



Organisation for Economic Co-operation and Development

DAF/WGB(2017)72

Unclassified

English - Or. English

11 January 2018

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS**

Cancels & replaces the same document of 27 November 2017

Phase 3 follow-up: Additional written report by Austria

Paris 12-15 December 2017

JT03423693

PHASE 3 EVALUATION OF AUSTRIA: ADDITIONAL WRITTEN FOLLOW-UP REPORT**Name of country:** Austria**Date of approval of Phase 3 evaluation report:** 14 December 2012**Date of previous information:** November 2016**Text of recommendation 1(c):**

1. Regarding the liability of legal persons for the bribery of foreign public officials, the Working Group recommends that Austria:

- a) Increase the fines for legal persons for the foreign bribery offence, given that they are substantially lower than the fines for natural persons, and in light of the size and importance of many Austrian companies, the location of their international business operations, and the business sectors in which they are involved; (Convention, Articles 2 and 3.2) and

Action taken as of the date of the follow-up report to implement this recommendation:

Due to several petitions the Constitutional Court of Austria has reviewed the VbVG for its constitutionality. Thus any changes to the VbVG had been put on hold until the decision in the aforementioned proceedings was delivered. It is crucial to note that the VbVG was still applicable during the pending scrutiny by the Constitutional Court.

The Constitutional Court of Austria acknowledged the VbVG as constitutional (Decision G 497/2015 and others). In the June 2017 meeting of the WGB Austria informed the Working Group in the course of the tour the table discussion about the key issues of the decision.

The main issues that were raised concerned the principle of objectiveness (especially in connection with the criminal liability of legal persons for acts of natural persons and the necessary link between the two to establish liability), the principle of guilt, the right to a fair trial, and procedural safeguards under the ECHR. The Constitutional Court stated that the VbVG is fully in line with all of these principles and requirements.

This good news, however, coincided with the announcement of early elections and the dissolution of parliament before further efforts concerning the VbVG could be undertaken. The elections took place on 15 October, and so far there is no new government. Due to ongoing

coalition talks any changes to the VbVG - like other reform projects - have been postponed until the new government has been formed. Like always, the new Government Work Programme should set the agenda for the work to be done during the new legislation period.

Text of recommendation 4(a):

2. Concerning the investigation and prosecution of foreign bribery cases, the Working Group recommends that Austria:

- a) Find a way that is appropriate and feasible within its legal system to remove the impediments to effective foreign bribery investigations caused by the routine use of remedial actions by financial institutions, and report in writing on progress in this regard in one year; (Convention, Article 5)

Action taken as of the date of the follow-up report to implement this recommendation:

Austria has created an **electronic Register of Account Information**, which law enforcement authorities can access electronically **without a court order**.

The Accounts Register, which was established by the Accounts Register and Inspection of Accounts Act (Accounts Register Act), contains data relating to bank accounts and deposits of securities (art. 2, Accounts Register Act). Credit institutions finalised the initial data delivery for the Account Register by 30 September 2016 and now have to transfer new data to the Register on a regular basis (art. 3 Accounts Register Act).

From 1 October 2016 to 30 September 2017 the register was **accessed 906 times**.

The rules of bank secrecy have been revised and amended in order to implement this new Register. Specifically, it was necessary to adapt the provisions in **art. 38 of the Banking Act**, which can only be amended with a constitutional quorum in Parliament. Art. 38 (2), Banking Act originally stated that an exemption from bank secrecy in connection with criminal proceedings required a court order. This provision has been changed so that a court order is no longer required. Art. 38, Banking Act now refers to art. 116 of the Code of Criminal Procedure. According to para. 3 of this article, obtaining information from the Register only requires an order by **the public prosecutor**.

The Account Register has effectively **replaced the order of disclosure** ("Fachverbandsanfrage") which had to be issued to all bank associations in cases where law enforcement authorities did

not know which bank accounts a suspect might hold (or whether he/she had a bank account at all). This issue was raised in the Austrian Phase 3 Report, especially in points 70 to 72. Due to the legislative changes mentioned above, **bank associations play no relevant role anymore in accessing bank information** and therefore have **no remedies** at their disposal, nor is there a legal remedy for the bank itself to object to access to the Account Register (art. 116 (6), Code of Criminal Procedure).

In fact, banks are not informed about such access by law enforcement authorities. Hence, not only has **bank associations' and banks' right to appeal been abolished, but they also do not receive any information on access, either in advance or afterwards**. While it used to be necessary to provide bank associations with detailed information on the respective case in order to enable them to exercise their right to appeal, the new system aims to address the detriments that were identified in the Phase 3 Report, point 71.

Furthermore, the **special procedure set out in art. 112, Code of Criminal Procedure** (stating that, in the case of objection by credit or financial institutions, documents had to be sealed and reviewed by a judge) has been **abolished** in relation to access to bank records. This significantly restricts the right of credit or financial institutions to appeal to the courts, eliminating causes of delay.

At the time of the **latest follow-up report in December 2016**, the account register had been operational for only two months. One concern that was voiced in the WGB discussions was that, as a consequence of removing remedial actions against access to the Account Register, credit and financial institutions would cause impediments to effective foreign bribery investigations by the routine use of remedial actions against court orders to provide further information.

Several steps have been taken to address issues that could have derived from establishing the new Account Register. As anticipated in the discussions, it has been confirmed that the electronic Judicial Case Automation ("*Verfahrensautomation Justiz*" - **VJ**) application, which supports all courts and public prosecutors' offices in keeping registers electronically, does not enable competent authorities to assess the use of remedial actions in connection with orders for further information on individual bank accounts. Staff is instructed to record various relevant steps in criminal proceedings, for example orders concerning information from the Account Register, but also court orders, applications, and court rulings, using different codes. There are

also different codes for remedial actions (i.e. against orders by the public prosecutor or decisions by the court). However, the VJ system does not record the connection between a remedial action and the decision/order that is being challenged. Therefore, VJ numbers and statistics cannot show any distinctive results here.

The Austrian **Ministry of Justice** has therefore requested the **public prosecutor's offices** to **report** on their experience of operating the Account Register. As a result, the Ministry has received overall **positive feedback from practitioners in the field**. The reports demonstrate that in the past year the Account Register has proved to be an **effective and by now well-established tool** for investigation and prosecution. Above all, practitioners appreciate the fact that the Account Register reduces the duration of proceedings.

To counter any possible doubts, experience with the Account Register was also discussed at the **highest possible level**, namely at the **annual conference of the heads of Austrian public prosecution offices** in November 2017.

Public prosecutors have not detected any impediments to effective foreign bribery investigations (or any investigations at all) resulting from the routine use of remedial actions by financial institutions in connection with the new Account Register, in particular no shift in the use of routine remedial actions as a consequence of removing the right to object to access to the Account Register.

Text of recommendation 4(c):

3. Concerning the investigation and prosecution of foreign bribery cases, the Working Group recommends that Austria:

- c) Find a way that is feasible and appropriate within its legal system to make it easier to identify beneficial owners of companies in which the beneficial owners are not the shareholders; (Convention, Article 5)

Action taken as of the date of the follow-up report to implement this recommendation:

According to sect 61 of the Austrian Stock Corporation Act (Aktiengesetz) owners of nominative shares have to be registered in a shareholders' register maintained by the company. The following information must be kept:

- name

- address
- date of birth (in case of a natural person)
- commercial register number (in case of a legal person)
- number of shares
- in case of par-value shares the value
- bank account.

Even though there is no obligation to list any information in the Commercial Register about “beneficial ownership” deviating from the shareholders published, sec 61 paragraph 4 of the Austrian Stock Corporation Act states, that if the owner is somebody else than the (natural of legal) person registered, all the information mentioned above (except the bank account) has to be given on the person to whom the shares belong.

According to Article 30 paragraph 3 of the Directive (EU) 2015/849 of 20 May on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (“4th AMLD”), Member States shall ensure that the information on beneficial ownership is held in a central register in each Member State, for example a commercial register, companies register as referred to in Article 3 of Directive 2009/101/EC of the European Parliament and of the Council (31), or a public register.

A new law implements the requirements set out in 4th AMLD, the “**Beneficial Owners Register Act**” (“Wirtschaftliche Eigentümer Registergesetz”, WiEReG), Federal Gazette I No. 136/2017, published on 15 September 2017. The provisions on the scope and definition of beneficial ownership entered into force on 16 September 2017. Other parts of the Beneficial Owners Register Act came into force in November 2017, the rest will take effect in January 2018.

A beneficial owner of legal persons is defined as any natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity, or through control via other means.

Direct beneficial ownership means a shareholding of 25 % plus one share or an ownership

interest of more than 25 %. **Indirect beneficial ownership** with regards to a natural person is described as a shareholding of 25 % plus one share or ownership interest of more than 25 % by a corporate entity or various corporate entities, if the natural persons controls, directly or indirectly, the corporate entity or all of the various corporate entities (further descriptions in art. 2 WiEReG). Finally, if, after having exhausted all possible means and provided there are not ground for suspicion, no person is identified, the natural person(s) who hold the position of **senior managing official(s)** is regarded as the beneficial owner. Legal entities are obliged to report their beneficial owner to the register agency. Certain mechanisms are in place when legal entities do not comply with this obligation to report (i.e. lacking or incorrect information on beneficial owner detected by competent authorities or the register agency, **sanctions** can be up to 200 000 Euro).

The Agency for Statistics Austria (“Bundesanstalt Statistik Österreich”) is instructed to coordinate their data with the automatically processed unique identifications of persons, the central register of residents, the company register, register of associations and the Ministry of Interior in order to get unequivocal results on beneficial ownership (art. 5 (3) and art. 7 WiEReG on keeping the registry came into force in November 2017).

Amongst other authorities, law enforcement authorities, public prosecutor and judicial authorities have access to the register in the course of criminal proceedings.

Text of recommendation 5:

4. The Working Group recommends that Austria take immediate measures to ensure that:
ii) bank secrecy does not cause unnecessary delays in providing MLA. (Convention, Article 9)

Action taken as of the date of the follow-up report to implement this recommendation:

As described under point 153 of the report the Federal Ministry of Justice when acting as Central Authority in cases of MLA requests Austria has a system of control of execution in place. Similar mechanisms of control are put in place at the local prosecution services surveyed by the four Higher Prosecution Services in Austria – the automated Court Information System (“VJ”) allows the surveying authorities to easily control the status of execution of a request and to intervene if a delay occurs.

Concerning ii) please see above recommendation 4 a). Following the amendment to art. 38

Banking Act and the establishment of the account register, bank secrecy does not cause unnecessary delays in providing MLA anymore.