



Bribery & Corruption

Third Edition

Contributing Editors: Jonathan Pickworth & Jo Dimmock
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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. Sometimes major corruption cases in Austria are investigated by a parliamentary committee and followed by criminal proceedings.

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*).

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. 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”. 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.

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, in that context, not a matter of fact, but usually a direct motive of delinquency. That also applies *inter alia* also to the abuse of office (§ 302 StGB) and breach of trust (§ 153 StGB).

Clause 153a of the Austrian Criminal Code (StGB) states that a person who possesses authority to represent a third party 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 (*Oberster Gerichtshof*) has repeatedly stated that a benefit can also consist of a non-pecuniary advantage.

As to corruption in the 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 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: A 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: A 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 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 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 bribe 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, and 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			

A particular focus shall 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 phrase) 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 during the past two years

Many significant cases have occurred during the last two years in Austria. Several prominent new cases of government and business corruption involving many public officials at the 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.

In the year 2013, 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. Last year the number of new cases related to bribery and corruption minimally increased up to 1,359 cases. Thirty-one of the cases in 2013 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 concerns 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. The Court of the First Instance has already issued a judgment in which seven of nine accused were sentenced in this bribery affair. The convicted persons immediately filed an appeal against this sentencing. Finally, only two accused were acquitted, for a lack of evidence.

- 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. The preliminary investigations are still ongoing and are not closed at this moment. Charges against the suspects are still not brought before court by the Austrian Public Prosecutor.
- 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 the 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 the Telekom Austria AG as the ‘damaged party’ was awarded damages of a certain amount of €9.9m. In this context the judgment is subject to an appeal of which the Appeal Court’s decision is still outstanding.
- Also quite notable and generating great media interest is the criminal proceedings against former football players and other individuals who have manipulated soccer matches of the Austrian Federal Soccer League (*Österreichische Fußball-Bundesliga*, ÖFBL). 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. The Court of First Instance has already passed judgments by which two notable former football players and other individuals were sentenced to prison for several years on the grounds of betting fraud. An appeal against the judgment of the First Instance was filed and at the time of writing the proceedings on appeal are still pending.

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 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 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). 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 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 lead 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 remarks 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.* The criminal cases that led to the Decision of the Constitutional Court are still pending at the Austrian Supreme Court (*Oberster Gerichtshof*). 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 before the judgment of the Austrian Constitutional Court – the system of the expert evidence has been changed by the Austrian legislator. Now the defendants/the defending counsels 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 and moreover 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
- 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. In 2010, Austria was ranked 15th among 178 countries on the Corruption Perception Index of Transparency International, whereas in 2014 Austria was ranked 23rd in 2014 among 175 countries and territories.

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 the fact 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 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 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 benefitted, and the efficiency of precautionary measures taken to reduce criminal offences by its decision-makers or employees.

Proposed reforms / The year ahead

Recently, a far-reaching reform has 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. Since 1st January 2015 the amendment of the Austrian Code of Criminal Procedure has become effective. The main innovation is that the term suspect (*Verdächtiger*) has been introduced. As long a person is (during preliminary investigation) not charged with a

specific criminal offence, they are a suspect. When a person is charged with a crime (but an indictment has not yet been filed), and the person is explicitly incriminated to a specific criminal offence on the ground of definite facts, that person is designated *Beschuldigter*.

Recently the Austrian National Council determined the amendment of the Austrian Criminal Code as well (*Strafrechtsänderungsgesetz 2015*) entering into force in the beginning of 2016. 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 – will be amended. In detail the term property loss gets 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 on 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 is modified from €3,000.00 to €5,000.00 and threshold limit 2 is modified from €50,000.00 to €300,000.00.
- Clause 32 (1a) of the Austrian Code of Criminal Procedure is 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 already mentioned, clause 126 of the Austrian Code of Criminal Procedure has been a hot topic in recent years. Clause 126 (4) will be 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.

Nevertheless there are still areas 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. So 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 frauds in cases of severe damage.



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Norbert Wess is a partner of the firm 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 (MBL). 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 is publishing relevant literature regarding criminal law and also holding lectures and presentations in issues relating to white-collar crime, compliance and related topics.

Norbert Wess explained wkk law attorneys at law's core principles: "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."



Bernhard Kispert

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

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