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## **Joint First and Second Evaluation Round**

### **Evaluation Report on Austria**

Adopted by GRECO  
at its 38<sup>th</sup> Plenary Meeting  
(Strasbourg, 9-13 June 2008)

## INTRODUCTION

1. Austria joined GRECO on 1 December 2006, i.e. after the close of the First Evaluation Round and just before the end of the Second Evaluation Round. It was therefore submitted to a joint evaluation procedure covering the themes of the First and Second Evaluation Rounds (see paragraph 3 below). The GRECO Evaluation Team (hereafter referred to as the “GET”) was composed of Mr Ernst GNAEGI, Head of the International Criminal Law Section of the Federal Ministry of Justice (Switzerland), Mr Vassil KIROV, Director General of the Financial Intelligence Unit (Bulgaria), Mrs Aleksandra POPOVIC, adviser, Ministry of Justice (Serbia) and Mr Tibor SEPSI, Government adviser, Office of the Prime Minister (Hungary). The team, accompanied by a member of the Council of Europe secretariat, visited Austria from 19 to 23 November 2007. Before the visit the GET experts were provided with replies to the Evaluation questionnaires (Greco Eval I-II (2007) 2E Eval I – Part 1 and Greco Eval I-II (2007) 2E Eval II – Part 2), copies of relevant legislation and other documentation.
2. The GET met representatives of the Ministry of Justice (Unit for Criminal Procedure Legislation, Unit for corruption and money laundering, Unit responsible for the orders given to prosecutors in individual cases, Unit responsible for money laundering and international cooperation, Human Resources Division, Department of Judicial Training, Commercial Register), Federal Ministry of the Interior (Federal Criminal Intelligence Service, including the Financial Intelligence Unit, Bureau for Internal Affairs), Federal Chancellery (departments responsible for human resources, political party financing, data protection law), Federal Parliament (General Directorate, Committee on conflicts of interests), Ministry of Economy and Labour (Unit responsible for real estate and construction tenders), Ministry of Finance (Bureau for Internal Affairs, Fiscal services), Ministry of Defence (Audit Division), Ministry of Health, Family and Youth (Unit for the control of social health insurance scheme), Austrian Court of Audit, the Austrian Ombudsman, judges (*Landesgerichtshof* and *Oberstes Landesgerichtshof* Vienna), General Prosecutor’s Office (including the *Oberstaatsanwaltschaft* Vienna), the Financial Market Authority. Meetings were also held with representatives from the administration of the Land/municipality of Vienna: Executive Office (internal audit office). Finally, the GET also met the following academic, civil society and private sector representatives: criminal law and criminology professors from the University of Vienna, the Chamber of civil law notaries, the Bar Association, the Chamber that gathers financial professions (such as chartered accountants, auditors, licensed bookkeepers, tax advisors, and management accountants), Transparency International, journalists (*Profil*, *Salzburger Nachrichten*, *Falter*).
3. In accordance with Article 10.3 of its Statute, GRECO had decided that:
  - the First Evaluation Round would deal with the following themes:
    - ❖ **Independence, specialisation and means available to national bodies engaged in the prevention and fight against corruption**<sup>1</sup>: Guiding Principle 3 (hereafter “GPC 3”: authorities in charge of preventing, investigating, prosecuting and adjudicating corruption offences: legal status, powers, means for gathering evidence, independence and autonomy); Guiding Principle 7 (hereafter “GPC 7”: specialised persons or bodies dealing with corruption, means at their disposal);
    - ❖ **Extent and scope of immunities**<sup>2</sup>: Guiding Principle 6 (hereafter “GPC 6”: immunities from investigation, prosecution or adjudication of corruption); and

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<sup>1</sup> Themes I and II of the First Evaluation Round

<sup>2</sup> Theme III of the First Evaluation Round

- the Second Evaluation Round would deal with the following themes:
    - ❖ **Proceeds of corruption**<sup>3</sup>: Guiding Principles 4 (seizure and confiscation of proceeds of corruption) and 19 (connections between corruption and money laundering/organised crime), together, for members having ratified the Criminal Law Convention on Corruption (ETS No. 173), with articles 19.3, 13 and 23 of the Convention;
    - ❖ **Public administration and corruption**<sup>4</sup>: Guiding Principles 9 (public administration) and 10 (public officials);
    - ❖ **Legal persons and corruption**<sup>5</sup>: Guiding Principles 5 (legal persons) and 8 (fiscal legislation), together, for members having ratified the Criminal Law Convention on Corruption (ETS No. 173), with articles 14, 18 and 19.2 of the Convention.
4. Austria has ratified the Council of Europe's Civil Law Convention on Corruption (ETS No. 174) and signed, but not ratified, the Criminal Law Convention on Corruption (ETS No. 173).
  5. This report was prepared on the basis of the replies to the questionnaires and the information provided during the on-site visit. The main objective of the report is to assess the measures adopted by the Austrian authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 3. The reports presents - for each theme - 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.

## I. OVERVIEW OF AUSTRIA'S ANTI-CORRUPTION POLICY

### a. **Description of the situation**

#### The perception and phenomenon of corruption

6. With its population of 8,3 million and a surface of 84,000 km<sup>2</sup>, Austria is one of the medium sized Council of Europe member States and one of the world's richest countries in terms of GDP per capita. A federal republic, Austria is divided into nine states (German: "Bundesländer"). These states are then divided into districts (*Bezirke*) and cities (*Statutarstädte*). Districts are subdivided into municipalities (*Gemeinden*). Cities have the competencies otherwise granted to both districts and municipalities. The states are not mere administrative divisions but have some legislative authority which is distinct from that of the federal government. However, criminal legislation is largely unified since there is a single Penal Code and a single Penal Procedure Code for the whole country.
7. The replies to the questionnaires contain no particular information about the characteristics of corruption in the country. They provide general police statistics which indicate that the main alleged breaches of official duties reported are abuse of official authority, accepting an advantage by public officials and bribery. The Austrian authorities also indicate that from the many cases of corruption investigated in the past, it can be noted that corruption in the private sector was very often linked with other kinds of crime like fraud, misappropriation, money laundering and

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<sup>3</sup> Theme I of the Second Evaluation Round

<sup>4</sup> Theme II of the Second Evaluation Round

<sup>5</sup> Theme III of the Second Evaluation Round

bankruptcy. Austria came fifteenth out of 179 in Transparency International's 2007 classification, with 8.1 points out of 10 on its corruption perception index.

8. The Austrian authorities indicated that currently, no particular links that would be a particular source of concern have been identified between domestic public sector corruption and organised crime. On the other hand, when it comes to private sector corruption, connections with organised crime are considered to exist, in particular in the construction business, banking sector, credit service sector, procurement sector and the gambling sector. In line with the Hague Programme, the Federal Ministry of the Interior will focus on the development of the anti-organised crime instruments and will examine the existing connections between corruption and organised crime.

### Criminal law

9. The term "corruption" became established in Austrian criminal law with the two so-called "Anti-Corruption Acts" in 1964 and 1982. The key standards in the fight against corruption are outlined in Section 302ff of the Penal Code (hereinafter PC). Among others, the abuse of official authority (Section 302 PC), accepting an advantage by public officials (Section 304 PC), accepting an advantage by senior executives of a public enterprise (Section 305 PC), accepting an advantage by experts (Section 306 PC), bribery (Section 307 PC) and illicit intervention (Section 308 PC) fall under these provisions. 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>6</sup> or accepting an advantage by managers (Section 153a PC), as well as restrictive agreements in procurement procedures (Section 168b PC).
10. Further provisions can be found in complementary legislation. 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 new 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 penal offences (therefore including corruption-related offences) provided for in the Penal Code, whether they are intentional or negligent.
11. The various offences mentioned above carry different sanctions. For instance (active) bribery under Section 307 is punishable - depending on the case - by up to two years' imprisonment (Section 307 para. 1) or by up to six months' imprisonment or by a fine of up to 360 daily rates – i.e. EUR 180,000 (Section 307 para. 2). Accepting an advantage by public officials under Section 304 is punishable by a maximum term of imprisonment of one year (Section 304 para. 2), or three years (Section 304 para. 1), increased to three and five years respectively when the value of the advantage exceeds EUR 3,000. Abuse of official authority (Section 302) – which is a frequent crime, see below – is punishable by a prison sentence of six months to five years or one to ten years depending on the circumstances. The afore-mentioned offences are either felonies or misdemeanours, by virtue of the classification of Section 17 PC: a felony - *Verbrechen* is "any intentional behaviour which is punishable by imprisonment for life or by a term of more than three years imprisonment"; all other criminal offences are misdemeanours - *Vergehen*.

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<sup>6</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.

12. In 2006, a total of 358 allegations of malpractices (i.e. offences under Sections 302 to 313 PC) were reported to the Austrian Federal Bureau for Internal Affairs (BIA)<sup>7</sup>. Of these 358 allegations, 288 dealt with abuse of official authority, 41 with breach of official secrecy and 14 with the acceptance of gifts. The remainder of the allegations (all in single digits) were divided between negligent infringement of liberty of persons and domestic authority (Section 303 PC), bribery (Section 307 PC), false recording or authentication in office (Section 311 PC), mistreatment or neglect of a prisoner (Section 312 PC), and usurping authority (Section 314 PC) (see table).

PC	facts	number
Sec. 302	Abuse of official authority	288
Sec. 303	Negligent infringement of liberty of persons and domestic authority	4
Sec. 304	Accepting an advantage by public officials	14
Sec. 307	Bribery	5
Sec. 310	Breach of official secrecy	41
Sec. 311	False recording or authentication in office	1
Sec. 312	Mistreatment or neglect of a prisoner	4
Sec. 314	Usurping authority	1

13. The table below shows the overall number of cases reported to the police in conjunction with corruption in Austria. The cases are listed according to the Sections in the Penal Code, it being understood that the figures for Section 302 CP cover the various offences handled as "Abuse of official authority" since the number of corruption cases cannot be singled out.

Austria	Year 2000	Year 2001	Year 2002	Year 2003	Year 2004	Year 2005	Year 2006
Sec. 153a PC	1	-	12	2	5	2	1
Sec. 302 PC	194	180	138	177	222	752	347
Sec. 303 PC	-	-	3	1	-	2	-
Sec. 304 PC	3	7	72	2	4	1	2
Sec. 305 PC	-	-	-	10	-	1	1
Sec. 306 PC	-	1	-	-	-	-	-
Sec. 307 PC	10	15	124	10	15	23	7
Sec. 308 PC	-	2	-	-	-	2	1

#### Main initiatives

14. The replies to the questionnaire do not refer to a specific national/overall anti-corruption policy. They refer to initiatives which can be grouped as follows:
- a) in certain states such as Vienna and in certain sectors of the federal civil service (police, financial authorities), special programmes have been implemented and special authorities have been established in order to prevent and fight corruption. Currently, a special code of conduct for persons employed in the whole public sector (federal, local, municipal level) is under preparation<sup>8</sup>;
  - b) enhanced role of the Federal Ministry of the Interior and its specialist bodies. As the Federal Ministry of the Interior's contact point for anti-corruption matters, the Bureau for Internal Affairs (BIA) follows a three-pillar approach concerning its fight against corruption. In

<sup>7</sup> Source: BIA-Statistics 2006, incorporated into the Mol security report 2006.

<sup>8</sup> Its adoption is expected by the end of June 2008

addition to reactive investigations, the Bureau takes preventive and educational measures. Particular importance is attached to international cooperation in the field of anti-corruption. In its capacity as an organisational unit of the Federal Ministry of the Interior, the BIA conducts security and criminal police investigations in cases of corruption or suspected malpractice by public officers. In such cases, the BIA cooperates directly with the competent public prosecutor's offices and courts. The BIA carries out investigations nationwide and, given its sphere of responsibilities, represents a centre of competence for all other security services. Other important tasks performed by the BIA are training programmes and the prevention of corruption;

- c) the Criminal Intelligence Service Austria (*Bundeskriminalamt* or BK) under the Federal Ministry of the Interior is an important body in the fight against corruption, as there is an obligation to report all cases in conjunction with corruption to the competent departments in the Police Headquarters. Furthermore the BK organises information sessions and training courses: in 2006 the BK organised several seminars on fighting corruption (for ambassadors and employees destined to work abroad, the Chamber of Commerce and especially foreign business entities and their employees, as well as the Federal Ministry of the Interior – especially staff particularly exposed to risks of corruption). In 2007 seminars were planned for officers in the Police Organisation competent to investigate cases of corruption and for judges and prosecutors in the Ministry of Justice;
- d) participation in international anti-corruption fora and implementing the relevant standards: EU-Anti-Bribery Convention, OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, United Nations Convention against Corruption, Criminal Law Convention on Corruption (ETS 173). The first three have been ratified. With the recent entry into force of the Statute on the Responsibility of Entities for Criminal Offences, Austria is in a position to ratify also the Criminal Law Convention on Corruption. The BIA also participates actively in the setting up of an informal association of the EU Police Monitoring and Inspection Bodies, and national Anti-Corruption Agencies (EPAC, the European Partners Against Corruption - [www.epac.at](http://www.epac.at)). Moreover, the BIA is tasked with assuring technical networking as well as safeguarding and intensifying international cooperation in the fight against corruption. Therefore, the national and international fight against corruption was one of the focal points of the Federal Ministry of the Interior during Austria's EU Presidency in the first half of 2006.

## **b. Analysis**

15. The on-site discussions have shown that there are some interesting anti-corruption initiatives in Austria (the efforts of the BIA of the Federal Ministry of the Interior and the BIA of the Ministry of Finance, the anti-corruption policy put in place in Vienna). But altogether, the GET found that Austria is at an early stage in the area of the fight against corruption. Leaving aside the reform of the criminal law and criminal procedure law, there is no specific governmental anti-corruption programme at the moment. The level of acknowledgement of the importance of corruption in the country is quite variable: although some interlocutors seemed to minimise its importance, others admitted frankly that this was a real issue in respect of every day relations with the administration, obtaining favours from senior and elected officials (especially since political financing is poorly regulated and corruption is not yet fully criminalised), and private sector corruption taking place sometimes in an organised manner. No sector seems to be immune from corruption; as well as the general administration or elected officials, cases have also occasionally involved prosecutors, the police, customs and tax officials. The statistics on convictions would not reveal much about the scale and patterns of corruption: as the GET was advised on site, Section

302 on abuse of office is often used to deal with corruption cases as well because of the lower level of evidentiary requirements for obtaining a conviction.

16. At the time of the on-site visit, the draft bill concerning amendments to the corruption offences (Strafrechtsänderungsgesetz 2008) was being discussed in Parliament (it was adopted later and entered into force on 1<sup>st</sup> January 2008). The law, *inter alia*, reviewed the provisions on active and passive bribery in the private sector (new Sections 168c and 168d PC)<sup>9</sup>. The revised law extends the provisions on active and passive bribery of foreign officials and officials of International Organisations to members of foreign public assemblies and of international organisations, including the European Parliament (Sections 74 in connection with 304 and 307 PC). The maximum penalty for active corruption in Section 307 is increased to three years. Finally, the penal code will contain new offences in Sections 304, paragraph 2 and 307, paragraph 2 covering the offer and acceptance of undue advantages in connection with the carrying out of official duties (*“im Hinblick auf seine Amtsführung”*) without a need to prove a link to a specific act or omission by the public officials. Those amendments will strengthen the Austrian anti-corruption legislation and are therefore to be welcomed.
17. It is important that employees of public companies owned by the state and tasked with public functions are also covered by the criminal provisions on bribery of public officials. It is not rare that such companies perform duties which are *per se* vulnerable to corruption, such as public procurement<sup>10</sup>. At the time of the on-site visit, the existing provisions of the penal code (Sections 302ss) only covered senior executives of a public enterprise (Section 305). The new legislation on corruption (*Strafrechtsänderungsgesetz 2008*), among other changes, widens the notion of public official to explicitly include, *inter alia*, persons performing public duties in public enterprises (see Section 74 of the bill). This modification is also an important improvement of the criminal measures against corruption in Austria.
18. At the time of the on-site visit the draft legislation did not contain a provision including members of domestic public assemblies. The GET was told that it is the prerogative of Parliament to introduce a provision concerning the criminal liability of its members for corruption offences. The Austrian authorities expected the plenary of the *Nationalrat* to insert such a provision when dealing with the draft. In fact, the bill published in the official gazette on 28<sup>th</sup> December 2007 and which entered into force on 1<sup>st</sup> January 2008 now contains a new article 304a with the following content: “Anyone who undertakes to buy or sell a vote for an election or ballot in the National Council, the Federal Council, in the Federal Assembly, in a Diet or in a municipal council, is to be punished with a prison sentence of up to three years.” The GET is clearly of the opinion that members of domestic public assemblies must be included in the anti-corruption provisions of a national criminal code on an equivalent basis as public officials (see also article 4 of the Criminal Law Convention on Corruption). At the time of the visit, this was far from being the case, given the fact that the offences of the twenty second part of the Penal Code (Sections 302-313) were not applicable to MPs - with the exception of Section 308 (illicit intervention). There were also no other restrictions which would limit the capacity of MP’s to accept gifts. The newly introduced article 304a of the penal code is restricted to buying or selling votes and thus still falls substantially short of a general passive corruption provision. As the incriminations will only be subject of GRECO’s Third Evaluation Round, the GET can therefore at this stage *only encourage*

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<sup>9</sup> However, active bribery in the sense of Section 168d can only be prosecuted upon request of the person whose interests are prejudiced or of persons who file a claim for omission according to the unfair competition act (new Section 168e).

<sup>10</sup> As an example in Austria the Federal real estate company (Bundesimmobiliengesellschaft, BIG) can be mentioned: This state owned company manages 90% of the buildings in state property. Its employees, at least the younger generation, are engaged on the basis of private law contracts.

*the Austrian authorities to ensure that criminal law is amended so as to fully cover the passive bribery of members of public assemblies, in Line with ETS 173.*

19. On the preventive side, the Bureau for Internal Affairs of the Federal Ministry of the Interior (BIA) has made considerable efforts in recent years in organising training courses and seminars and in publishing preventive materials (leaflets, newsletters, a book, posters and a brochure on the acceptance of gifts and advantages which was sent out to every employee of the Federal Ministry of the Interior). In June 2007, they organised a national anti-corruption day, as well as a two-day seminar to discuss with various authorities and actors (Ministries, police, Court of Audit of the Federation and the Länder) the situation of corruption and what further steps need to be taken in this respect. At the time of the on-site visit, the BIA had just compiled statistics on all domestic cases involving officials and integrity issues in the wider sense. Despite these initiatives, there is no typology of corruption available, nor any analysis and evaluation of the situation in Austria. BIA representatives explained that this was mainly a question of manpower, given the fact that at the time of the on-site visit, only one employee in the BIA was dealing with analytical work. The GET was told by representatives of academia (who are also involved in civil society activities) that there is no scientific research on the phenomenology and criminology of corruption (the only research work is based on the opinion polls conducted for Transparency International). This lacuna is all the more important given the diverging views about the extent of this kind of offences and the fact that current preventive efforts have no means to fine tune or target their approach on specific problems or sectors of society. The GET therefore recommends **that a study be undertaken covering the scale and the nature of corruption in Austria, and identifying the areas most exposed to corruption risks.**
  
20. The GET also found that a concerted approach to the issue of corruption was lacking. Various authorities had their own views about the problems at stake and the GET had the feeling that they all held a piece of the anti-corruption puzzle when discussions dealt i.a. with the real training needs, links between corruption and organised crime or money laundering, difficulties to investigate corruption, the importance of relationships between the Austrian Court of Audit and law enforcement bodies such as the BIA and Criminal Intelligence Service etc. Although Austria as a whole is subject to international anti-corruption requirements, the GET was often confronted with a lack of information and awareness on the part of the Austrian authorities as to anti-corruption initiatives taken at the level of the Länder and municipalities. In fact, as the GET was told by the federal Chancellery, the principle of homogeneity of legislation was abandoned in the mid-nineties and the Länder have become more autonomous when elaborating regulations; it has become difficult to establish what the differences are.
  
21. The GET noted that various representatives met on-site were unable to explain what kind of anti-corruption measures in general were in place for their sector of activity (Federal Ministry of Health, Family and Youth, Federal Ministry of Defence, Ministry of Economy and Labour). Representatives from the Chamber of commerce indicated that they consider corruption to be only a matter for the legislator; the GET found it difficult to accept this position given the fact that the prevention of corruption is also a matter for the business and commercial sectors. Furthermore, as the GET was told, Austrian businesses are quite active in neighbouring central and eastern European countries and some sectors of activity have a reputation of not being vigilant enough in respect of their relationship with criminals. Finally, the need for increased cooperation and coordination between the various authorities turned out to be the main conclusion of the inter-agency seminar of June 2007. In light of the aforementioned, the GET believes that the various entities and sectors of activity should be involved in a more global approach; it is therefore recommended **a) to establish an inter-institutional and multi-disciplinary coordination mechanism that would be given the necessary resources and a**



clear mandate to initiate a strategy or policy in the area of anti-corruption; b) to involve the Länder and the private sector in these overall anti-corruption efforts.

## II. INDEPENDENCE, SPECIALISATION AND MEANS AVAILABLE TO NATIONAL BODIES ENGAGED IN PREVENTING AND FIGHTING CORRUPTION

### a. Description of the situation

#### Law enforcement bodies

22. The Criminal Intelligence Service Austria is part of the Ministry of the Interior's Section II, the Directorate-General for Public Security. Section II is the highest security authority and reports directly to the Minister of the Interior. The highest level in Austria's criminal police hierarchy is the Criminal Intelligence Service Austria (*Bundeskriminalamt – BK*), i. e. the headquarters of the Criminal Police. In its Department 3 – Investigations, Organised Crime and General Crime – the sub-department 3.4 is responsible for dealing with financial investigations and all kinds of economic crime, such as fraud and falsification including forgery of money, “white-collar crime”, serious economic crimes including corruption, misappropriation and bankruptcy, especially in connection with companies and legal persons, and investigations in connection with environmental crime. The Austrian FIU for combating money laundering and the national Asset Recovery Office also form part of this sub-department. Each of the nine Länder has a police headquarters (*Landespolizeikommando*). In every HQ there is a Criminal Police Command (*Landeskriminalamt*). These nine crime departments which are also competent to combat economic crime, financial crime and corruption through their units - they all have units specialised in economic and financial crime - which are staffed with officers who have received specialist training in order to handle such crimes. Within the Länder, the district police services are staffed by generalists. The Criminal Intelligence Service has the authority to issue directives to the regional and local police authorities. Furthermore it has to be informed about all crimes that occur in conjunction with corruption in the Länder. The Criminal Intelligence Service is also responsible for the repression of corruption and arranges seminars for the private sector.
23. The police staff and budget are provided by the government (Office of the Federal Chancellor) and the Federal Ministry of Finance. All economic crime and corruption inspectors (e.g. in the Criminal Intelligence Service or in the regional departments) have specialist knowledge in the field of auditing and economic and financial laws and they are trained in conducting investigations in the field of economic and financial crime. Most of the officers have a basic economic education and have attended special courses domestically and/or abroad (e.g. at the Criminal Intelligence Service in Germany - *Bundeskriminalamt*). The executives have usually studied economics or law. The Director of the BK, as well as all Heads of Department (including at the level of the Länder offices) are appointed for a renewable term of 5 years by the Federal Ministry of the Interior. The appointments at the level of the Länder are made in consultation with the Director of Police of the Land. As the GET was told on-site, the Austrian police is perceived as being extremely politicised and the appointment of a senior executive can give rise to public controversy covered by the media. Police officers are recruited following publicly announced competitions and after undergoing a 21 month training course provided in the police schools. The GET was told that corruption is included in the programme of courses.
24. The Austrian Federal Bureau for Internal Affairs (BIA) was established by a Decree of the Minister of the Interior of 31 January 2001 as a special police department for the fight against corruption and other offences addressed under Section 302 to 313 PC. BIA's Director - who is under the direct responsibility of the Minister – is *ex officio* the Federal Ministry of the Interior's

commissioner for anti-corruption issues and, in order to provide for a reasonable degree of independence, the Federal Bureau for Internal Affairs was set up outside the classical law enforcement hierarchies, i.e. Section II, the Directorate-General for Public Security. However, as it is integrated into Section IV of the Federal Ministry of the Interior (Mol), the Bureau is part of its chain of command. No exception to the general subordination principle, such as it is defined by the Federal Constitution in article 20 paragraph 1 exists, even though in everyday practice, no instructions are issued concerning investigation matters. Yet, whenever the Bureau deals with security matters, it acts as the Directorate-General for Public Security.

25. The BIA's main task is the processing of serious complaints and allegations made against employees of the Mol as well as the investigation of suspected cases of corruption. In doing so, the BIA cooperates directly with the competent public prosecutors' offices and courts. The BIA conducts investigations nationwide. It has competence within its field of responsibility, i.e. the receipt and examination of complaints and allegations as well as security and criminal police investigations related to malpractice (Section 302-313 PC), provided that these allegations are made against employees of the Mol or employees of the Länder and municipalities who perform tasks in the fields of security administration or criminal police. As indicated earlier (see paragraph 14), the BIA is also actively involved in prevention and education activities, as well as international cooperation.
26. Since the Federal Minister of the Interior established the Federal Bureau for Internal Affairs (BIA) in January 2001, the Bureau's personnel has been increased according to needs. The range of qualifications and experience of the BIA staff members goes from several years of experience in the investigation of malpractice and corruption to degrees in law or postgraduate degrees in fields related to the fight against corruption. Knowledge of white-collar crime as well as an in-depth understanding of the legal framework is required. BIA police investigators come from all areas of the police or criminal police services and undergo in-service training.

#### Courts and judges

27. According to the Federal Constitution, the Austrian court system is unified under federal responsibility. The ordinary courts are organised in four levels, all having jurisdiction over penal matters, including corruption: a) district courts handle crimes punishable by a maximum of one year' imprisonment or a fine of up to 360 daily rates; b) regional (or first instance) courts act as appeal courts (with a panel of three judges) for decisions rendered by district courts and as first instance courts for more serious offences (crimes punishable by up to 5 years' imprisonment are dealt with by a single judge, offences punishable by a higher sentence are dealt with by a panel (composed of judges and lay assessors) or with the involvement of a jury; c) appeal (or second instance) courts, and d) the Supreme Court.
28. At present there are 141 district courts and 20 regional (or first instance) courts in Austria. The 4 appeal (or second instance) courts are located in Vienna (for Vienna, Lower Austria and Burgenland), in Graz (for Styria and Carinthia), in Linz (for Upper Austria and Salzburg) and in Innsbruck (for Tyrol and Vorarlberg). The President of the Court of Appeal is the head of the administration of justice of all the courts situated in his/her region and is subordinated in this function directly to the Federal Minister of Justice.
29. Section 32 of the Court organisation act provides general rules for the assignment of tasks. Each court has to provide such an assignment on an annual basis and, where appropriate, special Sections dealing with cases of drug abuse, juvenile or sexual offenders etc. are created. The team was informed on-site that it is mostly the regional (first instance) courts that have specialist

Sections, including for economic crime; for example, the first instance court of Vienna has 5 departments, one of which is specialised in economic crime and comprises 4 judges. A new system was recently introduced that consists of an electronic, random distribution of cases to individual judges (within the relevant specialist Section). The GET was informed on-site that certain parameters can be included to avoid that the same person deals with too many complex cases.

30. There are about 1700 professional judges in Austria. By virtue of Art. 87 (on the independence of the judiciary) and 88 (on the appointment, removal, transferral and retirement of judges) of the Federal Constitution, judges are independent, irremovable (except in circumstances provided by law – basically for disciplinary reasons – and on the basis of a court decision) and they enjoy life-long tenure until they retire at the age of 65. Persons who have successfully completed their legal studies (including practical training) and have applied to become “candidate judges” are appointed by the Minister of Justice upon a proposal by the President of the court of appeal who has initiated the recruitment procedure (the announcement of which has to be published). After 4 years of professional training and a final examination, the junior judge may apply for a vacant position. S/he is appointed by the Federal President of the Republic (who has delegated this responsibility to the Minister of Justice, except for the higher posts) from a list of 3 candidates proposed by an “internal” jury panel (judges from the appeal court responsible for the recruitment), corroborated by an “external” panel of judges. Judges met on-site by the GET said that the Minister is not bound by the proposals, in which case the appointment of another candidate has to be justified by objective criteria (training, experience etc.). Persons who have significant legal professional experience (lawyers etc.) may also apply to become a judge. The recruitment and training process is specific. The appointment process in this case is the same. Judges can be members of a political party.
31. As regards disciplinary proceedings, cases of serious misconduct by first and second instance court judges are examined by the disciplinary court. Disciplinary courts are specialised senates attached to each court of appeal. The general prosecutor’s office and the prosecutor general to the Supreme Court in their function as prosecutors responsible for disciplinary matters are to be heard and have the task to represent the interests of the public employer. Cases involving judges of the Supreme Court would be dealt with by a special senate to this Court. For minor misconducts, the Chair of each court can send a reminder of his/her duties to the judge concerned.

#### Prosecutorial authorities

32. As administrative authorities, the offices of public prosecution are not independent; the provisions of the Federal Constitution (see paragraph 30 above) apply to judges only. The structure of the state prosecution service is hierarchically organised and it mostly reflects that of the court system. The 16 prosecutor offices to the regional (first instance courts) are responsible for the cases to be tried by those courts and by the district courts. They are subordinated to (and subject to instructions from) the four general prosecutor offices attached to the courts of appeal. These general prosecutor offices are directly subordinated to the Federal Ministry of Justice. The office of the prosecutor general to the Supreme Court has a special position: it is directly subordinated to the Federal Minister of Justice and it has itself no right to give instructions to the lower offices of public prosecution. It performs an important function, namely the protection of the unity and security of penal law.
33. Instructions from the general prosecutor’s office and the Federal Minister of Justice may be given only in writing and must be reasoned. The Federal Minister of Justice is required to report to

parliament about the right to issue instructions. Within each office of public prosecution, staff members have to comply with the instructions of the head of the office (which can be given in writing or orally) and they cannot receive instructions from the Minister or General prosecutor directly. They are entitled - in case they consider that an instruction goes against the law - to ask for it to be given in writing and they have the right to be relieved of the case concerned.

34. In general, cases are assigned to the public prosecution departments according to an alphabetical order (of defendants' names) or location of the crime scene. Where necessary, special departments can be created to deal, for instance, with juvenile delinquency, military matters, drug abuse, etc. (Section 6 of the Public Prosecutors Act and Section 4, paragraph 2 and 3 of the Regulation on the implementation of the public prosecutors act). The General Prosecutor's Office in Vienna, for instance, comprises i.a. a special group for economic crime and another for organised crime. This Office also has country-wide jurisdiction for tax fraud and insider trading.
35. The GET was advised on-site that the Criminal Law Amendment Act 2008 (published in the official gazette on 28 December 2007) provides, among other changes, for the creation of a Central Office for the Prosecution of Corruption, with country-wide jurisdiction for all offences falling under Chapter 22 of the Criminal Code (breaches of official duties and other related criminal offences) and several other Sections, including: money laundering, organised crime and criminal association offences when these crimes are connected to corruption. The new anti-corruption office will also have the possibility to leave to the naturally competent office a given case "if there is no special public interest in the case because of the importance of the criminal offence or the accused person". Although the Criminal Law Amendment Act will be in force as from 1 January 2008, the provisions concerning the special anti-corruption office will become effective on 1 January 2009.
36. Austria's criminal justice system is based on the principle of mandatory prosecution<sup>11</sup> by virtue of Art. 18, paragraphs 1 and 2 of the Federal Constitution. It includes private prosecution<sup>12</sup> and "Diversion"<sup>13</sup> as further characteristics.
37. Prosecutors are recruited initially as judges and they choose later to become prosecutors, after a few years of professional experience (in addition to the requirements for a judge, one must have

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<sup>11</sup> The exceptions to the principle are based on reasons of procedural expediency. They apply when the prosecutor concludes that prosecution will not further the purpose of criminal justice, e.g. if the defendant is accused of having committed more than one crime, the prosecutor may abstain from prosecuting an offence which is likely to have little or no influence on the punishment, or if the defendant is to be extradited to a foreign country and the punishment that could be imposed on him in Austria is insignificant compared to the charges he has to face abroad (Section 192, paragraph 1, number 1 and 2 CPC; former Section 34, paragraph 2, number 1 and 2 CPC).

<sup>12</sup> According to Section 67 paragraph 1 and 2 CPC (former Section 47, paragraph 1 CPC), a persons who claims to have suffered damage as a result of an offence is entitled to claim compensation for this damage also within the criminal proceeding, as long as s/he has not yet obtained a writ of execution or the claim has not yet been settled. The claimant is not automatically granted a procedural position (besides being probably a witness) but is required to notify the court of his/her claim, whereby s/he will become a "*Privatbeteiligter*" (which can be translated as "additional private party"). If the public prosecutor decides either to close the case without indictment or to refrain to resume the case after having indicted the alleged offender, the "*Privatbeteiligter*" may take over the prosecution as a "*Subsidiarankläger*" ("additional private prosecutor").

<sup>13</sup> According to Sections 198 (former Section 90a) and following of the CPC [and Section 35 of the Austrian Drug Abuse law (*Suchtmittelgesetz*)] instead of a formal reaction (indictment with a main trial and possibly a formal conviction), alternative forms of reaction to a criminal act are possible. The public prosecutor is not free to decide whether formal or informal proceedings are taken, but has to apply Sections 198 and following CPC when the stated prerequisites are met. According to Section 198 CPC, prosecution may only be terminated if i.a. prosecution does not seem necessary to prevent the suspected person from committing further crimes or to keep other persons from committing crimes, or the guilt of the perpetrator can not be considered as "grave".

at least one year of practice to be appointed as a prosecutor - Section 12 of the Public Prosecutor Act). Vacant posts are advertised and filled following a competition organised by the Ministry of Justice. At the time of the visit, there were between 190 and 210 prosecutors. In parallel to the entering into force of the new Criminal Procedure Code (CPC) on 1 January 2008, the staffing of prosecutor offices was increased by approximately 50% (instead of 35% as planned at the time of the visit); there are currently 330 prosecutors. Prosecutors are appointed in a similar way to judges. At the time of the on-site visit, they were subject to the same disciplinary measures as civil servants<sup>14</sup>. Prosecutors can be members of a political party.

Criminal proceedings, expertise, means, special investigation methods, witness protection, professional and banking secrecy

38. Unlike (purely) adversarial procedural systems, it is the duty of the court to uncover the truth in Austria. The court has to gather all information pertaining to the case, whether it incriminates or exonerates the defendant (according to Section 3 paragraph 1 CPC this principle applies to the same extent to the public prosecutor and all other authorities involved in criminal proceedings).
39. With the reform entering into force on 1 January 2008, the prosecutorial authorities will have the exclusive lead over the pre-trial investigation; at the time of the on-site visit, police and prosecutors shared this responsibility, which implied for instance that the former could carry out criminal investigations on their own and retain the information for a few months before bringing it to the attention of the latter. The discussions held on-site also revealed that Austria has the institution of the investigative judge (competent to handle complex cases that involve coercive and investigative measures) but the GET understood that they almost never deal with corruption-related offences. Notwithstanding, with the amended CPC provisions, the prosecutor will have in future the exclusive responsibility for operative work and the investigative judges' role will be limited to the authorisation and control of coercive measures.
40. The BIA co-operates directly with the competent prosecutor's office. Upon request, the BIA can also investigate corruption cases outside this area, i.e. cases stemming from other branches of the administration. In such cases, the competent prosecutor may require the support of the BIA investigative forces, but this is not done on a systematic basis, even if the BIA is more frequently involved as its role is now better known by the prosecutors. Prosecutors are free – and will remain so under the future regime of the special prosecution office for corruption – to choose the BIA or the “normal” criminal police forces (including police units for economic crime) to lead police investigations in corruption cases outside the Federal Ministry of the Interior or committed by security staff of the Länder or municipalities. For financial investigations the support of the *Bundeskriminalamt* is needed in every case, as the BIA has no specialised financial investigation units or specialised police officers. Within the general police forces, the economic crime bureau has the right to take over, from local police forces, all serious cases.
41. If a case of unusual complexity or size falls within the competence of a judge or prosecutor, he or she can be discharged from his regular workload in order to concentrate on that case. If further expertise (in the auditing or financial fields, etc.) is necessary, the court or the competent prosecutor appoints an expert in accordance with Section 126 CPC (former Sections 118 and 118a paragraph 1 CPC). The expert provides the expertise on the basis of the court's or prosecutor's mandate.

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<sup>14</sup> Following statutory amendments on 1 January 2008, they are now subject to the same disciplinary proceedings as judges.

42. The statute of limitation is regulated in Section 57 of the Penal Code, which provides in particular that the period of limitation begins as soon as the punishable action is completed or the punishable conduct has ended. The limitation period is “a) 20 years, if the offence is punishable with imprisonment although not for life but for more than 10 years; b) 10 years, if the offence is punishable with imprisonment for more than 5 years but not more than 10 years; c) 5 years, if the offence is punishable with imprisonment for more than 1 year but not more than 5 years; d) 3 years, if the offence is punishable with imprisonment for more than 6 months but not more than 1 year; e) 1 year, if the offence is punishable with a maximum of 6 months’ imprisonment or only a fine. When an offence has become statute-barred, confiscation of profits, forfeiture and preventive measures are also no longer possible.” By virtue of the above classification, corruption offences falling under Sections 303-308 PC are statute-barred after 3 or 5 years in most cases.
43. Art 20 paragraph 3 of the Austrian Federal Constitution provides for the confidentiality of criminal proceedings, which applies to investigators, public prosecutors and judges. The breach of that rule is punishable by a penalty of deprivation of liberty for up to three years (Section 310, paragraph 1 PC).
44. Access to banking information is regulated by the Code of Criminal Procedure (Section 116; former Section 145a) and the Banking Act (Section 38). The GET was told on-site that the Police (with the exception of the Financial Intelligence Unit in the context of the money laundering prevention system<sup>15</sup>) need to ask the prosecutor to apply for a warrant to be issued by the judge; but banking information can be obtained by the prosecutor or a court only if court proceedings have already been initiated<sup>16</sup>. Also, bank secrecy cannot be lifted for offences punishable by a maximum penalty of less than one year imprisonment (which is in particular the case for active bribery offences under Section 307 para.2 PC). For financial information not covered by bank secrecy, financial institutions have to provide any relevant information to the FIU, to prosecutors and criminal courts in the course of criminal proceedings or investigations (on the basis of a court warrant), to the tax authorities, and to the Financial Market Authority and the National Bank acting as supervisory bodies.
45. At the time of the on-site visit, special investigative techniques were limited to the monitoring of communications traffic and interception of communications (regulated under Sections 134 subparagraphs 2 and 3 and Section 135 paragraphs 2 and 3 CPC<sup>17</sup>; former Sections 149a to 148c), applicable by analogy to the interception of mail and the monitoring of computer-traffic data by virtue of Section 92 paragraph 3 of the Law on Telecommunications). The Act on the reform of the Criminal Code of Procedure which entered into force on 1 January 2008 introduced further investigative techniques into Austrian legislation: observation, under-cover operations and simulated purchase (these are regulated by the new Sections 129 to 136 CPC).
46. There are no specific protective measures in Austria (e.g. crown witness regulations, witness protection etc.) that could encourage persons to cooperate with the criminal justice bodies. Plea

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<sup>15</sup> The exchange of banking information between FIUs in specific cases requires a formal agreement under Austrian law.

<sup>16</sup> According to the Austrian authorities, amendments passed after the on-site visit have softened this requirement.

<sup>17</sup> The interception of telecommunications is admissible if it could clarify an intentionally committed penal offence punishable by a prison sentence for a term exceeding six months and if the tenant expressly agrees to the surveillance. The tracing of telecommunications (Section 135 paragraph 2 CPC, former Section 149a paragraph 1 subparagraph 1 lit. a and b CPC) is also admissible, if it could clarify an intentionally committed penal offence punishable by a prison sentence for a term exceeding one year and if data of the accused can be gained through the surveillance. The interception of telecommunications (Section 135 paragraph 3 CPC; former Section 149a paragraph 1 subparagraph 1 lit. c CPC) is also admissible if the surveillance seems to be necessary for clarifying an intentionally committed penal offence punishable by a prison sentence for a term exceeding one year and if either the tenant himself is highly suspected of the offence or if there are grounds to believe that a highly suspicious person will use the telecommunication or establish a connection with it.

bargaining, especially in the sense that the prosecution agrees to drop a more serious charge if the defendant is prepared to confess to a less serious one, is prohibited, as it would contravene the fundamental principles of legality and independent investigation (*Grundsatz der amtswegigen Wahrheitserforschung*). According to Section 34 PC, making a confession can be considered as a mitigating circumstance by the court when determining the sentence.

#### Other authorities

47. The Federal Ministry of Finance also has a Bureau for Internal Affairs (BMF-BIA), similar to that of the Federal Ministry of the Interior. It was established in 2002, when it was found that the internal revision Department was not the adequate tool to deal with malpractices and corruption committed among staff working country-wide for the Federal authorities (federal tax and finance services, Customs etc.). The BMF-BIA supervises 12,000 staff but has no investigative powers and where these are needed, the regular police are asked to cooperate. In 2006, 51 investigations were carried out (mostly for embezzlement or stealing, which fall under Section 302 PC); they led to 12 convictions and the confiscation of assets for an amount of € 1,8 million. Corruption offences that the Bureau came across concerned mainly the Customs services but problems have also been found within the tax services in connection with the inspection of companies. The BMF-BIA also organises training seminars, including on ethics – attendance is mandatory for all staff.
48. As indicated earlier, the Criminal Intelligence Service (*Bundeskriminalamt*) has a special Unit (*Geldwäschemeldestelle*), within the Department of Economic and Financial Crime, which is responsible for money laundering and terrorist financing and acts as the Financial Intelligence Unit (FIU) for Austria. It analyses suspicious transaction reports received from the financial institutions and various other entities.

#### **b. Analysis**

49. Overall, the police and prosecutorial bodies are perceived as not being independent enough and/or strongly politicised. Some cases reported in the media in recent years have apparently further affected this perception. The GET was also told that although the influence of the “Proporz” system<sup>18</sup> was not as significant as it used to be in the past, political support could still contribute to swifter career progression for a prosecutor or a police officer (or a judge, to a lesser extent) to the detriment of a more committed and well-performing colleague who is not of the “right political colour”.
50. The GET believes that the changes introduced in 2008 to the Code of Criminal Procedure – and the overall leadership given to the prosecutors over the police investigation – are likely to introduce some safeguards against political and other forms of bias of the police work.

#### The investigation and prosecution authorities and the courts (independence, specialisation, means)

51. From the discussions with the Bureau of Internal Affairs of the Federal Ministry of the Interior (BIA-BMI), the GET understood that this agency tends to play a leading role in the fight against corruption in Austria. It is actively involved in the promotion of international anti-corruption activities by Austria. The GET believes that the BIA-BMI is a body that has the potential of playing a significant role in the fight against corruption. Measures were taken to make it relatively

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<sup>18</sup> This is an informal agreement between political parties whereby officials are appointed in the administration and state services according to the political weight of each party. This has traditionally had important implications on the political affiliation of civil servants.

independent as it was set up under the direct authority of the Federal Minister of the interior. This is important in the context of the perceived politicisation of the police mentioned above. At the same time, the BIA-BMI remains itself vulnerable: the legal possibility remains for the Minister to give instructions to drop a case and the GET was told that when the BIA handled its first major case, it was put under the threat of an internal audit.

52. It would also appear that the BIA-BMI has a broader jurisdiction than its name (“Internal Affairs”) or position within the Federal Ministry of the Interior suggests. The GET was sometimes told that the institution could intervene in any case of corruption involving an official, whether s/he was employed or not by a Service operating under the umbrella of the Ministry. On other occasions, it was said that the BIA-BMI could even handle a corruption case in the private sector or any other crime since it had retained its natural jurisdiction as a police body. It also seemed that the BIA-BMI had some kind of “priority” jurisdiction over such cases, and that it could decide to leave a case to the regular police bodies where no particular interest or level of complexity/sensitivity was involved. The GET very much welcomes the existence of the BIA-BMI and the ambition of the institution. Its broad territorial and substantive jurisdiction enables it to handle cases directly which might otherwise be (perceived as) sensitive at local level and the body was set up with some guarantees of greater independence compared to the regular police forces. Also, a reasonable level of overlapping of competences might be profitable in the context of the politicisation of the country. However, the views of the BIA-BMI were not supported by many other institutions and the GET could not conclude – although the institution was set-up in 2001 – that the BIA-BMI’s jurisdiction was totally clear and accepted; it would seem that its role was to a large extent a matter of awareness but also acceptance by the other investigative authorities. It also appears that a major problem is the lack of clear legislation and co-ordination of the competences of the various police forces in corruption investigations. In fact, the decision of the competent prosecutor is decisive, who has much flexibility to decide which police forces should be involved in the investigation of a given corruption case.
53. In any event, the BIA-BMI depends very much on cooperation with other police bodies since the BIA-BMI does not look at the financial dimension and the proceeds from corruption. Also, although the BIA-BMI is normally to be informed about the outcome of cases which have been handed over to the prosecutor/sent to court, it appears that the BIA-BMI does not receive such feedback in practice and there are no figures available on the number of cases handled by the BIA-BMI which have led to a conviction.
54. In the light of the aforementioned, the GET recommends **a) to clarify the role and jurisdiction of the Bureau of Internal Affairs of the Federal Ministry of the Interior and of the other police bodies in respect of corruption investigations, whilst confirming the central role of the BIA-BMI; b) to enhance the co-ordination between the various police units involved in the investigation of corruption cases, and between the BIA-BMI and the prosecution services.**
55. The discussions held on-site showed that the staffing of police bodies dealing with economic crime cases (corruption is usually part of this specialisation), and particularly also those dealing with financial investigations is sometimes limited. This is an important issue since financial investigations and the targeting of proceeds from crime are considered by the prosecutorial services to be primarily a matter for the regular police bodies in the field, especially the special criminal assets unit of the Criminal Intelligence Service (*Bundeskriminalamt*) and those of the Länder police forces. The situation is aggravated by the limited access of police to financial information (see paragraph 59 below). These factors could explain why despite the existence of criminal assets specialists, the efforts up to now have been modest in respect of the targeting of



proceeds from crime. The prosecutor's office cannot compensate for that due to their own lack of staff – which would be resolved in 2008 with the planned increase in the number of prosecutors. Although the police thus has, in practice, an important responsibility in the area of anti-corruption, it appears that they are not adequately prepared to deal effectively with this task and to carry out financial investigations - which are particularly important to locate criminal assets or to understand certain financial flows and relationships between suspects/legal entities. The GET therefore recommends **to increase the human resources available to the police, in particular the units responsible for conducting investigations concerning corruption and criminal assets.**

56. The prosecution services appear to be a particularly contentious issue at the moment. Representatives of the state authorities, but also academics, non governmental organisations and journalists acknowledged that more could be done to improve the status of the prosecution service, since the hierarchical organisation and the right to give instructions (improvements were expected as regards certain instructions<sup>19</sup>) are not counter-balanced by sufficient safeguards, including as regards disciplinary proceedings<sup>20</sup>. Prosecutors seem to be under strong pressure to achieve results although they do not necessarily have the means, backup or experience to deal with certain cases<sup>21</sup> which should ideally be dealt with by specialised and more senior prosecutors seconded by a team where this is necessary. In general, most interlocutors admitted that at the moment, the profession of prosecutor was rather unattractive. There are plans to change this situation and the perception of the profession, in particular by bringing the statute of prosecutors closer to that of judges; the appointment procedure could be changed and more formal guarantees of independence provided. Also, the authorities planned to increase significantly the number of prosecutors. Given the current image of the prosecution services, the GET supports these initiatives. In particular, it might be worth considering the creation of a specialist body / bodies (like a High Judicial Council which can be found in many other countries) that would have responsibility for the various aspects of the recruitment and career of judges and prosecutors altogether, including the promotion of merit-based approaches: as the GET was told, judges too, might occasionally take advantage from political support for a swifter career progression and as regards the selection process, it is still possible for the President or the Minister of Justice to appoint a new judge who is not among the three candidates proposed by the selection panels; bearing in mind that judges (like prosecutors) can be members of a political party, politics can easily be seen as influencing the recruitment process of judges. In the light of the aforementioned, the GET recommends **a) to proceed with the reform of the statute of prosecutors in order to bring it closer to the statute of judges; b) to consider the setting-up of a specialist body/bodies responsible for the selection, training, appointment, career development and disciplinary procedures in respect of judges and prosecutors.**
57. The GET was told by members of the prosecution services based in Vienna that outside the capital, the level of specialisation in economic crime and complex forms of corruption was very limited but it was difficult to obtain a clear picture<sup>22</sup>. During the discussions, even the members of the special groups dealing with economic crime and organised crime in Vienna acknowledged that in practice their knowledge in this area was sometimes limited and that there was no special

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<sup>19</sup> With the enactment of the reform of the penal procedure (1.1.2008), instructions from the superior prosecution office (*Oberstaatsanwaltschaft*) and from the Ministry of Justice have to be given exclusively in writing accompanied by reasons and founded on a legal basis. They must be included in the procedural file.

<sup>20</sup> The situation changed on 1 January 2008 and prosecutors are now subject to the same disciplinary proceedings as judges.

<sup>21</sup> Concrete examples of recent cases described were for instance a junior prosecutor with limited specialist knowledge or support who had been given a complex file which was under heavy media scrutiny and that involved several important personalities and companies.

<sup>22</sup> The GET was told that "one or two offices, perhaps in Graz or Linz might have specialists in economic crime".

training or background requirement to work within these units. The training in economic crime available at the time was insufficient and attended only on a voluntary basis. The use of external experts had to be paid from their budget line. In this context, the GET took note with interest of the creation, after 1 January 2009, of a special prosecutor's office to deal with a broad range of corruption cases, with country-wide jurisdiction and branches in Innsbruck, Linz and Graz. The relevant legal amendments for the introduction of the special prosecution office were voted by Parliament and published in the official gazette after the on-site visit. The GET welcomes this improvement. It also notes that the new rules applicable to instructions will also apply for this special prosecution office; the GET understood that the initial draft of the Federal Ministry of Justice excluded the possibility of the Federal Ministry of Justice giving instructions in individual cases to the special prosecution office. But this proposal did not find the necessary political support to be included in the bill. At the initial operational stage, the office will comprise 5 prosecutors with a total of 25 staff, including specialists such as accountants, economists and computer experts. This multidisciplinary approach is new for the Austrian prosecution service and certainly to be welcomed. However, the planned initial resources seem to be minimal, even if there will be a possibility to delegate more simple cases to the ordinary prosecution offices. Moreover, the GET was told by the Austrian authorities that budgetary resources for the planned level of staffing were not yet guaranteed. In the GET's view, it is of utmost importance that the special prosecution office for corruption disposes of sufficient human and material resources when it takes up its function to enable it to efficiently prosecute large and complex corruption cases. The GET therefore recommends **to ensure that the planned special prosecution office for corruption becomes operational at the beginning of 2009 with the resources envisaged and that after an initial period, the adequacy of the resources allocated is assessed.**

58. The overall situation as regards the profession of judges seems satisfactory. The human and material resources available would, in general, be sufficient to deal with the current workload. Salaries are considered to be adequate: after 5 years service, judges (and prosecutors) earn about € 2500 (after taxes) per month. Various training opportunities are offered and there are possibilities to involve various kinds of independent experts in court proceedings where necessary. However, some judges the GET met acknowledged that it takes about a year and a half to acquire just the basic knowledge needed to handle an economic/financial crime or complex corruption case and that more could be done in terms of specific training in that kind of area, including corruption. The GET concurs with this view, bearing in mind the inquisitorial nature of court proceedings and the fact that the level of specialisation of lower court judges is considered to be limited. Consequently, the GET recommends **to provide more training opportunities to judges, including those of lower courts, in those areas which are of particular relevance for handling corruption cases.**

The investigation process and powers of investigation (access to financial and other information, investigative techniques, prosecution time limit, witness protection and other similar measures)

59. Access to banking and other financial information is cumbersome for the Police, although they are considered to play an important role when it comes to financial investigations and looking into the (possible criminal) assets of a person. As indicated in the descriptive part (see paragraph 44), bank secrecy cannot be lifted for offences punishable by a maximum penalty of less than one year's imprisonment (which can concern also corruption offences). The GET was also advised on-site that the tax authorities have sometimes refused to provide the information requested and that access to fiscal data is possible only where this is the only way to obtain information in the course of a criminal investigation. For other sources of financial information (e.g. information held by brokers or insurance companies), the police needs to go through the financial market authority. Therefore, the GET believes there is a clear need to improve access to financial

information in the context of corruption investigations and recommends **to review the access to, and exchange of information needed in the context of corruption investigations and, in particular, to consider lifting bank secrecy also for corruption-related offences punishable by a maximum penalty of less than one year's imprisonment.**

60. At the time of the on-site visit, investigative powers were limited to interception of communications. The GET found that this technique is regulated in a rather unusual manner since the permission of the interlocutor of the target person is required in certain cases; however, such permission is not needed for the most serious corruption offences. The GET welcomes that new techniques such as observation, undercover operations and simulated purchase were introduced after the visit and that these are also applicable to corruption-related offences (except those punishable with the lowest sanctions). In due course, practitioners dealing with corruption (and other) offences will need to be made familiar with the new opportunities offered by these additional investigative means. The GET recommends **to ensure that the new special investigation techniques are applicable to all serious cases of corruption, accompanied by appropriate safeguards for fundamental rights.**
61. As indicated in the descriptive part of this report, there are no specific protective measures in Austria that could be used to encourage an important witness to cooperate with the criminal justice bodies but practitioners met during the visit were content with the current situation.

### **III. EXTENT AND SCOPE OF IMMUNITIES FROM PROSECUTION**

#### **a. Description of the situation**

62. As with most national legal systems, there are two sorts of immunity in Austrian law: non-liability for votes and opinions expressed in the exercise of duties (freedom of expression) and inviolability (especially immunity from arrest). The latter, which is the most relevant in the context of the present report, applies to four categories of officials. First of all, the Federal President: according to Article 63 of the Federal Constitution (FC), criminal proceedings against the President must be approved by the Federal Assembly (*Bundesversammlung*), a body composed of the members of the two Austrian parliament chambers. Members of the Federal Council (*Bundesrat*), members of the National Council (*Nationalrat*) and members of the Länder Parliament (*Landtage*) all enjoy the same immunity by virtue of (sometimes cross-referenced) provisions of the Federal Constitution (art. 57, 58 and 96(1)) and the constitutions of the respective Länder.
63. MPs may on account of an offence only be arrested with the consent of the Parliament to which s/he belongs; such a decision requires a simple majority in the respective parliamentary assembly. This does not apply when the MP is apprehended whilst committing a crime (*flagrante delicto*); however the Parliament (or, in case it is not assembled, its competent standing committee) may in these cases also demand that s/he be released or the prosecution be stopped. Consent of the parliament is also needed to carry out house searches.
64. In all other cases, proceedings against an MP on account of an offence may be carried out without the consent of the Parliament only if it is evidently not connected to the MP's political activities. In principle, it is for the investigative or prosecutorial authority to judge this question; however, if the MP concerned, or one third of the members of the competent standing committee so requests, the investigative or prosecutorial authority has to seek a decision of the Parliament. Pending such a decision, any procedural measure shall immediately cease or be interrupted.

65. In all these cases, the consent of the Parliament is considered to be given if it has not decided on the request of the prosecutorial body within 8 weeks. If the Parliament gives its consent thereto, prosecution may be continued, if not it has to be stopped.
66. According to Article 143 FC, charges against members of the federal and provincial government(s) concerning criminal offences committed in the conduct of their official duties may also be brought before the Constitutional Court. If so, the Constitutional Court gets exclusive jurisdiction on the matter and possible investigations pending in criminal courts pass over to the Constitutional Court.
67. There are no overall figures available on the number of proceedings against persons enjoying immunity and the number of times immunity has been lifted, in cases of alleged involvement in corruption or other offences.

**b. Analysis**

68. The range of persons benefiting from immunity is restricted to Members of the National and Länder Parliaments and to the Federal President. Members of the Federal Government do not enjoy immunity. The number of persons protected is therefore reasonably low. The legal framework and scope of immunities in Austria does not appear to represent an obstacle to the successful investigation and prosecution of corruption offences. Furthermore, the time limit of 8 weeks for a decision by the assemblies appeared to be appropriate, given the fact that in urgent matters a decision can be reached faster and in cases of *flagrante delicto* the person may be arrested without prior consent of the assembly.
69. The GET was advised that the practice followed by the Federal Parliament has changed over the years and that in the past, it was difficult to press any charges against an MP, even for traffic offences. Although the immunity protection would have been progressively loosened in the Austrian practice, it would appear that the concept of (acts connected to) official functions is still very broadly understood. For instance, in a recent case (as of 27 September 2007) the immunity Committee of the National Council had to deal with the suspicion of attempted instigation of abuse of official authority and of illicit intervention pursuant to Sections 12, 15, 302, paragraph 1 and Section 308 of the Penal Code. The report states that there was a connection between the incriminated act and the political activities carried out by the suspected member of the Austrian Parliament for whom lifting of immunity was sought by the regional criminal court of Vienna. Consequently it was decided not to lift the immunity of the MP in question. This case raises concerns. Participation in abuse of official authority (Section 302 PC) and illicit intervention (Section 308 PC) are those rare corruption-related offences for which National Parliamentarians can be held liable under the existing criminal provisions. Mainly in the case of illicit intervention there could often be a link with the political activity of the MP. The GET was informed that the report of the parliamentary committee that examines the request gives no indications on the relevant facts, especially on the level of seriousness of the case. Neither are any explanations provided to justify the decision that was taken.
70. Furthermore, it appears that determining whether the alleged offence is connected to the official duties can be a difficult issue also for the authorities who initiate the proceedings: in one case the GET learned of, it took almost a year for the prosecutorial authorities to take their decision and to decide to initiate proceedings *ex officio* or to apply for the lifting of the immunity. Since there is no general guidance available, decisions on the question of immunities are always based on a case by case consideration by MPs. It would certainly be useful to provide clear guidance in order to avoid in practice the misuse of immunities and it would also contribute to the preservation of

citizens' trust in their political institutions if additional initiatives were taken to clarify the scope of MPs' immunities. The GET therefore recommends **to a) adopt guidelines providing for specific and objective criteria to be applied in determining whether an act is connected to the official functions of a parliamentarian and thus whether the immunity of that member applies and can be lifted; b) ensure that these guidelines reflect the needs of the fight against corruption and c) require the competent parliamentary committees at federal and Länder levels to give grounds for their decision to lift or not to lift immunity in a given case.**

#### **IV. PROCEEDS OF CORRUPTION**

##### **a. Description of the situation**

###### Confiscation and other forms of deprivation of instruments and proceeds of crime

71. The Austrian authorities indicate that Section 20 of the Penal Code (PC), entitled "Confiscation of Profits" provides for the main provisions in this area. According to paragraphs 1 and 2, « Whoever has committed an offence and has obtained economic benefit from it, or has received economic benefit for committing an offence, is to be condemned to payment of an amount of money equivalent to the gained illegal profits. Insofar as the extent of the profits cannot be established at all, or cannot be established without disproportionate expenditure, the court may fix the sum of money to be confiscated according to its conviction. If the perpetrator has committed crimes (sect. 17 PC) continuously or repeatedly and has obtained economic benefits from, or received for, their commission and has gained during the same period further economic benefits, there being an obvious supposition that these benefits derive from other crimes of the same nature, and the legal acquisition of the benefits not being made credible, these economic benefits have to be taken into consideration in fixing the amount of money to be confiscated. » Paragraphs 3 to 6 regulate in more detail the situations involving an organised crime or terrorist group, those where a third party has benefited from the crime of another person (the measures of Section 20 apply to that third party as well), those where the offender has died (the measures then apply to the successor if the assets still existed at the moment of the transmission of ownership) and those cases where multiple persons have made illegal benefits from criminal activities (the measures are applied proportionally to their respective shares).
72. Section 20a PC, provides for a series of circumstances where the measures of Section 20 do not apply: a) if the person who has gained illegal profits has satisfied civil claims derived from the criminal act or has undergone the contractual and enforceable obligation to do so, or has been condemned, or is condemned simultaneously, to do so or if the profits are removed by other legal measures b) if the amount of money to be confiscated or the chances to enforce the order are disproportionate to the expenditure for proceeding to such order or for its enforcement or c) if the payment of the amount of money would unreasonably endanger the subsistence of the person who has gained the profits or would constitute an inappropriate hardship for that person, especially because the profits no longer exist at the time of the order; other disadvantageous consequences of a conviction are to be taken into consideration. Until recently, a further limitation excluded the applicability of Section 20 PC where the amount of the profits did not exceed € 21 802 and confiscation was not necessary, for specific reasons, to prevent the future commission of criminal offences. This exception was abolished on 1 January 2005.
73. The Penal Code, Section 20b para. 1, also provides for a system of mandatory forfeiture of assets held by criminal organisations and terrorist groups. Para. 2 imposes mandatory forfeiture of property deriving from an offence committed under the law of a foreign country and which does

not fall under Austrian jurisdiction. Similarly to Section 20a, Section 20c PC lists a series of circumstances where forfeiture will not apply: a) if the property concerned is legitimately claimed by a person not having participated in the offence or in the criminal organisation, or b) if its purpose is achieved by other legal measures, especially insofar as the illegal profits are declared confiscated in foreign proceedings and if the foreign decision can be executed in Austria, or c) if it would be out of proportion to the importance of the matter, or to the expenditure implied.

74. Finally, Section 26 PC establishes the mandatory confiscation (in the sense of deprivation and not payment of a fine) of instruments which have been used to commit an offence or which are the result of an offence.

#### Interim measures

75. Austria has various provisions dealing with interim measures. The most important ones are those of Section 115 (formerly, Section 144a) of the Criminal Procedure Code (CPC), which were introduced in 2002. Paragraph 1 subparagraph 3 provides that “If there is suspicion of illegal profits, and it is supposed that these profits will be confiscated according to Section 20 of the Penal Code, or if there is suspicion that property is at the disposal of a criminal or terrorist organization (sect. 278a and 278b Penal Code), was provided or collected for the purpose of financing terrorism (sect. 278d Penal Code), or derives from an offence, and it is supposed that this property will be declared forfeited according to Section 20b of the Penal Code, the judge must, upon application by the public prosecutor, issue a seizure order if there is concern that the future confiscation would otherwise be in danger or substantially impeded. The provisions of the Code of Civil Execution are to be applied mutatis mutandis to such orders (Section 115 paragraph 4.). The following measures can be applied, depending on the case: “1. the custody or administration of movable tangible goods belonging to the person against whom the provisional injunction is issued, including the payment into court; 2. the prohibition of transfer or pledge of movable tangible goods; 3. the third-party prohibition if the person against whom the provisional injunction is issued, has pecuniary claims or other claims to performance or restoration against a third party; 4. the prohibition to transfer real property, or rights incorporated in public registers, or to submit it to charges or encumbrances.” A provisional injunction may be issued even if the exact amount to be safeguarded is unknown.
76. In fact, given that the system of confiscation follows a value-based approach and does not target the proceeds as such directly, paragraph 4 specifies that “In the provisional injunction, an amount of money has to be fixed, by the payment of which the execution of the injunction is suspended. After the payment, the injunction is to be lifted, upon application of the party concerned. The amount of money is to be fixed so that it covers the presumable confiscation of profits or the presumable forfeiture.” Paragraphs 5 to 7 regulate the termination of temporary measures (in case the confiscation has become unlikely to take place, in case the measures have been annulled following an appeal, etc.).

#### Money laundering

77. Money laundering is criminalised under Section 165 PC. Paragraph 1 provides for the basic definition of the offence, which applies to a limited number of offences, including several corruption-related offences: “Whoever conceals property items that derive from the crime [felony] of another person, from such an offence [misdemeanour] under Sections 223, 224, 225, 229, 230, 269, 278, 278d, 288, 289, 293, 295 or 304 to 308, or from such a tax offence of smuggling or evasion of import or export taxes (insofar as these fall within the competence of the courts), or disguises the origin thereof, particularly by giving in legal relations false information regarding the

origin or true nature of those property items, the ownership of or other rights to them, the right to dispose of them, their transfer or their location, shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding 360 daily rates.” According to paragraph 2, “Whoever knowingly acquires such property items, holds them in custody, invests, administers, converts, realizes, or transfers them to a third party, shall be liable in the same way.” Paragraph 3 increases the penalty to imprisonment for a term of six months to 5 years when the offence involves assets worth more than € 50,000 or it is committed by a member of a criminal group involved in continuous money laundering.

78. On the preventive side, Austria has adopted the police-type model of Financial Intelligence Unit: a special unit within the Federal Office of Criminal Investigations is responsible for receiving suspicious transaction reports and for international exchange of information in this area. Unlike the vast majority of other comparable countries, Austria has no unified law on the prevention of money laundering. The existing duty to report suspicions that a transaction involves money laundering, and the various other anti-money laundering requirements that should be in place by virtue of the international standards (customer due diligence, internal anti-money laundering programmes and procedures, prohibition of tipping off etc.) are dealt with in various sector-specific regulations<sup>23</sup>: a) Banking Act, b) Insurance Supervision Act, c) Securities Supervision Act, d) Trade, Services and Industry Act (for external accountants, real estate agents, dealer in high value goods), e) Statute on the Regulation of the Auditing, Tax Advising and Related Professions (for licensed book-keepers, tax advisers, auditors, chartered accountants and auditors), f) the regulations concerning lawyers and notaries; g) the regulations for casinos. Prudential supervision and the monitoring of compliance with the anti-money laundering requirements is thus left to the sector-specific regulatory bodies (Financial Market Authority, professional chambers, etc.). The number of suspicious transaction reports (STRs) received from these entities by the FIU has increased significantly in recent years (373 in 2004, 467 in 2005, 692 in 2006), the vast majority of them coming from the banking sector<sup>24</sup>.
79. The coordination of efforts in this field is within the responsibility of the Ministry of Finance and the Financial Supervision Authority, together with other Ministries meeting on the occasion of round table meetings organised at least four times a year (no authority has been given leadership). The GET was advised on site that in December 2007, a law would come into force that would introduce customer due diligence measures for politically exposed persons (in accordance with FATF Recommendation 6 and the Third EU Directive on anti-money laundering). According to the information gathered on site by the GET, no guiding indicators have been elaborated (by the authorities or the industry) for the recognition of money laundering-related suspicious transactions (whether or not connected with corruption)<sup>25</sup>.

<sup>23</sup> The Austrian authorities stressed that through the implementation of the 3rd Anti-Money laundering Directive (2005/60/EC) due in December 2007, reporting obligations will be expanded to trust and company service providers, insurance intermediaries regarding life insurances and other investment related services and to natural or legal persons trading in any goods when payments are made in cash amounting to € 15,000 or more.

<sup>24</sup> In 2006, the situation was as follows:

Origin	Banks	Insurance business	Securities market intermediaries	lawyers	notaries	Dealers in high value goods	accountants	Tax advisors
STRs	654	7	0	4	2	3	1	2

<sup>25</sup> The GET was told after the visit that the Financial Market Authority (FMA) has, in 2004, elaborated in cooperation with the FIU two circulars for credit institutions, insurance companies and security market intermediaries which would provide comprehensive guidance indicators for the identification of money laundering (these circulars are published on the FMA-website ([www.fma.gv.at](http://www.fma.gv.at)))

## Statistics

80. The answers to the questionnaire indicate that there are no cases known where confiscation has been applied in a corruption case. From the discussions conducted on site, it would appear that one or two older cases were known of in which confiscation was applied in relation to possible bribery cases adjudicated as breach of trust (Section 153 PC). Concerning temporary measures, there are no consolidated statistics available but the Austrian authorities have provided some examples of cases<sup>26</sup> where temporary measures have been applied in the context of cases falling under Section 153 or 153a (“accepting of an advantage by rulers”), or Section 302-309PC.
81. In the area of money laundering, justice related statistics show that there were 145 money laundering prosecution cases over the period 2004 – 2006 which led to 5 convictions in 2004 and 3 convictions in 2005. At the time of the visit, there were no figures available for 2006. Over the period 2004-2006, there were all in all two money laundering cases reported, in which interim measures were taken. Occasionally, on the basis of foreign letters rogatory, criminal proceedings are initiated before Austrian courts under Section 165 PC (money laundering) on grounds of suspected corruption in the requesting state. In addition, there have sporadically been complaints to that effect filed by banking institutions; nevertheless, the results of the subsequent investigations led to the termination of the respective proceedings.

## Mutual legal assistance

82. Mutual legal assistance in the area of confiscation and temporary measures is regulated by the Federal Law on Extradition and Mutual Legal Assistance in Criminal Matters (*Auslieferungs- und Rechtshilfegesetz – ARHG*); it allows, i.a., Austrian courts to transmit a request for enforcement of a confiscation order abroad (Section 76) and to receive similar requests from abroad, which are then forwarded to the competent regional court for execution (Sections 64 and following). Austria has ratified the Council of Europe Convention on mutual legal assistance in criminal matters (ETS 030) and its first additional protocol (ETS 099). These matters are also covered in several bilateral agreements. At the time of the on-site visit, legislation was being prepared to implement the European Union Framework Decision of November 2006 on the application of the principle of mutual recognition to confiscation orders (the deadline for enacting domestic legislation is 24 November 2008).

### **b. Analysis**

83. The GET noted that although confiscation is, in principle, mandatory in Austria, it has never been applied in a corruption case in Austria during the three years preceding the on-site visit, according to the official information made available to the GET. The possible institutional reasons for that were examined earlier.
84. Turning to the legal framework, the GET noted with satisfaction that the exceptions of Section 20a PC to the application of confiscation measures were reduced in 2005 with the suppression of

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<sup>26</sup> In one proceeding before the St. Pölten Provincial Court (Landesgericht) for offences falling under Section 153 paragraph 1 and 2 PC, and Section 304 paragraph 1, 2 and 3 PC, assets for a total value of € 107,000 have been temporarily frozen on the basis of a temporary injunction under the former Section 144 CPC (which is now Section 115 paragraph 1 subparagraph 3 CPC). In two proceedings before the Wiener Neustadt Provincial Court (Landesgericht), for offences falling under Section 153 paragraph 1 and 2 PC, a) assets (cash, savings books, gold, gold coins, a portfolio of securities) with a total value over 1.5 million euros have been subjected to several temporary injunctions under the former Section 144a (currently, Section 115 paragraph 1 subparagraph 3 CPC), b) a prohibition of disposition and mortgaging of a property (1.333 m<sup>2</sup> plot area) with a multi-storey building has been issued; c) a temporary injunction has been issued (under the former provisions) concerning a bank deposit of €89,500.



the threshold that prevented the application of confiscation measures under Section 20 PC in case criminal benefits amount to less than € 21,802. Some discretion is still left to judges not to apply confiscation measures e.g. in case of “inappropriate hardness”, where it would “unreasonably endanger the subsistence of the person”, or in case of “other disadvantageous consequences of a conviction” etc.

85. Above all, the GET found that the only provisions that allow to target criminal assets directly and to confiscate them are those of Section 20b PC on forfeiture, which only apply to organised crime and terrorist groups, but not to corruption (and money laundering as such). Section 20 PC on confiscation is not meant to target the direct proceeds, but to impose a financial measure that would amount to the illegal benefit. The Austrian authorities take the view that this value confiscation system is ultimately equivalent to a system of direct confiscation. The GET believes that this system could involve difficulties of application in respect of certain types of assets (immaterial advantages such as honorary distinctions, assets that have a particular value for the offender notwithstanding their real market value etc.). Furthermore, the spirit of Section 20 PC bears the risk that investigative and prosecutorial bodies would tend, in practice, to neglect the financial dimension of a crime (searching and identifying the criminal assets). In this respect, the GET was informed by members of the judiciary that, as far as they knew, cases tried under Section 302 of the Penal Code (on “abuse of official authority”, which is often used to apprehend corruption) do not target the proceeds of crime except where the benefit would be obvious and proceeds could immediately be located. This seems to confirm the GET’s concerns.
86. Furthermore, the above provisions are silent as to the kind of assets that they can be applied to (for forfeiture), or those that can be taken into account in the calculation of the criminal benefit (tangible and intangible assets, movable and immovable property, direct proceeds and income derived from those proceeds, initial or converted proceeds, assets composed of both legitimate and illegitimate income, assets transferred to third persons or relatives etc.). The GET noted that from the sample of cases provided by the Austrian authorities, temporary measures were applied in respect of real estate, bank deposits, securities portfolio etc. (see footnote 26). But in the absence of any final confiscation pronounced in recent years in a corruption case (apart from one or two older cases where only direct fiduciary proceeds have been confiscated), there is no court practice available to lift those doubts. Judicial practitioners and academics met on-site agreed that there was room for clarification in this respect.
87. At the time of the on-site visit, there was no indication that the current system of seizure and confiscation would be significantly amended with the new criminal procedure provisions entering into force on 1 January 2008. Consequently, the GET recommends **to consider strengthening the system of confiscation and temporary measures so that a) the confiscation system also applies to the direct proceeds of corruption and not just to their equivalent value; b) it is made clear that temporary measures and final measures are applicable to the various forms of proceeds (in particular both tangible and intangible proceeds, proceeds deliberately transferred to third persons to avoid confiscation measures and proceeds intermingled with legitimate assets).**
88. As indicated under Part II of the present report (see paragraph 55), the police forces are not in a position to conduct financial investigations more systematically. Furthermore, it would appear that corruption offences as a whole receive insufficient attention from the investigative and prosecutorial authorities since, to date, no final confiscation decision had ever been made. In particular, it would appear that the lower level of evidence required to obtain a conviction under Section 302 PC (the offence of abuse of official authority is not characterised by the giving/receiving of a bribe nor an underlying corrupt agreement) makes Section 302 PC a useful

tool for apprehending possible corruption-like situations; at the same time, the authorities tend to neglect the financial dimension of the offence (possible bribes, kickbacks, graft etc.). These are important lacuna that need to be rapidly addressed. The GET therefore recommends **to take the necessary measures to make investigative and prosecutorial bodies more aware of the need to target the proceeds of corruption, including in respect of cases prosecuted under Section 302 of the Penal Code (abuse of official authority).**

89. The definition of money laundering under Section 165 PC follows, as regards the underlying, predicate offences, an all-crimes approach for all serious offences (felonies) which thus include offences under Section 302. The definition also involves a list-based approach for a series of misdemeanours, including various corruption-related offences. In the absence of criminalisation of bribery of members of domestic public assemblies, transactions involving proceeds generated by this kind of crime do not constitute a money laundering offence. The Austrian authorities indicate that 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 a bribe); thus, it constitutes an underlying offence in case of a felony (i.e. when the damage / bribe exceeds € 50.000).
90. The GET had misgivings about the money laundering preventive mechanisms. On the one hand, the system of reporting seems to be operational; the authorities exchange a great deal of information with the neighbouring countries including on possible proceeds from corruption which could be tunnelled out of those countries to Austria or via Austrian banks, and the FIU takes the view that the current reporting system (based on grounded suspicious transaction reports) generates high quality reports. On the other hand, the results in terms of convictions for money laundering appear to be modest compared to the number of prosecutions initiated, allegedly due to high standards of evidence and to the difficulty of obtaining a money laundering conviction without hard evidence (a conviction) for the predicate offence. Corruption-related money laundering is not yet fully taken into account as there is no guidance for the detection of corruption-related suspicious transactions and increased diligence measures for politically exposed persons are at an early stage. The GET also noted that self-laundering is not criminalised despite allegations that money from corruption is transferred to Austria or via Austrian banks possibly by corrupt foreign officials themselves and despite the fact that credit and financial institutions already have to report suspicious transactions related to self-laundering. The GET discussed this matter with Austrian judges who saw no real legal obstacle to have this offence introduced in domestic law<sup>27</sup>; at least, it would increase Austria’s ability to cooperate with those countries which have this offence in place, because of the usual dual criminality requirements for judicial cooperation. Finally, as indicated in the descriptive part, Austria has no general, consolidated law on the prevention of money laundering, but a series of sector-specific regulations where the various anti-money laundering requirements are enshrined; given the pace of change of international standards in this area, it is probably a constant challenge for the authorities to ensure that the various sectors concerned comply consistently with the many international requirements.
91. Various issues mentioned above will most probably be addressed in the context of other (anti-money laundering) evaluations, in particular that of the FATF. Some aspects, however, are important from the point of view of the fight against corruption and need to be addressed as soon as possible. Therefore, the GET recommends **to enhance the ability of Austria’s anti-money laundering system to better deal with proceeds from corruption by a) examining the need**

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<sup>27</sup> The Austrian authorities commented after the visit that the criminalisation of self-laundering would go against fundamental legal principles.

to criminalise self-laundering; b) providing guidance to all the obliged entities that would take into account the needs of the fight against corruption (typologies of corruption-related money laundering and indicators for corruption-related suspicious transactions, information and guidance on politically exposed persons etc.).

## **V PUBLIC ADMINISTRATION AND CORRUPTION**

### **a. Description of the situation**

#### Definitions and legal context

92. Unlike the justice and police system, the administrative structure of Austria reflects the federal structure of the country. Federal institutions are regulated by federal law and those of the Länder are regulated by specific legislation. Public institutions are subject to certain basic principles laid down in the constitution of the Federation and the Länder (separation of powers, legality of public action, civil servants' confidentiality duty etc.). There is no legal or constitutional definition of the term "public administration". In Austrian administrative practice, public administration usually is defined via the employment status. Public administration consists of those people in an employment relationship with one of the political subdivisions: Federation, Provinces (Länder), Municipalities (and associations of municipalities). The Austrian authorities stressed that the Penal Code definition (Section 74) of public officials extends the concept of public administration to also encompass those working in an entity which performs public tasks and is under a certain organisational influence and control of one of the political subdivisions: a public officer is "anyone who is appointed to perform legal acts in the name of the Federal Government, a Provincial Government, an association of municipalities, a municipality or any other public law entity with the exception of a Church or confession as its administrative organ by oneself or together with any other person or is entrusted in another way with duties of the federal, provincial or municipal administration". The concept includes judges, prosecutors, mayors and members of local councils, but not parliamentarians and members of other constitutional bodies (whether appointed or elected).

#### Anti-corruption programme

93. A special code of conduct that would cover everyone working in the public sector (federal, Länder and municipal level) is currently being elaborated but there is no general anti-corruption policy or programme as such for the entire country. In certain Länder such as Vienna<sup>28</sup> and in certain sectors of the federal civil service generally considered vulnerable to corruption (interior and police, finance), special programmes have been implemented and special authorities have been established in order to prevent and fight corruption (see also part II of this report as regards the Federal Ministry of the Interior and the Ministry of Finance which have both established a Bureau for Internal Affairs). Apart from the Land of Vienna (where "anonymous" statistics have been kept since 2002 for the purposes of assessing the level of corruption at the level of the Land administration), there are no particular review mechanisms to assess the efficiency of anti-corruption measures.

#### Transparency, access to information

94. The Federal Constitution (Article 20) provides that all functionaries entrusted with Federation, Länder and municipal administrative duties as well as the functionaries of other public law

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<sup>28</sup> Vienna is both a Land and a municipality.

corporate bodies have a duty to deliver information “in so far as this does not conflict with a legal obligation to maintain secrecy”. Access to information is regulated in a more detailed manner in the Act on the Duty to Grant Information (*Auskunftspflichtgesetz*) from 1987. According to Section 1, “The organs of the Federation as well as the organs of the self administration to be regulated by the Federal Legislation shall give information on matters within their scope of activities to the extent not being in contradiction to a statutory duty of secrecy. Information shall be given only or to an extent which does not substantially impair compliance with the other duties of the administration (...).” Section 2 provides that “Anyone is entitled to submit requests for information in writing, orally or by telephone. Any applicant for information may be requested to formulate his oral or telephonic request for information in writing, if the request does not sufficiently substantiate the contents or the extent of the information requested.” According to Section 3, “Information shall be given without undue delay, at the latest however, within 8 weeks after receipt of the request for information. If for special reasons such a term cannot be complied with, the applicant shall be informed accordingly in writing.” By virtue of Section 4, “If an information is not granted, a decree on the decision shall be issued if the applicant requests so. The rules of procedure determining the issue of the decree so to be rendered shall be subject to the AVG (General Administration Procedure Act), unless a different procedural act shall apply to the matter on which the information is requested.” Matters specific to data protection are addressed under the Federal Act on the Protection of Personal Data (*Datenschutzgesetz 2000 – DSG 2000*).

95. In Austria, the “*Rechtsinformationssystem des Bundes (RIS)*”, a computer-assisted, Internet-based information system, which is coordinated and operated by the Federal Chancellery, provides free of charge access to Austrian law and court decisions. The system comprises a comprehensive collection of links to websites of federal and regional authorities, the EU and international organisations as well as to other Internet providers of legal data.

#### Control of public authorities and other measures

96. Administrative decisions can be challenged before administrative authorities (application to the same authority or a higher authority) and before the courts (Administrative Court and Constitutional Court).
97. The Austrian Court of Audit (ACA) is an administrative-type supreme audit institution without prosecutorial function. The ACA reports to the National Council and to the parliaments and communities of the Länder. The scope of its control extends to the whole country and it includes all bodies and entities using/receiving state funds and subsidies, including regional and local authorities, organisations, funds, foundations and companies in which the state holds at least 50% of participation<sup>29</sup> or over which the state exerts others forms of financial, commercial or organisational control. ACA is also responsible for the management and control of declarations of certain officials (see part V of this report). ACA counts 337 staff distributed among 5 Sections specialised in different areas. It has the power to carry out on-site controls and has access to all documents, registries and databases held by public entities. In the framework of controls carried out by ACA, banking, commercial and other relevant information has to be made accessible by the audited institutions. ACA is independent from the government and the parliaments. Members of the ACA are appointed by the President of the Republic, upon a recommendation of ACA’s President. The latter appoints him/herself the auxiliary personnel and is him/herself appointed by

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<sup>29</sup> This is not seen as an issue by the ACA since the number of companies in which the State holds less than 50% participation is rather low.

the National Council for a (non renewable) term of 12 years. ACA publishes every year its annual activity report as well as several specific reports.

98. Austria has the institution of the Ombudsman (*Volksanwaltschaft*). The Ombudsman can act upon request or *ex officio*. S/he is competent to receive complaints against all authorities of the federation (including the courts and prosecutorial services) and 7 of its Länder (the other two Länder have their own Ombudsman). However, the institution cannot deal with public/private partnership structures, even when the majority of capital is owned by the state or another public entity. The Ombudsman receives about 16,000 to 18,000 complaints per year, only half of which are within the institution's competence. The vast majority of these (about 6000 per year) trigger inquiries.
99. In Austria, public tenders are regulated in the Federal Procurement Act (FPA, see: <http://www.bundeskanzleramt.at/site/5099/default.aspx>) which basically applies to all public purchases (works, supplies and services). The FPA covers procurements above certain threshold values that are subject to EC legislation (directives 2004/17/EC and 2004/18/EC) as well as low value contracts. Generally, the awarding of public contracts requires a prior notice and follows strict procedural rules (open, restricted and negotiated procedures) established to guarantee the fundamental principles of transparency<sup>30</sup>, equal treatment of economic operators, proportionality and non-discrimination. The FPA also contains a set of provisions on legal remedies for the award procedures of federal entities. Legal remedies concerning sub central and local purchases are regulated in nine different regional laws which are more or less harmonised with the federal rules. Legal remedies in public procurement are decided by special independent administrative tribunals.

#### Recruitment, careers and preventive measures

100. The Austrian authorities indicated that it is a usual practice for criminal records of a person applying for a post in the public administration to be screened before recruitment. Furthermore, the Public Competition Act (*Ausschreibungsgesetz – AusG*) of 1989 establishes a series of modalities for the organisation of competitions. In Vienna, the 1994 Public Service Regulations govern the criteria to be met as a prerequisite for the employment of all public employees. These criteria include a respectable lifestyle which is to be evidenced by means of submission of an extract from the register of criminal records. Similar requirements and modalities of recruitment apply in the other Länder.

#### Training

101. The Federation's Administrative Academy (*Verwaltungsakademie des Bundes*) offers relevant special seminars at all stages of vocational training: During the initial training, which has to be undergone by every person entering the federal civil service, seminars on the principles and rules of the functioning of public service as well as the service duties are offered. Furthermore, a wide range of special seminars on e.g. financial management, solving of dilemmas, conflict management, public procurement and internal revision is offered within management training. Since 2004/2005, the Austrian Federal Bureau for Internal Affairs twice a year organises a three-week seminar on "Combating and Preventing Corruption" for interested Ministry of Interior

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<sup>30</sup> The decision to award a contract has to be sent to all bidders before the contracting authority may award the contract; this information has to contain the reasons of the decision of the contracting authority. Bidders to whom the contract will not be awarded are entitled to challenge the decision of the contracting entity with the Federal Office on Public Procurement and the review bodies of the Austrian Länder.

employees of all categories. In order to be admitted to the course, applicants have to go through a two-stage selection process consisting of a psychological test and a panel assessment held in cooperation with the Psychological Service of the Federal Ministry of the Interior. Participants become acquainted with the background and mechanisms of the phenomenon of corruption, are presented with options for combating it (with due regard for the relevant legal provisions) and made aware of the problems and dangers related to this phenomenon, in particular in the field of public administration. In addition, practicable measures for the prevention of "allegations of maltreatment" are developed and communicated. A total of about 1,500 public servants participated in BIA's seminars in 2006. As of summer 2007, the subject of "corruption" will, in cooperation with the Federal Security Academy, be integrated into the ethics training offered in the framework of the Mol's basic training for the general administration. Furthermore, the training programme of the Federal Security Academy includes courses on "professional ethics for law enforcement officials". Their goal is to familiarise participants with the UN Code of Conduct in the area of conflict between efficiency and legitimacy of police actions.

#### Declaration of assets, conflicts of interest

102. By virtue of the Act on the Limitation of Emoluments of Holders of Public Offices (*Bundesverfassungsgesetz über die Begrenzung von Bezügen öffentlicher Funktionäre*) of 1997 - Paragraph 8 - all persons (including elected officials) who receive a salary or pension from the public sector (Federal, Land, Municipal, Social Security, Professional Bodies, companies audited by the Austrian Court of Audit), should be identified and the amount of their annual income declared in an income report published by the Austrian Court of Audit if it exceeds the amount of € 88.536,22 per annum.
  
103. According to the Act on incompatibilities of 1983 (*Unvereinbarkeitsgesetz*), Section 2 and 3, members of the Federal and Länder governments, the President of the National Council and the Chairpersons of the Parliamentary Parties within the National Council may not exercise any occupation from which they intend to receive earnings, without the approval of a special parliamentary committee (incompatibility committee) of the National Council or Parliament of the Land. This committee may only give its approval to the exercise of such an occupation provided it is possible to guarantee that the exercise of such an office will be objective and not subject to influence. The management of a personal portfolio and the exercise of duties within a political party, within a legal body representing certain interests or a voluntary professional association, is not considered to be the exercise of an occupation. Furthermore, if a Federal Minister, a Secretary of State or a member of a Regional Government is the owner of a company or holds a financial interest in an undertaking, then s/he must notify this fact to the aforementioned parliamentary committee when s/he takes up office. If a financial interest, including that of the spouse of the person concerned, exceeds 25%, certain restrictions apply.<sup>31</sup> The incompatibility committee of the National Council in the case of members of the Federal Government, and the committee of the Regional Parliament which is competent under Regional legislation in the case of members of the Regional Government, may allow exceptions, provided appropriate precautions are taken to ensure the unreserved conduct of official functions. The incompatibility

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<sup>31</sup> Such companies or undertakings may not

- in the case of members of the Federal Government or Secretaries of State, be directly or indirectly awarded contracts by the Federal Government or by undertakings which fall within the auspices of the Federal Audit Board,

- in the case of a Regional Government, be directly or indirectly awarded contracts by the Land concerned or by undertakings which fall within the auspices of the Federal Audit Board as a result of a financial interest.

This also applies in the event of the award of contracts to members of the Federal Government, Secretaries of State and members of the Regional Governments who work on a freelance basis, and persons working on a freelance basis who work with a member of the Federal Government, a Secretary of State or with a member of a Regional Government in shared offices or shared chambers.

committee of the National Council is required to notify to the Federal Chancellor those undertakings and freelance individuals to whom no contracts may be granted. The Federal Chancellor must publish this notification in the *Amtsblatt* [Official Journal] attached to the *Wiener Zeitung*. This provision is to be applied accordingly within the individual Federal Länder.

104. According to Section 3a of the above Act, members of the Federal and Länder government (and in Vienna the mayor and other members of the city council) are required to disclose their financial situation to the President of the ACA (regarding real estate, assets, companies, participations in companies and liabilities) every two years, as well as within three months after taking office and after retiring from office. In the case of a substantial increase in assets, the President of the ACA shall report this – as has already happened – to the President of the National Council and the Länder Parliament respectively. The latter may also, at any time, request the President of the ACA to make such a report.
105. By virtue of Section 6 and Section 6a of the above Act, members of the National and Federal Council must declare to the President of the concerned chamber any leading functions held in certain financial entities listed in the law. The parliamentary (incompatibility) committee has the possibility to declare these shares inadmissible. Similar restrictions for members of the National and Federal Council (as well as for members of the Länder parliaments) apply to any post held in the public administration; in this case, the declaration is also to be made to the President of the chamber concerned.
106. According to Section 6a para.2, judges, prosecutors, employees of the police and other security forces, in the case they get elected as a member of the National and Federal Council or as a member of the parliament of a Land, are prohibited from continuing their service assignments, unless the relevant committee otherwise agrees on the grounds that despite membership in the representative body, an objective and unbiased conduct of office is ensured.
107. The discussions and decisions of the various incompatibility committees are not public.
108. Secondary activities of federal civil servants in general are subject to Section 56 of the Civil Servants Service Act 1979; accordingly, “civil servants may not exercise any secondary occupation outside their public service, which a) prevents them from performing their public duties; b) gives rise to the suspicion of bias (the simple suspicion suffices, evidence is not required) or c) prejudices other fundamental interests associated with their public duties.” The civil servant himself is required to undertake this examination of admissibility. If the examination indicates that none of these grounds exist, then the civil servant may exercise the secondary occupation. If, however, the secondary occupation would lead to a sizeable additional income, then s/he must declare it to his service authority which has the possibility, on the basis of this declaration, to examine whether the secondary occupation may be (in)admissible. In any event, even if the secondary occupation is not remunerated, the civil servant must declare any activity carried out as a board member of a profit-making entity. Federal contractual staff are subject to the same rules<sup>32</sup>. Furthermore, Section 7 of the General Administrative Procedure Act 1991 lays down rules which have to be followed in order to prevent the partiality of administrative decisions: public employees are required to abstain from any decision and to refer the matter to another colleague if the decision concerned involves e.g. personal interests or those of relatives, political relationships, or where there are other important reasons to suspect a risk of bias.

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<sup>32</sup> By virtue of Section 5 para.1 of the Act on Contractual Public Employees of 1948, Section 56 of the regulation for civil servants applies by analogy to non-tenured staff.

109. At the level of the Länder, general restrictions on the prevention of conflicts of interest exist in Vienna. According to Section 22 of the 1994 Public Service Regulations (Section 8 of the 1995 Regulations on Non-tenured Public Employees) the employee has to “abstain from performing his/her official duties and to arrange for his/her representation if there are important reasons that might give rise to doubts as to whether s/he is fully unbiased.” In the case of imminent necessity, s/he shall perform those official duties that cannot be delayed if the representation by another colleague cannot be ensured immediately. Section 7 of the General Act on Administrative Procedure of 1991 and other procedural provisions on bias remain unaffected.) The public servants and employees are required to assess the situation of a potential conflict by themselves and to proceed as provided for in the regulations. Section 25 paragraph 2 of the 1994 Public Service Regulations prevent the public servant from engaging in any secondary activity that might impede him/her in the thorough performance of his/her professional duties, that might give rise to suspicion of bias or which might undermine the trust and respect shown to that person in his/her position as a public servant. The same criteria also have to be observed by non-tenured public employees. The Land of Styria has regulations requiring governmental employees to report secondary occupations that are remunerated; this requirement does not apply to honorary occupations. But in both cases, the employee is not allowed to engage in the activity if there is a conflict or if there are incompatibilities between the function in office and the activity in question. The Land of Upper Austria has strict budgetary regulations and a strict test process in areas potentially vulnerable to corruption (e.g. facility management). Occupations outside office hours which are vulnerable to corruption are prevented by official and legal measures.
110. As far as rules on “revolving doors” / “pantouflage” are concerned, after termination of employment, the federal civil servant is only obliged to keep official secrets, as defined under Section 46 of the Civil Servants Service Act 1979<sup>33</sup>. According to Section 310 paragraph 1 PC the violation of the official secrecy obligation by former public servants is punishable with a term of imprisonment of up to three years. In addition, claims for damages under civil law may be introduced by the interested party.

### Gifts

111. The Federal Civil Servants Act (BDG) addresses the issue of gifts under Section 59: public officials are not allowed to demand, accept or cause someone to promise gifts, pecuniary or other advantages for themselves or for a third party because of their official position. Only gifts of low value which are customary in the place or region (calendars, pens, promotional items, etc.) are permitted. If public officials receive gifts in the form of honorific distinctions or awards (certificates, cups, etc.), they have to notify their authority and the latter shall decide within a month whether the gift can be accepted; if not, it has to be returned. Similar provisions exist for judges. The Austrian authorities indicated that regulations on the prohibition of the acceptance of gifts exist in principle at the level of the Länder, for instance Vienna (Section 18 paragraph 3 of the 1994 Civil Service Regulations; Section 4 paragraph 5 of the 1995 Regulations on Contractual Public Employees).

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<sup>33</sup> “A civil servant has to observe secrecy related to all facts which are known to him due to his public office if their nondisclosure is

- in the interest of the maintenance of public peace, order and security; the comprehensive national defence or the diplomatic relationships,
- in the economical interest of a body established under public law,
- necessary for the preparation of a decision or
- necessary in the predominant interest of the parties. (...)



## Code of ethics

112. The basic values of the federal public administration are embodied in various legal frameworks (Penal Code, the Federal Civil Servants Act of 1979, the Act on Contractual Public Employees of 1948 (*Vertragsbedienstetengesetz* – VBG 1948). The Federal Ministry of Finance has guidelines for ethical behaviour and a brochure against corruption (“The Financial Administration - incorruptible and transparent”).
113. In Vienna, on the basis of relevant provisions of the 1994 Public Service Regulations and/or the 1995 Regulations on Non-tenured Public Employees and on the basis of the findings of the interdisciplinary working group set up by the Office of the Vienna Provincial Government, a manual on the prevention of corruption was developed. This manual serves as a practical guideline for civil servants, public employees and their superiors working in public administration but also provides interested citizens and customers with information. The first part deals with corruption as a worldwide phenomenon from a European, national and communal, as well as an individual’s personal point of view. The second part contains examples regarding the acceptance of gifts, bias, secondary employment, official secrecy and the recognition of risks and warning signals. The third part presents thoughts and recommendations for a joint prevention strategy in the form of a code of practice for ethics management.
114. Besides the above initiatives, there is no code of conduct or ethics in place in the federal and Land-level institutions that the GET has met<sup>34</sup>. As indicated earlier in this report, a special code of conduct for everyone working throughout the public sector (federal, local, municipal level) is being drafted<sup>35</sup>.

## Reporting cases of corruption

115. Section 86 of the Criminal Procedure Code (CPC) requires every person who has knowledge of a punishable act to report it to the prosecutor.
116. At federal level, according to Section 53 of the Public Service Act of 1979, civil servants (and, indirectly, contractual staff<sup>36</sup>) have a duty to report every substantiated suspicion of a judicially punishable act (including abuse of office, bribery etc.) which comes to his or her knowledge in the course of his or her duties. The report has to be made to the head of the administrative unit. The head of the administrative unit then has the duty (according to Section 78 – former Section 84 – CPC which provides for a general reporting duty for all public authorities) to report the suspicion directly to the public prosecutor or police authority. In addition to this general principle, the internal regulations of the Federal Ministry of the Interior and Ministry of Finance foresee that the respective Bureau of Internal Affairs is in principle informed and may undertake the internal inquiry.
117. Similar arrangements exist at the level of Vienna where the Rules of Procedure of the Vienna City Administration (Section 17 paragraph 3) oblige all public servants and employees to immediately report to the supervisor all important incidents and any criminal offences of which they are informed during their service. The Austrian authorities indicated that similar provisions exist in the other Länder. In January 2005, an anti-corruption hotline was created by the Internal

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<sup>34</sup> A further exception is the “Code of conduct for the cooperation with the pharmaceutical and medical devices industry”, which was produced by the Austrian Chamber of Medical Doctors.

<sup>35</sup> Its adoption is expected by the end of June 2008

<sup>36</sup> By virtue of Section 5 para.1 of the Act on Contractual Public Employees of 1948, Section 53 applies by analogy to non-tenured staff.

Auditing Group for the purposes of advising public servants and employees on the prevention of corruption and the correct behaviour in certain situations. Recently, the hotline was also opened to the general public (citizens, customers). One of the responsibilities of the Chief Executive Office, Executive Group for Personnel and Internal Auditing, Internal Auditing Group is to investigate complaints about alleged misconduct reported via the hotline or otherwise. Anonymous complaints have to be investigated as well.

### Disciplinary procedures

118. At Federal level, in the event of a breach of duties, disciplinary measures and proceedings applicable depend on the seriousness of the act; these measures include reprimands and warnings, small fines (up to 10% of a monthly wage), the initiation of formal disciplinary proceedings (involving a disciplinary commission) leading to reprimands, larger fines (up to 5 months of salary) or dismissal. Contractual staff are subject to transfer to a different department, termination of employment and/or dismissal. The employee may file a complaint against the termination and/or dismissal to the Court for Labour and Social Matters.
119. At the level of the Länder, different mechanisms are in place to impose disciplinary sanctions. The Vienna City Administration has various bodies (department of human resources, disciplinary commission, disciplinary senate etc.) to conduct hearings of public servants and non-tenured public employees suspected of corruption. In principle, any public servant or employee may call in a staff representative and/or a person of his/her choice to attend the meeting; the proceedings are confidential. In the Land of Vorarlberg, cases of violation of official duties are heard and decided upon by the office of the state government in case of administrative offences and by the disciplinary court<sup>37</sup> for state officials (civil servants) where the particular nature and seriousness of the violation justify disciplinary proceedings. Administrative and disciplinary penalties can be appealed before the Independent Administrative Tribunal, whose independence is guaranteed by constitutional law (Section 129b Federal Constitution). Contractual staff are not subject to these rules – decisions regarding disciplinary measures are taken by the Head of their entity. In Upper Austria, there is a two-stage disciplinary procedure applicable to public officials. A disciplinary court of first instance and one of second instance decide on breaches of official duties (including corruption). Both disciplinary courts are independent and not subject to instructions. There are no special disciplinary proceedings in respect of contractual staff; reprimands, suspension of duties and dismissal are decided by the head of the institution concerned.

### **b. Analysis**

120. The GET noted that the category of contractual staff is significant in Austria (50% of public officials). This is to be borne in mind when examining the regulations applicable to civil servants, which may (or may not), be reflected in corresponding regulations applicable to contractual staff. The GET was informed that as of 2008, the definition of public official in Section 74 of the Penal Code would be amended to include all holders of office in the administration and justice system, as well as all those entrusted with public functions also in a public company. The reform is not meant to include federal and local MPs and the GET was advised that it would be left up to them to make the necessary amendments.

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<sup>37</sup> The members of the disciplinary court are appointed by the state government for terms of six years (Section 106 (2) leg cit). In accordance with Section 106 (5) leg cit they are independent in the exercise of their office and not to be bound by instructions. They perform their office in a voluntary capacity and are only entitled to reimbursement of out-of-pocket expenses.

121. The GET learned that a discussion had been going on over the last 10 years about the need for further freedom of information legislation, since the current General Information Act mostly regulates the right to apply for information but does not guarantee a general right of access. As a result, state bodies are free to refuse to provide information without having to justify their decision and even the Ombudsman is bound by official secrecy: s/he cannot inform a citizen of the reasons a request has been denied by the administration (s/he can only inform the applicant whether the request was processed adequately or not by the administration). Journalists met on-site shared with the GET their own negative experience, including when working on cases which had received significant media and public attention. In addition, it would seem that the civil servants' confidentiality duty (*Dienstgeheimnis*) would lead to secrecy being the principle, and availability of information the exception. This situation is not satisfactory from the point of view of transparency of state authorities and makes it difficult for citizens and the media to exert control over the administration, which would contribute to the prevention of corruption. The GET therefore recommends, **with a view to facilitating access to information, to provide for precise criteria for a limited number of situations where access to information can be denied and to ensure that such denials can be challenged by the person concerned.**
122. Concerning control of the administration, the GET understood that most authorities have an internal audit body. In addition, the Austrian Court of Audit (ACA) complements these internal controls by further financial, efficiency, productivity and other annual reviews. Although ACA acknowledged its role in the prevention and fight against corruption and admitted the existence of various sectors at risk (construction, municipalities, the subcontracting of advisory functions, etc.) the GET was surprised to hear that it had never triggered any corruption-related investigation in recent years. It was also indicated that many ACA staff are not familiar enough with anti-corruption matters and that there should be closer links with the dedicated anti-corruption bodies (BIA, BK) and their work. The ACA, because of its country-wide jurisdiction and global overview, has the clear potential of fulfilling the role of a powerful anti-corruption watchdog. The GET recommends **to introduce appropriate training, cooperation agreements and other suitable measures that would place the Austrian Court of Audit in a position to contribute effectively to the country's anti-corruption efforts, in particular by reporting to the competent authorities both suspicions of corruption and cases of mismanagement liable to attract criminal sanctions.**
123. A duty to report suspected offences and misbehaviour, including corruption seems to be in place in Austria, but the GET was not in a position to determine whether all categories of staff (civil servants and contractual staff) are subject to such a requirement in the various Länder. Most importantly, there is no specific whistleblower protection available which would prevent those who report in good faith from being subject to retaliation measures that would affect, in particular, their career. As far as the Land/municipality of Vienna is concerned, most people report anonymously via a hotline (the proportion of officials among them is unknown). Anti-corruption specialists and the civil servants' union representatives met on-site were very much in favour of introducing such whistleblower protection mechanisms and the GET fully concurs that such protection would be a useful tool in the Austrian context (characterised i.a. by strict service confidentiality and a tendency to solve problems internally). Consequently, the GET recommends **to a) introduce whistleblower protection for all federal employees, i.e. civil servants and contractual staff; b) to invite the Länder which do not as yet have such protection mechanisms to introduce them.**
124. The GET welcomes the intention of the Federal authorities to introduce a Code of conduct for federal employees that would then be a source of inspiration for the authorities of the Länder and the municipalities. There was no information available at the time of the on-site visit on the

expected content of such a Code and to what extent it would cover corruption-related matters. The Austrian authorities need to make sure these are adequately taken into account. The GET supports this initiative and wishes to stress that it is of equal importance that the other administrative levels follow the example of the Federation and Vienna, which seems to be the only Land to have adopted such a document which is given systematically to all new staff and to other staff on the occasion of training activities and other events. The federal level should perhaps be more pro-active in this field when it comes to the Länder. The GET therefore recommends **a) to adopt, as planned, a Code of conduct for federal employees and to make sure that this Code also addresses the need to combat corruption; b) to invite the Länder that have not as yet done so to do the same.**

125. Concerning the issue of gifts, the matter seems to be well regulated for employees of the Federation and Vienna where only courtesy gifts of minor importance are acceptable. However, the GET could not obtain sufficient assurances, in particular from the Federal Chancellery and the Ministry of Justice, that the Länder have similar provisions. The GET was also doubtful that elected officials such as parliamentarians are adequately covered, and that judges and prosecutors are required to refuse gifts – even of minor importance – from a party to the proceedings. The Austrian authorities stressed that the Penal Code provisions, especially Section 304 on accepting an advantage by public officials, was an additional safeguard; the GET found that this Section raises certain issues, especially its paragraph 4 which seems to legitimise “minor advantages” without defining them<sup>38</sup>, bearing in mind that the understanding of minor advantage may vary from one type of official to another, depending on his/her rank, standard of living, etc. A similar exemption (in case of “petty advantage”) can be found for instance under Section 308 para. 2 on “illicit intervention”. Although the Austrian authorities have provided some assurances that the issue of gift is better addressed than it seems<sup>39</sup>, the GET believes that it is important to have a clear and consistent approach on the issue of gifts in Austria, even though it is clear that the impact might be limited as long as there is no criminalisation of bribery of parliamentarians (see also paragraph 18). **The GET recommends a) to make sure that all categories of officials (including elected officials, judges and prosecutors) are covered by adequate provisions on the acceptance of gifts; b) to invite the Länder that do not have adequate provisions on gifts for public officials to introduce such provisions; c) to examine whether additional clarification or guidance is needed to make sure that certain key provisions of the Penal Code (in particular Section 304 paragraph 4 on “accepting an advantage” and Section 308 paragraph 2 on “illicit intervention”) cannot be misinterpreted.**

#### Conflict of interest, incompatibilities, migration to the private sector, declaration of assets

126. The GET noted that there are no restrictions applicable to officials who move to the private sector (cooling off periods, restrictions on the ability to move to a business entity over which the official

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<sup>38</sup> (1) A public official, a public official of another Member State of the European Union or a Community official who demands, accepts or causes someone to promise an advantage for himself or for a third party for performing or refraining from performing his official duties in violation of such duties shall be punished by imprisonment of up to three years.

(2) A public official who demands, accepts or causes someone to promise an advantage for himself or for a third party for performing or refraining from performing his official duties in accordance with such duties shall be punished by imprisonment of up to one year.

(3) If the value of the advantage exceeds € 3,000, the offender shall be punished by imprisonment of up to five years in a case as laid down in paragraph 1 and by imprisonment of up to three years in a case as laid down in paragraph 2.

(4) A person who accepts or causes someone to promise only a minor advantage shall not be punished as laid down in paragraph 2 unless the deed is committed on a commercial basis.

<sup>39</sup> According to jurisprudence and legal commentaries, it would be admitted that the “minor-advantage” threshold of Section 304 is now € 100.

exerted some control etc.) that could usefully complement the obligation on former officials to continue to comply with his/her professional secrecy provisions.

127. Several provisions are in place to prevent conflicts of interest and incompatibilities in Austria. The provisions of Article 7 of the General Act on administrative procedure of 1991, and those of the Public Service Act of 1979 on secondary employment provide for measures applicable in general. They are complemented by the specific provisions of the Act on incompatibilities of 1983 which cover i.a. parliamentarians and members of the executive, including as regards the declaration of certain assets and interests. The system in place by virtue of this Act of 1983 appears to be complex and rather heterogeneous and it is difficult to gain a clear picture of the exact scope of declaration duties. More importantly, the GET was advised on-site that generally, the current control mechanisms as regards conflicts of interest and incompatibilities of functions are insufficient. The Austrian Court of Audit (ACA) itself underlined that to their knowledge, the existing systems for the declaration of assets and interests had not allowed to uncover a case of unjustified increase of assets nor another similar situation that would have been a cause of controversy. It would appear that there is no real control or enforcement. The GET was told that since cases had been brought before the European Court of Justice (ECJ) by the Austrian Constitutional Court and by the Austrian Supreme Court, the ACA no longer publishes declarations of salaries and pensions according to Paragraph 8 of the Act on limitation of Emoluments of Holders of Public Offices of 1997 because the national courts concluded – following the preliminary rulings of the ECJ<sup>40</sup> – that the national legislation at issue was incompatible with Article 8 of the European Convention on Human Rights.
128. At the level of the Länder, additional measures have been taken by the Land of Vienna which has a comprehensive framework that would cover both secondary occupation and conflicts of interest generally. But this would appear to be an isolated example and, also at this administrative level, there are apparently no (*ex ante* or *ex post*) control mechanisms in place.
129. In light of the above, the GET recommends **to a) provide for a framework to deal with moves of federal employees to the private sector; b) invite the Länder that do not have such measures nor appropriate mechanisms to prevent conflicts of interest yet to introduce such measures; c) strengthen the control of the declarations of assets and interests to be submitted by parliamentarians and senior members of the executive.**

## **VI. LEGAL PERSONS AND CORRUPTION**

### **a. Description of the situation**

#### General definition; formation

130. The Aktiengesellschaft (joint-stock company) is a stock corporation formed by at least two owners who subscribe to the shares and sign the Articles of Incorporation. The article must state the corporation's name, its purpose, the nominal amount of share capital, number and par value of each class of shares, the composition of the board of management and the form in which its notices will be published. The minimum capital stock is € 70,000. A general meeting of shareholders (*Hauptversammlung*) must be held annually. The legal capacity is not limited. The Gesellschaft mit beschränkter Haftung (limited liability company) is a limited liability company which is formed under the Limited Liability company law. The shareholders' liability is limited to the unpaid portion of the par value of the shares. Most foreign owned businesses in Austria

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<sup>40</sup> Judgement of the Court in Joined Cases C-465/00, C-138/01 and C-139/01 of 20 May 2003.

operate in this legal form. The minimum capital is € 35,000. The legal capacity is not limited. Erwerbs- und Wirtschaftsgenossenschaft (cooperative society) is a corporation without a fixed number of members. Its principle is not to make profits but to assist its members. A *Genossenschaft* can be founded with limited (which is the rule) or unlimited liability (which is rare). The legal capability is not limited. Vereine – or non-profit association - is a voluntary association, functioning on a continuing basis, pursuing a specific non-profit purpose. The association has to consist of at least two persons, its legal capacity is not limited. Privatstiftungen (private foundations) are legal entities, to which a founder dedicates a fortune of at least € 70,000 in order to serve a specific purpose by the use, administration and liquidation of this fortune. The purpose is defined by the founder and its legal capacity is not limited.

#### Registration and measures to ensure transparency

131. The Commercial Register is kept at the court nearest to where the entity is located. Newly formed entities must record the articles of incorporation and submit the application signed by all founders, members of the supervisory board and the board of management. Once the court has decided that all statutory requirements have been complied with, it orders the registration and publication in the “*Ediktsdatei*” which can be accessed via Internet.
132. Limited liability companies (GmbH) and joint-stock companies (AG) are required to register with the regional court of first instance in commercial matters (*Firmenbuchgericht*). Disclosed information includes: a) administrative address; b) identity (name, date of birth) of the directors and members of the supervisory board, where applicable; c) shareholders of a private limited company. The application must be accompanied by the company's notarised statutes, a list of shareholders, a list of the appointed managers, an affidavit from the managers that the minimum capital required will be retained, specimen signatures of managers and confirmation by the tax authorities that the capital transaction tax has been paid or guaranteed. In case of a joint-stock company, if there is only one shareholder, his/her name (natural or legal person) is disclosed. If there is more than one shareholder, they are not entered on the commercial register, irrespective of whether the company has issued bearer shares or registered shares. In case of a company with registered shares, the shareholder register is kept by the company and is open to inspection by every shareholder. Cooperative societies (Genossenschaften) are registered on the commercial register, but no information about members' identities is disclosed in the register. However, a cooperative society is required to keep a register of its members and make it available for inspection by all members of the public. Private foundations (Privatstiftungen) are also entered on the commercial register. They do not have owners but must have beneficiaries. The names of the beneficiaries need not be included in the statutes of the foundation, which are open for public consultation at the Commercial Registry; c) Non-profit associations (Vereine) are not registered at the Commercial Registry, but with administrative authorities at regional level (*Vereinsregister*). There is no disclosure of the identity of members to these administrative authorities.
133. Every change to a member's or shareholder's identity must be entered on the commercial register or the member's register kept by the company (whichever is applicable). Shareholders of private limited companies who are not registered at the Commercial Registry are precluded from exercising any of their rights vis-à-vis the company. The same applies to shareholders in a joint-stock company whose names have not been entered on the shareholders' register (when registered shares have been issued). In addition, non-compliance with registration requirements is punishable by a fine.

134. Legal persons in Austria have to be registered at a registry which is accessible to the public. It contains information on company data, managers, shareholders, capital etc which ensures a high degree of transparency for all legal persons. The information has to be verified and certified by a public notary, before being included in the register. The register is kept up-to-date since there are strict and short delays for up-dating information if changes occur. Further transparency rules apply to companies which are traded on a regulated market of the stock exchange, or companies who issue securities according to the Capital Market Act (CMA) and the Stock Exchange Act (SEA). These include obligations such as the publication of annual financial reports, half yearly financial reports, notification of the acquisition or disposal of major holdings and ad-hoc notifications etc. Finally, financial institutions and their management have to undergo a specific registration and approval process with the Financial Market Authority.
135. The GET also asked for statistics concerning penalties imposed in commercial register proceedings, to be in a better position to evaluate the efficiency of the control of the validity of commercial register entries. The document "*Strafen 2005, 2006, 2007*" ("Penalties 2005, 2006, 2007") provides an overview. According to these statistics, in 2005 approximately 11,000 warnings (with conditional penalties) had been issued and in 3.900 cases penalties had been fixed. In 1,586 of those cases, one penalty had been sufficient, whereas in 563 cases two penalties had to be imposed and in 130 cases three, in 45 cases four, in 17 cases five and in 19 cases more than five. In 2006, the number of warnings (with conditional penalties) decreased to about 8.900 and the number of fixed penalties to about 2.900. In 1,175 of those cases one penalty had been sufficient, whereas in 452 cases two penalties had to be imposed and, in 103 cases three, in 33 cases four, in 7 cases five and in 6 cases more than five. In 2007 the number of warnings (with conditional penalties) increased again to 9,200 and the number of fixed penalties to 3,411. In 1,367 of those cases one penalty had been sufficient, whereas in 342 cases two penalties had to be imposed and in 68 cases three, in 9 cases four, in 1 case five.

#### Restrictions on the activities of natural persons

136. There is no direct possibility to disqualify persons found guilty of offences from acting in a leading position in a legal person. However, a person is not allowed to carry out activities and therefore act as director of a legal entity which does business, if he or she has been found guilty of deceptive insolvency practices or other related crimes (Section 13 Business Law - *Gewerbeordnung*). As far as all financial sector players (banks, insurance, financial advisors) are concerned, the strict licensing regime of the FMA (responsible for supervising the financial sector) ensures a thorough background check of owners, managers and source of funds to ensure a high standard of management and ownership, to avoid criminal influences in the financial sector (so called "fit and proper testing" according to the prudential supervisory standards of the Basle Committee on Banking Supervision, IAIS and IOSCO). Additionally, the 3rd Anti-Money laundering Directive 2005/60/EC (which was about to be implemented at the time of the on-site visit) requires that licensing or registration of currency exchange offices, trust and company service providers and casinos is refused if the persons who direct the business or are the beneficial owners of such entities are not "fit and proper" (a requirement very similar to the one already established for banks and financial intermediaries). Thus, when the integrity of a manager or beneficial owner is in doubt (e.g. criminal records including bribery or money laundering) the person is disqualified from acting in a leading position in the legal persons.

#### Legislation on the liability of legal persons, penalties and other measures

137. On 1 January 2006 the new Federal Statute on the Responsibility of Entities for Criminal Offences (*Verbandsverantwortlichkeitsgesetz – VbVG*) came into force, providing for a general

criminal liability regime for legal persons and other bodies like partnerships. The Austrian authorities indicate that with this new legislation, legal persons can be held criminally liable for all penal offences (including corruption-related offences), whether they are intentional or committed by negligence, in addition to and independently from the criminal liability of natural persons involved. The VbVG contains certain safeguards designed to prevent a legal entity from evading the legal consequences of its actions by a significant change in its organisational structures. It also contains detailed provisions on the calculation and application of the fine to be applied in cases of offences for which legal persons are held liable (*Verbandsgeldbusse*). The basis is a merely theoretical maximum daily rate of € 10,000 (Section 4 Chapter 4 VbVG). The theoretical maximum number of daily rates depends on the maximum penalty for the offence committed. In the case of active bribery (Art. 307 PC) this number is 70, while for passive bribery (Section 304) it amounts to 85 and for abuse of official authority (Section 302 PC) to 100 daily rates (Section 4 Chapter 2 and 3 VbVG). This means that the absolute maximum total amount which could be imposed on a criminally liable legal person in a very serious corruption case is 1 million Euro.

#### Tax deductibility, tax administration

138. According to Section 20, paragraph 1, subparagraph 5 of the Income Tax Act 1988 gifts in cash and in kind the giving or receiving of which is subject to criminal sanctions are not deductible from income.
139. The tax authorities, in particular tax inspection units, are involved in the detection and reporting of offences. The payments in question, if such payments are recorded in the accounting system at all, are usually recorded as commission fees, entertainment expenses, agent's fees, lump sum deduction of expenses, loans (where in reality repayment is not necessary). It is the task of the tax auditor to examine whether such payments are business-related and deductible. The Austrian tax authorities provide information about suspicious bribery transactions under the following conditions: (a) Under Section 84 of the Criminal Procedure Code there is in principle an obligation to report to the prosecution authority; (b) Information on suspicious bribery transactions may be exchanged with foreign tax authorities on the basis of the exchange of information articles of the Double Taxation Conventions or according to the EC-Mutual Assistance Directive (77/799/EC as amended).
140. Tax secrecy as provided for in Section 48a of the Tax Procedural Act is waived in cases where disclosure of protected information is required under a legal obligation or if such disclosure is required by compelling public interest which will normally be the case if prosecution authorities do not have access to information through other legal means of investigation.
141. The GET was advised on-site that the Ministry of Finance has issued a guideline on gifts and their tax deductibility which is considered a useful tool but would not fill all the gaps. A broader project was initiated with the German tax authorities of North Rhine–Westphalia to study the various techniques used to dissimulate money laundering and corruption offences. The outcome will be used for strengthening the role of the tax authorities in the prevention and detection of criminal activities.

#### Accounting rules

142. According to Section 122 of the Federal Statute on limited companies and Section 255 of the Federal Statute on joint stock companies, managing directors, members of the supervisory board, agents and liquidators are punishable with up to one year imprisonment or a fine of up to 360 daily rates if they present the situation of the company or their financial status incorrectly or



omit relevant facts in reports, in inventories of the property of the company and especially in annual financial statements, which are addressed to the public, to shareholders, to auditors, to the supervisory board or to the general assembly of the company. The penalties apply to all other entities required to publish a balance sheet: cooperative societies (Section 89 of the Federal Statute on cooperative societies) and other commercial companies are subject to similar rules. The relevant fine can be imposed on the legal person. Foundations are subject to accounting rules and sanctions similar to those applicable to companies. Associations are required to keep accounts but there are no sanctions in case of violation of accounting requirements.

143. The (deliberate) destruction or the hiding of accounting records is not subject to criminal sanctions.

#### Role of auditors, accountants and other professionals

144. Lawyers, auditors and accountants are required to report suspicions of money laundering and terrorist financing to the FIU. For the time being, there is no reporting obligation regarding corruption offences. A guideline which was under preparation at the time of the on-site visit, will regulate in future the professional conduct of accountants vis-a-vis their clients, other persons authorised to practise as trustees [*Wirtschaftstreuhänder*], trainees and other persons that have relations with the professions related to *Wirtschaftstreuhänder*. The guideline will also include appropriate measures to protect the persons authorised to practise as trustees (*Wirtschaftstreuhänder*) against their involvement in organised crime. Accountants are under an obligation to exercise professional duties in compliance with the law.

#### **b. Analysis**

145. The GET could not obtain a clear picture as regards the transparency of certain legal entities. This was particularly the case for joint stock companies, which are allowed to issue bearer shares which are freely transferable from one holder to another without this being necessarily recorded, which can sometimes be a source of difficulties to identify certain assets or the beneficiaries of such companies<sup>41</sup>. Austria also has the institution of *Stille Gesellschafter* (which the GET understood to be similar to silent partnership) and it was unclear whether the silent associate must be declared by the other (co-) associate(s) who act as official managers of the entity. Prosecutors informed the GET that Foundations (*Stiftungen*) do not identify their possible beneficiary(ies), and that they can thus easily be used to dissimulate funds; prosecutors need carry out further research in order to identify such beneficiaries. Representatives from the tax authorities admitted that shell and ghost companies exist and are used in Austria for various fiscal, criminal and other offences, but no measures were mentioned to the GET to limit such entities. Police representatives indicated that occasionally, companies have been found to be involved in an organised manner in criminal activities, including corruption. Finally, the GET was told that in the context of Austria, "social capital", networking and political connections play a particularly important role which can make associations and political parties particularly attractive. The GET was also told that party financing is particularly un-transparent in Austria (a matter which will be looked at under GRECO's Third Evaluation Round) and it gives the impression that one can easily give money to elected officials in order to secure a favourable decision; details of some controversial cases were referred to. There are thus reasons for the Austrian authorities to

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<sup>41</sup> The Austrian authorities advised that there are different possibilities for investigators to get on the actual holder's track, for instance by studying the company register and the documents deposited there, by questioning the original shareholder or persons who acted on behalf of a shareholder or directors and other representatives of the company concerned, by consulting the list of persons who attend the meetings of shareholders etc. But it is acknowledged that a shareholder can remain difficult to identify if s/he does not exert the rights attached to the shares

remain particularly vigilant on the matter of transparency and control of legal persons<sup>42</sup>. The GET recommends **to initiate consultations on appropriate measures to be taken - in the context of the fight against corruption - with a view to increasing the transparency and control of business entities, foundations and associations.**

146. In this context, the new statute on responsibility of legal entities (*Verbandsverantwortlichkeitsgesetz - VbVG*) is to be welcomed. It contains many strong points, for instance the applicability of this form of liability to all criminal offences and the inclusion of detailed procedural provisions. At the time of the on-site visit there were some cases under investigation or prosecution (no corruption case among them) but no judgement had yet been delivered. The GET found that police, judges and also prosecutors were not familiar with the new law and they expressed some doubts as to its applicability. The law itself is quite complex and contains various provisions leaving significant room for interpretation to the applying authorities, e.g. concerning the assessment of the fine and the determination of the income period. The GET was informed that much more could – and should – be done in terms of training for police and the judicial authorities in this matter to support the implementation of the new mechanism. The GET therefore recommends **to establish guidelines for prosecutors facilitating the application of the statute on responsibility of legal entities (*Verbandsverantwortlichkeitsgesetz-VbVG*) and to develop systematic training for the competent police forces, prosecutors and judges on the matter.**
147. As regards fines applicable to legal persons, the maximum amount of 1 million Euro remains theoretical, as the law provides for a wide range of elements to assess the number and amount of the daily rates (see Section 4 and 5 VbVG). Conditional remission of the fine or for parts of it (Section 6 and 7) is also provided for. On the procedural side, an alternative measure, the so-called diversion (Section 19 VbVG), offers further possibilities for lower sanctions. This broad range of elements used to fix the adequate sanction for a criminally responsible legal person is not to be criticised as such, but given the wide margin of appreciation, the initial maximum threshold appears to be clearly too low<sup>43</sup>. Consequently, the GET recommends **to raise the initial maximum amount of fines for legal entities held criminally liable to ensure that sanctions for corruption offences are effective, proportionate and dissuasive in practice.**
148. For the time being there is no register of legal persons found guilty of corruption (or any other offences) and the Austrian authorities take the view that this is a rather complex matter. There seems to be also marked opposition from the business associations to publishing in the commercial register (*Firmenbuch*) details of sentences passed on entities. This being said, the GET believes that legal persons should be treated similarly to natural persons when they have committed an offence and a register would provide a useful institutional memory to those who want to avoid having business relationships with entities that do not hesitate to resort to corruption or other illegitimate methods for doing business. Notwithstanding this, the GET believes that alternatives exist to find a suitable compromise, e.g. creating a register with restricted access, offering guarantees when it comes to the legitimate interests of data protection, etc. The GET therefore recommends **to consider establishing a register of convicted legal persons.**
149. There is no provision in the Penal Code that would enable the courts to prohibit a person found guilty of corruption offences to hold a leading position in an entity. Such a possibility would be an

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<sup>42</sup> The Austrian authorities stressed that the measures adopted after the visit to implement the 3<sup>rd</sup> EU anti-money laundering Directive include requirements for the obliged business entities as regards the identification of the ultimate beneficiary of a transaction or legal person and to keep records of these checks, which helps increase the transparency of legal persons.

<sup>43</sup> The level of sanctions was increased on 1 January 2008, but not in a significant proportion.

effective tool for strengthening the prevention of corruption and more generally, for preventing criminals from infiltrating the business sector. As indicated above (see paragraph 145), opportunities for misusing legal entities appear to exist. Consequently, the GET recommends **to consider the introduction of a provision in the penal code which would enable the courts to prohibit a person found guilty of serious corruption offences to hold a leading position in a legal entity for a certain period of time.**

## **CONCLUSIONS**

150. Some interesting anti-corruption initiatives have been adopted in Austria but overall, the GET found that the country is still at an early stage of the fight against corruption, with the exception of the Municipality/Land of Vienna. Various sectors of society seem affected and/or exposed to risks of corruption which are not necessarily assessed or acknowledged yet. A study of the phenomenon of corruption, and the establishment of an inter-institutional coordination mechanism which would allow to also involve the Länder and the private sector would provide a general framework to trigger/accompany various future improvements.
151. Overall, the police and prosecutorial bodies are perceived as not being independent enough and/or strongly politicised, which is a crucial issue, particularly for the fight against corruption. The reform planned to bring prosecutors closer to judges in terms of statute would need to be implemented and possibly complemented with the creation of a body/bodies responsible notably for the appointment and career of prosecutors and judges. Additional staff, training opportunities and coordination mechanisms are needed by the law enforcement bodies and the role of the Bureau of Internal Affairs of the Ministry of the Interior needs to be strengthened and clarified. At the moment, the system of parliamentary immunities could hinder proceedings for corruption and there is a need to establish criteria to better distinguish acts that are connected with the parliamentarians' duties and those which are not. Also, the GET could not conclude that sufficient attention is paid by law-enforcement agencies to the proceeds from corruption. In particular, the legal framework for seizure and confiscation offers room for improvement.
152. There is room for improvement also as regards transparency and other preventive anti-corruption measures in place in the administration and as regards public officials (e.g. need to improve the legal basis on access to information, to better involve the Austrian Court of Audit in the prevention and detection of corruption, to introduce whistleblower protection and a code of conduct for public officials). Finally, the GET found that greater attention should be paid to the effect that various forms of legal entities are not misused for corruption and other criminal purposes. The recent introduction of corporate criminal liability is to be welcomed; inevitably, certain accompanying measures are needed to ensure the full application of this new mechanism (guidelines, training, register of convicted legal persons etc.).
153. In view of the above, GRECO addresses the following recommendations to Austria:
  - i. **that a study be undertaken covering the scale and the nature of corruption in Austria, and identifying the areas most exposed to corruption risks (paragraph 19);**
  - ii. **a) to establish an inter-institutional and multi-disciplinary coordination mechanism that would be given the necessary resources and a clear mandate to initiate a strategy or policy in the area of anti-corruption; b) to involve the Länder and the private sector in these overall anti-corruption efforts (paragraph 21);**

- iii. a) to clarify the role and jurisdiction of the Bureau of Internal Affairs of the Federal Ministry of the Interior and of the other police bodies in respect of corruption investigations, whilst confirming the central role of the BIA-BMI; b) to enhance the co-ordination between the various police units involved in the investigation of corruption cases, and between the BIA-BMI and the prosecution services (paragraph 54);
- iv. to increase the human resources available to the police, in particular the units responsible for conducting investigations concerning corruption and criminal assets (paragraph 55);
- v. a) to proceed with the reform of the statute of prosecutors in order to bring it closer to the statute of judges; b) to consider the setting-up of a specialist body/bodies responsible for the selection, training, appointment, career development and disciplinary procedures in respect of judges and prosecutors (paragraph 56);
- vi. to ensure that the planned special prosecution office for corruption becomes operational at the beginning of 2009 with the resources envisaged and that after an initial period, the adequacy of the resources allocated is assessed (paragraph 57);
- vii. to provide more training opportunities to judges, including those of lower courts, in those areas which are of particular relevance for handling corruption cases (paragraph 58);
- viii. to review the access to, and exchange of information needed in the context of corruption investigations and, in particular, to consider lifting bank secrecy also for corruption-related offences punishable by a maximum penalty of less than one year's imprisonment (paragraph 59);
- ix. to ensure that the new special investigation techniques are applicable to all serious cases of corruption, accompanied by appropriate safeguards for fundamental rights (paragraph 60);
- x. to a) adopt guidelines providing for specific and objective criteria to be applied in determining whether an act is connected to the official functions of a parliamentarian and thus whether the immunity of that member applies and can be lifted; b) ensure that these guidelines reflect the needs of the fight against corruption and c) require the competent parliamentary committees at federal and Länder levels to give grounds for their decision to lift or not to lift immunity in a given case (paragraph 70);
- xi. to consider strengthening the system of confiscation and temporary measures so that a) the confiscation system also applies to the direct proceeds of corruption and not just to their equivalent value; b) it is made clear that temporary measures and final measures are applicable to the various forms of proceeds (in particular both tangible and intangible proceeds, proceeds deliberately transferred to third persons to avoid confiscation measures and proceeds intermingled with legitimate assets) (paragraph 87);
- xii. to take the necessary measures to make investigative and prosecutorial bodies more aware of the need to target the proceeds of corruption, including in respect of

cases prosecuted under Section 302 of the Penal Code (abuse of official authority) (paragraph 88);

- xiii. to enhance the ability of Austria's anti-money laundering system to better deal with proceeds from corruption by a) examining the need to criminalise self-laundering; b) providing guidance to all the obliged entities that would take into account the needs of the fight against corruption (typologies of corruption-related money laundering and indicators for corruption-related suspicious transactions, information and guidance on politically exposed persons etc.) (paragraph 91);
- xiv. with a view to facilitating access to information, to provide for precise criteria for a limited number of situations where access to information can be denied and to ensure that such denials can be challenged by the person concerned (paragraph 121);
- xv. to introduce appropriate training, cooperation agreements and other suitable measures that would place the Austrian Court of Audit in a position to contribute effectively to the country's anti-corruption efforts, in particular by reporting to the competent authorities both suspicions of corruption and cases of mismanagement liable to attract criminal sanctions (paragraph 122);
- xvi. to a) introduce whistleblower protection for all federal employees, i.e. civil servants and contractual staff; b) to invite the Länder which do not as yet have such protection mechanisms to introduce them (paragraph 123);
- xvii. a) to adopt, as planned, a Code of conduct for federal employees and to make sure that this Code also addresses the need to combat corruption; b) to invite the Länder that have not as yet done so to do the same (paragraph 124);
- xviii. a) to make sure that all categories of officials (including elected officials, judges and prosecutors) are covered by adequate provisions on the acceptance of gifts; b) to invite the Länder that do not have adequate provisions on gifts for public officials to introduce such provisions; c) to examine whether additional clarification or guidance is needed to make sure that certain key provisions of the Penal Code (in particular Section 304 paragraph 4 on "accepting an advantage" and Section 308 paragraph 2 on "illicit intervention") cannot be misinterpreted (paragraph 125);
- xix. to a) provide for a framework to deal with moves of federal employees to the private sector; b) invite the Länder that do not have such measures nor appropriate mechanisms to prevent conflicts of interest yet to introduce such measures; c) strengthen the control of the declarations of assets and interests to be submitted by parliamentarians and senior members of the executive (paragraph 129);
- xx. to initiate consultations on appropriate measures to be taken - in the context of the fight against corruption - with a view to increasing the transparency and control of business entities, foundations and associations (paragraph 145);
- xxi. to establish guidelines for prosecutors facilitating the application of the statute on responsibility of legal entities (*Verbandsverantwortlichkeitsgesetz-VbVG*) and to develop systematic training for the competent police forces, prosecutors and judges on the matter (paragraph 146);

- xxii. to raise the initial maximum amount of fines for legal entities held criminally liable to ensure that sanctions for corruption offences are effective, proportionate and dissuasive in practice (paragraph 147);**
  - xxiii. to consider establishing a register of convicted legal persons (paragraph 148) ;**
  - xxiv. to consider the introduction of a provision in the penal code which would enable the courts to prohibit a person found guilty of serious corruption offences to hold a leading position in a legal entity for a certain period of time (paragraph 149).**
154. Pursuant to 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 31 December 2009.
155. Finally, GRECO invites the Austrian authorities to authorise publication of this report as soon as possible, translate it into the national language and publish this translation.