

Summary

New penal provisions

Coordinated provisions

The current provisions in the Penal Code on bribery are contained in three sections in separate chapters of the Penal Code. These provisions have been justifiably criticised as being hard to understand.

The Inquiry is now making proposals for changes according to which the provisions on bribery will be arranged in five sections, which will all be contained in a single chapter of the Penal Code, viz. Chapter 10 with the proposed title of On Embezzlement, Other Breaches of Trust and Bribery. Section 5 of the Chapter deals with breach of trust, section 5a with active bribery, section 5b with passive bribery, section 5c with gross active and passive bribery and section 5d with negligent financing of a bribe.

Furthermore, the report contains proposals on a Swedish code on gifts, rewards and other benefits in the business sector. The code is part of self-regulation in the business sector.

These proposals aim to achieve modern efficient and easily accessible regulations on bribery with clearer definitions of what is a punishable offence.

The proposed coordinated provisions in the Penal Code, together with the proposed code, will provide businesses and individuals with clearer guidance as to what constitutes permissible and impermissible influence on the exercise of public authority and public procurement. The code will also provide businesses with guidelines as to what is acceptable and unacceptable as regards benefits provided by businesses with a view to promoting their commercial activities.

The penal provisions to be complemented by a business law code

It is not possible in a legal text to give detailed and concrete guidelines as to when a benefit is a bribe. The legal text on bribery must instead, as at present, be restricted to short and provisions of a general nature on the prerequisites that must be met for criminal liability.

The code on benefits produced by the Inquiry, together with representatives of the business community, will be an important "source of law" for the courts and others who are to apply the new provisions (see below).

The new provisions on bribery are formulated as follows.

Category of persons

The current Chapter 20, section 2, of the Penal Code lists those who can be punished for passive bribery (taking a bribe). The same category of persons can be punished, under Chapter 17, section 7, for active bribery (giving a bribe). This technique of listing, together with the fact that the provisions on bribery are contained in three different chapters, makes the current legal texts difficult to read with numerous cross-references.

The explicitly defined category of persons for passive and active bribery leads to problems of differentiation. Changes in society also mean that the list has to be regularly adjusted to take into account new categories of persons. People who should reasonably be subject to the legislation on bribery are currently not included in the list.

According to the current arrangements, for instance, a self-employed person with independent contracts is not included in the above-mentioned list. It is thus not an offence for a freelance journalist to accept money from the business sector or from a political organisation to write or not to write a news article about a mismanaged company or about who is providing funds to a political party.

The Inquiry proposes that the current special list be removed. Consequently, all employees and contractors will be covered by the penal provisions of the bribery legislation. Instead, there will be some restriction of the category of persons through the requirement that an action shall have an improper influence on

the way that the employee or contractor has carried out his or her work or contract.

Improper influence

Chapter 17, Section 7, and Chapter 20, Section 2, of the Penal Code refer to "a bribe or other improper reward". The wording of the law makes it appear as if it is the reward, i.e. money or other benefits, which is *per se* improper. However, the provision should not be interpreted in this way. The impropriety relates to the transaction as a whole.

The Inquiry proposes that the penal provisions be clarified in such a way that it is evident from the wording of the law that a prerequisite for the offence of bribery is that the action influences the exercise of public authority or a public procurement or the recipient's way of performing his or her duties or commission. It should also be clear that this influence must appear in an overall assessment as being improper.

In the assessment of whether an action was intended to improperly influence the work or commission of the recipient, the following factors are of primary importance.

1. The nature and value of the benefit.
2. The connection between the benefit and the recipient's work or commission.
3. The recipient's position in relation to the provider of the benefit and to the recipient's employer or client.
4. The way in which the benefit was given, for example, if this took place openly or clandestinely, if the benefit was only given to one employee or to many employees and if the benefit was provided at the initiative of the recipient.
5. General custom and usage in the industry as regards benefits.

Breach of trust - Chapter 10, Section 5, of the Penal Code

The new criminal provisions are targeted on various typical cases. The first typical case concerns bribes given or received by employees in various companies and organisations with a view to benefiting the donor or some other party to the detriment of the company or organisation. In other words, it involves an

agreement where the donor, the recipient or someone else benefits at the expense of a third party.

An example of this is a sales manager who accepts a bribe to sell the company's products at an excessively low price. Conduct of this kind is currently covered by the criminal provision in Chapter 10, Section 5, on breach of trust.

The Inquiry proposes that wording of this provision be clarified to make it clear that it refers to passive bribery. In these cases, the recipient is sentenced as the perpetrator and the donor as the accessory. The provision is mainly intended to protect the interests of the principal and does not normally entail any problems of differentiation.

Bribes in the exercise of public authority and public procurement – Chapter 10, Section 5 a (1), of the Penal Code

The second typical case consists of bribes given with the intention of influencing the exercise of public authority or a public procurement. An example of this would be a judge who accepts money to pronounce a judgment in favour of the donor in conflict with current legislation.

The Inquiry proposes a new provision targeted on this typical case. The provision is primarily intended to protect trust in important public functions. These typical cases do not either lead to any real problems of differentiation.

Unfair competition and related matters – Chapter 10, Section 5a, (2) of the Penal Code

The third typical case consists of bribes given to be able to buy or sell goods or services, which in this way eliminates free competition. The Inquiry has not been tasked with proposing any new rules on violation of competition but deems that it is almost unavoidable, in the absence of any such rules, that certain conduct with elements of unfair competition, be covered by criminal liability for the offence of bribery.

The fourth typical case concerns benefits given in connection with anniversaries, or as a component in business relationships or marketing. The donor hopes that the recipient will reciprocate

by the donor receiving benevolent treatment from the recipient's company, and that the recipient understands this. In some contexts, it is completely legitimate to provide benefits of this kind, while in other cases it must be regarded as sufficiently reprehensible to be criminal.

To cover these typical cases, the Inquiry proposes criminal liability for actions intended to improperly influence an employee's or contractor's way of performing his or her duties or commission.

Bribes in competitions – Chapter 10, Section 5 a (3), of the Penal Code

It has emerged in cases abroad which have attracted a lot of attention that participants in competitions have accepted bribes not to do their best, which has benefited the provider of the bribe who has bet on the outcome of the competition. It is not improbable that bribes of this kind have already occurred in Sweden, even though to a limited extent. In the light of trends in the gaming market and the large amounts involved, the Inquiry considers that there is a risk of crime of this kind becoming a common occurrence in Sweden too.

Participants in competitions are sometimes employees of associations, for example, football or hockey players. In such cases, liability for bribery may come into question under the current legislation for an employee who accepts a bribe and for the briber. However, sometimes there is no employment nor any actual contractual relationship and the procedure is then not punishable as bribery.

The sanctions available within the sports movement to take measures against bribery, for example, suspension, cannot be considered as being sufficiently far-reaching to protect the gaming market or sports movement against organised crime which engages in betting on the outcome of fixed matches.

The Inquiry is therefore proposing a special provision targeted on benefits provided to influence the outcome of competitions, on which commercial betting takes place.

Negligent financing of bribery – Chapter 10, Section 5 d

Under Chapter 23, Section 4, a person who furthers an act by advice or deed can be punished for being an accessory to the crime. Accordingly, a person who has provided money or other assets to be used as a bribe can be sentenced for being an accessory to bribery, if he or she is not sentenced as the perpetrator. However, a prerequisite is that the accessory intentionally furthered the act.

The Inquiry considers that gross negligence in being an accessory to bribery should also be a criminal offence and is therefore proposing a special penal provision on negligent financing of bribery. It shall be possible to sentence a representative of a company for this crime if he or she, on behalf of the company, offers, promises or provides money or other assets to a person who, due to their position or by contract, represents the company in a particular matter and thereby furthers active bribery or gross active bribery in the matter through gross negligence.

A prerequisite for criminal liability is that the assets are given to a person who, due to his or her position or by contract, represents the company in a particular matter. This might, for example, be an employee of a company within the same group or an associated company or a person who, due to a contract for services, represents the company in the matter. The concepts group and associated company are used by the Inquiry in the same meaning as in Chapter 1, sections 4 and section 5, respectively of the Annual Accounts Act (1995:1554).

This provision is intended to apply together with, inter alia, the proposed code on gifts and other benefits in the business sector. The code proposes measures that companies should undertake to prevent bribery and improper influence. A company which has complied with the code in these respects cannot be considered as having acted in a grossly negligent way, even if it should prove that the company has commissioned an agent, who, despite all precautionary measures taken by the company, has resorted to bribes when selling the company's products.

Bribery may have been committed abroad as well as in Sweden. If the financier has transferred money from Sweden or if Swedish company is the financier, there is as a rule a Swedish

connection of such a kind that means that there is no requirement for double jeopardy under Chapter 2, section 3, of the Penal Code. However, the financing must concern active bribery under section 5a or gross active bribery under section 5c. It is sufficient for criminal liability for the prosecutor to show that such a crime has been committed even if it may be unclear by who. If the bribery has taken place abroad, local customs may be taken into account when considering whether the proceeding has been intended as improper influence.

The punishment for negligent financing of bribery is the same as for other bribery offences, a fine or imprisonment for at most two years.

Certain other penal law matters

The punishment for active bribery and passive bribery, breach of trust and misuse of office is currently a fine or imprisonment for at most two years. In gross cases, a sentence of imprisonment for at least six months and at most six years is imposed. The Inquiry has not been tasked with making any general overview of the scales of penalties for different forms of bribery offences. Nothing has emerged in the course of the Inquiry to indicate that a change in the scales of penalties is needed. It is therefore proposed that the existing scales of penalties be unchanged.

A special penal provision is proposed in *Chapter 10, Section 5c, of the Penal Code for gross active and passive bribery*. The Inquiry proposes that some circumstances are specified in the text of the law which the court shall particularly take into consideration in the assessment of whether the offence is gross. This should be the case if the deed concerned a substantial value, was part of crime that was engaged in systematically or otherwise was of a particularly dangerous kind.

The prosecutor has, at present, certain *restrictions on the duty to prosecute*. A prosecution may only be initiated if the employer or client has reported the crime for prosecution or if prosecution is called for from the point of view of the public interest. The Inquiry proposes that the rule that prosecution may only be initiated if the crime has been reported for prosecution by the employer or client be abolished. Instead, a global provision should be introduced which restricts the duty to prosecute to

cases where prosecution is called for from the point of view of the public interest. Prosecution is as a rule called for in the case of bribes that influence the influence of public authority or public procurement.

Penal provisions on bribery do not only apply to offences committed in Sweden but also for those committed abroad. However, there is currently a requirement in the Penal Code for *double jeopardy* which means that Swedish courts cannot normally impose sentences for bribes given abroad if there are no corresponding provisions in the country where the crime was committed. If the Inquiry's proposal for a new penal provision on negligent financing is adopted, the effects of the requirement for double jeopardy will be limited to some extent. In such cases, the crime has often been committed in Sweden or has in some other way a link to Sweden of such a kind that a Swedish court is competent to judge the case.

It happens that Swedish companies abroad pay money or give other benefits to foreign public employees to safeguard the companies' rights, for example, to obtain customs clearance of goods within a reasonable time. There are no reasons to have special rules for payments of this kind, "*facilitation payments*". A To the extent that the prerequisites for criminal liability, including the requirement for double jeopardy are met, a Swedish court can therefore impose a sentence for bribery.

Trading in influence

Article 12 of The Council of Europe's Criminal Law Convention on Corruption obliges states to make trading with influence a criminal offence. It shall be a punishable offence, inter alia, to "promise, give or offer, directly or indirectly, any advantage to exert an improper influence" over the decision making of certain persons, such as an employed decision-maker in the public sector, members of parliament or ministers. There is a similar recommendation in the United Nations Convention against Corruption.

Trading in influence is targeted on the interaction between three players. It is centred on a person who exercises power and who is a decision-maker (A) – who is to make a decision on a particular matter. Circling around the decision-maker is an

individual or an organisation (B) with a great interest in the outcome of an issue, which wishes to influence this outcome and commissions C to this end. What A does and realises is unimportant for the matter of whether B and C should be punished for trading in influence. It is also irrelevant whether the intermediary C is actually able to influence the decision-maker A.

The Inquiry considers that there is no reason to introduce criminal provisions on trading in influence targeted on contributions to political parties, neither is there any reason to introduce legislation to restrict the ability of an individual, a company or an interest organisation to employ a consultant or another agent to influence members of political bodies.

However, there are some distinctive situations where, in the view of the Inquiry, it would be directly objectionable if it was not possible to demand criminal liability. This might be the case if one party in an administrative proceeding secretly made a payment to the spouse of a decision-maker to get the spouse to convince his wife/the decision-maker to reach a decision in favour of the party.

The Inquiry therefore proposes that the provisions on bribery be worded in such a way that a person has criminal liability if this person offers, promises or grants a benefit to another person in order to influence the exercise of public authority or public procurement in an improper way. The same applies to the person who requests, accepts a promise or receives such a payment.

This provision would make it easier to punish cases where benefits are given to another person who is close to the decision-maker with a view to influencing the decision-maker's exercise of public authority although it cannot be proven that the public employee was aware that a benefit had been given for such a purpose.

A code on benefits in the business sector

The Inquiry Chair and a working group with representatives from the business sector in Sweden have produced a proposal for a *Swedish Code on Gifts, Rewards and Benefits in the Business Sector*.

This code is to be part of the business sector's self-regulation. *The Anti-Corruption Institute* has declared that it is willing after

this report has been circulated for comment to adopt and administer the code.

The code is intended to provide guidance to companies on matters relating to how benefits in the business sector may be used to promote the company's business activities. It is intended to complement the penal law provisions. According to these penal law provisions on bribery, criminal liability may be incurred if benefits are intended to improperly influence the work or commission of an employee or contractor.

If a representative of a company has complied with the code, the action cannot be considered to be intended to improperly influence the work or commission of the recipient. This is not to say that a representative who has breached the code is automatically guilty of a crime. The code is intended to make higher demands than those ensuing from the provisions of the penal code on bribery. It is therefore not necessarily the case that a person who has given a benefit in breach of the code is therefore also guilty of improper influence in the sense of the penal provisions.

A general code for the business sector cannot possibly include detailed rules on improper influence. More detailed and specific industry or market systems can be produced through special agreements between trade organisations and companies in the same industry.

Consideration has been taken in the work with the code to the regulatory frameworks previously produced by various organisations, for example, OECD, ICC, Transparency International and the Anti-Corruption Institute.

The code will apply to all companies with a statutory duty to keep accounts under the Accounting Act or the Foreign Branches Act. If a company is covered by the code, this may be important in a court assessment of whether the company's representatives are guilty of bribery or not. The code will also serve as a tool for the companies' owners, business partners, and other stakeholders.

The code contains guidelines on when it is permissible or impermissible for a company to offer, promise or provide a benefit *to* employees or contractors in another company or public body. The code also contains guidelines to companies on when their employees and contractors should accept benefits *from* another party.

The code also provides guidelines to companies on preventive measures and partners.

The full text of the code can be found directly following the proposed legislation.