



Groupe d'Etats contre la corruption  
*Group of States against corruption*

**DIRECTORATE GENERAL I - HUMAN RIGHTS AND RULE OF LAW**  
**INFORMATION SOCIETY AND ACTION AGAINST CRIME DIRECTORATE**



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**Greco Eval III Rep (2011) 3E**  
**Theme I**

## **Third Evaluation Round**

### **Evaluation Report on Austria Incriminations (ETS 173 and 191, GPC 2)**

(Theme I)

Adopted by GRECO  
at its 53<sup>rd</sup> Plenary Meeting  
(Strasbourg, 5-9 December 2011)

## I. INTRODUCTION

1. Austria joined GRECO on 1 December 2006, i.e. after the close of the First Evaluation Round. Consequently, Austria was submitted to a joint evaluation procedure covering the themes of the First and Second Evaluation Rounds. The relevant Joint First and Second Round Evaluation Report (Greco Eval I/II Rep (2007) 2E) in respect of Austria was adopted at its 38<sup>th</sup> Plenary Meeting (13 June 2008) available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:
  - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (EST 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
  - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
3. The GRECO Evaluation Team (hereafter referred to as the "GET") carried out an on-site visit to Austria from 6 to 10 June 2011. The GET for Theme I (6-7 June) was composed of Mrs Claire MORICE, judge, Versailles Court of Appeal (France) and Mr Luc REDING, Adviser, Direction of Legal and Judiciary Affairs, Ministry of Justice (Luxembourg). The GET was supported by Mr Christophe SPECKBACHER from GRECO's Secretariat. Prior to the visit, the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2011) 4E, Theme I) as well as copies of relevant legislation.
4. The GET met with officials from the following governmental and non governmental institutions or organisations: Ministry of Justice, Courts (Supreme Court, Court of First Instance of Vienna, Court of Appeal of Vienna), prosecution services (general prosecutor's office Vienna, Central Public Prosecution Service for Combating Corruption), police (*Bundeskriminalamt* - Federal Bureau of Investigation, Federal Bureau for the prevention of, and fight against corruption, University of Vienna (Law Faculty - [Department of Criminal Law and Criminology](#); University of Economics and Business - Institute for Economic Criminal Law), the Austrian chapter of Transparency International, Austrian Bar Association, Austrian Chamber of Commerce.
5. The present report on Theme I of GRECO's Third Evaluation Round – Incriminations – was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the measures adopted by the Austrian authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Austria in order to improve its level of compliance with the provisions under consideration.
6. The report on Theme II – Transparency of party funding – is set out in Greco Eval III Rep (2011) 3E, Theme II.

## II. INCRIMINATIONS

### Description of the situation

7. Austria is a federal republic composed of nine states; these have some legislative authority which is distinct from that of the federal government; however, there is a single Penal Code and a single Penal Procedure Code for the whole country. Austria signed the Criminal Law Convention on Corruption (ETS 173) on 13 October 2000; it has not ratified nor signed its Additional Protocol (ETS 191).
8. As indicated in the joint first and second evaluation round report, the term “corruption” became established in Austrian criminal law with the two so-called “Anti-Corruption Acts” of 1964 and 1982, and later in 1998 concerning Sections 304 et seq. of the Penal Code (hereinafter PC). The key standards in the fight against corruption are outlined in Section 302 et seq. PC. Yet, corruption may also take the form of other criminal offences such as fraud (Section 146ff PC), embezzlement/breach of trust (Section 153 PC)<sup>1</sup> or accepting an advantage by managers (Section 153a PC), as well as restrictive agreements in procurement procedures (Section 168b PC). Further provisions can be found in other laws: the law on pharmaceuticals (AMG), for instance, includes a regulation concerning the prohibition of granting benefits in kind (Section 55b AMG); the Unfair Competition Act (UWG) complements the private sector corruption provisions and defines bribery of employees or agents in Section 10. According to the Federal Statute on the Responsibility of Legal Entities for Criminal Offences (*Verbandsverantwortlichkeitsgesetz - VbVG*) which entered into force on 1<sup>st</sup> January 2006, legal persons and other entities like partnerships are subject to all criminal offences (therefore including corruption-related offences) provided for within as well as outside the Penal Code, whether they are intentional or negligent. The liability of legal persons was examined in the context of the second evaluation round.

### Bribery of domestic public officials (Articles 1-3 and 19 of ETS 173)

#### Definition of the offence

9. Passive bribery of domestic public officials is criminalised under the following Sections of the Penal Code (PC) which concern both public officials and arbitrators (and sometimes other categories of officials including court experts, foreign public officials etc.): Section 304 criminalises passive bribery, Section 305 criminalises acceptance of a benefit by a public official, and 306 criminalises the preparation of passive bribery and acceptance of benefits by a public official. The main distinctive feature a) between Sections 304 and 305 is that the former implies the existence of a breach of duty (it applies to all categories of public officials and arbitrators); the latter does not require a breach of duties (also it does not apply to domestic assembly members, according to the definition of the public official - “Amtsträger” - provided for in Section 305 para. (1), referring to Section 74 Abs. 1 Z 4a lit. b to d CP); b) between Sections 304 and 305 on one side, and Section 306 on the other side is that the former cover both already accomplished acts and future acts, whereas the latter covers only acts of bribery aimed at the performance of a future act (which may or may not imply a breach of duties).

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<sup>1</sup> Private sector bribery is prosecutable under the provisions of Section 153 PC on breach of trust (the concept of damage used in the definition can be applied by analogy to bribes); it constitutes a felony when the damage / bribe exceeds € 50.000 Euros.

**Section 304 PC – Passive bribery [Bestechlichkeit]**

*(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.*

**Section 305 PC – Acceptance of a benefit by a public official**

*(1) A public official according to section 74 par 1 (4a subpar b to d) or an arbitrator who accepts or allows him/herself to be promised an advantage contrary to public service or internal organisational rules for himself or a third person for performing or refraining from performing an official act in accordance with his duties shall be punished by imprisonment up to two years.*

*(2) Likewise such a public official or arbitrator shall be punished who demands an advantage for himself or a third person for performing or refraining from performing an official act in accordance with his duties, unless that was explicitly permitted according to a public service law or organisation law provision or by a public service approval.*

*(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.*

**Section 306 PC – Preparation of passive bribery or of the Acceptance of a benefit by a public official**

*(1) An Austrian public official or arbitrator, a public official or arbitrator of another Member State of the European Union or a Community official, who demands, accepts or allows him/herself to be promised an advantage for him/herself or a third person with the intention to initiate the performance or refrainment from performing of an official act in violation of his duties in the future shall be punished by imprisonment up to two years.*

*(2) Likewise a public official according to section 74 par 1 (4a subpar b to d) or an arbitrator shall be punished, who demands an advantage for him/herself or a third person with the intention to initiate the performance or refrainment from performing an official act in accordance with his duties in the future, unless that was explicitly permitted by public service law provision or institutional service provisions or a public service approval.*

*(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 who commits the offence with regard to the value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from six months up to five years.*

10. Following the logic of passive bribery incriminations, active bribery is criminalised under Section 307 (active bribery involving a breach of duties), Section 307a (granting of a benefit to a public official without this involving a breach of duties), and Section 307b (preparation of bribery).

**Section 307 PC – Active bribery [Bestechung]**

(1) *Whoever offers, promises or grants an advantage to a public official or an arbitrator 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 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 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.*

**Section 307a PC – Granting of a benefit to a public official**

(1) *Whoever offers, promises or grants an advantage to a public official according to section 74 par 1 (4a) subpar b to d or an arbitrator contrary to public service or internal organisational rules, for him/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 of 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.*

**Section 307b PC – Preparation of Bribery**

(1) *Who offers, promises or grants an advantage to an Austrian public official or arbitrator, a public official or arbitrator of another Member State of the European Union or a Community official for himself or a third person in order to initiate the performance or refrainment from performing of an official act in violation of such duties in the future 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 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 month up to five years.*

Elements/concepts of the offence

*“Domestic public official”*

11. All the offences refer to the concept of public official<sup>2</sup> (as well as to an “arbitrator” and sometimes to other categories of officials – especially foreign and international ones). The concept is defined under Section 74 paragraph 1 (4a) PC, which was amended last in 2009 following intense discussions, as indicated in the end of the present descriptive part:

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<sup>2</sup> In German *Amtsträger*, which is broader than the concept of civil servant or *Beamter*.

**Section 74 paragraph 1 (4a) PC – Definition of public official:**

*(4a) public official: anyone who*

*a) is member of a domestic constitutional assembly, insofar as s/he votes in an election or ballot or otherwise acts or refrains from acting in the exercise of the duties determined in the internal rules of procedure,*

*b) as an organ or employee discharges tasks of legislation, administration or justice for the federation, for a province (Bundesland), 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, with the exception of public officials mentioned under a) when executing their duties,*

*c) is otherwise authorised to perform official duties in fulfilment of the law for a body mentioned under b)*

*d) acts as an organ of a legal entity or due to the employment status to a legal entity, which is under the review of the court of auditors, or a comparable institution of the Provinces (Länder) or a comparable international or foreign control institution and works by far predominantly for the administration of a body mentioned under b)*

12. The definition contains four criteria/elements under the various subparagraphs. Subparagraph a) covers any member of a domestic assembly, but only “insofar as s/he votes in an election or ballot or otherwise acts or refrains from acting in the exercise of the duties determined in the internal rules of procedure”.
13. Subparagraph b) covers any person (except the domestic assembly members provided for in Subparagraph a) who – when carrying out his/her official duties – is acting as an organ or employee of any federal (state) or regional/local institution carrying out legislative, executive or judicial functions, as well as social insurance institutions, whether domestically or for a foreign country or for an international organisation. An “organ” of one of the bodies mentioned in sec 74 paragraph (1) (4a) lit b PC is a natural person particularly exercising public functions like the President of the Republic, Ministers or Members of Governments of the provinces as well as elected or other appointed organs of the administration like mayors at the municipal level. “Employee” means anybody who has a close personal and economic relationship to the body and is working within the structure of the organization including incoming judges, or trainees in administration. The function within the hierarchy does not have any effect on the qualification as public official. Further more the definition covers judges and public prosecutors or other persons discharging tasks of justice as lay judges or persons acting in a jury.
14. Subparagraph c) covers persons acting on behalf of the bodies mentioned in Subparagraph b) when they implement the law: this includes for instance notaries appointed by the court or mechanics entrusted to conduct technical inspection of cars for the administration, employees of the Austrian National Bank who are entrusted with control functions in the context of financial market supervision.
15. Finally, Section 74 paragraph (1) (4a) lit d) PC defines as public officials organs or employees of a legal entity under the review of the court of auditors (or a comparable institution) of the Provinces or a comparable international or foreign control institution and works by far predominantly for the administration of a body mentioned under b). An entity “works by far predominantly for the administration” if the main customers are administrations of bodies mentioned under b and the nature of the business is in the field of preserving infrastructure of the administration. Such entities include the Austrian Federal Computing Center, the Federal

Accounting Agency, or the Federal Real-estate Company (*Bundesimmobilien Gesellschaft*). Agencies or companies which are acting on the commercial market do not fall under the definition.

16. Persons falling under Section 74 paragraph (1) (4a) lit a) PC (members of domestic assemblies) are sometimes subject to bribery provisions in a manner which is different from the other categories of public officials (see also hereinafter paragraphs 30 et seq. on bribery of members of domestic public assemblies).

*“Promising, offering or giving” (active bribery)*

17. The relevant active bribery offences of the PC concerning public officials (i.e. active bribery under Section 307, granting of a benefit under Section 307a, preparation of active bribery under Section 307b) all use, in conjunction and in a consistent manner, the expression “offering, promising or giving [granting]” (*anbieten, versprechen, gewähren*) of an advantage.

*“Request or receipt, acceptance of an offer or promise” (passive bribery)*

18. The relevant passive bribery offences of the PC concerning public officials (i.e. passive bribery under Section 304, acceptance of a benefit under Section 305, preparation of passive bribery under Section 306) use the concepts “demanding, accepting, or allowing oneself to be promised” (*fordern, annehmen, sich versprechen lassen*) an advantage. In Section 305 which is the passive bribery offence which does not involve a breach of duty, the above elements are split: paragraph (1) refers to “accepting, or allowing oneself to be promised”, and only “demanding” appears in paragraph (2). The GET understands that the former covers those situations where the public official acts in contravention of an express prohibition, and that the latter those situations where the offence is constituted because the public official solicits an advantage in absence of an explicit permission. A similar approach is followed under Section 306 PC, where paragraph 2 refers only to “demanding”; contrary to paragraph 1, paragraph 2 does not imply a breach of duty, but the absence of an explicit permission.

*“Any undue advantage”*

19. All active and passive bribery incriminations of Sections 304 to 307c PC refer to the concept of “advantage” (“Vorteil”).
20. The replies to the questionnaire explain that with the Criminal Law Amendment Act 1998, the scope of the bribery offences was broadened from pecuniary advantages to any type of advantages, which are to be understood as any benefit (pecuniary and non-pecuniary) to which the receiving person is not entitled to and which places him / her in a better position. If a particular value of a benefit may be quantified, the benefit is deemed to be pecuniary (i.e. particular amount of money, object of value, services, concert tickets, discounts, invitations etc.). Other benefits such as social or professional advantages (i.e. granting an award, advice or support for a job application etc.) which cannot be valued in monetary terms are non-pecuniary advantages and these are equally covered by sec 304, 305, 306, 307, 307a and 307b PC.
21. Austrian legislation does not use the concept of “undue” (advantage). The replies to the questionnaire indicate that as far as Sections 304 and 307 PC are concerned, any advantage is automatically undue because it aims at, or is given for, an act in violation of the official’s duties (= an undue act / breach of duties). As for Sections 305 and 307a PC (which concern bribery

offences which do not involve a breach of duties), the wording of the offence incriminates bribery where the advantage is offered, accepted, solicited etc. “contrary to public service or internal organisational rules”; thus, one needs to refer to public service or institutional regulations to determine whether an advantage is legitimate (e.g. customary presents of low value) or not<sup>3</sup>. According to the Administrative Supreme Court’s case law, gratuities (tips, *pourboires*) may never be considered “customary”. Therefore, even smallest facilitation payments are not allowed.

*“Directly or indirectly”*

22. Sections 304 to 307b contain no reference to the fact that indirect bribery (i.e. where the offender would use an intermediary) is criminalised. The replies to the questionnaire indicate that despite that, both direct and indirect bribery are covered in accordance with the general principles of criminal law, in particular article 12 PC: 1) the briber and the bribe-taker always remain criminally liable, no matter if and how many intermediaries are involved, and whether or not the intermediary is him/herself also liable – depending on the circumstances of the case<sup>4</sup>; 2) not only the immediate offender but also anybody who instigates another person to commit a crime as well as anybody who otherwise contributes to its commission is punishable for the crime concerned (with all of them facing, in principle, the same sanctions).

*“For himself or herself or for anyone else”*

23. Sections 304 to 307b PC explicitly provide that the advantage has to be offered, promised or given, or demanded or accepted either by the public official him/herself or for a third person.

*“To act or refrain from acting in the exercise of his or her functions”*

24. Sections 304 and 305 PC (on passive bribery) and Sections 307 and 307a PC (on active bribery) refer to offences aimed at the public official performing or refraining from performing an official act either in violation of the official’s duties (Sections 304 and 307) or in conformity with the official’s duties (Sections 305 and 307a). The concept of “for performing or refraining from performing of an official act” includes any act by the public official which is carried out in order to fulfil his or her assigned tasks. It is irrelevant if the tasks belong to sovereign or private-economy administration. The notion of “official act” includes factual acts which may be of preparation, supporting or controlling character. It is also immaterial whether or not the concrete act falls within the competence (factual or local) of the public official as long as the public official has the (abstract) power to conduct official acts (of that kind). Acts that fall completely outside of the competence of the public official are not covered by the concept<sup>5</sup>.
25. A public official acts in violation of his or her duties if the official act is in contradiction with the concrete legal base, decrees, binding instructions or guidelines emanating from the employing

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<sup>3</sup> For instance, Sec 59 par 1 of the federal public service law prohibits the acceptance of any gifts or advantages by federal public officials which are offered with regard to the public function, while par 2 of sec 59 public service law states that customary presents of low value (in particular merchandise items such as cheap ball-point-pens, calendars etc). are not covered by the definition of par 1. Therefore customary presents of low value do not fall under the prohibition to accept gifts according to sec 59 par 1 public service law. The nine *Länder* do have their own public service law and all of them do have provisions similar to Section 59 of the Federal Public Service Law.

<sup>4</sup> If an intermediary is not part of the bribery scheme (e.g. he or she is just transmitting the envelope containing the bribe without knowing what he or she is carrying or without being aware of its purpose), only the briber and the bribe-taker are responsible. If, however, the intermediary incidentally takes part in the bribery scheme, he or she maybe held responsible for active or passive bribery, or even for both.

<sup>5</sup> Fuchs/Jerabek in “Korruption und Amtsmissbrauch”, 3<sup>rd</sup> Ed 2010; commentary of Sections 304 – 306.



authority. In accordance with the principle of fact-based decisions, the public official has to follow exclusively fact based and legally based reasons. Likewise, that principle has to be followed when official acts are exercised within discretionary powers. The public official's duties include the principle of acting impartially. A non-impartial act is by nature an act in violation of the official's duties, for instance handling in priority or in an accelerated manner a request or application (RIS-Justiz RS0096116). If the public official performs the official act in the same manner with or without receiving an advantage, it could be deemed to be in conformity with the official's duties.

*“Committed intentionally”*

26. Austrian law provides, under Section 5 PC, for a distinction of levels of criminal intent which can be translated as follows: a) intent based on a possible realisation of the act (*dolus eventualis*); b) purpose (2<sup>nd</sup> degree intent, based on the wilful achievement of the act or success of the action), c) knowledge (1<sup>st</sup> degree intent, based on the certainty of achieving the act or success of the action). The active and passive bribery offences established under Sections 304, 305, 306, 307a and 307b PC are intentional offences but *dolus eventualis* is sufficient. Only “Illicit Intervention” under Section 308 PC requires the above element of knowledge.

Sanctions

27. The following table provides an overview of the various sanctions provided under Sections 304 to 307b (as well Section 308 on illicit intervention) and, for the sake of comparison, for other comparable offences including breach of trust (Section 153 PC) and abuse of power (Section 302); the latter in particular, is the provision mostly used for prosecuting corruption offences – see also the explanations pertaining to the statistical data in the end of this descriptive part of the report).

Provision	Sanctions according to the individual circumstances of the case	Statute of Limitation Sec 57 PC
<b>Sec 153 PC Breach of trust</b>		
Par 1	Up to 6 months imprison. or a fee of up to 360 daily rates	1 year
Par 2 (damage exceeding an amount of 3.000,- Euros) (damage exceeding an amount of 50.000,- Euros)	Up to 3 years imprisonment From 1 year up to 10 years of imprisonment	5 years 10 years
<b>Sec 153a PC Accepting an advantage by rulers</b>	Up to 1 year of imprisonment	3 years
<b>Sec 168c PC Acceptance of presents by servants or agents</b>		
Par 1	Up to 2 years of imprisonment	5 years
Par 2 (advantage exceeding an amount of 3.000,- Euros)	Up to 3 years of imprisonment	5 years
<b>Sec 168d PC Bribery of servants or agents</b>	Up to 2 years of imprisonment	5 years
<b>Sec 302 PC Abuse of Power</b>		
Par 1	From 6 month up to 5 years of imprisonment	5 years
Par 2 (serious abuse of power)	From 1 year up to 10 years of imprisonment	10 years
<b>Sec 304 PC Passive bribery</b>		
Par 1	Up to 3 years imprisonment	5 years
Par 2 (advantage exceeding an amount of 3.000,- Euros) (advantage exceeding an amount of 50.000,- Euros)	From 6 month up to 5 years of imprisonment From 1 year up to 10 years of imprisonment	5 years 10 years
<b>Sec 305 PC Acceptance of a benefit by a public official</b>		
Par 1	Up to 2 years imprisonment	5 years
Par 2	Up to 2 years imprisonment	5 years
Par 3 (advantage exceeding an amount of 3.000,- Euros) (advantage exceeding an amount of 50.000,- Euros)	Up to 3 years imprisonment From 6 month up to 5 years of imprisonment	5 years 5 years

Provision	Sanctions according to the individual circumstances of the case	Statute of Limitation Sec 57 PC
<b>Sec 306 PC Preparation of bribery or of the Acceptance of a benefit by a public official</b>		
Par 1	Up to 2 years imprisonment	5 years
Par 2	Up to 2 years imprisonment	5 years
Par 3 (advantage exceeding an amount of 3.000,-- Euros) (advantage exceeding an amount of 50.000,-- Euros)	Up to 3 years imprisonment From 6 month up to 5 years of imprisonment	5 years 5 years
<b>Sec 307 PC Bribery</b>		
Par 1	Up to 3 years imprisonment	5 years
Par 2 (advantage exceeding an amount of 3.000,-- Euros) (advantage exceeding an amount of 50.000,-- Euros)	From 6 month up to 5 years of imprisonment From 1 year up to 10 years of imprisonment	5 years 10 years
<b>Sec 307a PC Granting of a benefit to a public official Section</b>		
Par 1	Up to 2 years imprisonment	5 years
Par 2 (advantage exceeding an amount of 3.000,-- Euros) (advantage exceeding an amount of 50.000,-- Euros)	Up to 3 years imprisonment From 6 month up to 5 years of imprisonment	5 years 5 years
<b>Sec 307b PC Preparation of Bribery</b>		
Par 1	Up to 2 years imprisonment	5 years
Par 2 (advantage exceeding an amount of 3.000,-- Euros) (advantage exceeding an amount of 50.000,-- Euros)	Up to 3 years imprisonment From 6 month up to 5 years of imprisonment	5 years 5 years
<b>Sec 308 PC Illicit intervention</b>		
Advantage not exceeding an amount of 3.000,-- Euros Advantage exceeding an amount of 3.000,-- Euros Advantage exceeding an amount of 50.000,-- Euros)	Up to 2 years imprisonment Up to 3 years imprisonment From 6 month up to 5 years of imprisonment	5 years 5 years 5 years
<b>Section 10 of the Unfair Competition Act - Bribery of Employees or Agents</b>		
Par 1	Up to 3 months imprison. or a fee (up to 180 daily rates)	1 year
Par 2	Up to 3 months imprison. or a fee (up to 180 daily rates)	1 year

28. According to Section 27 PC a public official who was convicted by an Austrian court because of an intentional crime and the sentence either exceeds one year of imprisonment (even under the probation) or the sentence to be served exceeds six months or the conviction is related to Section 212 PC (abuse of authority [*Missbrauch des Autoritätsverhältnisses*]) for sexual purposes) is subject to revocation under the terms provided by law. Furthermore the employer may take disciplinary actions on the grounds of public service law (Federal public service law or *Beamten-Dienstrechtsgesetz*, service law for judges and prosecutors - *Richter- und Staatsanwaltschaftsdienstgesetz*) or on the grounds of labour law.

#### Court decisions, case-law

29. As indicated earlier, relevant developments are also contained in a decision RIS-Justiz RS0096116.

#### **Bribery of members of domestic public assemblies (Article 4 of ETS 173)**

30. As indicated earlier, the concept of “public official” of Section 74 paragraph 1 (4a) PC includes members of domestic assemblies under subparagraph a. by reference to any “member of a domestic constitutional assembly”, but only insofar as s/he votes in an election or ballot or otherwise acts or refrains from acting in the exercise of the duties determined in the internal rules of procedure. The Austrian authorities explained on-site that bribery of assembly members (for the purposes of vote buying only) was introduced in 2008; it was further extended in 2009 to also include the performance of “duties determined in the internal rules of procedure”, following public controversies about the special treatment of elected officials.

31. Therefore rules of procedure of the national parliament, assemblies of provinces (*Länder*) and assemblies at commune level are relevant when determining duties of MPs. Sections 2, 11 and 12 of the rules of procedure of the National Parliament state the duties of MPs. In particular the duty to inaugurate, participate in sessions, participate in committees to which the MP was elected, to notify if he or she were prevented to participate in sessions. The situation is similar for assembly members at provincial (*Länder*) or communal level. Cases where MPs hold more than one office (double functions e.g. as an MP and as a mayor), the qualification as public official with regard to lit a. or b. of Section 74 par 1 subpar 4a CC depends on the concrete context in which s/he performs/refrains from performing an official act (the nature of the official act). If for example a person holding the double function of MP and Mayor is offered an advantage for granting a building permit – which is one of the official tasks of a mayor – the case would fall under the definition of lit. b of Section 74 paragraph 1 subpara. 4a PC.
32. Additionally it has to be mentioned that Section 74 par 1 subpar 4a lit a PC covers domestic MPs while foreign MPs when exercising tasks of legislation are covered by the definition of public official referred to in sec 74 par 1 subpar 4a lit b PC without any limitation.
33. Members of domestic public assemblies are thus subject to the same rules as domestic public officials, with the following exceptions: Sections 305 and 307a PC are not applicable to members of domestic assemblies and active and passive bribery in that context thus does not constitute an offence safe in case of breach of duties (under Sections 304 and 307 PC). Consequently, the offences of preparation of active and passive bribery of Section 306 and Section 307b respectively apply only in respect of passive and active bribery offences implying a breach of duties (Sections 304 and 307 respectively).

#### Sanctions, relevant case law

34. The sanctions applicable in accordance with the above provisions vary from imprisonment up to 2 years (which is the lowest penalty), to imprisonment from 1 to 10 years (which is the highest penalty).
35. According to the Law on the Organisation of Elections of the National Assembly (*Nationalratswahlordnung*) a person who was convicted by an Austrian court because of an intentional crime (including active or passive bribery) and the sentence exceeds one year of imprisonment is excluded from the right to be elected. The ban expires after a period of six months after the enforcement of the sentence had ended. If the court suspends the sentence on probation the person still has the right to be elected (sec 41 of the Law on the Organisation of Elections of the National Assembly). Similar provisions are contained in the laws on the Organisation of Elections of the Provincial Assemblies (*Landtage*) and in laws on the Organisation of Elections of the Municipal Assemblies (*Gemeinderäte*).
36. The replies to the questionnaire do not refer to relevant case law.

#### **Bribery of foreign public officials (Article 5 of ETS 173)**

37. As indicated earlier, the concept of “public official” of Section 74 paragraph 1 (4a) PC includes foreign public officials under subparagraph b. by reference to any person who “as an organ or employee discharges tasks of legislation, administration or justice (...) for another state or for an international organisation (...)”. All the other criteria of the definition of public official (see paragraphs 12 to 16 above) are also applicable to a foreign public official, except subparagraph

a. which is specific to members of domestic public assemblies; therefore, bribery of foreign public officials also applies in relation to any person “who is otherwise authorised to perform official duties in fulfilment of the law for a body mentioned [above]” (subparagraph c) or “acts as an organ of a legal entity or due to the employment status to a legal entity, which is under the review of the court of auditors, or a comparable institution of the Provinces (Länder) or a comparable international or foreign control institution and works by far predominantly for the administration of a body mentioned [above]” (subparagraph d).

38. The replies to the questionnaire indicate that as a consequence, Sections 304 to 307b PC apply in the same manner (as for domestic public officials) in relation to bribery of foreign public officials. However, the GET notes that the full assimilation of foreign officials to domestic officials ends when it comes to the offences of preparation of passive and active bribery (Sections 306 and 307b) since these provisions introduce certain distinctions: a) preparation of passive bribery involving a breach of duties is a criminal offence under Section 306 paragraph 1 (and thus covering the elements of “requesting, accepting or allowing oneself to be promised”) only insofar as the official is an Austrian official or a foreign official from a European Union country; b) preparation of active bribery involving a breach of duties is a criminal offence under Section 307b paragraph 1 (and thus covering the elements of “offering, promising or giving [granting]”) insofar as the official is an Austrian official or a foreign official from a European Union country – unlike Section 306, Section 307b contains no other provisions on preparation are applicable in relation to active bribery offences involving a foreign public official. For the rest, the situation is similar to bribery of domestic officials: preparation of passive bribery not involving a breach of duties is a criminal offence as regards foreign public officials under Section 306 paragraph 2 (and thus covering only the element of “requesting”).

#### The concept of “foreign public official”

39. As indicated above, Section 74 paragraph 1 (4a) subparagraph b PC refers to any person who “as an organ or employee discharges tasks of legislation, administration or justice (...) for another state (...)”. The other relevant two criteria of the definition of Section 74 refer to functions in a way which makes no distinction between domestic and foreign public officials (subparagraph c and subparagraph d):

#### Sanctions; court decisions and case law

40. The sanctions applicable in accordance with the above provisions vary from imprisonment up to 2 years (which is the lowest penalty), to imprisonment from 1 to 10 years (which is the highest penalty). Persons convicted for active bribery of a foreign public official in accordance with Section 307, 307a PC may be subject to additional administrative sanctions as disqualification from certain functions on the basis of industrial law (*Gewerbeordnung*), provisions related to the financial market and corporate law or may be excluded from public procurement procedures.
41. The replies to the questionnaire do not contain references to relevant court decisions and case-law.

#### **Bribery of members of foreign public assemblies (Article 6 of ETS 173)**

42. The situation of members of foreign public assemblies is exactly the same as for foreign public officials seen above. In accordance with the definition of (foreign) public official contained in sec 74 par 1 (4a) subparagraph b to d, a foreign public official is: 1) according to subparagraph b. any

person who discharges tasks of legislation, administration or justice as an organ or employee of another country or of an international organisation: the replies to the questionnaire indicate that foreign parliamentarians are covered by the definition as they discharge legislative tasks for another country 2) according to subparagraph c, also any person acting on behalf of the above bodies.

## **Bribery in the private sector (Articles 7 and 8 of ETS 173)**

### **Definition of the offence**

43. The main provisions incriminating bribery in the private sector are those on “Acceptance of presents by servants or agents” - Section 168c and “Bribery of servants or agents” – Section 168d PC. These provisions correspond to those on passive and active bribery of public officials of Sections 304 and 307 respectively and they should be read in the same manner. The replies to the questionnaire explain that when these Sections were introduced in 2008 in the PC, Section 10 of the Unfair Competition Act should have been abolished as it was used until then to criminalise / prosecute passive and active bribery in the private sector; it remained in force but it has no practical significance.

#### **Section 168c PC – Acceptance of presents by servants or agents**

*(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, is to be punished with a prison sentence of up to two years.*

*(2) If the amount of the advantage exceeds 3.000 Euros the perpetrator is to be punished with a prison sentence of up to three years.*

#### **Section 168d PC – Bribery of servants or agents**

*Anyone who offers, promises or give more than a merely minor 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 the other person's duties, is to be punished with a prison sentence of up to two years.*

#### **Section 10 of the Unfair Competition Act – Bribery of Employees or Agents**

*(1) Any person who, in the course of business for purposes of competition, offers, promises or grants gifts or other benefits to an employee or agent of an enterprise in order to obtain, through the unfair conduct of the employee or agent, an advantage for him or a third party in the procurement of goods or services, shall be sentenced by the court to a prison term not exceeding three months or to a fine not exceeding 180 daily rates.*

*(2) The same penalty shall be imposed upon any employee or agent of an enterprise who, in the course of business, demands, permits to be promised or accepts gifts or other benefits, in return for providing another person through unfair conduct with competitive advantages in the procurement of goods or services.*

*(3) Paragraphs 1 and 2 shall not apply if the conduct is subject to the same or more severe penalties under other provisions.*

*(4) Prosecution shall only take place at the request of a person entitled to apply for an injunction under the first sentence of section 14.*

44. Bribery in the private sector always presupposes a breach of duties under Sections 168c and 168d; therefore, unlike public sector bribery offences, no distinction is made between offences depending on whether or not such a breach of duties is involved. This being said, Austria incriminates other forms of illicit behaviour which are used in practice: “Breach of trust” –Section 153 PC, “Accepting an advantage by executives” – Section 153a PC. The replies to the questionnaire indicate that most cases of bribery in the private sector are (still) prosecuted as breach of trust under Section 153 PC (see also the statistics on convictions at the end of the descriptive part hereinafter).

**Section 153 PC – Breach of trust**

*(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.*

**Section 153a PC – Accepting an advantage by executives**

*Whoever accepts more than a merely minor advantage of wealth for the exercise of the authority conferred to him by statute, official order or contract to dispose of property not belonging to him or to oblige another person and does not transmit this advantage in violation of his duties, shall be liable to imprisonment for up to one year.*

45. The relation between the different provisions is basically the following: if one can prove that the authorised person is knowingly violating his/her duties and acts with *dolus eventualis* to the detriment of the authorising person – which is according to case-law regularly the case (RIS-Justiz RS0095562, RS0095585), in particular in case there is an agreement before the payment of the bribe and the official acting as expected – Section 153 PC applies as described above. If one cannot prove either that the bribe-taker has acted knowingly or that s/he acted with the intent to act detrimentally to the authorising person’s property, Sections 168c and 168d could apply. If there is no complaint (as required by Section 168e PC), Section 153a is applicable.
46. The replies to the questionnaire explain that whereas the bribe-taker is covered by Section 153 as such, basically for depriving the person he or she is working for of the advantage he or she him/herself has received (i.e. the secret commission), the briber (e.g. a business partner who wants to sell his goods to the authorising person or entity) can be held responsible for instigation to breach of trust according to Section 153 in combination with Section 12 PC. If the briber offers a secret commission to the authorised person who refuses to accept the offer, s/he can be held responsible for attempted (instigation of) breach of trust, On the other hand, the authorised person can be held responsible for attempted breach of trust if he/she demands a secret commission, but the request is denied.

## Elements/concepts of the offence

*“Persons who direct or work for, in any capacity, private sector entities”*

47. Sections 168c and 168d refer to a “servant or agent of a company”. The term “servant” means any employee bound to instructions regardless of his/her position in the hierarchy of the company, as well as board members of a legal entity and officials who, working for entities in the public or private sector, do not fall under Section 304 et seq. PC. The term “agent” (“Beauftragter”) means any person who is authorised to act in business for the company.

*“In the course of business activity”; “...in breach of duties”*

48. Both provisions on active and passive bribery in the private sector (Sections 168c and 168d PC) criminalise acts in the course of business activities; the expression is the one used in the Convention (“in the course of business activities”). Furthermore both provisions incriminate bribery in the private sector in relation to the performance of a legal act contrary to the person’s duties, as in the Convention.

## Other elements of the offence

49. Section 168c PC refers to an “advantage”, whereas Section 168d PC (as well as Section 153a PC) refers to “more than a merely minor advantage”. The latter establishes a “De minimis”-threshold used also in several other provisions of the PC, in particular minor robbery (Section 142 paragraph. 2). There is no particular case law concerning Section 168d (or sect 153a) PC but according to legal theory and general case law as well as court decisions related to earlier bribery offences, anything below EUR 100 would be considered “a merely minor advantage” (RIS-Justiz RS0099085). Moreover, there has been a Supreme Court ruling (12 Os 45/04) pointing out that this threshold is not rigid, but has to be assessed on a case-by-case basis, indicating that it might be lower in bribery cases. In this decision the Supreme Court also confirmed that several minor advantages which per se are lower than the threshold have to be added together if they are given or received “on the same occasion” (including the case where the same briber gives the same public official small facilitation payments on a regular basis through years). There is however, neither case law nor legal comments as to what would constitute a minor non-material advantage. Both offences provide that the advantage can be for the bribe-taker him/herself or for a third party. No reference is made to intermediaries but as indicated earlier, the general principles of the PC on instigation, aiding and abetting (Section 15) allow to address all situations where the criminal act involves one or several intermediaries.
50. In accordance with Section 168e PC, the prosecution cannot be initiated without a complaint:

### **Section 168e PC – Authorisation for the charge**

*The criminal offences according to sections 168c (1) and 168d are only to be prosecuted upon request of the person whose interests are prejudiced or one of the persons authorised to file a claim for omission according to section 14 (1) of the Unfair Competition Act 1984 [Gesetz gegen den unlauteren Wettbewerb 1984, UWG].*

## Sanctions, court decisions and case law

51. The sanctions provided for bribery in the private sector are up to 2 or 3 years imprisonment under Sections 168c and 168d. Under the other provisions, they vary between up to 3 months' imprisonment or a fine, and between 1 to 10 years' imprisonment (see table below).

Provision	Sanctions according to the individual circumstances of the case
Sec 153 PC Breach of trust	
Par 1	Up to 6 month imprisonment or a fee of up to 360 daily rates
Par 2 (damage exceeding an amount of 3.000,-- Euros) (damage exceeding an amount of 50.000,-- Euros)	Up to 3 years imprisonment From 1 year up to 10 years of imprisonment
Sec 153a PC Accepting an advantage by rulers	Up to 1 year of imprisonment
Sec 168c PC Acceptance of presents by servants or agents	
Par 1	Up to 2 years of imprisonment
Par 2 (advantage exceeding an amount of 3.000,-- Euros)	Up to 3 years of imprisonment
Sec 168d PC Bribery of servants or agents	Up to 2 years of imprisonment
Section 10 of the Unfair Competition Act - Bribery of Employees or Agents	
Par 1	Up to 3 month of imprisonment or a fee of up to 180 daily rates
Par 2	Up to 3 month of imprisonment or a fee of up to 180 daily rates

52. Persons convicted for bribery in private sector may be subject to additional administrative sanctions as disqualification from certain functions on the basis of industrial/commercial law (*Gewerbeordnung*), legislation related to the financial market and corporate law; in certain cases, they may be excluded from public procurement procedures.
53. Two court decisions are cited above (RIS-Justiz RS0095562, RS0095585) concerning the applicability of Section 153 CP on breach of trust.

### **Bribery of officials of international organisations (Article 9 of ETS 173); Bribery of members of international parliamentary assemblies (Article 10 of ETS 173); Bribery of judges and officials of international courts (Article 11 of ETS 173)**

54. The situation of these two categories of persons is the same as that of foreign public officials and members of foreign public assemblies seen above. The elements of the offence are thus the same, as well as sanctions.
55. The definition of officials given by Section 74 par 1 (4a) subparagraph b PC includes anyone who "as an organ or employee discharges tasks of legislation, administration or justice (...) for another state or for an international organisation (...)". This concerns any international organisation which has a public international or supranational character even at regional level or for economic purposes (i.e European Union, Council of Europe, United Nations, and International Criminal Court). Members of international parliamentary assemblies are also covered by this definition as they discharge tasks of legislation for the organisation in question. As judges of international courts discharge tasks of justice and officials of international courts discharge tasks of administration for the court these categories do fall under the definition of public official of an international organisation. As indicated under paragraphs 12 to 16, the definition of Section 74 also addresses any person who is entitled to act on behalf of a body mentioned in the above subparagraph b whilst implementing the law.
56. Therefore, active bribery of officials of international organisations, of members of international parliamentary assemblies, of judges and officials of international courts may be sanctioned under



Sections 307 and 307a PC, and passive bribery of the same categories of persons under Sections 304 and 305 PC. As already noted earlier by the GET, Sections 306 and 307b, on preparation of passive and active bribery respectively, are also applicable to some extent, in particular where the offence involves a civil servant of the EU in case of breach of duties (Section 306 paragraph 1, Section 307b paragraph 1), or where it involves any official of an international organisation but only insofar as this concerns the preparation of passive bribery concerning a request and only if the offence involves a breach of duties (Section 306 paragraph 2).

57. The replies to the questionnaire do not mention the existence of any court cases and relevant case law concerning.

### **Trading in influence (Article 12 of ETS 173)**

58. Trading in influence is criminalised in accordance with Section 308 PC on “illicit intervention”, which provides for the basic offence and two aggravating circumstances based on the monetary value of the undue advantage (respectively 3,000 and 50,000 Euros):

#### **Sec 308 PC – Illicit Intervention**

*A person who knowingly [Wissentlich], either directly or indirectly, exercises influence on a public official or an arbitrator in order to make that person perform or refrain from performing an act belonging to his/her official duties, thus violating these duties, and who demands, accepts, or allows him/herself to be promised an advantage for him/herself or a third person is to be punished by imprisonment up to two years. Whoever commits the offence in regard of the value of the advantage exceeding 3.000 Euro shall be punished with up to three years imprisonment, whereas who conducts the acts with regard to a value of the advantage exceeding 50.000 Euros shall be punished by imprisonment from six month up to five years.*

59. This Section criminalises the conduct of demanding, accepting or accepting a promise of an advantage for knowingly exercising influence on a public official (as defined in Section 74 paragraph 1 (4a) lit. a to d PC) or an arbitrator; the action is punishable if the influence is aimed at making the public official or arbitrator perform or refrain from performing an act in violation of his/her duties.

*“Request or receipt, acceptance of an offer or promise (for passive trading in influence)”*

60. Section 308 PC clearly incriminates the passive form of trading in influence by use of the words “demands, accepts, or allows him/herself to be promised”. The Austrian authorities indicate that these expressions are to be interpreted in the same manner as for bribery offences.

*“Promising, offering or giving (for active trading in influence)”*

61. The wording of Section 308 PC does not refer to the active form of the offence. The Austrian authorities explain that according to Section 12 of the General Part of the PC, not only the immediate offender but also anybody who acts as an instigator and thus incites another person to commit a crime, as well as anybody who otherwise contributes to its commission, is punishable for the crime concerned (with all of them in principle facing the same sanctions). Therefore anybody who promises, offers or gives an advantage to another person with a view to the latter exerting influence in the meaning of Section 308 PC may be punishable for instigating another

person to illicit intervention. This had to be clarified by the Supreme Court in its decision 14Os170/96; it had been argued that if the legislator had intended to cover also the active side, the law would explicitly provide so – as is the case with the bribery offences. The Supreme Court, however, ruled that one can resort to the general rules of participating in criminal offences, i.e. Section 12 PC, which means that the “bribe-giver” in cases of trading in influence is punishable according to Section 308 in combination with Section 12 PC.

*“when committed intentionally”*

62. The offence of illicit intervention under Sec 308 PC requires that the person acts with knowledge [*wissentlich*] that the influence on a public official aims at the performance or non-performance of an act constituting a violation of the public official’s duties (see also paragraph 26 on the gradation of criminal intent under Section 5 paragraph 3 PC).

*“Anyone who asserts or confirms”; “whether or not the influence is exerted”; “whether or not the supposed influence leads to the intended result”*

63. The perpetrator may be any person being able to exercise influence on a public official regardless if he or she claims or confirms being able to do so. Therefore even a person not asserting of being able to exert improper influence but nevertheless being able to do so is covered by that provision. The Austrian authorities indicated after the visit that someone who falsely claims to be in a position to exert influence in exchange for an advantage may also be punished for fraud.

64. The replies to the questionnaire were not entirely clear as to when the offence is constituted. Although they stressed that “It is not necessary that the influence is exerted, nor that the exertion of the influence was “successful”, it was also indicated that because the influence peddler is acting with knowledge (“knowingly”), “this implies that the influence has to be exerted”. However, if the undue advantage in exchange for the intervention has been actually requested or accepted (even if the influence was not exerted), the act may be punishable as attempted illicit influence – as a result of Section 15 on attempt, combined with Section 308 PC (according to sec 15 CC not only the completed act but also the attempts of intentional acts are punishable by the same provisions).

*“Directly or indirectly”, “for himself or herself or for someone else”*

65. Section 308 PC clearly refers to these expressions and thus covers the involvement of intermediaries and third party beneficiaries of the undue advantage. The expressions are to be interpreted just like for the bribery offences discussed earlier.

### Sanctions

66. Depending on the case, illicit intervention is punishable by up to 2 years of imprisonment (value of undue advantage below 3000 Euros), up to 3 years of imprisonment (value of undue advantage between 3000 and 50,000 Euros) and from 6 months to 5 years of imprisonment (value of undue advantage in excess of 50,000 Euros).

### **Bribery of domestic and foreign arbitrators (Articles 1-4 of ETS 191)**

67. Sections 304 and 305 CP (on passive bribery and on acceptance of benefits, respectively) and Sections 307 and 307a PC (on active bribery and on granting of an advantage) refer explicitly

both to public officials and to arbitrators. The definition of an arbitrator (see below) refers to domestic and to foreign arbitrators.

#### Elements of the offences and sanctions

*"Domestic arbitrator / arbitrator exercising his/her functions under the national law on arbitration";  
"Foreign arbitrator / arbitrator exercising his/her functions under the national law on arbitration of any other State"*

68. Bribery of arbitrators is thus criminalised in the same manner as bribery of public officials: domestic arbitrators are treated similarly to domestic public officials; foreign arbitrators are treated in the same manner as domestic arbitrators insofar as they are arbitrators from another EU country. The only difference between arbitrators from other EU countries and those from non-EU countries is that in respect of the latter, the provisions on preparation of passive bribery (Section 306 PC) apply to some extent, whilst those on preparation of active bribery (Section 307b) do not apply; but the main provisions of Sections 304, 305, 307 and 307a apply equally to all.
69. Section 74 par 1 (4c) PC defines an arbitrator as follows: "Any decision maker of a court of arbitration as defined in sections 577 ff of the Austrian Code of Civil Procedure (*Zivilprozessordnung, ZPO*) with its seat in Austria or a seat not yet determined (Austrian arbitrator) or with its seat in another country;". The Austrian Code of Civil Procedure specifies the tasks and functions of an arbitrator, the preconditions for these tasks and functions and the procedural rules. The decisive criteria for the distinction between national and foreign arbitrators is whether the court of arbitration has its seat in Austria or in a foreign country, irrespective of the law the parties have agreed upon to apply.
70. The basic elements of the offence, and the sanctions applicable are those described earlier as regards bribery of domestic and foreign public officials. The replies to the questionnaire do not refer to court cases or relevant case-law.

#### **Bribery of domestic and foreign jurors (Article 1, and Article 4 and 5 of ETS 191)**

71. Jurors are considered public officials in the meaning of Section 74 par 1 (4a) subparagraph b PC as they discharge tasks of justice as an organ for the federation or for another state or in case of an international court for an international organisation).
72. As a consequence, and similarly to arbitrators, bribery of jurors is thus criminalised in the same manner as bribery of public officials: domestic jurors are treated similarly to domestic public officials; foreign jurors are treated in the same manner as domestic jurors insofar as they are jurors from another EU country. In respect of jurors from non EU countries, the provisions on preparation of passive bribery (Section 306 PC) apply to some extent, whilst those on preparation of active bribery (Section 307b) do not apply. As for arbitrators, the main provisions (Sections 304, 305, 307 and 307a) apply equally to all jurors.
73. The basic elements of the offences, as well as the sanctions applicable, are those described earlier as regards bribery of domestic and foreign public officials. The replies to the questionnaire do not refer to court cases or relevant case-law.

## Other offences and questions

### Other provisions on corruption

74. As indicated in paragraph 8, Austrian legislation also provides for corruption-related offences specifically in certain sectors of activity. Like in many other countries, the PC also makes bribery of voters a specific offence.

### Participatory acts

75. Aiding and abetting are provided for under Section 12 PC, according to which instigators and accomplices are liable just like the main offender.

#### **Section 12 PC – Treatment of all participants as offenders**

*Not only the immediate offender commits the offence but also any person that instigates another person to commit it as well as everybody who is an accessory to its commission.*

### Effective regret

76. The replies to the questionnaire indicate that with a view to facilitate the detection of corruption-related offences, a Section 307c on active repentance was introduced in the PC with the last amendments in 2009; this mechanism of effective regret is applicable in connection (only) with the public sector bribery offences of Sections 304 to 307b:

#### **Section 307c PC – Active Repentance**

*(1) Anyone involved in a criminal offence established according to Section 304 to 307b, shall not to be punished if - before the authority (section 151 par 3) is informed about the criminal act – the offender abdicates his/her conduct or - in case more persons are involved – s/he impedes the conduct or averts its success and in any case, if s/he hands over the accepted advantage or the equivalent amount of money to the authority in the course of his/her self-denunciation.*

*(2) On the conditions mentioned in par 1 the offender still shall not be punished, if independently from any interference by him/her either the perpetration of the offence or its result do not occur and he/she, while not aware of this circumstance, did voluntarily and seriously endeavour either to prevent the perpetration or to avert the result of the offence*

77. The replies to the questionnaire did not provide additional information or explanations about this new mechanism, and no information was available on-site either as regards the practice (it would appear that the special anti-corruption prosecution service has applied it on one occasion so far).
78. The GET also noted that Austrian law makes broad use of effective regret mechanisms in relation with offences provided for in the PC (including money laundering). This is the case of Section 167 PC which applies in relation to a large catalogue of offences including breach of trust (Section 153) and accepting of advantages by rulers (Section 153a) – as indicated in the statistics at the end of the descriptive part, Section 153 has been commonly used for prosecuting bribery in the private sector:

### **Section 167 PC**

*(1) The punishability because of (...) breach of trust, acceptance of gifts by executives (...) is extinguished as a result of active remorse.*

*(2) The offender enjoys the benefit of active remorse, if s/he, before the authority (§151 paragraph 3) becomes aware of the offence, even following a complaint by the victim, but without the offender being forced to denounce him/herself,*

*1. provides compensation for the whole damage caused by his/her action or*

*2. commits him/herself contractually to provide within a certain time full compensation for the damage incurred by the injured person. In the latter case, the punishability revives again if the culprit does not keep to his/her obligation.*

*(3) The offender is also not to be punished if, in the course of self-denunciation revealing to the authority (Section 151 paragraph 3) his/her responsibility, s/he repairs the whole damage resulting from his action by making a consignment with the authority in question.*

*(4) The offender who has made due efforts to compensate for the damage, is not to be punished either if a third party acting in the offender's name, or if another person who participated in the offence, repairs the whole damage resulting from the offence, under the conditions stated in paragraph 2.*

### Jurisdiction

79. Austria assumes territorial jurisdiction for all offences committed in Austria on the basis of Section 62 and 67 PC (the latter applies the principle of ubiquity) and according to case law, it is sufficient when only part of the execution of the offence has taken place in Austria (RIS-Justiz RS0092073).

### **Section 62 PC – Criminal acts committed in Austria**

*The Austrian criminal law applies to all criminal acts committed within Austria.*

### **Section 67 PC – Time and place of a criminal act**

*(1) A criminal act has been committed by the perpetrator at the moment when he acted or when he should have acted; it is not relevant, when the results of the criminal act ensue.*

*(2) A criminal act has been committed by the perpetrator at the place where he acted or where he should have acted or where a result required by the definition of the criminal act ensued or should have ensued according to the intentions of the perpetrator.*

80. When it comes to offences committed abroad, Austria has two concepts of extraterritorial jurisdiction, in accordance with Sections 64 and 65 PC: whereas Section 64 PC provides for national jurisdiction in certain cases without the requirement of dual criminality (i.e. irrespective of the law of the state where the offence was committed), Section 65 paragraph 1 (1) PC establishes national jurisdiction over Austrian citizens in general (i.e. for all offences), but only under the condition of double criminality. Under the same condition, Section 65 paragraph 1 (2) PC establishes jurisdiction also if the offender has been a foreigner at the time of the offence, was gotten hold of in Austria and can not be extradited to a foreign state for other reasons than the nature or characteristics of the offence.

**Section 64 PC – Criminal acts committed abroad which are subject to prosecution irrespective of the laws of the state where the act was committed**

(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 par 1 (4) PC) or an Austrian Public official (sec 74 par 1 (4a) PC) while he/she fulfils his/her tasks or because he/she fulfils his/her tasks, as well as criminal acts committed by an Austrian public officer or Austrian public official.*

**Section 65 PC – Criminal acts committed abroad which are subject to prosecution if they are punishable according to the laws of the state where they have been committed.**

(1) *For other offences than those mentioned in sec 63<sup>6</sup> and 64 which have been committed in a foreign country the Austrian Penal Law applies, provided that the offences are also punishable according to the laws of the country where they have been committed,*

1. *if the offender was an Austrian citizen at the time of the commitment of the offence or if s/he has become an Austrian citizen later and is still so at the beginning of the criminal proceedings against him.*

2. *if the offender has been a foreigner at the time of the offence, was gotten hold of in Austria and can not be extradited to a foreign state for other reasons than the nature or characteristics of the offence*

(...)

81. In accordance with Section 64(1) paragraph 2, Austria can thus prosecute without condition of dual criminality “*criminal acts committed [abroad] against an Austrian public officer (Section 74 par 1 (4) PC) or an Austrian Public official (sec 74 par 1 (4a) PC) while he/she fulfils his/her tasks or because he/she fulfils his/her tasks, as well as criminal acts committed by an Austrian public officer or Austrian public official.*” As indicated above, Section 65(1) paragraph 1 and 2 provides for the possibility for Austria to prosecute offences committed abroad by its citizens and foreigners gotten hold of in Austria who cannot be extradited, subject to dual criminality.

Statutes of limitation

82. General statutes of limitation for the prosecution of criminal offences are provided under Section 57 PC<sup>7</sup>; statutes depend on the level of punishment incurred. An overview is available in the table

<sup>6</sup> Offences committed aboard an Austrian ship or airplane.

<sup>7</sup> Sec 57 PC 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 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 one year but not more than 5 years,

3 years, if the offence is punishable with imprisonment of more than six months, but not more than one year,

1 year, if the offence is punishable with a maximum of six months imprisonment or only a fine.

(4) When an offence has become statute-barred forfeiture and preventive measures are also no longer possible.

of paragraph 27. As a result, all bribery and trading in influence offences of Sections 304 to 308 PC are subject to a statute of 5 or 10 years; for other offences used in Austria to prosecute bribery and trading offences, particularly for acts involving private sector dealings, the statute of limitation can be much lower.

### Statistics

83. The following chart shows the statistics on convictions with regard to the criminal offences related to corruption for 2007, 2008 and 2009. The GET got confirmation during the visit, that statistics are not kept on investigations and prosecutions concerning the relevant corruption offences. 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, the only convictions available concern Section 153 PC (and not Section 10 of the unfair competition Act which criminalised active bribery in the private sector until new specific offences were introduced in 2008 (see paragraph 43). For these reasons, the informative value of the statistics below may be limited.

<b>Convictions</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
<b>§153</b>	119	143	126
<b>§153a</b>			1
<b>§168c</b>			
<b>§168d</b>			
<b>§302</b>	85	62	38
<b>§304</b>	2	4	1
<b>§305</b>			
<b>§306</b>			
<b>§307</b>	1		3
<b>§308</b>			

### Legislative amendments, reforms planned

84. The replies to the questionnaire do not refer to any reforms or amendments planned, whether or not connected with Austria's possible ratification of the Criminal Law Convention on Corruption and its Protocol or with the implementation of the United Nations Convention on Corruption (ratified by Austria on 11 January 2006). Austria just recently amended the Penal Code with respect to corruption offences in 2009 by the Act amending the Penal Code 2009, published in Federal Gazette Nr I 2009/98 which entered into force 1 September 2009. As the GET noted, amendments had been made earlier in 2008 to introduce a broad concept of public official and to extend the scope of the existing incriminations of corruption in the public sector (especially with the inclusion of provisions on "preparation of bribery" and in the private sector. It was seen by the Austrian anti-corruption community as a major step forward but at the same time, it triggered hefty criticism from various sectors of society (including academia, senior officials involved in the first proceedings under the new provisions on "preparation of bribery" for having accepted invitations to events, the industry involved in sponsoring of cultural and other events). As a result, the changes passed in 2009 aimed at defining more precisely the concept of public official and narrowing slightly the scope of incriminations.

### III. ANALYSIS

85. Austria is one of the very few GRECO members which have not ratified the Criminal Law Convention on Corruption (ETS 173) (hereinafter: the Convention) and the Additional Protocol thereto (ETS 191). Nevertheless, Austria, like any other member of GRECO, is subject to peer review according to the standards of the Convention and its Additional Protocol which are under examination in the Third Evaluation Round, together with Guiding Principle 2 of Resolution (97) 24 on the twenty guiding principles for the fight against corruption (“to ensure co-ordinated criminalisation of national and international corruption”). The GET notes that Austria signed the Convention on 13 October 2000, i.e. eleven years ago. In 2008 and 2009, the corruption offences contained in the Penal Code were amended but this has not led to the ratification of the Convention. The GET recommends **to proceed swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) as well as the signature and ratification of its Additional Protocol (ETS 191)**. In this context, attention is drawn to the formal Appeal by the Committee of Ministers to States, made at its 103rd Ministerial Session on the occasion of the adoption of the text of the Criminal Law Convention on Corruption (4 November 1998), to limit as far as possible the reservations that they declare pursuant to the Convention, when expressing their consent to be bound by the Convention. On the same occasion the Committee of Ministers appealed to States “which nevertheless find themselves obliged to declare reservations, to use their best endeavours to withdraw them as soon as possible.” The recommendations contained in the following paragraphs of this report are without prejudice to the right of Austria to enter declarations and reservations pursuant to articles 36 and 37 of the Convention and Article 9 of its Additional Protocol.
86. The Austrian Penal Code (hereinafter the “PC”) makes a distinction between active and passive bribery of public officials in a way which reflects the spirit of the Convention; it covers the various basic elements of giving/requesting, offering/accepting, and promising/accepting the promise (in Austrian law defined as “letting someone make a promise”). The GET also got confirmation during the on-site interviews that bribery is prosecutable - both in theory and practice - in the absence of an agreement between the bribe-giver and bribe-taker or where an agreement was reached but the bribe has not been paid and/or the conduct expected from the public official has not yet materialised. The offence is complete by the mere offering or solicitation of a bribe and attempt is relevant in the specific context of bribery in very exceptional situations only (for instance where the offer of, or request for a bribe has not yet reached the targeted person, or where the provisions on breach of trust of Section 153 PC are used as a basis – see paragraph 46). In various respects, the Austrian provisions go beyond the requirements of the Convention concerning the basic elements of the incriminations; in particular: a) the active and passive forms of bribery in the public sector (Sections 304 to 306 PC, and Sections 307 to 307b PC respectively) are each criminalised by a series of three provisions by which Austria makes a distinction between the basic bribery offence involving an action/inaction which does not constitute a breach of duties (Section 305 PC for the passive form and Section 307b PC for the active form), bribery for an action/inaction which constitutes a breach of duties – and therefore also an aggravating circumstance (Section 304 PC for the passive form and Section 307b for the active form), and “preparation of bribery” – which is meant to apprehend the practice of “baiting” for the purposes of a possible future and yet to be determined act/decision of the official (Section 306 PC for the passive form and Section 307b for the active form); b) at the same time, it is admitted in legal theory and practice that for the purposes of the active and passive bribery offences except “preparation”, it is irrelevant whether the solicitation (or promise or actual payment) of the bribe takes place before or after the performance of the expected act by the public official. Finally, during the on-site discussions, the GET did not come across undue



restrictions in practice (which would contradict the spirit of the incriminations) as regards for instance the level of proof required to obtain a conviction; the major challenge for the prosecution is to prove the illegitimate purpose of the bribe but jurisprudence has softened this requirement, for instance when there are professional contacts/relationships on an on-going basis; the prosecution may also use objective factual circumstances to substantiate the offence.

87. At the same time, most essential elements of the main definitions of active and passive bribery in the public sector provided under articles 2 and 3 of the Convention are present in the Austrian incriminations, which cover in particular both actions and inactions of the public official and the fact that the beneficiary of the bribe can be a third party. Moreover, it is irrelevant whether the bribery offence is committed directly or indirectly, i.e. by means of an intermediary. The Austrian authorities and practitioners met on site explained that Section 12 PC on instigation, aiding and abetting is applied broadly to cover also situations which would involve an intermediary (and as indicated in the descriptive part, s/he is him/herself prosecutable depending on his/her level of knowledge and criminal intent). According to information provided after the visit, this interpretation was reportedly confirmed in relevant judicial practice<sup>8</sup>. During the on-site visit, the current scope of the concept of “public official” (*Amtsträger*) of Section 74 paragraph (1)4a PC was also occasionally criticised for not applying, after the last legislative changes in 2009, to a series of public service undertakings which “do not work by far predominantly” for the administration or a public authority / body covered by the definition (e.g. the federal rail transport company, companies supplying gas and water, public hospitals and the like). It was stressed that these entities are exposed to risks of corruption due to the importance of tenders in those areas. The GET recalls that Article 1 of the Convention does not prescribe a definition of “public officials” and leaves this task to the States as long as the coverage is inclusive enough to take into account such essential public functions as ministers, mayors and judges. It would appear that from this point of view, the scope of Section 74 paragraph (1)4a is in line with the Convention. On the other hand, the GET noted divergent interpretations of the expression “works by far predominantly for the administration”; there may therefore be a need to take additional measures to ensure a common understanding among the relevant prosecution authorities and the economic stakeholders concerned. Austria may thus wish to keep the above matters under review.
88. The GET also recalls that in accordance with articles 2 and 3 of the Convention, it is irrelevant whether or not a breach of duty was committed by the public official's action or inaction expected/performed in return for a bribe; GRECO has consistently considered that domestic definitions of bribery limited to a breach of duty are not in line with the Convention. Different provisions of the Austrian Penal Code cover situations involving or not a breach of duty but following the latest amendments in 2009, the provisions on bribery not involving a breach of duty (especially Sections 305 and 307a PC) contain at present a requirement that the advantage concerned has to be in contravention of general service regulations or the employing institution's internal rules. The GET learned from the on-site discussions and legal literature that there are a number of potentially problematic issues connected with this approach. There might well be cases in practice where no regulations / provisions established and known in advance exist or where they exist, that they are unclear; during the on-site discussions it was not excluded that alternatively, an *ad hoc* decision or permission given by the employer could fill the gap, with the possible risk of abuses that goes with this kind of approach. The GET also received clear

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<sup>8</sup> The Austrian authorities referred, as an example, to the Supreme Court ruling 13 Os 51/80: in the underlying case, 3 persons were involved, the entrepreneur A, the tax official B and C, one of A's employees. C (i.a.) encouraged A to offer B an advantage in return for a tax reduction and at the same time he encouraged B to accept the advantage. All three were convicted – A on the basis of Sec 307 PC, B on the basis of Section 304 PC and C on the basis of Section 307 and 304 PC (in combination with Section 12).

confirmation that although regulations on gifts and similar advantages seem to be generally in place in Austria for the public administration at the level of the federation and the Länder (including the municipalities) (see also paragraph 21), certain categories of public officials are not currently subject to adequate administrative rules, for instance senior executives at federal, state and municipal levels (ministers, state secretaries, mayors etc.; during the visit, reference was made to a case where criminal charges against a mayor had to be dropped because of this lacuna). This is probably the case also for certain entities and their employees who qualify as public officials in accordance with Section 74 PC although they work in the private sector. Moreover, the current provisions imply that also the bribe-giver's criminal liability depends on the content of administrative regulations he may/can not be aware of, which raises questions from the point of view of general fairness and the rule of law. In addition, since Sections 305 and 307a PC apply equally to bribery of foreign and international public officials, the above issues could be exacerbated because of the possible particular difficulty of knowing the content of the relevant foreign rules and regulations. The GET understands that the reference to administrative regulations was included in 2009 because of fears that traditional gestures of appreciation and for the entertainment of good contacts – e.g. invitations to certain events addressed to public officials by businessmen – would be captured by the incriminations of bribery not involving a breach of duty. The important changes which took place in 2008 had, in fact, led to a prohibition of gifts worth more than 100 € for all categories of public officials, including senior officials. However, it would appear that instead of triggering an in-depth review of certain questionable practices concerning advantages which are far from being perceived as symbolic or negligible by the general public and criminal justice bodies<sup>9</sup>, the controversies led to an amendment to the existing bribery offences. For the above reasons, the GET considers that the current approach taken by Sections 305 and 307a PC could be problematic from the point of view of legal security. The GET recommends **to keep under review the application of Sections 305 and 307a of the Penal Code (concerning active and passive bribery not involving a breach of duty) concerning the requirement that the advantage concerned has to be in contravention of general service regulations or the employing institution's internal rules, in order to ascertain possible implications for legal security, including in matters of investigation and prosecution of corruption offences and, if need be, to take appropriate measures.**

89. With the Criminal Law Amendment Act 1998, the bribery offence definitions were broadened to capture not only pecuniary advantages but any type of advantages, which are to be understood as any benefit which places the bribe-taker in a better position. It would appear that the spirit of the former provisions was partly retained since the various offences of bribery and trading in influence refer to levels of punishment defined by reference to the monetary value of the advantage. The GET was not in a position to gain a clear view as to how non-material advantages are actually taken into account in judicial practice, and valued for the purposes of determining the applicable penalty: although the on-site discussions confirmed that the (undue) advantage can be non-material, it would appear that to date, corruption cases taken to court only involved a financial benefit. There is a clear risk that cases involving non-material advantages of a significant importance and/or which have significant repercussions, could be apprehended as basic corruption offences (and that as a consequence, the level of punishment would not be proportionate to the seriousness of the offence). The GET recommends **to examine whether**

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<sup>9</sup> The GET was informed that a few cases had been initiated on the basis of the new provisions of 2008 but charges were dropped after 2009; in one case in particular, which attracted media attention, generous VIP-invitations to a sport event, reportedly worth 3,500 €, had been distributed by the head of a business entity to various senior executives of state companies with whom they had a supplier relationships. The GET was also told that this case had probably contributed to triggering the amendments of 2009.

**additional initiatives need to be taken to ensure that all cases of bribery and trading in influence are adequately dealt with, even in case of non-material undue advantages.**

90. As indicated in paragraphs 37 to 42 and 54 to 57 of the present report, foreign and international public officials including assembly members and judges are treated in the same manner as domestic public officials, given the very broad scope of Section 74 paragraph (1) 4a PC, particularly subparagraph (b) by use of the words “anyone... who ...as an organ or employee discharges tasks of legislation, administration or justice for ...another state or for an international organisation” (subparagraphs c and d also treat equally the different categories of domestic and foreign/international officials). The GET welcomes this broad wording. By contrast, the incrimination of bribery involving public assembly members appears problematic. In accordance with the definition of public officials (“Amsträger”) of Section 74 paragraph (1) 4a subparagraph (a) PC, the incrimination of bribery involving members of domestic assemblies currently covers situations where the bribe-taker is a “member of a domestic constitutional assembly, insofar as s/he votes in an election or ballot or otherwise acts or refrains from acting in the exercise of the duties determined in the internal rules of procedure”. The discussions held on-site clearly confirmed that the incriminations of active and passive bribery of members of domestic assemblies are much narrower than those established under the Convention since the reference to “the exercise of duties determined in the internal rules of procedure” does not add much to an incrimination which is basically limited to the buying of votes. It was for instance indicated that the relevant internal rules of procedure generally do not say much about the concrete functions of assembly members apart for instance from the duty to participate in sessions, to participate in committees to which the MP was elected, to notify if the member was prevented from participating in sessions and the like. The reference to “duties” excludes the applicability of a number of situations where for instance an elected official would be bribed to present or support (before the formal voting stage) a legislative proposal or amendment, to refrain from participating in committee deliberations, to request the setting up of an investigation committee and take a specific position in that context, to address a formal question to the government etc. The discussions on site clearly confirmed that the above are not mere hypothetical situations. It would also appear that the scope of incriminations concerning foreign and international/EU public officials, members of foreign and international assemblies, members of international courts is not limited at all to such situations, if one refers to the broader wording of subparagraph 4b of Section 74 paragraph 1 PC. Consideration was given in 2008 as well as in 2009 to a possible extension of the incriminations but no concrete steps were taken. The GET very much regrets this missed opportunity which leaves Austria with limited means to prevent and combat corruption involving political figures (cf. in this respect part II of the present report on “Party financing”). The GET consequently recommends **to substantially broaden the incrimination of active and passive bribery of members of domestic assemblies resulting from the definition of public officials in section 74 paragraph 1 (4a) of the Penal Code, and thus bringing this incrimination in line with article 4 of the Criminal Law Convention on Corruption (ETS 173).**
91. Through the interviews, the GET received confirmation that the current incriminations of bribery in the private sector provided for in Sections 168c (1) and 168d PC do not apply in case the bribe-taker is working for an entity conducting business as a one-man company or an independent worker. The present situation does not appear to be in contradiction with the Convention since independent business owners or workers cannot commit a breach of duties against themselves. As indicated in the descriptive part, bribery offences in the private sector are not prosecutable *ex officio*, contrary to offences concerning public officials; they are prosecutable only “upon request of the person whose interests are prejudiced or one of the persons authorised to file a claim for omission according to section 14 (1) of the Unfair Competition Act 1984” (section 168e PC). In

the opinion of the GET, this is an unnecessary obstacle to the effective prosecution of bribery offences between private sector entities: the already secretive nature of corruption and risks for the image of the employer of the bribe-taker or –giver, in particular, are likely to prevent that such complaints are filed, as practice has also shown in other countries. Moreover, in the context of Austria, the relatively vast sector of privatised public services and the intricacies of the distinction between public and private sector for the purposes of the prosecution of corruption offences could be additional arguments for not excessively differentiating the conditions for the prosecution of corruption in the public and corruption in the private sector. In view of the above, the GET recommends **to abolish the requirement for a prior complaint before prosecutions are brought for bribery in the private sector (Section 168e of the Penal Code).**

92. As indicated earlier in this report (see paragraph 8 and 43 et seq.), some bribery offences are still contained in pieces of legislation other than the Penal Code. Among these, the Unfair Competition Act (UWG) is the only one containing criminal offences, more precisely those used until 2008 to criminalise bribery in the private sector. These were meant to be abolished when the above Sections 168c and 168d were introduced in the Penal Code but this has not happened yet and the GET was concerned about the persisting co-existence of two sets of provisions criminalising private sector bribery with different definitions and sanctions. The Austrian authorities also stressed that the main provisions which have been used in practice to date for the prosecution of acts of bribery, both in the public and in the private sector are in fact those of the Penal Code on Abuse of power – Section 302 PC – and on breach of trust – Sections 153 and 153a PC. This is not uncommon among GRECO member states. However, in Austria it seems to be particularly salient and the available statistics on convictions seem to confirm this (see paragraph 83). As regards Section 302 PC, it was explained to the GET that all public sector bribery offences automatically constitute an “abuse of power” and they are thus absorbed by this offence, which entailed traditionally a higher level of punishment. As for the offence of “breach of trust”, the GET noted that the two Sections concerned (i.e. Section 153 and Section 153a PC) are not fully consistent and Section 153a (which applies specifically to cases involving persons with executive functions) is drafted in a way which resembles the offence of bribery as it refers to the acceptance of “more than a merely minor advantage”. Leaving aside the fact that there is some room for interpretation of this expression, overall the level of punishment is much lower than for bribery offences, bearing also in mind that aggravating circumstances pursuant to Section 153 PC may not be easily applicable in a bribery case since they are defined by reference to the financial dimension of the damage. This could lead to the consequence that bribery offences in the private sector are not adequately captured and sanctioned in practice. Finally, , it was confirmed that the offences of abuse of power and of breach of trust do usually not lead to the initiation of a financial investigation which would allow to seize and confiscate the proceeds of crime. The Austrian authorities admitted however, that this was still a general issue for all corruption-related offences (see also the joint first and second round evaluation report). In light of the above, the GET recommends **(i) to review the need to keep provisions on bribery in the Unfair Competition Act and (ii) to take such measures as may be necessary to assure that the prosecution of acts of bribery leads in practice to a penal response which reflects the needs of an effective anti-corruption policy.**
93. Section 308 PC criminalises “Illicit intervention” and for the time being, this offence diverges from the concept of trading in influence as established by article 12 of the Convention, even though some differences are more apparent than real: for instance, Section 308 PC covers only the passive element of the offence. The Supreme Court, however, has made it clear in a decision of 1996 that the person remunerating the offender (similarly to the active element of the offence of trading in influence of the Convention) is also prosecutable as instigator under the general

principles on instigation, aiding and abetting of Section 12 PC. The on-site discussions confirmed that contrary to the definition of Article 12 of the Convention, acts falling under the offence of Section 308 PC, in principle, are prosecutable only where the influence was actually exerted vis-à-vis the public official (or arbitrator). It was indicated that where the influence is not / has not been exerted yet, the general provisions on attempt of Section 15 PC could be applied and that the sanction level would be the same as for the completed offence. However, it would appear that this applies only where the offender is actually in a position to exert the influence s/he claims to have; it is doubtful whether this meets the expectations of the Convention: the explanatory report, indeed, makes it clear that it does not matter whether a person has real or supposed influence and the Convention is clear about the fact that it is irrelevant whether the influence leads to the intended result. Section 308 PC also contains a dual limitation: in order to be prosecutable, the intervention must be aiming at an act belonging to the public official's "official duties" and it must lead to a violation of these duties. Article 12 of the Convention does not provide for such limitations and it refers, generally, to the exertion of influence over the decision making of the official who is target of the influence. Even though the concepts of "duties" or "breach of duties" are interpreted broadly in Austria, the GET considers that they could constitute an unnecessary requirement in the context of the effective prosecution of trading in influence (the GET recalls that, in comparison, bribery of public officials is prosecutable also in the absence of a breach of duty under Sections 305 and 307a). In view of the above, the GET recommends **to ensure, for instance by amending Section 308 of the Penal Code on illicit intervention, that the various elements of the offence of trading in influence established under article 12 of ETS 173 are implemented in Austrian criminal law.**

94. The provisions on active and passive bribery discussed above refer explicitly to arbitrators. In Austria, arbitrators perform their duties under the provisions of the law on arbitration of 2006 and the corresponding provisions of the Code of Civil Procedure (CCP) which deal with arbitration performed by a state body or an *ad hoc* body established by the parties to a litigation. The definition of arbitrators under Section 74 paragraph 1 (4c) makes a cross-reference to the CCP and both refer to persons acting as arbitrators in Austria and in a foreign country. As for jurors, these are not explicitly referred to in the incriminations of bribery, but their function is reportedly captured by the broad scope of the definition of "public officials". Although this has not been tested in court yet, the GET did not come across information that would contradict this interpretation. Overall, it would appear that even if Austria is not yet a party to the Protocol to the Criminal Law Convention on Corruption (ETS 191) – see the recommendation in paragraph 85 – bribery of domestic and foreign arbitrators and jurors is adequately criminalised, subject to Austria taking measures to implement the recommendations made in the present report concerning the incriminations of bribery of public officials.
95. As regards the system of sanctions, all the acts of bribery of a public official and trading in influence are liable to a basic level of punishment of up to 2 or 3 years imprisonment depending on the provisions concerned. In aggravated circumstances (where the undue advantage exceeds 3,000 or 50,000€), the punishment is increased: imprisonment of 6 months to 5 years or 1 to 10 years, depending on the case. In comparison, acts of bribery in the private sector are subject to low penalties: up to 2 or 3 years imprisonment under Section 168c PC, and only up to 2 years imprisonment under Section 168d. In the context of Austria, the latter may not be proportionate and dissuasive enough to effectively deter private sector entities from engaging in corrupt practices: as explained in paragraph 87, law makers have decided to leave out of the scope of public sector bribery offences large parts of activities of common interest and these are perceived in Austria as exposed to risks of corruption. GRECO has often pointed out that corruption in the private sector is of no lesser importance for society at large than public sector corruption; this

implies that both be apprehended with the similar determination. The GET therefore recommends **to consider increasing the maximum criminal sanctions in respect of active and passive bribery in the private sector of Section 168d of the Penal Code.**

96. The GET was concerned that no overall analytical information (statistics) is available as regards investigations and prosecutions for bribery, the types of cases concerned (for instance whether domestic officials or foreign officials are involved), or the level of punishment applied in practice. Police and prosecution (except, to some extent, the Anti-Corruption prosecutor's Office which deals with part of these cases) keep no specific data on corruption-related offences. As indicated earlier, most bribery cases have to date been prosecuted and adjudicated as breach of trust (Section 153 PC) or abuse of office (Section 302 and 302a PC). In the period 2007-2009, there have officially been 7 convictions for bribery, which seems very low compared to the widespread perception in Austria that corruption is a significant problem. The share of corruption cases which is "absorbed" by other offences is unknown. Keeping adequate analytical and statistical information as regards the various stages of the proceedings on an ongoing-basis (investigations, prosecutions, convictions), including the main characteristics of the cases dealt with, would no doubt allow Austria to better assess the effectiveness of its anti-corruption efforts. The Austrian authorities may wish to give consideration to this matter.
97. The latest amendments to the Penal Code of 2009 have introduced under the new Section 307c ("Active repentance") a mechanism of effective regret which is applicable in respect of the various active and passive bribery offences in the public sector as established under Sections 304 to 307b. Compared to other GRECO members evaluated to date which also have the legal institution of "effective regret", a particularity of the Austrian approach is that Section 307c applies in respect of the bribe-giver and the bribe-taker, and not just to the former. The GET was concerned by the little safeguards in place: on the one hand, the offender must report the offence spontaneously but on the other hand, there is no precondition that s/he committed the offence following a prior solicitation or because s/he was forced to do so (e.g. the briber giving a sum of money to a municipal authority because he was asked to do so in order to obtain the building permit s/he applied for). In principle, very serious cases of active corruption could go totally unpunished by reference to this Section. There is a danger that the provision might lead to unreasonable results, since the offender (active or passive briber) in fact has an undisputable legal right to be exempted from punishment if the – very strict and formal – requirements are fulfilled; in this connection, the GET is concerned about the automatic nature of this defence. More importantly, the decision to drop charges rests with the prosecutor and it would appear that the exemption is total. Although GRECO has recognised the potential of effective regret for the fight against corruption, it has consistently expressed reservations. In line with this approach, and bearing in mind the limited practice with Section 307c PC, the GET recommends **to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment granted to perpetrators of active and passive bribery in the public sector in cases of effective regret (Section 307c of the Penal Code).**
98. The rules on jurisdiction do not, as yet, comply fully with the principles established in Article 17 of the Convention as far as transnational offences are concerned. Section 64 paragraph 1 PC allows Austria to prosecute "criminal acts committed against an Austrian public officer (as defined in Section 74 paragraph 1 (4) PC) or an Austrian Public official (as defined in Section 74 par 1 (4a) PC) while he/she fulfils his/her tasks or because he/she fulfils his/her tasks, as well as criminal acts committed by an Austrian public officer or Austrian public official". The on-site discussions showed that whilst half of the practitioners and specialists questioned considered that the expression "committed against" would allow to prosecute – for offences committed abroad – a

foreign bribe-giver or person committing an active trading in influence offence involving a domestic official, the other half considered this was not the case. Apparently, this provision has never been tested and clarification is thus needed. At the same time, Section 65 PC allows Austria to prosecute: a) offences committed by its nationals abroad, either as bribe-givers or as bribe-takers whilst performing functions of a public official (or member of a domestic assembly as well as those functions addressed under articles 9 to 11 of the Convention), as well as b) offences committed by foreign bribe-givers that would involve the categories of persons listed under a). However, Section 65 PC subjects the applicability of Austrian legislation to the condition of dual criminality. In earlier evaluations, GRECO has already considered that the condition of dual criminality, in the context of the fight against corruption, is an unnecessary restriction to the competence of a country. In view of the above, the GET therefore recommends **to ensure that the Penal Code provides for rules on jurisdiction which are in line with article 17 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173) without the requirement of dual criminality with respect to the offences of bribery and trading in influence committed abroad.**

#### **IV. CONCLUSIONS**

99. Austria is one of the very few Council of Europe and GRECO member states which are not a party to the Criminal Law Convention on Corruption (ETS 173) and the country therefore needs to proceed swiftly with the ratification of this instrument, as well as its Additional Protocol (ETS 191). This being said, Austria has already in place a set of criminal law provisions that reflect many of the standards of the above instruments since the Austrian legislation has undergone several changes over the last few years. The more recent changes took place in 2008 and 2009. Those of 2009 can be considered as a genuine progress in terms of the severity of criminal sanctions for corruption offences. But they also constitute a step back as they narrowed down considerably the circumstances in which different categories of persons are liable for bribery. In particular, public officials are not prosecutable where gifts and other gratuities are allowed by administrative regulations or the employing institution's internal rules. This leads to practical difficulties since top executives at federal, state and local levels are usually not subject to such regulations. At the same time, bribery of members of domestic assemblies is still construed in such a narrow manner that it is of little practical use. Some improvements are also necessary in other areas, including the extension of Austria's jurisdiction regarding cross-border offences, and the possible stiffening of sanctions for certain corruption offences in the private sector, especially since important entities providing services of common interest are currently excluded from the scope of public sector bribery and trading in influence offences.
100. In view of the above, GRECO addresses the following recommendations to Austria:
- i. **to proceed swiftly with the ratification of the Criminal Law Convention on Corruption (ETS 173) as well as the signature and ratification of its Additional Protocol (ETS 191) (paragraph 85);**
  - ii. **to keep under review the application of Sections 305 and 307a of the Penal Code (concerning active and passive bribery not involving a breach of duty) concerning the requirement that the advantage concerned has to be in contravention of general service regulations or the employing institution's internal rules, in order to ascertain possible implications for legal security, including in matters of investigation and prosecution of corruption offences and, if need be, to take appropriate measures (paragraph 88);**

- iii. **to examine whether additional initiatives need to be taken to ensure that all cases of bribery and trading in influence are adequately dealt with, even in case of non-material undue advantages (paragraph 89);**
  - iv. **to substantially broaden the incrimination of active and passive bribery of members of domestic assemblies resulting from the definition of public officials in section 74 paragraph 1 (4a) of the Penal Code, and thus bringing this incrimination in line with article 4 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 90);**
  - v. **to abolish the requirement for a prior complaint before prosecutions are brought for bribery in the private sector (Section 168e of the Penal Code) (paragraph 91);**
  - vi. **(i) to review the need to keep provisions on bribery in the Unfair Competition Act and (ii) to take such measures as may be necessary to assure that the prosecution of acts of bribery leads in practice to a penal response which reflects the needs of an effective anti-corruption policy (paragraph 92);**
  - vii. **to ensure, for instance by amending Section 308 of the Penal Code on illicit intervention, that the various elements of the offence of trading in influence established under article 12 of ETS 173 are implemented in Austrian criminal law (paragraph 93);**
  - viii. **to consider increasing the maximum criminal sanctions in respect of active and passive bribery in the private sector of Section 168d of the Penal Code (paragraph 95);**
  - ix. **to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment granted to perpetrators of active and passive bribery in the public sector in cases of effective regret (Section 307c of the Penal Code) (paragraph 97);**
  - x. **to ensure that the Penal Code provides for rules on jurisdiction which are in line with article 17 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173) without the requirement of dual criminality with respect to the offences of bribery and trading in influence committed abroad (paragraph 98).**
101. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the Austrian authorities to present a report on the implementation of the above-mentioned recommendations by 30 June 2013.
102. Finally, GRECO invites the authorities of Austria to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.