

**Permanent
Mission
of Austria**

to the United
Nations in Geneva

Genf-ÖV/RECHT/0001/2022

Enclosure

Note Verbale

The Permanent Mission of Austria to the United Nations in Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights in Geneva and with Reference to Note Verbale OL AUT 2/2021 dated August 24th, 2021 has the honour to transmit herewith the Austrian Submission to the Information Request of 5 Special Rapporteurs on the Austrian Anti-Terrorism Act (Terrorbekämpfungsgesetz TeBG).

The Permanent Mission of Austria would like to express its sincere apologies for the late submission.

The Permanent Mission of Austria to the United Nations Office in Geneva avails itself of this opportunity to renew to the Office of the United Nations High Commissioner for Human Rights in Geneva the assurances of its highest consideration.

Geneva, 4 January 2022



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Reply of the Government of Austria to the information request of five Special Rapporteurs on the Austrian Anti-Terrorism Act (Terrorbekämpfungsgesetz TeBG)

In reply to the **Joint Communication of Special Procedures**¹ of **24 August 2021** (OL AUT 2/2021) the Federal Ministry of European and International Affairs has the honour to submit the following information on behalf of the Austrian government.

Introductory Remarks

The Austrian government is fully committed to international human rights law and its implementation into domestic legislation. This concerns not only the European Convention on Human Rights, which has the status of constitutional law in Austria, but also the relevant international Agreements as well as the resolutions of the UN Security Council, the Human Rights Council and the General Assembly.

Austria has a long tradition of tolerance and inclusion. Therefore, Austria's current measures to prevent and combat radicalization and extremism should not be understood as being directed against any particular religion. Rather, religious communities and faith leaders play a crucial role in countering radical tendencies and feelings of social exclusion, discrimination and marginalisation amongst minority groups. In other words, religious communities are part of the solution.

In Austria, the fight against extremism is a cross-cutting issue, involving local, regional and federal actors from the security and justice sector. Education, employment, social, youth and family are only the most visible fields of action. Austria has adopted a nationwide strategy for the prevention and countering of violent extremism and de-radicalisation. To give just a few examples, police training places special emphasis on prevention and early warning signs for radicalization. Moreover, in the criminal justice system efforts are being stepped up where training, staff expertise, procedures for risk assessment and de-radicalization programmes are concerned.

Also in its foreign policy Austria looks back on a long tradition of intercultural and interreligious activities. Austria relies on dialogue of cultures and religions as a central

¹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression

Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association

Special Rapporteur on Minority Issues

Special Rapporteur on freedom of religion or belief

element of international politics in order to contribute to better understanding, conflict prevention, peace, sustainable development and stability. Global challenges including extremism and terrorism and the growing importance of religion, culture and identity give special significance to intercultural and interreligious dialogue as an instrument of foreign policy, even in times of crisis.

Austria takes its obligations under international human rights treaties very seriously, including the right to freedom of religion. Respect for constitutionally enshrined human rights guides Austria in the design and implementation of its measures and policies to counter terrorism and violent extremism.

For Austria, the effective fight against terrorism while at the same time strictly respecting fundamental rights and freedoms and supporting victims of terrorism is an issue of highest priority. The Austrian government fully agrees with the Special Rapporteurs' assessment that *"counter-terrorism legislation with penal sanctions should not be misused against individuals peacefully exercising their human rights and fundamental freedoms"*². Austria also fully subscribes to the Special Rapporteurs' assessment of the *"importance of a comprehensive, balanced, and human rights-centred approach to preventing and countering violent extremism, beyond the criminalization of extremist offenses"*³ and that *"any measure limiting the exercise of these (human) rights and freedoms on counter-terrorism grounds must comply with the objective criteria of legality, proportionality, necessity and non-discrimination (...)"*⁴.

The **terrorist attack** in Vienna on **2 November 2020** was an unexpected and serious shock for the entire country. During the terrorist shooting spree four persons were killed and another 23 were wounded, some of them severely. In view of this tragic event, it became clear that the legal framework for combatting terrorism had to be adapted. Hence, the Austrian Government announced its intention to introduce a package of measures to better prevent and combat terrorism. Furthermore, a **fact-finding commission** („*Untersuchungskommission*") was installed to investigate the reactions of police, intelligence services and judicial authorities as well as associations assigned with the task of de-radicalisation to the conduct of K.F., the terrorist perpetrator, prior and up to the attack of 2 November 2020.

² Joint Communication of Special Rapporteurs of 24 August 2021, page 4.

³ Joint Communication of Special Rapporteurs of 24 August 2021, page 5.

⁴ Joint Communication of Special Rapporteurs of 24 August 2021, page 5.

Negotiations resulted in a draft **Terrorism Combating Act (TeBG)**, the Federal Act amending the Criminal Code, the Code of Criminal Procedure 1975, the Penal Execution Act (Prison Act) and the Court Organisation Act to combat terrorism⁵. The public consultation on the Draft TeBG ended on 29 January 2021. More than sixty individuals and institutions took the opportunity to comment on the Draft TeBG. All statements are publicly available on the website of the Austrian Parliament (www.parlament.gv.at). Furthermore, the fact-finding commission rendered its final report on 10 February 2021. This report was published on the website of the Federal Ministry of the Interior (www.bmi.gv.at/downloads/Endbericht.pdf) and also includes comments on the Draft TeBG.

All comments on the Draft TeBG were carefully analysed and taken into consideration in the further process. Accordingly, several changes were made to the text as well as the Explanatory Notes (*“Erläuterungen”*).

When drafting new laws, the rights guaranteed in the European Convention on Human Rights (ECHR) always have to be taken into account, not only as international obligations, but as directly applicable and enforceable rights. Under Austrian law, every individual who alleges that their constitutional rights have been violated by a law that was applied by a court decision (of first instance) can appeal to the Constitutional Court (*“Verfassungsgerichtshof”*) and claim that the said law violates constitutional law including the European Convention on Human Rights (Art. 140 para 1 no. 1 lit. d Federal Constitution⁶). The Constitutional Court can repeal laws if it concludes that they violate constitutional laws.

1. Please provide any additional information and/or comment(s) you may have on the above

On 7 July 2021, the National Council (*“Nationalrat”*) passed the **Terrorism Combating Act**. In its session of 15 July 2021, the Parliament’s second chamber, the Federal Council (*“Bundesrat”*) decided not to object to the National Council's decision on the law. The TeBG was promulgated on 27 July 2021 in Federal Law Gazette I No. 159/2021⁷. Part of the TeBG (the amendments of the Code of Criminal Procedure and the majority of the amendments of the Criminal Code) entered into force on 1 September 2021. The amendments of §§ 52b and 53 of the Criminal Code (judicial supervision of terrorist offenders with case conference and electronic monitoring including the possibility of extended, also repeated, extension of

⁵ Ministerialentwurf für ein Bundesgesetz, mit dem das Strafgesetzbuch, die Strafprozessordnung 1975, das Strafvollzugsgesetz und das Gerichtsorganisationsgesetz zur Bekämpfung von Terror geändert werden – Terror-Bekämpfungsgesetz TeBG

⁶ Bundes-Verfassungsgesetz B-VG

⁷ BGBl. I Nr. 159/2021

the probationary period), of the Penal Execution Act (Prison Act) and the Court Organisation Act will enter into force on 1 January 2022.

2. Please provide information in detail on how the counter-terrorism and preventing and countering violent extremism efforts of your Excellency's Government comply with United Nations Security Council resolutions 1373(2001), 1456 (2003), 1566 (2004), 1624 (2005), 2178 (2014), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017) and 2396 (2017); as well as Human Rights Council resolution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123 and 72/180, in particular with international human rights law.

Austria is fully committed to its **obligations under international law, particular international human rights law, refugee law and humanitarian law** and takes them into account when drafting new legislation. This includes Austria's obligations as set out in United Nations Security Council resolutions 1373 (2001), 1456 (2003), 1566 (2004), 1624 (2005), 2178 (2014), 2341 (2017), 2354 (2017), 2368 (2017), 2395 (2017), 2396 (2017), 2370 (2017) as well as in General Assembly resolutions 49/60, 51/210, 72/123 and 72/180 and in the Human Rights Council's resolution 35/34.

It is stated that **terrorism cannot and should not be associated with any religion, nationality or civilization** in United Nations Security Council resolutions 2178 (2014), 2341 (2017), 2354 (2017), 2368 (2017), 2395 (2017), 2396 (2017) and 2370 (2017) as well as in the Human Rights Council's resolution 35/34, and that **measures and laws taken to counter terrorism are not discriminatory on any ground** as set out in General Assembly resolution 72/180 and in the Human Rights Council's resolution 35/34. It is therefore necessary to point out that the provision of § 247b of the Criminal Code is not at all discriminatory and does not focus on any specific religion. The Explanatory Notes to TeBG (*Erläuterungen*) explicitly state that the provision of § 247b of the Criminal Code should cover all religiously motivated extremist ideologies and does not single out certain religious or ideological beliefs⁸. Therefore, (political) Islamism is only mentioned as one example in the Explanatory Notes. These notes explain i. a. that Islamism is founded on identity politics which can contribute to segregated communities ("*Parallelgesellschaften*") (page 13). The Federal Office for the Protection of the Constitution and Counterterrorism warns in this context that the greatest threat to Austria continues to come from Islamist extremism and terrorism.

As far as the **rights of freedom of expression and peaceful assembly and association of individuals in civil society and freedom of religion or belief** are mentioned in United Nations Security Council resolutions 1624 (2005), 2354 (2017), 2368 (2017) and 2395 (2017) as well as in General Assembly resolution 72/180, it is necessary to point out that the Explanatory Notes explicitly refer to the rights to freedom of thought, conscience and

⁸ EBRV 849 BlgNR 27. GP, page 13

religion, which are guaranteed in Austria for everyone and can only be restricted under certain strict conditions, in particular for measures that are necessary in a democratic society, in the interest of public safety, public order, health and morals or for the protection of the rights and freedoms of others⁹. The Explanatory Notes also explicitly point out that acts that constitute merely a critical examination of politics, the state or other essential elements of the democratic constitutional order or attempt to rethink these structures, should not at all be covered by the criminal offence of § 247b of the Criminal Code¹⁰.

Furthermore, a perpetrator of the criminal offence of § 247b of the Criminal Code when participating in a religiously motivated extremist association has to act with the intent to promote the commission of religiously motivated extremist acts. If someone only takes part in a rally of the association, he or she does not do anything that could promote the commission of religiously motivated extremist acts¹¹.

It should be noted that the provision of § 247b of the Criminal Code is based on the prohibition of abuse of rights (Art. 17 ECHR), which ensures that nothing in the ECHR “*may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention*”¹². The close connection between the values codified in the ECHR and democracy has been emphasised by the European Court of Human Rights in its established jurisprudence: no one can be allowed to assert rights under the ECHR in order to destroy or weaken the ideals and values of a democratic society. Therefore, the provision of § 247b of the Criminal Code is intended to be directed against those religiously motivated extreme forces that violate the fundamental principles of a constitutional democracy in an unlawful manner.

3. Please provide information for the newly adopted „religiously motivated extremist association“ basis for criminalization, including any underlying empirical data on the linkage between religious ideology and violent extremism; how your Excellency’s Government considers that such criminalization respects the principles of necessity,

⁹ EBRV 849 BlgNR 27. GP, page 12. „Beschränkungen, die in einer demokratischen Gesellschaft notwendige Maßnahmen im Interesse der öffentlichen Sicherheit, der öffentlichen Ordnung, Gesundheit und Moral oder für den Schutz der Rechte und Freiheiten anderer sind.“

¹⁰ EBRV 849 BlgNR 27. GP, page 15 „Aktionen, die hingegen eine kritische Auseinandersetzung mit Politik, dem Staat oder anderen wesentlichen Elementen der demokratischen rechtsstaatlichen Grundordnung zum Gegenstand haben oder versuchen, ein Überdenken dieser zu erreichen, sollen den Tatbestand nicht erfüllen.“

¹¹ EBRV 849 BlgNR 27. GP, page 16 „Der Teilnehmer muss mit dem Vorsatz handeln, durch die Teilnahme die Begehung religiös motivierter extremistischer Handlungen zu fördern. (...) Nimmt jemand physisch an einer Kundgebung der Verbindung teil, macht er damit aber allein noch nichts, was die Begehung religiös motivierter extremistischer Akte fördert.“

¹² EBRV 849 BlgNR 27. GP, page 15

legality, proportionality, and non-discrimination, and safeguards the rights to freedom of religion, expression, and association; and how the Act guarantees to not resort to religious profiling and to ensure that religious associations, including minority religious faiths, performing legitimate, peaceful activities will not be targeted and hindered by the application of this Act.

The government has jointly created a comprehensive package to continue the consistent fight against radical, extremist ideologies. The new legislation explicitly criminalizes the formation and participation in religiously motivated extremist associations and, at the same time, introduces a comprehensive package to ensure, for example, effective oversight of convicted terrorists if they continue to pose a threat after release from prison, and to take action against designated hate preachers, to address foreign funding of extremist religious institutions more effectively and to close associations that convey radical messages more quickly.

On this basis, the respective provision seeks to cover only associations that strive for an exclusive religiously based social and state order by unlawful means, and that aim to replace our fundamental elements of the democratic constitutional order, the rule of law and principles, with a religiously based social and state order. In contrast, all religious organizations are fully able to continue their regular, peaceful activities.

4. Please provide information on the lack of definitional clarity on the terms „religiously motivated extremist association“, „religiously motivated extreme orientation“, „religiously motivated extremist motives“ and „religiously motivated extremist acts“, and how your Excellency’s Government plans to address these definitional gaps in practice.

As regards the **clarity and precision of the legal terms used in § 247b and § 33 para. 1 of the Criminal Code**, the Government refers to the Explanatory Notes to the Act which provide a comprehensive overview of how the terms are to be understood¹³. The terms are comprehensively defined and do not lack definitional clarity.

According to **§ 247b para. 3 of the Criminal Code**, a **“religiously motivated extremist association”** is one that continually attempts to replace, in an unlawful manner, the essential elements of the democratic constitutional order of the Republic with a social and state order based exclusively on religion, by preventing the enforcement of laws,

¹³ EBRV 849 BlgNR 27. GP, pages 3 et seq and pages 12 et seq.

ordinances or other state decisions, or by arrogating to itself sovereign rights based on religion or attempting to enforce such rights¹⁴.

- **“Continually”** (German: *“fortgesetzt”*) means that such acts are to be repeated.
- **“In an unlawful manner”** (German: *“gesetzwidrig”*) means all acts that violate the law, e.g. the use of violence and threats of violence. This term primarily refers to a violation of criminal law, but also to violations of administrative regulations or regulations concerning courts’ rules of procedure (e.g. disrupting the proceedings by signs of applause or disapproval).
- The **“enforcement of laws, ordinances or other state decisions”**¹⁵ is usually prevented by de facto acts such as disruptions during court hearings or resistance to acts of execution.
- Alternatively, the association has to aim at **“arrogating to itself sovereign rights based on religion or attempting to enforce such rights”**¹⁶. Such "claimed" sovereign rights of religious origin must be close in character to real sovereign rights.
- The term **“association”** (German: *“Verbindung”*) means a larger number of people (approx. 10 persons). However, this number is rather a guideline, depending on the degree of organisation and danger of the association. Thus, the number of its members has to be weighed against other prerequisites. If the number of members is too small, the founder of a religiously motivated extremist association could be punishable for attempting the offence. It is important for an association that everyone subordinates himself or herself to an overall will and thus supports it. In addition, the association must be of a certain duration, which will be the case if there is a certain degree of organisation in the association. The association does not have to be secret.
- A **„religiously motivated extremist association”**¹⁷ presupposes a consensus of will (*“Willensübereinstimmung”*) to form a community for a longer period of time. An association only exists when a minimum level of organizational order is in place, even if this is not stated in written form. What is needed is a corresponding leadership structure that takes decisions for the collective. It is irrelevant whether the leadership functions hierarchically, authoritatively or based on democratic rules.

¹⁴ § 247b(3) in German: *„Eine religiös motivierte extremistische Verbindung ist eine solche, die fortgesetzt auf gesetzwidrige Art und Weise die wesentlichen Elemente der demokratischen rechtsstaatlichen Grundordnung der Republik durch eine ausschließlich religiös begründete Gesellschafts- und Staatsordnung zu ersetzen versucht, indem sie die Vollziehung von Gesetzen, Verordnungen oder sonstigen hoheitlichen Entscheidungen zu verhindern oder sich religiös begründete Hoheitsrechte anzumaßen oder solche Rechte durchzusetzen versucht.“*

¹⁵ German: *“Vollziehung von Gesetzen, Verordnungen oder sonstigen hoheitlichen Entscheidungen”*

¹⁶ German: *“sich religiös begründete Hoheitsrechte anzumaßen oder solche Rechte durchzusetzen versucht”*

¹⁷ German: *„religiös motivierte extremistische Verbindung“.*

The purpose of the association must be aimed at changing fundamental elements of the democratic constitutional order of the Republic. It is not necessary that the association concerned pursues this purpose exclusively: It is sufficient that it pursues one of the purposes. The offense is thus intended to be directed against those religiously motivated extreme forces that threaten the fundamental principles of a constitutional democracy in a targeted and unlawful manner. The mere membership and activity in a leading position is sufficient to commit the offense, as far as the condition of criminal liability is fulfilled, i.e. the perpetrator or another participant has performed or contributed to a serious unlawful act. This condition is intended to ensure that the religiously motivated extremist orientation has already clearly manifested itself in an action of the participants.

- The purpose of the association must be aimed at **“replacing essential elements of the democratic constitutional order of the Republic”**¹⁸, while it is not necessary that it exclusively focuses on this purpose. The offence is intended to be directed against those religiously motivated extreme forces that threaten the essential basic principles of a constitutional democracy in a targeted and unlawful manner.
- The **“essential elements of the democratic constitutional order”**¹⁹ are, in particular, those that are also laid down in the basic principles of constitutional law. These include the **democratic principle** and the **principle of the rule of law**. Human rights as state-limiting fundamental rights also fall under the principle of the rule of law (liberal Principle). In Austria, the ECHR has the rank of a constitutional law and its fundamental rights provisions are directly applicable.
- The **“founding of or the activity in a leading position in a religiously motivated extremist association”**²⁰ is punishable under § 247b of the Criminal Code, if the perpetrator or another participant has carried out or contributed to a serious unlawful act, in which the religiously motivated extremist orientation is clearly manifested.
- An **act is to be taken seriously if it is meant seriously**; if it is a threat or an announcement, it is also to be taken seriously if it appears to be realisable.²¹
- The religiously motivated **extremist orientation must also manifest itself clearly**. This will be the case if the assignment to the religiously motivated extremist association is disclosed in these acts. The existence of an unlawful act is not sufficient, because not every unlawful act is based on a religiously motivated

¹⁸ German: *“die wesentlichen Elemente der demokratischen rechtsstaatlichen Grundordnung der Republik”*

¹⁹ German: *“die wesentlichen Elemente der demokratischen rechtsstaatlichen Grundordnung”*

²⁰ German: *“Wer eine religiös motivierte extremistische Verbindung gründet oder sich in einer solchen führend betätigt”*

²¹ German: *„Eine Handlung ist dann ernst zu nehmen, wenn sie ernst gemeint ist; handelt es sich um eine Drohung oder Ankündigung auch dann, wenn sie umsetzbar erscheint.“*

extremist orientation. Therefore, it is necessary that the religiously motivated extremist background is evident, for example, if the perpetrator verbally indicates that he/she considers himself or herself to be part of a religiously motivated extremist association.

The **participation in a religiously motivated extremist association** with the intent to promote, finance or otherwise support the commission of religiously motivated extremist acts in a substantial manner, is also punishable under **§ 247b para. 2 of the Criminal Code**²².

- **“Participating”** means joining such an association in a way that is recognisable to the outside world, for example by using fake identification papers²³. The term presupposes that the perpetrator is part of the association, and regards its goals as his or her own. This is the case if he or she declares himself or herself to be part of it or if his or her behaviour otherwise indicates that he or she belongs to this group. Mere interest in such an association is not sufficient for participation.
- **“Substantial funds”** must make up a significant part of the financial resources of the association; at least 10,000 € can be taken as a guideline. However, the relevant sum needs to be compared to the total budget of the association. In comparison to this, the relevant sum must not be completely insignificant²⁴.
- **“Other substantial support”** means all other substantial acts of support that do not consist in the donation of substantial funds, for example arranging contacts to important persons (especially financiers), the long-term provision of rooms or facilities, the (substantial) advertising of the association or the removal of substantial obstacles to the association's activities, if this is likely to further support the aims of the association²⁵.

²² German: „Wer an einer solchen Verbindung mit dem Vorsatz teilnimmt, dadurch die Begehung von religiös motivierten extremistischen Handlungen zu fördern, oder sie mit erheblichen Geldmitteln oder sonst in erheblicher Weise unterstützt, ist unter der Bedingung des Abs. 1 mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bis zu 720 Tagessätzen zu bestrafen.“

²³ German: „Teilnehmen bedeutet, sich einer solchen Verbindung nach außen hin erkennbar anzuschließen, etwa indem erfundene Ausweise verwendet werden.“

²⁴ German: „Erhebliche Geldmittel müssen einen nicht unwesentlichen Teil der finanziellen Ausstattung der Bewegung ausmachen, dabei sind mindestens 10.000 € als Richtwert anzusehen. Ausschlaggebend ist allerdings immer der Vergleich mit dem Gesamtbudget der konkreten Verbindung, dem gegenüber die Geldzuwendung nicht ganz unbedeutend sein darf.“

²⁵ German: „Als sonstige erhebliche Unterstützung werden alle sonstigen (nicht in der Zuwendung von bedeutenden Geldmitteln bestehenden) erheblichen Unterstützungshandlungen verstanden. Unter Umständen kann auch eine Vielzahl untergeordneter Unterstützungsleistungen in einer Gesamtschau das Tatbild erfüllen. In Betracht kommt bspw. die Kontaktherstellung oder -aufrechterhaltung zu einflussreichen Personen (insb. Geldgebern), die längerfristige Zurverfügungstellung von Räumlichkeiten, die (erhebliche) Werbetätigkeit für die Verbindung oder das Beseitigen von erheblichen Hindernissen für die Verbindungstätigkeit, wenn dies geeignet ist, die Ziele der Verbindung zu fördern.“

- Furthermore, the perpetrator of § 247b of the Criminal Code has to act with the **intent to promote the commission of religiously motivated extremist acts** when participating in a religiously motivated extremist association. If someone only takes part in a demonstration of the association, he or she does not do anything that could promote the commission of religiously motivated extremist acts.

As regards the term **“religiously motivated extremist motives²⁶”**, it must be pointed out that the catalogue of aggravating circumstances in § 33 of the Criminal Code as a whole is an exemplary list. § 33 para. 1 subpara. 5a of the Criminal Code is therefore intended to emphasise that religiously motivated extremist motives can also be explicitly considered as aggravating circumstances. Considering the terrorist attack of 2 November 2020 in Vienna and taking into account the continuously increasing international threat of terrorist attacks in recent years, however, the exemplary highlighting of this motive for the offence as an aggravating circumstance must be considered appropriate.

5. Please provide information on how the process of implementation of the electronic surveillance system is compatible with the principles of necessity, legality, proportionality, and non-discrimination, and safeguards the rights to privacy, liberty and freedom of movement; whether the Federal Minister of Justice has issued any guidance on the implementation of electronic surveillance by ordinance; and what capacity-building and training measures have been taken in this respect, in particular with respect to a human rights-centred approach.

The *Austrian Electronic Monitoring Program* was introduced in 2010. Since then, around 8.000 people have been electronically monitored in the penal system. The electronic monitoring takes place while respecting personal rights, proportionality and the avoidance of stigmatization by the prison system.

The administration and backup of the monitoring data take place in an Austrian data centre, and corresponding archiving and deletion routines for the monitoring data have been defined. Anonymized processing and management of the data of electronically monitored persons are possible. The access of each user to the monitoring system and personal monitoring data are logged.

The GPS ankle monitor is a compact, lightweight monitoring device. Due to its design and the availability of a wireless charger, the person to be monitored is only insignificantly impaired in his/her lifestyle.

²⁶ German: „aus religiös motivierten extremistischen Beweggründen gehandelt hat“.

Intensive education and training measures have been undertaken for the concerned personnel throughout Austria, with a focus on raising awareness of the special group of monitored persons in the penal system.

The **legal basis** for the electronic monitoring in the framework of the Counter-Terrorism Act (TeBG) are the amendments in **§§ 52b and 53 of the Criminal Code** (judicial supervision of terrorist offenders with case conference and electronic monitoring including the possibility of extended, also repeated, extension of the probationary period). These amendments **have not yet entered into force**. They will enter into force on **1 January 2022**. The regulations and guidelines regarding the practical implementation of electronic surveillance of this group of people are hence in progress but not finalized yet.

6. Please provide any information pertaining to the independent oversight of counter-terrorism measures required by your Excellency's government.

In Austria, **independent courts** decide on the conviction or acquittal of an accused person after conducting **criminal proceedings**. This, of course, also applies to criminal offences under § 247b and offences related to terrorism under the Criminal Code.

The same holds true for **measures of "judicial supervision"**²⁷. In this context, it has to be emphasised that the new provision of **§ 52b of the Criminal Code** explicitly stipulates "**judicial** supervision in criminal cases involving subversion crimes and terrorism as well as genocide, crimes against humanity and war crimes", which means that the **decision** whether electronic supervision is "absolutely necessary" is **taken by an independent court** and put under review at least once a year. Therefore, it is also the court's duty to convene a "case conference"²⁸ before the end of the first half of the period of judicial supervision to assess the conduct of the offender during judicial supervision and to determine measures to be taken to ensure compliance with instructions.

Also, during **pre-trial proceedings the public prosecutor has to apply for authorization of certain investigation measures by independent courts** (§ 105 of the Austrian Code of Criminal Procedure = CCP). This includes, for instance, search of certain places, physical examinations or surveillance of communication as well as video and audio surveillance of persons.

²⁷ German: „gerichtliche Aufsicht“.

²⁸ German: "Fallkonferenz"

Every measure of the public prosecutor is subject to judicial review. According to § 106 para. 1 CCP (“Objections because of violation of rights”)²⁹ **“any person** claiming to have their personal rights violated in investigation proceedings by the prosecution authority may also **raise objections to the court** if

1. the exercise of a right under the CCP has been refused or
2. an investigative or coercive measure has been approved or executed in violation of provisions under the CCP³⁰.

Furthermore, the tasks of the **Commissioner for Legal Protection**³¹ provides **additional control mechanisms** during pre-trial criminal proceedings:

According to § 147 para. 1 CCP, the **Commissioner for Legal Protection** is responsible for assessing and controlling certain directions, authorizations, approvals, and the carrying out of certain investigation measures in pre-trial proceedings like e.g.

- undercover investigations (§ 131 para. 2 CCP),
- data matching using electronic data collection (§ 141 CCP) or
- video and audio surveillance of persons (§ 136 para. 1 subpara. 3 CCP).

The **Commissioner for Legal Protection** needs to have special knowledge and skills in the area of fundamental rights and freedoms and must have been professionally active in the field of criminal law and criminal procedure law for a certain period. He or she is **independent** in the exercise of his or her duties and is not bound by any directives.

Instructions to public prosecution offices are only possible in cases provided for by law and have to be given in writing (§ 29c et seq. of the Act of Public Prosecution Service³²). This includes, in particular, cases where a directive shall be given regarding the handling of a particular case and cases of repeated and supra-regional media coverage or repeated public criticism of the approach of the public prosecution office and the criminal investigation

²⁹ German: “Einspruch wegen Rechtsverletzung”

³⁰ German: “Einspruch an das Gericht steht jeder Person zu, die behauptet, im Ermittlungsverfahren durch Staatsanwaltschaft in einem subjektiven Recht verletzt zu sein, weil 1. ihr die Ausübung eines Rechtes nach diesem Gesetz verweigert oder 2. eine Ermittlungs- oder Zwangsmaßnahme unter Verletzung von Bestimmungen dieses Gesetzes angeordnet oder durchgeführt wurde.”

³¹ German: “Rechtsschutzbeauftragter”

³² German: „§ 29c Staatsanwaltschaftsgesetz - StAG“

department or for reasons of bias³³. A copy of an instruction has to be given to the investigation file in the pre-trial phase and to the application aimed at a judicial decision in the trial phase and appeals procedure. In any case, measures of the public prosecution set because of an instruction, are also subject of judicial oversight.

Besides, acts of the Federal Minister of Justice are subject to parliamentary control. Moreover, the **Advisory Council for Ministerial Directions** (“*Weisungsrat*”) has to advise the Federal Minister of Justice, who is the supreme body authorised to issue directives to the public prosecution offices. The members of the **Advisory Council** are **independent** in the exercise of their office and not bound by any instructions. If the Minister of Justice does not follow the statement of the Advisory Council on Directives, the statement including the grounds why it has not been taken into account has to be published in the annual report of the Federal Minister of Justice to the National Council and the Federal Council on instructions he/she gave after the respective procedure was terminated.

Finally, when investigating terrorism-related offences, it must be kept in mind that as a basic rule, **all authorities** involved in the handling of a criminal case (police, public prosecutor, court) are obliged to **maintain objectivity** and to inform the alleged offender of his procedural rights. Above all, judicial authorities are strictly bound to submit both incriminating and exonerating evidence. Non-disclosure of evidence and files is only admissible as long as it is to be assumed that the disclosure would jeopardise the purpose of the investigations.

³³ German: „Der Bundesminister für Justiz hat dem Weisungsrat (§ 29b) zu seiner Beratung in folgenden Fällen den Bericht der Staatsanwaltschaft über ihr beabsichtigtes Vorgehen nach § 8 Abs. 1, die Stellungnahme der Oberstaatsanwaltschaft sowie einen begründeten Erledigungsentwurf vorzulegen:

1. wenn eine Weisung zur Sachbehandlung in einem bestimmten Verfahren (§ 29a Abs. 1) erteilt werden soll;
2. bei Strafsachen gegen oberste Organe der Vollziehung (Art. 19 B-VG), Mitglieder des Verfassungsgerichtshofs, des Verwaltunggerichtshofs und des Obersten Gerichtshofs sowie der Generalprokuratur;
3. wenn es der Bundesminister für Justiz wegen des außergewöhnlichen Interesses der Öffentlichkeit an der Strafsache, insbesondere bei wiederholter und überregionaler medialer Berichterstattung oder wiederholter öffentlicher Kritik am Vorgehen der Staatsanwaltschaft und der Kriminalpolizei, oder aus Befangenheitsgründen für erforderlich hält.“