesgesetz über den Österreichischen Rundfunk (ORF-Gesetz)], and
12. any foreign corporate entities similar to those listed in subparas. 1 to 11 whose transferrable securities may be lawfully traded in a regulated domestic market or which have a branch in Austria that is listed in the commercial register (sect. 12 Corporations Act).

Section 163d. Active repentance

(1) A person is not liable under section 163a if the person freely corrects any incorrect statements or adds any missing information

1. in cases of reports to a supervisory body (para. 1 subpara.1), prior to the completion of the meeting of this body,
2. in cases under para. 1 subpara. 2, prior to a person joining the corporate entity,
3. in cases under para. 1 subpara. 3, prior to the completion of the shareholders' meeting, general meeting, or members' meeting or in another meeting of the shareholders or members of the corporate entity,
4. in cases under para. 1 subpara 4, prior to the presentation of the report by the relevant auditor, and
5. in cases under para. 1 subpara. 5, prior to the approval of registration in the commercial register.

(2) A person is not liable under sect. 163b para. 1 subpara. 2 if the person freely adds the concealed information prior to the completion of the shareholders' meeting, general meeting, or members' meeting or in another meeting of the shareholders or members of the corporate entity.

Money Laundering

Section 165. Money laundering

(1) Any person who

1. converts or transfers to another person property derived from criminal activity (para. 5) with the intent to conceal or disguise its illegal origin or to assist another person involved in such criminal activity to evade the legal consequences of their act, or
2. conceals or disguises the true nature, origin, location, disposition, or movement of property derived from criminal activity (para. 5),

shall be liable to a custodial sentence of six months to five years.

(2) The same penalty applies to anyone who acquires, otherwise acquires, possesses, converts, transfers to another person, or otherwise uses assets knowing at the time of acquisition that they derive from criminal activity (subsection 5) of another person.

(3) The same penalty applies to anyone who acquires, otherwise acquires, possesses, converts, transfers to another, or otherwise uses property subject to the power of disposal of a criminal organisation (section 278a) or a terrorist group (section 278b) on its behalf or in its interest, if he/she knows of this power of disposal at the time of acquisition.

(4) Any person who commits the offence in relation to a value exceeding 50 000 Euro or as a member of a criminal organisation that has been formed for the purpose of laundering money on a continuing basis is liable to imprisonment for one to 10 years.

(5) Criminal activities are acts punishable by more than one year's imprisonment or under Sections 223, 229, 289, 293, 295 or Sections 27 or 30 of the Narcotic Substances Act if they

1. are subject to Austrian criminal law and were committed unlawfully or
2. were committed abroad without being subject to Austrian criminal law, but are considered to constitute an offense punishable by law under both Austrian criminal law and - unless they are offenses under Art. 2 no. 1 lit. a to e and h of Directive (EU) 2018/1673 on combating money laundering by criminal law, OJ No. L 284 of 12.11.2018 p 22, and applicable Union law - under the laws of the place where the offense was committed and were committed unlawfully. It is not necessary that the perpetrator can be convicted of the criminal activity, nor that all elements of the facts or all circumstances relating to that activity, such as the identity of the perpetrator, are established.

(6) Items of property are assets of all kinds, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal titles or documents in any form - including electronic or digital - evidencing title or rights to such assets, as well as units of virtual currencies and the appreciation in value attributable to them or rights evidenced by them, but not mere savings, such as unrealized losses in value, waivers of claims or saved expenses and duties.

(7) An item of property derives from a criminal activity (para. 5) if the perpetrator of the criminal activity obtained it through the offense or received it for its commission or if the value of the originally obtained or received item of property is embodied in it."

Federal Statute on the Responsibility of Entities (VbVG)

1st section - Scope and definitions

Entities

§ 1. (1) This federal law regulates the conditions under which entities are responsible for criminal offenses and how they are sanctioned, as well as the procedure by which responsibility is determined and sanctions are imposed. A criminal offense within the meaning of this law is an act punishable by a court under a federal or province law. However,

this federal law only applies to financial offenses to the extent that this is provided for in the Financial Crimes Act, Federal Law Gazette No. 129/1958.

(2) Entities within the meaning of this law are legal entities as well as registered partnerships and European economic interest groups.

(3) The following are not entities within the meaning of this law

3. estates;
4. the Federation, Länder, municipalities, and other legal entities, insofar as they act in execution of the law;
5. recognized churches, religious societies, and religious confessional communities, insofar as they are active in pastoral care.

Decision makers and employees

§ 2. (1) The decision-maker within the meaning of this law is whoever

1. is a managing director, board member, or authorised representative, or is similarly authorised to represent the entity externally due to corporate or legal representation,
2. is a member of the supervisory board or the administrative board, or otherwise exercises control powers in a managerial position, or
3. otherwise exerts significant influence on the management of the entity.

(2) Employee within the meaning of this law is anyone who

1. due to an employment, apprenticeship, or other training relationship,
2. due to a relationship subject to the Home Work Act 1960, Federal Law Gazette No. 105/1961, or a relationship similar to that of an employee, on the basis of a relationship that is subject to the Home Work Act 1960, Federal Law Gazette No. 105 of 1961, or a relationship similar to that of an employee,
3. as a temporary worker (Section 3 Paragraph 4 of the Temporary Employment Act - AÜG, Federal Law Gazette No. 196/1988) or as a hired worker (Section 3, Paragraph 4, of the Temporary Employment Act - AÜG, Federal Law Gazette No. 196 from 1988), or
4. on the basis of an employment contract, or another special legal relationship under public law

provides work for the entity.

2nd section - Entity responsibility – substantive legal provisions

§ 3. (1) An entity is liable for a criminal offense under the further conditions of paragraphs 2 or 3 if

1. the act was committed for its benefit or
2. the act violated obligations that affect the entity.

(2) The entity is responsible for criminal offenses committed by a decision-maker if the decision-maker as such committed the act illegally and culpably.

(3) The entity is responsible for crimes committed by employees if:

1. employees have unlawfully carried out the facts that correspond to the statutory offense; the entity is only responsible for a crime that requires intentional action if an employee acted intentionally; for a crime that requires negligent action, only if employees have failed to exercise the care required by the circumstances; and
2. the commission of the crime was made possible or significantly facilitated by the fact that decision-makers disregarded the due and reasonable care required by the circumstances, in particular by failing to take essential technical, organisational or personnel measures to prevent such crimes.

(4) The responsibility of an entity for an act and the criminal liability of decision-makers or employees for the same act are not mutually exclusive.

Entity fine

§ 4. (1) If an entity is responsible for a crime, an entity fine must be imposed on it.

(2) The entity fine is to be calculated in daily rates. It amounts to at least one daily rate.

(3) The number of daily rates is up to

180, if the offense is punishable by life imprisonment or imprisonment for up to twenty years,

155, if the offense is punishable by a prison sentence of up to fifteen years,

130, if the offense is punishable by a prison sentence of up to ten years,

100, if the offense is punishable by a prison sentence of up to five years,

85, if the offense is punishable by a prison sentence of up to three years,

70, if the offense is punishable by a prison sentence of up to two years,

55, if the offense is punishable by a prison sentence of up to one year,

40, in all other cases.

(4) The daily rate is to be determined based on the entity's earnings situation, taking into account its other economic performance. It is to be set at an amount that corresponds to 360th part of the annual income or exceeds or falls short of this by a maximum of one third, but a minimum of 50 and a maximum of 30 000 euros. If the entity serves charitable, humanitarian or church purposes (Sections 34 to 47 of the Federal Tax Code, Federal Law Gazette No. 194/1961) or is not otherwise aimed at making a profit, the daily rate must be set at a minimum of 2 and a maximum of 1 500 euros.

Calculation of the entity fine

§ 5. (1). When determining the number of daily rates, the court must weigh up the aggravating and mitigating factors, provided they do not already determine the amount of the threatened fine.

(2) In particular, the number should be increased,

1. the greater the damage or danger for which the entity is responsible;
2. the greater the benefit gained from the offense by the entity;
3. the more illegal behavior was tolerated or encouraged by employees.

(3) The number should be smaller in particular if:

1. the entity took precautions to prevent such acts before the crime or encouraged employees to behave in accordance with the law;
2. the entity is only responsible for criminal offenses committed by employees (Section 3 Paragraph 3);
3. the entity made a significant contribution to finding the truth after the crime;
4. the entity has made up for the consequences of the act;
5. the entity has taken significant steps to prevent similar acts in the future;
6. the act has already resulted in significant legal disadvantages for the entity or its owners.

Conditional leniency of the entity fine

§ 6. (1) If an entity is sentenced to an entity fine of no more than 70 daily rates, the fine must be waived conditionally, specifying a probationary period of a minimum of one and a maximum of three years, if necessary with the issuance of instructions (Section 8), if it can be assumed that this is sufficient in order to deter the commission of further acts for which the entity is responsible (Section 3), and it is not necessary to enforce the fine in order to counteract the commission of acts in the context of the activities of other entities. In particular, the type of offense, the severity of the breach of duty or breach of care, previous convictions of the entity, the reliability of the decision-makers and the measures taken by the entity after the offense must be taken into account.

(2) If the leniency is not revoked, the fine must be waived definitively. In such a case, deadlines that begin as soon as the fine is enforced are to be calculated from the date the judgment becomes final.

Conditional leniency of part of the entity fine

§ 7. If an entity is sentenced to an entity fine and the requirements of Section 6 apply to part of the fine, this part, but a minimum of a third and a maximum of five sixths, is subject to a probationary period of a minimum of one and a maximum of three years, if necessary subject to instructions (Section 8), to be checked conditionally.

Instructions

§ 8. (1) If an entity’s fine is partially or completely waived, the court can issue instructions to it.

(2) The entity is to be instructed to make good the damage resulting from the act to the best of its ability, if this has not already been done.

(3) Furthermore, with its consent, the entity can be instructed to take technical, organisational or personnel measures to counteract the commission of further acts for which the entity is responsible (Section 3).

Revocation of the conditional leniency of the entity fine

§ 9. (1) If the entity is convicted for an act committed during the probationary period, the court must revoke the conditional leniency and enforce the fine or the part of the fine, if this appears to be necessary in addition to the new conviction in order to prevent the commission of further acts for which the entity is responsible (Section 3). An act committed in the period between the first instance decision and the decision granting conditional leniency becomes final is equivalent to an act committed during the probationary period.

(2) If the entity does not follow an instruction despite a formal warning, the court must revoke the conditional leniency

and enforce the fine or the part of the fine, if this appears necessary under the circumstances, in order to prevent the commission of further acts for which the entity is responsible (Section 3).

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

(4) If the entity is subsequently sentenced to an additional fine in application of Section 31 of the Criminal Code, the court may revoke the conditional leniency in whole or in part and enforce the fine or the part of the fine, insofar as the fines would not have been conditionally waived if they had been imposed jointly. If the conditional leniency is not revoked, each of the concurrent probation periods shall last until the expiry of the probation period that ends last, but no longer than five years.

Legal succession

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

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

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

Exclusion of recourse

§ 11. Recourse to decision-makers or employees is excluded for sanctions and legal consequences that affect the entity on the basis of this federal law.

Application of general criminal laws

§ 12. (1) In all other respects, the general criminal laws shall also apply to entities to the extent that they are not exclusively applicable to natural persons.

(2) If the law makes the validity of Austrian criminal laws for offences committed abroad dependent on the domicile or residence of the offender in Austria or on his/her Austrian citizenship, the seat of the entity or the place of business or establishment shall be decisive for entities.

(3) The limitation period for enforceability is:

- fifteen years, if a fine of more than 100 daily rates has been imposed,
- ten years, if a fine of more than 50 but not more than 100 daily rates has been imposed,
- five years, in all other cases.

3rd section - Proceedings against entities

[…]

Prosecution discretion

§ 18. (1) The public prosecutor's office may refrain from prosecuting an entity or withdraw prosecution if, taking into account the seriousness of the offense, the seriousness of the breach of duty or breach of care, the consequences of the offense, the entity's behavior after the offense, and the expected amount of a fine to be imposed on the entity, and any legal disadvantages that have already occurred or are immediately foreseeable for the entity or its owners as a result of the offence, prosecution and sanctions appear to be unnecessary. This is particularly the case if investigating or prosecuting would involve considerable effort that would obviously be disproportionate to the importance of the matter or to the sanctions to be expected in the event of a conviction.

(2) However, the persecution may not be waived or withdrawn if it appears necessary

1. because of a risk emanating from the entity of perpetration of an offence with serious consequences for which the entity could be responsible,
2. to counteract the perpetration of offences in the context of the activities of other entities, or
3. otherwise, due to a special public interest.

Withdrawal from persecution (diversion)

§ 19. (1) If, on the basis of sufficiently clarified facts, it is established that discontinuing the proceedings pursuant to Sections 190 to 192 of the Criminal Procedure Code or taking action in accordance with Section 18 is not an option,

and if the requirements specified in Section 198(2)(1) and (3) of the Criminal Procedure Code are met, the public prosecutor's office must withdraw from the prosecution of an entity charged with liability for a criminal offence caused by the offence and remedies other consequences of the offence and provides evidence of this without delay, and if the imposition of a fine on the entity with regard to

1. the payment of an amount of up to 50 daily rates plus the costs of the proceedings to be reimbursed in the event of a conviction (§ 200 CPC),
2. a probationary period of up to three years to be determined, where possible and appropriate in conjunction with the entity's expressly declared willingness to take one or more of the measures mentioned in Section 8(3) (Section 203 CPC), or
3. the entity's express commitment that it will provide certain charitable services free of charge within a specified period of no more than six months to be determined (§ 202 CPC),

does not appear necessary in order to prevent the commission of criminal offences for which the entity can be held responsible (Section 3) and the commission of criminal offenses in the context of the activities of other entities. Section 202 Paragraph 1 CPC shall not apply.

(2) After the application for the imposition of an entity fine for the perpetration of a criminal offense that is to be prosecuted *ex officio* has been filed, the court shall apply paragraph 1 *mutatis mutandis* and discontinue the proceedings against the entity, until the end of the main hearing, under the conditions applicable to the public prosecutor's office (§ 199 CPC).

[…]

Federal Statute on the Public Prosecution Authorities (StAG)

Reports from the public prosecutor's offices

§ Section 8 (1) The public prosecutor's offices shall report on their own initiative to the respective higher-level senior public prosecutor's office on criminal cases in which there is a particular public interest due to the significance of the offence to be solved or the role of the suspect in public life, or in which legal questions of fundamental importance that have not yet been sufficiently clarified are to be assessed.

(1a) Reports pursuant to para. 1 shall describe and justify the intended procedure. They shall be accompanied by the draft of the intended settlement. Insofar as this information is not contained in the draft settlement, it must include in particular

1. a presentation of the facts on which the report is based;
2. the evidence taken and its assessment;
3. the legal assessment of the facts of the case.

(2) In exercising their supervisory and instructional powers, in particular to promote the uniform application of the law, the senior public prosecutors' offices may order in writing that reports be submitted to them on certain groups of criminal cases; they may also request reports in individual cases, whereby the time and nature of the reports shall be determined by the special orders of the senior public prosecutors' offices.

(3) Reports pursuant to subsection (1) shall generally be submitted before refraining from initiating preliminary proceedings (section 35c), terminating preliminary proceedings pursuant to the provisions of the 10th and 11th main sections of the Code of Criminal Procedure, filing (section 210 of the Code of Criminal Procedure) or withdrawing from an indictment (section 227), or before deciding on a waiver of appeal or the execution of an appeal in the main proceedings, unless an order or an application depends on the assessment of a legal issue of fundamental importance that has not yet been sufficiently clarified. Furthermore, in criminal proceedings that are subject to a reporting obligation pursuant to para. 1, the public prosecutor's offices must provide information on significant procedural steps, in particular coercive measures (sections 102 para. 1 second sentence, 105 para. 1 Code of Criminal Procedure), after these have been ordered.

(4) The obligation to report on an intended order or settlement shall not preclude orders and applications that must be made immediately due to imminent danger.

Decrees and reports of the senior public prosecutors' offices

§ 8a. (1) The senior public prosecutor's offices shall examine reports pursuant to section 8 and issue the necessary instructions (section 29) where appropriate. Prior to any intended action under subsection (2), these shall be limited to mere instructions to rectify incompleteness in the reports submitted (section 8 (1a)).

(2) Insofar as criminal cases of limited geographical significance are not involved or a legal question of fundamental importance that has not yet been sufficiently clarified is to be assessed, the senior public prosecutors' offices shall submit reports pursuant to section 8 (1) with a statement as to whether there is an objection to the intended procedure or the type of execution submitted for approval to the Federal Minister of Justice, who shall then proceed in accordance with subsection (1) vis-à-vis the senior public prosecutors' office submitting the report.

(3) In exercising his supervisory powers and powers to issue instructions (section 29a), to promote the uniform application of the law and to report to legislative bodies, their organs and international organisations, the Federal Minister of Justice may proceed in accordance with section 8(2). In these cases, he may also request reports from the senior public prosecutors' offices on the handling of individual proceedings. This shall be recorded in the diary.

(4) Informal information and information to the Federal Ministry of Justice on the subject matter and status of a procedure for responding to media enquiries shall not constitute reports within the meaning of para. 3.

Reports on special investigative measures

§ 10a. (1) The public prosecutor's offices shall report to the senior public prosecutor's offices on intended orders to monitor encrypted messages pursuant to Section 135a (1) of the Code of Criminal Procedure, optical or acoustic monitoring of persons pursuant to Section 136 (1) Z 2 and 3 of the Code of Criminal Procedure or automated data comparison pursuant to Section 141 (2) and (3) of the Code of Criminal Procedure; Section 8 (4) shall apply accordingly.

(2) The public prosecutor's offices shall submit separate annual reports to the senior public prosecutor's offices on criminal cases in which surveillance of encrypted messages pursuant to section 135a of the Code of Criminal Procedure, optical or acoustic surveillance of persons pursuant to section 136 of the Code of Criminal Procedure or automated data comparison pursuant to section 141 of the Code of Criminal Procedure has been ordered and, in the cases referred to in subsection 1, attach copies of the corresponding orders together with the court authorisation. The reports shall contain in particular:

1. the number of cases in which the interception of encrypted messages, the optical or acoustic surveillance of persons or an automated data comparison was ordered, as well as the number of persons affected by an interception and the number of persons identified by a data comparison,

2. the period of the individual monitoring measures,

3. the number of cases in which the special investigative measures referred to in paragraph 2 were carried out successfully.

(3) The senior public prosecutor's offices shall examine these reports, have them corrected if necessary or make any other necessary orders. They shall forward to the Federal Ministry of Justice a complete overview of special investigative measures together with the copies of the authorised orders within the meaning of subsection 1.

(4) On the basis of the reports of the public prosecutor's offices and the report of the Legal Protection Commissioner, the Federal Minister of Justice shall submit an annual overall report to the National Council, the Data Protection Council and the Data Protection Authority on the use of special investigative measures, insofar as these were carried out with judicial authorisation.

Instructions from the senior public prosecutors' offices

§ Section 29 (1) Instructions from the senior public prosecutor's offices on the handling of a particular case shall be issued to the public prosecutor's offices in writing with reference to this provision of the law and shall state the reasons

for the instruction. If this is not possible for special reasons, in particular due to imminent danger, an oral instruction shall be confirmed in writing as soon as possible.

(2) If the handling of the case in a particular proceeding is discussed orally, the public prosecutor's office shall record the result of such a discussion in minutes, stating in particular whether a concurring legal opinion has emerged or whether the senior public prosecutor's office has issued an instruction. The minutes shall be signed by all persons present.

(3) The public prosecutor's office shall attach the instruction or the minutes to the diary. A copy of the instruction or the minutes shall be attached to the investigative file (section 34c) in preliminary proceedings and to the application for a court decision in main proceedings and appeal proceedings.

Instructions to the Chief Public Prosecutor's Office

§ 29a. (1) The Federal Minister of Justice shall examine the reports of the senior public prosecutors' offices and the intended course of action. Instructions shall be issued in writing with reference to this provision of the law and shall state the reasons. The senior public prosecutor's offices shall then proceed in accordance with section 29.

(1a) The Federal Minister of Justice shall generally examine the intended course of action on the basis of the reports submitted. However, he may request investigative or criminal files or individual parts of files, in particular in order to clarify justified concerns or indications of incompleteness of the reports submitted (section 8 (1a)). The Federal Minister of Justice shall issue an instruction in any case if

1. the report on decisive facts is unclear, incomplete, contradictory or obviously insufficiently substantiated,

2. there is a significant discrepancy between the information in the report and that in the draft decision, or

3. a law has been violated or incorrectly applied in the legal assessment of the facts.

(2) Section 29 (2) shall apply mutatis mutandis to the oral discussion of the handling of the case in specific proceedings, whereby the minutes shall be drawn up by the senior public prosecutor's office if the public prosecutor's office was not involved in the oral discussion.

(3) The Federal Minister of Justice shall report annually to the National Council and the Federal Council on the instructions issued by him after the proceedings on which the instruction is based have been concluded.