

Bribery, Bribery across Borders and the Like from a Danish Perspective

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1 Introduction

The Nordic countries are generally known as being almost free of corruption. Transparency International publishes a “Corruption Perception Index” every year, and in 2008¹ Denmark and Sweden shared first place with New Zealand, Finland ranked as number five, Iceland as number seven and Norway as number fourteen. The survey comprised a total of 180 countries.

This does not, however, mean that corruption does not occur in these countries, merely that corruption is perceived as unacceptable by the population in general, and that public officials in particular do not see themselves or their colleagues as accepting bribes. Bribery is thus neither an implied custom nor part of the relevant persons’ self-perception. Attempting to bribe a public official in these countries also involves a considerable risk, as there is every probability of facing an outright rejection and being reported to the police instead.

According to a PhD thesis by Mette Frisk Jensen², individual corruption³ was a rare occurrence in Denmark in the period from the mid-eighteenth century until around 1810. A dramatic increase was then seen in the number of cases until 1830, but from 1860 to today, corruption has been almost non-existent in Denmark. An important part of the explanation for the substantial drop from 1830 to 1860 was increased control of the accounts of local and regional administrations, an accounting reform in 1840, and not least the government’s relentless prosecution and punishment of corrupt public officials (cf. Frisk Jensen).⁴

This article presents a review of the Danish rule set in particular and of a large proportion of the cases which do indeed emerge from time to time. The article will demonstrate that the Danish rules largely conform with the requirements set by the relevant conventions, although Denmark has made reservations in regard of the introduction of penalty provisions on trading in influence. The Scandinavian rules are also more or less identical, although the rules on public and private bribery in Norway⁵ and Sweden coincide to a larger degree than in the other countries.

1 See “www.transparency.org/policy_research/surveys_indices/cpi/2008”. The individual rankings of the countries vary a little, but never show any major deviation from the 2008 figures.

2 *Korruption og Embedsetik – danske embedsmænds korruption i perioden 1800 til 1866*. Aalborg Universitet 2008.

3 Denmark has, however, almost always been free of systemic and institutional corruption (*ibid.* p. 285).

4 *Ibid.* p. 287.

5 Here, the elements of the crime are identical, although it is stressed in the legal history that the assessment of “undue” will vary.

2 The Danish Regulation in General

The Danish parliament (*Folketinget*) passed a number of amendments to the provisions on bribery (public bribery) and secret commissions (private bribery) in Act No. 228 of 4 April 2000. The objective of the amendments was to ensure compliance by the Danish rules with the requirements of as many as five different conventions etc.,⁶ all with the same chief aim, viz. to impose a duty on the participating countries to criminalise public and private bribery, to criminalise both the giving and receiving of a bribe (passive bribery) and, not least, to criminalise bribery across the borders.

The Danish rules already more or less complied with the general requirements, but there were no rules on providing bribes to foreign public officials, as the provisions in parts 14 and 16 of the Danish Criminal Code are assumed to be limited with respect to territory.⁷ As a result of the changes to the act, we now, on the whole, live up to our international obligations, but the change has not made it any easier to apply, let alone understand, the rule set, which is not exactly uncomplicated. To this should be added that corruption can be extremely difficult to reveal in real life, and may assume many forms which do not necessarily fall under any of the “usual” corruption provisions.

A certain confusion of definitions also exists as already suggested above.

The following is a review of the current rule set, its interpretation, and the very moderate case law in the area. I shall then look at situations which are similar to, but which do not necessarily constitute, bribery, or which are punishable under the normal rules. Finally, I shall conclude with some of the problems arising in this area in relation to investigation, production of evidence etc.

3 The Concepts and Objectivity

The word “*corruption*” is not a Danish legal concept but it is used as a general term meaning abuse of power or authority. The word is most often used about an

6 Firstly, the protocol of the *EU convention on fraud* from 1995 (the Convention on the protection of the European Communities’ financial interests), secondly the *EU convention on corruption* from 1997 (The Convention on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union), thirdly the *OECD Anti-Bribery Convention* also from 1997 (the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions), fourthly the *Joint Action of 22 December 1998* (adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector) and fifthly *The European Council’s anti-corruption convention from 1999* (the European Criminal Law Convention on Corruption).

7 See e.g. Gorm Toftegaard Nielsen, *Strafferet I*, 2nd ed., 2004 p. 343, or Vagn Greve, *Det strafferetlige ansvar*, 2nd ed., 2004 p. 113 including references.

(unacceptable) mixing of private and public interests.⁸ When used in criminal law, the term thus refers to a range of elements of crimes, e.g. criminal breach of trust, embezzlement, abuse of public office, secret commissions and, of course, the bribery rules. Within administrative law, corruption will fall under e.g. the disqualification rules and the abuse of power principle. The rule sets' common objective is to ensure that the person to whom the rules apply allows himself to be governed by objective considerations and motives only. In the public debate, the word is used in a looser, sometimes very broad, sense, which in addition to covering acts under the above rules, may include everything from possible acts of friendship of any kind to acts which can be perceived as expressions of a person's generally dubious moral standards. Most often, however, lawyers as well as non-lawyers associate the word with providing and receiving financial or other favours intended to make the recipient more favourably inclined towards the giver, and to induce the recipient to e.g. speed up processing of the giver's case, ensure the latter some advantages which are (legally) at the recipient's disposal, or even induce the recipient to grant the giver some undue and possibly even illegal advantages.

It is in this last, narrow sense of the word that the *actus reus* of bribery and secret commissions is found. The word "bribery" (*bestikkelse*) is reserved by Danish lawyers for violations of Sections 122 and 144 of the Criminal Code, which impose penalties on providing and receiving undue favours if the recipient is acting in official public capacity. Providing a bribe is often called "active bribery" (*aktiv bestikkelse*) and receiving it "passive bribery" (*passiv bestikkelse*). These terms are not entirely adequate, however, because the recipient of the bribe (the employee in public service) may very well be the active party, e.g. by demanding some special favours in return for a certain decision. The terms also tend to be rather misleading because we usually consider an active act to be more punishable than a purely passive one. But in case of bribery, it is the other way round. The maximum penalty for passive bribery is thus twice as high as for active bribery (see immediately below). The most precise – and neutral – terms are thus provider and recipient of a bribe.

"Secret commissions" are included in the *actus reus* in Section 299(2) of the Criminal Code. The issue here is the same as for bribery of public-sector employees, viz. that the private-sector employee receiving the undue gift or favour risks being influenced by it to such an extent that it is to be feared that his loyalty has shifted from the principal (e.g. the company he is representing) to the provider of the favour. This similarity is the reason why secret commissions are often referred to as "private bribery" (*privat bestikkelse*), and in situations where the distinction is important, "bribery" (*bestikkelse*) is then referred to as "public bribery" (*offentlig bestikkelse*). These terms are also imprecise, however, because it is not clear that the words "private" and "public" refer to the recipient's employment conditions. They could also refer to the way in which the bribery happened, or whether the favour was of a private or public nature.

8 See e.g. Knud J.V. Jespersen's eminent historical account in *Den store danske Encyklopædi*. Transparency International provides the following practical definition on its website "www.transparency.org": "the misuse of entrusted power for private gain."

The concepts “active” and “passive” (bribery) are also used about secret commissions.

4 The *Actus Reus* of the Offences

4.1 Section 144 of the Criminal Code

The principal provision on receiving a bribe is as follows: “Any person who receives, requests or accepts a promise of an undue gift or other favour for him-/herself in the exercise of a Danish, foreign or international public service or assignment, shall be punished by fine or imprisonment for up to six (6) years”.

The people in question no longer include only Danish public officials, but also persons employed to perform public services or assignments abroad (see Section 2 above). Any public-sector employee is a public official irrespective of whether the government, a region or municipality is the employer, and employees of the courts are also included.⁹ It is immaterial whether the employee has decision-making powers or contributes to decisions pursuant to his position, or whether he performs other types of functions.¹⁰ It is not, at any rate, a requirement that the person in question processes cases involving decision-making, since actual administration may also be exercised under undue influence of personal gains. This applies without a doubt to public-sector employees in both Denmark and abroad. The provision¹¹ also applies to politicians who hold positions as e.g. members or chairmen of boards, committees etc.

Generally, the provision does not apply to employees of publicly owned companies. Under Danish law, it will not apply to an employee of e.g. a state-owned limited company merely because the company is state-owned. If, on the other hand, the company performs functions which are similar to functions under public law, it cannot be excluded that the nature of the assignment would justify application of the bribery rules. The comments which accompanied the OECD’s anti-corruption convention¹² indicate at any rate that employees of publicly-owned companies will be subject to the provisions unless they “operate on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges”.¹³

The comments even indicate that the provision may apply in exceptional cases to a person holding some form of public authority irrespective of the terms

9 Section 304a of the Criminal Code applies to arbitrators in Denmark and abroad. The provision stipulates a maximum penalty corresponding to section 299 on “private bribery”/secret commissions, i.e. a fine or imprisonment for up to 18 months.

10 See e.g. *UfR* 1983.990 H and *UfR* 1985.270 Ø.

11 Cf. e.g. *UfR* 1994.773 Ø.

12 The comments were also adopted by “the Negotiating Conference on 21 November 1997”.

13 The comments on paragraph 4 – point 15.

of his employment.¹⁴ Greve et al. in *komm. strfl. II*, p. 56, thus take the view that the comments imply that the functions performed by the employee may have to be considered to a higher degree in the future. This may very well be correct, but the comments on the convention are based on employment under *public law*, and only point out that employees who are not public-sector employees (i.e. those who are also not employed in a publicly owned company) fall under the bribery rules in the “legal principles of some countries”. The Convention thus does not establish specifically that such persons should be within the area of discretion. The thought may seem attractive, however. If prisons were entirely privately owned and operated, which is the case in some countries, it might seem offensive if prison employees were not subject to Section 144 since, in principle, they would hardly fulfil the conditions on secret commissions under Section 299 of the Criminal Code.¹⁵ Nor would this interpretation be excluded by the wording of Section 144.

The elements of the *actus reus* are undue receipt and request or promise of a gift or other favour (“*gave eller anden fordel*”). The gift or favour received does not have to be money or gifts of direct economic value. Other special favours, e.g. the right to rent a flat at the normal market price if the conditions on the housing market make it difficult or impossible to find one, may be included. It is hardly a requirement that the favour accrues to the public official personally. Gifts to the relevant person’s children or spouse must be assumed to be included, and this must apply similarly (depending on the circumstances) to providing gifts or sponsorships to organisations or associations which are particularly close to the person in question. Precisely because the rules do not require financial gain to be involved, unlike in e.g. property offences, it must be presumed that the much broader term “favour” can include strong idealistic interests in others obtaining e.g. an economic gain despite the wording which stipulates the acceptance of a promise of a “personal” gift etc. The decisive factor for this interpretation is, of course, that it may be feared that the favour provided will induce the recipient to consider non-objective considerations to the same degree as would money in his own hand.¹⁶

Receiving the gift or favour need not be linked to a specific act, but the gift or favour must of course be linked to the duties performed by the person in question¹⁷ (cf. Section 144). Cases where gifts and favours can be held to fall outside the area of discretion on these grounds must be assumed to be rare and only occur where it is quite obvious that the gift was given in a completely

14 Comments on paragraph 4 – point 16. The example given is political party officials in a single-party state, whether or not they are formally public officials, provided they *de facto* perform a public function.

15 This applies only if the person in question manages the property of another (“*varetager en andens formueanliggender*”). See also section 4.3 below on this.

16 In support of this interpretation, see article 1 of the OECD Anti-Corruption Convention which states: “... or other advantage ... for that official or for a third party”. See also Vagn Greve, et al., *komm. strfl. II*, 8th ed., 2005, p. 56 and Oluf H. Krabbe, *Borgerlig straffelov*, 3rd ed., 1941 p. 326 and Stephan Hurwitz, *Speciel del*, 1955 p. 42, the latter two on Section 122.

17 See Bent Unmack Larsen, 1985B, 49 ff for critical comments on this.

different context to that of the person's occupation. It can e.g. be a situation where the recipient is an amateur actor or a director of amateur plays and the other crew members show their gratitude for her total commitment to a play just performed by collecting for a disproportionate gift for her. Her position as chief administrative officer at the local authority does not make this act a criminal offence. It might, however, do so if one of the givers also has work or business relations with her. The receipt of spots free of charge on a commercial radio station by a local politician was found to be "linked to her assignment as acting chairman of the Danish Radio and Television Board during the period in which the station's difficulties with obtaining a broadcasting licence were solved" (Decision in *UfR* 1994.773 Ø).

Since it is not a requirement that the receipt, request or promise of a favour is linked to a specific act performed in the discharge of official duty, it is obviously also irrelevant whether the public official demands remuneration or similar for issuing a licence to which the giver is entitled or whether the official would be committing an illegal act by issuing the licence.¹⁸

The requirement that the favour must be "undue" underlines the fact that some cases of receiving gifts will fall outside the discrete area. The word may be regarded as a general emphasis on the fact that instances of cases with no substantial culpability may occur, but according to the legal history, the word refers directly to "the discretion of the Court" in cases concerning a "gift which is received as a token of appreciation of the person's performance of his or her duties in general, e.g. on the occasion of an anniversary, resignation/retirement or transfer". Such tokens of appreciation will "generally fall outside the area of discretion."¹⁹ In other words, the term "undue" is not intended to emphasise that exceptional situations may occur which must be excluded from the scope of the regulation on the grounds of no substantial culpability. It is rather intended to indicate a general lower limit between what is a criminal act and what is not.²⁰

Receipt of favours on the basis of extra work performed by the person in question is also excluded by the provision, e.g. payment of an amount of money to a public official for giving a lecture.

The relevant case law shows in fact that besides focusing on whether there are objective and good reasons for receiving advantages, e.g. a trip,²¹ considerable importance is also attached to the value of what is received.

18 The distinction was relevant for the choice between application of two different provisions of the Criminal Code from 1866 (sections 117 and 118). It is emphasised in the legal history of the Criminal Code from 1930 that this distinction is of no importance for application of the new combined provision on bribery, but that it may of course be of importance for the severity of the sentence. See e.g. the report from 1923, legislative history column 249 f.

19 All in accordance with the report from 1923, legislative history column 250 f.

20 Similarly Vagn Greve, et al., *komm. strfl. II*, 8th ed., 2005, p. 56 with respect to the equivalent word in section 122. Similarly with respect to the contents (*ibid.* p. 108) concerning section 144. See Fr. Vinding Kruse, 1951B,129 ff. for a very critical view of leaving such important definitions to the courts.

21 See *UfR* 1985.270 Ø for the *ratio decidendi* of the counts on which the defendant was acquitted.

An example is given in *UfR* 1985.270 Ø where the value of a number of gifts from the same giver ranging from a DKK 85 teapot to a DKK 1,265 bicycle were added up, totalling an amount of DKK 5,374 received over a period of four and a half years. The court found on this count that Section 144 had been violated. The court emphasised, among other things, that the gifts “were of direct economic significance to the defendant to the extent to which he had been able to find a use for them”.

Five persons were convicted of receiving bribes (see *UfR* 1983.990 H). The person who had received the biggest favour had received approximately DKK 125,000 over an eight-year period. The person who had received the smallest bribe had received car accessories to a value of approx. DKK 1,800 over a five-year period and been granted an interest-free loan of DKK 15,000 by the same giver.

A police officer was convicted of receiving a bribe from an accused (see *UfR* 1951.1020 H). The policeman had received DKK 150 in cash and in addition “accepted service at various restaurants”. The amount of DKK 150 in 1951 corresponded to a purchasing power of just over DKK 2,050 in 2006.²²

There is thus no doubt that a lower limit applies to Section 144 of the Danish Criminal Code, at any rate in situations where the gifts etc. received are not directly linked to e.g. individual decisions, but are given on special occasions as a general appreciation of the person in question and/or the cooperation with the person. These occasions include anniversaries, special birthdays etc. The count which led to the conviction reported in *UfR* 1985.270 Ø concerned gifts which had been given only on such occasions.

Bent Unmack Larsen is critical, and with good reason, of the Prosecution’s application (and the courts’ approval) of the so-called “addition method” which was applied in the decision reported in *UfR* 1985.270 Ø (see *UfR* 1985 B. 49²³). It is indeed a matter for concern that a person can receive gifts on special occasions without committing a crime, e.g. at three different events over a couple of years, and then later, if he receives another gift on a special occasion from the same giver which causes the gifts’ total value to exceed the lower limit, be convicted of receiving a bribe, not just with respect to the most recent gift received, but also the previous gifts. At the times of receiving the other gifts, the Section 144 requirements were not met either objectively or subjectively, and it would seem to strain a point to allow the acceptance of a teapot worth DKK 85 to lead to the conclusion that Section 144 had then been wilfully violated to the tune of several thousand Danish Kroner. Unless, as an exception, it had been found that the gifts received were interrelated, the only conclusion drawn ought to have been that by application of the “addition method”, the teapot was found not to be within the lower limit and to punish only the receipt of the teapot (and any subsequent gifts).

There are no fixed rules in Danish administrative law on the limit between allowable and non-allowable gifts. Together with the National Association of

22 According to StatBank Denmark’s price index.

23 P. 58.

Local Authorities and The Danish Regions, the State Employers' Authority under the Danish Ministry of Finance issued a booklet in June 2007 with the title "Code of Conduct in the Public Sector". The booklet includes a description of receipt of gifts which appear to adequately cover the state of administrative law.

The booklet has *inter alia* this to say about occasional gifts: "... It [is] generally acknowledged that employees in the public sector may accept customary gifts from citizens or enterprises in connection with events of a personal nature, e.g. special birthdays, anniversaries or resignation/retirement.

Example: a chief executive of a local authority celebrates his twenty-fifth anniversary with a reception at the office. An enterprise with which the local authority has regular work relations wants to give the chief executive a suitable gift on this occasion, e.g. a book or wine. The chief executive is allowed to receive the gift.

Employees in public service may similarly accept minor gifts from business connections etc. in connection with, for example, Christmas or New Year. It is important in these cases in particular, however, that the gifts are moderate."

Even if an employee in public service breaks such administrative law rules, he may not be in violation of Section 144, partly because it is up to the courts and not the State Employers' Authority to set the limits for criminal conduct, and partly because a situation needs to be of a certain severity for a violation of the Criminal Code to be established.²⁴

Acceptance on this basis that a lower limit, or at least a non-punishable interval, has formed in Denmark where a case is found not to be bribery on the grounds of culture or custom, notwithstanding the fact that gifts which had an economic value were received by employees in public service, leads to the question of the extent to which similar considerations should apply to foreign employees in public service.

It is emphasised in the comments on the OECD Anti-Corruption Convention that "small 'facilitation' payments" are not included in the convention because such payments are not made to obtain an "improper advantage"²⁵. The Danish translation of the European Council's Criminal Law Convention on Corruption mentions providing and receiving an "undue advantage" (*utilbørlig fordel*), while no reservations are made for such "sweeteners" as the OECD convention allows. Neither are there any reservations in the other conventions.²⁶

Although Section 144 has thus applied to persons who accept bribes while in foreign or international public office since 2000, the consequence is not that any bribery which takes place around the world is punishable in the Danish courts. The pre-condition for Danish courts having jurisdiction thus continues to be fulfilment of the conditions of Sections 6-12 of the Criminal Code. The only one

24 See also *UfR* 1985.270 Ø: "...the limit of what is legally acceptable under section 144 of the Criminal Code will be broader than under administrative law depending on the circumstances".

25 The comments on article 1, point 9.

26 See the comments on Draft Bill No. L 15, 1999/2000, point 4.7.1., for a thorough review and comparison of the requirements in the various conventions etc.

of these conditions which will now always be fulfilled is the condition in Section 10 on the territorial scope of Danish regulation.

Cases involving receipt of bribes are infrequent in the Danish courts. A total of seven cases concerning violation of Section 144 were decided in the period from 2002 to 2005.²⁷ Charges were withdrawn in three of the cases and one resulted in acquittal. Two of the remaining three cases²⁸ resulted in a suspended sentence and one in an unconditional sentence.

Whether the bribee acted contrary to his duties in connection with the bribe or whether he (apparently) had no actual influence on the case has a bearing on sentencing.

In an unpublished decision by Copenhagen Court of 14 November 2006²⁹, a former head of department of the Danish Immigration Service (previously the Directorate of Immigration) was found guilty of violation of Section 144 in having received a total of four soccer trips from the Danish FA/DBU. The trips represented a total value of approx. DKK 15,000 after deduction of the head of department's own share of expenses. The head of department processed cases *inter alia* on residence and work permits for professional soccer players.

On handing down the sentence, the court, which was sitting with lay judges, stated as follows: "The Court considers that the Defendant cannot be blamed for any administrative errors in cases handled by the Defendant, but on the contrary, that the Defendant was a professionally very competent case administrator, including in the period covered by the indictment. The Court further considers that the Defendant did not allow himself to be influenced with respect to his case administration or decisions by the travel gifts which the Defendant received from Danish FA. The Court further considers that a disciplinary penalty has already been imposed on the Defendant, that the conclusion to the disciplinary case documents indicates that criminal aspects do not come into consideration, that the Defendant has been moved to other responsibilities twice, that the Defendant understood three of the trips to be cancellations, and that the Defendant paid an amount of his own accord on the trip to Luxembourg because the Defendant understood this trip not to be a cancellation. The Court further considers that the Defendant made no financial gain from the trips as explained by the Defendant."³⁰ Two of the court's judges found on this basis that the applicable penalty should be cancelled, among other things with reference to Section 82:12 and Section 83 of the Criminal Code, whereas one judge favoured a suspended sentence.

27 Cf. details from Statistics Denmark and the Ministry of Justice.

28 One of the cases was reported in *TfK* 2003.100 Ø. A police officer had received 1800 cigarettes or more in connection with entry checks on two cruise liners. The officer received a suspended sentence of 60 days' imprisonment and a supplementary fine for violation of section 144 and the Customs Act.

29 Case SS 33.23018/2006.

30 The court is probably referring to the defendant's statement that he would never have gone had the trips not been offered to him, but this circumstance as such can hardly substantiate the absence of economic enrichment. Very few employees would, for example, purchase a large diamond, a cruise liner or other very luxurious goods themselves.

4.2 Section 122 of the Criminal Code

The prohibition against bribery (active bribery) is given in Section 122 of the Criminal Code, which reads as follows after the amendments in 2000: “Any person who unduly provides, promises or offers a gift or other favour to someone in Danish, foreign or international public service or engaged in such assignment in order to induce such person to perform, or to omit performing, an act in the service shall be punished by fine or imprisonment for up to three (3) years.”

Those people to whom a bribe may not be provided are the same as for Section 144 as described in section 3.1 above. The briber can be anybody. While Section 144 applied to the receipt of all undue advantages, however, Section 122 imposes a penalty on providing gifts and other favours only if this is done to ensure a certain conduct by the employee in public service. The words “perform or to omit performing an act” (*gøre eller undlade noget*) in the service cover not only any kind of decision, but also the actual exercise of administrative duties. Subsequent gifts or favours provided in gratitude of good case administration are not included in Section 122 and the provider is thus not liable to punishment, whereas they can be included in Section 144 depending on circumstances, and the recipient will then be liable to punishment.

The amendment of the act in 2000 meant an extension of the group of people who may not be bribed as well as the *actus reus*. It had been a requirement until then that the briber must have provided, promised or offered something in order to induce the recipient to “commit an act contrary to duty” (*gøre sig skyldig i pligtstridig handlemåde*). This limitation has now been abandoned to comply with the convention’s requirements, and just as in Section 144, the discrete area now includes instances where the gift or favour requested comprises conduct or a decision which is illegal or otherwise contrary to duty, as well as e.g. the request for particularly speedy administration of a case which the public officer then “moves to the top” of the pile of cases to be attended to.

It must be assumed that this implies a real extension of the *actus reus*, since the former requirement for “conduct contrary to duty” must be intended to specify the conduct which the bribe was intended to encourage and cannot merely have been intended to establish that receiving a bribe is contrary to duty. If the latter reading had been intended, the words “contrary to duty” (*pligtstridig*) would have no content at all.³¹ The only limitation – apart from the link to a transaction in the exercise of duty – now lies in the gift or favour having to be “undue” exactly as in Section 144.

Determining when a prior gift or favour is undue can pose a problem in Denmark (see Section 3.1 above). The fact that Section 122 covers the presumably not infrequent situation where a Danish enterprise pays amounts of money to foreign public officials poses even greater difficulties in specifying the scope of the word “undue”. In fact, the Ministry of Justice made the following point in its comments on the draft bill:³²

31 Possibly cf. Vagn Greve et al., *komm. strfl. II*, 8th ed., 2005 p. 56.

32 Draft Bill L 15, 1999-2000, Comments on the individual provisions of the draft bill ’s section 1, no. 3.

“While the *actus reus* of the proposed amendment is the same for bribing of foreign public officials etc. as for bribing Danish public officials, it cannot be excluded that very special conditions may apply in some countries which would mean that certain tokens of appreciation would not be criminal in the circumstances, although they would constitute criminal bribery had they occurred in this country. This might be the case even if such tokens are provided to induce the foreign public official to act contrary to duty. Whether such situations enjoy impunity (not ‘undue’) must be a matter of a concrete assessment in each individual case, which must include consideration of the purpose of providing the token of appreciation.”

Such a reservation would presumably have to be reserved for situations where it would seem offensive from a Danish perspective to find a bribe “undue”, e.g. where it is necessary to bribe a prison officer abroad to be able to deliver medicine to a Danish citizen in prison because permits cannot be obtained through the usual channels, and for situations where a bribe to an official would not be deemed “undue” bribery under the particular country’s criminal and administrative case law. It may be difficult, for example, to determine whether a local African harbour master is charging a legally authorised fee for mooring alongside the quay, or whether he is demanding personal payment for issuing the licence.³³ Neither can it be excluded that “sweeteners” are acceptable in the country in question, but not bribery, to procure an act which is contrary to duty.

This last aspect further brings into focus the fact that the prosecution of a criminal case in Denmark against the provider of a potentially criminal bribe abroad (also) depends on the other country’s statutory and case law in the area. When Section 7(1:2) of the Criminal Code was amended, the double criminality requirement was not abandoned.³⁴ It therefore follows that the conduct must also be criminal in the bribee’s home country, and that no penalty meted out by the Danish courts can be stricter than it would have been in the country in question (cf. Section 10(2) of the Criminal Code).

The fact of the matter is, however, that both briber and bribee incur criminal liability, including in countries where bribery is rampant in both public and private legal relationships.³⁵ The maximum penalty may even be exorbitantly high in comparison with Danish conditions.³⁶ The primary reason for this is, of course, that the governments in almost all the relevant countries are attempting to suppress every form of corruption because corruption is instrumental in the

33 If this is not sufficiently clear to the person making the payment, the required *mens rea* may of course also be lacking.

34 In its ratification of the various conventions, Denmark made the reservation that Denmark’s application of its own jurisdiction is conditional upon double criminality. Otherwise, Section 8(5) of the Criminal Code would presumably have resulted in jurisdiction. *See* Vagn Greve, et al., *Komm. strfl. I*, 8th ed., 2005 p. 136 for details on the interpretation of section 8:5.

35 *See e.g.* the descriptions of individual countries on the extremely informative website “www.business-anti-corruption.dk”, which was prepared in a joint effort with the Ministry of Foreign Affairs.

36 Article 390 of the Chinese Criminal Code, for example, allows imprisonment for up to life in particularly aggravating circumstances.

destruction – or perhaps more often an impediment to the desired establishment – of sound economic and democratic structures in these countries.

The opponents in such attempts are partly organised crime, partly a culture-bound and thus deeply ingrained perception that “gift-giving” to and “payment” of a public official can and should be made directly to the official, and that this is neither offensive nor unethical.

A business deciding to pay a bribe abroad is thus picking a path through a minefield between Scylla and Charybdis, and may face multiple choices: if we pay nothing, we won’t get the order; if we pay under the table, we risk paying to the wrong person and may then face a strict penalty being imposed on our representative in the country in question (or in Denmark); but if we decide to pay to the “right” person, we risk punishment in Denmark.

It may seem surprising, in light of the narrower *actus reus*, that the number of decided criminal cases in this country for violation of Section 122 is higher than for violation of Section 144. A total of twelve closed cases was thus registered from 2002 to 2005 (compared with seven cases concerning Section 144). Five of the twelve resulted in withdrawal of the charges and three in acquittal. Three of the remaining four decisions resulted in a suspended sentence and one in an unconditional sentence.

The primary reason for this is presumably³⁷ that the number of people offering public officials a bribe is higher than the number of public officials wanting to receive a bribe. This view is supported by the published decisions which typically concern offers, but not acceptance of bribes.^{38 39}

4.3 Section 299(2) of the Criminal Code

The provision concerning secret commissions (or bribery in private legal relationships) today reads as follows: “Any person who, in the absence of the conditions for applying Section 280... 2, receives, requests or accepts a promise of a gift or other favour contrary to duty in connection with his management of the property matters of another, and any person who provides, promises or offers such gift or other favour, shall be liable to a fine or imprisonment for up to eighteen (18) months.”

This provision was also amended in the review of the act in 2000 as it had previously been a condition for incurring liability that the receipt of the favour must be “kept concealed” from the person whose interests the perpetrator was

37 See also Birgitte Vestberg, 1985B p. 79 ff.

38 See *UfR* 1982.771 H, *UfR* 1975.671 Ø and *UfR* 1969.538 V. In one – much publicised – case in late 2006/early 2007, NCC Contractors in fact advised the City of Copenhagen that it felt exposed to demands for payment of a bribe or similar from a local politician. The City of Copenhagen – very sensibly – reported the case to the police. In a decision of 27 March 2007, the Copenhagen police found, however, that it could not reasonably be presumed that a criminal act had been committed, and the investigation was consequently discontinued pursuant to section 749(2) of the Administration of Justice Act (file no. 0108-83990-00526-07).

39 More unkindly, it may of course also be suggested that it is easier to uncover and bring charges in matters where the public official does not want to receive the bribe, and that this is the primary explanation for the imbalance in the number of cases.

managing. This was changed so that receipt now has to be “contrary to duty” as indicated above. In addition, the discrete area was extended to include favours other than those which are readily translated into monetary value.

Section 299(2) is very similar to Sections 122 and 144 – but there is also a fundamental difference between the situations addressed by each rule set, viz. that it is a very clear principle that a public official never receives money from his clients, whereas it is just as clear that a prior exchange of goods and/or services has taken place between the parties in a private legal relationship. This can make it more difficult to determine when the receipt of an amount of money by an employee in a private legal relationship is “contrary to duty”. Before its amendment, the regulation required the receipt to have been “kept concealed”, as mentioned above. The assumption must still apply in principle that an employee in a private enterprise who conceals from the enterprise that he has received e.g. 2% in “commission” for entering into an agreement between the recipient’s enterprise and the provider’s enterprise has acted contrary to duty.⁴⁰ Considering the provision’s kinship with breach of trust (see immediately below), it may be possible in theory, but hardly likely, that the courts would declare an act contrary to duty in cases where the recipient did not keep the receipt concealed from the enterprise.⁴¹ There is no doubt, however, that the change of wording in 2000 meant a broadening of the objective *actus reus*. The legal history also fails to provide clear information on what difference this broadening of scope is supposed to make in relation to the existing state of law.

Despite the possible concern involved in allowing the majority’s (or at least a large minority’s) conduct to have an effect on what is deemed to be criminal,⁴² it cannot be ignored that normal conduct which is out in the open – and therefore acknowledged by both the employer and the employee – can hardly be characterised as contrary to duty. Tipping is, for example, so widespread in hotels and restaurants that it cannot be contrary to duty that a waiter receives generous tips, not even if it is proved that the abundant tips were precisely intended to induce the recipient to provide extraordinary service, e.g. the best table, frequent exchange of fruit in the room, no problems with having luggage brought up etc. etc.

It is normally assumed⁴³ that as a precondition for violation of Section 299, the favour must have been provided or promised prior to the act which the favour was intended to influence. This sensible interpretation is in keeping partly with the wording of Section 299 and partly with the kinship with Sections 122

40 The situation was similar in the decision reported in *UfR* 1974.955 Ø in which the recipient had accepted a promise of approximately half a million Danish kroner in agency commission.

41 Carl Torp’s report from 1917 on a draft criminal code states (in the motives p. 253) that “the safest and most tangible criterion of whether the advantage is of this nature [undue favours which seriously endanger the honesty in a business relationship] is that it must be kept concealed from the person whose matters the recipient is managing. The very concealment renders it suspicious...”

42 See Carl Torp *ibid*.

43 Vagn Greve, et al., *komm. strfl. II*, 8th ed., 2005 *komm. Strl. II* p. 534 f.

and 144, combined with the fact that Section 299 makes no distinction between the description of the provider's and the recipient's criminal conduct.

The kinship between Sections 280 and 299(2) is most obvious where doubt arises about whether a received amount is a "supplementary payment" which does not result in a loss for the party whose interests are being managed by the recipient, or the amount should rightfully have benefited the enterprise, but is instead diverted into the perpetrator's pocket.⁴⁴

A more infrequent situation was seen in the so-called Carl Bro case, where three managerial staff in the group were accused primarily of breach of trust under Section 280, alternatively of violation of Section 299(2) of the Criminal Code, by having paid out secret commissions. It is unusual but not contradictory that the company Carl Bro as such would be the victim of a crime under the primary charge, while the most fitting description of the company under the alternative charge was "beneficiary" of the crime. The prosecution service's problem was thus evidently to determine firstly the money flow: how the money left the company and what happened to it subsequently, and secondly: who in the business had knowledge of the payment of money.

The money flow in the Carl Bro case⁴⁵ was as follows.: A person living in Switzerland issued two fictitious invoices for a total of just under two million Danish Kroner. The two invoices were paid by the Carl Bro group and one of the defendants subsequently collected the money – less some commissions – in Switzerland. The money's fate is undecided after this time. According to the defendants' evidence in court, a suitcase with the money was handed over to a "Mr Schmidt" at a pub in Germany. There are quite a few "Mr Schmidts" in Germany, as is well known! The defendants also stated in court that the money was to be passed on to a person central to the management of the German company Nordbau, which had a number of building contracts near Hamburg, projects which the Carl Bro group would like to participate in.

It is quite simply impossible to say on the basis of this course of events whether the Carl Bro group was the victim of a crime, or, on the contrary, had derived advantage from a crime which had been committed in its interest. The High Court considered it an "obvious possibility", however, that the defendants had been telling the truth, and that the money had been spent on special consultancy fees.

44 An example is the decision reported in *UfR* 2005.1388 V, where the managing director of a property company was granted a discount by the local house painter when the latter was redecorating flats for tenants when they moved out. The court was not satisfied that the bonus granted by the painter should have been passed on to the tenants or that the landlord had violated section 299(2). The district court had found the landlord guilty of breach of trust under section 280.

45 Judgment handed down by the Western High Court on 15 May 2007. The court had previously refused to hear the charge of violation of section 299(2) in its order of 8 May 2007, having found that a reduction of charges binding upon the court had applied to this part of the charges prior to the district court's hearing of the case. Vejle Criminal Court had acquitted the defendants on the counts of breach of trust as well as secret commissions in a judgment of 30 May 2006.

The district court's assessment was that the senior group management had found it "pretty obvious that the fees [the two million Danish Kroner] were just on or beyond the border of bribery, but that the fees might be a necessary evil". It had similarly seemed to the management that "it was an issue which had to be handled with discretion". The court found on this basis that the defendants may very well "have believed that the Carl Bro management considered the projects to be of such importance to the group that it was prepared to turn a blind eye, and more or less tacitly accept that [one of the defendants] managed the practical difficulties with payment of the special consultancy fees, including by withdrawing the mentioned amounts and providing the required vouchers."

5 "... and the Like"

5.1 *Oil for Food*

In late summer 2005, the public was shocked by revelations that about 20 named Danish companies had allegedly paid money under the table in connection with contracts entered into with Iraqi companies and authorities. The contracts had been entered into in connection with the oil for food programme, after the UN had relaxed the total embargo previously imposed on Iraq because of its occupation of Kuwait. The relaxation allowed the Iraqis to sell oil, but the profits from the sales had to be deposited in a French bank. If an Iraqi company or authority wanted to use any of the money for buying equipment, food or medicine from e.g. a Danish company, the Danish company had to describe the goods involved and the price demanded for the goods on the invoice. The invoice would then be sent via the Danish authorities to a UN office where the invoice would be approved. It would then be sent on to the Iraqi company which would present it for payment at the French bank, which would finally transfer the amount to the Danish company which had delivered the goods.

The illegal activity which had taken place in connection with this procedure was that the Iraqi company persuaded the Danish company to issue an invoice for an amount greater than the amount which the Danish company asked for its goods. When the excess money was released from the French bank, all the Danish company had to do was to deposit the excess in a specified bank in the Middle East, often in Saudi Arabia, from where the money could be taken home to the Iraqi government which was then free to use it entirely without UN control.

The legal assessment of this case must take account of several elements which are atypical relative to ordinary cases of bribery and secret commissions. Firstly, the recipient was not one (or more) individual person(s), but an entire regime, the Iraqi government. Secondly, the money which was paid did not come out of the Danish company's own pocket (as is normally the case with a bribe or secret commission). Neither was it paid by an "accidental" third party (the typical scenario in cases of breach of trust). No, it was the recipient's own money which was returned to him. These elements made it impossible to use either Section 122 or Section 299 of the criminal code.

Apart from this, the ultimate “victim” of the events here described was in a sense the stability of the global society here personified by the UN, and this brings Section 110c(2,3,4) into play. These provisions include a framework penalty clause for obligations which Denmark has undertaken in its relations with the EU and the UN. It is, moreover, extraordinarily difficult to establish the exact *actus reus* in these provisions. The oil for food programme is thus governed by Regulation No. 124 of 12 March 1993 with subsequent amendments in Regulation No. 1238 of 27 December 1996 – oil-for-food. These regulations state *inter alia* that “Section 5 offenders, including board members in companies in violation of Sections 1 and 2, shall be punishable pursuant to Section 110c(2) of the Civil Penal Code by fine, mitigated imprisonment or under aggravating circumstances by up to four years’ imprisonment. *Subparagraph 2.* If the violation of Section 1(1,2) is committed by a public or private company or similar, a fine can be imposed on the company as such.”

Sections 1 and 2 also include a reference to the goods and the schedules in which the goods are listed, which may still (or again) be sold to e.g. Iraq, and states that such sales are subject to approval initially by the minister of industry, and subsequently the minister of economic and business affairs. The regulations also specify that final release from the deposit accounts is subject to approval by a UN committee.

Reports in the media, including admissions by some of the companies of the actual events, made it likely that an objective breach of the rules had taken place. It was also alleged, however, that some of the companies had contacted the foreign ministry and/or the relevant UN committee with information that the Iraqis had requested excess invoicing. If this allegation is true – and if the invoices or an accompanying letter in each individual case indicate the actual price of the goods/services in question and the amount of the overpayment, no violation of the relevant provisions will presumably exist. The stipulated requirements concern the nature of the goods alone and the required approval of the sale by a relevant authority. The provisions make no mention of the price of the goods; and the purpose of the provisions was to enable UN control, and such control was possible if the UN was given all relevant information.

The State Prosecutor for Serious Economic Crime, who handled these cases, advised in 2006, however, that the liability of companies and individuals was time-barred.⁴⁶ But the question of forfeiture was not time-barred, and this question is still under examination in the ministry of justice as far as I know.⁴⁷ The Department for Serious Economic Crime is supposed to have recommended to the ministry of justice in mid-2008 that legal action be instigated with regard to the forfeiture cases.

5.2 *Breach of Trust*

As mentioned in Section 2, the word “corruption” is often used confusingly about a mix of public and private interests. The typical situation in cases of

⁴⁶ *Morgenavisen Jyllands-Posten*, 22 September 2006.

⁴⁷ The ministry of Justice decided in March 2009, that the forfeiture cases were to be tried in court.

bribery and secret commissions is that the person receiving the favour fails to distinguish between his own personal interests and the public or private office which it is his duty to perform. A variation of such a failure is indicated if the offender is furthering his own personal interests not by using money or other favours which he has received from others, but money which he is administering on behalf of the state or his company. An example of such a case is the so-called “sponsor case” from Farum,⁴⁸ where the mayor forced through the use of DKK 9 million of public funds and 1 million of a development firm’s money to support the local handball club. The mayor, the chief executive and two managers in the development firm were found guilty of breach of trust or complicity in breach of trust respectively.

One may well ask whether, seen in isolation, the fact that a mayor demands that a construction firm seeking a municipal contract must pay one million kroner in sponsorship to a local handball club in which the mayor has a special interest could involve a breach of Section 144 of the criminal code: “... requests an undue gift or other favour”.

Given that the person requesting the favour need not be the recipient of it as discussed above in section 3.1, and given that no undue financial gain need be involved, it is difficult to see the reason why, in principle, the request for a sponsorship should not fall under Section 144 of the Criminal Code.

5.3 Other Unfair Means of Exerting Influence

“No man is an island unto himself”. The words are John Donne’s, but we may add that no official or private person acting on others’ behalf can make his own decisions and choices in a vacuum. Nobody is left unaffected by knowledge of or rumours about the neighbour or the other contracting party. We are all basically more pleasantly inclined towards friends and acquaintances than towards total strangers. In small societies – even in bigger ones as well – the “people at the top” all know each other lengthwise and crosswise. If the administrative and company legal rules on conflict of interest are complied with, no case in law will exist. If the rules are ignored, this may not constitute a punishable offence as such – although the potential influence can be considerably greater than the receipt of a nice big anniversary present.

It is clear that the delimitations and choices involved are highly complex. Societies vary in size and they all have to function whatever their size, but it is important that a high level of public trust exists, that the decisions of public authorities are made (solely) on the basis of objective considerations, and that public servants who exploit their position of power to procure personal favours are a social evil and must be liable to punishment. Acceptance of this complexity should not, however, lead to resignation, but to the introduction of a set of sensible and relevant limits to influence which is easy to prevent. The rules of Sections 122, 144, 280 and 299, no. 2 set such limits.

Other areas where limits should perhaps be introduced concern the acceptance by political parties of large donations from companies and organisations. Although political parties have no public authority and no scope

48 *UfR* 2008.1607 H.

for acting on behalf of others, there is still a risk that political parties so favoured would entertain warm feelings towards the donors – which could generate greater understanding for donor wishes among law-makers and authorities. Such donations thus constitute a risk of a less “objective” influence than that exercised by political lobbyists. Characteristically, lobbyists possess expert knowledge of their field and they argue openly about core issues.

In an article in *Advokaten*,⁴⁹ Peter Pagh mentions another grey area: should local politicians be allowed to “bind” local councils to offer builders preferential treatment if, in return, the builders construct a specified volume of housing? No, is Peter Pagh’s answer, not if this means that the local council sets aside the requirements of the planning act regarding *inter alia* environmental screening. On the other hand, using Sections 122 and 144 is hardly possible because the person receiving the favour (the housing estate) is not one (or more) individual persons, but the municipality as such. The question of whether the law should intervene in a case such as this is more open to doubt than the example given above.

Generally speaking, the border areas of corruption are becoming ever greyer and more blurred in step with the demands on public and private companies (and hence private financial interests which are no concern of the public) to collaborate and enter into partnerships and binding agreements with each other on terms and conditions of a privatised nature. The evident advantages of such partnerships and alliances also carry the germ of difficult issues of demarcation and suspicion of corruption.

6 Agents of Influence

In contrast to Norway, Iceland and Finland, Denmark and Sweden have expressed reservations on the introduction of penalties for so-called agents of influence. An agent of influence can, for example, be a person close to a high-ranking politician. An offence would then exist if such a person receives a gift or other favour on the understanding that that person will exert his or her influence on the politician.

The Norwegian criminal code was changed in 2003 to make influence trading an offence. The provision is contained in Section 276 c and it states:

“Any person shall be guilty of influence trading who

- a) on behalf of himself or another demands, receives or accepts an offer of an undue favour in return for exerting his influence on the performance of a position, responsibility or a task, or
 - b) gives or offers another person an undue favour in return for exerting influence on the performance of a position, responsibility or task.
- A position, responsibility or task under a) shall also include a position, responsibility or task abroad.

49 2007:4.24 f.

The penalty for influence trading shall be a fine or up to three years' imprisonment. Complicity shall carry the same penalty."

In contrast to "ordinary" cases of bribery, the issue in the case of agents of influence is not that the public servant or the politician who is the object of the inducement to perform a given act is the person who receives the favour. The public servant will, if things work out the way the intermediary and the provider intend, be an innocent victim manipulated by the intermediary. Influence trading can thus be said to be a less dangerous form of corruption than pure bribery. The intermediary must convince the unbribable⁵⁰ decision maker to act in the manner the agent wishes. In the vast majority of cases, it will also be impossible for the agent of influence to induce the decision maker to act in an illegal or unlawful manner.

7 Some Practical Problems

The city court's reasoning on the secret commission charge in the Carl Bro case is highly telling with respect to some of the problems faced by police and prosecution in this type of cases. The court stated:⁵¹

"In its account of the facts, the indictment leaves the question entirely open as to the circumstances under which the alleged act of bribery took place. The indictment fails to identify the person or persons who are supposed to have received the bribe and more particularly, it fails to name the relationship this person or these persons had with Nordbau, with which the agreements on the projects were entered into.

The evidence presented has thrown no more light on these circumstances, and the Court therefore finds that the prosecution has failed to prove that the accused have violated Section 299(2) of the criminal code. The Court therefore acquits the accused of violation of Section 299(2) of the Criminal Code".

In short, what happened to the money? One special point about bribes and secret commissions paid on behalf of (Danish) companies is that a company which has paid out is just as interested in hiding the money flow as the direct offender (or receiver) is.⁵² We know already that it is extremely difficult to detect criminal activities in companies if the crime is committed in collaboration between an internal person (an employee in the company) and an external person (third party). Provided that management is involved in the act, letting minor or major amounts slip out without the usual checks is quite simple and risk-free. The chance is high that these difficulties of investigation will be reflected in the indictment. It would therefore have been interesting to have had the high court's assessment of the alternative claim in the Carl Bro indictment. It is well-known that indictments in drug cases can be formulated less precisely than is desirable,

50 If the decision maker had been bribable, it would have been far safer in terms of results to bribe him or her directly.

51 The judgment p. 63.

52 Similarly *Birgitte Vestberg*, 1985B, 79 ff.

but that such lack of precision may be necessary in recognition of the fact that it is impossible to “penetrate any further down” into this type of crime. It is up to case law to decide whether a similar relaxation of the demands regarding precision is acceptable in bribery cases in light of the at least equally strong difficulties in these cases. There is hardly any way around challenging the traditional limits on this, but the demands regarding a fair trial must of course continue to be observed.

If there are difficulties in uncovering and bringing charges in possible bribery and secret commission cases on Danish territory, the difficulties become next to insurmountable in cases involving payment of bribes abroad – perhaps even in a country with which we do not normally have police cooperation.

It is, however, important to pursue such cases, because whatever the outcome, they always serve to focus the eye of the public on the issues at stake for the duration of the case, and this forces companies to consider their own attitude to bribery of (especially) people abroad. A highly reasonable demand on managements in such contexts is that they not only discuss their own attitude to the issues, but that they also make their – negative – attitude to bribery etc. clear to those employees in particular who risk being placed in a position where they must make a decision on a demand for a bribe. If managements fail to do this, they leave their employees in the lurch and they risk that any case of breach of trust will be deemed to a case of bribery or secret commission because both types of crime (as in the Carl Bro case) often leave only very few clues.

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