



CHAMBERS
Global Practice Guides

Anti-Corruption

Law and Practice – Austria

Contributed by
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LAW AND PRACTICE:

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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Brandl & Talos Rechtsanwälte GmbH has seven qualified lawyers, with its key office location in Vienna and primary practice areas of dispute resolution and white-collar crime. In banking and capital markets, the firm brings its negotiat-

ing strength to bear before the courts and with the authorities, while in the leisure and entertainment arena, it takes advantage of comprehensive expertise in relevant transactions.

Authors



Christopher Schrank is a partner whose expertise in white-collar crime places him in high demand when companies and/or managers face criminal liability and his unparalleled success in representing several large banks, executives and

auditors in criminal proceedings is a testament to his ability. Christopher was asked to join a panel of experts commissioned by the Ministry of Justice to elaborate on the reformulation and harmonisation of criminal law provisions regarding accounting fraud. He advises and represents banks, corporations and individuals in management positions facing criminal prosecution relating to their business and assists clients with regulatory compliance to prevent behavioural and business practices that could trigger criminal prosecution.



Volkert Sackmann has been a public prosecutor for ten years and was head of the white-collar crime unit at the Public Prosecutor's Office in Vienna prior to his current position of senior associate. In his former position, he prosecuted several

high-profile bribery cases. Volkert was a participant at the International Visitors Leadership Programme of the US State Department in February 2013 (international crime issues) and the leader of a joint investigation team for Austria (with Finland and Slovenia) investigating a bribery case in Slovenia related to a wheeled armoured vehicles deal. He has taken part in several missions for the European Council and the Council of Europe, including the Ukraine Forum on Asset Recovery in London in April 2014.

1. Offences

1.1 Legal framework for offences

The main regulations relating to anti-bribery and anti-corruption in Austria can be found in the Austrian Criminal Code (*Strafgesetzbuch*). The major parts of the standard anti-corruption rules can be found in Sections 302 to 313 of the Code. Further legislation relating to anti-corruption can be found in other sections, such as Section 153a of the Code, which prohibits persons who possess authority to represent a third party (such as lawyers but also executive board members) from accepting benefits. A unique anti-bribery act that is comparable to the UK Bribery Act does not exist.

There are no guidelines on the interpretation and enforcement of legislation governing anti-corruption practices. There are third-party interpretations but no official guidelines as to how the legislation would be enforced. The regulating authority is afforded broad discretion in its enforcement activities as set forth in further detail below.

Austria is a party to the following conventions relating to anti-bribery and anti-corruption:

- the Council of Europe Criminal Law Convention against Corruption 1999;
- the 2003 United Nations Convention against Corruption;

- the Civil Law Convention on Corruption (1999); and
- the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

1.2 Bribery

A bribe is the offer, promise or giving of a benefit to a public servant or a third-party representative to induce them to perform or neglect to perform an act contrary to their duties.

The offences can be roughly divided into two main categories of offences: (i) receiving/accepting a bribe or such a promise by – as well as offering, promising or giving a bribe to – a public servant and (ii) receiving/accepting a benefit or such a promise by – as well as offering, promising or giving a benefit to – a servant or representative of a company.

Relating to bribery for the performance or omission of an official act, the Austrian jurisdiction recognises the following offences under the Austrian Criminal Code:

- Section 304 punishes the demand or acceptance of a benefit as well as the acceptance of a promise for a benefit by a public official or an arbitrator to perform or neglect to perform an official function in contradiction to their official duties. Furthermore, a false report by an expert in front of

a court or public authority for the demand or acceptance of a benefit as well as the acceptance of a promise for a benefit is punished in the same way.

- Section 307 punishes the offer, promise or giving of a benefit to a public official or an arbitrator to induce them to perform or neglect to perform an official function in contradiction to their official duties. The offer, promise or giving of a bribe to an expert to make them report falsely is punished in the same way.
- Section 305 punishes the demand or acceptance of a benefit as well as the acceptance of a promise for a benefit by a public official or an arbitrator to perform or neglect to perform an official function in fulfilment of their duty.
- Section 307a punishes the offer, promise or giving of a benefit to a public official or an arbitrator to induce them to perform or neglect to perform an official function in fulfilment of their duty.
- Section 306 punishes the demand or acceptance of a benefit as well as the acceptance of a promise for a benefit by a public official or an arbitrator with the intent to be influenced in the performance of their official functions. It is known as 'sweetening' – luring public officials/arbitrators with gifts, initially without demanding services in return. Hospitality/promotional expenditures as well as facilitation payments can be treated under this section and it is a very thin line.
- Section 307b punishes the offer, promise or giving of a benefit to a public official or an arbitrator with the intent to influence them in the performance of their official functions ('sweetening counterpart').
- Section 308 punishes the demand or acceptance of a benefit as well as the acceptance of a promise for a benefit for the undue exertion of influence on a public official or an arbitrator. The offer, promise or giving of a benefit to a third person for the undue exertion of influence on a public official or an arbitrator is punished the same way.

Relating to the bribery of or receipt of bribes by a servant or representative of a company, the Austrian jurisdiction recognises the following offences under the Austrian Criminal Code:

- Section 153a punishes the acceptance of any undue benefit by a representative.
- Section 168b punishes illegal agreements (price rigging) between contractors in competitive tendering procedures.
- Section 309 punishes the demand or acceptance of a benefit as well as the acceptance of a promise for a benefit by a servant or representative to perform or neglect to perform a legal act in contradiction to their duties. The offer, promise or giving of a benefit to a servant or representative to perform or neglect to perform a legal act in contradiction to their duties is punished the same way.

Generally, in Austria, no person is obliged to prevent a crime. Only under specific rules may a person be criminally liable

for not preventing a crime committed by another person. These cases include, according to Section 2 of the Austrian Criminal Code, that a person is criminally liable for not preventing a crime only if he or she is obliged to do so through a particular legislative requirement. The requirement could emerge by law or by voluntary acceptance of an obligation (eg, contractual obligation). Another example may be that a public servant may have an obligation to notify the occurrence of a bribe taking place. Not doing so could potentially result in a dereliction of duty by the public servant as such public servant has a duty to serve in the public's interest.

If a crime was facilitated through the organisational fault of a corporation, a company can be punished for a crime committed by a representative or an employee in accordance with the Austrian Act on Corporate Criminal Liability (*Verbandsverantwortlichkeitsgesetz*).

1.3 Accounting provisions

The Austrian legislation on accounting and bookkeeping is not specifically tailored towards corruption; nevertheless, rules on bookkeeping and accounting are relevant for the prevention of corruption and bribery. If companies do not comply with such rules, the executives can be punished alongside the company. The offences are laid down in Sections 163a and 163b of the Austrian Criminal Code.

1.4 Intermediaries

Under Austrian criminal law, persons who aided or abetted in the commission of a crime are criminally liable in the same way as the perpetrator. This rule would also apply to cases involving bribery.

As stated, Section 308 of the Austrian Criminal Code provides a specific rule regarding payment to a third party with the intent to exercise influence on a public official.

1.5 Corruption

Primarily, the courts rely on the elements present in the statute: a bribe is an offer, promise or giving of a benefit to a public official or an arbitrator to make them perform or omit an official function in contradiction to their official duties. The competent judge is charged with the task of determining whether all the relevant elements were met.

The offences relating to corruption and bribery can be committed only intentionally; therefore, intent is a mandatory element. Conditional intent is also sufficient. Motive is irrelevant.

1.6 Scope

Depending on the specific offence and on the value of the specific benefit, the criminal liability of the offences is subject to a statute of limitations between five and ten years after

the commission of the crime in accordance with Section 57 of the Austrian Criminal Code.

According to Section 62 of the Code, Austrian criminal law is applicable to all crimes committed in Austria, regardless of the perpetrator's nationality. Furthermore, under Section 67 of the Code, Austrian law also applies if any part of the crime was committed or any effect of the crime occurred in Austria.

If the crime was fully committed abroad, under Section 64 paragraph 2 No 2 of the Austrian Criminal Code, Austrian law is still applicable if the crime was aimed at an Austrian official or arbitrator in the fulfilment of their duties.

According to Section 64 paragraph 2 No 2, Austrian law is applicable to all crimes relating to corruption or breach of official duties committed by Austrian citizens or crimes committed in favour of an Austrian official or arbitrator.

Regarding persons receiving a bribe, on the one hand the liability is aimed at state officials and arbitrators, on the other hand at any person who holds authority to dispose over another person's assets or perform legal acts for another person. Regarding persons giving a bribe, anybody is liable, if their action is aimed at a person as mentioned before.

However, alongside the immediate perpetrator, any person is fully liable who supports the perpetrator in the commission of the crime or instigates him or her to commit such crime.

According to the Austrian Act on Corporate Criminal Liability, a company can be punished for a crime committed by a representative or an employee if the crime was committed for the benefit of the company.

2. Defences & Exceptions

2.1 Defences

Since the common justifications and legal excuses such as self-defence, emergency or mental incapacity do not apply in the areas of corruption and bribery, the only valid defence is a lack of intent. The rules on intent are to be found in Section 5 of the Austrian Criminal Code.

2.2 Exceptions

There are no exceptions as lack of intent is the only viable defence.

2.3 De minimis exceptions

There are only de minimis exceptions for the offence of the acceptance or giving of an undue benefit in accordance with Section 305 paragraph 4 of the Austrian Criminal Code. As far as bribery is concerned, only benefits that are not sub-

stantially likely to influence another person are not recognised by the criminal law rules on corruption.

2.4 Exempt industries/sectors

There are no exceptions.

2.5 Safe harbour or amnesty programme

Regarding corruption and bribery, there are no provisions on active repentance (*Tätige Reue*). The only possibility for amnesty would be the performance as a principal witness in accordance with Section 209a of the Austrian Criminal Procedure Code (*Strafprozessordnung*). As far as Section 168b is concerned, the rule provides an amnesty for the suspect, if they prevent the effects of the crime (eg, cancelling the contract).

3. Penalties

3.1 Penalties on conviction

The offences mentioned above carry different penalties. The penalties are as follows under the Austrian Criminal Code:

- Section 153a: a prison sentence of up to one year or a financial penalty of up to 720 daily rates.
- Section 168b: a prison sentence of up to three years.
- Section 304: a prison sentence of up to three years. If the benefit has a value of more than EUR3,000, the penalty is a prison sentence of six months up to five years. If the benefit has a value of more than EUR50,000, the penalty is a prison sentence of one year up to ten years.
- Section 305: a prison sentence of up to two years. If the benefit has a value of more than EUR3,000, the penalty is a prison sentence of up to three years. If the benefit has a value of more than EUR50,000, the penalty is a prison sentence of six months up to five years.
- Section 306: a prison sentence of up to two years. If the benefit has a value of more than EUR3,000, the penalty is a prison sentence of up to three years. If the benefit has a value of more than EUR50,000, the penalty is a prison sentence of six months up to five years.
- Section 307: a prison sentence of up to three years. If the benefit has a value of more than EUR3,000, the penalty is a prison sentence of six months up to five years. If the benefit has a value of more than EUR50,000, the penalty is a prison sentence of one year up to ten years.
- Section 307a: a prison sentence of up to two years. If the benefit has a value of more than EUR3,000, the penalty is a prison sentence of up to three years. If the benefit has a value of more than EUR50,000, the penalty is a prison sentence of six months up to five years.
- Section 307b: a prison sentence of up to two years. If the benefit has a value of more than EUR3,000, the penalty is a prison sentence of up to three years. If the benefit has

a value of more than EUR50,000, the penalty is a prison sentence of six months up to five years.

- Section 308: a prison sentence of up to two years. If the benefit has a value of more than EUR3,000, the penalty is a prison sentence of up to three years. If the benefit has a value of more than EUR50,000, the penalty is a prison sentence of six months up to five years.
- Section 309: a prison sentence of up to two years. If the benefit has a value of more than EUR3,000, the penalty is a prison sentence of up to three years. If the benefit has a value of more than EUR50,000, the penalty is a prison sentence of six months up to five years.

3.2 Guidelines applicable to the assessment of penalties

There are aggravating circumstances that can be found in Section 33 of the Austrian Criminal Code (eg, bribing someone to commit a crime) as well as mitigating circumstances that can be found in Section 34 of the Austrian Criminal Code (eg, no prior convictions). The judge has to consider these guidelines when determining the length of the sentence.

4. Whistle-blowing

4.1 Protection afforded to whistle-blowers

The Austrian Office of Prosecution for Economic Crime and Corruption (*Wirtschafts und Korruptionsstaatsanwaltschaft*, the 'Office of Prosecution') runs a special website for the anonymous reporting of crimes in the field of economic crime and corruption. Whistle-blowers who are employed in the public sector may, by law, not be discriminated against due to their reporting. Whistle-blowers in the private sector are protected only through anonymity.

4.2 Incentives for whistle-blowers

There are no particular incentives.

4.3 Location of provisions

Under Section 53a of the Austrian Public Service Act (*Beamten-Dienstrechtsgesetz*), public service employees may not be discriminated against for reporting criminal actions in good faith and upon reasonable suspicion.

5. Enforcement

5.1 Enforcement body

The enforcement body for crimes relating to corruption and bribery is the Austrian Office of Prosecution for Economic Crime and Corruption.

5.2 Guidance for enforcement bodies

There are no official guidelines; the Office of Prosecution is afforded discretion in enforcement.

5.3 Jurisdiction for the enforcement body/bodies

The Office of Prosecution is competent for all major crimes relating to public malpractice and corruption in the Austrian jurisdiction.

5.4 General powers and limitations of the enforcement body/bodies

The Office of Prosecution is responsible for prosecuting such crimes with all necessary measures in accordance with the relevant rules. The measures taken depend on the case and could range from standard measures such as interrogation to stronger measures such as house searches, confiscations or pre-trial detention. If human (fundamental) rights such as right to privacy and right of freedom are to be violated, a judge has to approve the order of the prosecution's office.

5.5 Powers of the enforcement bodies to require documentation

The Office of Prosecution can interrogate witnesses and suspects (subpoena powers), confiscate documents or demand files from other public authorities such as courts or the tax authorities. They may also use investigative measures such as wiretapping, upon issuance of a warrant (such warrant to be approved by a competent judge).

5.6 Process of application for documentation

Some measures, such as interrogations, can be performed as necessary upon decision of the Office of Prosecution. Usually the police enforcement has to ask or act on an order of the Office of Prosecution. A house search has to be approved by a judge as well.

5.7 Discretion for mitigation

Austrian law provides for Diversion, which is a waiver of prosecution by the Office of Prosecution if the prosecution in front of a court does not deem it necessary to prevent the suspect or others from the commitment of further crimes. A Diversion can be performed under the following conditions:

- The provided penalty for the offence does not exceed five years.
- The suspect's guilt is not seen as aggravated in accordance with Section 32 of the Austrian Criminal Code.
- The criminal act did not result in the death of a person.

Instead of criminal prosecution in a court, Diversion requires the payment of a certain amount of money, performance of charitable work by the suspect, a criminal probation period for the suspect or victim-suspect mediation without a previous trial.

Other kinds of plea agreements, other than the principal witness rule, do not exist. Any plea agreements would require the Ministry of Justice to approve the party as a principal witness.

5.8 Jurisdictional reach of the body/bodies

The jurisdictional reach is Austria and foreign countries under the aspects stated in **1.6 Scope**.

6. Future changes

6.1 Likely changes to the applicable legislation or the enforcement body

There are no changes planned to the legislation in the area of corruption and bribery, at the time of writing.

Brandl & Talos Rechtsanwälte GmbH

Mariahilfer Straße 116

Vienna

Austria

A-1070

Tel: +43 1 522 5700

Fax: +43 1 522 5701

Email: office@btp.at

Web: <http://www.btp.at>

BRANDL & TALOS

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