

Bribery & Corruption

Second Edition

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Brief overview of the law and enforcement regime

The legal framework of corruption laws in Austria is well-developed because of its functioning institutional and legal system. Major corruption cases in Austria are often investigated and solved by a parliamentary committee ending with legal proceedings and effective judgment.

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. In 2012 the Austrian legislator introduced for the first time the term “corruption” in the 22nd Section of the Austrian Criminal Code (*Österreichisches Strafgesetzbuch, StGB*).

In the meantime progress has been made in the common understanding of the term “corruption”. Thus in the current language it means that anyone who is taking a decision for his own benefit or the benefit of a third party while breaking certain laws is acting corruptly. This means that the term covers all forms of breach of duty and misuse of powers to gain a benefit.

The main legal provisions governing and dealing with bribery and corruption are laid down in the Austrian Criminal Code (*Strafgesetzbuch, StGB*). They are characterised by the fact that a clear distinction is made between offences involving public officials and bribery in commercial practice. Furthermore regarding public officials, Austrian criminal law distinguishes between offering and receiving/accepting bribes.

Section 22 of the Austrian Criminal Code comprises “criminal offences relating to public officials, corruption and other related criminal offences”. In this connection – based on the principle of fault or guilt – the fact that Austrian criminal law only provides for criminal liability of individuals is really remarkable. As only natural persons can act with (personal) fault or guilt, Austrian criminal law (from this point of view assimilable to German criminal law) did not provide for criminal responsibility of corporations until the Act on Corporate Criminal Liability (*Verbandsverantwortlichkeitsgesetz, VBVG*) was introduced and provided for criminal liability of corporations.

In the context of bribery and corruption, the prosecution of active and passive bribery in the public and private sector (in particular holders of public offices such as politicians, judges, police officers, custom officials, etc.) represents the central part of Austrian criminal law.

The most severe form of corruption is the deliberate misuse of authority. To obtain an (unfair) advantage is not a matter of fact, but usually a direct motive of delinquency. This includes *inter alia* the abuse of office (§ 302 StGB), breach of trust (§ 153 StGB) and breach of trust (§ 153 StGB) in conjunction with a public official’s deliberate misuse of authority (§313 StGB).

Clause 153a of the Austrian Criminal Code (StGB) states that a person who possesses authority is not allowed to accept an advantage in the performance of his duties. 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 (*OGH*) has repeatedly stated that a benefit can also consist of a non-pecuniary advantage, for example such as sexual favours or an honorary position.

As to corruption in a strict sense of criminal law, with respect to criminal offences involving public officials, Austrian Criminal Law differentiates between accepting and offering bribes. 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 receiving bribes, whereas clauses 307, 307a and 307b of the Austrian Criminal Code relate to offering and giving bribes.

Receiving/Accepting a bribe	Offering a bribe
Clause 304 of the Austrian Criminal Code: A public official or arbitrator who 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 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 accepts benefits for the performance or omission of an official duty .	Clause 307a Austrian Criminal Code: Person who offers 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 accepts improper benefits for an impact .	Clause 307b Austrian Criminal Code: Person who offers improper benefits to a public official or an arbitrator for an impact .
Clause 308 StGB: Prohibited intervention	

Furthermore, these four categories are similar in that they are related to the same 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 up to ten 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 and offering 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 general, the legal consequences of bribery and corruption for a natural person are imprisonment and monetary fines. But 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 law 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, or 307 (2) 2nd alternative of the Austrian Criminal Code.

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 153	≤ 6 months or ≤ 360 daily rates	≤ 3 years	1 to 10 years
clause 153 a	≤ 1 year		
clause 302	6 months to 5 years		1 to 10 years
clauses 304, 307	≤ 3 years	6 months to 5 years	1 to 10 years
clauses 305, 307a	≤ 2 years	≤ 3 years	6 months to 5 years
clauses 306, 307b			
clause 308			
clause 309			

Overview of enforcement activity and policy during the past two years

Many significant cases have been tried during the last two years in Austria. Several prominent new cases of government and business corruption involving many public officials at provincial and regional level, senior public officials and the central government have been investigated. All of these cases were made public and the findings of *Eurobarometer 2012*, for example, show that two-thirds of respondents have questioned the ethical standards of the Austrian political elite.

Consequently, criminal investigations in Austria have been paying more attention to cases of bribery and corruption in the last few years. Furthermore, almost all major enterprises and companies have set up compliance structures to investigate and avoid cases of bribery and corruption.

Last year the Austrian Public Prosecutor's Office against Corruption had to deal with 1,351 new cases related to bribery and corruption concerning 3,771 persons. Thirty-one of these cases were major cases reported by the press:

- On 25th October 2011 the Austrian National Bank (OeNB) reported to the Austrian Public Prosecutor's Office that there was some concern that the subsidiary

Österreichische Banknoten- und Sicherheitsdruck GmbH (OeSB) was involved in a bribery affair. After detailed examination by the public prosecutor the indictment stated that during the relevant period of time, i.e. from 2004 to 2011, bribes had been paid to Azerbaijani and Syrian public officials in order to obtain public contracts in the amount of more than €50m.

- In 2012 the German Public Prosecutor and the Austrian Public Prosecutor initiated investigations regarding the purchase of 18 ‘Euro-fighter’ aircrafts. The reason for carrying out criminal investigations was that it was likely that bribes in the amount of millions of euros had been paid to Austrian officials in the performance of the transactions, even to members of the then Austrian government.
- A few months earlier on 2nd July 2012, the Austrian Public Prosecutor accused three members of the Board of Management of Telekom Austria AG, two authorised signatories of Telekom Austria AG and one member of the Board of Management of the Euro Invest Bank AG of having manipulated the stock price of Telekom Austria AG. Telekom Austria AG succeeded in obtaining a remarkable court decision of the Court of First Instance: several defendants received prison sentences and Telekom Austria AG as the ‘damaged party’ was awarded damages of a certain amount of €9.9m.
- Also quite notable and generating great media interest are the criminal proceedings against former football players and other individuals who have manipulated soccer matches of the Austrian Federal Soccer League (*Österreichische Fußball-Bundesliga*, ÖFB). On 14th April 2014, the Austrian Public Prosecutor accused five former soccer players of the Austrian Federal Soccer League and five other individuals of acting as backers for the manipulation of bets (“betting fraud”) by manipulating numerous soccer matches during the period between 2004 and 2013.

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 kinds of services and any kinds of social or professional benefits.

In the specific case of facilitation payments the Austrian legal opinion is that small sums are as 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 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 case of clauses 305 (1), 306 (1), 307a (1) and 307b (1), the 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 law 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 above mentioned.

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). But 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 23 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.

Another important key issue in connection with the Public Prosecutor and also relating to investigation and decision-making is the question of additionally obtaining external expert reports. Clause 126 of the Austrian Code of Criminal Procedure specifies that the public prosecutor or the court is allowed to order an external expert, depending on the complexity of the matter. A central problem in this respect is that the Austrian Code of Criminal Procedure allows that the external expert working with the investigative authorities is also allowed to continue his work during the trial. However, Article 47 of the Charter of Fundamental Rights of the EU (GRC) and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) laid down that a defendant is guaranteed the right to a fair trial, and also includes the principle of equality of arms. But pursuant to these superior rules of law, the Austrian court has to disregard the provision of the Austrian Code of Criminal Procedure which is in contradiction to the provisions mentioned above. Nevertheless on 22nd August 2013 the Austrian Supreme Court confirmed, in one of the most notable trials of 2012 and 2013 (Hypo Alpe Adria Bank suffered losses of around €48m, caused by former managers), that the involvement of external experts during the pre-trial investigations and the later carrying-out of an expertise in court proceedings, is respectively compatible with the Austrian Code of Criminal Procedure. Meanwhile the convicted former managers have submitted an application to the European Court of Human Rights, complaining about an alleged violation of their right to a fair trial.

Overview of cross-border issues

Bribery and corruption in Austria is not only a major national problem involving Austrian national institutions and moreover the Austrian private sector, it also exists to a large extent in different institutions and positions at an international level. For this reason Austria has an active role in 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
- Second Protocol of the Convention on the protection of the European Communities' financial interests.

Austria's fight against corruption is still a special national concern. 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, Austria was ranked 26th in 2013.

It is obvious that Austria has taken the necessary steps and measures to counteract bribery and corruption. Until recently, while corresponding to the principle of territoriality, Austrian criminal law only applied to all criminal offences committed in Austria. Meanwhile it is also applicable to certain offences explicitly specified by law, even if the relevant criminal offences were committed abroad. In this respect, it does not matter whether the offence was committed by individuals or companies.

Of particular relevance for companies also is 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. Conversely, these crimes are also prosecuted in Austria if the offence was committed in favour of an Austrian public official.

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

Conversely, 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 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 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 include imprisonment up to 10 years according to the Austrian Criminal Code and fines up to a maximum of €1.8m. The amount of fines is charged per 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.

Proposed reforms / The year ahead

On the whole, with respect to bribery and corruption Austrian Criminal Law is systematically and appropriately organised. A far-reaching reform has only recently been implemented by the Austrian legislator. In January 2013, a number of material changes were made (“*Korruptionsstrafrechtsänderungsgesetz 2013*”) with respect to the Corruption Law of 2012, amending the Austrian Criminal Code. The major changes were:

- As already mentioned, the term “corruption” was adopted for the first time in the Austrian Criminal Code.
- A significant extension of the term “*Amtsträger*” (meaning public official), so that from now on the term “official” includes every person who performs a function/duty for any Austrian (regional) authority or any regional governmental or local authority of any other state or international organisation.
- Making harsher sentences for bribery and corruption at all.
- Extending the criminal liability for bribery and corruption to Austrians who bribe officials abroad, if the criminal offence is not a punishable act in the foreign country.
- Introducing a useful definition of “*Anfüttern*” (means baiting, grooming or sweetening), so that the granted advantage is punishable even if there is no connection with any official duties.

Nevertheless there are still areas in need of reform, such as the field of sports, and betting and gambling. The possibility to win a lot of money by betting on sports is quite attractive for illegal activities. According to Austrian media reports the manipulation of bets (“betting fraud”) is even more attractive than dealing with 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. But in most cases it is almost impossible to prove the correlation between criminal offence and damage, meaning the collusion between an athlete and sports club on the one hand, the athlete and the bettor on the other hand, and the damage caused to betting providers. The bettor places high stakes on the – already known – result of a game or tournament with the intention of generating high winnings, and the betting providers have to pay the winnings of the bets. But apparently there is no direct protection against these (criminal) offences and regarding clause 309 of the Austrian Criminal Code, liability is excluded because there is **no legal act** at this point. Clause 304 of the Austrian Criminal Code cannot be applied either, because no public official is involved.

For the time being there is hardly any legal protection against bribery and corruption in sports, which is why it is very important to define a specific offence against manipulating bets and gaining a lot of money from manipulated games. In this respect there are a lot of discussions among leading Austrian legal experts to introduce a specific criminal offence of “betting fraud”.

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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 University of Vienna as Doctor *iuris* (*Dr iur*) and also holds two postgraduate degrees in European Law (LL.M.) and Business Law (MBL). Within a short time he has 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.

In the meantime Norbert Wess has been ranked among the top 5 on the list of the premier lawyers in the field of criminal law 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, has published relevant literature regarding criminal law and also holds lectures and presentations on issues relating to white collar crime, compliance and related topics.

Norbert Wess explains wkk law attorneys at law's core principles of the firm: "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 a partner at wkk law attorneys at law. He graduated from University of Vienna and passed his Austrian bar exam with distinction in 2005. During his activity as a lawyer he gained a lot of 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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