“Undue” Gifts for Public Employees: 
An Administrative and Criminal Law Analysis

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Abstract
Both administrative law and criminal law set limits on public employees’ acceptance of gifts or other privileges. The core rules in these two areas of the law are the same. The elements of the crime of bribery refer essentially to the administrative law’s rules on the acceptance of gifts. It is probably the same underlying standard that constitutes the measure for the extent to which public employees can accept gifts. However, criminal law may require additional security and clarification in the cause of action for liability. Acceptance of gifts in a number of cases can only be sanctioned under administrative law and not criminal law. This article will analyse these issues and will attempt to define the criteria for determining when the acceptance of gifts is impermissible under both administrative law and criminal law.

1. Introduction
Bribery and corruption are international phenomena that most countries in the world today agree upon combating.¹ Bribery is generally defined as the offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of an official in the discharge of his or her public or legal duties. Often

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¹ See, e.g., United Nations Convention against Corruption of 29 September 2003; the protocol of the EU convention on fraud from 1995 (the Convention on the protection of the European Communities’ financial interests); 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); the OECD Anti-Bribery Convention also from 1997 (the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions); 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 the European Council’s anti-corruption convention from 1999 (the European Criminal Law Convention on Corruption). Each with later amendments.

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bribery is used as a term only covering criminalised behaviour. Corruption is generally used in a wider sense also including dishonesty, jobbery, nepotism and other forms of misuse of power.

Waging war on bribery and corruption can be accomplished with different tools such as criminalisation of the unwanted conduct. Another recognised tool utilises guidelines to regulate the conduct of public servants using disciplinary actions which may result in reprimands, dismissals, etc. Both tools follow the same goal and each tool can be expected to be efficient in its own right. The crime of bribery has been described and analysed in academic theories and — to a smaller extent — so have administrative regulations against acceptance by bribes among public servants (see references in the following).

Although both of these legal instruments are used to minimise corrupt behaviour, it is very seldom that descriptions and analyses of the interaction between the criminal and the administrative approach are found in either national or international literature. The reason for this is probably due to several factors. First, the sanction itself is of a very different nature depending on whether it is a criminal punishment or a typical administrative disciplinary measure. Second, these instruments are being found in two different areas of law which explains them being dealt with by scholars from both fields.

In this article, we try to narrow the gap between the criminal and the administrative approach. We do this by examining the “lower” area of the criminalised field in order to see how administrative law may be used in determining when an advantage is “undue.” By doing this, however, a “grey area” appears. This is an area where the public servant has possibly overstepped the administrative rules but has not yet entered the criminal area. This analysis is not possible without looking at a number of examples ranging from the allowed acceptance of advantages to more clear cut criminal behaviour.

Danish law and court practice provide the legal framework for our analysis with supporting examples and literature from other countries, especially some of the Nordic Countries as well as the UK. Nordic legislation in this field is very similar to Danish law and as is UK regulation – although the new UK Bribery Act 2010 is

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3) See L.B. Langsted, NTfK 2010.1 ff.: Den retlige regulering af korruption i Norden (The Legal Regulation of Corruption in the Nordic Countries).
construed slightly differently than the Nordic legislation. The “grey area” between administrative and criminal regulation, however, seems identical.⁴

2. Background on the Nordic countries

The Nordic countries generally have been known as being free from corruption. Transparency International publishes a “Corruption Perception Index” every year which is based on a survey of 176 countries. In 2012⁵ Denmark was ranked first together with Finland and New Zealand. Sweden ranked fourth and Norway came in at seventh. Iceland was the lowest ranked amongst the other Nordic countries at eleventh place.

This does not mean, however, that corruption does not occur in these countries. It merely means 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 person’s self-perception. Attempting to bribe a public official in these countries also involves a considerable risk because there is a high probability of outright rejection and the possibility of being reported to the police instead.

According to a PhD thesis by Mette Frisk Jensen,⁶ individual corruption⁷ was a rare occurrence in Denmark during the period from the mid-1700s until around 1810. There was a dramatic increase in the number of cases until 1830, but from 1860 to today, corruption has again been almost non-existent in Denmark. An important part of the explanation for the substantial drop from 1830 to 1860 was increased control of local and regional administration accounts, an accounting reform in 1840, and not least the government’s relentless prosecution and punishment of corrupt public officials (cf., Frisk Jensen).⁸

Based on experience from Danish law and jurisprudence, and also including rules from other European countries, this article attempts to establish some guidelines by which gifts to public officials are classified as either “due” or “undue.” Administrative law and criminal law both set limits on public employees’ acceptance of gifts and other privileges. Where the Danish Criminal Code

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⁴ This is not surprising since most of the modern criminal legislation throughout the world stems from or is inspired from the same conventions on bribery.
⁵ See http://cpi.transparency.org/cpi2012/results/. The individual rankings of the countries have varied a little over the years, but never show any major deviation from the 2012 figures.
⁶ Korruption og Embedsetik – danske embedsmænds korruption i perioden 1800 til 1866 [Corruption and Etichs – Corruption among Danish Civil Servants During the Years 1800 to 1866]. Aalborg University 2008.
⁷ Denmark has, however, almost always been free of systemic and institutional corruption (ibid. p. 285).
⁸ Ibid. page 287.
contains relatively precise and detailed provisions (in particular, see section 144 on accepting bribes), administrative law has few hard law regulations. Administrative law seldom has binding written provisions regarding the acceptance of gifts or other privileges that equal the rules of bribery in the Criminal Code. Administrative matters are, therefore, regulated primarily by those principles inferred from other administrative rules and case law. Some countries have published administrative rules, but those rules are often non-binding (soft law). Normally, such disparity in the degree of regulation is unproblematic in view of the rules’ purpose and function. The distinction and clarity in a criminal law context are only ostensible, though, as the criminal law reaction in the area of bribery, is based on administrative law. Section 144 of the Danish Criminal Code, Article 15 of the UN Convention on Bribery and the OECD Convention on Bribery in Article 1(1) demonstrate that acceptance of gifts or other privileges must be “undue.” The use of the term “undue” is a standard criminal reservation in many penal provisions, though, and it normally takes into account that unique situations may occur. In such cases the offenders’ act falls within the wording of the description of the actus reus, but outside its scope because of its character being atypical to the intended criminalised area. Such situations are often referred to as situations of “material atypicality.” If the word undue was to be interpreted solely in the traditional sense, this could entail that any gift, no matter how small, could foreseeably be cause for punishment. It would hardly be possible to claim that such an acknowledgement would altogether fall outside the provision’s protection interest, let alone that sanctioning in such a situation would conflict with more basic principles. Most likely for the same reason, in bribery cases the word “undue” is at times referred to as a ‘legal standard’ – which is inconsistent with the fact


10) The UK Bribery Act 2010 uses the word “improper”, Norwegian Criminal Code (section 276a) uses the word “utilbørlig” and the same word is used in the Swedish Criminal Code (7 kap 7 §). For a description of the meaning of the word in the UN Convention, see M. Kubiciel, ‘Core Criminal Law Provisions in the United Nations Convention Against Corruption’, 9 International Criminal Law Review (2009), 139-155 (esp. pp. 144 ff.).

11) See, e.g., G. Toftegaard Nielsen in ‘Strafferet I – ansvaret’, 3rd edn (Copenhagen: Jurist- og Økonomforbundets Forlag, 2008), p. 42, where he, among other things, gives the example that when a doctor removes a cancer-affected woman’s breast, it is not a situation that is liable to punishment under section 245 (serious bodily injury) of the Danish Criminal Code, notwithstanding it falls within the wording. It would thus be inconsistent with purposive construction of the provision to use it in such cases. See also T. Baumbach, ‘Det strafferetlige legalitetsprincip’ (Copenhagen: Jurist- og Økonomforbundets Forlag, 2008), which on p. 453 ff. includes an interesting survey of the concept and, in several connections, characterises it as an ‘emergency break’ (see, e.g., pp. 468 and 529).

that it should act as a safety valve in altogether atypical cases, but as a more general norm, delimiting the scope of the provision.

Therefore, it must be assumed that the word “undue” is intended as a general ‘lower limit’ to that which is exempt from punishment, and that this lower limit must be determined on the basis of norms and rules outside the provision.14 With this understanding,15 we are talking about a reference to administrative law rules. The first commission draft to the 1930 Danish Criminal Code16 states that ‘Acceptance of gratuity … will in many cases not fall within the scope of the provision, thus not … when the service is of such a nature that it, according to a not illegal custom, can be accepted, though not required’ (unless otherwise stated, this and all other quotations below are presented in our translation).

This connection between the guidelines provided by the administrative law and the criminal law judgement is also well-known in, e.g., Norwegian law. Section 20 of the civil servant law is assumed to provide some guidance as to the evaluation of whether acceptance of a benefit is undue and thus at variance with section 276a of the Norwegian Criminal Code. Section 20 prohibits civil servants from receiving ‘gifts, fees, favours or other services that are suitable for or with which the giver intends to affect his official actions or which it, following regulations, is illegal to receive’. Thus, Nils Dalseide assumes17 that in view of the fact that a gift is at variance with section 20 of the civil servant law, ‘it must as a rule follow that it may also form the grounds for sanctions under section 276a of the criminal code’. Likewise the UK Bribery Act 2010 states in section 2(3)(b), that the acceptance of an advantage in itself constitutes an improper performance of the receiver’s duty. An example of this may be if the receiver is subject to rules preventing

13) As elaborated in Section 7 below, this should not be understood as a monetary de minimis threshold.
15) As Trine Baumbach demonstrates in ‘Det strafferetlige legalitetsprincip’, the word “undue” does not always include real exceptions; it can also (see section 293 of the Danish Criminal Code on taking without the owner's consent) ‘... be understood as a reference to rules and legal doctrine outside criminal law. However, it must be assumed that “undue” also excludes some under civil law “illegal” situations from the criminal area’ (p. 474). It is this very understanding of the word “undue” that we find is the most precise, in so far as section 144 is concerned, and we agree that the term ‘material sui generis’ should be used primarily as an emergency break and not as a ‘reference’ to other rules.
16) Report issued by the commission appointed to examine the general civil criminal code, 1912, p. 179.
him from accepting gifts when performing his duty.18 This is undoubtedly true if the “administrative” obligation follows from legislation, but it does not necessarily constitute a crime to accept an advantage that is only against codes of conduct.

In other words, to be able to determine whether the acceptance of a gift is “undue” in a criminal law sense, it is necessary first to consider whether the service is legal in an administrative law sense. If it is, conviction for bribery is never a possibility. If acceptance, on the other hand, violates administrative law rules, surely the acceptance is also as a rule “undue”. However, it must be assumed that there is a grey area where acceptance of a service may well be in violation of administrative law rules, but nevertheless cannot lead to criminal liability as it is not considered legally “undue”. One might argue that these assumptions are too absolute to be of general validity. If they are regarded from within each jurisdiction, however, we believe them to be true. It could never be in accordance with administrative law of a country to act in a criminal way and it can hardly be met with criminal sanctions if an act is within the administrative laws and guidelines of that country. The assumptions become less distinct, we admit, if it is a question of transnational bribery. What may be in accordance with administrative law in one country could be regarded as a criminal offence in another country. For this reason — and in order to diminish that possible discrepancy — the Council of Europe has issued a model code of conduct for public officials19 that should be implemented in each member state. Attention is drawn to this code in the explanatory report to the Criminal Law Convention on Corruption in connection to the interpretation of the word “undue”. Thus section 38 in the report states that: “What constitutes “undue” advantage will be of central importance in the transposition of the Convention into national law. “Undue” for the purposes of the Convention should be interpreted as something that the recipient is not lawfully entitled to accept or receive. For the drafters of the Convention, the adjective “undue” aims at excluding advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts.”

As stated in the citation “undue” excludes what is permitted by law or by administrative rules. The UK Bribery Act 2010 is construed upon the same assumption, since sections 5 and 6 exclude from the criminalised area performance that is “permitted or required by the written law applicable to the country or territory concerned”.

Our assumptions and the assumed “grey area” of course depend on the existence of administrative as well as criminal rules concerning bribery and the like.

In case no administrative law exists it is left to criminal law only to draw the lines. However, this is hardly the case in many countries of the world today.

In 2007, the Danish Agency for the Modernisation of Public Administration published (in cooperation with, among others, Local Government Denmark) a guide to good conduct in the public sector with very precise and detailed guidelines and examples. But the guidelines are not legally binding. In May 2010, an entry was added by the Agency for the Modernisation of Public Administration under the Ministry of Finance. Additionally, some administrative authorities have produced their own internal guidelines. There is no (published) Danish case law on the administrative law limits for acceptance of gifts, etc. and very little ombudsman practice.

Especially the administrative law rules of legal incapacity and the misuse of power have spawned a number of principles on a public employee’s ‘purity’, impartiality etc. The Civil Service Management Code in the UK (section 4.1.3) talks about “impartiality” and “integrity” in reference to gifts. The requirements as to capacity, which public employees must meet, prevent a person from participating in the handling of a given case if the person in question has an undue interest in this case, which is an interest that may well have a subjective influence on the latter. The underlying view is that public employees in their work must focus their attention exclusively on ‘objective’ criteria. Public employees must perform administration in such a way that the objectives and intentions of the legislation are administered as close as possible to the will of the legislator. It must not disturb the work of the administration that some employees have accepted services, ‘bribery’ or the like, just as it must not affect the work of the employee that he or she is processing a private case that involve family members, etc.

The criminal law rules of bribery have been addressed in relative detail in legal theory and practice in Denmark. As mentioned, administrative law has

21) In the published version the entry contains no precise date or file number, but gives the initials ‘IDA’. The title of the entry is ‘Modtagelse af gaver, invitationer og andre fordele’ (Acceptance of gifts, invitations, and other benefits).
22) See, e.g., the Danish Defence Acquisition and Logistics Organisation’s gift policy, ‘FMT Gavepolicy’, from April 2009 (in the following referred to as ‘FMT Gavepolicy’).
addressed the subject in a somewhat more ‘stepmotherly’ fashion. The following will seek to remedy this matter as the presentation is devoted to problems and limits that have not already been more or less clearly described in criminal law theory. One could, therefore, say that the following concentrates first, on a number of potential suggestions as to when the acceptance of gifts and such is “undue” following administrative law, and second, on the grey area and the interaction between administrative law and criminal law.

As mentioned earlier, most of the examples stem from Danish practice, but examples from other jurisdictions are drawn into the text where appropriate either to illustrate the problems or to show that the same problems are relevant in other jurisdictions as well.

As suggested earlier, it is essentially the same points of view that underlie the rules of bribery and the rules of incapacity, etc. The travaux préparatoires to the Danish Criminal Code’s provisions on crime in public service or duty, including the rule of bribery, specify that ‘both the desirability of the fact that the purity and indisputability of these public bodies are thus secured, and the interest in safeguarding the citizens against misuse of the power conferred to these authorities ...’

The same objective is evident in the rules of incapacity, in that these should also both prevent subjective interests from having an influence (warranty considerations) and ensure the population’s confidence in public authorities (confidence considerations) (cf., also, e.g., UfR 1985.270 Ø (criminal bribery) and UfR 1999.689 Ø (incapacity)). In 1948, the famous Lynskey Tribunal of Inquiry (in the UK) reported on allegations that ministers and other public servants had been bribed in connection with the grant of licences by the Board of Trade. A Minister was found to have received gifts of wine and spirits, knowing that they had been given in order to secure favorable treatment by the Department of Applications for Licences.

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25) This is true for the delimitation of concepts such as ‘financial benefit’, the group of people included, (employees, elected etc.) and so on.

26) 15. Report issued by the criminal code commission of 9 November 1917, Copenhagen 1923 (in the following referred to as U III), the motives, sp. 248.


28) "UfR" refers to Ugeskrift for Rettsvæsen - The Danish Law Reports.

As a rule, the main difference between the rules stated in the Criminal Code and administrative law, respectively, will be that actions must be of a gross nature to form the basis for sanctions. Or, put another way, the elements in the individual situation that determine when the acceptance of gifts or other benefits are ‘due’ are likely to be the same under both criminal law and administrative law, while criminal sanctions must take into consideration that requirements are usually greater and more severe than in administrative law contexts. In UfR 1985.270 Ø the Danish High Court found that ‘In recent years, it has been attempted to narrow the limit for when benefits are acceptable in Danish administrative law, allowing only benefits that cannot reasonably be presumed to want to affect a public employee or give rise to suspicions hereof. The limit for the allowable under administrative law has nevertheless not been securely established. In criminal law terms, considerations which correspond to similar considerations in administrative law are found to be vital; however, with the substantial degree of security that must be required to be able to establish criminal liability, the limit for the legally acceptable under section 144 of the Criminal Code will be comparatively wider than in administrative law terms’.

Under the guidelines provided by the Agency for the Modernisation of Public Administration, the underlying basis is that ‘public employees should not accept gifts or other benefits from citizens or companies in connection with their work’ (our translation). Similar restrictions are found in other countries’ rules, either literally according to the text or after an interpretation. In the UK, the Civil Service Management Code (from 2011) holds in section 4.1.3., that “… civil servants must not receive gifts, hospitality or benefits of any kind from a third party which might be seen to compromise their personal judgement or integrity.” The Code of Conduct for EU Commissioners (C (2011) 2904) states that “Commissioners shall not accept any gift with a value of more than EUR 150.” In FOB 1955.150, the Danish ombudsman found that it was ‘… misfortunate that [Professor M], when he was employed as assistant professor, received cigarettes from students in a not completely insignificant amount.”

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30) As stated by Hanne Rahbek a.st., p. 71, ‘criminal liability presupposes that a de minimis threshold is significantly violated’.

31) In the following, only the concept gift is used, as it also includes other ‘benefits’, such as services or positive discrimination, etc. of the employee, cf. komm. strl. sp.d., p. 122 and Lars Bo Langsted in Festschrift for Gorm Toftegaard Nielsen (2007), p. 221. See also E. O’Shea, p. 28, for a non-exhaustive list of benefits covered by the UK Bribery Act (2010).

32) See also P. Szarek-Mason, ‘The European Union’s Fight Against Corruption’ (Cambridge: Cambridge University Press, 2010), p. 8, where she stresses the distinction between criminal law definitions on corruption and “the broader concept of corruption” that is often used in more prevention orientated areas. The latter might be codes of conduct within the administrative area, etc.
The following paragraphs contain a series of model situations that are presented in order to identify shared elements in the assessments.

3. Beneficiary: the Person or the Organisation?

It is important to distinguish between whether gifts are considered to be received by the employee or by the organisation in question. This will, to a great extent, determine whether or not the gift can be accepted. The Ministerial Code from the UK (2010) provides, that “Gifts given to Ministers in their Ministerial capacity become the property of the Government and do not need to be declared in the Register of Members’ or Peers’ Interests.” If, for example, an organisation receives an official visit from foreign delegations, companies, and the like, any gift can be accepted. The mayor or the head of the department can, therefore, on behalf of the organisation in question, accept a fine, valuable work of art. In general, all gifts given to an organisation can be accepted, whereas gifts to individuals employed by that organisation are construed in accordance with considerable limitations (cf. the following pages).

In assessing whether a gift is received by a person employed by the organisation or the organisation itself, a factor to be considered is whether the accepted gift is registered, kept, used and so forth privately by the employee or at the organisation’s premises. Naturally, it is easiest to make this assessment with regard to physical gifts but harder with regard to services, dinners and other non-physical gifts. Here the assessment could take into account whether a given invitation was received by the organisation or by the person in question, whether it is directed to the organisation or a particular person and whether the organisation can decide who should participate.

There must be situations in which public employees, as a part of their employment, can accept ‘samples’, etc. For example, an employee can accept a dinner if

33) Here we will not address further whether or not there are special cases in which organisations cannot accept gifts. Presumably, it may be unlawful (under administration law) for an organisation to receive gifts, if the giver has a clear intention of affecting the organisation in question. Therefore, as a rule, municipalities can accept a gift from a local company that wishes to donate a fountain, a public swimming pool or an opera house to the municipality. However, if this is simultaneously connected (directly or indirectly) to the fact that the municipality is processing an application made by the company or if any other (unreasonable) connection to the discharge of organisation or other administrative functions can be documented, then, presumably, the gift should be declined. It may be possible to draw a parallel to the rules for the incapacity of authorities, cf., e.g., K. Revsbech et al., ‘Forvaltningsret – Sagsbehandling’, 6th edn (2007), p. 124 ff., and S. Rønsholdt, ‘Forvaltningsret’, 2nd ed. (2006), p. 262 ff.

34) FMT Gavepolicy para 2.1 states that ‘The gift must ... remain at the place of employment and must not be brought home’. In addition, it is stated that gifts with the employee's name on it (e.g., engraved) must be declined.
the objective is to consider whether or not the donor (e.g., a restaurant or a conference centre) should cater an event at the premises of the organisation. Obviously, the scope and type of dinner must correspond to what the organisation already contemplated purchasing for the given event.

In practice, there are cases where employees are invited by private companies on trips in order to participate in product presentations, conferences, meetings, and such. Here, the underlying basis should be that there must be a clear and impartial objective as well as a justification for the arrangement. In 1965 the Danish ombudsman (cf. FOB 1965.159) found that ‘... on the basis of principled administrative law views and with a view to strengthen general confidence in the municipal councils, the greatest caution is exercised as regards accepting invitations similar to the one in the present case’. In the concrete case, a number of parish councillors from Zealand had attended a trip to Bornholm (an island in Denmark) paid for by an asphalt company. The Parish councillors had an interest in ‘... comparing older granite surfaces on the roads on Bornholm with corresponding gravel surfaces on the roads in the given municipality.’ Since there was great uncertainty at the time about the administrative rules in the area, the ombudsman refrained from criticising them.

The Danish Defence Acquisition and Logistics Organisation’s gift policy holds that ‘In general, you should decline to meet with a supplier under more private forms or when the meeting place seems to have been chosen to facilitate other than professional activities’.

The Ministerial Code (UK), 2010, section 7.24, holds that: “If a Minister accepts hospitality in a Ministerial capacity, the Minister should notify their Permanent Secretary.”

The EU Code of conduct for Commissioners (C (2011) 2904) holds in section 1.11: “Commissioners shall not accept hospitality except when in accordance with diplomatic and courtesy usage. Attendance upon invitation to any events where Commissioners represent the Institution shall not be considered as hospitality.”

Occasionally, public employees are invited to attend different events of a certain reputation and/or social character. Employees can naturally attend events to represent the organisation or to attend on behalf of the organisation. However, if the participation is because the employee wants to go or if it is primarily of a private, personal interest, then participation is classified as undue.

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35) To be clear, it is noted that gifts for the employee’s family, associations, etc. with which the employee has a close relationship can also be included in the rule of bribery, because it is assumed that they can also constitute a ‘benefit’ for the employee, cf. Lars Bo Langsted in Festschrift for Gorm Toftegaard Nielsen (2007), p. 221, and komm. strfl. sp.d., p. 122. Similarly, the Danish Ministry of Justice’s pamphlet from 2007: ‘Undgå Korruption’ (Avoid Corruption), p. 5 f.

36) Likewise the COE recommendation on codes of conduct forbids the acceptance of hospitality except conventional hospitality and minor gifts, re. article 18, 1.

37) See also the Agency for the Modernisation of Public Administration’s entry of May 2010, pp. 2 and 5.
the event must be subject to the requirement that the employee is genuinely representing the organisation. For example, the mayor is allowed to accept free access to the art museum when the show, which is sponsored by their municipality, is opened. Official representatives can be the face of the municipality and ‘inspect’ the object of the municipality’s sponsorship. Similarly, ministers, mayors and the like, can attend events that give them an opportunity to present, explain and discuss the organisation’s policies in relation to relevant target groups. Of course, it is assumed that the person in question holds a position or function at the organisation which involves the duty to represent on behalf of the organisation. For example, a purchasing manager in a city council normally cannot attend the local business organisations’ annual golf trip with the purpose to participate in discussions on the municipality’s future industrial structure. This could perhaps be done by the mayor or e.g. the trade promotion officer.

4. Purely Private Gifts and Gifts in Other Connections than Public Service

It is natural that a public employee, like any other person, can accept normal gifts in private. Chief executives of municipal authorities can accept gifts from family, friends and colleagues. The difficult part is determining when the giver is also affiliated with the organisation in question. First, an evaluation must be made of whether the giver in question is affiliated with either the organisation or the person. Consideration whether a gift qualifies as a legal, private gift depends to some degree on the personal relation between the giver and the receiver. If the giver is mainly related to the organisation, and has no private relationship with the receiver, the gift should be considered an impermissible gift. Moreover, the administrative law rules on incapacity should be able to provide, with some degree of guidance, whether the giver belongs to the receiver’s ‘private sphere’, in the sense, that the employee becomes disqualified to handle a case where the giver is part or has an interest. Thus, one might indicate that if the incapacity rules entail that the public employee in question is under a legal incapacity in cases concerning the giver, then there is a presumption that gifts that are given in a private context are legal. Such interaction safeguards the underlying considerations regarding impartiality, etc.

38) Cf. UfR 1994.773 Ø and the District Court of Copenhagen’s ruling of 14/11 2006, case SS 33.23018/2006, where a head of department in the Danish Immigration Directorate had received four football trips from DBU (Danish Football Association). Among other things, the head of department processed cases concerning residence and work permits for professional football players. For more information on the ruling, see Lars Bo Langsted in Festschrift for Gorm Toftegaard Nielsen (2007), p. 225 f.

39) Cf., section 3, subsection 1, numbers 2 and 5 in the Danish Public Administration Act.

40) Naturally, then, it also follows that the receiver cannot process cases concerning the giver in question. One can therefore say that either: (a) the giver and the receiver have a private relationship
Subsequently it should be a determining factor whether the character and size of the gift are typical in regards to the private relationship in question. Normally, private friends do not give each other international trips, cars and the like — and hardly on the occasion of birthdays, Christmas or other special days. Spouses also rarely do this, but in this connection the nature of the relation should entail that the size and character are insignificant. In a recent Swedish court case, the chairman of a municipal board and the county governor were acquitted in a bribery trial. They had both received a very costly trip to South Africa from a Swedish businessman, whose company sold expensive equipment to the local Government. The defendants, however, had nothing to do with the decisions for buying the said equipment, since such decisions were made by officials in lower positions. The main reason for the acquittal was that the Chairman and the Governor both had a close and long lasting friendship with the businessman and that the trip was also a birthday present for the chairman. The above-mentioned private gifts do not necessarily concern strictly personal and private relationships. The acceptance of gifts may be authorised if the receiver in question accepts these gifts in other contexts of which he or she is a part. Members of the municipal council, office heads and others can be board members in associations, companies and so forth, without this being connected to the person’s public service. A member of the municipal council, who is on the board of a sports club, because the person in question was chosen at the annual general meeting, can of course accept free tickets for club events, etc., whereas a member of the municipal council, who is not on the board, cannot accept free tickets, and other such gifts, if the acceptance should be regarded as being on account of his or her duty in the municipal council (and not external to the ‘field of representation’, cf., above).

5. Private Fees, Other Paid Occupations, Etc.

In Denmark, public employees, members of municipal councils, and the like, can outside of their employment, perform other work for a monetary consideration (within the rules of other paid occupations, decorum, etc.). In some countries, there is a prohibition against this, especially regarding ministers, etc. The EU’s Code of Conduct for Commissioners (C (2011) 2904) holds in section 1.1 that: “Commissioners may not engage in any other professional activity, whether

and can exchange gifts, but yet are under a legal disability in connection with the processing of cases, or (b) they have no private relationship, cannot exchange gifts and are not under legal disability.


gainful or not. Unpaid courses given from time to time in the interests of European integration and other communication activities on areas of European interest are the only outside activities that are permitted, and do not have to be declared.”

To the extent that public employees are allowed to perform work outside of their employment such a money consideration is not inconsistent with the rules of the acceptance of gifts. The consideration must be consistent with the “normal size and character” rule. In UfR 2009.2049 Ø (allegedly), an engineer employed by a municipality had provided consultancy for a contractor who had to submit a tender for work for the municipality. On looking at the evidence presented, the Danish High Court was not satisfied that the engineer had ‘performed any specific service for the total of DKK 100 000 (about €13 000) which he received in 2004 from [the contractor].

6. Connection with the Function – Risk of Conflict with Duty

For the acceptance of gifts to be considered “undue”, the employee is not required to have acted contrary to his or her duty in regards to the acceptance. As indicated above, the mere abstract risk of acting contrary to the employee's duty or the risk that the general public will lose faith in the public administration is sufficient.

The UK Ministerial Code (2011) holds that: “...no Minister should accept gifts ... which would, or might appear to, place him or her under an obligation.”

The UK Civil Service Management Code holds that: “...which might be seen to compromise their personal judgement or integrity.”

Thus, the acceptance of gifts and other privileges does not necessarily have to involve a specific act (that is contrary to one's duty) as a ‘quid pro quo’. In addition, it is not necessary to establish that there was a certain degree of risk.

43) Cf. also U III, the motives, sp. 250.

44) Cf. also the Agency for the Modernisation of Public Administration's entry, May 2010, p. 4.

45) This question is discussed in the travaux préparatoires of the Danish Criminal Code, as the 1866 Danish Criminal Code contained two separate provisions for taking bribery ‘... without moreover violating any official duty ...’ (section 117) and for taking bribery ‘... and thus violating an official duty’. Already in U I a collective provision is suggested for taking a 'bribe' (section 167), regardless of whether the aim is to act contrary to duty or not.


47) Cf. also UfR 1983.990 H and the District Court of Copenhagen's ruling of 14/11 2006, case SS 33-23018/2006, where the district court in connection with sentencing stresses that the defendant
Presumably, it is not even necessary to establish that there was a concrete risk. It is, (as indicated) a requirement that there is an abstract risk, meaning that the gifts and the context in which they are given must be suitable for creating a risk of conduct that is contrary to duty – or merely a suspicion of risk. In UfR 1985.270 Ø, the Danish High Court states, “The received services have subsequent to a general evaluation of the scope and character of the majority hereof been found suitable for affecting the defendant in connection with safeguarding the interests of the municipality in relation to the company or, at least, creating uncertainty in the general public with regard to whether the interests of the municipality were safeguarded by the defendant.” Therefore, it must be a prerequisite that the employee’s function not only allows but risks generating conditions that are contrary to duty — or just a suspicion of risk in the outside world.48

This evaluation may also take into consideration the duties of the employee in relation to the case, for instance, whether the person in question has decision-making competence, has procedural steps to follow, holds a leadership position, etc.50

It is also stated that it is also considered undue if a gift is received as a thank you for completely legal action such as the issuing of a permission that the presenter would have received anyway.51

Gifts to an employee whose job allows for conduct that is not necessarily contrary to duty — with respect to the giver and the interests of the giver — are not included.52 Therefore, it is not considered illegal (undue), if, for example, a medical researcher (such as in public university) receives a donation from a foundation for a research project.53 Another example is if a municipal primary or lower

48) Cf. UfR 1985.270 Ø and UfR 1994.773 Ø. The fact that it is established that the gift did in fact not lead to conduct that is contrary to duty (or the likelihood hereof) can be important for sentencing and mitigation of punishment, cf., UfR 2007.673 Ø and UfR 1994.773 Ø and note no. 31 above.
49) Under the disability rules, a person who is under legal disability cannot participate in any parts of the case handling, decisions or in any other way ‘contribute to the processing of the case in question,’ cf., section 3, subsection 3 of the Danish Public Administration Act.
50) Cf. UfR 1985.270 Ø. The Modernisation of Public Administration’s entry, May 2010, states that leading employees must be especially reticent about accepting gifts.
51) Cf. Lars Bo Langsted in Festschrift for Gorm Toftegaard Nielsen (2007), p. 222 and in connection with note no. 12, and the District Court of Copenhagen’s ruling of 14 November 2006, case SS 33.23018/2006. Moreover, for the sake of comparison, it could be added here that the disability rules also apply to cases where a fully (material) legal judgement has been made.
53) This may not be so if the giver is a company that wants researchers to produce a specific result. On the other hand, researchers are encouraged to cooperate with private companies, in the form of
secondary school class and the teachers receive a donation from a company to help pay for a class excursion abroad.

Thus, it is also stated that some organisations are more likely than others to come into conflict with the gift rules. An organisation with many widely defined functions, such as municipalities, the police and the like, has so much contact with the citizens that it frequently risks conflicts of interest. Employees here will often have to refuse theatre tickets and other gifts. The opposite is true for very narrowly defined authorities. It will be easier for members of a rent control board or the Appeals Tribunal for Students' Grants and Loans Scheme, to accept tickets, when the donor is a theatre.

It follows then that gifts received subsequent to a specific service are also included in the rule on bribery in section 144.54 This section calls for toning down of too close a causal relation between the gift and an act. In principle, it can be difficult to argue that a gift caused a specific service (that is lawful or contrary to duty), if the gift was given thereafter – and if there was no (proven) promise of the gift prior to the act.

The position and character of the giver of the gift is also significant. Acceptance of gifts is more problematic from a private citizen or a company than from a widely founded interest group or trade organisation that represents ‘all’ companies or persons in the area.55 In the last-mentioned case, the giver will normally not be the addressee in relation to the organisation's cases, and the risk of behaviour that is contrary to duty in relation to the underlying interests will often be weak or not involve a risk of unfair treatment. Additionally, gifts from companies that indisputably neither are nor can be addressees in relation to the organisation do not involve a risk of conduct that is contrary to duty. If the Minister of Ecclesiastical Affairs accepts a dinner invitation from a knitting association, it is unlikely to be found impermissible.56,57

54 The Modernisation of Public Administration's entry, May 2010, refers to a dismissal jury trial, where home care staffs were dismissed for accepting the inheritance of a deceased citizen who had received home care.

55 Cf. also the Modernisation of Public Administration's entry, May 2010, p. 2.

56 The giver’s motive can be attention for and press coverage of the business (in the present context, the prohibition on ministers contributing to the advertisement of companies is disregarded).

57 As mentioned above, a mayor is more likely to come into conflict with the gift rules, as municipalities have a number of functions in relation to businesses. On the other hand, mayors may often
7. Legal Custom

In Denmark, situations have developed where it is recognised that public employees can accept different gifts and services, without it being illegal, even though it might be in contradiction of the above. The Slovak Criminal law on bribery deals with “socially acceptable gifts” in the private sector. Pursuant to the Slovak authorities, the Supreme Court of Czechoslovakia gave the term “socially acceptable gift” a similar meaning to the expression “very small gift, or gift of very small value”. Such gifts, for example, a bunch of flowers or a pen offered during business negotiations, are not considered a bribe. It is important to state that the social context in which the act has been committed is essential. In particular, the Slovak legal system does not recognise “socially acceptable gifts” in relation to state bodies, municipalities, the school system, the health and insurance system, or the area of work relations, to name a few.58

In Germany, Penal Code sections 331 and further on, criminalises the giving or acceptance of an “advantage” (ein “Vorteil”). This is often interpreted with the limitation of Social Adequacy (“Sozialadäquanz”), meaning that socially adequate behaviour does not constitute the crime of bribery or the taking of advantages.59 “Socially adequate behaviour”, however, must not be confused with “socially adequate corrupt behaviour” since the latter is always a way of disguising or civilising corruption like the Chinese guanxi-practice.60

Corresponding rules in both Danish criminal law and administrative law allow public employees to accept working lunches and the like, if this takes place in a work context, and is in accordance with what is usual and reasonable.61

Public employees can accept normal, standard gifts on the occasion of jubilees, significant birthdays, etc.62

legally represent the municipality in a number of contexts (cf., the above-mentioned comments on representation).


59) Re Stefanie Selle, Der Vorteil im Sinne der Bestechungsdelikte bei Abschluss eines Vertrages [The advantage within the corruptioncrimes when closing a deal], Nomos Verlag 2012, pp. 28.


62) Cf. UfR 1985.270 Ø and U III, the motives sp. 250. ‘FMT Gavepolicy’ further requires that the gift is enjoyed in connection with an official event and must remain at the place of employment.
It is also recognised that public employees can accept modest gifts in ‘gratitude’. A nursing staff can accept chocolate, wine, and the like, from patients and patients’ relatives as a thank you for good treatment, loyalty, and so forth.63

8. De Minimis Threshold?

As a means of fleshing out what is considered a non-criminalised, socially acceptable act, it is sometimes debated whether there is a de minimis threshold for the acceptance of gifts. This must be presumed to be the case.64 The difficult part, however, is to establish such a threshold. As certain as it is that a presumed de minimis threshold exists, it is just as certain that this should not be established as a specific nominal threshold (a specific amount).65 In some countries, it is determined that gifts under a certain value can be kept private by the recipient.

Thus, it is determined in the UK Ministerial Code (2010), section 7.22: “Gifts of small value, currently this is set at £140, may be retained by the recipient.”

Other countries tolerate gifts of an insignificant amount without legal basis, on the grounds that they do not constitute any kind of danger.66 Whether there is set specific de minimis threshold or not, there will still be questions about the importance of the value of the gift.

Initially, it must be established that a de minimis threshold is not relevant until a situation occurs in which the acceptance of a gift is considered undue. Permissible (“due”) gifts are legal. Subsequently, it should be stated that in a number of the above-mentioned situations, some gifts can be accepted within the ‘ordinary’, ‘standard’, and ‘customary’, elements. Here, the cases must be decided by concrete guidelines of where the line should be drawn.67 In these situations, the matter at hand is not a ‘de minimis threshold’, but a threshold that distinguishes legal gifts from illegal gifts. Furthermore, these situations will establish the

63) Cf. the Modernisation of Public Administration’s ‘Vejledning om God adfærd i det offentlige’ (Guidance notes on good conduct in the public sector), 2007, chapter 6, and the Danish Ministry of Justice’s pamphlet on corruption from 2007, p. 7.

64) A series of rulings focus on the ‘extent’ and nature of gifts, cf., e.g., UfR 1985.270 Ø. See also Lars Bo Langsted in Festschrift for Gorm Toftegaard Nielsen (2007), p. 223 f.

65) The Modernisation of Public Administration’s entry, May 2010, p. 5, states that the public understanding of a de minimis threshold is based on a ‘misunderstanding’ and that such a thing does not exist. At the same time, ‘smaller’ gifts are accepted in some contexts. There is presumably no incongruence between the points of view presented in the entry and the present article, respectively, seeing as the two agree in terms of content. This is most likely a question of terminology.


67) Cf., the Modernisation of Public Administration’s ‘Vejledning om God adfærd i det offentlige’ (Guidance notes on good conduct in the public sector), 2007, chapter 6, and UfR 1985.270 Ø.
question of whether there are two thresholds, depending on whether the situation is evaluated from the perspective of administrative law or criminal law.

In Austria, it has been suggested that a minimum threshold of €100 might be sensible as to private bribery. This suggestion followed a new anti-bribery law that repealed the former explicit exception from the criminalised area as to the minor advantages (“geringfügiger Vorteile”).

In Germany, there is no legal exception for such small advantages, and although suggestions have been made for thresholds ranging from 25 € to 500 €, there seems to be an agreement in theory, that no matter what kind of monetary value is used as the de minimis threshold, it could never be free from conditions. The UK Bribery Act 2010 does not include any de minimis threshold, but it is argued that such advantages that have a potential to influence the mind of the receiver or decision maker should be covered by the act.

In this regard, one is likely to find inspiration in the High Court of Eastern Denmark’s ruling of 6 October 2009 (unpublished) in a case against a mayor who was, among other things, found guilty of fraudulent abuse of his position by allowing the municipality in question to pay for a great number of very expensive ‘working lunches’. The High Court found that the maximum cover charge for lunches, such as the ones referred to in the case, should be DKK 1,000 (about 130 €) (administrative law). However, the High Court also determined that only the transgressions that violated the law 40% above the maximum cover should be convicted (criminal law) –, as in this case, when the cover charge exceeded DKK 1,400. Given that the situation here is that the act, as a rule, is legal and the transgression violates a somewhat imprecise limit, there is much to be said in favour of such a ‘tolerance limit’ of 40% (in the described case). Therefore, in cases involving bribery, one could argue that if the court finds that a public employee can legally (administrative law) accept a jubilee gift with a maximum of DKK 1,000, then individuals accused of bribery should not be convicted unless the gift exceeds DKK 1,400.

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69) Re Stefanie Selle (2012), p. 32 with quotations. Even in Kazakhstan, one of the few countries left with a de minimis Threshold, conditions like the receiver being a first-time defender and that the performed act or omission must be lawful, re the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, The Criminalisation of Bribery in Asia and the Pacific, Thematic Review – Final Report (2011), p. 37.
71) 12th division a.s. no. S 1208-07.
Situations remain in which the acceptance of a gift is impermissible and therefore, unlawful. If, for instance, a citizen appears at a municipal caseworker’s office and places a €10 note and a building application on his or her table, mentioning that the money is intended as a gift for the employee personally, then there is no doubt that acceptance of the €10 would be undue under both administrative law and criminal law. The Official Commentary number 7 to the OECD Convention on Bribery holds that: “It is also an offence irrespective of, inter alia, the value of the advantage ...”

It is also evident from legal practice that occasionally some services and/or the acceptance of very small amounts are followed by convictions. In, e.g., UfR 1975.671 Ø and UfR 2007.1680 Ø, the persons involved were convicted of bribery of DKK 500 (about 70 €). The cases were somewhat unique though, as they, on the one hand, concerned so-called active bribery (section 122 of the Danish Criminal Code on the person performing bribery) and, on the other, involved a clear intentional act of conduct that conflicted with the duty of the individuals involved. At the same time, the persons were convicted of other criminal acts (drunk-driving and violating speed limits, respectively).

The question then becomes whether it is at all possible to operate under a monetary de minimis threshold, according to which a gift, regardless of whether it is undue, can be excluded from the criminal area for monetary reasons alone. That is hardly the case.

9. Conclusion

In the assessment of whether a public employee can legally or illegally accept gifts or other benefits in connection with his or her work, the same elements are taken into account in assessments of both administrative law and criminal law, respectively.

The assessment will always be situational, based on the notion that public employees cannot accept gifts or other benefits from persons or companies that are or will possibly be in contact with the public employee through the organisation in

73) See, e.g., the Ministry of Justice’s pamphlet on corruption, where the response to both course of events 1 and 2 (pages 12 f. and 15) states that whether the matter at hand is DKK 500 (about €65) (a bribe to a police officer) or DKK 20 (about €3), a holiday on Lanzarote (a bribe to a municipal caseworker) or two bottles of wine, respectively, is ‘unimportant’ for criminality.

74) However, this does not necessarily mean that the police and the prosecution service will investigate and bring a charge against individuals involved in cases of modest value — but, on the other hand, the interest in maintaining public faith in the public authorities may call for legal proceedings of even very small cases — compare, e.g., with the fact that shoplifting cases concerning objects worth €2 or less are in practice if possible investigated and decided.
question. Evaluation of this contact risk must be broad. The exceptions to the main rule that are usually mentioned in literature on administrative law, as well as criminal law, include special occasion gifts in connection with jubilees, accessions, minor gratitude gifts for the public employee's effort, etc. In these exceptions, great emphasis is placed on the financial value of the service received. Otherwise, no importance is attached to the financial value of the gift. Additionally, there is a series of more unclear situations in which the public employee, on the one hand, can perhaps be said to represent the organisation, but where the gift on the other hand is a typical ‘private’ pleasure that others pay for with their own means. We have addressed these cases above, and a significant emphasis is placed on the value of the received gift or benefit in the overall assessment.

Undoubtedly, a ‘grey area’ exists between that which is illegal under administrative law and that which is liable to punishment under criminal law. We consent to the phrasing of the High Court in UfR 1985.270 Ø, but with the clarifying addendum that there is generally no unpunished tolerance limit between the administrative law and criminal law aspects. Where administrative law is clear cut — such as where a driver gives a stopping police officer a €10 note — there is convergence between the administrative and the criminal law assessment. The impunity limit only exists where the negative administrative law assessment is subject to uncertainty with regards to the permissibility of the acceptance. The same considerations that generally call for a clear legal basis as a condition for punishment also, to an equal extent, call for a requirement of a ‘clear-cut basis’ for the conviction of bribery. Therefore, it would not be contradictory to punish a civil servant for receiving €5 in connection with the processing of a case and yet refrain from punishing a civil servant who has received free concert tickets worth €100 on four different occasions. As a general description of the buffer between administrative law and criminal law in this area, the term ‘de minimis threshold’ is misleading. It would be more precise to talk about a ‘clarity threshold’.

As a consequence of the aspects and considerations made in this article, the following highlights might deserve further consideration by policymakers, as well as by officials and prosecutorial services:

• Although the fine line between administrative and criminal law is often blurred, convergence on the other hand, seems to be the rule.
• Where total convergence is replaced by a “clarity threshold” that forms the “grey area” between administrative and criminal law, a parallelism emerges in that if the administrative law rules have a very low threshold before the acceptance becomes illegal, then so does criminal law — the addition of the 40% in clarity. If administrative law on the other hand, has a rather

75) See Section 2 above.
high threshold, then it follows that criminal law would have a high threshold also, however, it is probably by adding the same “clarity percentage”.

• Provided that our assumptions above are correct, publishers of administrative guidelines should be aware that although there may be no direct or formal sanctioning if such guidelines are set aside, they nevertheless set the threshold that forms the lower limit of the criminalised area.