

## Austria

### I. Brief Introduction to the Legal System of Austria

The path of federal legislation for Austrian statutes is regulated in Art. 41 of the Federal Constitution Law (*Bundes-Verfassungsgesetz* (B-VG)). The legislative power is divided between the federal legislation and the state level legislation. Statutes are adopted by the National and Federal Assembly at the federal level and at the state level by the *Landtag*.

Since the Austrian parliament has two chambers – the National Assembly and the Federal Assembly – one could assume that the legislative power is equally divided between the two. In practice the legislative power mainly lies with the National Assembly (*Nationalrat*), which also constitutes the first chamber. In the Federal Assembly (*Bundesrat*), Austria's nine federal states contribute to the federal legislation. Although the Federal Assembly is the second chamber, it has in essence no veto right against proposed legislation by the National Assembly.

Within the Federal Constitution the tasks of the Constitutional Court are also determined. One of the main competences of the Constitutional Court is judicial review. The Constitutional Court is the only court which has jurisdiction to examine the constitutionality of Austrian acts, regulations, state treaties, statutes, or other treaties. Members of the Constitutional Court are appointed by the Federal President upon proposals by the Federal Government, the National Assembly, or the Federal Assembly. The Constitutional Court can only act upon application: no application, no review. Besides the judicial review by the Constitutional Court, the Austrian Supreme Court (*Oberster Gerichtshof*) plays an important role in applying criminal provisions on a daily basis because the Supreme Court acts as the final tribunal in criminal matters.

### II. Austria's Anticorruption Laws

#### *Anti-bribery laws*

In 1964 the first anti-bribery provisions were passed and adopted in the Criminal Act in Austria with its provisions against "The Acceptance of Gifts by Employees and Bribery of Employees."<sup>1</sup> All provisions regarding corruption were then exclusively and are now mainly regulated by the Criminal Act. Over the years the legislature has amended these provisions within the Criminal Act (CA) and adopted new ones by special laws. The Austrian Criminal Act contains the following articles regarding corruption: passive corruption, (Section 153a CA),

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<sup>1</sup> Anti-Bribery Act 1964 (Antikorruptionsgesetz 1964), Official Gazette (BGBl) I. No. 116/1964.

corruption (Section 304 sub-section 1 CA), acceptance of advantages (Section 305 sub-section 1 CA), acceptance of an undue advantage for influencing an official (Section 306 sub-section 1 CA), active corruption such as bribery (Section 307 sub-section 1 CA), granting of advantages (Section 307 a sub-section 1 CA), and reparation of corruption (307b sub-section 1 CA). Moreover, the Unfair Competition Act is one of several specific laws that includes an article against corruption. Its Section 10 regulates the acceptance of gifts or other advantages by employees or authorized representatives of a company.

Recently Austria enacted a new Anti-Bribery Act amending the Criminal Act (*Korruptionsstrafrechtsänderungsgesetz 2012*) which entered into force on January 1, 2013.<sup>2</sup> With regard to the new Act, certain changes can be observed: the term “appropriate gifts” is defined more precisely and covers, for instance, charitable gifts. Public officials or arbitrators can accept gifts, if they are charitable, but they are not allowed to have a decisive impact concerning who will receive such a donation.

#### *Public officials and foreign officials*

The definition of the term “public official” covers among others any person holding a legislative, an administrative, or a judicial office as a body of or as an employee for the Federal Government, the Federal States, and the municipalities, either for another state, or for an international organization. These changes had as a result that for the first time also members of the National Assembly are included within this definition, which broadens the scope of application. In addition, the new definition also covers persons working as employees or as organs in companies where domestic or foreign authorities (*Gebietskörperschaften*) hold at least 50% of the share capital of the company and employees of companies being audited by the national or one of the regional courts of auditors. In practice this means that officials of hospitals and universities are included by the term “public official” because such entities are mainly owned by the State or the nine regions. Additionally the provision with regard to “sweetening the public officials” is clarified. Now public officials and arbitrators who take gifts from parties aiming to influence their position will be punished. Other recent developments with regard to white collar crime in Austria were the establishment of the “Central Public Prosecutor’s Office to Combat Corruption” (*Korruptionsstaatsanwaltschaft*) in Vienna in 2009 and the establishment of the Federal Bureau of Anti-Corruption in 2010.

#### *Prosecutions and sanctions*

Prosecution of crimes under the Austrian Procedural Code is dependent on the type of crime. Crimes can be divided into *ex officio* crimes, crimes subject to private charges, and crimes prosecuted upon application by the authorized party. With regard to *ex officio* crimes, the public prosecutor’s office is exclusively permitted to prosecute. For instance, the acceptance of gifts by authorized party (Section 153a CA) and corruption (Section 304 sub-section 1 CA) are *ex-officio* crimes. In case of a crime subject to private charges, the public prosecutor’s office has no right to prosecute; prosecution only takes place if the injured party demands it. For instance, Section 10 of the Unfair Competition Act constitutes a crime subject

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<sup>2</sup> Criminal Law Amendment Act 2012 (*Korruptionsstrafrechtsänderungsgesetz 2012*), Official Gazette (BGBl) I. No. 61/2012.

to private charges. Under the Austrian Criminal Act penalties, depending on the crime, can be either a monetary fine or a sentence of a prison term.

### *Implementation of the OECD Convention*

Austria's legislation implementing the OECD Convention (*Strafrechtsänderungsgesetz 1998*; BGBl I. 1998/153) was published in the Federal Law Gazette on August 20, 1998, and entered into force on October 1, 1998. This implementing law amended the Austrian Criminal Code Section 307 (offense of bribery) and Section 308 (trafficking in influence). The legislation changed the Criminal Law 2008 (*Strafrechtsänderungsgesetz 2008*; BGBl No. I 109/2007) and the Criminal Law on Corruption 2009 (*Korruptionsstrafrechtsänderungsgesetz 2009*; BGBl No. I 98/2009). The Centralized Corruption Prosecution Service was created by the former and the latter introduced more severe penalties for active and passive bribery.

### *Passive bribery and undue advantage*

Passive bribery is both the demand of an undue advantage (304 CA) and the acceptance of one (305A). Since the entering into effect of the Amendment of 2012, the law for the first time provides guidance on what would not be considered an undue advantage. The Medicines Act allows that pharmaceutical companies may pay reasonable expenses for a physician – including one employed by a state hospital – for taking part in a scientific event. In addition, if a donation was given for charitable purposes, then this would also be permissible albeit with the admonition that the recipient may not have a major influence on how the donation will be used. Acceptable also are customary gifts, for instance gifts of low value, such as a plastic pen or a small paper notebook. Except for permitted exceptions, the law in Section 306 CA (acceptance of an undue advantage for influencing an official), provides that an official can face criminal liability if he or she accepts, demands, or requests from somebody to provide him or her with an undue advantage with the aim that such official will be influenced later on, when performing his or her function. However, Section 306, subsection 3 CA states that accepting an advantage is not punishable if it is only an insignificant advantage (up to €100 according to a guideline provided by the Ministry of Justice).

### *Extraterritorial effect*

The anti-bribery provisions will not only apply if the official was bribed in Austria but also if an Austrian citizen bribes a foreign official, or if a foreigner bribes an Austrian official irrespective of where such bribe occurred. These provisions also apply to foreign officials if they are organs of a company which is subject to an international or foreign audit authority or if an Austrian local authority holds more than 50 percent of the company's equity capital.

### *Increased sanctions*

Penalties have continuously increased. Since the amendment in 2009 the sanction depends on the value of the advantage. The penalty increases when certain thresholds are exceeded. For example, the regular penalty for corruptibility (sec 304) is imprisonment for up to three years. If the value of the advantage exceeds €3.000, it is between six months and up to five years and if it exceeds €50.000, it is between one to ten years. The penalties for active bribery, governed in the sections 306, 307 a and b CA correspond to those for passive bribery. They also depend on the value of the advantage and are up to ten years.

### III. Assessment

The OECD Working Group has evaluated Austria in all Phases 1, 2, and 3.

In its Phase 1 report in 1999, the Working Group stated that Austria generally conforms to the standards of the Convention with one exception regarding the very limited criminal responsibility of legal persons. Austrian authorities promised to address this and did so on January 1, 2006 by enacting the Austrian Federal Statute on the Responsibility of Entities for Criminal Offenses (*Verbandsverantwortlichkeitsgesetz* (VbVG)) which establishes general criminal liability of legal persons, including for bribery offenses. Additionally, the Working Group noted that Section 307 of the Criminal Code only applies to bribery of Austrian officials and does not apply to bribery of foreign public officials. The Working Group also urged Austria to be more precise about the term “foreign public official” in Section 74 of the CC and the relation between this term and the definition of “public official of another EU member state” and “official of the European Communities”.

In its 2006 Phase 2 report, the Working Groups came to the conclusion that Austria has engaged in significant legislative efforts to implement the Convention but still had a lack of the offense of foreign bribery both in the public and the private sectors since there was an absence of any foreign bribery investigations in Austria and absence of liability of foreign public officials for bribery. Austria strengthened the law on confiscation to fight against foreign bribery and adopted a law that will provide for mandatory exclusion from participation in public contracts of a candidate or tenderer who has been the subject of a final judgment for corruption.

In its Phase 3 report in 2012, the OECD Working Group expressed their concern that so far not a single case of foreign bribery has proceeded to trial in Austria since the Anti-Bribery Convention was ratified by Austria in May 1999. In addition, the OECD Working Group strongly encouraged the Austrian Government to increase the fines for entities which are substantially below the fines foreseen for natural persons. The OECD Working Group, however, is of the opinion that the 2012 Amendments could have an important impact on foreign bribery enforcement in Austria.

Austria is a signatory to the Convention on the Protection of the European Communities’ Financial Interest and the Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union<sup>3</sup>. It is a member of GRECO and IACA. Transparency International ranks Austria 25 on its 2012 Corruption Perceptions Index.

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<sup>3</sup> Wirtschaftsstrafrecht, Köck 2007, 67.

IV. Texts

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*Reindl-Krauskopf*, Korruptionsstrafrecht neu – ein Überblick, ecolex  
2009, 732.

C. <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/45099404.pdf>,

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