



**UNODC**

United Nations Office on Drugs and Crime

# **Country Review Report of Austria**

Review by Israel and Vietnam of the implementation by Austria of articles 15 – 42 of Chapter III. “Criminalization and law enforcement” and articles 44 – 50 of Chapter IV. “International cooperation” of the United Nations Convention against Corruption for the review cycle 2010 - 2015

## I. Introduction

The Conference of the States Parties to the United Nations Convention against Corruption was established pursuant to article 63 of the Convention to, inter alia, promote and review the implementation of the Convention.

In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention. The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.

The Review Mechanism is an intergovernmental process whose overall goal is to assist States parties in implementing the Convention.

The review process is based on the terms of reference of the Review Mechanism.

## II. Process

The following review of the implementation by Austria of the Convention is based on the completed response to the comprehensive self-assessment checklist received from Austria, and any supplementary information provided in accordance with paragraph 27 of the terms of reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from Israel, Vietnam and Austria, by means of telephone conferences and e-mail exchanges and involving, inter alia, the following experts:

### Austria:

- Ms. Martina Koger, Head, “International Instruments, Mechanisms and EU Cooperation” Unit, Deputy Head, Department “International Cooperation and Projects”, Federal Bureau of Anti-Corruption (BAK), Federal Ministry of Interior;
- Mr. Martin Krämer, Counsellor, Permanent Mission of Austria to the UN, IAEA, UNIDO and CTBTO).

### Israel:

- Mr. Yitzhak Blum, Deputy Director, Department of International Affairs, Office of the State Attorney, Ministry of Justice;
- Ms. Tamar Borenstein, Senior Executive, Criminal Division, Office of the State Attorney

### Vietnam:

- Mr. Nguyen Tuan Anh, Deputy Director, Legal Department, Government Inspectorate;
- Ms. Nguyen Ngoc Ha, Expert, Department of International Law and Treaties, Ministry of Foreign Affairs.

### Secretariat:

- Mr. Dimosthenis Chrysikos, UNODC/DTA/CEB/CSS
- Mr. Oliver Landwehr, UNODC/DTA/CEB/CSS

A country visit, agreed to by Austria, was conducted from 11 to 13 June 2013. During the country visit, the reviewing experts met with Austrian representatives from the Federal Ministry for European and International Affairs, the Federal Ministry of the Interior (including the Federal Anti-corruption Office - BAK), the Federal Ministry of Justice, the Federal Chancellery, the Federal Ministry of Finance (including the Austrian Financial Market Authority –FMA), the Federal Public Prosecutor’s Office for Combatting Economic Crime and Corruption (WKStA) and the Federal Criminal Police Office (BK). The review team also met a representative from the civil society (Prof. Sickinger – University Vienna and President of Advisory Board of TI/Austrian Chapter).

### III. Executive summary

#### **1. Introduction: Overview of the legal and institutional framework of Austria in the context of implementation of the United Nations Convention against Corruption**

*The United Nations Convention against Corruption was signed on 10 December 2003 and ratified on 11 January 2006. Austria deposited its instrument of ratification with the Secretary-General of the United Nations on 12 January 2006. The Convention became an integral part of Austria’s domestic law following its ratification and entry into force on 10 February 2006. To the extent that this is possible, its provisions are directly applicable for the Austrian authorities. In particular, chapter III of the Convention is not self-executing and requires the enactment of domestic legislation to be enforced.*

*Chapter IV is partly self-executing: if there is no other legal basis for cooperation with another country, the Convention provisions on international cooperation will be applied directly.*

*Austria’s legal framework against corruption includes provisions from the Constitution, the Penal Code (PC) and the Criminal Procedure Code (CPC). It also includes specific legislation such as the Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption; the Federal Statute on Responsibility of Entities for Criminal Offences and the Federal Law on Extradition and Mutual Assistance in Criminal Matters.*

*Austria has put in place a comprehensive institutional framework to address corruption. Authorities involved in the fight against corruption include the Federal Ministry of Justice, the Federal Ministry of Interior and its Federal Bureau of Anti-Corruption (BAK), the Central Office for Prosecuting Economic Crimes and Corruption (WKStA) and the Criminal Police Office (BK).*

#### **2. Chapter III: Criminalization and law enforcement**

##### **2.1. Observations on the implementation of the articles under review**

*Bribery and trading in influence (arts. 15, 16, 18 and 21)*

*Active bribery of domestic public officials is criminalized through sections 307 (active bribery involving a breach of duties), 307a (granting of advantages), 307b (granting of advantages for the purpose of exercising influence) and 302 (abuse of official authority) of the Penal Code (PC). Section 307 requires a breach of duties, but applies to*

any advantage. Section 307a applies to acts in accordance with duties, but criminalizes only undue advantages. Section 307b applies to any influence, without the use of an intermediary.

The constituent elements of “promising”, “offering” or “giving” an advantage to a public official are all included in the description of the conduct covered in those sections. Passive bribery of domestic public officials is incriminated under sections 304 (passive bribery involving a breach of duties), 305 (acceptance of advantages), 306 (acceptance of advantages for the purpose of exercising influence) and 302 PC.

The concept of “public official” is defined in section 74(1)(4a) PC. The definition comprises elected and appointed officials. Since 2013, Members of Parliament are fully covered by section 74(1)(4a)(b) PC. The offences of sections 307 to 307b do not differentiate between domestic or foreign public officials, whereas section 302 only applies to national public officials.

The concept of “advantage” is understood as any type of benefit, pecuniary or non-pecuniary. The provisions on active and passive bribery explicitly cover all cases where the advantage is offered not only for the benefit of the public official himself/herself, but also for the benefit of a third person (third-party beneficiary).

None of the provisions refer to the direct or indirect commission of the offence. Instead, the general principles of criminal law are applicable, particularly section 12 PC (treatment of participants as offenders).

Bribery in the private sector is criminalized through section 309 PC, in conjunction with section 153 PC (breach of trust). Section 309 PC refers to bribery acts committed in the course of business activities involving a servant or agent of a company. The term “in the course of business” is interpreted broadly and includes even unpaid charitable work or work for NGOs. The latter was identified as a good practice by the review team.

Trading in influence is criminalized through section 308 PC (illicit intervention). Both the active and the passive side are covered explicitly, the offence is already completed with the trading of the influence, no matter if the influence is exerted afterwards and also irrespective of whether the (potential) influence is real or only pretended.

*Money-laundering, concealment (arts. 23 and 24)*

Money-laundering is criminalized through section 165 PC, which provides for the basic definition of the offence. The elements of money-laundering set forth in article 23 of the Convention against Corruption are all covered except for mere conspiracy, which is not criminalized. The purpose of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action is covered by section 299 PC.

All crimes which are intentional acts and liable to imprisonment of more than

3 years are considered as predicate offences for the purpose of money-laundering. Also covered are all misdemeanours against property punishable with more than one year imprisonment. All bribery offences are enumerated as predicate offences. Mere embezzlement involving a damage of not more than 3,000 euros (section 153(1) PC) is not treated as predicate offence.

Section 165 PC does not differentiate as to whether a predicate offence has been committed within or outside the Austrian territory. The

*practice of self-laundering is criminalized in Austria.*

*Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)*

*Embezzlement, misappropriation or other diversion of property both in the public and private sectors are incriminated through sections 133 (misappropriation) and 153 (breach of trust) PC. Section 153 PC applies to officials and non-officials.*

*The abuse of functions is incriminated through sections 302, 304 and 306 PC. Purely economic damage is sufficient and a violation of laws will almost always harm the State.*

*Austria has not criminalized the conduct of illicit enrichment as it would lead to constitutional problems and would be contrary to principles enshrined in the European Convention on Human Rights (ECHR), which enjoys constitutional status in Austria. However, a limited asset declaration scheme is in place, which does not seem to be very comprehensive and does not foresee effective sanctions in case of incorrect declarations.*

*Obstruction of justice (art. 25)*

*Article 25(a) of the Convention is implemented through sections 288 PC (criminalization of false testimony) and 105 PC (coercion) and section 12 (complicity). However, the combination of section 288 and section 12, which incriminates those who cause the witness to give false testimony as participants in that offence, does not seem to fulfil the Convention requirement to prohibit the act of contacting or harassing a witness. Moreover, certain situations which are covered by the Convention may not be criminalized by either section 105 or section 288 PC, e.g. where money is given to a potential witness/observer of the bribe as a reward for not reporting it or for refraining from testifying.*

*Article 25(b) of the Convention has been implemented through sections 269 (obstruction against state authority) and 270 (assault against a public official) PC.*

*Liability of legal persons (art. 26)*

*Austria has introduced in its legal system the criminal responsibility of legal persons through the Federal Act on the Responsibility of Entities for Criminal Offences (VbVG). The responsibility of an entity for an offence does not exclude the criminal liability of decision makers or staff on grounds of the same offence (art. 3(4)).*

*So far, no convictions in connection with bribery exist. This could indicate a structural problem of the law. In passive bribery cases, a possible interpretation of the bribery statute might transform the legal person itself into a purported victim to the offence, thereby shielding legal persons from criminal liability.*

*Moreover, the maximum fine for an act of corruption raises questions about the effectiveness of the sanction. In addition to that, there is no public criminal record for companies. A certificate containing information on whether a company has already been convicted or whether proceedings concerning a company are pending is only issued at the request and initiative of the company. Dissolution of a company is not possible under the VbVG.*

*Participation and attempt (art. 27)*

*Participation in the commission of criminal offences, including corruption-related offences, is covered by section 12 PC. This provision*

*does not differentiate between instigators, aiders and abettors. Section 15 PC deals with the punishability of attempt. The mere preparation for a corruption offence is not criminalized.*

*Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)*

*In general, the sanctions applicable to persons who have committed corruption-related offences appear to be sufficiently dissuasive. There are no sentencing guidelines for judges in Austria. The trial judge is free in his or her determination of the sentence.*

*In relation to the extent and scope of immunities from prosecution, the members of the national Parliament (Nationalrat — first chamber of Parliament, MPs) and of the Parliaments of the Länder, as well as the Federal President are the only public officials benefiting from such protection. MPs may be prosecuted for criminal acts only if it is evidently in no way connected to their political activity. The public prosecutor has to seek a decision of Parliament whether such a connection exists if the MP concerned so requests (Article 57(3) Federal Constitution).*

*However, while the personal scope of immunity is fairly limited, no investigative steps can be undertaken until it is lifted. Finally, the lifting of the MP's immunity is required not only if the MP is the subject of the investigation, but also if the investigation only touches upon the MP's sphere, i.e. if the investigation concerns another person but would imply an investigation of the MP.*

*Austria's criminal justice system is based on the system of mandatory prosecution by virtue of article 18(1) and (2) of the Federal Constitution. Plea bargaining does not exist in Austria because it runs counter to a fundamental principle of Austrian criminal procedure.*

*On 1 January 2011, a new leniency programme was introduced to enable the public prosecutor, on the basis of successful cooperation with a principal witness, to withdraw from prosecution of criminal acts committed by such witness (section 209a CPC). In addition, a crown witness may receive a mitigating punishment if he/she contributed with his/her statement considerably to the establishment of the truth (section 34(1)(17) PC).*

*The protection of persons who cooperate in an investigation or prosecution is subject to the same rules as witness protection.*

*At the federal level, in the event of breach of duties, disciplinary measures can be enforced depending on the seriousness of the act. There is no formal procedure of disqualification for a certain period of time. For a conviction related to corruption offences, a public official may be dismissed, either as a direct result of the conviction (depending on the concrete sentence) or as a result of consecutive disciplinary proceedings. A prior conviction may exclude a person from holding elected public office.*

*Protection of witnesses and reporting persons (arts. 32 and 33)*

*On the basis of section 22 Code of Police Practice and section 162 CPC, witnesses in corruption cases can benefit from witness protection programmes, including relocation measures. Non-disclosure of information concerning the identity and whereabouts of such persons is a part of the procedural protection measures.*

*Austria has concluded several bilateral and multilateral international agreements on police cooperation containing provisions on witness protection. The guidelines for the protection programmes do not*

*distinguish between victims and witnesses. Both can be included in the protection programme.*

*Provisions of the domestic legislation are aimed at preventing the discrimination of civil servants and judges or prosecutors as a result of their reporting in good faith well-founded suspicions of criminal offences. The Ministry of Justice has established a web-based whistle-blower system. This system offers the possibility to report corruption and related offences to the WKStA. The system allows for bidirectional communication between the whistle-blower and the WKStA while maintaining anonymity. There is no whistle-blower protection in the private sector.*

*Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)*

*The confiscation of “assets obtained for or through a punishable act” is regulated in section 20 PC. The term “assets” is interpreted broadly and covers all tangible and intangible assets and anything that has commercial value. Objects which were used or intended by a perpetrator for deliberately committing an offence are also subject to confiscation (sections 19a and 26 PC). Confiscation under civil law does not exist but non-conviction-based confiscation would be possible in some cases. Interim measures are provided in sections 110 (seizure) and 115 (sequestration) CPC.*

*Under the title “extended forfeiture”, section 20b PC covers special cases in which no explicit proof is required of the specific criminal act from which the assets originated. Paragraph 2 of this section simplifies the rules on the burden of proof with regard to the suspected proceeds of crimes covered by sections 165 (money-laundering), 278 (criminal association) or 278c (terrorist crimes) PC. Such proceeds can be declared forfeit provided that they are suspected to originate from an unlawful act and their lawful origin cannot be substantiated.*

*According to section 114 CPC, the custody of seized items is incumbent on the criminal investigation department until the seizure is reported to the judiciary, thereafter it is the responsibility of the public prosecutor's office. The Federal Ministry of Justice has started a process where better possibilities to manage assets are discussed with prosecutors and other practitioners.*

*Access to bank and financial records can be obtained where such information is required for “solving a deliberate criminal act” (section 116 CPC; art. 38 of the Banking Act). There is no central register of bank accounts in Austria. Therefore, if the suspicion exists that a person has a bank account in Austria, a two-step approach must be followed: a court order is sent to the five bank associations in Austria, which forward the request to their member banks. Both the associations and the concerned banks themselves can challenge the court order. However, under a new Ministerial Decree of 13 August 2013, the process has been streamlined. The original court order shall be transmitted to the banks only with respect to the specific request and only to a limited range of persons (e.g. the compliance officer or the anti-money-laundering officer). The banks are supposed to inform the prosecution authority within five days of the accounts of the person concerned.*

*Statute of limitations; criminal record (arts. 29 and 41)*

*General statutes of limitation for the prosecution of criminal offences are provided under section 57 PC and depend on the level of punishment incurred. For some of the corruption-related offences, the statute of limitations is 5 years as they carry sentences that range from 1 to 5 years. However, any investigative step would suspend the limitation*

*period (section 58(3)(2) PC).*

*Section 73 PC (foreign convictions) stipulates that foreign convictions are considered to be “equal to domestic convictions” for purposes of establishing the criminal record of the case under certain circumstances.*

*Jurisdiction (art. 42)*

*Austrian legislation establishes jurisdiction over offences committed within the national territory (sections 62 and 67 PC) and offences committed on board of Austrian vessels and planes (section 63 PC).*

*In addition, Austria has two concepts of extraterritorial jurisdiction. Section 64 PC provides for national jurisdiction without the double criminality requirement for criminal acts committed against an Austrian official while he/she fulfils his/her tasks, as well as criminal acts committed by an Austrian official. For other offences, jurisdiction is established subject to double criminality if the offender is an Austrian citizen or a foreigner, was arrested in Austria and cannot be extradited to a foreign State for other reasons than the nature or other characteristics of the offence (section 65 PC). Consequently, the Austrian legislation not only allows jurisdiction to prosecute when extradition is denied due to nationality but also allows such jurisdiction when extradition is denied for other reasons not related to the nature of the offences.*

*Consequences of acts of corruption; compensation for damage (arts. 34 and 35)*

*The Federal Public Procurement Act provides for the possibility of annulment of decisions taken by the awarding authority, if such decision is in breach of the law. In addition, the general principle of invalidity of a contract which violates a legal prohibition or public morality also applies to contracts concluded as a result of corrupt conduct (section 879 Civil Code).*

*The general principles of Austrian tort law also apply to cases involving corruption. In case of harm caused by unlawful conduct, the person whose rights have been infringed has a right to claim damages (sections 1293 et seq. of the Civil Code).*

*Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)*

*There are two main agencies in the fight against corruption, the Central Office for Prosecuting Economic Crimes and Corruption (WKStA) and the Federal Bureau of Anti-Corruption (BAK). WKStA was established in September 2011 and is responsible for filing charges and representing the prosecution in court in corruption cases where the value is above a certain threshold. Moreover, it has an opt-in competence and is responsible for a catalogue of severe economic crimes.*

*The Federal Ministry of Justice can give instructions to the higher-level prosecutor offices. In important cases, involving important crimes or persons of public interest, prosecutors have to obtain prior authorization from the Ministry before they can prosecute the case in court. However, initial investigative steps can be taken without authorization. At the end of the investigation, when a decision about prosecution or discontinuing proceedings has to be taken, the prosecutor has to report to the Ministry. If prosecution is declined by the Ministry, that decision has to be made in the form of an official instruction.*

*The Federal Bureau of Anti-Corruption (BAK) was established in January 2010. It has nationwide jurisdiction in the prevention of and the fight against corruption. BAK has to report all cases to the prosecution in order to ensure adequate supervision of corruption cases. There are periodical informal contacts between the head of the WKStA and the director of the BAK and joint trainings. However, BAK currently has no access to the judgments resulting from its investigations.*

*In relation to the cooperation between national authorities and the private sector, it was reported that since 2010, a multidisciplinary committee was in place to coordinate measures in the area of anti-corruption with the participation of representatives of various Federal Ministries, the Länder, WKStA, BAK and the Financial Market Authority. The private sector is represented by the Chamber of Commerce, the Union of Civil Servants, the Chamber of Notaries and the Bar Association. In future, Transparency International will also be a permanent Member.*

## **2.2. Successes and good practices**

*Overall, the following successes and good practices in implementing Chapter III of the Convention are highlighted:*

- The broad interpretation of the concept of “business activities” when applying the provision on bribery in the private sector (art. 21 of the Convention against Corruption);*
- The broad range of State authorities protected within the context of section 269 PC, which goes beyond the requirement of protecting the judicial and law enforcement authorities against obstruction of justice, as foreseen in article 25(b) of the Convention;*
- The availability of “extended forfeiture” for assets that are likely to be proceeds of crime if their legal origin cannot be proven to the satisfaction of the court (art. 31 of the Convention);*
- The fact that the Austrian legislation not only allows jurisdiction to prosecute when extradition is denied due to nationality but also allows such jurisdiction when extradition is denied for other reasons not related to the nature of the offences (art. 42 of the Convention).*

## **2.3. Challenges in implementation**

*While noting Austria’s considerable efforts to harmonize the national legal system with the Convention’s criminalization and law enforcement provisions, the reviewers identified some challenges in implementation and/or grounds for further improvement and made the following remarks to be taken into account for action or consideration by the competent national authorities (depending on the mandatory or optional nature of the relevant Convention requirements):*

- Expand the scope of predicate offences for purposes of money-laundering to include the offence established in section 153(1) PC (mere embezzlement involving a damage of not more than 3,000 euros) (art. 23 of the Convention);*
- Consider strengthening the existing asset declaration regime by making it more comprehensive and subject to monitoring, as well as providing for more effective criminal sanctions in dealing with incorrect declarations (art. 20 of the Convention);*
- Introduce a specific offence to fully implement the mandatory requirements of article 25(a) of the Convention;*
- Take measures to ensure the effectiveness of the domestic*

legislation on the criminal liability of legal persons; in doing so, consider the need for increasing the fines against entities to ensure that they have sufficient deterrent effect (art. 26 of the Convention);

- Adopt legislation to clarify that investigative action to secure evidence is allowed before the lifting of immunity takes place; and to ensure that the process for lifting the immunity should be strictly restricted to those cases where the Member of the Parliament himself/herself is the subject of the investigation (art. 30(2) of the Convention);
- Explore the possibility of expanding the scope of criminal offences for which extended confiscation is allowed to include corruption-related offences (art. 31 of the Convention);
- Consider the establishment of an asset management office (art. 31(3) of the Convention);
- Take measure to expand the protection of whistle-blowers in the private sector, including protection against any unjustified treatment (e.g. unfair dismissal) by private employers and consider precisely interpreting the term “good faith” in legislation to avoid the case where whistle-blowers are reluctant to expose suspicions of criminal offences (art. 33 of the Convention);
- Continue efforts to ensure that there are no unnecessary delays in accessing bank information and to keep information related to suspicions of criminal offences confidential; consider the introduction of a central bank account registry (art. 40 of the Convention);
- Abolish the requirement for prosecutors to obtain prior approval from the Ministry of Justice for the prosecution of cases involving persons of public interest and limit reporting obligations (art. 36 of the Convention);
- Strengthen the cooperation between WKStA and BAK and ensure that BAK receives feedback on the effectiveness of its work; Take further action to improve the independence of WKStA and BAK in terms of financial and human resources (art. 36 of the Convention).

### **3. Chapter IV: International cooperation**

#### **3.1. Observations on the implementation of the articles under review**

*Extradition; transfer of sentenced persons; transfer of criminal proceedings  
(arts. 44, 45 and 47)*

*A two-tier system on extradition has been put in place in Austria. With regard to other Member States of the European Union (EU), the surrender of fugitives is carried out in line with the requirements of the European Council Framework Decision of 13 June 2002 on the European Arrest Warrant (EAW). The Framework Decision was implemented in Austria through the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (EU-JZG).*

*With regard to other countries, although Austria does not make extradition dependant on the existence of a treaty, it is bound by existing multilateral treaties, such as the Council of Europe Convention on Extradition and its Second Additional Protocol and the United Nations Convention against Transnational Organized Crime. Austria has also concluded bilateral agreements on extradition with Australia, the*

*Bahamas, Canada, Pakistan, Paraguay and the United States of America.*

*Austria recognizes the Convention against Corruption as a legal basis for extradition, although no such request has yet been made. In the absence of an international treaty, the domestic extradition legislation shall apply on a basis of reciprocity.*

*Double criminality is always a requirement for granting extradition. It is interpreted on the basis of the “underlying conduct” approach, in line with article 43(2) of the Convention. Exceptionally, the double criminality requirement is not needed when executing an EAW, as the Framework Decision removes this condition in respect of a list of 32 offences, including corruption offences.*

*The substantive and procedural conditions for extradition, as well as the grounds for refusal of extradition requests, are stipulated in the Federal Law on Extradition and Mutual Assistance in Criminal Matters (ARHG). The extradition process revolves around the competences of both the judicial authority, which judges on the admissibility of the extradition request, and the Minister of Justice that has the final word on the surrender of the person sought.*

*The time frame needed to grant an extradition request varies depending, among others, on the complexity of the case, the type and nature of the process that can be applied, as well as the potentially parallel asylum proceedings. There is also the possibility of a simplified extradition process if the person sought consents to be extradited and waives his/her entitlement to the speciality rule. The EAW process has substantially shortened the period needed for the surrender of a fugitive to another EU Member State.*

*Section 65 PC authorizes domestic prosecution in cases where the Austrian authorities decline to extradite a fugitive to serve a sentence solely on the ground of his/her nationality. Austria allows the surrender of its nationals only on the basis of an EAW on the condition that, after the trial in the issuing State, the person sought is to be returned to Austria to serve the custodial sentence or detention order.*

*Austria cannot execute a foreign (non-EU) conviction for a Convention offence against an Austrian national but will prosecute him/her all over again.*

*The surrender of an Austrian national for purposes of enforcing a sentence is only feasible within the context of the EAW process. Outside this context, the execution of a decision by a foreign court imposing a custodial sentence is only admissible if the convicted person is an Austrian citizen, has his/her domicile or place of residence in Austria and has agreed to the execution in Austria (section 64(2) ARHG).*

*The transfer of sentenced persons is regulated by regional conventions (Council of Europe Convention on the Transfer of Sentenced Persons and its Additional Protocol).*

*The transfer of criminal proceedings is enabled through sections 60 et seq. and 74 et seq. ARHG, as well as the European Convention on the Transfer of Proceedings in Criminal Matters.*

*Mutual legal assistance (art. 46)*

*Mutual legal assistance is subject to section 50 et seq. ARHG and international agreements, and can be afforded for all purposes stipulated in article 46(3) of the Convention, including in cases where legal persons may be held liable.*

*The provision of assistance is subject to the double criminality*

requirement

(section 51(1) ARHG). The absence of criminal liability under Austrian law shall not oppose the service of documents if the recipient is prepared to accept them (section 51(2) ARHG). In this case, the service of documents is considered as a non-coercive measure for which assistance can be afforded even if the double criminality requirement is not fulfilled. A similar approach is followed in relation to the hearing of experts and witnesses who are not forced to appear before the court to testify.

Austria has designated the Federal Ministry of Justice as the central authority for receiving and transmitting MLA requests and has informed the Secretary-General of the United Nations accordingly. The MLA requests can be transmitted through diplomatic channels or, in urgent circumstances, through INTERPOL. Direct transmittal between competent authorities is also possible.

A request for judicial assistance which requires a procedure that differs from the Austrian laws on criminal procedure will be executed, if this is compatible with the principles set forth in the CPC (section 58 ARHG).

The customary length of time between receiving MLA requests and responding to them, including the decision on execution, was reported to be approximately three months.

Austria has concluded bilateral MLA treaties with Australia, Canada and the United States of America. It is also a party to the European Convention on Mutual Assistance in Criminal Matters and its First Additional Protocol. Austria has ratified the EU Convention on Mutual Assistance in Criminal Matters (2000) and its Protocol (2001).

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

Austria can provide for cooperation between law enforcement authorities based on domestic law (section 3 ARHG), even without any treaty, as long as reciprocity is guaranteed. Moreover, the Convention against Corruption has already been considered as legal basis and will be used more often in the future.

As a member of INTERPOL, Eurojust and Europol, Austria can engage in information exchange through their databases. Cooperation and exchange of information is further facilitated through the Schengen Information System and via police liaison officers. The BAK acts as point of contact for OLAF, INTERPOL, Europol and other comparable international institutions.

Joint investigation teams are possible and subject to ad hoc arrangements. In relation to EU Member States, it is regulated by sections 60 et seq. of the EU-JZG. At the operational level, two bilateral joint investigation teams and one trilateral are dealing with cases involving bribery allegations.

Special investigative techniques are regulated in the CPC. Sections 129-133 provide for observation, covert investigation, fictitious business transaction, whereas sections 134-140 provide for surveillance of telecommunications and persons. Section 72(2) EU-JZG concerns controlled deliveries.

### **3.2. Successes and good practices**

Austria has established a comprehensive and coherent legal framework on international cooperation in criminal matters. The domestic legislation encompasses all forms of international cooperation and is efficiently implemented. Moreover, the following successes and good

*practices in implementing Chapter IV of the Convention are highlighted:*

- *The interpretation of the double criminality requirement focusing on the underlying conduct and not the legal denomination of the offence (art. 44 of the Convention);*
- *The fact that the Austrian legislation not only allows jurisdiction to prosecute when extradition is denied due to nationality but allows such jurisdiction when extradition is denied for other reasons not related to the nature of the offences (art. 44 of the Convention).*

### **3.3. Challenges in implementation**

*The following points are brought to the attention of the Austrian authorities for their action or consideration (depending on the mandatory or optional nature of the relevant Convention requirements) with a view to enhancing international cooperation to combat offences covered by the Convention:*

- *Explore the possibility of further relaxing the strict application of the double criminality requirement in line with article 44(2) of the Convention and following such a flexible approach for cases beyond the execution of European Arrest Warrants, with due respect to the protection of human rights;*
- *Consider ways to overcome potential challenges posed by the fact that Austria cannot execute a foreign (non-EU) conviction for an UNCAC offence against a Austrian national but instead, when it denies extradition on the basis of nationality, will prosecute the offender anew (art. 44 of the Convention);*
- *Consider ways to address the potential impact that the practical difficulties in collecting domestically bank information (due to lack of central registry, etc.) may have on the ability to obtain and provide such information and evidence under mutual legal assistance (art. 46 of the Convention).*

## **IV. Implementation of the Convention**

### **A. Ratification of the Convention**

The Convention was signed on 10 December 2003 by the federal president of the republic, Dr. Heinz Fischer, and ratified by parliament on 11 January 2006. Austria deposited its instrument of ratification with the Secretary-General of the United Nations on 12 January 2006.

Upon ratification of the UNCAC, its provisions are directly applicable for the Austrian authorities, to the extent that this is possible. Treaties take precedence over acts of parliament. Accordingly, the UN Convention against Corruption has become an integral part of Austria's domestic law following ratification of the Convention (see above) and entry into force on 10 February 2006 in accordance with Article 68 of the Convention.

Chapter IV of the Convention is partly self-executing: if there is no other legal basis for cooperation with another country, the Convention provisions on international cooperation will be applied directly.

The implementing legislation includes the acts listed below.

## **B. Legal system of Austria**

The Austrian legal system is based on Roman law and is structured in hierarchical layers. The Civil Code - Allgemeine Bürgerliche Gesetzbuch (ABGB) - is one of the world's oldest codes of civil law.

The legal system is structured according to a so-called tier system of laws, which decrees that laws and regulations must comply with the standards set by the higher tiers (eg. the constitution, constitutional laws). In the top tier are the Austrian Federal Constitution and individual constitutional laws, as well as the EU Acts of Accession. General federal laws and laws of the federal provinces are in the lower tiers. Statutory authorities can enact regulations or individual administrative rulings (*Bescheide*) in accordance with these.

There is no case law system in Austria. This means that the judge is free to reach his own decision or ruling, although previous rulings may be adduced in hearings.

With entry to the EU on 1.1.1995, Austria adopted the EU legal framework.

The judiciary is separate from the executive at all levels of jurisdiction. The police, as an executive agency, are subject to the Republic of Austria.

The administration of justice in Austria proceeds from the federal level. Court judgments and decisions are pronounced and published in the name of the Republic. Judges are independent in the exercise of their office. Proceedings in courts of civil and criminal law are verbal and public. The final court of appeal for civil and criminal proceedings is the Supreme Court.

As in other countries, there are four levels of judicial authority in Austria: district courts (*Bezirksgericht*); regional courts (*Landesgericht*); Higher Regional Court (*Oberlandesgericht*); Supreme Court (*Oberster Gerichtshof*).

Administrative Courts (*Verwaltungsgerichte*) deal with disputes in connection with decisions taken by the administrative authorities. Judgments by administrative courts can be challenged at the "Administrative Court" (*Verwaltungsgerichtshof*). The Constitutional Court (*Verfassungsgerichtshof*) deals with actions based on violations of the constitution against federal, provincial, regional or municipal authorities.

The prosecution authority is a self-contained judicial authority separate from the courts which has to safeguard the interest of the state in the administration of justice. The prosecutor's most important tasks include the commencement of criminal proceedings, acting for the prosecution and conducting the preliminary proceedings. The Public Prosecution Act governs these tasks. In contrast to the judge, the prosecution, as a judicial body, is obliged to follow the instructions of the

superior authority. At first-instance courts their responsibilities are vested in the public prosecutor, at the court of appeal in the senior public prosecutor and at the Supreme Court in the general procurator. The offices of senior public prosecutors and the General Procurator's Office are each only subordinate to the Federal Ministry of Justice. A general procurator does not have any authority to issue instructions to senior public prosecutors or public prosecutors.

Only judges or former judges, who continue to meet the requirements for being appointed as professional judges, may become public prosecutors. Just as the established posts for judges, the established posts for public prosecutors are also advertised publicly to applicants. The Federal President appoints public prosecutors upon proposal by the staff commission. However, for most established public-prosecutor posts he has delegated the right of appointment to the Federal Minister of Justice.

Public prosecutors are in a public-law employment relation to the Federal State and represent the public interest on behalf of the state in court, as an independent body in the administration of justice. In penal proceedings, public prosecutors present the indictment and are thus formally a party in the proceedings. However, they are obliged to observe full impartiality vis-à-vis all sides. Public prosecutors must follow up on aggravating as well as mitigating circumstances with the same diligence and care. The prosecutor heads the preliminary proceedings and in doing so may ask the criminal police to take evidence. The prosecutor grants and issues orders. Any party to the proceedings that regards a prosecutor's order as onerous may turn to the court.

In 2010, the Federal Anti-Corruption Agency (Bundesamt für Korruptionsprävention und Korruptionsbekämpfung, BAK) was established as a separate agency to ensure more independence from the police. It is a federal agency with federal competences and its own legal basis.

Regarding the political system, Austria is a democratic republic. Its head of state (the Federal President) and its legislative organs are elected by the populace. Citizens of Austria have been guaranteed basic rights and freedoms (such as freedom of belief and conscience) since 1867. Austria has ratified the European Convention on the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

Austria is a federal republic, composed of nine constituent federal states: Burgenland, Carinthia, Lower Austria, Salzburg, Styria, Tyrol, Upper Austria, Vienna and Vorarlberg. Vienna is also the nation's capital. Federal legislation is enacted by the two chambers of Parliament, the Nationalrat and the Bundesrat. The latter chamber represents the interests of the federal states. The state diets exercise the legislative power of the federal states.

The 183 deputies in the Nationalrat are elected by the populace every five years. The members of the state diets are elected by the population of the federal state concerned. The members of the Bundesrat - currently 62 - are nominated by the state diets.

After the last national parliamentary election on 28 September 2008, the distribution of seats is as follows: 57 Social Democratic Party of Austria (SPÖ), 51 Austrian People's Party (ÖVP), 34 Freedom Party of Austria (FPÖ), 20 The Greens (Grüne), 21 Alliance Future Austria (BZÖ).

The supreme federal executive organs are the Federal President and the members of the Federal Government, headed by the Federal Chancellor. The supreme state executive organs are the State Governments, each headed by the State Governor.

On October 26, 1955 the Nationalrat enacted a federal constitutional law declaring Austria to be a permanently neutral state.

Austria listed the articles of the relevant laws, policies and/or other measures that are cited in the responses to the self-assessment checklist:

1) Banking Act:  
Section 38

2) Civil Servants' Employment Act (Beamten-Dienstrechtsgesetz - BDG):  
Sections 53 a, 109

3) Code of Criminal Procedure (CCP/Strafprozessordnung - StPO):  
Sections 109-166 (only headlines) Sections: 2, 20a, 20b, 76, 78, 99, 103, 109, 110, 114, 115, 115a, 115e, 116, 156, 173, 173a, 180, 181, 190, 191, 192, 197, 198, 199, 200, 201, 203, 204, 205, 209a, 375

4) Code of Police Practice (Sicherheitspolizeigesetz - SPG): 22, 48

5) Contract Staff Act (Vertragsbedienstetengesetz - VBG): 5

6) Convention, established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union:  
Article 7, 13

7) Convention implementing the Schengen Agreement:  
Article 47

8) Council Decision of 6 April 2009 establishing the European Police Office (Europol) -2009/371/JHA:  
Article 9

9) Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European communities or officials of Member States of the European Union (Übereinkommen über die Bekämpfung der Bestechung in der EU):  
Article 9

10) EU Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States 2002/584/JI:  
Articles 1-35

11) Federal Law on Extradition and Mutual Assistance in Criminal Matters (Extradition and Mutual Assistance Act - Auslieferungs- und Rechtshilfegesetz - ARHG):  
Sections 1-78

12) EU-Police Cooperation Act (EU-Polizeikooperationsgesetz - EU-PolKG):  
Sections 6, 7, 9, 10, 11, 23, 27, 28, 29, 30, 33, 35, 38, 39

13) European Convention on Extradition:  
Article 20

14) European Convention on Mutual Assistance in Criminal Matters (Europäisches Übereinkommen über die Rechtshilfe in Strafsachen - EuRHÜb):  
Articles 1, 15

15) Federal Constitution Law (Bundes-Verfassungsgesetz - B-VG):  
Articles: 57, 58, 96

16) Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption (BAK-G):  
Sections 4-6

17) Federal Law on the Rules of Procedure of the Austrian National Council - Rules of Procedure Law of 1975 (Bundesgesetz vom 4. Juli 1975 über die Geschäftsordnung des Nationalrates - Geschäftsordnungsgesetz 1975):  
Section 10

18) Federal Statute on Responsibility of Entities for Criminal Offences (Verbandsverantwortlichkeitsgesetz - VbVG):  
Sections 1-12

19) 38th Federal Constitutional Law on Cooperation and Solidarity in the Secondment of Units and Individuals to Foreign Countries (KSE-BVG):  
Section 1

20) (Federal Act on) Judicial Cooperation in Criminal Matters with the Member States of the EU (EU-JZG):  
Sections 1, 5, 56, 60, 62, 69, 72, 73

21) Judicial and Prosecution Service Act (Richter- und Staatsanwaltschaftsdienstgesetz - RStDG):  
Section 58b

22) Law on the Federal Criminal Police Office (Bundeskriminalamt-Gesetz - BKA-G):  
Article 4

23) Penal Code (Strafgesetzbuch - StGB):  
Sections 12, 15, 19a, 20, 20a, 20b, 26, 34, 57, 58, 62, 63, 64, 65, 67, 73, 74, 153, 164, 165, 269, 270, 278, 288, 302, 304, 305, 306, 307, 307a, 307b, 308, 309

24) Police Cooperation Act (PolKG):  
Sections 2, 3, 5, 14, 18

25) Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Protokoll vom Rat gemäß Artikel 34 des Vertrags über die Europäische Union erstellt zu dem Übereinkommen über die Rechtshilfe in Strafsachen zwischen den Mitgliedstaaten der Europäischen Union (ProtEU-RHÜ):  
Articles 1-3

26) Second Additional Protocol to the European Convention on Extradition:  
Articles 1-12

27) United Nations Convention against Transnational Organized Crime (Übereinkommen der Vereinten Nationen gegen die grenzüberschreitende Kriminalität - UNTOC):  
Article 27

Austria advised that the Anti-Corruption laws were amended as of 1 January 2013. Therefore, it included the new laws and provisions in the answering of the questions in the Omnibus Software. This also implies that statistics and cases (if available and applicable) are based on the existing laws until 31 December 2012. Simultaneously, statistics and cases for the new legal context are not available yet.

The following chart shows the statistics on convictions with regard to the criminal offences related to corruption for 2007, 2008, 2009, 2010 and 2011. A study on the scale and nature of corruption in Austria was conducted by the Institute for Research on Conflicts (Institut für Konfliktforschung - IKF) in 2010, which examined court files and files of prosecution with regard to cases related to corruption for the years 2002 to 2009; an outcome of this work is that the majority of corruption

cases concerning the public sector are dealt with under Section 302 PC on abuse of power (see <[http://www.ikf.ac.at/a\\_proj10/a\\_pro11.htm](http://www.ikf.ac.at/a_proj10/a_pro11.htm)>); only few cases are dealt with under Section 304 to 308 PC. As for corruption in the private sector, including the private-sector-like public sector corruption (most notably public procurement cases), the only convictions available concern Section 153 PC.

On the other hand, within the convictions for Sections 153 and 302, the statistics do not reveal how many cases of embezzlement or abuse of power involve corruption and how many cases of embezzlement or abuse of power do not involve corruption. For these reasons, the informative value of the statistics below may be limited.

Convictions	2007	2008	2009	2010	2011
Section153	119	143	126	150	138
Section168c	n.a.				1
Section168d	n.a.				
Section302	85	62	38	60	82
Section304	2	4	1	1	2
Section305					1
Section306					
Section307	1		3	1	3
Section 307a	n.a.				1
Section 307b	n.a.				
Section 308					

Since Austria is member of GRECO (Group of States against Corruption of the Council of Europe) and of OECD, it has been evaluated several times within their review mechanisms. The websites of the two organizations list the Austrian reports.

## **C. Implementation of selected articles**

### **Chapter III. Criminalization and law enforcement**

#### **Article 15 Bribery of national public officials**

##### **Subparagraph (a)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;*

##### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Sections 307; 307a; 307b; 12, 302 PC (Section 302 in combination with Section 12 PC signifies that Active Bribery may also be treated as instigation to abuse of official authority)

### ***Bribery***

#### ***Section 307***

(1) Whoever offers, promises or gives an advantage to a public official or an arbitrator for himself or a third person for performing or refraining from performing an official act in violation of his duties, shall be punished by imprisonment up to three years. Likewise anybody is to be punished who offers, promises or gives an advantage to an expert (sec 304 par. 1) for himself or a third person for delivering an incorrect evidence or expertise.

(2) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euros shall be punished by imprisonment from six month up to five years, whereas whoever commits the offence with regard to a value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from one year up to ten years.

### ***Granting of advantages***

#### ***Section 307a.***

(1) Whoever offers, promises or grants an undue advantage (Section 305 para. 4) to a public official or an arbitrator for him/her or for a third person for performing or refraining from performing an official act in accordance with his/her duties shall be punished by imprisonment up to two years.

(2) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euros shall be punished by imprisonment from six month up to five years, whereas whoever commits the offence with regard to a value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from one up to ten years.

### ***Granting of advantages for the purpose of exercising influence***

#### ***Section 307b.***

(1) Who, apart from the cases of Sections 307 and 307a, offers, promises or grants an undue advantage (Section 305 para. 4) to a public official or an arbitrator for him/her or for a third person with the intention of influencing him/her in his activity as public official, shall be punished by imprisonment of up to two years.

(2) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euro shall be punished by imprisonment up to three years, whereas who commits the offence with regard to the value of the advantage exceeding 50.000 Euro shall be punished by imprisonment from six months up to five years.

### ***Treatment of all participants as offenders***

#### ***Section 12.***

A criminal offence is committed not only by the immediate perpetrator who commits the criminal offence, but also by anyone who instigates another person to commit the offence or who contributes to its perpetration in any other way.

### ***Abuse of official authority***

#### ***Section 302***

(1) An official who abuses wilfully his authority to carry out official matters executing the laws in the name of the federal government, a land, a local government, a municipality or another person under public law with the intent to harm the right of others shall be punished by prison sentence from six months to five years.

(2) Who commits the offence carrying out official matters with a foreign power or a multilateral or bilateral institution shall be punished by prison sentence from one year to ten years. By the same sentence shall be punished who causes through the offence a damage exceeding 40 000 Euro.

Austria did not provide any cases of implementation, but the following statistics:

Investigations	2010	2011
Section 302	586	701
Section 307	10	9
Section 307a	0	2
Section 307b	1	4

Convictions	2007	2008	2009	2010	2011
Section302	85	62	38	60	82
Section307	1		3	1	3
Section 307a	n.a.				1
Section 307b	n.a.				

**(b) Observations on the implementation of the article**

During the country visit, Austria clarified the difference between the three articles which govern the bribery offense, as well as those which govern the taking of bribes. Section 307 requires a violation of duties, but applies to any advantage; Section 307a applies to acts in accordance with duties, but only undue advantages; Section 307b applies to any influence, without the use of an intermediary.

The constituent elements of “promising”, “offering” or “giving” an advantage to a public official are all included in the description of the conducts covered on those sections.

Austria also pointed out that while the indirect commission of the act was not explicitly mentioned in the wording of the relevant Sections of the PC, it was self-evident that this was also covered. Moreover, Section 12 PC provides that a criminal offence is committed not only by the immediate perpetrator who commits the criminal offence, but also by anyone who instigates another person to commit the offence or who contributes to its perpetration in any other way.

The domestic provisions on active bribery explicitly cover all cases where the advantage is offered not only for the benefit of the public official himself/herself, but also for the benefit of a third person (third-party beneficiary).

It was further explained that the definition of “public official” set out in Section 74 PC also applies to elected officials as well as public officials appointed to positions. In particular, since the beginning of 2013, Members of Parliament are now fully covered by Section 74(1) no. 4a (b) PC. Arbitrators are not public officials, therefore they are mentioned separately.

The bribery offences also refer to the concept of “advantage”, which is understood as any type of benefit, pecuniary or non-pecuniary. Immaterial advantages are covered but for obvious reasons, there are no monetary thresholds for immaterial benefits with regard to the severity of the crime.

With regard to the requirement of “intent to harm” in Section 302 it was explained that it suffices if the State (the legal order) is harmed.

The reviewing experts concluded that the UNCAC provision has been adequately implemented.

## **Subparagraph (b)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention. It cited Sections 304, 305, 306, 302 PC (passive bribery may also be treated as abuse of official authority).

#### ***Passive bribery [Bestechlichkeit]***

##### ***Section 304***

(1) A public official or an arbitrator, who demands, accepts or allows him/herself to be promised an advantage for him/herself or a third person for performing or refraining from performing an official act in violation of his/her duties shall be punished by imprisonment of up to three years. Likewise to be punished is an expert assigned by the court or another administrative body for certain proceedings who demands, accepts or causes someone to promise an advantage for him/herself or a third person for delivering an incorrect evidence or expertise.

(2) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euros shall be punished by imprisonment from six month up to five years, whereas whoever commits the offence with regard to a value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from one year up to ten years.

#### ***Acceptance of advantages***

##### ***Section 305.***

(1) A public official or an arbitrator who accepts or allows himself/herself to be promised an undue advantage (para. 4) for himself/herself or a third person for performing or refraining from performing an official act in accordance with his/her duties shall be punished by imprisonment up to two years.

(2) deleted.

(3) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euros shall be punished by imprisonment up to three years, whereas whoever commits the offence with regard to a value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from six months up to five years.

(4) The following advantages are not considered undue:

1. advantages, the acceptance of which is explicitly permitted by law, or which are granted in the framework of events which are being attended because of an official or objective interest, 2. advantages for charitable purposes (Section 35 BAO) on the usage of which the arbitrator or official does not exercise any influence, and

3. if there are no laws in the sense of item 1 advantages of minor value given in accordance with local customs unless the act is committed on a professional scale.

#### ***Acceptance of advantages for the purpose of exercising influence***

##### ***Section 306.***

(1) A public official or arbitrator who, apart from the cases mentioned in Sections 304 and 305, demands an advantage or accepts or allows himself/herself to be promised an undue advantage (Section 305 para. 4) for himself/herself or a third person with the intention to let himself/herself be influenced by this in his/her activity as public official, shall be punished by imprisonment up to two years.

(2) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euro shall be punished by imprisonment up to three years, whereas who commits the offence with regard to the value of the advantage exceeding 50.000 Euro shall be punished by imprisonment from six month up to five years.

(3) Whoever accepts or causes someone to promise only a minor advantage is not to be punished according to (1) unless the act is committed on a professional scale.

***Abuse of official authority***

***Section 302***

(1) An official who abuses wilfully his authority to carry out official matters executing the laws in the name of the federal government, a land, a local government, a municipality or another person under public law with the intent to harm the right of others shall be punished by prison sentence from six months to five years.

(2) Who commits the offence carrying out official matters with a foreign power or a multilateral or bilateral institution shall be punished by prison sentence from one year to ten years. By the same sentence shall be punished who causes through the offence a damage exceeding 40 000 Euro.

Austria did not provide any cases of implementation, but the following statistics:

Investigations	2010	2011
Section 302	586	701
Section 304	24	13
Section 305	7	3
Section 306	1	0

Convictions	2007	2008	2009	2010	2011
Section302	85	62	38	60	82
Section304	2	4	1	1	2
Section305					1
Section306					

**(b) Observations on the implementation of the article**

Passive bribery of domestic public officials is incriminated under sections 304 (passive bribery involving a breach of duties), 305 (acceptance of advantages), 306 (acceptance of advantages for the purpose of exercising influence) and 302 PC. The acts of “demanding”, “accepting” or “allowing oneself to be promised” are reflected in the text of those provisions.

Sections 304 and 305 PC on passive bribery refer to bribery acts involving a public official performing or refraining from performing an official act either in violation of the official’s duties (sections 307 and 304 PC) or in conformity with the official’s duties (sections 307a and 305 PC). An “official act” includes any act that the public official carries out in order to fulfill his/her duties.

In the light of the explanations given on Article 15(a) UNCAC, the reviewing experts concluded that the provision has been adequately implemented.

**Article 16 Bribery of foreign public officials and officials of public international organizations**

**Paragraph 1**

*1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official*

*or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention. It referred to the answers provided to article 15(a) UNCAC; the offenses of Section 307 to 307b do not differentiate between domestic or foreign public officials; cf. Section 74 PC, however, Section 302 only applies to national public officials.

**Section 74.**

- (1) According to this Federal Law 1. ...
- 4a. public official: anyone who a) deleted
- b) as an organ or employee discharges tasks of legislation, administration or justice for the federation, for a federal state, for an association of municipal corporations, for a commune, for a social insurance institution or its association, for another state or for an international organisation,
- c) is otherwise authorised to perform official duties in fulfilment of the law for a body mentioned under b), or
- d) acts as an organ or employee of an enterprise, where one or more national or foreign territorial corporate bodies directly or indirectly hold at least fifty per cent of the share, stock, or equity capital, where such a territorial corporate body is either the sole or joint operator with other such territorial corporate bodies or has de facto control by other financial, other economic measures or organisational measures, but at any rate every enterprise the conduct of which is subject to examination of the court of auditors or a comparable institution of the Provinces or a comparable international or foreign control institution.

Austria did not provide any cases of implementation, but the following statistics:

Investigations	2010	2011
Section 307	10	9
Section 307a	0	2
Section 307b	1	4

Convictions	2007	2008	2009	2010	2011
Section 307	1		3	1	3
Section 307a	n.a.				1
Section 307b	n.a.				

**(b) Observations on the implementation of the article**

The reviewing experts noted that section 74, paragraph 1(4a) PC refers to “any person who as an organ or employee discharges tasks of legislation, administration or justice... for another state or for an international organization”. Hence, the relevant provisions on bribery of domestic public officials are also applicable. The offenses of sections 307 to 307b do not differentiate between domestic or foreign public officials, whereas section 302 only applies to national public officials.

During the country visit, Austria confirmed that the PC applies e.g. to an Austrian citizen who works for a foreign corporation outside of Austria and commits the offence outside Austria. Austria cited Section 64(1) no. 2a (a) PC. Furthermore, as already mentioned, the definition of public

officials was expanded in 2013 (see para. 0 above). Therefore, there are no convictions yet under the new law, but there have been convictions under the old law.

In the light of the explanations given on Article 15(a) UNCAC, the reviewing experts concluded that the provision has been adequately implemented.

**Paragraph 2**

*2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention. It referred to the answers provided to articles 15(b) and 16(1) UNCAC. There is no difference between national and foreign public officials on the passive side either, again with the exception that Section 302 only applies to national public officials.

Austria cited the following domestic laws: Sections 304, 305, 306 PC.

Austria did not provide any cases of implementation, but the following statistics:

Investigations	2010	2011
Section 304	24	13
Sect. 305	7	3
Section 306	1	0

Convictions	2007	2008	2009	2010	2011
Section304	2	4	1	1	2
Section305					1
Section306					

**(b) Observations on the implementation of the article**

The reviewing experts concluded that the provision has been implemented.

**Article 17 Embezzlement, misappropriation or other diversion of property by a public official**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Sections 133, 153 PC.

***Misappropriation***

***Section 133***

(1) A person, who has been entrusted with an object, and who misappropriates the object for himself/herself or a third party, with the intention of enriching himself/herself or a third party unlawfully, shall be sentenced to a prison term of up to six months, or a fine of up to 360 daily rates.

(2) A person who misappropriates an object, the value of which is in excess of 3,000 euros, shall be sentenced to a prison term of up to three years; a person misappropriating an object, the value of which is in excess of 50,000 euros, shall be sentenced to a prison term of up to ten years.

***Breach of trust***

***Section 153***

(1) Whoever knowingly abuses the authority conferred to him by statute, official order or contract to dispose of property not belonging to him or to oblige this other person and causes damage to another person in this way, shall be liable to imprisonment for up to six months or a fine of up to 360 daily rates.

(2) Whoever causes a damage exceeding 3,000 Euros shall be liable to imprisonment for up to three years, whoever causes damage exceeding 50,000 Euros shall be liable to imprisonment from one to ten years.

Austria did not provide any cases of implementation, but the following statistics:

Investigations	2010	2011
Section 153	11	14

Convictions	2007	2008	2009	2010	2011
Section 153	119	143	126	150	138

**(b) Observations on the implementation of the article**

During the country visit, Austria explained that Section 153 PC applies to officials and non officials; that the harm required can be done to the State (the legal order); and that *dolus eventualis* is sufficient.

It was confirmed that Section 153 PC is not a predicate offence for money laundering. Austria stated that there was no international obligation in that respect and therefore, Austria had no intention to change this.

If the perpetrator is an official, Section 313 PC provides for a more severe punishment.

The reviewing experts concluded that the provision has been adequately implemented.

**Article 18 Trading in influence**

**Subparagraph (a)**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Section 308 PC.

***Illicit Intervention***

***Section 308***

(1) Who demands, accepts or allows him/herself to be promised an advantage for himself/herself or for a third person for exercising undue influence on the decision-making process of a public official or an arbitrator shall be punished by imprisonment up to two years.

(2) Likewise, anyone shall be punished, who offers, promises or gives an advantage to someone to have him/her exercise undue influence on the decision-making process of a public official or an arbitrator.

(3) Whoever commits the offence with regard to a value of the advantage exceeding 3.000 Euro shall be punished by imprisonment up to three years, whereas who commits the offence with regard to the value of the advantage exceeding 50.000 Euro shall be punished by imprisonment from six months up to five years.

(4) Influencing the decision-making process of a public official or an arbitrator is considered undue if it aims at performing or refraining from performing a legal act contrary to his/her duties or is connected with offering, promising or giving an undue advantage (Section 305 para. 4) to the public official or a third person.

(5) The perpetrator is not to be punished according to the above-mentioned provisions if the act is punishable with a more severe punishment according to other legal provisions.

Austria did not provide any cases of implementation, but the following statistics:

Investigations	2010	2011
Section 308	0	2

No convictions were reported.

**(b) Observations on the implementation of the article**

During the country visit, it was confirmed that the exercise of merely supposed influence would also be constitute criminal behaviour (fraud). However, a small present for an act not contrary to the duties of the official would not be covered (Sections 308(4) in conjunction with 305(4)) PC.

The offence is already completed with the trading of the influence, no matter if the influence is exerted afterwards and also irrespective of whether the (potential) influence is real or only pretended

An example was provided of a case from the 1990s, involving the acquisition of fighter jets. An Austrian businessman in Italy had tax problems; he told his Italian tax advisor about it who approached the former PM of Croatia who in turn approached the former PM of Italy. The case was prosecuted under Section 308 PC.

The reviewing experts concluded that the provision has been adequately implemented.

## Subparagraph (b)

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.*

### (a) Summary of information relevant to reviewing the implementation of the article

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Section 308 PC.

Austria did not provide any cases of implementation but the following statistics:

Investigations	2010	2011
Section 308	0	2

No convictions were reported.

### (b) Observations on the implementation of the article

The reviewing experts concluded that the provision has been adequately implemented.

## Article 19 Abuse of Functions

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.*

### (a) Summary of information relevant to reviewing the implementation of the article

Austria confirmed that it had implemented this provision of the Convention.

Austria cited the following domestic laws: Sections 302, 304, 306 PC.

#### *Abuse of official authority*

##### *Section 302*

(1) A public official who wilfully abuses his authority to conduct official matters executing the laws in the name of the federal government, a Land, an association of municipalities, a municipality or another body under public law with the intent to harm the rights of another person shall be punished by imprisonment from six months to five years.

#### *Corruptibility*

##### *Section 304.*

(1) A public official or an arbitrator, who demands, accepts or accepts a promise of an advantage for himself or a third person for performing or refraining from performing an official act in violation of his

duties shall be punished by imprisonment of up to three years. Likewise to be punished is an expert assigned by the court or another administrative body for certain proceedings who demands, accepts or accepts a promise of an advantage for himself or a third person for delivering an incorrect evidence or expertise.

***Acceptance of advantages for the purpose of exercising influence  
Section 306.***

(1) A public official or arbitrator who, apart from the cases mentioned in Sections 304 and 305, demands an advantage or accepts or allows himself/herself to be promised an undue advantage (Section 305 para. 4) for himself/herself or a third person with the intention to let himself/herself be influenced by this in his/her activity as public official, shall be punished by imprisonment up to two years.

Austria provided the following example of implementation:

(Strasser Case) In 2011, British journalists (pretending to be lobbyists) blew the cover of a former Austrian Member of the European Parliament when he offered them his services to propose an amendment in the EU Parliament in return for payment. Charges based on corruptibility (Section 304 PC) were brought in court. The former MEP has been convicted at first instance.

Austria provided the following statistics:

In 2011, there were 701 cases in which the main criminal offence was a breach of Section 302 PC (Abuse of Official Authority). Furthermore, there were 20 convictions pursuant to Section 304 PC (Corruptibility).

**(b) Observations on the implementation of the article**

The reviewing experts noted that Austria has implemented this article, despite its optional nature. However, they noted in Section 302 PC the requirement of the “intent to harm the rights of another person”. During the country visit, it was explained that purely economic damage is sufficient and that a violation of laws will almost always harm the State (the legal order).

Austria acknowledged that if a personal interest was not disclosed but it does not influence the decision, then Sections 302-306 would not apply. However, the Convention is only concerned with cases where an undue advantage is sought.

The reviewing experts concluded that Austria’s legislation is in compliance with this provision.

**Article 20 Illicit Enrichment**

*Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria indicated that it has not implemented this provision of the Convention.

**(b) Observations on the implementation of the article**

During the country visit, Austria acknowledged that implementation of this provision had not officially been considered. There was general consensus among Austrian jurists that the criminalisation of illicit enrichment would lead to insurmountable constitutional problems. It was pointed out that the European Convention on Human Rights enjoys constitutional status in Austria.

The reviewing experts further learned that while there was a limited asset declaration scheme in place, it was not very comprehensive and did not foresee effective sanctions in case of incorrect declarations.

### **(c) Challenges in implementation**

In view of the information provided during the country visit, the review team encouraged the Austrian authorities to reconsider strengthening the existing asset declaration regime by making it more comprehensive and subject to monitoring, as well as providing for more effective criminal sanctions in dealing with incorrect declarations.

## **Article 21 Bribery in the private sector**

### **Subparagraph (a)**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:*

*(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;*

### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Sections 309, 153 PC (together with Section 12; active bribery in the private sector may be treated as instigation to embezzlement).

#### ***Acceptance of gifts and bribery of servants or agents***

##### ***Section 309.***

(1) A servant or agent of a company, who, in the course of business activities, demands, accepts or allows him/herself to be promised an advantage for him/herself or for a third person for performing or refraining from performing a legal act contrary to his/her duties, shall be punished by imprisonment up to two years.

(2) Likewise, anyone shall be punished, who offers, promises or gives an advantage in the course of business activities to servants or agents of a company for performing or refraining from performing a legal act contrary to his/her duties.

(3) Whoever commits the offence with regard to a value of the advantages exceeding 3.000 Euro shall be punished by imprisonment up to three years, whereas who commits the offence with regard to the value of the advantage exceeding 50.000 Euro shall be punished by imprisonment from six months up to five years.

#### ***Treatment of all participants as offenders***

##### ***Section 12.***

A criminal offence is committed not only by the immediate perpetrator who commits the criminal offence, but also by anyone who instigates another person to commit the offence or who contributes to its perpetration in any other way.

Austria did not provide any cases of implementation, but the following statistics:

§ 12 Investigations against	2010	2011
Perpetrators	1388	1370
Perpetrators inciting another person	73	17
Accessories	78	21

Convictions	2007	2008	2009	2010	2011
§153	119	143	126	150	138

Based on information received during the country visit, the implementation of § 309 will start in 2013.

**(b) Observations on the implementation of the article**

Bribery in the private sector is criminalized through section 309 PC, in conjunction with section 153 PC (breach of trust). Section 309 PC refers to bribery acts committed in the course of business activities involving a servant or agent of a company performing or refraining from performing a legal act contrary to his/her duties.

During the country visit, the reviewing experts were told that the term “in the course of business” is interpreted broadly and includes even unpaid charitable work or work for NGOs. The latter was identified as a good practice by the review team.

Contrary to the provisions on public sector bribery, no distinction is made using as a criterion the involvement of a breach of duties. Although the element of breach of duties is foreseen in section 309 PC, many cases of bribery in the private sector are prosecuted as breach of trust under section 153 PC. The experts also noted that there is now ex officio prosecution and higher sanctions.

The reviewing experts concluded that the provision has been implemented.

**(c) Successes and good practices**

The reviewing experts identified as a good practice the broad interpretation of the concept of “business activities” when applying the provision on bribery in the private sector.

**Subparagraph (b)**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:*

*(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Sections 309, 153 PC (passive bribery in the private sector may be treated as embezzlement/breach of trust if the offender knows that he or she is breaching his or her duties and has at least *dolus eventualis* with regard to acting detrimental for his or her enterprise). For the texts, see above answer to Articles 17 and 21(a).

Austria did not provide any cases of implementation, but the following statistics:

Investigations	2010	2011
§ 153	11	14

Investigations against	2010	2011
Perpetrators	1388	1370
Perpetrators inciting another person	73	17
Accessories	78	21

The implementation of § 309 will start in 2013.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that the provision has been implemented.

**Article 22 Embezzlement of property in the private sector**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Section 153 PC. For the texts, see above answer to Article 17.

Austria did not provide any cases of implementation, but the following statistics:

Investigations	2010	2011
§ 153	11	14

Convictions	2007	2008	2009	2010	2011
§153	119	143	126	150	138

**(b) Observations on the implementation of the article**

The reviewing experts made the same observations as in the case of Article 17 UNCAC. They concluded that the provision has been adequately implemented.

**Article 23 Laundering of proceeds of crime**

**Subparagraph 1 (a) (i)**

*1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Section 165 PC.

***Money laundering  
Section 165***

- (1) Whoever conceals property items that derive from a crime, from an offense against property threatened with imprisonment of more than one year or from a misdemeanour under Sections 223, 224, 225, 229, 230, 269, 278, 278d, 288, 289, 293, 295 or 304 to 308, from a misdemeanour against intellectual property rights (if committed commercially), or from a tax offense of smuggling or evasion of import or export taxes (insofar as such an offense falls within the competence of the courts), or disguises the origin thereof, particularly by giving in legal relations false information regarding the origin or true nature of those property items, the ownership of or other rights to them, the right to dispose of them, their transfer or their location, shall be liable to imprisonment for a term not exceeding three years.
- (2) Whoever knowingly acquires such property items, holds them in custody, invests, administers, converts, realizes, or transfers them to a third party, deriving from an offense according to par. 1, but committed by another person shall be liable in the same way.
- (3) Whoever knowingly, acting on behalf or in the interest of a criminal organization (Section 278a) or of a terrorist group (Section 278b), acquires property items of that organization or group, holds them in custody, invests, administers, converts, realizes, or transfers them to a third party shall be liable in the same way.
- (4) Whoever commits the offense involving items worth more than 50,000 Euro or as the member of a criminal group associated for the purpose of continuous money laundering, shall be liable to imprisonment for a term from one to ten years.
- (5) A property item shall be deemed to derive from an offense when the perpetrator of the crime has obtained it through that offense or received it for the commission of that offense, or when it represents the value of the originally obtained or received property item.

Austria did not provide any cases of implementation, but the following statistics:

Investigations	2010	2011
§ 165	4	3

During the country visit, Austria informed that in 2011, there were 13 convictions for money laundering; in 2012, there were 23 convictions for money laundering, 8 of them under Section 165(2).

**(b) Observations on the implementation of the article**

The reviewing experts note that money-laundering is criminalized through section 165 PC, which provides for the basic definition of the offence. The definitional elements of money-laundering set forth in article 23 of the UNCAC are all covered except for mere conspiracy, which is not criminalized.

During the country visit it was explained that the purpose of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action would be covered by Section 299 PC (Begünstigung – accessory after the fact). If the helping person would do this knowingly, he or she would be liable of money laundering himself/herself.

The reviewing experts concluded that the provision has been implemented.

**Subparagraph 1 (a) (ii)**

*1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Section 165 PC.

Austria referred to its answer to the previous provision.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that the provision has been implemented.

**Subparagraph 1 (b) (i)**

*1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) Subject to the basic concepts of its legal system:*

*(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Section 165 PC.

Austria referred to its answer to the previous provision.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that the provision has been implemented.

**Subparagraph 1 (b) (ii)**

*1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) Subject to the basic concepts of its legal system:*

*(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention, with the exception of mere conspiracy, which is not criminalised.

Austria cited the following domestic laws: Sections 12, 278, 15 PC.

***Treatment of all participants as offenders***  
***Section 12.***

A criminal offence is committed not only by the immediate perpetrator who commits the criminal offence, but also by anyone who instigates another person to commit the offence or who contributes to its perpetration in any other way.

***Criminal association***  
***Section 278***

(1) A person who founds a criminal association or participates in such an association as member is to be sentenced to imprisonment up to three years.

(2) A criminal association is an union planned for a longer time of more than two persons aiming the commitment of one or more crimes by one or more members of the association, other considerable acts of violence against life and limb, not only petty damages to property, thefts or frauds or misdemeanours under sects. 104a, 165, 177b, 233 to 239, 241a to 241c, 241e, 241f, 304 or 307 or under Sect 114 para 2 or 116 Aliens' Police Act.

(3) As member participates in a criminal association who commits a criminal offense within the scope of its criminal orientation or participates in its activities by providing for information or assets or in another way with the awareness that he promotes thereby the association or its criminal acts.

(4) If the association did not lead to a criminal offense in the planned way no member shall be punished if the association dissolves itself voluntarily or it results from its conduct that it has given up its plan voluntarily. Furthermore a person shall not be punished for criminal association who withdraws

voluntarily from the association before an offense in the planned way has been committed or attempted; but a person who participated in the association in a leading position only in case he effects by an information of the authority (sect.151 para. 3) or in another way that the danger is removed which arises from the association.

***Punishability of attempt***

***Section 15***

(1) Punitive sanctions against offenses committed intentionally do not only apply to the completed offense but also to its attempt and any participation in an attempt.

(2) An offense is considered attempted as soon as the offender puts his decision to commit the offense or have another person commit it (§ 12) into practice by taking an action immediately preceding the commission of the offense.

(3) An attempted offense and participation in an offense will not be liable to punishment if the offense could not have been completed under any circumstances for lack of the perpetrator's personal qualities or circumstances required under the law, or on account of the type of action or object that has been subject to the offense.

Austria did not provide any cases of implementation, but the following statistics:

	2010	2011
Offences attempted	103	36
Offences completed	1233	1276

**(b) Observations on the implementation of the article**

The reviewing experts observed that the Austrian legal system does not provide for the criminalization of conspiracy.

In view of the fact that this criminalization requirement is subject to the basic concepts of the State Party's legal system, the reviewing experts concluded that the provision has been adequately implemented.

**Subparagraph 2 (a) and (b)**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;*

*(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Section 165 PC.

Austria referred to its answer under Article 23 (1) (a) (i) and added the following explanations:

On Subpara. (a): all crimes are covered, which are all intentional acts liable to imprisonment of more than 3 years. So every serious and medium-range offence is covered. Also covered are all misdemeanours against property punishable with more than one year imprisonment. In addition a

couple of other misdemeanours are enumerated in Section 165(1) PC, to which Section 165 PC is also applicable entirely.

On Subpara. (b): all bribery offences are enumerated (Section 309 is not mentioned erroneously; that will be repaired soon; mere embezzlement with a damage of not more than 3000 euros would also not be covered).

**(b) Observations on the implementation of the article**

The reviewing experts noted that all crimes which are intentional acts and liable to imprisonment of more than 3 years are considered as predicate offences for the purpose of money-laundering. Also covered are all misdemeanours against property punishable with more than one year imprisonment. All bribery offences are enumerated as predicate offences with the exception of bribery in the private sector (section 309), which was erroneously not included in the legislation. During the country visit, the Austrian authorities clarified that through an amendment in the legislation that came into effect on 1 August 2013, this would be repaired.

The reviewing experts welcomed this development and further noted that the mere embezzlement involving a damage of not more than 3000 euros (section 153, paragraph 1 PC) is not treated as predicate offence. Therefore they recommended that legislative measures be taken to expand the scope of predicate offences to also include this criminal act.

**Subparagraph 2 (c)**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Section 165 PC. It explained that Section 165 PC does not differentiate as to whether a predicate offence has been committed within or outside Austrian jurisdiction.

Austria also referred to its answer under Article 23 (1) (a) (i).

**(b) Observations on the implementation of the article**

During the country visit, Austria confirmed again that, as long as the money laundering is committed in Austria, it has jurisdiction, no matter where the predicate offence has been committed.

The Austrian authorities further mentioned the example of a conviction for money laundering where the predicate offence was an act of corruption in Slovenia.

The reviewing experts concluded that the provision has been implemented.

### **Subparagraph 2 (d)**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria indicated that it had not implemented this provision of the Convention.

#### **(b) Observations on the implementation of the article**

The reviewing experts observed that Austria has not yet implemented this provision of the Convention. They encouraged Austria to furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations.

### **Subparagraph 2 (e)**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria indicated that, pursuant to recommendations by FATF, it changed its laws in 2010 and no longer invokes an exception for self-laundering.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that self-laundering is criminalized in the domestic legislation.

### **Article 24 Concealment**

*Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Sections 164, 165 PC.

### *Dealing in stolen goods*

#### **Section 164.**

(1) Whoever supports the perpetrator of an offence against property in concealing or realizing a property item that he has obtained through knowingly a property item, shall be liable in the same way. shall be liable to imprisonment for up to six months or a fine of up to 360 daily rates. (2) Whoever acquires or else gets possession of such an item or makes such an item available to a third person, shall be liable in the same way.

(3) Whoever deals in stolen goods of more than 3,000 Euros shall be held liable to imprisonment for up to two years or a fine of up to 360 daily rates.

(4) Whoever deals in stolen goods of more than 50,000 Euros or on a commercial basis shall be held liable to imprisonment from six months up to five years. The dealer in stolen goods shall be held liable in the same way, if the offense through which the perpetrator has gained the item, is threatened with punishment reaching five years or more, for reasons different from committing them on a commercial basis, and the dealer in stolen goods is aware of the circumstances causing such punishment.

Austria did not provide any cases of implementation, but the following statistics:

Investigations	2010	2011
§ 164	0	3
§ 165	4	3

#### **(b) Observations on the implementation of the article**

The reviewing experts concluded that the provision has been implemented.

### **Article 25 Obstruction of Justice**

#### **Subparagraph (a)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Sections 288 in combination with Section 12 PC.

#### ***False Testimony***

##### **Section 288.**

(1) Whoever as witness in court or, as far as he/she is not party to the proceedings at the same time, as respondent in the course of his/her formal interrogation, gives false testimony in substance or as an expert witness submits false findings or a false expert opinion, shall be punished by imprisonment up to two years.

(2) Whoever gives false testimony in court under oath or confirms a false testimony with an oath or swears another oath provided by law falsely shall be punished by imprisonment from six months to five

years. Equivalent to an oath is the reference to a previously sworn oath as well as - concerning persons, who are exempt from the obligation to swear an oath - the affirmation designated to replace the oath.

(3) According to par 1 and 2 shall also be punished who commits an offence mentioned therein before a committee established in accordance with art 53 of the Federal Constitution or a federal, regional or municipal disciplinary authority

(4) According to par 1 shall also be punished, who as a witness or expert witness commits an offence mentioned therein during criminal investigation proceedings initiated according to the CCP before criminal police or the prosecutor's office.

***Treatment of all participants as offenders***  
***Section 12.***

A criminal offence is committed not only by the immediate perpetrator who commits the criminal offence, but also by anyone who instigates another person to commit the offence or who contributes to its perpetration in any other way.

Austria did not provide any cases of implementation or statistics.

**(b) Observations on the implementation of the article**

The reviewing experts observed that Austria refers to Section 288 concerning false testimony. They note that the main purpose of this section is to protect the integrity of the judicial process.

However, the offense of obstruction of justice, as set forth in the Convention, is intended to protect witnesses from being influenced by others through threats or promises of undue advantages. The witness is a victim of the offence, while according to Section 288 PC, the witness is the perpetrator of an offence. In addition, while complicity to an offence includes as per the general law (section 12 PC) those who persuaded the offender to commit the act or abetted them in any way, the combination of section 288 that prohibits giving false testimony and section 12 that incriminates those who cause the witness to give false testimony as participants in the offence, does not seem to fulfill the Convention's requirement to prohibit the act of contacting or harassing a witness.

During the country visit, Section 105 PC (Nötigung – coercion) was also cited. However, it would seem that certain situations which are covered by the Convention would not be criminalized by either Section 105 or Section 288 PC (in conjunction with Section 12 PC), e.g. where money is given to a potential witness/observer of the bribe as a reward for not reporting it.

Therefore, the reviewing experts recommended the introduction of a specific offence to fully implement the mandatory criminalization requirements of article 25(a) UNCAC.

**Subparagraph (b)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Sections 269, 270 PC.

***Obstruction against state authority***

***Section 269.***

(1) Whoever obstructs an authority through force or threat with force as well as whoever obstructs a public official through force or through dangerous threat from performing an official act, shall be punished with imprisonment of up to three years, in case of a severe duress (§ 106) with imprisonment from six months to five years.

(2) Likewise shall be punished, whoever coerces an authority through force or through threat with force or a public official to perform an official act.

(3) Only an act shall be considered an official act within the meaning of par 1 and 2, by which the public official exercises power of order or coercive power as an organ of public authority or the judiciary.

(4) The offender shall not be punished in accordance with par 1, if the authority or the official are not entitled to perform such kind of official act, or if the official act violates criminal law.

***Assault against a public official***

***Section 270.***

(1) Whoever assaults a public official during the performance of an official act (§ 269 par. 3), shall be punished with imprisonment up to six months or a fine up to 360 daily rates. (2) § 269 par. 4 applies accordingly.

Austria did not provide any cases of implementation or statistics.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that the provision has been implemented.

**(c) Successes and good practices**

The reviewing experts identified as a good practice the fact that any state authority is to be protected under section 269, and not only the judicial or law enforcement authorities, as required in article 25(b) of the UNCAC.

**Article 26 Liability of legal persons**

**Paragraphs 1, 2 and 4**

*1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.*

*2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.*

*4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic law: Federal Act on the Responsibility of Entities for Criminal Offences (Verbandsverantwortlichkeitsgesetz - VbVG).

## **Federal Act on the Responsibility of Entities for Criminal Offences (Verbandsverantwortlichkeitsgesetz - VbVG)**

### **Chapter 1 Scope of Application and Definitions**

#### ***Entities***

##### ***Section 1.***

(1) This Federal Statute regulates the conditions under which entities are responsible for criminal offences, the criminal penalties for such offences as well as the procedure according to which responsibility is ascertained and criminal penalties are imposed. For the purpose of this Federal Statute a criminal offence shall mean an act punishable by court under a federal statute or a provincial statute; however, this Federal Statute shall only apply to tax offences to the extent provided for in the Tax Offences Act, BGBl. [Federal Law Gazette] No. 129/1958.

(2) For the purpose of this statute entities shall mean legal persons, registered partnerships [Eingetragene Personengesellschaften] and European Economic Interest Groupings.

(3) For the purpose of this statute the following shall not be entities:

1. a (deceased person's) estate;
2. the federal state, provinces and municipalities and other corporations to the extent they enforce laws;
3. recognised churches, religious societies and religious communities to the extent they are engaged in pastoral care.

#### ***Decision Makers and Staff***

##### ***Section 2.***

(1) For the purpose of this statute decision maker shall mean a person who

1. is a managing director, an executive board member or Prokurist [translator's note: compare: authorised officer] or who is authorised in a comparable manner to represent the entity vis-à-vis third parties either according to statutory power of representation or based upon contract,
2. is a member of the supervisory board or board of directors or otherwise exercises controlling powers in a leading position, or
3. otherwise exercises relevant influence on the management of the entity.

(2) For the purpose of this Statute staff shall mean a person who works for the entity

1. on the basis of an employment relationship, apprentice relationship or other training relationship,
2. on the basis of a relationship that is subject to the provisions of the Outwork Act [Heimarbeitsgesetz] 1960, BGBl. [Federal Law Gazette] No. 105/1961 or that is of an employee-like status,
3. as an employee provided on a temporary basis as defined in Section 3 para 4 of the Act on Temporary Provision of Employees [Arbeitskräfteüberlassungsgesetz - AÜG], BGBl. No. 196/1988, or
4. on the basis of a service relationship or other special public-law relationship.

### **Chapter 2 Responsibility of Entities - Provisions relating to Substantive Law**

#### ***Responsibility***

##### ***Section 3.***

(1) Subject to the additional conditions defined in paragraphs 2 or 3 an entity shall be responsible for a criminal offence if

1. the offence was committed for the benefit of the entity or
2. duties of the entity have been neglected by such offence.

- (2) The entity shall be responsible for offences committed by a decision maker if the decision maker acted illegally and culpably.
- (3) The entity shall be responsible for criminal offences of staff if
  1. the facts and circumstances which correspond to the statutory definition of an offence have been realised in an illegal manner; the entity shall be responsible for an offence that requires wilful action only if a staff has acted with wilful intent, and for a criminal offence that requires negligent action only if a staff has failed to apply the due care required in the respective circumstances; and
  2. commission of the offence was made possible or considerably easier due to the fact that decision makers failed to apply the due and reasonable care required in the respective circumstances, in particular by omitting to take material technical, organisational or staff-related measures to prevent such offences.
- (4) Responsibility of an entity for an offence and criminal liability of decision makers or staff on grounds of the same offence shall not exclude each other.

### ***Fine for the entity***

#### ***Section 4.***

- (1) If an entity is responsible for a criminal offence, a fine shall be imposed.
- (2) The fine shall be assessed in the form of daily rates. The fine shall amount to at least one daily rate.
- (3) The number of daily fines shall be up to 180
  - if the criminal penalty for the offence is a life sentence or imprisonment of up to twenty years, 155
  - if the criminal penalty for the offence is imprisonment of up to fifteen years, 130
  - if the criminal penalty for the offence is imprisonment of up to ten years, 100
  - if the criminal penalty for the offence is imprisonment of up to five years, 85
  - if the criminal penalty for the offence is imprisonment of up to three years, 70
  - if the criminal penalty for the offence is imprisonment of up to two years, 55
  - if the criminal penalty for the offence is imprisonment of up to one year, 40
  - in all other cases.
- (4) The daily rate shall be assessed on the basis of the income situation of the entity by taking into account its other financial performance. The daily rate shall be equal to one 360th of the yearly proceeds or exceed or fall short of such amount by not more than one third; however, the daily rate shall amount to not less than 50 euros and not more than 10.000 euros. If the association serves charitable, humanitarian or church purposes (Sections 34 to 47 Fiscal Code, BGBl. No. 194/1961) or is not profit-oriented, the daily rate shall be fixed at a minimum of 2 euros and a maximum of 500 euros.

### ***Assessment of the Fine for the Entity***

#### ***Section 5.***

- (1) When fixing the number of daily rates the court shall weigh aggravating causes and mitigating causes to the extent they have not already been used for fixing the amount of the threatened fine.
- (2) The number shall, in particular, be the higher
  1. the larger the damage or threat for which the entity is responsible;
  2. the larger the benefit for the entity obtained from the criminal offence;
  3. the more illegal conduct of staff was tolerated or favoured.
- (3) The number shall, in particular, be the lower if
  1. the entity took measures to prevent such offences already before the offence was committed or has told staff to observe the law;
  2. the entity is merely responsible for criminal offences committed by staff (Section 3 para 3);
  3. the entity substantially contributed to finding out the truth;
  4. the entity made good the consequences of the offence;
  5. the entity took essential steps towards future prevention of similar offences;
  6. the offence already resulted in severe legal disadvantages for the entity or its owners.

### ***Conditional Remission of the Fine***

#### ***Section 6.***

- (1) If an entity is sentenced to a fine of not more than 70 daily rates, the fine shall be conditionally remitted by fixing a probationary period of at least one and not more than three years, if applicable by

giving instructions (Section 8), if it has to be assumed that this will be sufficient to keep the entity from committing further offences for which it is responsible and there is no need to enforce payment of the fine in order to counteract commission of offences in connection with the activities of other entities. In this connection, above all, the type of offence, the weight of the breach of duty or care, previous convictions of the entity, reliability of the decision maker and the measures taken by the entity after the offence shall be taken into consideration.

(2) If the remission is not revoked, the fine shall be remitted finally. Periods of time which start to run once the fine has been enforced shall, in such a case, be calculated as of the time the sentence becomes non-appealable.

### ***Conditional Remission of Part of the Fine***

#### ***Section 7.***

If an entity is sentenced to a fine and if the conditions of Section 6 are met with respect to part of the fine, such part, but at least one third and not more than five sixth thereof, shall be conditionally remitted by fixing a probationary period of a minimum of one and a maximum of three years, if applicable by giving instructions (Section 8).

### ***Instructions***

#### ***Section 8.***

(1) If a fine is conditionally remitted in whole or in part, the court may give instructions to the entity.

(2) The entity shall be instructed to endeavour to make good the damage caused by the offence unless this has been done already.

(3) For the rest, the entity may be instructed to take technical, organisational or staff-related measures to counteract commission of further offences for which the association would be responsible (Section 3).

### ***Revocation of Conditional Remission of the Fine***

#### ***Section 9.***

(1) If the entity is convicted on grounds of responsibility for an offence committed during the probationary period, the court shall revoke the conditional remission of the fine and enforce the fine or part of the fine if this appears to be necessary in view of the repeated conviction in addition to the same to prevent commission of further offences for which the entity would be responsible (Section 3). An offence that is committed during the period between the decision of the court of first instance and non-appealability of the decision on conditional remission shall be deemed equivalent to an offence committed during the probationary period.

(2) If the entity fails to comply with an instruction despite a formal warning, the court shall revoke the conditional remission and enforce the fine or part of the fine if this appears to be necessary in the circumstances to prevent commission of further offences for which the entity would be responsible (Section 3).

(3) If in the cases described in paragraphs 1 and 2 the conditional remission is not revoked, the court may extend the probationary period to a maximum of five years and give new instructions.

(4) If, applying of Section 31 StGB [Criminal Code], the entity is subsequently sentenced to an additional fine, the court may revoke the conditional remission of the fine in whole or in part and enforce the fine or part of the fine to the extent that the fines would not have been remitted conditionally in case of concurrent conviction. If the conditional remission is not revoked, each of the probationary periods which coincide shall last until the end of the probationary period that ends last, but not longer than five years.

### ***Legal Succession***

#### ***Section 10.***

(1) If the rights and obligations of the entity are transferred to another entity by way of universal succession, the legal consequences provided for in this Federal Statute shall apply to the legal successor. Legal consequences imposed on the legal predecessor shall also apply to the legal successor.

(2) Individual succession shall be deemed equivalent to universal succession if more or less the same ownership structure of the entity exists and the operation or activity is more or less continued.

(3) If there is more than one legal successor, a fine imposed on the legal predecessor may be enforced vis-à-vis any legal successor. Other legal consequences may be attributed to individual legal successors to the extent this is in line with their area of activities.

## ***Exclusion of Recourse***

### ***Section 11.***

For criminal penalties and legal consequences affecting the entity on the basis of this Federal Statute there shall be no right of recourse to decision makers or staff.

## ***Applicability of General Criminal Laws***

### ***Section 12.***

(1) For the rest, the general criminal laws shall also apply to entities unless they exclusively apply to natural persons.

(2) If the law provides that applicability of Austrian criminal laws to offences committed abroad is subject to the fact that the offender's domicile or habitual residence is in Austria or that he is an Austrian citizen, then the registered office of the entity or the place of operation or establishment shall be relevant with regard to associations.

(3) Enforceability shall become statute-barred after fifteen years

- if the sentence is more than 100 daily rates, ten years

- if the sentence is a fine of more than 50 but not more than 100 daily rates, and five years - in all other cases.

Austria did not provide any cases of implementation, but the following statistics:

Investigations	2006	2007	2008	2009	2010	Total
	26	60	79	61	86	312

Years 2006 to 2010	Dismissal	Diversion	Prosecution	Conviction	Acquittal	Total
BAZ (district attorneys)	40	1	2	0	3	46
ST (public prosecutors)	143	1	25	13	9	191
Total	183	2	27	13	12	237

### **(b) Observations on the implementation of the article**

Austria has introduced in its legal system the criminal responsibility of legal persons through the Federal Act on the Responsibility of Entities for Criminal Offences. The responsibility of an entity for an offence does not exclude the criminal liability of decision makers or staff on grounds of the same offence (article 3, paragraph 4).

During the country visit it was confirmed that the term “entities” is to be interpreted broadly and includes all forms of legal persons (the term corporations in the English translation of Section 1(2) is a mistranslation of the German term “juristische Personen” – legal persons).

The reviewing experts identified certain issues of implementation of the Federal Law (VbVG). First, it was noted that so far, no convictions in connection with bribery exist (the statistics provided refer to all convictions under the act, not specifically to corruption offences). This could be due to a structural problem of the law. There was a concern that, in passive bribery cases, a possible interpretation of the bribery statute might, transform the legal person itself into a purported victim to the offense, thereby shielding legal persons from criminal liability.

Moreover, there seems to be a problem with the effectiveness of the possible sanctions. In fact, the maximum fine for an act of corruption would seem to be 130 x 10,000 euros. It could be argued that the deterrent effect of such a fine for a big company is far too weak. In addition to that, there is no public criminal record for companies, although companies may ask the prosecution service for a certificate that they have not been convicted. This certificate contains information on whether the

company has already been convicted, but also whether proceedings concerning a company are pending. However, it was the understanding of the reviewing experts that the certificate is only issued at the request and initiative of the corporation, thus reducing the effectiveness of this mechanism against companies found guilty of corruption offences. Dissolution of a company is not possible under the VbVG.

In view of the above, the reviewing experts recommended that measures be taken to ensure the effective implementation of the domestic legislation on the criminal liability of legal entities; in doing so, consideration should be given, inter alia, to the need for increasing the fines against entities to ensure that they have sufficient deterrent effect.

### **Paragraph 3**

*3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

If the criminal offence is committed by a staff member, the legal person can be held liable without prejudice to the criminal liability of the natural person. Concerning decision makers, the entity is only responsible for offences that are committed illegally and culpably by the decision maker. The responsibility of the entity for an offence and criminal liability of decision makers or staff on grounds of the same offence do not exclude each other.

Austria cited the following domestic law: Section 3(4) VbVG.

#### ***Responsibility***

##### ***Section 3.***

(4) Responsibility of an entity for an offence and criminal liability of decision makers or staff on grounds of the same offence shall not exclude each other.

#### **(b) Observations on the implementation of the article**

The reviewing experts concluded that the provision has been implemented.

## **Article 27 Participation and attempt**

### **Paragraph 1**

*1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic law: Section 12 PC.

### *Treatment of all participants as offenders*

#### **Section 12.**

A criminal offence is committed not only by the immediate perpetrator who commits the criminal offence, but also by anyone who instigates another person to commit the offence or who contributes to its perpetration in any other way.

Austria provided the following information on the implementation of the provision under review:

The way Section 12 PC works is best explained by the judgment of the Austrian Supreme Court of 12 June 1980, 13 Os51/80.

With the judgment under appeal the following persons were found guilty: the owner of a coffee shop A for active bribery the tax official B for passive bribery the employee C for passive and active bribery, in both cases in combination with sec 12 B was a tax official. As a result of the annual tax audit of A's coffee shop he came to the conclusion that A was due to a payment of tax arrears of 600.000. A offered B 30.000 to reduce the arrears to 100.000, but B requested 60.000. C had instigated B to request the 60.000 and repeatedly told A to get the money and pay the 60.000. Whereas A left the verdict unchallenged, both B and C appealed to the Supreme Court.

B argued that the verdict was contradictory in itself, since according to the wording of the verdict he was found guilty of „requesting“ the money, whereas in the part where the reasons are given it said that he “had himself promised” the money.

The Supreme Court did not follow B. The Supreme Court stated, that even if B was right, it would not matter for legal reasons since “requesting” a bribe and “having oneself promised” a bribe are totally equal way of committing the offence.

C argued that being convicted for passive bribery [which was at that time more severely punished than active bribery] would be sufficient to cover the whole tort.

The Supreme Court did not follow C either, since he reasoned that instigating B to request the money and urging C to pay the money were two separate offences and the conviction for only one of them would not sufficiently cover the whole tort so that C had to be convicted for both.

No statistics were provided by Austria.

#### **(b) Observations on the implementation of the article**

During the country visit, it was confirmed that Section 12 PC does not differentiate between instigators, aiders and abettors. Section 12 PC represents a unified notion of the perpetrator which includes all persons that contribute to the perpetration of the act in any way.

The reviewing experts concluded that the provision has been implemented.

### **Paragraph 2**

*2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic law: Section 15 PC.

#### ***Punishability of attempt***

### **Section 15**

(1) Punitive sanctions against offenses committed intentionally do not only apply to the completed offense but also to its attempt and any participation in an attempt.

(2) An offense is considered attempted as soon as the offender puts his decision to commit the offense or have another person commit it (§ 12) into practice by taking an action immediately preceding the commission of the offense.

(3) An attempted offense and participation in an offense will not be liable to punishment if the offense could not have been completed under any circumstances for lack of the perpetrator's personal qualities or circumstances required under the law, or on account of the type of action or object that has been subject to the offense.

Austria did not provide any cases of implementation or statistics.

#### **(b) Observations on the implementation of the article**

The reviewing experts concluded that the provision has been implemented.

### **Paragraph 3**

*3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

During the country visit, Austria confirmed that the mere preparation for a corruption offence is not criminalised.

#### **(b) Observations on the implementation of the article**

The reviewing experts concluded that given the non-mandatory nature of the provision, Austria's legislation is in compliance with the Convention.

### **Article 29 Statute of limitations**

*Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Sections 57, 58 PC.

#### **Section 57 (Limitation of punishability)**

(1) Punishable actions liable to imprisonment for life or to imprisonment from 10 to 20 years or for life are not subject to the period of limitation. After a period of 20 years the lifelong imprisonment, however is replaced by imprisonment from 10 to 20 years. For this period para. 2 and section 58 apply accordingly.

- (2) The punishability of other offences expires through limitation. The period of limitation begins as soon as the punishable action is completed or the punishable conduct has ended.
- (3) The period of limitation is
- 20 years, if the offence is punishable with imprisonment although not for life but for more than 10 years,
  - 10 years, if the offence is punishable with imprisonment of more than 5 years but not more than 10 years,
  - 5 years, if the offence is punishable with imprisonment of more than 1 year but not more than 5 years,
  - 3 years, if the offence is punishable with imprisonment of more than 6 months but not more than 1 year,
  - 1 year, if the offence is punishable with a maximum of 6 months imprisonment or only a fine.
- (4) When an offence has become statute-barred confiscation of profits, forfeiture and preventive measures are also no longer possible.

***Section 58 (Extension of the period of limitation)***

- (1) If the success"/effect of an offence does only occur after the punishable action has been completed or the punishable conduct has ended, the period of limitation does not end before it has also expired counted from the occurrence of the effect or if one and a half times the period of limitation or three years have passed since the date indicated in section 57 para. 2.
- (2) If the offender commits another offence stemming from the same bad inclination during the period of limitation the [former] offence is not barred by the statute of limitation until it has also expired for the latter [the newly committed] offence.
- (3) Not included in the period of limitation are:
- 1. the period of time during which prosecution can not be established or continued according to law, unless the federal constitution or para. 4 do not provide otherwise;
  - 2. the time between the first hearing as an accused person, the first threatening or execution of official coercion against the accused (sec 93 par 1, 105 par 1 CCP), the first prosecutorial fiat to or application for the performance or approval of an investigation measure or taking of evidence as provided by the 8th chapter of the CCP for the sake of clearance of a suspicion against the perpetrator, the ordinance to search or arrest the accused, the application for the imposition of pretrial detention or the tabling of the indictment and the final termination of the proceedings; ...

Austria did not provide any cases of implementation or statistics.

**(b) Observations on the implementation of the article**

General statutes of limitation for the prosecution of criminal offences are provided under section 57 PC and depend on the level of punishment incurred.

The reviewing experts noted that for some of the offences it appears that their statute of limitations is only 5 years. These are offenses that carry sentences of five years in prison (such as the offense set forth in section 302), or less than five years (such as the offense set forth in section 153). The experts were concerned if this period is sufficient, given that corruption offences are by nature not easy to detect.

However, during the country visit it was confirmed that any investigative step would suspend the limitation period. Therefore, the experts considered the 5 year limit to be sufficient.

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 1**

*1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Sections 307, 304, 302, 153, 165 PC are all punishable with imprisonment of up to ten years.

Austria did not provide any cases of implementation or statistics.

#### **(b) Observations on the implementation of the article**

In general, the sanctions applicable to persons who have committed corruption-related offences appear to be sufficiently dissuasive.

During the country visit, it was added that there are no sentencing guidelines for judges in Austria. The trial judge is free in his or her determination of the sentence. However, the judge has to follow the established jurisprudence on sentencing or the judgment risks being quashed on appeal. It was also explained that the purpose of deterrence can be used in determining the sentence.

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

### **Paragraph 2**

*2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The members of the national parliament and of the parliaments of the Länder are the only public officials who are accorded immunities.

The members of the National Council (Nationalrat - first chamber of parliament) may not be prosecuted for votes cast in parliament or for spoken or written statements made as members of parliament (Article 57(1) Federal Constitution Law). Without consent of the parliament members of the National Council may not be arrested (unless in the act of committing a crime) and their premises may not be searched (Article 57(2) Federal Constitution Law). Otherwise members of the National Council may be prosecuted for criminal acts only if this criminal act is evidently in no way connected to their political activity as members of parliament. The public prosecutor has to seek a decision of the parliament whether such a connection exists if the Member of Parliament concerned or a third of the members of the Standing Committee on Immunity Issues so requests (Article 57(3) Federal Constitution Law). The consent of parliament for the lifting of immunity of one of its

members is deemed granted if no decision is taken within eight weeks (Article 57(4) Federal Constitution Law).

The rules for the members of the National Council are by virtue of Article 58 and Article 96 of the Federal Constitution Law also applicable to the members of the Federal Council (Bundesrat - second chamber of parliament) and to members of the parliaments of the Länder.

Austria cited the following domestic laws: Articles 57, 58, 96 Federal Constitution Law (Bundes-Verfassungsgesetz B-VG) and Section 10 of the Federal Law on the Rules of Procedure of the Austrian National Council.

### ***Federal Constitution Law (Bundes-Verfassungsgesetz B-VG)***

#### ***Art. 57.***

(1) The members of the National Council may never be made responsible for votes cast in the exercise of their function and only by the National Council on the grounds of oral or written utterances made in the course of their function.

(2) The members of the National Council may on the ground of a criminal offence – the case of apprehension in the act of committing a crime excepted - be arrested only with the consent of the National Council. Domiciliary visitations of National Council members likewise require the National Council's consent.

(3) Legal action on the ground of a criminal offence may otherwise without the National Council's consent be taken against members of the National Council only if it is manifestly not connected with the political activity of the member in question. The authority concerned must however seek a decision by the National Council on the existence of such a connection if the member in question or a third of the members belonging to the Standing Committee entrusted with these matters so demands. Every act of legal process shall in the case of such a demand immediately cease or be discontinued.

(4) In all these instances the consent of the National Council counts as granted if within eight weeks it has not given a ruling on an appropriate request by the authority competent for the institution of legal action; the President, with a view to the National Council's adoption of a resolution in good time, shall at the latest put such a request to the vote on the day but one before expiry of the deadline. The latter does not include the period when the National Council is not in session.

(5) In case of a member's apprehension in the act of committing a crime, the authority concerned must immediately notify the President of the National Council of the occurrence of the arrest. If the National Council or when it is not in session the Standing Committee entrusted with these matters so demands, the arrest must be suspended or the legal process as a whole be dropped.

(6) The immunity of members ends with the day of the meeting of the newly elected National Council, that of functionaries of the National Council whose tenure of office extends beyond this date on the expiry of this term of office.

(7) The detailed provisions are settled by the Federal Law on the Rules of Procedure of the Austrian National Council (Rules of Procedure Law of 1975).

#### ***Art. 58.***

The members of the Federal Council enjoy for the whole duration of their tenure of office the immunity of the members of the Diet which has delegated them.

#### ***Art. 96.***

(1) The members of a Diet enjoy the same immunity as the members of the National Council; the provisions of Art. 57 are applied analogously.

### ***Federal Law on the Rules of Procedure of the Austrian National Council of 1975 (Geschäftsordnungsgesetz 1975):***

#### ***§ 10.***

(1) Members shall under no circumstances be held responsible for any votes cast in the exercise of their functions; they shall be exclusively responsible to the National Council for any statement, whether oral or in writing, made in the exercise of their functions.

(2) Unless apprehended flagrante delicto in the performance of a felony, Members shall only be arrested with the approval of the National Council. Likewise, they shall be immune from searches unless approved by the National Council.

(3) Otherwise, Members shall, without approval of the National Council, only be prosecuted for punishable offences which are obviously in no way connected with their political activities. However, the prosecuting authority shall, upon demand of the Member concerned or of one third of the members of the Standing Committee having jurisdiction over such matters, seek a decision of the National Council on whether or not any such connection exists. Once such a demand has been made, the prosecuting authority shall immediately cease to take action or stop any action already undertaken. If the National Council determines that there is a connection between the alleged offence and the Member's political activity, it shall at the same time decide on whether or not it approves the prosecution of the Member in question.

(4) The National Council shall in all such cases be deemed to have given its approval if it fails to decide within eight weeks on a request for a decision made by the competent prosecuting authority.

(5) If a Member is apprehended flagrante delicto in the performance of a felony, the authority in question shall without delay notify the President of the National Council of the arrest of the Member. On demand of the National Council or, between parliamentary sessions, of the Standing Committee having jurisdiction over such matters, the authority shall release the arrested Member or altogether refrain from prosecuting him/her.

(6) The immunity of Members shall terminate on the day the newly elected National Council meets for its first sitting or, in the case of organs of the National Council whose function extends beyond that day, when that function expires.

Austria did provide the following examples of implementation:

On the basis of a suspicious activity report for money laundering, the Austrian National Council was requested by the public prosecutor to lift the immunity and extradite the suspected Member and former Minister. Upon approval of the request, investigations were commenced (obtaining the tax files, opening of accounts and interrogating the accused).

The case concerns payments of about 400,000 euros to a company of the MP located in the United Arab Emirates. The payments originated inter alia from the international armaments company which won the tender for the purchase of fighter planes for the Austrian military in 2002 when the present MP was a Minister.

Regarding concrete instances where the issue of immunities and/or jurisdictional or other privileges accorded to public officials has arisen and addressed in official documents, Austria provided the following information:

The issue of parliamentary immunity has repeatedly been addressed in Decrees of the Ministry of Justice. The newest document is the Decree of the Ministry of Justice of 8 July 2009 concerning the consent of parliamentary assemblies to the prosecution of their members according to Articles 57 para 3 and 4, 58 and 96 Federal Constitution Law. This decree explained inter alia at which point of the investigation the public prosecutor has to apply for the consent of the Parliament, certain formalities of such applications and the notion of “connection to political activities”.

The reports of the Standing Committee on Immunity Issues are published on the homepage of Parliament ([http://www.parlament.gv.at/PAKT/VHG/XXIV/A-IM/A-IM\\_00001\\_00274/index.shtml#tab-Berichte](http://www.parlament.gv.at/PAKT/VHG/XXIV/A-IM/A-IM_00001_00274/index.shtml#tab-Berichte))

**(b) Observations on the implementation of the article**

In relation to the extent and scope of immunities from prosecution, the members of the national parliament and of the parliaments of the Länder, as well as the Federal President are the only public officials benefiting from such protection.

The members of the National Council (Nationalrat – first chamber of Parliament) may not be prosecuted for votes cast in Parliament or for spoken or written statements made as members of Parliament (Article 57 para 1 Federal Constitution Law). Without consent of the Parliament, Members of the National Council may not be arrested (unless in the act of committing a crime) and their premises may not be searched (Article 57 para 2 Federal Constitution Law).

Otherwise members of the National Council may be prosecuted for criminal acts only if this criminal act is evidently in no way connected to their political activity as members of parliament. The public prosecutor has to seek a decision of Parliament whether such a connection exists if the member of Parliament concerned or a third of the members of the Standing Committee on Immunity Issues so requests (Article 57 para 3 Federal Constitution Law).

The reviewing experts inquired about the procedure for lifting the immunity of MPs. It was explained that the prosecutor has to ask a parliamentary committee to lift the immunity. This committee decides if immunity applies at all and whether to lift it or not. Parliament is deemed to have given its consent if within eight weeks it has not given a ruling on an appropriate request by the prosecution. The reviewing experts were told that so far, in corruption cases, parliament has always lifted the immunity of concerned MPs.

However, while it is true that the personal scope of the immunities is fairly limited (comprising only MPs and the Federal President), the reviewing experts learned that the material scope of the immunities is extremely wide. Indeed, according to the prevailing interpretation of the scope of this immunity, until it is lifted, i.e. until consent has been given or the deadline has expired, no investigative steps can be undertaken at all. The police cannot even start collecting evidence or hearing witnesses. At the same time, it is impossible to keep the investigation secret because the request has to go to a parliamentary committee and this means that in practice, the MP will gain knowledge about the investigation. This entails the obvious risk that during the time it takes to lift the immunity, evidence can disappear or be tampered with.

Finally, the lifting of the MP's immunity is required not only if the MP is the subject of the investigation, but also if the investigation only touches upon the MP's sphere, i.e. if the investigation concerns another persons but would imply an investigation of the MP.

In the light of these explanations, the reviewing experts recommended the adoption of legislation to clarify that investigative action to secure evidence is allowed before the lifting of immunity takes place; and to ensure that the process for lifting the immunity should be strictly restricted to those cases where the Member of the Parliament himself/herself is the subject of the investigation.

### **Paragraph 3**

*3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.*

(a) **Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Sections 2, 190 et seq. Criminal Procedure Code (CPC).

***Ex-officio prosecution***

***Section 2***

(1) Criminal police and the public prosecutor are obliged in the framework of their tasks, to explore every suspicion of a criminal act that comes to their knowledge in an investigative proceeding except those criminal acts which are only prosecuted on the initiative of an entitled person.

(2) ....

***Rescinding Investigative Proceedings***

***Section 190***

The public prosecutor shall refrain from prosecuting a punishable act and rescind the investigative proceedings whenever

1. the offence underlying the investigative proceedings does not carry a court punishment, or if any further prosecution of the accused would be inadmissible for legal reasons, or
2. there is no factual reason to further prosecute the accused.

***Rescinding Petty Cases***

***Section 191***

(1) The public prosecutor shall refrain from prosecuting a punishable act that only carries a fine, a maximum prison term of three years, or such a prison term and a fine, as well as discontinue the investigative proceedings if

1. when weighing the guilt, the consequences of the offence and the conduct of the accused after the offence, especially with a view to a possible reparation of the damage, as well as additional circumstances which would have an impact on assessing the punishment, the annoyance of the offence would have to be regarded as small, and
2. a punishment or an approach pursuant to Part 11 does not appear to be appropriate in order to prevent the accused from committing punishable acts, or to counteract that others commit punishable acts.

(2) Once an indictment has been issued, or once the written accusation has become final in proceedings at a regional court before a jury or a panel of lay judges in connection with a punishable act that must be prosecuted ex officio, the court shall discontinue the proceedings by court decision under the same requirements (paragraph (1)), before the end of the trial. § 209(2) first sentence shall be applied in analogy.

***Rescinding Proceedings in Case of Several Punishable Acts***

***Section 192***

(1) The public prosecutor may refrain from prosecuting individual punishable acts, either with final effect or with the proviso of prosecuting them at a later stage, as well as discontinue the investigative proceedings to such an extent, whenever the accused has been charged with several punishable acts and

1. this will most likely not have any major impact, neither on the punishments or preventive measures, nor on the legal consequences connected to the conviction or the diversionary measures, or
2. the accused was already punished abroad for the punishable act with which he/she has been charged, or the punishable act was withdrawn from prosecution following diversionary measures, and it is not to be expected that the domestic court will impose a more severe punishment, or that he/she will be extradited to another State for having committed other offences, and the punishments to be expected in Austria, or the preventive measures, will not matter in comparison to those that will most likely be imposed abroad. (2) When prosecution is subject to the provisos pursuant to paragraph (1), it may be resumed within three months after the domestic criminal proceedings have been completed with final effect, or within one year in the case of criminal proceedings abroad. Any further reservations on

account of individual punishable acts shall then be inadmissible.

***Discontinuing Investigative Proceedings against Absent Persons and against Unknown Offenders***  
***Section 197***

(1) Whenever the accused is at large or of unknown domicile, the investigative proceedings shall be continued to the extent necessary in order to secure traces and evidence. In this case, investigative acts and evidence-taking, in which the accused has the right to participate (§ 150, § 165), may also be conducted in his/her absence. A search warrant may be issued concerning the accused in order to establish his/her whereabouts and obtain his/her arrest. The public prosecutor shall discontinue the proceedings and continue the matter once the accused has been found.

(2) Paragraph (1) shall apply in analogy to proceedings against unknown offenders.

(3) The criminal police and the victim shall be informed that the proceedings against a known offender have been discontinued, as well as that proceedings are being continued or commenced, once an accused has been found.

(4) An accused who is absent or at large, who states voluntarily that he/she wishes to give himself/herself up to the proceedings, may be granted safe conduct by the Federal Ministry of Justice, after an opinion has been expressed by the senior public prosecutor of the district in which the competent public prosecutor is located, possibly against providing security, as well as making a promises, as mentioned in § 173 (5) items 1 and 2, with the effect that the accused may be exempt from custody for the punishable act for which he/she is granted safe conduct, until the first-instance court decision has been taken. § 180 shall apply in analogy to the provision of security, its forfeiture and the loss of the effect of safe conduct.

***Withdrawal from Prosecution (Diversion)***

***General Provisions***

***Section 198***

(1) The public prosecutor shall proceed pursuant to the present chapter of the law and withdraw from prosecuting a punishable act, if it has been established, on the basis of sufficiently clear facts, that there is no question of rescinding the proceedings pursuant to § 190 to § 192, but that a punishment shall not be required, with a view to

1. the payment of an amount of money (§ 200), or
2. the provision of community services (§ 201), or
3. the setting of a probation period, in connection with probation services and the compliance with obligations (§ 203), or
4. diversion (§ 204) in order to keep the accused from committing punishable acts or to counteract that others will commit punishable acts.

(2) However, an approach pursuant to the present chapter of the law shall only be admissible if

1. the punishable act does not fall under the competences of a regional court sitting as a jury or a panel of lay judges,
2. the guilt of the accused were not to be regarded as grave (§ 32 of the Criminal Law Code), and
3. the offence did not result in the death of a person.

***Section 199***

Once an indictment has been issued in connection with the perpetration of a punishable act that must be prosecuted ex officio, the court shall apply, in analogy, the provisions of Sections 198, 200 to 209 that pertain to public prosecutors and rescind the proceedings by way of decision until the end of the trial under the requirements applicable to the public prosecutor.

***Paying a Fine***

***Section 200***

(1) Under the requirements of § 198, the public prosecutor may withdraw from prosecuting a punishable act if the accused pays an amount of money for the benefit of the Federal State.

(2) The amount of money must not exceed the sum that corresponds to a fine of 180 daily rates, plus the costs of the criminal proceedings that he/she must reimburse in the event of his/her conviction (§ 389 (2) and (3), § 391 (1)). The amount shall be paid within 14 days as of the service of the notice pursuant to paragraph (4). If this were to unreasonably affect the accused, he/she may be granted a maximum respite of six months, or the payment of subamounts during that period.

(3) Unless a withdrawal from prosecution can be waived for special reasons, the withdrawal from prosecution after payment of an amount of money shall also be made dependant upon the accused repairing the damage caused by the offence within a period to be determined with a maximum duration of six months and giving proof of it immediately.

(4) The public prosecutor shall inform the accused that it is planned to indict him/her for a specific punishable act, but that this will be waived if he/she pays a fixed sum of money and, if applicable, pays damages in a certain amount. Moreover, the public prosecutor shall inform the accused in accordance with § 207, as well as of the possibility of deferred payments (paragraph (2)), unless the public prosecutor offers him/her such a respite on ex officio basis.

(5) Upon payment of the amount of money and, if applicable, repairing the damage, the public prosecutor shall withdraw from any prosecution, unless the proceedings need to be continued at a later stage, pursuant to § 205.

### ***Community Service Section 201***

(1) The public prosecutor may preliminarily withdraw from prosecuting a punishable act if the requirements of § 198 are fulfilled, if the accused expressly states that he/she is willing to provide community services on a gratuitous basis within a period to be determined (maximum: six months).

(2) Community services are to express the readiness of the accused to answer for his/her offence. They shall be provided during leisure-time with an appropriate facility, the consent of which shall be obtained.

(3) Unless it can be waived for specific reasons, withdrawal from prosecution after the provision of community services shall also be made dependant upon the fact that the accused also repairs the damage that has occurred on account of the offence within a period to be determined (maximum: six months) and also contributes otherwise to remedy the consequences of the offence, and gives proof thereof immediately.

(4) The public prosecutor shall inform the accused that it is intended to indict him/her for a specific punishable act, but that he/she will preliminarily refrain from so doing, if the accused is prepared to provide community services of a specified type and scope within a specified period of time, as well as to settle the consequences of the offence, if necessary. In this context, the public prosecutor shall inform the accused in accordance with § 207; he/she may also request a person with experience in social work to provide the information, as well as to help find community services (§ 29b of the Probation Services Act). The facility (paragraph (2)) shall issue a confirmation to the accused concerning the services provided, which shall be submitted immediately.

(5) After providing the community services and, if applicable, settling the consequences of the offence, the public prosecutor shall finally withdraw from prosecution, unless the proceedings shall be continued subsequently pursuant to § 205.

### ***Section 203***

(1) The public prosecutor shall preliminarily withdraw from prosecuting a punishable act under the requirements of § 198, setting a probationary period between one and two years. The probationary period commences with the service of the communication concerning the preliminary withdrawal from prosecution.

(2) Unless specific reasons prevent it, the preliminary withdrawal from prosecution may also be made dependant upon the fact that the accused expressly stated that he/she is ready to comply with certain obligations during the probationary period which might be issued as instructions (§ 51 of the Criminal Law Code), as well as to be supported by a probation officer (§ 52 of the Criminal Law Code). This may involve, in particular, the obligation to use his/her best effort to remedy the damage caused or to contribute otherwise to a compensation

of the consequences of the offence.

(3) The public prosecutor shall inform the accused that the indictment against him/her for a specific punishable act will preliminarily not be issued during a specified probationary period, as well as inform him/her along the lines of § 207. If applicable, the public prosecutor shall inform the accused that this preliminary withdrawal from prosecution requires that he/she expressly states his/her readiness to assume certain obligations and to be supported by a probation officer (paragraph (2)). In this case, the public prosecutor may also request a person with experience in social work to provide the information, as well as to request that the accused is supported in fulfilling such obligations (§ 29a of the Probation Services Act).

(4) After expiry of the probationary period and complying with possible obligations, the public prosecutor shall finally withdraw from prosecution, unless the proceedings must subsequently be continued pursuant to § 205.

### ***Settlement of Punishable Acts***

#### ***Section 204***

(1) Under the requirements of § 198 the public prosecutor may withdraw from prosecuting a punishable act if the legally protected rights of a person might be directly affected by the offence and the accused is prepared to answer for his/her offence and to deal with its causes, if he/she settles possible consequences of an offence in a manner commensurate with the circumstances, especially by remedying the damage caused by the offence, or by contributing otherwise to settle the consequences of the offence, and if he/she assumes obligations, if so required, that document his/her readiness to refrain, in the future, from the kind of conduct that led to the offence.

(2) The victim shall be involved in the efforts to settle the punishable act, to the extent that he/she is prepared to do so. It depends on his/her agreement whether a settlement of the punishable act is achieved, unless he/she does not accept it for reasons that do not deserve consideration in the criminal proceedings. However, his/her legitimate interests shall certainly be taken into account (§ 206).

(3) The public prosecutor may also ask an expert in conflict resolving to inform the victim and the accused about the possibility of settling the punishable act, as well as in accordance with § 206 and § 207, and to guide them in their efforts to initiate and to support such a settlement (§ 29a of the Probation Service Act).

(4) The expert in conflict resolving shall report to the public prosecutor about the settlement negotiations and review their fulfilment. The expert in conflict resolving shall make a final report, once the accused has complied with his/her obligations, at least to the extent that it can be assumed, when taking account of his/her conduct otherwise, that he/she will continue to comply with the agreements, or if it is no longer to be expected that a settlement will be reached.

### ***Subsequent Continuation of Criminal Proceedings***

#### ***Section 205***

(1) After a not merely preliminary withdrawal from prosecuting an accused pursuant to the present chapter of the law (§ 200 (5), § 201 (5), § 203 (4) and § 204 (1)), a continuation of the criminal proceedings shall only be admissible under the conditions for a regular reopening of the case. The criminal proceedings shall certainly be continued after such a withdrawal, if the accused so demands.

(2) If the public prosecutor proposed to the accused that he/she pay an amount of money (§ 200 (4)), provides community services (§ 201 (4)), or accepts a probationary period and, if applicable, obligations (§ 203 (3)), or if the public prosecutor withdrew preliminarily from prosecuting a punishable act (§ 201 (1), § 203 (1)), he/she shall continue the criminal proceedings if

1. in full or in time, the accused does not pay the amount of money and does not remedy the damage, if applicable, or if the accused does not provide the community services and does not settle the consequences of the offence, if applicable,
2. the accused does not sufficiently comply with the accepted obligations or consistently evades the influence of the probation officer, or
3. criminal proceedings are lodged against the accused for another punishable act prior to the

expiry of the probationary period. In this case, the subsequent continuation of the proceedings is admissible, as soon as an indictment is issued against the accused, in connection with the new or newly emerged punishable act, which shall also be possible during three months after issuing the indictment, also if the probationary period has expired in the meantime. However, the subsequently continued criminal proceedings shall be ended, subject to the other requirements, if the new criminal proceedings are ended by another outcome than a conviction.

(3) However, continuation of the proceedings may be waived, if this appears to be justifiable for specific reasons in the cases of paragraph (2) item 1, if this is not required under the circumstances in the cases of paragraph (2) items 2 and 3 in order keep the accused from committing punishable acts. Moreover, a continuation of the proceedings in the cases listed in paragraph (2) shall only be admissible, except for the requirements listed in items 1 to 3, if the accused does not accept the proposal of the public prosecutor that is mentioned there.

(4) If the accused cannot pay the amount of money in full or in time, or cannot comply with his/her accepted obligations in full or in time, as this would unduly affect him/her on account of a considerable change in the circumstances determining the sum of the amount of money, or the type or scope of the obligations, the public prosecutor may reasonably adjust the sum of the amount of money or the obligation.

(5) Obligations which the accused has accepted, and payments which he/she is prepared to pay, become irrelevant when the proceedings are subsequently continued. The probation service shall end; § 179 shall, however, remain unaffected. Amounts of money which the accused has paid (§ 200) shall be credited to a fine which is not imposed on condition, applying § 38 (1) item 1 of the Criminal Law Code in analogy. All other amounts shall be paid back. Other performances shall not be compensated; in the event of a conviction, they shall, however, also be taken into due account when fixing the punishment. In this connection, the type and duration of the performance shall be taken into account.

Austria provided the following examples of implementation:

Jurisdiction with respect to abuse of functions (which in practice will frequently coincide with corruption offences) is very restrictive and very often excludes the application of withdrawal in petty cases (Section 191 CPC) or of diversion (Section 198 CPC). An example is a sentence issued recently by the Supreme Court, confirming the judgment against a public official for abusing power of office (Section 302 PC), who on six occasions without official reason made excerpts from the central register of residents (accessible to everybody) for private purposes and thereby prevented the state from collecting dues of not more than € 15 per request.

A further practical example for this repressive approach is the case of the owner of a snack kiosk wanting to bribe a public official with a voucher in the value of about € 100 to refrain from requiring a criminal record from his home country. In this case, charges were filed and the court even considered the public prosecutor's request to order an arrest as proportionate.

#### **(b) Observations on the implementation of the article**

Austria's criminal justice system is based on the system of mandatory prosecution by virtue of article 18, paragraphs 1 and 2 of the Federal Constitution. Plea bargaining does not exist in Austria because it runs counter to a fundamental principle of Austrian criminal procedure.

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

#### **Paragraph 4**

*4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial*

*or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

While it is possible and not unusual to continue the pre-trial custody until the defendant begins to serve his sentence the CPC provides nonetheless a wide range of alternative measures that can be applied in connection with release pending trial to ensure the presence of the defendant for the rest of the proceedings. Such alternative measures include a formal pledge (e.g. not to flee or change the place of residence or not to impede the investigation, Section 173 para 5 subpara 1 and 2 CPC), the order to inform the court of every change of domicile or to report to the police at regular intervals (Section 173 para 5 subpara 5 CPC), bail (Section 173 para 5, 180, 181 CPC) and the preliminary confiscation of documents, in particular of passports and driving licences (Section 173 para 5 subpara 6 CPC). Since 2010 it is additionally possible to substitute the pre-trial detention with an electronically monitored house arrest (Section 173a CPC).

Austria cited the following domestic laws: Sections 173 et seq. Criminal Procedure Code (CPC).

***Pre-trial detention***

***Admissibility***

***§ 173***

(1) ... Pre-trial detention may not be imposed or continued if it is disproportionate to the importance of the case or to the expected sentence or if its purpose can be achieved by alternative means (paragraph 5).

....

(5) Applicable alternative means are in particular:

1. the formal pledge not to flee or to hide until the final sentence nor to change the place of domicile without consent of the public prosecutor;
2. the formal pledge not to attempt to hinder the investigation;
3. in case of domestic violence (Section 38a Security Police Act) the formal pledge to refrain from any contact with the victim and the order not to approach a certain domicile and its immediate surroundings or to violate an already imposed protection order according to Section 38a paragraph 2 Security Police Act or an injunction according to Section 382b Act on the Enforcement of Judgments, including the removal of all keys to that domicile;
4. the order to take domicile in a specific location or with a specific family, to avoid a specific domicile, a specific location or a specific company, to refrain from alcohol or other intoxicating substances or to pursue a regular occupation;
5. the order to notify every change of domicile or to report regularly to the police or another institution;
6. the preliminary confiscation of identity documents, driving documents or other documents;
7. preliminary probation according to Section 179;
8. the deposition of bail according to Sections 180 and 181;
9. with the consent of the defendant the order to undergo a withdrawal treatment, any other medical treatment or psychotherapy (Section 51 paragraph 3 CC) or any other health related measure (Section 11 paragraph 2 Narcotic Substances Act).

***House arrest***

***§ 173a.***

(1) Subject to an application of the public prosecutor or the defendant pre-trial detention can be continued as house arrest which is executed in the domicile where the defendant has his domestic residence. House arrest may be ordered, if the pre-trial detention can not be substituted by alternative measures (Section 173 paragraph 5) while the purpose of the pre-trial detention (Section 182 paragraph 1) can be achieved also by this form of execution of the pre-trial detention, because the defendant lives in orderly living conditions and consents to being monitored by appropriate instruments of electronic surveillance (Section 156b paragraph 1 and 2 Federal Law on the Execution of Prison Sentences and Preventive Detention). Otherwise the provisions on the continuation, repeal and maximum time span of

the pre-trial detention are applicable *mutatis mutandis* subject to the modifications that after house arrest has been ordered no more hearings on the detention are taking place *ex officio* and that the order to continue or to repeal the pre-trial detention can be issued in writing without prior hearing.

(2) The decision on an application according to paragraph 1 has to be pronounced in a hearing (Section 176 paragraph 1). If applicable the court has to order preliminary probation according to Section 179 immediately after the application and to order the probation service to report at the latest in the hearing on the living conditions of the defendant and his social relations, including the possibility to pursue a profession or an education without endangering the purposes of the pre-trial detention as well as the terms for the execution of the house arrest agreed upon with the defendant, which the defendant has to pledge formally to respect at the hearing. Leaving the domicile is not permissible except for traveling on the shortest way possible to the place of work or education, for purchasing necessities for living and for resorting to necessary medical aid.

(3) If the application is granted the public prosecutor has to inform the criminal police and the security authority of the location where the house arrest will be executed and to order the prison administration to transfer the defendant into house arrest after installation of the technical means necessary for the electronic surveillance.

(4) The court has to repeal the house arrest and order the continuation of the execution of the pre-trial detention if the defendant declares to withdraw his consent. The same rules apply subject to application by the public prosecutor if the defendant violates the terms to which he gave his formal pledge or if it is established by other means that the purposes of the pre-trial detention can not be achieved through house arrest. The criminal police is to be tasked with the execution of the transfer.

(5) In case of a final sentence Section 3 paragraph 2 Federal Law on the Execution of Prison Sentences and Preventive Detention is applicable *mutatis mutandis* if the house arrest is not repealed according to paragraph 4.

### ***Bail***

#### ***§ 180.***

(1) The defendant can be released against bail and the formal pledges according to Section 173 paragraph 5 subparagraphs 1 and 2 if the danger of escape is the only reason for pre-trial detention; this has to take place if the criminal act is not punishable with a more severe sentence than five years imprisonment.

(2) The amount of bail has to be set by the court upon application by the public prosecutor under consideration of the importance of the criminal acts the defendant is charged with, his personal and financial conditions and of the resources of the person providing bail.

(3) Bail has to be deposited at the court in cash or in securities safe for investing money of wards, calculated according to the stock market rates of the day of the deposition, or by a collateral on real estate or on rights which are inscribed in the land registry or by a surety bond by a reliable person who pledges to pay the bail. The court has to investigate the legality of the origins of the bail if specific circumstances give rise to the suspicion that the bail offered originates from a criminal act.

(4) The bail is declared forfeited by the court on application of the public prosecutor if the defendant evades the proceedings or in the case of an unsuspended prison sentence the execution of the sentence, in particular by moving without permission from his domicile or by not complying with a citation. This citation and the forfeiture order have to be served upon the defendant according to Section 8 paragraph 2 Federal Law on the Service of Public Documents. (5) The forfeited bail is confiscated for the Federal State with the entry into force of the court order according to paragraph 4; however the victim is entitled to demand, that his claims for damages are satisfied with priority from the bail or the proceeds from its realization

#### ***§ 181.***

(1) If the defendant prepares to flee after his release or new circumstances are uncovered which necessitate his arrest he has to be taken into custody notwithstanding the bail, however in these cases the bail becomes free.

(2) The same rule applies as soon as the proceedings are finalised, in case of an unsuspended prison sentence however only when the sentenced person has begun to serve his sentence. (3) The release of the bail is subject to a decision by the court.

Austria did not provide any cases of implementation or statistics.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

**Paragraph 5**

*5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Early release is dependent on the length of the sentence the perpetrator has been convicted to. This in turn depends on the gravity of the offence.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

**Paragraph 6**

*6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

In the event of a culpable breach of service duties by a tenured civil servant disciplinary action is instituted. There are three kinds of disciplinary proceedings, dependent on the seriousness of the breach of official duties:

- Non-formal disciplinary proceedings: the superior gives an admonition in petty cases
- Shortened disciplinary proceedings: the service authority can issue a disciplinary order for a slight breach of duties; the range of disciplinary sanctions consists of
  - reprimands and
  - small fines (up to half a month's salary)
- Formal disciplinary proceedings: a commission (Disciplinary Committee or Superior Disciplinary Committee) decides (see below); the range of disciplinary sanctions consists of
  - reprimands,
  - small fines (up to half a month's salary),
  - large fines (from one to five month's salary) and § dismissal.

In the case of a breach of official duties by a non-tenured public employee (staff employed under private law), possible consequences are a transfer to a different department, termination of employment and/or dismissal. The employee may file an action against the termination and/or

dismissal to the Court for Labour and Social Matters. If the violation also constitutes a criminal offence, there is an obligation to report the matter to the public prosecutor's office.

A securing measure, which is independent of the introduction of disciplinary measures, is suspending. A civil servant has to be suspended if he is imprisoned on remand or leaving him on active duty would endanger the reputation of the office or any other essential interests of the service. The service authority is enabled to suspend provisionally and the Disciplinary Committee is taking decision on the suspension. If the disciplinary proceeding is already at the Superior Disciplinary Committee or at the Appellate Committee, these bodies are also enabled to render the suspension.

Additionally, a final disciplinary conviction may constitute an adequate reason for transferring the civil servant in question to another organization, if - taking into account kind and gravity of the breach of duties - leaving him with his original organization does not seem justifiable.

Relevant bodies:

**Service authority:**

The service authority decides to institute a disciplinary procedure. Either the service authority issues a disciplinary order or the case is referred to the Disciplinary Committee. It may suspend provisionally. It may transfer after a final disciplinary conviction.

**Disciplinary Committee:**

Tasks:

The Disciplinary Committee is responsible for rendering disciplinary decisions and taking decisions on the suspension of civil servants employed in the organizational unit, within which the Disciplinary Committee is set up.

Establishment and composition:

A Disciplinary Committee shall be established within each of the highest supervising units. The Disciplinary Committee consists of the chairman, the necessary deputies and additional members. The chairman and the deputies shall have legal expert knowledge. All members of the Committee must be federal civil servants.

The chairman, his deputies and one half of the additional members of the Disciplinary Committee shall be appointed by the head of the Central Office with effect 1 January for a five-year period. The other half of the additional members shall be appointed by the competent Central Committee(s) of the employee representation.

The Disciplinary Committee takes decisions in panels consisting of three members (chairman of the panel, one representative of the employer and one representative of the employees).

Decisions:

The panel shall take decisions by a majority of votes. The disciplinary punishment of dismissal requires a unanimous decision. Abstentions are inadmissible. The chairman shall be the last to cast his vote. The members of the Disciplinary Committee exercise this office independently and freely.

**Superior Disciplinary Committee:**

Tasks:

The Superior Disciplinary Committee takes decisions on appeal against disciplinary decisions of the Disciplinary Committee.

Establishment and composition:

The Committee is established within the Federal Chancellery. The Superior Disciplinary Committee consists of the chairman, the necessary deputies and additional members. All members of the Committee must be federal civil servants.

The chairman, his deputies and the additional members are appointed by the Federal President based on a proposal by the federal government with effect 1 January for a five-year period. All members of the Superior Disciplinary Committee shall have legal expert knowledge. The Superior Disciplinary Committee takes decisions in panels consisting of three members.

Decisions: the panel shall take decisions by a majority of votes. Abstentions are inadmissible. The chairman shall be the last to cast his vote.

The members of the Superior Disciplinary Committee exercise this office independently and freely.

**Appellate Committee:**

Tasks:

The Appellate Committee takes decision on appeals against decisions of the Disciplinary Committee to institute, not to institute or discontinue disciplinary proceedings as well as appeals against the suspension of a civil servant by the Disciplinary Committee.

Establishment and composition:

The Committee is established within the Federal Chancellery.

The Chairman and his deputies shall be judges, while the other members shall be federal civil servants with legal expert knowledge, one half of which are representatives of the employer and the other half representatives of the employees. The Appellate Committee takes decisions in panels consisting of three members.

Decisions: The panel shall decide by a majority of votes. The members of the Appellate Committee exercise this office independently and freely.

Furthermore, the Disciplinary Attorney is taking part in the disciplinary proceeding. He has the status of a legal party and the tasks to advocate the interests of the service. He has not the role of a classical public prosecutor and is not unbound by instructions.

Against the decisions of the Superior Disciplinary Committee and the Appellate Committee no further (regular) appeal is admissible. Against decisions of the Appellate Committee, the extraordinary legal appeal to the Constitutional Court is admissible; against those of the Superior Disciplinary Committee the extraordinary legal appeal to the courts of public law (Constitutional Court, Administrative Court) is admissible.

Austria did not provide examples of implementation. With regard to statistics, it was explained that presently, there are no relevant statistics available. According to the 2011 amendment of the Civil Servants Service Act 1979, from 2013 on each Disciplinary Committee will have to file a report to the superior disciplinary committee containing e.g. kind of process, kind of breach of service duties and sanctions.

**(b) Observations on the implementation of the article**

During the country visit it was added that if a civil servant is convicted for more than one year, he loses his status as an official.

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

**Subparagraph 7 (a)**

*7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification,*

*by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:*

*(a) Holding public office; and*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria explained that there is no formal procedure of disqualification for a certain period of time. For a conviction related to corruption offences, a public official may be dismissed, either as a direct result of the conviction (depending on the concrete sentence) or as a result of consecutive disciplinary proceedings. When hiring new staff, service authorities are under the duty to check the applicant's personal and professional aptitude for the position. This check also includes a look at his criminal record. In case his record includes convictions for corruption offences, he/she may not be regarded as holding the necessary personal and professional aptitude.

**(b) Observations on the implementation of the article**

The reviewing experts observed that there is no procedure which prevents a person who was convicted for bribery or other Convention offenses from returning to work as a public official. An applicant's criminal record is introduced and taken into account when applying for a position, but the decision whether to hire the applicant ultimately falls within the employer's discretion.

During the country visit, it was explained that a prior conviction may exclude a person from holding elected public office. Pursuant to Section 22 of the Parliament Election Act, there is a category of offences, including corruption offences, which automatically exclude the offender from being elected if the sentence is higher than 1 year imprisonment for an intentional crime; and from voting if the sentence is higher than 1 year imprisonment without parole.

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

**Subparagraph 7 (b)**

*7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:*

*(b) Holding office in an enterprise owned in whole or in part by the State.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria referred to its answer under the previous provision.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

**Paragraph 8**

*8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Disciplinary proceedings against judges and public prosecutors are separate from criminal proceedings. According to § 144 of the Judges and Public Prosecutors Service Act (Richter und Staatsanwaltschaftsdienstgesetz - RStDG) in case of parallel criminal proceedings the disciplinary procedure is suspended until the criminal procedure is completed. According to § 102 section 6 RStDG the limitation period is extended accordingly in order to ensure disciplinary accountability. In this regard criminal and administrative proceedings are treated equally.

Recently, the 2011 Amendment of the Public Service Act, has introduced updated and efficiency-enhancing measures into the service and disciplinary law for judges and public prosecutors (such as a streamlined, practice-oriented system of penalties, downsized senates and higher transparency of proceedings).

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

**Paragraph 10**

*10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The promotion of the reintegration into society is a general principle of Austrian Criminal Law, but there are no programmes or measures exclusively designed for the reintegration of corruption offenders.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria's policy is in compliance with this provision of the Convention.

**Article 31 Freezing, seizure and confiscation**

**Subparagraph 1 (a)**

*1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:*

*(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic law: Section 20 PC.

**Section 20**

- (1): Assets that were obtained for or through a punishable act shall be declared forfeited by the court.
- (2) Forfeiture shall also cover the fruits, usufruct and replacement value of assets to be declared forfeited according to paragraph 1.
- (3) As far as assets subject to forfeiture according to paragraph 1 or 2 have not been seized or attached (sections 110 paragraph 1 sub-paragraph 3, 115 paragraph 1 sub-paragraph 3 CPC) the court shall declare forfeited an amount of money corresponding to the assets obtained pursuant to paragraph 1 and paragraph 2.

Austria provided the following examples of implementation:

- Money from an investment fraud was declared forfeited.
- Real estate and vehicles are also declared forfeited.

During the country visit, the following statistics were provided by Austria:

	2010	2011	2012	2013 (Jan-Apr)
Police seizures	44m	60m	58m	
Later confiscations	1m	5.7m	9.2m	>6m

**(b) Observations on the implementation of the article**

The confiscation of “assets obtained for or through a punishable act” is regulated in section 20 PC. The term “assets” is interpreted broadly and covers all tangible and intangible assets and anything that has commercial value. Objects which were used or intended by a perpetrator for deliberately committing an offence are also subject to confiscation (sections 19a and 26 PC). Confiscation under civil law does not exist but non-conviction-based confiscation would be possible in some cases. Interim measures are provided in sections 110 (seizure) and 115 (sequestration) CPC.

Under the title “extended forfeiture”, section 20b PC covers special cases in which no explicit proof is required of the specific criminal act from which the assets originated. Paragraph 2 of this section simplifies the rules on the reversal of the burden of proof with regard to the suspected proceeds of crimes covered by sections 165 (money laundering), 278 (criminal association) or 278c (terrorist crimes) PC. Such proceeds obtained in temporal proximity to the act can be declared forfeit provided that they are suspected to originate from an unlawful act and their lawful origin cannot be substantiated.

The reviewing experts encouraged the Austrian authorities to explore the possibility of expanding the scope of criminal offences for which extended confiscation is allowed to include corruption-related offences.

**(c) Successes and good practices**

- The availability of “extended forfeiture” for assets that are likely to be proceeds of crime and their legal origin cannot be proven to the satisfaction of the court.

### **Subparagraph 1 (b)**

*1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:*

*(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Section 19a, 26 PC. The latter describes the mandatory confiscation (meaning deprivation and not payment of a fine) of instruments which have been used for committing an offence or which are the proceeds from an offence.

##### ***Section 19a.***

(1) Objects which were used or intended by a perpetrator for deliberately committing an offence, or which have been produced by this act, shall be confiscated if they are owned by the perpetrator at the time of the decision.

##### ***Section 26***

(1) Objects which were used or intended by a perpetrator for deliberately committing an offence or which have been produced by this act shall be confiscated if the confiscation seems to be necessary for preventing the commission of punishable acts, given the special nature of these objects.

Austria provided the following examples of implementation:

- Due to this being new legislation, no examples can be given, but it is foreseen that objects used to commit the crime like cars for illegal trafficking in human beings shall be confiscated or computers used for child pornography.
- Drugs, illegal weapons like pump guns, CDs with child pornography, false money or documents are confiscated regularly.

No information on the amount/types of property, equipment or other instrumentalities confiscated were provided.

#### **(b) Observations on the implementation of the article**

The reviewing experts sought clarification as to the phrase “deliberately committing an offence” (Section 19a, 26 PC). It was explained that the *mens rea* is intent to commit the offense and intent to use these objects for the offense.

The reviewing experts concluded that Austria’s legislation is in compliance with this provision of the Convention.

### **Paragraph 2**

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Investigations are conducted by the criminal investigation department in accordance with the public prosecutor's office's orders. Chapter 8 of the Austrian Code of Criminal Procedure (CPC) contains information on investigative measures and taking of evidence. Part 1 regulates seizure, sequestration and information on bank accounts and bank operations. Definitions are provided in section 109 CPC.

Austria cited the following domestic laws:

***Section 99 CPC***

- (1) The criminal investigation department shall conduct investigation ex officio or on the basis of a complaint and shall follow orders from the public prosecutor's office and the court (section 105 paragraph 2).
- (2) If an order from the public prosecutor's office is required for an investigative action, the criminal investigation department may exercise this power without having obtained such an order in case of imminent danger. In this case, the criminal investigation department shall immediately obtain permission (section 100 paragraph 2 sub-paragraph 2). If permission is not granted, the criminal investigation department shall terminate any investigative action immediately and restore the original state as far as possible.
- (3) If such an order requires authorisation by the court, it is not permissible to take such an investigative action without this authorisation in case of imminent danger unless it is expressly provided for by law.
- (4) A delay of criminal investigations is permissible, if this
  1. contributes to solving a more serious offence or to identifying a leading accessory to the crime subject to the proviso that it does not involve serious risk to the life, health, physical integrity or freedom of third parties, or
  2. is the only means of averting a serious threat to the life, health, physical integrity or freedom of third parties.
- (5) The criminal investigation department is required to immediately notify the public prosecutor's office of a delay under paragraph 4. In case of a controlled delivery, i.e. the transport of banned or restricted goods in the national territory, and the absence of requirement for action under section 2 paragraph 1, the provisions of sections 71 and 72 of the Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the EU (EU- JZG) shall apply mutatis mutandis.

***Investigations***

***Section 103***

- (1) Except to the extent that the present Act provides otherwise, it is incumbent on the criminal investigation department to carry out the orders received from the public prosecutor's office. The public prosecutor's office may participate in all investigations conducted by the criminal investigation department and may give the head of the CID operation single assignments, if this is expedient for legal or factual reasons, in particular if the investigation is of importance for deciding on whether the proceedings are to be continued.
- (2) The public prosecutor's office may conduct investigations (section 91 paragraph 2) of its own accord or commission an expert to do so.

***Section 109***

For the purpose of this law

1. "Seizure" shall mean the temporary establishment of a power of disposal over items and the temporary prohibition to surrender items or other assets to third persons (third party prohibition) and the temporary prohibition to alienate or pledge such objects and assets,

2. “sequestration” shall mean a court decision on performing or maintaining a seizure pursuant to sub-paragraph 1 and a court decision prohibiting the alienation, encumbrance or pledging of real property or rights recorded in a public register,
3. “Information on bank accounts and bank operations” shall mean the disclosure of the name and other identity details of a client having a business relation with a bank as well as his/her address or information whether an accused person has a business relation with this institution, is the beneficial owner of such a relation or the agent for it, and delivery of all documentary evidence of the identity details of the holder of the business relation and his/her authorisation to dispose of an account, inspection of documents and other written evidence held by a credit or financial institution of the nature and extent of a business relation and related transactions and events during for a given past or future period of time.

### ***Section 110 - Seizure***

- (1) A seizure is permissible if it is considered necessary
  1. for evidential purposes,
  2. for securing private-law claims (section 367), or
  3. for securing a confiscation (section 19a PC), a forfeiture (section 20 PC), an extended forfeiture (section 20b PC), a confiscation (section 26 PC) or another order affecting property as provided for by law.
- (2) A seizure is subject to an order from the public prosecutor’s office and shall be effected by the criminal investigation department.
- (3) The criminal investigation department shall be authorized to seize items (section 109 paragraph 1a) of its own accord,
  1. if
    - a. they are not under the control of any person
    - b. a victim has been deprived of them as a result of the offence,
    - c. they have been found on the scene of crime and are likely to have been intended or used for committing the offence, or
    - d. they are of low value or can easily be replaced on a temporary basis,
  2. if their possession is generally prohibited (section 445a, paragraph 1),
  3. if they were found in possession of a suspect who was arrested in the circumstances described in section 170, paragraph 1, sub-paragraph 1, immediately or during a body search pursuant to section 120, paragraph 1, or
  4. if there is reason to suspect that they involve an infringement of particular intellectual property rights pursuant to Article 4 of the European Council Regulation no. 1383/2003 of 22 July 2003 concerning customs measures to be taken against goods found to have infringed such rights (Official Journal no. L 196 of 2/8/2003, p. 7 - 14).
- (4) The seizure of items for evidence purposes (paragraph 1, sub-paragraph 1) is not permissible and must be rescinded at the request of the person affected as soon as and to the extent that the evidential purpose can be served by making video, audio or other recordings, or copies of written records or electronically processed data, and the seized items or the originals of seized documents are not liable to be inspected during the trial.

### ***Section 115 - sequestration***

- sequestration is permissible if it the seized items are liable to be
1. required as evidence for the proceedings,
  2. subject to civil law claims (section 367) or
  3. required for ensuring that the execution of a court order for confiscation (section 19a PC), forfeiture (section 20 PC), confiscation (section 26 PC) or another order affecting property, which would otherwise be jeopardized or considerably complicated.
- (2) When an sequestration is requested by the public prosecutor’s office, the court is required to immediately take a decision.
  - (3) Section 110 paragraph 4 shall apply mutatis mutandis. Where appropriate, the sequestration is to be restricted to the recordings and copies mentioned there.
  - (4) If items subject to prohibition of surrender to third parties, of alienation and of encumbrance are attached (section 109 sub-paragraph 2b) the provisions of the Austrian Enforcement Act (Exekutionsordnung - EO) on preliminary injunctions shall apply mutatis mutandis unless this law provides otherwise.

(5) The decision authorizing an sequestration with a view to secure the execution of a court decision on recovery of criminal proceeds (section 20 PC) or forfeiture (section 20b PC) shall contain an amount of money covering the recovery or the forfeiture.

(6) If and as soon as the conditions leading to the sequestration do not or no longer exist or an amount of money as determined in paragraph 5 is deposited, the public prosecutor's office or the court, once the criminal proceedings have been instituted, has to lift the sequestration.

The police decide whether to investigate not only the commission of the crime but also to find out the whereabouts of the assets gained as a result of the crime and to seize this money.

No information on the cases and amounts of money/value of property frozen or seized was made available.

**(b) Observations on the implementation of the article**

The reviewing experts conclude that Austria's legislation is in compliance with this provision of the Convention, although no statistics were provided.

**Paragraph 3**

*3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has partly implemented this provision of the Convention.

Austria cited the following domestic laws:

***Section 114 CPC***

(1) The custody of seized items is incumbent on the criminal investigation department until the seizure is reported to the judiciary (section 115 paragraph 2), thereafter it is the responsibility of the public prosecutor's office.

(2) If the reason for maintaining custody of seized objects no longer applies, the items shall immediately be handed over to the person who had control of them at the time of seizure unless it is apparent that this person is not entitled to dispose of them. In such a case the items shall be handed over to the entitled person or, if such a person has not been identified or cannot be identified with reasonable effort, lodged pursuant to section 1425 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch - ABGB). The persons affected shall be notified accordingly.

***Section 115a***

(1) The confiscation or alienation of funds, money claims and securities, which have been seized according to section 110 paragraph 1 sub-paragraph 3 or can be attached according to section 115 paragraph 1 sub-paragraph 3 is required,

if it is impossible for the court to decide on their forfeiture or extended forfeiture as part of a sentence (sections 443 to 444a) or in separate proceedings (sections 445 to 446), because the accused person or a liable stakeholder cannot be located or tried and the proceedings have to be discontinued on this ground pursuant to section 197,  
if at least two years have passed since the seizure or sequestration and the edict on the imminent alienation (section 115b) has been made public at least for one year (section 115b paragraph 2).

(2) An alienation is not permissible, as far and as long as

1. a person who is not suspected of being involved in the punishable act has established the probable validity of his/her claim on the asset (paragraph 1) or
2. the asset (paragraph 1) has been attached by court.

(3) The decision on the alienation of an asset shall be made by court on the request of the public prosecutor's office, where appropriate simultaneously with the sequestration.

***Section 115e***

(1) If items or assets that have been seized (section 110 paragraph 1 sub-paragraph 3) or attached (section 115 paragraph 1 sub-paragraph 3) are subject to fast spoilage or major decrease in value, or involve disproportionately high costs when being stored, they may be alienated by the court under section 377 upon request of the public prosecutor's office. However, they shall not be alienated as long as they are required for evidential purposes (section 110 paragraph 4). Their alienation shall however be omitted as long as the objects are required for evidential purposes (section 110 paragraph 4).

(2) Persons affected by the alienation shall be notified beforehand, where appropriate in application *mutatis mutandis* of section 83 paragraph 5. The proceeds will replace the alienated items. The alienation on the ground of disproportionate storage costs shall not be effected, if a sufficient amount for covering these costs is paid in time.

(3) The decision on the alienation of assets shall be made by the court on the request of the public prosecutor's office, where appropriate simultaneously with the sequestration.

(section 115e, in force since 01/09/2012)

***Section 375***

(1) If an accused person is found in possession of assets that are apparently owned by another person he/she is not able or willing to name, such assets shall be attached (section 115 paragraph 1, subparagraph 2) and described in an edict (section 376) in such a way that the owner is able to recognize them as his property while omitting essential characteristics which are required to be indicated as proof of ownership.

As an example of implementation, a new regulation entered into force on 1 September 2012.

No statistics were provided by Austria.

**(b) Observations on the implementation of the article**

According to section 114 CPC, the custody of seized items is incumbent on the criminal investigation department until the seizure is reported to the judiciary, thereafter it is the responsibility of the public prosecutor's office.

During the country visit it was explained that Section 114 CPC is already in force but the asset management office has still not been established. Currently, the Prosecutor's office is responsible for the administration of assets. He needs to apply for court authorization e.g. to sell shares if they go down in value. Pursuant to Section 115e CPC, it is possible to sell assets when they lose value or if they cost money to store.

Concerning the different measures, it was clarified that freezing is used for bank accounts while seizure is used for tangible objects.

The reviewing experts concluded that Austria has partly implemented the present provision. They recommended that the Austrian authorities continue working towards ensuring the full and effective implementation of article 31, paragraph 3, of the UNCAC, possibly including the establishment of an asset management office or other alternatives which might fit better in the Austrian system (e.g. the outsourcing of certain administrative tasks to private enterprises).

**Paragraph 4**

*4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has partly implemented this provision of the Convention.

Austria cited the following domestic law:

***Forfeiture***

***Section 20 PC***

(2) Forfeiture also refers to the use and substitute value of assets to be declared forfeited according to paragraph 1.

(3) As far as assets subject to forfeiture according to paragraph 1 or 2 have not been seized or attached (sections 110 paragraph 1 sub-paragraph 3, 115 paragraph 1 sub-paragraph 3 CPC) the court has to declare an amount of money forfeited equalling the amount of assets obtained according to paragraph 1 and paragraph 2.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention, although no statistics were provided.

**Paragraph 5**

*5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has partly implemented this provision of the Convention.

Austria cited the following domestic law: Section 20(3) PC (see previous answer above).

Austria provided the following example of implementation: money deriving from a bank robbery was intermingled with other money. The court declared the forfeiture of an amount of money equal to the money stolen in the bank robbery.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

**Paragraph 6**

*6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has partly implemented this provision of the Convention.

Austria cited the following domestic law: Section 20 PC (see previous answers above).

Austria provided the following example of implementation: money deriving from a bank robbery was used to buy a car.

**(b) Observations on the implementation of the article**

During the country visit, it was confirmed that the car from the example above was confiscated. It was explained that it does not matter in which form the assets are present, any equivalent value can be confiscated.

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

**Paragraph 7**

*7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic law: Section 116 CPC.

***Information on bank accounts and bank operations***

***Section 116***

(1) Information on bank accounts and bank operations is permissible if it seems to be required for solving a deliberately committed indictable or non-indictable offence falling under the jurisdiction of the regional courts (section 31 paragraph 2 to 4), or for clarifying whether the conditions for issuing an order for disclosing information under paragraph 2 sub-paragraph 2 in proceedings dealing with a deliberately committed punishable offence where the regional court would be competent to conduct the trial are met.

(2) In addition, information on bank accounts and bank operations according to section 109 sub-paragraph 3b is permissible only if specific facts suggest that

1. items, documents or other records of a business relationship and related transactions may be seized on the basis of such information, as far as this is necessary for solving the offence;
2. items or other assets may be seized according to section 109 sub-paragraph 1b for securing a confiscation (section 19a PC), a forfeiture (section 20 PC), an extended forfeiture (section 20b PC), a confiscation (section 26 PC) or another order affecting property as provided for by law.
3. a transaction related to a criminal act is carried out using this business relationship.

(3) Authorization by a court must be obtained the public prosecutor's office for an order to disclose information on bank accounts and bank operations.

(4) The order and its authorization regarding the disclosure of information must contain:

1. the case reference of the proceedings and the criminal charge it is based on as well as the pertinent section of the Penal Code,
2. the credit or financial institution involved,
3. the description of the items, documents (records) or assets to be seized,

4. the facts substantiating the necessity and proportionality (section 5) of the orders, 5. the period of time covered by an order according to paragraph 2 sub-paragraph 3.

(5) The order and its authorization have to be served on the credit or financial institution, the accused and the persons entitled to dispose of the bank account, as soon as they are known to the public prosecutor's office. Service on the accused and the persons entitled to dispose of the bank account can be postponed as long as the investigation would be jeopardized. The credit or financial institution has to be notified thereof and the same is required to observe secrecy towards clients and third parties in respect of the order and all facts and transactions.

(6) Credit and financial institutions and their staff are obliged to disclose the information and to allow the documents and written evidence to be inspected and surrendered. For this purpose an electronic data carrier in a common file format has to be used, if electronic data processing is used for the operation of the business relation. If the credit or financial institution lodges a complaint against the judicial authorization and refuses to disclose information or surrender documents, the procedure as defined in sections 93 paragraph 2 and 112 must be adopted with instruction to present the documents to the S with the difference that the documents have to be presented to the higher regional court (Oberlandesgericht). A search of credit or financial institutions always requires an order of the public prosecutor's office on the basis of a judicial authorization. Sections 110 paragraph 4 and 111 paragraph 3 apply.

Austria indicated that there were no examples of implementation or statistics since Section 116 para 1 was amended and is in force only since 1 September 2012.

#### **(b) Observations on the implementation of the article**

The reviewing experts referred to their observations and recommendations on Article 40 UNCAC.

### **Paragraph 8**

*8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Under the title "extended forfeiture", Section 20b PC covers special cases in which, under certain conditions (different from the forfeiture provisions of Section 20), no explicit proof is required of the specific criminal act from which the assets originated. Paragraph 2 simplifies the rules on the reversal of the burden of proof as laid down in Section 20 paragraphs 2 and 3 with regard to the suspected proceeds of crime and extends the scope so that in the case of an unlawful act covered by Sections 165 (= money laundering), 278 (= criminal association) or 278c (=terrorist crimes) of the PC or in the case of assets being acquired for an offence or being obtained through an offence, all assets obtained in temporal proximity to the act can now be declared forfeit provided that they are suspected to originate from an unlawful act and their lawful origin cannot be substantiated.

Austria cited the following domestic law: Section 20b PC.

#### ***Extended forfeiture*** ***Section 20b.***

(2) If a criminal act according to sections 165, 278, 278c, for the commission for which or from which assets were obtained, or such a crime has been committed, the forfeiture also covers assets obtained in temporal with that act, provided that they are likely to be the proceeds of a criminal act and their legal origin cannot be proven to the satisfaction of the court.

Austria provided the following examples of implementation:

A drug dealer was sentenced twice. He lived on social welfare but his assets were much larger than his income from the last drug deal. He had to show the legal origin of his assets but failed to do so.

**(b) Observations on the implementation of the article**

During the country visit, it was confirmed that Section 20b PC only applies to money laundering, criminal association and terrorist crimes.

Therefore, the reviewing experts encouraged Austria to explore the possibility of including corruption offences in the list contained in Section 20b PC (see above under paragraph (1a)).

**(c) Successes and good practices**

Nevertheless, the existence of extended confiscation was noted as a good practice (see above under paragraph (1a)).

**Paragraph 9**

*9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic law: Section 20a PC.

***Exclusion of forfeiture  
Section 20a.***

- (1) Forfeiture against third persons according to section 20 paragraph 2 and paragraph 3 is excluded when this person was unaware of the punishable act when acquiring the assets.
- (2) Forfeiture is also excluded
  1. when a third person was unaware of the punishable act when acquiring the assets against remuneration.

No examples of implementation or statistics were provided since this is a fairly new provision (from 2011).

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision.

**Article 32 Protection of witnesses, experts and victims**

**Paragraph 1**

*1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for*

*witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has taken a couple of measures to provide effective protection from potential retaliation or intimidation for persons who give testimony in accordance with this Convention.

Austria cited the following domestic law: Section 22, para.1, sub-para.5, Code of Police Practice

***Section 22(1)(5)***

“The law enforcement authorities are to provide particular protection...

to individuals who are able to supply information on a dangerous assault or organized crime and who are therefore especially endangered as well as relatives of this individuals.”

Austria provided the following examples of implementation:

Protection measures in the broad sense including:

- Witness and Victim assistance and support
- Police Protection (Code of Police Practice)
- Procedural Protection (Code of Criminal Procedures)
- Witness/Victim Protection Programme

Due to official secrecy and data protection, no specific information is available. In particular, the number, type or classification of protected persons cannot be disclosed. In order to avoid any risk to the safety of protected persons, no information will be provided.

No cost per protected person has been estimated. The costs depend on the individual protection program and the financial resources of the protected persons and concerns not only cases which are subsumed under the term corruption. A serious statement about the costs is therefore not possible.

**(b) Observations on the implementation of the article**

The reviewing experts noted that measures are in place to provide effective protection from potential retaliation or intimidation for persons who give testimony in accordance with the Convention. On the basis of Section 22 Code of Police Practice and – as reported during the country visit - Section 162 CPC, witnesses in corruption cases can benefit from witness protection programmes, including relocation measures. Due to official secrecy and data protection, no specific information in terms of the number, type or classification of protected persons was provided. Non-disclosure or limitations of information concerning the identity and whereabouts of such persons is a part of the procedural protection measures and regulated by the CPC.

During the country visit, it was confirmed that on the basis of Section 22 Code of Police Practice and Section 162 CPC, witnesses in corruption cases can benefit from witness protection programmes, including relocation measures.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Subparagraph 2 (a)**

2. *The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:*

(a) *Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that physical protection can be either a task of the normal police or a measure of the protection programme. Relocation is a measure of the Protection Programme and depends on the level of risk.

Non-disclosure or limitations of information concerning the identity and whereabouts of such persons is a part of the procedural protection measures and regulated by the CPC.

Austria cited again Section 22 Code of Police Practice (see previous answer), as well as Section 48, para. 1, Code of Police Practice, according to which public security service officers shall be authorised to guard persons if, based on certain facts, it is to be assumed that a dangerous attack against their life, health or freedom is imminent.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Subparagraph 2 (b)**

2. *The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:*

(b) *Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Section 162, 165 CPC.

***§ 162 - Anonymous Evidence***

If, due to certain circumstances, there is reason to fear that the witness would expose himself/herself or a third person to a serious danger to their lives, health, physical integrity or freedom by providing his/her name or other personal details or by answering questions allowing conclusions thereon, this witness may be permitted not to answer such questions. In this case the witness is also allowed to change his/her appearance so as not to be recognized. However, the witness may not cover his/her face in a way that his/her facial expressions cannot be observed and the indispensable assessment of the credibility of his/her testimony is impeded.

***§ 165 Criminal Procedure Code***

***Adversary Questioning of the Accused or a Witness***

(1) Adversary questioning, and an audio or video recording of such questioning of the accused or a witness is allowed if there are reasons to believe that the questioning would not be possible during the main trial, due to factual or legal reasons.

(2) The court shall implement adversary questioning upon a request by the public prosecution service, as stipulated in the provisions of §§ 249 and 250 (§ 104). The court shall provide the possibility to the

public prosecutor, the accused, the victim, the private participant and their representatives to participate in the interrogation and to ask questions.

(3) During the interrogation of a witness, it is in his/her interest to limit the possibility of participation of other participants in the proceedings (paragraph 2) and their representatives, in view of the young age or the psychological or health condition of the witness or, upon the request of the public prosecutor, in the interest of seeking the truth, or ex officio, by the use of technical means of audio and visual transmission for following the interrogation, and the right to ask questions being exercised, without being present at the interrogation. Especially if a witness is under 14 years of age, it is possible to appoint an expert witness to conduct the interrogation. In any case, care shall be taken to avoid a possible encounter of the witness with the accused and other participants in the proceedings.

(4) The court shall, in any case, interrogate any witness in the manner described in paragraph 3, who has not yet turned fourteen and who could have been injured in a sexual sense by the alleged offence of the accused. The other witnesses mentioned in § 156 para 1 subparagraphs 1 and 2 shall be examined in this manner, if this is requested by the public prosecutor.

(5) Prior to the interrogation, the court shall also inform the witness of the fact that the minutes may be read out and the audio or video recording played during the main trial, even if the witness refuses to give his/her deposition in further proceedings. If an expert witness has been appointed to conduct the interrogation (para 3), he/she shall be in charge of providing this information and the information defined under §§ 161 para 1. In doing so, the age and the condition of the witness shall be taken into account. Minutes shall be drafted on the information and the explanation given in this respect.

(6) As for the rest, the provisions of this section shall be applied mutatis mutandis.

**(b) Observations on the implementation of the article**

During the country visit, it was further explained that “adversarial questioning” means that testimony is not given during trial but during the investigative procedure before a court. All parties, including the defence, are present. During the trial a video of the testimony can be shown.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 3**

*3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria has concluded several bilateral and multilateral international agreements on police co-operation. Part of those agreements is very often also a chapter which deals with co-operation on witness protection including all necessary measures (e.g. relocation of endangered persons).

Austria explained that content of the agreements is essentially similar to the following text of the Police Co-Operation Convention for Southeast Europe:

***“Witness Protection***

(1) The law enforcement authorities of the Contracting Parties designated for the witness protection shall directly cooperate in the area of witness protection programmes.

(2) The cooperation shall, in particular, include the exchange of information, assistance as regards logistics and taking over of persons to be protected.

(3) An Agreement will be signed for each particular case of taking over of persons to be protected, in order for mutual rights and obligations to be regulated.

(4) The person to be protected must have been placed under the witness protection programme of the requesting Contracting Party. The person to be protected will not be included in the witness protection programme of the requested Contracting Party. When taking supportive measures in connection with the protection of these persons the national legislation of the requested Contracting Party shall apply accordingly.

(5) In principle the requesting Contracting Party shall bear the costs of living for the persons to be protected. The requested Contracting Party shall bear the expenses for personnel and material resources for the protection of these persons.

(6) For serious reasons and after having duly notified the requesting Contracting Party, the requested Contracting Party can cease the supportive measures. In this case, the requesting Contracting Party shall retake the person concerned.”

**(b) Observations on the implementation of the article**

Austria has concluded several bilateral and multilateral international agreements on police co-operation containing provisions on witness protection.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 4**

*4. The provisions of this article shall also apply to victims insofar as they are witnesses.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that the provisions of Section 22, para.1, sub-para.5, Code of Police Practice also apply to victims insofar as they are witnesses.

The guidelines for the Protection Programs do not distinguish between victims and witnesses. Both can be included in the protection programme as long as they meet the criteria for admission.

**(b) Observations on the implementation of the article**

The guidelines for the Protection Programmes do not distinguish between victims and witnesses. Both can be included in the protection programme as long as they meet the criteria for admission.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 5**

*5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: Sections 66, 67 CPC.

**§ 66**

***Rights of Victims***

(1) Victims – regardless of their position as private participants – shall have the right, to be represented (§ 73), to have insight into official files (§ 68),

to be informed on the subject matter of the proceedings and on their significant rights prior to their examination (§ 70 para 1),  
to be informed about the progress of the proceedings (§§ 25 Abs. 3, 177 Abs. 5, 194, 197 Abs. 3, 206 und 208 Abs. 4),  
to be granted the assistance of an interpreter, for which § 56 is applied mutatis mutandis,  
to participate in adversary questioning of witnesses and the accused (§ 165) and at the reconstruction of the offence (§ 150 para 1),  
to be present during the main trial, and to interrogate the accused, witnesses and expert witnesses, and to be heard in relation to their claims,  
to request the continuation of proceedings, which were suspended by the public prosecutor's office (§ 195 para 1).

(2) Upon their request, victims, as defined in § 65 subparagraph 1 lit. a or b shall be granted psycho-social or legal assistance during court proceedings, insofar as this is necessary for reasons of protecting the procedural rights of victims, under maximum consideration for their personal concernment. Psycho-social assistance during court proceedings comprises the preparation of the affected person for the proceedings and for the emotional burden related to it, as well as accompanying the person to the hearings during investigative proceedings and the main trial, legal assistance during the court proceedings, legal advice and representation by an attorney. The Federal Minister of Justice is authorized to delegate contractually provision of assistance to victims during court proceedings, as defined under § 65 subparagraph 1 lit. a or b to suitable experienced institutions.

## **§ 67**

### ***Joining Criminal Proceedings as a Private Party***

(1) Victims have the right to demand reparation of the damage suffered by the offence or compensation for the impairment of the legal goods protected by criminal law. The scope of the damage or the impairment shall be determined ex officio, whenever this is possible on the basis of the outcome of the criminal proceedings or other standard investigations. If an expert is appointed to determine a physical injury or health damage, the expert shall also be ordered to establish the periods of pain.

(2) Victims join criminal proceedings as a private party by so stating this. In their statement they shall give the reasons for their entitlement to participate in the proceedings and their claims for damages or compensation, unless this is obvious.

(3) A statement according to paragraph (2) shall be filed with the criminal police or the public prosecutor, or with the court, once charges have been laid against the accused. The statement must be made before the end of the evidence-taking process, at the latest. The amount of the damages or the compensation must also be quantified until that date. The statement may be withdrawn at any time.

(4) A statement shall be rejected if

1. it is obviously unjustified,
2. it was made too late (paragraph (3)), or
3. the amount of the damages or the compensation was not quantified in time.

(5) The public prosecutor is responsible for rejecting a statement according to paragraph (4), or the court, once the charges have been laid against the accused.

(6) In addition to the rights of victims (§ 66), persons joining criminal proceedings as private parties also have the right

1. to apply for the taking of evidence pursuant to § 55,
2. to uphold the charges pursuant to § 72, if the public prosecutor withdraws from the action,
3. to file a complaint, pursuant to § 87, if the court stays the proceedings,
4. to be summoned to the trial and to be given an opportunity to state and explain his/her claims after the public prosecutor has submitted his/her final pleadings,
5. to file an appeal concerning his/her private-law claims, in accordance with § 366.

(7) Persons joining criminal proceedings as private parties shall be granted legal aid by granting them the gratuitous services of a counsel – unless they are entitled to receive judicial assistance during the proceedings (§ 66 (2)) – if representation by a counsel is in the interest of the administration of justice, especially in the interest of appropriately enforcing their claims in order to avoid subsequent civil proceedings, and they are not in a position to bear the costs of being represented by a lawyer without being affected in their necessary subsistence. The necessary subsistence shall be defined as that support which is necessary for a plain lifestyle for the person as such and the family whose maintenance the

person has to provide. The provisions of § 61 (4), § 62 (1), (2) and (4) shall apply in analogy to the assignment and appointment of such a representative.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Article 33 Protection of reporting persons**

*Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws:

1) Civil Servants' Employment Act (Beamten-Dienstrechtsgesetz [BDG]): § 53a, "Protection from discrimination"

**§ 53a**

A civil servant who, in accordance with § 53, paragraph 1, in good faith reports well-founded suspicions of a criminal offence laid down in § 4, paragraph 1, of the Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption must not be discriminated against by the representative of the employer as a response to such report. The same applies if a civil servant exercises the right to report in accordance with § 5 of the Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption.

2) Contract Staff Act (Vertragsbedienstetengesetz [VBG]): § 5, paragraph 1: "General duties and swearing-in"

**§ 5.**

(1) ... § 53, § 53a, ... of the BDG ... apply. ...

3) Judicial and Prosecution Service Act (Richter- und Staatsanwaltschaftsdienstgesetz [RStDG]): § 58b: "Protection from discrimination"

**§ 58b**

A judge or public prosecutor who, in accordance with § 53, paragraph 1, in good faith reports well-founded suspicions of a criminal offence laid down in § 4, paragraph 1, of the Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption (Federal Law Gazette [BGBl.] I, no 72/2009) must not be discriminated against by the representative of the employer as a response to such report. The same applies if a judge or public prosecutor exercises the right to report in accordance with § 5 of the Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption.

Austria provided the following examples of implementation:

So far, the Federal Bureau of Anti-Corruption (BAK) has no knowledge of cases related to the above mentioned provisions of the Austrian law, in particular § 53a of the Civil Servants' Employment Act 1979, § 5 of the Contract Staff Act, and § 58b of the Judicial and Prosecution Service Act.

**(b) Observations on the implementation of the article**

The reviewing experts noted that while the Convention refers to “any person” who reports Convention offenses, in its response, Austria only refers to provisions which protect civil servants.

During the country visit, it was confirmed, that there is no whistleblower protection in the private sector or in private law. In particular, private employees do not enjoy protection against unfair dismissal, e.g. when an employer considers the whistleblower's report a breach of a confidentiality requirement owed by the employee towards his employer.

The experts were told that state employees are under an obligation to report wrongdoing. While formerly, this could only be done along the lines of hierarchy, now they can report directly to the BAK.

The specialized anti-corruption prosecution service (WKStA) told the experts that a whistleblower hotline had recently been installed in March 2013. This hotline technically assured anonymity for reporting persons. The WKStA reported that it received a lot of cases through the hotline, but many did not fall into the competence of the WKStA. Indeed, in less than three months, WKStA had received more than 400 reports. 90% of the reports were relevant, but not all of them concerned corruption offences.

When the experts asked why the hotline had been established within WKStA rather than the BAK, they learned that there were conflicting opinions as to whether the hotline has a legal basis in the CPC and if Section 80(1) CPC could be considered a proper legal basis.

Finally, the reviewing experts were told that already light negligence excludes good faith of the reporting person.

The reviewing experts recommended that the Austrian authorities take measures aimed at expanding the protection of whistleblowers in the private sector, including protection against any unjustified treatment (e.g. unfair dismissal) by private employers and reconsider precisely interpreting the term “good faith” in legislation to avoid the case where whistleblowers are reluctant to expose suspicions of criminal offences. The reviewing experts further recommend clarifying the legal basis for the whistleblower hotline and clearly defining the institutional competences between BAK and WKStA.

**Article 34 Consequences of acts of corruption**

*With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The Austrian Federal Public Procurement Act 2006 provides for the possibility of annulment of decisions taken by the awarding authority, if such decision is in breach of Public Procurement Law (see Section 320 et seq., Section 325).

Secondly, according to Section 916 of the Austrian Civil Code (ABGB), a declaration of intent is null and void if it concerns a fictitious transaction and the other party gives their consent. If the contract is intended to cover up another transaction, the legality of the underlying agreement has to be examined.

Thirdly, the general principle of invalidity of a contract which violates a legal prohibition or public morality also applies to contracts concluded as a result of corrupt conduct by the parties (Section 879 Austrian Civil Code).

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that the sections referred to in Austria's response did not cover all of the requirements of the Convention, as there is no provision directly addressing consequences of corruption, the possibility to annul or rescind a contract related to corruption, and protection of the rights of third parties acquired in good faith.

During the country visit it was explained that an act of corruption will not *ex lege* render a contract null and void.

It was explained that natural and legal persons can be excluded from public procurement contracts but it was not explained how this works and if companies that had been involved in corruption could be blacklisted.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

#### **Article 35 Compensation for damage**

*Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The general principles of Austrian tort law also apply to cases involving corruption. In case of harm caused by unlawful, culpable conduct, the person whose rights have been infringed has a right to claim damages (Sections 1293 et seq Austrian Civil Code). Apart from these general rules, the Austrian Federal Public Procurement Act 2006 includes a provision on indemnification of unsuccessful tenderers (Section 337).

In addition, the following provisions of the CPC regulate the status of victims in domestic criminal proceedings:

#### **§ 65 Criminal Procedure Code - new Definitions**

Under this Code,

1. the "victim" is
  - a. each person, who could have been exposed to violence or dangerous threat or whose sexual integrity could have been compromised through an intentional criminal offence,
  - b. the spouse, life companion, relative in a direct line, brother or sister of a person, whose death could have been caused by a criminal offence, or other relatives, who were witnesses of the criminal offence,
  - c. any other person, who could have suffered damage caused by a criminal offence or who could have otherwise been affected with respect to his/her interests protected by criminal legislation,
2. "Private participant" is each victim, who declares that he/she wishes to participate in the proceedings, in order to request compensation for the damages sustained or the infringement of rights,
3. "Private prosecutor" is each person, who submits to the court the indictment or another motion to initiate the main trial for reasons of a criminal offence, which is not prosecuted ex officio (§ 71),
4. "Subsidiary prosecutor" is each private participant, who pursues an indictment, which was withdrawn by the public prosecutor.

### **§ 66 Criminal Procedure Code - new Rights of Victims**

- (1) Victims – regardless of their position as private participants – shall have the right,
  1. to be represented (§ 73),
  2. to have insight into official files (§ 68),
  3. to be informed on the subject matter of the proceedings and on their significant rights prior to their examination (§ 70 para 1),
  4. to be informed about the progress of the proceedings (§§ 25 Abs. 3, 177 Abs. 5, 194, 197 Abs. 3, 206 und 208 Abs. 4),
  5. to be granted the assistance of an interpreter, for which § 56 is applied mutatis mutandis,
  6. to participate in adversary questioning of witnesses and the accused (§ 165) and at the reconstruction of the offence (§ 150 para 1),
  7. to be present during the main trial, and to interrogate the accused, witnesses and expert witnesses, and to be heard in relation to their claims,
  8. to request the continuation of proceedings, which were suspended by the public prosecutor's office (§ 195 para 1).
- (2) Upon their request, victims, as defined in § 65 subparagraph 1 lit. a or b shall be granted psycho-social or legal assistance during court proceedings, insofar as this is necessary for reasons of protecting the procedural rights of victims, under maximum consideration for their personal concernment. Psycho-social assistance during court proceedings comprises the preparation of the affected person for the proceedings and for the emotional burden related to it, as well as accompanying the person to the hearings during investigative proceedings and the main trial, legal assistance during the court proceedings, legal advice and representation by an attorney. The Federal Minister of Justice is authorized to delegate contractually provision of assistance to victims during court proceedings, as defined under § 65 subparagraph 1 lit. a or b to suitable experienced institutions.

### **§ 67 Criminal Procedure Code Joining Criminal Proceedings as a Private Party**

- (1) Victims have the right to demand reparation of the damage suffered by the offence or compensation for the impairment of the legal goods protected by criminal law. The scope of the damage or the impairment shall be determined ex officio, whenever this is possible on the basis of the outcome of the criminal proceedings or other standard investigations. If an expert is appointed to determine a physical injury or health damage, the expert shall also be ordered to establish the periods of pain.

(2) Victims join criminal proceedings as a private party by so stating this. In their statement they shall give the reasons for their entitlement to participate in the proceedings and their claims for damages or compensation, unless this is obvious.

(3) A statement according to paragraph (2) shall be filed with the criminal police or the public prosecutor, or with the court, once charges have been laid against the accused. The statement must be made before the end of the evidence-taking process, at the latest. The amount of the damages or the compensation must also be quantified until that date. The statement may be withdrawn at any time.

(4) A statement shall be rejected if

1. it is obviously unjustified,
2. it was made too late (paragraph (3)), or
3. the amount of the damages or the compensation was not quantified in time.

(5) The public prosecutor is responsible for rejecting a statement according to paragraph (4), or the court, once the charges have been laid against the accused.

(6) In addition to the rights of victims (§ 66), persons joining criminal proceedings as private parties also have the right

1. to apply for the taking of evidence pursuant to § 55,
2. to uphold the charges pursuant to § 72, if the public prosecutor withdraws from the action,
3. to file a complaint, pursuant to § 87, if the court stays the proceedings,
4. to be summoned to the trial and to be given an opportunity to state and explain his/her claims after the public prosecutor has submitted his/her final pleadings,
5. to file an appeal concerning his/her private-law claims, in accordance with § 366.

(7) Persons joining criminal proceedings as private parties shall be granted legal aid by granting them the gratuitous services of a counsel – unless they are entitled to receive judicial assistance during the proceedings (§ 66 (2)) – if representation by a counsel is in the interest of the administration of justice, especially in the interest of appropriately enforcing their claims in order to avoid subsequent civil proceedings, and they are not in a position to bear the costs of being represented by a lawyer without being affected in their necessary subsistence. The necessary subsistence shall be defined as that support which is necessary for a plain lifestyle for the person as such and the family whose maintenance the person has to provide. The provisions of § 61 (4), § 62 (1), (2) and (4) shall apply in analogy to the assignment and appointment of such a representative.

#### **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

#### **Article 36 Specialized authorities**

*Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The Central Office for Prosecuting Economic Crimes and Corruption (WKStA) has been established as of 1 September 2011 with nationwide jurisdiction. The Federal Bureau of Anti-Corruption (BAK) has been established as of 1 January 2010 with nationwide jurisdiction.

## The Central Office for Prosecuting Economic Crimes and Corruption (WKStA)

Pursuant to Section 20a (1) CCP, this Office is responsible for conducting and concluding investigative proceedings or filing charges, and to act for the prosecution in the main trial and in trials before a Higher Regional Court inter alia for the following offences of particular relevance in the framework of UNCAC:

1. embezzlement, serious fraud or serious professional fraud, fraudulent misuse of data processing, breach of trust, misappropriation of subsidies and fraudulent bankruptcy, if it can be assumed on the basis of specific facts that the damage done by the offence exceeds 5,000,000 euros (Sections 133 (2) 2nd case, 147 (3), 148 2nd case, 148a (2) 2nd case, Sections 153 (2) second case, 153b (4) und 156 (2) Penal Code) (Section 20a (1) clause 1 CCP);
2. Accepting gifts by stakeholders (Section 153a Penal Code), agreements restricting competition during procurement procedures (Section 168b Penal Code), and if it can be assumed on the basis of specific facts that the offence was committed for a benefit value exceeding 3,000 euros, breaches of the official duty, corruption and similar criminal acts such as (they are) defined in §§ 304 to 309 of the Penal Code.
3. Money laundering (Section 165 Penal Code), inasmuch as the assets originate from a criminal act mentioned in the paragraphs above (Section 20a (1) clause 8 CCP);
4. Criminal association and criminal organisation (Sections 278 and 278a Penal Code), inasmuch as the association or organisation is aimed at committing a criminal act as mentioned in the paragraphs above (Section 20a (1) clause 9 CCP).

Moreover, with respect to all offences mentioned, WKStA is responsible for procedures of mutual legal assistance and for criminal co-operation with the relevant bodies of the European Union, and of the justice authorities of the Member States of the European Union. It is the central national contact point for OLAF and Eurojust, inasmuch as proceedings for such offences are involved (Section 20a (3) CCP).

If it should become necessary to have available special business know-how or experience in such proceedings to effectively and expeditiously deal with economic crimes, WKStA may take away from the competent public prosecutor and take over any economic crime (Section 20b (1) CCP). Economic crimes in this sense are proceedings for criminal acts against third party assets in connection with entrepreneurial activities, which are characterised by extent and complexity or the number of participants, by the business circles involved or by the special public interest in solving the facts investigated (Section 20b (2) CCP).

Moreover, WKStA may also take over proceedings for offences pursuant to Sections 302 and 304 to 308 Penal Code, if the offence was committed by receiving a benefit not exceeding 3,000 euros, and there is special public interest to solve such offence due to its significance or the person of the suspect involved (Section 20b (3) CCP).

## The Federal Bureau of Anti-Corruption (BAK)

The BAK is an institution of the Austrian Federal Ministry of the Interior. Organizationally speaking, it is, de jure, established outside the Directorate-General for Public Security and has nationwide jurisdiction in

- the prevention of and the fight against corruption,
- the close cooperation with the Public Prosecutor's Office for White-Collar Crime and Corruption (WKStA) and
- security police and criminal police cooperation with foreign and international anti-corruption institutions.

Corruption is a complex phenomenon which has to be tackled in a holistic way. According to its legal mandate, the BAK follows a 4-pillar approach (prevention, education, law enforcement, cooperation).

Pursuant to Section 4 (1) of the Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption, this Bureau is responsible for the security and criminal police investigations concerning the following criminal offences:

1. abuse of official authority (§ 302 of the Austrian Penal Code (StGB)),
2. corruptibility (§ 304 StGB),
3. acceptance of an advantage (§ 305 StGB),
4. facilitation of corruptibility (§ 306 StGB),
5. bribery (§ 307 StGB),
6. offering an advantage (§ 307a StGB),
7. facilitation of bribery or of the acceptance of an advantage (§ 307b StGB),
8. illicit intervention (§ 308 StGB),
9. breach of trust due to abuse of an official function or due to involvement of an office holder (§§ 153 para. 2 case 2, 313 or in connection with § 74 para. 1 no. 4a StGB),
10. acceptance of gifts by persons holding a position of power (§ 153a StGB),
11. agreements restricting competition in procurement procedures (§ 168b StGB) as well as serious fraud (§ 147 StGB) and commercial fraud (§ 148 StGB) on the basis of such agreement,
12. acceptance of gifts by employees or agents (§ 168c para. 2 StGB),
13. money laundering (§ 165 StGB), provided that the assets arise from the offences 1 to 9, 11 (second and third case) or 12; criminal associations or organizations (§§ 278 and 278a StGB), provided that they intend to commit the offences 1 to 9 or 11 (second and third case),
14. acts punishable pursuant to the StGB as well as to other laws relevant to criminal law, provided that they are related to the offences 1 to 13 and have to be prosecuted by the BAK by written order of a court or a public prosecutor's office,
15. acts punishable pursuant to the StGB as well as to laws relevant to criminal law concerning public employees of the Federal Ministry of the Interior, provided that they have to be prosecuted by the BAK by written order of a court or a public prosecutor's office.

In the cases defined in section 4, para. 1, nos. 11 to 13, of the BAK-G the BAK may only be responsible if the extent of the punishment depends, pursuant to section 28, para. 1, sent. 2, StGB, on the above mentioned criminal offences.

The Federal Bureau of Anti-Corruption has also jurisdiction over investigations within the framework of international police cooperation and administrative assistance as well as for cooperation with the corresponding institutions of the European Union and the investigating authorities of the EU Member States in the above mentioned cases. Regarding international police cooperation in the cases 1 to 13 the Bureau acts as point of contact for OLAF, Interpol, Europol and other comparable international institutions.

Austria cited the following domestic laws:

**CPC**

**§ 20a. Office for Prosecuting Economic Crimes and Corruption (WKStA)**

(1) The WKStA is responsible in the entire territory of the Federation for conducting investigative proceedings and concluding them according to Chapters 10 and 11 and for filing charges, and to present them in the main trial and in trials before a Higher Regional Court for the following offences:

1. embezzlement, serious fraud or serious professional fraud, fraudulent misuse of data processing, breach of trust, misappropriation of subsidies and fraudulent bankruptcy, if it can be assumed on the basis of specific facts that the damage done by the offence exceeds 5,000,000 euros (Sections 133 (2) 2nd case, 147 (3), 148 2nd case, 148a (2) 2nd case, Sections 153 (2) second case, 153b (4) und 156 (2) Penal Code);
2. Fraudulent withholding of social security contributions and surcharges pursuant to the Construction Worker Leave Entitlement and Severance Act, inasmuch as it can be assumed on the basis of specific facts that the amount of contributions or surcharges withheld exceeds 5,000,000 euros (Section 153d (2) and (3) Penal Code), and organised illegal employment (Section 153e Penal Code);
3. Grossly negligent impairment of creditors' interests pursuant to Section 159 (4) clause 1 and 2 Penal Code, only inasmuch as it can be assumed on the basis of specific facts that the failure to satisfy such interests exceeds 5,000,000 euros;
4. Chain and pyramid schemes pursuant to Section 168 a (2) Penal Code;

5. Accepting gifts by stakeholders (Section 153a Penal Code), agreements restricting competition during procurement procedures (Section 168b Penal Code), and if it can be assumed on the basis of specific facts that the offence was committed for a benefit value exceeding 3,000 euros, breaches of the official duty, corruption and similar criminal acts such as (they are) defined in §§ 304 to 309 of the Penal Code.

6. Violations pursuant to Section 255 Securities Act, Section 122 Limited Liability Act, Section 89 Cooperatives Act, Section 37 Real Estate Investment Fund Act, Section 44 Investment Fund Act, Section 15 Capital Market Act, Section 43 ORF [Austrian Broadcasting Corporation] Act, Section 41 Private Foundation Act, Section 64 SE Act, Section 18 Demerger Act, and Section 114 Insurance Supervision Act, inasmuch as the company involved has a nominal capital of at least 5,000,000 euros or employs more than 2000. [Note: these consistently are offences which could be summed up under the heading “balance sheet crimes”], as well as proceedings pursuant to Section 48b Stock Exchange Act [Note: insider trading] (Section 20a (1) clause 6 CCP),

7. Financial offences under the jurisdiction of courts inasmuch as it can be assumed on the basis of certain facts that the punishable value exceeds 5,000,000 euros.

8. Money laundering (Section 165 Penal Code), inasmuch as the assets originate from a criminal act mentioned in the paragraphs above;

9. Criminal association and criminal organisation (Sections 278 and 278a Penal Code), inasmuch as the association or organisation is aimed at committing a criminal act as mentioned in the paragraphs above.

(2) Investigations for offences referred to in paragraph 1 subparagraph 5 and in Section 20b paragraph 3 and for offences according to paragraph 1 subparagraphs 8 and 9 insofar as they are connected to them are conducted by the WKStA according to the provisions of this Federal Law in cooperation with the Federal Bureau of Anti-Corruption unless their representatives can not act in time or the Federal Bureau of Anti-Corruption has transferred the investigations to a different office of the criminal police or a different important reason exists to give orders to other offices of the criminal police.

(3) WKStA is also responsible with respect to the offences referred to in paragraph 1 for procedures of mutual legal assistance and for criminal co-operation with the relevant bodies of the European Union, and with the justice authorities of the Member States of the European Union. It is the central national contact point for OLAF and Eurojust, inasmuch as proceedings for such offences are involved.

(4) In the case that other criminal acts are connected to offences referred to under paragraph 1 the WKStA has to proceed according to Sections 26 and 27. In respect to other offences the WKStA has to separate the investigations and afterwards transfer them to the competent public prosecution unless the competence of the WKStA according to Section 20b exists; furthermore the WKStA can proceed in that manner if the investigation for the offence that establishes its competence is finalized. In any case the public prosecutor who first gains knowledge of offences according to paragraph 1 has to order whatever can not be delayed and transfer the investigation to the WKStA.

### ***Section 20b.***

(1) Insofar as it is necessary to have available special business know-how or experience in such proceedings to effectively and expeditiously deal with economic crimes, WKStA may take away any economic crime from the competent public prosecutor and take it over .

(2) Economic crimes in this sense are proceedings for criminal acts against third party assets in connection with entrepreneurial activities, which are characterised by extent and complexity or the multitude of participants in the proceedings, by the business circles involved or by the special public interest in solving the facts investigated.

(3) WKStA may also take over proceedings for offences pursuant to Sections 302 and 304 to 308 Penal Code, if the offence was committed by receiving a benefit not exceeding 3,000 euros, and there is special public interest to solve such an offence due to its significance or the person of the suspect involved.

(4) Public prosecutors have to report to the WKStA without delay any cases according to preceding paragraphs that can be dealt with more efficiently and faster by the WKStA. Until the WKStA has decided they have to take the necessary steps nonetheless.

## ***Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption (BAK-G)***

### ***Section 4:***

- (1) The Federal Bureau has nationwide jurisdiction in security and criminal police matters concerning the following criminal offences:
1. abuse of official authority (§ 302 of the Austrian Penal Code (StGB)), 2. corruptibility (§ 304 StGB),
  3. acceptance of an advantage (§ 305 StGB), 4. facilitation of corruptibility (§ 306 StGB), 5. bribery (§ 307 StGB),
  6. offering an advantage (§ 307a StGB),
  
  7. facilitation of bribery or of the acceptance of an advantage (§ 307b StGB), 8. illicit intervention (§ 308 StGB),
  9. breach of trust due to abuse of an official function or due to involvement of an office holder (§§ 153 para. 2 case 2, 313 or in connection with § 74 para. 1 no. 4a StGB),
  10. acceptance of gifts by persons holding a position of power (§ 153a StGB),
  11. agreements restricting competition in procurement procedures (§ 168b StGB) as well as serious fraud (§ 147 StGB) and commercial fraud (§ 148 StGB) on the basis of such agreement, 12. acceptance of gifts by employees or agents (§ 168c para. 2 StGB),
  13. money laundering (§ 165 StGB), provided that the assets arise from the offences 1 to 9, 11 (second and third case) or 12; criminal associations or organizations (§§ 278 and 278a StGB), provided that they intend to commit the offences 1 to 9 or 11 (second and third case),
  14. acts punishable pursuant to the StGB as well as to other laws relevant to criminal law, provided that they are related to the offences 1 to 13 and have to be prosecuted by the BAK by written order of a court or a public prosecutor's office,
  15. acts punishable pursuant to the StGB as well as to laws relevant to criminal law concerning public employees of the Federal Ministry of the Interior, provided that they have to be prosecuted by the BAK by written order of a court or a public prosecutor's office.
- (2) The Federal Bureau of Anti-Corruption has jurisdiction over investigations within the framework of international police cooperation and administrative assistance as well as for cooperation with the corresponding institutions of the European Union and the investigating authorities of the EU Member States in the above mentioned cases. Regarding international police cooperation in the cases 1 to 13 the Bureau acts as point of contact for OLAF, Interpol, Europol and other comparable international institutions.

Concerning information on the measures adopted to ensure the independence of the specialized body, Austria reported that WKStA is subject to only restricted reporting obligations to the Senior Public Prosecuting Office (OStA) or the Federal Ministry of Justice (BMJ).

Only the final decision (termination or indictment) will be submitted for approval by WKStA to the Federal Ministry of Justice via OStA Vienna. Mention must be made, however, that any directives issued by the Ministry have to be submitted in writing and duly justified and must be attached to the investigative files, so that they can be inspected by the court and the parties to the proceedings. Pursuant to Section 29a (3) Public Prosecutor Act the Federal Minister of Justice has to report annually to Parliament about the directives issued once the proceedings underlying such directives have been concluded.

In general, no requirement exists to obtain approval from the Federal Ministry of Justice for prosecuting cases of bribery. Pursuant to Section 8 (1) or Section 8a (2) of the Public Prosecutor Act a final settlement of criminal proceedings in which due to the significance of the offence or the person of the suspect there is special supra-regional public interest, as a rule will only happen upon approval by the Federal Ministry of Justice. Such cases are e.g. bribery of foreign public officials or of Members of Parliament.

Moreover, the competences of the officer for legal protection have also been expanded, who in cases of victimless offences, which very often occur in offences of giving or taking bribes, is entitled to request the court for continuation of the proceedings against the decision by the public

prosecutor to terminate investigations (Section 195 (2)a CCP). Victims are entitled to exercise the same right in the criminal proceeding (Section 195 (2) CCP).

The BAK is an institution of the Austrian Federal Ministry of the Interior. Organizationally speaking, it is, de jure, established outside the Directorate-General for Public Security. Pursuant to § 7 of the Law on the BAK, instructions given to the Federal Bureau regarding the investigation of a specific case have to be issued in writing and justified. An oral instruction issued in advance due to special reasons, in particular in the case of imminent danger, has to be issued in writing as soon as possible thereafter.

#### Training:

1. In order to be able to fight corruption and economic crime efficiently a wide knowledge in the area of business and economic law is a prerequisite for judges and prosecutors dealing with this topic. Due to the establishing of the Central Public Prosecutor's Office for Economic Crime and Corruption in Vienna in September 2011 the Federal Ministry of Justice offered two five month lasting training courses „Business Law“ for judges and prosecutors from January until June 2011 and from February until May 2012. The course provided a basic introduction into base knowledge fields of business law including business and administration, business accountancy, company law and tax law. In total 74 participants completed this training course.
2. The Senior Public Prosecutor's Office in Linz also provided a special training course for prosecutors entitled „Business Criminal Law by Practising Experts for Expert Practice“, which lasted almost twelve months (April 2010 until March 2011). This training also provided specific knowledge in the fields of business law including business and administration, business accountancy, controlling, tax law and business criminal law.
3. In addition to these above mentioned trainings, since October 2010 the Federal Ministry of Justice has given judges and prosecutors the opportunity to participate in the “Post Graduate Programme Business Studies for Lawyers” hosted by the Johannes Kepler University Linz. This three semester lasting program provides also solid knowledge in the fields of business administration including business accountancy, controlling and finance as well as management and leadership, the influence taxation has in regards to business decisions, and crisis and re-structuring management. 16 participants completed this programme.
4. Furthermore, the Federal Ministry of Justice is going to host the four semester lasting course “Master of Laws (LL.M.) - white-collar crime and law” in cooperation with the Vienna University of Economics and Business. This programme will cover inter alia the topics of business law, capital markets, accounting as well as international business crime, white-collar crime, corruption and bribery.
5. Since September 2012, a new university course (three semesters) to become investigator for economic and financial crimes is being offered by the Ministry of the Interior's Federal Security Academy in cooperation with the University of Applied Sciences Wiener Neustadt. The curriculum focuses on law, accounting, IT and technology (preservation of evidence, data analysis and data processing), operational practices (empirical work in major cases of economic crime) as well as on economics, in particular accounting and balancing. The course will be open to participants from the public (especially Ministry of the Interior and Ministry of Justice) and the private sector. Graduates from the public sector will complete the course as academically qualified investigators or investigators for economic crime.

Regarding information on how WKStA staff is selected and trained, Austria provided the following information:

In spite of the difficult economic situation, the number of statutory positions of public prosecutors at the Central Office for Prosecuting Economic Crimes and Corruption has been increased over recent years from initially 5 or 7 (2009 vs. 2010) to 21 in 2011. Statutory positions for public prosecutors total 21, with an increase to achieve this number being planned in the years to come, in accordance with

incidence of cases to be transacted. Since 1 May 2012, a total of 18 public prosecutors are employed with WKStA. Necessary staff measures have already been taken to achieve the targeted staffing.

Additionally, there is appropriate expert support from the fields of business and finance as well as infrastructure support by the modern team assistance system established since 1 September 2011.

1. Experts: in order to provide public prosecutors within WKStA with the necessary technical know-how for their often most complicated investigations, pursuant to Section 2a (5) Public Prosecutor Act it is essential to ensure that WKStA has appropriate access to experts from business and finance.

It is the goal to organise employment of experts in a way that the respective technical knowledge required is made available in the best possible manner. Against this background, WKStA has at its disposal the services of four experts, which were recruited via the Judicial Service Agency (JBA).

As required, new experts are continually being recruited via the Judicial Services Agency, while the heads of WKStA and JBA are in discussion regarding a further tender to recruit additional experts.

In addition to these measures, a co-operation model was established between the large-company auditing unit and BMJ to enable secondment of experts from a pool of large-company examiners, if needed, up to a maximum extent of one full monthly employment equivalent. An agreement, which moreover provides for training of candidate judges with the large-company auditing unit and the opportunity of knowledge transfer was concluded between the Ministers of Justice and of Finance and has entered into force on 1 November 2011. Further co-operation opportunities are being evaluated.

2. Team assistance: Starting from the staff resources available and special requirements resulting from the necessity of a flexible deployment of resources, establishing a modern and novel office structure by forming team assistance was of prime importance when staffing the WKStA office. The future orientation of WKStA, with flexible teams of public prosecutors ensuring effective and case-by-case prosecution, suggests an integrated "team assistance" approach as a flexible solution, allowing for variable deployment - according to actual requirements. The model finally established includes teams headed by a team leader with one deputy leader reporting to him/her. The rest of the team assistants are pooled and will be allocated to individual teams as required. With this team assistance, which was implemented as scheduled on 1 September 2011, it is possible to react in a prompt and targeted manner to requirements arising. Experience with this new structure of prosecution support is most encouraging so far.

Moreover, the 2011 Amendment of the Public Service Act, FLG I No 140/2011 has introduced updated and efficiency-enhancing measures into the service and disciplinary law for judges and public prosecutors (such as a streamlined, practice-oriented system of penalties, downsized senates, higher transparency of proceedings, greater ease of switching between former disciplinary and new service disciplinary proceedings).

C) Further more special training and education for judges and prosecutors with regard to regard to a broad interpretation of economic crime which also includes corruption and bribery of foreign public officials considered that for fighting both economic crime and corruption a wide knowledge in the area of business and economic law is a prerequisite to be able to fight economic crime and corruption efficiently. Due to the establishing of the Central Public Prosecutor's Office for Economic Crime and Corruption in Vienna in September 2011 the Federal Ministry of Justice offered a five month lasting training course „Business Law“ for judges and prosecutors from January until June 2011. The course provided a basic introduction into base knowledge fields of business law including business and administration, business accountancy, company law and tax law. In total 37 participants completed this training course. A further program started in February 2012.

The Senior Public Prosecutor's Office in Linz also provided a special training course for prosecutors entitled „Business Criminal Law by Practising Experts for Expert Practice“, which lasted almost twelve months (April 2010 until March 2011). This training also provided specific knowledge in the fields of

business law including business and administration, business accountancy, controlling, tax law and business criminal law.

In addition to these above mentioned trainings, since October 2010 the Federal Ministry of Justice has given judges and prosecutors the opportunity to participate in the “Post Graduate Program Business Studies for Lawyers” hosted by the Johannes Kepler University Linz. This three semester lasting program provides also solid knowledge in the fields of business administration including business accountancy, controlling and finance as well as management and leadership, the influence taxation has in regards to business decisions, and crisis and re-structuring management.

## **(b) Observations on the implementation of the article**

The Austrian authorities reported on the responsibilities and functions of the Central Office for Prosecuting Economic Crimes and Corruption (WKStA) and the Federal Bureau of Anti-Corruption (BAK). The WKStA was established in September 2011 and is responsible for conducting and concluding investigative proceedings or filing charges, as well as representing the prosecution in trials before a Higher Regional Court inter alia for offences of particular relevance in the framework of UNCAC.

During the country visit, it was explained that WKStA is competent for corruption cases where the value is greater than 3000 euros and economic crimes with a value greater than 5m euros. Moreover, it has an opt-in competence and is responsible for a catalogue of severe economic crimes. Until 2011, the jurisdiction of WKStA was thus more or less the same as that of the BAK. Now that it is also competent for economic crime, the competences are no longer the same. WKStA is the first and only federal prosecution service. It disposes of economic experts who support the work of the prosecutors.

With regard to the independence of prosecutor's, the chain of instructions was explained. Accordingly, every prosecutor's office is an independent public office, but it may receive instructions. The Federal Ministry of Justice can give instructions to the higher-level prosecutor offices (Oberstaatsanwaltschaft, OStA) and the OStA can give instructions to first-instance prosecutor offices. These instructions must be submitted in writing and must be reasoned, and have to be recorded in the case file; involved persons have access to the case file. In important cases, involving important crimes or persons of public interest, prosecutors have to obtain authorization from the Ministry before they can prosecute the case in court. However, initial investigative steps can be taken without authorization. At the end of the investigation, when the decision about prosecution or discontinuing proceedings has to be taken, the prosecutor has to report to the Ministry. If prosecution is declined, that decision has to be made in the form of an official instruction (*Weisung*). The prosecutor has no right of appeal against the *Weisung* but the victim and the officer for legal protection (Rechtsschutzbeauftragter) can appeal it. The reviewing experts noted that in these special cases, a political institution decides whether to authorize prosecution or not.

It was further explained that in the Minister's office there is a division with prosecutors who decide if the proposal of the prosecutor to charge such a case is correct or not. Individual prosecutors do not have to accept a *Weisung* but if they don't then the case is transferred to another prosecutor. The minister is accountable before parliament.

Moreover, the officer for legal protection (*Rechtsschutzbeauftragter*) offers additional protection against any possibly undue order of the Minister to terminate investigations and sections 8 (1) and 8a (2) Public Prosecutor Act limits the requirement to obtain approval from the Senior Public Prosecuting Office and the Federal Ministry of Justice to cases of outstanding public interest due to the importance either of the criminal offence or of persons involved.

The reviewing experts expressed concerns that the requirement for prosecutors to obtain approval from the Ministry of Justice, i.e. the politically appointed, executive branch of government, for the prosecution of some cases involving persons of public interest undermines the independence of the judiciary and infringes the fundamental principle of the separation of powers. Therefore, the review team recommended that this requirement should be abolished.

Concerning law enforcement, the reviewing experts were told that BAK has to report all cases to the prosecution in order to ensure adequate supervision of corruption cases. However, there seemed to be a problem concerning the flow of information back to BAK. In particular, BAK currently has no access to the judgments resulting from its investigations, meaning that it is difficult to assess the effectiveness and improve the quality of its work.

With regard to the independence of WKStA and BAK in terms of financial and human resources, the reviewing experts noted that the Ministry of Justice decides on the staffing and the resources of WKStA. The Ministry of the Interior decides on the staffing and the resources of BAK. Partly, officials are only seconded to BAK. Moreover, the term of office of the BAK chief and vice chief is limited to only 5 years.

The reviewing experts recommended that the national authorities:

- Abolish the requirement for prosecutors to obtain approval from the Ministry of Justice for the prosecution of cases involving persons of public interest;
- Undertake action geared towards strengthening the cooperation between WKStA and BAK and ensuring that BAK receives feedback on the effectiveness of its work; and
- Take further action to improve the independence of WKStA and BAK in terms of financial and human resources, e.g. by giving long-term job security to staff, including the director and vice director of BAK.

## **Article 37 Cooperation with law enforcement authorities**

### **Paragraphs 1, 2 and 3**

*1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.*

*2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

*3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

On 1 January 2011 a new leniency programme was introduced which aims at enabling the public prosecutor, on the basis of successful cooperation with a principal witness, to withdraw from prosecution of criminal acts committed by such witness. The new leniency programme which is above all applied in proceedings of the also newly established Central Office for the Prosecution of Economic Crimes and Corruption (WKStA) is governed by Section 209a CPC.

A pre-condition for applying this provision is, that the defendants wishing to become principal witnesses reveal voluntarily their knowledge of facts which are not the subject of investigations conducted against them. The facts revealed by principal witnesses must make an important contribution to the investigation of a crime subject to the jurisdiction of a regional court of lay judges or assizes or the Central Office for the Prosecution of Economic Crimes and Corruption (Sections 20a and 20b PC) or to getting hold of a person who is or was a leading member of a criminal association or a criminal or terrorist organisation.

In the case of successful cooperation, this provision offers the advantage to the principal witness to avoid an entry into his criminal record. Nevertheless, his own criminal behaviour will not remain without sanctions, but will be dealt with by way of diversion. This means that (in addition to restoring damages if applicable) he either has to pay a fine or has to perform community services or that his proceedings will be terminated after a probation period of up to two years. Moreover, any withdrawal from prosecution requires, that in consideration of services performed, i.e. the diversion measure mentioned, conduct during giving evidence, in particular complete description of his deeds, and the evidence value of the information a punishment is not deemed necessary to prevent the defendant from committing further criminal acts.

The public prosecutor may resume proceedings against the principal witness previously concluded, if the agreed participation in solving the crime was violated, the documents and information provided were false or could not contribute to convicting the offender, or were only provided to conceal the principal witnesses leading function in a criminal association or terrorist organization.

For considerations of legal protection, the public prosecutor has to submit his orders to the officer for legal protection, who is not bound by instructions and cannot be relocated or discharged, including reasoning for the decision. The officer for legal protection has legal remedies against the public prosecutor dealing with the offence by way of diversion, but also against an order to continue proceedings against the principal witness.

The leniency programme can also be applied to entities.

The leniency programme is in force until 1 January 2017. Following an evaluation, a decision about its continuation will be made.

***Withdrawing from Prosecution because of Cooperation with the Public Prosecutor***  
**§ 209a. CPC**

(1) The public prosecutor can proceed according to Sections 200 to 203 and 205 to 209 if the defendant voluntarily reveals his knowledge of facts which are not yet subject of the investigations against him and which make a significant contribution

1. to the investigation of a crime subject to the jurisdiction of a regional court of lay judges or assizes or the Central Office for the Prosecution of Economic Crimes and Corruption (Sections 20a and 20b),
2. or to getting hold of a person who is or was a leading member of a criminal association or a criminal or terrorist organization.

(2) The application of paragraph 1 requires as a precondition that in consideration of the agreed services, in particular in view of the promised contributions (Section 198 paragraph 1 subparagraphs 1 to 3), conduct during giving evidence, in particular complete description of his own deeds, and the evidence value of the information, a punishment is not deemed necessary to prevent the defendant from committing further criminal acts; it is not permissible in the case of Section 198 paragraph 2 subparagraph 3 or of criminal acts of the defendant which might have infringed upon the right to sexual integrity and self-determination. In deviation of Section 200 paragraph 2 the fine imposed may be equivalent to up to 240 daily fines.

(3) After the services have been performed the public prosecutor has to withdraw from the prosecution with the reservation of later prosecution.

(4) The prosecution reserved according to paragraph 3 may be resumed if

1. the agreed participation in solving the crime was violated or
2. the documents and information provided were false or could not contribute to convicting the offender, or were only provided to conceal the principal witnesses leading function in an association or organisation referred to in paragraph 1 subparagraph 2 unless the public prosecutor does not issue the orders necessary for a resumption within a deadline of fourteen days beginning with the service of the final decision of the proceedings in which the circumstances described in subparagraph 1 or 2 have been established.

(5) The public prosecutor shall submit his orders according to paragraphs 3 and 4 to the officer for legal protection including a motivation for the decision. The officer for legal protection is entitled to apply in case of paragraph 3 for a resumption of the proceedings and in case of paragraph 4 for a withdrawing from the prosecution.

(6) In proceedings against Entities according to the Federal Statute on Responsibility of Entities for Criminal Offences [...] the same rules apply mutatis mutandis with the modification that Section 19 paragraph 1 subparagraph 1 to 3 Federal Statute on Responsibility of Entities for Criminal Offences are applicable. In deviation of Section 19 paragraph 1 subparagraph 1 Federal Statute on Responsibility of Entities for Criminal Offences the fine imposed may be equivalent to an entity fine of up to 75 daily rates.

#### *Specific mitigating grounds*

##### *Section 34 PC*

(1) It is particularly a mitigating ground, if the offender ...

16. has surrendered himself, although he could have easily escaped or it has been likely that he would have remained undetected;
17. made a rueful confession or contributed with his statement considerably to the establishment of the truth.

The new Section 209a CPC has already found application in practice in spite of it having been valid only for a short time, namely above all in complicated economic and corruption proceedings.

Statistics are not yet available as Section 209a CPC has entered into force only last year.

#### **(b) Observations on the implementation of the article**

The reviewing experts took into account that on 1 January 2011, a new leniency programme was introduced to enable the public prosecutor, on the basis of successful cooperation with a principal witness, to withdraw from prosecution of criminal acts committed by such witness. The new leniency programme is governed by Section 209a CPC.

For the application of the leniency programme, the crown witness has to provide added value and that the significance of his testimony is assessed by the prosecution. The crown witness will not get immunity from prosecution but will not be convicted. If his information turns out to be false, he will be charged in court.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

#### **Paragraph 4**

*4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.*

##### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The protection of people who cooperate in an investigation or prosecution is subject to the same rules as witness protection (i.e. Section 22 para 1 subpara 5 Security Police Act). For details please refer therefore to the information supplied under Article 32 UNCAC.

Regarding examples of implementation, Austria provided the following information:

If, due to certain circumstances, there is reason to fear that a witness would expose himself/herself or a third person to a serious danger to their lives, health, physical integrity or freedom by providing his/her name or other personal details or by answering questions allowing conclusions thereon, this witness may be permitted, pursuant to § 162 CPC, not to answer such questions. In this case the witness is also allowed to change his/her appearance so as not to be recognized. However, the witness may not cover his/her face in a way that his facial expressions cannot be observed and the indispensable assessment of the credibility of his/her testimony is impeded.

Due to the sensitivity of the measures addressed in this context, no relevant information can be provided.

##### **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

#### **Paragraph 5**

*5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.*

##### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria stated that it has not entered into such agreements or arrangements up to now.

##### **(b) Observations on the implementation of the article**

During the country visit, mention was made of the so called “Salzburg Forum” and police cooperation agreements in this field.

The reviewing experts concluded that Austria’s legislation and practice are in compliance with the Convention.

## Article 38 Cooperation between national authorities

*Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:*

*(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or*

*(b) Providing, upon request, to the latter authorities all necessary information.*

### (a) Summary of information relevant to reviewing the implementation of the article

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following domestic laws: On (a): Civil Servants' Employment Act (BDG), § 109 (1); CPC, § 78; Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption (BAK-G), § 5; on (b): § 76 CPC

#### **§ 109 BDG**

(1) In case of reasonable suspicion of a breach of official duty, the superior, directly or indirectly responsible for supervision, has to undertake all investigations required for the preliminary clarification of the facts of the case and thereafter, without delay and going through the official channels, file a disciplinary complaint to the authority. If the suspicion of a breach of official duty also raises the suspicion of a punishable act to be prosecuted ex officio, the superior, in this capacity, has to abstain from any investigation and immediately report to the authority, which has to proceed in accordance with § 78 CPC.

#### **§ 78 CPC**

(1) Every public authority or department has the duty to report (to the police or the public prosecutor's office) any suspicion of a criminal act falling within the remit of the public authority or department.

(2) There is no duty to report

1. if reporting the crime would affect an official act whose effectiveness requires a personal relationship of trust, or

2. if and as long as there is sufficient reason to believe that before long, measures by which the damage is eliminated and the act ceases to be punishable will be taken.

(3) In any case, the public authority or department has to do all that is necessary to protect the victim or other persons against any risk; if necessary, even the cases defined in (2) have to be reported.

#### **§ 5 BAK-G. Reporting Centre**

Without prejudice to their duties to report in accordance with the CPC 1975 (BGBl. No. 631/1975), law enforcement authorities and departments getting notice of a criminal offence defined in § 4, paragraph 1 (1-15), have to report this offence without delay and in writing to the Federal Bureau (duty to report). Federal employees must not be prevented from reporting allegations or suspicious circumstances concerning § 4, paragraph 1 (1-15), directly to the Federal Bureau without going through the official channels (right to report).

#### **§ 76 CPC**

(1) In accordance with this law, the criminal police, the public prosecutor's offices and the courts, in order to fulfil their tasks, have the right to receive immediate support from all public authorities and departments at federal, regional and municipal level as well as from other public corporations and

institutions established by law. Such requests have to be complied with as soon as possible; potential obstacles have to be announced instantly. If necessary, files have to be made available for inspection.

(3) The relations and communication with foreign authorities are governed by international treaties, the Federal Act on Extradition and Mutual Assistance in Criminal Matters, the Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the EU, as well as the Police Cooperation Act.

(4) For reasons relating to security management, criminal justice and review of the legality of acts of the bodies mentioned above, the criminal police, the public prosecutor's offices and the courts have the right to provide information about person-related data investigated in accordance with this law. In any case, the transmission of data to public bodies other than financial crime authorities for performing services related to criminal justice or on behalf of law enforcement authorities, public prosecutor's offices and courts is only permitted if there is an explicit legal authorization to do so.

(5) The corresponding administrative authority has to be informed of the beginning and end of criminal proceedings against civil servants.

Austria provided the following examples of implementation:

1.) An anonymous complaint filed to the tax office against some of its employees in 2011 on suspicion of non-completion of proceedings in cases of financial crime was reported to the Federal Bureau of Anti-Corruption pursuant to § 78, paragraph 1, CPC on suspicion of abuse of official authority (§ 302 PC).

2.) In 2011, the Federal Ministry of Economy, Family and Youth filed a report against one of its senior officials to the Public Prosecutor's Office for Combating Economic Crime and Corruption (WKStA) in accordance with § 78, paragraph 1, CPC on suspicion of irregularities in the accounting of subsidies.

Regarding the related statistical data, Austria provided:

In 2011, the public prosecutor's offices assigned the investigation of 287 cases to the Federal Bureau of Anti-Corruption (BAK). In 2010, 296 cases were assigned to the BAK by the public prosecutor's offices.

#### **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

### **Article 39 Cooperation between national authorities and the private sector**

#### **Paragraph 1**

*1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Since 2010, the Coordinating Body on Combating Corruption, a multi-disciplinary committee, coordinates measures in the area of anti-corruption with the participation of representatives of the Parliamentary Administration and of various Federal Ministries, the Länder, various authorities (the Central Office for Prosecuting Economic Crimes and Corruption [WKStA], Federal Bureau of Anti-Corruption [BAK], Financial Market Authority) exists. The private sector is represented by the Chamber of Commerce (representing multinational, small and medium enterprises), the Union of

Civil Servants, the Chamber of Notaries and the Bar Association. In the future, Transparency International will also be a permanent Member.

In 2012, the Body was established formally by a Decision of the Committee of Ministers. The main task will be to elaborate a National Anti-Corruption-Strategy which shall be backed up by an Action Plan as well as presenting a report on the Anti-Corruption measures to the Federal Government.

**(b) Observations on the implementation of the article**

During the country visit, it was added that the Action Plan will be elaborated in the autumn (criminalization, cooperation between law enforcement and prosecution, bank secrecy). TI Austria will be part of the body. The BAK has sessions on the prevention branch of the Action Plan (compliance officers in private companies).

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 2**

*2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The country cited the following domestic laws: Section 78 CPC

Section 78 CPC contains a reporting obligation for public authorities and public agencies to the criminal police or to a public prosecutor service in case of suspicions of criminal acts which concerns its statutory area of activities. Section 53a of the 1979 Public Sector Employment Act (BDG 1979), which in conjunction with Section 5 Contractual Employee Act also applies to contractual employees of the Federation, implements a recommendation of the Group of States against Corruption (GRECO) to provide effective employment protection against measures based on prohibited motives such as terminations or dismissal, demotion or any other coercive measures against so-called “whistle-blowers”. Such protection requires the presence of two cumulative conditions: the report must be based on “a reasonable suspicion” and has to be made “bona fide”. In this context, “bona fide”, means that the whistle-blower could believe the reported facts to be correct for probable reasons. Such protection covers not only the whistle-blower but also other employees who support the reporting e.g. by being witnesses or by their active behaviour against the employer.

The official website of the BAK (<<http://www.bak.gv.at>>) offers a reporting point for corruption and malpractice in office. Federal employees can report suspicious circumstances concerning the criminal offences falling within the remit of the Bureau directly to the BAK without going through the official channels. It can be reported to the BAK by post, fax, email or telephone. The Federal Bureau of Anti-Corruption will treat all reported allegations confidentially. The allegations can also be reported anonymously. However, persons making a report are asked to provide at least one contact detail, because in many cases more detailed information is necessary to carry out the investigation.

Reporting persons are informed that in some cases, it may be indispensable, following the corresponding criminal law and security police provisions, to reveal the source of the allegation, even if it was reported anonymously.

Financial incentives are not offered.

#### **§ 78 CPC**

(1) Every public authority or department has the duty to report (to the police or the public prosecutor's office) any suspicion of a criminal act falling within the remit of the public authority or department.

(2) There is no duty to report

1. if reporting the crime would affect an official act whose effectiveness requires a personal relationship of trust, or

2. if and as long as there is sufficient reason to believe that before long, measures by which the damage is eliminated and the act ceases to be punishable will be taken.

(3) In any case, the public authority or department has to do all that is necessary to protect the victim or other persons against any risk; if necessary, even the cases defined in (2) have to be reported.

Regarding the related statistical data, Austria provided the following information. Anonymous reports are given due consideration by the competent authorities. They are, however, not subject to any specific form of record keeping. Statistics or per annum figures are therefore not available.

Reports from	2011
Federal Police	716
Private people	179
Public Prosecution	218
Ministry of the Interior	177
Anonymous	56
Others	330
	1676

#### **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

#### **Article 40 Bank secrecy**

*Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The country cited the following domestic laws: Sections 38(2) Banking Act, 116 CPC

**Banking Act**  
**IX. Banking Secrecy**  
**Article 38**

(1) Credit institutions, their members, members of their governing bodies, their employees as well as any other persons acting on behalf of credit institutions must not divulge or exploit secrets which are revealed or made accessible to them exclusively on the basis of business relations with customers, or on the basis of Article 75 para. 3 (banking secrecy). If the functionaries of authorities as well as the Oesterreichische Nationalbank acquire knowledge subject to banking secrecy requirements in the course of performing their duties, then they must maintain banking secrecy as official secrecy; these functionaries may only be relieved of this obligation in the cases indicated under para. 2. The obligation to maintain secrecy applies for an indefinite period of time.

(2) The obligation to maintain banking secrecy does not apply

1. vis-à-vis public prosecutors and criminal courts in connection with criminal court proceedings on the basis of a court approval (Article 116 CPC), and vis-à-vis the fiscal authorities in connection with initiated criminal proceedings due to wilful fiscal offences, except in the case of financial misdemeanours;
2. in the case of obligations to provide information pursuant to Article 41 paras. 1 and 2, Article 61 para. 1, Article 93 and Article 93a;
3. vis-à-vis the probate court and the court commissioner in the event of the death of a customer; 4. vis-à-vis the competent court for guardianship or tutelage matters if the customer is a minor or otherwise under tutelage;
5. if the customer grants his/her express written consent to the disclosure of secrets;
6. for general information commonly provided in the banking business on the economic situation of an undertaking, unless the undertaking expressly objects to the provision of such information;
7. where disclosure is necessary in order to resolve legal matters arising from the relationship between the credit institution and customer;
8. with regard to the reporting requirements pursuant to Article 25 para. 1 of the Inheritance and Gift Tax Act (Erbschafts- und Schenkungssteuergesetz);
9. in the case of obligations to provide information to the FMA pursuant to the Securities Supervision Act and the Stock Exchange Act.

(3) A credit institution may not invoke its banking secrecy obligations in cases where the disclosure of secrets is necessary in order to determine the credit institution's own tax liabilities. (4) The provisions of paras. 1 to 3 also apply to financial institutions and contract insurance undertakings with regard to Article 75 para. 3 and to protection schemes, with the exception of cooperation with other protection schemes, deposit guarantee schemes and investor compensation schemes as required by Articles 93 to 93b.

(5) (constitutional law provision) Paras. 1 to 4 may only be amended by the National Council with at least one-half of the representatives present and with a two-thirds majority of the votes cast.

### ***Information on bank accounts and bank operations***

#### ***Section 116***

(1) Information on bank accounts and bank operations is permissible if it seems to be required for solving a deliberately committed indictable or non-indictable offence falling under the jurisdiction of the regional courts (section 31 paragraph 2 to 4), or for clarifying whether the conditions for issuing an order for disclosing information under paragraph 2 sub-paragraph 2 in proceedings dealing with a deliberately committed punishable offence where the regional court would be competent to conduct the trial are met.

(2) In addition, information on bank accounts and bank operations according to section 109 sub-paragraph 3b is permissible only if specific facts suggest that

1. items, documents or other records of a business relationship and related transactions may be seized on the basis of such information, as far as this is necessary for solving the offence;
2. items or other assets may be seized according to section 109 sub-paragraph 1b for securing a confiscation (section 19a PC), a forfeiture (section 20 PC), an extended forfeiture (section 20b PC), a confiscation (section 26 PC) or another order affecting property as provided for by law.
3. a transaction related to a criminal act is carried out using this business relationship.

(3) Authorization by a court must be obtained the public prosecutor's office for an order to disclose information on bank accounts and bank operations.

(4) The order and its authorization regarding the disclosure of information must contain:

1. the case reference of the proceedings and the criminal charge it is based on as well as the pertinent section of the Penal Code,
2. the credit or financial institution involved,

3. the description of the items, documents (records) or assets to be seized,
4. the facts substantiating the necessity and proportionality (section 5) of the orders,
5. the period of time covered by an order according to paragraph 2 sub-paragraph 3.

(5) The order and its authorization have to be served on the credit or financial institution, the accused and the persons entitled to dispose of the bank account, as soon as they are known to the public prosecutor's office. Service on the accused and the persons entitled to dispose of the bank account can be postponed as long as the investigation would be jeopardized. The credit or financial institution has to be notified thereof and the same is required to observe secrecy towards clients and third parties in respect of the order and all facts and transactions.

(6) Credit and financial institutions and their staff are obliged to disclose the information and to allow the documents and written evidence to be inspected and surrendered. For this purpose an electronic data carrier in a common file format has to be used, if electronic data processing is used for the operation of the business relation. If the credit or financial institution lodges a complaint against the judicial authorization and refuses to disclose information or surrender documents, the procedure as defined in sections 93 paragraph 2 and 112 must be adopted with instruction to present the documents to the S with the difference that the documents have to be presented to the higher regional court (Oberlandesgericht). A search of credit or financial institutions always requires an order of the public prosecutor's office on the basis of a judicial authorization. Sections 110 paragraph 4 and 111 paragraph 3 apply.

Austria provided the following examples of implementation:

Article 38 (2) Banking Act and Article 116 CPC represent the legal basis for access to information on bank accounts and bank operations in connection with criminal investigations. Pursuant to Article 38 (2) Banking Act bank secrecy laws are not applicable in the event of criminal investigations in which a court order according to Article 116 CPC has been issued. Accordingly, access to banking information is available in relation to all intentionally committed criminal acts. In practice this will mean that access to banking accounts will be excluded only in investigations dealing with criminal acts committed negligently under the jurisdiction of the District Courts (e.g. negligent manslaughter or injuries). It is, however, important to stress that banking information is accessible without the need of establishing a link between the criminal act and the suspect on the one hand and the banking account on the other hand. Access to banking information is therefore available if items, documents or other records need to be seized for the investigation. That being said, banking information is treated the same way as any other information which can be seized on the simple condition of their necessity as evidence.

#### **(b) Observations on the implementation of the article**

The Austrian authorities reported on existing rules and procedures for obtaining access to bank and financial records where such information is required for "solving a deliberate criminal act" (section 116 CPC; article 38 of the Banking Act).

During the country visit, the reviewing experts enquired about the procedure for obtaining information covered by bank secrecy. They were told that there is no central register of bank accounts in Austria. Therefore, if the suspicion exists that a person has a bank account in Austria, a court order is sent to the five bank associations in Austria, which forward the request to their (several hundred) member banks. Both the associations and the concerned banks themselves can challenge the court order. The experts learned that in practice, such a challenge by the bank association happens frequently because of formal mistakes in the order. Indeed, a two-step approach must be followed. First, the bank association is asked if the person has an account in Austria. Only then, in a second step, investigators can ask an individual bank to disclose information. If both requests are made in one order, it will be challenged on formal grounds. Once the information is received, the prosecutor can issue a freezing order.

The experts were told that without an appeal, it takes 2-3 weeks to obtain this information. With an appeal it could easily take 3-4 months. Therefore, all the practitioners asked by the reviewing

experts agreed that it would be much more efficient and effective if Austria had a central register of bank accounts, like it exists in many other countries. Moreover, while the practitioners thought it would be unlikely that banks pass on information about requests to suspects, they agreed that leaks do happen in practice and that the enormous number of institutions involved make it more likely that the suspect prematurely learns about the investigation.

However, the Austrian authorities reported that the Ministry of Justice, in collaboration with the bank associations, had taken steps to avoid possible delays in the described two-step approach to get access to a bank account. By virtue of Ministerial Decree of 13 August 2013, the prosecution authorities are ordered to use a form provided by the Ministry and to send this form via fax to the five bank associations. Within seven days, the bank associations shall examine the court order and forward only the name and other information necessary to identify the person concerned to the banks. To achieve better data protection and better protection of sensitive information, the original court order shall be transmitted to the banks only with respect to the specific request and only to a limited range of persons (e.g. the compliance officer or the anti-money laundering officer). The banks are supposed to inform the prosecution authority within five days of the accounts of this person concerned. This new Decree is expected, according to the Austrian authorities, to reduce unnecessary delays and keep sensitive information confidential.

The reviewing experts recommended that the national authorities continue efforts to ensure, in line with article 40 of the UNCAC, that there are no unnecessary delays in accessing bank information and keep information related to suspicions of criminal offences confidential during the process of resolution by competent agencies, and consider the introduction of a central banking account registry.

#### **Article 41 Criminal record**

*Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.*

##### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The country cited the following domestic law: Section 73 PC:

##### ***Section 73 (Foreign convictions)***

Provided that a statute does not explicitly refer to the conviction by a domestic court, foreign convictions are equal to domestic convictions, if the offender was convicted for an offence which is punishable by a criminal court also under Austrian law, and if the judgment was rendered as a result of proceedings which were in conformity with the principles set forth in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

##### **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

## Article 42 Jurisdiction

### Subparagraph 1 (a)

*1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:*

*(a) The offence is committed in the territory of that State Party; or*

#### (a) Summary of information relevant to reviewing the implementation of the article

Austria confirmed that it has implemented this provision of the Convention.

The country cited the following domestic laws: Sections 62, 67 PC:

##### *Section 62 (Criminal acts committed in Austria)*

The Austrian criminal law applies to all criminal acts committed within Austria.

##### *Section 67 (Time and place of a criminal act)*

(1) The offender has committed the punishable offence at the time at which he has acted or at which he should have acted; it does not matter when the result has ensued.

(2) The offender has committed the punishable offence at each place where he has acted or where he should have acted, or where a result corresponding to the constituting elements of the offence either has totally or partially ensued or should have ensued according to the conception of the offender.

#### (b) Observations on the implementation of the article

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

### Subparagraph 1 (b)

*1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:*

*(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.*

#### (a) Summary of information relevant to reviewing the implementation of the article

Austria confirmed that it has implemented this provision of the Convention.

The country cited the following domestic law: Section 63 PC:

##### *§ 63 (Criminal acts committed on board of Austrian vessels and planes)*

The Austrian criminal law applies to criminal acts committed on board of Austrian vessels and planes, irrespective of their location.

#### (b) Observations on the implementation of the article

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

## **Subparagraphs 2 (a) and (b)**

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

- (a) The offence is committed against a national of that State Party; or
- (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The country cited the following domestic law:

#### ***Section 64. Criminal offences abroad being punished irrespective of the laws which are valid for the scene of the crime***

(1) The following criminal acts committed abroad are subject to prosecution according to Austrian criminal law irrespective of the criminal law of the foreign state where the criminal act was committed:

1. ...
2. criminal acts committed against an Austrian public officer (section 74 para. 1 item 4), an Austrian public official (section 74 para. 1 item 4a) or an Austrian arbitrator (section 74 para. 1 item 4c) while he/she fulfils his/her tasks or because he/she fulfils his/her tasks and criminal acts committed by someone as Austrian public officer, public official or arbitrator;
- 2a. apart from item 2 criminal violations of the official duty, corruption and other related criminal acts (sections 302 to 309) if
  - a) the perpetrator was a national of Austria at the time the act was committed or
  - b) the act was committed for the benefit of an Austrian public official or arbitrator;

#### ***Section 65 (Criminal Acts abroad which are only punishable, if they are also punishable by the Law applicable at the Crime Location)***

(1) For all other criminal acts committed abroad than the ones mentioned in Sections 63 and 64 Austrian criminal law applies, inasmuch as the acts are also punishable by the laws applicable at the crime location:

1. if at the time of committing the crime the offender was an Austrian national or obtained Austrian citizenship at a later time, which he/she still possesses at the time of initiating criminal proceedings,

### **(b) Observations on the implementation of the article**

The reviewing experts noted that Austria has two concepts of extraterritorial jurisdiction, in accordance with sections 64 and 65 PC. Section 64 provides for national jurisdiction without the double criminality requirement for criminal acts committed against an Austrian public officer or an Austrian public official while he/she fulfils his/her tasks, as well as criminal acts committed by an Austrian public officer or an Austrian public official. For other offences which have been committed in a foreign country, jurisdiction is established subject to double criminality if the offender is an Austrian citizen or has been a foreigner at the time of the offence, was arrested in Austria and cannot be extradited to a foreign State for other reasons than the nature or other characteristics of the offence (section 65 PC).

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

## **Subparagraph 2 (c)**

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The country cited the following domestic laws: Sections 64(1) no. 8, 67(2) PC:

***Section 64 (Criminal offences abroad being punished irrespective of the laws which are valid for the scene of the crime)***

(1) The following criminal acts committed abroad are subject to prosecution according to Austrian criminal law irrespective of the criminal law of the foreign state where the criminal act was committed:

...

8. Participation (Section 12) in a criminal offence which the direct perpetrator has committed in Austria, as well as dealing in stolen goods (Section 164) and money laundering (Section 165) in relation to a criminal act committed in Austria;

***Section 67 (Time and place of a criminal act)***

(1) The offender has committed the punishable offence at the time at which he has acted or at which he should have acted; it does not matter when the result has ensued.

(2) The offender has committed the punishable offence at each place where he has acted or where he should have acted, or where a result corresponding to the constituting elements of the offence either has totally or partially ensued or should have ensued according to the conception of the offender.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria's legislation is in compliance with this provision of the Convention.

**Subparagraph 2 (d)**

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(d) The offence is committed against the State Party.

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The country cited the following domestic laws: Sections 64(1) nos. 2 and 2a PC:

***Section 64 (Criminal offences abroad being punished irrespective of the laws which are valid for the scene of the crime)***

(1) The following criminal acts committed abroad are subject to prosecution according to Austrian criminal law irrespective of the criminal law of the foreign state where the criminal

act was committed:

...

2. criminal acts committed against an Austrian public officer (section 74 para. 1 item 4), an Austrian public official (section 74 para. 1 item 4a) or an Austrian arbitrator (section 74 para. 1 item 4c) while he/she fulfils his/her tasks or because he/she fulfils his/her tasks and criminal acts committed by someone as Austrian public officer, public official or arbitrator;

2a. apart from item 2 criminal violations of the official duty, corruption and other related criminal acts (sections 302 to 309) if

- a) the perpetrator was a national of Austria at the time the act was committed or
- b) the act was committed for the benefit of an Austrian public official or arbitrator;

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 3**

*3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The country cited the following domestic laws: Sections 64(1) no. 2a, 65(1) no. 1 PC:

***Section 64 (Criminal offences abroad being punished irrespective of the laws which are valid for the scene of the crime)***

(1) The following criminal acts committed abroad are subject to prosecution according to Austrian criminal law irrespective of the criminal law of the foreign state where the criminal act was committed:

...

2a. apart from item 2 criminal violations of the official duty, corruption and other related criminal acts (sections 302 to 309) if

- a) the perpetrator was a national of Austria at the time the act was committed or
- b) the act was committed for the benefit of an Austrian public official or arbitrator;

***Section 65 (Criminal Acts abroad which are only punishable, if they are also punishable by the Law applicable at the Crime Location)***

(1) For all other criminal acts committed abroad than the ones mentioned in Sections 63 and 64 Austrian criminal law applies, inasmuch as the acts are also punishable by the laws applicable at the crime location:

- 1. if at the time of committing the crime the offender was an Austrian national or obtained Austrian citizenship at a later time, which he/she still possesses at the time of initiating criminal proceedings,

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 4**

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The country cited the following domestic law: Section 65(1) no. 2 PC:

***Section 65 (Criminal Acts abroad which are only punishable, if they are also punishable by the Law applicable at the Crime Location)***

(1) For all other criminal acts committed abroad than the ones mentioned in Sections 63 and 64 Austrian criminal law applies, inasmuch as the acts are also punishable by the laws applicable at the crime location:

...

2. if at the time of committing the crime the offender at the time of the crime was an alien, is present in Austria, and cannot be extradited abroad for a different reason than for the nature and quality of his/her offence.

**(b) Observations on the implementation of the article**

The reviewing experts conclude that Austria has implemented this provision of the Convention.

**(c) Successes and good practices**

The reviewing experts observed that many states only apply the principle of *aut dedere aut judicare* to allow extraterritorial jurisdiction to cases of non-extradition of nationals. Often, however, there may be other reasons which prevent extradition of an offender, such as issues relating to the human rights conditions in the requesting State or even due to the fact that the state of direct jurisdiction does not request extradition. These situations may particularly arise in cases involving corruption offenses. It is important that these bars to extradition should not allow for impunity regarding the offender. The fact that Austria has provided a jurisdictional basis to try the offender in Austria in such cases seems commendable.

**Paragraph 5**

*5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention even without an explicit provision in the domestic legislation because the Convention is directly applicable in Austria.

Austria provided the following examples of implementation:

In a case of alleged bribery of foreign officials by an Austrian company, the judicial authorities of Thailand provided information in order to initiate criminal investigations against a company with its legal seat in Austria. The exchange of further information was carried out through diplomatic channels; the investigation and criminal proceedings in Austria have not been finalized yet.

In a case of alleged bribery by an Austrian citizen in Azerbaijan, the suspect was arrested in a third country which gave priority to an extradition towards Austria where an investigation of the alleged facts in Azerbaijan had been initiated. Due to a lack of information from the country where the alleged facts took place the investigations had to be discontinued.

**(b) Observations on the implementation of the article**

During the country visit, it was added that Austria can spontaneously share information with other countries and let them take over the proceedings. The principle of legality does not prevent this.

The reviewing experts conclude that Austria has implemented this provision of the Convention.

**Paragraph 6**

*6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

The country cited the following domestic laws: Sections 64, 65 PC:

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Chapter IV. International cooperation**

As a general conclusion, the reviewing experts noted that Austria established a comprehensive, well-articulated legal framework on international cooperation in criminal matters. The domestic law is a very coherent piece of legislation as it regulates in a detailed manner all forms of international

cooperation and, as reported, it is efficiently implemented, in conjunction with existing treaties or arrangements, where applicable. It is, thus, considered as a **good practice**.

## **Article 44 Extradition**

### **Paragraph 1**

*1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Upon ratification of the United Nations Convention against Corruption, its provisions are directly applicable by the Austrian authorities.

The Federal Law on Extradition and Mutual Assistance in Criminal Matters (ARHG-1979) regulates issues of extradition (see Annex).

The European Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States of the European Union (see Annex) has been domesticated through the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (EU-JZG).

There were no cases of extradition within the scope of application of the United Nations Convention against Corruption in the last years where dual criminality problems arose.

Extradition cases are registered in the national criminal justice database system, similarly to all domestic criminal cases.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that a two-tier system on extradition has been put in place in Austria. With regard to other Member States of the European Union, the surrender of fugitives is carried out in line with the requirements of the European Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States of the European Union. The Framework Decision was domesticated in Austria through the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (EU-JZG).

The reviewing experts concluded that Austria has implemented this provision of the Convention.

### **Paragraph 2**

*2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has partly implemented this provision of the Convention with EU Member States.

Austria cited the following applicable measures:

Federal Law on Extradition and Mutual Assistance in Criminal Matters (ARHG-1979)

Punishable Acts Qualifying for Extradition

§ 11. (1) Extradition shall be admissible for the prosecution of intentionally committed acts that are punishable under the law of the requesting State by a custodial sentence of more than one year or by a preventive measure of the same duration and that are subject to a custodial sentence of more than one year under Austrian law. The penal sanctions, as amended by § 5 item 4 of the 1988 Juvenile Court Act shall not be used as a basis for deciding whether a punishable act shall give rise to an extradition. It is irrelevant whether an application, as required for prosecution under Austrian law, has been made or such an authorization has been given.

On the basis of Art. 2 of the Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, 2002/584/JI, Austria has to surrender a person for a corruption offence, even in the absence of the double criminality requirement being met, provided that all the other conditions for surrender are met.

Article 2

Scope of the European arrest warrant

1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:

- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,

- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,
- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage.

**(b) Observations on the implementation of the article**

The reviewing experts were informed that double criminality is always a requirement for granting extradition requests (see above under paragraph 1, section 11 of the Federal Law on Extradition and Mutual Assistance in Criminal Matters (ARHG-1979)). As reported during the country visit, this requirement is interpreted on the basis of the “underlying conduct” approach, in line with article 43, paragraph 2, of the UNCAC. This was identified as a good practice by the review team. Exceptionally, the double criminality requirement is not needed when executing a European Arrest Warrant, as the Framework Decision removes this condition in respect of a list of 32 offences, including corruption offences.

The reviewing experts recommended that the national authorities explore the possibility of further relaxing the strict application of the double criminality requirement in line with article 44, paragraph 2, of the UNCAC and following such a flexible approach for cases beyond the execution of European Arrest Warrants, with due respect to the protection of human rights.

**(c) Successes and good practices**

- The interpretation of the double criminality requirement focusing on the underlying conduct and not the legal denomination of the offence;

**Paragraph 3**

*3. If the request for extradition includes several separate offences, at least one of which is extraditable under*

*this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Upon ratification of the UN Convention against Corruption, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 11 para. 3 of the Austrian Extradition and Mutual Legal Assistance Act (ARHG) is also applicable.

**Punishable Acts Qualifying for Extradition**

§ 11. (1) Extradition shall be admissible for the prosecution of intentionally committed acts that are punishable under the law of the requesting State by a custodial sentence of more than one year or by a preventive measure of the same duration and that are subject to a custodial sentence of more than one year under Austrian law. The penal sanctions, as amended by § 5 item 4 of the 1988 Juvenile Court Act shall not be used as a basis for deciding whether a punishable act shall give rise to an extradition. It is irrelevant whether an application, as required for prosecution under Austrian law, has been made or such an authorization has been given.

(2) An extradition for execution shall be admissible in cases where the custodial sentence or the preventive measure has been imposed for one or several of the punishable acts listed in paragraph (1) and when a remaining period of at least four months still needs to be executed. Several custodial sentences or the remaining parts thereof shall be aggregated.

(3) If an extradition is admissible under paragraphs (1) or (2), a person may also be extradited for the prosecution of other punishable acts or for the execution of other custodial sentences or preventive measures, in cases where extradition would otherwise not be admissible on account of the term of the stipulated sanction (paragraph (1)) or of the duration of the punishment or measure (paragraph (2)).

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 4**

*4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Upon ratification of the United Nations Convention against Corruption, its provisions are directly applicable by the Austrian authorities. Furthermore, it should be emphasized that under Austrian law, extradition may not only be granted on the basis of a treaty but also on the basis of reciprocity.

As, according to article 44 para. 4, the offences in question are deemed to be included in any extradition treaty existing between State Parties, it is not necessary to actually include them. Furthermore, since ratification of the UNCAC by Austria, no new bilateral extradition treaties have been concluded.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 5**

*5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria does not make extradition conditional on the existence of a treaty.

There were no cases of extradition based solely on United Nations Convention against Corruption.

**(b) Observations on the implementation of the article**

The reviewing experts noted that extradition is not subject to the existence of an applicable treaty. In the absence of an international treaty, the domestic extradition legislation shall apply on a basis of reciprocity. Austria recognizes the UNCAC as a legal basis for extradition, although no such request has been made.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 6**

*6. A State Party that makes extradition conditional on the existence of a treaty shall:*

*(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and*

*(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria does not make extradition conditional on the existence of a treaty.

**(b) Observations on the implementation of the article**

The reviewing experts noted that extradition is not subject to the existence of a treaty according to

the Austrian legal system.

## **Paragraph 7**

*7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Upon ratification of the United Nations Convention against Corruption, its provisions are directly applicable by the Austrian authorities.

Austria provided the following examples of implementation:

In the case of a former prime minister of a European country, the Austrian court declared extradition admissible and the Federal Minister granted extradition - inter alia - for alleged taking bribes. The person was surrendered accordingly.

The details of the extradition case were as follows:

A former Premier Minister of a European state was arrested during his transit through Austria by car based on an international alert by his home State. A few weeks earlier the Parliament of his home State had lifted his immunity. He was accused of abuse of official power, bribery and money laundering. After several supplemental extradition requests he finally entered into an extradition waiver after being heard in the course of legal assistance in the presence of officials of his home State and via video conference.

In the past the person concerned has been living for a long time in Austria, where he had established a company and was involved in another company. There were several bank accounts in Austria.

The challenge of the Case was the coordination and the management of a domestic proceeding on counts of money laundering with a parallel extradition process and multiple mutual legal assistance requests including requests for identification of proceeds of crime and freezing and seizure. Substantial investigative steps were carried in the domestic proceeding.

These steps have to be coordinated with the respective authorities of the requesting State. The financial situation and a possible involvement of relatives of the person concerned were examined in the domestic proceeding.

The investigations were accompanied by a strong interest of the public. After completion of domestic investigation the proceedings were transferred to the requesting State. No separate custody was necessary.

### **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

## **Paragraph 8**

*8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty*

*requirement for extradition and the grounds upon which the requested State Party may refuse extradition.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria cited the following applicable measures:

See sections 10 - 25 of the Austrian Extradition and Mutual Legal Assistance Act (ARHG) authorities (see Annex).

Austria provided the following examples of implementation:

Due to the regulations on bribery in the Austrian Penal Code the minimum threshold of punishment in all cases fulfils the conditions for an extraditable offence. So there were no refusals on the ground of minimum penalty requirements for extradition.

**(b) Observations on the implementation of the article**

The reviewing experts noted that the substantive and procedural conditions for extradition, as well as the grounds for refusal of extradition requests, are stipulated in the Federal Law on Extradition and Mutual Assistance in Criminal Matters (ARHG-1979). The extradition process revolves around the competences of both the judicial authority, which judges on the admissibility of the extradition request, and the administrative authority (Minister of Justice) that has the final word on the surrender of the person sought.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 9**

*9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Under the Austrian Code of Procedure, which also applies to extradition cases (see Section 9 para. 1 of the ARHG), all competent authorities have to endeavour to conduct the proceedings as quickly as possible.

As far as evidentiary requirements are concerned, it has to be emphasized that under Austrian law there are no particular evidentiary requirements in extradition proceedings.

Austria provided the following examples of implementation:

According to Austrian law, there is the possibility of a simplified extradition procedure if the person concerned consents to be extradited and waives to the rule of speciality. So the length of the extradition procedure depends on which type of proceeding can be applied. As an overall average time could be mentioned 6 months for an extradition decision including the surrender of the person.

**(b) Observations on the implementation of the article**

The reviewing experts noted the absence of special evidentiary requirements in the extradition legislation of Austria.

They also took into account the information provided by the Austrian authorities regarding, as such information was enriched during the round-table discussions within the context of the country visit. In particular:

The timeframe needed to grant an extradition request varies depending, among others, on the complexity of the case, the type and nature of the process that can be applied, as well as the potentially parallel asylum proceedings. The Austrian authorities presented statistics during the country visit and informed the review team that, on average, a normal extradition process, if not simplified and without appeal proceedings, lasts approximately 1,5 month. According to the Austrian legislation (ARHG-section 32), there is also the possibility of a simplified extradition process if the person sought consents to be extradited and waives his/her entitlement to the speciality rule. Such a simplified extradition process normally lasts 19 days. In relation to surrender procedures to other European Union Member States, the EAW process has contributed to substantially shortening the period needed for the surrender of a fugitive to another EU Member State. On the other hand, the overall average time reported by the Austrian authorities for the completion of extradition proceedings which also involve an appeal to a higher court and/or a petition for judicial review before the Supreme Court on the basis of human rights considerations may extend to six months. Delays may be encountered in cases of applications against an extradition decision lodged by the individuals concerned at the European Court of Human Rights, with a parallel request for interim measures to suspend the extradition process. In any case, the maximum detention period in the context of extradition is six months, which can be prolonged to one year (section 29 para. 6 ARHG).

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 10**

*10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Upon ratification of the United Nations Convention against Corruption, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 27 ARHG is applicable.

§ 27. (1) Requests received for imposing detention pending extradition shall be examined by the public prosecutor in order to establish whether there are sufficient grounds to assume that the underlying act gives rise to an extradition. If these prerequisites are met, the public prosecutor's office shall order the search measures stipulated in Title 9 of the Code of Criminal Procedure or, if necessary, order the arrest of the sought person.

(2) A public prosecutor need not be seized in connection with a request received by way of a computer-assisted search system, by way of the International Criminal Police Organization -

INTERPOL - or by way of any other official international criminal police assistance system if there are no grounds to assume that the sought person is staying in Austria and if the request only gives rise to search measures that do not require any public announcement (§ 169 (2) second sentence of the Code of Criminal Procedure).

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 11**

*11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Upon ratification of the United Nations Convention against Corruption, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 65 para. 1 subpara. 1 of the Austrian Penal Code is applicable (see Annex).

Regarding the examples of implementation, Austria provided that the prosecution service is a necessary party to each extradition proceedings so it will know about the alleged facts and has to open an investigation if the facts fall under domestic jurisdiction.

No statistics are available.

**(b) Observations on the implementation of the article**

The reviewing experts noted that section 65 PC authorizes the initiation of domestic prosecution in cases where the Austrian authorities decline to extradite a fugitive to serve a sentence solely on the ground of his/her nationality.

As already mentioned under article 42, paragraph 4, of the UNCAC, the Austrian legislation not only allows jurisdiction to prosecute when extradition is denied due to nationality but also allows such jurisdiction when extradition is denied for other reasons not related to the nature of the offences.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**(c) Successes and good practices**

- The fact that the Austrian legislation not only allows jurisdiction to prosecute when extradition is denied due to nationality but allows such jurisdiction when extradition is denied for other reasons not related to the nature of the offences.

## Paragraph 12

*12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.*

### (a) Summary of information relevant to reviewing the implementation of the article

Austria confirmed that it has partly implemented this provision of the Convention with EU Member States.

Austria cited the following applicable measures:

The surrender of an Austrian national upon condition that he or she will be returned to Austria in order to serve the sentence imposed on him or her in the requestion State is only possible in the relations to the Member States of the European Union.

Section 5 para. 5 of the Austrian Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (EU-JZG).

#### Part Two

#### Execution of a European Arrest Warrant

#### Execution of a European Arrest Warrant against Austrian nationals

§ 5. (Constitutional Provision) (1) Execution of a European arrest warrant against an Austrian national by an Austrian judicial authority is only admissible on the conditions of the following provisions.

- (2) The execution of a European arrest warrant against an Austrian national for acts that are subject to the jurisdiction of Austrian criminal laws is inadmissible.
- (3) The execution of a European arrest warrant against an Austrian national is inadmissible if
  1. the person concerned did not commit any acts on the national territory of the issuing State, and
  2. acts of the same type, committed outside the national territory in keeping with Austrian law, would not be subject to the scope of application of Austrian criminal law.
- (4) The execution of a European arrest warrant against an Austrian national for the enforcement of a custodial sentence or a preventive measure involving deprivation of liberty is inadmissible. If an Austrian judicial authority is requested to execute such an arrest warrant, the sentence or

measure imposed by the issuing State shall be enforced in Austria according to § 39 to § 44, also without separate application by the issuing judicial authority, if the execution of this European arrest warrant would otherwise be admissible.

(5) The execution of a European arrest warrant by the surrender of an Austrian national for conducting a criminal prosecution is always admissible only on the condition that the person concerned by the surrender is returned to Austria, after having been granted to be heard in court, for serving the custodial sentence or preventive measure involving deprivation of liberty imposed by the court in the issuing State.

(6) If the Austrian national concerned is kept in pre-trial detention or detention pending surrender, he/she may renounce a ground for refusal and conditions pursuant to the present federal law only expressly and at the earliest at the hearing on his/her detention, as defined by § 20 (1) (§ 32 (1) of the ARHG, § 175 (2) item 1 of the Code of Criminal Procedure). In any event, such a renunciation shall become effective only if it is put on record in court.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that Austria allows the surrender of its nationals only on the basis of a European Arrest Warrant on the condition that, after the trial in the issuing State, the person sought is to be returned to Austria to serve the custodial sentence or detention order. In this regard, the reviewing experts, bearing in mind the optional nature of this provision of the UNCAC, concluded that Austria has partially implemented it.

#### **Paragraph 13**

*13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has partly implemented this provision of the Convention with EU Member States.

Austria cited the following applicable measures:

See Section 5 para. 4 of the Austrian Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (EU-JZG) (see Annex).

Within the scope of application of the Convention no such cases have arisen.

#### **(b) Observations on the implementation of the article**

The surrender of an Austrian national for purposes of enforcing a sentence can only be feasible within the context of the EAW process. Outside the EU context, the execution of a decision by a foreign court imposing a custodial sentence or preventive measure shall be admissible if the convicted person is an Austrian citizen, has his/her domicile or place of residence in Austria and has agreed to the execution in Austria (ARHG-section 64, paragraph 2).

It was noted by the review team that Austria cannot execute against a wanted Austrian national a foreign (non-EU) conviction for an UNCAC offence but instead, when it denies extradition on the basis of nationality, should actually prosecute him/her all over again. This was found to be a challenge to implementation and ways to overcome such challenge should be considered by the Austrian authorities.

#### **Paragraph 14**

*14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.*

##### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Upon ratification of the United Nations Convention against Corruption, its provisions are directly applicable by the Austrian authorities. Furthermore, Austria is a Party to the European Convention on Human Rights and its Protocols. The enjoyment of all the rights and guarantees provided by Austrian law is guaranteed through the applicability of the provisions of the Austrian Code of Procedure to extradition proceedings (Section 9 para. 1 of the ARHG).

##### **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

#### **Paragraph 15**

*15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.*

##### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention. Upon ratification of the United Nations Convention against Corruption, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 19 of the ARHG is applicable.

Compliance with the Principles of the Rule of Law; Asylum

§ 19. An extradition shall be inadmissible if there is reason to suspect that

1. the criminal proceedings in the requesting State will not comply or did not comply with the principles of Articles 3 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Federal Law Gazette No. 210/1958,
2. the punishment or preventive measure imposed by or to be expected in the requesting State would be enforced in a manner that is not consistent with the requirements of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Federal Law Gazette No. 210/1958, or
3. the person to be extradited would be subject to persecution in the requesting State because of

his/her origin, race, religion, affiliation to a specific ethnic or social group, nationality, or political opinions, or would have to expect other serious prejudices for any of these reasons (extradition asylum).

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 16**

*16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention. Upon ratification of the UN Convention against Corruption, its provisions are directly applicable to Austrian authorities. Furthermore, see Article 2 of the Second Additional Protocol to the European Convention on Extradition of 17.3.1978, to which Austria is a Party.

Article 2

Article 5 of the Convention shall be replaced by the following provisions:

“Fiscal offences

- 1 For offences in connection with taxes, duties, customs and exchange extradition shall take place between the Contracting Parties in accordance with the provisions of the Convention if the offence, under the law of the requested Party, corresponds to an offence of the same nature.
- 2 Extradition may not be refused on the ground that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, custom or exchange regulation of the same kind as the law of the requesting Party.”

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 17**

*17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention. Upon ratification of the United Nations Convention against Corruption, its provisions are directly applicable by the Austrian authorities. In practice, consultations with the foreign counterparts are always pursued.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 18**

*18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria has concluded several bilateral extradition treaties. Furthermore, Austria is a Party to the Council of Europe Convention on Extradition and its Second Additional Protocol. In the relations to the Member States of the European Union, Austria has implemented the Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender proceedings between Member States, 2002/584/JI.

The texts of the above-mentioned CoE and EU-instruments are available on the website of those organizations.

**(b) Observations on the implementation of the article**

The reviewing experts noted that Austria is bound by existing multilateral treaties, such as the Council of Europe Convention on Extradition and its Second Additional Protocol and the United Nations Convention against Transnational Organized Crime. As reported during the country visit, Austria has also concluded bilateral agreements on extradition with Australia, Bahamas, Canada, Pakistan, Paraguay and United States of America.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Article 45 Transfer of sentenced persons**

*States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention.

Austria is Party to the CoE Convention on the Transfer of Sentenced Prisoners and its Protocol. In the relations to the Members of the European Union, Austria has implemented the Framework Decision of 27 November 2008 on the Application of the Principle of Mutual Recognition to Judgments in Criminal Matters imposing Custodial Sentences or Measures involving Deprivation of Liberty for the Purpose of their Enforcement in the European Union, 2008/909/JI.

The texts of the above-mentioned CoE and EU-instruments are available on the website of those organizations.

Within the scope of application of the Convention no such cases have arisen.

## **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

## **Article 46 Mutual legal assistance**

### **Paragraph 1**

*1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.*

## **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 50 ARHG is applicable.

### **General Principle**

§ 50. (1) In accordance with the provisions of this federal law, judicial assistance may be granted in criminal matters upon a request by a foreign authority, including proceedings to order preventive measures and to issue a property-law order, as well as in matters of extinction and the register of criminal records, in proceedings to obtain compensation for confinement and conviction by a criminal court, in clemency petition matters and in matters concerning the execution of sentences and measures. With the proviso of § 59a, the transfer of data to a foreign authority shall be admissible without such a request.

(2) An authority within the meaning of paragraph (1) shall be a court, a public prosecutor's office, or an agency acting in matters concerning the execution of sentences or measures.

(3) Judicial assistance within the meaning of paragraph (1) shall be any support that is provided in connection with foreign proceedings in a criminal-law matter. It also includes consenting to activities as part of cross-border observations on the basis of intergovernmental agreements.

## **(b) Observations on the implementation of the article**

Mutual legal assistance is subject to section 50 et seq. ARHG and international agreements and can be afforded for all purposes stipulated in article 46, paragraph 3, of the UNCAC (see below).

The reviewing experts concluded that Austria has implemented this provision of the Convention.

### **Paragraph 2**

*2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it has implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. In this context, it should be mentioned that under Austrian law, there exists a liability for legal persons (see Act on Liability for Legal Persons for Criminal Offences; VbVG).

Regarding examples of implementation, Austria provided that following to an exchange of information on an investigation of alleged bribery against an Austrian company in a Far East country, the locally competent prosecution service has started investigations on the above mentioned Act on Liability for Legal Persons for Criminal Offences. The investigations are still ongoing

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Subparagraphs 3 (a) to 3 (i)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(a) Taking evidence or statements from persons; (b)*

*Effecting service of judicial documents;*

*(c) Executing searches and seizures, and freezing;*

*(d) Examining objects and sites;*

*(e) Providing information, evidentiary items and expert evaluations;*

*(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*

*(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*

*(h) Facilitating the voluntary appearance of persons in the requesting State Party;*

*(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria can afford the forms of mutual legal assistance listed in the provision above. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Sections 52 to 54 ARHG are applicable.

Sending of Objects and Case Files

§ 52. (1) Objects or case files may only be sent if it is ensured that they will be returned as soon as possible. The return of sent objects may be waived if these are no longer required.

(2) Objects to which the Republic of Austria or third parties hold a title may only be sent with the proviso that these rights remain unaffected. It shall not be admissible to send objects and case files if there is reason for concern that this would frustrate or render disproportionately complicated the prosecution or realization of these rights.

(3) Sending objects or case files should be deferred for as long as these are required for court or administrative proceedings pending in Austria.

#### Summons

§ 53. (1) A request to appear before a foreign authority may only be served upon a person staying in Austria if it is ensured that the person will not be prosecuted, punished or restricted in his/her personal liberty for an act committed before leaving the Republic of Austria. It shall be admissible, though, to prosecute, punish or restrict personal liberty

1. in connection with a punishable act that is the subject of the summons of a person as a defendant,
2. if, after the examination has been completed, the person summoned remains on the territory of the requesting State for more than fifteen days, although the person was in a position and allowed to leave it, or
3. if, after leaving the territory of the requesting State, the person returns there at his/her own accord, or is lawfully returned there.

(2) Summonses that contain threats of coercive measures in the event of non-compliance may only be served with the instruction that the threatened measures cannot be executed in Austria.

(3) Witnesses and experts shall be paid a reasonable advance on their travel costs, at their request if the other State so requested and reimbursement of the advance by the other State has been ensured.

#### Transferring Detained Persons for the Evidence Purposes

§ 54. (1) Upon a request by a foreign authority, a person who is being kept in pre-trial detention or punitive detention or who is being kept detained for the execution of measures, may be transferred to a foreign country in order to perform important investigative measures or evidence-taking, especially for the purposes of examining or confronting him/her, if

1. the person agrees to this transfer,
2. his/her presence is not required for criminal proceedings pending in Austria,
3. his/her detention is not prolonged on account of the transfer, and
4. the requesting State ensures to keep him/her in custody, to return him/her without delay after the investigative measure or evidence-taking has been completed, as well as not to prosecute or punish him/her for an act committed prior to the transfer.

(2) A transfer shall not interrupt the serving of pre-trial or punitive detention or the execution of a preventive measure.

Austria provided the following examples of implementation:

Due to the fact that considerable parts of the MLA activity is being carried out on the basis of direct communication between judicial authorities there are no centralised statistics available. Austria would stress its efforts to collect and provide more statistical data on MLA if the questions during an evaluation process would be posed early enough so that the data could be sorted out and collected by the judicial authorities just when dealing with the request. In this regard the electronic file management system is of great help but needs to be adapted to questions which are to be expected early enough.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Subparagraphs 3 (j) and 3 (k)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

...

*(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;*

*(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria can afford the forms of mutual legal assistance listed in the provision above. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 4**

*4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party to this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

It is possible for Austria to transmit information. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 59a ARHG is applicable.

**Data Transfer without Request**

§ 59a. (1) Courts and public prosecutor's offices may communicate person-related data without a request for judicial assistance on the basis of an intergovernmental agreement, to the extent that

1. the information relates to acts qualifying for extradition,
2. communicating the information in question to an Austrian court or to an Austrian public prosecutor's office would also be admissible without a request, and
3. it can be assumed on the basis of specific facts that - on account of the content of the information - it will be possible
  - a) to initiate criminal proceedings in the other State,
  - b) to prevent a criminal act of considerable significance or to avert a direct and serious danger to public security,

(2) The data shall be communicated pursuant to paragraph (1) with the proviso that

1. without the consent of the communicating authority the communicated data will not be used for any other purpose than the purpose underlying the communication;
2. the communicated data will be deleted or corrected by the receiving authority without any delay, as soon as
  - a) the inaccuracy of the data has been established,
  - b) the communicating authority sends a notification that the data were obtained or communicated unlawfully, or
  - c) it is established that the data are not or no longer needed for the purpose underlying their communication;
3. the receiving authority shall inform the communicating authority without delay about any inaccuracy of the communicated data.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 5**

*5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restriction on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 59a ARHG is applicable (see above).

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 8**

*8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities.

**(b) Observations on the implementation of the article**

The reviewing experts found that the practical difficulties in collecting bank information (due to lack of central registrar, etc.) which were mentioned under Chapter III (article 40), may also impede

the ability to obtain and provide such information and evidence under mutual legal assistance as well.

Therefore the reviewing experts recommended that the Austrian authorities Consider ways to address the potential impact that the practical difficulties in collecting domestically bank information (due to lack of central registrar, etc.) may have on the ability to obtain and provide such information and evidence under mutual legal assistance.

### **Subparagraph 9 (a) of article 46**

*9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that the provision of assistance is subject to the double criminality requirement (section 51, paragraph 1 ARHG). The absence of criminal liability under Austrian law shall not oppose the service of documents if the recipient is prepared to accept them (section 51, paragraph 2 ARHG). In this case, the service of documents is considered as a non-coercive measure for which assistance can be afforded even if the double criminality requirement is not fulfilled. A similar approach is followed in relation to the hearing of experts and witnesses who are not forced to appear before the court to testify.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

### **Subparagraph 9 (b)**

*(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria considered that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 51 para. 2 ARHG is applicable.

Under Austrian law, e.g. searches and seizures, including the opening of bank accounts, are considered to be coercive.

There exists no definition or legal text concerning the *minimis* matters, as the concept does not exist under Austrian law, which is guided by the principle of legality (instead of that of opportunity).

Regarding the information on the types of non-coercive actions taken when rendering assistance in the absence of dual criminality, Austria cited the hearing of experts and witnesses and the service of documents.

Double criminality issues with regard to MLA requests in bribery cases have not yet.

**(b) Observations on the implementation of the article**

The reviewing experts noted that the provision of assistance is subject to the double criminality requirement (section 51, paragraph 1 ARHG). The absence of criminal liability under Austrian law shall not oppose the service of documents if the recipient is prepared to accept them (section 51, paragraph 2 ARHG). In this case, the service of documents is considered as a non-coercive measure for which assistance can be afforded even if the double criminality requirement is not fulfilled. A similar approach is followed in relation to the hearing of experts and witnesses who are not forced to appear before the court to testify.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Subparagraph 9 (c) of article 46**

*(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.*

**(a) Summary of information relevant to reviewing the implementation of the article**

See above.

**(b) Observations on the implementation of the article**

See above.

**Paragraph 10**

*10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:*

*(a) The person freely gives his or her informed consent;*

*(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 54 ARHG is applicable.

- § 54.(1) Upon a request by a foreign authority, a person who is being kept in pre-trial detention or punitive detention or who is being kept detained for the execution of measures, may be transferred to a foreign country in order to perform important investigative measures or evidence-taking, especially for the purposes of examining or confronting him/her, if
1. the person agrees to this transfer,
  2. his/her presence is not required for criminal proceedings pending in Austria,
  3. his/her detention is not prolonged on account of the transfer, and
  4. the requesting State ensures to keep him/her in custody, to return him/her without delay after the investigative measure or evidence-taking has been completed, as well as not to prosecute or punish him/her for an act committed prior to the transfer.
- (2) A transfer shall not interrupt the serving of pre-trial or punitive detention or the execution of a preventive measure.

There were no examples of implementation within the scope of application of the Convention.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 11**

*11. For the purposes of paragraph 10 of this article:*

*(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;*

*(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;*

*(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;*

*(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria considered that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 54 ARHG is applicable (see above).

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 12**

*12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted,*

*detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 54 para. 1 subpara. 4 ARHG is applicable (see above).

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 13**

*13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria has designated the Austrian Federal Ministry of Justice as central authority for receiving and transmitting requests for mutual legal assistance and has informed the Secretary General of the United Nations accordingly.

**(b) Observations on the implementation of the article**

The reviewing experts noted that Austria has designated the Federal Ministry of Justice as the central authority for receiving and transmitting MLA requests and has informed the Secretary-General of the United Nations accordingly. The MLA requests can be transmitted through diplomatic channels or, in urgent circumstances, through Interpol. Direct transmittal between competent authorities is also possible.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 14**

*14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties,*

*requests may be made orally but shall be confirmed in writing forthwith.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria is in compliance with this provision with regard to the communication of requests for mutual legal assistance. Requests for mutual legal assistance addressed to Austrian authorities have to be accompanied by a translation into the German language. The Secretary General of the United Nations has been informed accordingly.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraphs 15 and 16**

*15. A request for mutual legal assistance shall contain: (a) The identity of the authority making the request;*

*(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;*

*(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;*

*(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;*

*(e) Where possible, the identity, location and nationality of any person concerned; and (f) The purpose for which the evidence, information or action is sought.*

*16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Additional information will be requested when the transmitted information is not sufficient for the execution of the request for mutual legal assistance. Its citation is not possible as it depends on the circumstances of the individual case.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 17**

*17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 58, first sentence ARHG is applicable.

#### Applicable Procedural Provisions

§ 58. There shall be compliance with a request for judicial assistance which requires a procedure that differs from Austrian laws on criminal procedure, if this is compatible with the criminal procedure and its principles pursuant to the provisions of Title 1 of the Code of Criminal Procedure. If judicial assistance is provided in the form of confiscation, information about bank accounts and bank transactions, or one of the investigative measures governed by Chapter Four or Chapter Five of Title 8 of the Code of Criminal Procedure, the assistance shall be limited in time, of which the requesting foreign authority shall be informed by way of the established channels of communication.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that a request for judicial assistance which requires a procedure that differs from the Austrian laws on criminal procedure will be executed, if this is compatible with the principles set forth in the CPC (section 58 ARHG).

The reviewing experts concluded that Austria has implemented this provision of the Convention.

#### **Paragraph 18**

*18. Whenever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria permits hearings of individuals mentioned above to take place by video conference as described above. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Sections 156 para. 2 and 198 para. 4 of the Austrian Code of Criminal Procedure are applicable (see Annex).

There were no examples of implementation within the scope of application of the Convention.

#### **(b) Observations on the implementation of the article**

During the country visit, it was further reported that Austria is also a party to the 2000 EU Convention on Mutual Assistance in Criminal Matters, which regulates the issue of videoconferencing.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

## Paragraph 19

*19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.*

### (a) Summary of information relevant to reviewing the implementation of the article

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities.

Austria provided the following examples of implementation:

Some countries - like FL or HU - normally grant MLA on bank information only with a strict rule of speciality. In these cases the Austrian Federal Ministry of Justice or the competent Austrian judicial authority has to give a declaration to obey these rules imposed by the executing state.

### (b) Observations on the implementation of the article

The reviewing experts concluded that Austria has implemented this provision of the Convention.

## Paragraph 20

*20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.*

### (a) Summary of information relevant to reviewing the implementation of the article

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities.

### (b) Observations on the implementation of the article

The reviewing experts concluded that Austria has implemented this provision of the Convention.

## Paragraph 21

*21. Mutual legal assistance may be refused:*

*(a) If the request is not made in conformity with the provisions of this article;*

*(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;*

*(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the*

*action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;*

*(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria considered that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 51 para. 1 subpara. 3 ARHG is applicable.

Inadmissible Judicial Assistance

- § 51. (1) Providing judicial assistance shall not be admissible to the extent that
1. the act underlying the request is either not subject to punishment by a court under Austrian law or does not qualify for extradition pursuant to § 14 und § 15,
  2. extradition would be inadmissible pursuant to § 19 items 1 and 2 for the proceedings underlying the request, or
  3. either the practical requirements to perform specific investigative measures, as defined in Title 8 of the Code of Criminal Procedure, do not prevail, or providing judicial assistance would result in a violation of the obligation to confidentiality, to be also observed vis-à-vis criminal courts under Austrian law (§ 76 (2) of the Code of Criminal Procedure).
- (2) The absence of criminal liability under Austrian law shall not oppose the service of documents if the recipient is prepared to accept them.

Depending on the case, the prosecutor or the Ministry of Justice has the competence to refuse an MLA request.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 22 of article 46**

*22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Article 8 of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 17 March 1978 to which Austria is a Party, is applicable.

**(b) Observations on the implementation of the article**

The reviewing experts noted that the fiscal nature of the offences in question is not a ground for refusal of MLA requests according to the domestic legislation.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

### **Paragraph 23**

*23. Reasons shall be given for any refusal of mutual legal assistance.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria considered that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, see Section 57 para. 1 ARHG.

There were no refusals within the scope of application of the Convention.

#### **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

### **Paragraph 24**

*24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable to Austrian authorities.

The customary length of time between receiving requests for mutual legal assistance and responding to them is approximately three months.

#### **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

### **Paragraph 25**

*25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria considered that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 26**

*26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria considered that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 27**

*27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 53 para. 1 ARHG is applicable.

Summons

§ 53. (1) A request to appear before a foreign authority may only be served upon a person staying in Austria if it is ensured that the person will not be prosecuted, punished or restricted in his/her personal liberty for an act committed before leaving the Republic of Austria. It shall be admissible, though, to prosecute, punish or restrict personal liberty

1. in connection with a punishable act that is the subject of the summons of a person as a defendant,
2. if, after the examination has been completed, the person summoned remains on the territory of the requesting State for more than fifteen days, although the person was in a position and allowed to leave it, or
3. if, after leaving the territory of the requesting State, the person returns there at his/her own accord, or is lawfully returned there.

(2) Summonses that contain threats of coercive measures in the event of non-compliance may only be served with the instruction that the threatened measures cannot be executed in Austria.

(3) Witnesses and experts shall be paid a reasonable advance on their travel costs, at their request if the other State so requested and reimbursement of the advance by the other State has been ensured.

There were no example of implementation within the scope of application of the Convention.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 28**

*28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Subparagraph 29 (a)**

*29. The requested State Party:*

*(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 52 ARHG is applicable.

§ 52. (1) Objects or case files may only be sent if it is ensured that they will be returned as soon as possible. The return of sent objects may be waived if these are no longer required.

(2) Objects to which the Republic of Austria or third parties hold a title may only be sent with the proviso that these rights remain unaffected. It shall not be admissible to send objects and case files if there is reason for concern that this would frustrate or render disproportionately complicated the prosecution or realization of these rights.

(3) Sending objects or case files should be deferred for as long as these are required for court or administrative proceedings pending in Austria.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Subparagraph 29 (b)**

*29. The requested State Party:*

*(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria considered that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Section 52 ARHG is applicable (see above).

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 30**

*30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Austria has concluded several bilateral mutual legal assistance treaties. Furthermore, Austria is a Party to the CoE-Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and its First Additional Protocol of 17 March 1978. In the relations to the Member States of the European Union, Austria has ratified the Convention on Mutual Assistance in Criminal Matters of 29 May 2000 and its Protocol of 16 October 2001.

The texts of the above-mentioned CoE and EU-instruments are available on the websites of those organizations.

**(b) Observations on the implementation of the article**

As reported during the country visit, further to the information above, Austria has concluded bilateral MLA treaties with Australia, Canada and United States of America.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Article 47 Transfer of criminal proceedings**

*States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable to Austrian authorities. Furthermore, the following provisions are of relevance:

- Sections 74 seq. of the ARHG (see Annex), which deal with requests to foreign states to take over prosecution over a matter where Austria possesses criminal jurisdiction;
- Sections 60 et seq. ARHG, which deal with requests made by foreign jurisdiction to Austria to take over prosecutions and proceedings; and
- Article 21 of the European Convention on Mutual Legal Assistance, to which Austria is a Party.

Austria is also a Party to the European Convention on the Transfer of Proceedings.

The texts of the above-mentioned CoE-instruments are available on the website of that organization.

There were no formal requests for transfer within the scope of application of the Convention. As already indicated in several cases prosecution was started in Austria based on the fact that Austria has domestic jurisdiction over an alleged fact (in most cases because of the Austrian citizenship of the alleged perpetrator).

**(b) Observations on the implementation of the article**

The transfer of criminal proceedings is enabled through sections 60 et seq. and 74 et seq. ARHG, as well as the European Convention on the Transfer of Proceedings in Criminal Matters to which Austria is a party.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Article 48 Law enforcement cooperation**

**Subparagraph 1 (a)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention.

Austria cited the following applicable measures:

1. Reports (at national level): in accordance with Section 100, paragraph (2), of the StPO (Austrian Code of Criminal Procedure): "The criminal police has to report to the public prosecutor's office in writing or by means of electronic data processing..." BGBl. (Federal Law Gazette) 1975/631 idgF (as amended), and in accordance with Section 100a, paragraph (1): „Pursuant to § 100, paragraph 2 (1), the criminal police has to report any suspicion of a criminal offence defined in § 20a, paragraph 1, to the WKStA [Public Prosecutor's Office for Combating Economic Crime and Corruption].“

- Since 1 January 2008, there is an IT network between the Federal Ministry of the Interior (the so called "PAD" system for recording processes and data) and the Federal Ministry of Justice ("VJ-Register", a system for processing automation). The public prosecutor's offices and law enforcement authorities are part of this network.

2. Cooperation and exchange of information between law enforcement agencies via Europol Network

2.1. Law on the Criminal Intelligence Service Austria (Bundeskriminalamt-Gesetz, BKA-G) as amended by Federal Law Gazette (BGBl.) I 2010/37: According to Article 4, paragraph (1), of the BKA-G (legal act concerning the competent authorities in the field of police cooperation), the Europol National Unit is part of the Bundeskriminalamt (Criminal Intelligence Service Austria) within the Federal Ministry of the Interior.

2.2. EU Police Cooperation Act (EU-PolKG) as amended by BGBl. I 2010/105 (legal act implementing the Europol Council Decision 2009/371/JHA):

Article 8 of the Europol Council Decision, implemented by Article 6 of the EU-PolKG

3. Cooperation and exchange of information between law enforcement agencies of the Schengen Area

EU-PolKG as amended by BGBl. I 2010/105 (Anti-Fraud Act [BBKG 2010])

- Use of the Visa Information System (VIS) by law enforcement agencies in accordance with § 30 (1) - "Other Serious Criminal Offences", pursuant to Appendix 1, Part A, to the Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the EU (Justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der EU [EU-JZG])

- Use of the Schengen Information System, § 33 (1) and § 35 (1)

4. Cooperation and exchange of information via police liaison officers -

Convention implementing the Schengen Agreement, Art. 47 (1)

- bi- and multilateral treaties between the Republic of Austria and the receiving countries, concluded on the basis of the Police Cooperation Act (Polizeikooperationsgesetz [PolKG]) as amended by BGBl. I 2009/132 (Administrative Assistance), Chapter 4: "Authorization to Conclude Intergovernmental Treaties", § 18

- EU-PolKG §27 (2)

- 38th Federal Constitutional Law on Cooperation and Solidarity in the Secondment of Units and

Individuals to Foreign Countries (Bundesverfassungsgesetz über Kooperation und Solidarität bei der Entsendung von Einheiten und Einzelpersonen in das Ausland [KSE-BVG]) § 1, paragraph 1a (BGBl. I, 38/1997)

- Council Decision of 6 April 2009 establishing the European Police Office (Europol) - 2009/371/JHA, Art. 9 (1) - (3) a-d

5. Cooperation and exchange of information at EU level

- EU-JZG (Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the EU) as amended by BGBl. I 2007/112 (Act Accompanying the Reform of the Code of Criminal Procedure [Strafprozessreformbegleitgesetz]):

Forming joint investigation teams in accordance with § 60 (1), and exchange of information in accordance with § 62 (1);

European Judicial Network in accordance with § 69.

6. Communication channels and information exchange within the framework of mutual assistance

- European Convention on Mutual Assistance in Criminal Matters

(EU-Rechtshilfeübereinkommen [EuRHÜb]) as amended by BGBl. 1983/303

Chapter I, Art. 1 (1), Chapter II, Art. 3 (3), Chapter V, Art. 15 (1)

7. Convention, established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union

BGBl. III 2005/65

Art. 7: Spontaneous exchange of information

Art. 13 (9): Joint investigation teams

8. Federal Law on the Establishment and Organization of the BAK (BAK-G), BGBl. I 2009/72 §4 (2)

9. Bilateral treaties on law enforcement cooperation with Croatia, Germany, Hungary and Slovenia.

The Austrian authorities provided the following laws:

Ad 1) In accordance with Section 100, paragraph (2), of the StPO, “the criminal police has to report to the public prosecutor’s office in writing or by means of electronic data processing...” (BGBl. [Federal Law Gazette] 1975/631 as amended), and, in accordance with Section 100a, paragraph (1), “pursuant to § 100, paragraph 2 (1), the criminal police has to report any suspicion of a criminal offence defined in § 20a, paragraph 1, to the WKStA [Public Prosecutor’s Office for Combating Economic Crime and Corruption].“

Ad 2.1)

Legal act concerning the competent authorities in the field of police cooperation: Article 4, paragraph (1): “In order to fulfil the tasks assigned to the Federal Minister of the Interior in the field of international police cooperation, the Criminal Intelligence Service runs the National Central Bureau of the International Criminal Police Organization INTERPOL, the EUROPOL National Unit and the SIRENE Bureau.“

The Europol National Unit is thus part of the Bundeskriminalamt (Criminal Intelligence Service Austria) within the Federal Ministry of the Interior.

Ad 2.2)

EU-PolKG § 6:

„(1) The Europol National Unit is the only body with direct access to the Europol information systems and is responsible for the contact with Europol.

(2) The Europol National Unit shall:

1. supply Europol on their own initiative with the information and intelligence necessary for it to

- carry out its tasks;
- 2. respond to Europol's requests for information, intelligence and advice;
- 3. keep information and intelligence up to date;
- 4. evaluate information and intelligence for the law enforcement authorities and transmit that material to them;
- 5. issue requests for information, intelligence, advice and analysis to Europol;
- 6. supply Europol with information for storage in its databases;
- 7. ensure compliance with the law in the exchange of information with Europol."

Ad 3)

- Authorization to access VIS data: § 30 EU-PolKG, paragraph (1): "The law enforcement authorities are authorized to query the following data from the Visa Information System (VIS) if this is required in individual cases to prevent, detect and investigate terrorist offences pursuant to §§ 278b and 278c StGB (Austrian Penal Code) as well as other serious criminal offences such as defined in Appendix 1, Part A, to the EU-JZG [point 7: corruption; point 8: fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests; point 9: laundering of the proceeds of crime]..."

- Schengen Information System: § 33 EU-PolKG, paragraph (1): „The law enforcement authorities jointly run a central database application, the national Schengen Information System, providing access to alerts on persons and property. They have to supply these data to other Member States through the central Schengen Information System..." Furthermore, § 35 EU-PolKG, paragraph (1), applies: „At the request of the courts or public prosecutor's offices, the law enforcement authorities are authorized to enter data on persons for whom a European arrest warrant has been issued for the purpose of extradition, into the Schengen Information System."

Ad 4)

- Convention implementing the Schengen Agreement, Art. 47 (1): "The Contracting Parties may conclude bilateral agreements providing for the secondment, for a specified or unspecified period, of liaison officers from one Contracting Party to the police authorities of another Contracting Party."

- PolKG (Police Cooperation Act) as amended by BGBl. I 2009/132 (Administrative Assistance),

§ 18: Authorization to Conclude Intergovernmental Treaties: „Provided that the federal government..."

- EU-PolKG §27 (2): „Furthermore, with the consent of the Federal Minister of the Interior and for the purpose of strengthening police cooperation, officers of the public law enforcement services can be seconded to another Member State in order to jointly carry out tasks aimed at maintaining public peace, order and security or tasks supporting the criminal police in the receiving Member State."

- 38<sup>th</sup> Federal Constitutional Law on Cooperation and Solidarity in the Secondment of Units and Individuals to Foreign Countries (KSE-BVG) § 1, paragraph 1a (BGBl. I, 38/1997): „Units and individuals can be seconded to foreign countries

1. for solidarity and participation in a) peacekeeping measures including the promotion of democracy and the rule of law, as well as the protection of human rights in the framework of an international organization, the Organization for Security and Co-operation in Europe (OSCE), or the implementation of decisions of the European Union within the Common Foreign and Security Policy."

- Council Decision of 6 April 2009 establishing the European Police Office (Europol) - 2009/371/JHA, Art. 9 (1) - (3) a-d: Liaison officers:

"(1) Each national unit shall second at least one liaison officer to Europol. Except as otherwise stipulated in specific provisions of this Decision, liaison officers shall be subject to the national law of the seconding Member State. (2) Liaison officers shall constitute the national liaison bureaux at Europol and shall be instructed by their national units to represent the interests of the latter within Europol in accordance with the national law of the seconding Member State and the provisions

applicable to the administration of Europol. (3) Without prejudice to Article 8 (4) and (5), liaison officers shall: a) provide Europol with information from the seconding national unit; b) forward information from Europol to the seconding national unit; c) cooperate with Europol staff by providing information and giving advice; and d) assist in the exchange of information from their national units with the liaison officers of other Member States under their responsibility in accordance with national law. Such bilateral exchanges may also cover crimes outwith the competence of Europol, as far as allowed by national law.”

Ad 5)

EU-JZG (Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the EU) as amended by BGBl. I 2007/112 (Act Accompanying the Reform of the Code of Criminal Procedure)

Establishment of joint investigation teams in accordance with § 60 (1): „Joint investigation teams, which perform criminal-law investigations, are formed by way of special agreement between the competent authorities of two or several Member States for a specific purpose or for a specific period of time. The purpose, duration and composition of the joint investigation team may be amended with the consent of all Member States involved.“

Exchange of information in accordance with § 62 (1): „The information obtained in Austria by a joint investigation team may be used by the authorities of the Member States involved to the extent that it may also have been obtained by way of judicial assistance.“

European Judicial Network in accordance with § 69: “ The European Judicial Network (EJN) shall serve to facilitate the direct exchange of information between authorities and the cooperation between judicial authorities of the Member States by active intermediary services and establishing direct contacts by involving the competent contact authorities of other Member States.“

Ad 6)

- European Convention on Mutual Assistance in Criminal Matters (EuRHÜb) as amended by BGBl. 1983/303

Chapter I, Art. 1 (1), Chapter II, Art. 3 (3), Chapter V, Art. 15 (1): „Letters rogatory referred to in Articles 3, 4 and 5 as well as the applications referred to in Article 11 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels.“ Chapter V, Art. 15 (2): „In case of urgency, letters rogatory may be addressed directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party. They shall be returned together with the relevant documents through the channels stipulated in paragraph 1 of this article.“

Ad 7)

Convention, established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (BGBl. III 2005/65)

Art. 7 - “Spontaneous exchange of information”: “1. Within the limits of their national law, the competent authorities of the Member States may exchange information, without a request to that effect, relating to criminal offences and the infringements of rules of law referred to in Article 3 (1), the punishment or handling of which falls within the competence of the receiving authority at the time the information is provided. 2. The providing authority may, pursuant to its national law, impose conditions on the use of such information by the receiving authority. 3. The receiving authority shall be bound by those conditions.”

Art. 13 (9) - “Joint investigation teams”: “A member of the joint investigation team may, in accordance with his or her national law and within the limits of his or her competence, provide the team with information available in the Member State which has seconded him or her for the purpose of the criminal investigations conducted by the team.”

Ad 8)

Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption (BAK-G): § 4 (2)

“The Federal Bureau of Anti-Corruption has jurisdiction over investigations within the framework

of international police cooperation and administrative assistance as well as for cooperation with the competent institutions of the European Union and the investigating authorities of the EU Member States in the cases defined in paragraph 1. Regarding international police cooperation in the cases 1 to 13 defined in paragraph 1, the Federal Bureau acts as the national point of contact for OLAF, Interpol, Europol and other comparable international institutions. Section 4, paragraph 1, of the Law on the Criminal Intelligence Service Austria [Bundeskriminalamt-Gesetz, BKA-G], BGBl. I 22/2002, remains unaffected.”

Austria provided the following examples of implementation:

Some weeks ago, a South American country sent a request by email. Since the email address could not be assigned to an official authority, the authenticity of the request was checked via Interpol. No investigation was initiated as the case did not fall within the remit of Austria.

- At national level there is a database used by the law enforcement and judicial authorities (“PAD” system for recording processes and data)
- Europol Information System (Austrian National Desk - established in the Criminal Intelligence Service Austria)
- Visa Information System (VIS)
- Schengen Information System (SIS)
- Interpol I-24-7 (via National Central Bureau - established in the Criminal Intelligence Service Austria)

Exchange of information most frequently takes place with German law enforcement authorities, although it should be noted that Germany is not (yet) a State Party to the UNCAC.

No further information can be provided because it would relate to ongoing cases.

#### **(b) Observations on the implementation of the article**

The Austrian legislation provides for a wide array of mechanisms and authorities for the provision of law enforcement cooperation, particularly within the EU context. Austria is in a position to provide for cooperation between law enforcement authorities based on domestic law (section 3 ARHG), even without any treaty, as long as reciprocity is guaranteed. However, as the Austrian authorities reported, the UNCAC has already been considered as legal basis and will be used more often in future for promoting the cooperation between law enforcement authorities.

As a member of Interpol, Eurojust and Europol, Austria is in a position to engage in information exchange through their databases. Cooperation and exchange of information is further facilitated through the Schengen Information System and via police liaison officers.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

#### **Subparagraph 1 (b)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

...

*(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:*

(i) *The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;*

(ii) *The movement of proceeds of crime or property derived from the commission of such offences;*

(iii) *The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention.

- 1) Extradition and Mutual Assistance Law (Auslieferungs- und Rechtshilfegesetz [ARHG]):  
§ 25 (1): “Surrender of Items“ and § 50 (3): “Mutual Assistance for Foreign Countries, General Principle“
- 2) Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the EU (Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union [EU-JZG]):  
§ 1 (1), numbers 1b and 2: “Scope of Application“; § 56 (3): “Judicial Assistance, General Principles”.
- 3) EU Police Cooperation Act (EU-Polizeikooperationsgesetz [EU-PolKG]): § 9 (1): “Europol Information System“;  
§ 11 (1): “Use of data from Europol data processing systems by law enforcement authorities“;  
§ 23 (1): “Collection of criminal records data for the purpose of administrative assistance“;  
§ 30 (1): “Use of the Visa Information System by law enforcement authorities: authorization to access VIS data“;  
§ 33 (1): “Schengen Information System“;  
§ 35 (1): “Alerts for arrest for surrender or extradition purposes“; § 38 (1): “Alerts for persons sought for a judicial procedure“;  
§ 39 (1): “Alerts for persons and property for discreet checks”.
- 4) In general, reference has to be made to § 4, paragraph 2, of the Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption (Bundesgesetz über die Einrichtung und Organisation des Bundesamts zur Korruptionsprävention und Korruptionsbekämpfung [BAK-G]) in this context.
- 5) European Convention on Mutual Assistance in Criminal Matters (Europäisches Übereinkommen über die Rechtshilfe in Strafsachen [EuRHÜb]), Art. 1 (1) - “General provisions”
- 6) Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Protokoll vom Rat gemäss Artikel 34 des Vertrags über die Europäische Union erstellt zu dem Übereinkommen über die Rechtshilfe in Strafsachen zwischen den Mitgliedstaaten der Europäischen Union [ProtEU-RHÜ]):  
Art 1 (1): “Request for information on bank accounts”  
Art. 2 (1): “Requests for information on banking transactions Art. 3

(1): “Requests for the monitoring of banking transactions”

Austria provided the following laws:

Ad 1) ARHG:

§ 25 (1): „With respect to extraditions, items that may be used as evidence or items that the extraditable person has acquired by means of the offence or the proceeds of the exploitation of items stemming from said offence may be surrendered.”

§ 50 (3): “Mutual assistance in the meaning of (1) is any support that is provided for a foreign proceeding in a criminal matter. It also includes the approval of activities within the framework of cross-border surveillance on the basis of intergovernmental agreements.”

Ad 2) EU-JZG:

§ 1 (1): “The present federal law governs the cooperation between the judicial authorities of the Republic of Austria and those of the other Member States of the European Union in criminal proceedings against natural persons and associations (§ 1 (2) and (3) of the Responsibilities of Associations Act - VbVG, BGBl. (Federal Law Gazette) I No. 151/2005). This cooperation comprises

1. the recognition and execution of judicial decisions, especially by [...]
- b) the freezing of evidence and property, [...]
2. judicial assistance in criminal matters, including the formation of joint investigation teams, cooperation with Eurojust and the European Judicial Network (EJN), as well as the service of documents.”

§ 56 (3): “Judicial assistance, as referred to in paragraph (1), shall be any type of support that is granted in connection with foreign proceedings in criminal-law matters. It also comprises the approval of activities that are part of cross-border observations, based on bilateral agreements, of joint investigation teams, and of under-cover investigations.”

Ad 3) EU-PolKG:

§ 9 (1): “In so far as it is necessary in individual cases for carrying out the tasks assigned to them, the Europol National Unit as well as the liaison officers have the right to process the following data in the Europol Information System relating to persons who have been convicted of having committed or having taken part in a criminal offence in respect of which Europol is competent, or who are suspected of such an offence, or if there are reasonable grounds to believe that they will commit such offences:

1. surname, maiden name, given names and any alias or assumed name;
2. date and place of birth;
3. nationality;
4. sex;
5. place of residence, profession and whereabouts of the person concerned;
6. driving licences, identification documents and passport data;
7. where necessary, other characteristics likely to assist in identification, including any specific objective physical characteristics not subject to change such as dactyloscopic data and DNA profile established from the non-coding part of DNA.”

(2) Under the conditions laid down in (1) the Europol National Unit as well as the liaison officers may also use the Europol Information System to process the following data:

1. convictions, where they relate to criminal offences in respect of which Europol is competent;
2. suspicion of punishable acts, as well as criminal offences and when, where and how they were allegedly committed or proven to have been committed;

3. means which were or may be used to commit those criminal offences;
4. suspected membership of a criminal organization;
5. information concerning legal persons;
6. departments handling the case and their filing references;
7. inputting party. [...].“

§ 11 (1): “The law enforcement authorities are authorized to use data from Europol data processing systems for the purpose of preventing and fighting criminal offences in the fields of organized crime and terrorism as well as other forms of serious crime and related criminal offences.”

§ 23 (1): “The law enforcement authorities are authorized to collect criminal records data from individuals if this is required to provide mutual assistance to a law enforcement authority of another Member State and provided that this measure would have been permitted also in similar domestic cases.”

§ 30 (1): “The law enforcement authorities are authorized to query the following data from the Visa Information System (VIS) if this is required in individual cases to prevent, detect and investigate terrorist offences pursuant to §§ 278b and 278c StGB (Austrian Penal Code) as well as other serious criminal offences such as defined in Appendix 1, Part A, to the EU-JZG [point 7: corruption; point 8: fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities’ financial interests; point 9: laundering of the proceeds of crime]: 1. surname, [...] 4. main destination and duration of the intended stay; 8. place of residence.“

§ 33 (1): „The law enforcement authorities jointly run a central database application, the national Schengen Information System, providing access to alerts on persons and property. They have to supply these data to other Member States through the central Schengen Information System [...].”

§ 35 (1): “At the request of the courts or public prosecutor’s offices, the law enforcement authorities are authorized to enter data on persons for whom a European arrest warrant has been issued for the purpose of extradition, into the Schengen Information System.”

§ 38 (1): “At the request of the courts or public prosecutor’s offices, the law enforcement authorities are authorized to enter data on the following persons into the Schengen Information System for the purpose of ascertaining their place of residence or domicile:

1. persons sought to appear as witnesses in a judicial procedure;
2. persons summoned or persons sought to be summoned to appear before the court in connection with criminal proceedings in order to account for acts for which they are being prosecuted; [...]

§ 39 (1): “In order to detect and prosecute punishable acts and to prevent dangerous attacks, the law enforcement authorities are authorized to enter alerts on persons into the Schengen Information System for the purpose of discreet checks, provided that

1. there are reasonable grounds to believe that a person plans to commit or commits a criminal offence defined in Appendix 1 to the EU-JZG, or
2. an overall assessment of a person, in particular on the basis of past criminal offences, gives reason to suppose that that person will commit a criminal offence in the future, such as the offences referred to in Appendix 1, Part A, to the EU-JZG. [...].”

Ad 4) BAK-G: § 4 (2):

“The Federal Bureau of Anti-Corruption has jurisdiction over investigations within the framework of international police cooperation and administrative assistance as well as for cooperation with

the competent institutions of the European Union and the investigating authorities of the EU Member States in the cases defined in paragraph 1. Regarding international police cooperation in the cases 1 to 13 defined in paragraph 1, the Federal Bureau acts as the national point of contact for OLAF, Interpol, Europol and other comparable international institutions. Section 4, paragraph 1, of the Law on the Criminal Intelligence Service Austria [Bundeskriminalamt-Gesetz, BKA-G], BGBl. I 22/2002, remains unaffected.”

Ad 5) EuRHÜb:

Art. 1 (1): “The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.”

Ad 6) ProtEU-RHÜ:

Art. 1 (1): “Each Member State shall, under the conditions set out in this Article, take the measures necessary to determine, in answer to a request sent by another Member State, whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in its territory and, if so, provide all the details of the identified accounts.”

Art. 2 (1): “On request by the requesting State, the requested State shall provide the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified in the request, including the particulars of any sending or recipient account.”

Art. 3 (1): “Each Member State shall undertake to ensure that, at the request of another Member State, it is able to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request and communicate the results thereof to the requesting Member State.”

Austria provided the following examples of implementation:

The establishment, within the Austrian Criminal Intelligence Service (Bundeskriminalamt -BKJ), of the Unit for Asset Recovery and the Austrian Financial Intelligence Unit is a successful organizational measure in this field.

## **(b) Observations on the implementation of the article**

The reviewing experts noted that the BAK has jurisdiction over investigations within the framework of international police cooperation and administrative assistance as well as for cooperation with the corresponding institutions of the European Union and the investigating authorities of the EU Member States in the above mentioned cases. Regarding international police cooperation, the Bureau acts as point of contact for OLAF, Interpol, Europol and other comparable international institutions.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

## **Subparagraph 1 (c)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

...

*(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention.

The country under review provided the following laws:

- 1) Extradition and Mutual Assistance Law (Auslieferungs- und Rechtshilfegesetz [ARHG]): § 25 (1): “Surrender of Items“
- 2) Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the EU (Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union [EU-JZG]): § 1 (1), number 1b: „Scope of Application“
- 3) EU Police Cooperation Act (EU-Polizeikooperationsgesetz [EU-PolKG]): § 10 (1): „Work Files for the Purpose of Analysis“
- 4) European Convention on Extradition: Art. 20 (1a): “Handing over of property”

(In relations with Member States already applying the European arrest warrant this convention was replaced as of 1 May 2004 by the federal law “EU-JZG”, BGBl. I 36/2004.)

Ad 1) ARHG:

§ 25 (1): „With respect to extraditions, items that may be used as evidence or items that the extraditable person has acquired by means of the offence or the proceeds of the exploitation of items stemming from said offence may be surrendered.”

Ad 2) EU-JZG:

§ 1 (1): “The present federal law governs the cooperation between the judicial authorities of the Republic of Austria and those of the other Member States of the European Union in criminal proceedings against natural persons and associations (§ 1 (2) and (3) of the Responsibilities of Associations Act - VbVG, Federal Law Gazette I No. 151/2005). This cooperation comprises 1. the recognition and execution of judicial decisions, especially by [...] b) the freezing of evidence and property [...].”

Ad 3) EU-PolKG:

§ 10 (1): “The Europol National Unit and the liaison officers are authorized to provide information to Europol on criminal offences in respect of which it is competent for setting up work files for the purpose of analysis, provided that the law enforcement authorities are also authorized to process this information in accordance with § 53a, paragraph 2, of the Security Police Act (Sicherheitspolizeigesetz [SPG]) for the purpose of analysis.”

Ad 4) European Convention on Extradition:

Art. 20 (1a): “The requested Party shall, in so far as its law permits and at the request of the requesting Party, seize and hand over property:

- a. which may be required as evidence, or [...].”

Austria did not provide any cases of implementation.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

### **Subparagraph 1 (d)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

...

*(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;*

### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention.

Austria cited the following applicable measures:

1. PolKG (Police Cooperation Act, BGBl. I 1997/104) as amended by BGBl. (Federal Law Gazette) I 2009/132: Administrative assistance in accordance with §3 and §5, paragraph 1
2. Cooperation and exchange of information between law enforcement agencies via Europol Network
  - 2.1. BKA-G (Law on the Criminal Intelligence Service Austria) as amended by BGBl. I 2010/37: According to Article 4, paragraph (1), of the BKA-G (legal act concerning the competent authorities in the field of police cooperation), the Europol National Unit is part of the Criminal Intelligence Service Austria within the Federal Ministry of the Interior.
  - 2.2. EU-PolKG (EU Police Cooperation Act) as amended by BGBl. I 2010/105 (legal act implementing the Europol Council Decision 2009/371/JHA): Article 8 of the Europol Council Decision, implemented by Article 6 of the EU-PolKG
3. Cooperation and exchange of information between law enforcement agencies of the Schengen area  
EU-PolKG as amended by BGBl. I 2010/105 (Anti-Fraud Act [BBKG 2010])
  - Use of the Visa Information System (VIS) by law enforcement agencies in accordance with § 30 (1) - "Other Serious Criminal Offences", pursuant to Appendix 1, Part A, to the Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the EU (EU-JZG)
  - Use of the Schengen Information System, § 33 (1) and § 35 (1)
4. Cooperation and exchange of information via police liaison officers
  - Convention implementing the Schengen Agreement, Art. 47 (1)
  - bi- and multilateral treaties between the Republic of Austria and the receiving countries, concluded on the basis of the PolKG as amended by BGBl. I 2009/132 (Administrative Assistance), Chapter 4: „Authorization to Conclude Intergovernmental Treaties“, § 18
  - EU-PolKG §27 (2)
  - 38<sup>th</sup> Federal Constitutional Law on Cooperation and Solidarity in the Secondment of Units and Individuals to Foreign Countries (Bundesverfassungsgesetz über Kooperation und Solidarität bei der Entsendung von Einheiten und Einzelpersonen in das Ausland [KSE-BVG]) § 1, paragraph 1a (BGBl. I, 38/1997)
  - Council Decision of 6 April 2009 establishing the European Police Office (Europol) - 2009/371/JHA, Art. 9 (1) - (3) a-d

5. Cooperation and exchange of information at EU level

- EU-JZG (Judicial Cooperation in Criminal Matters with the Member States of the EU) as amended by BGBl. I 2007/112 (Act Accompanying the Reform of the Code of Criminal Procedure [Strafprozessreformbegleitgesetz]):

Forming joint investigation teams in accordance with § 60 (1), and exchange of information in accordance with § 62 (1);

European Judicial Network in accordance with § 69.

6. Communication channels and information exchange within the framework of mutual assistance

- European Convention on Mutual Assistance in Criminal Matters (EuRHÜb) as amended by BGBl. 1983/303

Chapter I, Art. 1 (1), Chapter II, Art. 3 (3), Chapter V, Art. 15 (1)

7. Convention, established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union

BGBl. III 2005/65

Art. 7: Spontaneous exchange of information  
Art. 13 (9): Joint investigation teams

8. Federal Law on the Establishment and Organization of the BAK (BAK-G), BGBl. I 2009/72 §4 (2)

Austria provided the following laws:

Ad 1) Administrative assistance in accordance with PolKG

§3 (1): „The law enforcement authorities are obliged to provide administrative assistance upon request

1. pursuant to international law,
2. if it serves to fulfil the duties stipulated under § 1, paragraph 1, of a foreign law enforcement authority on the condition of reciprocity, or
3. if it serves to fulfil the duties stipulated under § 1, paragraph 1, of a law enforcement organization.

(2) The law enforcement authorities are obliged to provide administrative assistance also without being requested,

1. by using data that, pursuant to international law, have to be transmitted also due to their nature, or
2. if required to fulfil the duties stipulated under § 1, paragraph 1, of a foreign law enforcement authority on the condition of reciprocity, or
3. if required for criminal investigation activities by Interpol.“

§5 (1): „The law enforcement authorities are empowered to provide administrative assistance

1. in the form of any measure that does not interfere with the rights of a human being, or
2. by using person-related data in conformity with the following paragraphs and Chapter 3.“

Ad 2.1) BKA-G, Article 4, paragraph (1): “In order to fulfil the tasks assigned to the Federal Minister of the Interior in the field of international police cooperation, the Criminal Intelligence Service runs the National Central Bureau of the International Criminal Police Organization INTERPOL, the EUROPOL National Unit and the SIRENE Bureau.“

The Europol National Unit is thus part of the Bundeskriminalamt (Criminal Intelligence Service Austria) within the Federal Ministry of the Interior.

Ad 2.2)

EU-PolKG § 6:

„(1) The Europol National Unit is the only body with direct access to the Europol information systems and is responsible for the contact with Europol.

(2) The Europol National Unit shall:

1. supply Europol on their own initiative with the information and intelligence necessary for it to carry out its tasks;
2. respond to Europol's requests for information, intelligence and advice;
3. keep information and intelligence up to date;
4. evaluate information and intelligence for the law enforcement authorities and transmit that material to them;
5. issue requests for information, intelligence, advice and analysis to Europol;
6. supply Europol with information for storage in its databases;
7. ensure compliance with the law in the exchange of information with Europol.”

Ad 3)

- Authorization to access VIS data: § 30 EU-PolKG, paragraph (1): “The law enforcement authorities are authorized to query the following data from the Visa Information System (VIS) if this is required in individual cases to prevent, detect and investigate terrorist offences pursuant to §§ 278b and 278c StGB (Austrian Penal Code) as well as other serious criminal offences such as defined in Appendix 1, Part A, to the EU-JZG [point 7: corruption; point 8: fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests; point 9: laundering of the proceeds of crime]...”

- Schengen Information System: § 33 EU-PolKG, paragraph (1): „The law enforcement authorities jointly run a central database application, the national Schengen Information System, providing access to alerts on persons and property. They have to supply these data to other Member States through the central Schengen Information System...” Furthermore, § 35 EU-PolKG, paragraph (1) applies: „At the request of the courts or public prosecutor's offices, the law enforcement authorities are authorized to enter data on persons for whom a European arrest warrant has been issued for the purpose of extradition, into the Schengen Information System.”

Ad 4)

- Convention implementing the Schengen Agreement, Art. 47 (1): “The Contracting Parties may conclude bilateral agreements providing for the secondment, for a specified or unspecified period, of liaison officers from one Contracting Party to the police authorities of another Contracting Party.”

- PolKG (Police Cooperation Act) as amended by BGBl. I 2009/132 (Administrative Assistance),

§ 18: Authorization to Conclude Intergovernmental Treaties: „Provided that the federal government...”

- EU-PolKG §27 (2): „Furthermore, with the consent of the Federal Minister of the Interior and for the purpose of strengthening police cooperation, officers of the public law enforcement services can be seconded to another Member State in order to jointly carry out tasks aimed at maintaining public peace, order and security or tasks supporting the criminal police in the receiving Member State.”

- 38<sup>th</sup> Federal Constitutional Law on Cooperation and Solidarity in the Secondment of Units and Individuals to Foreign Countries (KSE-BVG) § 1, paragraph 1a (BGBl. I, 38/1997): „Units and individuals can be seconded to foreign countries

1. for solidarity and participation in a) peacekeeping measures including the promotion of democracy and the rule of law, as well as the protection of human rights in the framework of an international organization, the Organization for Security and Co-operation in Europe (OSCE), or the implementation of decisions of the European Union within the Common Foreign and Security Policy.”

- Council Decision of 6 April 2009 establishing the European Police Office (Europol) - 2009/371/JHA, Art. 9 (1) - (3) a-d: Liaison officers:

“(1) Each national unit shall second at least one liaison officer to Europol. Except as otherwise stipulated in specific provisions of this Decision, liaison officers shall be subject to the national law of the seconding Member State. (2) Liaison officers shall constitute the national liaison bureaux at Europol and shall be instructed by their national units to represent the interests of the latter within Europol in accordance with the national law of the seconding Member State and the provisions applicable to the administration of Europol. (3) Without prejudice to Article 8 (4) and (5), liaison officers shall: a) provide Europol with information from the seconding national unit; b) forward information from Europol to the seconding national unit; c) cooperate with Europol staff by providing information and giving advice; and d) assist in the exchange of information from their national units with the liaison officers of other Member States under their responsibility in accordance with national law. Such bilateral exchanges may also cover crimes out of the competence of Europol, as far as allowed by national law.”

Ad 5)

EU-JZG (Judicial Cooperation in Criminal Matters with the Member States of the EU) as amended by BGBl. I 2007/112 (Act Accompanying the Reform of the Code of Criminal Procedure)

Establishment of joint investigation teams in accordance with § 60 (1): „Joint investigation teams, which perform criminal-law investigations, are formed by way of special agreement between the competent authorities of two or several Member States for a specific purpose or for a specific period of time. The purpose, duration and composition of the joint investigation team may be amended with the consent of all Member States involved.“

Exchange of information in accordance with § 62 (1): „The information obtained in Austria by a joint investigation team may be used by the authorities of the Member States involved to the extent that it may also have been obtained by way of judicial assistance.“

European Judicial Network in accordance with § 69: “The European Judicial Network (EJN) shall serve to facilitate the direct exchange of information between authorities and the cooperation between judicial authorities of the Member States by active intermediary services and establishing direct contacts by involving the competent contact authorities of other Member States.“

Ad 6)

- European Convention on Mutual Assistance in Criminal Matters (EuRHÜb) as amended by BGBl. 1983/303

Chapter I, Art. 1 (1), Chapter II, Art. 3 (3), Chapter V, Art. 15 (1): „Letters rogatory referred to in Articles 3, 4 and 5 as well as the applications referred to in Article 11 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels.“ Chapter V, Art. 15 (2): „In case of urgency, letters rogatory may be addressed directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party. They shall be returned together with the relevant documents through the channels stipulated in paragraph 1 of this article.“

Ad 7)

Convention, established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (BGBl. III 2005/65)

Art. 7 - “Spontaneous exchange of information”: “1. Within the limits of their national law, the competent authorities of the Member States may exchange information, without a request to that effect, relating to criminal offences and the infringements of rules of law referred to in Article 3 (1), the punishment or handling of which falls within the competence of the receiving authority at the time the information is provided. 2. The providing authority may, pursuant to its national law, impose conditions on the use of such information by the receiving authority. 3. The receiving authority shall be bound by those conditions.”

Art. 13 (9) - “Joint investigation teams”: “A member of the joint investigation team may, in accordance with his or her national law and within the limits of his or her competence, provide

the team with information available in the Member State which has seconded him or her for the purpose of the criminal investigations conducted by the team.”

Ad 8)

Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption (BAK-G): § 4 (2)

“The Federal Bureau of Anti-Corruption has jurisdiction over investigations within the framework of international police cooperation and administrative assistance as well as for cooperation with the competent institutions of the European Union and the investigating authorities of the EU Member States in the cases defined in paragraph 1. Regarding international police cooperation in the cases 1 to 13 defined in paragraph 1, the Federal Bureau acts as the national point of contact for OLAF, Interpol, Europol and other comparable international institutions. Section 4, paragraph 1, of the Law on the Criminal Intelligence Service Austria [Bundeskriminalamt-Gesetz, BKA-G], BGBl. I 22/2002, remains unaffected.”

Austria provided the following examples of implementation:

The Austrian Federal Bureau of Anti-Corruption (BAK) launched a European initiative, the “European Anti-Corruption Training” (EACT). EACT is a platform for European anti-corruption agencies to exchange experience and best practices in the fields of investigation and prevention, including specific means and methods to combat corruption.

## **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

## **Subparagraph 1 (e)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

...

*(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;*

## **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention.

Austria cited the following applicable measures:

1. The Federal Bureau of Anti-Corruption (BAK) as the national point of contact for international police cooperation in the field of anti-corruption. Within its remit, the Federal Bureau acts as the national contact point for foreign authorities in the field of preventing, combating and prosecuting corruption, and promotes international cooperation in the anti-corruption field, in particular within the implementation of the United Nations Convention against Corruption (UNCAC) and conventions of the Council of Europe (GRECO) or within the framework of international networks.

2. Cooperation between the BAK and other authorities and departments in accordance with the Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption

(BAK-G)

3. International administrative assistance in the police field in accordance with the PolKG (Police Cooperation Act) as a basis for economic and effective law enforcement

4. Seconding liaison officers to Europol:

4.1 In accordance with Art. 5 of the Europol Convention, implemented by the EU-PolKG (EU Police Cooperation Act), § 7

4.2 Pursuant to BKA-G (Law on the Criminal Intelligence Service Austria) as amended by BGBl. (Federal Law Gazette) I 2010/37

The country under review provided the following laws:

Ad 1) BAK-G, § 4 (2):

“The Federal Bureau of Anti-Corruption has jurisdiction over investigations within the framework of international police cooperation and administrative assistance as well as for cooperation with the competent institutions of the European Union and the investigating authorities of the EU Member States in the cases defined in paragraph 1. Regarding international police cooperation in the cases 1 to 13 defined in paragraph 1, the Federal Bureau acts as the national point of contact for OLAF, Interpol, Europol and other comparable international institutions. Section 4, paragraph 1, of the Law on the Criminal Intelligence Service Austria [Bundeskriminalamt-Gesetz, BKA-G], BGBl. I 22/2002, remains unaffected.”

Ad 2) BAK-G, § 6:

“(2) For reasons of expediency, the Federal Bureau may assign certain investigations to other law enforcement authorities and departments. It may order the respective entity to directly report to the Federal Bureau, at regular or specified intervals, on the progress of a certain case.

(3) The Federal Bureau may transfer investigations to other law enforcement authorities and departments if there is no particular public interest regarding the importance of the criminal offence or of the person investigated. The relevant public prosecutor’s office has to be informed of such transfer.”

Ad 3) PolKG § 2 (1):

“International administrative assistance in the police field (hereinafter: administrative assistance) refers to mutual assistance in the completion of tasks and to cooperation in the joint completion of tasks. It takes place between law enforcement authorities on the one hand and security organizations or foreign law enforcement authorities on the other hand.”

Ad 4.1) EU-PolKG § 7:

„Seconding liaison officers to Europol“

„(1) The Europol National Unit has to second the required number of liaison officers to Europol. The liaison officers are members of the Europol National Unit.

(2) The main duties of the liaison officers seconded to Europol are:

1. to represent, within their remit, the Austrian interests vis-à-vis Europol;
2. to provide Europol with information from the Europol National Unit;
3. to forward information from Europol to the Europol National Unit;
4. to cooperate with the officials of Europol in the completion of the tasks of Europol;
5. to assist in the exchange of information between the Europol National Unit and liaison officers of other Member States.”

Ad 4.2) BKA-G, Article 4, paragraph (1):

“In order to fulfil the tasks assigned to the Federal Minister of the Interior in the field of international police cooperation, the Criminal Intelligence Service runs the National Central Bureau of the International Criminal Police Organization INTERPOL, the EUROPOL National Unit and the SIRENE Bureau.“

The Europol National Unit is thus part of the Bundeskriminalamt (Criminal Intelligence Service

Austria) within the Federal Ministry of the Interior.

Austria provided the following examples of implementation:

Since 2006, four criminal investigators have been seconded by the BAK (Federal Bureau of Anti-Corruption) and, respectively, the former Federal Bureau for Internal Affairs (BIA) to Germany (Landeskriminalamt Lower Saxony and Landeskriminalamt Hamburg) for one month each. In return, the BAK (the BIA, respectively) has received several German criminal investigators for secondments of one month each.

If applicable, please identify/describe the liaison officer positions within your law enforcement authorities

These special attachés are part of the organizational structure of the Austrian Federal Ministry of the Interior (Department I/4 - International Affairs). In principle, they are official members of the diplomatic staff of the representation office to the country to which they are seconded and have the official title “Attaché (Polizeilicher Verbindungsbeamter)” / “Attaché (Police Liaison)” / “Attaché (Affaires de Coopération Policière)”. Generally, the period of secondment is four years and can be extended. Irrespective of having a permanent post in the Ministry of the Interior, the liaison officers - in their capacity as “special attachés of the Ministry of the Interior” - are members of the diplomatic staff of the respective embassy. Therefore, whenever acting as members of the diplomatic staff in external matters, in particular regarding international law, foreign affairs and protocol, they are bound by the instructions of the head of the respective representation office.

## **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

### **Subparagraph 1 (f)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

...

*(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.*

## **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention.

Austria cited the following applicable measures:

1. Cooperation and exchange of information between law enforcement agencies via Europol Network:

EU Police Cooperation Act (EU-PolKG) as amended by BGBl. I 2010/105 (legal act implementing the Europol Council Decision 2009/371/JHA):

Article 8 of the Europol Council Decision, implemented by Article 6 of the EU-PolKG

2. Cooperation and exchange of information via police liaison officers  
- Convention implementing the Schengen Agreement, Art. 47 (1)

- bi- and multilateral treaties between the Republic of Austria and the receiving countries, concluded on the basis of the Police Cooperation Act (Polizeikooperationsgesetz [PolKG]) as amended by BGBl. I 2009/132 (Administrative Assistance), Chapter 4: „Authorization to Conclude Intergovernmental Treaties“, § 18

### 3. Co-ordinating body for combating corruption

GRECO recommended i) to establish an inter-institutional and multi-disciplinary coordination mechanism that would be given the necessary resources and a clear mandate to initiate a strategy or policy in the area of anti-corruption; ii) to involve the Länder and the private sector in these overall anti-corruption efforts. The Co-ordinating Body has dealt with various issues regarding the prevention of and fight against corruption such as whistleblower protection and improvement of efficiency regarding the investigation and prosecution of economic crime

UNODC

including corruption. Topics that the Co-ordinating Body dealt with resulted in draft bills such as that on lobbying and also in amendments, already adopted by Parliament, such as measures on whistleblower protection and post public employment. Finally, questions regarding the legal base and concrete tasks of the Co-ordinating Body are still under consideration.

#### 4. Anti-Corruption Day as a platform for leading national and international experts

Due to its statutory responsibilities, the Federal Bureau of Anti-Corruption (BAK) offers seminars and lectures for employees of the entire Ministry of the Interior and other public bodies.

In addition, since 2007, the BAK organizes the annual Austrian Anti-Corruption Day, which has established itself as a platform for leading national and international experts in the field of combating and preventing corruption.

Within the framework of this event, specialists from all parts of the public service, government-related companies and institutions, as well as renowned scientists analyse and discuss the most current issues and challenges concerning the fight against corruption.

Austria provided the following laws:

Ad 1)

EU-PolKG § 6:

„(1) The Europol National Unit is the only body with direct access to the Europol information systems and is responsible for the contact with Europol.

(2) The Europol National Unit shall:

1. supply Europol on their own initiative with the information and intelligence necessary for it to carry out its tasks;
2. respond to Europol's requests for information, intelligence and advice;
3. keep information and intelligence up to date;
4. evaluate information and intelligence for the law enforcement authorities and transmit that material to them;
5. issue requests for information, intelligence, advice and analysis to Europol;
6. supply Europol with information for storage in its databases;
7. ensure compliance with the law in the exchange of information with Europol.”

Ad 2)

- Convention implementing the Schengen Agreement, Art. 47 (1): “The Contracting Parties may conclude bilateral agreements providing for the secondment, for a specified or unspecified period, of liaison officers from one Contracting Party to the police authorities of another Contracting Party.”

- PolKG (Police Cooperation Act) as amended by BGBl. I 2009/132 (Administrative Assistance),

§ 18: Authorization to Conclude Intergovernmental Treaties: „Provided that the federal government is authorized to conclude treaties in accordance with Art. 66 (2) of the Federal Constitutional Law (Bundesverfassungsgesetz, B-VG), it may conclude international agreements:

[...]

2. on the intervention of law enforcement authorities carried out by officers of the public law enforcement services or customs officers in foreign countries, or the intervention of foreign law enforcement authorities on the Austrian territory pursuant to §§ 14 to 16; in this context, officers of the public law enforcement services or customs officers may only be authorized for intrusion when conducting open or undercover investigations or when directly exercising official

authority and coercive power for the purpose of stopping or arresting someone; agreements on intrusion by officers of foreign law enforcement authorities may only be concluded pursuant to the provisions empowering officers of the public law enforcement services to such intrusion on the Austrian territory.[...]"

Ad 3)

Greco RC-I/II (2010) 1E (Joint First and Second Evaluation Round)

GRECO recommended i) to establish an inter-institutional and multi-disciplinary coordination mechanism that would be given the necessary resources and a clear mandate to initiate a strategy or policy in the area of anti-corruption; ii) to involve the Länder and the private sector in these overall anti-corruption efforts.

Ad 4)

Federal Law on the Establishment and Organization of the Federal Bureau of Anti-Corruption (BAK-G) § 4 (3): "The BAK shall analyse corruption phenomena, gather information on preventing and combating them and develop appropriate preventive measures."

Austria provided the following examples of implementation:

Due to the recommendation by GRECO [see above, b) 3.], an inter-institutional and multi-disciplinary coordination mechanism ("Co-ordinating body for combating corruption") was established to coordinate the anti-corruption measures. This body consists of representatives of the Parliamentary Administration, several ministries (Federal Chancellery, Federal Ministry of Finance, Federal Ministry of the Interior, Federal Ministry of Justice, Federal Ministry of Economy, Family and Youth), the Länder, different authorities (Public Prosecutor's Office for Combating Economic Crime and Corruption, Federal Bureau of Anti-Corruption - BAK, Financial Market Authority), as well as representatives of the private sector (Economic Chamber, Union of Public Service, Chamber of Civil Law Notaries, Chamber of Lawyers).

## **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

## **Paragraph 2**

*2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.*

## **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention.

Austria cited the following applicable measures:

1) Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, implemented by BGBl. (Federal Law Gazette) III 38/2000 (“Übereinkommen über die Bekämpfung der Bestechung in der EU”)

2) Police Cooperation Act (PolKG): BGBl. I 104/1997 as amended by BGBl. I 146/1999

3) Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the EU (EU-JZG) as amended by BGBl. I No. 36/2004

Otherwise, cooperation between law enforcement agencies is based on international agreements such as the UNCAC, the UNTOC, and the conventions of GRECO.

Austria provided the following laws:

Ad 1) Article 9, paragraphs 1-2:

“1. If any procedure in connection with an offence established in accordance with the obligations arising out of Articles 2, 3 and 4 concerns at least two Member States, those States shall cooperate effectively in the investigation, the prosecution and in carrying out the punishment imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another Member State.

2. Where more than one Member State has jurisdiction and has the possibility of viable prosecution of an offence based on the same facts, the Member States involved shall cooperate in deciding which shall prosecute the offender or offenders with a view to centralizing the prosecution in a single Member States where possible.”

Ad 2) Section 18, paragraphs 1-3:

“Authorization to Conclude Intergovernmental Treaties: Provided that the federal government is authorized to conclude treaties in accordance with Art. 66 (2) of the Federal Constitutional Law (Bundesverfassungsgesetz, B-VG), it may conclude international agreements:

1. on the transmission or cession of data for the purpose of administrative assistance; data transmitted in this context must be used in accordance with the conditions laid down in § 9 (1); 2. on the intervention of law enforcement authorities carried out by officers of the public law enforcement services or customs officers in foreign countries, or the intervention of foreign law enforcement authorities on the Austrian territory pursuant to §§ 14 to 16; in this context, officers of the public law enforcement services or customs officers may only be authorized for intrusion when conducting open or undercover investigations or when directly exercising official authority and coercive power for the purpose of stopping or arresting someone; agreements on intrusion by officers of foreign law enforcement authorities may only be concluded pursuant to the provisions empowering officers of the public law enforcement services to such intrusion on the Austrian territory.

3. in order to conduct joint training courses dealing with the tasks defined in § 1 (1).”

Ad 3) § 1 (1):

“The present federal law governs the cooperation between the judicial authorities of the Republic of Austria and those of the other Member States of the European Union in criminal proceedings against natural persons and associations (§ 1 (2) and (3) of the Responsibilities of Associations Act - VbVG, Federal Law Gazette I No. 151/2005). This cooperation comprises 1. the recognition and execution of judicial decisions, especially by

- a) the surrender of persons;
- b) the freezing of evidence and property;
- c) the execution of orders relating to property rights;
- d) the execution of

pecuniary sanctions;

2. judicial assistance in criminal matters, including the formation of joint investigation teams, cooperation with Eurojust and the European Judicial Network (EJN), as well as the service of documents.”

3. the transfer of criminal prosecution and the transfer of the enforcement of sentences.” § 1 (2):

“Unless the provisions of the present federal law stipulate otherwise, the Extradition and Mutual

Assistance Law (ARHG), BGB. (Federal Law Gazette) No. 529/1979, shall apply in analogy.”

International cooperation between law enforcement agencies is thus guaranteed even if no special agreements exist on a bilateral level.

Austria may consider the UNCAC as a legal basis for law enforcement cooperation in respect of the offences covered by this Convention.

Austria did not provide any cases of implementation.

#### **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

#### **Paragraph 3**

*3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention.

United Nations Convention against Transnational Organized Crime (Übereinkommen der Vereinten Nationen gegen die grenzüberschreitende organisierte Kriminalität - UNTOC), implemented by BGBl. (Federal Law Gazette) III No. 84/2005

Austria provided the following laws:

Article 27, paragraph 3: “States Parties shall endeavour to cooperate within their means to respond to transnational organized crime committed through the use of modern technology.”

The cooperation with Interpol, Europol and Eurojust guarantees the successful investigation and prosecution of criminal offences committed through the use of modern technology.

Austria provided the following examples of implementation:

Currently, the Austrian Federal Ministry of the Interior (Criminal Intelligence Service) is setting up a unit for the nationwide fight against cybercrime.

**(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Article 49 Joint investigations**

*States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention. Upon ratification of the UNCAC, its provisions are directly applicable by the Austrian authorities. Furthermore, Sections 60 seq. of the EU-JZG (in the relations to the Member States of the EU) are applicable (Seenex).

Regarding the examples of implementation:

Two bilateral Joint Investigation Teams (JIT) - one with Denmark and one with the Czech Republic - are actually dealing with cases including bribery allegations. One trilateral JIT (with Slovenia and Finland) has already concluded the investigation phase and led to an indictment in the participating countries (no final conviction yet).

**(b) Observations on the implementation of the article**

The reviewing experts noted that international cooperation in the field of gathering evidence through special investigative means and joint investigation teams is possible and subject to ad hoc arrangements and, in relation to Member States of the European Union, is regulated by sections 60 et seq. of the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (EU-JZG). At the operational level, two bilateral joint investigation teams and one trilateral are dealing with cases involving bribery allegations.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Article 50 Special investigative techniques**

**Paragraph 1**

*1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria considered that it had implemented this provision of the Convention.

Austria cited the following applicable measures:

The measures available to the law enforcement agencies are laid down in Chapter 8 (§§ 109 up to and including 166) of the Austrian Code of Criminal Procedure (StPO), and include: seizure (§§ 110-114); attachment (§ 115); alienation of seized or attached assets (§§ 115a); information on bank accounts and bank operations (§116); identification, search of areas and objects, search of persons, body inspection and molecular genetic analysis (§§ 117-124); experts and interpreters, external examination of a corpse and autopsy (§§ 125-128); surveillance, undercover investigation and sham transactions (§§ 129-133); seizure of letters, information on telecommunication data, information on retained data as well as on the surveillance of telecommunication and persons (§§ 134-140); linkage of databases (§§ 141-143); protection of clerical secrecy and professional secrecy (§ 144); special rules for application, legal protection and compensation for damages (§ 145, 147, 148); inspection and reconstruction of the offence (§§ 149, 150); enquiries and hearings (§§ 151-153); witness and obligation to tell the truth (§ 154); prohibition to interview as a witness (§ 155); exemption from giving evidence (§ 156); refusal to give evidence (§ 157, 158); information and invalidity (§ 159); carrying out the hearing (§ 160); anonymous evidence (§ 162); identity parade (§ 163); hearing of the defendant (§ 164); indirect interrogation during the investigation stage with participation of the parties (§ 165); prohibited evidence (§ 166).

**1975 Code of Criminal Procedure, as last amended,**

**date 17 June 2013**

**4<sup>th</sup> Chapter**

**Observation, Covert Investigation and Fictitious Business Transaction**

**Definitions**

**Section 129.** In the meaning of this law

1. "Observation" is the clandestine monitoring of a person's conduct,
2. "Covert Investigation" is the intervention of criminal police officers or other persons on behalf of the criminal police, who neither disclose nor indicate their official function or else their assignment,
3. "Fictitious Business Transaction" is the attempt or the simulated execution of a criminal act, consisting of purchasing, getting hold of, owning, importing, exporting or transiting objects or assets, which were alienated, originated from a criminal act or are intended for committing such a criminal act, or whose possession is absolutely forbidden.

**Observation**

**Section 130.** (1) Observation is permissible, if it is deemed necessary to resolve a criminal act or to trace the whereabouts of an accused person.

(2) The use of technical means, which by way of signal processing facilitate confirming the spatial area, in which the person observed is present, and the opening of vehicles and receptacles for mounting such technical means shall be permissible to support the observation procedure, if otherwise such observation would be futile or made much more difficult.

(3) If such observation

1. is supported by the use of technical means, paragraph (2),
2. lasts over a time period of more than 48 hours, or
3. is executed or supposed to be executed outside the Austrian territory,

it shall only be permissible if there is suspicion that an intentional criminal act has been committed, which is punishable with a prison term of more than one year, and it can be assumed on the basis of certain facts that the person observed has committed such criminal act or, that contact will be established with the accused person, or the hiding place of a fugitive or absent accused person can be discovered by such action.

### **Covert Investigation**

**Section 131.** (1) Covert investigation shall be permissible if it is deemed necessary to resolve a criminal act.

(2) Any systematic, longer-term covert investigation shall only be permissible, if otherwise the resolution of an intentional criminal act which is punishable with a prison term of more than one year, or the prevention of a criminal act planned by a criminal or terrorist group or criminal organisation (Sections 278 to 278b Penal Code) would be made much more difficult. If such action is indispensable for such resolution or prevention, it shall be also permissible pursuant to Section 54a Security Police Act to manufacture documents concealing the identity of the criminal police officer, and to use them in legal dealings to accomplish such investigation purposes.

(3) The covert investigator shall be directed by the criminal police and monitored in regular intervals. His deployment and the detailed circumstances of such deployment, as well as information and knowledge obtained by him, shall be recorded in a report or in an official memo (Section 95), inasmuch as they could be important for the investigation.

(4) Covert investigators may only enter flats or other facilities protected by domiciliary rights with the consent of the owner. Such consent may not be achieved by faking an access authorisation.

### **Fictitious Business Transaction**

**Section 132.** Performing a fictitious business transaction shall be permissible, if otherwise resolving a criminal act (Section 17 (1) Penal Code), or securing objects or assets originating from a criminal act or subject to confiscation (Section 19a Penal Code), forfeiture (Section 20 Penal Code), extended forfeiture (Section 20b (1) Penal Code) or seizure (Section 26 Penal Code), would be made much more difficult. Subject to such conditions it shall also be permissible to participate in the execution of a fictitious business transaction by a third party (Section 12, third case Penal Code).

### **Common Provisions**

**Section 133.** (1) Observation pursuant to Section 130 (1) and covert investigation pursuant to Section 131 (1), as well as fictitious business transactions (Section 132), which serve to secure drugs or counterfeit money, may be executed by the criminal police on their own initiative. Conclusion of any other fictitious business transaction, or execution of observation pursuant to Section 130 (3) and covert investigation pursuant to Section 131 (2) shall be ordered by the public prosecutor's office. Any observation may exceed the timeframe foreseen in Section 130 (3), clause 2 by not more than fourteen days, provided the criminal police officers notify the public prosecutor without delay, once the deadline has been exceeded (Section 100 (2), clause 2).

(2) Any observation pursuant to Section 130 (3) and covert investigation pursuant to Section 131 (2) may only be ordered and authorised for such time period as is likely required for accomplishing its purpose, but not longer than three months. A newly issued order shall be permissible, inasmuch as the conditions prevail, and it can be assumed on the basis of certain facts that continued observation and covert investigation will be successful; But Section 99 (2) shall not be applicable. Observation and covert investigation shall be terminated if the conditions cease to exist, if their purpose has been accomplished or such accomplishment can no longer be expected, or if the public prosecutor has ordered such termination.

(3) Observation, covert investigation and fictitious business transactions shall be executed by the criminal police. The use of technical means for optical or acoustical surveillance of persons during such investigation measures shall only be permissible under the provisions of Section 136.

(4) Upon termination of the observation pursuant to Section 130 (3), the covert investigation pursuant to Section 131 (2) and the fictitious business transaction, the persons accused or involved, provided their identity is known or can be ascertained without any particular procedural efforts, shall be served the orders and authorisations under (1) and (2). Such service may be postponed, however, as long as it could endanger the purpose of investigations in the present or in other proceedings.

### **§ 134. Criminal Procedure Code Definitions**

For the purposes of the present law, the following terms shall mean:

1. "confiscation of letters" relates to telegrams, letters or other mail pieces that are opened or held back, which the accused sends off, or which are addressed to him/her,
2. "information about the data of a message transmission" is information that is provided about communication data (§ 92 (3) item 4 of the Telecommunications Act), access data (§ 92 (3) item 4a of the Telecommunications Act) and position data (§ 92 (3) item 6 of the Telecommunications Act) of a telecommunications service, or a service of the information society (§ 1 (1) item 2 of the Notification Act),
- 2a "information about data retained" is information that is provided about data provider of public communication services under § 102a para 2 to 4 of Telecommunications Act are obliged to store and which are not covered by § 99 para 2 Telecommunications Act and do not fall under the information under nr. 2.
3. "surveillance of messages" is the determination of the contents of messages (§ 92 (3) item 7 of the Telecommunications Act), which are exchanged or forwarded via a communications network (§ 3 item 11 of the Telecommunications Act), or a service of the information society (§ 1 (1) item 2 of the Notification Act),
4. "optical and acoustic surveillance of persons" is the surveillance of the conduct of persons by penetrating their private sphere, as well as of the comments of persons which are not intended to come to the immediate knowledge of third parties, by using technical means for image and sound transmission and image and sound recording, without the persons concerned having any knowledge thereof,
5. "result" (of the confiscation, information or surveillance listed in items 1 to 4) is the contents of letters (item 1), the data of a message transmission, retained data or the contents of transmitted messages (items 2 to 3), and the image and sound recordings of a surveillance operation (item 4).

**§ 135. Confiscation of Letters, Information about Data of a Message Transmission,  
Information on Data Retained as well as Surveillance of  
Messages**

- (1) The confiscation of letters shall be admissible if it is required to clear up a punishable act, committed with intent, which carries a prison term of more than 1 year, and if the accused is being kept detained for such an act, or if his presentation in court or arrest has been ordered for this purpose.
- (2) Information about the data of a message transmission shall be admissible
  1. if and as long as it is urgently suspected that one of the persons concerned by the information has kidnapped or otherwise seized another person, and that the information about data is restricted to such a message of which it has to be assumed that it was communicated, received or sent by the accused at the time when the person was deprived of his/her liberty,
  2. if it is to be expected that this can promote the clearing up of a punishable act, committed with intent, which carries a prison term of more than six months, and if the owner of the technical equipment, which was or will be the source or the target of a message transmission, expressly agrees to it, or
  3. if it is to be expected that this can promote the clearing up of a punishable act, committed with intent, which carries a prison term of more than one year, and if it is to be assumed, on account of certain facts, that data concerning the accused can thus be obtained.
  4. if on account of certain facts it is to be expected that defendant who fled or is not present may be located and the defendant is urgently suspicious to have committed a punishable act which carries a prison term of more than 1 year.
- (2a) Information about data retained (§§ 102a and 102b Telecommunications Act) shall be admissible in cases of para 2 item 2 to 4
- (3) The surveillance of messages shall be admissible
  1. in the cases of paragraph (2) item 1,
  2. in the cases of paragraph (2) item 2, whenever the owner of the technical equipment, which was or will be the source or target of the message transmission agrees to the surveillance,
  3. if this appears to be required to clear up a punishable act, committed with intent, that carries a prison term of more than one year, or if the clearing up or prevention of a punishable act, committed or planned within the framework of a criminal or terrorist association or a criminal

organisation (§ 278 to § 278b of the Criminal Law Code) would otherwise be essentially impeded, and

a. the owner of the technical equipment, which was or will be the source or target of messages is urgently suspected of a punishable act, committed with intent, that carries a prison term of more than one year, or of a punishable act pursuant to § 278 to § 278b of the Criminal Law Code, or

b. it is to be expected, on account of certain facts, that a person urgently suspected of the offence (letter a) will use the technical equipment or will establish contact with it;

4. if it is to be expected, on account of certain facts, that the whereabouts of a fugitive or absent accused may be determined, who is urgently suspected of a punishable act, committed with intent, that carries a prison term of more than one year.

### **§ 136 Optical and Acoustic Surveillance of Persons**

(1) The optical and acoustic surveillance of persons shall be admissible

1. if and for as long as it is urgently suspected that a person affected by the surveillance has kidnapped or otherwise seized another person, and if the surveillance is restricted to processes and comments at the time and location of the deprivation of liberty,

2. if it is restricted to processes and comments that are intended to be brought to the knowledge of an under-cover investigator, or another person informed of the surveillance, or that may be perceived by that person directly, and if it appears to be required in order to clear up a crime (§ 17 (1) of the Criminal Law Code), or

3. if the clearing up of a crime carrying a prison term of more than ten years, or of a crime by a criminal organization or terrorist association (§ 278a and § 278b of the Criminal Law Code), or the clearing up or prevention of a punishable act committed or planned within the framework of such an organization or association, or the determination of the whereabouts of the person accused of such a punishable act would otherwise be without prospects of success or be essentially impeded, and

a. the person who is the target of the surveillance is urgently suspected of a crime carrying a prison term of more than ten years, or of a crime pursuant to § 278 a or § 278b of the Criminal Law Code, or

b. it is to be expected, on account of certain facts, that a person who is thus urgently suspected will establish contact with the person who is the target of the surveillance.

(2) To the extent that this is unavoidable for performing the surveillance pursuant to paragraph (1) item 3, it shall be admissible to penetrate a certain flat or other rooms protected by domestic authority, if it is to be expected, on account of certain facts, that the accused will use the rooms in question.

(3) The acoustic surveillance of persons in the process of clearing up a punishable act is also admissible

1. if it is restricted to processes outside of a flat or other rooms protected by domestic authority, and if it is conducted exclusively for the purpose of monitoring objects or premises in order to record the conduct

of persons who enter into contact with the objects, or who enter the premises, or

2. if it is performed exclusively for the purpose mentioned in item 1 in a flat or other rooms protected by domestic authority, and the clearing up of a punishable act, committed with intent, that carries a prison term of more than one year, would otherwise be essentially impeded, and the proprietor of that flat or those rooms expressly agrees to the surveillance.

(4) A surveillance shall only be admissible to the extent that proportionality (§ 5) is maintained. A surveillance pursuant to paragraph (1) item 3 to prevent punishable acts, committed or planned within the framework of a terrorist association or a criminal organization (§ 278a and § 278b of the Criminal Law Code) shall only be admissible if one may conclude from certain facts that there is a serious danger to public security.

### **§ 137. Common Provisions**

(1) The criminal police may conduct a surveillance pursuant to § 136 (1) item 1 on its own initiative. The other investigative measures pursuant to § 135 and § 136 shall be ordered by the

public prosecutor on the basis of a court authorization, with the entering of rooms pursuant to § 136 (2) always requiring a court authorization in each individual case.

(2) § 111 (4) and § 112 shall be applied in analogy to the confiscation of letters.

(3) Investigative measures pursuant to § 135 and § 136 may only be ordered for such a future period of time in the cases of § 135 (2) and (2a) also for such past periods of time that are likely to be required in order to fulfil the purpose. Another order is admissible in every case, whenever it is to be expected on account of certain facts that the further performance of an investigative measure will lead to success. Moreover, the investigative measure shall be ended as soon as its requirements have ceased to apply.

#### **§ 138.**

(1) Orders and court authorizations for the confiscation of letters pursuant to § 135 (1) shall indicate the designation of the proceedings, the name of the accused, the offence of which the accused is suspected and its statutory designation, as well as the facts from which it results that the order or the authorization is required and proportional in order to clear up the offence. An order and authorization of an investigative measure

pursuant to § 135 (2) to (3), as well as § 136 shall also contain the following:

1. the name or other identification features of the proprietor of the technical device that was or will be the origin or target of a message communication, or of the person whose surveillance is being ordered,
2. the premises envisaged to carry out the investigative measure,
3. the type of message communication, the technical equipment and the terminal device, or the type of the technical means that is likely to be used for the optical and acoustic surveillance,
4. the time when the surveillance begins and ends,
5. the premises which may be entered on the basis of the order,
6. in the case of § 136 (4) the facts from which results the serious danger to public security.

(2) Operators of postal and telegraph services are obliged to cooperate in the confiscation of letters and, upon an order by the public prosecutor, hold back such mailings until a court authorization has been received; if such an authorization is not granted within three days, they must not postpone the delivery any further. Providers (§ 92 (1) item 3 of the Telecommunications Act) and other providers of services (§ 13, § 16 and § 18 (2) of the E-Commerce Act, Federal Law Gazette I No. 152/2001) are obliged to provide information about data of a message transmission (§ 135 (2)) and about data retained (§ 135 (2a)) and to cooperate in the surveillance of messages (§ 135 (3)).

(3) The obligation pursuant to paragraph (2) and its scope, as well as a possible obligation to keep confidential facts and processes linked to the order and the authorization shall be imposed upon the provider by the public prosecutor by means of a separate order. This order shall indicate the corresponding court authorization. § 93 (2), § 111 (3), as well as the provisions on searches shall apply in analogy.

(4) The public prosecutor shall review the results (§ 134 item 5) and have those parts transformed into images or written form, as well as annexed to the files that are of significance for the proceedings and may be used as evidence (§ 140 (1), § 144, § 157 (2)).

(5) After ending an investigative measure pursuant to § 135 (2) to (3), as well as § 136, the public prosecutor shall immediately serve his/her order and the court authorization on the accused and the persons concerned by the investigative measure. However, the service may be postponed for as long as this would jeopardize the purpose of these or other proceedings. If the investigative measure was begun later or ended earlier than at the times indicated in paragraph (1) item 4, the period of the actual performance shall also be communicated.

#### **§ 139.**

(1) The accused shall be given an opportunity to see and hear all results (§ 134 item 5). Whenever the interests of third parties so require, the public prosecutor shall, however, exclude from becoming known to the accused those parts of the results that are not of significance for the proceedings. The foregoing shall not apply whenever the results are being used during the trial.

(2) The persons concerned by the performance of investigative measures shall have the right to examine the results whenever they relate to their data of a message transmission, to messages

addressed to them or sent by them, or to conversations conducted by them, or to images showing them. The public prosecutor shall inform these persons of this right and their right under paragraph (4), to the extent that their identity is known, or can be established without particular effort.

(3) Upon application by the accused, further results in image or written form shall be transformed if this is of significance for the proceedings and their use as evidence is admissible (§ 140 (1), § 144, § 157 (2)).

(4) Upon application by the accused or ex officio the results of the investigative measure shall be destroyed if they cannot be of significance for criminal proceedings, or may not be used as evidence. The persons concerned by the investigative measure also have this right of application, to the extent that these are messages or images showing them, which are addressed to them, or sent by them, or conversations conducted by them.

#### **§ 140.**

(1) Results (§ 134 item 5) may only be used as evidence, and will otherwise be null and void,

1. if the requirements for an investigative measure pursuant to § 136 (1) item 1 prevailed,
2. if the investigative measure pursuant to § 135 or § 136 (1) items 2 or item 3 or paragraph (3) was lawfully ordered and authorized (§ 137), and
3. in the cases pursuant to § 136 (1) items 2 and 3 only to prove a crime (§ 17 (1) of the Criminal Law Code),
4. in the cases of § 135 (1), (2) items 2 to 4, (2a), (3) items 2 to 4 only when used as evidence for the punishable act, committed with intent, for which the investigative measure was ordered or could have been ordered.

(2) If a review of the results leads to indications that another punishable act was committed than the one that gave rise to the surveillance, a separate file must be opened with that part of the results, whenever their use as evidence is admissible (paragraph (1), § 144, § 157 (2)).

(3) Results may only be used in other judicial proceedings or in proceedings before administrative authorities to the extent that their use was or would be admissible in criminal proceedings.

#### **§ 162 - Anonymous Evidence**

If, due to certain circumstances, there is reason to fear that the witness would expose himself/herself or a third person to a serious danger to their lives, health, physical integrity or freedom by providing his/her name or other personal details or by answering questions allowing conclusions thereon, this witness may be permitted not to answer such questions. In this case the witness is also allowed to change his/her appearance so as not to be recognized. However, the witness may not cover his/her face in a way that his/her facial expressions cannot be observed and the indispensable assessment of the credibility of his/her testimony is impeded.

#### **§ 165 Criminal Procedure Code**

##### **Adversary Questioning of the Accused or a Witness**

§ 165. (1) Adversary questioning, and an audio or video recording of such questioning of the accused or a witness is allowed if there are reasons to believe that the questioning would not be possible during the main trial, due to factual or legal reasons.

(2) The court shall implement adversary questioning upon a request by the public prosecution service, as stipulated in the provisions of §§ 249 and 250 (§ 104). The court shall provide the possibility to the public prosecutor, the accused, the victim, the private participant and their representatives to participate in the interrogation and to ask questions.

(3) During the interrogation of a witness, it is in his/her interest to limit the possibility of participation of other participants in the proceedings (paragraph 2) and their representatives, in view of the young age or the psychological or health condition of the witness or, upon the request of the public prosecutor, in the interest of seeking the truth, or ex officio, by the use of technical means of audio and visual transmission for following the interrogation, and the right to ask questions being exercised, without being present at the interrogation. Especially if a witness is

under 14 years of age, it is possible to appoint an expert witness to conduct the interrogation. In any case, care shall be taken to avoid a possible encounter of the witness with the accused and other participants in the proceedings.

(4) The court shall, in any case, interrogate any witness in the manner described in paragraph 3, who has not yet turned fourteen and who could have been injured in a sexual sense by the alleged offence of the accused. The other witnesses mentioned in § 156 para 1 subparagraphs 1 and 2 shall be examined in this manner, if this is requested by the public prosecutor.

(5) Prior to the interrogation, the court shall also inform the witness of the fact that the minutes may be read out and the audio or video recording played during the main trial, even if the witness refuses to give his/her deposition in further proceedings. If an expert witness has been appointed to conduct the interrogation (para 3), he/she shall be in charge of providing this information and the information defined under §§ 161 para 1. In doing so, the age and the condition of the witness shall be taken into account. Minutes shall be drafted on the information and the explanation given in this respect.

(6) As for the rest, the provisions of this section shall be applied *mutatis mutandis*.

The Public Prosecutor's Office for Combating Economic Crime and Corruption as well as the Federal Bureau of Anti-Corruption are not allowed to use investigative measures other than those mentioned above.

Special investigative techniques are used in many cases; they are often part of the standard procedure.

In 2011, special investigative techniques have been used in a total of 73 cases.

In the years 2010 and 2011, due to operations including undercover investigation, surveillance and telephone interception, the Federal Bureau of Anti-Corruption and the Public Prosecutor's Office for Combating Corruption (now: Public Prosecutor's Office for Combating Economic Crime and Corruption) were able to trace an employee of the depository of a regional court, who, abusing his authority, resold seized drugs stored at the regional court to third persons. The employee was subsequently sentenced to several years of imprisonment.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that special investigative techniques are regulated in the CPC. Sections 129-133, as last amended on 17 June 2013, provide for observation, covert investigation, fictitious business transaction, whereas sections 134-140 provide for surveillance of telecommunications and persons. Section 72, paragraph 2 EU-JZG on controlled deliveries was also reported.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

#### **Paragraph 2**

*2. For the purpose of investigating the offences covered by this Convention, States parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention.

Austria cited the following applicable measures:

- 1) Police Cooperation Act (PolKG), BGBl. (Federal Law Gazette) I No. 104/1997 as amended by BGBl. I No. 146/1999
- 2) Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the EU (EU-JZG) as amended by BGBl. I No. 36/2004

Austria provided the following laws:

Ad 1) Section 18, paragraphs 1-3:

“Authorization to Conclude Intergovernmental Treaties: Provided that the federal government is authorized to conclude treaties in accordance with Art. 66 (2) of the Federal Constitutional Law (Bundesverfassungsgesetz, B-VG), it may conclude international agreements:

1. on the transmission or cession of data for the purpose of administrative assistance; data transmitted in this context must be used in accordance with the conditions laid down in § 9 (1);
2. on the intervention of law enforcement authorities carried out by officers of the public law enforcement services or customs officers in foreign countries, or the intervention of foreign law enforcement authorities on the Austrian territory pursuant to §§ 14 to 16; in this context, officers of the public law enforcement services or customs officers may only be authorized for intrusion when conducting open or undercover investigations or when directly exercising official authority and coercive power for the purpose of stopping or arresting someone; agreements on intrusion by officers of foreign law enforcement authorities may only be concluded pursuant to the provisions empowering officers of the public law enforcement services to such intrusion on the Austrian territory.
3. in order to conduct joint training courses dealing with the tasks defined in § 1 (1).”

Ad 2) § 1 (1):

“The present federal law governs the cooperation between the judicial authorities of the Republic of Austria and those of the other Member States of the European Union in criminal proceedings against natural persons and associations (§ 1 (2) and (3) of the Responsibilities of Associations Act - VbVG, Federal Law Gazette I No. 151/2005). This cooperation comprises 1. the recognition and execution of judicial decisions, especially by

- a) the surrender of persons;
- b) the freezing of evidence and property;
- c) the execution of orders relating to property rights;
- d) the execution of pecuniary sanctions;

2. judicial assistance in criminal matters, including the formation of joint investigation teams, cooperation with Eurojust and the European Judicial Network (EJN), as well as the service of documents.”

3. the transfer of criminal prosecution and the transfer of the enforcement of sentences.”

Austria provided the following examples of implementation:

- Ø Bilateral contract with South Africa “Agreement concerning police cooperation” according to BGBl. III Nr. 143/2004 Article 3 h about, inter alia, implementation of the coordination of special investigation methods such as controlled deliveries, observation and covered operations for gathering evidence to take legal steps against criminals [...]
- Ø Bilateral contract with Germany “Cross-border cooperation for danger prevention of police” according to BGBl. III Nr. 210/2005 Article 14 (1) about covered investigations for prosecution. On request, the requested State party can allow the execution of covered investigations on his territory by civil servants of the requesting State party [...]
- Ø Multilateral contract with Southeast Europe “Convention about police cooperation in Southeast Europe” according to BGBl. III Nr. 152/2011 Article 16 (1) about covered investigations for prosecution. In the course of investigations of offences, a State party may allow, on the basis of a request, the realization of covered investigations on her territory by civil servants of the requesting State party [...]

There are no known cases.

**(b) Observations on the implementation of the article**

Examples of use of special investigative techniques in the context of bilateral agreements with South Africa and Germany, as well as at the sub-regional level within Southeast Europe, were reported.

The reviewing experts concluded that Austria has implemented this provision of the Convention.

**Paragraph 3**

*3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention.

Austria cited the following applicable measures:

1. Police Cooperation Act (PolKG): § 14: (“Intervention of the law enforcement authorities in foreign countries and of foreign law enforcement authorities on the Austrian territory”)
2. EU Police Cooperation Act (EU-PolKG): § 27 (“Intervention on the territory of other Member States”), § 28 (“Intervention of officers of law enforcement authorities of a Member State in Austria”), § 29 (“Powers on foreign territory”)
3. Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the EU (EU-JZG): § 60 (“Forming joint investigation teams”)
4. EU-JZG: § 73 (“Undercover investigation”)

Austria provided the following laws:

Ad 1) § 14:

“Where provided for under international law and in line with the following rules, officers of the public law enforcement services are authorized to operate on foreign territory, and officers of foreign law enforcement authorities are authorized to operate on Austrian territory if it serves to fulfil the tasks defined in § 1 (1).”

(§ 1 (1): “International cooperation serves the  
purposes of 1. law enforcement (police),  
2. ensuring criminal justice (criminal police),  
3. passport authorities, aliens police, and border control.”)

Ad 2) § 27 (2):

“Furthermore, with the consent of the Federal Minister of the Interior and for the purpose of strengthening police cooperation, officers of the public law enforcement services can be seconded to another Member State in order to jointly carry out tasks aimed at maintaining public peace, order and security or tasks supporting the criminal police in the receiving Member State.” §28 (2):

“Furthermore, for the purpose of strengthening police cooperation, the Federal Minister of the Interior can, with the consent of the seconding State, entrust officers of the law enforcement authorities of other Member States with tasks aimed at maintaining public peace, order and security or tasks supporting the criminal police on the Austrian territory.”

§29 (1):

“For the period of their deployment in the cases described in § 28, officers of law enforcement authorities of other Member States have the same powers and responsibilities as officers of the public law enforcement services. They are treated in the same way as Austrian officers with regard to any criminal offences that might be committed by or against them.”

§ 29 (2):

“Officers of law enforcement authorities of other Member States are authorized [...]

5. to use the technical means necessary to complete their tasks.”

Ad 3) § 60 (1):

“Joint investigation teams, which perform criminal-law investigations, are formed by way of special agreement between the competent authorities of two or several Member States for a specific purpose or for a specific period of time. The purpose, duration and composition of the joint investigation team may be amended with the consent of all Member States involved.”

§ 60 (2):

“A joint investigation team may be formed, in particular, if

1. in investigating proceedings of a Member State difficult and complicated investigations need to be carried out to clear up criminal acts that are linked to investigations in other Member States;
2. several Member States are carrying out investigations to clear up criminal offences that require a coordinated and synchronized approach by the Member States involved on account of the underlying facts.”

Ad 4) § 73 (1):

„The deployment of an official of a Member State operating under cover or under a false identity in Austria shall only be admissible on the basis of an order issued in advance of such an operation by the public prosecutor responsible for the area in which the operation is planned to start, and only on the basis of a request by a judicial authority of a Member State, which has granted this deployment in the course of previously launched criminal proceedings or preliminary investigations.”

§ 73 (2):

“The deployment of a foreign undercover investigator in Austria shall be ordered if

1. the offences underlying the foreign criminal proceedings meet the prerequisites for issuing a European arrest warrant, and
2. if there were no chances of clearing up the offences, or if their clarification was seriously complicated without the planned investigating operations.”

Austria did not provide any cases of implementation

#### **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.

#### **Paragraph 4**

*4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Austria confirmed that it had implemented this provision of the Convention.

Austria cited the following applicable measures:

Federal Act on Judicial Cooperation in Criminal Matters with the Member States of the EU (EU-JZG): §72 (2): “Controlled deliveries”

Austria provided the following laws:

§ 72 (2):

“Upon request by a Member State or in agreement with another Member State a controlled delivery through Austria or from Austria to another Member State shall be granted if

1. the reasons underlying the controlled delivery or the foreign criminal proceedings meet the prerequisites for issuing a European arrest warrant, and
2. the controlled delivery will promote the clearing up of such offences or the exploration of a person who is involved in committing the offences in more than a subordinate position.”

No statistics nor cases of implementation were provided by the reviewed country.

#### **(b) Observations on the implementation of the article**

The reviewing experts concluded that Austria has implemented this provision of the Convention.