

Stricter measures against corruption



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From lobbying to baiting and bribing: corruption remains a current as well as sensitive topic in Austria. Corruption starts out in small ways and affects many more than just politicians. The new criminal law on corruption will tighten up the situation as of 1 January 2013 and may well concern any enterprise. Compliance is the order of the day to avoid getting caught in the criminal corruption trap through Christmas and New Year's presents.

A new act amending criminal law on corruption, about to enter into force on 1 January 2013, is designed chiefly to close gaps in government related matters. Extending to takers as much as givers, with both sides becoming liable to prosecution, the tighter regime will be spanning not just the public and semi-public sector but the entire business community as much as private parties. Entrepreneurs therefore need to take comprehensive compliance measures in order to be sure that they won't be accused of fostering corruption.

The criminal law on corruption ties in with the new "Amtsträger" (public official) concept which tightens up criminal liability. Under the new law, the *Amtsträger* in particular includes:

- bodies and employees (including delegates) of territorial (federal, state and local) authorities or other public legal entities, and
- bodies and employees of enterprises in which a domestic or foreign territorial authority holds a share of at least 50 % or which are operated or otherwise controlled by a territorial authority, and
- bodies and employees of enterprises which are subject to monitoring by the Court of Audit.

In the future, it will therefore be necessary to exercise restraint when it comes to gifts for employees or decision-makers in semi-public enterprises, which substantially enlarges the circle of potential offenders compared to the currently applicable situation.

Provided that the other prerequisites for a crime are met (see below), it is a crime to **offer, promise or grant improper benefits**. This means that benefits which are not improper are allowed. These include benefits which are **permissible under the law** to be accepted by an *Amtsträger* as well as benefits which are granted within the scope of an event, if participation in such an event is in the official or **objectively justified interest** and provided that the benefit is not of an unusually valuable kind. It would thus be usual to invite an *Amtsträger* to serve him/herself from a buffet after a lecture, while it would be clearly unusual to accommodate his/her whole family at a five-star hotel for the duration of a conference. Also permissible are benefits that serve a **charitable purpose** for as long as the *Amtsträger* does not have a controlling influence on their use, as well as gifts of small value that are customary, provided that they are physical things (not cash) and the giving or acceptance is not carried out for profit. The "small value" is typically defined as EUR 100. Accordingly, the giving of ballpoint pens, calendars and similar trifles is without problems.

Ban on baiting (granting benefits to influence the beneficiary)

In the future, it will be prohibited to offer, promise or grant an improper benefit to an *Amtsträger* with the intention of **influencing him/her in his/her function as a public official**. The object is not to get such a person to take or refrain from taking a specific activity, but to influence his/her future activities, i.e. to make the public official amenable for the future.



Bribing and granting of benefits

As before, the offering, promising and granting of a benefit (whether improper or not) to an *Amtsträger* or a third party continues to be a punishable crime if it is done with the intention of getting the *Amtsträger* to take or refrain from a (concrete) official action contrary **to his/her duty** (bribing). What is newly criminalised is the granting of an improper benefit in order to get the *Amtsträger* to take or refrain from an official action which is **in line with his/her duty**; this is the so called granting of benefits.

Prohibited intervention (lobbying)

Lobbying will also be subject to stricter rules. In the future, anybody who offers, promises or grants another person (lobbyist) an advantage in order that the latter influences an *Amtsträger* to take or refrain from an official action against his/her duty or grants him/her an improper benefit commits a criminal offence. Naturally, the lobbyist him/herself commits a criminal offence, as well. In addition to these sanctions, a law on transparency of lobbying and representation of interests will enter into force which will make lobbying subject to the prior entry in a **register**.

Bribing in the private sector

New regulations also apply to the bribing of employees and representatives of a purely private enterprise in its business transactions with a view to their **taking** or refraining from a legal act in **breach of their duty**. Although this has already been a criminal offence prosecuted upon application by the damaged party, it becomes a criminal offence under the new provisions, rendering the accused liable to public prosecution; therefore, it must be prosecuted ex officio by the public prosecutor. Moreover, the thresholds relevant for the scope of punishment are adapted to reflect those for offences in the public sector.

No more active repentance

Under the new law, there will no longer be the possibility to be exempt from punishment by active repentance.

Compliance as a way out

Corruption may have considerable consequences for companies: in addition to the direct consequences under criminal law, which include prison sentences (of up to ten years) as much as fines payable by the company, there is the risk of damage claims and the exclusion from future public tenders. Moreover, a substantial loss of image from negative reporting will result.

The stricter rules will make compliance programmes for preventing corruption even more important. Often overlooked is the fact that the management is liable under law to set up internal monitoring systems (e.g. Section 22 (1) Limited Liability Companies Act, Section 82 Stock Companies Act) and to monitor their observance. This includes **effective organisational measures to fight corruption**. Targeted countermeasures through rules of conduct developed for a company will reduce the risk and refute any claim of negligence. Examples of such compliance measures would be obligations to document and evidence payment transactions (in particular, cash payments, travel costs, expenses and consultant fees), strict rules regarding the approval of gifts, invitations, donations and sponsoring, organisational separation of sectors burdened by conflicts of interest or contractual rules governing additional occupation. Ultimately, it is necessary to make random checks and document all such measures on an ongoing basis.

However, there are still no objections to giving away company calendars, as is customary at the turn of the year.



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News at Preslmayr

We haven't moved but we still got a **new address**: with the former Dr. Karl Lueger-Ring renamed, you can now find us at **Universitätsring 12, A-1010 Vienna**. That is a perfect fit: our office is just opposite the University of Vienna.

Another novelty is our **new internet presence**: not only did we redesign our homepage, but we can now also be found on Facebook. Visit us online at **www.preslmayr.at** or **www.facebook.com/PreslmayrRechtsanwalte** and profit from interesting articles and a comprehensive offer of information.

Another award for Preslmayr: Preslmayr Rechtsanwälte recently won the "Advocatus '12" in the **Insolvency Law and Restructuring** category, an award newly introduced by *Die Presse*, an Austrian quality newspaper. At the award ceremony, the newspaper presented the "Handbuch Wirtschaftsanwälte" which names the leading law offices. Preslmayr Rechtsanwälte are noted as highly recommended and "first choice in Austria" in the areas of Competition Law, Insolvency and Restructuring as well as IP, IT, Media and Telecoms.