



Bribery & Corruption

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Austria

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Brief overview of the law and enforcement regime

The legal framework of corruption laws in Austria is well-developed and there is also a functioning institutional and legal system.

First, it must be pointed out that there is no specific written definition of “corruption” in Austrian law, but it is traditionally understood that the abuse of public duties to obtain a benefit is unlawful and, moreover, a criminal offence. The term “corruption” sums up such crimes. In 2012, the Austrian legislator introduced the term “corruption” – using it as a headline – into the 22nd Section of the Austrian Criminal Code (*Österreichisches Strafgesetzbuch, StGB*). On the contrary, the term “bribery” is well defined in the Austrian Criminal Code (see below).

The main legal provisions governing and dealing with bribery and corruption are laid down in the Austrian Criminal Code. They are characterised by the fact that a clear distinction is made between offences involving public officials and bribery in commercial practice.

Section 22 of the Austrian Criminal Code comprises “criminal offences relating to public officials, corruption and other related criminal offences”. These crimes (and others) are also relevant with regard to corporate liability, as the Act on Corporate Criminal Liability (*Verbandsverantwortlichkeitsgesetz, VbVG*) was introduced and provided for criminal liability of corporations in 2006.

The most severe form of corruption is the deliberate misuse of (public or private) authority. To obtain an (unfair) advantage is, in that context, not a matter of fact, but usually a direct motive of delinquency. That applies to the abuse of office (§ 302 StGB) as well as to breach of trust (§ 153 StGB).

Clause 153a of the Austrian Criminal Code prohibits a much less serious form of corruption; in particular, a person who possesses authority to represent a third party is not allowed to accept an advantage in the performance of his duties, regardless of a misuse of authority. §§ 153 and 153a StGB both apply to public officials (see below) as well as persons with solely private authority.

The core corruption law in the Austrian legal system can be found in §§ 302 *ff* StGB. As to corruption in a strict sense of criminal law, with respect to criminal offences involving public officials, Austrian Criminal Law basically differentiates between claiming, accepting a promise for and accepting a bribe on the one hand and offering, promising or giving a bribe on the other hand. Moreover, the Austrian legislator notes that a public official (*Amtsträger*) means a person who works for a local, regional, national or international authority, state or international organisation and also every person who works for any public law entity.

Clauses 304, 305 and 306 of the Austrian Criminal Code contain the offence of claiming and receiving bribes, whereas clauses 307, 307a and 307b of the Austrian Criminal Code relate to offering and giving bribes.

Receiving/accepting a bribe or such an offer	Offering/promising/giving a bribe
Clause 304 of the Austrian Criminal Code: A public official or arbitrator who claims, accepts a promise for a bribe or accepts a bribe for the performance of an official act in contradiction to official duties .	Clause 307 (1) of the Austrian Criminal Code: A person who offers, promises or gives a bribe to a public official or an arbitrator for the performance of an official act in contradiction to official duties .
Clause 305 of the Austrian Criminal Code: A public official or arbitrator who claims, accepts a promise for or accepts benefits for the performance or omission of an official duty .	Clause 307a of the Austrian Criminal Code: A person who offers, promises or gives benefits to a public official or an arbitrator for the performance of an official act .
Clause 306 of the Austrian Criminal Code: A public official or arbitrator who claims, accepts a promise for or accepts improper benefits for an impact .	Clause 307b of the Austrian Criminal Code: A person who offers, promises or gives improper benefits to a public official or an arbitrator for an impact .
Clause 308 StGB: prohibited intervention	

Furthermore, these four categories are similar regarding one main element: the performance or omission of an official act. Pursuant to Austrian Criminal Law, the consequences of the aforementioned criminal offences entail fines or imprisonment for up to 10 years; for example, if the criminal offence exceeds the maximum value prescribed by law.

The second main category of Austrian bribery and corruption law provisions is the offering and receiving/accepting of bribes in commercial practice. As already mentioned, a central area of this category of bribery and corruption is included, e.g., in the clauses 153, 153a, 168b and 309 of the Austrian Criminal Code.

Receiving/accepting an advantage or such an offer and offering/promising/giving a bribe to an employee or authorised representative of a company	
Clause 309 (1) of the Austrian Criminal Code	Clause 309 (2) of the Austrian Criminal Code
An employee or authorised representative of a company requesting, agreeing to receive or accepting an advantage for his performance or omission of a legal act in contradiction to duty.	A person who offers (or promises or gives) an advantage to an employee or authorised representative of a company for his performance or omission of a legal act in contradiction to duty.

In the context of all bribery and corruption-related provisions, an advantage covers cash and non-cash gifts, consultancy, agreements, etc. The Austrian Supreme Court of Justice (*Oberster Gerichtshof*) has repeatedly stated that a benefit can also consist of a non-pecuniary advantage.

In general, the legal consequences of bribery and corruption for a natural person are imprisonment and monetary fines. However, the Austrian Criminal Code also states different value limits which have to be distinguished:

- the exception of any undue advantage specified in clause 305 (4) of the Austrian Criminal Code states that receiving an advantage is not a punishable act if it is permitted by law or the advantage has been given within the scope of an event, if there is a legitimate interest to attend this event. Receiving an advantage for the purpose of a public benefit is not punishable either, or if the advantage (or valuable product) has a low value and is in accordance with local custom;

- this also applies to the threshold limit of €3,000.00 specified in clauses 304 (2) 1st alternative, 305 (3) 1st alternative, 306 (2) 1st alternative, 307 (2) 1st alternative of the Austrian Criminal Code; and
- the threshold limit of €50,000.00 stated in clauses 304 (2) 2nd alternative, 305 (3) 2nd alternative, 306 (2) 2nd alternative, 307 (2) 2nd alternative of the Austrian Criminal Code.

It must be pointed out that since the amendment to the Austrian Criminal Code (*Strafrechtsänderungsgesetz 2015*) entered into force at the beginning of 2016, the Austrian Criminal Code provides for all four different value limits. The value limit for most clauses was raised from €3,000.00 to €5,000.00, and from €50,000.00 to €300,000.00. However, the value limits of the clauses included in Section 22 of the Austrian Criminal Code were not changed at all.

Criminal offence (Austrian Criminal Code)	Underlying offence (imprisonment/fine)	Threshold limit 1 over €3,000.00 (imprisonment/fine)	Threshold limit 2 over €50,000.00 (imprisonment/fine)
Clause 302	6 months to 5 years		1 to 10 years
Clauses 304, 307	≤ 3 years	6 months to 5 years	
Clauses 305, 307a	≤ 2 years	≤ 3 years	6 months to 5 years
Clauses 306, 307b			
Clause 308			
Clause 309			

Criminal offence (Austrian Criminal Code)	Underlying offence (imprisonment/fine)	Threshold limit 1 over €5,000.00 (imprisonment/fine)	Threshold limit 2 over €300,000.00 (imprisonment/fine)
Clause 153	≤ 6 months or ≤ 360 daily rates	≤ 3 years	1 to 10 years
Clause 153a	≤ 1 year or ≤ 720 daily rates		

A particular focus should be put on the jurisdiction and competence of the court. In cases where the charge is brought to the court by the prosecutor after 1st January 2015, the jury must consist of two professional judges and two lay judges regarding (amongst others) several business crimes (e.g. clause 153 “breach of trust”) in connection with a damage or a value-determining amount of more than €1m, bribery (clause 304 to 309) regarding bribes above €100,000.00, and financial crimes regarding amounts above €1m. Cases of severe abuse of authority (clause 302 (2) 2nd phase) are additionally subject to appear before this specific jury if a damage or a value-determining amount of more than €100,000.00 occurs.

Overview of enforcement activity and policy over the last year

Many significant cases have occurred during the last year in Austria. Several prominent new cases of public and private corruption involving public officials at regional and national level, including a member of the Austrian Parliament as well as a former finance minister, have been investigated.

- A very prominent case that occurred last year concerns a member of the Austrian Parliament and a case of illegal political party funding regarding an electoral campaign. The prosecution argued that the defendants used a sham bill issued by an advertising agency to the Telekom Austria AG with the purpose to illegally transfer €120,000.00 to

an Austrian political party. At trial, the member of the Austrian Parliament was (without legal effect) convicted of the abetment to breach of trust (clause 12, in conjunction with clause 153 of the Austrian Criminal Code). The court of first instance sentenced the defendant to a nine-month prison sentence, but released him on probation for a period of three years. Two other defendants were acquitted in the same trial; however, the two other defendants were also convicted of abetment to breach of trust.

- The media also focused its attention on a criminal procedure known as the “*Blaulichtfunk-Prozess*”. One of the defendants, a former representative of Telekom Austria AG, was convicted of breach of trust (clause 153 of the Austrian Criminal Code); the other one, a well-known lobbyist with a close relationship to a certain political party, of abetment to breach of trust (clause 12, in conjunction with clause 153 of the Austrian Criminal Code) and sentenced respectively to one year and three years of imprisonment. The lobbyist received – the court found – a sum of €1.1m without performing any services. The accused had argued that his services enabled the Telekom Austria AG to be awarded with a contract regarding the establishment of a uniform radio system for all Austrian emergency services. This verdict is – as the one mentioned above – also without legal effect, as the accused have announced their intention to bring on remedies against the verdict.
- The criminal procedure concerning some former employees of IMMOFINANZ AG has been going on for some time now. The subject matter of these criminal proceedings is the allotment of stock options without the approval of the directorate. The Austrian Supreme Court finally reached a decision in October of last year, which is now legally binding. One issue that the Supreme Court had to approach was the possible partiality of the expert, which was negated by the court. Both defendants were convicted of breach of trust (clause 153 of the Austrian Criminal Code) and received prison sentences, because they misused their power with the purpose to enrich themselves by buying stocks of the company for themselves with the money of the company.
- The most sensational matter, however, is the criminal proceedings concerning the privatisation of BUWOG and the Terminal Tower. The trial will include up to 16 defendants, one of whom is the former Austrian Minister of Finance, and it is possibly the largest trial concerning bribery and corruption ever to occur in Austria. The prosecution claims that the former Austrian minister demanded a bribe in the amount of €9.6m for himself and his friends. He also supposedly damaged the Austrian State by violating the rules provided for the privatisation of State-owned enterprises, by not realising the greatest profit for the Austrian State. The prosecution office for business crimes investigated this matter for seven years and filed the charges in July 2016. The former Austrian Minister of Finance is accused of breach of trust in connection with the privatisation of BUWOG as well as bribery. Currently, the defendants are fighting the arraignment and the start of the trial is uncertain.

At the beginning of 2016, the amendment of the Austrian Criminal Code (*Strafrechtsänderungsgesetz 2015*) entered into force. The major changes concerning bribery and corruption are:

- Clause 153 of the Austrian Criminal Code (breach of trust) – the most important criminal offence regarding bribery and corruption – was amended. In detail, the term ‘property loss’ was replaced by a more restricted definition of loss. The purpose behind this amendment was to reduce the scope of application after huge criticism connected with the wide scope of application of this specific clause which arose during the last couple

of years. The newly included paragraph (2) clarifies the abuse of law in the context “breach of trust”. Simultaneously, threshold limit 1 was modified from €3,000.00 to €5,000.00, and threshold limit 2 was modified from €50,000.00 to €300,000.00.

- Clause 32 (1a) of the Austrian Code of Criminal Procedure was amended. From now on, only the following crimes are subject to a jury consisting of two professional judges and two lay judges: clause 302 (abuse of authority); clause 304 (passive bribery); and clause 307 (active bribery). Criminal acts liable to clause 305 (acceptance of benefits), clause 306 (receiving benefits for influencing), clause 308 (forbidden intervention) and clause 309 (acceptance of gifts and bribery of employees and commissioners) are no longer subject to this specific jury.
- As will be shown later, clause 126 of the Austrian Code of Criminal Procedure has been a hot topic in recent years. Clause 126 (4) was altered so that the accused can (principally) object to an expert because of his involvement in the preliminary investigations. But apart from this favourable adjustment of the clause 126 (4), the accused is still obliged to claim the expert’s partiality for each individual case.

Law and policy relating to issues such as facilitation payments and hospitality

The Austrian Criminal Law regarding bribery and corruption states that a facilitation payment is a punishable act in the same manner as any other advantage. Worth mentioning as advantages here in particular are material and non-material advantages like, for example, payments, valuable articles, any kind of services, and any kind of social or professional benefits.

In the specific case of facilitation payments, the Austrian legal opinion considers small sums to be equally criminal as bigger amounts of money or promised benefits, so that any payment to an official to induce or reward his performance of official duties, or in the performance of official activities, would violate the Austrian Criminal Code. Nevertheless, the Austrian legislator specifies a few noteworthy exceptions, such as:

- In the case of clause 153a of the Austrian Criminal Code where a monetary advantage of less than €100.00 is accepted, it is not liable to prosecution.
- In the case of clauses 305 (1), 306 (1), 307a (1) and 307b (1), clause 305 (4) of the Austrian Criminal Code specifies that an (“*undue*”) advantage is not liable to prosecution if it is permitted by law or has been given within the scope of an event if there is a legitimate interest to attend this event. Receiving an advantage for the purpose of a public benefit is not punishable either, or if the advantage (product) has a low value and is in accordance with local custom.

Regarding hospitality, the Austrian legal opinion is that as long as it represents a valuable advantage, its criminal liability has to be assessed on the basis of criteria arising from the exceptions mentioned above.

Key issues relating to investigation, decision-making and enforcement procedures

Criminal offences regarding bribery and corruption in the private and public sector are both prosecuted by the Austrian Public Prosecutor, who is the competent authority for investigation in accordance with the Austrian Code of Criminal Procedure (*Strafprozessordnung*, StPO). However, in recent years, there has been a growing lack of public prosecutors who are specialised in offences relating to businesses. Therefore, in 2011, the Austrian Legislator decided to create the *Zentrale Wirtschafts- und Korruptionsstaatsanwaltschaft* (WKStA) in Vienna, which is the special Austrian Public Prosecutor’s Office for the Enforcement of

Business Crimes and Corruption. Presently, the WKStA has 34 public prosecutors, who are not only capable of reading and interpreting balance sheets but also have better understanding and in-depth knowledge of the rules of the economy.

Major corruption cases in Austria are sometimes investigated by a parliamentary committee and followed by criminal proceedings.

Another important key issue occurred regarding the appointment of experts and the use of expert evidence in criminal proceedings. Until 1st January 2015, only the public prosecutor could appoint an expert during the preliminary proceedings. In the trial, the same expert, who has already worked for the prosecutor during the preliminary investigations, was regularly appointed by the court. This expert represents the only expert of the trial. In addition, the accused have no right to appoint an expert of their own to whom the same rights are granted as the court's/the prosecutor's expert. These circumstances led to an infringement of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – a provision which has constitutional status in Austria – and lays down that a defendant is guaranteed the right to a fair trial; this also includes the principle of equality of arms.

Ultimately, however, and this marks a major step forward from the point of view of the defendants, the Austrian Constitutional Court has asserted that this provision in clause 126 of the Austrian Code of Criminal Procedure was unconstitutional in the decision of 10th March 2015, G 180/2014 *et al.* Now the Supreme Court is obliged to decide on the basis of the judgment of the Constitutional Court whether in each individual case the constitutional rights of the defendants have been infringed or not.

In the meantime – although pending the judgment of the Austrian Constitutional Court – the system of expert evidence has been changed by the Austrian legislator. The defendants/defending counsels now have the right to demand that the expert has to be court-appointed, even in preliminary investigations. As a result, an infringement of the equality of arms principle should be avoided.

Overview of cross-border issues

Bribery and corruption is, of course, not only a major national problem involving Austrian national institutions but also the Austrian private sector. Therefore, Austria has concluded several multilateral agreements related to anti-corruption, including:

- the United Nations Convention against Corruption;
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention);
- the Council of Europe Criminal Law Convention on Corruption (not ratified); and
- the Second Protocol of the Convention on the protection of the European Communities' financial interests.

In the past few years there has been great pressure from the national media as well as from the Council of Europe. Whereas in 2010 Austria was ranked 15th among 178 countries on the Corruption Perception Index of Transparency International, in 2014 Austria was ranked 23rd among 175 countries and territories. The Corruption Perception Index of the year 2015 shows that the measures taken against corruption seem to pay off. Austria is now ranked 16th among 168 countries and territories. In the year 2015 there were 136 convictions related to bribery and corruption in Austria.

The legal provision that crimes of corruption and bribery will be prosecuted in Austria regardless of the place where the crime was committed, if the offender is Austrian, is also of

particular relevance (for companies as well as individuals). Additionally, these crimes are also prosecuted in Austria if the offence was committed in favour of an Austrian public official.

If an Austrian citizen as an employee or decision-maker of a company bribes a foreign public official, he/she will be punished pursuant to Austrian criminal laws. This applies regardless of whether the crime was committed in Austria or abroad, and whether it was an Austrian or foreign company.

Moreover, decision-makers or employees of foreign companies can be held criminally liable in Austria if they – even abroad or from abroad – bribe an Austrian public official.

This type of special regulation goes far beyond the original principle of territoriality. In reality, this means that bribery committed worldwide by Austrian citizens, or of Austrian public officials, can be prosecuted. This is also a reason why Austrian criminal justice authorities (have to) cooperate closely with foreign authorities.

Corporate liability for bribery and corruption offences

Following the principle of “*societas delinquere non potest*”, Austrian criminal law did not provide for corporate liability for bribery and corruption until the end of the year 2005. However, on 1st January 2006, the Austrian legislator introduced the Austrian Act on Corporate Criminal Liability (*Verbandsverantwortlichkeitsgesetz*) with the effect that legal entities are also liable if an employee or a decision-maker violates the Austrian Criminal Code in order to achieve a business advantage for the entity.

Regarding bribery and corruption, there is corporate liability for active and passive criminal offences, which means that offering and receiving a bribe justifies the liability of the entity concerned. Basically, an entity is liable for any criminal offence of its decision-maker or employee if the criminal offence was performed for the benefit of the organisation or in breach of the organisation’s duties. Only if the entity provides necessary and reasonable care to prevent criminal offences, in particular by implementing technical, organisational or personal precautions, may the liability be excluded.

Clause 2 (1) of the Austrian Act on Corporate Criminal Liability states that a decision-maker is a person with the power to act on behalf of the organisation under its bylaws, or any other individual representing the organisation.

The penalties for violating anti-corruption laws by companies include fines up to a maximum of €1.8m. The amount of the fine is based on 40 to 180 daily rates and based on the entity’s profitability, taking into account its overall financial capacity. When determining the number of daily rates the Austrian Court has to consider the severity of the crime, the extent to which the organisation benefited, and the efficiency of precautionary measures taken to reduce criminal offences by its decision-makers or employees.

It is especially notable that there currently is an application to review the legislative act of VbVG concerning the corporate criminal law pending before the Austrian Constitutional Court. In particular, there are doubts about whether the VbVG complies with the principle of equality and the principle of liability in the continental European sense (*nulla poena sine culpa*).

Proposed reforms / The year ahead

The Austrian legislator established a law concerning the register of bank accounts. This register contains the specific personal identifier or the name of the customer or the company as well as the account number, the date of the opening or the resolution of the account, and

the name of the financial institution. The Minister of Finance will have to provide such information by order of the public prosecutor without the permission of the court. The Austrian Code of Criminal Procedure will have to be adjusted to this new regulation.

There are other areas still in need of reform, such as the field of sports, betting and gambling. According to Austrian media reports, the manipulation of bets (“betting fraud”) is even more attractive than dealing drugs. But these criminal offences in the field of sports are punishable only under the specific criminal offence of fraud, clause 146 of the Austrian Criminal Code. According to this case, clause 146 of the Austrian Criminal Code states that there has to be a certain damage caused by fraud.

For the time being, there is hardly any legal protection against bribery and corruption in sports. Therefore, there is probably a need to define a specific offence against manipulating bets. In this respect, there are a lot of discussions among leading Austrian legal experts to introduce a specific criminal offence of “betting fraud”.

But note that there is – of course – in clause 147 (1a) of the Austrian Criminal Code a provision regarding doping fraud in cases of severe damage.

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Norbert Wess is a member of the firm's partners and leader of the white-collar crime law team. He graduated from the University of Vienna as *Doctor iuris* (*Dr. iur.*) and also holds two postgraduate degrees in European Law (LL.M.) and Business Law (M.B.L.). Within a short time, he established himself in most of Austria's high-profile cases concerning white-collar crime, and has earned a reputation nationally and internationally as one of the top defence lawyers in Austria.

Norbert Wess has a broad range of experience and is an active member of national and international criminal law associations. Furthermore, he advises companies in matters of compliance and in-house investigations, and he publishes relevant literature regarding criminal law and also holds lectures and presentations in issues relating to white-collar crime, compliance and related topics.

Norbert Wess explains wkk law attorneys at law's core principles as follows: "We are team players. We are promoting teamwork in order to exchange different point of views, form a solid structure and act as one person."

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Bernhard Kispert is partner at wkk law attorneys at law. He graduated from the University of Vienna and passed his Austrian Bar exam with distinction in 2005. During his activity as a lawyer, he gained considerable experience in civil and criminal proceedings, especially regarding sophisticated corruption and white-collar crime cases. In addition to his activities concerning Austrian criminal law, Bernhard Kispert has ongoing business relationships with several insurance companies charging him with the enforcement of extensive claims for damages.

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Dietmar Bachmann graduated from the University of Vienna in 2009 and has been an associate at wkk law attorneys at law since 2012. In 2015, he passed his Austrian Bar exam and closely collaborates with Norbert Wess. His practice covers a wide range of criminal disputes, and in recent years, he has gained a lot of experience, especially in white-collar crime cases.

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